CODE OF FEDERAL REGULATIONS

Title 32
National Defense

Parts 1 to 190

Revised as of July 1, 2021

Containing a codification of documents
of general applicability and future effect

As of July 1, 2021

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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 32 CFR 2.1 *refers to title 32, part 2, section 1.*

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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.

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OLIVER A. POTTS,
Director,
Office of the Federal Register
July 1, 2021

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, 2021.

The current regulations issued by the Office of the Secretary of Defense appear in the volumes containing parts 1–190 and parts 191–399; 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, Office of the Director of National Intelligence, National Counterintelligence Center, Central Intelligence Agency, Information Security Oversight Office (National Archives and Records Administration), 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, Gabrielle E. Burns 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 1 to 190)

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Part

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Subtitle A—Department of Defense

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SUBCHAPTER A—ACQUISITION

PART 1 [RESERVED]

PART 2—PILOT PROGRAM POLICY

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2.3 Regulatory relief for participating programs.
2.4 Designation of participating programs.
2.5 Criteria for designation of participating programs.

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

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

§ 2.1 Purpose.

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

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

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

(1) Innovative contracting policies and practices;

(2) Performance and commercial specifications and standards;

(3) Innovative budget policies;

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

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

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

(7) Other best commercial practices.

§ 2.2 Statutory relief for participating programs.

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

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

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

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

§ 2.3 Regulatory relief for participating programs.

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

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

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

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

[2] See footnote 1 to § 2.3(a).

§ 2.4 Designation of participating programs.

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

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

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

§ 2.5 Criteria for designation of participating programs.

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

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

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

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

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

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

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

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

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

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

Sec.

3.1 Purpose.
3.2 Background.
3.3 Applicability.
3.4 Definitions.
3.5 Appropriate use.
3.6 Limitations on cost-sharing.
3.7 Comptroller General access.
3.8 DoD access to records policy.
3.9 Follow-on production contracts.

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

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

[4] See footnote 3 to § 2.4(b).

[5] See footnote 3 to § 2.4(b).

§ 3.1 Purpose.

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

[67 FR 54956, Aug. 27, 2002]

§ 3.2 Background.

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

[67 FR 54956, Aug. 27, 2002]

§ 3.3 Applicability.

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

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

§ 3.4 Definitions.

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

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

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

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

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

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

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

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

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

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

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

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

Project Manager. The government manager for the prototype project.

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

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

Senior Procurement Executive. The following individuals:

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

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

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

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

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

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

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

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

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

§ 3.5 Appropriate use.

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

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

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

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

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

[67 FR 54956, Aug. 27, 2002]

§ 3.6 Limitations on cost-sharing.

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

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

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

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

[67 FR 54956, Aug. 27, 2002]

§ 3.7 Comptroller General access.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 3.8 DoD access to records policy.

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

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

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

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

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

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

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

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

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

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

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

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

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

(ii) The Agreements Officer will document:

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

(B) Why it was problematic;

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

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

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

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

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

(ii) Additionally, the justification will document:

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

(B) Why it was problematic;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[68 FR 27457, May 20, 2003]

§ 3.9 Follow-on production contracts.

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

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

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

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

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

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

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

without placing undue risks on the awardee.

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

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

(i) The competitive procedures used;

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

(iii) The percentage of cost-share; and

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

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

[69 FR 16482, Mar. 30, 2004]

PARTS 4–8 [RESERVED]

SUBCHAPTER B [RESERVED]

SUBCHAPTER C—DoD GRANT AND AGREEMENT REGULATIONS

PART 21—DoD GRANTS AND AGREEMENTS—GENERAL MATTERS

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APPENDIX A TO PART 21—INSTRUMENTS TO WHICH DoDGARs PORTIONS APPLY

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

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

Subpart A—Introduction

§ 21.100 What are the purposes of this part?

This part of the DoD Grant and Agreement Regulations:

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

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

Subpart B—Defense Grant and Agreement Regulatory System

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

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

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

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

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

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

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

§ 21.210 What are the purposes of the DGARS?

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

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

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

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

§ 21.215 Who is responsible for the DGARS?

The Assistant Secretary of Defense for Research and Engineering (ASD(R&E)), or his or her designee, develops and implements DGARS policies and procedures. He or she does so by issuing and maintaining the DoD publications that comprise the DGARS.

[68 FR 47153, Aug. 7, 2003, as amended at 85 FR 51240, Aug. 19, 2020]

§ 21.220 What publications are in the DGARS?

The DoD Grant and Agreement Regulations comprise the principal element of the DGARS. The ASD(R&E) also may publish DGARS policies and procedures in DoD instructions and other DoD publications, as appropriate.

[85 FR 51240, Aug. 19, 2020]

Subpart C—The DoD Grant and Agreement Regulations

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

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

(b) Note that each portion of the DoDGARs identifies the types of instruments to which it applies.

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

[68 FR 47153, Aug. 7, 2003, as amended at 85 FR 51240, Aug. 19, 2020]

§ 21.305 What is the purpose of the DoDGARs?

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

§ 21.310 Who ensures DoD Component compliance with the DoDGARs?

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

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

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

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

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

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

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

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

[68 FR 47153, Aug. 7, 2003, as amended at 85 FR 51240, Aug. 19, 2020]

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

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

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

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

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

§ 21.330 How are the DoDGARs published and maintained?

(a) The DoD publishes the DoDGARs in the Code of Federal Regulations (CFR).

(b) The location of the DoDGARs in the CFR currently is in transition. The regulations are moving from chapter I,

subchapter C, title 32, to a new location in chapter XI, title 2 of the CFR. During the transition, there will be some parts of the DoDGARs in each of the two titles.

(c) The DoD publishes updates to the DoDGARs in the FEDERAL REGISTER for public comment.

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

[85 FR 51240, Aug. 19, 2020]

§ 21.335 Who can authorize deviations from the DoDGARs?

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

(b) The ASD(R&E) or his or her designee must approve in advance any deviation for a class of awards. Note that, as described at 2 CFR 1126.3, OMB concurrence also is required for some class deviations from requirements included in awards to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.

[68 FR 47153, Aug. 7, 2003, as amended at 85 FR 51240, Aug. 19, 2020]

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

(a) DoD Components must submit copies of justifications and agency approvals for individual deviations and written requests for class deviations to: Principal Deputy Assistant Secretary of Defense for Research and Engineering, ATTN: Basic Research, 3030 Defense Pentagon, Washington, DC 20301–3030.

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

[68 FR 47153, Aug. 7, 2003, as amended at 85 FR 51240, Aug. 19, 2020]

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

§ 21.400 To what instruments does this subpart apply?

This subpart applies to grants, cooperative agreements, and technology investment agreements, which are legal instruments used to reflect assistance relationships between the United States Government and recipients.

§ 21.405 What is the purpose of this subpart?

This subpart describes the sources and flow of authority to make or administer assistance awards, and assigns the broad responsibilities associated with DoD Components' use of those instruments.

§ 21.410 Must a DoD Component have statutory authority to make an assistance award?

Yes, the use of an assistance instrument to carry out a program requires authorizing legislation. That is unlike the use of a procurement contract, for which Federal agencies have inherent, Constitutional authority.

§ 21.415 Must the statutory authority specifically mention the use of grants or other assistance instruments?

No, the statutory authority described in § 21.410 need not specifically say that the purpose of the program is assistance or mention the use of any type of assistance instrument. However, the intent of the statute must support a judgment that the use of an assistance instrument is appropriate. For example, a DoD Component may judge that the principal purpose of a program for which it has authorizing legislation is assistance, rather than acquisition. The DoD Component would properly use an assistance instrument to carry out that program, in accordance with 31 U.S.C. chapter 63.

§ 21.420 Under what types of statutory authorities do DoD Components award assistance instruments?

DoD Components may use assistance instruments under a number of statutory authorities that fall into three categories:

(a) *Authorities that statutes provide to the Secretary of Defense.* These authorities generally are delegated by the Secretary of Defense to Heads of DoD Components, usually through DoD directives, instructions, or policy memoranda that are not part of the Defense Grant and Agreement Regulatory System. Examples of statutory authorities in this category are:

(1) Authority under 10 U.S.C. 2391 to award grants or cooperative agreements to help State and local governments alleviate serious economic impacts of defense program changes (*e.g.*, base openings and closings, contract changes, and personnel reductions and increases).

(2) Authority under 10 U.S.C. 2413 to enter into cooperative agreements with entities that furnish procurement technical assistance to businesses.

(b) *Authorities that statutes may provide directly to Heads of DoD Components.* When a statute authorizes the Head of a DoD Component to use a funding instrument to carry out a program with a principal purpose of assistance, use of that authority requires no delegation by the Secretary of Defense. For example, 10 U.S.C. 2358 authorizes the Secretaries of the Military Departments, in addition to the Secretary of Defense, to perform research and development projects through grants and cooperative agreements. Similarly, 10 U.S.C. 2371 provides authority for the Secretaries of the Military Departments and Secretary of Defense to carry out basic, applied, or advanced research projects using assistance instruments other than grants and cooperative agreements. A Military Department's use of the authority of 10 U.S.C. 2358 or 10 U.S.C. 2371 therefore requires no delegation by the Secretary of Defense.

(c) *Authorities that arise indirectly as the result of statute.* For example, authority to use an assistance instrument may result from:

(1) A federal statute authorizing a program that is consistent with an assistance relationship (*i.e.*, the support or stimulation of a public purpose, rather than the acquisition of a good or service for the direct benefit of the Department of Defense). In accordance with 31 U.S.C. chapter 63, such a program would appropriately be carried out through the use of grants or cooperative agreements. Depending upon the nature of the program (*e.g.*, research) and whether the program statute includes authority for any specific types of instruments, there also may be authority to use other assistance instruments.

(2) Exemptions requested by the Department of Defense and granted by the Office of Management and Budget under 31 U.S.C. 6307, as described in 32 CFR 22.220.

§ 21.425 How does a DoD Component's authority flow to awarding and administering activities?

The Head of a DoD Component, or his or her designee, may delegate to the heads of contracting activities (HCAs) within the Component, that Component's authority to make and administer awards, to appoint grants officers and agreements officers (*see* §§ 21.435 through 21.450), and to broadly manage the DoD Component's functions related to assistance instruments. The HCA is the same official (or officials) designated as the head of the contracting activity for procurement contracts, as defined at 48 CFR 2.101. The intent is that overall management responsibilities for a DoD Component's functions related to nonprocurement instruments be assigned only to officials that have similar responsibilities for procurement contracts.

§ 21.430 What are the responsibilities of the head of the awarding or administering activity?

When designated by the Head of the DoD Component or his or her designee (see 32 CFR 21.425), the head of the awarding or administering activity (*i.e.*, the HCA) is responsible for the awards made by or assigned to that activity. He or she must supervise and establish internal policies and procedures for that activity's awards.

§ 21.435 Must DoD Components formally select and appoint grants officers and agreements officers?

Yes, each DoD Component that awards grants or enters into cooperative agreements must have a formal process (see § 21.425) for selecting and appointing grants officers and for terminating their appointments. Similarly, each DoD Component that awards or administers technology investment agreements must have a process for selecting and appointing agreements officers and for terminating their appointments.

§ 21.440 What are the standards for selecting and appointing grants officers and agreements officers?

In selecting grants officers and agreements officers, DoD Components must use the following minimum standards:

(a) In selecting a grants officer, the appointing official must judge whether the candidate has the necessary experience, training, education, business acumen, judgment, and knowledge of assistance instruments and contracts to function effectively as a grants officer. The appointing official also must take those attributes of the candidate into account when deciding the complexity and dollar value of the grants and cooperative agreements to be assigned.

(b) In selecting an agreements officer, the appointing official must consider all of the same factors as in paragraph (a) of this section. In addition, the appointing official must consider the candidate's ability to function in the less structured environment of technology investment agreements, where the rules provide more latitude and the individual must have a greater capacity for exercising judgment. Agreements officers therefore should be individuals who have demonstrated expertise in executing complex assistance and acquisition instruments.

§ 21.445 What are the requirements for a grants officer's or agreements officer's statement of appointment?

A statement of a grants officer's or agreements officer's appointment:

(a) Must be in writing.

(b) Must clearly state the limits of the individual's authority, other than limits contained in applicable laws or regulations. Information on those limits of a grants officer's or agreements officer's authority must be readily available to the public and agency personnel.

(c) May, if the individual is a contracting officer, be incorporated into his or her statement of appointment as a contracting officer (*i.e.*, there does not need to be a separate written statement of appointment for assistance instruments).

§ 21.450 What are the requirements for a termination of a grants officer's or agreements officer's appointment?

A termination of a grants officer's or agreements officer's authority:

(a) Must be in writing, unless the written statement of appointment provides for automatic termination.

(b) May not be retroactive.

(c) May be integrated into a written termination of the individual's appointment as a contracting officer, as appropriate.

§ 21.455 Who can sign, administer, or terminate assistance instruments?

Only grants officers are authorized to sign, administer, or terminate grants or cooperative agreements (other than technology investment agreements) on behalf of the Department of Defense. Similarly, only agreements officers may sign, administer, or terminate technology investment agreements.

§ 21.460 What is the extent of grants officers' and agreements officers' authority?

Grants officers and agreements officers may bind the Government only to the extent of the authority delegated to them in their written statements of appointment (*see* § 21.445).

§ 21.465 What are grants officers' and agreements officers' responsibilities?

Grants officers and agreements officers should be allowed wide latitude to exercise judgment in performing their responsibilities, which are to ensure that:

(a) Individual awards are used effectively in the execution of DoD programs, and are made and administered

in accordance with applicable laws, Executive orders, regulations, and DoD policies.

(b) Sufficient funds are available for obligation.

(c) Recipients of awards receive impartial, fair, and equitable treatment.

Subpart E—Information Reporting on Awards Subject to 31 U.S.C. Chapter 61

§ 21.500 What is the purpose of this subpart?

This subpart prescribes policies and procedures for compiling and reporting data related to DoD awards and programs that are subject to information reporting requirements of 31 U.S.C. chapter 61. That chapter of the U.S. Code requires the Office of Management and Budget to maintain a Governmentwide information system to collect data on Federal agencies' domestic assistance awards and programs.

§ 21.505 What is the Catalog of Federal Domestic Assistance (CFDA)?

The Catalog of Federal Domestic Assistance (CFDA) is a Governmentwide compilation of information about assistance programs. It covers all assistance programs and activities, regardless of the number of awards made under the program, the total dollar value of assistance provided, or the duration. In addition to programs using grants and agreements, covered programs include those providing assistance in other forms, such as payments in lieu of taxes or indirect assistance resulting from Federal operations.

[68 FR 47153, Aug. 7, 2003, as amended at 85 FR 51240, Aug. 19, 2020]

§ 21.510 Why does the DoD report information to the CFDA?

The Federal Program Information Act (31 U.S.C. 6101 through 6106), as implemented through OMB guidance at 2 CFR 200.202 requires the Department of Defense and other Federal agencies to provide certain information about their assistance programs to the OMB and the General Services Administration (GSA). The GSA makes this information available to the public by publishing it in the Catalog of Federal Domestic Assistance (CFDA).

[68 FR 47153, Aug. 7, 2003, as amended at 85 FR 51240, Aug. 19, 2020]

§ 21.515 Who reports the information for the CFDA?

(a) Each DoD Component that provides financial assistance must:

(1) Report to the Defense Assistance Awards Data System (DAADS) Administrator all new programs and changes as they occur or as the DoD Component submits its annual updates to existing CFDA information. DAADS is further described in §§ 21.520 through 21.555.

(2) Identify to the DAADS Administrator a point-of-contact who will be responsible for reporting the program information and for responding to inquiries related to it.

(b) The DAADS Administrator is the Department of Defense's single liaison with whom DoD Components that collect and compile such program information work to report the information to OMB and GSA.

[85 FR 51240, Aug. 19, 2020]

§ 21.520 What are the purposes of the Defense Assistance Awards Data System (DAADS)?

Data from the Defense Assistance Awards Data System (DAADS) are used to provide:

(a) DoD inputs to meet statutory requirements for Federal Governmentwide reporting of data related to obligations of funds by assistance instrument.

(b) A basis for meeting Governmentwide requirements to report to *USASpending.gov* (or any successor site designated by OMB) and for preparing other recurring and special reports to the President, the Congress, the Government Accountability Office, and the public.

(c) Information to support policy formulation and implementation and to meet management oversight requirements related to the use of awards.

[68 FR 47153, Aug. 7, 2003, as amended at 85 FR 51240, Aug. 19, 2020]

§ 21.525 Who issues policy guidance for the DAADS?

The Principal Deputy Assistant Secretary of Defense for Research and Engineering (PDASD(R&E)), or his or her designee, issues necessary policy guidance for the Defense Assistance Awards Data System.

[68 FR 47153, Aug. 7, 2003, as amended at 85 FR 51241, Aug. 19, 2020]

§ 21.530 What are the responsibilities of the DAADS Administrator?

The DAADS Administrator, consistent with guidance issued by the PDASD(R&E):

(a) Processes DAADS information twice a month and prepares recurring and special reports using such information.

(b) Prepares, updates, and disseminates instructions for reporting information to the DAADS. The instructions are to specify procedures, formats, and editing processes to be used by DoD Components, including record layout, submission deadlines, media, methods of submission, and error correction schedules.

[85 FR 51241, Aug. 19, 2020]

§ 21.535 Do DoD Components have central points for collecting DAADS data?

Each DoD Component must have a central point for collecting DAADS information from contracting activities within that DoD Component. The central points are as follows:

(a) For the Army: As directed by the U.S. Army Contracting Support Agency.

(b) For the Navy: As directed by the Office of Naval Research.

(c) For the Air Force: As directed by the Office of the Secretary of the Air Force, Acquisition Contracting Policy and Implementation Division (SAF/AQCP).

(d) For the Office of the Secretary of Defense, Defense Agencies, and DoD Field Activities: Each Defense Agency must identify a central point for collecting and reporting DAADS information to the DAADS administrator. The DAADS Administrator serves as the central point for offices and activities within the Office of the Secretary of Defense and for DoD Field Activities.

[68 FR 47153, Aug. 7, 2003, as amended at 85 FR 51241, Aug. 19, 2020]

§ 21.540 What are the duties of the DoD Components' central points for the DAADS?

The office that serves, in accordance with § 21.535, as the central point for collecting DAADS information from contracting activities within each DoD Component must:

(a) Establish internal procedures to ensure reporting by contracting activities that make awards subject to 31 U.S.C. chapter 61.

(b) Collect information required by the DAADS User Guide from those contracting activities, and report it to the DAADS Administrator, in accordance with §§ 21.545 through 21.555. Note that the DAADS User Guide, which a registered DAADS user may find at the Resources section of the DAADS website (*https://www.dmdc.osd.mil/daads/*), provides further information about required data elements and instructions for submitting data.

(c) Submit to the DAADS Administrator any recommended changes to the DAADS.

[68 FR 47153, Aug. 7, 2003, as amended at 85 FR 51241, Aug. 19, 2020]

§ 21.545 Must DoD Components report every obligation to the DAADS?

Yes, DoD Components' central points must collect and report the data required by the DD Form 2566 for each individual action that involves the obligation or deobligation of Federal funds for an award that is subject to 31 U.S.C. chapter 61.

§ 21.550 Must DoD Components relate reported actions to listings in the CFDA?

Yes, DoD Components' central points must report each action as an obligation or deobligation under a specific programmatic listing in the Catalog of Federal Domestic Assistance (CFDA, see § 21.505). The programmatic listing to be shown is the one that provided the funds being obligated or deobligated. For example, if a grants officer or agreements officer in one

DoD Component obligates appropriations of a second DoD Component's programmatic listing, the grants officer or agreements officer must show the CFDA programmatic listing of the second DoD Component on the DD Form 2566.

§ 21.555 When and how must DoD Components report to the DAADS?

DoD Components must report:

(a) Each obligating or deobligating action no later than 15 days after the date of the obligation or deobligation. Doing so enables DAADS to comply with the deadline in the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282; 31 U.S.C. 6101 note) to report to the Government-wide data system (*USASpending.gov*) established to implement requirements of that Act.

(b) Using a method and in a format permitted either by the DAADS User Guide described in § 21.540(b) or by agreement with the DAADS Administrator.

[85 FR 51241, Aug. 19, 2020]

§ 21.560 Must DoD Components assign numbers uniformly to awards?

Yes, DoD Components must assign identifying numbers to all awards subject to this subpart, including grants, cooperative agreements, and technology investment agreements. The uniform numbering system parallels the procurement instrument identification (PII) numbering system specified in 48 CFR 204.70 (in the ''Defense Federal Acquisition Regulation Supplement''), as follows:

(a) The first six alphanumeric characters of the assigned number must be identical to those specified by 48 CFR 204.7003(a)(1) to identify the DoD Component and contracting activity.

(b) The seventh and eighth positions must be the last two digits of the fiscal year in which the number is assigned to the grant, cooperative agreement, or other nonprocurement instrument.

(c) The 9th position must be a number:

(1) ''1'' for grants.

(2) ''2'' for cooperative agreements, including technology investment agreements that are cooperative agreements (see Appendix B to 32 CFR part 37).

(3) ''3'' for other nonprocurement instruments, including technology investment agreements that are not cooperative agreements.

(d) The 10th through 13th positions must be the serial number of the instrument. DoD Components and contracting activities need not follow any specific pattern in assigning these numbers and may create multiple series of letters and numbers to meet internal needs for distinguishing between various sets of awards.

§ 21.565 Must DoD Components' electronic systems accept Data Universal Numbering System (DUNS) numbers?

The DoD Components must comply with paragraph 5.e of the Office of Management and Budget (OMB) policy directive entitled, ''Requirement for a DUNS number in Applications for Federal Grants and Cooperative Agreements.''[2] Paragraph 5.e requires electronic systems that handle information about grants and cooperative agreements (which, for the DoD, include Technology Investment Agreements) to accept DUNS numbers. Each DoD Component that awards or administers grants or cooperative agreements must ensure that DUNS numbers are accepted by each such system for which the DoD Component controls the system specifications. If the specifications of such a system are subject to another organization's control and the system can not accept DUNS numbers, the DoD Component must alert that organization to the OMB policy directive's requirement for use of DUNS numbers with a copy to: Director for Basic Research, OASD(R&E), 3040 Defense Pentagon, Washington, DC 20301–3040.

[72 FR 34986, June 26, 2007, as amended at 85 FR 51241, Aug. 19, 2020]

Subpart F—Definitions

§ 21.605 Acquisition.

The acquiring (by purchase, lease, or barter) of property or services for the

[2] This OMB policy directive is available at the Internet site *http://www.whitehouse.gov/omb/grants/ grants_docs.html*.

direct benefit or use of the United States Government (see more detailed definition at 48 CFR 2.101). In accordance with 31 U.S.C. 6303, procurement contracts are the appropriate legal instruments for acquiring such property or services.

§ 21.610 Agreements officer.

An official with the authority to enter into, administer, and/or terminate technology investment agreements.

§ 21.615 Assistance.

The transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States (*see* 31 U.S.C. 6101(3)). Grants, cooperative agreements, and technology investment agreements are examples of legal instruments used to provide assistance.

§ 21.620 Award.

A grant, cooperative agreement, technology investment agreement, or other nonprocurement instrument subject to one or more parts of the DoD Grant and Agreement Regulations (*see* appendix A to this part).

§ 21.625 Contract.

See the definition for procurement contract in this subpart.

§ 21.630 Contracting activity.

An activity to which the Head of a DoD Component has delegated broad authority regarding acquisition functions, pursuant to 48 CFR 1.601.

§ 21.635 Contracting officer.

A person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. A more detailed definition of the term appears at 48 CFR 2.101.

§ 21.640 Cooperative agreement.

A legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition ''grant''), except that substantial involvement is expected between the Department of Defense and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include ''cooperative research and development agreements'' as defined in 15 U.S.C. 3710a.

§ 21.645 Deviation.

The issuance or use of a policy or procedure that is inconsistent with the DoDGARs.

§ 21.650 DoD Components.

The Office of the Secretary of Defense, the Military Departments, the Defense Agencies, and DoD Field Activities.

§ 21.655 Grant.

A legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship:

(a) Of which the principal purpose is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Department of Defense's direct benefit or use.

(b) In which substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated by the grant.

§ 21.660 Grants officer.

An official with the authority to enter into, administer, and/or terminate grants or cooperative agreements.

§ 21.665 Nonprocurement instrument.

A legal instrument other than a procurement contract. Examples include instruments of financial assistance, such as grants or cooperative agreements, and those of technical assistance, which provide services in lieu of money.

§ 21.670 Procurement contract.

A legal instrument which, consistent with 31 U.S.C. 6303, reflects a relationship between the Federal Government and a State, a local government, or other recipient when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal Government.

See the more detailed definition for contract at 48 CFR 2.101.

§ 21.675 Recipient.

An organization or other entity receiving an award from a DoD Component.

§ 21.680 Technology investment agreements.

A special class of assistance instruments used to increase involvement of commercial firms in defense research programs and for other purposes related to integrating the commercial and defense sectors of the nation's technology and industrial base. Technology investment agreements include one kind of cooperative agreement with provisions tailored for involving commercial firms, as well as one kind of other assistance transaction. Technology investment agreements are described more fully in 32 CFR part 37.

APPENDIX A TO PART 21—INSTRUMENTS TO WHICH DODGARS PORTIONS APPLY

I. For each DoDGARs part that DoD already has adopted in chapter XI of title 2 of the Code of Federal Regulations (CFR), the following table summarizes the general subject area that the part addresses and its applicability. All of the DoDGARs ultimately will be located in chapter XI of 2 CFR.

DoDGARs . . .	Which addresses . . .	Applies to . . .
Part 1104	DoD's interim implementation of the OMB guidance in 2 CFR part 200.	grants and cooperative agreements other than TIAs.
Part 1108 (2 CFR part 1108).	Definitions of terms	terms used throughout the DoDGARs in chapter XI of 2 CFR other than the portion containing regulations implementing specific national policy requirements that provide their own definitions of terms.
Part 1120 (2 CFR part 1120).	Award format	grants and cooperative agreements, other than TIAs.
Part 1122 (2 CFR part 1122).	National policy requirements general award terms and conditions.	grants and cooperative agreements other than TIAs. Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply.
Part 1125 (2 CFR part 1125).	Governmentwide debarment and suspension requirements.	nonprocurement generally, including grants, cooperative agreements, TIAs, and any other instruments that are "covered transactions" under OMB guidance in 2 CFR 180.210 and 180.215, as implemented by 2 CFR part 1125, except acquisition transactions to carry out prototype projects (*see* 2 CFR 1125.20).
Parts 1126, 1128, 1130, 1132, 1134, 1136, and 1138 (subchapter D of 2 CFR chapter XI).	Administrative Requirements Terms and Conditions for Cost-type Awards to Nonprofit and Governmental Entities.	cost-type grants and cooperative agreements other than TIAs. Portions of this subchapter apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply.

II. For each DoDGARs part that will remain in subchapter C of chapter I of title 32 of the CFR, pending completion of the DoDGARs updating needed to fully implement OMB guidance in 2 CFR part 200 and for other purposes, the following table summarizes the general subject area that the part addresses and its applicability. All of the substantive content of these DoDGARs parts ultimately will be located in new parts in chapter XI of 2 CFR.

DoDGARs . . .	which addresses . . .	applies to . . .
Part 21 (32 CFR part 21), all but subparts D and E.	The Defense Grant and Agreement Regulatory System and the DoD Grant and Agreement Regulations.	"awards," which are grants, cooperative agreements, technology investment agreements (TIAs), and other nonprocurement instruments subject to one or more parts of the DoDGARs.
Part 21 (32 CFR part 21), subpart D.	Authorities and responsibilities for assistance award and administration.	grants, cooperative agreements, and TIAs.
Part 21 (32 CFR part 21), subpart E.	DoD Components' information reporting requirements.	grants, cooperative agreements, TIAs, and other nonprocurement instruments subject to reporting requirements in 31 U.S.C. chapter 61.
Part 22 (32 CFR part 22)	DoD grants officers' responsibilities for award and administration of grants and cooperative agreements.	grants and cooperative agreements other than TIAs. Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply.

DoDGARs . . .	which addresses . . .	applies to . . .
Part 26 (32 CFR part 26)	Governmentwide drug-free workplace requirements.	grants, cooperative agreements and other financial assistance instruments, including TIAs, that are included in the definition of "award" at 32 CFR 26.605.
Part 28 (32 CFR part 28)	Governmentwide restrictions on lobbying	grants, cooperative agreements and other financial assistance instruments, including TIAs, that are included in the definitions of "Federal grant" and "Federal cooperative agreement" at 32 CFR 28.105.
Part 34 (32 CFR part 34)	Administrative requirements for grants and agreements with for-profit organizations.	grants and cooperative agreements other than TIAs ("award," as defined in 32 CFR 34.2). Portions of this part apply to TIAs, but only as 32 CFR part 37 refers to them and makes them apply.
Part 37 (32 CFR part 37)	Agreements officers' responsibilities for award and administration of TIAs.	TIAs. Note that this part refers to other portions of DoDGARs that apply to TIAs.

[85 FR 51241, Aug. 19, 2020]

PART 22—DoD GRANTS AND AGREEMENTS—AWARD AND ADMINISTRATION

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APPENDIX A TO PART 22—PROPOSAL PROVISION FOR REQUIRED CERTIFICATION.

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

SOURCE: 63 FR 12164, Mar. 12, 1998, unless otherwise noted.

Subpart A—General

§ 22.100 Purpose.

This part outlines grants officers' and DoD Components' responsibilities

related to the award and administration of grants and cooperative agreements.

[85 FR 51242, Aug. 19, 2020]

§ 22.105 Definitions.

Other than the terms defined in this section, terms used in this part are defined in 32 CFR part 21, subpart F.

Administrative offset. An action whereby money payable by the United States Government to, or held by the Government for, a recipient is withheld to satisfy a delinquent debt the recipient owes the Government.

Advanced research. Advanced technology development that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way. Advanced research is most closely analogous to precompetitive technology development in the commercial sector (i.e., early phases of research and development on which commercial competitors are willing to collaborate, because the work is not so coupled to specific products and processes that the results of the work must be proprietary). It does not include development of military systems and hardware where specific requirements have been defined. It is typically funded in Advanced Technology Development (Budget Activity 3 and Research Category 6.3A) programs within Research, Development, Test and Evaluation (RDT&E).

Applied research. Efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology such as new materials, devices, methods and processes. It typically is funded in Applied Research (Budget Activity 2 and Research Category 6.2) programs within Research, Development, Test and Evaluation (RDT&E). Applied research normally follows basic research but may not be fully distinguishable from the related basic research. The term does not include efforts whose principal aim is the design, development, or testing of specific products, systems or processes to be considered for sale or acquisition; these efforts are within the definition of ''development.''

Basic research. Efforts directed toward increasing knowledge and understanding in science and engineering, rather than the practical application of that knowledge and understanding. It typically is funded within Basic Research (Budget Activity 1 and Research Category 6.1) programs within Research, Development, Test and Evaluation (RDT&E). For the purposes of this part, basic research includes:

(1) Research-related, science and engineering education, including graduate fellowships and research traineeships.

(2) Research instrumentation and other activities designed to enhance the infrastructure for science and engineering research.

Claim. A written demand or written assertion by one of the parties to a grant or cooperative agreement seeking as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of award terms, or other relief arising under or relating to a grant or cooperative agreement. A routine request for payment that is not in dispute when submitted is not a claim. The submission may be converted to a claim by written notice to the grants officer if it is disputed either as to liability or amount, or is not acted upon in a reasonable time.

Debt. Any amount of money or any property owed to a Federal Agency by any person, organization, or entity except another United States Federal Agency. Debts include any amounts due from insured or guaranteed loans, fees, leases, rents, royalties, services, sales of real or personal property, or overpayments, penalties, damages, interest, fines and forfeitures, and all other claims and similar sources. Amounts due a nonappropriated fund instrumentality are not debts owed the United States, for the purposes of this subchapter.

Delinquent debt. A debt:

(1) That the debtor fails to pay by the date specified in the initial written notice from the agency owed the debt, normally within 30 calendar days, unless the debtor makes satisfactory payment arrangements with the agency by that date; and

(2) With respect to which the debtor has elected not to exercise any available appeals or has exhausted all agency appeal processes.

Development. The systematic use of scientific and technical knowledge in the design, development, testing, or evaluation of potential new products, processes, or services to meet specific performance requirements or objectives. It includes the functions of design engineering, prototyping, and engineering testing.

Electronic commerce. The conduct of business through the use of automation and electronic media, in lieu of paper transactions, direct personal contact, telephone, or other means. For grants and cooperative agreements, electronic commerce can include the use of electronic data interchange, electronic mail, electronic bulletin board systems, and electronic funds transfer for: program announcements or solicitations; applications or proposals; award documents; recipients' requests for payment; payment authorizations; and payments.

Electronic data interchange. The exchange of standardized information communicated electronically between business partners, typically between computers. It is DoD policy that DoD Component EDI applications conform to the American National Standards Institute (ANSI), Accredited Standards Committee (ASC) X–12 standard. [1]

Electronic funds transfer. A system that provides the authority to debit or credit accounts in financial institutions by electronic means rather than source documents (e.g., paper checks). Processing typically occurs through the Federal Reserve System and/or the Automated Clearing House (ACH) computer network. It is DoD policy that DoD Component EFT transmissions conform to the American National Standards Institute (ANSI), Accredited Standards Committee (ASC) X–12 standard.

Historically Black colleges and universities. Institutions of higher education determined by the Secretary of Education to meet the requirements of 34 CFR 608.2. Each DoD Component's contracting activities and grants officers may obtain a list of historically Black colleges and universities from that DoD Component's Small and Disadvantaged Business Utilization office.

Institution of higher education. An educational institution that meets the criteria in section 1201(a) of the Higher Education Act of 1965 (20 U.S.C. 1141(a)). Note, however, that institution of higher education has a different meaning in § 22.520, as given at § 22.520(b)(2).

Minority institutions. Institutions of higher education that meet the criteria for *minority institutions* specified in 10 U.S.C. 2323. Each DoD Component's contracting activities and grants officers may obtain copies of a current list of institutions that qualify as *minority institutions* under 10 U.S.C. 2323 from that DoD Component's Small and Disadvantaged Business Utilization office (the list of *minority institutions* changes periodically, based on Department of Education data on institutions' enrollments of minority students).

Research. Basic, applied, and advanced research, as defined in this section.

Subaward. An award of financial assistance in the form of money, or property in lieu of money, made under a DoD grant or cooperative agreement by a recipient to an eligible subrecipient. The term includes financial assistance for substantive program performance by the subrecipient of a portion of the program for which the DoD grant or cooperative agreement was made. It does not include the recipient's procurement of goods and services needed to carry out the program.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

Subpart B—Selecting the Appropriate Instrument

§ 22.200 Purpose.

This subpart provides the bases for determining the appropriate type of instrument in a given situation.

§ 22.205 Distinguishing assistance from procurement.

Before using a grant or cooperative agreement, the grants officer shall

[1] Available from Accredited Standards Committee, X–12 Secretariat, Data Interchange Standards Association, 1800 Diagonal Road, Suite 355, Alexandria, VA 22314–2852; Attention: Manager Maintenance and Publications.

make a positive judgment that an assistance instrument, rather than a procurement contract, is the appropriate instrument, based on the following:

(a) *Purpose.* (1) The grants officer must judge that the principal purpose of the activity to be carried out under the instrument is to stimulate or support a public purpose (i.e., to provide assistance), rather than acquisition (i.e., to acquire goods and services for the direct benefit of the United States Government). If the principal purpose is acquisition, then the grants officer shall judge that a procurement contract is the appropriate instrument, in accordance with 31 U.S.C. chapter 63 (''Using Procurement Contracts and Grant and Cooperative Agreements''). Assistance instruments shall not be used in such situations, except:

(i) When a statute specifically provides otherwise; or

(ii) When an exemption is granted, in accordance with § 22.220.

(2) For research and development, the appropriate use of grants and cooperative agreements therefore is almost exclusively limited to the performance of selected basic, applied, and advanced research projects. Development projects nearly always shall be performed by contract or other acquisition transaction because their principal purpose is the acquisition of specific deliverable items (e.g., prototypes or other hardware) for the benefit of the Department of Defense.

(b) *Fee or profit.* Payment of fee or profit is consistent with an activity whose principal purpose is the acquisition of goods and services for the direct benefit or use of the United States Government, rather than an activity whose principal purpose is assistance. Therefore, the grants officer shall use a procurement contract, rather than an assistance instrument, in all cases where:

(1) Fee or profit is to be paid to the recipient of the instrument; or

(2) The instrument is to be used to carry out a program where fee or profit is necessary to achieving program objectives.

§ 22.210 Authority for providing assistance.

(a) Before a grant or cooperative agreement may be used, the grants officer must:

(1) Identify the program statute, the statute that authorizes the DoD Component to carry out the activity the principal purpose of which is assistance (see 32 CFR 21.410 through 21.420.

(2) Review the program statute to determine if it contains requirements that affect the:

(i) Solicitation, selection, and award processes. For example, program statutes may authorize assistance to be provided only to certain types of recipients; may require that recipients meet certain other criteria to be eligible to receive assistance; or require that a specific process shall be used to review recipients' proposals.

(ii) Terms and conditions of the award. For example, some program statutes require a specific level of cost sharing or matching.

(b) The grants officer shall ensure that the award of DoD appropriations through a grant or cooperative agreement for a research project meets the standards of 10 U.S.C. 2358, DoD's broad authority to carry out research, even if the research project is authorized under a statutory authority other than 10 U.S.C. 2358. The standards of 10 U.S.C. 2358 are that, in the opinion of the Head of the DoD Component or his or her designee, the projects must be:

(1) Necessary to the responsibilities of the DoD Component.

(2) Related to weapons systems and other military needs or of potential interest to the DoD Component.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003]

§ 22.215 Distinguishing grants and cooperative agreements.

(a) Once a grants officer judges, in accordance with §§ 22.205 and 22.210, that either a grant or cooperative agreement is the appropriate instrument, the grants officer shall distinguish between the two instruments as follows:

(1) Grants shall be used when the grants officer judges that substantial involvement is not expected between

the Department of Defense and the recipient when carrying out the activity contemplated in the agreement.

(2) Cooperative agreements shall be used when the grants officer judges that substantial involvement is expected. The grants officer should document the nature of the substantial involvement that led to selection of a cooperative agreement. Under no circumstances are cooperative agreements to be used solely to obtain the stricter controls typical of a contract.

(b) In judging whether substantial involvement is expected, grants officers should recognize that ''substantial involvement'' is a relative, rather than an absolute, concept, and that it is primarily based on programmatic factors, rather than requirements for grant or cooperative agreement award or administration. For example, substantial involvement may include collaboration, participation, or intervention in the program or activity to be performed under the award.

§ 22.220 Exemptions.

Under 31 U.S.C. 6307, ''the Director of the Office of Management and Budget may exempt an agency transaction or program'' from the requirements of 31 U.S.C. chapter 63. Grants officers shall request such exemptions only in exceptional circumstances. Each request shall specify for which individual transaction or program the exemption is sought; the reasons for requesting an exemption; the anticipated consequences if the exemption is not granted; and the implications for other agency transactions and programs if the exemption is granted. The procedures for requesting exemptions shall be:

(a) In cases where 31 U.S.C. chapter 63 would require use of a contract and an exemption from that requirement is desired:

(1) The grants officer shall submit a request for exemption, through appropriate channels established by his or her DoD Component (see 32 CFR 21.320(a)), to the Director of Defense Procurement and Acquisition Policy (DDP&AP).

(2) The DDP&AP, after coordination with the Assistant Secretary of Defense for Research and Engineering (ASD (R&E)), shall transmit the request to OMB or notify the DoD Component that the request has been disapproved.

(b) In other cases, the DoD Component shall submit a request for the exemption through appropriate channels to the ASD (R&E). The ASD (R&E) shall transmit the request to OMB or notify the DoD Component that the request has been disapproved.

(c) Where an exemption is granted, documentation of the approval shall be maintained in the award file.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003; 70 FR 49464, Aug. 23, 2005; 85 FR 51242, Aug. 19, 2020]

Subpart C—Competition

§ 22.300 Purpose.

This subpart establishes DoD policy and implements statutes related to the use of competitive procedures in the award of grants and cooperative agreements.

§ 22.305 General policy and requirement for competition.

(a) It is DoD policy to maximize use of competition in the award of grants and cooperative agreements. This also conforms with:

(1) 31 U.S.C. 6301(3), which encourages the use of competition in awarding all grants and cooperative agreements.

(2) 10 U.S.C. 2374(a), which sets out Congressional policy that any new grant for research, development, test, or evaluation be awarded through merit-based selection procedures.

(b) Grants officers shall use merit-based, competitive procedures (as defined by § 22.315) to award grants and cooperative agreements:

(1) In every case where required by statute (e.g., 10 U.S.C. 2361, as implemented in § 22.310, for certain grants to institutions of higher education).

(2) To the maximum extent practicable in all cases where not required by statute.

§ 22.310 Statutes concerning certain research, development, and facilities construction grants.

(a) *Definitions specific to this section.* For the purposes of implementing the requirements of 10 U.S.C. 2374 in this

section, the following terms are defined:

(1) *Follow-on grant.* A grant that provides for continuation of research and development performed by a recipient under a preceding grant. Note that follow-on grants are distinct from incremental funding actions during the period of execution of a multi-year award.

(2) *New grant.* A grant that is not a follow-on grant.

(b) *Statutory requirement to use competitive procedures.* (1) A grants officer shall not award a grant by other than merit-based, competitive procedures (as defined by § 22.315) to an institution of higher education for the performance of research and development or for the construction of research or other facilities, unless:

(i) In the case of a new grant for research and development, there is a statute meeting the criteria in paragraph (c)(1) of this section;

(ii) In the case of a follow-on grant for research and development, or of a grant for the construction of research or other facilities, there is a statute meeting the criteria in paragraph (c)(2) of this section; and

(iii) The Secretary of Defense submits to Congress a written notice of intent to make the grant. The grant may not be awarded until 180 calendar days have elapsed after the date on which Congress received the notice of intent. Contracting activities must submit a draft notice of intent with supporting documentation through channels to the Principal Deputy Assistant Secretary of Defense for Research and Engineering.

(2) Because subsequently enacted statutes may, by their terms, impose different requirements than set out in paragraph (b)(1) of this section, grants officers shall consult legal counsel on a case-by-case basis, when grants for the performance of research and development or for the construction of research or other facilities are to be awarded to institutions of higher education by other than merit-based competitive procedures.

(c) *Subsequent statutes.* In accordance with 10 U.S.C. 2361 and 10 U.S.C. 2374, a provision of law may not be construed as requiring the award of a grant through other than the merit-based, competitive procedures described in § 22.315, unless:

(1) *Institutions of higher education—new grants for research and development.* In the case of a new grant for research and development to an institution of higher education, such provision of law specifically:

(i) Identifies the particular institution of higher education involved;

(ii) States that such provision of law modifies or supersedes the provisions of 10 U.S.C. 2361 (a requirement that applies only if the statute authorizing or requiring award by other than competitive procedures was enacted after September 30, 1989); and

(iii) States that the award to the institution of higher education involved is required by such provision of law to be made in contravention of the policy set forth in 10 U.S.C. 2374(a).

(2) *Institutions of higher education—follow-on grants for research and development and grants for the construction of any research or other facility.* In the case of any such grant to an institution of higher education, such provision of law specifically:

(i) Identifies the particular institution of higher education involved; and

(ii) States that such provision of law modifies or supersedes the provisions of 10 U.S.C. 2361 (a requirement that applies only if the statute authorizing or requiring award by other than competitive procedures was enacted after September 30, 1989).

(3) *Other entities—new grants for research and development*—(i) *General.* In the case of a new grant for research and development to an entity other than an institution of higher education, such provision of law specifically:

(A) Identifies the particular entity involved;

(B) States that the award to that entity is required by such provision of law to be made in contravention of the policy set forth in 10 U.S.C. 2374(a).

(ii) *Exception.* The requirement of paragraph (c)(3)(i) of this section does not apply to any grant that calls upon the National Academy of Sciences to:

(A) Investigate, examine, or experiment upon any subject of science or art of significance to the Department of

Defense or any Military Department; and

(B) Report on such matters to the Congress or any agency of the Federal Government.

[63 FR 12164, Mar. 12, 1998, as amended at 85 FR 51242, Aug. 19, 2020]

§ 22.315 Merit-based, competitive procedures.

Competitive procedures are methods that encourage participation in DoD programs by a broad base of the most highly qualified performers. These procedures are characterized by competition among as many eligible proposers as possible, with a published or widely disseminated notice. Competitive procedures include, as a minimum:

(a) *Notice to prospective proposers.* The notice may be a notice of funding availability or Broad Agency Announcement that is publicly disseminated, with unlimited distribution, or a specific notice that is distributed to eligible proposers (a specific notice must be distributed to at least two eligible proposers to be considered as part of a competitive procedure). Requirements for notices are as follows:

(1) The format and content of each notice must conform with the Governmentwide format for announcements of funding opportunities established by the Office of Management and Budget (OMB) in a policy directive entitled, ''Format for Financial Assistance Program Announcements.'' [2]

(2) In accordance with that OMB policy directive, DoD Components also must post on the Internet any notice under which domestic entities may submit proposals, if the distribution of the notice is unlimited. DoD Components are encouraged to simultaneously publish the notice in other media (*e.g.*, the FEDERAL REGISTER), if doing so would increase the likelihood of its being seen by potential proposers. If a DoD Component issues a specific notice with limited distribution (*e.g.*, for national security considerations), the notice need not be posted on the Internet.

(3) To comply with an OMB policy directive entitled, ''Requirement to Post Funding Opportunity Announcement Synopses at Grants.gov and Related Data Elements/Format,'' [3] DoD Components must post on the Internet a synopsis for each notice that, in accordance with paragraph (a)(2) of this section, is posted on the Internet. The synopsis must be posted at the Governmentwide site designated by the OMB (currently *http://www.Grants.gov*). The synopsis for each notice must provide complete instructions on where to obtain the notice and should have an electronic link to the Internet location at which the notice is posted.

(4) In accordance with an OMB policy directive entitled, ''Requirement for a DUNS Number in Applications for Federal Grants and Cooperative Agreements,'' [4] each notice must include a requirement for proposers to include Data Universal Numbering System (DUNS) numbers in their proposals. If a notice provides for submission of application forms, the forms must incorporate the DUNS number. To the extent that unincorporated consortia of separate organizations may submit proposals, the notice should explain that an unincorporated consortium would use the DUNS number of the entity proposed to receive DoD payments under the award (usually, a lead organization that consortium members identify for administrative matters).

(b) At least two eligible, prospective proposers.

(c) Impartial review of the merits of applications or proposals received in response to the notice, using the evaluation method and selection criteria described in the notice. For research and development awards, in order to be considered as part of a competitive procedure, the two principal selection

[2] This OMB policy directive is available at the Internet site *http://www.whitehouse.gov/omb/grants/ grants_docs.html* (the link is ''Final Policy Directive on Financial Assistance Program Announcements'').

[3] This OMB policy directive is available at the Internet site *http://www.whitehouse.gov/omb/grants/ grants_docs.html* (the link is ''Office of Federal Financial Management Policy Directive on Use of Grants.Gov FIND'').

[4] This OMB policy directive is available at the Internet site *http://www.whitehouse.gov/omb/ grants/grants_docs.html* (the link is ''Use of a Universal Identifier by Grant Applicants'').

criteria, unless statute provides otherwise, must be the:

(1) Technical merits of the proposed research and development; and

(2) Potential relationship of the proposed research and development to Department of Defense missions.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 72 FR 34988, June 26, 2007; 85 FR 51242, Aug. 19, 2020]

§ 22.320 Special competitions.

Some programs may be competed for programmatic or policy reasons among specific classes of potential recipients. An example would be a program to enhance U.S. capabilities for academic research and research-coupled graduate education in defense-critical, science and engineering disciplines, a program that would be competed specifically among institutions of higher education. All such special competitions shall be consistent with program representations in the President's budget submission to Congress and with subsequent Congressional authorizations and appropriations for the programs.

Subpart D—Recipient Qualification Matters—General Policies and Procedures

§ 22.400 Purpose.

The purpose of this subpart is to specify policies and procedures for grants officers' determination of recipient qualifications prior to award.

§ 22.405 Policy.

(a) *General.* Grants officers normally shall award grants or cooperative agreements only to qualified recipients that meet the standards in § 22.415. This practice conforms with the Governmentwide policy to do business only with responsible persons, which is stated in OMB guidance at 2 CFR 180.125(a) and implemented by the Department of Defense in 2 CFR part 1125.

(b) *Exception.* In exceptional circumstances, grants officers may make awards to recipients that do not fully meet the standards in § 22.415 and include special award conditions that are appropriate to the particular situation, in accordance with 32 CFR 34.4 for awards to for-profit organizations or as described in OMB guidance at 2 CFR 200.207 for awards to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 72 FR 34988, June 26, 2007; 85 FR 51242, Aug. 19, 2020]

§ 22.410 Grants officers' responsibilities.

The grants officer is responsible for determining a recipient's qualification prior to award. The grants officer's signature on the award document shall signify his or her determination that either:

(a) The potential recipient meets the standards in § 22.415 and is qualified to receive the grant or cooperative agreement; or

(b) An award is justified to a recipient that does not fully meet the standards, pursuant to § 22.405(b). In such cases, grants officers shall document in the award file the rationale for making an award to a recipient that does not fully meet the standards.

§ 22.415 Standards.

To be qualified, a potential recipient must:

(a) Have the management capability and adequate financial and technical resources, given those that would be made available through the grant or cooperative agreement, to execute the program of activities envisioned under the grant or cooperative agreement.

(b) Have a satisfactory record of executing such programs or activities (if a prior recipient of an award).

(c) Have a satisfactory record of integrity and business ethics.

(d) Be otherwise qualified and eligible to receive a grant or cooperative agreement under applicable laws and regulations (see § 22.420(c)).

§ 22.420 Pre-award procedures.

(a) The appropriate method to be used and amount of effort to be expended in deciding the qualification of a potential recipient will vary. In deciding on the method and level of effort, the grants officer should consider factors such as:

(1) DoD's past experience with the recipient;

(2) Whether the recipient has previously received cost-type contracts, grants, or cooperative agreements from the Federal Government; and

(3) The amount of the prospective award and complexity of the project to be carried out under the award.

(b) There is no DoD-wide requirement to obtain a pre-award credit report, audit, or any other specific piece of information. On a case-by-case basis, the grants officer will decide whether there is a need to obtain any such information to assist in deciding whether the recipient meets the standards in § 22.415 (a), (b), and (c).

(1) Should the grants officer in a particular case decide that a pre-award credit report, audit, or survey is needed, he or she should consult first with the appropriate grants administration office (identified in § 22.710), and decide whether pre-existing surveys or audits of the recipient, such as those of the recipient's internal control systems under OMB guidance in subpart F of 2 CFR part 200, will satisfy the need (see § 22.715(a)(1)).

(2) If, after consulting with the grants administration office, the grants officer decides to obtain a credit report, audit, or other information, and the report or other information discloses that a potential recipient is delinquent on a debt to an agency of the United States Government, then:

(i) The grants officer shall take such information into account when determining whether the potential recipient is qualified with respect to the grant or cooperative agreement; and

(ii) If the grants officer decides to make the award to the recipient, unless there are compelling reasons to do otherwise, the grants officer shall delay the award of the grant or cooperative agreement until payment is made or satisfactory arrangements are made to repay the debt.

(c) In deciding whether a recipient is otherwise qualified and eligible in accordance with the standard in § 22.415(d), the grants officer shall ensure that the potential recipient:

(1) Is not identified in the Exclusions area of the System for Award Management (SAM Exclusions) as being debarred, suspended, or otherwise ineligible to receive the award (SAM is at *www.sam.gov*). In addition to being a requirement for every new award, note that checking SAM Exclusions also is a requirement for subsequent obligations of additional funds, such as incremental funding actions, in the case of pre-existing awards to institutions of higher education, as described at § 22.520(e)(5). The grants officer's responsibilities include (see the OMB guidance at 2 CFR 180.425 and 180.430, as implemented by the Department of Defense at 2 CFR 1125.425) checking SAM Exclusions for:

(i) Potential recipients of prime awards; and

(ii) A recipient's principals (as defined in OMB guidance at 2 CFR 180.995, implemented by the Department of Defense in 2 CFR part 1125), potential recipients of subawards, and principals of those potential subaward recipients, if DoD Component approval of those principals or lower-tier recipients is required under the terms of the award.

(2) Has provided all certifications and assurances required by Federal statute, Executive order, or codified regulation, unless they are to be addressed in award terms and conditions at the time of award (see § 22.510).

(3) Meets any eligibility criteria that may be specified in the statute authorizing the specific program under which the award is being made (see § 22.210(a)(2)).

(d) Grants officers shall obtain each recipient's Taxpayer Identification Number (TIN, which may be the Social Security Number for an individual and Employer Identification Number for a business or non-profit entity) and notify the recipient that the TIN is being obtained for purposes of collecting and reporting on any delinquent amounts that may arise out of the recipient's relationship with the Government. Obtaining the TIN and so notifying the recipient is a statutory requirement of 31 U.S.C. 7701, as amended by the Debt Collection Improvement Act of 1996 (section 31001(i)(1), Pub. L. 104–134).

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 72 FR 34988, June 26, 2007; 85 FR 51242, Aug. 19, 2020]

Subpart E—National Policy Matters

§ 22.505 Purpose.

The purpose of this subpart is to supplement other regulations that implement national policy requirements, to the extent that it is necessary to provide additional guidance to DoD grants officers.

[85 FR 51242, Aug. 19, 2020]

§ 22.510 Certifications, representations, and assurances.

(a) *Certifications*—(1) *Policy*. Certifications of compliance with national policy requirements are to be obtained from recipients only for those national policies where a statute, Executive order, or codified regulation specifically states that a certification is required. Other national policy requirements may be addressed by obtaining representations or assurances (see paragraph (b) of this section). Grants officers should utilize methods for obtaining certifications, in accordance with Executive Order 12866 (3 CFR, 1993 Comp., p. 638), that minimize administration and paperwork.

(2) *Procedures*. (i) When necessary, grants officers may obtain individual, written certifications.

(ii) Whenever possible, and to the extent consistent with statute and codified regulation, grants officers should identify the certifications that are required for the particular type of recipient and program, and consolidate them into a single certification provision that cites them by reference.

(A) If a grants officer elects to have proposers incorporate certifications by reference into their proposals, he or she must do so in one of the two following ways. When required by statute or codified regulation, the solicitation must include the full text of the certifications that proposers are to provide by reference. In other cases, the grants officer may include language in the solicitation that informs the proposers where the full text may be found (*e.g.*, in documents or computer network sites that are readily available to the public) and offers to provide it to proposers upon request.

(B) Appendix A to this part provides language that may be used for incorporating by reference the certification on lobbying, which currently is the only certification requirement that commonly applies to DoD grants and agreements. Because that certification is required by law to be submitted at the time of proposal, rather than at the time of award, Appendix A includes language to incorporate the certification by reference into a proposal.

(C) Grants officers may incorporate certifications by reference in award documents when doing so is consistent with statute and codified regulation (that is not the case for the lobbying certification addressed in paragraph (a)(2)(ii)(B) of this section). The provision that a grants officer would use to incorporate certifications in award documents, when consistent with statute and codified regulation, would be similar to the provision in Appendix A to this part, except that it would be modified to state that the recipient is providing the required certifications by signing the award document or by accepting funds under the award.

(b) *Representations and assurances*. Many national policies, either in statute or in regulation, require recipients of grants and cooperative agreements to make representations or provide assurances (rather than certifications) that they are in compliance with the policies. Part 1122 of the DoDGARs (2 CFR part 1122) provides standard wording of general award terms and conditions to address several of the more commonly applicable national policy requirements. These terms and conditions may be used to obtain required assurances and representations for national policy matters covered in part 1122 at the time of award, which is as effective and more efficient and less administratively burdensome than obtaining them at the time of each proposal. If any other assurances or representations must be obtained at the time of proposal, grants officers should use the most efficient method for doing so—*e.g.*, for a program that has a program announcement and applications using the standard application form

(SF–424[5]), the program announcement should include the texts of the required assurances and representations and clearly state that the applicant's electronic signature of the SF–424 will serve to affirm its agreement with each representation or assurance.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49464, Aug. 23, 2005; 85 FR 51242, Aug. 19, 2020]

§ 22.515 Provisions of annual appropriations acts.

An annual appropriations act can include general provisions stating national policy requirements that apply to the use of funds (e.g., obligation through a grant or cooperative agreement) appropriated by the act. Because these requirements are of limited duration (the period during which a given year's appropriations are available for obligation), and because they can vary from year to year and from one agency's appropriations act to another agency's, the grants officer must know the agency(ies) and fiscal year(s) of the appropriations being obligated by a given grant or cooperative agreement, and may need to consult legal counsel if he or she does not know the requirements applicable to those appropriations.

§ 22.520 Campus access for military recruiting and Reserve Officer Training Corps (ROTC).

(a) *Purpose.* (1) The purpose of this section is to implement 10 U.S.C. 983 as it applies to grants. Under that statute, DoD Components are prohibited from providing funds to institutions of higher education that have policies or practices, as described in paragraph (c) of this section, restricting campus access of military recruiters or the Reserve Officer Training Corps (ROTC).

(2) By addressing the effect of 10 U.S.C. 983 on grants and cooperative agreements, this section supplements the DoD's primary implementation of that statute in 32 CFR part 216, ''Military Recruiting and Reserve Officer Training Corps Program Access to Institutions of Higher Education.'' Part 216 establishes procedures by which the Department of Defense identifies institutions of higher education that have a policy or practice described in paragraph (c) of this section.

(b) *Definition specific to this section.* ''Institution of higher education'' in this section has the meaning given at 32 CFR 216.3, which is different than the meaning given at § 22.105 for other sections of this part.

(c) *Statutory requirement of 10 U.S.C. 983.* No funds made available to the Department of Defense may be provided by grant to an institution of higher education (including any subelement of such institution) if the Secretary of Defense determines that the institution (or any subelement of that institution) has a policy or practice that either prohibits, or in effect prevents:

(1) The Secretary of a Military Department from maintaining, establishing, or operating a unit of the Senior ROTC (in accordance with 10 U.S.C. 654 and other applicable Federal laws) at that institution (or any subelement of that institution);

(2) A student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior ROTC at another institution of higher education;

(3) The Secretary of a Military Department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(4) Access by military recruiters for purposes of military recruiting to the following information pertaining to students (who are 17 years of age or older) enrolled at that institution (or any subelement of that institution):

(i) Names, addresses, and telephone listings.

(ii) Date and place of birth, levels of education, academic majors, degrees

[5] For copies of Standard Forms listed in this part, contact regional grants administration offices of the Office of Naval Research. Addresses for the offices are listed in the ''Federal Directory of Contract Administration Services (CAS) Components,'' which may be accessed through the Defense Contract Management Agency homepage at: *http://www.dcma.mil.*

received, and the most recent educational institution enrolled in by the student.

(d) *Policy*—(1) *Applicability to cooperative agreements.* As a matter of DoD policy, the restrictions of 10 U.S.C. 983, as implemented by 32 CFR part 216, apply to cooperative agreements, as well as grants.

(2) *Deviations.* Grants officers may not deviate from any provision of this section without obtaining the prior approval of the Assistant Secretary of Defense for Research and Engineering. Requests for deviations shall be submitted, through appropriate channels, to: Director for Basic Research, OASD(R&E), 3040 Defense Pentagon, Washington, D.C. 20301–3040.

(e) *Grants officers' responsibility.* (1) A grants officer shall not award any grant or cooperative agreement to an institution of higher education that has been identified pursuant to the procedures of 32 CFR part 216. Such institutions are identified as being ineligible in the Exclusions area of the System for Award Management (SAM Exclusions). The exclusion types in SAM Exclusions broadly indicate the nature of an institution's ineligibility, as well as the effect of the exclusion, and the Additional Comments field may have further details about the exclusion. Note that OMB guidance in 2 CFR 180.425 and 180.430, as implemented by the Department of Defense at 2 CFR part 1125, require a grants officer to check the SAM Exclusions prior to determining that a recipient is qualified to receive an award.

(2) A grants officer shall not consent to a subaward of DoD funds to such an institution, under a grant or cooperative agreement to any recipient, if the subaward requires the grants officer's consent.

(3) A grants officer shall include the following award term in each grant or cooperative agreement with an institution of higher education (note that this requirement does not flow down and that recipients are not required to include the award term in subawards):

''As a condition for receipt of funds available to the Department of Defense (DoD) under this award, the recipient agrees that it is not an institution of higher education (as defined in 32 CFR part 216) that has a policy or practice that either prohibits, or in effect prevents:

(A) The Secretary of a Military Department from maintaining, establishing, or operating a unit of the Senior Reserve Officers Training Corps (in accordance with 10 U.S.C. 654 and other applicable Federal laws) at that institution (or any subelement of that institution);

(B) Any student at that institution (or any subelement of that institution) from enrolling in a unit of the Senior ROTC at another institution of higher education;

(C) The Secretary of a Military Department or Secretary of Homeland Security from gaining access to campuses, or access to students (who are 17 years of age or older) on campuses, for purposes of military recruiting in a manner that is at least equal in quality and scope to the access to campuses and to students that is provided to any other employer; or

(D) Access by military recruiters for purposes of military recruiting to the names of students (who are 17 years of age or older and enrolled at that institution or any subelement of that institution); their addresses, telephone listings, dates and places of birth, levels of education, academic majors, and degrees received; and the most recent educational institutions in which they were enrolled.

If the recipient is determined, using the procedures in 32 CFR part 216, to be such an institution of higher education during the period of performance of this agreement, the Government will cease all payments of DoD funds under this agreement and all other DoD grants and cooperative agreements to the recipient, and it may suspend or terminate such grants and agreements unilaterally for material failure to comply with the terms and conditions of award.''

(4) If an institution of higher education refuses to accept the award term in paragraph (e)(3) of this section, the grants officer shall:

(i) Determine that the institution is not qualified with respect to the award. The grants officer may award to an alternative recipient.

(ii) Transmit the name of the institution, through appropriate channels, to the Director for Accession Policy, Office of the Deputy Under Secretary of Defense for Military Personnel Policy (ODUSD(MPP)), 4000 Defense Pentagon, Washington, DC 20301–4000. This will allow ODUSD(MPP) to decide whether to initiate an evaluation of the institution under 32 CFR part 216, to determine whether it is an institution that

has a policy or practice described in paragraph (c) of this section.

(5) With respect to any pre-existing award to an institution of higher education that currently is listed in SAM Exclusions pursuant to a determination under 32 CFR part 216, a grants officer:

(i) Shall not obligate additional funds available to the DoD for the award. A grants officer therefore must check SAM Exclusions before approving an incremental funding action or other additional funding for any pre-existing award to an institution of higher education. The grants officer may not obligate the additional funds if the cause and treatment code indicates that the reason for an institution's SAM Exclusions listing is a determination under 32 CFR part 216 that institutional policies or practices restrict campus access of military recruiters or ROTC.

(ii) Shall not approve any request for payment submitted by such an institution (including payments for costs already incurred).

(iii) Shall:

(A) Terminate the award unless he or she has a reason to believe, after consulting with the ODUSD(MPP), 4000 Defense Pentagon, Washington, DC 20301–4000), that the institution may be removed from SAM Exclusions in the near term and have its eligibility restored; and

(B) Suspend any award that is not immediately terminated, as well as all payments under it.

(f) *Post-award administration responsibilities of the Office of Naval Research (ONR).* As the DoD office assigned responsibility for performing field administration services for grants and cooperative agreements with institutions of higher education, the ONR shall disseminate the list it receives from the ODUSD(MPP) of institutions of higher education identified pursuant to the procedures of 32 CFR part 216 to:

(1) ONR field administration offices, with instructions to:

(i) Disapprove any payment requests under awards to such institutions for which post-award payment administration was delegated to the ONR; and

(ii) Alert the DoD offices that made the awards to their responsibilities under paragraphs (e)(5)(i) and (e)(5)(iii) of this section.

(2) Awarding offices in DoD Components that may be identified from data in the Defense Assistance Awards Data System (see 32 CFR 21.520 through 21.555) as having awards with such institutions for which post-award payment administration was not delegated to ONR. The ONR is to alert those offices to their responsibilities under paragraph (e)(5) of this section.

[70 FR 49465, Aug. 23, 2005, as amended at 72 FR 34988, June 26, 2007; 85 FR 51243, Aug. 19, 2020]

§ 22.525 Paperwork Reduction Act.

Grants officers shall include appropriate award terms or conditions, if a recipient's activities under an award will be subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3500, *et seq.*):

(a) Generally, the Act only applies to Federal agencies—it requires agencies to obtain clearance from the Office of Management and Budget before collecting information using forms, schedules, questionnaires, or other methods calling either for answers to:

(1) Identical questions from ten or more persons other than agencies, instrumentalities, or employees of the United States.

(2) Questions from agencies, instrumentalities, or employees of the United States which are to be used for statistical compilations of general public interest.

(b) The Act applies to similar collections of information by recipients of grants or cooperative agreements only when:

(1) A recipient collects information at the specific request of the awarding Federal agency; or

(2) The terms and conditions of the award require specific approval by the agency of the information collection or the collection procedures.

§ 22.530 Metric system of measurement.

(a) *Statutory requirement.* The Metric Conversion Act of 1975, as amended by the Omnibus Trade and Competitiveness Act of 1988 (15 U.S.C. 205) and implemented by Executive Order 12770 (3 CFR, 1991 Comp., p. 343), states that:

(1) The metric system is the preferred measurement system for U.S. trade and commerce.

(2) The metric system of measurement will be used, to the extent economically feasible, in federal agencies' procurements, grants, and other business-related activities.

(3) Metric implementation shall not be required to the extent that such use is likely to cause significant inefficiencies or loss of markets to United States firms.

(b) *Responsibilities.* DoD Components shall ensure that the metric system is used, to the maximum extent practicable, in measurement-sensitive activities supported by programs that use grants and cooperative agreements, and in measurement-sensitive outputs of such programs.

Subpart F—Award

§ 22.600 Purpose.

This subpart sets forth grants officers' responsibilities relating to the award document and other actions at the time of award.

§ 22.605 Grants officers' responsibilities.

At the time of award, the grants officer is responsible for ensuring that:

(a) The award:

(1) Conforms to the award format specified in 2 CFR part 1120.

(2) Includes appropriate general terms and conditions and any program-specific and award-specific terms and conditions needed to specify applicable administrative, national policy, and programmatic requirements. These requirements include:

(i) Federal statutes or Executive orders that apply broadly to Federal or DoD grants and cooperative agreements; and

(ii) Any requirements specific to the program, as prescribed in the program statute (see § 22.210(a)(2)), or specific to the funding, as stated in pertinent Congressional appropriations (see § 22.515).

(b) Information about the award is reported to the Defense Assistance Award Data System (DAADS), in accordance with Subpart E of 32 CFR part 21.

(c)(1) In addition to the copy of the award document provided to the recipient, a copy is forwarded to the office designated to administer the grant or cooperative agreement, and another copy is forwarded to the finance and accounting office designated to make the payments to the recipient.

(2) For any award subject to the electronic funds transfer (EFT) requirement described in § 22.810(b)(2), the grants officer shall include a prominent notification of that fact on the first page of the copies forwarded to the recipient, the administrative grants officer, and the finance and accounting office. On the first page of the copy forwarded to the recipient, the grants officer also shall include a prominent notification that the recipient, to be paid, must submit a Payment Information Form (Standard Form SF–3881[6]) to the responsible DoD payment office, if that payment office does not currently have the information (e.g., bank name and account number) needed to pay the recipient by EFT.

[63 FR 12164, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003; 70 FR 49465, Aug. 23, 2005; 85 FR 51243, Aug. 19, 2020]

Subpart G—Field Administration

§ 22.700 Purpose.

This subpart prescribes policies and procedures for administering grants and cooperative agreements. It does so in conjunction with 32 CFR part 34 and subchapter D of 2 CFR chapter XI, which prescribe administrative requirements for particular types of recipients.

[63 FR 12164, Mar. 12, 1998, as amended at 85 FR 51243, Aug. 19, 2020]

§ 22.705 Policy.

(a) DoD policy is to have each recipient deal with a single office, to the maximum extent practicable, for post-award administration of its grants and cooperative agreements. This reduces burdens on recipients that can result when multiple DoD offices separately administer grants and cooperative

[6] See footnote 5 to § 22.510(b).

agreements they award to a given recipient. It also minimizes unnecessary duplication of field administration services.

(b) To further reduce burdens on recipients, the office responsible for performing field administration services for grants and cooperative agreements to a particular recipient shall be, to the maximum extent practicable, the same office that is assigned responsibility for performing field administration services for contracts awarded to that recipient.

(c) Contracting activities and grants officers therefore shall use cross-servicing arrangements whenever practicable and, to the maximum extent possible, delegate responsibility for post-award administration to the cognizant grants administration offices identified in § 22.710.

§ 22.710 Assignment of grants administration offices.

In accordance with the policy stated in § 22.705(b), the DoD offices (referred to in this part as ''grants administration offices'') that are assigned responsibility for performing field administration services for grants and cooperative agreements are (see the ''Federal Directory of Contract Administration Services (CAS) Components''[7] for specific addresses of administration offices):

(a) Regional offices of the Office of Naval Research, for grants and cooperative agreements with:

(1) Institutions of higher education and laboratories affiliated with such institutions, to the extent that such organizations are subject to the cost principles in subpart E of 2 CFR part 200.

(2) Nonprofit organizations that are subject to the cost principles in subpart E of 2 CFR part 200 if their principal business with the Department of Defense is research and development.

(b) Field offices of the Defense Contract Management Agency, for grants and cooperative agreements with all other entities, including:

(1) For-profit organizations.

(2) Nonprofit organizations identified in appendix VIII to 2 CFR part 200 that are subject to for-profit cost principles in 48 CFR part 31.

(3) Nonprofit organizations subject to the cost principles in subpart E of 2 CFR part 200, if their principal business with the Department of Defense is other than research and development.

(4) State and local governments.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49466, Aug. 23, 2005; 72 FR 34989, June 26, 2007; 85 FR 51243, Aug. 19, 2020]

§ 22.715 Grants administration office functions.

The primary responsibility of cognizant grants administration offices shall be to advise and assist grants officers and recipients prior to and after award, and to help ensure that recipients fulfill all requirements in law, regulation, and award terms and conditions. Specific functions include:

(a) Conducting reviews and coordinating reviews, audits, and audit requests. This includes:

(1) Advising grants officers on the extent to which audits by independent auditors (i.e., public accountants or Federal auditors) have provided the information needed to carry out their responsibilities. If a recipient has had an independent audit in accordance with subpart F of 2 CFR part 200, and the audit report disclosed no material weaknesses in the recipient's financial management and other management and control systems, additional preaward or closeout audits usually will not be needed (see §§ 22.420(b) and 22.825(b)).

(2) Performing pre-award surveys, when requested by a grants officer, after providing advice described in paragraph (a)(1) of this section.

(3) Reviewing recipients' systems and compliance with Federal requirements, in coordination with any reviews and compliance audits performed by independent auditors under subpart F of 2 CFR part 200, or in accordance with the terms and conditions of the award. This includes:

(i) Reviewing recipients' financial management, property management, and purchasing systems, to determine the adequacy of such systems.

[7] The ''Federal Directory of Contract Administration Services (CAS) Components'' may be accessed through the Defense Contract Management Agency homepage at *http://www.dcma.mil*.

(ii) Determining that recipients have drug-free workplace programs, as required under 32 CFR part 26.

(iii) Determining that governmental, university and nonprofit recipients have complied with requirements in subpart F of 2 CFR part 200, as implemented at subpart E of 2 CFR part 1128, to have single audits and submit audit reports to the Federal Audit Clearinghouse. If a recipient has not had a required audit, appropriate action must be taken (*e.g.*, contacting the recipient and coordinating with the Office of the Assistant Inspector General for Audit Policy and Oversight (OAIG(P&O)), Office of the Deputy Inspector General for Inspections and Policy, Office of the Inspector General of the Department of Defense (OIG, DoD), 4800 Mark Center Drive, Alexandria, VA 22350–1500).

(4) Issuing timely management decisions, in accordance with DoD Instruction 7640.02, ''Policy for Follow-up on Contract Audit Reports,''[8] on single audit findings referred by the OIG, DoD, under DoD Instruction 7600.10, ''Audits of States, Local Governments, and Non-Profit Organizations.''[9]

(b) Performing property administration services for Government-owned property, and for any property acquired by a recipient, with respect to which the recipient has further obligations to the Government.

(c) Ensuring timely submission of required reports.

(d) Executing administrative closeout procedures.

(e) Establishing recipients' indirect cost rates, where the Department of Defense is the cognizant or oversight Federal agency with the responsibility for doing so.

(f) Performing other administration functions (e.g., receiving recipients' payment requests and transmitting approved payment authorizations to payment offices) as delegated by applicable cross-servicing agreements or letters of delegation.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49466, Aug. 23, 2005; 72 FR 34989, June 26, 2007; 85 FR 51243, Aug. 19, 2020]

Subpart H—Post-Award Administration

§ 22.800 Purpose and relation to other parts.

This subpart sets forth grants officers' and DoD Components' responsibilities for post-award administration, by providing DoD-specific requirements on payments; debt collection; claims, disputes and appeals; and closeout audits.

§ 22.805 Post-award requirements in other parts.

Grants officers responsible for post-award administration of grants and cooperative agreements shall administer such awards in accordance with the following parts of the DoDGARs, as supplemented by this subpart:

(a) *Awards to domestic recipients.* Standard administrative requirements for grants and cooperative agreements with domestic recipients are specified in other parts of the DoDGARs, as follows:

(1) For awards to domestic institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes, requirements are specified in subchapter D of 2 CFR chapter XI.

(2) For awards to domestic for-profit organizations, requirements are specified in 32 CFR part 34.

(b) *Awards to foreign recipients.* DoD Components shall use the administrative requirements specified in paragraph (a) of this section, to the maximum extent practicable, for grants and cooperative agreements to foreign recipients.

[63 FR 12164, Mar. 12, 1998, as amended at 85 FR 51244, Aug. 19, 2020]

§ 22.810 Payments.

(a) *Purpose.* This section prescribes policies and grants officers' post-award responsibilities, with respect to payments to recipients of grants and cooperative agreements.

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

[9] See footnote 8 to this section.

(b) *Policy.* (1) It is Governmentwide policy to minimize the time elapsing between any payment of funds to a recipient and the recipient's disbursement of the funds for program purposes.

(2) It also is a Governmentwide requirement to use electronic funds transfer (EFT) in the payment of any grant unless the recipient has obtained a waiver in accordance with Department of the Treasury regulations at 31 CFR part 208. As a matter of DoD policy, this requirement applies to cooperative agreements, as well as grants. Within the Department of Defense, the Defense Finance and Accounting Service implements this EFT requirement, and grants officers have collateral responsibilities at the time of award, as described in §22.605(c), and in post-award administration, as described in paragraph (c)(3)(iv) of this section.

(3) Expanding on these Governmentwide policies, DoD policy is for DoD Components to use electronic commerce, to the maximum extent practicable, in the portions of the payment process for grants and cooperative agreements for which grants officers are responsible. In cases where recipients submit each payment request to the grants officer, this includes using electronic methods to receive recipients' requests for payment and to transmit authorizations for payment to the DoD payment office. Using electronic methods will improve timeliness and accuracy of payments and reduce administrative burdens associated with paper-based payments.

(c) *Post-award responsibilities.* In cases where the recipient submits each payment request to the grants officer, the administrative grants officer designated to handle payments for a grant or cooperative agreement is responsible for:

(1) [Reserved]

(2) Reviewing each payment request to ensure that:

(i) The request complies with the award terms.

(ii) Available funds are adequate to pay the request.

(iii) The recipient will not have excess cash on hand, based on expenditure patterns.

(3) Maintaining a close working relationship with the personnel in the finance and accounting office responsible for making the payments. A good working relationship is necessary, to ensure timely and accurate handling of financial transactions for grants and cooperative agreements. Administrative grants officers:

(i) Should be generally familiar with policies and procedures for disbursing offices that are contained in Chapter 19 of Volume 10 of the DoD Financial Management Regulation (the FMR, DoD 7000.14-R[10]).

(ii) Shall forward authorizations to the designated payment office expeditiously, so that payments may be made in accordance with the timely payment guidelines in Chapter 19 of Volume 10 of the FMR. Unless alternative arrangements are made with the payment office, authorizations should be forwarded to the payment office at least 3 working days before the end of the period specified in the FMR. The period specified in the FMR is:

(A) No more than seven calendar days after receipt of the recipient's request by the administrative grants officer, whenever electronic commerce is used (i.e., EDI to request and authorize payments and electronic funds transfer (EFT) to make payments).

(B) No more than thirty calendar days after receipt of the recipient's request by the administrative grants officer, when it is not possible to use electronic commerce and paper transactions are used.

(C) No more than seven calendar days after each date specified, when payments are authorized in advance based on a predetermined payment schedule, provided that the payment schedule was received in the disbursing office at least 30 calendar days in advance of the date of the scheduled payment.

(iii) Shall ensure that, for recipients not required to register in the System for Award Management, the recipients' Taxpayer Identification Number (TIN) is included with each payment authorization forwarded to the payment office. This is a statutory requirement of 31 U.S.C. 3325, as amended by the Debt

[10] See footnote 8 to §22.715(a)(4).

Collection Improvement Act of 1996 (section 31001(y), Pub. L. 104–134).

(iv) For each award that is required to be paid by EFT (see § 22.605(c) and (§ 22.810(b)(2)), shall prominently indicate that fact in the payment authorization.

[63 FR 12164, Mar. 12, 1998, as amended at 70 FR 49467, Aug. 23, 2005; 85 FR 51244, Aug. 19, 2020]

§ 22.815 Claims, disputes, and appeals.

(a) *Award terms.* Grants officers shall include in grants and cooperative agreements a term or condition that incorporates the procedures of this section for:

(1) Processing recipient claims and disputes.

(2) Deciding appeals of grants officers' decisions.

(b) *Submission of claims*—(1) *Recipient claims.* If a recipient wishes to submit a claim arising out of or relating to a grant or cooperative agreement, the grants officer shall inform the recipient that the claim must:

(i) Be submitted in writing to the grants officer for decision;

(ii) Specify the nature and basis for the relief requested; and

(iii) Include all data that supports the claim.

(2) *DoD Component claims.* Claims by a DoD Component shall be the subject of a written decision by a grants officer.

(c) *Alternative Dispute Resolution (ADR)*—(1) *Policy.* DoD policy is to try to resolve all issues concerning grants and cooperative agreements by mutual agreement at the grants officer's level. DoD Components therefore are encouraged to use ADR procedures to the maximum extent practicable. ADR procedures are any voluntary means (e.g., mini-trials or mediation) used to resolve issues in controversy without resorting to formal administrative appeals (see paragraph (e) of this section) or to litigation.

(2) *Procedures.* (i) The ADR procedures or techniques to be used may either be agreed upon by the Government and the recipient in advance (e.g., when agreeing on the terms and conditions of the grant or cooperative agreement), or may be agreed upon at the time the parties determine to use ADR procedures.

(ii) If a grants officer and a recipient are not able to resolve an issue through unassisted negotiations, the grants officer shall encourage the recipient to enter into ADR procedures. ADR procedures may be used prior to submission of a recipient's claim or at any time prior to the Grant Appeal Authority's decision on a recipient's appeal (see paragraph (e)(3)(iii) of this section).

(d) *Grants officer decisions.* (1) Within 60 calendar days of receipt of a written claim, the grants officer shall either:

(i) Prepare a written decision, which shall include the reasons for the decision; shall identify all relevant data on which the decision is based; shall identify the cognizant Grant Appeal Authority and give his or her mailing address; and shall be included in the award file; or

(ii) Notify the recipient of a specific date when he or she will render a written decision, if more time is required to do so. The notice shall inform the recipient of the reason for delaying the decision (e.g., the complexity of the claim, a need for more time to complete ADR procedures, or a need for the recipient to provide additional information to support the claim).

(2) The decision of the grants officer shall be final, unless the recipient decides to appeal. If a recipient decides to appeal a grants officer's decision, the grants officer shall encourage the recipient to enter into ADR procedures, as described in paragraph (c) of this section.

(e) *Formal administrative appeals*—(1) *Grant appeal authorities.* Each DoD Component that awards grants or cooperative agreements shall establish one or more Grant Appeal Authorities to decide formal, administrative appeals in accordance with paragraph (e)(3) of this section. Each Grant Appeal Authority shall be either:

(i) An individual at a grade level in the Senior Executive Service, if civilian, or at the rank of Flag or General Officer, if military; or

(ii) A board chaired by such an individual.

(2) *Right of appeal.* A recipient has the right to appeal a grants officer's decision to the Grant Appeal Authority (but note that ADR procedures, as described in paragraph (c) of this section,

are the preferred means for resolving any appeal).

(3) *Appeal procedures*—(i) *Notice of appeal*. A recipient may appeal a decision of the grants officer within 90 calendar days of receiving that decision, by filing a written notice of appeal to the Grant Appeal Authority and to the grants officer. If a recipient elects to use an ADR procedure, the recipient is permitted an additional 60 calendar days to file the written notice of appeal to the Grant Appeal Authority and grants officer.

(ii) *Appeal file*. Within 30 calendar days of receiving the notice of appeal, the grants officer shall forward to the Grant Appeal Authority and the recipient the appeal file, which shall include copies of all documents relevant to the appeal. The recipient may supplement the file with additional documents it deems relevant. Either the grants officer or the recipient may supplement the file with a memorandum in support of its position. The Grant Appeal Authority may request additional information from either the grants officer or the recipient.

(iii) *Decision*. The appeal shall be decided solely on the basis of the written record, unless the Grant Appeal Authority decides to conduct fact-finding procedures or an oral hearing on the appeal. Any fact-finding or hearing shall be conducted using procedures that the Grant Appeal Authority deems appropriate.

(f) *Representation*. A recipient may be represented by counsel or any other designated representative in any claim, appeal, or ADR proceeding brought pursuant to this section, as long as the representative is not otherwise prohibited by law or regulation from appearing before the DoD Component concerned.

(g) *Non-exclusivity of remedies*. Nothing in this section is intended to limit a recipient's right to any remedy under the law.

§ 22.820 Debt collection.

(a) *Purpose*. This section prescribes procedures for establishing debts owed by recipients of grants and cooperative agreements, and transferring them to payment offices for collection.

(b) *Resolution of indebtedness*. The grants officer shall attempt to resolve by mutual agreement any claim of a recipient's indebtedness to the United States arising out of a grant or cooperative agreement (e.g., by a finding that a recipient was paid funds in excess of the amount to which the recipient was entitled under the terms and conditions of the award).

(c) *Grants officer's decision*. In the absence of such mutual agreement, any claim of a recipient's indebtedness shall be the subject of a grants officer decision, in accordance with § 22.815(b)(2). The grants officer shall prepare and transmit to the recipient a written notice that:

(1) Describes the debt, including the amount, the name and address of the official who determined the debt (e.g., the grants officer under § 22.815(d)), and a copy of that determination.

(2) Informs the recipient that:

(i) Within 30 calendar days of the grants officer's decision, the recipient shall either pay the amount owed to the grants officer (at the address that was provided pursuant to paragraph (c)(1) of this section) or inform the grants officer of the recipient's intention to appeal the decision.

(ii) If the recipient elects not to appeal, any amounts not paid within 30 calendar days of the grants officer's decision will be a delinquent debt.

(iii) If the recipient elects to appeal the grants officer's decision the recipient has 90 calendar days, or 150 calendar days if ADR procedures are used, after receipt of the grants officer's decision to file the appeal, in accordance with § 22.815(e)(3)(i).

(iv) The debt will bear interest, and may include penalties and other administrative costs, in accordance with the debt collection provisions in Chapters 29, 31, and 32 of Volume 5 and Chapters 18 and 19 of Volume 10 of the DoD Financial Management Regulation (DoD 7000.14–R). No interest will be charged if the recipient pays the amount owed within 30 calendar days of the grants officer's decision. Interest will be charged for the entire period from the date the decision was mailed, if the recipient pays the amount owed after 30 calendar days.

(d) *Follow-up.* Depending upon the response from the recipient, the grants officer shall proceed as follows:

(1) If the recipient pays the amount owed within 30 calendar days to the grants officer, the grants officer shall forward the payment to the responsible payment office.

(2) If within 30 calendar days the recipient elects to appeal the grants officer's decision, further action to collect the debt is deferred, pending the outcome of the appeal. If the final result of the appeal is a determination that the recipient owes a debt to the Federal Government, the grants officer shall send a demand letter to the recipient and transfer responsibility for further debt collection to a payment office, as described in paragraph (d)(3) of this section.

(3) If within 30 calendar days the recipient has neither paid the amount due nor provided notice of intent to file an appeal of the grants officer's decision, the grants officer shall send a demand letter to the recipient, with a copy to the payment office that will be responsible for collecting the delinquent debt. The payment office will be responsible for any further debt collection activity, including issuance of additional demand letters (see Chapter 19 of volume 10 of the DoD Financial Management Regulation, DoD 7000.14–R). The grants officer's demand letter shall:

(i) Describe the debt, including the amount, the name and address of the official that determined the debt (e.g., the grants officer under § 22.815(d)), and a copy of that determination.

(ii) Notify the recipient that the debt is a delinquent debt that bears interest from the date of the grants officer's decision, and that penalties and other administrative costs may be assessed.

(iii) Identify the payment office that is responsible for the collection of the debt, and notify the recipient that it may submit a proposal to that payment office to defer collection, if immediate payment is not practicable.

(e) *Administrative offset.* In carrying out the responsibility for collecting delinquent debts, a disbursing officer may need to consult grants officers, to determine whether administrative offset against payments to a recipient owing a delinquent debt would interfere with execution of projects being carried out under grants or cooperative agreements. Disbursing officers may also ask grants officers whether it is feasible to convert payment methods under grants or cooperative agreements from advance payments to reimbursements, to facilitate use of administrative offset. Grants officers therefore should be familiar with guidelines for disbursing officers, in Chapter 19 of Volume 10 of the Financial Management Regulation (DoD 7000.14–R), concerning withholding and administrative offset to recover delinquent debts.

§ 22.825 Closeout audits.

(a) *Purpose.* This section establishes DoD policy for obtaining audits at closeout of individual grants and cooperative agreements.

(b) *Policy.* Grants officers shall use their judgment on a case-by-case basis, in deciding whether to obtain an audit prior to closing out a grant or cooperative agreement (i.e., there is no specific DoD requirement to obtain an audit prior to doing so). Factors to be considered include:

(1) The amount of the award.

(2) DoD's past experience with the recipient, including the presence or lack of findings of material deficiencies in recent:

(i) Audits of individual awards; or

(ii) Systems-wide financial audits and audits of the compliance of the recipient's systems with Federal requirements, under OMB guidance in subpart F of 2 CFR part 200, where that guidance is applicable. (See § 22.715(a)(1)).

[63 FR 12164, Mar. 12, 1998, as amended at 85 FR 51244, Aug. 19, 2020]

APPENDIX A TO PART 22—PROPOSAL PROVISION FOR REQUIRED CERTIFICATION

PROVISION IN PROPOSAL (or, suitably modified, in award)	USED FOR			SOURCE OF REQUIREMENT
	Type of Award	Type of Recipient	Specific Situation	
By signing and submitting this proposal, the recipient is providing the certification at Appendix A to 32 CFR Part 28 regarding lobbying.	Any financial assistance [see 32 CFR 28.105(b) and definitions of "Federal grant," "Federal cooperative agreement," and "Federal loan" in 32 CFR 28.105(c), (d), and (e)]	All but Indian tribe or tribal organization with respect to expenditures specifically permitted by other Federal law [see 32 CFR 28.105(l)]	Any	32 CFR 28, which implements 31 U.S.C. 1352

[70 FR 49468, Aug. 23, 2005]

PART 26—GOVERNMENTWIDE REQUIREMENTS FOR DRUG-FREE WORKPLACE (FINANCIAL ASSISTANCE)

Subpart A—Purpose and Coverage

Sec.
26.100 What does this part do?
26.105 Does this part apply to me?
26.110 Are any of my Federal assistance awards exempt from this part?
26.115 Does this part affect the Federal contracts that I receive?

Subpart B—Requirements for Recipients Other Than Individuals

26.200 What must I do to comply with this part?
26.205 What must I include in my drug-free workplace statement?
26.210 To whom must I distribute my drug-free workplace statement?
26.215 What must I include in my drug-free awareness program?
26.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?
26.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?
26.230 How and when must I identify workplaces?

Subpart C—Requirements for Recipients Who Are Individuals

26.300 What must I do to comply with this part if I am an individual recipient?
26.301 [Reserved]

Subpart D—Responsibilities of DOD Component Awarding Officials

26.400 What are my responsibilities as a DOD Component awarding official?

Subpart E—Violations of This Part and Consequences

26.500 How are violations of this part determined for recipients other than individuals?
26.505 How are violations of this part determined for recipients who are individuals?
26.510 What actions will the Federal Government take against a recipient determined to have violated this part?
26.515 Are there any exceptions to those actions?

Subpart F—Definitions

26.605 Award
26.610 Controlled substance.
26.615 Conviction.
26.620 Cooperative agreement.
26.625 Criminal drug statute.
26.630 Debarment.
26.632 DOD Component.
26.635 Drug-free workplace.
26.640 Employee.
26.645 Federal agency or agency.
26.650 Grant.
26.655 Individual.
26.660 Recipient.
26.665 State.
26.670 Suspension.

AUTHORITY: 41U.S.C.701, *et seq.*

SOURCE: 68 FR 66557, 66609, Nov. 26, 2003, unless otherwise noted.

Subpart A—Purpose and Coverage

§ 26.100 What does this part do?

This part carries out the portion of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 *et seq.*, as amended) that applies to grants. It also applies the provisions of the Act to cooperative agreements and other financial assistance awards, as a matter of Federal Government policy.

§ 26.105 Does this part apply to me?

(a) Portions of this part apply to you if you are either—

(1) A recipient of an assistance award from the DOD Component; or

(2) A(n) DOD Component awarding official. (See definitions of award and recipient in §§ 26.605 and 26.660, respectively.)

(b) The following table shows the subparts that apply to you:

If you are . . .	see subparts . . .
(1) A recipient who is not an individual	A, B and E.
(2) A recipient who is an individual	A, C and E.
(3) A(n) DOD Component awarding official.	A, D and E.

§ 26.110 Are any of my Federal assistance awards exempt from this part?

This part does not apply to any award that the Head of the DOD Component or his or her designee determines that the application of this part would be inconsistent with the international obligations of the United States or the laws or regulations of a foreign government.

§ 26.115 Does this part affect the Federal contracts that I receive?

It will affect future contract awards indirectly if you are debarred or suspended for a violation of the requirements of this part, as described in § 26.510(c). However, this part does not apply directly to procurement contracts. The portion of the Drug-Free Workplace Act of 1988 that applies to Federal procurement contracts is carried out through the Federal Acquisition Regulation in chapter 1 of Title 48 of the Code of Federal Regulations (the drug-free workplace coverage currently is in 48 CFR part 23, subpart 23.5).

Subpart B—Requirements for Recipients Other Than Individuals

§ 26.200 What must I do to comply with this part?

There are two general requirements if you are a recipient other than an individual.

(a) First, you must make a good faith effort, on a continuing basis, to maintain a drug-free workplace. You must agree to do so as a condition for receiving any award covered by this part. The specific measures that you must take in this regard are described in more detail in subsequent sections of this subpart. Briefly, those measures are to—

(1) Publish a drug-free workplace statement and establish a drug-free awareness program for your employees (see §§ 26.205 through 26.220); and

(2) Take actions concerning employees who are convicted of violating drug statutes in the workplace (see § 26.225).

(b) Second, you must identify all known workplaces under your Federal awards (see § 26.230).

§ 26.205 What must I include in my drug-free workplace statement?

You must publish a statement that—

(a) Tells your employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in your workplace;

(b) Specifies the actions that you will take against employees for violating that prohibition; and

(c) Lets each employee know that, as a condition of employment under any award, he or she:

(1) Will abide by the terms of the statement; and

(2) Must notify you in writing if he or she is convicted for a violation of a criminal drug statute occurring in the workplace and must do so no more than five calendar days after the conviction.

§ 26.210 To whom must I distribute my drug-free workplace statement?

You must require that a copy of the statement described in § 26.205 be given to each employee who will be engaged in the performance of any Federal award.

§ 26.215 What must I include in my drug-free awareness program?

You must establish an ongoing drug-free awareness program to inform employees about—

(a) The dangers of drug abuse in the workplace;

(b) Your policy of maintaining a drug-free workplace;

(c) Any available drug counseling, rehabilitation, and employee assistance programs; and

(d) The penalties that you may impose upon them for drug abuse violations occurring in the workplace.

§ 26.220 By when must I publish my drug-free workplace statement and establish my drug-free awareness program?

If you are a new recipient that does not already have a policy statement as described in § 26.205 and an ongoing awareness program as described in § 26.215, you must publish the statement and establish the program by the time given in the following table:

If . . .	then you . . .
(a) The performance period of the award is less than 30 days.	must have the policy statement and program in place as soon as possible, but before the date on which performance is expected to be completed.
(b) The performance period of the award is 30 days or more.	must have the policy statement and program in place within 30 days after award.

If . . .	then you . . .
(c) You believe there are extraordinary circumstances that will require more than 30 days for you to publish the policy statement and establish the awareness program.	may ask the DOD Component awarding official to give you more time to do so. The amount of additional time, if any, to be given is at the discretion of the awarding official.

§ 26.225 What actions must I take concerning employees who are convicted of drug violations in the workplace?

There are two actions you must take if an employee is convicted of a drug violation in the workplace:

(a) First, you must notify Federal agencies if an employee who is engaged in the performance of an award informs you about a conviction, as required by § 26.205(c)(2), or you otherwise learn of the conviction. Your notification to the Federal agencies must—

(1) Be in writing;

(2) Include the employee's position title;

(3) Include the identification number(s) of each affected award;

(4) Be sent within ten calendar days after you learn of the conviction; and

(5) Be sent to every Federal agency on whose award the convicted employee was working. It must be sent to every awarding official or his or her official designee, unless the Federal agency has specified a central point for the receipt of the notices.

(b) Second, within 30 calendar days of learning about an employee's conviction, you must either—

(1) Take appropriate personnel action against the employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973 (29 U.S.C. 794), as amended; or

(2) Require the employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for these purposes by a Federal, State or local health, law enforcement, or other appropriate agency.

§ 26.230 How and when must I identify workplaces?

(a) You must identify all known workplaces under each DOD Component award. A failure to do so is a violation of your drug-free workplace requirements. You may identify the workplaces—

(1) To the DOD Component official that is making the award, either at the time of application or upon award; or

(2) In documents that you keep on file in your offices during the performance of the award, in which case you must make the information available for inspection upon request by DOD Component officials or their designated representatives.

(b) Your workplace identification for an award must include the actual address of buildings (or parts of buildings) or other sites where work under the award takes place. Categorical descriptions may be used (*e.g.*, all vehicles of a mass transit authority or State highway department while in operation, State employees in each local unemployment office, performers in concert halls or radio studios).

(c) If you identified workplaces to the DOD Component awarding official at the time of application or award, as described in paragraph (a)(1) of this section, and any workplace that you identified changes during the performance of the award, you must inform the DOD Component awarding official.

Subpart C—Requirements for Recipients Who Are Individuals

§ 26.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a(n) DOD Component award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

(1) In writing.

(2) Within 10 calendar days of the conviction.

(3) To the DOD Component awarding official or other designee for each award that you currently have, unless § 26.301 or the award document designates a central point for the receipt of the notices. When notice is made to a central point, it must include the

identification number(s) of each affected award.

§ 26.301 [Reserved]

Subpart D—Responsibilities of DOD Component Awarding Officials

§ 26.400 What are my responsibilities as a(n) DOD Component awarding official?

As a(n) DOD Component awarding official, you must obtain each recipient's agreement, as a condition of the award, to comply with the requirements in—

(a) Subpart B of this part, if the recipient is not an individual; or

(b) Subpart C of this part, if the recipient is an individual.

Subpart E—Violations of this Part and Consequences

§ 26.500 How are violations of this part determined for recipients other than individuals?

A recipient other than an individual is in violation of the requirements of this part if the Head of the DOD Component or his or her designee determines, in writing, that—

(a) The recipient has violated the requirements of subpart B of this part; or

(b) The number of convictions of the recipient's employees for violating criminal drug statutes in the workplace is large enough to indicate that the recipient has failed to make a good faith effort to provide a drug-free workplace.

§ 26.505 How are violations of this part determined for recipients who are individuals?

An individual recipient is in violation of the requirements of this part if the Head of the DOD Component or his or her designee determines, in writing, that—

(a) The recipient has violated the requirements of subpart C of this part; or

(b) The recipient is convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity.

§ 26.510 What actions will the Federal Government take against a recipient determined to have violated this part?

If a recipient is determined to have violated this part, as described in § 26.500 or § 26.505, the DOD Component may take one or more of the following actions—

(a) Suspension of payments under the award;

(b) Suspension or termination of the award; and

(c) Suspension or debarment of the recipient under 32 CFR Part 25, for a period not to exceed five years.

§ 26.515 Are there any exceptions to those actions?

The Secretary of Defense or Secretary of a Military Department may waive with respect to a particular award, in writing, a suspension of payments under an award, suspension or termination of an award, or suspension or debarment of a recipient if the Secretary of Defense or Secretary of a Military Department determines that such a waiver would be in the public interest. This exception authority cannot be delegated to any other official.

Subpart F—Definitions

§ 26.605 Award.

Award means an award of financial assistance by the DOD Component or other Federal agency directly to a recipient.

(a) The term award includes:

(1) A Federal grant or cooperative agreement, in the form of money or property in lieu of money.

(2) A block grant or a grant in an entitlement program, whether or not the grant is exempted from coverage under the Governmentwide rule 32 CFR Part 33 that implements OMB Circular A–102 (for availability, see 5 CFR 1310.3) and specifies uniform administrative requirements.

(b) The term award does not include:

(1) Technical assistance that provides services instead of money.

(2) Loans.

(3) Loan guarantees.

(4) Interest subsidies.

(5) Insurance.

(6) Direct appropriations.

(7) Veterans' benefits to individuals (*i.e.*, any benefit to veterans, their families, or survivors by virtue of the service of a veteran in the Armed Forces of the United States).

§ 26.610 Controlled substance.

Controlled substance means a controlled substance in schedules I through V of the Controlled Substances Act (21 U.S.C. 812), and as further defined by regulation at 21 CFR 1308.11 through 1308.15.

§ 26.615 Conviction.

Conviction means a finding of guilt (including a plea of nolo contendere) or imposition of sentence, or both, by any judicial body charged with the responsibility to determine violations of the Federal or State criminal drug statutes.

§ 26.620 Cooperative agreement.

Cooperative agreement means an award of financial assistance that, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of grant in §26.650), except that substantial involvement is expected between the Federal agency and the recipient when carrying out the activity contemplated by the award. The term does not include cooperative research and development agreements as defined in 15 U.S.C. 3710a.

§ 26.625 Criminal drug statute.

Criminal drug statute means a Federal or non-Federal criminal statute involving the manufacture, distribution, dispensing, use, or possession of any controlled substance.

§ 26.630 Debarment.

Debarment means an action taken by a Federal agency to prohibit a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions. A recipient so prohibited is debarred, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689.

§ 26.632 DOD Component.

DOD Component means the Office of the Secretary of Defense, a Military Department, a Defense Agency, or the Office of Economic Adjustment.

[68 FR 66609, Nov. 26, 2003]

§ 26.635 Drug-free workplace.

Drug-free workplace means a site for the performance of work done in connection with a specific award at which employees of the recipient are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance.

§ 26.640 Employee.

(a) *Employee* means the employee of a recipient directly engaged in the performance of work under the award, including—

(1) All direct charge employees;

(2) All indirect charge employees, unless their impact or involvement in the performance of work under the award is insignificant to the performance of the award; and

(3) Temporary personnel and consultants who are directly engaged in the performance of work under the award and who are on the recipient's payroll.

(b) This definition does not include workers not on the payroll of the recipient (*e.g.*, volunteers, even if used to meet a matching requirement; consultants or independent contractors not on the payroll; or employees of subrecipients or subcontractors in covered workplaces).

§ 26.645 Federal agency or agency.

Federal agency or agency means any United States executive department, military department, government corporation, government controlled corporation, any other establishment in the executive branch (including the Executive Office of the President), or any independent regulatory agency.

§ 26.650 Grant.

Grant means an award of financial assistance that, consistent with 31 U.S.C.

6304, is used to enter into a relationship—

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Federal Government's direct benefit or use; and

(b) In which substantial involvement is not expected between the Federal agency and the recipient when carrying out the activity contemplated by the award.

§ 26.655 Individual.

Individual means a natural person.

§ 26.660 Recipient.

Recipient means any individual, corporation, partnership, association, unit of government (except a Federal agency) or legal entity, however organized, that receives an award directly from a Federal agency.

§ 26.665 State.

State means any of the States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

§ 26.670 Suspension.

Suspension means an action taken by a Federal agency that immediately prohibits a recipient from participating in Federal Government procurement contracts and covered nonprocurement transactions for a temporary period, pending completion of an investigation and any judicial or administrative proceedings that may ensue. A recipient so prohibited is suspended, in accordance with the Federal Acquisition Regulation for procurement contracts (48 CFR part 9, subpart 9.4) and the common rule, Government-wide Debarment and Suspension (Nonprocurement), that implements Executive Order 12549 and Executive Order 12689. Suspension of a recipient is a distinct and separate action from suspension of an award or suspension of payments under an award.

PART 28—NEW RESTRICTIONS ON LOBBYING

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APPENDIX A TO PART 28—CERTIFICATION REGARDING LOBBYING
APPENDIX B TO PART 28—DISCLOSURE FORM TO REPORT LOBBYING

AUTHORITY: Section 319, Public Law 102–121 (31 U.S.C. 1352); 5 U.S.C. section 301; 10 U.S.C. 113.

SOURCE: 55 FR 6737, 6752, Feb. 26, 1990, unless otherwise noted. Redesignated at 57 FR 6199, Feb. 21, 1992.

CROSS REFERENCE: See also Office of Management and Budget notice published at 54 FR 52306, December 20, 1989.

Subpart A—General

§ 28.100 Conditions on use of funds.

(a) No appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of any Federal

contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) Each person who requests or receives from an agency a Federal contract, grant, loan, or cooperative agreement shall file with that agency a certification, set forth in Appendix A, that the person has not made, and will not make, any payment prohibited by paragraph (a) of this section.

(c) Each person who requests or receives from an agency a Federal contract, grant, loan, or a cooperative agreement shall file with that agency a disclosure form, set forth in Appendix B, if such person has made or has agreed to make any payment using nonappropriated funds (to include profits from any covered Federal action), which would be prohibited under paragraph (a) of this section if paid for with appropriated funds.

(d) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a statement, set forth in appendix A, whether that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

(e) Each person who requests or receives from an agency a commitment providing for the United States to insure or guarantee a loan shall file with that agency a disclosure form, set forth in Appendix B, if that person has made or has agreed to make any payment to influence or attempt to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with that loan insurance or guarantee.

§ 28.105 Definitions.

For purposes of this part:

(a) *Agency*, as defined in 5 U.S.C. 552(f), includes Federal executive departments and agencies as well as independent regulatory commissions and Government corporations, as defined in 31 U.S.C. 9101(1).

(b) *Covered Federal action* means any of the following Federal actions:

(1) The awarding of any Federal contract;

(2) The making of any Federal grant;

(3) The making of any Federal loan;

(4) The entering into of any cooperative agreement; and,

(5) The extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

Covered Federal action does not include receiving from an agency a commitment providing for the United States to insure or guarantee a loan. Loan guarantees and loan insurance are addressed independently within this part.

(c) *Federal contract* means an acquisition contract awarded by an agency, including those subject to the Federal Acquisition Regulation (FAR), and any other acquisition contract for real or personal property or services not subject to the FAR.

(d) *Federal cooperative agreement* means a cooperative agreement entered into by an agency.

(e) *Federal grant* means an award of financial assistance in the form of money, or property in lieu of money, by the Federal Government or a direct appropriation made by law to any person. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, loan insurance, interest subsidies, insurance, or direct United States cash assistance to an individual.

(f) *Federal loan* means a loan made by an agency. The term does not include loan guarantee or loan insurance.

(g) *Indian tribe* and *tribal organization* have the meaning provided in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450B). Alaskan Natives are included under the definitions of Indian tribes in that Act.

(h) *Influencing or attempting to influence* means making, with the intent to

influence, any communication to or appearance before an officer or employee or any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any covered Federal action.

(i) *Loan guarantee* and *loan insurance* means an agency's guarantee or insurance of a loan made by a person.

(j) *Local government* means a unit of government in a State and, if chartered, established, or otherwise recognized by a State for the performance of a governmental duty, including a local public authority, a special district, an intrastate district, a council of governments, a sponsor group representative organization, and any other instrumentality of a local government.

(k) *Officer or employee of an agency* includes the following individuals who are employed by an agency:

(1) An individual who is appointed to a position in the Government under title 5, U.S. Code, including a position under a temporary appointment;

(2) A member of the uniformed services as defined in section 101(3), title 37, U.S. Code;

(3) A special Government employee as defined in section 202, title 18, U.S. Code; and,

(4) An individual who is a member of a Federal advisory committee, as defined by the Federal Advisory Committee Act, title 5, U.S. Code appendix 2.

(l) *Person* means an individual, corporation, company, association, authority, firm, partnership, society, State, and local government, regardless of whether such entity is operated for profit or not for profit. This term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(m) *Reasonable compensation* means, with respect to a regularly employed officer or employee of any person, compensation that is consistent with the normal compensation for such officer or employee for work that is not furnished to, not funded by, or not furnished in cooperation with the Federal Government.

(n) *Reasonable payment* means, with respect to perfessional and other technical services, a payment in an amount that is consistent with the amount normally paid for such services in the private sector.

(o) *Recipient* includes all contractors, subcontractors at any tier, and subgrantees at any tier of the recipient of funds received in connection with a Federal contract, grant, loan, or cooperative agreement. The term excludes an Indian tribe, tribal organization, or any other Indian organization with respect to expenditures specifically permitted by other Federal law.

(p) *Regularly employed* means, with respect to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or a commitment providing for the United States to insure or guarantee a loan, an officer or employee who is employed by such person for at least 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person for receipt of such contract, grant, loan, cooperative agreement, loan insurance commitment, or loan guarantee commitment. An officer or employee who is employed by such person for less than 130 working days within one year immediately preceding the date of the submission that initiates agency consideration of such person shall be considered to be regularly employed as soon as he or she is employed by such person for 130 working days.

(q) *State* means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, an agency or instrumentality of a State, and a multi-State, regional, or interstate entity having governmental duties and powers.

§ 28.110 Certification and disclosure.

(a) Each person shall file a certification, and a disclosure form, if required, with each submission that initiates agency consideration of such person for:

(1) Award of a Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) An award of a Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000.

(b) Each person shall file a certification, and a disclosure form, if required, upon receipt by such person of:

(1) A Federal contract, grant, or cooperative agreement exceeding $100,000; or

(2) A Federal loan or a commitment providing for the United States to insure or guarantee a loan exceeding $150,000,

Unless such person previously filed a certification, and a disclosure form, if required, under paragraph (a) of this section.

(c) Each person shall file a disclosure form at the end of each calendar quarter in which there occurs any event that requires disclosure or that materially affects the accuracy of the information contained in any disclosure form previously filed by such person under paragraphs (a) or (b) of this section. An event that materially affects the accuracy of the information reported includes:

(1) A cumulative increase of $25,000 or more in the amount paid or expected to be paid for influencing or attempting to influence a covered Federal action; or

(2) A change in the person(s) or individual(s) influencing or attempting to influence a covered Federal action; or,

(3) A change in the officer(s), employee(s), or Member(s) contacted to influence or attempt to influence a covered Federal action.

(d) Any person who requests or receives from a person referred to in paragraphs (a) or (b) of this section:

(1) A subcontract exceeding $100,000 at any tier under a Federal contract;

(2) A subgrant, contract, or subcontract exceeding $100,000 at any tier under a Federal grant;

(3) A contract or subcontract exceeding $100,000 at any tier under a Federal loan exceeding $150,000; or,

(4) A contract or subcontract exceeding $100,000 at any tier under a Federal cooperative agreement,

Shall file a certification, and a disclosure form, if required, to the next tier above.

(e) All disclosure forms, but not certifications, shall be forwarded from tier to tier until received by the person referred to in paragraphs (a) or (b) of this section. That person shall forward all disclosure forms to the agency.

(f) Any certification or disclosure form filed under paragraph (e) of this section shall be treated as a material representation of fact upon which all receiving tiers shall rely. All liability arising from an erroneous representation shall be borne solely by the tier filing that representation and shall not be shared by any tier to which the erroneous representation is forwarded. Submitting an erroneous certification or disclosure constitutes a failure to file the required certification or disclosure, respectively. If a person fails to file a required certification or disclosure, the United States may pursue all available remedies, including those authorized by section 1352, title 31, U.S. Code.

(g) For awards and commitments in process prior to December 23, 1989, but not made before that date, certifications shall be required at award or commitment, covering activities occurring between December 23, 1989, and the date of award or commitment. However, for awards and commitments in process prior to the December 23, 1989 effective date of these provisions, but not made before December 23, 1989, disclosure forms shall not be required at time of award or commitment but shall be filed within 30 days.

(h) No reporting is required for an activity paid for with appropriated funds if that activity is allowable under either subpart B or C.

Subpart B—Activities by Own Employees

§ 28.200 Agency and legislative liaison.

(a) The prohibition on the use of appropriated funds, in § 28.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement if the payment is for agency and legislative liaison activities not directly related to a covered Federal action.

(b) For purposes of paragraph (a) of this section, providing any information specifically requested by an agency or Congress is allowable at any time.

(c) For purposes of paragraph (a) of this section, the following agency and legislative liaison activities are allowable at any time only where they are not related to a specific solicitation for any covered Federal action:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

(d) For purposes of paragraph (a) of this section, the following agencies and legislative liaison activities are allowable only where they are prior to formal solicitation of any covered Federal action:

(1) Providing any information not specifically requested but necessary for an agency to make an informed decision about initiation of a covered Federal action;

(2) Technical discussions regarding the preparation of an unsolicited proposal prior to its official submission; and,

(3) Capability presentations by persons seeking awards from an agency pursuant to the provisions of the Small Business Act, as amended by Public Law 95–507 and other subsequent amendments.

(e) Only those activities expressly authorized by this section are allowable under this section.

[55 FR 6737, 6752, Feb. 26, 1990. Redesignated and amended at 57 FR 6199, 6200, Feb. 21, 1992]

§ 28.205 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 28.100 (a), does not apply in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of a Federal contract, grant, loan, or cooperative agreement if payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(c) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or

reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(d) Only those services expressly authorized by this section are allowable under this section.

[55 FR 6737, 6752, Feb. 26, 1990. Redesignated and amended at 57 FR 6199, 6200, Feb. 21, 1992]

§ 28.210 Reporting.

No reporting is required with respect to payments of reasonable compensation made to regularly employed officers or employees of a person.

Subpart C—Activities by Other Than Own Employees

§ 28.300 Professional and technical services.

(a) The prohibition on the use of appropriated funds, in § 28.100 (a), does not apply in the case of any reasonable payment to a person, other than an officer or employee of a person requesting or receiving a covered Federal action, if the payment is for professional or technical services rendered directly in the preparation, submission, or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving that Federal contract, grant, loan, or cooperative agreement.

(b) The reporting requirments in § 28.110 (a) and (b) regarding filing a disclosure form by each person, if required, shall not apply with respect to professional or technical services rendered directly in the preparation, submission, or negotiation of any commitment providing for the United States to insure or guarantee a loan.

(c) For purposes of paragraph (a) of this section, ''professional and technical services'' shall be limited to advice and analysis directly applying any professional or technical discipline. For example, drafting of a legal document accompanying a bid or proposal by a lawyer is allowable. Similarly, technical advice provided by an engineer on the performance or operational capability of a piece of equipment rendered directly in the negotiation of a contract is allowable. However, communications with the intent to influence made by a professional (such as a licensed lawyer) or a technical person (such as a licensed accountant) are not allowable under this section unless they provide advice and analysis directly applying their professional or technical expertise and unless the advice or analysis is rendered directly and solely in the preparation, submission or negotiation of a covered Federal action. Thus, for example, communications with the intent to influence made by a lawyer that do not provide legal advice or analysis directly and solely related to the legal aspects of his or her client's proposal, but generally advocate one proposal over another are not allowable under this section because the lawyer is not providing professional legal services. Similarly, communications with the intent to influence made by an engineer providing an engineering analysis prior to the preparation or submission of a bid or proposal are not allowable under this section since the engineer is providing technical services but not directly in the preparation, submission or negotiation of a covered Federal action.

(d) Requirements imposed by or pursuant to law as a condition for receiving a covered Federal award include those required by law or regulation, or reasonably expected to be required by law or regulation, and any other requirements in the actual award documents.

(e) Persons other than officers or employees of a person requesting or receiving a covered Federal action include consultants and trade associations.

(f) Only those services expressly authorized by this section are allowable under this section.

[55 FR 6737, 6752, Feb. 26, 1990. Redesignated and amended at 57 FR 6199, 6200, Feb. 21, 1992]

Subpart D—Penalties and Enforcement

§ 28.400 Penalties.

(a) Any person who makes an expenditure prohibited herein shall be subject to a civil penalty of not less than

$10,000 and not more than $100,000 for each such expenditure.

(b) Any person who fails to file or amend the disclosure form (see Appendix B) to be filed or amended if required herein, shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

(c) A filing or amended filing on or after the date on which an administrative action for the imposition of a civil penalty is commenced does not prevent the imposition of such civil penalty for a failure occurring before that date. An administrative action is commenced with respect to a failure when an investigating official determines in writing to commence an investigation of an allegation of such failure.

(d) In determining whether to impose a civil penalty, and the amount of any such penalty, by reason of a violation by any person, the agency shall consider the nature, circumstances, extent, and gravity of the violation, the effect on the ability of such person to continue in business, any prior violations by such person, the degree of culpability of such person, the ability of the person to pay the penalty, and such other matters as may be appropriate.

(e) First offenders under paragraphs (a) or (b) of this section shall be subject to a civil penalty of $10,000, absent aggravating circumstances. Second and subsequent offenses by persons shall be subject to an appropriate civil penalty between $10,000 and $100,000, as determined by the agency head or his or her designee.

(f) An imposition of a civil penalty under this section does not prevent the United States from seeking any other remedy that may apply to the same conduct that is the basis for the imposition of such civil penalty.

§ 28.405 Penalty procedures.

Agencies shall impose and collect civil penalties pursuant to the provisions of the Program Fraud and Civil Remedies Act, 31 U.S.C. sections 3803 (except subsection (c)), 3804, 3805, 3806, 3807, 3808, and 3812, insofar as these provisions are not inconsistent with the requirements herein.

§ 28.410 Enforcement.

The head of each agency shall take such actions as are necessary to ensure that the provisions herein are vigorously implemented and enforced in that agency.

Subpart E—Exemptions

§ 28.500 Secretary of Defense.

(a) *Exemption authority.* The Secretary of Defense may exempt, on a case-by-case basis, a covered Federal action from the prohibition whenever the Secretary determines, in writing, that such an exemption is in the national interest. The Secretary shall transmit a copy of each such written exemption to Congress immediately after making such a determination.

(b) *Policy.* It is the policy of the Department of Defense that exemptions under paragraph (a) of this section shall be requested only rarely and in exceptional circumstances.

(c) *Procedures.* Each DoD Component that awards or administers Federal grants, Federal cooperative agreements, or Federal loans subject to this part shall establish procedures whereby:

(1) A grants officer wishing to request an exemption for a grant, cooperative agreement, or loan shall transmit such request through appropriate channels to: Director for Research, ODDR&E(R), 3080 Defense Pentagon, Washington, DC. 20301–3080.

(2) Each such request shall explain why an exemption is in the national interest, a justification that must be transmitted to Congress for each exemption that is approved.

[63 FR 12188, Mar. 12, 1998]

Subpart F—Agency Reports

§ 28.600 Semi-annual compilation.

(a) The head of each agency shall collect and compile the disclosure reports (see appendix B) and, on May 31 and November 30 of each year, submit to the Secretary of the Senate and the Clerk of the House of Representatives a report containing a compilation of the information contained in the disclosure reports received during the six-month period ending on March 31 or

September 30, respectively, of that year.

(b) The report, including the compilation, shall be available for public inspection 30 days after receipt of the report by the Secretary and the Clerk.

(c) Information that involves intelligence matters shall be reported only to the Select Committee on Intelligence of the Senate, the Permanent Select Committee on Intelligence of the House of Representatives, and the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(d) Information that is classified under Executive Order 12356 or any successor order shall be reported only to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives or the Committees on Armed Services of the Senate and the House of Representatives (whichever such committees have jurisdiction of matters involving such information) and to the Committees on Appropriations of the Senate and the House of Representatives in accordance with procedures agreed to by such committees. Such information shall not be available for public inspection.

(e) The first semi-annual compilation shall be submitted on May 31, 1990, and shall contain a compilation of the disclosure reports received from December 23, 1989 to March 31, 1990.

(f) Major agencies, designated by the Office of Management and Budget (OMB), are required to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives no later than with the compilations due on May 31, 1991. OMB shall provide detailed specifications in a memorandum to these agencies.

(g) Non-major agencies are requested to provide machine-readable compilations to the Secretary of the Senate and the Clerk of the House of Representatives.

(h) Agencies shall keep the originals of all disclosure reports in the official files of the agency.

§ 28.605 Inspector General report.

(a) The Inspector General, or other official as specified in paragraph (b) of this section, of each agency shall prepare and submit to Congress each year, commencing with submission of the President's Budget in 1991, an evaluation of the compliance of that agency with, and the effectiveness of, the requirements herein. The evaluation may include any recommended changes that may be necessary to strengthen or improve the requirements.

(b) In the case of an agency that does not have an Inspector General, the agency official comparable to an Inspector General shall prepare and submit the annual report, or, if there is no such comparable official, the head of the agency shall prepare and submit the annual report.

(c) The annual report shall be submitted at the same time the agency submits its annual budget justifications to Congress.

(d) The annual report shall include the following: All alleged violations relating to the agency's covered Federal actions during the year covered by the report, the actions taken by the head of the agency in the year covered by the report with respect to those alleged violations and alleged violations in previous years, and the amounts of civil penalties imposed by the agency in the year covered by the report.

APPENDIX A TO PART 28—CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

The undersigned certifies, to the best of his or her knowledge and belief, that:

(1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

(3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required certification shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

Statement for Loan Guarantees and Loan Insurance

The undersigned states, to the best of his or her knowledge and belief, that:

If any funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this commitment providing for the United States to insure or guarantee a loan, the undersigned shall complete and submit Standard Form-LLL, ''Disclosure Form to Report Lobbying,'' in accordance with its instructions.

Submission of this statement is a prerequisite for making or entering into this transaction imposed by section 1352, title 31, U.S. Code. Any person who fails to file the required statement shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.

APPENDIX B TO PART 28—DISCLOSURE FORM TO REPORT LOBBYING

DISCLOSURE OF LOBBYING ACTIVITIES

Approved by OMB
0348-0046

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure.)

1. **Type of Federal Action:** ☐ a. contract b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	2. **Status of Federal Action:** ☐ a. bid/offer/application b. initial award c. post-award	3. **Report Type:** ☐ a. initial filing b. material change **For Material Change Only:** year _____ quarter _____ date of last report _____

4. **Name and Address of Reporting Entity:** ☐ Prime ☐ Subawardee Tier _____, *if known*: **Congressional District,** *if known*:	5. **If Reporting Entity in No. 4 is Subawardee, Enter Name and Address of Prime:** **Congressional District,** *if known*:
6. **Federal Department/Agency:**	7. **Federal Program Name/Description:** CFDA Number, *if applicable*: _____
8. **Federal Action Number,** *if known*:	9. **Award Amount,** *if known*: $
10. **a. Name and Address of Lobbying Entity** *(if individual, last name, first name, MI)*:	**b. Individuals Performing Services** *(including address if different from No. 10a)* *(last name, first name, MI)*:

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

11. **Amount of Payment** *(check all that apply)*: $ _____ ☐ actual ☐ planned	13. **Type of Payment** *(check all that apply)*: ☐ a. retainer ☐ b. one-time fee ☐ c. commission ☐ d. contingent fee ☐ e. deferred ☐ f. other; specify: _____
12. **Form of Payment** *(check all that apply)*: ☐ a. cash ☐ b. in-kind; specify: nature _____ value _____	

14. **Brief Description of Services Performed or to be Performed and Date(s) of Service, including officer(s), employee(s), or Member(s) contacted, for Payment Indicated in Item 11:**

(attach Continuation Sheet(s) SF-LLL-A, if necessary)

15. **Continuation Sheet(s) SF-LLL-A attached:** ☐ Yes ☐ No

16. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.	**Signature:** _____ **Print Name:** _____ **Title:** _____ **Telephone No.:** _____ **Date:** _____

Federal Use Only: | **Authorized for Local Reproduction Standard Form - LLL**

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Use the SF-LLL-A Continuation Sheet for additional information if the space on the form is inadequate. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.
2. Identify the status of the covered Federal action.
3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.
4. Enter the full name, address, city, state and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.
5. If the organization filing the report in item 4 checks "Subawardee", then enter the full name, address, city, state and zip code of the prime Federal recipient. Include Congressional District, if known.
6. Enter the name of the Federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.
7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.
8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitation for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Include prefixes, e.g., "RFP-DE-90-001."
9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.
10. (a) Enter the full name, address, city, state and zip code of the lobbying entity engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10 (a). Enter Last Name, First Name, and Middle Initial (MI).
11. Enter the amount of compensation paid or reasonably expected to be paid by the reporting entity (item 4) to the lobbying entity (item 10). Indicate whether the payment has been made (actual) or will be made (planned). Check all boxes that apply. If this is a material change report, enter the cumulative amount of payment made or planned to be made.
12. Check the appropriate box(es). Check all boxes that apply. If payment is made through an in-kind contribution, specify the nature and value of the in-kind payment.
13. Check the appropriate box(es). Check all boxes that apply. If other, specify nature.
14. Provide a specific and detailed description of the services that the lobbyist has performed, or will be expected to perform, and the date(s) of any services rendered. Include all preparatory and related activity, not just time spent in actual contact with Federal officials. Identify the Federal official(s) or employee(s) contacted or the officer(s), employee(s), or Member(s) of Congress that were contacted.
15. Check whether or not a SF-LLL-A Continuation Sheet(s) is attached.
16. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

Public reporting burden for this collection of information is estimated to average 30 mintues per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, D.C. 20503.

DISCLOSURE OF LOBBYING ACTIVITIES
CONTINUATION SHEET

Approved by OMB
0348-0046

Reporting Entity: _____ **Page** _____ **of** _____

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Standard Form - LLL-A

PART 34—ADMINISTRATIVE REQUIREMENTS FOR GRANTS AND AGREEMENTS WITH FOR-PROFIT ORGANIZATIONS

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

SOURCE: 63 FR 12204, Mar. 12, 1998, unless otherwise noted.

Subpart A—General

§ 34.1 Purpose.

(a) This part prescribes administrative requirements for awards to for-profit organizations.

(b) Applicability to prime awards and subawards is as follows:

(1) *Prime awards.* DoD Components shall apply the provisions of this part to awards to for-profit organizations. DoD Components shall not impose requirements that are in addition to, or inconsistent with, the requirements provided in this part, except:

(i) In accordance with the deviation procedures or special award conditions in § 34.3 or § 34.4, respectively; or

(ii) As required by Federal statute, Executive order, or Federal regulation implementing a statute or Executive order.

(2) *Subawards.* (i) Any legal entity (including any State, local government, university or other nonprofit organization, as well as any for-profit entity) that receives an award from a DoD Component shall apply the provisions of this part to subawards with for-profit organizations. It should be noted that subawards (see definition in § 34.2) are financial assistance for substantive programmatic performance and do not include recipients' procurement of goods and services.

(ii) For-profit organizations that receive prime awards covered by this part shall apply to each subaward the administrative requirements that are applicable to the particular type of subrecipient.

[63 FR 12204, Mar. 12, 1998, as amended at 85 FR 51244, Aug. 19, 2020]

§ 34.2 Definitions.

The following are definitions of terms as used in this part. Grants officers are cautioned that terms may be defined differently in this part than they are in other parts of the DoD Grant and Agreement Regulations (DoDGARs).

Advance. A payment made by Treasury check or other appropriate payment mechanism to a recipient upon its request either before outlays are made by the recipient or through the use of predetermined payment schedules.

Award. A grant or a cooperative agreement other than a technology investment agreement (TIA). TIAs are covered by part 37 of the DoDGARs (32 CFR part 37). Portions of this part may apply to a TIA, but only to the extent that 32 CFR part 37 makes them apply.

Cash contributions. The recipient's cash outlay, including the outlay of money contributed to the recipient by third parties.

Closeout. The process by which the grants officer administering an award made by a DoD Component determines that all applicable administrative actions and all required work of the award have been completed by the recipient and DoD Component.

Contract. Either:

(1) A procurement contract made by a recipient under a DoD Component's award or by a subrecipient under a subaward; or

(2) A procurement subcontract under a contract awarded by a recipient or subrecipient.

Cost sharing or matching. That portion of project or program costs not borne by the Federal Government.

Disallowed costs. Those charges to an award that the grants officer administering an award made by a DoD Component determines to be unallowable, in accordance with the applicable Federal cost principles or other terms and conditions contained in the award.

DoD Component. A Military Department, Defense Agency, DoD Field Activity, or organization within the Office of the Secretary of Defense that provides or administers an award to a recipient.

Equipment. Tangible nonexpendable personal property charged directly to the award having a useful life of more than one year and an acquisition cost of $5,000 or more per unit. That definition applies for the purposes of the Federal administrative requirements in this part. However, the recipient's policy may be to use a lower dollar value for defining ''equipment,'' and nothing in this part should be construed as requiring the recipient to establish a higher limit for purposes other than the administrative requirements in this part.

Excess property. Property under the control of any DoD Component that, as determined by the head thereof, is no longer required for its needs or the discharge of its responsibilities.

Expenditures. See the definition for outlays in this section.

Federally owned property. Property in the possession of, or directly acquired by, the Government and subsequently made available to the recipient.

Funding period. The period of time when Federal funding is available for obligation by the recipient.

Intellectual property. Intangible personal property such as patents and patent applications, trademarks, copyrights, technical data, and software rights.

Obligations. The amounts of orders placed, contracts and grants awarded, services received and similar transactions during a given period that require payment by the recipient during the same or a future period.

Outlays or *expenditures.* Charges made to the project or program. They may be reported on a cash or accrual basis. For reports prepared on a cash basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense charged, the value of third party in-kind contributions applied and the amount of cash advances and payments made to subrecipients. For reports prepared on an accrual basis, outlays are the sum of cash disbursements for direct charges for goods and services, the amount of indirect expense incurred, the value of in-kind contributions applied, and the net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, subrecipients and other payees and other amounts becoming owed under programs for which no current services or performance are required.

Personal property. Property of any kind except real property. It may be:

(1) Tangible, having physical existence (i.e., equipment and supplies); or

(2) Intangible, having no physical existence, such as patents, copyrights, data and software.

Prior approval. Written or electronic approval by an authorized official evidencing prior consent.

Program income. Gross income earned by the recipient that is directly generated by a supported activity or earned as a result of the award. Program income includes, but is not limited to, income from fees for services performed, the use or rental of real or personal property acquired under federally-funded projects, the sale of commodities or items fabricated under an award, license fees and royalties on patents and copyrights, and interest on loans made with award funds. Interest earned on advances of Federal funds is not program income. Except as otherwise provided in program regulations or the terms and conditions of the award, program income does not include the receipt of principal on loans, rebates, credits, discounts, etc., or interest earned on any of them.

Project costs. All allowable costs, as set forth in the applicable Federal cost principles, incurred by a recipient and the value of the contributions made by third parties in accomplishing the objectives of the award during the project period.

Project period. The period established in the award document during which Federal sponsorship begins and ends.

Property. Real property and personal property (equipment, supplies, and intellectual property), unless stated otherwise.

Real property. Land, including land improvements, structures and appurtenances thereto, but excludes movable machinery and equipment.

Recipient. A for-profit organization receiving an award directly from a DoD Component to carry out a project or program.

Research. Basic, applied, and advanced research activities. *Basic research* is defined as efforts directed toward increasing knowledge or understanding in science and engineering. *Applied research* is defined as efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology, such as new materials, devices, methods, and processes. ''Advanced research,'' advanced technology development that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way, is most closely analogous to precommercialization or precompetitive technology development in the commercial sector (it does not include development of military systems and hardware where specific requirements have been defined).

Small award. See the definition for this term in 2 CFR part 1108.

Small business concern. A concern, including its affiliates, that is independently owned and operated, not dominant in the field of operation in which it has applied for an award, and qualified as a small business under the criteria and size standards in 13 CFR part 121. For more details, grants officers should see 48 CFR part 19 in the ''Federal Acquisition Regulation.''

Subaward. Financial assistance in the form of money, or property in lieu of money, provided under an award by a recipient to an eligible subrecipient or by a subrecipient to a lower tier subrecipient. The term includes financial assistance when provided by any legal agreement, even if the agreement is called a contract, but the term includes neither procurement of goods and services nor any form of assistance which is excluded from the definition of ''award'' in this section.

Subrecipient. The legal entity to which a subaward is made and which is accountable to the recipient for the use of the funds provided.

Supplies. Tangible expendable personal property that is charged directly to the award and that has a useful life of less than one year or an acquisition cost of less than $5000 per unit.

Suspension. An action by a DoD Component that temporarily withdraws Federal sponsorship under an award, pending corrective action by the recipient or pending a decision to terminate the award by the DoD Component. Suspension of an award is a separate action from suspension of a participant under 2 CFR part 1125.

Termination. The cancellation of an award, in whole or in part, under an agreement at any time prior to either:

(1) The date on which all work under an award is completed; or

(2) The date on which Federal sponsorship ends, as given on the award document or any supplement or amendment thereto.

Third party in-kind contributions. The value of non-cash contributions provided by non-Federal third parties. Third party in-kind contributions may be in the form of real property, equipment, supplies and other expendable property, and the value of goods and services directly benefiting and specifically identifiable to the project or program.

Unobligated balance. The portion of the funds authorized by a DoD Component that has not been obligated by the recipient and is determined by deducting the cumulative obligations from the cumulative funds authorized.

[63 FR 12204, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003; 72 FR 34998, June 26, 2007; 85 FR 51244, Aug. 19, 2020]

§ 34.3 Deviations.

(a) *Individual deviations.* Individual deviations affecting only one award may be approved by DoD Components in accordance with procedures stated in 32 CFR 21.335(a) and 21.340.

(b) *Small awards.* DoD Components may apply less restrictive requirements than the provisions of this part when awarding small awards, except for those requirements which are statutory.

(c) *Other class deviations.* For classes of awards other than small awards, the Assistant Secretary of Defense for Research and Engineering, or his or her designee, may grant exceptions from the requirements of this part when exceptions are not prohibited by statute. DoD Components shall request approval for such deviations in accordance with 32 CFR 21.335 (b) and 21.340.

[63 FR 12204, Mar. 12, 1998, as amended at 68 FR 47160, Aug. 7, 2003; 85 FR 51244, Aug. 19, 2020]

§ 34.4 Special award conditions.

(a) Grants officers may impose additional requirements as needed, over and above those provided in this part, if an applicant or recipient:

(1) Has a history of poor performance;

(2) Is not financially stable;

(3) Has a management system that does not meet the standards prescribed in this part;

(4) Has not conformed to the terms and conditions of a previous award; or

(5) Is not otherwise responsible.

(b) Before imposing additional requirements, DoD Components shall notify the applicant or recipient in writing as to:

(1) The nature of the additional requirements;

(2) The reason why the additional requirements are being imposed;

(3) The nature of the corrective action needed;

(4) The time allowed for completing the corrective actions; and

(5) The method for requesting reconsideration of the additional requirements imposed.

(c) Any special conditions shall be promptly removed once the conditions that prompted them have been corrected.

(d) Grants officers:

(1) Should coordinate the imposition and removal of special award conditions with the cognizant grants administration office identified in 32 CFR 22.710.

(2) Shall include in the award file the written notification to the recipient, described in paragraph (b) of this section, and the documentation required by 32 CFR 22.410(b).

Subpart B—Post-award Requirements

FINANCIAL AND PROGRAM MANAGEMENT

§ 34.10 Purpose of financial and program management.

Sections 34.11 through 34.17 prescribe standards for financial management systems; methods for making payments; and rules for cost sharing and matching, program income, revisions to budgets and program plans, audits, allowable costs, and fee and profit.

§ 34.11 Standards for financial management systems.

(a) Recipients shall be allowed and encouraged to use existing financial management systems established for

doing business in the commercial marketplace, to the extent that the systems comply with Generally Accepted Accounting Principles (GAAP) and the minimum standards in this section. As a minimum, a recipient's financial management system shall provide:

(1) Effective control of all funds. Control systems must be adequate to ensure that costs charged to Federal funds and those counted as the recipient's cost share or match are consistent with requirements for cost reasonableness, allowability, and allocability in the applicable cost principles (see §34.17) and in the terms and conditions of the award.

(2) Accurate, current and complete records that document for each project funded wholly or in part with Federal funds the source and application of the Federal funds and the recipient's required cost share or match. These records shall:

(i) Contain information about receipts, authorizations, assets, expenditures, program income, and interest.

(ii) Be adequate to make comparisons of outlays with budgeted amounts for each award (as required for programmatic and financial reporting under §34.41. Where appropriate, financial information should be related to performance and unit cost data. Note that unit cost data are generally not appropriate for awards that support research.

(3) To the extent that advance payments are authorized under §34.12, procedures that minimize the time elapsing between the transfer of funds to the recipient from the Government and the recipient's disbursement of the funds for program purposes.

(4) The recipient shall have a system to support charges to Federal awards for salaries and wages, whether treated as direct or indirect costs. Where employees work on multiple activities or cost objectives, a distribution of their salaries and wages will be supported by personnel activity reports which must:

(i) Reflect an after the fact distribution of the actual activity of each employee.

(ii) Account for the total activity for which each employee is compensated.

(iii) Be prepared at least monthly, and coincide with one or more pay periods.

(b) Where the Federal Government guarantees or insures the repayment of money borrowed by the recipient, the DoD Component, at its discretion, may require adequate bonding and insurance if the bonding and insurance requirements of the recipient are not deemed adequate to protect the interest of the Federal Government.

(c) The DoD Component may require adequate fidelity bond coverage where the recipient lacks sufficient coverage to protect the Federal Government's interest.

(d) Where bonds are required in the situations described above, the bonds shall be obtained from companies holding certificates of authority as acceptable sureties, as prescribed in 31 CFR part 223, ''Surety Companies Doing Business with the United States.''

§ 34.12 Payment.

(a) *Methods available.* Payment methods for awards with for-profit organizations are:

(1) *Reimbursement.* Under this method, the recipient requests reimbursement for costs incurred during a time period. In cases where the recipient submits each request for payment to the grants officer, the DoD payment office reimburses the recipient by electronic funds transfer or check after approval of the request by the grants officer designated to do so.

(2) *Advance payments.* Under this method, a DoD Component makes a payment to a recipient based upon projections of the recipient's cash needs. The payment generally is made upon the recipient's request, although predetermined payment schedules may be used when the timing of the recipient's needs to disburse funds can be predicted in advance with sufficient accuracy to ensure compliance with paragraph (b)(2)(iii) of this section.

(b) *Selecting a method.* (1) The preferred payment method is the reimbursement method, as described in paragraph (a)(1) of this section

(2) Advance payments, as described in paragraph (a)(2) of this section, may be used in exceptional circumstances, subject to the following conditions:

(i) The grants officer, in consultation with the program official, must judge that advance payments are necessary or will materially contribute to the probability of success of the project contemplated under the award (e.g., as startup funds for a project performed by a newly formed company). The rationale for the judgment shall be documented in the award file.

(ii) Cash advances shall be limited to the minimum amounts needed to carry out the program.

(iii) Recipients and the DoD Component shall maintain procedures to ensure that the timing of cash advances is as close as is administratively feasible to the recipients' disbursements of the funds for program purposes, including direct program or project costs and the proportionate share of any allowable indirect costs.

(iv) Recipients shall maintain advance payments of Federal funds in interest-bearing accounts, and remit annually the interest earned to the administrative grants officer responsible for post-award administration (the grants officer shall forward the payment to the responsible payment office, for return to the Department of Treasury's miscellaneous receipts account), unless one of the following applies:

(A) The recipient receives less than $120,000 in Federal awards per year.

(B) The best reasonably available interest bearing account would not be expected to earn interest in excess of $250 per year on Federal cash balances.

(C) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources.

(c) *Frequency of payments.* For either reimbursements or advance payments, recipients shall be authorized to submit requests for payment at least monthly.

(d) *Forms for requesting payment.* DoD Components may authorize recipients to use the SF–270,[1] ''Request for Advance or Reimbursement;'' the SF–271,[2] ''Outlay Report and Request for Reimbursement for Construction Programs;'' or prescribe other forms or formats as necessary.

(e) *Timeliness of payments.* Payments normally will be made within 30 calendar days of the receipt of a recipient's request for reimbursement or advance by the office designated to receive the request (for further information about timeframes for payments, see 32 CFR 22.810(c)(3)(ii)).

(f) *Precedence of other available funds.* Recipients shall disburse funds available from program income, rebates, refunds, contract settlements, audit recoveries, and interest earned on such funds before requesting additional cash payments.

(g) *Withholding of payments.* Unless otherwise required by statute, grants officers shall not withhold payments for proper charges made by recipients during the project period for reasons other than the following:

(1) A recipient has failed to comply with project objectives, the terms and conditions of the award, or Federal reporting requirements, in which case the grants officer may suspend payments in accordance with § 34.52.

(2) The recipient is delinquent on a debt to the United States (see definitions of ''debt'' and ''delinquent debt'' in 32 CFR 22.105). In that case, the grants officer may, upon reasonable notice, withhold payments for obligations incurred after a specified date, until the debt is resolved.

[63 FR 12204, Mar. 12, 1998, as amended at 85 FR 51244, Aug. 19, 2020]

§ 34.13 Cost sharing or matching.

(a) *Acceptable contributions.* All contributions, including cash contributions and third party in-kind contributions, shall be accepted as part of the recipient's cost sharing or matching when such contributions meet all of the following criteria:

(1) They are verifiable from the recipient's records.

[1] For copies of Standard Forms listed in this part, contact regional grants administration offices of the Office of Naval Research. Addresses for the offices are listed in the ''Federal Directory of Contract Administration Services (CAS) Components,'' which is available through the ''CAS Directory'' link at the Defense Contract Management Agency homepage (*http://www.dcma.mil*).

[2] See footnote 1 to this paragraph (d).

(2) They are not included as contributions for any other federally-assisted project or program.

(3) They are necessary and reasonable for proper and efficient accomplishment of project or program objectives.

(4) They are allowable under § 34.17.

(5) They are not paid by the Federal Government under another award, except:

(i) Costs that are authorized by Federal statute to be used for cost sharing or matching; or

(ii) Independent research and development (IR&D) costs. In accordance with the for-profit cost principle in 48 CFR 31.205–18(e), use of IR&D as cost sharing is permitted, whether or not the Government decides at a later date to reimburse any of the IR&D as allowable indirect costs. In such cases, the IR&D must meet all of the criteria in paragraphs (a) (1) through (4) and (a) (6) through (8) of this section.

(6) They are provided for in the approved budget, when approval of the budget is required by the DoD Component.

(7) If they are real property or equipment, whether purchased with recipient's funds or donated by third parties, they must have the grants officer's prior approval if the contributions' value is to exceed depreciation or use charges during the project period (paragraphs (b)(1) and (b)(4)(ii) of this section discuss the limited circumstances under which a grants officer may approve higher values). If a DoD Component requires approval of a recipient's budget (see paragraph (a)(6) of this section), the grants officer's approval of the budget satisfies this prior approval requirement, for real property or equipment items listed in the budget.

(8) They conform to other provisions of this part, as applicable.

(b) *Valuing and documenting contributions*—(1) *Valuing recipient's property or services of recipient's employees.* Values shall be established in accordance with the applicable cost principles in § 34.17, which means that amounts chargeable to the project are determined on the basis of costs incurred. For real property or equipment used on the project, the cost principles authorize depreciation or use charges. The full value of the item may be applied when the item will be consumed in the performance of the award or fully depreciated by the end of the award. In cases where the full value of a donated capital asset is to be applied as cost sharing or matching, that full value shall be the lesser of the following:

(i) The certified value of the remaining life of the property recorded in the recipient's accounting records at the time of donation; or

(ii) The current fair market value. However, when there is sufficient justification, the grants officer may approve the use of the current fair market value of the donated property, even if it exceeds the certified value at the time of donation to the project. The grants officer may accept the use of any reasonable basis for determining the fair market value of the property.

(2) *Valuing services of others' employees.* When an employer other than the recipient furnishes the services of an employee, those services shall be valued at the employee's regular rate of pay plus an amount of fringe benefits and overhead (at an overhead rate appropriate for the location where the services are performed) provided these services are in the same skill for which the employee is normally paid.

(3) *Valuing volunteer services.* Volunteer services furnished by professional and technical personnel, consultants, and other skilled and unskilled labor may be counted as cost sharing or matching if the service is an integral and necessary part of an approved project or program. Rates for volunteer services shall be consistent with those paid for similar work in the recipient's organization. In those instances in which the required skills are not found in the recipient organization, rates shall be consistent with those paid for similar work in the labor market in which the recipient competes for the kind of services involved. In either case, paid fringe benefits that are reasonable, allowable, and allocable may be included in the valuation.

(4) *Valuing property donated by third parties.* (i) Donated supplies may include such items as office supplies or laboratory supplies. Value assessed to donated supplies included in the cost

sharing or matching share shall be reasonable and shall not exceed the fair market value of the property at the time of the donation.

(ii) Normally only depreciation or use charges for equipment and buildings may be applied. However, the fair rental charges for land and the full value of equipment or other capital assets may be allowed, when they will be consumed in the performance of the award or fully depreciated by the end of the award, provided that the grants officer has approved the charges. When use charges are applied, values shall be determined in accordance with the usual accounting policies of the recipient, with the following qualifications:

(A) The value of donated space shall not exceed the fair rental value of comparable space as established by an independent appraisal of comparable space and facilities in a privately-owned building in the same locality.

(B) The value of loaned equipment shall not exceed its fair rental value.

(5) *Documentation*. The following requirements pertain to the recipient's supporting records for in-kind contributions from third parties:

(i) Volunteer services shall be documented and, to the extent feasible, supported by the same methods used by the recipient for its own employees.

(ii) The basis for determining the valuation for personal services and property shall be documented.

§ 34.14 Program income.

(a) DoD Components shall apply the standards in this section to the disposition of program income from projects financed in whole or in part with Federal funds.

(b) Recipients shall have no obligation to the Government, unless the terms and conditions of the award provide otherwise, for program income earned:

(1) From license fees and royalties for copyrighted material, patents, patent applications, trademarks, and inventions produced under an award. Note, however, that the Patent and Trademark Amendments (35 U.S.C. Chapter 18), as implemented in §34.25, apply to inventions made under a research award.

(2) After the end of the project period. If a grants officer anticipates that an award is likely to generate program income after the end of the project period, the grants officer should indicate in the award document whether the recipient will have any obligation to the Federal Government with respect to such income.

(c) If authorized by the terms and conditions of the award, costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

(d) Other than any program income excluded pursuant to paragraphs (b) and (c) of this section, program income earned during the project period shall be retained by the recipient and used in one or more of the following ways, as specified in program regulations or the terms and conditions of the award:

(1) Added to funds committed to the project by the DoD Component and recipient and used to further eligible project or program objectives.

(2) Used to finance the non-Federal share of the project or program.

(3) Deducted from the total project or program allowable cost in determining the net allowable costs on which the Federal share of costs is based.

(e) If the terms and conditions of an award authorize the disposition of program income as described in paragraph (d)(1) or (d)(2) of this section, and stipulate a limit on the amounts that may be used in those ways, program income in excess of the stipulated limits shall be used in accordance with paragraph (d)(3) of this section.

(f) In the event that the terms and conditions of the award do not specify how program income is to be used, paragraph (d)(3) of this section shall apply automatically to all projects or programs except research. For awards that support research, paragraph (d)(1) of this section shall apply automatically unless the terms and conditions specify another alternative or the recipient is subject to special award conditions, as indicated in §34.4.

(g) Proceeds from the sale of property that is acquired, rather than fabricated, under an award are not program income and shall be handled in

accordance with the requirements of the Property Standards (see §§ 34.20 through 34.25).

§ 34.15 Revision of budget and program plans.

(a) The budget plan is the financial expression of the project or program as approved during the award process. It may include either the sum of the Federal and non-Federal shares, or only the Federal share, depending upon DoD Component requirements. It shall be related to performance for program evaluation purposes whenever appropriate.

(b) Recipients are required to report deviations from budget and program plans, and request prior approvals for budget and program plan revisions, in accordance with this section.

(c) Recipients shall immediately request, in writing, prior approval from the cognizant grants officer when there is reason to believe that within the next seven calendar days a programmatic or budgetary revision will be necessary for certain reasons, as follows:

(1) The recipient always must obtain the grants officer's prior approval when a revision is necessary for either of the following two reasons (i.e., these two requirements for prior approval may never be waived):

(i) A change in the scope or the objective of the project or program (even if there is no associated budget revision requiring prior written approval).

(ii) A need for additional Federal funding.

(2) The recipient must obtain the grants officer's prior approval when a revision is necessary for any of the following six reasons, unless the requirement for prior approval is waived in the terms and conditions of the award (i.e., if the award document is silent, these prior approvals are required):

(i) A change in a key person specified in the application or award document.

(ii) The absence for more than three months, or a 25 percent reduction in time devoted to the project, by the approved project director or principal investigator.

(iii) The inclusion of any additional costs that require prior approval in accordance with applicable cost principles for Federal funds and recipients' cost share or match, in § 34.17 and § 34.13, respectively.

(iv) The inclusion of pre-award costs. All such costs are incurred at the recipient's risk (i.e., the DoD Component is under no obligation to reimburse such costs if for any reason the recipient does not receive an award, or if the award is less than anticipated and inadequate to cover such costs).

(v) A ''no-cost'' extension of the project period that does not require additional Federal funds and does not change the approved objectives or scope of the project.

(vi) Any subaward, transfer or contracting out of substantive program performance under an award, unless described in the application and funded in the approved awards. This provision does not apply to the purchase of supplies, material, or general support services, except that procurement of equipment or other capital items of property always is subject to the grants officer's prior approval under § 34.21(a), if it is to be purchased with Federal funds, or § 34.13(a)(7), if it is to be used as cost sharing or matching.

(3) The recipient also must obtain the grants officer's prior approval when a revision is necessary for either of the following reasons, if specifically required in the terms and conditions of the award document (i.e., if the award document is silent, these prior approvals are not required):

(i) The transfer of funds among direct cost categories, functions and activities for awards in which the Federal share of the project exceeds the simplified acquisition threshold and the cumulative amount of such transfers exceeds or is expected to exceed 10 percent of the total budget as last approved by the DoD Component. No DoD Component shall permit a transfer that would cause any Federal appropriation or part thereof to be used for purposes other than those consistent with the original intent of the appropriation.

(ii) For awards that provide support for both construction and nonconstruction work, any fund or budget transfers between the two types of work supported.

(d) Within 30 calendar days from the date of receipt of the recipient's request for budget revisions, the grants officer shall review the request and notify the recipient whether the budget revisions have been approved. If the revision is still under consideration at the end of 30 calendar days, the grants officer shall inform the recipient in writing of the date when the recipient may expect the decision.

[63 FR 12204, Mar. 12, 1998, as amended at 85 FR 51244, Aug. 19, 2020]

§ 34.16 Audits.

(a) Any recipient that expends $750,000 or more in a year under Federal awards shall have an audit made for that year by an independent auditor, in accordance with paragraph (b) of this section. The audit generally should be made a part of the regularly scheduled, annual audit of the recipient's financial statements. However, it may be more economical in some cases to have the Federal awards separately audited, and a recipient may elect to do so, unless that option is precluded by award terms and conditions, or by Federal laws or regulations applicable to the program(s) under which the awards were made.

(b) The auditor shall determine and report on whether:

(1) The recipient has an internal control structure that provides reasonable assurance that it is managing Federal awards in compliance with Federal laws and regulations, and with the terms and conditions of the awards.

(2) Based on a sampling of Federal award expenditures, the recipient has complied with laws, regulations, and award terms that may have a direct and material effect on Federal awards.

(c) The recipient shall make the auditor's report available to DoD Components whose awards are affected.

(d) The requirement for an annual independent audit is intended to ascertain the adequacy of the recipient's internal financial management systems and to curtail the unnecessary duplication and overlap that usually results when Federal agencies request audits of individual awards on a routine basis. Therefore, a grants officer:

(1) Shall consider whether the independent audit satisfies his or her requirements, before requesting any additional audits; and

(2) When requesting an additional audit, shall:

(i) Limit the scope of such additional audit to areas not adequately addressed by the independent audit.

(ii) Coordinate the audit request with the Federal agency with the predominant fiscal interest in the recipient, as the agency responsible for the scheduling and distribution of audits. If DoD has the predominant fiscal interest in the recipient, the Defense Contract Management Agency (DCMA) is responsible for monitoring audits, ensuring resolution of audit findings, and distributing audit reports. When an additional audit is requested and DoD has the predominant fiscal interest in the recipient, DCMA shall, to the extent practicable, ensure that the additional audit builds upon the independent audit or other audits performed in accordance with this section.

(e) There may be instances in which Federal auditors have recently performed audits, are performing audits, or are planning to perform audits, of a recipient. In these cases, the recipient and its Federal cognizant agency should seek to have the non-Federal, independent auditors work with the Federal auditors to develop a coordinated audit approach, to minimize duplication of audit work.

(f) Audit costs (including a reasonable allocation of the costs of the audit of the recipient's financial statement, based on the relative benefit to the Government and the recipient) are allowable costs of DoD awards.

[63 FR 12204, Mar. 12, 1998, as amended at 70 FR 49477, Aug. 23, 2005; 85 FR 51244, Aug. 19, 2020]

§ 34.17 Allowable costs.

Allowability of costs shall be determined in accordance with the cost principles applicable to the type of entity incurring the costs, as follows:

(a) *For-profit organizations.* Allowability of costs incurred by for-profit organizations that are recipients of prime awards from DoD Components, and those that are subrecipients under prime awards to other organizations, is to be determined in accordance with:

(1) The for-profit cost principles in 48 CFR parts 31 and 231 (in the Federal Acquisition Regulation, or FAR, and the Defense Federal Acquisition Regulation Supplement, or DFARS, respectively).

(2) The supplemental information on allowability of audit costs, in §34.16(f).

(b) *Other types of organizations.* Allowability of costs incurred by other types of organizations that may be subrecipients under a prime award to a for-profit organization is determined as follows:

(1) *Institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes.* Allowability is determined in accordance with the cost principles in subpart E of OMB guidance in 2 CFR part 200. Note that 2 CFR 200.401(c) provides that a nonprofit organization listed in appendix VIII to 2 CFR part 200 is subject to the FAR and DFARS cost principles specified in paragraph (a)(1) of this section for for-profit organizations.

(2) *Hospitals.* Allowability is determined in accordance with the cost principles identified in appendix IX to 2 CFR part 200 (currently 45 CFR part 75).

[63 FR 12204, Mar. 12, 1998, as amended at 85 FR 51244, Aug. 19, 2020]

§34.18 Fee and profit.

In accordance with 32 CFR 22.205(b), grants and cooperative agreements shall not:

(a) Provide for the payment of fee or profit to the recipient.

(b) Be used to carry out programs where fee or profit is necessary to achieving program objectives.

PROPERTY STANDARDS

§34.20 Purpose of property standards.

Sections 34.21 through 34.25 set forth uniform standards for management, use, and disposition of property. DoD Components shall encourage recipients to use existing property-management systems, to the extent that the systems meet these minimum requirements.

§34.21 Real property and equipment.

(a) *Prior approval for acquisition with Federal funds.* Recipients may purchase real property or equipment in whole or in part with Federal funds under an award only with the prior approval of the grants officer.

(b) *Title.* Title to such real property or equipment shall vest in the recipient upon acquisition. Unless a statute specifically authorizes a DoD Component to vest title in the recipient without further obligation to the Government, and the DoD Component elects to do so, the title shall be a conditional title. Title shall vest in the recipient subject to the conditions that the recipient:

(1) Use the real property or equipment for the authorized purposes of the project until funding for the project ceases, or until the property is no longer needed for the purposes of the project.

(2) Not encumber the property without approval of the grants officer.

(3) Use and dispose of the property in accordance with paragraphs (d) and (e) of this section.

(c) *Federal interest in real property or equipment offered as cost-share.* A recipient may offer the full value of real property or equipment that is purchased with recipient's funds or that is donated by a third party to meet a portion of any required cost sharing or matching, subject to the prior approval requirement in §34.13(a)(7). If a recipient does so, the Government has a financial interest in the property, a share of the property value attributable to the Federal participation in the project. The property therefore shall be considered as if it had been acquired in part with Federal funds, and shall be subject to the provisions of paragraphs (b)(1), (b)(2) and (b)(3) of this section, and to the provisions of §34.23.

(d) *Use.* If real property or equipment is acquired in whole or in part with Federal funds under an award, and the award provides that title vests conditionally in the recipient, the real property or equipment is subject to the following:

(1) During the time that the real property or equipment is used on the project or program for which it was acquired, the recipient shall make it available for use on other projects or programs, if such other use will not interfere with the work on the project

or program for which the real property or equipment was originally acquired. Use of the real property or equipment on other projects will be in the following order of priority:

(i) Activities sponsored by DoD Components' grants, cooperative agreements, or other assistance awards;

(ii) Activities sponsored by other Federal agencies' grants, cooperative agreements, or other assistance awards;

(iii) Activities under Federal procurement contracts, or activities not sponsored by any Federal agency. If so used, use charges shall be assessed to those activities. For real property or equipment, the use charges shall be at rates equivalent to those for which comparable real property or equipment may be leased. The use charges shall be treated as program income.

(2) After Federal funding for the project ceases, or when the real property or equipment is no longer needed for the purposes of the project, the recipient may use the real property or equipment for other projects, insofar as:

(i) There are Federally sponsored projects for which the real property or equipment may be used. If the only use for the real property or equipment is for projects that have no Federal sponsorship, the recipient shall proceed with disposition of the real property or equipment, in accordance with paragraph (e) of this section.

(ii) The recipient obtains written approval from the grants officer to do so. The grants officer shall ensure that there is a formal change of accountability for the real property or equipment to a currently funded, Federal award.

(iii) The recipient's use of the real property or equipment for other projects is in the same order of priority as described in paragraph (d)(1) of this section.

(e) *Disposition*. (1) When an item of real property or equipment is no longer needed for Federally sponsored projects, the recipient shall proceed as follows:

(i) If the property that is no longer needed is equipment (rather than real property), the recipient may wish to replace it with an item that is needed currently for the project. In that case, the recipient may use the original equipment as trade-in or sell it and use the proceeds to offset the costs of the replacement equipment, subject to the approval of the responsible agency (i.e., the DoD Component or the Federal agency to which the DoD Component delegated responsibility for administering the equipment).

(ii) The recipient may elect to retain title, without further obligation to the Federal Government, by compensating the Federal Government for that percentage of the current fair market value of the real property or equipment that is attributable to the Federal participation in the project.

(iii) If the recipient does not elect to retain title to real property or equipment (see paragraph (e)(1)(ii) of this section), or request approval to use equipment as trade-in or offset for replacement equipment (see paragraph (e)(1)(i) of this section), the recipient shall request disposition instructions from the responsible agency.

(2) If a recipient requests disposition instructions, in accordance with paragraph (e)(1)(iii) of this section, the responsible grants officer shall:

(i) For equipment (but not real property), consult with the Federal program manager and judge whether the age and nature of the equipment warrant a screening procedure, to determine whether the equipment is useful to a DoD Component or other Federal agency. If a screening procedure is warranted, the responsible agency shall determine whether the equipment can be used to meet a DoD Component's requirement. If no DoD requirement is found, the responsible agency shall report the availability of the equipment to the General Services Administration, to determine whether a requirement for the equipment exists in other Federal agencies.

(ii) For either real property or equipment, issue instructions to the recipient for disposition of the property no later than 120 calendar days after the recipient's request. The grants officer's options for disposition are to direct the recipient to:

(A) Transfer title to the real property or equipment to the Federal Government or to an eligible third party provided that, in such cases, the recipient shall be entitled to compensation for its attributable percentage of the current fair market value of the real property or equipment, plus any reasonable shipping or interim storage costs incurred. If title is transferred to the Federal Government, it shall be subject thereafter to provisions for Federally owned property in § 34.22.

(B) Sell the real property or equipment and pay the Federal Government for that percentage of the current fair market value of the property that is attributable to the Federal participation in the project (after deducting actual and reasonable selling and fix-up expenses, if any, from the sale proceeds). When the recipient is authorized or required to sell the real property or equipment, proper sales procedures shall be established that provide for competition to the extent practicable and result in the highest possible return.

(3) If the responsible agency fails to issue disposition instructions within 120 calendar days of the recipient's request, as described in paragraph (e)(2)(ii) of this section, the recipient shall dispose of the real property or equipment through the option described in paragraph (e)(2)(ii)(B) of this section.

§ 34.22 Federally owned property.

(a) *Annual inventory.* Recipients shall submit annually an inventory listing of all Federally owned property in their custody (property furnished by the Federal Government, rather than acquired by the recipient with Federal funds under the award), to the DoD Component or other Federal agency responsible for administering the property under the award.

(b) *Use on other activities.* (1) Use of federally owned property on other activities is permissible, if authorized by the DoD Component responsible for administering the award to which the property currently is charged.

(2) Use on other activities will be in the following order of priority:

(i) Activities sponsored by DoD Components' grants, cooperative agreements, or other assistance awards;

(ii) Activities sponsored by other Federal agencies' grants, cooperative agreements, or other assistance awards;

(iii) Activities under Federal procurement contracts, or activities not sponsored by any Federal agency. If so used, use charges shall be assessed to those activities. For real property or equipment, the use charges shall be at rates equivalent to those for which comparable real property or equipment may be leased. The use charges shall be treated as program income.

(c) *Disposition of property.* Upon completion of the award, the recipient shall report the property to the responsible agency. The agency may:

(1) Use the property to meet another Federal Government need (e.g, by transferring accountability for the property to another Federal award to the same recipient, or by directing the recipient to transfer the property to a Federal agency that needs the property, or to another recipient with a currently funded award).

(2) Declare the property to be excess property and either:

(i) Report the property to the General Services Administration, in accordance with the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 483(b)(2)), as implemented by General Services Administration regulations at 41 CFR 101–47.202; or

(ii) Dispose of the property by alternative methods, if there is statutory authority to do so (e.g., DoD Components are authorized by 15 U.S.C. 3710(i), the Federal Technology Transfer Act, to donate research equipment to educational and nonprofit organizations for the conduct of technical and scientific education and research activities. Such donations shall be in accordance with the DoD implementation of E.O. 12999 (3 CFR, 1996 Comp., p. 180), ''Educational Technology: Ensuring Opportunity for All Children in the Next Century,'' as applicable.) Appropriate instructions shall be issued to the recipient by the responsible agency.

§ 34.23 Property management system.

The recipient's property management system shall include the following, for property that is Federally owned, and for equipment that is acquired in whole or in part with Federal funds, or that is used as matching share:

(a) Property records shall be maintained, to include the following information:

(1) A description of the property.

(2) Manufacturer's serial number, model number, Federal stock number, national stock number, or any other identification number.

(3) Source of the property, including the award number.

(4) Whether title vests in the recipient or the Federal Government.

(5) Acquisition date (or date received, if the property was furnished by the Federal Government) and cost.

(6) Information from which one can calculate the percentage of Federal participation in the cost of the property (not applicable to property furnished by the Federal Government).

(7) The location and condition of the property and the date the information was reported.

(8) Ultimate disposition data, including date of disposal and sales price or the method used to determine current fair market value where a recipient compensates the Federal Government for its share.

(b) Federally owned equipment shall be marked, to indicate Federal ownership.

(c) A physical inventory shall be taken and the results reconciled with the property records at least once every two years. Any differences between quantities determined by the physical inspection and those shown in the accounting records shall be investigated to determine the causes of the difference. The recipient shall, in connection with the inventory, verify the existence, current utilization, and continued need for the property.

(d) A control system shall be in effect to insure adequate safeguards to prevent loss, damage, or theft of the property. Any loss, damage, or theft of property shall be investigated and fully documented; if the property was owned by the Federal Government, the recipient shall promptly notify the Federal agency responsible for administering the property.

(e) Adequate maintenance procedures shall be implemented to keep the property in good condition.

§ 34.24 Supplies.

(a) Title shall vest in the recipient upon acquisition for supplies acquired with Federal funds under an award.

(b) Upon termination or completion of the project or program, the recipient shall retain any unused supplies. If the inventory of unused supplies exceeds $5,000 in total aggregate value and the items are not needed for any other Federally sponsored project or program, the recipient shall retain the items for use on non-Federal sponsored activities or sell them, but shall, in either case, compensate the Federal Government for its share.

§ 34.25 Intellectual property developed or produced under awards.

(a) *Patents.* Grants and cooperative agreements with:

(1) Small business concerns shall comply with 35 U.S.C. Chapter 18, as implemented by 37 CFR part 401, which applies to inventions made under grants and cooperative agreements with small business concerns for research and development. 37 CFR 401.14 provides a standard clause that is required in such grants and cooperative agreements in most cases, 37 CFR 401.3 specifies when the clause shall be included, and 37 CFR 401.5 specifies how the clause may be modified and tailored.

(2) For-profit organizations other than small business concerns shall comply with 35 U.S.C. 210(c) and Executive Order 12591 (3 CFR, 1987 Comp., p. 220) (which codifies a Presidential Memorandum on Government Patent Policy, dated February 18, 1983).

(i) The Executive order states that, as a matter of policy, grants and cooperative agreements should grant to all for-profit organizations, regardless of size, title to patents made in whole or in part with Federal funds, in exchange for royalty-free use by or on behalf of the Government (i.e., it extends the applicability of 35 U.S.C. Chapter 18, to the extent permitted by law, to for-

profit organizations other than small business concerns).

(ii) 35 U.S.C. 210(c) states that 35 U.S.C. Chapter 18 is not intended to limit agencies' authority to agree to the disposition of rights in inventions in accordance with the Presidential memorandum codified by the Executive order. It also states that such grants and cooperative agreements shall provide for Government license rights required by 35 U.S.C. 202(c)(4) and march-in rights required by 35 U.S.C. 203.

(b) *Copyright, data and software rights.* Requirements concerning data and software rights are as follows:

(1) The recipient may copyright any work that is subject to copyright and was developed under an award. DoD Components reserve a royalty-free, nonexclusive and irrevocable right to reproduce, publish, or otherwise use the work for Federal purposes, and to authorize others to do so.

(2) Unless waived by the DoD Component making the award, the Federal Government has the right to:

(i) Obtain, reproduce, publish or otherwise use for Federal Government purposes the data first produced under an award.

(ii) Authorize others to receive, reproduce, publish, or otherwise use such data for Federal purposes.

PROCUREMENT STANDARDS

§ 34.30 Purpose of procurement standards.

Section 34.31 sets forth requirements necessary to ensure:

(a) Compliance of recipients' procurements that use Federal funds with applicable Federal statutes and executive orders.

(b) Proper stewardship of Federal funds used in recipients' procurements.

§ 34.31 Requirements.

The following requirements pertain to recipients' procurements funded in whole or in part with Federal funds or with recipients' cost-share or match:

(a) *Reasonable cost.* Recipients procurement procedures shall make maximum practicable use of competition, or shall use other means that ensure reasonable cost for procured goods and services.

(b) *Pre-award review of certain procurements.* Prior to awarding a procurement contract under an award, a recipient may be required to provide the grants officer administering the award with pre-award documents (e.g., requests for proposals, invitations for bids, or independent cost estimates) related to the procurement. Recipients will only be required to provide such documents for the grants officer's pre-award review in exceptional cases where the grants officer judges that there is a compelling need to do so. In such cases, the grants officer must include a provision in the award that states the requirement.

(c) *Contract provisions.* (1) Contracts in excess of the simplified acquisition threshold shall contain contractual provisions or conditions that allow for administrative, contractual, or legal remedies in instances in which a contractor violates or breaches the contract terms, and provide for such remedial actions as may be appropriate.

(2) All contracts in excess of the simplified acquisition threshold shall contain suitable provisions for termination for default by the recipient or for termination due to circumstances beyond the control of the contractor.

(3) All negotiated contracts in excess of the simplified acquisition threshold shall include a provision permitting access of the Department of Defense, the Comptroller General of the United States, or any of their duly authorized representatives, to any books, documents, papers, and records of the contractor that are directly pertinent to a specific program, for the purpose of making audits, examinations, excerpts, and transcriptions.

(4) All contracts, including those for amounts less than the simplified acquisition threshold, awarded by recipients and their contractors shall contain the procurement provisions of Appendix A to this part, as applicable.

REPORTS AND RECORDS

§ 34.40 Purpose of reports and records.

Sections 34.41 and 34.42 prescribe requirements for monitoring and reporting financial and program performance and for records retention.

§ 34.41 Monitoring and reporting program and financial performance.

Grants officers may use the provisions of subparts A and B of 2 CFR part 1134 for awards to for-profit organizations, or may include equivalent technical and financial reporting requirements that ensure reasonable oversight of the expenditure of appropriated funds. As a minimum, equivalent requirements must include:

(a) Periodic reports (at least annually, and no more frequently than quarterly) addressing both program status and business status, as follows:

(1) The program portions of the reports must address progress toward achieving program performance goals, including current issues, problems, or developments.

(2) The business portions of the reports shall provide summarized details on the status of resources (federal funds and non-federal cost sharing or matching), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from those schedules; and discuss actions that will be taken to address the deviations.

(3) When grants officers previously authorized advance payments, pursuant to § 34.12(a)(2), they should consult with the program official and consider whether program progress reported in the periodic report, in relation to reported expenditures, is sufficient to justify continued authorization of advance payments.

(b) Unless inappropriate, a final performance report that addresses all major accomplishments under the award.

[63 FR 12204, Mar. 12, 1998, as amended at 85 FR 51244, Aug. 19, 2020]

§ 34.42 Retention and access requirements for records.

(a) This section sets forth requirements for records retention and access to records for awards to recipients.

(b) Financial records, supporting documents, statistical records, and all other records pertinent to an award shall be retained for a period of three years from the date of submission of the final expenditure report. The only exceptions are the following:

(1) If any litigation, claim, or audit is started before the expiration of the 3-year period, the records shall be retained until all litigation, claims or audit findings involving the records have been resolved and final action taken.

(2) Records for real property and equipment acquired with Federal funds shall be retained for 3 years after final disposition.

(3) When records are transferred to or maintained by the DoD Component that made the award, the 3-year retention requirement is not applicable to the recipient.

(4) Indirect cost rate proposals, cost allocations plans, and related records, for which retention requirements are specified in § 34.42(g).

(c) Copies of original records may be substituted for the original records if authorized by the grants officer.

(d) The grants officer shall request that recipients transfer certain records to DoD Component custody when he or she determines that the records possess long term retention value. However, in order to avoid duplicate recordkeeping, a grants officer may make arrangements for recipients to retain any records that are continuously needed for joint use.

(e) DoD Components, the Inspector General, Comptroller General of the United States, or any of their duly authorized representatives, have the right of timely and unrestricted access to any books, documents, papers, or other records of recipients that are pertinent to the awards, in order to make audits, examinations, excerpts, transcripts and copies of such documents. This right also includes timely and reasonable access to a recipient's personnel for the purpose of interview and discussion related to such documents. The rights of access in this paragraph are not limited to the required retention period, but shall last as long as records are retained.

(f) Unless required by statute, no DoD Component shall place restrictions on recipients that limit public access to the records of recipients that are pertinent to an award, except when the DoD Component can demonstrate

that such records shall be kept confidential and would have been exempted from disclosure pursuant to the Freedom of Information Act (5 U.S.C. 552) if the records had belonged to the DoD Component making the award.

(g) Indirect cost proposals, cost allocation plans, and other cost accounting documents (such as documents related to computer usage chargeback rates), along with their supporting records, shall be retained for a 3-year period, as follows:

(1) If a recipient is required to submit an indirect-cost proposal, cost allocation plan, or other computation to the cognizant Federal agency, for purposes of negotiating an indirect cost rate or other rates, the 3-year retention period starts on the date of the submission. This retention requirement also applies to subrecipients submitting similar documents for negotiation to the recipient.

(2) If the recipient or the subrecipient is not required to submit the documents or supporting records for negotiating an indirect cost rate or other rates, the 3-year retention period for the documents and records starts at the end of the fiscal year (or other accounting period) covered by the proposal, plan, or other computation.

(h) If the information described in this section is maintained on a computer, recipients shall retain the computer data on a reliable medium for the time periods prescribed. Recipients may transfer computer data in machine readable form from one reliable computer medium to another. Recipients' computer data retention and transfer procedures shall maintain the integrity, reliability, and security of the original computer data. Recipients shall also maintain an audit trail describing the data transfer. For the record retention time periods prescribed in this section, recipients shall not destroy, discard, delete, or write over such computer data.

TERMINATION AND ENFORCEMENT

§ 34.50 Purpose of termination and enforcement.

Sections 34.51 through 34.53 set forth uniform procedures for suspension, termination, enforcement, and disputes.

§ 34.51 Termination.

(a) Awards may be terminated in whole or in part only in accordance with one of the following:

(1) By the grants officer, if a recipient materially fails to comply with the terms and conditions of an award.

(2) By the grants officer with the consent of the recipient, in which case the two parties shall agree upon the termination conditions, including the effective date and, in the case of partial termination, the portion to be terminated.

(3) By the recipient upon sending to the grants officer written notification setting forth the reasons for such termination, the effective date, and, in the case of partial termination, the portion to be terminated. The recipient must provide such notice at least 30 calendar days prior to the effective date of the termination. However, if the grants officer determines in the case of partial termination that the reduced or modified portion of the award will not accomplish the purposes for which the award was made, he or she may terminate the award in its entirety.

(b) If costs are allowed under an award, the responsibilities of the recipient referred to in §34.61(b), including those for property management as applicable, shall be considered in the termination of the award, and provision shall be made for continuing responsibilities of the recipient after termination, as appropriate.

§ 34.52 Enforcement.

(a) *Remedies for noncompliance.* If a recipient materially fails to comply with the terms and conditions of an award, whether stated in a Federal statute, regulation, assurance, application, or notice of award, the grants officer may, in addition to imposing any of the special conditions outlined in §34.4, take one or more of the following actions, as appropriate in the circumstances:

(1) Temporarily withhold cash payments pending correction of the deficiency by the recipient or more severe enforcement action by the grants officer and DoD Component.

(2) Disallow (that is, deny both use of funds and any applicable matching

credit for) all or part of the cost of the activity or action not in compliance.

(3) Wholly or partly suspend or terminate the current award. In the case of termination, the recipient will be reimbursed for allowable costs incurred prior to termination, with the possible exception of those for activities and actions described in paragraph (a)(2) of this section.

(4) Withhold further awards for the project or program.

(5) Take other remedies that may be legally available.

(b) *Hearings and appeals.* In taking an enforcement action, the grants officer and DoD Component shall provide the recipient an opportunity for hearing, appeal, or other administrative proceeding to which the recipient is entitled under any statute or regulation applicable to the action involved (see §34.53 and 32 CFR 22.815).

(c) *Effects of suspension and termination.* Costs of a recipient resulting from obligations incurred by the recipient during a suspension or after termination of an award are not allowable unless the grants officer expressly authorizes them in the notice of suspension or termination or subsequently. Other recipient costs during suspension or after termination which are necessary and not reasonably avoidable are allowable if the costs:

(1) Result from obligations which were properly incurred by the recipient before the effective date of suspension or termination, are not in anticipation of it, and in the case of a termination, are noncancellable; and

(2) Would be allowable if the award were not suspended or expired normally at the end of the funding period in which the termination takes effect.

(d) *Relationship to debarment and suspension.* The enforcement remedies identified in this section, including suspension and termination, do not preclude a recipient from being subject to debarment and suspension under 2 CFR part 1125.

[63 FR 12188, Mar. 12, 1998, as amended at 72 FR 34998, June 26, 2007]

§34.53 Disputes and appeals.

Recipients have the right to appeal certain decisions by grants officers. In resolving such issues, DoD policy is to use Alternative Dispute Resolution (ADR) techniques, to the maximum practicable extent. See 32 CFR 22.815 for standards for DoD Components' dispute resolution and formal, administrative appeal procedures.

Subpart C—After-the-Award Requirements

§34.60 Purpose.

Sections 34.61 through 34.63 contain procedures for closeout and for subsequent disallowances and adjustments.

§34.61 Closeout procedures.

(a) The cognizant grants officer shall, at least six months prior to the expiration date of the award, contact the recipient to establish:

(1) All steps needed to close out the award, including submission of financial and performance reports, liquidation of obligations, and decisions on property disposition.

(2) A schedule for completing those steps.

(b) The following provisions shall apply to the closeout:

(1) The responsible grants officer and payment office shall expedite completion of steps needed to close out awards and make prompt, final payments to a recipient for allowable reimbursable costs under the award being closed out.

(2) The recipient shall promptly refund any unobligated balances of cash that the DoD Component has advanced or paid and that is not authorized to be retained by the recipient for use in other projects. For unreturned amounts that become delinquent debts, see 32 CFR 22.820.

(3) When authorized by the terms and conditions of the award, the grants officer shall make a settlement for any upward or downward adjustments to the Federal share of costs after closeout reports are received.

(4) The recipient shall account for any real property and personal property acquired with Federal funds or received from the Federal Government in accordance with §§34.21 through 34.25.

(5) If a final audit is required and has not been performed prior to the closeout of an award, the DoD Component

shall retain the right to recover an appropriate amount after fully considering the recommendations on disallowed costs resulting from the final audit.

§ 34.62 Subsequent adjustments and continuing responsibilities.

(a) The closeout of an award does not affect any of the following:

(1) The right of the Department of Defense to disallow costs and recover funds on the basis of a later audit or other review.

(2) The obligation of the recipient to return any funds due as a result of later refunds, corrections, or other transactions.

(3) Audit requirements in § 34.16.

(4) Property management requirements in §§ 34.21 through 34.25.

(5) Records retention as required in § 34.42.

(b) After closeout of an award, a relationship created under an award may be modified or ended in whole or in part with the consent of the grants officer and the recipient, provided the responsibilities of the recipient referred to in § 34.61(a), including those for property management as applicable, are considered and provisions made for continuing responsibilities of the recipient, as appropriate.

§ 34.63 Collection of amounts due.

Any funds paid to a recipient in excess of the amount to which the recipient is finally determined to be entitled under the terms and conditions of the award constitute a debt to the Federal Government. Procedures for issuing the demand for payment and pursuing administrative offset and other remedies are described in 32 CFR 22.820.

APPENDIX A TO PART 34—CONTRACT PROVISIONS

All contracts awarded by a recipient, including those for amounts less than the simplified acquisition threshold, shall contain the following provisions as applicable:

1. *Equal Employment Opportunity*—All contracts shall contain a provision requiring compliance with E.O. 11246 (3 CFR, 1964–1965 Comp., p. 339), ''Equal Employment Opportunity,'' as amended by E.O. 11375 (3 CFR, 1966–1970 Comp., p. 684), ''Amending Executive Order 11246 Relating to Equal Employment Opportunity,'' and as supplemented by regulations at 41 CFR chapter 60, ''Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.''

2. *Copeland ''Anti-Kickback'' Act (18 U.S.C. 874 and 40 U.S.C. 3145)*—All contracts and subawards in excess of $2000 for construction or repair awarded by recipients and subrecipients shall include a provision for compliance with the Copeland ''Anti-Kickback'' Act (18 U.S.C. 874), as supplemented by Department of Labor regulations (29 CFR part 3, ''Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States''). The Act provides that each contractor or subrecipient shall be prohibited from inducing, by any means, any person employed in the construction, completion, or repair of public work, to give up any part of the compensation to which he is otherwise entitled. The recipient shall report all suspected or reported violations to the responsible DoD Component.

3. *Contract Work Hours and Safety Standards Act (40 U.S.C., chapter 37)*—Where applicable, all contracts awarded by recipients in excess of $100,000 for construction and other purposes that involve the employment of mechanics or laborers shall include a provision for compliance with Sections 102 and 107 of the Contract Work Hours and Safety Standards Act (40 U.S.C., chapter 37), as supplemented by Department of Labor regulations (29 CFR part 5). Under Section 102 of the Act, each contractor shall be required to compute the wages of every mechanic and laborer on the basis of a standard work week of 40 hours. Work in excess of the standard work week is permissible provided that the worker is compensated at a rate of not less than 1½ times the basic rate of pay for all hours worked in excess of 40 hours in the work week. Section 107 of the Act is applicable to construction work and provides that no laborer or mechanic shall be required to work in surroundings or under working conditions which are unsanitary, hazardous or dangerous. These requirements do not apply to the purchases of supplies or materials or articles ordinarily available on the open market, or contracts for transportation or transmission of intelligence.

4. *Rights to Inventions Made Under a Contract, Grant or Cooperative Agreement*—Contracts, grants, or cooperative agreements for the performance of experimental, developmental, or research work shall provide for the rights of the Federal Government and the recipient in any resulting invention in accordance with 37 CFR part 401, ''Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements.''

5. *Clean Air Act* (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act (33 U.S.C. 1251 *et seq.*), as amended—Contracts and subawards of amounts in excess of $150,000 shall contain a provision that requires the recipient to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401 *et seq.*) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251 *et seq.*). Violations shall be reported to the responsible DoD Component and the Regional Office of the Environmental Protection Agency (EPA).

6. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*—Contractors who apply or bid for an award of $100,000 or more shall file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the recipient.

7. *Debarment and Suspension (E.O.s 12549 and 12689)*—A contract award with an amount expected to equal or exceed $25,000 and certain other contract awards (see 2 CFR 1125.220, which implements OMB guidance at 2 CFR 180.220) shall not be made to parties identified in the Exclusions area of the System for Award Management (SAM Exclusions) as being currently debarred, suspended, or otherwise excluded. This restriction is in accordance with the DoD adoption at 2 CFR part 1125 of the OMB guidance implementing E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), ''Debarment and Suspension.''

8. *Wage Rate Requirements (Construction), formerly the Davis Bacon Act.* When required by Federal program legislation, you must take the following actions with respect to each construction contract for more than $2,000 to be awarded using funding provided under this award:

a. Place in the solicitation under which the contract will be awarded a copy of the current prevailing wage determination issued by the Department of Labor;

b. Condition the decision to award the contract upon the contractor's acceptance of that prevailing wage determination;

c. Include in the contract the clauses specified at 29 CFR 5.5(a) in Department of Labor regulations (29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction'') to require the contractor's compliance with the Wage Rate Requirements (Construction), as amended (40 U.S.C. 3141–44, 3146, and 3147); and

d. Report all suspected or reported violations to the award administration office identified in this award.

9. *Fly America requirements.* In each contract under which funds provided under this award might be used to participate in costs of international air travel or transportation for people or property, you must include a clause to require the contractor to:

a. Comply with the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118, also known as the ''Fly America'' Act), as implemented by the General Services Administration at 41 CFR 301–10.131 through 301–10.143, which provides that U.S Government financed international air travel and transportation of personal effects or property must use a U.S. Flag air carrier or be performed under a cost sharing arrangement with a U.S. carrier, if such service is available; and

b. Include the requirements of the Fly America Act in all subcontracts that might involve international air transportation.

10. *Cargo preference for United States flag vessels.* In each contract under which equipment, material, or commodities may be shipped by oceangoing vessels, you must include the clause specified in Department of Transportation regulations at 46 CFR 381.7(b) to require that at least 50 percent of equipment, materials or commodities purchased or otherwise obtained with Federal funds under this award, and transported by ocean vessel, be transported on privately owned U.S. flag commercial vessels, if available.

[63 FR 12204, Mar. 12, 1998, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34998, June 26, 2007; 85 FR 51245, Aug. 19, 2020]

PART 37—TECHNOLOGY INVESTMENT AGREEMENTS

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APPENDIX A TO PART 37—WHAT IS THE CIVIL-MILITARY INTEGRATION POLICY THAT IS THE BASIS FOR TECHNOLOGY INVESTMENT AGREEMENTS?
APPENDIX B TO PART 37—WHAT TYPE OF INSTRUMENT IS A TIA AND WHAT STATUTORY AUTHORITIES DOES IT USE?
APPENDIX C TO PART 37—WHAT IS THE DESIRED COVERAGE FOR PERIODIC AUDITS OF FOR-PROFIT PARTICIPANTS TO BE AUDITED BY IPAS?
APPENDIX D TO PART 37—WHAT COMMON NATIONAL POLICY REQUIREMENTS MAY APPLY AND NEED TO BE INCLUDED IN TIAS?
APPENDIX E TO PART 37—WHAT PROVISIONS MAY A PARTICIPANT NEED TO INCLUDE WHEN PURCHASING GOODS OR SERVICES UNDER A TIA?

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

SOURCE: 68 FR 47160, Aug. 7, 2003, unless otherwise noted.

Subpart A—General

§ 37.100 What does this part do?

This part establishes uniform policies and procedures for the DoD Components' award and administration of technology investment agreements (TIAs).

§ 37.105 Does this part cover all types of instruments that 10 U.S.C. 2371 authorizes?

No, this part covers only TIAs, some of which use the authority of 10 U.S.C. 2371 (*see* appendix B to this part). This part does not cover assistance instruments other than TIAs that use the authority of 10 U.S.C. 2371. It also does not cover acquisition agreements for prototype projects that use 10 U.S.C. 2371 authority augmented by the authority in section 845 of Public Law 103–160, as amended.

§ 37.110 What type of instruments are technology investment agreements (TIAs)?

TIAs are assistance instruments used to stimulate or support research. As discussed in appendix B to this part, a TIA may be either a kind of cooperative agreement or a type of assistance transaction other than a grant or cooperative agreement.

§ 37.115 For what purposes are TIAs used?

The ultimate goal for using TIAs, like other assistance instruments used in defense research programs, is to foster the best technologies for future defense needs. TIAs differ from and complement other assistance instruments available to agreements officers, in that TIAs address the goal by fostering civil-military integration (*see* appendix

A to this part). TIAs therefore are designed to:

(a) Reduce barriers to commercial firms' participation in defense research, to give the Department of Defense (DoD) access to the broadest possible technology and industrial base.

(b) Promote new relationships among performers in both the defense and commercial sectors of that technology and industrial base.

(c) Stimulate performers to develop, use, and disseminate improved practices.

§ 37.120 Can my organization award or administer TIAs?

Your office may award or administer TIAs if it has a delegation of the authorities in 10 U.S.C. 2371, as well as 10 U.S.C. 2358. If your office is in a Military Department, it must have a delegation of the authority of the Secretary of that Military Department under those statutes. If your office is in a Defense Agency, it must have a delegation of the authority of the Secretary of Defense under 10 U.S.C. 2358 and 2371. Your office needs those authorities to be able to:

(a) Enter into cooperative agreements to stimulate or support research, using the authority of 10 U.S.C. 2358, as well as assistance transactions other than grants or cooperative agreements, using the authority of 10 U.S.C. 2371. The reason that both authorities are needed is that a TIA, depending upon its patent rights provision (*see* appendix B to this part), may be either a cooperative agreement or a type of assistance transaction other than a grant or cooperative agreement.

(b) Recover funds from a recipient and reuse the funds for program purposes, as authorized by 10 U.S.C. 2371 and described in § 37.580.

(c) Exempt certain information received from proposers from disclosure under the Freedom of Information Act, as authorized by 10 U.S.C. 2371 and described in § 37.420.

§ 37.125 May I award or administer TIAs if I am authorized to award or administer other assistance instruments?

(a) You must have specific authorization to award or administer TIAs. Being authorized to award or administer grants and cooperative agreements is not sufficient; a grants officer is an agreements officer only if the statement of appointment also authorizes the award or administration of TIAs.

(b) You receive that authorization in the same way that you receive authority to award other assistance instruments, as described in 32 CFR 21.425 and 21.435 through 21.445.

§ 37.130 Which other parts of the DoD Grant and Agreement Regulations apply to TIAs?

(a) TIAs are explicitly covered in this part and part 21 of the DoD Grant and Agreement Regulations (DoDGARs). Part 21 (32 CFR part 21) addresses deviation procedures and other general matters that relate to the DoDGARs, to DoD Components' authorities and responsibilities for assistance instruments, and to requirements for reporting information about assistance awards.

(b) Two additional parts of the DoDGARs apply to TIAs, although they do not mention TIAs explicitly. They are:

(1) Part 1125 (2 CFR part 1125) on nonprocurement debarment and suspension, which applies because it covers nonprocurement instruments in general;

(2) Part 26 (32 CFR part 26), on drug-free workplace requirements, which applies because it covers financial assistance in general; and

(3) Part 28 (32 CFR part 28), on lobbying restrictions, which applies by law (31 U.S.C. 1352) to TIAs that are cooperative agreements and as a matter of DoD policy to all other TIAs.

(c) Portions of other DoDGARs parts apply to TIAs only as cited by reference in this part.

[68 FR 47160, Aug. 7, 2003, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34999, June 26, 2007; 85 FR 51245, Aug. 19, 2020]

Subpart B—Appropriate Use of Technology Investment Agreements

§ 37.200 What are my responsibilities as an agreements officer for ensuring the appropriate use of TIAs?

You must ensure that you use TIAs only in appropriate situations. To do so, you must conclude that the use of a TIA is justified based on:

(a) The nature of the project, as discussed in § 37.205;

(b) The type of recipient, addressed in § 37.210;

(c) The recipient's commitment and cost sharing, as described in § 37.215;

(d) The degree of involvement of the Government program official, as discussed in § 37.220; and

(e) Your judgment that the use of a TIA could benefit defense research objectives in ways that likely would not happen if another type of assistance instrument were used. Your answers to the four questions in § 37.225 should be the basis for your judgment.

§ 37.205 What judgments must I make about the nature of the project?

You must:

(a) Conclude that the principal purpose of the project is stimulation or support of research (*i.e.*, assistance), rather than acquiring goods or services for the benefit of the Government (*i.e.*, acquisition);

(b) Decide that the basic, applied, or advanced research project is relevant to the policy objective of civil-military integration (*see* appendix A of this part); and

(c) Ensure that, to the maximum extent practicable, any TIA that uses the authority of 10 U.S.C. 2371 (*see* appendix B of this part) does not support research that duplicates other research being conducted under existing programs carried out by the Department of Defense. This is a statutory requirement of 10 U.S.C. 2371.

(d) When your TIA is a type of assistance transaction other than a grant or cooperative agreement, satisfy the condition in 10 U.S.C. 2371 to judge that the use of a standard grant or cooperative agreement for the research project is not feasible or appropriate. As discussed in appendix B to this part:

(1) This situation arises if your TIA includes a patent provision that is less restrictive than is possible under the Bayh-Dole statute (because the patent provision is what distinguishes a TIA that is a cooperative agreement from a TIA that is an assistance transaction other than a grant or cooperative agreement).

(2) You satisfy the requirement to judge that a standard cooperative agreement is not feasible or appropriate when you judge that execution of the research project warrants a less restrictive patent provision than is possible under Bayh-Dole.

§ 37.210 To what types of recipients may I award a TIA?

(a) As a matter of DoD policy, you may award a TIA only when one or more for-profit firms are to be involved either in the:

(1) Performance of the research project; or

(2) The commercial application of the research results. In that case, you must determine that the nonprofit performer has at least a tentative agreement with specific for-profit partners who plan on being involved when there are results to transition. You should review the agreement between the nonprofit and for-profit partners, because the for-profit partners' involvement is the basis for using a TIA rather than another type of assistance instrument.

(b) Consistent with the goals of civil-military integration, TIAs are most appropriate when one or more commercial firms (as defined at § 37.1250) are to be involved in the project.

(c) You are encouraged to make awards to consortia (a consortium may include one or more for-profit firms, as well as State or local government agencies, institutions of higher education, or other nonprofit organizations). The reasons are that:

(1) When multiple performers are participating as a consortium, they are more equal partners in the research performance than usually is the case with a prime recipient and subawards. All of them therefore are more likely to be directly involved in developing and revising plans for the research effort, reviewing technical progress, and overseeing financial and other business

matters. That feature makes consortia well suited to building new relationships among performers in the defense and commercial sectors of the technology and industrial base, a principal objective for the use of TIAs.

(2) In addition, interactions among the participants within a consortium potentially provide a self-governance mechanism. The potential for additional self-governance is particularly good when a consortium includes multiple for-profit participants that normally are competitors within an industry.

(d) TIAs also may be used for carrying out research performed by single firms or multiple performers in prime award-subaward relationships. In awarding TIAs in those cases, however, you should consider providing for greater involvement of the program official or a way to increase self-governance (*e.g.*, a prime award with multiple subawards arranged so as to give the subrecipients more insight into and authority and responsibility for programmatic and business aspects of the overall project than they usually have).

§ 37.215 What must I conclude about the recipient's commitment and cost sharing?

(a) You should judge that the recipient has a strong commitment to and self-interest in the success of the project. You should find evidence of that commitment and interest in the proposal, in the recipient's management plan, or through other means. A recipient's self-interest might be driven, for example, by a research project's potential for fostering technology to be incorporated into products and processes for the commercial marketplace.

(b) You must seek cost sharing. The purpose of cost share is to ensure that the recipient incurs real risk that gives it a vested interest in the project's success; the willingness to commit to meaningful cost sharing therefore is one good indicator of a recipient's self-interest. The requirements are that:

(1) To the maximum extent practicable, the non-Federal parties carrying out a research project under a TIA are to provide at least half of the costs of the project. Obtaining this cost sharing, to the maximum extent practicable, is a statutory condition for any TIA under the authority of 10 U.S.C. 2371, and is a matter of DoD policy for all other TIAs.

(2) The parties must provide the cost sharing from non-Federal resources that are available to them unless there is specific authority to use other Federal resources for that purpose (*see* § 37.530(f)).

(c) You may consider whether cost sharing is impracticable in a given case, unless there is a non-waivable, statutory requirement for cost sharing that applies to the particular program under which the award is to be made. Before deciding that cost sharing is impracticable, you should carefully consider whether there are other factors that demonstrate the recipient's self-interest in the success of the current project.

§ 37.220 How involved should the Government program official be in the project?

(a) TIAs are used to carry out cooperative relationships between the Federal Government and the recipient, which requires a greater level of involvement of the Government program official in the execution of the research than the usual oversight of a research grant or procurement contract. For example, program officials will participate in recipients' periodic reviews of research progress and will be substantially involved with the recipients in the resulting revisions of plans for future effort. That increased programmatic involvement before and during program execution with a TIA can reduce the need for some Federal financial requirements that are problematic for commercial firms.

(b) Some aspects of their involvement require program officials to have greater knowledge about and participation in business matters that traditionally would be your exclusive responsibility as the agreements officer. TIAs therefore also require closer cooperation between program officials and you, as the one who decides business matters.

§ 37.225 What judgment must I make about the benefits of using a TIA?

Before deciding that a TIA is appropriate, you also must judge that using a TIA could benefit defense research objectives in ways that likely would not happen if another type of assistance instrument were used (*e.g.*, a cooperative agreement subject to all of the requirements of 32 CFR part 34). You, in conjunction with Government program officials, must consider the questions in paragraphs (a) through (d) of this section, to help identify the benefits that may justify using a TIA and reducing some of the usual requirements. In accordance with § 37.1020, you must document your answers to these questions in the award file. Note that you must give full concise answers only to questions that relate to the benefits that you perceive for using the TIA, rather than another type of funding instrument, for the particular research project. A simple ''no'' or ''not applicable'' is a sufficient response for other questions. The questions are:

(a) Will the use of a TIA permit the involvement in the research of any commercial firms or business units of firms that would not otherwise participate in the project? If so:

(1) What are the expected benefits of those firms' or divisions' participation (e.g., is there a specific technology that could be better, more readily available, or less expensive)?

(2) Why would they not participate if an instrument other than a TIA were used? You should identify specific provisions of the TIA or features of the TIA award process that enable their participation.

(b) Will the use of a TIA allow the creation of new relationships among participants at the prime or subtier levels, among business units of the same firm, or between non-Federal participants and the Federal Government that will help the DoD get better technology in the future? If so:

(1) Why do these new relationships have the potential for helping the DoD get technology in the future that is better, more affordable, or more readily available?

(2) Are there provisions of the TIA or features of the TIA award process that enable these relationships to form? If so, you should be able to identify specifically what they are. If not, you should be able to explain specifically why you think that the relationships could not be created if an assistance instrument other than a TIA were used.

(c) Will the use of a TIA allow firms or business units of firms that traditionally accept Government awards to use new business practices in the execution of the research that will help us get better technology, help us get new technology more quickly or less expensively, or facilitate partnering with commercial firms? If so:

(1) What specific benefits will the DoD potentially get from the use of these new practices? You should be able to explain specifically why you foresee a potential for those benefits.

(2) Are there provisions of the TIA or features of the TIA award process that enable the use of the new practices? If so, you should be able to identify those provisions or features and explain why you think that the practices could not be used if the award were made using an assistance instrument other than a TIA.

(d) Are there any other benefits of the use of a TIA that could help the Department of Defense better meet its objectives in carrying out the research project? If so, you should be able to identify specifically what they are, how they can help meet defense objectives, what features of the TIA or award process enable the DoD to realize them, and why the benefits likely would not be realized if an assistance instrument other than a TIA were used.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51245, Aug. 19, 2020]

§ 37.230 May I use a TIA if a participant is to receive fee or profit?

In accordance with 32 CFR 22.205(b), you may not use a TIA if any participant is to receive fee or profit. Note that this policy extends to all performers of the research project carried out under the TIA, including any subawards for substantive program performance, but it does not preclude participants' or subrecipients' payment of reasonable fee or profit when making purchases from suppliers of goods (*e.g.*,

supplies and equipment) or services needed to carry out the research.

Subpart C—Expenditure-Based and Fixed-Support Technology Investment Agreements

§ 37.300 What is the difference between an expenditure-based and fixed-support TIA?

The fundamental difference between an expenditure-based and fixed-support TIA is that:

(a) For an expenditure-based TIA, the amounts of interim payments or the total amount ultimately paid to the recipient are based on the amounts the recipient expends on project costs. If a recipient completes the project specified at the time of award before it expends all of the agreed-upon Federal funding and recipient cost sharing, the Federal Government may recover its share of the unexpended balance of funds or, by mutual agreement with the recipient, amend the agreement to expand the scope of the research project. An expenditure-based TIA therefore is analogous to a cost-type procurement contract or grant.

(b) For a fixed-support TIA, the amount of assistance established at the time of award is not meant to be adjusted later if the research project is carried out to completion. In that sense, a fixed-support TIA is somewhat analogous to a fixed-price procurement contract (although ''price,'' a concept appropriate to a procurement contract for buying a good or service, is not appropriate for a TIA or other assistance instrument for stimulation or support of a project).

§ 37.305 When may I use a fixed-support TIA?

You may use a fixed-support TIA if:

(a) The agreement is to support or stimulate research with outcomes that are well defined, observable, and verifiable;

(b) You can reasonably estimate the resources required to achieve those outcomes well enough to ensure the desired level of cost sharing (*see* example in § 37.560(b)); and

(c) Your TIA does not require a specific amount or percentage of recipient cost sharing. In cases where the agreement does require a specific amount or percentage of cost sharing, a fixed-support TIA is not practicable because the agreement has to specify cost principles or standards for costs that may be charged to the project; require the recipient to track the costs of the project; and provide access for audit to allow verification of the recipient's compliance with the mandatory cost sharing. You therefore must use an expenditure-based TIA if you:

(1) Have a non-waivable requirement (*e.g.*, in statute) for a specific amount or percentage of recipient cost sharing; or

(2) Have otherwise elected to include in the TIA a requirement for a specific amount or percentage of cost sharing.

§ 37.310 When would I use an expenditure-based TIA?

In general, you must use an expenditure-based TIA under conditions other than those described in § 37.305. Reasons for any exceptions to this general rule must be documented in the award file and must be consistent with the policy in § 37.230 that precludes payment of fee or profit to participants.

§ 37.315 What are the advantages of using a fixed-support TIA?

In situations where the use of fixed-support TIAs is permissible (see §§ 37.305 and 37.310), their use may encourage some commercial firms' participation in the research. With a fixed-support TIA, you can eliminate or reduce some post-award requirements that sometimes are cited as disincentives for those firms to participate. For example, a fixed-support TIA need not:

(a) Specify minimum standards for the recipient's financial management system.

(b) Specify cost principles or standards stating the types of costs the recipient may charge to the project.

(c) Provide for financial audits by Federal auditors or independent public accountants of the recipient's books and records.

(d) Set minimum standards for the recipient's purchasing system.

(e) Require the recipient to prepare financial reports for submission to the Federal Government.

Subpart D—Competition Phase

§ 37.400 Must I use competitive procedures to award TIAs?

DoD policy is to award TIAs using merit-based, competitive procedures, as described in 32 CFR 22.315:

(a) In every case where required by statute; and

(b) To the maximum extent practicable in all other cases.

§ 37.405 What must my announcement or solicitation include?

Your announcement, to be considered as part of a competitive procedure, must include the basic information described in 32 CFR 22.315(a). Additional elements for you to consider in the case of a program that may use TIAs are described in §§ 37.410 through 37.420.

§ 37.410 Should my announcement or solicitation state that TIAs may be awarded?

Yes, once you consider the factors described in subpart B of this part and decide that TIAs are among the types of instruments that you may award pursuant to a solicitation, it is important for you to state that fact in the solicitation. You also should state that TIAs are more flexible than traditional Government funding instruments and that provisions are negotiable in areas such as audits and intellectual property rights that may cause concern for commercial firms. Doing so should increase the likelihood that commercial firms will be willing to submit proposals.

§ 37.415 Should I address cost sharing in the announcement or solicitation?

To help ensure a competitive process that is fair and equitable to all potential proposers, you should state clearly in the solicitation:

(a) That, to the maximum extent practicable, the non-Federal parties carrying out a research project under a TIA are to provide at least half of the costs of the project (see § 37.215(b)).

(b) The types of cost sharing that are acceptable;

(c) How any in-kind contributions will be valued, in accordance with §§ 37.530 through 37.555; and

(d) Whether you will give any consideration to alternative approaches a proposer may offer to demonstrate its strong commitment to and self-interest in the project's success, in accordance with § 37.215.

§ 37.420 Should I tell proposers that we will not disclose information that they submit?

Your solicitation should tell potential proposers that:

(a) For all TIAs, information described in paragraph (b) of this section is exempt from disclosure requirements of the Freedom of Information Act (FOIA)(codified at 5 U.S.C. 552) for a period of five years after the date on which the DoD Component receives the information from them.

(b) As provided in 10 U.S.C. 2371, disclosure is not required, and may not be compelled, under FOIA during that period if:

(1) A proposer submits the information in a competitive or noncompetitive process that could result in their receiving a cooperative agreement for basic, applied, or advanced research under the authority of 10 U.S.C. 2358 or any other type of transaction authorized by 10 U.S.C. 2371 (as explained in appendix B to this part, that includes all TIAs); and

(2) The type of information is among the following types that are exempt:

(i) Proposals, proposal abstracts, and supporting documents; and

(ii) Business plans and technical information submitted on a confidential basis.

(c) If proposers desire to protect business plans and technical information for five years from FOIA disclosure requirements, they must mark them with a legend identifying them as documents submitted on a confidential basis. After the five-year period, information may be protected for longer periods if it meets any of the criteria in 5 U.S.C. 552(b) (as implemented by the DoD in subpart C of 32 CFR part 286) for exemption from FOIA disclosure requirements.

Subpart E—Pre-Award Business Evaluation

§ 37.500 What must my pre-award business evaluation address?

(a) You must determine the qualification of the recipient, as described in §§ 37.510 and 37.515.

(b) As the business expert working with the program official, you also must address the financial aspects of the proposed agreement. You must:

(1) Determine that the total amount of funding for the proposed effort is reasonable, as addressed in § 37.520.

(2) Assess the value and determine the reasonableness of the recipient's proposed cost sharing contribution, as discussed in §§ 37.525 through 37.555.

(3) If you are contemplating the use of a fixed-support rather than expenditure-based TIA, ensure that its use is justified, as explained in §§ 37.560 and 37.565.

(4) Address issues of inconsistent cost accounting by traditional Government contractors, should they arise, as noted in § 37.570.

(5) Determine amounts for milestone payments, if you use them, as discussed in § 37.575.

§ 37.505 What resources are available to assist me during the pre-award business evaluation?

Administrative agreements officers of the Defense Contract Management Agency and the Office of Naval Research can share lessons learned from administering other TIAs. Program officials can be a source of information when you are determining the reasonableness of proposed funding (*e.g.*, on labor rates, as discussed in § 37.520) or establishing observable and verifiable technical milestones for payments (*see* § 37.575). Auditors at the Defense Contract Audit Agency can act in an advisory capacity to help you determine the reasonableness of proposed amounts, including values of in-kind contributions toward cost sharing.

RECIPIENT QUALIFICATION

§ 37.510 What are my responsibilities for determining that a recipient is qualified?

Prior to award of a TIA, your responsibilities for determining that the recipient is qualified are the same as those of a grants officer who is awarding a grant or cooperative agreement. Those responsibilities are described in subpart D of 32 CFR part 22. When the recipient is a consortium that is not formally incorporated, you have the additional responsibility described in § 37.515.

§ 37.515 Must I do anything additional to determine the qualification of a consortium?

(a) When the prospective recipient of a TIA is a consortium that is not formally incorporated, your determination that the recipient meets the standard at 32 CFR 22.415(a) requires that you, in consultation with legal counsel, review the management plan in the consortium's collaboration agreement. The purpose of your review is to ensure that the management plan is sound and that it adequately addresses the elements necessary for an effective working relationship among the consortium members. An effective working relationship is essential to increase the research project's chances of success.

(b) The collaboration agreement, commonly referred to as the articles of collaboration, is the document that sets out the rights and responsibilities of each consortium member. It binds the individual consortium members together, whereas the TIA binds the Government and the consortium as a group (or the Government and a consortium member on behalf of the consortium, as explained in § 37.1015). The document should discuss, among other things, the consortium's:

(1) Management structure.

(2) Method of making payments to consortium members.

(3) Means of ensuring and overseeing members' efforts on the project.

(4) Provisions for members' cost sharing contributions.

(5) Provisions for ownership and rights in intellectual property developed previously or under the agreement.

TOTAL FUNDING

§ 37.520 What is my responsibility for determining that the total project funding is reasonable?

In cooperation with the program official, you must assess the reasonableness of the total estimated budget to perform the research that will be supported by the agreement. Additional guidance follows for:

(a) *Labor.* Much of the budget likely will involve direct labor and associated indirect costs, which may be represented together as a ''loaded'' labor rate. The program official is an essential advisor on reasonableness of the overall level of effort and its composition by labor category. You also may rely on your experience with other awards as the basis for determining reasonableness. If you have any unresolved questions, two of the ways that you might find helpful in establishing reasonableness are to:

(1) Consult the administrative agreements officers or auditors identified in § 37.505.

(2) Compare loaded labor rates of for-profit firms that do not have expenditure-based Federal procurement contracts or assistance awards with a standard or average for the particular industry. Note that the program official may have knowledge about customary levels of direct labor charges in the particular industry that is involved. You may be able to compare associated indirect charges with Government-approved indirect cost rates that exist for many nonprofit and for-profit organizations that have Federal procurement contracts or assistance awards (note the requirement in § 37.630 for a for-profit participant to use Federally approved provisional indirect cost rates, if it has them).

(b) *Real property and equipment.* In almost all cases, the project costs may include only depreciation or use charges for real property and equipment of for-profit participants, in accordance with § 37.685. Remember that the budget for an expenditure-based TIA may not include depreciation of a participant's property as a direct cost of the project if that participant's practice is to charge the depreciation of that type of property as an indirect cost, as many organizations do.

COST SHARING

§ 37.525 What is my responsibility for determining the value and reasonableness of the recipient's cost sharing contribution?

You must:

(a) Determine that the recipient's cost sharing contributions meet the criteria for cost sharing and determine values for them, in accordance with §§ 37.530 through 37.555. In doing so, you must:

(1) Ensure that there are affirmative statements from any third parties identified as sources of cash contributions.

(2) Include in the award file an evaluation that documents how you determined the values of the recipient's contributions to the funding of the project.

(b) Judge that the recipient's cost sharing contribution, as a percentage of the total budget, is reasonable. To the maximum extent practicable, the recipient must provide at least half of the costs of the project, in accordance with § 37.215.

§ 37.530 What criteria do I use in deciding whether to accept a recipient's cost sharing?

You may accept any cash or in-kind contributions that meet all of the following criteria:

(a) In your judgment, they represent meaningful cost sharing that demonstrates the recipient's commitment to the success of the research project. Cash contributions clearly demonstrate commitment and they are strongly preferred over in-kind contributions.

(b) They are necessary and reasonable for accomplishment of the research project's objectives.

(c) They are costs that may be charged to the project under § 37.625 and § 37.635, as applicable to the participant making the contribution.

(d) They are verifiable from the recipient's records.

(e) They are not included as cost sharing contributions for any other Federal award.

(f) They are not paid by the Federal Government under another award, except:

(1) Costs that are authorized by Federal statute to be used for cost sharing; or

(2) Independent research and development (IR&D) costs, as described at 32 CFR 34.13(a)(5)(ii), that meet all of the criteria in paragraphs (a) through (e) of this section. IR&D is acceptable as cost sharing, even though it may be reimbursed by the Government through other awards. It is standard business practice for all for-profit firms, including commercial firms, to recover their research and development (R&D) costs (which for Federal procurement contracts is recovered as IR&D) through prices charged to their customers. Thus, the cost principles at 48 CFR part 31 allow a for-profit firm that has expenditure-based, Federal procurement contracts to recover through those procurement contracts the allocable portion of its R&D costs associated with a technology investment agreement.

§ 37.535 How do I value cost sharing related to real property or equipment?

You rarely should accept values for cost sharing contributions of real property or equipment that are in excess of depreciation or reasonable use charges, as discussed in § 37.685 for for-profit participants. You may accept the full value of a donated capital asset if the real property or equipment is to be dedicated to the project and you expect that it will have a fair market value that is less than $5,000 at the project's end. In those cases, you should value the donation at the lesser of:

(a) The value of the property as shown in the recipient's accounting records (*i.e.*, purchase price less accumulated depreciation); or

(b) The current fair market value. You may accept the use of any reasonable basis for determining the fair market value of the property. If there is a justification to do so, you may accept the current fair market value even if it exceeds the value in the recipient's records.

§ 37.540 May I accept fully depreciated real property or equipment as cost sharing?

You should limit the value of any contribution of a fully depreciated asset to a reasonable use charge. In determining what is reasonable, you must consider:

(a) The original cost of the asset;

(b) Its estimated remaining useful life at the time of your negotiations;

(c) The effect of any increased maintenance charges or decreased performance due to age; and

(d) The amount of depreciation that the participant previously charged to Federal awards.

§ 37.545 May I accept costs of prior research as cost sharing?

No, you may not count any participant's costs of prior research as a cost sharing contribution. Only the additional resources that the recipient will provide to carry out the current project (which may include pre-award costs for the current project, as described in § 37.830) are to be counted.

§ 37.550 May I accept intellectual property as cost sharing?

(a) In most instances, you should not count costs of patents and other intellectual property (*e.g.*, copyrighted material, including software) as cost sharing, because:

(1) It is difficult to assign values to these intangible contributions;

(2) Their value usually is a manifestation of prior research costs, which are not allowed as cost share under § 37.545; and

(3) Contributions of intellectual property rights generally do not represent the same cost of lost opportunity to a recipient as contributions of cash or tangible assets. The purpose of cost share is to ensure that the recipient incurs real risk that gives it a vested interest in the project's success.

(b) You may include costs associated with intellectual property if the costs are based on sound estimates of market value of the contribution. For example, a for-profit firm may offer the use of commercially available software for

which there is an established license fee for use of the product. The costs of the development of the software would not be a reasonable basis for valuing its use.

§ 37.555 How do I value a recipient's other contributions?

For types of participant contributions other than those addressed in §§ 37.535 through 37.550, the general rule is that you are to value each contribution consistently with the cost principles or standards in § 37.625 and § 37.635 that apply to the participant making the contribution. When valuing services and property donated by parties other than the participants, you may use as guidance the provisions of 32 CFR 34.13(b)(2) through (5).

Fixed-Support or Expenditure-Based Approach

§ 37.560 Must I be able to estimate project expenditures precisely in order to justify use of a fixed-support TIA?

(a) To use a fixed-support TIA, rather than an expenditure-based TIA, you must have confidence in your estimate of the expenditures required to achieve well-defined outcomes. Therefore, you must work carefully with program officials to select outcomes that, when the recipient achieves them, are reliable indicators of the amount of effort the recipient expended. However, your estimate of the required expenditures need not be a precise dollar amount, as illustrated by the example in paragraph (b) of this section, if:

(1) The recipient is contributing a substantial share of the costs of achieving the outcomes, which must meet the criteria in § 37.305(a); and

(2) You are confident that the costs of achieving the outcomes will be at least a minimum amount that you can specify and the recipient is willing to accept the possibility that its cost sharing percentage ultimately will be higher if the costs exceed that minimum amount.

(b) To illustrate the approach, consider a project for which you are confident that the recipient will have to expend at least $800,000 to achieve the specified outcomes. You must determine, in conjunction with program officials, the minimum level of recipient cost sharing that you want to negotiate, based on the circumstances, to demonstrate the recipient's commitment to the success of the project. For purposes of this illustration, let that minimum recipient cost sharing be 40% of the total project costs. In that case, the Federal share should be no more than 60% and you could set a fixed level of Federal support at $480,000 (60% of $800,000). With that fixed level of Federal support, the recipient would be responsible for the balance of the costs needed to complete the project.

(c) Note, however, that the level of recipient cost sharing you negotiate is to be based solely on the level needed to demonstrate the recipient's commitment. You may not use a shortage of Federal Government funding for the program as a reason to try to persuade a recipient to accept a fixed-support TIA, rather than an expenditure-based instrument, or to accept responsibility for a greater share of the total project costs than it otherwise is willing to offer. If you lack sufficient funding to provide an appropriate Federal Government share for the entire project, you instead should rescope the effort covered by the agreement to match the available funding.

§ 37.565 May I use a hybrid instrument that provides fixed support for only a portion of a project?

Yes, for a research project that is to be carried out by a number of participants, you may award a TIA that provides for some participants to perform under fixed-support arrangements and others to perform under expenditure-based arrangements. This approach may be useful, for example, if a commercial firm that is a participant will not accept an agreement with all of the post-award requirements of an expenditure-based award. Before using a fixed-support arrangement for that firm's portion of the project, you must judge that it meets the criteria in § 37.305.

ACCOUNTING, PAYMENTS, AND RECOVERY OF FUNDS

§ 37.570 What must I do if a CAS-covered participant accounts differently for its own and the Federal Government shares of project costs?

(a) If a participant has Federal procurement contracts that are subject to the Cost Accounting Standards (CAS) in part 30 of the Federal Acquisition Regulation (FAR) and the associated FAR Appendix (48 CFR part 30 and 48 CFR 9903.201–1, respectively), you must alert the participant during the preaward negotiations to the potential for a CAS violation, as well as the cognizant administrative contracting officer (ACO) for the participant's procurement contracts, if you learn that the participant plans to account differently for its own share and the Federal Government's share of project costs under the TIA. This may arise, for example, if a for-profit firm or other organization subject to the FAR cost principles in 48 CFR parts 31 and 231 proposes to charge:

(1) Its share of project costs as independent research and development (IR&D) costs to enable recovery of the costs through Federal Government procurement contracts, as allowed under the FAR cost principles; and

(2) The Federal Government's share to the project, rather than as IR&D costs.

(b) The reason for alerting the participant and the ACO is that the inconsistent charging of the two shares could cause a noncompliance with Cost Accounting Standard (CAS) 402. Noncompliance with CAS 402 is a potential issue only for a participant that has CAS-covered Federal procurement contracts (note that CAS requirements do not apply to a for-profit participant's TIAs).

(c) For for-profit participants with CAS-covered procurement contracts, the cognizant ACO in most cases will be an individual within the Defense Contract Management Agency (DCMA). You can identify a cognizant ACO at the DCMA by querying the contract administration team locator that matches contractors with their ACOs (currently on the World Wide Web at *http://alerts.dcmdw.dcma.mil/support*, a site that also can be accessed through the DCMA home page at *http://www.dcma.mil).*

§ 37.575 What are my responsibilities for determining milestone payment amounts?

(a) If you select the milestone payment method (*see* § 37.805), you must assess the reasonableness of the estimated amount for reaching each milestone. This assessment enables you to set the amount of each milestone payment to approximate the Federal share of the anticipated resource needs for carrying out that phase of the research effort.

(b) The Federal share at each milestone need not be the same as the Federal share of the total project. For example, you might deliberately set payment amounts with a larger Federal share for early milestones if a project involves a start-up company with limited resources.

(c) For an expenditure-based TIA, if you have minimum percentages that you want the recipient's cost sharing to be at the milestones, you should indicate those percentages in the agreement or in separate instructions to the post-award administrative agreements officer. That will help the administrative agreements officer decide when a project's expenditures have fallen too far below the original projections, requiring adjustments of future milestone payment amounts (*see* § 37.1105(c)).

(d) For fixed-support TIAs, the milestone payments should be associated with the well-defined, observable and verifiable technical outcomes (*e.g.*, demonstrations, tests, or data analysis) that you establish for the project in accordance with §§ 37.305(a) and 37.560(a).

§ 37.580 What is recovery of funds and when should I consider including it in my TIA?

(a) Recovery of funds refers to the use of the authority in 10 U.S.C. 2371 to include a provision in certain types of agreements, including TIAs, that require a recipient to make payments to the Department of Defense or another Federal agency as a condition of the agreement. Recovery of funds is a good

tool in the right circumstances, at the discretion of the agreements officer and the awarding organization, but its purpose is not to augment program budgets. It may be used to recover funds provided to a recipient through a TIA or another Federal procurement or assistance instrument, and the recovery should not exceed the amounts provided. Recovery of funds is distinct from program income, as described in § 37.835.

(b) In accordance with 10 U.S.C. 2371, as implemented by policy guidance from the Office of the Under Secretary of Defense (Comptroller), the payment amounts may be credited to an existing account of the Department of Defense and used for the same program purposes as other funds in that account.

(c) Before you use the authority to include a provision for recovery of funds, note that 10 U.S.C. 2371 requires you to judge that it would not be feasible or appropriate to use for the research project a standard grant or cooperative agreement (in this instance, a ''standard cooperative agreement'' means a cooperative agreement without a provision for recovery of funds). You satisfy that 10 U.S.C. 2371 requirement when you judge that execution of the research project warrants inclusion of a provision for recovery of funds.

Subpart F—Award Terms Affecting Participants' Financial, Property, and Purchasing Systems

§ 37.600 Which administrative matters are covered in this subpart?

This subpart addresses ''systemic'' administrative matters that place requirements on the operation of a participant's financial management, property management, or purchasing system. Each participant's systems are organization-wide and do not vary with each agreement. Therefore, all TIAs should address systemic requirements in a uniform way for each type of participant organization.

§ 37.605 What is the general policy on participants' financial, property, and purchasing systems?

The general policy for expenditure-based TIAs is to avoid requirements that would force participants to use different financial management, property management, and purchasing systems than they currently use for:

(a) Expenditure-based Federal procurement contracts and assistance awards in general, if they receive them; or

(b) Commercial business, if they have no expenditure-based Federal procurement contracts and assistance awards.

§ 37.610 Must I tell participants what requirements they are to flow down for subrecipients' systems?

If it is an expenditure-based award, your TIA must require participants to flow down the same financial management, property management, and purchasing systems requirements to a subrecipient that would apply if the subrecipient were a participant. For example, a for-profit participant would flow down to a university subrecipient the requirements that apply to a university participant. Note that this policy applies to subawards for substantive performance of portions of the research project supported by the TIA, and not to participants' purchases of goods or services needed to carry out the research.

Financial Matters

§ 37.615 What standards do I include for financial systems of for-profit firms?

(a) To avoid causing needless changes in participants' financial management systems, your expenditure-based TIAs will make for-profit participants that currently perform under other expenditure-based Federal procurement contracts or assistance awards subject to the same standards for financial management systems that apply to those other awards. Therefore, if a for-profit participant has expenditure-based DoD assistance awards other than TIAs, your TIAs are to apply the standards in 32 CFR 34.11. You may grant an exception and allow a for-profit participant that has other expenditure-based Federal Government awards to use an alternative set of standards that meets the minimum criteria in paragraph (b) of this section, if there is a compelling programmatic or business reason to do so. For each case in which you grant an

exception, you must document the reason in the award file.

(b) For an expenditure-based TIA, you are to allow and encourage each for-profit participant that does not currently perform under expenditure-based Federal procurement contracts or assistance awards (other than TIAs) to use its existing financial management system as long as the system, as a minimum:

(1) Complies with Generally Accepted Accounting Principles.

(2) Effectively controls all project funds, including Federal funds and any required cost share. The system must have complete, accurate, and current records that document the sources of funds and the purposes for which they are disbursed. It also must have procedures for ensuring that project funds are used only for purposes permitted by the agreement (*see* § 37.625).

(3) Includes, if advance payments are authorized under § 37.805, procedures to minimize the time elapsing between the payment of funds by the Government and the firm's disbursement of the funds for program purposes.

§ 37.620 What financial management standards do I include for participants that are nonprofit?

So as not to force system changes for any State, local government, institution of higher education, or other nonprofit organization, your expenditure-based TIA's requirements for the financial management system of any nonprofit participant are the same as those that apply to the participant's other Federal assistance awards.

[85 FR 51245, Aug. 19, 2020]

§ 37.625 What cost principles or standards do I require for for-profit participants?

(a) So as not to require any firm to needlessly change its cost-accounting system, your expenditure-based TIAs are to apply the Government cost principles in 48 CFR parts 31 and 231 to for-profit participants that currently perform under expenditure-based Federal procurement contracts or assistance awards (other than TIAs) and therefore have existing systems for identifying allowable costs under those principles. If there are programmatic or business reasons to do otherwise, you may grant an exception from this requirement and use alternative standards as long as the alternative satisfies the conditions described in paragraph (b) of this section; if you do so, you must document the reasons in your award file.

(b) For other for-profit participants, you may establish alternative standards in the agreement as long as that alternative provides, as a minimum, that Federal funds and funds counted as recipients' cost sharing will be used only for costs that:

(1) A reasonable and prudent person would incur in carrying out the research project contemplated by the agreement. Generally, elements of cost that appropriately are charged are those identified with research and development activities under the Generally Accepted Accounting Principles (see Statement of Financial Accounting Standards Number 2, ''Accounting for Research and Development Costs,'' October 1974[1]). Moreover, costs must be allocated to DoD and other projects in accordance with the relative benefits the projects receive. Costs charged to DoD projects must be given consistent treatment with costs allocated to the participants' other research and development activities (*e.g.*, activities supported by the participants themselves or by non-Federal sponsors).

(2) Are consistent with the purposes stated in the governing Congressional authorizations and appropriations. You are responsible for ensuring that provisions in the award document address any requirements that result from authorizations and appropriations.

§ 37.630 Must I require a for-profit firm to use Federally approved indirect cost rates?

In accordance with the general policy in § 37.605, you must require a for-profit participant that has Federally approved indirect cost rates for its Federal procurement contracts to use those rates to accumulate and report costs under an expenditure-based TIA.

[1] Copies may be obtained from the Financial Accounting Standards Board (FASB), 401 Merritt 7, P.O. Box 5116, Norwalk, CT 06856–5116. Information about ordering also may be found at the Internet site *http://www.fasb.org* or by telephoning the FASB at (800) 748–0659.

This includes both provisional and final rates that are approved up until the time that the TIA is closed out. You may grant an exception from this requirement if there are programmatic or business reasons to do otherwise (*e.g.*, the participant offers you a lower rate). If you grant an exception, the participant must accumulate and report the costs using an accounting system and practices that it uses for other customers (*e.g.*, its commercial customers). Also, you must document the reason for the exception in your award file.

§ 37.635 What cost principles do I require a nonprofit participant to use?

So as not to force financial system changes for any nonprofit participant, your expenditure-based TIA will provide that costs to be charged to the research project by any nonprofit participant must be determined to be allowable in accordance with:

(a) Subpart E of OMB guidance in 2 CFR part 200, if the participant is a State, local government, Indian tribe, institution of higher education, or nonprofit organization. In conformance with 2 CFR 200.401(c) of that OMB guidance, a nonprofit organization listed in appendix VIII to 2 CFR part 200 is subject to the cost principles in the Federal Acquisition Regulation (48 CFR subpart 31.2) and Defense Federal Acquisition Regulation Supplement (48 CFR subpart 231.2).

(b) The cost principles identified in appendix IX to the OMB guidance in 2 CFR part 200 (see 45 CFR part 75), if the participant is a hospital.

[85 FR 51245, Aug. 19, 2020]

§ 37.640 Must I include a provision for audits of for-profit participants?

If your TIA is an expenditure-based award, you must include in it an audit provision that addresses, for each for-profit participant:

(a) Whether the for-profit participant must have periodic audits, in addition to any award-specific audits, as described in § 37.645. Note that the DCAA or the Office of the Inspector General, DoD (OIG, DoD), can provide advice on the types and scope of audits that may be needed in various circumstances.

(b) Whether the DCAA or an independent public accountant (IPA) will perform required audits, as discussed in § 37.650.

(c) How frequently any periodic audits are to be performed, addressed in § 37.655.

(d) Other matters described in § 37.660, such as audit coverage, allowability of audit costs, auditing standards, and remedies for noncompliance.

§ 37.645 Must I require periodic audits, as well as award-specific audits, of for-profit participants?

You need to consider requirements for both periodic audits and award-specific audits (as defined in § 37.1325 and § 37.1235, respectively). The way that your expenditure-based TIA addresses the two types of audits will vary, depending upon the type of for-profit participant.

(a) For for-profit participants that are audited by the DCAA or other Federal auditors, as described in §§ 37.650(b) and 37.655, you need not add specific requirements for periodic audits because the Federal audits should be sufficient to address whatever may be needed. Your inclusion in the TIA of the standard access-to-records provision for those for-profit participants, as discussed in § 37.915(a), gives the necessary access in the event that you or administrative agreements officers later need to request audits to address award-specific issues that arise.

(b) For each other for-profit participant, you:

(1) Should require that the participant have an independent auditor (*i.e.*, the DCAA or an independent public accountant) conduct periodic audits of its systems if it expends $750,000 or more per year in TIAs and other Federal assistance awards. A prime reason for including this requirement is that the Federal Government, for an expenditure-based award, necessarily relies on amounts reported by the participant's systems when it sets payment amounts or adjusts performance outcomes. The periodic audit provides some assurance that the reported amounts are reliable.

(2) Must ensure that the award provides an independent auditor the access needed for award-specific audits, to be

performed at the request of the cognizant administrative agreements officer if issues arise that require audit support. However, consistent with the government-wide policies on single audits that apply to nonprofit participants (see § 37.665), you should rely on periodic audits to the maximum extent possible to resolve any award-specific issues.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51246, Aug. 19, 2020]

§ 37.650 Who must I identify as the auditor for a for-profit participant?

The auditor that you will identify in the expenditure-based TIA to perform periodic and award-specific audits of a for-profit participant depends on the circumstances, as follows:

(a) You may provide that an IPA will be the auditor for a for-profit participant that does not meet the criteria in paragraph (b) of this section, but only if the participant will not agree to give the DCAA access to the necessary books and records for audit purposes. Note that the allocable portion of the costs of the IPA's audit may be reimbursable under the TIA, as described in § 37.660(b). The IPA should be the one that the participant uses to perform other audits (*e.g.*, of its financial statement), to minimize added burdens and costs. You must document in the award file the participant's unwillingness to give the DCAA access. The DCAA is to be the auditor if the participant grants the necessary access.

(b) Except as provided in paragraph (c) of this section, you must identify the DCAA as the auditor for any for-profit participant that is subject to DCAA audits because it is currently performing under a Federal award that is subject to the:

(1) Cost principles in 48 CFR part 31 of the Federal Acquisition Regulation (FAR) and 48 CFR part 231 of the Defense FAR Supplement; or

(2) Cost Accounting Standards in 48 CFR chapter 99.

(c) If there are programmatic or business reasons that justify the use of an auditor other than the DCAA for a for-profit participant that meets the criteria in paragraph (b) of this section, you may provide that an IPA will be the auditor for that participant if you obtain prior approval from the Office of the Inspector General, DoD. You must submit requests for prior approval to the Assistant Inspector General (Auditing), 4800 Mark Center Drive, Alexandria, VA 22350–1500. Your request must include the name and address of the business unit(s) for which IPAs will be used. It also must explain why you judge that the participant will not give the DCAA the necessary access to records for audit purposes (*e.g.*, you may submit a statement to that effect from the participant). The OIG, DoD, will respond within five working days of receiving the request for prior approval, either by notifying you of the decision (approval or disapproval) or giving you a date by which they will notify you of the decision.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51246, Aug. 19, 2020]

§ 37.655 Must I specify the frequency of IPAs' periodic audits of for-profit participants?

If your expenditure-based TIA provides for periodic audits of a for-profit participant by an IPA, you must specify the frequency for those audits. You should consider having an audit performed during the first year of the award, when the participant has its IPA do its next financial statement audit, unless the participant already had a systems audit due to other Federal awards within the past two years. The frequency thereafter may vary depending upon the dollars the participant is expending annually under the award, but it is not unreasonable to require an updated audit every two to three years to reverify that the participant's systems are reliable (the audit then would cover the two or three-year period between audits). The DCAA is a source of advice on audit frequencies if your TIA provides for audits by IPAs.

§ 37.660 What else must I specify concerning audits of for-profit participants by IPAs?

If your expenditure-based TIA provides for audits of a for-profit participant by an IPA, you also must specify:

(a) What periodic audits are to cover. It is important that you specify audit coverage that is only as broad as needed to provide reasonable assurance of

the participant's compliance with award terms that have a direct and material effect on the research project. Appendix C to this part provides guidance to for-profit participants and their IPAs that you may use for this purpose. The DCAA and the OIG, DoD, also can provide advice to help you set appropriate limits on audit objectives and scope.

(b) Who will pay for periodic and award-specific audits. The allocable portion of the costs of any audits by IPAs may be reimbursable under the TIA. The costs may be direct charges or allocated indirect costs, consistent with the participant's accounting system and practices.

(c) The auditing standards that the IPA will use. Unless you receive prior approval from the OIG, DoD, to do otherwise, you must provide that the IPA will perform the audits in accordance with the Generally Accepted Government Auditing Standards.[2]

(d) The available remedies for noncompliance. The agreement must provide that the participant may not charge costs to the award for any audit that the agreements officer, with the advice of the OIG, DoD, determines was not performed in accordance with the Generally Accepted Government Auditing Standards or other terms of the agreement. It also must provide that the Government has the right to require the participant to have the IPA take corrective action and, if corrective action is not taken, that the agreements officer has recourse to any of the remedies for noncompliance identified in 32 CFR 34.52(a).

(e) The remedy if it later is found that the participant, at the time it entered into the TIA, was performing on a procurement contract or other Federal award subject to the Cost Accounting Standards at 48 CFR part 30 and the cost principles at 48 CFR part 31. Unless the OIG, DoD, approves an exception (see § 37.650(c)), the TIA's terms must provide that the DCAA will perform the audits for the agreement if it later is found that the participant, at the time the TIA was awarded, was performing under awards described in § 37.650(b) that gave the DCAA audit access to the participant's books and records.

(f) Where the IPA is to send audit reports. The agreement must provide that the IPA is to submit audit reports to the administrative agreements officer and the OIG, DoD. It also must require that the IPA report instances of fraud directly to the OIG, DoD.

(g) The retention period for the IPA's working papers. You must specify that the IPA is to retain working papers for a period of at least three years after the final payment, unless the working papers relate to an audit whose findings are not fully resolved within that period or to an unresolved claim or dispute (in which case, the IPA must keep the working papers until the matter is resolved and final action taken).

(h) Who will have access to the IPA's working papers. The agreement must provide for Government access to working papers.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51246, Aug. 19, 2020]

§ 37.665 Must I require nonprofit participants to have periodic audits?

Yes, expenditure-based TIAs are assistance instruments subject to the Single Audit Act (31 U.S.C. 7501–7507), so nonprofit participants are subject to their usual requirements under that Act, as implemented by subpart F of 2 CFR part 200. Specifically, the requirements are the same as those in subpart E of 2 CFR part 1128 for grants and cooperative agreements to institutions of higher education, nonprofit organizations, States, local governments, and Indian tribes. Note that those requirements also apply to Federally Funded Research and Development Centers (FFRDCs) and other Government-owned, Contractor-Operated (GOCO) facilities administered by nonprofit organizations, because nonprofit FFRDCs and GOCOs are subject to the Single Audit Act.

[85 FR 51246, Aug. 19, 2020]

[2] The electronic document may be accessed at *www.gao.gov*. Printed copies may be purchased from the U.S. Government Printing Office; for ordering information, call (202) 512–1800 or access the Internet site at *www.gpo.gov*.

§ 37.670 Must I require participants to flow down audit requirements to subrecipients?

(a) Yes, in accordance with § 37.610, your expenditure-based TIA must require participants to flow down the same audit requirements to a subrecipient that would apply if the subrecipient were a participant.

(b) For example, a for-profit participant that is audited by the DCAA:

(1) Would flow down to a university subrecipient the Single Audit Act requirements that apply to a university participant.

(2) Could enter into a subaward allowing a for-profit participant, under the circumstances described in § 37.650(a), to use an IPA to do its audits.

(c) This policy applies to subawards for substantive performance of portions of the research project supported by the TIA, and not to participants' purchases of goods or services needed to carry out the research.

PROPERTY

§ 37.685 May I allow for-profit firms to purchase real property and equipment with project funds?

(a) With the two exceptions described in paragraph (b) of this section, you must require a for-profit firm to purchase real property or equipment with its own funds that are separate from the research project. You should allow the firm to charge to an expenditure-based TIA only depreciation or use charges for real property or equipment (and your cost estimate for a fixed-support TIA only would include those costs). Note that the firm must charge depreciation consistently with its usual accounting practice. Many firms treat depreciation as an indirect cost. Any firm that usually charges depreciation indirectly for a particular type of property must not charge depreciation for that property as a direct cost to the TIA.

(b) In two situations, you may grant an exception and allow a for-profit firm to use project funds, which includes both the Federal Government and recipient shares, to purchase real property or equipment (*i.e.*, to charge to the project the full acquisition cost of the property). The two circumstances, which should be infrequent for equipment and extremely rare for real property, are those in which you either:

(1) Judge that the real property or equipment will be dedicated to the project and have a current fair market value that is less than $5,000 by the time the project ends; or

(2) Give prior approval for the firm to include the full acquisition cost of the real property or equipment as part of the cost of the project (see § 37.535).

(c) If you grant an exception in either of the circumstances described in paragraphs (b)(1) and (2) of this section, you must make the real property or equipment subject to the property management standards in 32 CFR 34.21(b) through (d). As provided in those standards, the title to the real property or equipment will vest conditionally in the for-profit firm upon acquisition. Your TIA, whether it is a fixed-support or expenditure-based award, must specify that any item of equipment that has a fair market value of $5,000 or more at the conclusion of the project also will be subject to the disposition process in 32 CFR 34.21(e), whereby the Federal Government will recover its interest in the property at that time.

§ 37.690 How are nonprofit participants to manage real property and equipment?

For nonprofit participants, your TIA's requirements for vesting of title, use, management, and disposition of real property or equipment acquired under the award are the same as those that apply to the participant's other Federal assistance awards.

[85 FR 51246, Aug. 19, 2020]

§ 37.695 What are the requirements for Federally owned property?

If you provide Federally owned property to any participant for the performance of research under a TIA, you must require that participant to account for, use, and dispose of the property in accordance with:

(a) 32 CFR 34.22, if the participant is a for-profit firm.

(b) The requirements that apply to the participant's other Federal awards, if it is an entity other than a for-profit

firm. If the other Federal awards of a participant that is a GOCO or FFRDC administered by a nonprofit organization are procurement contracts, it is appropriate for you to specify the same property standards that apply to those Federal procurement contracts.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51246, Aug. 19, 2020]

§ 37.700 What are the requirements for supplies?

Your expenditure-based TIA's provisions should permit participants to use their existing procedures to account for and manage supplies. A fixed-support TIA should not include requirements to account for or manage supplies.

PURCHASING

§ 37.705 What standards do I include for purchasing systems of for-profit firms?

(a) If your TIA is an expenditure-based award, it should require for-profit participants that currently perform under DoD assistance instruments subject to the purchasing standards in 32 CFR 34.31 to use the same requirements for TIAs, unless there are programmatic or business reasons to do otherwise (in which case you must document the reasons in the award file).

(b) You should allow other for-profit participants under expenditure-based TIAs to use their existing purchasing systems, as long as they flow down the applicable requirements in Federal statutes, Executive orders or Governmentwide regulations (see appendix E to this part for a list of those requirements).

(c) If your TIA is a fixed-support award, you need only require for-profit participants to flow down the requirements listed in appendix F to this part.

§ 37.710 What standards do I include for purchasing systems of nonprofit organizations?

(a) So as not to force system changes for any nonprofit participant, your expenditure-based TIA will provide that each nonprofit participant's purchasing system comply with standards that conform as much as practicable with requirements that apply to the participant's other Federal awards.

(b) If your TIA is a fixed-support award, you need only require nonprofit participants to flow down the requirements listed in appendix E to this part.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51246, Aug. 19, 2020]

Subpart G—Award Terms Related to Other Administrative Matters

§ 37.800 Which administrative matters are covered in this subpart?

This subpart addresses ''non-systemic'' administrative matters that do not impose organization-wide requirements on a participant's financial management, property management, or purchasing system. Because an organization does not have to redesign its systems to accommodate award-to-award variations in these requirements, a TIA that you award may differ from other TIAs in the non-systemic requirements that it specifies for a given participant, based on the circumstances of the particular research project. To eliminate needless administrative complexity, you should handle some non-systemic requirements, such as the payment method, in a uniform way for the agreement as a whole.

PAYMENTS

§ 37.805 If I am awarding a TIA, what payment methods may I specify?

Your TIA may provide for:

(a) *Reimbursement*, as described in 32 CFR 34.12(a)(1), if it is an expenditure-based award.

(b) *Advance payments*, as described in 32 CFR 34.12(a)(2), subject to the conditions in 32 CFR 34.12(b)(2)(i) through (iii).

(c) *Payments based on payable milestones.* These are payments made according to a schedule that is based on predetermined measures of technical progress or other payable milestones. This approach relies upon the fact that, as research progresses throughout the term of the agreement, observable activity will be taking place. The recipient is paid upon the accomplishment of the predetermined measure of progress. Fixed-support TIAs must use

this payment method and each measure of progress appropriately would be one of the well-defined outcomes that you identify in the agreement (this does not preclude use of an initial advance payment, if there is no alternative to meeting immediate cash needs). There are cash management considerations when this payment method is used as a means of financing for an expenditure-based TIA (*see* § 37.575 and § 37.1105).

§ 37.810 What should my TIA's provisions specify for the method and frequency of recipients' payment requests?

The procedure and frequency for payment requests depend upon the payment method, as follows:

(a) For either reimbursements or advance payments, your TIA must allow recipients to submit requests for payment at least monthly. You may authorize the recipients to use the forms or formats described in 32 CFR 34.12(d).

(b) If the payments are based on payable milestones, the recipient will submit a report or other evidence of accomplishment to the program official at the completion of each predetermined activity. The agreement administrator may approve payment to the recipient after receiving validation from the program manager that the milestone was successfully reached.

§ 37.815 May the Government withhold payments?

Your TIA must provide that the administrative agreements officer may withhold payments in the circumstances described in 32 CFR 34.12(g), but not otherwise.

§ 37.820 Must I require a recipient to return interest on advance payments?

If your expenditure-based TIA provides for either advance payments or payable milestones, the agreement must require the recipient to:

(a) Maintain in an interest-bearing account any advance payments or milestone payment amounts received in advance of needs to disburse the funds for program purposes unless:

(1) The recipient receives less than $120,000 in Federal grants, cooperative agreements, and TIAs per year;

(2) The best reasonably available interest-bearing account would not be expected to earn interest in excess of $1,000 per year on the advance or milestone payments; or

(3) The depository would require an average or minimum balance so high that it would not be feasible within the expected Federal and non-Federal cash resources for the project.

(b) Remit annually the interest earned to the administrative agreements officer.

Revision of Budget and Program Plans

§ 37.825 Must I require the recipient to obtain prior approval from the Government for changes in plans?

If it is an expenditure-based award, your agreement must require the recipient to obtain the agreement administrator's prior approval if there is to be a change in plans that results in a need for additional Federal funding (this is unnecessary for a fixed-support TIA because the recipient is responsible for additional costs of achieving the outcomes). Other than that, the program official's substantial involvement in the project should ensure that the Government has advance notice of changes in plans.

§ 37.830 May I let a recipient charge pre-award costs to the agreement?

Pre-award costs, as long as they are otherwise allowable costs of the project, may be charged to an expenditure-based TIA only with the specific approval of the agreements officer. All pre-award costs are incurred at the recipient's risk (*i.e.*, no DoD Component is obligated to reimburse the costs if for any reason the recipient does not receive an award or if the award is less than anticipated and inadequate to cover the costs).

Program Income

§ 37.835 What requirements do I include for program income?

Your TIA should apply the standards of 32 CFR 34.14 for program income that may be generated. Note the need to specify whether the recipient is to have any obligation to the Federal Government with respect to program

income generated after the end of the project period (the period, as established in the award document, during which Federal support is provided). Doing so is especially important if the TIA includes a provision for the recipient to return any amounts to the Federal Government (see § 37.580).

INTELLECTUAL PROPERTY

§ 37.840 What general approach should I take in negotiating data and patent rights?

(a) You should confer with program officials and legal counsel to develop an overall strategy for intellectual property that takes into account inventions and data that may result from the project and future needs the Government may have for rights in them. The strategy should take into account any intellectual property the Government is furnishing and any pre-existing proprietary information that the recipient is furnishing, as well as data and inventions that may be generated under the award (recognizing that new data and inventions may be less valuable without pre-existing information). All pre-existing intellectual property, both the Government's and the recipient's, should be marked to give notice of its status.

(b) Because TIAs entail substantial cost sharing by recipients, you must use discretion in negotiating Government rights to data and patentable inventions resulting from research under the agreements. The considerations in §§ 37.845 through 37.875 are intended to serve as guidelines, within which you necessarily have considerable latitude to negotiate provisions appropriate to a wide variety of circumstances that may arise. Your goal should be a good balance between DoD interests in:

(1) Gaining access to the best technologies for defense needs, including technologies available in the commercial marketplace, and promoting commercialization of technologies resulting from the research. Either of these interests may be impeded if you negotiate excessive rights for the Government. One objective of TIAs is to help incorporate defense requirements into the development of what ultimately will be commercially available technologies, an objective that is best served by reducing barriers to commercial firms' participation in the research. In that way, the commercial technology and industrial base can be a source of readily available, reliable, and affordable components, subsystems, computer software, and other technological products and manufacturing processes for military systems.

(2) Providing adequate protection of the Government's investment, which may be weakened if the Government's rights are inadequate. You should consider whether the Government may require access to data or inventions for Governmental purposes, such as a need to develop defense-unique products or processes that the commercial marketplace likely will not address.

§ 37.845 What data rights should I obtain?

(a) You should seek to obtain what you, with the advice of legal counsel, judge is needed to ensure future Government use of technology that emerges from the research, as long as doing so is consistent with the balance between DoD interests described in § 37.840(b). You should consider data in which you wish to obtain license rights and data that you may wish to be delivered; since TIAs are assistance instruments rather than acquisition instruments, however, it is not expected that data would be delivered in most cases. What generally is needed is an irrevocable, world-wide license for the Government to use, modify, reproduce, release, or disclose for Governmental purposes the data that are generated under TIAs (including any data, such as computer software, in which a recipient may obtain a copyright). A Governmental purpose is any activity in which the United States Government participates, but a license for Governmental purposes does not include the right to use, or have or permit others to use, modify, reproduce, release, or disclose data for commercial purposes.

(b) You may negotiate licenses of different scope than described in paragraph (a) of this section when necessary to accomplish program objectives or to protect the Government's interests. Consult with legal counsel

before negotiating a license of different scope.

(c) In negotiating data rights, you should consider the rights in background data that are necessary to fully utilize technology that is expected to result from the TIA, in the event the recipient does not commercialize the technology or chooses to protect any invention as a trade secret rather than by a patent. If a recipient intends to protect any invention as a trade secret, you should consult with your intellectual property counsel before deciding what information related to the invention the award should require the recipient to report.

§ 37.850 Should I require recipients to mark data?

To protect the recipient's interests in data, your TIA should require the recipient to mark any particular data that it wishes to protect from disclosure with a legend identifying the data as licensed data subject to use, release, or disclosure restrictions.

§ 37.855 How should I handle protected data?

Prior to releasing or disclosing data marked with a restrictive legend (as described in § 37.850) to third parties, you should require those parties to agree in writing that they will:

(a) Use the data only for governmental purposes; and

(b) Not release or disclose the data without the permission of the licensor (*i.e.*, the recipient).

§ 37.860 What rights should I obtain for inventions?

(a) You should negotiate rights in inventions that represent a good balance between the Government's interests (*see* § 37.840(b)) and the recipient's interests. As explained in appendix B to this part:

(1) You have the flexibility to negotiate patent rights provisions that vary from what the Bayh-Dole statute (Chapter 18 of Title 35, U.S.C.) requires in many situations. You have that flexibility because TIAs include not only cooperative agreements, but also assistance transactions other than grants or cooperative agreements.

(2) Your TIA becomes an assistance instrument other than a grant or cooperative agreement if its patent rights provision varies from what Bayh-Dole requires in your situation. However, you need not consider that difference in the type of transaction until the agreement is finalized, and it should not affect the provision you negotiate.

(b) As long as it is consistent with the balance between DoD interests described in § 37.840(b) and the recipient's interests, you should seek to obtain for the Government, when an invention is conceived or first actually reduced to practice under a TIA, a nonexclusive, nontransferrable, irrevocable, paid-up license to practice the invention, or to have it practiced, for or on behalf of the United States throughout the world. The license is for Governmental purposes, and does not include the right to practice the invention for commercial purposes.

(c) To provide for the license described in paragraph (b) of this section, your TIA generally would include the patent-rights clause that 37 CFR 401.14 specifies to implement the Bayh-Dole statute's requirements. Note that:

(1) The clause is designed specifically for grants, contracts, and cooperative agreements awarded to small businesses and nonprofit organizations, the types of funding instruments and recipients to which the entire Bayh-Dole statute applies. As explained in appendix B to this part, only two Bayh-Dole requirements (in 35 U.S.C. sections 202(c)(4) and 203) apply to cooperative agreements with other performers, by virtue of an amendment to Bayh-Dole at 35 U.S.C. 210(c).

(2) You may use the same clause, suitably modified, in cooperative agreements with performers other than small businesses and nonprofit organizations. Doing so is consistent with a 1983 Presidential memorandum that calls for giving other performers rights in inventions from Federally supported research that are at least as great as the rights that Bayh-Dole gives to small businesses and nonprofit organizations (*see* appendix B to this part for details). That Presidential memorandum is incorporated by reference in Executive Order 12591 (52 FR 13414, 3 CFR, 1987 Comp., p. 220), as amended by

Executive Order 12618 (52 FR 48661, 3 CFR, 1987 Comp., p. 262).

(3) The clause provides for flow-down of Bayh-Dole patent-rights provisions to subawards with small businesses and nonprofit organizations.

(4) There are provisions in 37 CFR part 401 stating when you must include the clause (37 CFR 401.3) and, in cases when it is required, how you may modify and tailor it (37 CFR 401.5).

(d) You may negotiate Government rights of a different scope than the standard patent-rights provision described in paragraph (c) of this section when necessary to accomplish program objectives and foster the Government's interests. If you do so:

(1) With the help of the program manager and legal counsel, you must decide what best represents a reasonable arrangement considering the circumstances, including past investments, contributions under the current TIA, and potential commercial markets. Taking past investments as an example, you should consider whether the Government or the recipient has contributed more substantially to the prior research and development that provides the foundation for the planned effort. If the predominant past contributor to the particular technology has been:

(i) The Government, then the TIA's patent-rights provision should be at or close to the standard Bayh-Dole provision.

(ii) The recipient, then a less restrictive patent provision may be appropriate, to allow the recipient to benefit more directly from its investments.

(2) You should keep in mind that obtaining a nonexclusive license at the time of award, as described in paragraph (b) of this section, is valuable if the Government later requires access to inventions to enable development of defense-unique products or processes that the commercial marketplace is not addressing. If you do not obtain a license at the time of award, you should consider alternative approaches to ensure access, such as negotiating a priced option for obtaining nonexclusive licenses in the future to inventions that are conceived or reduced to practice under the TIA.

(3) You also may consider whether you want to provide additional flexibility by giving the recipient more time than the standard patent-rights provision does to:

(i) Notify the Government of an invention, from the time the inventor discloses it within the for-profit firm.

(ii) Inform the Government whether it intends to take title to the invention.

(iii) Commercialize the invention, before the Government license rights in the invention become effective.

§ 37.865 Should my patent provision include march-in rights?

Your TIA's patent rights provision should include the Bayh-Dole march-in rights clause at paragraph (j)(1) of 37 CFR 401.14, or an equivalent clause, concerning actions that the Government may take to obtain the right to use subject inventions, if the recipient fails to take effective steps to achieve practical application of the subject inventions within a reasonable time. The march-in provision may be modified to best meet the needs of the program. However, only infrequently should the march-in provision be entirely removed (*e.g.*, you may wish to do so if a recipient is providing most of the funding for a research project, with the Government providing a much smaller share).

§ 37.870 Should I require recipients to mark documents related to inventions?

To protect the recipient's interest in inventions, your TIA should require the recipient to mark documents disclosing inventions it desires to protect by obtaining a patent. The recipient should mark the documents with a legend identifying them as intellectual property subject to public release or public disclosure restrictions, as provided in 35 U.S.C. 205.

§ 37.875 Should my TIA include a provision concerning foreign access to technology?

(a) Consistent with the objective of enhancing the national security by increasing DoD reliance on the U.S. commercial technology and industrial bases, you must include a provision in

the TIA that addresses foreign access to technology developed under the TIA.

(b) The provision must provide, as a minimum, that any transfer of the:

(1) Technology must be consistent with the U.S. export laws, regulations and policies (*e.g.*, the International Traffic in Arms Regulation at chapter I, subchapter M, title 22 of the CFR (22 CFR parts 120 through 130), the DoD Industrial Security Regulation in DoD 5220.22–R,[3] and the Department of Commerce Export Regulation at chapter VII, subchapter C, title 15 of the CFR (15 CFR parts 730 through 774), as applicable.

(2) Exclusive right to use or sell the technology in the United States must, unless the Government grants a waiver, require that products embodying the technology or produced through the use of the technology will be manufactured substantially in the United States. The provision may further provide that:

(i) In individual cases, the Government may waive the requirement of substantial manufacture in the United States upon a showing by the recipient that reasonable but unsuccessful efforts have been made to transfer the technology under similar terms to those likely to manufacture substantially in the United States or that under the circumstances domestic manufacture is not commercially feasible.

(ii) In those cases, the DoD Component may require a refund to the Government of some or all the funds paid under the TIA for the development of the transferred technology.

(c) You may, but are not required to, seek to negotiate a domestic manufacture condition for transfers of nonexclusive rights to use or sell the technology in the United States, to parallel the one described for exclusive licenses in paragraph (b)(2) of this section, if you judge that nonexclusive licenses for foreign manufacture could effectively preclude the establishment of domestic sources of the technology for defense purposes.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51246, Aug. 19, 2020]

Financial and Programmatic Reporting

§ 37.880 What requirements must I include for periodic reports on program and business status?

Your TIA must include requirements that, as a minimum, include periodic reports addressing program and, if it is an expenditure-based award, business status. You must require submission of the reports at least annually, and you may require submission as frequently as quarterly (this does not preclude a recipient from electing to submit more frequently than quarterly the financial information that is required to process payment requests if the award is an expenditure-based TIA that uses reimbursement or advance payments under §37.810(a)). The requirements for the content of the reports are as follows:

(a) The program portions of the reports must address progress toward achieving program performance goals, including current issues, problems, or developments.

(b) The business portions of the reports, applicable only to expenditure-based awards, must provide summarized details on the status of resources (federal funds and non-federal cost sharing), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from those schedules; and discuss actions that will be taken to address the deviations. You may require a recipient to separately identify in these reports the expenditures for each participant in a consortium and for each programmatic milestone or task, if you, after consulting with the program official, judge that those additional details are needed for good stewardship.

[85 FR 51246, Aug. 19, 2020]

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

§ 37.885 May I require updated program plans?

In addition to reports on progress to date, your TIA may include a provision requiring the recipient to annually prepare updated technical plans for the future conduct of the research effort. If your TIA does include a requirement for annual program plans, you also must require the recipient to submit the annual program plans to the agreements officer responsible for administering the TIA.

§ 37.890 Must I require a final performance report?

You need not require a final performance report that addresses all major accomplishments under the TIA. If you do not do so, however, there must be an alternative that satisfies the requirement in DoD Instruction 3200.14[4] to document all DoD Science and Technology efforts and disseminate the results through the Defense Technical Information Center (DTIC). An example of an alternative would be periodic reports throughout the performance of the research that collectively cover the entire project.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51246, Aug. 19, 2020]

§ 37.895 How is the final performance report to be sent to the Defense Technical Information Center?

(a) Whether your TIA requires a final performance report or uses an alternative means under § 37.890,[5] you may include an award term or condition or otherwise instruct the recipient to submit the documentation, electronically if available, either:

(1) Directly to the DTIC; or

(2) To the office that is administering the award (for subsequent transmission to the DTIC).

(b) If you specify that the recipient is to submit the report directly to the DTIC, you also:

(1) Must instruct the recipient to include a fully completed Standard Form 298, ''Report Documentation Page,'' with each document, so that the DTIC can recognize the document as being related to the particular award and properly record its receipt; and

(2) Should advise the recipient to provide a copy of the completed Standard Form 298 to the agreements officer responsible for administering the TIA.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51246, Aug. 19, 2020]

§ 37.900 May I tell a participant that information in financial and programmatic reports will not be publicly disclosed?

You may tell a participant that:

(a) We may exempt from disclosure under the Freedom of Information Act (FOIA) a trade secret or commercial and financial information that a participant provides after the award, if the information is privileged or confidential information. The DoD Component that receives the FOIA request will review the information in accordance with DoD procedures at 32 CFR 286.23(h) (and any DoD Component supplementary procedures) to determine whether it is privileged or confidential information under the FOIA exemption at 5 U.S.C. 552(b)(4), as implemented by the DoD at 32 CFR 286.12(d).

(b) If the participant also provides information in the course of a competition prior to award, there is a statutory exemption for five years from FOIA disclosure requirements for certain types of information submitted at that time (see § 37.420).

§ 37.905 Must I make receipt of the final performance report a condition for final payment?

If a final report is required, your TIA should make receipt of the report a condition for final payment. If the payments are based on payable milestones, the submission and acceptance of the final report by the Government representative will be incorporated as an event that is a prerequisite for one of the payable milestones.

[4] See footnote 3 to § 37.875(b)(1).

[5] Additional information on electronic submission to the DTIC can be found online, currently at *http://www.dtic.mil/dtic/ submitting/elec_subm.html*.

RECORDS RETENTION AND ACCESS REQUIREMENTS

§ 37.910 How long must I require participants to keep records related to the TIA?

Your TIA must require participants to keep records related to the TIA (for which the agreement provides Government access under § 37.915) for a period of three years after submission of the final financial status report for an expenditure-based TIA or final programmatic status report for a fixed-support TIA, with the following exceptions:

(a) The participant must keep records longer than three years after submission of the final financial status report if the records relate to an audit, claim, or dispute that begins but does not reach its conclusion within the 3-year period. In that case, the participant must keep the records until the matter is resolved and final action taken.

(b) Records for any real property or equipment acquired with project funds under the TIA must be kept for three years after final disposition.

§ 37.915 What requirement for access to a for-profit participant's records do I include in a TIA?

(a) If a for-profit participant currently grants access to its records to the DCAA or other Federal Government auditors, your TIA must include for that participant the standard access-to-records requirements at 32 CFR 34.42(e). If the agreement is a fixed-support TIA, the language in 32 CFR 34.42(e) may be modified to provide access to records concerning the recipient's technical performance, without requiring access to the recipient's financial or other records. Note that any need to address access to technical records in this way is in addition to, not in lieu of, the need to address rights in data (*see* § 37.845).

(b) For other for-profit participants that do not currently give the Federal Government direct access to their records and are not willing to grant full access to records pertinent to the award, there is no set requirement to include a provision in your TIA for Government access to records. If the audit provision of an expenditure-based TIA gives an IPA access to the recipient's financial records for audit purposes, the Federal Government must have access to the IPA's reports and working papers and you need not include a provision requiring direct Government access to the recipient's financial records. For both fixed-support and expenditure-based TIAs, you may wish to negotiate Government access to recipient records concerning technical performance. Should you negotiate a provision giving access only to specific Government officials (*e.g.*, the agreements officer), rather than a provision giving Government access generally, it is important to let participants know that the OIG, DoD, has a statutory right of access to records and other materials to which other DoD Component officials have access.

§ 37.920 What requirement for access to a nonprofit participant's records do I include in a TIA?

Your TIA must include for any nonprofit participant, including any FFRDC or GOCO administered by a nonprofit organization, the standard access-to-records requirement that subpart B of 2 CFR part 1136 specifies in Section F of OAR Article II (the standard wording for Section F of OAR Article II is provided in appendix B to 2 CFR part 1136).

[85 FR 51246, Aug. 19, 2020]

TERMINATION AND ENFORCEMENT

§ 37.925 What requirements do I include for termination and enforcement?

Your TIA must apply the standards of 32 CFR 34.51 for termination, 32 CFR 34.52 for enforcement, and your organization's procedures implementing 32 CFR 22.815 for disputes and appeals.

Subpart H—Executing the Award

§ 37.1000 What are my responsibilities at the time of award?

At the time of the award, you must:

(a) Ensure that the award document contains the appropriate terms and conditions and is signed by the appropriate parties, in accordance with §§ 37.1005 through 37.1015.

(b) Document your analysis of the agreement in the award file, as discussed in § 37.1020.

(c) Provide information about the award to offices responsible for reporting, as described in § 37.1025.

(d) Distribute copies of the award document, as required by § 37.1045.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51246, Aug. 19, 2020]

THE AWARD DOCUMENT

§ 37.1005 What are my general responsibilities concerning the award document?

You are responsible for ensuring that the award document is complete and accurate. Your objective is to create a document that:

(a) Addresses all issues;

(b) States requirements directly. It is not helpful to readers to incorporate statutes or rules by reference, without sufficient explanation of the requirements. You generally should not incorporate clauses from the Federal Acquisition Regulation (48 CFR parts 1–53) or Defense Federal Acquisition Regulation Supplement (48 CFR parts 201–253), because those provisions are designed for procurement contracts that are used to acquire goods and services, rather than for TIAs or other assistance instruments.

(c) Is written in clear and concise language, to minimize potential ambiguity.

§ 37.1010 What substantive issues should my award document address?

You necessarily will design and negotiate a TIA individually to meet the specific requirements of the particular project, so the complete list of substantive issues that you will address in the award document may vary. Every award document must address:

(a) *Project scope.* The scope is an overall vision statement for the project, including a discussion of the project's purpose, objectives, and detailed military and commercial goals. It is a critical provision because it provides a context for resolving issues that may arise during post-award administration. In a fixed-support TIA, you also must clearly specify the well-defined outcomes that reliably indicate the amount of effort expended and serve as the basis for the level of the fixed support (*see* §§ 37.305 and 37.560(a)).

(b) *Project management.* You should describe the nature of the relationship between the Federal Government and the recipient; the relationship among the participants, if the recipient is an unincorporated consortium; and the overall technical and administrative management of the project. TIAs are used to carry out collaborative relationships between the Federal Government and the recipient. Consequently, there must be substantial involvement of the DoD program official (*see* § 37.220) and usually the administrative agreements officer. The program official provides technical insight, which differs from the usual technical oversight of a project. The management provision also should discuss how you and the recipient will make any modifications to the TIA.

(c) *Termination, enforcement, and disputes.* Your TIA must provide for termination, enforcement remedies, and disputes and appeals procedures, in accordance with § 37.925.

(d) *Funding.* You must:

(1) Show the total amount of the agreement and the total period of performance.

(2) If the TIA is an expenditure-based award, state the Government's and recipient's agreed-upon cost shares. The award document should identify values for any in-kind contributions, determined in accordance with §§ 37.530 through 37.555, to preclude later disagreements about them.

(3) Specify the amount of Federal funds obligated and the performance period for those obligated funds.

(4) State, if the agreement is to be incrementally funded, that the Government's obligation for additional funding is contingent upon the availability of funds and that no legal obligation on the part of the Government exists until additional funds are made available and the agreement is amended. You also must include a prior approval requirement for changes in plans requiring additional Government funding, in accordance with § 37.825.

(e) *Payment.* You must choose the payment method and tell the recipient

how, when, and where to submit payment requests, as discussed in §§ 37.805 through 37.815. Your payment method must take into account sound cash management practices by avoiding unwarranted cash advances. For an expenditure-based TIA, your payment provision must require the return of interest should excess cash balances occur, in accordance with § 37.820. For any TIA using the milestone payment method described in § 37.805(c), you must include language notifying the recipient that post-award administrators may adjust amounts of future milestone payments if a project's expenditures fall too far below the projections that were the basis for setting the amounts (*see* § 37.575(c) and § 37.1105(c)).

(f) *Records retention and access to records.* You must include the records retention requirement at § 37.910. You also must provide for access to for-profit and nonprofit participants' records, in accordance with § 37.915 and § 37.920.

(g) *Patents and data rights.* In designing the patents and data rights provision, you must set forth the minimum required Federal Government rights in intellectual property generated under the award and address related matters, as provided in §§ 37.840 through 37.875. It is important to define all essential terms in the patent rights provision.

(h) *Foreign access to technology.* You must include a provision, in accordance with § 37.875, concerning foreign access and domestic manufacture of products using technology generated under the award.

(i) *Title to, management of, and disposition of tangible property.* Your property provisions for for-profit and nonprofit participants must be in accordance with §§ 37.685 through 37.700.

(j) *Financial management systems.* For an expenditure-based award, you must specify the minimum standards for financial management systems of both for-profit and nonprofit participants, in accordance with §§ 37.615 and 37.620.

(k) *Allowable costs.* If the TIA is an expenditure-based award, you must specify the standards that both for-profit and nonprofit participants are to use to determine which costs may be charged to the project, in accordance with §§ 37.625 through 37.635, as well as § 37.830.

(l) *Audits.* If your TIA is an expenditure-based award, you must include an audit provision for both for-profit and nonprofit participants and subrecipients, in accordance with §§ 37.640 through 37.670.

(m) *Purchasing system standards.* You should include a provision specifying the standards in §§ 37.705 and 37.710 for purchasing systems of for-profit and nonprofit participants, respectively.

(n) *Program income.* You should specify requirements for program income, in accordance with § 37.835.

(o) *Financial and programmatic reporting.* You must specify the reports that the recipient is required to submit and tell the recipient when and where to submit them, in accordance with §§ 37.880 through 37.905.

(p) *Assurances for applicable national policy requirements.* You must incorporate assurances of compliance with applicable requirements in Federal statutes, Executive orders, or regulations (except for national policies that require certifications). Appendix D to this part contains a list of commonly applicable requirements that you need to augment with any specific requirements that apply in your particular circumstances (*e.g.*, general provisions in the appropriations act for the specific funds that you are obligating).

(q) *Other routine matters.* The agreement should address any other issues that need clarification, including who in the Government will be responsible for post-award administration and the statutory authority or authorities for entering into the TIA (*see* appendix B to this part for a discussion of statutory authorities). In addition, the agreement must specify that it takes precedence over any inconsistent terms and conditions in collateral documents such as attachments to the TIA or the recipient's articles of collaboration.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51246, Aug. 19, 2020]

§ 37.1015 How do I decide who must sign the TIA if the recipient is an unincorporated consortium?

(a) If the recipient is a consortium that is not formally incorporated and the consortium members prefer to have

the agreement signed by all of them individually, you may execute the agreement in that manner.

(b) If they wish to designate one consortium member to sign the agreement on behalf of the consortium as a whole, you should not decide whether to execute the agreement in that way until you review the consortium's articles of collaboration with legal counsel.

(1) The purposes of the review are to:

(i) Determine whether the articles properly authorize one participant to sign on behalf of the other participants and are binding on all consortium members with respect to the research project; and

(ii) Assess the risk that otherwise could exist when entering into an agreement signed by a single member on behalf of a consortium that is not a legal entity. For example, you should assess whether the articles of collaboration adequately address consortium members' future liabilities related to the research project (*i.e.*, whether they will have joint and severable liability).

(2) After the review, in consultation with legal counsel, you should determine whether it is better to have all of the consortium members sign the agreement individually or to allow them to designate one member to sign on all members' behalf.

REPORTING INFORMATION ABOUT THE AWARD

§ 37.1020 What must I document in my award file?

You should include in your award file an agreements analysis in which you:

(a) Briefly describe the program and detail the specific military and commercial benefits that should result from the project supported by the TIA. If the recipient is a consortium that is not formally incorporated, you should attach a copy of the signed articles of collaboration.

(b) Describe the process that led to the award of the TIA, including how you and program officials solicited and evaluated proposals and selected the one supported through the TIA.

(c) Explain how you decided that a TIA was the most appropriate instrument, in accordance with the factors in Subpart B of this part. Your explanation must include your answers to the relevant questions in § 37.225(a) through (d).

(d) Explain how you valued the recipient's cost sharing contributions, in accordance with §§ 37.530 through 37.555. For a fixed-support TIA, you must document the analysis you did (*see* § 37.560) to set the fixed level of Federal support; the documentation must explain how you determined the recipient's minimum cost share and show how you estimated the expenditures required to achieve the project outcomes.

(e) Document the results of your negotiation, addressing all significant issues in the TIA's provisions. For example, this includes specific explanations if you:

(1) Specify requirements for a participant's systems that vary from the standard requirements in §§ 37.615(a), 37.625(a), 37.630, or 37.705(a) in cases where those sections provide flexibility for you to do so.

(2) Provide that any audits are to be performed by an IPA, rather than the DCAA, where permitted under § 37.650. Your documentation must include:

(i) The names and addresses of business units for which IPAs will be the auditors;

(ii) Estimated amounts of Federal funds expected under the award for those business units; and

(iii) The basis (*e.g.*, a written statement from the recipient) for your judging that the business units do not currently perform under types of awards described in § 37.650(b)(1) and (2) and are not willing to grant the DCAA audit access.

(3) Include an intellectual property provision that varies from Bayh-Dole requirements.

(4) Determine that cost sharing is impracticable.

§ 37.1025 Must I report information to the Defense Assistance Awards Data System?

Yes, you must give the necessary information about the award to the office in your organization that is responsible for preparing DD Form 2566, ''DoD Assistance Award Action Report,'' reports for the Defense Assistance Award Data System, to ensure timely and accurate reporting of data required by 31

U.S.C. 6101–6106 (*see* 32 CFR part 21, subpart E).

DISTRIBUTING COPIES OF THE AWARD DOCUMENT

§ 37.1045 To whom must I send copies of the award document?

You must send a copy of the award document to the:

(a) Recipient. You must include on the first page of the recipient's copy a prominent notice about the current DoD requirements for payment by electronic funds transfer (EFT).

(b) Office you designate to administer the TIA. You are strongly encouraged to delegate post-award administration to the regional office of the Defense Contract Management Agency or Office of Naval Research that administers awards to the recipient. When delegating, you should clearly indicate on the cover sheet or first page of the award document that the award is a TIA, to help the post-award administrator distinguish it from other types of assistance instruments.

(c) Finance and accounting office designated to make the payments to the recipient.

Subpart I—Post-Award Administration

§ 37.1100 What are my responsibilities generally as an administrative agreements officer for a TIA?

As the administrative agreements officer for a TIA, you have the responsibilities that your office agreed to accept in the delegation from the office that made the award. Generally, you will have the same responsibilities as a post-award administrator of a grant or cooperative agreement, as described in 32 CFR 22.715. Responsibilities for TIAs include:

(a) Advising agreements officers before they award TIAs on how to establish award terms and conditions that better meet research programmatic needs, facilitate effective post-award administration, and ensure good stewardship of Federal funds.

(b) Participating as the business partner to the DoD program official to ensure the Government's substantial involvement in the research project. This may involve attendance with program officials at kickoff meetings or post-award conferences with recipients. It also may involve attendance at the consortium management's periodic meetings to review technical progress, financial status, and future program plans.

(c) Tracking and processing of reports required by the award terms and conditions, including periodic business status reports, programmatic progress reports, and patent reports.

(d) Handling payment requests and related matters. For a TIA using advance payments, that includes reviews of progress to verify that there is continued justification for advancing funds, as discussed in § 37.1105(b). For a TIA using milestone payments, it includes making any needed adjustments in future milestone payment amounts, as discussed in § 37.1105(c).

(e) Coordinating audit requests and reviewing audit reports for both single audits of participants' systems and any award-specific audits that may be needed, as discussed in §§ 37.1115 and 37.1120.

(f) Responding, after coordination with program officials, to recipient requests for permission to sell or exclusively license intellectual property to entities that do not agree to manufacture substantially in the United States, as described in § 37.875(b). Before you grant approval for any technology, you must secure assurance that the Government will be able to use the technology (*e.g.*, a reasonable license for Government use, if the recipient is selling the technology) or seek reimbursement of the Government's investments.

[68 FR 47160, Aug. 7, 2003, as amended at 85 FR 51246, Aug. 19, 2020]

§ 37.1105 What additional duties do I have as the administrator of a TIA with advance payments or payable milestones?

Your additional post-award responsibilities as an administrative agreements officer for an expenditure-based TIA with advance payments or payable milestones are to ensure good cash management. To do so, you must:

(a) For any expenditure-based TIA with advance payments or payable

milestones, forward to the responsible payment office any interest that the recipient remits in accordance with §37.820(b). The payment office will return the amounts to the Department of the Treasury's miscellaneous receipts account.

(b) For any expenditure-based TIA with advance payments, consult with the program official and consider whether program progress reported in periodic reports, in relation to reported expenditures, is sufficient to justify your continued authorization of advance payments under §37.805(b).

(c) For any expenditure-based TIA using milestone payments, work with the program official at the completion of each payable milestone or upon receipt of the next business status report to:

(1) Compare the total amount of project expenditures, as recorded in the payable milestone report or business status report, with the projected budget for completing the milestone; and

(2) Adjust future payable milestones, as needed, if expenditures lag substantially behind what was originally projected and you judge that the recipient is receiving Federal funds sooner than necessary for program purposes. Before making adjustments, you should consider how large a deviation is acceptable at the time of the milestone. For example, suppose that the first milestone payment for a TIA you are administering is $50,000, and that the awarding official set the amount based on a projection that the recipient would have to expend $100,000 to reach the milestone (*i.e.*, the original plan was for the recipient's share at that milestone to be 50% of project expenditures). If the milestone payment report shows $90,000 in expenditures, the recipient's share at this point is 44% ($40,000 out of the total $90,000 expended, with the balance provided by the $50,000 milestone payment of Federal funds). For this example, you should adjust future milestones if you judge that a 6% difference in the recipient's share at the first milestone is too large, but not otherwise. Remember that milestone payment amounts are not meant to track expenditures precisely at each milestone and that a recipient's share will increase as it continues to perform research and expend funds, until it completes another milestone to trigger the next Federal payment.

§37.1110 What other responsibilities related to payments do I have?

If you are the administrative agreements officer, you have the responsibilities described in 32 CFR 22.810(c), regardless of the payment method. You also must ensure that you do not withhold payments, except in one of the circumstances described in 32 CFR 34.12(g).

§37.1115 What are my responsibilities related to participants' single audits?

For audits of for-profit participant's systems, under §§37.640 through 37.660, you are the focal point within the Department of Defense for ensuring that participants submit audit reports and for resolving any findings in those reports. Nonprofit participants send their single audit reports to a Government-wide clearinghouse. For those participants, the Office of the Assistant Inspector General (Auditing) should receive any DoD-specific findings from the clearinghouse and refer them to you for resolution, if you are the appropriate official to do so.

§37.1120 When and how may I request an award-specific audit?

Guidance on when and how you should request additional audits for expenditure-based TIAs is identical to the guidance for grants officers in 32 CFR 34.16(d). If you require an award-specific examination or audit of a for-profit participant's records related to a TIA, you must use the auditor specified in the award terms and conditions, which should be the same auditor who performs periodic audits of the participant. The DCAA and the OIG, DoD, are possible sources of advice on audit-related issues, such as appropriate audit objectives and scope.

Subpart J—Definitions of Terms Used in This Part

§37.1205 Advance.

A payment made to a recipient before the recipient disburses the funds for

program purposes. Advance payments may be based upon recipients' requests or predetermined payment schedules.

§ 37.1210 Advanced research.

Research that creates new technology or demonstrates the viability of applying existing technology to new products and processes in a general way. Advanced research is most closely analogous to precompetitive technology development in the commercial sector (*i.e.*, early phases of research and development on which commercial competitors are willing to collaborate, because the work is not so coupled to specific products and processes that the results of the work must be proprietary). It does not include development of military systems and hardware where specific requirements have been defined. It is typically funded in Research, Development, Test and Evaluation programs within Budget Activity 3, Advanced Technology Development.

§ 37.1215 Agreements officer.

An official with the authority to enter into, administer, and/or terminate TIAs (*see* § 37.125).

§ 37.1220 Applied research.

Efforts that attempt to determine and exploit the potential of scientific discoveries or improvements in technology such as new materials, devices, methods and processes. It typically is funded in Research, Development, Test and Evaluation programs within Budget Activity 2, Applied Research (also known informally as research category 6.2) programs. Applied research normally follows basic research but may not be fully distinguishable from the related basic research. The term does not include efforts whose principal aim is the design, development, or testing of specific products, systems or processes to be considered for sale or acquisition; these efforts are within the definition of ''development.''

§ 37.1225 Articles of collaboration.

An agreement among the participants in a consortium that is not formally incorporated as a legal entity, by which they establish their relative rights and responsibilities (*see* § 37.515).

§ 37.1230 Assistance.

The transfer of a thing of value to a recipient to carry out a public purpose of support or stimulation authorized by a law of the United States (*see* 31 U.S.C. 6101(3)). Grants, cooperative agreements, and technology investment agreements are examples of legal instruments used to provide assistance.

§ 37.1235 Award-specific audit.

An audit of a single TIA, usually done at the cognizant agreements officer's request, to help resolve issues that arise during or after the performance of the research project. An award-specific audit of an individual award differs from a periodic audit of a participant (as defined in § 37.1325).

§ 37.1240 Basic research.

Efforts directed toward increasing knowledge and understanding in science and engineering, rather than the practical application of that knowledge and understanding. It typically is funded within Research, Development, Test and Evaluation programs in Budget Activity 1, Basic Research (also known informally as research category 6.1).

§ 37.1245 Cash contributions.

A recipient's cash expenditures made as contributions toward cost sharing, including expenditures of money that third parties contributed to the recipient.

§ 37.1250 Commercial firm.

A for-profit firm or segment of a for-profit firm (*e.g.*, a division or other business unit) that does a substantial portion of its business in the commercial marketplace.

§ 37.1255 Consortium.

A group of research-performing organizations that either is formally incorporated or that otherwise agrees to jointly carry out a research project (see definition of ''articles of collaboration,'' in § 37.1225).

§ 37.1260 Cooperative agreement.

A legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a

grant (see definition of ''grant,'' in §37.1295), except that substantial involvement is expected between the Department of Defense and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include ''cooperative research and development agreements'' as defined in 15 U.S.C. 3710a.

§ 37.1265 Cost sharing.

A portion of project costs that are borne by the recipient or non-Federal third parties on behalf of the recipient, rather than by the Federal Government.

§ 37.1270 Data.

Recorded information, regardless of form or method of recording. The term includes technical data, which are data of a scientific or technical nature, and computer software. It does not include financial, cost, or other administrative information related to the administration of a TIA.

§ 37.1275 DoD Component.

The Office of the Secretary of Defense, a Military Department, a Defense Agency, or a DoD Field Activity.

§ 37.1280 Equipment.

Tangible property, other than real property, that has a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

§ 37.1285 Expenditure-based award.

A Federal Government contract or assistance award for which the amounts of interim payments or the total amount ultimately paid (*i.e.*, the sum of interim payments and final payment) are subject to redetermination or adjustment, based on the amounts expended by the recipient in carrying out the purposes for which the award was made. Most Federal Government grants and cooperative agreements are expenditure-based awards.

§ 37.1290 Expenditures or outlays.

Charges made to the project or program. They may be reported either on a cash or accrual basis, as shown in the following table:

If reports are prepared on a . . .	Expenditures are the sum of . . .
(a) Cash basis	(1) Cash disbursements for direct charges for goods and services; (2) The amount of indirect expense charged; (3) The value of third party in-kind contributions applied; and (4) The amount of cash advances and payments made to any other organizations for the performance of a part of the research effort.
(b) Accrual basis	(1) Cash disbursements for direct charges for goods and services; (2) The amount of indirect expense incurred; (3) The value of in-kind contributions applied; and (4) The net increase (or decrease) in the amounts owed by the recipient for goods and other property received, for services performed by employees, contractors, and other payees and other amounts becoming owed under programs for which no current services or performance are required.

§ 37.1295 Grant.

A legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship:

(a) The principal purpose of which is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the Department of Defense's direct benefit or use.

(b) In which substantial involvement is not expected between the Department of Defense and the recipient when carrying out the activity contemplated by the grant.

§ 37.1300 In-kind contributions.

The value of non-cash contributions made by a recipient or non-Federal third parties toward cost sharing.

§ 37.1305 Institution of higher education.

An educational institution that:

(a) Meets the criteria in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001); and

(b) Is subject to the provisions of OMB Circular A–110, ''Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations,'' as implemented by the Department of Defense at 32 CFR part 32.

§ 37.1310 Intellectual property.

Inventions, data, works of authorship, and other intangible products of intellectual effort that can be owned by a person, whether or not they are patentable or may be copyrighted. The term also includes mask works, such as those used in microfabrication, whether or not they are tangible.

§ 37.1315 Nonprofit organization.

(a) Any corporation, trust, association, cooperative or other organization that:

(1) Is operated primarily for scientific, educational, service, or similar purposes in the public interest.

(2) Is not organized primarily for profit; and

(3) Uses its net proceeds to maintain, improve, or expand the operations of the organization.

(b) The term includes any nonprofit institution of higher education or nonprofit hospital.

§ 37.1320 Participant.

A consortium member or, in the case of an agreement with a single for-profit entity, the recipient. Note that a for-profit participant may be a firm or a segment of a firm (*e.g.*, a division or other business unit).

§ 37.1325 Periodic audit.

An audit of a participant, performed at an agreed-upon time (usually a regular time interval), to determine whether the participant as a whole is managing its Federal awards in compliance with the terms of those awards. Appendix C to this part describes what such an audit may cover. A periodic audit of a participant differs from an award-specific audit of an individual award (as defined in § 37.1235).

§ 37.1330 Procurement contract.

A Federal Government procurement contract. It is a legal instrument which, consistent with 31 U.S.C. 6303, reflects a relationship between the Federal Government and a State, a local government, or other recipient when the principal purpose of the instrument is to acquire property or services for the direct benefit or use of the Federal Government. See the more detailed definition of the term ''contract'' at 48 CFR 2.101.

§ 37.1335 Program income.

Gross income earned by the recipient or a participant that is generated by a supported activity or earned as a direct result of a TIA. Program income includes but is not limited to: income from fees for performing services; the use or rental of real property, equipment, or supplies acquired under a TIA; the sale of commodities or items fabricated under a TIA; and license fees and royalties on patents and copyrights. Interest earned on advances of Federal funds is not program income.

§ 37.1340 Program official.

A Federal Government program manager, scientific officer, or other individual who is responsible for managing the technical program being carried out through the use of a TIA.

§ 37.1345 Property.

Real property, equipment, supplies, and intellectual property, unless stated otherwise.

§ 37.1350 Real property.

Land, including land improvements, structures and appurtenances thereto, but excluding movable machinery and equipment.

§ 37.1355 Recipient.

An organization or other entity that receives a TIA from a DoD Component. Note that a for-profit recipient may be a firm or a segment of a firm (e.g., a division or other business unit).

§ 37.1360 Research.

Basic, applied, and advanced research, as defined in this subpart.

§ 37.1365 Supplies.

Tangible property other than real property and equipment. Supplies have a useful life of less than one year or an acquisition cost of less than $5,000 per unit.

§ 37.1370 Termination.

The cancellation of a TIA, in whole or in part, at any time prior to either:

(a) The date on which all work under the TIA is completed; or

(b) The date on which Federal sponsorship ends, as given in the award document or any supplement or amendment thereto.

§ 37.1375 Technology investment agreements.

A special class of assistance instruments used to increase involvement of commercial firms in defense research programs and for other purposes (described in appendix A to this part) related to integrating the commercial and defense sectors of the nation's technology and industrial base. A technology investment agreement may be a cooperative agreement with provisions

tailored for involving commercial firms (as distinct from a cooperative agreement subject to all of the requirements in 32 CFR part 34), or another kind of assistance transaction (*see* appendix B to this part).

APPENDIX A TO PART 37—WHAT IS THE CIVIL-MILITARY INTEGRATION POLICY THAT IS THE BASIS FOR TECHNOLOGY INVESTMENT AGREEMENTS?

Appendix A to Part 37-What is the Civil-Military Integration Policy that is the Basis for Technology Investment Agreements?

A. TIAs complement other funding instruments that are available to agreements officers in that they are designed to foster civil-military integration in DoD Science and Technology (S&T) programs. Civil-military integration creates a single, national technology and industrial base upon which the DoD can draw to meet its needs. Achieving civil-military integration is a national policy objective, as stated in 10 U.S.C. 2501.

B. Civil-military integration includes:

1. Removing barriers to participation in DoD programs by commercial firms, firms that deal primarily in the commercial marketplace. In recent years, some commercial firms judged that it would be overly burdensome and costly for them to comply with Government-unique requirements. That belief caused some firms to decline to do cost-type business with the Federal Government. It caused other firms to create divisions for Government business that are separate and isolated from their divisions for commercial business. TIAs give agreements officers flexibility to tailor Government requirements and lower or remove barriers to firms' participation, where the tailoring of requirements can be done consistently with good stewardship of Federal Government funds.

2. Creating new business relationships among the performers in the technology and industrial base. Collaborations among commercial firms, firms that regularly perform defense programs, and nonprofit organizations can create wholes that are greater than the sums of the parts. The collaborations can enhance overall quality and productivity.

3. Promoting the development and use of new business practices and disseminating current best practices throughout the technology and industrial base.

C. The use of TIAs to promote civil-military integration will help defense S&T programs achieve their primary mission. That mission is to develop superior technology and help transition the technology to applications that enable affordable, decisive military capability. The use of TIAs to increase access to

commercial firms, to create new relationships, and to promote better business practices will help:

1. Increase technological sophistication. The DoD and firms that currently perform defense programs will benefit from technology in the commercial marketplace that often is more advanced than what is available in the defense-specific sector.

2. Reduce DoD's life-cycle costs for buying, operating, and maintaining weapon and support systems. The intent is that the DoD and firms that currently perform defense programs will be able to take advantage of the economies of scale of the commercial marketplace, which has a much larger volume of business for many high-technology products and processes than the Federal Government's share alone.

APPENDIX B TO PART 37—WHAT TYPE OF INSTRUMENT IS A TIA AND WHAT STATUTORY AUTHORITIES DOES IT USE?

Appendix B to Part 37-What Type of Instrument is a TIA and What Statutory Authorities Does it Use?

A. A TIA may be either a type of cooperative agreement or a type of "assistance transaction other than a grant or cooperative agreement," depending on its patent-rights provision. It is awarded under the statutory authority of 10 U.S.C. 2358, 10 U.S.C. 2371, or both, as explained in the paragraphs B through E of this Appendix and illustrated in the table below.

	The TIA's patent provision complies with Bayh-Dole	The TIA's patent provision varies from what is possible under Bayh-Dole
1. The TIA does not include recovery of funds provision	The TIA is a type of cooperative agreement, under 10 U.S.C. 2358(b)(1).	The TIA is a type of assistance transaction other than a grant or cooperative agreement, under 10 U.S.C. 2371.
2. The TIA includes recovery of funds provision	The TIA is a type of cooperative agreement, under 10 U.S.C. 2358(b)(1). It uses recovery of funds authority of 10 U.S.C. 2371.	The TIA is a type of assistance transaction other than a grant or cooperative agreement, under 10 U.S.C. 2371. It also uses the recovery of funds authority of 10 U.S.C. 2371.

B. A TIA is a type of cooperative agreement whenever its patent-rights provision complies with the Bayh-Dole statute (Chapter 18 of Title 35, U.S.C.), as shown in the preceding table. The authority to award the TIA is 10 U.S.C. 2358, in addition to any program-specific statute that may provide authority to award cooperative agreements. The TIA also may use the authority of 10 U.S.C. 2371 to include a recovery of funds provision that requires the recipient, as a condition for receiving support under the agreement, to make payments to the Department of Defense or other Federal agency.

C. A TIA becomes a type of assistance transaction other than a grant or cooperative agreement when its patent-rights provision is less restrictive than is possible under Bayh-Dole. The authority to award the instrument is 10 U.S.C. 2371, as well as any program-specific authority to provide assistance. Note that the agreements officer's judgment that the execution of the research project warrants a less restrictive patent provision than is possible under Bayh-Dole is sufficient to satisfy the statutory condition in 10 U.S.C. 2371 for use of an assistance transaction other than a cooperative agreement or grant (i.e., that it is not feasible or appropriate to use a standard grant or cooperative agreement to carry out the project). The TIA also may include a recovery of funds provision, as authorized by 10 U.S.C. 2371.

D. From a practical point of view, an agreements officer need not decide while he or she is negotiating the terms and conditions with the recipient whether a TIA is a cooperative agreement or an assistance transaction other than a grant or cooperative agreement. The agreements officer must make that decision when the agreement is finalized, based upon a comparison of the patent provision with what is required by Bayh-Dole.

E. In making that comparison, the agreements officer should consult with legal counsel and remember that most Bayh-Dole requirements apply only to small business firms and nonprofit organizations (note that a consortium that is not formally incorporated is neither a small business firm nor a nonprofit organization). There are only two requirements of Bayh-Dole, in 35 U.S.C. 202(c)(4) and 203 that directly apply to cooperative agreements with other than small business firms and nonprofit organizations. A 1984 amendment to Bayh-Dole, at 35 U.S.C. 210(c), makes those two portions apply. The 1984 amendment otherwise states that Bayh-Dole does not preclude agencies from complying with a 1983 Presidential Statement of Government Patent Policy (incorporated by reference in Executive Order 12591). The President in that statement authorized Federal agencies to tailor cooperative agreements with for-profit firms other than small businesses, in ways that would waive rights of the Government or obligations of the performer under Bayh-Dole, if they determined that:

1. "The interests of the United States and the general public will be better served thereby as, for example, where this is necessary to obtain a uniquely or highly qualified performer; or"

2. "The award involves co-sponsored, cost sharing, or joint venture research and development, and the performer, co-sponsor or joint venturer is making substantial contribution of funds, facilities or equipment to the work performed under the award."

APPENDIX C TO PART 37—WHAT IS THE DESIRED COVERAGE FOR PERIODIC AUDITS OF FOR-PROFIT PARTICIPANTS TO BE AUDITED BY IPAS?

Appendix C to Part 37-What is the Desired Coverage for Periodic Audits of For-Profit Participants to be Audited by IPAs?

You may provide the following guidance to a for-profit participant and its IPA on the desired coverage of periodic audits.

COVERAGE OF INDEPENDENT AUDITS OF FOR-PROFIT FIRMS

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PART 1. GENERAL INFORMATION

What is the purpose of this document?

This document provides guidance for an independent public accountant (IPA) who is asked by a for-profit firm to conduct an audit of its systems, due to the firm's having received a technology investment agreement from the Department of Defense (DoD).

Why does the Federal Government need an audit?

Federal officials are accountable to the public for the resources provided to carry out Government programs. Financial auditing contributes to accountability by providing an independent assessment to assure that recipients are handling Government funds properly.

Can the audit be integrated with the regular audit of a firm's financial statements?

Yes, the intent is to cause the minimum possible disruption to the firm's activities, so the IPA is encouraged to do the needed transaction sampling for DoD awards as part of the regularly scheduled audit of the firm's financial statements. In some cases, it may be even more efficient and economical to separately audit the individual DoD awards, and the firm may elect to have the IPA do so.

What are the objectives of the audit?

The auditor is to determine and report on whether:

- The firm has an internal control structure that provides reasonable assurance that it is managing DoD awards in compliance with the award terms and conditions, including applicable Federal laws and regulations.

- Based on a sampling of DoD award expenditures, the firm has complied with award terms and conditions, including applicable Federal laws and regulations, that may have a direct and material effect on DoD awards.

What is the source of the requirement for the audit?

The source of the requirement stated in the award document stems from sections 37.640 through 37.660 of 32 CFR part 37, which is part 37 of the DoD Grant and Agreement Regulations (DoDGARs).

What should the IPA do if he or she finds that the Defense Contract Audit Agency is performing audits of the firm?

The IPA should consult with officials of the firm to ensure that:

- DoD agreements officers were aware of the DCAA audit presence at the time they made awards; and

- The DoD agreements authorize the IPA to perform the audit, rather than requiring that the DCAA do so. If the IPA is authorized to perform the audit, he or she must consider the nature, timing, and extent of his or her own auditing procedures, to avoid unnecessary duplication of the DCAA effort.

PART 2. AUDIT OBJECTIVES AND COMPLIANCE REQUIREMENTS

A. ALLOWABLE COSTS

What is the objective of this portion of the audit?

The objective is to determine, by testing a sample of transactions, whether the firm complied with the requirements concerning allowability of costs charged to DoD awards.

What standards or cost principles determine the costs that are allowable as charges to the award?

Each technology investment agreement should specify the standards or cost principles that the for-profit firm is to use to determine the costs that it is allowed to charge to that award. While the TIA may specify use of the for-profit cost principles in the Federal Acquisition Regulation (FAR, at 48 CFR part 31) and Defense FAR Supplement (DFARS, at 48 CFR part 231), it more likely will specify an alternative standard. The minimum standard in the latter case is that Federal funds and the firm's cost sharing contributions will be used only for costs that a reasonable and prudent person would incur in carrying out the research project contemplated by the agreement.

What compliance requirements for allowability of costs should the audit address?

For a firm that is subject to the cost principles in the FAR and DFARS, the IPA should determine and report on whether costs charged to DoD awards are in compliance with those cost principles and indirect cost rates are applied in accordance with approved rate agreements.

For a firm that is subject to alternative standards that may be used for a TIA, the IPA should determine and report on whether costs charged to the DoD awards are:

- Necessary and reasonable for the performance of the research projects supported by the awards, or for related administration. Generally, elements of cost that appropriately are charged are those identified with research and development activities under the Generally Accepted Accounting Principles (see Statement of Financial Accounting Standards Number 2, "Accounting for Research and Development Costs," October 1974).

- Allocable to the research projects (i.e., costs are charged to DoD projects in a manner that is in accordance with the benefits the projects received).

- Given consistent treatment with costs allocated to the firm's other research and development activities (e.g., activities supported by the firm itself or by non-Federal sponsors).

- In conformance with any limitations in the award documents or regulations that they cite (e.g., any restrictions on types or amounts of costs, or requirements for prior approval of DoD agreements officers).

- Supported by appropriate documentation in the firm's records. The documentation may be in electronic form.

B. COST SHARING

What is the objective of this portion of the audit?

The objective is to determine, by testing a sample of cost sharing contributions, whether the firm made the contributions that the agreements required.

What are the compliance requirements for cost sharing?

The provisions of the award documents will specify requirements for the firm's cost sharing, which may be contributions of a specified amount or a percentage of total project costs. The cost sharing may be in the form of allowable costs incurred or in-kind contributions (including third-party in-kind contributions).

The values of the firm's contributions are determined in accordance with sections 37.530 through 37.555 of 32 CFR part 37, which is part 37 of the DoDGARs.

C. FINANCIAL REPORTING

What are the objectives of this portion of the audit?

The primary objective is to determine whether the firm's financial reports for DoD awards:

- Fairly and completely represent the expenditures and status of resources for projects supported by those awards; and
- Are supported by applicable accounting records and the accounting basis used (e.g., cash or accrual).

What are the compliance requirements for financial reporting?

The agreements will specify the frequency and content of the financial reports. They may specify the use of standard forms (e.g., the Standard Form 269 or 269A, "Financial Status Report," or Standard Form 272, "Report of Federal Cash Transactions). Alternatively, the agreements may specify an equivalent approach of periodic reports, and the reports may include information on both programmatic and business status. The requirements are in section 37.880 of 32 CFR part 37, which is part 37 of the DoDGARs.

Each financial report (and the business portion of any report that also has programmatic information) will contain at least summarized details on the status of resources (Federal funds and any non-Federal cost sharing that the agreements require), including an accounting of expenditures for the period covered by the report. The report should compare the resource status with any payment and expenditure schedules or plans provided in the original award; explain any major deviations from these schedules; and discuss actions that will be taken to address the deviations.

D. EQUIPMENT AND REAL PROPERTY MANAGEMENT

Is a review of a firm's property management system usually required?

No, the IPA needs to review the property management system only if:

- There is Federally owned property associated with the award; or

- The firm charged the full purchase price of any equipment or real property as project costs (i.e., to Federal funds or the firm's funds that are counted toward required cost sharing); and

- The award under which the property was purchased provides for a continuing Federal interest in the property.

Note that the IPA generally will not need to review the property management system because most DoD awards will not have Federally owned property associated with them and will allow the firm to charge to the project only depreciation or use charges for real property or equipment.

What are the objectives of the review?

The objectives are to determine whether the firm:

- Obtained the necessary prior approval for the equipment or real property purchase from the grants officer or agreements officer.

- Keeps proper records for equipment and adequately safeguards and maintains equipment.

- Handles disposition or encumbrance of equipment or real property acquired under DoD awards in accordance with the applicable requirements.

What are the compliance requirements for Federally owned property and for equipment or real property purchased under DoD awards?

To protect the Federal interest in property, the DoD Grant and Agreement Regulations include standards for the firm's property management, use, and disposition, as shown in this table:

If the property is . . .	Then the property management standards for the for-profit firm are in . . .
Real property or equipment purchased under a TIA,	Section 37.685 of 32 CFR part 37.
Federally owned property,	Section 37.695 of 32 CFR part 37.

Note that a for-profit firm may include the full acquisition cost of real property or equipment as a charge to the project only with the prior approval of the grants officer or the agreements officer. The title to the real property or equipment vests conditionally in the for-profit firm upon acquisition, and there is a continuing Federal interest in the property unless an awarding office has statutory authority to do otherwise and elects to use that authority for a particular award. The Federal Government recovers its interest in the property through the disposition process at the project's end.

E. PROGRAM INCOME

Is an audit of program income usually required?

No, most awards will not involve any program income.

What is program income?

Program income is gross income earned by the recipient that is generated by a supported activity or earned as a result of the award. For example, if the purpose of an award is to support the firm's delivery of services and the firm collects fees for doing so, those fees are program income. As another example, if samples of materials or biological specimens are generated as a result of a supported research effort, and the firm sells samples to other research organizations, the proceeds of those sales would be program income. If authorized by the terms and conditions of the award costs incident to the generation of program income may be deducted from gross income to determine program income, provided these costs have not been charged to the award.

What is the objective of this portion of the audit?

The objective is to determine whether program income is correctly recorded and used in accordance with the award terms and applicable standards.

What are the applicable standards for program income?

The standards for program income are in section 37.835 of 32 CFR part 37, which is part 37 of the DoDGARs.

APPENDIX D TO PART 37—WHAT COMMON NATIONAL POLICY REQUIREMENTS MAY APPLY AND NEED TO BE INCLUDED IN TIAS?

Whether your TIA is a cooperative agreement or another type of assistance transaction, as discussed in Appendix B to this part, the terms and conditions of the agreement must provide for recipients' compliance with applicable Federal statutes and regulations. This appendix lists some of the more common requirements to aid you in identifying ones that apply to your TIA. The list is not intended to be all-inclusive, however, and you may need to consult legal

counsel to verify whether there are others that apply in your situation (*e.g.*, due to a provision in the appropriations act for the specific funds that you are using or due to a statute or rule that applies to a particular program or type of activity).

A. Certifications

One requirement that applies to all TIAs currently requires you to obtain a certification at the time of proposal. That requirement is in a Governmentwide common rule about lobbying prohibitions, which is implemented by the DoD at 32 CFR part 28. The prohibitions apply to all financial assistance. Appendix A to 32 CFR part 22 includes a sample provision that you may use, to have proposers incorporate the certification by reference into their proposals.

B. Assurances That Apply to All TIAs

DoD policy is to use a certification, as described in the preceding paragraph, only for a national policy requirement that specifically requires one. The usual approach to communicating other national policy requirements to recipients is to incorporate them as award terms or conditions, or assurances. Part 1122 of 2 CFR lists national policy requirements that commonly apply to DoD grants and cooperative agreements. It also has standard wording of general terms and conditions to incorporate the requirements in award documents. Of those requirements, the following six apply to all TIAs. (Note that TIAs must generally use the standard wording in 2 CFR part 1122 for the terms and conditions of these six requirements, but not the standard format.)

1. Requirements concerning debarment and suspension in the OMB guidance in 2 CFR part 180, as implemented by the DoD at 2 CFR part 1125. The requirements apply to all nonprocurement transactions.

2. Requirements concerning drug-free workplace in the Governmentwide common rule that the DoD has codified at 32 CFR part 26. The requirements apply to all financial assistance.

3. Prohibitions on discrimination on the basis of race, color, or national origin in Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d, *et seq.*), as implemented by DoD regulations at 32 CFR part 195. These apply to all financial assistance. They require recipients to flow down the prohibitions to any subrecipients performing a part of the substantive research program (as opposed to suppliers from whom recipients purchase goods or services).

4. Prohibitions on discrimination on the basis of age, in the Age Discrimination Act of 1975 (42 U.S.C. 6101, *et seq.*). They apply to all financial assistance and require flow down to subrecipients, as implemented by Department of Health and Human Services regulations at 45 CFR part 90.

5. Prohibitions on discrimination on the basis of handicap, in section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), as implemented by Department of Justice regulations at 28 CFR part 41 and DoD regulations at 32 CFR part 56. They apply to all financial assistance recipients and require flow down to subrecipients.

6. Preferences for use of U.S.-flag air carriers in the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118), commonly referred to as the ''Fly America Act,'' and implementing regulations at 41 CFR 301–10.131 through 301–10.143, which apply to uses of U.S. Government funds.

C. Other National Policy Requirements

Additional national policy requirements may apply in certain circumstances, as follows:

1. If construction work is to be done under a TIA or its subawards, it is subject to the prohibitions in Executive Order 11246, as amended, on discrimination on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin. You must include the clause provided in 41 CFR 60–1.4(b) in any ''federally assisted construction contract'' (as defined in 41 CFR 60–1.3) under this award unless provisions of 41 CFR part 60–1 exempt the contract from the requirement. The clause will require the contractor to comply with equal opportunity requirements in 41 CFR chapter 60.

2. If the research involves human subjects or animals, it is subject to the applicable requirements identified in appendix C of 2 CFR part 1122.

3. If the research involves actions that may affect the human environment, it is subject to the requirements of the National Environmental Policy Act in paragraph A.4.a of NP Article II, which is found in appendix B of 2 CFR part 1122. It also may be subject to one or more of the other requirements in paragraphs A.4.b through A.4.f, A.5, and A.6 of NP Article II, which concern flood-prone areas, coastal zones, coastal barriers, wild and scenic rivers, underground sources of drinking water, endangered species, and marine mammal protection.

4. If the project may impact any property listed or eligible for listing on the National Register of Historic Places, it is subject to the National Historic Preservation Act of 1966 (54 U.S.C. 306108) as specified in paragraph 11.a of NP Article IV, which is found in appendix D of 2 CFR part 1122.

5. If the project has potential under this award for irreparable loss or destruction of significant scientific, prehistorical, historical, or archeological data, it is subject to the Archaeological and Historic Preservation Act of 1974 (54 U.S.C. Chapter 3125) as

specified in paragraph 11.b of NP Article IV, which is found in appendix D of 2 CFR part 1122.

[68 FR 47160, Aug. 7, 2003, as amended at 70 FR 49477, Aug. 23, 2005; 72 FR 34999, June 26, 2007; 85 FR 51247, Aug. 19, 2020]

APPENDIX E TO PART 37—WHAT PROVISIONS MAY A PARTICIPANT NEED TO INCLUDE WHEN PURCHASING GOODS OR SERVICES UNDER A TIA?

A. As discussed in §37.705, you must inform recipients of any national policy requirements that flow down to their purchases of goods or services (*e.g.*, supplies or equipment) under their TIAs. Note that purchases of goods or services differ from subawards, which are for substantive research program performance.

B. Appendix A to 32 CFR part 34 lists ten national policy requirements that commonly apply to firms' purchases under grants or cooperative agreements. Of those ten, two that apply to all recipients' purchases under TIAs are:

1. *Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)*. A contractor submitting a bid to the recipient for a contract award of $100,000 or more must file a certification with the recipient that it has not and will not use Federal appropriations for certain lobbying purposes. The contractor also must disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. For further details, see 32 CFR part 28, the DoD's codification of the Governmentwide common rule implementing this amendment.

2. *Debarment and suspension*. A contract award with an amount expected to equal or exceed $25,000 and certain other contract awards (see 2 CFR 1125.220, which implements OMB guidance at 2 CFR 180.220) shall not be made to parties identified in the Exclusions area of the System for Award Management (SAM Exclusions) as being currently debarred, suspended, or otherwise excluded. This restriction is in accordance with the DoD adoption at 2 CFR part 1125 of the OMB guidance implementing E.O.s 12549 (3 CFR, 1986 Comp., p. 189) and 12689 (3 CFR, 1989 Comp., p. 235), ''Debarment and Suspension.''

C. The following requirements apply to recipient's purchases under TIAs in the situations specified below:

1. *Equal Employment Opportunity*. Although construction work should happen rarely under a TIA, the agreements officer in that case should inform the recipient that Department of Labor regulations at 41 CFR 60–1.4(b) prescribe a clause that must be incorporated into recipients' and subrecipients' construction contracts under their awards and subawards, respectively. Further details are provided in appendix B to part 22 of the DoDGARs (32 CFR part 22), in section b. under the heading ''Nondiscrimination.'' any ''federally assisted construction contract'' (as defined in 41 CFR 60–1.3) under the award unless provisions of 41 CFR part 60–1 exempt the contract from the requirement. The clause will require the contractor to comply with equal opportunity requirements in 41 CFR chapter 60.

2. *Wage Rate Requirements (Construction), formerly the Davis Bacon Act*. When required by Federal program legislation, you must take the following actions with respect to each construction contract for more than $2,000 to be awarded using funding provided under this award:

a. Place in the solicitation under which the contract will be awarded a copy of the current prevailing wage determination issued by the Department of Labor;

b. Condition the decision to award the contract upon the contractor's acceptance of that prevailing wage determination;

c. Include in the contract the clauses specified at 29 CFR 5.5(a) in Department of Labor regulations (29 CFR part 5, ''Labor Standards Provisions Applicable to Contracts Governing Federally Financed and Assisted Construction'') to require the contractor's compliance with the Wage Rate Requirements (Construction), as amended (40 U.S.C. 3141–44, 3146, and 3147); and

d. Report all suspected or reported violations to the award administration office identified in this award.

3. *Fly America requirements*. In each contract under which funds provided under this award might be used to participate in costs of international air travel or transportation for people or property, you must include a clause to require the contractor to:

a. Comply with the International Air Transportation Fair Competitive Practices Act of 1974 (49 U.S.C. 40118, also known as the ''Fly America'' Act), as implemented by the General Services Administration at 41 CFR 301–10.131 through 301–10.143, which provides that U.S Government financed international air travel and transportation of personal effects or property must use a U.S. Flag air carrier or be performed under a cost sharing arrangement with a U.S. carrier, if such service is available; and

b. Include the requirements of the Fly America Act in all subcontracts that might involve international air transportation.

4. *Cargo preference for United States flag vessels*. In each contract under which equipment, material, or commodities may be shipped by oceangoing vessels, you must include the clause specified in Department of Transportation regulations at 46 CFR 381.7(b) to require that at least 50 percent of equipment, materials or commodities purchased or otherwise obtained with Federal funds under this award, and transported by ocean

vessel, be transported on privately owned U.S. flag commercial vessels, if available.

[85 FR 51247, Aug. 19, 2020]

SUBCHAPTER D—PERSONNEL, MILITARY AND CIVILIAN

CROSS REFERENCE: For a revision of Standards for a Merit System of Personnel Administration, see 5 CFR part 900.

PART 44—SCREENING THE READY RESERVE

Sec.
44.1 Purpose.
44.2 Applicability.
44.3 Definitions.
44.4 Policy.
44.5 Responsibilities.
APPENDIX A TO PART 44—GUIDANCE FOR EMPLOYERS OF READY RESERVISTS

AUTHORITY: 10 U.S.C. 10149.

SOURCE: 85 FR 84241, Dec. 28, 2020, unless otherwise noted.

§ 44.1 Purpose.

This rule updates Department of Defense (DoD) policy and responsibilities for the screening of Ready Reservists under 10 U.S.C. 10149.

§ 44.2 Applicability.

This rule applies to non-Federal employers of Ready Reservists filling key positions.

§ 44.3 Definitions.

For purposes of this part, the following definitions apply:

Extreme community hardship. A situation that, because of a Reserve member's mobilization, may have a substantially adverse effect on the health, safety, or welfare of the community. Any request for a determination of such hardship will be made by the Reserve member and must be supported by documentation, as required by the Secretary of the Military Department concerned.

Inactive National Guard (ING). Members of the National Guard in an inactive status in the Ready Reserve and attached to a specific National Guard unit. These members do not participate in training activities but mobilize with their unit of assignment or with other units within their State on partial or full mobilization. They are not subject to a call-up pursuant to 10 U.S.C. 12304.

Individual Ready Reserve (IRR). A manpower pool within the Ready Reserve of each of the RCs consisting of individuals who have had some training or who have served previously in the AC or in the Selected Reserve, and may have some period of their MSO remaining pursuant to 10 U.S.C. 651. The IRR consists of members of the Ready Reserve who are not in the Selected Reserve or the ING. Additionally, the IRR also includes some personnel who are participating in officer training programs or in the Armed Forces Health Professions Scholarship and Financial Assistance Programs.

Key employee. Any non-federal employee occupying a key position within an agency, company, local government, or organization.

Key position. A public or private civilian position, not a job series, designated by the employer and approved by the Secretary of the Military Department concerned) that cannot be vacated during war or national emergency.

Mobilization. The process by which the Armed Forces of the United States, or part of them, are brought to a state of readiness for war or other national emergency.

Ready Reserve. The Selected Reserve and Individual Ready Reserve liable for active duty as prescribed by law.

Selected Reserve. Those units and individuals within the Ready Reserve designated by their respective Military Service and approved by the Joint Chiefs of Staff as so essential to initial wartime missions that they have priority over all other reserves.

§ 44.4 Policy.

It is DoD policy that:

(a) Members of the Ready Reserve shall be screened (see the appendix to this part for specific screening guidance) at least annually to meet the provisions of 10 U.S.C. 10149 and to provide a Ready Reserve force composed of members who:

(1) Meet Military Service readiness standards of mental, moral, professional, and physical fitness and possess the military qualifications required in the various ranks, ratings, and specialties.

(2) Are available immediately for active duty (AD) during a mobilization or as otherwise required by law.

(b) Ready Reserve members whose immediate recall to AD during an emergency would create an extreme personal or community hardship shall be transferred to the Standby Reserve or the Retired Reserve, or shall be discharged, as applicable.

(c) Ready Reserve members who occupy key positions shall be transferred to the Standby Reserve or the Retired Reserve, or shall be discharged, as appropriate.

(d) After a mobilization is ordered, no deferment, delay, or exemption from mobilization will be granted to Ready Reserve members because of their civilian employment.

§ 44.5 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) adjudicates, before mobilization, conflicts the Ready Reserve screening process has identified, but has not resolved, between the mobilization manpower needs of the civilian sector and the Military Services.

(b) The Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD(M&RA)), under the USD(P&R), coordinates resolution of conflicts between the mobilization manpower needs of the civilian sector and the Military Services identified but not resolved through the Ready Reserve screening process.

(c) The Secretaries of the Military Departments and Commandant, United States Coast Guard, ensure coordination with the ASD(M&RA) to resolve conflicts (identified, but not resolved through the Ready Reserve screening process) between the mobilization manpower needs of the civilian sector and the military. They will review petitions submitted by employers, take applicable action, and promptly transmit the results of that determination to the reservist concerned and their employer after making a determination in response to the petition. Materials provided or produced with regard to the petition will be retained by the Secretary Concerned.

APPENDIX A TO PART 44—GUIDANCE FOR EMPLOYERS OF READY RESERVISTS

(a) Employers of Ready Reserve members. Prior to any mobilization action, employers of Ready Reserve members are encouraged to adopt personnel management procedures designed to prevent conflicts between the emergency manpower needs of civilian and military activities that may occur during a military mobilization requiring Ready Reserve participation. Employers are encouraged to assess the internal capabilities of their own positions and the organic capacity to sustain emergency manpower needs prior to a military mobilization which can produce an accurate listing of what they consider key positions to their organization. Employers, via the head of or suitable designee within an agency, company, local government, or organization, are encouraged to use the below key position guidelines as a reference for considering designations and, when applicable, petitioning the respective Military Service if a Ready Reserve member fills a key position. Nothing in this part shall reduce, limit, or eliminate in any manner any right or benefit provided by USERRA. Employers must ensure that key position determinations are not undertaken in a manner that would violate USERRA.

(b) Key position guidelines:

(1) Designate individual positions that are essential in nature to, and within, the organization as ''key positions,'' and require they will not be filled by Ready Reserve members to prevent such positions from being vacated during a mobilization.

(2) Consider the following questions to determine whether an individual position should be designated as a key position:

(i) Can the position be filled in a reasonable time after mobilization? (Note that this factor must not be the sole factor relied on in making a key position determination.)

(ii) Does the position require technical or managerial skills that are possessed uniquely by the incumbent employee?

(iii) Is the position associated directly with defense mobilization?

(iv) Does the position include a mobilization or relocation assignment in a federal agency that has emergency functions, as designated by E.O. 12656?

(v) Is the position directly associated with industrial or manpower mobilization, as designated in E.O.s 12656 and 12919?

(vi) Are there other factors related to the national defense, health, or safety that will make the incumbent of the position unavailable for mobilization? These factors should not be applied more broadly than intended as to encompass an entire class of workers, nor misapplied to conflict with USERRA, its implementing regulations at 20 CFR part 1002, or other federal statutes and regulations.

(3) Conduct an annual review of key positions and employees as noted herein.

(4) Petition to the respective Military Service any findings for adjudication of specific Ready Reserve members filling critical positions, as needed.

(5) When employers consider a Ready Reserve member as filling a key position within their organization, they should petition the applicable Reserve personnel center for discussion and adjudication. An employer may not take any employment action with regard to the position for which approval is sought based upon an employee or potential employee's military service until such time as the petition for approval has been approved by the relevant Service Secretary. Below is the list of Reserve personnel centers to which petitions shall be forwarded:

Army Reserve: U.S. Army Human Resources, Command 1600 Spearhead Division, Avenue ATTN: AHRC–ROR–PPA, Fort Knox, KY 40122–5100, *https://www.hrc.army.mil/*

Navy Reserve: Commander, Naval Military Personnel Command (Pers 91), 5720 Integrity Drive, Millington, TN 38055–9100, *https://www.public.navy.mil/ bupers-npc/ Pages/default.aspx*

Marine Corps Reserve: Director, Marine Corps Individual Reserve Support Activity (MCIRSA), 2000 Opelousas Ave., New Orleans, LA 70114, *https:// www.marforres.marines.mil/ Major-Subordinate-Commands/ Force-Headquarters-Group/ Marine-Corps-Individual-Reserve-Support-Activity/*

Air Force Reserve: Commander, Air Reserve Personnel Center/DPAM, 18420 E. Silver Creek Ave., Bldg. 390, MS 68, Buckley AFB, CO 80011, *https://www.arpc.afrc.af.mil/*

Coast Guard Reserve: Commander (PSC–RPM), U. S. Coast Guard Personnel Service Center, 2703 Martin Luther King Jr Ave. SE, Stop 7200, Washington, DC 20593–7200, *https://www.dcms.uscg.mil/ Our-Organization/ Assistant-Commandant-for-Human-Resources-CG–1/ Personnel-Service-Center-PSC/ Reserve-Personnel-Management-PSC–RPM/*

Army and Air National Guard: Submit petitions to the Adjutant General of the appropriate State, Territory, or the District of Columbia.

PART 45—MEDICAL MALPRACTICE CLAIMS BY MEMBERS OF THE UNIFORMED SERVICES (Eff. 7-19-21)

Sec.

45.1 Purpose of this part.
45.2 Claims payable and not payable in general.
45.3 Authorized claimants.
45.4 Filing a claim.
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45.6 Element of payable claim: negligent or wrongful act or omission.
45.7 Element of payable claim: proximate cause.
45.8 Calculation of damages: disability rating.
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45.10 Calculation of damages: non-economic damages.
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45.12 Initial and Final Determinations.
45.13 Appeals.
45.14 Final and conclusive resolution.
45.15 Other claims procedures and administrative matters.

AUTHORITY: 10 U.S.C. 2733a.

SOURCE: 86 FR 32208, June 17, 2021, unless otherwise noted.

EFFECTIVE DATE NOTE: At 86 FR 32208, June 17, 2021, part 45 was added, effective July 19, 2021.

§45.1 Purpose of this part.

(a) *In general.* The purpose of this part is to establish the rules and procedures for members of the uniformed services or their representatives to file claims for compensation for personal injury or death caused by the medical malpractice of a Department of Defense (DoD) health care provider. Claims under this part may be settled and paid by DoD under the Military Claims Act, Title 10, United States Code, Chapter 163, specifically section 2733a of Title 10 (hereinafter 10 U.S.C. 2733a, section 2733a, or the statute), as added to the Military Claims Act by section 731 of the National Defense Authorization Act for Fiscal Year 2020 (Pub. L. 116–92; 133 Stat. 1457). Claims are adjudicated under an administrative process. This administrative process follows a set of rules and procedures set forth in this part. These rules and procedures are based primarily on a number of detailed provisions in the statute.

(b) *Relationship to military and veterans' compensation programs.* Federal law provides a comprehensive system of compensation for military members and their families in cases of death or disability incurred in military service. This system applies to all causes of death or disability incurred in service,

whether due to combat injuries, training mishaps, motor vehicle accidents, naturally occurring illnesses, household events, with limited exceptions (*e.g.*, when the member is absent without leave or the injury is due to the member's intentional misconduct or willful negligence). This comprehensive compensation system applies to cases of personal injury or death caused by medical malpractice incurred in service as it does to all other causes. This part provides for the possibility of separate compensation in certain cases of medical malpractice but in no other type of case. A medical malpractice claim under this part will have no effect on any other compensation the member or family is entitled to under the comprehensive compensation system applicable to all members. However, a claimant under this part does not receive duplicate compensation for the same harm. Thus, with some limited exceptions, a potential malpractice damages award under this part is reduced or offset by the total value of the compensation the claimant is expected to receive under the comprehensive compensation system, whether or not the claimant ultimately receives such compensation, and the ultimate amount of a settlement under this part will be the amount, if any, that a potential malpractice damages award determined under the terms and conditions of this part exceeds the value of all the compensation and benefits the claimant is otherwise expected to receive from DoD or the Department of Veterans Affairs (VA).

(c) *Relationship to Healthcare Resolutions Program.* The medical malpractice claims process under this part is separate from the Military Health System Healthcare Resolutions Program. The Healthcare Resolutions Program, under Defense Health Agency Procedural Instruction 6025.17, is an independent, neutral, and confidential system that promotes full disclosure of factual information—including information involving adverse events and outcomes—and mediation of clinical conflicts. The program is part of the Military Health System's commitment to transparency, which also includes a patient's right to be heard as part of any quality assurance review of care provided. The Healthcare Resolutions Program is not involved in legal proceedings, compensation matters, or the adjudication of claims under this part. However, any member of the uniformed services may engage the Healthcare Resolutions Program to address nonmonetary aspects of his or her belief that he or she has been harmed by medical malpractice by a DoD health care provider. Because it is not involved in claims or legal proceedings, the Healthcare Resolutions Program disengages when a claim is filed by a service member or his or her representative.

§ 45.2 Claims payable and not payable in general.

(a) *In general.* This section sets forth a number of terms and conditions included in the statute (10 U.S.C. 2733a) that describe claims that are payable and not payable. Some of these terms and conditions are discussed in more detail in later sections of this part.

(b) *Claim not otherwise payable.* As required by the statute (section 2733a(b)(5)), a claim under this Part may only be paid if it is not allowed to be settled and paid under any other provision of law. This limitation provides that it cannot be a claim allowed under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346 and Chapter 171. Claims against the United States filed by members of the uniformed services or their representatives for personal injury or death incident to service are not allowed under the FTCA. These claims may be allowed under this Part if they meet the other applicable terms and conditions.

(c) *Time period for filing claims.* (1) The statute (section 2733a(b)(4)) requires that a claim must be received by DoD in writing within two years after the claim accrues. For mailed claims, timeliness of receipt will be determined by the postmark.

(2) There is a special rule for claims filed during calendar year 2020. Such claims must be presented to DoD in writing within three years after the claim accrues. The tolling provisions under the Servicemembers Civil Relief Act, 50 U.S.C. 3901–4043, are not applicable under this section.

(3) For purposes of applying the time limit for filing a claim, a claim accrues as of the latter of:

(i) The date of the act or omission by a DoD health care provider that is the basis of the malpractice claim; or

(ii) The date on which the claimant knew, or with the exercise of reasonable diligence should have known, of the injury and that malpractice was its possible cause.

(4) State statutes of limitation or repose are inapplicable.

(d) *No claim for attorney's fees or expenses in addition to statutorily allowed amount.*In calculating the amount that may be paid under this part, consistent with section 2733a(c)(2), there is no additional amount permitted for attorneys' fees or expenses associated with filing a claim or participating in any process relating to the adjudication of the claim. The adjudication of claims under this part is not an adversarial proceeding and there is no prevailing party to be awarded costs.

(e) *Claims adjudication based on national standards.* As required by the statute (section 2733a(f)(2)(B)), claims are adjudicated based on national standards consistent with generally accepted standards used in a majority of States in adjudicating claims under the FTCA. The determination of the applicable law is without regard to the place of occurrence of the alleged medical malpractice giving rise to the claim or the military or executive department or service of the member of the uniformed services. Foreign law has no role in the case of claims arising in foreign countries. The legal standards set forth in other sections of this part apply to determinations with respect to:

(1) Whether an act or omission by a DoD health care provider in the context of performing medical, dental, or related health care functions was negligent or wrongful, considering the specific facts and circumstances;

(2) Whether the personal injury or death of the member was proximately caused by a negligent or wrongful act or omission of a DoD health care provider in the context of performing medical, dental, or related health care functions, considering the specific facts and circumstances;

(3) Requirements relating to proof of duty, breach of duty, and causation resulting in compensable injury or loss, subject to such exclusions as may be established by this Part; and

(4) Calculation of damages that may be paid.

(f) *Certain other claims not payable.* The generally accepted legal standards under FTCA that are required to be reflected in the adjudication of claims under this Part include certain exclusions that are part of FTCA law.

(1) The due care and discretionary function exceptions apply to claims under this part.

(i) The due care and discretionary function exceptions, 28 U.S.C. 2680(a), bar any claim based upon an act or omission of a DoD health care provider, exercising due care, in the execution of a statute or regulation or based upon the exercise or performance of any discretionary function or duty on the part of DoD or a DoD health care provider.

(ii) The due care exception applies to any DoD health care provider's act, if carried out with due care, or omission, if omitted with due care, in the execution of a statute or regulation. The due care exception applies whether or not the statute or regulation is valid.

(iii) The discretionary function exception applies to the exercise or performance or the failure to exercise or perform any discretionary function. The discretionary function exception applies whether or not the discretion involved was abused. It applies to any DoD health care provider's act or omission that is a permissible exercise of discretion under the applicable statutes, regulations, or directive and, by its nature, is susceptible to policy analysis. The discretionary function exception applies to DoD policy decisions regarding clinical practice, patient triage, force health protection, medical readiness, health promotion, disease prevention, medical screening, health assessment, resource management, hiring and retaining employees, selection of contractors, military standards, fitness for duty, duty limitations, and health information management, among other matters affecting or involving the provision of health care services.

(2) The quarantine exception applies to claims under this part. This exception, consistent with 28 U.S.C. 2680(f), bars any claim for damages caused by the imposition or establishment of a quarantine by any agency of the U.S. Government.

(3) The combatant activities exception applies to claims under this part. This exception, consistent with 28 U.S.C. 2680(j), bars any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, in time of war.

(4) The FTCA's exclusions under 28 U.S.C. 2674 of interest prior to judgment and punitive damages apply to any claim under this part.

(5) Claims based on intentional or negligent infliction of emotional distress, other intentional torts, wrongful death/life, strict liability, products liability, informed consent, negligent credentialing, or joint and severable liability theories are not payable under this part.

(6) Breach of medical confidentiality is not actionable under this part.

§ 45.3 Authorized claimants.

(a) *In general.* This section describes who may file a claim under this part. A claim may be filed only by a member of a uniformed service or an authorized representative on behalf of a member who is deceased or otherwise unable to file the claim due to incapacitation. A member of the uniformed services includes a cadet or midshipman from the military academies. It does not include an applicant to join a uniformed service or a delayed entry program recruit who has not been accessed into active duty.

(1) As provided in section 2733a(b)(1), the claim must be filed by the member of the uniformed services who is the subject of the medical malpractice claim or by an authorized representative on behalf of such member who is deceased or otherwise unable to file the claim due to incapacitation.

(2) In some circumstances, a claim otherwise payable under this part may be filed by or on behalf of a reserve component member. As provided in section 2733a(i)(3), those circumstances are that the claim is in connection with personal injury or death that occurred while the member was in a Federal duty status. This circumstance includes personal injury, death, or negligent diagnosis resulting from a negligent or wrongful act or omission that occurred while the member was in a Federal duty status. In the case of a member of the National Guard of the United States, a period of Federal duty status may be under Title 10, U.S. Code, or, based on 10 U.S.C. 12602, duty under title 32, U.S. Code. Other duty under State control is not covered.

(b) *Third party claims not allowed.* The statute only authorizes claims by members of the uniformed services. Thus, the regulation does not permit derivative claims or other claims from third parties alleging a separate injury as a result of harm to a member of the uniformed services. This prohibition includes claims by family members or survivors arising out of the circumstances of personal injury or death of a member.

(c) *Incident to service requirement.* Under section 2733a(a), the member's personal injury or death must be incident to service. An injury or death is incident to service if the medical care provided is based on the member's status under this section.

§ 45.4 Filing a claim.

(a) *In general.* A member of a uniformed service or, when applicable, an authorized representative may file a claim in writing. Any written claim will suffice as long as it is meets the requirements below and is signed by the claimant or authorized representative.

(b) *Contents of the claim.* The filed claim must include the following:

(1) The factual basis for the claim, including identification of the conduct allegedly constituting malpractice (*e.g.*, the theory of liability and/or breach of the applicable standard of care);

(2) A demand for a specified dollar amount;

(3) If the claim is filed by an attorney, an affidavit from the claimant affirming the attorney's authority to file the claim on behalf of the claimant;

(4) If the claim is filed by an authorized representative, an affidavit from

the representative affirming his/her authority to file on behalf of the claimant;

(5) If the claimant is not represented by an attorney, unless the alleged medical malpractice is within the general knowledge and experience of ordinary laypersons, an affidavit from the claimant affirming that the claimant consulted with a health care professional who opined that a DoD health care provider breached the standard of care that caused the alleged harm. Alternatively, if the claimant is represented by an attorney, unless the alleged medical malpractice is within the general knowledge and experience of ordinary laypersons, the claimant must submit an affidavit from the attorney affirming that the attorney consulted with a health care professional who opined that a DoD health care provider breached the standard of care that caused the alleged harm. The requirement in this paragraph does not apply to claims filed prior to the publication of this Interim Final Rule.

(c) *Additional information to file in support of claim.* In the investigation and adjudication of a claim, DoD will access pertinent DoD records and information systems regarding the member in order to consider fully all facts that have a bearing on the claim. This collection may include information in personnel and medical records, the Defense Eligibility and Enrollment System (DEERS), reports of investigation, medical quality assurance records, and other information. Upon DoD's request, a claimant must identify any pertinent health care providers outside of DoD, and provide a copy of his or her medical records from each of the identified health care providers, including a statement that the records are complete. A claimant must provide medical release(s) upon DoD's request, enabling DoD to obtain medical records from these health care providers. Claimants may submit any other relevant information they believe supports their claim, such as information regarding the medical care involved, the acts or omissions the claimant believes constitute malpractice, medical opinions from non-DoD providers, and evidence of pain and suffering or other harm.

(d) *Substantiating the claim.* Under section 2733a(b)(6), DoD is allowed to pay a claim only if it is substantiated. The claimant has the burden to substantiate the claim by a preponderance of the evidence. Upon receipt of a claim, DoD may require that the claimant provide additional information DoD believes is necessary for adjudication of the claim, including the submission of an expert opinion at the claimant's expense. DoD may determine an expert opinion is not necessary when negligence is within the general knowledge and experience of ordinary laypersons, such as when a foreign object is unintentionally left in the body or an operation occurred on the wrong body part.

(e) *No discovery.* There is no discovery process for adjudication of claims under this Part. However, claimants may obtain copies of records in DoD's possession that are part of their personnel and medical records in accordance with DoD Instruction 5400.11, ''DoD Privacy and Civil Liberties Programs''; DoD Instruction 6025.18, ''Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule Compliance in DoD Health Care Programs,'' and supplemental DoD issuances to those Instructions. Claimants are not entitled to attorney work product, attorney client privileged communications, material that is part of a DoD Quality Assurance Program protected under 10 U.S.C. 1102, predecisional material, or other privileged information.

§45.5 Elements of payable claim: facilities and providers.

(a) *In general.* This section describes some of the necessary elements of a payable claim. The health care involved must occur in a covered military medical treatment facility (MTF) and be provided by a DoD health care provider acting within the scope of employment.

(b) *Covered MTF.* (1) As provided in section 2733a(b)(3) and (i)(1), the alleged act or omission constituting medical malpractice must have occurred in a covered MTF. For the purposes of this regulation, an MTF is a medical center, inpatient hospital, or ambulatory

care center, as those facilities are described in 10 U.S.C. 1073d. Fixed dental clinics are also included.

(2) A claim may not be based on health care services provided by DoD health care providers in any other location, such as in the field, battalion aid stations, ships, planes, deployed settings, or in any other place that is not a covered MTF.

(c) *DoD health care provider.* As provided in section 2733a(i)(2), a DoD health care provider is a member of the uniformed services, DoD civilian employee, or personal services contractor of the Department (under 10 U.S.C. 1091) authorized by DoD to provide health care services. A non-personal services contractor or a volunteer working in an MTF is not a DoD health care provider for purposes of a payable claim under this part.

(d) *Scope of employment.* As provided in section 2733a(b)(2), for a claim to be payable under this part, the DoD health care provider whose negligent or wrongful act or omission is the basis of a claim must be acting within the scope of employment, meaning that the provider was acting in furtherance of his or her duties in the MTF. For personal services contractors, ''scope of employment'' means the contractor was acting within the scope of his or her duties.

§ 45.6 Element of payable claim: negligent or wrongful act or omission.

(a) *In general.* To establish the element of a negligent or wrongful act or omission, a member of a uniformed service (''claimant'') allegedly harmed incident to service by medical malpractice must prove by a preponderance of the evidence that one or more DoD health care providers in a covered MTF acting within the scope of employment had a professional duty to the patient involved and by act or omission breached that duty which proximately caused the injury or death.

(b) *Standard of care.* The professional duty referred to in paragraph (a) of this section is a duty to exercise the same degree of skill, care, and knowledge ordinarily expected of providers in the same field or specialty in a comparable clinical setting. The standard of care is determined based on generally recognized national standards, not on the standards of a particular region, State or locality. However, standard of care in the military context may be impacted by the particular setting and the availability of resources in that setting.

(c) *Breach of the standard of care.* A breach referred to in paragraph (a) occurs if the health care provider or providers by act or omission did not meet the standard of care.

(d) *Presenting evidence of the standard of care.* A claimant may present evidence to support what the claimant believes is the standard of care relevant to the care involved in the claim.

(e) *Presenting evidence of a failure to meet the standard of care.* (1) A claimant may present evidence to support what the claimant believes demonstrates the failure of one or more DoD health care providers to meet the standard of care. That evidence may be based on the medical records of the patient involved and other documentary evidence of the acts or omissions of health care providers involved, including expert reports.

(2) Evidence of an apology by a health care provider or any other DoD or Military Department personnel, such as hospital directors or commanders, to or regarding a patient will not be considered evidence of medical malpractice. Providers often apologize for unexpected or adverse outcomes independent of whether the provider's acts or omissions met the standard of care.

(f) *Information DoD will consider in assessing whether there was a negligent or wrongful act or omission.* (1) In addition to the information submitted by the claimant, DoD may consider all relevant information in DoD records and information systems or otherwise available to DoD, including information prepared by or on behalf of DoD in connection with adjudication of the claim.

(2) DoD will consider medical quality assurance records relevant to the health care provided to the patient. DoD's Clinical Quality Management Program features reviews of many circumstances of clinical care. Results of any such reviews of the care involved

in the claim that occurred before or after the claim was filed may be considered by DoD in the adjudication of the claim. As required by 10 U.S.C. 1102, DoD medical quality assurance records are confidential. While such records may be used by DoD, any information contained in or derived from such records may not be disclosed to the claimant.

§45.7 Element of payable claim: proximate cause.

(a) *In general.* (1) In a case otherwise payable under this part, a claimant must prove by a preponderance of evidence that a negligent or wrongful act or omission by one or more DoD health care providers was the proximate cause of the harm suffered by the member.

(2) Under section 2733a(c)(1), DoD is liable for only the portion of compensable injury, loss, or damages attributable to the medical malpractice of a DoD health care provider. To the extent other causes contributed to the personal injury or death of the member, whether pre-existing, concurrent, or subsequent, the potential amount of compensation under this regulation will be reduced by that proportion of the alternative cause(s).

(b) *Comparative negligence.* A rule of modified comparative negligence will apply to claims under this part. If a claimant was contributorily negligent in relation to the health care provided, damages will be reduced by the proportion of fault assigned to the Service member. If the claimant's own negligence constituted more than 50% of the fault, the claim is not payable.

(c) *Loss of chance or failure to diagnose.* A claimant may recover for loss of chance for a more favorable clinical outcome in the diagnosis and treatment of his or her illness or injury. The claimant must prove by a preponderance of the evidence that one or more DoD health care providers in a covered MTF acting within the scope of employment had a professional duty to the claimant and by act or omission breached that duty and proximately caused harm. In proving that the claimant suffered harm, the claimant must prove that the lost chance for a better outcome or the failure to diagnose a condition is attributable to the provider or providers. The claimant must prove a substantial loss as opposed to a theoretical or de minimis loss. The portion of harm attributable to the breach of duty will be the percentage of chance lost in proportion to the overall clinical outcome. Damages will be calculated based on this portion of harm.

(d) *Information DoD will consider in assessing proximate cause.* (1) In addition to the information submitted by the claimant, DoD may consider all relevant information in DoD records or information systems or otherwise available to DoD, including information prepared by or on behalf of DoD in connection with adjudication of the claim.

(2) DoD will consider medical quality assurance records relevant to the health care provided to the patient. DoD's Clinical Quality Management Program features reviews of many circumstances of clinical care. Results of any such reviews of the care involved in the claim that occurred before or after the claim was filed may be considered by DoD in the adjudication of the claim. As required by 10 U.S.C. 1102, DoD medical quality assurance records are confidential. While such records may be used by DoD, any information contained in or derived from such records may not be disclosed to the claimant.

§45.8 Calculation of damages: disability rating.

(a) *In general.* For certain purposes relating to calculating damages for a member in a claim under this part, DoD will use the disability rating established in the DoD Disability Evaluation System under DoD Instruction 1332.18[1] or otherwise established by the Department of Veterans Affairs (VA) to assess the extent of the harm alleged to have been caused by medical malpractice. This rating is stated as a disability percentage under the VA Schedule for Rating Disabilities (VASRD) under 38 CFR part 4 or a successor provision. Under 10 U.S.C. 1216a, DoD is required to use the VASRD for assessing

[1] Available at *https://www.esd.whs.mil/Portals/54/ Documents/DD/issuances/ dodi/ 133218p.pdf?ver= 2018-05-24-133105-050.*

the degree of disability of a member under the Disability Evaluation System. DoD will use it for purposes of this part as well. A VASRD-based disability percentage represents the Government's estimate of the lost earning capacity attributable to an illness or injury incurred during military service. A Service member medically separated or retired through the Disability Evaluation System may receive distinct DoD and VA disability ratings. DoD will consider disability ratings, to the extent DoD deems pertinent, for other purposes relating to calculating damages, such as calculating loss of earning capacity and non-economic damages.

(b) *Disability rating procedures.* (1) If a claimant disagrees with the disability rating received in the DoD or VA disability evaluation or claims processes, the member must pursue the appeal opportunities available within the DoD and/or VA to change the member's disability rating.

(2) In any case in which a member has filed a claim under this part and also has a disability determination pending under DoD or VA disability evaluation or claims processes applicable to determinations or appeals, DoD may, in its discretion, hold in abeyance the claim under this part pending the outcome of the disability evaluation or claims process. DoD will notify the claimant that his or her claim is being held in abeyance.

(3) In any case in which a member has not yet received a DoD or VA disability evaluation because the member is retained on active duty, DoD will use the VASRD as the standard for assessing the degree of disability of the member relevant to the member's claim under this part.

§ 45.9 Calculation of damages: economic damages.

(a) *In general.* Economic damages are one component of a potential damages award. The claimant has the burden to prove the amount of economic damages by a preponderance of evidence. Estimates of future losses must be discounted to present value.

(b) *Elements of economic damages in personal injury cases.* Elements of economic damage are limited to the following:

(1) Past expenses, including medical, hospital, and related expenses actually incurred. These expenses do not include health care services provided or paid for by DoD or VA.

(2) Future medical, hospital, and related expenses. These expenses do not include health care goods and services for which the member is entitled to receive from, or be reimbursed for by, DoD (including TRICARE) or VA. Goods and services provided or paid for by DoD or VA are deemed sufficient to meet the claimant's needs for that particular type of good or service.

(3) Past lost earnings unrelated to compensation as a member of the uniformed services. Appropriate documentation is required.

(4) Loss of earning capacity, after deducting for the claimant's personal consumption from the date of injury causing death until expiration of the claimant's work-life expectancy, as substantiated by appropriate documentation. In addition, loss of retirement benefits is compensable and similarly discounted after appropriate deductions. Estimates must be discounted to present value.

(5) Compensation when the claimant can no longer perform essential household services on his or her own behalf, including activities of daily living. This compensation does not include goods and services the member is entitled to receive from, or be reimbursed for by, DoD or VA. Goods and services provided or paid for by DoD or VA are deemed sufficient to meet the claimant's needs for that particular type of good or service.

(c) *Information DoD will consider in calculating economic damages.* In addition to the information submitted by the claimant, DoD may consider all relevant information in DoD records or information systems or otherwise available to DoD, including assessments from appropriate documentary sources and experts available to DoD.

§45.10 Calculation of damages: non-economic damages.

(a) *In general.* Non-economic damages are one component of a potential damages award. The claimant has the burden of proof on the amount of non-economic damages by a preponderance of evidence.

(b) *Elements of non-economic damages.* Elements of non-economic damage are limited to the following:

(1) *Past and future conscious pain and suffering by the claimant.* This element is physical discomfort as well as mental and emotional trauma or distress. Loss of enjoyment of life is compensable. The inability to perform daily activities that one performed prior to injury, such as recreational activities, is included in this element. DoD may request an interview of or statement from the member or other person with primary knowledge of the claimant.

(2) *Physical disfigurement.* This element is impairment resulting from an injury to a member that causes diminishment of beauty or symmetry of appearance rendering the member unsightly, misshapen, imperfect, or deformed. DoD may require a medical statement and photographs, documenting the claimant's condition.

(c) *Cap on non-economic damages.* In any claim under this part, total non-economic damages may not exceed a cap amount. The current cap amount is $500,000. Updates to cap amounts in subsequent years will be published periodically, consistent with changes in prevailing amounts in the majority of the States with non-economic damages caps.

(d) *Information DoD will consider in calculating non-economic damages.* In addition to the information submitted by the claimant, DoD may consider all relevant information in DoD records or otherwise available to DoD, including assessments from appropriate documentary sources and experts available to DoD.

§45.11 Calculation of damages: offsets for DoD and VA Government compensation.

(a) *In general.* Total potential damages calculated under this Part, both economic and non-economic, are reduced by offsetting most of the compensation otherwise provided or expected to be provided by DoD or VA for the same harm that is the subject of the medical malpractice claim. The general rule is that prospective medical malpractice damage awards are offset by DoD or VA payments and benefits that are primarily funded by Government appropriations. However, there is no offset for U.S. Government payments and benefits that are substantially funded by the military member.

(b) *Eligibility for payments and benefits.* In determining the offsets that are applied to a medical malpractice damages award under this part, DoD presumes that a claimant will receive all the payments and benefits for which the claimant is expected to be eligible, whether or not the claimant has taken steps to obtain the payment or benefit or ultimately receives such payment or benefit. A claimant may present evidence that he or she is not eligible for a payment or benefit to rebut the presumption.

(c) *Information considered.* In determining offsets under this section, DoD will consider all data available in DoD records or information systems, other U.S. Government records systems, and other information available to DoD. This data may include information on military pay and allowances, Disability Evaluation System outcomes, VA disability claims, marital status, number and ages of dependents, survivor benefits, and other information. Access to all such information will be in accordance with the Privacy Act, 5 U.S.C. 552a, and applicable implementing regulations.

(d) *Present value of future payments and benefits.* In determining offsets under this section, DoD will estimate the present value of future payments and benefits. Many such payments and benefits in cases of disability or death are lifetime benefits for members or survivors. With respect to any lifetime payments or benefits that may terminate upon the remarriage of a surviving spouse, DoD will not assume a remarriage. Estimates will be based on actuarial information provided by the Chief Actuary, DoD Office of the Actuary, taking into consideration methods and assumptions approved by the DoD

Board of Actuaries and DoD Medicare-Eligible Retiree Health Care Board of Actuaries, respectively, as of the recent actuarial valuation date.

(e) *Payment and benefit programs.* The listings in this section of certain programs that offset and do not offset potential medical malpractice damages awards are not all-inclusive and are subject to adjustment as necessary to account for compensation otherwise provided by DoD or VA for the same harm that resulted from the medical malpractice. Because compensation programs are often changed by Congress, Federal agencies, or judicial decisions, DoD will annually review relevant programs and take account of any such changes for purposes of applying the rules of this section to the adjudication of claims under this part.

(f) *Payments and benefits that are offsets.* Potential damage awards under this part are offset by the present value of the following payments and benefits:

(1) Pay and allowances while a member remains on active duty or in an active status.

(2) Disability retired pay in the case of retirement due to the disability caused by the alleged medical malpractice.

(3) Disability severance pay in the case of non-retirement disability separation caused by the alleged medical malpractice.

(4) Incapacitation pay.

(5) Involuntary and voluntary separation pays and incentives.

(6) Death gratuity.

(7) Housing allowance continuation.

(8) Survivor Benefit Plan.

(9) VA disability compensation, to include Special Monthly Compensation, attributable to the disability resulting from the malpractice.

(10) VA Dependency and Indemnity Compensation, attributable to the disability resulting from the malpractice.

(11) Special Survivor Indemnity Allowance.

(12) Special Compensation for Assistance with Activities of Daily Living.

(13) Program of Comprehensive Assistance for Family Caregivers.

(14) Fry Scholarship.

(15) TRICARE coverage, including TRICARE-for-Life, for a disability retiree, family, or survivors. Future TRICARE coverage is part of the Government's compensation package for a disability retiree or survivor.

(g) *Payments and benefits that are not offsets.* Potential awards under this Part are not offset by the present value of the following payments and benefits.

(1) Servicemembers Group Life Insurance.

(2) Traumatic Servicemembers Group Life Insurance.

(3) Social Security disability benefits.

(4) Social Security survivor benefits.

(5) Prior Government contributions to a Thrift Savings Plan.

(6) Commissary, exchange, and morale, welfare, and recreation facility access.

(7) Value of legal assistance and other services provided by DoD.

(8) Medical care provided while in active service or in an active status prior to death, retirement, or separation.

[86 FR 32208, June 17, 2021; 86 FR 33885, June 28, 2021]

§ 45.12 Initial and Final Determinations.

(a) *Denial of claim—deficient filing.* If a claim does not contain the information required by §45.4(b), DoD will issue an Initial Determination stating that DoD will issue a Final Determination denying the claim unless the deficiency is cured.

(1) DoD will provide the claimant 30 calendar days following receipt of the Initial Determination to cure the deficiency, unless an extension of time is granted for good cause. The date of receipt of the Initial Determination will be presumed to be five calendar days after the date the Initial Determination was mailed or emailed, unless there is evidence to the contrary.

(2) If the claimant does not timely cure the deficiency, DoD will issue a Final Determination denying the claim for failure to cure the deficiency. A Final Determination issued under paragraph (a) of this section may not be appealed.

(b) *Denial of claim—failure to state a claim.* If a claim does not, based upon the information provided, state a claim cognizable under 10 U.S.C. 2733a or this interim final rule, DoD will issue an

Initial Determination denying the claim. Such an Initial Determination may be appealed under the procedures in § 45.13.

(c) *Denial of claim—absence of an expert report.* Where applicable, if the claimant initially does not submit an expert report in support of his or her claim and DoD intends to deny the claim, DoD will issue an Initial Determination stating, without more, that DoD will issue a Final Determination denying the claim in the absence of an expert report or manifest negligence.

(1) DoD will provide the claimant 90 calendar days following receipt of the Initial Determination to submit an expert report, unless an extension of time is granted for good cause. The date of receipt of the Initial Determination will be presumed to be five calendar days after the date the Initial Determination was mailed or emailed, unless there is evidence to the contrary.

(2) If the claimant does not timely submit an expert report, DoD will issue a Final Determination denying the claim and will provide a brief explanation of the basis for the denial to the extent practicable. A Final Determination issued under this paragraph (c) may not be appealed.

(d) *Initial Determination.* (1) Upon consideration of the information provided by the claimant and relevant information available to DoD, DoD will issue the claimant a written Initial Determination.

(2) The Initial Determination may be in the form of a certified letter and/or an email. The Initial Determination may take the form of a grant of a claim and an offer of a settlement or a denial of the claim. Subject to applicable confidentiality requirements, such as 10 U.S.C. 1102, privileged information, and paragraph (a) of this section, DoD will provide a brief explanation of the basis for the Initial Determination to the extent practicable.

(3) The Initial Determination will include information on the claimant's right to appeal if the claimant does not agree with the Initial Determination.

(4) The claimant may request reconsideration of the damages calculation contained in an Initial Determination if, within the time otherwise allowed to file an administrative appeal, the claimant identifies an alleged clear error—a definite and firm conviction that a mistake has been committed—in the damages calculation. DoD will review the alleged clear error and will issue an Initial Determination on Reconsideration either granting or denying reconsideration of the Initial Determination and adjusting the damages calculation, if appropriate. The Initial Determination on Reconsideration will include information on the claimant's right to appeal under the procedures in § 45.13.

§ 45.13 Appeals.

(a) *In general.* This section describes the appeals process applicable to Initial Determinations under this part, which include Initial Determinations on Reconsideration. With the exception of Initial Determinations issued under § 45.12(a), in any case in which the claimant disagrees with an Initial Determination, the claimant has a right to file an administrative appeal. The claimant should explain why he or she disagrees with the Initial Determination, but may not submit additional information in support of the claim unless requested to do so by DoD. An appeal must be received within 60 calendar days of the date of receipt by the claimant/counsel of the Initial Determination, unless an extension of time is granted for good cause. The date of receipt of the Initial Determination will be presumed to be five calendar days after the date the Initial Determination was mailed or emailed, unless there is evidence to the contrary. If no timely appeal is received, DoD will issue a Final Determination.

(b) *Appeals Board.* Appeals will be decided by an Appeals Board administratively supported by the Defense Health Agency. Although there may be, in DoD's discretion, multiple offices that initially adjudicate claims under this part (such as offices in the Military Departments), there is a single DoD Appeals Board. The Appeals Board will consist of not fewer than three and no more than five DoD officials designated by the Defense Health Agency from that agency and/or the Military Departments who are experienced in medical malpractice claims adjudication. Appeals Board members must not have

had any previous role in the claims adjudication under appeal. Appeals are decided on a written record and decisions will be approved by a majority of the members. There is no adversarial proceeding and no hearing. There is no opposing party. The Appeals Board may obtain information or assessments from appropriate sources, including from the claimant, to assist in deciding the appeal. The Appeals Board is bound by the provisions of this Part and will not consider challenges to them.

(c) *Burden of proof.* The claimant on appeal has the burden of proof by a preponderance of evidence that the claim is substantiated in the written record considered as a whole.

(d) *Appeals Board decisions.* (1) Every claimant will be provided a written Final Determination on the claimant's appeal. The Final Determination may adopt by reference the Initial Determination or revise the Initial Determination, as appropriate. If the Final Determination revises the Initial Determination, DoD will provide a brief explanation of the basis for the revisions to the extent practicable.

(2) An Appeals Board decision is final and conclusive. 10 U.S.C. 2735.

(3) The Appeals Board may reverse the Initial Determination to grant or deny a claim and may adjust the settlement amount contained in the Initial Determination either upwards or downwards as appropriate.

§ 45.14 Final and conclusive resolution.

(a) *Administrative adjudication final.* As provided in 10 U.S.C. 2735, the adjudication and settlement of a claim under this part is final and conclusive and not subject to review in any court. Unlike the FTCA, the Military Claims Act, 10 U.S.C. chapter 163, which provides the authority for this part, does not give Federal courts jurisdiction over claims. Further, no claim under this Part may be paid unless the amount tendered is accepted by the claimant in full satisfaction.

(b) *Additional terms of settlement agreement.* (1) Settlement agreements under this part will incorporate the requirement of section 2733a(g)(1) that no attorney may charge, demand, receive, or collect for services rendered, fees in excess of 20 percent of any claim payment amount under this part.

(2) Because settlement and payment of a claim under this part is under section 2733a(b)(5) conditional on the claim not being allowed to be settled and paid under any other provision of law, a settlement agreement under this part will include a provision that it bars any other claim against the United States or DoD health care providers arising from the same set of facts.

§ 45.15 Other claims procedures and administrative matters.

(a) *Payment of damages.* In the event damages are awarded, the claimant or the claimant's estate is entitled to payment of those damages.

(b) *Communication through counsel.* If the claimant is represented by counsel, all communications will be through the claimant's counsel.

(c) *Remedies for filing false claims or making false statements.* Remedies available to the United States for filing false claims with Federal agencies or making false statements to Federal agencies and officials are applicable to claims and statements made in connection with claims under this part. Applicable authorities include 31 U.S.C. 3729 and 18 U.S.C. 1001. False claims and claims supported by false statements will be denied.

(d) *Reports to the Defense Health Agency.* As provided in section 2733a(e), not later than 30 calendar days after a Final Determination of medical malpractice or the payment of all or a portion of a claim under this part, a report documenting that determination is sent to the Director, Defense Health Agency to be used for all necessary and appropriate purposes, including those actions undertaken as part of DoD's Clinical Quality Management Program.

(e) *Monitoring claims adjudications under this part.* The General Counsel of the Defense Health Agency will monitor the performance of the claims adjudications structures and procedures under this part, including accounting for the number of claims processed under this part and the resolution of each claim and identifying means to enhance the effectiveness of the claims adjudication process.

(f) *Authority for actions under this part.* To ensure consistency and compliance with statutory requirements, supplementation of the procedures in this part is not permitted without approval in writing by the General Counsel of the Department of Defense. The General Counsel of the Department of Defense, under DoD Directive 5145.01, ''General Counsel of the Department of Defense,'' may delegate in writing authority for making Initial and Final Determinations, and other actions by DoD officials under this part. As used in this part, and at DoD's discretion, ''DoD'' may include, but is not limited to, Military Departments.

PART 47—ACTIVE DUTY SERVICE FOR CIVILIAN OR CONTRACTUAL GROUPS

Sec.

47.1 Purpose.
47.2 Applicability and scope.
47.3 Definitions.
47.4 Policy.
47.5 Responsibilities.
47.6 Procedures.

APPENDIX A TO PART 47—INSTRUCTIONS FOR SUBMITTING GROUP APPLICATIONS UNDER PUBLIC LAW 95–202

APPENDIX B TO PART 47—THE DOD CIVILIAN/MILITARY SERVICE REVIEW BOARD AND THE ADVISORY PANEL

AUTHORITY: 38 U.S.C. 106 note.

SOURCE: 54 FR 39993, Sept. 29, 1989, unless otherwise noted.

§47.1 Purpose.

This document:

(a) Revises 32 CFR part 47 and implements Public Law 95–202.

(b) Directs the Secretary of the Air Force to determine if an established group of civilian employees or contract workers provided service to the U.S. Armed Forces in a manner considered active military service for Department of Veterans Affairs (VA) benefits.

(c) Establishes the DoD Civilian/Military Service Review Board and the Advisory Panel.

(d) Establishes policy, assigns responsibilities, prescribes application procedures for groups and individuals, and clarifies the factors used to determine active duty (AD) service.

§47.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense (OSD), the Military Departments, and by agreement with the Department of Transportation (DoT), the U.S. Coast Guard.

(b) Applies to any group application considered under Public Law 95–202 after September 11, 1989 and to any individual who applies for discharge documents as a member of a group recognized by the Secretary of the Air Force.

§47.3 Definitions.

Armed conflict. A prolonged period of sustained combat involving members of the U.S. Armed Forces against a foreign belligerent. The term connotes more than a military engagement of limited duration or for limited objectives, and involves a significant use of military and civilian forces.

(a) Examples of armed conflict are World Wars I and II, and the Korean and Vietnam Conflicts.

(b) Examples of military actions that are not armed conflicts are as follows:

(1) The incursion into Lebanon in 1958, and the peacekeeping force there in 1983 and 1984.

(2) The incursions into the Dominican Republic in 1965 and into Libya in 1986.

(3) The intervention into Grenada in 1983.

Civilian or contractual group. An organization similarly situated to the Women's Air Forces Service Pilots (a group of Federal civilian employees attached to the U.S. Army Air Force in World War II). Those organization members rendered service to the U.S. Armed Forces during a period of armed conflict in a capacity that was then considered civilian employment with the Armed Forces, or the result of a contract with the U.S. Government, to provide direct support to the Armed Forces.

Recognized group. A group whose service the Secretary of the Air Force administratively has determined to have been ''active duty for the purposes of all laws administered by the Department of Veterans Affairs''; i.e., VA benefits under 38 U.S.C. 101.

Similarly situated. A civilian or contractual group is similarly situated to the Women's Air Forces Service Pilots when it existed as an identifiable group at the time the service was being rendered to the U.S. Armed Forces during a period of armed conflict. Persons who individually provided support through civilian employment or contract, but who were not members of an identifiable group at the time the services were rendered, are not ''similarly situated'' to the Women's Air Forces Service Pilots of World War II.

§ 47.4 Policy.

(a) *Eligibility for consideration.* To be eligible to apply for consideration under Public Law 95–202 and this part, a group must:

(1) Have been similarly situated to the Women's Air Forces Service Pilots of World War II.

(2) Have rendered service to the United States in what was considered civilian employment with the U.S. Armed Forces either through formal Civil Service hiring or less formal hiring if the engagement was created under the exigencies of war, or as the result of a contract with the U.S. Government to provide direct support to the U.S. Armed Forces.

(3) Have rendered that service during a period of armed conflict.

(4) Consist of living persons to whom VA benefits can accrue.

(5) Not have already received benefits from the Federal Government for the service in question.

(b) A determination of AD service that is considered to be equivalent to active military service is made on the extent to which the group was under the control of the U.S. Armed Forces in support of a military operation or mission during an armed conflict. The extent of control exerted over the group must be similar to that exerted over military personnel and shall be determined by, but not necessarily limited to, the following:

(1) *Incidents favoring equivalency*—(i) *Uniqueness of service.* Civilian service (civilian employment or contractual service) is a vital element of the warfighting capability of the Armed Forces. Civilian service during a period of armed conflict is not necessarily equivalent to active military service, even when performed in a combat zone. Service must be beyond that generally performed by civilian employees and must be occasioned by unique circumstances. For civilian service to be recognized under this part, the following factors must be present:

(A) The group was created or organized by U.S. Government authorities to fill a wartime need or, if a group was not created specifically for a wartime need, but existed before that time, then its wartime mission was of a nature to substantially alter the organization's prewar character.

(B) If the application is based on service in a combat zone, the mission of the group in a combat zone must have been substantially different from the mission of similar groups not in a combat zone.

(ii) *Organizational authority over the group.* The concept of military control is reinforced if the military command authority determines such things as the structure of the civilian organization, the location of the group, the mission and activities of the group, and the staffing requirements to include the length of employment and pay grades of the members of the group.

(iii) *Integration into the military organization.* Integrated civilian groups are subject to the regulations, standards, and control of the military command authority.

(A) Examples include the following:

(*1*) Exchanging military courtesies.

(*2*) Wearing military clothing, insignia, and devices.

(*3*) Assimilating the group into the military organizational structure.

(*4*) Emoluments associated with military personnel; i.e., the use of commissaries and exchanges, and membership in military clubs.

(B) A group fully integrated into the military would give the impression that the members of the group were military, except that they were paid and accounted for as civilians.

(C) Integration into the military may lead to an expectation by members of the group that the service of the group imminently would be recognized as active military service. Such integration acts in favor of recognition.

(iv) *Subjection to military discipline.* During past armed conflicts, U.S. military commanders sometimes restricted the rights or liberties of civilian members as if they were military members.

(A) Examples include the following:

(*1*) Placing members under a curfew.

(*2*) Requiring members to work extended hours or unusual shifts.

(*3*) Changing duty assignments and responsibilities.

(*4*) Restricting proximity travel to and from the military installation.

(*5*) Imposing dress and grooming standards.

(B) Consequences for noncompliance might include a loss of some privilege, dismissal from the group, or trial under military law. Such military discipline acts in favor of recognition.

(v) *Subjection to military justice.* Military members are subject to the military criminal justice system. During times of war, ''persons serving with or accompanying an Armed Force in the field'' are subject to the military criminal justice code. Those who were serving with the U.S. Armed Forces may have been treated as if they were military and subjected to court-martial jurisdiction to maintain discipline. Such treatment is a factor in favor of recognition.

(vi) *Prohibition against members of the group joining the armed forces.* Some organizations may have been formed to serve in a military capacity to overcome the operation of existing laws or treaty or because of a governmentally established policy to retain individuals in the group as part of a civilian force. These factors act in favor of recognition.

(vii) *Receipt of military training and/or achievement of military capability.* If a group employed skills or resources that were enhanced as the result of military training or equipment designed or issued for that purpose, this acts toward recognition.

(2) *Incidents not favoring equivalency—*(i) *Submission to the U.S. Armed Forces for protection.* A group that seeks protection and assistance from the U.S. Armed Forces and submits to military control for its own well-being is not deemed to have provided service to the Armed Forces equivalent to AD military service, even though the group may have been as follows:

(A) Armed by the U.S. military for defensive purposes.

(B) Routed by the U.S. military to avoid the enemy.

(C) Instructed by the U.S. military for the defense of the group when attacked by, or in danger of attack by, the enemy.

(D) Otherwise submitted themselves to the U.S. military for sustenance and protection.

(ii) *Permitted to resign.* The ability of members to resign at will and without penalty acts against military control. Penalty may be direct and severe, such as confinement, or indirect and moderate, such as difficult and costly transportation from an overseas location.

(iii) *Prior recognition of group service.* Recognition of a group's service by agencies of State or local government does not provide support in favor of recognition under this part.

(3) *Status of group in international law.* In addition to other factors, consideration will be given to whether members of the group were regarded and treated as civilians, or assimilated to the Armed Forces as reflected in treaties, customary international law, judicial decisions, and U.S. diplomatic practice.

(c) *Reconsideration.* Applications by groups previously denied a favorable determination by the Secretary of the Air Force shall be reconsidered under this part if the group submits evidence that is new, relevant, and substantive. Any request that the DoD Civilian/Military Service Review Board established hereunder (see §47.5(b)) determines does not provide new, relevant, and substantive evidence shall be returned to the applicant with the reasons for nonacceptance.

(d) *Counsel Representation.* Neither the Department of Defense nor Department of Transportation shall provide representation by counsel or defray the cost of such representation with respect to any matter covered by this part.

§47.5 Responsibilities.

(a) The Assistant Secretary of Defense (Force Management and Personnel) (ASD(FM&P)) shall:

(1) Appoint a primary and an alternate member in the grade of O–6 or GM–15 or higher to the DoD Civilian/Military Service Review Board.

(2) Exercise oversight over the Military Departments and the U.S. Coast Guard for compliance with this Directive and in the issuance of discharge documents and casualty reports to members of recognized groups.

(b) The Secretary of the Air Force, as the designated Executive Agent of the Secretary of Defense for the administration of Public Law 95–202 shall:

(1) Establish the DoD Civilian/Military Service Review Board and the Advisory Panel.

(2) Appoint as board president a member or employee of the Air Force in grade O–6 or GM–15 or higher.

(3) Request the Secretary of Transportation to appoint an additional voting member from the U.S. Coast Guard when the board is considering the application of a group claiming active Coast Guard service.

(4) Provide a recorder and an assistant to maintain the records of the board and administer the functions of this part.

(5) Provide nonvoting legal advisors and historians.

(6) Publish notices of group applications and other Public Law 95–202 announcements in the FEDERAL REGISTER.

(7) Consider the rationale and recommendations of the DoD Civilian/Military Service Review Board.

(8) Determine whether the service rendered by a civilian or contractual group shall be considered AD service to the U.S. Armed Forces for all laws administered by the VA. The decision of the Secretary of the Air Force is final. There is no appeal.

(9) Notify the following persons in writing when a group determination is made (if the Secretary of the Air Force disagrees with the rationale or recommendations of the board, the Secretary of the Air Force shall provide the decision and reasons for it in writing to these persons):

(i) The applicant(s) for the group.

(ii) The Secretary of the Department of Veterans Affairs.

(iii) The Secretary of the Army.

(iv) The Secretary of the Navy.

(v) The ASD (FM&P).

(vi) The Secretary of Transportation (when a group claims active Coast Guard service).

(c) The Secretary of the Army, Secretary of the Navy, Secretary of the Air Force, and Commandant of the Coast Guard shall:

(1) Appoint to the board a primary and an alternate member in the grades of O–6 or GM–15 or higher from their respective Military Services.

(2) Process applications for discharge documents from individuals claiming membership in a recognized group in accordance with applicable laws, Directives, the Secretary of the Air Force rationale and instrument effecting a group determination, and any other instructions of the board.

(3) Determine whether the applicant was a member of a recognized group after considering the individual's evidence of membership and verifying the service against available Government records.

(4) Issue a DD Form 214, ''Certificate of Release or Discharge from Active Duty,'' and a DD Form 256, ''Honorable Discharge Certificate,'' or a DD Form 257, ''General Discharge Certificate,'' as appropriate, consistent with DoD Instruction 1336.1[1] and DoD Directive 1332.14[2] and the implementing documents of the appropriate statutes of the Military Department concerned or the DoT and the instructions of the DoD Civilian/Military Service Review Board.

(5) Issue a DD Form 1300, ''Report of Casualty,'' in accordance with DoD Instruction 1300.9[3] if a verified member was killed during the period of AD service.

(6) Ensure that each DD Form 214, ''Certificate of Release or Discharge from Active Duty,'' and each DD Form 1300, ''Report of Casualty,'' have the following statement entered in the ''Remarks'' section:

This document, issued under Public Law 95–202 (38 U.S.C. 106 Note), administratively

[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, Attn: 1053, 5801 Tabor Avenue, Philadelphia, PA 19120.

[2] See footnote 1 to § 47.5(c)(4).

[3] See footnote 1 to § 47.5(c)(4).

establishes active duty service for the purposes of Department of Veterans Affairs benefits.

(7) Determine the equivalent military pay grade, when required by the Department of Veterans Affairs. For VA benefits, a pay grade is needed only in cases when an individual was killed or received service-connected injuries or disease during the recognized period of AD service. A DD Form 1300 shall be issued with the equivalent pay grade annotated for a member who died during the recognized period of service. A DD Form 214 shall not include pay grade, unless the Department of Veterans Affairs requests that a grade determination be given. Determinations of equivalent grade shall be based on the following criteria in order of importance:

(i) Officially recognized organizational grade or equivalent rank.

(ii) The corresponding rank for civilian pay grade.

(iii) If neither of the criteria in paragraphs (c)(7) (i) and (ii) of this section, and applies, only one of three grades may be issued; i.e., O–1, E–4, or E–1. Selection depends on the nature of the job performed, the level of supervision exercised, and the military privileges to which the individual was entitled.

(8) Adjudicate applicant challenges to the period of AD service, characterization of service, or other administrative aspects of the discharge documents issued.

§ 47.6 Procedures.

(a) *Submitting group applications.* Applications on behalf of a civilian or contractual group shall be submitted to the Secretary of the Air Force using the instructions in appendix A to this part.

(b) *Processing group applications.* (1) When received, the recorder shall review the application for sufficiency and either return it for more information or accept it for consideration and announce acceptance in the FEDERAL REGISTER.

(2) The recorder shall send the application to the appropriate advisory panel for historical review and analysis.

(3) When received, the recorder shall send the advisory panel's report to the applicant for comment. The applicant's comments shall be referred to the advisory panel if significant disagreement requires resolution. Additional comments from the historians also shall be referred to the applicant for comment.

(4) The DoD Civilian/Military Service Board shall consider the group application, as established, in paragraph (a) and paragraphs (b) (1) through (3) of this section.

(5) After the Secretary of the Air Force makes a decision, the recorder shall notify the applicant of the decision and announce it in the ''FEDERAL REGISTER.''

(c) *Submitting individual applications.* When a group is recognized, individual members may apply to the appropriate Military Department or to the Coast Guard for discharge documents. Submit applications on DD Form 2168, ''Application for Discharge of Member or Survivor of Member of Group Certified to Have Performed Active Duty with the Armed Forces of the United States.'' An application on behalf of a deceased or incompetent member submitted by the next of kin must be accompanied by proof of death or incompetence.

APPENDIX A TO PART 47—INSTRUCTIONS FOR SUBMITTING GROUP APPLICATIONS UNDER PUBLIC LAW 95–202

A. In Submitting a Group Application: 1. Define the group to include the time period that your group provided service to the U.S. Armed Forces.

2. Show the relationship that the group had with the U.S. Armed Forces, the manner in which members of the group were employed, and the services the members of the group provided to the Armed Forces.

3. Address each of the factors in §47.4.

4. Substantiate and document the application. (The burden of proof rests with the applicant.)

B. Send Completed Group Applications To: Secretary of the Air Force (SAF/MRC), DoD Civilian/Military Service Review Board, Washington, DC 20330–1000.

APPENDIX B TO PART 47—THE DOD CIVILIAN/MILITARY SERVICE REVIEW BOARD AND THE ADVISORY PANEL

A. Organization and Management

1. The board shall consist of a president selected from the Department of the Air Force and one representative each from the OSD,

the Department of the Army, the Department of the Navy, the Department of the Air Force, and the U.S. Coast Guard (when the group claims active Coast Guard service). Each member shall have one vote except that the president shall vote only to break a tie. The board's decision is determined by majority vote. The president and two voting members shall constitute a quorum.

2. The advisory panel shall act as a nonvoting adjunct to the board. It shall consist of historians selected by the Secretaries of the Military Departments and, if required, by the Secretary of Transportation. The respective Military Departments and the DOT shall ensure that the advisory panel is provided with administrative and legal support.

B. Functions

1. The board shall meet in executive session at the call of the president, and shall limit its reviews to the following:

a. Written submissions by an applicant on behalf of a civilian or contractual group. Presentations to the board are not allowed.

b. Written report(s) prepared by the advisory panel.

c. Any other relevant written information available.

d. Factors established in this part for determining AD service.

2. The board shall return to the applicant any application that does not meet the eligibility criteria established in §47.4(a). The board only needs to state the reasons why the group is ineligible for consideration under this part.

3. If the board determines that an application is eligible for consideration under §47.4(a), the board shall provide, to the Secretary of the Air Force, a recommendation on the AD service determination for the group and the rationale for that recommendation that shall include, but not be limited to, a discussion of the factors listed in §47.4.

a. No factors shall be established that require automatic recognition. Neither the board nor the Secretary of the Air Force shall be bound by any method in reaching a decision.

b. Prior group determinations made under Public Law 95–202 do not bind the board or the Secretary of the Air Force. The board and the Secretary of the Air Force fully and impartially shall consider each group on its own merit in relation to the factors listed in section D. of this Directive.

PART 50—PERSONAL COMMERCIAL SOLICITATION ON DOD INSTALLATIONS

GENERAL PROVISIONS

Sec.
50.1 Purpose.
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APPENDIX A TO PART 50—LIFE INSURANCE PRODUCTS AND SECURITIES

APPENDIX B TO PART 50—OVERSEAS LIFE INSURANCE REGISTRATION PROGRAM

AUTHORITY: 5 U.S.C. 301.

SOURCE: 71 FR 38764, July 10, 2006, unless otherwise noted.

GENERAL PROVISIONS

§50.1 Purpose.

This part:

(a) Implements section 577 of Public Law No. 109–163 (2006) and establishes policy and procedures for personal commercial solicitation on DoD installations.

(b) Continues the established annual DoD registration requirement for the sale of insurance and securities on DoD installations overseas.

(c) Identifies prohibited practices that may cause withdrawal of commercial solicitation privileges on DoD installations and establishes notification requirements when privileges are withdrawn.

(d) Establishes procedures for persons solicited on DoD installations to evaluate solicitors.

(e) Prescribes procedures for providing financial education programs to military personnel.

§50.2 Applicability.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense

(hereafter referred to collectively as the ''DoD Components'').

(b) Does not apply to services furnished by residential service companies, such as deliveries of milk, laundry, newspapers, and related services to personal residences on the installation requested by the resident and authorized by the installation commander.

(c) Applies to all other personal commercial solicitation on DoD installations. It includes meetings on DoD installations of private, non-profit, tax-exempt organizations that involve commercial solicitation. Attendance at these meetings shall be voluntary and the time and place of such meetings are subject to the discretion of the installation commander or his or her designee.

§50.3 Definitions.

Agent. An individual who receives remuneration as a salesperson or whose remuneration is dependent on volume of sales of a product or products. (Also referred to as ''commercial agent'' or ''producer''). In this part, the term ''agent'' includes ''general agent'' unless the content clearly conveys a contrary intent.

''Authorized'' Bank and/or Credit Union. Bank and/or credit union selected by the installation commander through open competitive solicitation to provide exclusive on-base delivery of financial services to the installation under a written operating agreement.

Banking institution. An entity chartered by a State or the Federal Government to provide financial services.

Commercial sponsorship. The act of providing assistance, funding, goods, equipment (including fixed assets), or services to an MWR program or event by an individual, agency, association, company or corporation, or other entity (sponsor) for a specified (limited) period of time in return for public recognition or advertising promotions. Enclosure 9 of DoD Instruction 1015.10[1] provides general policy governing commercial sponsorship.

Credit union. A cooperative nonprofit association, incorporated under the Credit Union Act (12 U.S.C. 1751), or similar state statute, for the purpose of encouraging thrift among its members and creating a source of credit at a fair and reasonable rate of interest.

DoD installation. For the purposes of this part, any Federally owned, leased, or operated base, reservation, post, camp, building, or other facility to which DoD personnel are assigned for duty, including barracks, transient housing, and family quarters.

DoD personnel. For the purposes of this part, all active duty officers (commissioned and warrant) and enlisted members of the Military Departments and all civilian employees, including nonappropriated fund employees and special Government employees, of the Department of Defense.

Financial services. Those services commonly associated with financial institutions in the United States, such as electronic banking (e.g., ATMs), in-store banking, checking, share and savings accounts, fund transfers, sale of official checks, money orders and travelers checks, loan services, safe deposit boxes, trust services, sale and redemption of U.S. Savings Bonds, and acceptance of utility payments and any other consumer-related banking services.

General agent. A person who has a legal contract to represent a company. See the definition of ''Agent'' in this section.

Insurance carrier. An insurance company issuing insurance through an association reinsuring or coinsuring such insurance.

Insurance product. A policy, annuity, or certificate of insurance issued by an insurer or evidence of insurance coverage issued by a self-insured association, including those with savings and investment features.

Insurer. An entity licensed by the appropriate department to engage in the business of insurance.

Military services. See Joint Publication 1–02, ''DoD Dictionary of Military and Associated Terms.''[2]

Normal home enterprises. Sales or services that are customarily conducted in a domestic setting and do not compete

[1] Copies may be obtained at *http://www.dtic.mil/whs/directives/*.

[2] See *http://www.dtic.mil/doctrine/ jel/doddict/indexs.html*.

with an installation's officially sanctioned commerce.

Personal commercial solicitation. Personal contact, to include meetings, meals, or telecommunications contact, for the purpose of seeking private business or trade.

Securities. Mutual funds, stocks, bonds, or any product registered with the Securities and Exchange Commission except for any insurance or annuity product issued by a corporation subject to supervision by State insurance authorities.

Suspension. Temporary termination of privileges pending completion of a commander's inquiry or investigation.

Withdrawal. Termination of privileges for a set period of time following completion of a commander's inquiry or investigation.

§ 50.4 Policy.

(a) It is DoD policy to safeguard and promote the welfare of DoD personnel as consumers by setting forth a uniform approach to the conduct of all personal commercial solicitation and sales to them by dealers and their agents. For those individuals and their companies that fail to follow this policy, the opportunity to solicit on military installations may be limited or denied as appropriate.

(b) Command authority includes authority to approve or prohibit all commercial solicitation covered by this part. Nothing in this part limits an installation commander's inherent authority to deny access to vendors or to establish time and place restrictions on commercial activities at the installation.

§ 50.5 Responsibilities.

(a) The Principal Deputy Under Secretary of Defense for Personnel and Readiness (PDUSD(P&R)), under the Under Secretary of Defense for Personnel and Readiness, shall:

(1) Identify and publish policies and procedures governing personal commercial solicitation on DoD installations consistent with the policy set forth in this part.

(2) Maintain and make available to installation commanders and appropriate Federal personnel the current master file of all individual agents, dealers, and companies who have their privileges withdrawn at any DoD installation.

(3) Develop and maintain a list of all State Insurance Commissioners' points of contact for DoD matters and forward this list to the Military Services.

(b) The Heads of the DoD Components shall:

(1) Ensure implementation of this part and compliance with its provisions.

(2) Require installations under their authority to report each instance of withdrawal of commercial solicitation privileges.

(3) Submit lists of all individuals and companies who have had their commercial solicitation privileges withdrawn at installations under their authority to the PDUSD(P&R) in accordance with this part.

§ 50.6 Procedures.

(a) *General.* (1) No person has authority to enter a DoD installation to transact personal commercial solicitation as a matter of right. Personal commercial solicitation may be permitted only if the following requirements are met:

(i) The solicitor is duly licensed under applicable Federal, State, or municipal laws and has complied with installation regulations.

(ii) A specific appointment has been made for each meeting with the individual concerned. Each meeting is conducted only in family quarters or in other areas designated by the installation commander.

(iii) The solicitor agrees to provide each person solicited the personal commercial solicitation evaluation included in DD Form 2885[3] during the initial appointment. The person being solicited is not required to complete the evaluation. However, completed evaluations should be sent by the person who was solicited to the office designated by the installation commander on the back of the evaluation form.

[3] Copies may be obtained from *http://www.dtic.mil/whs/directives/infomgt/forms/forminfo/forminfopage2239.html*.

(iv) The solicitor agrees to provide DoD personnel with a written reminder, prior to their making a financial commitment, that free legal advice is available from the Office of the Staff Judge Advocate.

(2) Solicitors on overseas installations shall be required to observe, in addition to the above, the applicable laws of the host country. Upon request, the solicitor must present documentary evidence to the installation commander that the company they represent, and its agents, meet the applicable licensing requirements of the host country.

(b) *Life insurance products and securities.* (1) Life insurance products and securities offered and sold to DoD personnel shall meet the prerequisites described in §50.3.

(2) Installation commanders may permit insurers and their agents to solicit on DoD installations if the requirements of paragraph (a) of this section are met and if they are licensed under the insurance laws of the State where the installation is located. Commanders will ensure the agent's license status and complaint history are checked with the appropriate State or Federal regulators before granting permission to solicit on the installation.

(3) In addition, before approving insurance and financial product agents' requests for permission to solicit, commanders shall review the list of agents and companies currently barred, banned, or limited from soliciting on any or all DoD installations. This list may be viewed via the Personal *Commercial Solicitation Report* ''quick link'' at *http://www.commanderspage.com.* In overseas areas, the DoD Components shall limit insurance solicitation to those insurers registered under the provisions of appendix B to this part.

(4) The conduct of all insurance business on DoD installations shall be by specific appointment. When establishing the appointment, insurance agents shall identify themselves to the prospective purchaser as an agent for a specific insurer.

(5) Installation commanders shall designate areas where interviews by appointment may be conducted. The opportunity to conduct scheduled interviews shall be extended to all solicitors on an equitable basis. Where space and other considerations limit the number of agents using the interviewing area, the installation commander may develop and publish local policy consistent with this concept.

(6) Installation commanders shall make disinterested third-party insurance counseling available to DoD personnel desiring counseling. Financial counselors shall encourage DoD personnel to seek legal assistance or other advice from a disinterested third-party before entering into a contract for insurance or securities.

(7) In addition to the solicitation prohibitions contained in paragraph (d) of this section, DoD Components shall prohibit the following:

(i) The use of DoD personnel representing any insurer, dealing directly or indirectly on behalf of any insurer or any recognized representative of any insurer on the installation, or as an agent or in any official or business capacity with or without compensation.

(ii) The use of an agent as a participant in any Military Service-sponsored education or orientation program.

(iii) The designation of any agent or the use by any agent of titles (for example, ''Battalion Insurance Counselor,'' ''Unit Insurance Advisor,'' ''Servicemen's Group Life Insurance Conversion Consultant,'') that in any manner, states, or implies any type of endorsement from the U.S. Government, the Armed Forces, or any State or Federal agency or government entity.

(iv) The use of desk space for interviews for other than a specific prearranged appointment. During such appointment, the agent shall not be permitted to display desk signs or other materials announcing his or her name or company affiliation.

(v) The use of an installation ''daily bulletin,'' marquee, newsletter, Web page, or other official notice to announce the presence of an agent and/or his or her availability.

(c) *Supervision of on-base commercial activities.* (1) All pertinent installation regulations shall be posted in a place easily accessible to those conducting and receiving personal commercial solicitation on the installation.

(2) The installation commander shall make available a copy of installation regulations to anyone conducting on-base commercial solicitation activities warning that failure to follow the regulations may result in the loss of solicitation privileges.

(3) The installation commander, or designated representative, shall inquire into any alleged violations of this part or of any questionable solicitation practices. The DD Form 2885 is provided as a means to supervise solicitation activities on the installation.

(d) *Prohibited practices.* The following commercial solicitation practices shall be prohibited on all DoD installations:

(1) Solicitation of recruits, trainees, and transient personnel in a group setting or ''mass'' audience and solicitation of any DoD personnel in a ''captive'' audience where attendance is not voluntary.

(2) Making appointments with or soliciting military or DoD civilian personnel during their normally scheduled duty hours.

(3) Soliciting in barracks, day rooms, unit areas, transient personnel housing, or other areas where the installation commander has prohibited solicitation.

(4) Use of official military identification cards or DoD vehicle decals by active duty, retired or reserve members of the Military Services to gain access to DoD installations for the purpose of soliciting. When entering the installation for the purpose of solicitation, solicitors with military identification cards and/or DoD vehicle decals must present documentation issued by the installation authorizing solicitation.

(5) Procuring, attempting to procure, supplying, or attempting to supply non-public listings of DoD personnel for purposes of commercial solicitation, except for releases made in accordance with DoD Directive 5400.7.[4]

(6) Offering unfair, improper, or deceptive inducements to purchase or trade.

(7) Using promotional incentives to facilitate transactions or to eliminate competition.

(8) Using manipulative, deceptive, or fraudulent devices, schemes, or artifices, including misleading advertising and sales literature. All financial products, which contain insurance features, must clearly explain the insurance features of those products.

(9) Using oral or written representations to suggest or give the appearance that the Department of Defense sponsors or endorses any particular company, its agents, or the goods, services, and commodities it sells.

(10) DoD personnel making personal commercial solicitations or sales to DoD personnel who are junior in rank or grade, or to the family members of such personnel, except as authorized in Section 2–205 and 5–409 of the Joint Ethics Regulation, DoD 5500.7–R.[5]

(11) Entering into any unauthorized or restricted area.

(12) Using any portion of installation facilities, including quarters, as a showroom or store for the sale of goods or services, except as specifically authorized by DoD Directive 1330.17[6] and DoD Instructions 1015.10, 1000.15[7] and 1330.21.[8] This does not apply to normal home enterprises that comply with applicable State and local laws and installation rules.

(13) Soliciting door to door or without an appointment.

(14) Unauthorized advertising of addresses or telephone numbers used in personal commercial solicitation activities conducted on the installation, or the use of official positions, titles, or organization names, for the purpose of personal commercial solicitation, except as authorized in DoD 5500.7–R. Military grade and Military Service as part of an individual's name (e.g., Captain Smith, U.S. Marine Corps) may be used in the same manner as conventional titles, such as ''Mr.'', ''Mrs.'', or ''Honorable''.

(15) Contacting DoD personnel by calling a government telephone, faxing to a government fax machine, or by sending e-mail to a government computer, unless a pre-existing relationship (i.e., the DoD member is a current client or requested to be contacted) exists between the parties and the DoD

[4] See footnote 1 to § 50.3.

[5] See footnote 1 to § 50.3.

[6] See footnote 1 to § 50.3.

[7] See footnote 1 to § 50.3.

[8] See footnote 1 to § 50.3.

member has not asked for contact to be terminated.

(e) *Denial, suspension, and withdrawal of installation solicitation privileges.* (1) The installation commander shall deny, suspend, or withdraw permission for a company and its agents to conduct commercial activities on the base if such action is in the best interests of the command. The grounds for taking these actions may include, but are not limited to, the following:

(i) Failure to meet the licensing and other regulatory requirements prescribed in this part or violations of the State law where the installation is located. Commanders will request that appropriate state officials determine whether a company or agent violated State law.

(ii) Commission of any of the practices prohibited in paragraphs (b)(6) and (d) of this section.

(iii) Substantiated complaints and/or adverse reports regarding the quality of goods, services, and/or commodities, and the manner in which they are offered for sale.

(iv) Knowing and willful violations of Public Law 90–321.

(v) Personal misconduct by a company's agent or representative while on the installation.

(vi) The possession of, and any attempt to obtain supplies of direct deposit forms, or any other form or device used by Military Departments to direct a Service member's pay to a third party, or possession or use of facsimiles thereof. This includes using or assisting in using a Service member's ''MyPay'' account or other similar Internet medium for the purpose of establishing a direct deposit for the purchase of insurance or other investment product.

(vii) Failure to incorporate and abide by the Standards of Fairness policies contained in DoD Instruction 1344.9.[9]

(2) The installation commander may determine that circumstances dictate the immediate suspension of solicitation privileges while an investigation is conducted. Upon suspending solicitation privileges, the commander shall promptly inform the agent and the company the agent represents, in writing.

(3) In suspending or withdrawing solicitation privileges, the installation commander shall determine whether to limit such action to the agent alone or extend it to the company the agent represents. This decision shall be based on the circumstances of the particular case, including, but not limited to, the nature of the violations, frequency of violations, the extent to which other agents of the company have engaged in such practices and any other matters tending to show the culpability of an individual and the company.

(4) If the investigation determines an agent or company does not possess a valid license or the agent, company, or product has failed to meet other State or Federal regulatory requirements, the installation commander shall immediately notify the appropriate regulatory authorities.

(5) In a withdrawal action, the commander shall allow the individual or company an opportunity to show cause as to why the action should not be taken. To ''show cause'' means an opportunity must be given for the aggrieved party to present facts on an informal basis for the consideration of the installation commander or the commander's designee. The installation commander shall make a final decision regarding withdrawal based upon the entire record in each case. Installation commanders shall report concerns or complaints involving the quality or suitability of financial products or concerns or complaints involving marketing methods used to sell these products to the appropriate State and Federal regulatory authorities. Also, installation commanders shall report any suspension or withdrawal of insurance or securities products solicitation privileges to the appropriate State or Federal regulatory authorities.

(6) The installation commander shall inform the Military Department concerned of any denial, suspension, withdrawal, or reinstatement of an agent or company's solicitation privileges and the Military Department shall inform the Office of the PDUSD(P&R), which will maintain a list of insurance and financial product companies and agents currently barred, banned, or otherwise

[9] See footnote 1 to §50.3.

limited from soliciting on any or all DoD installations. This list may be viewed at *http://www.commanderspage.com*. If warranted, the installation commander may recommend to the Military Department concerned that the action taken be extended to other DoD installations. The Military Department may extend the action to other military installations in the Military Department. The PDUSD(P&R), following consultation with the Military Department concerned, may order the action extended to other Military Departments.

(7) All suspensions or withdrawals of privileges may be permanent or for a set period of time. If for a set period, when that period expires, the individual or company may reapply for permission to solicit through the installation commander or Military Department originally imposing the restriction. The installation commander or Military Department reinstating permission to solicit shall notify the Office of the PDUSD(P&R) and appropriate State and Federal regulatory agencies when such suspensions or withdrawals are lifted.

(8) The Secretaries of the Military Departments may direct the Armed Forces Disciplinary Control Boards in all geographical areas in which the grounds for withdrawal action have occurred to consider all applicable information and take action that the Boards deem appropriate.

(9) Nothing in this part limits the authority of the installation commander or other appropriate authority from requesting or instituting other administrative and/or criminal action against any person, including those who violate the conditions and restrictions upon which installation entry is authorized.

(f) *Advertising and commercial sponsorship.* (1) The Department of Defense expects voluntary observance of the highest business ethics by commercial enterprises soliciting DoD personnel through advertisements in unofficial military publications when describing goods, services, commodities, and the terms of the sale (including guarantees, warranties, and the like).

(2) The advertising of credit terms shall conform to the provisions of 15 U.S.C. 1601 as implemented by Federal Reserve Board Regulation Z according to 12 CFR part 226.

(3) Solicitors may provide commercial sponsorship to DoD Morale, Welfare and Recreation programs or events according to DoD Instruction 1015.10. However, sponsorship may not be used as a means to obtain personal contact information for any participant at these events without written permission from the individual participant. In addition, commercial sponsors may not use sponsorship to advertise products and/or services not specifically agreed to in the sponsorship agreement.

(4) The installation commander may permit organizations to display sales literature in designated locations subject to command policies. In accordance with DoD 7000.14–R,[10] Volume 7(a), distribution of competitive literature or forms by off-base banks and/or credit unions is prohibited on installations where an authorized on-base bank and/or credit union exists.

(g) *Educational programs.* (1) The Military Departments shall develop and disseminate information and provide educational programs for members of the Military Services on their personal financial affairs, including such subjects as insurance, Government benefits, savings, budgeting, and other financial education and assistance requirements outlined in DoD Instruction 1342.27.[11] The Military Departments shall ensure that all instructors are qualified as appropriate for the subject matter presented. The services of representatives of authorized on-base banks and credit unions may be used for this purpose. Under no circumstances shall commercial agents, including representatives of loan, finance, insurance, or investment companies, be used for this purpose. Presentations shall only be conducted at the express request of the installation commander.

(2) The Military Departments shall also make qualified personnel and facilities available for individual counseling on loans and consumer credit transactions in order to encourage thrift and financial responsibility and

[10] See footnote 1 to § 50.3.

[11] See footnote 1 to § 50.3.

promote a better understanding of the wise use of credit, as prescribed in DoD 7000.14–R.

(3) The Military Departments shall encourage military members to seek advice from a legal assistance officer, the installation financial counselor, their own lawyer, or a financial counselor, before making a substantial loan or credit commitment.

(4) Each Military Department shall provide advice and guidance to DoD personnel who have a complaint under DoD 1344.9 or who allege a criminal violation of its provisions, including referral to the appropriate regulatory agency for processing of the complaint.

(5) Banks and credit unions operating on DoD installations are required to provide financial counseling services as an integral part of their financial services offerings. Representatives of and materials provided by authorized banks and/or credit unions located on military installations may be used to provide the educational programs and information required by this part subject to the following conditions:

(i) If the bank or credit union operating on a DoD installation sells insurance or securities or has any affiliation with a company that sells or markets insurance or other financial products, the installation commander shall consider that company's history of complying with this part before authorizing the on-base financial institution to provide financial education.

(ii) All prospective educators must agree to use appropriate disclaimers in their presentations and on their other educational materials. The disclaimers must clearly indicate that they do not endorse or favor any commercial supplier, product, or service, or promote the services of a specific financial institution.

(6) Use of other non-government organizations to provide financial education programs is limited as follows:

(i) Under no circumstances shall commercial agents, including employees or representatives of commercial loan, finance, insurance, or investment companies, be used.

(ii) The limitation in paragraph (g)(6)(i) of this section does not apply to educational programs and information regarding the Survivor Benefits Program and other government benefits provided by tax-exempt organizations under section (c)(23) of 26 U.S.C. 501 or by any organization providing such a benefit under a contract with the Government.

(iii) Educators from non-government, non-commercial organizations expert in personal financial affairs and their materials may, with appropriate disclaimers, provide the educational programs and information required by this part if approved by a Presidentially-appointed, Senate-confirmed civilian official of the Military Department concerned. Presentations by approved organizations shall be conducted only at the express request of the installation commander. The following criteria shall be used when considering whether to permit a non-government, non-commercial organization to present an educational program or provide materials on personal financial affairs:

(A) The organization must qualify as a tax-exempt organization under 5 U.S.C. 501(c)(3) or 5 U.S.C. 501(c)(23).

(B) If the organization has any affiliation with a company that sells or markets insurance or other financial products, the approval authority shall consider that company's history of complying with this part.

(C) All prospective educators must use appropriate disclaimers, in their presentations and on their other educational materials, which clearly indicate that they and the Department of Defense do not endorse or favor any commercial supplier, product, or service or promote the services of a specific financial institution.

§50.7 Information requirements.

The reporting requirements concerning the suspension or withdrawal of solicitation privileges have been assigned Report Control Symbol (RCS) DD–P&R(Q)2182 in accordance with DoD 8910.1–M.[12]

[12] See footnote 1 to §50.3.

APPENDIX A TO PART 50—LIFE INSURANCE PRODUCTS AND SECURITIES

A. LIFE INSURANCE PRODUCT CONTENT PREREQUISITES

Companies must provide DoD personnel a written description for each product or service they intend to market to DoD personnel on DoD installations. These descriptions must be written in a manner that DoD personnel can easily understand, and fully disclose the fundamental nature of the policy. Companies must be able to demonstrate that each form to be used has been filed with and approved, where applicable, by the insurance department of the State where the installation is located. Insurance products marketed to DoD personnel on overseas installations must conform to the standards prescribed by the laws of the State where the company is incorporated.

1. Insurance products, other than certificates or other evidence of insurance issued by a self-insured association, offered and sold worldwide to personnel on DoD installations, must:

a. Comply with the insurance laws of the State or country in which the installation is located and the requirements of this part.

b. Contain no restrictions by reason of Military Service or military occupational specialty of the insured, unless such restrictions are clearly indicated on the face of the contract.

c. Plainly indicate any extra premium charges imposed by reason of Military Service or military occupational specialty.

d. Contain no variation in the amount of death benefit or premium based upon the length of time the contract has been in force, unless all such variations are clearly described in the contract.

e. In plain and readily understandable language, and in type font at least as large as the font used for the majority of the policy, inform Service members of:

1. The availability and cost of government subsidized Servicemen's Group Life Insurance.

2. The address and phone number where consumer complaints are received by the State insurance commissioner for the State in which the insurance product is being sold.

3. That the U.S. Government has in no way sanctioned, recommended, or encouraged the sale of the product being offered. With respect to the sale or solicitation of insurance on Federal land or facilitates located outside the United States, insurance products must contain the address and phone number where consumer complaints are received by the State insurance commissioner for the State which has issued the agent a resident license or the company is domiciled, as applicable.

2. To comply with paragraphs A.1.b., A.1.c. and A.1.d., an appropriate reference stamped on the first page of the contract shall draw the attention of the policyholder to any restrictions by reason of Military Service or military occupational specialty. The reference shall describe any extra premium charges and any variations in the amount of death benefit or premium based upon the length of time the contract has been in force.

3. Variable life insurance products may be offered provided they meet the criteria of the appropriate insurance regulatory agency and the Securities and Exchange Commission.

4. Insurance products shall not be marketed or sold disguised as investments. If there is a savings component to an insurance product, the agent shall provide the customer written documentation, which clearly explains how much of the premium goes to the savings component per year broken down over the life of the policy. This document must also show the total amount per year allocated to insurance premiums. The customer must be provided a copy of this document that is signed by the insurance agent.

B. SALE OF SECURITIES

1. All securities must be registered with the Securities and Exchange Commission.

2. All sales of securities must comply with the appropriate Securities and Exchange Commission regulations.

3. All securities representatives must apply to the commander of the installation on which they desire to solicit the sale of securities for permission to solicit.

4. Where the accredited insurer's policy permits, an overseas accredited life insurance agent—if duly qualified to engage in security activities either as a registered representative of the National Association of Securities Dealers or as an associate of a broker or dealer registered with the Securities and Exchange Commission—may offer life insurance and securities for sale simultaneously. In cases of commingled sales, the allotment of pay for the purchase of securities cannot be made to the insurer.

C. USE OF THE ALLOTMENT OF PAY SYSTEM

1. Allotments of military pay for life insurance products shall be made in accordance with DoD 7000.14–R.

2. For personnel in pay grades E–4 and below, in order to obtain financial counseling, at least seven calendar days shall elapse between the signing of a life insurance application and the certification of a military pay allotment for any supplemental commercial life insurance. Installation Finance Officers are responsible for ensuring this seven-day cooling-off period is monitored and enforced. The purchaser's commanding officer may grant a waiver of the seven-day cooling-off period requirement for

good cause, such as the purchaser's imminent deployment or permanent change of station.

D. ASSOCIATIONS—GENERAL

The recent growth and general acceptability of quasi-military associations offering various insurance plans to military personnel are acknowledged. Some associations are not organized within the supervision of insurance laws of either a State or the Federal Government. While some are organized for profit, others function as nonprofit associations under Internal Revenue Service regulations. Regardless of the manner in which insurance is offered to members, the management of the association is responsible for complying fully with the policies contained in this part.

APPENDIX B TO PART 50—OVERSEAS LIFE INSURANCE REGISTRATION PROGRAM

A. REGISTRATION CRITERIA

1. Initial Registration

a. Insurers must demonstrate continuous successful operation in the life insurance business for a period of not less than 5 years on December 31 of the year preceding the date of filing the application.

b. Insurers must be listed in Best's Life-Health Insurance Reports and be assigned a rating of B + (Very Good) or better for the business year preceding the Government's fiscal year for which registration is sought.

2. Re-Registration

a. Insurers must demonstrate continuous successful operation in the life insurance business, as described in paragraph A.1.a. of this appendix.

b. Insurers must retain a Best's rating of B + or better, as described in paragraph A.1.b. of this appendix.

c. Insurers must demonstrate a record of compliance with the policies found in this part.

3. Waiver Provisions

Waivers of the initial registration or re-registration provisions shall be considered for those insurers demonstrating substantial compliance with the aforementioned criteria.

B. APPLICATION INSTRUCTIONS

1. *Applications Filed Annually.* Insurers must apply by June 30 of each year for solicitation privileges on overseas U.S. military installations for the next fiscal year beginning October 1. Applications e-mailed, faxed, or postmarked after June 30 shall not be considered.

2. *Application prerequisites.* A letter of application, signed by the President, Vice President, or designated official of the insurance company shall be forwarded to the Principal Deputy Under Secretary of Defense (Personnel and Readiness), Attention: Morale, Welfare and Recreation (MWR) Policy Directorate, 4000 Defense, Pentagon, Washington, DC 20301–4000. The registration criteria in paragraph A1.a. or A1.b. of this appendix must be met to satisfy application prerequisites. The letter shall contain the information set forth below, submitted in the order listed. Where criteria are not applicable, the letter shall so state.

a. The overseas Combatant Commands (e.g., U.S. European Command, U.S. Pacific Command, U.S. Central Command, U.S. Southern Command) where the company presently solicits, or plans to solicit, on U.S. military installations.

b. A statement that the company has complied with, or shall comply with, the applicable laws of the country or countries wherein it proposes to solicit. ''Laws of the country'' means all national, provincial, city, or county laws or ordinances of any country, as applicable.

c. A statement that the products to be offered for sale conform to the standards prescribed in appendix A to this part and contain only the standard provisions such as those prescribed by the laws of the State where the company's headquarters are located.

d. A statement that the company shall assume full responsibility for the acts of its agents with respect to solicitation. If warranted, the number of agents may be limited by the overseas command concerned.

e. A statement that the company shall only use agents who have been licensed by the appropriate State and registered by the overseas command concerned to sell to DoD personnel on DoD installations.

f. Any explanatory or supplemental comments that shall assist in evaluating the application.

g. If the Department of Defense requires facts or statistics beyond those normally involved in registration, the company shall make separate arrangements to provide them.

h. A statement that the company's general agent and other registered agents are appointed in accordance with the prerequisites established in section C of this appendix.

3. If a company is a life insurance company subsidiary, it must be registered separately on its own merits.

C. AGENT REQUIREMENTS

The overseas Combatant Commanders shall apply the following principles in registering agents:

1. An agent must possess a current State license. This requirement may be waived for

a registered agent continuously residing and successfully selling life insurance in foreign areas, who, through no fault of his or her own, due to State law (or regulation) governing domicile requirements, or requiring that the agent's company be licensed to do business in that State, forfeits eligibility for a State license. The request for a waiver shall contain the name of the State or jurisdiction that would not renew the agent's license.

2. General agents and agents may represent only one registered commercial insurance company. This principle may be waived by the overseas Combatant Commander if multiple representations are in the best interest of DoD personnel.

3. An agent must have at least 1 year of successful life insurance underwriting experience in the United States or its territories, generally within the 5 years preceding the date of application, in order to be approved for overseas solicitation.

4. The overseas Combatant Commanders may exercise further agent control procedures as necessary.

5. An agent, once registered in an overseas area, may not change affiliation from the staff of one general agent to another and retain registration, unless the previous employer certifies in writing that the release is without justifiable prejudice. Overseas Combatant Commanders will have final authority to determine justifiable prejudice. Indebtedness of an agent to a previous employer is an example of justifiable prejudice.

D. ANNOUNCEMENT OF REGISTRATION

1. Registration by the Department of Defense upon annual applications of insurers shall be announced as soon as practicable by notice to each applicant and by a list released annually in September to the appropriate overseas Combatant Commanders. Approval does not constitute DoD endorsement of the insurer or its products. Any advertising by insurers or verbal representation by its agents, which suggests such endorsement, is prohibited.

2. In the event registration is denied, specific reasons for the denial shall be provided to the applicant.

a. The insurer shall have 30 days from the receipt of notification of denial of registration (sent certified mail, return receipt requested) in which to request reconsideration of the original decision. This request must be in writing and accompanied by substantiating data or information in rebuttal of the specific reasons upon which the denial was based.

b. Action by the Office of the PDUSD(P&R) on a request for reconsideration is final.

c. An applicant that is presently registered as an insurer shall have 90 calendar days from final action denying registration in which to close operations.

3. Upon receiving an annual letter approving registration, each company shall send to the applicable overseas Combatant Commander a verified list of agents currently registered for overseas solicitation. Where applicable, the company shall also include the names and prior military affiliation of new agents for whom original registration and permission to solicit on base is requested. Insurers initially registered shall be furnished instructions by the Department of Defense for agent registration procedures in overseas areas.

4. Material changes affecting the corporate status and financial condition of the company that occur during the fiscal year of registration must be reported to the MWR Policy Directorate at the address in paragraph B.2. of this appendix as they occur.

a. The Office of the PDUSD(P&R) reserves the right to terminate registration if such material changes appear to substantially affect the financial and operational standards described in section A of this appendix on which registration was based.

b. Failure to report such material changes may result in termination of registration regardless of how it affects the standards.

5. If an analysis of information furnished by the company indicates that unfavorable trends are developing that could adversely affect its future operations, the Office of the PDUSD(P&R) may, at its option, bring such matters to the attention of the company and request a statement as to what action, if any, is considered to deal with such unfavorable trends.

PART 53—WEARING OF THE UNIFORM

Sec.
53.1 Purpose.
53.2 Policy.

AUTHORITY: 5 U.S.C. 301, 10 U.S.C. 772.

§ 53.1 Purpose.

This part prescribes limitations on wearing of the uniform by members of the Armed Forces, and establishes policy with respect to wearing of the uniform by former members of the Armed Forces.

[35 FR 1236, Jan. 30, 1970]

§ 53.2 Policy.

(a) *Members of the Armed Forces* (including retired members and members of reserve components). The wearing of the uniform is prohibited under any of the following circumstances:

(1) At any meeting or demonstration which is a function of, or sponsored by an organization, association, movement, group, or combination of persons which the Attorney General of the United States has designated, pursuant to E.O. 10450 as amended, as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under The Constitution of the United States, or as seeking to alter the form of Government of the United States by unconstitutional means.

(2) During or in connection with the furtherance of political activities, private employment or commercial interests, when an inference of official sponsorship for the activity or interest could be drawn.

(3) Except when authorized by competent Service authority, when participating in activities such as public speeches, interviews, picket lines, marches, rallies or any public demonstrations (including those pertaining to civil rights), which may imply Service Sanction of the cause for which the demonstration or activity is conducted.

(4) When wearing of the uniform would tend to bring discredit upon the Armed Forces.

(5) When specifically prohibited by regulations of the department concerned.

(b) *Former members of the Armed Forces*. (1) Unless qualified under another provision of this part or under the provisions of 10 U.S.C. 772, former members who served honorably during a declared or undeclared war and whose most recent service was terminated under honorable conditions may wear the uniform in the highest grade held during such war service only upon the following occasions and in the course of travel incidents thereto:

(i) Military funerals, memorial services, weddings, and inaugurals.

(ii) Parades on national or State holidays; or other parades or ceremonies of a patriotic character in which any active or reserve U.S. military unit is taking part.

(2) Wearing of the uniform or any part thereof at any other time or for any other purpose is prohibited.

(c) *Medal of Honor holders*. Persons who have been awarded the Medal of Honor may wear the uniform at their pleasure except under the circumstances set forth in paragraph (a) of this section.

[35 FR 1236, Jan. 30, 1970]

PART 56—NONDISCRIMINATION ON THE BASIS OF HANDICAP IN PROGRAMS AND ACTIVITIES ASSISTED OR CONDUCTED BY THE DEPARTMENT OF DEFENSE

Sec.

56.1 Purpose.
56.2 Applicability and scope.
56.3 Definitions.
56.4 Policy.
56.5 Responsibilities.
56.6 Information requirements.
56.7 Programs and activities subject to this part.
56.8 Guidelines for determining discriminatory practices.
56.9 Ensuring compliance with this part in Federal financial assistance programs and activities.
56.10 Ensuring compliance with this part in programs and activities conducted by the Department of Defense.

AUTHORITY: Pub. L. 93–112, sec. 504 29 U.S.C. 794, as amended by Pub. L. 95–602, 92 Stat. 2982; Pub. L. 93–112, sec. 7, 29 U.S.C. 706, as amended by Pub. L. 93–516, 88 Stat. 1619; Executive Order 12250; Executive Order 12291; Executive Order 12067.

SOURCE: 47 FR 15124, Apr. 8, 1982, unless otherwise noted.

§56.1 Purpose.

This part implements section 504 of Public Law 93–112, ''Rehabilitation Act of 1973,'' September 26, 1973 (29 U.S.C. 794) (1976); section 111 of Pub. L. 93–516, ''Rehabilitation Act Amendments of 1974,'' December 7, 1974 (29 U.S.C. 706, 780, 790) (1976); section 119 of Pub. L. 95–602, ''Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978,'' November 6, 1978 (29 U.S.C. 794) (supp. III 1979); and Department of Justice Regulation, ''Implementation of Executive Order 12250, Nondiscrimination on the Basis of Handicap in Federally Assisted Programs,'' August 11, 1981 (28 CFR part

41) to prohibit discrimination based on handicap in programs and activities receiving Federal financial assistance disbursed by the Department of Defense and in programs and activities conducted by the Department of Defense.

§ 56.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the National Guard Bureau, and the Defense Agencies (hereafter referred to as ''DoD Components'') insofar as they:

(1) Extend Federal financial assistance to programs and activities that affect handicapped persons in the United States and that are covered by this part (see § 56.7(b)).

(2) Conduct programs and activities that affect handicapped persons in the United States and that are covered by this part (see § 56.7(c)).

(b) This part also applies to each recipient of Federal financial assistance disbursed by the Department of Defense and to each program and activity that receives or benefits from such assistance, insofar as such recipient, program, or activity affects a handicapped person in the United States.

§ 56.3 Definitions.

(a) *Facility*. All or any portion of buildings, structures, equipment, roads, walks, parking lots, or other real or personal property or any interest in such property.

(b) *Federal financial assistance*. Any grant, loan, contract (other than a procurement contract or a contract of insurance or guaranty), or any other arrangement by which the Federal Government provides or otherwise makes available assistance in the form of:

(1) Funds.

(2) Services performed by Federal personnel, including technical assistance, counseling, training, and provision of statistical or expert information.

(3) Real and personal property or any interest in or use of such property, including:

(i) Transfers or leases of such property for less than fair market value or for reduced consideration.

(ii) Proceeds from a subsequent transfer or lease of such property if the Federal share of its fair market value is not returned to the Federal government.

(c) *Handicapped person*. Any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment. For purposes of this Directive as it relates to employment programs of recipients, such term does not include any individual who is an alcoholic or drug abuser and whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question, or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or to the safety of others. As used in this paragraph:

(1) *Physical or mental impairment*. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal and special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term includes such diseases and conditions as orthopedic, visual, speech, and hearing impairments; cerebral palsy, epilepsy, and muscular dystrophy; multiple sclerosis; cancer; heart disease; diabetes; drug abuse; and alcoholism.

(2) *Major life activities*. Functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment*. Has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment*. Has: (i) A physical or mental impairment that does not substantially

limit major life activities but is treated by a recipient or DoD Component as constituting such a limitation;

(ii) A physical or a mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) None of the impairments defined above, but is treated by a recipient or DoD Component as having such an impairment.

(d) *Historic properties*. Those properties listed or eligible for listing in the National Register of Historic Places.

(e) *Include; such as*. Not all the possible items are covered, whether like or unlike the ones named.

(f) *Qualified handicapped person*. A handicapped person who:

(1) With respect to employment, can perform the essential functions of the job in question with reasonable accommodation.

(2) With respect to services, meets the essential eligibility requirements for receiving the services in question.

(g) *Recipient*. Any State or political subdivision or instrumentality thereof, any public or private agency, institution, organization, or other entity, or any person that receives Federal financial assistance directly or through another recipient, including any successor, assignee, or transferee of a recipient, but not the ultimate beneficiary of the assistance. The term includes persons and entities applying to be recipients.

(h) *Substantial impairment*. A significant loss of the integrity of finished materials, design quality, or special character resulting from a permanent alteration.

§ 56.4 Policy.

It is DoD policy that no qualified handicapped person shall be subjected to discrimination on the basis of handicap under any program or activity that receives or benefits from Federal financial assistance disbursed by a DoD Component or under any Federal program or activity that is conducted by a DoD Component. Guidelines for determining actions that discriminate against handicapped persons are prescribed in § 56.8.

§ 56.5 Responsibilities.

(a) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) (ASD(MRA&L))*, or designee, shall monitor compliance with this part. In discharging this responsibility, the ASD(MRA&L), or designee, shall:

(1) Coordinate efforts of DoD Components to enforce this part.

(2) Assist in the development of standards and procedures promulgated pursuant to § 56.9.

(3) Perform the responsibilities assigned to the ASD(MRA&L) in § 56.8, 9, and 10.

(4) Otherwise assist DoD Components in implementing this part.

(b) The *Heads of DoD Components* shall comply with this part. In discharging this responsibility, they shall:

(1) Designate a policy-level official to ensure compliance with this part receive and investigate complaints filed under this part and otherwise manage DoD Component responsibilities under this part.

(2) Notify the ASD(MRA&L), or designee, of the name, position, location, and telephone number of persons selected by them to be policy-level officials within 15 calendar days of such a selection.

(3) Issue guidelines pursuant to § 56.9.

(4) Cooperate fully with the ASD(MRA&L), or designee, in that official's performance of the responsibilities assigned herein, including furnishing to the ASD(MRA&L), or designee, in a timely fashion any requested reports and information.

(5) Assign sufficient personnel to implement and to ensure effective enforcement of this part.

§ 56.6 Information requirements.

(a) Each DoD Component shall maintain a log of all complaints that are filed with it or its recipients under this part. The log shall contain the complainant's name (last name, first, and middle initial) and address (street address, city, State, and zip code), the recipient's name (if this refers to a person, last name, first, and middle initial) and address (street address, city, State, and zip code), the nature of the complaint, and the current status of

the complaint investigation or resolution. Each DoD Component shall submit a narrative summary report on complaints by memorandum to the ASD(MRA&L), or designee, before July 15 and January 15 of each year. This reporting requirement has been assigned Report Control Symbol DD-M(SA)1596.

(b) Each DoD Component shall submit a narrative report by memorandum to the ASD(MRA&L), or designee, whenever, pursuant to enclosure 4 of this directive, the DoD Component notifies an applicant or recipient that noncompliance with this part is indicated. The report shall include the recipient's name (if this refers to a person, last name, first, and middle initial) and address (street address, city, State, and zip code), the date (YYMMDD) and nature of the finding, and the name of the applicable federally assisted program or activity. This reporting requirement has been assigned Report Control Symbol DD-M(AR)1597.

(c) The recordkeeping requirements contained in § 56.9(c)(2), have been approved by the Office of Management and Budget (OMB) under 44 U.S.C. chapter 35 and have been assigned OMB No. 0704–0102.

§ 56.7 Programs and activities subject to this part.

(a) This part applies to all DoD Components and recipients of Federal financial assistance disbursed by a DoD Component insofar as the programs and activities of the DoD Components and recipients affect handicapped persons in the United States. Existing programs and activities that are assisted or conducted by a DoD Component and that are subject to this part but do not appear in paragraph (b) or (c) of this section, are covered even though not listed. DoD Components must report new programs and activities that are subject to this part to the ASD (MRA&L), or designee, within 15 calendar days of their creation or funding.

(b) Federal financial assistance programs subject to this part include: (1) title 32, United States Code, sections 101–716 (1976 and supp. III 1979): the Army and Air National Guard.

(2) Title 40, U.S. Code, sections 483, 484, and 512 (1976); title 49, U.S. Code, sections 1101 and 1107 (1976); and title 10, U.S. Code, sections 2541, 2544, 2571, 2576, 2662, 7308, 7541, 7542, 7545, 7546, and 7547 (1976 and supp. IV 1980): Various programs involving the loan or other disposition of surplus, obsolete, or unclaimed property.

(3) Title 10 U.S. Code, sections 4307–4311 (1976), and the annual Department of Defense Appropriations Act: National Program for the Promotion of Rifle Practice.

(4) Secretary of the Navy Instruction 5720.19E, ''Navy Science Cruiser Program,'' February 24, 1977.

(5) Title 10 U.S. Code, section 9441 (1976 and supp. IV 1980): Civil Air Patrol.

(6) Title 41 U.S. Code, sections 501–509 (supp. III 1979): Federal grants and cooperative agreements.

(7) Title 33 U.S. Code, section 426 (1976 and supp. III 1979): Army Corps of Engineers participation in cooperative investigations and studies concerning the erosion of shores of coastal and lake waters.

(8) Title 33 U.S. Code, sections 426e–426h (1976): Army Corps of Engineers assistance in the construction of works for the restoration and protection of shores.

(9) Title 16 U.S. Code, section 460d (1976): Construction and operation of public park and recreational facilities in water resource development projects under the administrative jurisdiction of the Department of the Army.

(10) Title 33 U.S. Code, section 701c–3 (1976): Payment to States of lease receipts from lands acquired by the United States for flood control, navigation, and allied purposes.

(11) Title 33 U.S. Code, sections 558c and 702d–1 (1976); title 10, U.S. Code, sections 2668 and 2669 (1976); title 43, U.S. Code, section 961 (1976); and title 40, U.S. Code, section 319 (1976): Grants of easements without consideration, or at a nominal or reduced consideration, on land under the control of the Department of the Army at water resource development projects.

(12) Title 33 U.S. Code, sections 540 and 577 (1976): Army Corps of Engineers assistance in the construction of small boat harbor projects.

(13) Title 33 U.S. Code, section 701s (1976): Emergency bank protection

works constructed by the Army Corps of Engineers for protection of highways, bridge approaches, and public works.

(14) Title 33 U.S. Code, section 633 (1976): Army Corps of Engineers contracts for the protection, alteration, reconstruction, relocation, or replacement of structures and facilities.

(15) Title 50 U.S. Code, section 453 (1976): Defense Logistics Agency loans of industrial equipment to educational institutions (Tools for Schools).

(16) Title 33 U.S. Code, section 610 (1976): Provision of specialized services or technical information by the Army Corps of Engineers to State and local governments for the control of aquatic plant growths in rivers, harbors, and allied waters.

(17) Title 42 U.S. Code, section 1962d–16 (1976): Provision of specialized services by the Army Corps of Engineers to any State for the preparation of comprehensive plans for drainage basins located within the boundaries of said State.

(18) Title 33 U.S. Code, section 603a (1976): Provision of specialized services by the Army Corps of Engineers to improve channels for navigation.

(19) Title 33 U.S. Code, section 701g (1976): Provision of specialized services by the Army Corps of Engineers to reduce flood damage.

(20) Title 24 U.S. Code, sections 44c and 47 (1976): United States Soldiers' and Airmen's Home.

(21) Title 10 U.S. Code, chapter 55, as implemented by DoD 6010.8–R, ''Civilian Health and Medical Program of the Uniformed Services (CHAMPUS),'' January 10, 1977.

(c) All programs and activities conducted by the Department of Defense that affect handicapped persons in the United States are subject to this part. They include:

(1) Promulgation of rules and regulations for public comment in a manner that grants handicapped persons a reasonable opportunity for such comment (such as by making cassette recordings of proposed rules).

(2) Public meetings, conferences, or seminars sponsored or conducted by a DoD Component but held in nongovernmental buildings.

(3) Public meetings, conferences, or seminars sponsored or conducted by a DoD Component or by a non-DoD organization but held in a DoD building.

(4) Open houses, memorial services, tours, or other ceremonies held on or in DoD property.

(5) Military museums.

(6) Historic vessels.

(7) Historic buildings and properties maintained by a DoD Component and properties designated as historic under a statute of the appropriate State or local governmental body.

(8) Schools operated by the Department of Defense within the United States pursuant to section 6 of Public Law 81–874, title 20, U.S. Code, section 241 (1976).

§56.8 Guidelines for determining discriminatory practices.

(a) *General prohibitions against discrimination.* (1) No qualified handicapped person shall, on the basis of handicap, be excluded from participation in, be denied the benefit of, or otherwise be subjected to discrimination under any program or activity that is conducted by the Department of Defense or that receives or benefits from Federal financial assistance disbursed by the Department of Defense.

(2) A recipient or DoD Component may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap:

(i) Provide different or separate aid, benefits, or services to handicapped persons than is provided to others unless such action is necessary to provide qualified handicapped persons with aid, benefits, or services that are equal to those provided to others;

(ii) Deny a qualified handicapped person the opportunity to participate in or benefit from the aid, benefit, or service;

(iii) Afford a qualified handicapped person an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iv) Provide a qualified handicapped person with an aid, benefit, or service that is not as effective as that afforded to others; or

(v) Otherwise limit a qualified handicapped person in the enjoyment of any

right, privilege, advantage, or opportunity granted to others receiving the aid, benefit, or service.

(3) A recipient or DoD Component may not deny a qualified handicapped person the opportunity to participate in programs or activities that are not separate or different from regular programs or activities, even if such separate or different programs and activities are permissible under paragraph (a)(2)(i) of this section.

(4) A recipient or DoD Component may not provide assistance to an agency, organization, or person that discriminates on the basis of handicap in providing any aid, benefit, or service to beneficiaries of the recipient's program or activity.

(5) A recipient of DoD Component may not deny, on the basis of handicap, a qualified handicapped person the opportunity to participate as a member of planning or advisory boards.

(6) A recipient or DoD Component may not use, directly or through contractual or other arrangements, criteria or methods of administration that:

(i) Subject qualified handicapped persons to discrimination on the basis of handicap;

(ii) Defeat or substantially impair accomplishment of the objectives of the recipient's or DoD Component's program or activity with respect to handicapped persons; or

(iii) Perpetuate discrimination by another recipient if both recipients are subject to common administrative control or are agencies of the same State.

(7) In determining the site or location of a facility, a recipient or DoD Component may not make selections that:

(i) Exclude handicapped persons from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity that receives or benefits from Federal financial assistance; or

(ii) Defeat or substantially impair, with respect to handicapped persons, the accomplishment of the objectives of the program or activity.

(8) Recipients and DoD Components shall administer programs and activities in the most integrated setting appropriate to the needs of qualified handicapped persons.

(9) Recipients and DoD Components shall take appropriate steps to make communications with their applicants, employees, and beneficiaries available to persons with impaired vision and hearing.

(10) This section may not be interpreted to prohibit the exclusion of:

(i) Persons who are not handicapped from benefits, programs, and activities limited by Federal statute or Executive order to handicapped persons; or

(ii) One class of handicapped persons from a program or activity limited by Federal statute or Executive order to a different class of handicapped persons.

(11) Recipients and DoD Components shall take appropriate steps to ensure that no handicapped individual is denied the benefits of, excluded from participation in, or otherwise subjected to discrimination under any program or activity receiving or benefiting from Federal financial assistance disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense because of the absence of auxiliary aids, such as certified sign-language interpreters, telecommunication devises (TDDs), or other telephonic devices for individuals with impaired sensory, manual, or speaking skills.

(b) *Prohibitions against employment discrimination by recipients.* (1) No qualified handicapped person shall, on the basis of handicap, be subjected to discrimination in employment under any program or activity that receives or benefits from Federal financial assistance disbursed by the Department of Defense.

(2) The prohibition against discrimination in employment applies to the following:

(i) Recruitment, advertising, and processing of applications for employment.

(ii) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring.

(iii) Rates of pay or any other form of compensation and changes in compensation.

(iv) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists.

(v) Leaves of absence, sick leave, or any other leave.

(vi) Fringe benefits available by virtue of employment, whether or not administered by the recipient.

(vii) Selection and financial support for training, including apprenticeship, professional meetings, conferences and other related activities, and selection for leaves of absence for training.

(viii) Programs and activities sponsored by the employer, including social and recreational programs.

(ix) Any other term, condition, or privilege of employment.

(3) A recipient may not participate in a contractual or other relationship that subjects qualified handicapped applicants or employees to discrimination prohibited by this section, including relationships with employment and referral agencies, labor unions, organizations providing or administering fringe benefits to employees of the recipient, and organizations providing training and apprenticeship programs.

(4) A recipient shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient can demonstrate that the accommodation would impose an undue hardship on the operation of its program. Reasonable accommodation includes providing ramps, accessible restrooms, drinking fountains, interpreters for deaf employees, readers for blind employees, amplified telephones, TDDs such as Teletypewriters or Telephone Writers (TTYs), and tactile signs on elevators.

(5) A recipient may not use employment tests or criteria that discriminate against handicapped persons, and shall ensure that employment tests are adapted for use by persons who have handicaps that impair sensory, manual, or speaking skills.

(6) A recipient may not conduct a preemployment medical examination or make a preemployment inquiry about whether an applicant is a handicapped person or about the nature or severity of a handicap. A recipient may make, however, a preemployment inquiry into an applicant's ability to perform job-related functions.

(7) When a recipient is taking remedial action to correct the effects of past discrimination or is taking voluntary action to overcome the effects of conditions that have resulted in limited participation by handicapped persons in its federally assisted program or activity, the recipient may invite applicants for employment to indicate whether and to what extent they are handicapped if:

(i) The recipient makes clear to the applicants that the information is intended for use solely in connection with its remedial action obligations or its voluntary affirmative action efforts.

(ii) The recipient makes clear to the applicants that the information is being requested on a voluntary basis, that it will be kept confidential as provided in paragraph (b)(9) in this section, that refusal to provide it will not subject the applicants to any adverse treatment, and that it will be used only in accordance with this part.

(8) Nothing in this section shall prohibit a recipient from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty if:

(i) All entering employees are subjected to such an examination, regardless of handicap.

(ii) The results of such an examination are used only in accordance with this part which prohibits discrimination against a qualified handicapped person on the basis of handicap.

(9) Information obtained under this section concerning the medical condition or history of applicants shall be collected and maintained on separate forms that shall be accorded confidentiality as medical records, except that:

(i) Supervisors and managers may be informed about restrictions on the work or duties of handicapped persons and about necessary accommodations.

(ii) First aid and safety personnel may be informed, when appropriate, if a handicapping condition might require emergency treatment.

(iii) Government officials investigating compliance with section 504, Pub. L. 93–112, and this part shall be

provided relevant information upon request.

(c) *Program accessibility*—(1) *General requirements.* No qualified handicapped person shall, because a recipient's or DoD Component's facilities are inaccessible to or not usable by handicapped persons, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity that receives or benefits from Federal financial assistance disbursed by the Department of Defense or under any program or activity conducted by the Department of Defense.

(2) *Existing facilities.* (i) A recipient or DoD Component shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by handicapped persons. This does not necessarily require a recipient or DoD Component to make each of its existing facilities or every part of an existing facility accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see chapter 18 of DoD 4270.1–M, ''Department of Defense Construction Criteria Manual,'' June 1, 1978, and Department of the Army, Office of the Chief of Engineers, Manual EM 1110–1–103, ''Design for the Physically Handicapped,'' October 15, 1976. Inquiries on specific accessibility design problems may be addressed to the ASD (MRA&L), or designee.

(ii) When structural changes are necessary to make programs or activities in existing facilities accessible to the exent required by paragraph (c)(1) of this section.

(A) Such changes shall be made as soon as practicable, but not later than 3 years after the effective date of this part however, if the program or activity is a particular mode of transportation (such as a subway station) that can be made accessible only through extraordinarily expensive structural changes to, or replacement of, existing facilities and if other accessible modes of transportation are available, the DoD Component concerned may extend this period of time. This extension shall be for a reasonable and definite period, which shall be determined after consultation with the ASD(MRA&L), or designee.

(B) The recipient or DoD Component shall develop, with the assistance of interested persons or organizations and within a period to be established in each DoD Component's guidelines, a transition plan setting forth the steps necessary to complete such changes.

(C) The recipient or DoD Component shall make a copy of the transition plan available for public inspection. At a minimum, the plan shall:

(*1*) Identify physical obstacles in the recipient's or DoD Component's facilities that limit the accessibility of its program or activity to handicapped persons.

(*2*) Describe in detail the methods that will be used to make the facilities accessible.

(*3*) Specify the schedule for taking the steps necessary to achieve full program accessibility and, if the time period of the transition plan is longer than 1 year, identify steps that will be taken during each year of the transition period.

(*4*) Indicate the person (last name, first, and middle initial) responsible for implementation of the transition plan.

(iii) A recipient or DoD Component may comply with paragraphs (c)(2)(i) and (c)(2)(ii) of this section, through such means as the acquisition or redesign of equipment, such as telecommunication or other telephonic devices; relocation of classes or other services to accessible buildings; assignment of aides to beneficiaries, such as readers or certified sign-language interpreters; home visits; delivery of health, welfare, or other services at accessible alternate sites; alteration of existing facilities and construction of new facilities in conformance with paragraph (c)(3) in this section; or any other method that results in making the program or activity of the recipient or DoD Component accessible to handicapped persons.

(iv) A recipient or DoD Component is not required to make structural changes in existing facilities when other methods are effective in achieving compliance with this section.

(v) In choosing among available methods for meeting the requirements of this section, a recipient or DoD

Component shall give priority to those methods that offer programs and activities to handicapped persons in the most integrated setting appropriate with nonhandicapped persons.

(3) *New Construction*. New facilities shall be designed and constructed to be readily accessible to and usable by handicapped persons. Alterations to existing facilities shall be designed and constructed, to the maximum extent feasible, to be readily accessible to and usable by handicapped persons. For guidance in determining the accessibility of facilities, see chapter 18 of DoD 4270.1–M and Department of the Army, Office of the Chief of Engineers, Manual EM 1110–1–103. Inquiries about specific accessibility design problems may be addressed to the ASD(MRA&L), or designee.

(4) *Historic properties*. (i) In the case of historic properties, program accessibility shall mean that, when viewed in their entirety, programs are readily accessible to and usable by handicapped persons. Because the primary benefit of historic properties is the experience of the property itself, DoD Components and recipients shall give priority to those methods of achieving program accessibility that make the historic property, or portions thereof, physically accessible to handicapped persons.

(ii) Methods of achieving program accessibility include:

(A) Making physical alterations that give handicapped persons access to otherwise inaccessible areas or features of historic properties.

(B) Using audiovisual materials and devices to depict otherwise inaccessible areas or features of historic properties.

(C) Assigning individuals to guide handicapped persons into or through otherwise inaccessible portions of historic properties.

(D) Adopting other innovative methods.

(iii) When program accessibility cannot be achieved without causing a substantial impairment of significant historic features, the DoD Component or recipient may seek a modification or waiver of access standards from the ASD (MRA&L), or designee.

(A) A decision to grant a modification or waiver shall be based on consideration of the following:

(*1*) Scale of the property, reflecting its ability to absorb alterations.

(*2*) Use of the property, whether primarily for public or private purposes.

(*3*) Importance of the historic features of the property to the conduct of the program.

(*4*) Costs of alterations in comparison to the increase in accessibility.

(B) The ASD(MRA&L), or designee, shall review periodically any waiver granted under this paragraph and may withdraw it if technological advances or other changes warrant.

(iv) The decision by the ASD(MRA&L), or designee, to grant a modification or waiver of access standards is subject to section 106 of the National Historic Preservation Act, as amended, and shall be made in accordance with the Advisory Council on Historic Preservation regulation on ''Protection of Historic and Cultural Properties'' (36 CFR part 800). When the property is federally owned or when Federal funds may be used for alterations, the ASD(MRA&L), or designee, shall obtain the comments of the Advisory Council on Historic Preservation when required by section 106 of the National Historic Preservation Act and the Advisory Council on Historic Preservation regulation on ''Protection of Historic and Cultural Properties'' (36 CFR part 800) prior to effectuation of structural alterations.

(v) DoD Component guidelines prepared in accordance with §56.10 shall include a listing of all historic properties, including historic ships, subject to this part and a plan for compliance with paragraph (c)(4) of this section.

(5) *Military museums*. (i) In the case of military museums, program accessibility shall mean that exhibits, displays, tours, lectures, circulating or traveling exhibits, and other programs of military museums are accessible to and usable by handicapped persons. Methods of meeting this requirement include the following:

(A) Museum programs may be made accessible to deaf and hearing-impaired

persons by means such as training museum staff, such as docents, in sign language; providing qualified sign-language interpreters to accompany deaf or hearing-impaired visitors; ensuring that clear, concise language is used on all museum signs and display labels; providing amplification devices; or providing printed scripts for films, videotapes, lectures, or tours. DoD Components are encouraged to use ''Museums and Handicapped Students: Guidelines for Educators,'' published by the National Air and Space Museum, Smithsonian Institution, Washington, DC 20560.

(B) Museum programs may be made accessible to blind and visually-impaired persons by means such as providing museum catalogues in a large-print edition printed over braille; providing cassette tapes, records, or discs for museum tours or exhibits; providing readers to accompany blind or visually impaired visitors; using large-print and braille display cards at exhibits; providing raised-line maps of the museum building; using raised-line drawings, reproductions, or models of large exhibits to facilitate tactile experiences when touching exhibits is prohibited; placing large-print and braille signs to identify galleries, elevators, restrooms, and other service areas; and permitting guide dogs in all museum facilities.

(C) Museum programs may be made accessible to other physically impaired persons by means such as lowering display cases; spacing exhibits to facilitate movement; using ramps in galleries; increasing lighting in exhibit areas to facilitate viewing from a distance; providing places to sit in exhibit areas; making restrooms accessible; using large-print exhibit display cards to facilitate reading from a distance; and sensitizing museum staff to consider the needs of handicapped visitors when organizing exhibits.

(ii) DoD Component guidelines developed in accordance with paragraph (c)(5) of this section shall identify military museums subject to paragraph (c) of this section and shall contain a plan for making museum programs accessible to handicapped persons. Technical assistance in the preparation and content of these plans may be obtained from the National Access Center, 1419 27th Street, NW., Washington, DC 20007 ((202) 333–1712 or TTY (202) 333–1339). In addition, community organizations that serve handicapped persons and handicapped persons themselves shall be consulted in the preparation of these plans.

(d) *Reasonable accommodation.* (1) A recipient or DoD Component shall make reasonable accommodation to the known physical or mental limitations of an otherwise qualified handicapped applicant or employee unless the recipient or DoD Component demonstrates to the ASD(MRA&L), or designee, that the accommodation would impose an undue hardship on the operation of its program.

(2) Reasonable accommodation includes the following:

(i) Making facilities used by employees readily accessible to and usable by handicapped persons.

(ii) Job restructuring; part-time or modified work schedules; acquisition or modification of equipment or devices, such as telecommunication or other telephonic instruments; the provision of readers or certified sign-language interpreters; and similar actions.

(3) In determining whether an accommodation would impose an undue hardship on the operation of a recipient's or DoD Component's program, the ASD(MRA&L), or designee, shall consider the following factors, at a minimum:

(i) The overall size of the recipient's or DoD Component's program or activity, such as the number of employees, number and type of facilities, and size of budget.

(ii) The size of the recipient's or DoD Component's operations, including the composition and structure of the recipient's or DoD Component's workforce.

(iii) The nature and cost of the accommodation needed.

(4) A recipient or DoD Component may not deny any employment opportunity to a qualified handicapped employee or applicant for employment if the basis for the denial is the need to make reasonable accommodation to the physical or mental limitations of the employee or applicant.

§ 56.9 Ensuring compliance with this part in Federal financial assistance programs and activities.

(a) *Supplementary guidelines issued by DoD Components.* (1) Whenever necessary, DoD Components shall publish supplementary guidelines for each type of program or activity to which they disburse Federal financial assistance within 120 days of the effective date of this part or of the effective date of any subsequent statute authorizing Federal financial assistance to a new type of program or activity. DoD Components shall obtain approval of these supplementary guidelines from the ASD(MRA&L), or designee, before issuing them. Prior to their issuance, the ASD(MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to paragraph (a)(1) of this section to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review and approval. To the extent that supplementary guidelines issued by DoD Components deal with the employment of civilians in programs and activities subject to this part the ASD(MRA&L), or designee, shall also obtain the approval of the Equal Employment Opportunity Commission (EEOC) in accordance with Executive Order 12067.

(2) The ASD(MRA&L), or designee, and DoD Components shall ensure that their supplementary guidelines conform to the requirements of this part and that they provide:

(i) A description of the types of programs and activities covered.

(ii) Examples of prohibited practices likely to arise with respect to those types of programs and activities.

(iii) A list of the data collection and reporting requirements of the recipients.

(iv) Procedures for processing and investigating complaints.

(v) Procedures for hearings to determine compliance by recipients with this part.

(vi) Requirements or suggestions for affirmative action on behalf of qualified handicapped persons.

(vii) Requirements for the dissemination of program and complaint information to the public.

(viii) A description of the form of the assurances that must be executed pursuant to paragraph (b) of this section, and sample assurances.

(ix) Requirements concerning the frequency and nature of postapproval reviews conducted pursuant to paragraph (h) of this section.

(x) A period of time, provided for by § 56.8(c)(2)(ii)(B), for the development of a transition plan that sets out the steps necessary to complete structural changes that might be required by § 56.8(c).

(xi) The maximum period of time that may be allowed for extensions that might be granted pursuant to § 56.8(c)(2)(ii).

(xii) An appendix that contains a list of identified programs and activities of the type covered by the supplementary guidelines, including the names of the programs and activities and the authorizing statute, regulation, or directive for each program and activity.

(xiii) Requirements for the recipient to designate a responsible official to coordinate the implementation of supplementary guidelines.

(xiv) Requirements for any other actions or procedures necessary to implement this part.

(3) When the head of a DoD Component determines that it would not be appropriate to include on or more of the provisions described in paragraph (a)(2) of this section, in the supplementary guidelines of that DoD Component or that it is not necessary to issue such guidelines at all, the reasons for such determination shall be stated in writing and submitted to the ASD(MRA&L), or designee, for review and approval. Once that determination is approved, the DoD Component shall make it available to the public upon request.

(4) The heads of DoD Components, or designees, shall be responsible for keeping the supplementary guidelines current and accurate. When a DoD Component determines that a program or activity should be added to or deleted from the guidelines, the DoD Component shall notify the ASD(MRA&L), or designee, in writing.

(b) *Required assurances.* (1) DoD Components shall require all recipients to file written assurances that their programs or activities will be conducted

in accordance with this part and supplementary guidelines promulgated by DoD Components. If a recipient fails to provide an assurance that conforms to the requirements of this section, the DoD Component shall attempt to effect compliance pursuant to paragraphs (f) through (h) of this section, provided that if assistance is due and payable to the recipient based on an application approved prior to the effective date of this part the DoD Component shall continue the assistance while any proceedings required by paragraphs (n) through (v) of this section, are pending.

(2) DoD Components shall advise each recipient of the required elements of the assurance and, with respect to each program or activity, of the extent to which those receiving assistance from recipients shall be required to execute similar assurances.

(3) DoD Component shall ensure that each assurance:

(i) Obligates the recipient to advise the DoD Component of any complaints received that allege discrimination against handicapped persons.

(ii) Obligates the recipient to collect and provide the items of information that the DoD Component lists in its supplementary guidelines pursuant to paragraph (a)(2)(iii) of this section.

(iii) Is made applicable to any Federal financial assistance that might be disbursed by a DoD Component without the submission of a new application.

(iv) Obligates the recipient, when the financial assistance is in the form of proprerty, for the period during which the property is used under a financial assistance agreement or is possessed by the recipient.

(v) Includes a provision recognizing that the U.S. Government has the right to seek judicial enforcement of section 504 and this part.

(c) *Self-evaluation and consultation with interested persons and organizations.* (1) DoD Components shall require recipients to conduct, within 6 months of the effective date of this part or of first receiving Federal financial assistance disbursed by the Department of Defense, a self-evaluation with the assistance of interested persons, including handicapped persons or organizations that represent them. When appropriate, DoD Components also shall require recipients to consult at least annually with such persons. The ''Department of Health, Education, and Welfare Section 504 Technical Assistance Reserve Directory,'' April 1980, shall be consulted to identify likely sources for consultation. In conducting its self-evaluation, each recipient shall:

(i) Evaluate the effects of its policies and practices with respect to its compliance with this part and the applicable DoD Component's supplementary guidelines.

(ii) Modify any policies that do not meet such requirements.

(iii) Take appropriate remedial steps to eliminate the discriminatory effects of any such policies or practices.

(2) For at least 3 years following the completion of a self-evaluation required under paragraph (c)(1) of this section, a recipient shall maintain on file, make available for public inspection, and provide to the ASD(MRA&L), or designee, upon request:

(i) A list of the interested persons (last names, first names, and middle initials) consulted.

(ii) A description of areas examined and problems identified, if any, with respect to those areas.

(iii) A description of any modification made and remedial steps taken.

(d) *Dissemination of information.* (1) Within 90 days of the effective date of this part or of first receiving assistance from the Department of Defense and on a continuing basis thereafter, each recipient shall notify beneficiaries and employees of their rights under this part and shall take appropriate steps to notify participants, beneficiaries, applicants for employment and employees, including those with impaired vision or hearing, and unions or professional organizations involved in collective bargaining or professional agreements with the recipient that the recipient does not discriminate on the basis of handicap in violation of this part. The notification shall state, when appropriate, that the recipient does not discriminate in admitting or providing access to or treating or employing persons in its programs and activities. Such notification may be accomplished

by posting notices, publishing announcements in newspapers and magazines, placing notices in its publications, or distributing memoranda or other written communications.

(2) If a recipient publishes or uses and makes available to participants, beneficiaries, applicants for employment, or employees recruitment materials or publications containing general information about the recipient's programs and activities, it shall include in those materials or publications a statement of the policy described in paragraph (d)(1) of this section. This may be accomplished by including appropriate inserts in existing materials and publications or by revising and reprinting the materials and publications.

(3) Understandable materials developed in accordance with this section shall be provided to ensure that all beneficiaries and employees of the recipient understand the information. In addition, recipients shall disseminate appropriate and comprehensive information about formal and informal complaint and appeal procedures, including directions on how and where to file complaints and to appeal DoD Component decisions.

(e) *Intimidation and interference.* Recipients and DoD Components shall take reasonable steps to ensure that no person intimidates, threatens, coerces, or discriminates against any individual for the purpose of retaliating against, interfering with, or discouraging the filing of a complaint, furnishing of information, or assisting or participating in an investigation, compliance review, hearing, or other activity related to the administration of this part.

(f) *Staff responsibilities.* All DoD Component determinations of recipient compliance with this part shall be subject to reviews by the ASD(MRA&L), or designee. When responsibility for approving applications for Federal financial assistance disbursed by a DoD Component is assigned to regional or area offices of the DoD Component, personnel in such offices shall be designated to perform the functions described in paragraphs (h) and (o) through (w) of this section.

(g) *Access to records and facilities.* Each recipient shall permit access to its premises by DoD officials during normal business hours when such access is necessary for conducting onsite compliance reviews or complaint investigations, and shall allow such officials to photograph facilities and to inspect and copy any books, records, accounts, and other material relevant to determining the recipient's compliance with this part. Information so obtained shall be used only in connection with the administration of this part. If the recipient does not have the information requested, it shall submit to the DoD Component a written report that contains a certification that the information is not available and describes the good-faith efforts made to obtain the information.

(h) *Compliance review.* DoD Components shall determine the compliance of each recipient with this part as follows: (1) *General.* Whenever possible, DoD Components shall perform compliance reviews in conjunction with their review and audit efforts implementing title VI of the Civil Rights Act of 1964.

(2) *Desk audit application review.* Before approving an application for Federal financial assistance, the DoD Component concerned shall make a written determination as to whether the recipient is in compliance with this part, based on a review of the assurance of compliance executed by a recipient pursuant to paragraph (b) of this section, and other data submitted by the recipient. When a determination cannot be made from the assurance and other data submitted by the recipient, the DoD Component concerned shall require the recipient to submit additional information and shall take other steps as necessary to determine the recipient's compliance with this part. If this additional information demonstrates that the recipient is in compliance with this part, the DoD Component shall notify the recipient promptly that it is in compliance.

(3) *Preapproval onsite review.* (i) When a desk audit application review conducted pursuant to paragraph (h)(2) of this section indicates that the recipient might not be in compliance with this part, the DoD Component concerned may conduct a preapproval onsite review at the recipient's facilities before approving the disbursement of

Federal financial assistance to the recipient. The DoD Component shall conduct such a review:

(A) When appropriate, if a desk audit application review reveals that the recipient's compliance posture is questionable because of a history of discrimination complaints, current discrimination complaints, a noncompliance determination by another government agency or DoD Component, or other indications of possible noncompliance; or

(B) If Federal financial assistance is requested for construction, except under extraordinary circumstances, to determine whether the location and design of the project would provide service on a nondiscriminatory basis, in conformity with §56.8(c).

(ii) Preapproval onsite reviews shall be conducted under DoD Component supplementary guidelines and in accordance with the provisions of paragraph (h)(4) of this section, concerning postapproval reviews.

(4) *Postapproval reviews.* DoD Components shall: (i) Establish and maintain effective programs of postapproval reviews.

(ii) Conduct such reviews of each recipient, the frequency and the nature of which shall be prescribed in the DoD Component supplemetary guidelines implementing this part.

(iii) Require recipients periodically to submit compliance reports to them.

(iv) Record the results of the reviews, including findings of fact and recommendations.

(5) A DoD Component shall complete a review within 180 calendar days of initiating it unless an extension of time is granted by the ASD(MRA&L), or designee, for good cause shown, and shall either:

(i) Find the recipient to be in compliance and notify the recipient of that finding; or

(ii) Notify the recipient and the ASD(MRA&L), or designee, of a finding of probable noncompliance, pursuant to paragraph (o) of this section.

(i) *Filing of complaints against recipients.* (1) DoD Components shall establish and publish in their supplementary guidelines procedures for the prompt processing and disposition of complaints against recipients, consistent with this section.

(2) A DoD Component shall consider all complaints that: (i) Are filed with it within 180 days of the alleged discrimination or within a longer period of time if an extension is granted for good cause by the DoD Component with the approval of the ASD(MRA&L), or designee.

(ii) Include the name, address, and telephone number, if any, of the complainant; the name and address of the recipient committing the alleged discrimination; a description of the acts or omissions considered to be discriminatory; and other pertinent information.

(iii) Are signed by the complainant or the complainant's authorized representative (legal counsel or a person with power of attorney granted by the complainant).

(3) DoD Components shall transmit a copy of each complaint filed with them to the ASD(MRA&L), or designee, within 10 calendar days after its receipt.

(4) If the information in a complaint is incomplete, the DoD Component shall request the complainant to provide the additional information required. If the DoD Component does not receive this requested information within 30 calendar days of the date of the request, the case may be closed and the complainant so notified in writing.

(5) If a complaint concerning a program or activity is filed with a DoD Component that does not have jurisdiction over it, the DoD Component shall refer the complaint to the ASD(MRA&L), or designee, and advise the complainant in writing of such referral. The ASD(MRA&L), or designee, then shall refer the complaint to the appropriate DoD Component and so notify the complainant in writing.

(j) *Investigation by DoD components.* (1) DoD Components shall investigate complaints that involve recipients and that meet the standards described in paragraph (i) of this section, unless good cause for not investigating is stated in a written notification of the disposition of the complaint provided to the complainant.

(2) If an investigation of a complaint is conducted, the DoD Component concerned shall maintain a case record that contains:

(i) The name (last name, first, and middle initial), address (street address, city, State, and zip code), and telephone number of each person interviewed.

(ii) Copies, transcripts, or summaries of pertinent documents.

(iii) A reference to at least one program or activity conducted by the recipient and receiving Federal financial assistance disbursed by a DoD Component, and a description of the amount and nature of the assistance.

(iv) A narrative report of the results of the investigation that contains references to relevant exhibits and other evidence that relates to the alleged violations.

(k) *Investigations by recipients.* (1) A DoD Component may require or permit recipients to investigate complaints alleging violation of this part. In such cases, the DoD Component shall:

(i) Ensure that the recipient investigates the complaints in accordance with the standards, procedures, and requirements prescribed in paragraph (j) of this section.

(ii) Require the recipient to submit a written report of each complaint and investigation to the DoD Component.

(iii) Retain a review responsibility over the investigation and disposition of each complaint.

(iv) Ensure that each complaint investigation is completed within 180 calendar days of the receipt of the complaint by the proper DoD Component, unless an extension of time is granted for good cause by the ASD(MRA&L), or designee.

(v) Require the recipient to maintain a log of all complaints filed against it, as described in §56.6(a)(1).

(2) DoD Components that require or permit complaint investigations to be conducted by recipients shall review recipient complaint investigations pursuant to paragraphs (k) and (l) of this section.

(l) *Results of investigations.* (1) Within 180 days of the receipt of a complaint, the DoD Component, recipient, or the ASD(MRA&L), or designee, shall give written notification:

(i) Of the disposition of the complaint to the complainant and, as the case may be, to the recipient or DoD Component.

(ii) To the complainant that within 30 calendar days of receipt of the written notification, the complainant may request that the ASD(MRA&L), or designee, review the findings in the notification pursuant to paragraph (m) of this section.

(2) If the complaint investigation results in a determination by the DoD Component that a recipient is not complying with this part the DoD Component shall proceed as prescribed in paragraph (n) through (v) of this section. If the DoD Component determines that the recipient is in compliance, the DoD Component shall submit the complete case file to the ASD(MRA&L), or designee, within 15 calendar days after the notification of the disposition of the investigation to the complainant.

(m) *Reviewing completed investigations.* (1) The ASD(MRA&L), or designee, may review all completed investigations.

(2) The ASD(MRA&L), or designee, shall review the results of any investigation of a complaint if the complainant requests such a review pursuant to paragraph (l)(1)(ii) of this section.

(3) After reviewing the results of an investigation, the ASD(MRA&L), or designee, may:

(i) Find that no further investigation is necessary and approve the results of the investigation;

(ii) Request further investigation by the DoD Component; or

(iii) Require the DoD Component to take appropriate corrective action.

(n) *Effecting compliance.* (1) When a compliance review or complaint investigation indicates that a recipient has violated this part, the applicable DoD Component's supplementary guidelines, or the assurances executed pursuant to paragraph (b) of this section, the responsible DoD Component or the ASD(MRA&L), or designee, shall attempt to effect compliance in accordance with paragraphs (o) and (p) of this section. The inability of a DoD Component to comply with any time frame prescribed by this part does not relieve a recipient of the responsibility for compliance with this part.

(2) The DoD Component may require, when necessary to overcome the effects of discrimination in violation of this part, a recipient to take remedial action:

(i) With respect to handicapped persons who are no longer participants in the recipient's program or activity but who were participants in the program or activity when such discrimination occurred.

(ii) With respect to handicapped persons who would have been participants in the recipient's program or activity had the discrimination not occurred.

(iii) With respect to handicapped persons presently in the recipient's program or activity, but not receiving full benefits or equal and integrated treatment within the program or activity.

(o) *Written notice.* After evaluating the investigative report, the DoD Component shall issue to the recipient and, pursuant to paragraph (n)(2) of this section to the ASD(MRA&L), or designee, a written notice that:

(1) Describes the apparent violation and the corrective actions necessary to achieve compliance.

(2) Extends an offer to meet informally with the recipient.

(3) Informs the recipient that failure to respond to the notice within 15 calendar days of its receipt shall result in the initiation of enforcement procedures described in paragraphs (r) through (v), of this section.

(p) *Attempting to achieve voluntary compliance by recipients.* (1) If a DoD Component issues a notice pursuant to paragraph (o) of this section, the DoD Component shall attempt to meet with the recipient and shall attempt to persuade it to take the steps necessary to achieve compliance with this part.

(2) If a recipient agrees to take remedial steps to achieve compliance, the DoD Component shall require that the agreement be in writing and:

(i) Be signed by the head of the DoD Component concerned, or designee, and by the principal official of the recipient.

(ii) Specify the action necessary to achieve compliance.

(iii) Be made available to the public upon request.

(iv) Be subject to the approval of the ASD(MRA&L), or designee.

(3) If satisfactory adjustment or a written agreement has not been achieved within 60 calendar days of the recipient's receipt of the notice issued pursuant to paragraph (o) of this section, the DoD Component shall notify the ASD(MRA&L), or designee, and state the reasons therefor.

(4) The DoD Component shall initiate the enforcement actions prescribed in paragraphs (r) through (v) of this section if:

(i) The recipient does not respond to a notice pursuant to paragraph (o) of this section, within 15 calendar days of its receipt and satisfactory adjustments are not made within 45 calendar days of the date of the recipient's response; or

(ii) The DoD Component or the ASD (MRA&L) determines at any time within 90 days after the recipient receives a notice pursuant to paragraph (o) of this section, that, despite reasonable efforts, it is not likely that the recipient will comply promptly and voluntarily.

(5) If, pursuant to paragraph (p)(4) of this section, the DoD Component initiates enforcement action, it also shall continue its attempts to persuade the recipient to comply voluntarily.

(q) *Imposing sanctions*—(1) *Sanctions available.* If a DoD Component has taken action pursuant to paragraphs (o) and (p) of this section, the DoD Component may, by order, subject to paragraph (q)(2) and (q)(3) of this section:

(i) Terminate, suspend, or refuse to grant or continue assistance to such recipient.

(ii) Refer the case to the Department of Justice for the initation of enforcement proceedings at a Federal, State, or local level.

(iii) Pursue any remedies under State or local law.

(iv) Impose other sanctions upon consultation with the ASD (MRASL), or designee.

(2) *Terminating, suspending, or refusing to grant or continue assistance.* A DoD Component may not terminate or refuse to grant or continue Federal financial assistance unless:

(i) Such action has been approved by the Secretary of Defense.

(ii) The DoD Component has given the recipient an opportunity for a hearing pursuant to the procedures set out in paragraph (r) of this section, and a finding of noncompliance has resulted.

(iii) Thirty calendar days have elapsed since the Secretary of Defense has filed a written report describing the violation and action to be taken with the committees of the House of Representatives and Senate that have jurisdiction over the program or activity in which the violation of this part exists.

(iv) Such action is limited to affect only the particular activity or program, or portion thereof, of the recipient where the violation exists.

(3) *Other sanctions.* A DoD Component may not impose the sanctions set out in paragraphs (q)(1) (iii) and (iv) of this section, unless:

(i) The DoD Component has given the recipient an opportunity for a hearing pursuant to paragraph (r) of this section, and a finding of noncompliance has resulted.

(ii) The action has been approved by the Secretary of Defense.

(iii) Ten calendar days have elapsed since the mailing of a notice informing the recipient of its continuing failure to comply with this part the action necessary to achieve compliance, and the sanction to be imposed.

(iv) During those 10 calendar days the DoD Component has made additional efforts to persuade the recipient to comply.

(r) *Hearings for recipients*—(1) *General.* When, pursuant to paragraph (q)(2)(ii) of this section, an opportunity for a hearing is given to a recipient, the DoD Component involved shall follow the procedures prescribed in paragraphs (r)(2) through (r)(6) of this section.

(2) *Notice.* The DoD Component concerned shall notify the recipient of the opportunity for a hearing by registered or certified mail, return receipt requested, when the recipient denies a tentative finding of noncompliance with this part.

(i) The DoD Component shall ensure that the notice:

(A) Describes the proposed sanctions to be imposed.

(B) Cites the section of this part under which the proposed action is to be taken.

(C) States the name and office of the DoD Component official who is responsible for conducting the hearing (hereafter referred to as the ''responsible DoD official'').

(D) Outlines the issues to be decided at the hearing.

(E) Advises the recipient either of a date, not less than 20 calendar days after the date that the notice is received, by which the recipient may request that the matter be scheduled for a hearing, or of a reasonable time and place of a hearing that is subject to change for good cause shown.

(ii) When a time and place for a hearing are set, the DoD Component shall give the recipient and the complainant, if any, reasonable notice of such time and place.

(3) *Waiver of a hearing.* A recipient may waive a hearing and submit to the responsible DoD official, in writing, information or arguments on or before the date stated pursuant to paragraph (r)(2)(i)(E) of this section.

(i) A recipient waives its right to a hearing if it fails to request a hearing on or before a date stated pursuant to paragraph (r)(2)(i)(E) of this section, or fails to appear at a hearing that has been scheduled pursuant to that paragraph.

(ii) If a recipient waives its right to a hearing under this section, the responsible DoD official shall decide the issues and render a final decision that is based on the information available and that conforms to the requirements of paragraph (s)(4) of this section.

(4) *Hearing examiner.* Hearings shall be conducted by the responsible DoD official or by a hearing examiner designated by the official, provided that the hearing examiner shall be a field grade officer or civilian employee above the grade of GS–12 (or the equivalent) who is admitted to practice law before a Federal court or the highest court of a State, territory, commonwealth, or the District of Columbia.

(5) *Right to counsel.* In all proceedings under this section, the recipient and

the DoD Component may be represented by counsel. The representation of the recipient will not be at U.S. Government expense.

(6) *Procedures.* Hearings authorized under this section shall be subject to the following: (i) Hearings shall be open to the public.

(ii) Formal rules of evidence will not apply. The DoD Component concerned and the recipient shall be entitled to introduce all relevant evidence on the issues stated in the notice of hearing issued pursuant to paragraph (r)(2) of this section, and those designated by the responsible DoD official or the hearing examiner at the outset of or during the hearing. The responsible DoD official or hearing examiner, however, may exclude irrelevant, immaterial, or repetitious evidence.

(iii) All witnesses may be examined or cross-examined, as the case may be, by each party.

(iv) All parties shall have the opportunity to examine all evidence offered or admitted for the record.

(v) A transcript of the proceedings shall be maintained in either electronic or typewritten form and made available to all parties.

(s) *Decisions*—(1) *Initial or proposed decisions by a hearing examiner.* If a hearing is conducted by a hearing examiner who is designated by the responsible DoD official pursuant to paragraph (r)(4) of this section, the hearing examiner shall either:

(i) Make an initial decision, if so authorized, that conforms to the requirements of paragraph (s)(4) of this section; or

(ii) Certify the entire record and submit to the responsible DoD official recommended findings and a proposed decision.

(2) *Review of initial decisions.* Initial decisions made by a hearing examiner pursuant to paragraph (s)(1)(i) of this section, shall be reviewed as follows:

(i) A recipient may file exceptions to an initial decision within 30 calendar days of receiving notice of such initial decision. Reasons shall be stated for each exception.

(ii) If the recipient does not file exceptions pursuant to paragraph (s)(2)(i) of this section, the responsible DoD official may notify the recipient within 45 calendar days of the initial decision that the responsible DoD official will review the decisions.

(iii) If exceptions are filed pursuant to paragraph (s)(2)(i) of this section, or a notice of review is issued pursuant to paragraph (s)(2)(ii) of this section, the responsible DoD official shall review the initial decision and, after giving the recipient reasonable opportunity to file a brief or other written statement of its contentions, issue a final decision that addresses each finding and conclusion in the initial decision and each exception, if any.

(iv) If the exceptions described in paragraph (s)(2)(i) of this section are not filed and the responsible DoD official does not issue the notice of review described in paragraph (s)(2)(ii) of this section, the initial decision of the hearing examiner shall constitute the final decision of the responsible DoD official.

(3) *Decisions by the responsible DoD official who conducts a hearing or receives a certified record.* If a hearing examiner who is designated by the responsible DoD official certifies the entire record and submits recommended findings and a proposed decision to the responsible DoD official pursuant to paragraph (s)(1)(ii) of this section, or if the responsible DoD official conducts the hearing, after giving the recipient a reasonable opportunity to file a brief or other written statement of its contentions, the responsible DoD official shall render a final decision that conforms to paragraph (s)(4) of this section.

(4) *Contents of decisions.* Each decision of a hearing examiner or responsible DoD official shall state all findings and conclusions and identify each violation of this part. The final decision may contain an order pursuant to paragraph (q) of this section, providing for the suspension or termination of or refusal to grant or continue all or some of the Federal financial assistance under the program or activity involved and contain terms, conditions, and other provisions that are consistent with and intended to achieve compliance with this Directive.

(5) *Notice of decisions and certifications.* The responsible DoD official shall provide a copy of any certified

record of a hearing and any initial or final decision to the recipient and the complainant, if any.

(6) *Review by the Secretary of Defense.* The responsible DoD official shall transmit promptly any final decision that orders a suspension, termination, or denial of Federal financial assistance through the ASD(MRA&L) to the Secretary of Defense. The Secretary may;

(i) Approve the decision;

(ii) Vacate the decision; or

(iii) Remit or mitigate any sanction imposed.

(t) *Restoring eligibility for financial assistance.* (1) A recipient that is affected adversely by a final decision issued under paragraph (s) of this section, may at any time request the responsible DoD official to restore fully its eligibility to receive Federal financial assistance.

(2) If the responsible DoD official determines that the information supplied by the recipient demonstrates that it has satisfied the terms and conditions of the order entered pursuant to paragraph (s) of this section, and that is complying with and has provided reasonable assurance that it will continue to comply with this part the responsible DoD official shall restore such eligibility immediately.

(3) If the responsible DoD official denies a request for restoration of eligibility, the recipient may submit a written request for a hearing that states why it believes the responsible DoD official erred in denying the request. Following such a written request, the recipient shall be given an expeditious hearing under rules of procedure issued by the responsible DoD official to determine whether the requirements described in paragraph (t)(2) of this section, have been met. While any such proceedings are pending, the sanctions imposed by the order issued under paragraph (s) of this section, shall remain in effect.

(u) *Interagency cooperation and delegation.* (1) When several recipients are receiving assistance for the same or similar purposes from a DoD Component and another Federal agency, the DoD Component shall notify the ASD (MRA&L), or designee. Such notification shall be in writing and shall contain:

(i) A description of the programs and activities involved.

(ii) A statement of the amount of money expended on the programs and activities in the previous and current fiscal year by the DoD Component and the agency.

(iii) A list of the known primary recipients.

(2) The ASD(MRA&L), or designee, shall attempt to negotiate with the Federal agency a written delegation agreement that designates the agency or the DoD Component as the primary agency for purposes of ensuring compliance with section 504 of Public Law 93–112, as amended, and this part depending upon which of them administers a larger financial assistance program with the common recipients and other relevant factors. If necessary, the agreement shall establish procedures to ensure the enforcement of section 504 of Public Law 93–112, as amended, and this part. The ASD(MRA&L), or designee, shall provide written notification to recipients of an agreement reached under this subsection.

(3) When several recipients are receiving assistance for the same or similar purposes from two or more DoD Components, the DoD Components may negotiate a proposed written delegation agreement that:

(i) Assigns responsibility for ensuring that the recipient complies with this part to one of the DoD Components.

(ii) Provides for the notification to recipients and the responsible program officials of the DoD Components involved of the assignment of enforcement responsibility.

(4) No delegation agreement reached in accordance with paragraph (u)(3) to this section shall be effective until it is approved by the ASD(MRA&L), or designee.

(5) When possible, existing delegation agreements relating to title VI of the Civil Rights Act of 1964 shall be amended to provide for the enforcement of this part.

(6) Any DoD Component conducting a compliance review or investigating a complaint of an alleged violation by a recipient shall notify any other affected agency or DoD Component

through the ASD(MRA&L), or designee, upon discovery that the agency or DoD Component has jurisdiction over the program or activity in question and shall subsequently inform it of the finding made. Such reviews or investigations may be conducted on a joint basis.

(7) When a compliance review or complaint investigation under this part reveals a possible violation of Executive Order 11246, titles VI or VII of the Civil Rights Act of 1964, or any other Federal law, the DoD Component shall notify the appropriate agency, through the ASD(MRA&L), or designee.

(v) *Coordination with sections 502 and 503.* (1) DoD Components shall use DoD 4270.1–M and Department of the Army, Office of the Chief of Engineers, Manual EM 1110–1–103, in developing requirements for the accessibility of facilities. If DoD Components encounter issues with respect to section 502 of the Rehabilitation Act of 1973, as amended, that are not covered by these publications, the ASD(MRA&L), or designee, may be consulted. If necessary, the ASD(MRA&L), or designee, shall consult with the Architectural and Transportation Barriers Compliance Board in resolving such problems.

(2) DoD Components may advise recipients to consult directly with the Architectural and Transportation Barriers Compliance Board in developing accessibility criteria.

(3) DoD Components shall coordinate enforcement actions relating to the accessibility of facilities with the Architectural and Transportation Barriers Compliance Board and shall notify the ASD(MRA&L), or designee, of such coordination.

(4) If a recipient is also a Federal contractor subject to section 503 of the Rehabilitation Act of 1973, as amended, and the regulations thereunder (41 CFR part 60–741) and if a DoD Component has reason to believe that the recipient is in violation thereof, the DoD Component shall coordinate enforcement actions with the Department of Labor, Office of Federal Contract Compliance Programs. The DoD Component shall notify the ASD(MRA&L), or designee, of such coordination.

§ 56.10 Ensuring compliance with this part in programs and activities conducted by the Department of Defense.

(a) *Supplementary guidelines.* (1) Whenever necessary, the ASD(MRA&L), or designee, shall publish supplementary guidelines for programs and activities that are conducted by DoD Components and that are subject to this Directive. Prior to their issuance, the ASD(MRA&L), or designee, shall submit supplementary guidelines prepared pursuant to this subsection to the Coordination and Review Section, Civil Rights Division, Department of Justice, for review.

(2) The heads of DoD Components, or designees, shall be responsible for keeping the supplementary guidelines described in this section current and accurate. When a DoD Component head determines that a program or activity should be added to or deleted from the guidelines, that official shall notify the ASD(MRA&L), or designee, in writing.

(b) *Staff responsibilities.* The ASD(MRA&L), or designee, shall determine DoD Component compliance with this part as it pertains to programs and activities that are conducted by DoD Components and are subject to this part.

(c) *Filing of complaints.* (1) Complaints of discrimination in a program or activity conducted by a DoD Component may be filed directly with the ASD(MRA&L), or designee.

(2) DoD Components shall develop procedures, such as posters or other devices, to notify participants in the programs and activities listed in § 56.7(c) of their right to be free of discrimination because of handicap in those programs and activities and of their right to file complaints of discrimination with the ASD(MRA&L), or designee.

(d) *Investigations of complaints.* (1) The ASD(MRA&L), or designee, shall investigate complaints of discrimination in programs and activities that are conducted by DoD Components and are subject to this part.

(2) A case record of each investigation shall be compiled in accordance with § 56.9(j)(2).

(e) *Results of investigations.* If the complaint investigation results in a determination by the ASD(MRA&L), or

designee, that a DoD Component's program or activity is not complying with §56.9, the ASD(MRA&L), or designee, shall proceed as prescribed in §56.9 (n) through (v). Hearings prescribed under §56.9(r) however, need not be conducted. If the ASD(MRA&L), or designee, determines that the DoD Component is in compliance, the ASD(MRA&L), or designee, shall notify the complainant within 15 calendar days of such determination.

(f) *Written notice.* If an investigative report concludes that there has been a violation of this part in a program or activity conducted by a DoD Component and the ASD(MRA&L), or designee, accepts that conclusion, that official shall issue to the head of the DoD Component a written notice describing the apparent violation, the corrective actions necessary to achieve compliance, and a suspense date for completion of the corrective actions.

(g) *Effecting compliance.* When necessary to overcome the effects of discrimination in violation of this part the ASD(MRA&L), or designee, may require a DoD Component to take remedial action similar to that in §56.9(n)(2).

(h) *Employment.* DoD Components that conduct Federal programs or activities covered by this part that involve employment of civilian persons to conduct such a program or activity must comply with section 501 of the Rehabilitation Act of 1973, as amended, and the implementing rules and regulations of the EEOC.

PART 57—PROVISION OF EARLY INTERVENTION AND SPECIAL EDUCATION SERVICES TO ELIGIBLE DOD DEPENDENTS

Sec.

57.1 Purpose.
57.2 Applicability.
57.3 Definitions.
57.4 Policy.
57.5 Responsibilities.
57.6 Procedures.

AUTHORITY: 10 U.S.C. 2164, 20 U.S.C. 921–932 and chapter 33.

SOURCE: 80 FR 36660, June 25, 2015, unless otherwise noted.

§57.1 Purpose.

This part:

(a) Establishes policy and assigns responsibilities to implement, other than the funding and reporting provisions, chapter 33 of 20 U.S.C. (also known and hereinafter referred to in this part as ''Individuals with Disabilities Education Act (IDEA)'') pursuant to 20 U.S.C. 927(c) and 10 U.S.C. 2164(f) for:

(1) Provision of early intervention services (EIS) to infants and toddlers with disabilities and their families, as well as special education and related services to children with disabilities entitled under this part to receive education services from the DoD in accordance with 20 U.S.C. 921–932, 10 U.S.C. 2164, and DoD Directive 1342.20, ''Department of Defense Education Activity (DoDEA)'' (available at *http://www.dtic.mil/whs/ directives/corres/ pdf/134220p.pdf*), and the IDEA.

(2) Implementation of a comprehensive, multidisciplinary program of EIS for infants and toddlers with disabilities and their DoD civilian-employed and military families.

(3) Provision of a free appropriate public education (FAPE), including special education and related services for children with disabilities who are eligible to enroll in DoDEA schools, as specified in their respective individualized education programs (IEP).

(4) Monitoring of DoD programs providing EIS, or special education and related services for compliance with this part.

(b) Establishes a DoD Coordinating Committee to recommend policies and provide compliance oversight for early intervention and special education.

(c) Authorizes the issuance of other guidance as necessary.

§57.2 Applicability.

This part applies to:

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

(b) Eligible infants, toddlers, and children receiving or entitled to receive early intervention services (EIS) or special education and related services from the DoD, whose parents have not elected voluntary enrollment in a non-Department of Defense Education Activity (DoDEA) school.

(c) All schools operated under the oversight of the DoDEA, including:

(1) Domestic Dependent Elementary and Secondary Schools (DDESS) operated by the DoD pursuant to 10 U.S.C. 2164.

(2) Department of Defense Dependents Schools (DoDDS) operated by the DoD pursuant to 20 U.S.C. 921–932 (hereinafter referred to as ''overseas'' schools).

(d) Does not create any substantive rights or remedies not otherwise authorized by the IDEA or other relevant law; and may not be relied upon by any person, organization, or other entity to allege a denial of substantive rights or remedies not otherwise authorized by the IDEA or other relevant law.

§ 57.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Age of majority. The age when a person acquires the rights and responsibilities of being an adult. For purposes of this part, a child attains majority at age 18, unless the child has been determined by a court of competent jurisdiction to be incompetent, or, if the child has not been determined to be incompetent, he or she is incapable of providing informed consent with respect to his or her educational program.

Alternate assessment. An objective and consistent process that validly measures the performance of students with disabilities unable to participate, even with appropriate accommodations provided as necessary and as determined by their respective CSC, in a systemwide assessment.

Alternative educational setting (AES). A temporary setting in or out of the school, other than the setting normally attended by the student (e.g., alternative classroom, home setting, installation library) as determined by school authorities or the CSC, in accordance with §57.6(b)(12) as the appropriate learning environment for a student because of a violation of school rules and regulations or disruption of regular classroom activities.

Assistive technology device. Any item, piece of equipment, or product system, whether acquired commercially or off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of children with disabilities. This term does not include a medical device that is surgically implanted or the replacement of that device.

Assistive technology service. Any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. The term includes: Evaluating the needs of an individual with a disability, including a functional evaluation in the individual's customary environment; purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by individuals with disabilities; selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices; coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing educational and rehabilitative plans and programs; training or technical assistance for an individual with disabilities or the family of an individual with disabilities; and training or technical assistance for professionals (including individuals providing educational rehabilitative services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of an individual with a disability.

Case study committee (CSC). A school-level multidisciplinary team, including the child's parents, responsible for making educational decisions concerning a child with a disability.

Child-find. An outreach program used by DoDEA, the Military Departments, and the other DoD Components to locate, identify, and evaluate children from birth to age 21, inclusive, who may require EIS or special education and related services. All children who

are eligible to attend a DoD school under 20 U.S.C. 921–932 or 10 U.S.C. 2164 fall within the scope of the DoD child-find responsibilities. Child-find activities include the dissemination of information to Service members, DoD employees, and parents of students eligible to enroll in DoDEA schools; the identification and screening of children; and the use of referral procedures.

Children with disabilities. Children, ages 3 through 21, inclusive, who are entitled to enroll, or are enrolled, in a DoD school in accordance with 20 U.S.C. 921–932 and 10 U.S.C. 2164, have not graduated from high school or completed the General Education Degree, have one or more disabilities in accordance with section 1401(3) of the IDEA, and need and qualify for special education and related services.

Complainant. Person making an administrative complaint.

Comprehensive system of personnel development (CSPD). A system of personnel development that is developed in coordination with the Military Departments and the Director, DoDEA. CSPD is the training of professionals, paraprofessionals, and primary referral source personnel with respect to the basic components of early intervention, special education, and related services. CSPD may also include implementing innovative strategies and activities for the recruitment and retention of personnel providing special education and related services, ensuring that personnel requirements are established and maintaining qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared to provide special education and related services. Training of personnel may include working within the military and with military families, the emotional and social development of children, and transition services from early intervention to preschool and transitions within educational settings and to post-secondary environments.

Consent. The permission obtained from the parent ensuring they are fully informed of all information about the activity for which consent is sought, in his or her native language or in another mode of communication if necessary, and that the parent understands and agrees in writing to the implementation of the activity for which permission is sought.

Continuum of placement options. Instruction in general education classes, special classes, special schools, home instruction, and instruction in hospitals and institutions; includes provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

Controlled substance. As defined in Sections 801–971 of title 21, United States Code (also known as the ''Controlled Substances Act, as amended'').

Day. A calendar day, unless otherwise indicated as a business day or a school day.

(1) *Business day.* Monday through Friday except for Federal and State holidays.

(2) *School day.* Any day, including a partial day, that children are in attendance at school for instructional purposes. School day has the same meaning for all children in school, including children with and without disabilities.

Department of Defense Education Activity (DoDEA). The Department of Defense Education Activity is a DoD Field Activity under the direction, operation, and control of the Under Secretary of Defense for Personnel & Readiness (USD(P&R)) and the Assistant Secretary of Defense for Readiness & Force Management (ASD(R&FM)). The mission of DoDEA is to provide an exemplary education by effectively and efficiently planning, directing, and overseeing the management, operation, and administration of the DoD Domestic Dependent Elementary and Secondary Schools (DDESS) and the DoD Dependents Schools (DoDDS), which provide instruction from kindergarten through grade 12 to eligible dependents.

Department of Defense Dependents Schools (DoDDS). The overseas schools (kindergarten through grade 12) established in accordance with 20 U.S.C. 921–932.

Department of Defense Education Activity School. A DDESS or DoDDS school operated under the oversight of DoDEA.

Developmental Delay in children ages 3 through 7. A child three through seven (or any subset of that age range, including ages 3 through 5) who is experiencing developmental delays, as defined for infants and toddlers at § 57.6(a)(4)(ii)(A) as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development, and who, by reason thereof, needs special education and related services. A child determined to have a developmental delay before the age of 7 may maintain that eligibility through age 9.

Domestic Dependent Elementary and Secondary Schools (DDESS). The schools (pre-kindergarten through grade 12) established in accordance with 10 U.S.C. 2164.

Early intervention service provider. An individual that provides early intervention services in accordance with this part.

Educational and Developmental Intervention Services (EDIS). Programs operated by the Military Departments to provide EIS to eligible infants and toddlers with disabilities, and related services to eligible children with disabilities in accordance with this part.

EIS. Developmental services for infants and toddlers with disabilities, as defined in this part, that are provided under the supervision of a Military Department, including evaluation, individualized family service plan (IFSP) development and revision, and service coordination, provided at no cost to the child's parents (except for incidental fees also charged to children without disabilities).

Extended school year (ESY) services. Special education and related services that are provided to a child with a disability beyond the normal DoDEA school year, in accordance with the child's IEP, are at no cost to the parents, and meet the standards of the DoDEA school system.

Evaluation. The method used by a multidisciplinary team to conduct and review the assessments of the child and other relevant input to determine whether a child has a disability and a child's initial and continuing need to receive EIS or special education and related services.

Extracurricular and non-academic activities. Services and activities including counseling services; athletics; transportation; health services; recreational activities; special interest groups or clubs sponsored by the DoDEA school system; and referrals to agencies that provide assistance to individuals with disabilities and employment of students, including employment by a public agency and assistance in making outside employment available.

FAPE. Special education and related services that are provided under the general supervision and direction of DoDEA at no cost to parents of a child with a disability, in conformity with an IEP, in accordance with the requirements of the IDEA and DoD guidance.

Functional behavioral assessment. A process for identifying the events that predict and maintain patterns of problem behavior.

General education curriculum. The curriculum adopted by the DoDEA school systems for all children from preschool through secondary school. To the extent applicable to an individual child with a disability, the general education curriculum can be used in any educational environment along a continuum of alternative placements.

IEP. A written document that is developed, reviewed, and revised at a meeting of the CSC, identifying the required components of the individualized education program for a child with a disability.

Individualized Family Service Plan (IFSP). A written document identifying the specially designed services for an infant or toddler with a disability and the family of such infant or toddler.

Independent educational evaluation (IEE). An evaluation conducted by a qualified examiner who is not an EDIS examiner or an examiner funded by the DoDEA school who conducted the evaluation with which the parent is in disagreement.

Infants and toddlers with disabilities. Children from birth up to 3 years of age, inclusive, who need EIS because:

(1) They are experiencing developmental delays as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Cognitive development, physical development including vision and hearing, communication development, social or emotional development, adaptive development; or

(2) They have a diagnosed physical or mental condition that has a high probability of resulting in developmental delay.

Inter-component. Cooperation among DoD organizations and programs, ensuring coordination and integration of services to infants, toddlers, children with disabilities, and their families.

Manifestation determination. The process in which the CSC reviews all relevant information and the relationship between the child's disability and the child's behavior to determine whether the behavior is a manifestation of the child's disability.

Mediation. A confidential, voluntary, informal dispute resolution process that is provided at no charge to the parents, whether or not a due process petition has been filed, in which the disagreeing parties engage in a discussion of issues related to the provision of the child's EIS or special education and related services in accordance with the requirements of IDEA and this part, in the presence of, or through, a qualified and impartial mediator who is trained in effective mediation techniques.

Medical services. Those evaluative, diagnostic, and therapeutic, services provided by a licensed and credentialed medical provider to assist providers of EIS, regular and special education teachers, and providers of related services to develop and implement IFSPs and IEPs.

Multidisciplinary. The involvement of two or more disciplines or professions in the integration and coordination of services, including evaluation and assessment activities and development of an IFSP or an IEP.

Native language. When used with reference to an individual of limited English proficiency, the home language normally used by such individuals, or in the case of a child, the language normally used by the parents of the child.

Natural environment. A setting, including home and community, in which children without disabilities participate.

Non-DoD school or facility. A public or private school or other educational program not operated by DoD.

Parent. The natural, adoptive, or foster parent of a child, a guardian, an individual acting in the place of a natural or adoptive parent with whom the child lives, or an individual who is legally responsible for the child's welfare if that person contributes at least one-half of the child's support.

Personally identifiable information. Information that would make it possible to identify the infant, toddler, or child with reasonable certainty. Information includes: The name of the child, the child's parent or other family member; the address of the child; a personal identifier, such as the child's social security number or student number; or a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

Primary referral source. Parents and the DoD Components, including child development centers, pediatric clinics, and newborn nurseries, that suspect an infant or toddler has a disability and bring the child to the attention of the EDIS.

Psychological services. Psychological services include: Administering psychological and educational tests and other assessment procedures; interpreting assessment results; obtaining, integrating and interpreting information about child behavior and conditions relating to learning; consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observations, and behavioral evaluations; planning and managing a program of psychological services, including psychological counseling for children and parents; and assisting in developing positive behavioral intervention strategies.

Public awareness program. Activities or print materials focusing on early identification of infants and toddlers

with disabilities. Materials may include information prepared and disseminated by a military medical department to all primary referral sources and information for parents on the availability of EIS. Procedures to determine the availability of information on EIS to parents are also included in that program.

Qualified. A person who meets the DoD-approved or recognized certification, licensing, or registration requirements or other comparable requirements in the area in which the person provides evaluation or assessment, EIS, special education or related services to an infant, toddler, or child with a disability.

Rehabilitation counseling. Services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of the student with a disability. The term also includes vocational rehabilitation services provided to a student with disabilities by vocational rehabilitation programs funded in accordance with the Rehabilitation Act of 1973, 29 U.S.C. chapter 16.

Related services. Transportation and such developmental, corrective, and other supportive services, as required, to assist a child with a disability to benefit from special education under the child's IEP. The term includes services or consults in the areas of speech-language pathology; audiology services; interpreting services; psychological services; physical and occupational therapy; recreation including therapeutic recreation; social work services; and school nurse services designed to enable a child with a disability to receive a FAPE as described in the child's IEP; early identification and assessment of disabilities in children; counseling services including rehabilitation counseling; orientation and mobility services; and medical services for diagnostic or evaluative purposes. The term does not include a medical device that is surgically implanted or the replacement of such.

Related services assigned to the Military Departments. Medical and psychological services, audiology, and optometry for diagnostic or evaluative purposes, including consults, to determine whether a particular child has a disability, the type and extent of the disability, and the child's eligibility to receive special services. In the overseas and domestic areas, transportation is provided as a related service by the Military Department when transportation is prescribed in an IFSP for an infant or toddler, birth to 3 years of age, with disabilities.

Resolution meeting. The meeting between parents and relevant school personnel, which must be convened within a specified number of days after receiving notice of a due process complaint and prior to the initiation of a due process hearing, in accordance with the IDEA and this part. The purpose of the meeting is for the parent to discuss the due process complaint and the facts giving rise to the complaint so that the school has the opportunity to resolve the complaint.

Resolution period. That period of time following a resolution meeting, the length of which is defined in this part, during which the school is afforded an opportunity to resolve the parent's concerns before the dispute can proceed to a due process hearing.

Separate facility. A school or a portion of a school, regardless of whether it is operated by DoD, attended exclusively by children with disabilities.

Serious bodily injury. A bodily injury, which involves a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Service coordination. Activities of a service coordinator to assist and enable an infant or toddler and the family to receive the rights, procedural safeguards, and services that are authorized to be provided.

Special education. Specially designed instruction, which is provided at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education.

Supplementary aids and services. Aids, services, and other supports that are

provided in regular education classes or other educational-related settings, and in extracurricular and non-academic settings to enable children with disabilities to be educated with non-disabled children to the maximum extent appropriate.

Transition services. A coordinated set of activities for a child with a disability that is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation, and is based on the individual child's needs, taking into account the child's strengths, preferences, and interests and includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and when appropriate, acquisition of daily living skills and functional vocational evaluation.

Transportation. A service that includes transportation and related costs, including the cost of mileage or travel by taxi, common carrier, tolls, and parking expenses, that are necessary to: enable an eligible child with a disability and the family to receive EIS, when prescribed in a child's IFSP; enable an eligible child with a disability to receive special education and related services, when prescribed as a related service by the child's IEP; and enable a child to obtain an evaluation to determine eligibility for special education and related services, if necessary. It also includes specialized equipment, including special or adapted buses, lifts, and ramps needed to transport children with disabilities.

Weapon. Defined in Department of Defense Education Activity Regulation 2051.1, ''Disciplinary Rules and Procedures'' (available at *http://www.dodea.edu/foia/ iod/pdf/2051_1a.pdf*).

§57.4 Policy.

It is DoD policy that:

(a) Infants and toddlers with disabilities and their families who (but for the children's age) would be entitled to enroll in a DoDEA school in accordance with 20 U.S.C. 921–932 or 10 U.S.C. 2164 shall be provided EIS.

(b) The DoD shall engage in child-find activities for all children age birth to 21, inclusive, who are entitled by 20 U.S.C. 921–932 or 10 U.S.C. 2164 to enroll or are enrolled in a DoDEA school.

(c) Children with disabilities who meet the enrollment eligibility criteria of 20 U.S.C. 921–932 or 10 U.S.C. 2164 shall be provided a FAPE in the least restrictive environment, including if appropriate to the needs of the individual child, placement in a residential program for children with disabilities in accordance with the child's IEP and at no cost to the parents.

(d) The Military Departments and DoDEA shall cooperate in the delivery of related services prescribed by section 1401(26) of the IDEA and this part as may be required to assist eligible children with disabilities to benefit from special education.

(e) Children with disabilities who are eligible to enroll in a DoDEA school in accordance with 20 U.S.C. 921–932 or 10 U.S.C. 2164 shall not be entitled to provision of a FAPE by DoDEA, or to the procedural safeguards prescribed by this part in accordance with the IDEA, if:

(1) The sponsor is assigned to an overseas area where a DoDEA school is available within the commuting area of the sponsor's overseas assignment, but the sponsor does not elect to enroll the child in a DoDEA school for reasons other than DoDEA's alleged failure to provide a FAPE; or

(2) The sponsor is assigned in the United States or in a U.S. territory, commonwealth, or possession and the sponsor's child meets the eligibility requirements for enrollment in a DoDEA school, but the sponsor does not elect to enroll the child in a DoDEA school for reasons other than DoDEA's alleged failure to provide a FAPE.

§57.5 Responsibilities.

(a) The ASD(R&FM) under the authority, direction, and control of the USD(P&R) shall:

(1) Establish, in accordance with DoD Instruction 5105.18, ''DoD Intergovernmental and Intragovernmental Committee Management Program'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 510518p.pdf*), a DoD Coordinating Committee to recommend policies regarding the provision of early intervention and special education services.

(2) Ensure the development, implementation and administration of a system of services for infants and toddlers with disabilities and their families and children with disabilities; and provide compliance oversight for early intervention and special education in accordance with DoD Directive 5124.02, ''Under Secretary of Defense for Personnel and Readiness (USD(P&R))'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 512402p.pdf*); 20 U.S.C. 921–932; the applicable statutory provision of the IDEA; 10 U.S.C. 2164; DoD Directive 1342.20 and implementing guidance authorized by this part.

(3) Oversee DoD Component collaboration on the provision of services and transition support to infants, toddlers, and school-aged children.

(4) Develop a DoD-wide comprehensive child-find system to identify eligible infants, toddlers, and children ages birth through 21 years, inclusive, who may require early intervention or special education services, in accordance with the IDEA.

(5) Develop and provide guidance as necessary for the delivery of services for children with disabilities and for the protection of procedural rights consistent with the IDEA and implementing guidance authorized by this part.

(6) Coordinate with the Secretaries of the Military Departments to ensure that their responsibilities, as detailed in paragraph (f) of this section, are completed.

(7) Direct the development and implementation of a comprehensive system of personnel development (CSPD) for personnel serving infants and toddlers with disabilities and children with disabilities, and their families.

(8) Develop requirements and procedures for compiling and reporting data on the number of eligible infants and toddlers with disabilities and their families in need of EIS and children in need of special education and related services.

(9) Require DoDEA schools provide educational information for assignment coordination and enrollment in the Services' Exceptional Family Member Program or Special Needs Program consistent with DoD Instruction 1315.19, ''Authorizing Special Needs Family Members Travel Overseas at Government Expense'' (available at *http://www.dtic.mil/whs/ directives/corres/ pdf/ 131519p.pdf*).

(10) Identify representatives to serve on the Department of Defense Coordinating Committee on Early Intervention, Special Education, and Related Services (DoD-CC).

(11) Ensure delivery of appropriate early intervention and educational services to eligible infants, toddlers, and children, and their families as appropriate pursuant to the IDEA and this part through onsite monitoring of special needs programs and submission of an annual compliance report.

(b) The Assistant Secretary of Defense for Health Affairs (ASD(HA)), under the authority, direction, and control of the USD(P&R), shall:

(1) Advise the USD(P&R) and consult with the General Counsel of the Department of Defense (GC, DoD) regarding the provision of EIS and related services.

(2) Oversee development of provider workload standards and performance levels to determine staffing requirements for EIS and related services. The standards shall take into account the provider training needs, the requirements of this part, and the additional time required to provide EIS and related services in schools and the natural environments, and for the coordination with other DoD Components and other service providers, indirect services including analysis of data, development of the IFSP, transition planning, and designing interventions and accommodations.

(3) Establish and maintain an automated data system to support the operation and oversight of the Military Departments' delivery of EIS and related services.

(4) Assign geographical areas of responsibility for providing EIS and related services under the purview of healthcare providers to the Military Departments. Periodically review the alignment of geographic areas to ensure that resource issues (e.g., base closures) are considered in the cost-effective delivery of services.

(5) Establish a system for measuring EIS program outcomes for children and their families.

(6) Resolve disputes among the DoD Components providing EIS.

(c) The Director, Defense Health Agency (DHA), under the authority, direction, and control of the ASD(HA), shall identify representatives to serve on the DoD-CC.

(d) The Director, DoD Education Activity (DoDEA), under the authority, direction, and control of the USD(P&R), and through the ASD(R&FM), in accordance with DoD Directive 5124.02, shall ensure that:

(1) Children who meet the enrollment eligibility criteria of 20 U.S.C. 921–932 or 10 U.S.C. 2164 are identified and referred for evaluation if they are suspected of having disabilities, and are afforded appropriate procedural safeguards in accordance with the IDEA and implementing guidance authorized by this part.

(2) Children who meet the enrollment eligibility criteria of 20 U.S.C. 921–932 or 10 U.S.C. 2164 shall be evaluated in accordance with the IDEA and implementing guidance authorized by this part, as needed. If found eligible for special education and related services, they shall be provided a FAPE in accordance with an IEP, with services delivered in the least restrictive environment and procedural safeguards in accordance with the requirements of the IDEA and implementing guidance authorized by this part.

(3) Records are maintained on the special education and related services provided to children in accordance with this part, pursuant to 32 CFR part 310.

(4) Related services as prescribed in an IEP for a child with disabilities enrolled in a DoDEA school in the United States, its territories, commonwealths, or possessions are provided by DoDEA.

(5) Transportation is provided by DoDEA in overseas and domestic areas as a related service to children with disabilities when transportation is prescribed in a child's IEP. The related service of transportation includes necessary accommodations to access and leave the bus and to ride safely on the bus and transportation between the child's home, the DoDEA school, or another location, as specified in the child's IEP.

(6) Appropriate personnel participate in the development and implementation of a CSPD.

(7) Appropriate written guidance is issued to implement the requirements pertaining to special education and related services under 20 U.S.C. 921–932, 10 U.S.C. 2164, and the IDEA.

(8) Activities to identify and train personnel to monitor the provision of services to eligible children with disabilities are funded.

(9) DoDEA schools that operate pursuant to 20 U.S.C. 921–932 and 10 U.S.C. 2164 conduct child-find activities for all eligible children;

(10) A free appropriate public education (FAPE) and procedural safeguards in accordance with IDEA and this part available to children with disabilities who are entitled to enroll in DoDEA schools under the enrollment eligibility criteria of 20 U.S.C. 921–932 or 10 U.S.C. 2164. However, a FAPE, or the procedural safeguards prescribed by the IDEA and this part, shall NOT be available to such children, if:

(i) The sponsor is assigned to an overseas area where a DoDEA school is available within the commuting area of the sponsor's assignment, but the sponsor does not elect to enroll his or her child in a DoDEA school for reasons other than DoDEA's alleged failure to provide a FAPE; or

(ii) The sponsor is assigned in the United States or in a U.S. territory, commonwealth, or possession and the sponsor's child meets the eligibility requirements for enrollment in a DoDEA school, but the sponsor does not elect to enroll the child in a DoDEA school for reasons other than DoDEA's alleged failure to provide a FAPE.

(11) The educational needs of children with and without disabilities are met comparably, in accordance with §57.6(b) of this part.

(12) Educational facilities and services (including the start of the school day and the length of the school year) operated by DoDEA for children with and without disabilities are comparable.

(13) All programs providing special education and related services are monitored for compliance with this part and with the substantive rights, protections, and procedural safeguards of the IDEA and this part at least once every 3 years.

(14) A report is submitted to the USD(P&R) not later than September 30 of each year certifying whether all schools are in compliance with the IDEA and this part, and are affording children with disabilities the substantive rights, protections, and procedural safeguards of the IDEA.

(15) Transition assistance is provided in accordance with IDEA and this part to promote movement from early intervention or preschool into the school setting.

(16) Transition services are provided in accordance with IDEA and this part to facilitate the child's movement into different educational settings and post-secondary environments.

(e) The GC, DoD shall identify representatives to serve on the DoD-CC.

(f) The Secretaries of the Military Departments shall:

(1) Establish educational and developmental intervention services (EDIS) to ensure infants and toddlers with disabilities are identified and provided EIS where appropriate, and are afforded appropriate procedural safeguards in accordance with the requirements of the IDEA and implementing guidance authorized by this part.

(2) Staff EDIS with appropriate professional staff, based on the services required to serve children with disabilities.

(3) Provide related services required to be provided by a Military Department in accordance with the mandates of this part for children with disabilities. In the overseas areas served by DoDEA schools, the related services required to be provided by a Military Department under an IEP necessary for the student to benefit from special education include medical services for diagnostic or evaluative purposes; social work; community health nursing; dietary, audiological, optometric, and psychological testing and therapy; occupational therapy; and physical therapy. Transportation is provided as a related service by the Military Department when it is prescribed in a child's IFSP for an infant or toddler birth up to 3 years of age, inclusive, with disabilities. Related services shall be administered in accordance with guidance issued pursuant to this part, including guidance from the ASD(HA) on staffing and personnel standards.

(4) Issue implementing guidance and forms necessary for the operation of EDIS in accordance with this part.

(5) Provide EIS to infants and toddlers with disabilities and their families, and related services to children with disabilities as required by this part at the same priority that medical care is provided to active duty military members.

(6) Provide counsel from the Military Department concerned or request counsel from the Defense Office of Hearings and Appeals (DOHA) to represent the Military Department in impartial due process hearings and administrative appeals conducted in accordance with this part for infants and toddlers birth up to 3 years of age, inclusive, with disabilities who are eligible for EIS.

(7) Execute Departmental responsibilities under the Exceptional Family Member program (EFMP) prescribed by DoD Instruction 1315.19.

(8) Train command personnel to fully understand their legal obligations to ensure compliance with and provide the services required by this part.

(9) Fund activities to identify and train personnel to monitor the provision of services to eligible children with disabilities.

(10) Require the development of policies and procedures for providing, documenting, and evaluating EDIS, including EIS and related services provided to children receiving special education in a DoDEA school.

(11) Maintain EDIS to provide necessary EIS to eligible infants and toddlers with disabilities and related services to eligible children with disabilities in accordance with this part and the substantive rights, protections, and

procedural safeguards of the IDEA, §57.6(a) and §57.6(c) of this part.

(12) Implement a comprehensive, coordinated, inter-component, community-based system of EIS for eligible infants and toddlers with disabilities and their families using the procedures established in §57.6(a) of this part and guidelines from the ASD(HA) on staffing and personnel standards.

(13) Provide transportation for EIS pursuant to the IDEA and this part.

(14) Provide transportation for children with disabilities pursuant to the IDEA and this part. The Military Departments are to provide transportation for a child to receive medical or psychological evaluations at a medical facility in the event that the local servicing military treatment facility (MTF) is unable to provide such services and must transport the child to another facility.

(15) Require that EDIS programs maintain the components of an EIS as required by the IDEA and this part, to include:

(i) A comprehensive child-find system, including a system for making referrals for services that includes timelines and provides for participation by primary referral sources, and that establishes rigorous standards for appropriately identifying infants and toddlers with disabilities for services.

(ii) A public awareness program focusing on early identification of infants and toddlers with disabilities to include:

(A) Preparation of information materials for parents regarding the availability of EIS, especially to inform parents with premature infants or infants with other physical risk factors associated with learning or developmental complications.

(B) Dissemination of those materials to all primary referral sources, especially hospitals and physicians, for distribution to parents.

(C) A definition of developmental delay, consistent with §57.6(g) of this part, to be used in the identification of infants and toddlers with disabilities who are in need of services.

(D) Availability of appropriate EIS.

(iii) A timely, comprehensive, multidisciplinary evaluation of the functioning of each infant or toddler and identification of the needs of the child's family to assist appropriately in the development of the infant or toddler.

(iv) Procedures for development of an Individualized Family Service Plan (IFSP) and coordination of EIS for families of eligible infants and toddlers with disabilities.

(v) A system of EIS designed to support infants and toddlers and their families in the acquisition of skills needed to become functionally independent and to reduce the need for additional support services as toddlers enter school.

(vi) A central directory of information on EIS resources and experts available to military families.

(16) Implement a comprehensive system of personnel development consistent with the requirements of the IDEA.

(17) Require that EDIS participate in the existing MTF quality assurance program, which monitors and evaluates the medical services for children receiving such services as described by this part. Generally accepted standards of practice for the relevant medical services shall be followed, to the extent consistent with the requirements of the IDEA including provision of EIS in a natural environment, to ensure accessibility, acceptability, and adequacy of the medical portion of the program provided by EDIS.

(18) Require transition services to promote movement from early intervention, preschool, and other educational programs into different educational settings and post-secondary environments.

(19) Direct that each program providing EIS is monitored for compliance with this part, and the substantive rights, protections, and procedural safeguards of the IDEA, at least once every 3 years.

(20) Submit a report to the USD(P&R) not later than September 30 of each year stating whether all EDIS programs are in compliance with this part and are affording infants and toddlers the substantive rights, protections, and procedural safeguards of the IDEA, as stated in §57.6(f) of this part.

(21) Compile and report EDIS workload and compliance data using the

system established by the ASD(HA) as stated in § 57.6(f).

(g) The Director, DOHA, under the authority, direction, and control of the GC, DoD/Director, Defense Legal Services Agency, shall:

(1) Ensure impartial due process hearings are provided in accordance with the IDEA and implementing guidance authorized by this part with respect to complaints related to special education and related services arising under the IDEA.

(2) Ensure DOHA Department Counsel represents DoDEA in all due process proceedings arising under the IDEA for children age 3 through 21 who are eligible for special education and related services.

(3) Ensure DOHA Department Counsel, upon request by a Military Department, represents the Military Department in due process proceedings arising under the IDEA for infants and toddlers birth up to 3 years of age with disabilities who are eligible for EIS.

(4) Ensure the DOHA Center for Alternative Dispute Resolution (CADR) maintains a roster of mediators qualified in special education disputes and, when requested, provides a mediator for complaints related to special education and related services arising under the IDEA.

§ 57.6 Procedures.

(a) *Procedures for the Provision of EIS for Infants and Toddlers with Disabilities*—(1) *General.* (i) There is an urgent and substantial need to:

(A) Enhance the development of infants and toddlers with disabilities to minimize their potential for developmental delay and to recognize the significant brain development that occurs during a child's first 3 years of life.

(B) Reduce educational costs by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age.

(C) Maximize the potential for individuals with disabilities to live independently.

(D) Enhance the capacity of families to meet the special needs of their infants and toddlers with disabilities.

(ii) All procedures and services within EIS must be in accordance with the IDEA and the provisions of this part.

(2) *Identification and screening.* (i) Each Military Department shall develop and implement in its assigned geographic area a comprehensive child-find and public awareness program, pursuant to the IDEA and this part, that focuses on the early identification of infants and toddlers who are eligible to receive EIS pursuant to this part.

(ii) The military treatment facility (MTF) and Family Advocacy Program must be informed that EDIS will accept direct referrals for infants and toddlers from birth up to 3 years of age who are:

(A) Involved in a substantiated case of child abuse or neglect; or

(B) Identified as affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure.

(iii) All other DoD Components will refer infants and toddlers with suspected disabilities to EDIS in collaboration with the parents.

(iv) Upon receipt of a referral, EDIS shall appoint a service coordinator.

(v) All infants and toddlers referred to the EDIS for EIS shall be screened to determine the appropriateness of the referral and to guide the assessment process.

(A) Screening does not constitute a full evaluation. At a minimum, screening shall include a review of the medical and developmental history of the referred infant or toddler through a parent interview and a review of medical records.

(B) If screening is conducted prior to the referral, or if there is a substantial or obvious biological risk, a screening following the referral may not be necessary.

(C) If EDIS determines that an evaluation is not necessary based on screening results, EDIS will provide written notice to the parents in accordance with paragraph (a)(9) of this section.

(3) *Assessment and evaluation*—(i) *Assessments and evaluations.* The assessment and evaluation of each infant and toddler must:

(A) Be conducted by a multidisciplinary team.

(B) Include:

(*1*) A review of records related to the infant's or toddler's current health status and medical history.

(*2*) An assessment of the infant's or toddler's needs for EIS based on personal observation of the child by qualified personnel.

(*3*) An evaluation of the infant's or toddler's level of functioning in each of the following developmental areas, including a multidisciplinary assessment of the unique strengths and needs of the child and the identification of services appropriate to meet those needs.

(*i*) Cognitive development.

(*ii*) Physical development, including functional vision and hearing.

(*iii*) Communication development.

(*iv*) Social or emotional development.

(*v*) Adaptive development.

(*4*) Informed clinical opinion of qualified personnel if the infant or toddler does not qualify based on standardized testing and there is probable need for services.

(ii) *Family assessments.* (A) Family assessments must include consultation with the family members.

(B) If EDIS conducts an assessment of the family, the assessment must:

(*1*) Be voluntary on the part of the family.

(*2*) Be conducted by personnel trained to utilize appropriate methods and procedures.

(*3*) Be based on information provided by the family through a personal interview.

(*4*) Incorporate the family's description of its resources, priorities, and concerns related to enhancing the infant's or toddler's development and the identification of the supports and services necessary to enhance the family's capacity to meet the developmental needs of the infant or toddler.

(iii) *Standards for Assessment Selection and Procedures.* EDIS shall ensure, at a minimum, that:

(A) Evaluators administer tests and other evaluations in the native language of the infant or toddler, or the family's native language, or other mode of communication, unless it is clearly not feasible to do so.

(B) Assessment, evaluation procedures, and materials are selected and administered so as not to be racially or culturally discriminatory.

(C) No single procedure is used as the sole criterion for determining an infant's or toddler's eligibility under this part.

(D) Qualified personnel conduct evaluations and assessments.

(iv) *Delivery of Intervention Services.* With parental consent, the delivery of intervention services may begin before the completion of the assessment and evaluation when it has been determined by a multidisciplinary team that the infant or toddler or the infant's or toddler's family needs the service immediately. Although EDIS has not completed all assessments, EDIS must develop an IFSP before the start of services and complete the remaining assessments in a timely manner.

(4) *Eligibility.* (i) The EDIS team shall meet with the parents and determine eligibility. The EIS team shall document the basis for eligibility in an eligibility report and provide a copy to the parents.

(ii) Infants and toddlers from birth up to 3 years of age with disabilities are eligible for EIS if they meet one of the following criteria:

(A) The infant or toddler is experiencing a developmental delay in one or more of the following areas: Physical development; cognitive development; communication development; social or emotional development; or adaptive development, as verified by a developmental delay of two standard deviations below the mean as measured by diagnostic instruments and procedures in at least one area; a 25 percent delay in at least one developmental area on assessment instruments that yield scores in months; a developmental delay of 1.5 standard deviations below the mean as measured by diagnostic instruments and procedures in two or more areas; or a 20 percent delay in two or more developmental areas on assessment instruments that yield scores in months.

(B) The infant or toddler has a diagnosed physical or mental condition that has a high probability of resulting in developmental delay. Includes conditions such as, chromosomal abnormalities; genetic or congenital disorders;

severe sensory impairments; inborn errors of metabolism; disorders reflecting disturbance of the development of the nervous system; congenital infections; and disorders secondary to exposure to toxic substances, including fetal alcohol syndrome.

(5) *Timelines.* (i) EIS shall complete the initial evaluation and assessment of each infant and toddler (including the family assessment) in a timely manner ensuring that the timeline in paragraph (a)(6)(ii) of this section is met.

(ii) The Military Department responsible for providing EIS shall develop procedures requiring that, if circumstances make it impossible to complete the evaluation and assessment within a timely manner (e.g., if an infant or toddler is ill), EDIS shall:

(A) Document those circumstances.

(B) Develop and implement an appropriate interim IFSP in accordance with this part.

(6) *IFSP.* (i) The EDIS shall develop and implement an IFSP for each infant and toddler with a disability, from birth up to 3 years of age, who meets the eligibility criteria for EIS.

(ii) EDIS shall convene a meeting to develop the IFSP of an infant or toddler with a disability. The meeting shall be scheduled as soon as possible following its determination that the infant or toddler is eligible for EIS, but not later than 45 days from the date of the referral for services.

(iii) The IFSP team meeting to develop and review the IFSP must include:

(A) The parent or parents of the infant or toddler.

(B) Other family members, as requested by the parent, if feasible.

(C) An advocate or person outside of the family if the parent requests that person's participation.

(D) The service coordinator who has worked with the family since the initial referral of the infant or toddler or who is responsible for the implementation of the IFSP.

(E) The persons directly involved in conducting the evaluations and assessments.

(F) As appropriate, persons who shall provide services to the infant or toddler or the family.

(iv) If a participant listed in paragraph (a)(6)(iii) of this section is unable to attend a meeting, arrangements must be made for the person's involvement through other means, which may include:

(A) A telephone conference call or other electronic means of communication.

(B) Providing knowledgeable, authorized representation.

(C) Providing pertinent records for use at the meeting.

(v) The IFSP shall contain:

(A) A statement of the infant's or toddler's current developmental levels including physical, cognitive, communication, social or emotional, and adaptive behaviors based on the information from the evaluation and assessments.

(B) A statement of the family's resources, priorities, and concerns about enhancing the infant's or toddler's development.

(C) A statement of the measurable results or measurable outcomes expected to be achieved for the infant or toddler and the family. The statement shall contain pre-literacy and language skills, as developmentally appropriate for the infant or toddler, and the criteria, procedures, and timelines used to determine the degree to which progress toward achieving the outcomes is being made and whether modification or revision of the results and services are necessary.

(D) A statement of the specific EIS based on peer-reviewed research, to the extent practicable, necessary to meet the unique needs of the infant or toddler and the family, including the frequency, intensity, and method of delivering services.

(E) A statement of the natural environments in which EIS will be provided including a justification of the extent, if any, to which the services shall not be provided in a natural environment because the intervention cannot be achieved satisfactorily for the infant or toddler. The IFSP must include a justification for not providing a particular early intervention service in the natural environment.

(F) The projected dates for initiation of services and the anticipated length,

duration, and frequency of those services.

(G) The name of the service coordinator who shall be responsible for the implementation of the IFSP and for coordination with other agencies and persons. In meeting these requirements, EDIS may:

(*1*) Assign the same service coordinator appointed at the infant or toddler's initial referral for evaluation to implement the IFSP;

(*2*) Appoint a new service coordinator; or

(*3*) Appoint a service coordinator requested by the parents.

(H) A description of the appropriate transition services supporting the movement of the toddler with a disability to preschool or other services.

(vi) EDIS shall explain the contents of the IFSP to the parents and shall obtain an informed, written consent from the parents before providing EIS described in the IFSP.

(vii) The IFSP shall be implemented within ten business days of completing the document, unless the IFSP team, including the parents, documents the need for a delay.

(viii) If a parent does not provide consent for participation in all EIS, EDIS shall still provide those interventions to which a parent does give consent.

(ix) EDIS shall evaluate the IFSP at least once a year and the family shall be provided an opportunity to review the plan at 6-month intervals (or more frequently, based on the needs of the child and family). The purpose of the periodic review is to determine:

(A) The degree to which progress toward achieving the outcomes is being made.

(B) Whether modification or revision of the outcomes or services is necessary.

(x) The review may be carried out by a meeting or by another means that is acceptable to the parents and other participants.

(7) *Transition from early intervention services.* (i) EDIS shall provide a written transition plan for toddlers receiving EIS to facilitate their transition to preschool or other setting, if appropriate. A transition plan must be recorded on the IFSP between the toddler's second and third birthday and not later than 90 days before the toddler's third birthday and shall include the following steps to be taken:

(A) A plan for discussions with, and training of, parents, as appropriate, regarding future transition from early intervention services, and for obtaining parental consent to facilitate the release of toddler records in order to meet child-find requirements of DoDEA, and to ensure smooth transition of services;

(B) The specific steps to be taken to help the toddler adjust to, and function in, the preschool or other setting and changes in service delivery;

(C) The procedures for providing notice of transition to the DoDEA CSC, for setting a pre-transition meeting with the CSC (with notice to parents), and for confirmation that child-find information, early intervention assessment reports, the IFSP, and relevant supporting documentation are transmitted to the DoDEA CSC;

(D) Identification of transition services or other activities that the IFSP team determines are necessary to support the transition of the child.

(ii) Families shall be included in the transition planning. EDIS shall inform the toddler's parents regarding future preschool, the child-find requirements of the school, and the procedures for transitioning the toddler from EIS to preschool.

(iii) Not later than 6 months before the toddler's third birthday, the EDIS service coordinator shall obtain parental consent prior to release of identified records of a toddler receiving EIS to the DoD local school in order to allow the DoDEA school to meet child-find requirements.

(iv) The EDIS service coordinator shall initiate a pre-transition meeting with the CSC, and shall provide the toddler's early intervention assessment reports, IFSP, and relevant supporting documentation. The parent shall receive reasonable notice of the pre-transition meeting, shall receive copies of any documents provided to the CSC, and shall have the right to participate in and provide input to the pre-transition meeting.

(v) As soon as reasonably possible following receipt of notice of a toddler potentially transitioning to preschool, the local DoDEA school shall convene a CSC. The CSC and EDIS shall cooperate to obtain parental consent, in accordance with IDEA and this part, to conduct additional evaluations if necessary.

(vi) Based on the information received from EDIS, the CSC, coordinating with EDIS, will determine at the pre-transition meeting whether:

(A) No additional testing or observation is necessary to determine that the toddler is eligible for special education and related services, in which case the CSC shall develop an eligibility report based on the EDIS early intervention assessment reports, IFSP, supporting documentation and other information obtained at the pre-transition meeting, in accordance with paragraph (b) of this section; or

(B) Additional testing or observation is necessary to determine whether the toddler is eligible for special education and related services, in which case the CSC shall develop an assessment plan to collect all required information necessary to determine eligibility for special education and obtain parental consent, in accordance with IDEA and this part, for evaluation in accordance with paragraph (b) of this section.

(vii) In the event that the toddler is first referred to EDIS fewer than 90 days before the toddler's third birthday, EDIS and the DoDEA school shall work cooperatively in the evaluation process and shall develop a joint assessment plan to determine whether the toddler is eligible for EIS or special education.

(A) EDIS shall complete its eligibility determination process and the development of an IFSP, if applicable.

(B) The CSC shall determine eligibility for special education.

(viii) Eligibility assessments shall be multidisciplinary and family-centered and shall incorporate the resources of the EDIS as necessary and appropriate.

(ix) Upon completion of the evaluations, the CSC shall schedule an eligibility determination meeting at the local school, no later than 90 days prior to the toddler's third birthday.

(A) The parents shall receive reasonable notice of the eligibility determination meeting, shall receive copies of any documents provided to the CSC, and shall have the right to participate in and provide input to the meeting.

(B) EDIS and the CSC shall cooperate to develop an eligibility determination report based upon all available data, including that provided by EDIS and the parents, in accordance with paragraph (b) of this section.

(x) If the toddler is found eligible for special education and related services, the CSC shall develop an individualized education program (IEP) in accordance with paragraph (b) of this section, and must implement the IEP on or before the toddler's third birthday.

(xi) If the toddler's third birthday occurs during the period June through August (the traditional summer vacation period for school systems), the CSC shall complete the eligibility determination process and the development of an IEP before the end of the school year preceding the toddler's third birthday. An IEP must be prepared to ensure that the toddler enters preschool services with an instructional program at the start of the new school year.

(xii) The full transition of a toddler shall occur on the toddler's third birthday unless the IFSP team and the CSC determine that an extended transition is in the best interest of the toddler and family.

(A) An extended transition may occur when:

(*1*) The toddler's third birthday falls within the last 6 weeks of the school year;

(*2*) The family is scheduled to have a permanent change of station (PCS) within 6 weeks after a toddler's third birthday; or

(*3*) The toddler's third birthday occurs after the end of the school year and before October 1.

(B) An extended transition may occur if the IFSP team and the CSC determine that extended EIS beyond the toddler's third birthday are necessary and appropriate, and if so, how long extended services will be provided.

(*1*) The IFSP team, including the parents, may decide to continue services in accordance with the IFSP until the

end of the school year, PCS date, or until the beginning of the next school year.

(*2*) Extended services must be delivered in accordance with the toddler's IFSP, which shall be updated if the toddler's or family's needs change on or before the toddler's third birthday.

(*3*) The CSC shall maintain in its records meeting minutes that reflect the decision for EDIS to provide an extended transition for the specified period.

(*4*) Prior to the end of the extended transition period, the CSC shall meet to develop an IEP that shall identify all special education and related services that will begin at the end of the transition period and meet all requirements of the IDEA and this part, in accordance with paragraph (b) of this section.

(C) The IFSP team and the CSC may jointly determine that the toddler should receive services in the special education preschool prior to the toddler's third birthday.

(*1*) If only a portion of the child's services will be provided by the DoDEA school, the information shall be identified in the IFSP, which shall also specify responsibilities for service coordination and transition planning. The CSC shall develop an IEP that shall identify all services to be delivered at the school, in accordance with paragraph (b) of this section.

(*2*) If all the toddler's services will be provided by the DoDEA school, the services will be delivered pursuant to an IEP developed in accordance with paragraph (b) of this section. Transition activities and other services under the IFSP will terminate with the toddler's entry into the special education preschool.

(*3*) Early entry into preschool services should occur only in exceptional circumstances (e.g., to facilitate natural transitions).

(xiii) In the case of a child who may not be eligible for DoDEA preschool special education services, with the approval of the parents, EDIS shall make reasonable efforts to convene a conference among EDIS, the family, and providers of other services for children who are not eligible for special education preschool services (e.g., community preschools) in order to explain the basis for this conclusion to the parents and obtain parental input.

(8) *Maintenance of records.* (i) EDIS officials shall maintain all EIS records, in accordance with 32 CFR part 310.

(ii) EIS records, including the IFSP and the documentation of services delivered in accordance with the IFSP, are educational records consistent with 32 CFR part 285 and shall not be placed in the child's medical record.

(9) *Procedural safeguards.* (i) Parents of an infant or toddler who is eligible for EIS shall be afforded specific procedural safeguards that must include:

(A) The right to confidentiality of personally identifiable information in accordance with 32 CFR part 310, including the right of a parent to receive written notice and give written consent to the exchange of information between the Department of Defense and outside agencies in accordance with Federal law and 32 CFR part 310 and 32 CFR part 285.

(B) The opportunity to inspect and review records relating to screening, evaluations and assessments, eligibility determinations, development and implementation of IFSPs.

(C) The right to determine whether they or other family members will accept or decline any EIS, and to decline such a service after first accepting it without jeopardizing the provision of other EIS.

(D) The right to written parental consent.

(*1*) Consent must be obtained before evaluation of the infant or toddler in accordance with this section.

(*2*) Consent must be obtained before initiation of EIS in accordance with this section.

(*3*) If consent is not given, EDIS shall make reasonable efforts to ensure that the parent:

(*i*) Is fully aware of the nature of the evaluation and assessment or the services that would be available.

(*ii*) Understands that the infant or toddler will not be able to receive the evaluation and assessment or services unless consent is given.

(E) The right to prior written notice.

(*1*) Prior written notice must be given to the parents of an infant or toddler entitled to EIS a reasonable

time before EDIS proposes to initiate or change, or refuses to initiate or change the identification, evaluation, or placement of the infant or toddler, or the provision of appropriate EIS to the infant or toddler and any family member.

(*2*) The notice must be in sufficient detail to inform the parents about:

(*i*) The action that is being proposed or refused.

(*ii*) The reasons for taking the action.

(*iii*) Each of the procedural safeguards that are available in accordance with this section, including availability of mediation, administrative complaint procedures, and due process complaint procedures that are available for dispute resolution as described in paragraph (d) of this section, including descriptions of how to file a complaint and the applicable timelines.

(*3*) The notice must be provided in language written for a general lay audience and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(F) The right to timely administrative resolution of complaints.

(G) The availability of dispute resolution with respect to any matter relating to the provision of EIS to an infant or toddler, through the administrative complaint, mediation and due process procedures described in paragraph (d) of this section, except the requirement to conduct a resolution meeting, in the event of a dispute between the Military Department concerned and the parents regarding EIS.

(H) Any party aggrieved by the decision regarding a due process complaint filed in accordance with paragraph (d) of this section shall have the right to bring a civil action in a district court of the United States of competent jurisdiction without regard to the amount in controversy.

(ii) During the pendency of any proceeding or action involving a complaint by the parent of an infant or toddler with a disability relating to the provision of EIS, unless the parent and EDIS otherwise agree, the infant or toddler shall continue to receive the appropriate EIS currently being provided under the most recent signed IFSP or, if applying for initial EIS services, shall receive the services not in dispute.

(10) *Mediation and due process procedures.* Mediation and due process procedures, described in paragraph (d) of this section, except the requirement to conduct a resolution meeting, are applicable to early intervention when the Military Department concerned and the parents will be the parties in the dispute.

(b) *Procedures for the provision of educational programs and services for children with disabilities, ages 3 through 21 years, inclusive*—(1) *Parent involvement and general provisions.* (i) The CSC shall take reasonable steps to provide for the participation of the parent(s) in the special education program of his or her child. School officials shall use devices or hire interpreters or other intermediaries who might be necessary to foster effective communications between the school and the parent about the child. Special education parental rights and responsibilities will be provided in the parent's native language, unless it is clearly not feasible to do so, e.g., low incidence language or not a written language.

(ii) The CSC shall afford the child's parents the opportunity to participate in CSC meetings to determine their child's initial or continuing eligibility for special education and related services, to prepare or change the child's IEP, or to determine or change the child's placement.

(iii) No child shall be required to obtain a prescription for a substance covered by the Controlled Substances Act, as amended, 21 U.S.C. 801 *et seq.* as a condition of attending school, receiving an evaluation, or receiving services.

(iv) For meetings described in this section, the parent of a child with a disability and the DoDEA school officials may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(2) *Identification and referral.* (i) DoDEA shall:

(A) Engage in child-find activities to locate, identify, and screen all children who are entitled to enroll in DDESS in accordance with DoD Instruction 1342.26, ''Eligibility Requirements for

Minor Dependents to Attend Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS)'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/134226p.pdf*) or in DoDDS in accordance with DoDEA Regulation 1342.13, ''Eligibility Requirements for Education of Elementary and Secondary School-Age Dependents in Overseas Areas'' (available at *http://www.dodea.edu/foia/ iod/pdf/1342_13.pdf*) who may require special education and related services.

(B) Cooperate with the Military Departments to conduct ongoing child-find activities and periodically publish any information, guidelines, and directions on child-find activities for eligible children with disabilities, ages 3 through 21 years, inclusive.

(C) Conduct the following activities to determine if children may need special education and related services:

(*1*) Review school records for information about student performance on system-wide testing and other basic skills tests in the areas of reading and language arts and mathematics.

(*2*) Review school health data such as reports of hearing, vision, speech, or language tests and reports from healthcare personnel about the health status of a child. For children with disabilities, any health records or other information that tends to identify a child as a person with a disability must be maintained in confidential files that are not co-mingled with other records and that are available only to essential staff for the purpose of providing effective education and services to the child.

(*3*) Review school discipline records and maintain the confidentiality of such records and any information that tends to identify a child as a person with a disability.

(*4*) Participate in transition activities of children receiving EIS who may require special education preschool services.

(ii) DoDEA school system officials, related service providers, or others who suspect that a child has a possible disabling condition shall submit a child-find referral to the CSC containing, at a minimum, the name and contact information for the child and the reason for the referral.

(iii) The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services and does not require informed consent.

(3) *Incoming students.* The DoDEA school will take the following actions, in consultation with the parent, when a child transfers to a DoDEA school with an active IEP:

(i) If the current IEP is from a non-DoDEA school:

(A) Promptly obtain the child's educational records including information regarding assessment, eligibility, and provision of special education and related services from the previous school.

(B) Provide FAPE, including services comparable (*i.e.*, similar or equivalent) to those described in the incoming IEP, which could include extended school year services, in consultation with the parents, until the CSC:

(*1*) Conducts an evaluation, if determined necessary by such agency.

(*2*) Develops, adopts, and implements a new IEP, if appropriate, in accordance with the requirements of the IDEA and this part within 30 school days of receipt of the IEP.

(ii) If the current IEP is from a DoDEA school, the new school must provide the child a FAPE, including services comparable to those described in the incoming IEP, until the new school either:

(A) Adopts the child's IEP from the previous DoDEA school; or

(B) Develops, adopts, and implements a new IEP that meets the requirements of the IDEA and this part within 30 school days of receipt of the incoming IEP.

(iii) Coordinate assessments of children with disabilities who transfer with the child's previous school as quickly as possible to facilitate prompt completion of full evaluations.

(4) *Referral by a parent.* A parent may submit a request for an evaluation if they suspect their child has a disability. The CSC shall ensure any such request is placed in writing and signed by the requesting parent and shall, within 15 school days, review the request and any information provided by

the parents regarding their concerns, confer with the child's teachers, and gather information related to the educational concerns. Following a review of the information, the CSC shall:

(i) Convene a conference among the parents, teachers, and one or more other members of the CSC to discuss the educational concerns and document their agreements. Following the discussion, the parents may agree that:

(A) The child's needs are not indicative of a suspected disability and other supports and accommodations will be pursued;

(B) Additional information is necessary and a pre-referral process will be initiated; or

(C) Information from the conference will be forwarded to the CSC for action on the parent's request for an evaluation.

(ii) Within 10 school days of receipt of information from the conference regarding the parents' request for evaluation, agree to initiate the preparation of an assessment plan for a full and comprehensive educational evaluation or provide written notice to the parent denying the formal evaluation.

(5) *Referral by a teacher.* (i) Prior to referring a child who is struggling academically or behaviorally to the CSC for assessment and evaluation and development of an IEP, the teacher shall identify the child's areas of specific instructional need and target instructional interventions to those needs using scientific, research-based interventions as soon as the areas of need become apparent.

(ii) If the area of specific instructional need is not resolved, the teacher shall initiate the pre-referral process involving other members of the school staff.

(iii) If interventions conducted during pre-referral fail to resolve the area of specific instructional need, the teacher shall submit a formal referral to the CSC.

(6) *Assessment and evaluation.* (i) A full and comprehensive evaluation of educational needs shall be conducted prior to eligibility determination and before an IEP is developed or placement is made in a special education program, subject to the provisions for incoming students transferring to a DoDEA school as set forth in paragraph (b)(3) of this section. When the school determines that a child should be evaluated for a suspected disability, the school will:

(A) Issue a prior written notice to the parents of the school's intention to evaluate and a description of the evaluation in accordance with paragraph (b)(19) of this section.

(B) Provide parents notice of procedural safeguards.

(C) Request that the parent execute a written consent for the evaluation in accordance with paragraph (b)(17) of this section.

(D) Make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability.

(ii) The CSC shall ensure that the following elements are included in a full and comprehensive assessment and evaluation of a child:

(A) Screening of visual and auditory acuity.

(B) Review of existing school educational and health records.

(C) Observation in an educational environment.

(D) A plan to assess the type and extent of the disability. A child shall be assessed in all areas related to the suspected disability. The assessment plan shall include, as appropriate:

(*1*) An assessment of the nature and level of communication and the level of functioning academically, intellectually, emotionally, socially, and in the family.

(*2*) An assessment of physical status including perceptual and motor abilities.

(*3*) An assessment of the need for transition services for students 16 years and older.

(iii) The CSC shall involve the parents in the assessment process in order to obtain information about the child's strengths and needs and family concerns.

(iv) The CSC, where possible, shall conduct the evaluations in the geographic area where the child resides, and shall use all locally available community, medical, and school resources, including qualified examiners employed by the Military Departments, to

accomplish the assessment and evaluation. At least one specialist with knowledge in each area of the suspected disability shall be a member of the multidisciplinary assessment team.

(v) The CSC must obtain parental consent, in accordance with IDEA and this part, before conducting an evaluation. The parent shall not be required to give consent for an evaluation without first being informed of the specific evaluation procedures that the school proposes to conduct.

(vi) The evaluation must be completed by the school within 45 school days following the receipt of the parent's written consent to evaluate in accordance with the school's assessment plan.

(vii) The eligibility determination meeting must be conducted within 10 school days after completion of the school's formal evaluation.

(viii) All DoD elements including the CSC and related services providers shall:

(A) Use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, which may assist in determining:

(*1*) Whether the child has a disability.

(*2*) The content of the child's IEP, including information related to enabling the child to be involved and progress in the general education curriculum or, for preschool children, to participate in appropriate activities.

(B) Not use any single measure or assessment as the sole criterion for determining whether a child has a disability or determining an appropriate educational program for the child.

(C) Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

(ix) The CSC and DoD related services providers shall ensure that assessment materials and evaluation procedures are:

(A) Selected and administered so as not to be racially or culturally discriminatory.

(B) Provided in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide and administer.

(C) Selected and administered to assess the extent to which the child with limited English proficiency has a disability and needs special education, rather than measuring the child's English language skills.

(D) Validated for the specific purpose for which they are used or intended to be used.

(E) Administered by trained and knowledgeable personnel in compliance with the instructions of the testing instrument.

(F) Selected to assess specific areas of educational needs and strengths and not merely to provide a single general intelligence quotient.

(G) Administered to a child with impaired sensory, motor, or communication skills so that the results accurately reflect a child's aptitude or achievement level or other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills.

(x) As part of an initial evaluation and as part of any reevaluation, the CSC shall review existing evaluation data on the child, including:

(A) The child's educational records.

(B) Evaluations and information provided by the parents of the child.

(C) Current classroom-based, local, or system-wide assessments and classroom observations.

(D) Observations by teachers and related services providers.

(xi) On the basis of that review and input from the child's parents, identify what additional data, if any, are needed to determine:

(A) Whether the child has a particular category of disability or, in the case of a reevaluation of a child, whether the child continues to have such a disability.

(B) The present levels of academic achievement and related developmental and functional needs of the child.

(C) Whether the child needs special education and related services or, in the case of a reevaluation of a child,

whether the child continues to need special education and related services.

(D) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum.

(xii) The CSC may conduct its review of existing evaluation data without a meeting.

(xiii) The CSC shall administer tests and other evaluation materials as needed to produce the data identified in paragraph (b)(6)(ii) and (xi) of this section.

(7) *Eligibility*. (i) The CSC shall:

(A) Require that the full comprehensive evaluation of a child is accomplished by a multidisciplinary team including specialists with knowledge in each area of the suspected disability and shall receive input from the child's parent(s).

(B) Convene a meeting to determine eligibility of a child for special education and related services not later than 10 school days after the child has been assessed by the school.

(C) Afford the child's parents the opportunity to participate in the CSC eligibility meeting.

(D) Determine whether the child is a child with a disability as defined by the IDEA and this part, and the educational needs of the child.

(E) Issue a written eligibility determination report, including a synthesis of evaluation findings, that documents a child's primary eligibility in one of the disability categories described in paragraph (g) of this section, providing a copy of the eligibility determination report to the parent.

(F) Determine that a child does NOT have a disability if the determinant factor is:

(*1*) Lack of appropriate instruction in essential components of reading;

(*2*) Lack of instruction in mathematics; or

(*3*) Limited English proficiency.

(ii) The CSC shall reevaluate the eligibility of a child with a disability every 3 years, or more frequently, if the child's educational or related services needs, including improved academic achievement and functional performance, warrant a reevaluation. School officials shall not reevaluate more often than once a year, unless the parents and the school officials agree otherwise.

(A) The scope and type of the reevaluation shall be determined individually based on a child's performance, behavior, and needs during the reevaluation and the review of existing data.

(B) If the CSC determines that no additional data are needed to determine whether the child continues to be a child with a disability, the CSC shall, in accordance with paragraph (b)(19) of this section, provide prior written notice to the child's parents of:

(*1*) The determination that no additional assessment data are needed and the reasons for their determination.

(*2*) The right of the parents to request an assessment to determine whether the child continues to have a disability and to determine the child's educational needs.

(C) The CSC is not required to conduct assessments for the purposes described in paragraph §57.6(b)(7)(ii)(B), unless requested to do so by the child's parents.

(iii) The CSC shall evaluate a child in accordance with paragraph (b)(7)(ii) of this section before determining that the child no longer has a disability.

(iv) The CSC is not required to evaluate a child before the termination of the child's eligibility due to graduation from secondary school with a regular diploma, or due to exceeding the age of eligibility for FAPE.

(v) When a child's eligibility has terminated due to graduation or exceeding the age of eligibility, the DoDEA school must provide the child, or the parent if the child has not yet reached the age of majority or is otherwise incapable of providing informed consent, with a summary of the child's academic achievement and functional performance.

(A) The summary of performance must be completed during the final year of a child's high school education.

(B) The summary must include:

(*1*) Child's demographics.

(*2*) Child's postsecondary goal.

(*3*) Summary of performance in the areas of academic, cognitive, and functional levels of performance to include

the child's present level of performance, and the accommodations, modifications, and assistive technology that were essential in high school to assist the student in achieving maximum progress.

(*4*) Recommendations on how to assist the child in meeting the child's post-secondary goals.

(8) *IEP*—(i) *IEP development.* (A) DoDEA shall ensure that the CSC develops and implements an IEP to provide FAPE for each child with a disability who requires special education and related services as determined by the CSC. An IEP shall be in effect at the beginning of each school year for each child with a disability eligible for special education and related services under the IDEA and this part.

(B) In developing the child's IEP, the CSC shall consider:

(*1*) The strengths of the child.

(*2*) The concerns of the parents for enhancing the education of their child.

(*3*) The results of the initial evaluation or most recent evaluation of the child.

(*4*) The academic, developmental, and functional needs of the child.

(ii) *IEP development meeting.* The CSC shall convene a meeting to develop the IEP of a child with a disability. The meeting shall:

(A) Be scheduled within 10 school days from the eligibility meeting following a determination by the CSC that the child is eligible for special education and related services.

(B) Include as participants:

(*1*) An administrator or school representative other than the child's teacher who is qualified to provide or supervise the provision of special education and is knowledgeable about the general education curriculum and available resources.

(*2*) Not less than one general education teacher of the child (if the child is, or may be, participating in the general education environment).

(*3*) Not less than one special education teacher or, where appropriate, not less than one special education provider of such child.

(*4*) The child's parents.

(*5*) An EIS coordinator or other representative of EIS, if the child is transitioning from EIS.

(*6*) The child, if appropriate.

(*7*) A representative of the evaluation team who is knowledgeable about the evaluation procedures used and can interpret the instructional implications of the results of the evaluation.

(*8*) Other individuals invited at the discretion of the parents or school who have knowledge or special expertise regarding the child or the IDEA, including related services personnel, as appropriate.

(iii) *IEP content.* The CSC shall include in the IEP:

(A) A statement of the child's present levels of academic achievement and functional performance including:

(*1*) How the child's disability affects involvement and progress in the general education curriculum, or

(*2*) For preschoolers, how the disability affects participation in appropriate activities.

(*3*) For children with disabilities who take an alternate assessment, a description of short-term objectives.

(B) A statement of measurable annual goals including academic and functional goals designed to meet:

(*1*) The child's needs that result from the disability to enable the child to be involved in and make progress in the general education curriculum.

(*2*) Each of the child's other educational needs resulting from his or her disability.

(C) A description of how the child's progress toward meeting the annual goals shall be measured, and when periodic progress reports will be provided to the parents.

(D) A statement of the special education and related services, supplementary aids and services (which are based on peer-reviewed research to the extent practicable and shall be provided to the child or on behalf of the child), and a statement of the program modifications or supports for school personnel that shall be provided for the child to:

(*1*) Advance appropriately toward attaining the annual goals.

(*2*) Be involved in and make progress in the general education curriculum and participate in extracurricular and other non-academic activities.

(*3*) Be educated and participate with other children who may or may not have disabilities.

(E) An explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular class and in non-academic activities.

(F) A statement of any individualized appropriate accommodations necessary to measure the child's academic achievement and functional performance on system-wide or district-wide assessments. If the CSC determines that the child shall take an alternate assessment of a particular system-wide or district-wide assessment of student achievement (or part of an assessment), a statement of why:

(*1*) The child cannot participate in the regular assessment.

(*2*) The particular alternate assessment selected is appropriate for the child.

(G) Consideration of the following special factors:

(*1*) Assistive technology devices and services for all children.

(*2*) Language needs for the child with limited English proficiency.

(*3*) Instruction in Braille and the use of Braille for a child who is blind or visually impaired, unless the CSC determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille) that instruction in Braille or the use of Braille is not appropriate for the child.

(*4*) Interventions, strategies, and supports including positive behavioral interventions and supports to address behavior for a child whose behavior impedes his or her learning or that of others.

(*5*) Language and communication needs, and in the case of a child who is deaf or hard of hearing, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's communication mode.

(H) A statement of the amount of time that each service shall be provided to the child, including the date for beginning of services and the anticipated frequency, number of required related services sessions to be provided by EDIS, location and duration of those services (including adjusted school day or an extended school year), and modifications.

(I) A statement of special transportation requirements, if any.

(J) Physical education services, specially designed if necessary, shall be made available to every child with a disability receiving a FAPE. Each child with a disability must be afforded the opportunity to participate in the regular physical education program available to non-disabled children unless the child is enrolled full-time in a separate facility or needs specially designed physical education, as prescribed in the child's IEP.

(iv) *Transition services.* (A) Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the CSC, and updated annually, thereafter, the IEP must include:

(*1*) Appropriate measurable postsecondary goals based on age-appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills.

(*2*) The transition services, including courses of study, needed to assist the child in reaching postsecondary goals.

(B) Beginning at least 1 year before the child reaches the age of majority (18 years of age), except for a child with a disability who has been determined to be incompetent in accordance with Federal or State law, a statement that the child has been informed of those rights that transfer to him or her in accordance with this part.

(9) *Implementation of the IEP.* (i) The CSC shall ensure that all IEP provisions developed for any child entitled to an education by the DoDEA school system are fully implemented.

(ii) The CSC shall:

(A) Seek to obtain parental agreement and signature on the IEP before delivery of special education and related services in accordance with that IEP is begun.

(B) Provide a copy of the child's IEP to the parents.

(C) Ensure that the IEP is implemented as soon as possible following the IEP development meeting.

(D) Ensure the provision of special education and related services, in accordance with the IEP.

(E) Ensure that the child's IEP is accessible to each general education teacher, special education teacher, related service provider, and any other service provider who is responsible for its implementation, and that each teacher and provider is informed of:

(*1*) His or her specific responsibilities related to implementing the child's IEP.

(*2*) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

(F) Review the IEP for each child periodically and at least annually in a CSC meeting to determine whether the child has been progressing toward the annual goals.

(G) Revise the IEP, as appropriate, and address:

(*1*) Any lack of progress toward the annual goals and in the general education curriculum, where appropriate.

(*2*) The results of any reevaluation.

(*3*) Information about the child provided by the parents, teachers, or related service providers.

(*4*) The child's needs.

(10) *Placement and Least Restrictive Environment (LRE).* (i) The CSC shall determine the educational placement of a child with a disability.

(ii) The educational placement decision for a child with a disability shall be:

(A) Determined at least annually.

(B) Made in conformity with the child's IEP.

(C) Made in conformity with the requirements of IDEA and this part for LRE.

(*1*) A child with a disability shall be educated, to the maximum extent appropriate, with children who are not disabled.

(*2*) A child with a disability shall not be removed from education in age-appropriate general education classrooms solely because of needed modifications in the general education classroom.

(*3*) As appropriate, the CSC shall make provisions for supplementary services to be provided in conjunction with general education placement.

(*4*) Special classes, separate schooling, or other removal of a child with a disability from the general education environment shall occur only when the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(*5*) In providing or arranging for the provision of non-academic and extracurricular services and activities, including meals, recess periods, assemblies, and study trips, the CSC shall ensure that a child with a disability participates with non-disabled children in those services and activities to the maximum extent appropriate to the needs of that child.

(iv) In determining the LRE for an individual student, the CSC shall:

(A) Consider the needs of the individual child as well as any potential harmful effect on the child or the quality of services that he or she needs.

(B) Make a continuum of placement options available to meet the needs of children with disabilities for special education and related services. The options on this continuum include the general education classroom, special classes (a self-contained classroom in the school), home bound instruction, or instruction in hospitals or institutions.

(v) When special schools and institutions may be appropriate, the CSC shall consider such placement options in coordination with the Area Special Education Office.

(vi) In the case of a disciplinary placement, school officials shall follow the procedures set forth in paragraph (b)(13) of this section.

(11) *Extended School Year (ESY) services.* ESY services must be provided only if a child's IEP team determines that the services are necessary for the provision of FAPE to the child. DoDEA may not:

(i) Limit ESY services to particular categories of disability; or

(ii) Unilaterally limit the type, amount, or duration of ESY services.

(12) *Discipline*—(i) *School discipline.* All regular disciplinary rules and procedures applicable to children attending a DoDEA school shall apply to children with disabilities who violate school rules and regulations or disrupt regular classroom activities, except that:

(A) A manifestation determination must be conducted for discipline proposed for children with disabilities in accordance with DoDEA disciplinary rules and regulations and paragraph (b)(12)(v) of this section, and

(B) The child subject to disciplinary removal shall continue to receive educational services in accordance with DoD disciplinary rules and regulations and paragraph (b)(12)(iv) of this section.

(ii) *Change of placement.* (A) It is a change of placement if a child is removed from his or her current placement for more than 10 consecutive school days or for a series of removals that cumulates to more than 10 school days during the school year that meets the criteria of paragraph (b)(12)(ii)(C) of this section.

(B) It is not a change of placement if a child is removed from his or her current academic placement for not more than 10 consecutive or cumulative days in a school year for one incident of misconduct. A child can be removed from the current educational placement for separate incidents of misconduct in the same school year (as long as those removals do not constitute a change of placement under IDEA) to the extent such a disciplinary alternative is applied to children without disabilities.

(C) If a child has been removed from his or her current placement for more than 10 days in a school year, but not more than 10 consecutive school days, the CSC shall determine whether the child has been subject to a series of removals that constitute a pattern. The determination is made on a case-by-case basis and is subject to review by a hearing officer in accordance with the provisions of paragraph (d)(5) of this section. The CSC will base its determination on whether the child has been subjected to a series of removals that constitute a pattern by examining whether:

(*1*) The child's behavior is substantially similar to his or her behavior in previous incidents that resulted in the series of removals, and;

(*2*) Additional factors such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

(D) On the date the decision is made to remove a child with a disability because of misconduct, when the removal would change the child's placement, the school must notify the parents of that decision and provide the parents the procedural safeguards notice described in paragraph (b)(19) of this section.

(iii) *Alternate educational setting determination, period of removal.* School personnel may remove a child with a disability for misconduct from his or her current placement:

(A) To an appropriate interim alternate educational setting (AES), another setting, or suspension for not more than 10 consecutive school days to the extent those alternatives are applied to children without disabilities (for example, removing the child from the classroom to the school library, to a different classroom, or to the child's home), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct as long as the CSC has determined that those removals do not constitute a pattern in accordance with paragraphs (b)(12)(ii) and (b)(12)(iv)(C) of this section; or

(B) To an AES determined by the CSC for not more than 45 school days, without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child, at school, on school-provided transportation, on school premises, or at a school-sponsored event:

(*1*) Carries a weapon or possesses a weapon;

(*2*) Knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance; or

(*3*) Has inflicted serious bodily injury upon another person; or

(C) To an AES determined by the CSC, another setting or suspension for more than 10 school days, where the behavior giving rise to the violation was

determined by the CSC not to be a manifestation of the child's disability, in accordance with (b)(12)(v) of this section.

(D) After an expedited hearing if school personnel believe that returning the child to his or her current educational placement is substantially likely to cause injury to the child or to others.

(iv) *Required services during removal.* (A) If a child with a disability is removed from his or her placement for 10 cumulative school days or less in a school year, the school is required only to provide services comparable to the services it provides to a child without disabilities who is similarly removed.

(B) If a child with a disability is removed from his or her placement for more than 10 school days, where the behavior that gave rise to the violation of the school code is determined in accordance with paragraph (b)(12)(v) of this section not to be a manifestation of the child's disability, or who is removed under paragraph (b)(12)(iii)(B) of this section irrespective of whether the behavior is determined to be a manifestation of the child's disability, the school must:

(*1*) Continue to provide the child with the educational services as identified by the child's IEP as a FAPE so as to enable the child to continue participating in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

(*2*) Provide, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications designed to address the behavior violation so that it does not recur.

(C) If a child with a disability has been removed for more than 10 cumulative school days and the current removal is for 10 consecutive school days or less, then the CSC must determine whether the pattern of removals constitutes a change of placement in accordance with paragraph (b)(12)(ii) of this section.

(*1*) If the CSC determines the pattern of removals is NOT a change of placement, then the CSC must determine the extent to which services are needed to enable the child to continue participating in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

(*2*) If the CSC determines that the pattern of removals IS a change of placement, then the CSC must conduct a manifestation determination.

(v) *Manifestation determination and subsequent action by CSC and school personnel.* (A) A principal must give the notice required and convene a manifestation determination meeting with the CSC within 10 school days of recommending, in accordance with DoDEA Regulation 2051.1, a disciplinary action that would remove a child with disabilities for:

(*1*) More than 10 consecutive school days, or

(*2*) A period in excess of 10 cumulative school days when the child has been subjected to a series of removals that constitute a pattern.

(B) The manifestation CSC will review all relevant information in the child's file (including the IEP, any teacher observations, and any information provided by the sponsor or parent) and determine whether the misconduct was a manifestation of the child's disability.

(*1*) The misconduct must be determined to be a manifestation of the child's disability if it is determined the misconduct:

(*i*) Was caused by the child's disability or had a direct and substantial relationship to the child's disability; or

(*ii*) Was the direct result of the school's failure to implement the IEP.

(*2*) If the determination is made that the misconduct was a manifestation of the child's disability, the CSC must:

(*i*) Conduct a functional behavioral assessment, unless the school conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(*ii*) Review any existing behavioral intervention or disciplinary plan and modify it, as necessary, to address the behavior; and

(*iii*) Revise the student's IEP or placement and delivery system to address the school's failure to implement the IEP and to ensure that the student

receives services in accordance with the IEP.

(*3*) Unless the parent and school agree to a change of placement as part of the modification of the behavioral intervention plan, the CSC must return the child to the placement from which the child was removed:

(*i*) Not later than the end of 10 days of removal; or

(*ii*) Not later than the end of 45 consecutive school days, if the student committed a weapon or drug offense or caused serious bodily injury for which the student was removed to an AES.

(*4*) If the determination is made that the misconduct in question was the direct result of the school's failure to implement the IEP, the school must take immediate steps to remedy those deficiencies.

(*5*) If the determination is made that the behavior is NOT a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures in the same manner and for the same duration as the procedures that would be applied to children without disabilities, and must:

(*i*) Forward the case and a recommended course of action to the school principal, who may then refer the case to a disciplinary committee for processing.

(*ii*) Reconvene the CSC following a disciplinary decision that would change the student's placement, to identify, if appropriate, an educational setting and delivery system to ensure the child receives services in accordance with the IEP.

(vi) *Appeals of school decision regarding placement or manifestation determination*. (A) The parent of a child with a disability who disagrees with any decision regarding placement or manifestation determination, or a school that believes maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting an expedited due process hearing before a hearing officer by filing a petition in accordance with paragraph (d)(5) of this section.

(B) A hearing officer, appointed in accordance with paragraph (d) of this section, hears and makes a determination regarding an appeal. In making the determination the hearing officer may:

(*1*) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of the authority of school personnel in accordance with this part or that the child's behavior was a manifestation of the child's disability; or

(*2*) Order a change of placement of the child with a disability to an appropriate interim AES for not more than 45 school days if the hearing officer determines that maintaining the child's current placement is substantially likely to result in injury to the child or to others.

(C) At the end of the placement in the appropriate AES, the procedures for placement in an AES may be repeated, with the consent of the Area Director, if the school believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

(D) When an appeal has been made by either the parent or the school, the child must remain in the interim AES pending the decision of the hearing officer or until the expiration of the specified time period, whichever occurs first, unless the parent and the DoDEA school system agree otherwise.

(13) *Children not yet determined eligible for special education*. (i) A child who has not been determined to be eligible for special education and related services and who is subject to discipline may assert any of the protections provided for in paragraph (b)(19) of this section if the school had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(ii) DoDEA shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred:

(A) The parent of the child expressed concern in writing to a teacher of the child, the school principal or assistant principal, or the school special education coordinator that the child was in need of special education and related services;

(B) The child presented an active IEP from another school;

(C) The parent of the child requested an evaluation of the child; or

(D) The teacher of the child or other school personnel expressed specific concerns about a pattern of behavior demonstrated by the child directly to the principal or assistant principal, the special education coordinator, or to another teacher of the child.

(iii) A school is deemed NOT to have knowledge that a child is a child with a disability if:

(A) The parent of the child has not allowed an evaluation of the child or the parent has revoked consent, in writing, to the delivery of the child's special education and related services, in accordance with this part; or

(B) The child has been evaluated and determined not to be a child with a disability.

(iv) Conditions that apply if there is no basis of knowledge that the child is a child with a disability.

(A) If a school has no basis of knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to non-disabled children who engage in comparable behaviors in accordance with paragraph (b)(12)(i) of this section.

(B) If a request is made for an evaluation of a child during the time period when the child is subjected to disciplinary measures:

(*1*) The evaluation must be expedited.

(*2*) Until the evaluation is completed, the child remains in his or her then current educational placement, which can include suspension or expulsion without educational services.

(v) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the school must provide special education and related services in accordance with an IEP.

(14) *Referral to and action by law enforcement and judicial authorities*—(i) *Rule of construction.* Nothing prohibits a school from reporting a crime threatened or committed by a child with a disability to appropriate authorities, or prevents military, host-nation, or State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal, host-nation, and State law to crimes committed or threatened by a child with a disability.

(ii) *Transmittal of records.* An agency reporting a crime in accordance with this paragraph may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is in accordance with 32 CFR part 285.

(15) *Children with disabilities who are placed in a non-DoDEA school or facility pursuant to an IEP.*

(i) Children with disabilities who are eligible to receive a DoDEA school education, but are placed in a non-DoD school or facility by DoDEA because a FAPE cannot be provided by DoD, shall have all the rights of children with disabilities who are enrolled in a DoDEA school.

(ii) A child with a disability may be placed at DoD expense in a non-DoD school or facility only if required by the IEP.

(iii) DoDEA school officials shall initiate and conduct a meeting to develop an IEP for the child before placement. A representative of the non-DoD school or facility should attend the meeting. If the representative cannot attend, the DoDEA school officials shall communicate in other ways to facilitate participation including individual or conference telephone calls. A valid IEP must document the necessity of the placement in a non-DoD school or facility. The IEP must:

(A) Be signed by an authorized DoDEA official before it becomes valid.

(B) Include a determination that the DoDEA school system does not currently have and cannot reasonably create an educational program appropriate to meet the needs of the child with a disability.

(C) Include a determination that the non-DoD school or facility and its educational program and related services conform to the requirements of this part.

(iv) The DoD shall not be required to reimburse the costs of special education and related services if DoDEA made FAPE available in accordance with the requirements of the IDEA and a parent unilaterally places the child

in a non-DoD school without the approval of DoDEA.

(A) Reimbursement may be ordered by a hearing officer if he or she determines that DoDEA had not made FAPE available in a timely manner prior to enrollment in the non-DoDEA school and that the private placement is appropriate.

(B) Reimbursement may be reduced or denied:

(*1*) If, at the most recent CSC meeting that the parents attended prior to removal of the child from the DoDEA school, the parents did not inform the CSC that they were rejecting the placement proposed by the DoDEA school to provide FAPE to their child, including stating their concerns and their intent to enroll their child in non-DoD school at DoD expense.

(*2*) If, at least 10 business days (including for this purpose any holidays that occur on a Monday through Friday) prior to the removal of the child from the DoDEA school, the parents did not give written notice to the school principal or CSC chairperson of the information described in paragraph (b)(15)(iv)(B)(*1*) of this section.

(*3*) If, the CSC informed the parents of its intent to evaluate the child, using the notice requirement described in paragraph (b)(6)(i) and paragraph (b)(19) of this section, but the parents did not make the child available; or

(*4*) Upon a hearing officer finding of unreasonableness with respect to actions taken by the parents.

(C) Reimbursement may not be reduced or denied for failure to provide the required notice if:

(*1*) The DoDEA school prevented the parent from providing notice;

(*2*) The parents had not received notification of the requirement that the school provide prior written notice required by paragraph (b)(19) of this section;

(*3*) Compliance would result in physical or emotional harm to the child; or

(*4*) The parents cannot read and write in English.

(16) *Confidentiality of the records.* The DoDEA school and EDIS officials shall maintain all student records in accordance with 32 CFR part 310.

(17) *Parental consent*—(i) *Consent requirements.* The consent of a parent of a child with a disability or suspected of having a disability shall be obtained before:

(A) Initiation of formal evaluation procedures to determine whether the child qualifies as a child with a disability and prior to conducting a reevaluation;

(B) Initial provision of special education and related services.

(ii) *Consent for initial evaluation.* If the parent of a child does not provide consent for an initial evaluation or fails to respond to a request for consent for an initial evaluation, then DoDEA may use the procedures described in paragraph (d) of this section to pursue an evaluation of a child suspected of having a disability.

(A) Consent to evaluate shall not constitute consent for placement or receipt of special education and related services.

(B) If a parent declines to give consent for evaluation, DoDEA shall not be in violation of the requirement to conduct child-find, the initial evaluation, or the duties to follow evaluation procedures or make an eligibility determination and write an IEP as prescribed in this section.

(iii) *Consent for reevaluation.* The school must seek to obtain parental consent to conduct a reevaluation. If the parent does not provide consent or fails to respond to a request for consent for a reevaluation, then the school may conduct the reevaluation without parental consent if the school can demonstrate that it has made reasonable efforts to obtain parental consent and documented its efforts. The documentation must include a record of the school's attempts in areas such as:

(A) Detailed records of telephone calls made or attempted and the results of those calls.

(B) Copies of correspondence sent to the parents and any responses received.

(C) Detailed records of visits made to the parents' home, place of employment or duty station, and the results of those visits.

(iv) *Consent for the initial provision of special education and related services.* The school that is responsible for making a FAPE available to a child with a disability under this part must seek to

obtain informed consent from the parent of such child before providing special education and related services to the child. If the parent refuses initial consent for services, the DoDEA school:

(A) May not use the procedures described in paragraph (d) of this section (mediation and due process) to obtain agreement or a ruling that the special education and related services recommended by the child's CSC may be provided to the child without parental consent.

(B) Shall not be considered to be in violation of the requirement to make a FAPE available to the child for its failure to provide those services to the child for which parental consent was requested.

(C) Shall not be required to convene an IEP meeting or develop an IEP for the child.

(18) *Parent revocation of consent for continued special education and related services.* (i) Parents may unilaterally withdraw their children from further receipt of all special education and related services by revoking their consent for the continued provision of special education and related services to their children.

(ii) Parental revocation of consent must be in writing.

(iii) Upon receiving a written revocation of consent, the DoDEA school must cease the provision of special education and related services and must provide the parents prior written notice before ceasing the provision of services. The notice shall comply with the requirements of paragraph (b)(19) of this section and shall advise the parents:

(A) Of any changes in educational placement and services that will result from the revocation of consent.

(B) That the school will terminate special education and related services to the child on a specified date, which shall be within a reasonable time following the delivery of the written notice.

(C) That DoDEA will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services.

(D) That the DoDEA school will not be deemed to have knowledge that the child is a child with a disability and the child may be disciplined as a general education student and will not be entitled to the IDEA discipline protections.

(E) That the parents maintain the right to subsequently request an initial evaluation to determine if the child is a child with a disability who needs special education and related services and that their child will not receive special education and related services until eligibility has been determined.

(F) That the DoDEA school will not challenge, through mediation or a due process hearing, the revocation of consent to the provision of special education or related services.

(G) That while the school is not required to convene a CSC meeting or to develop an IEP for further provision of special education and related services, it is willing to convene a CSC meeting upon request of the parent prior to the date that service delivery ceases.

(iv) Revocation of consent for a particular service:

(A) Upon receiving a revocation of consent for a particular special education or related service, the DoDEA school must provide the parent prior written notice in accordance with the requirements of paragraph (b)(19) of this section.

(B) If parents disagree with the provision of a particular special education or related service and the school members of the CSC and the parents agree that the child would be provided a FAPE if the child did not receive that service, the child's IEP may be modified to remove the service.

(C) If the parent and the school members of the CSC disagree as to whether the child would be provided a FAPE if the child did not receive a particular service, the parent may use the mediation or due process procedures under this part to obtain a determination as to whether the service with which the parent disagrees is or is not appropriate to his or her child and whether it is necessary to FAPE, but the school may not cease the provision of a particular service.

(19) *Procedural safeguards*—(i) *Parental rights.* Parents of children, ages 3

through 21 inclusive, with disabilities must be afforded procedural safeguards with respect to the provision of FAPE which shall include:

(A) The right to confidentiality of personally identifiable information in accordance with Federal law and DoD regulations.

(B) The right to examine records and to participate in meetings with respect to assessment, screening, eligibility determinations, and the development and implementation of the IEP.

(C) The right to furnish or decline consent in accordance with this section.

(D) The right to prior written notice when the school proposes to initiate or change, or refuses to initiate or change the identification, evaluation, educational placement, or provision of FAPE to a child with a disability.

(*1*) The notice shall include:

(*i*) A description of the action that is being proposed or refused.

(*ii*) An explanation of why the agency proposes or refuses to take the action.

(*iii*) A description of each evaluation procedure, assessment, record, or report used as a basis for the proposed or refused action.

(*iv*) A description of the factors that were relevant to the agency's proposal or refusal.

(*v*) A description of any other options considered by the CSC and the reasons why those options were rejected.

(*vi*) Each of the procedural safeguards that is available in accordance with the IDEA and this part.

(*vii*) Sources for parents to contact to obtain assistance in understanding the provisions of this part.

(*viii*) Dispute resolution procedures, including a description of mediation, how to file a complaint, due process hearing procedures, and applicable timelines.

(*2*) The notice must be provided in language understandable to a lay person and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(E) The right to obtain an independent educational evaluation (IEE) of the child.

(F) The right to timely administrative resolution of complaints.

(G) The availability of dispute resolution through the administrative complaint, mediation, and due process procedures described in paragraph (d) of this section with respect to any matter relating to the identification, evaluation, or educational placement of the child, or a FAPE for the child, age 3 through 21 years, inclusive.

(H) The right of any party aggrieved by the decision regarding a due process complaint to bring a civil action in a district court of the United States of competent jurisdiction in accordance with paragraph (d)(21) of this section.

(ii) *Procedural safeguards notice.* A DoDEA school shall not be required to give parents a copy of the procedural safeguards notice more than once a school year, except that a copy must be given to parents upon a request from the parents; upon initial referral for evaluation or parental request for evaluation; and upon receipt of the first due process complaint.

(A) The procedural safeguards notice must include a full explanation of all of the procedural safeguards available, including:

(*1*) Independent evaluation for children (3 through 21 years, inclusive).

(*2*) Prior written notice.

(*3*) Parental consent.

(*4*) Access to educational records.

(*5*) Dispute resolution procedures together with applicable timelines including:

(*i*) The availability of mediation.

(*ii*) Procedures for filing a due process complaint and the required time period within which a due process complaint must be filed.

(*iii*) The opportunity for the DoDEA school system to resolve a due process complaint filed by a parent through the resolution process.

(*iv*) Procedures for filing an administrative complaint and for administrative resolution of the issues.

(*6*) The child's placement during pendency of due process proceedings in accordance with paragraph (d)(18) of this section.

(*7*) Procedures for children (3 through 21 years, inclusive) who are subject to placement in an interim AES.

(*8*) Requirements for unilateral placement by parents of children in private schools at public expense.

(*9*) Due process hearings, including requirements for disclosure of evaluation results and recommendations.

(*10*) The right to bring a civil action in a district court of the United States in accordance with paragraph (d)(21) of this section, including the time period in which to file such action.

(*11*) The possibility of an award of attorney's fees to the prevailing party in certain circumstances.

(B) The procedural safeguards notice must be:

(*1*) Written in language understandable to the general public.

(*2*) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the procedural safeguards notice is not translated into the native language of the parent, then the DoDEA school system shall ensure that:

(*i*) The notice is translated orally or by other means for the parent in his or her native language or other mode of communication.

(*ii*) The parent understands the content of the notice.

(*iii*) There is written evidence that the requirements above have been met.

(iii) *Independent Educational Evaluation (IEE)*—(A) *Obtaining an IEE.* The DoDEA school system shall provide to the parents, upon request for an IEE, information about the requirements to meet the DoDEA school system criteria, as set forth in paragraph (b)(19)(iii)(F) of this section, and identification of qualified resources available to meet the requirements of paragraph (b)(iii)(F)(2) of this section.

(B) *Right to IEE.* The parents of a child with a disability have a right to an IEE at the DoDEA school system expense if the parent disagrees with an evaluation obtained by the DoDEA school system, subject to paragraph (b)(19)(iii)(C) to (H) of this section.

(C) *Written request for IEE.* If a parent provides the DoDEA school system with a written request for an IEE funded by the school system, then the school system shall either:

(*1*) Agree to fund an appropriate IEE that meets the criteria the DoDEA school system would use for an initial evaluation of a child as set forth in paragraph (b)(19)(iii)(F) of this section, or

(*2*) Initiate a due process hearing in accordance with paragraph (d) of this section, without unnecessary delay, and demonstrate that its evaluation was appropriate under this part.

(*i*) If the DoDEA school system initiates a due process hearing and the final decision is that the school system's evaluation is appropriate, the parent still has the right to an IEE, but not at public expense.

(*ii*) If a parent requests an IEE, the DoDEA school system may ask for the parent's reason why he or she objects to the school system's evaluation. However, the parent may not be compelled to provide an explanation and the DoDEA school system may not unreasonably delay either agreeing to fund an IEE that meets DoDEA school system criteria or initiating a due process hearing to defend its evaluation.

(D) *Parent-initiated evaluations.* If the parent obtains an IEE funded by the school system or shares with the DoDEA school system an evaluation obtained at private expense:

(*1*) The results of the evaluation shall be considered by the DoDEA school if it meets the school system's criteria in any decision made with respect to the provision of FAPE to the child.

(*2*) The results may be presented by any party as evidence at a due process hearing under this section regarding that child.

(*3*) The DoDEA school system may not be required to fund an IEE that has been obtained by a parent if at a due process hearing initiated by either party and conducted under this section, the DoDEA school system demonstrates either that:

(*i*) The parentally obtained evaluation was not educationally appropriate or failed to meet agency criteria; or

(*ii*) The DoDEA school system's evaluation was appropriate.

(E) *Hearing officer order for evaluation.* A hearing officer may only order an IEE at the DoDEA school system's expense as part of a due process hearing under this section if:

(*1*) The school system has failed to demonstrate its assessment was appropriate; or

(*2*) The school system has not already funded an IEE in response to a given school evaluation.

(F) *DoDEA school system criteria.* An IEE provided at the DoDEA school system's expense must:

(*1*) Conform to the requirements of paragraph (b)(6)(viii) and (ix) of this section.

(*2*) Be conducted, when possible, in the geographic area where the child resides utilizing available qualified resources, including qualified examiners employed by the Military Department, in accordance with (b)(6)(iv) of this part, unless the parent can demonstrate to the satisfaction of the DoDEA school system or in a due process hearing filed in accordance with paragraph (d) of this section, that the geographic limitation renders the IEE impossible.

(G) *Conditions.* Except for the criteria in paragraph (b)(19)(iii)(F) of this section, the DoDEA school system shall not impose conditions or timelines related to obtaining an IEE at the DoDEA school system expense.

(H) *Limitations.* A parent is entitled to only one IEE at DoDEA school system expense in response to a given DoDEA school system evaluation with which the parent disagrees.

(iv) *Placement during due process, appeal, or civil procedures.* While an impartial due process proceeding, appeal proceeding, or civil proceeding is pending, unless the DoDEA school system and the parent of the child agree otherwise in writing, the child shall remain in his or her current placement, subject to the disciplinary procedures prescribed in paragraph (b)(12) of this section.

(v) *Transfer of parental rights at age of majority.* (A) In the DoDEA school system, a child reaches the age of majority at age 18.

(B) When a child with a disability reaches the age of majority (except for a child with a disability who has been determined to be incompetent in accordance with Federal or State law) the rights afforded to the parents in accordance with the IDEA and this part transfer to the child.

(C) When a child reaches the age of majority, the DoDEA school shall notify the child and the parents of the transfer of rights.

(D) When a child with a disability who has not been determined to be incompetent, but who does not have the ability to provide informed consent with respect to his or her educational program reaches the age of majority, the DoD shall appoint a parent or the parents of the child to represent the educational interests of the child throughout the period of eligibility for special education services.

(c) *Procedures for provision of related services by the military departments to students with disabilities in a DoDDS*—(1) *Evaluation procedures.* (i) Upon request by a CSC, the responsible EDIS shall ensure that a qualified medical authority conducts or verifies a medical evaluation for use by the CSC in determining the medically related disability that results in a child's need for special education and related services, and shall oversee an EDIS evaluation used in determining a child's need for related services.

(ii) The medical or related services evaluation, including necessary consultation with other medical personnel, shall be supervised by a physician or other qualified healthcare provider.

(iii) The medical or related services evaluation shall be specific to the concerns addressed in the request from the CSC.

(iv) The EDIS shall provide to the CSC an evaluation report that responds to the questions posed in the original request for an evaluation. The written report shall include:

(A) Demographic information about the child, such as the child's name, date of birth, and grade level.

(B) Behavioral observation of the child during testing.

(C) Instruments and techniques used.

(D) Evaluation results.

(E) Descriptions of the child's strengths and limitations.

(F) Instructional implications of the findings.

(G) The impact of the child's medical condition(s), if applicable, on his or her educational performance.

(v) If the EDIS that supports the DoDDS school requires assistance to conduct or complete an evaluation, the EDIS shall contact the MTF designated

by the Military Department with geographic responsibility for the area where the EDIS is located.

(vi) If EDIS determines that in order to respond to the CSC referral the scope of its assessment and evaluation must be expanded beyond the areas specified in the initial parental permission, EDIS must:

(A) Obtain parental permission for the additional activities.

(B) Complete its initial evaluation by the original due date.

(C) Notify the CSC of the additional evaluation activities.

(vii) When additional evaluation information is submitted by EDIS, the CSC shall review all data and determine the need for program changes and the reconsideration of eligibility.

(viii) An EDIS provider shall serve on the CSC when eligibility, placement, or requirements for related services that EDIS provides are to be determined.

(2) *IEP*—(i) EDIS shall be provided the opportunity to participate in the IEP meeting.

(ii) EDIS shall provide related services assigned to EDIS that are listed on the IEP.

(3) *Liaison with DoDDS.* Each EDIS shall designate a special education liaison officer to:

(i) Provide liaison between the EDIS and DoDDS on requests for evaluations and other matters within their purview.

(ii) Offer, on a consultative basis, training for school personnel on medical aspects of specific disabilities.

(iii) Offer consultation and advice as needed regarding the medical services provided at school (for example, tracheotomy care, tube feeding, occupational therapy).

(iv) Participate with school personnel in developing and delivering in-service training programs that include familiarization with various conditions that impair a child's educational endeavors, the relationship of medical findings to educational functioning, related services, and the requirements of the IDEA and this part.

(d) *Dispute resolution and due process procedures*—(1) *General.* This section establishes requirements for resolving disputes regarding the provision of EIS to an infant or toddler up to 3 years of age, or the identification, evaluation, or educational placement of a child (ages 3 through 21, inclusive), or the provision of a FAPE to such child in accordance with the IDEA and this part.

(2) *Conferences.* Whenever possible, parties are encouraged to resolve disputes through the use of conferences at the lowest level possible between the parents and EDIS or the DoDEA school.

(i) Within a DoDEA school, problems should be brought first to the teacher, then the school administrator, and then the district office.

(ii) At EDIS, problems should be brought first to the EDIS provider, then the EDIS program manager, and then the local MTF commander.

(3) *Administrative complaints.* (i) A complaint filed with the responsible agency, relating to the provision of services under the IDEA and this part, other than due process complaints filed in accordance with paragraph (d)(5) of this section, is known as an administrative complaint.

(ii) An individual or organization may file an administrative complaint alleging issues relating to services required to be delivered under the IDEA and this part with:

(A) The Office of the Inspector General of a Military Department when the issue involves services or programs for infants and toddlers with disabilities, or related services provided by the Military Departments to children with disabilities.

(B) The DoDEA Director, Office of Investigations and Internal Review (OI&IR) when the issue involves the services or programs for children ages 3 through 21, inclusive that are under the direction or control of the DoDEA school system.

(iii) An administrative complaint alleging issues relating to services required to be delivered under the IDEA or this part must include:

(A) A statement that the Military Service or the DoDEA school system has violated a requirement of the IDEA or this part.

(B) The facts on which the statement is based.

(C) The signature and contact information for the complainant.

(D) If alleging violations with respect to specific children:

(*1*) The name of the school the child is attending.

(*2*) The name and address of the residence of the child.

(*3*) A description of the nature of the problem of the child, including facts relating to the problem.

(*4*) A proposed resolution of the problem to the extent known and available to the complainant at the time the complaint is filed.

(iv) An administrative complaint may not allege a violation that occurred more than 1 year prior to the date that the complaint is received.

(v) The complainant filing an administrative complaint alleging issues related to services required to be delivered under the IDEA or this part must forward a copy of the complaint to the DoDEA school or EDIS clinic serving the child at the same time the complainant files the complaint with the appropriate authority in paragraph (d)(3)(i) of this section.

(A) Upon receipt of the complaint, the Inspector General of the Military Department concerned will notify the Secretary of the Military Department concerned, and the OI&IR will notify the Director, DoDEA, of the complaint.

(B) Upon receipt of a complaint, the responsible Military Department Inspector General or the OCA shall, if warranted, promptly open an investigation consistent with its established procedures for investigating complaints.

(*1*) The investigation shall afford the complainant an opportunity to submit additional information about the allegations.

(*2*) The investigation shall afford the DoDEA school system or the Military Department an opportunity to:

(*i*) Respond to the complaint;

(*ii*) Propose a resolution to the complaint; or

(*iii*) If the parties are willing, voluntarily engage in mediation of the complaint.

(*3*) The investigation shall produce a report consistent with those the investigating agency routinely provides, shall determine whether its findings support the complaint, and shall state whether the DoDEA school system or the Military Department is violating a requirement of the IDEA or this part.

(vi) The findings and conclusions of the report of investigation related to the administrative complaint shall be made available to the complainant and members of the public in accordance with the standard operating procedures of the investigating activity and 32 CFR parts 285 and 310.

(A) The investigating activity shall provide a copy of the report to the Director, DoDEA and the Secretary of a Military Department concerned or in accordance with the investigating activity's protocols.

(B) The report shall be provided, to the extent practicable, within 60 days of initiating the investigation, unless extended by the complainant and the DoDEA school system or the Military Department.

(vii) The Secretary of the Military Department concerned or the Director, DoDEA shall resolve complaints within their respective area of responsibility when the Military Service or the DoDEA school system is found to have failed to provide appropriate services consistent with the requirements of the IDEA or this part. Remediation may include corrective action appropriate to address the needs of the child such as compensatory services, or monetary reimbursement where otherwise authorized by law.

(viii) When a complaint received under this section is also the subject of a due process complaint regarding alleged violations of rights afforded under the IDEA and this part, or contains multiple issues of which one or more are part of that due process complaint, the investigation activity shall set aside any issues alleged in the due process complaint until a hearing is concluded in accordance with the IDEA and this part. Any issue that is not part of the due process hearing must be resolved using the procedures of this section.

(ix) If an issue raised in a complaint filed under this section has been previously decided in a due process hearing involving the same parties:

(A) The due process hearing decision is binding on that issue.

(B) The Director, DoDEA or the Secretary of the Military Department concerned shall so inform the complainant.

(4) *Mediation.* (i) A parent, the Military Department concerned, or DoDEA may request mediation at any time, whether or not a due process petition has been filed, to informally resolve a disagreement on any matter relating to the provision of EIS to an infant or toddler (birth up to 3 years of age), or the identification, evaluation, or educational placement of a child (ages 3 through 21, inclusive), or the provision of a FAPE to such child.

(ii) Mediation must be voluntary on the part of the parties and shall not be used to deny or delay a parent's right to a due process hearing or to deny other substantive or procedural rights afforded under the IDEA.

(A) DoDEA school officials participate in mediation involving special education and related services; the cognizant Military Department participates in mediation involving EIS.

(B) The initiating party's request must be written, include a description of the dispute, bear the signature of the requesting party, and be provided:

(*1*) In the case of a parent initiating mediation, to:

(*i*) The local EDIS program manager in disputes involving EDIS; or

(*ii*) The school principal in disputes involving a DoDEA school.

(*2*) In the case of the school or EDIS initiating mediation, to the parent.

(C) Acknowledgment of the request for mediation shall occur in a timely manner.

(D) Agreement to mediate shall be provided in writing to the other party in a timely manner.

(iii) Upon agreement of the parties to mediate a dispute, the local EDIS or DoDEA school shall forward a request for a mediator to the Military Department or to DoDEA's Center for Early Dispute Resolution (CEDR), respectively.

(iv) The mediator shall be obtained from the Defense Office of Hearings and Appeals (DOHA) unless another qualified and impartial mediator is obtained by the Military Department or CEDR.

(A) Where DOHA is used, the DOHA Center for Alternate Dispute Resolution (CADR) shall provide the mediator from its roster of mediators qualified in special education disputes.

(B) Where the Military Department or DoDEA elects to secure a mediator through its own DoD Component resources, the mediator shall be selected from the Component's roster of mediators qualified in special education disputes, or by contract with an outside mediator duly qualified in special education disputes and who is trained in effective mediation techniques.

(v) The Military Department or DoDEA through CEDR shall obtain a mediator within 15 business days of receipt of a request for mediation, or immediately request a mediator from the Director, DOHA, through the DOHA CADR.

(vi) When requested, the Director, DOHA, through the CADR, shall appoint a mediator within 15 business days of receiving the request, unless a party provides written notice to the Director, DOHA that the party refuses to participate in mediation.

(vii) Unless both parties agree otherwise, mediation shall commence in a timely manner after both parties agree to mediation.

(viii) The parents of the infant, toddler, or child, and EDIS or the school shall be parties in the mediation. With the consent of both parties, other persons may attend the mediation.

(ix) Mediation shall be conducted using the following rules:

(A) The Military Department concerned shall bear the cost of the mediation process in mediations concerning EIS.

(B) DoDEA shall bear the cost of the mediation process in mediations concerning special education and related services.

(C) Discussions and statements made during the mediation process, and any minutes, statements or other records of a mediation session other than a final executed mediation agreement, shall be considered confidential between the parties to that mediation and are not discoverable or admissible in a due process proceeding, appeal proceeding, or civil proceeding under this part.

(D) Mediation shall be confidential. The mediator may require the parties to sign a confidentiality pledge before the commencement of mediation.

(E) Either party may request a recess of a mediation session to consult advisors, whether or not present, or to consult privately with the mediator.

(F) The mediator shall ensure and the contract for mediation services shall require that any partial or complete resolution or agreement of any issue in mediation is reduced to writing, and that the written agreement is signed and dated by the parties, with a copy given to each party.

(x) Any written agreement resulting from the mediation shall state that all discussions that occurred during the mediation process and all records of the mediation other than a final executed agreement shall be confidential and may not be discoverable or admissible as evidence in any subsequent due process proceeding, appeal proceeding, or civil proceeding, and shall be legally binding upon the parties and enforceable in a district court of the United States.

(xi) All mediation sessions shall be held in a location that is convenient to both parties.

(xii) No hearing officer or adjudicative body shall draw any inference from the fact that a mediator or a party withdrew from mediation or from the fact that mediation did not result in settlement of a dispute.

(5) *Due process complaint procedures.* (i) Parents of infants, toddlers, and children who are covered by this part and the cognizant Military Department or DoDEA, are afforded impartial hearings and administrative appeals after the parties have waived or participated in and failed to resolve a dispute through:

(A) Mediation, in the case of an infant or toddler; or

(B) A resolution process, or mediation in lieu of the resolution process prior to proceeding to a due process hearing in the case of a child (ages 3 through 21 years, inclusive).

(ii) An impartial due process hearing is available to resolve any dispute concerning the provision of EIS to infants and toddlers with disabilities or with respect to any matter relating to the identification, evaluation, educational placement of, and the FAPE provided by the Department of Defense to children (ages 3 through 21, inclusive) who are covered by this part, in accordance with the IDEA and this part.

(A) Whenever the parents or the cognizant Military Department present a due process complaint (petition) in accordance with this part, an impartial due process hearing is available to resolve any dispute concerning the provision of EIS.

(B) When the parents of children ages 3 through 21 years, inclusive, or the cognizant Military Department or DoDEA, present a due process complaint (petition) in accordance with this part relating to any matter regarding the identification, evaluation, placement, or the provision of FAPE, the parties shall first proceed in accordance with the requirements for a statutory resolution process in accordance with this part, after which time an impartial due process hearing is available to resolve the dispute set forth by the complaint.

(iii) An expedited impartial due process hearing may be requested:

(A) By a parent when the parent disagrees with the manifestation determination or any decision regarding the child's disciplinary placement.

(B) By the school when it believes that maintaining a student in his or her current educational placement is substantially likely to result in injury to the student or others.

(iv) Any party to a special education dispute may initiate a due process hearing by filing a petition stating the specific issues that are in dispute. The initiating party is the ''petitioner'' and the responding party is the ''respondent.'' The petition itself will remain confidential, in accordance with applicable law, not be released to those not a party to the litigation and its Personally Identifiable Information shall be protected in accordance with the DoD Privacy Act.

(v) Petitioner and respondent are each entitled to representation by counsel at their own expense. The parent and child may choose to be assisted by a personal representative with special knowledge or training with respect

to the problems of disabilities rather than by legal counsel.

(vi) To file a petition that affords sufficient notice of the issues and commences the running of relevant timelines, petitioners shall specifically include in the petition:

(A) The name and residential address of the child and the name of the school the child is attending or the location of the EDIS serving the child.

(B) A description of the nature of the problem of the child relating to the proposed or refused initiation or change including facts (such as who, what, when, where, how, why of the problem).

(C) A proposed resolution of the problem to the extent known and available to the petitioner at the time.

(D) The signature of the parent, or if the petitioner is DoDEA or a Military Department, an authorized representative of that petitioner, or of the counsel or personal representative for the petitioner, and his or her telephone number and mailing address.

(vii) When the cognizant Military Department or DoDEA petitions for a hearing, it shall additionally:

(A) Inform the parent of the 10 business-day deadline (or 5 school days in the case of an expedited hearing) for filing a response that specifically addresses the issues raised in the petition.

(B) Provide the parent with a copy of this part.

(viii) A special rule applies for expedited hearing requests. The petitioner must state, as applicable to his or her petition:

(A) The disciplinary basis for the child's change in placement to an interim AES or other removal from the child's current placement.

(B) The reasons for the change in placement.

(C) The reasoning of the manifestation determination committee in concluding that a particular act of misconduct was not a manifestation of the child's disability.

(D) How the child's current educational placement is or is not substantially likely to result in injury to the child or others.

(ix) The petition or request for an expedited due process hearing must be delivered to:

(A) The Director, DOHA, by mail to P.O. Box 3656, Arlington, Virginia 22203, by fax to 703–696–1831, or email to *specialedcomplaint@osdgc.osd.mil*. Filing may also be made by hand delivery to the office of the Director, DOHA if approval from the Director, DOHA is obtained in advance of delivery.

(B) The respondent by mail, fax, email, or hand delivery.

(*1*) If the petitioner is a parent of a child (ages of 3 through 21, inclusive), or a child (in the event that rights have been transferred in accordance with paragraph (b)(19) of this section, the respondent is DoDEA and the petition must be delivered to and received by the principal of the school in which the child is enrolled, or if the child is enrolled in the Non-DoD School Program (NDSP) to the DoDEA General Counsel (*generalcounsel@hq.dodea.edu*).

(*2*) If the petitioner is the parent of an infant or toddler (birth up to 3 years of age), the respondent is the responsible Military Department and the petition must be delivered to and received by the EDIS manager.

(*3*) If the petitioner is the responsible Military Department or DoDEA, the petition must be delivered to and received by the parent of the child.

(C) Filing of the due process petition with DOHA is considered complete when received by DOHA.

(x) The timelines for requesting and conducting a due process hearing are:

(A) *Timelines for requesting a hearing*. A petitioner may not allege a violation that occurred more than 2 years before the date the petitioner knew, or should have known, about the alleged action that forms the basis of the complaint, unless the parent was prevented from requesting the hearing due to:

(*1*) Specific misrepresentation by DoDEA or EDIS that it had resolved the problem forming the basis of the complaint.

(*2*) The withholding of information by DoDEA or EDIS from the petitioning parent that was required to be provided to the parent in accordance with the IDEA and this part.

(B) *Timelines for conducting a due process hearing*. Except as provided in

paragraph (d)(5)(x)(D) and (d)(8)(ii) of this section, a hearing officer shall issue findings of fact and conclusions of law not later than 50 business days:

(*1*) In a case involving EDIS, following the filing and service of a legally sufficient petition or amended petition in accordance with this section.

(*2*) In disputes involving a school and a child age 3 through 21, inclusive, following the filing and service of a legally sufficient petition or amended petition in accordance with this section and the hearing officer's receipt of notice that the 30-day resolution period concluded without agreement, the parties waived the resolution meeting, or the parties concluded mediation in lieu of the resolution process without reaching agreement.

(C) *Exceptions to the timelines for conduct of a hearing.* (*1*) When the hearing officer grants a request for discovery made by either party, as provided for in paragraph (d)(10) of this section, in which case the time required for such discovery does not count toward the 50 business days.

(*2*) When the hearing officer grants a specific extension of time for good cause in accordance with paragraph (d)(8) of this section.

(D) *Timeline for conducting an expedited hearing.* In the event of a petition for expedited hearing is requested, a DOHA hearing officer shall arrange for the hearing to be held not later than 20 school days (when school is in session) of the date the request is filed with DOHA, subject to the timeline for scheduling a resolution meeting and the 15 day resolution period requirements of this section. The hearing officer must make a determination within 10 school days after the hearing.

(6) *Responses and actions required following receipt of a petition or request for expedited hearing.* (i) Immediately upon receipt of the petition, the Director, DOHA, shall appoint a hearing officer to take charge of the case.

(A) The hearing officer shall immediately notify the parties of his or her appointment.

(B) Upon receipt of notice that a hearing officer is appointed, the parties shall communicate all motions, pleadings, or amendments in writing to the hearing officer, with a copy to the opposing party, unless the hearing officer directs otherwise.

(ii) Within 10 business days of receipt of the petition (5 school days when school is in session in the case of a petition for an expedited hearing), the respondent shall deliver a copy of the written response to the petitioner and file the original written response with the hearing officer. Filing may be made by mail to P.O. Box 3656, Arlington, Virginia 22203, by fax to 703–696–1831, by hand delivery if approved in advance by the hearing officer, or by email to *specialedcomplaint@osdgc.osd.mil*. If a hearing officer has not yet been appointed, the respondent will deliver the original written response to the Director, DOHA in accordance with paragraph (d)(5)(ix) of this section.

(iii) The respondent shall specifically address the issues raised in the due process hearing petition.

(iv) If the respondent is the cognizant Military Department or DoDEA, the response shall include:

(A) An explanation of why the respondent proposed or refused to take the action at issue in the due process complaint.

(B) A description of each evaluation procedure, assessment, record, or report the DoD Component used as the basis for the proposed or refused action.

(C) A description of the options that the respondent considered and the reasons why those options were rejected.

(D) A description of the other factors that are relevant to the respondent's proposed or refused action.

(v) The respondent may file a notice of insufficient petition within 15 business days of receiving a petition if the respondent wishes to challenge the sufficiency of the petition for failure to state the elements required by the IDEA. Within 5 business days of receiving a notice of insufficient petition, the hearing officer will issue a decision and will notify the parties in writing of that determination.

(vi) A response to the petitioner under (d)(6)(ii) of this section shall not be construed to preclude the respondent from asserting that the due process complaint was insufficient using the

procedures available under (d)(6)(v) of this section.

(vii) Parties may amend a petition only if:

(A) The other party consents in writing to such amendment and is given the opportunity to resolve the complaint through the resolution process; or

(B) The hearing officer grants permission, except that the hearing officer may not grant such permission at any time later than 5 days before a due process hearing is scheduled to begin.

(viii) The filing of an amended petition resets the timelines for:

(A) The conduct of a resolution meeting and the resolution period relating to the amended petition, and

(B) All deadlines for responses and actions required following the receipt of the amended petition, and for conducting a due process hearing on the amended petition.

(7) *Statutory resolution process.* A resolution meeting shall be convened by DoDEA and a resolution period afforded, in accordance with this section, for any dispute in which a due process petition has been filed regarding the identification, evaluation, or educational placement, or the provision of FAPE for children ages 3 to 21, inclusive.

(i) Within 15 calendar days of receiving the parent's petition for due process (7 calendar days in the case of an expedited hearing), DoDEA, through the pertinent school principal or superintendent, shall convene a dispute resolution meeting, which must be attended by:

(A) The parents.

(B) A legal representative of the parents if desired by the parents.

(C) A DoDEA official designated and authorized by the District Superintendent or Area Director to exercise decision-making authority on behalf of DoDEA.

(D) A DoDEA legal representative, only if the parents are represented by counsel at the resolution meeting.

(E) The relevant members of the child's CSC who have specific knowledge of the facts identified in the petition.

(ii) The parties may agree to mediate in lieu of conducting a resolution meeting or in lieu of completing the resolution period. The resolution meeting need not be held if the parties agree in writing to waive the meeting or agree to use the mediation process.

(iii) Failure to convene or participate in resolution meeting.

(A) If DoDEA has offered to convene a resolution meeting and has been unable to obtain parental participation in the resolution meeting after making and documenting its reasonable efforts, DoDEA may, at the conclusion of the resolution period (30 days or 15 days in the case of an expedited hearing) request that a hearing officer dismiss the parent's due process complaint or request for an expedited due process hearing.

(B) If DoDEA fails to convene a resolution meeting within 15 days of receipt of a due process complaint or if it fails to participate in the resolution meeting, the parent may request the hearing officer to immediately convene the due process hearing without waiting for the 30-day resolution period to expire.

(iv) DoDEA shall have a 30-day resolution period, counted from the receipt of the complaint by the school principal, (15 days in the case of an expedited hearing request) within which to resolve the complaint to the satisfaction of the parents.

(v) The resolution period may be adjusted because of one of the following events:

(A) Both parties agree in writing to waive the resolution meeting.

(B) After the resolution meeting starts, but before the end of the applicable resolution period, the parties agree in writing that no agreement is possible and agree to waive the balance of the resolution period.

(C) Both parties agree in writing to continue the resolution meeting at the end of the applicable resolution period, but later the parent or the school withdraws from the resolution process.

(vi) If a partial or complete resolution to the dispute is reached at the resolution meeting, the parties must execute a written agreement that is:

(A) Signed by both the parents and a representative of the school with authority to bind the school to the terms of the agreement.

(B) Legally enforceable in a U.S. District Court of competent jurisdiction, unless the parties have voided the agreement within an agreement review period of 3 business days following the execution of the agreement.

(vii) Discussions held, minutes, statements, and other records of a resolution meeting, and any final executed resolution agreement are not presumed confidential and therefore are discoverable and admissible in a due process proceeding, appeal proceeding, or civil proceeding, except when the parties have agreed to confidentiality.

(viii) If DoDEA has not resolved the complaint to the satisfaction of the parents at the expiration of the resolution period or the adjusted resolution period, if applicable:

(A) DoDEA shall provide written notice to the hearing officer, copy to the parents, within 3 business days (1 business day in the case of an expedited hearing) of the expiration of the resolution period or adjusted resolution period that the parties failed to reach agreement.

(B) Upon receipt of that notification by the hearing officer, all of the applicable timelines for proceeding to a due process hearing under this section shall commence.

(ix) If the parties execute a binding written agreement at the conclusion of the resolution period, and do not subsequently declare it void during the 3-business day agreement review period, then:

(A) DoDEA shall provide written notice to the hearing officer, copy to the parents, at the conclusion of the agreement review period that the parties have reached an agreement for resolution of complaints set forth in the due process petition.

(B) Upon receipt of that notification by the presiding hearing officer, no due process hearing shall proceed on the issues resolved.

(8) *The due process hearing*—(i) *Purpose.* The purpose of the due process hearing is to establish the relevant facts necessary for the hearing officer to reach a fair and impartial determination of the case.

(ii) *Hearing officer duties.* The hearing officer shall be the presiding officer, with judicial powers to manage the proceeding and conduct the hearing. Those powers shall include, but are not limited to, the authority to:

(A) Determine the adequacy of pleadings.

(B) Decide whether to allow amendment of pleadings, provided permission is granted to authorize the amendment not later than 5 days before a due process hearing occurs.

(C) Rule on questions of timeliness and grant specific extension of time for good cause either on his or her own motion or at the request of either party.

(*1*) Good cause includes the time required for mediation in accordance with paragraph (d)(4) of this section where the parties have jointly requested an extension of time in order to complete mediation.

(*2*) If the hearing officer grants an extension of time, he or she shall identify the length of the extension and the reason for the extension in the record of the proceeding. Any such extension shall be excluded from the time required to convene a hearing or issue a final decision, and at the discretion of the hearing officer may delay other filing dates specified by this section.

(D) Rule on requests for discovery and discovery disputes.

(E) Order an evaluation of the child at the expense of the DoDEA school system or the Military Department concerned.

(F) Rule on evidentiary issues.

(G) Ensure a full and complete record of the case is developed.

(H) Decide when the record in a case is closed.

(I) Issue findings of fact and conclusions of law.

(J) Issue a decision on substantive grounds based on a determination of whether the child received a FAPE. When the petition alleges a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies:

(*1*) Impeded the child's right to a FAPE;

(*2*) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or

(*3*) Caused a deprivation of educational benefits.

(K) Order such relief as is necessary for the child to receive a FAPE or appropriate EIS, including ordering the DoDEA school system or the responsible Military Department to:

(*1*) Correct a procedural deficiency that caused a denial of a FAPE or appropriate EIS;

(*2*) Conduct evaluations or assessments and report to the hearing officer;

(*3*) Change the school-aged child's placement or order the child to an AES for up to 45 days;

(*4*) Provide EIS or specific school-age educational or related services to a child to remedy a denial of FAPE, including compensatory services when appropriate and in accordance with the current early intervention or educational program; or

(*5*) Placement of a school-aged child in an appropriate residential program for children with disabilities at DoD expense, when appropriate under the law and upon a determination that DoDEA has failed to provide and cannot provide an otherwise eligible child with a FAPE at the appropriate DoD facility.

(*i*) A residential program must be one that can address the specific needs of the child as determined by the DoDEA school.

(*ii*) The program should, whenever possible, be located near members of the child's family.

(9) *Attendees at the hearing.* Attendance at the hearing is limited to:

(i) The parents and the counsel or personal representative of the parents.

(ii) A representative of DoDEA or the EDIS concerned and the counsel representing DoDEA or the EDIS.

(iii) Witnesses for the parties, including but not limited to the professional employees of DoDEA or the EDIS concerned and any expert witnesses.

(iv) A person qualified to transcribe or record the proceedings.

(v) Other persons with the agreement of the parties or the order of the hearing officer, in accordance with the privacy interests of the parents and the individual with disabilities.

(10) *Discovery.* (i) Full discovery shall be available, with the Federal Rules of Civil Procedure, Rules 26–37, 28 U.S.C. appendix, serving as a guide to parties to a due process hearing or conducted in accordance with this part.

(ii) If voluntary discovery cannot be accomplished, a party seeking discovery may file a motion with the hearing officer to accomplish discovery. The hearing officer shall grant an order to accomplish discovery upon a showing that the document or information sought is relevant or reasonably calculated to lead to the discovery of admissible evidence. An order granting discovery, or compelling testimony or the production of evidence shall be enforceable by all reasonable means within the authority of the hearing officer, to include the exclusion of testimony or witnesses, adverse inferences, and dismissal or summary judgment.

(iii) Records compiled or created in the regular course of business, which have been provided to the opposing party at least 5 business days prior to the hearing, may be received and considered by the hearing officer without authenticating witnesses.

(iv) A copy of the written or electronic transcription of a deposition taken by a Military Department or DoDEA shall be made available by the Military Department or DoDEA without charge to the opposing party.

(11) *Right to an open hearing.* The parents, or child who has reached the age of majority, have the right to an open hearing upon waiving, in writing, their privacy rights and those of the individual with disabilities who is the subject of the hearing.

(12) *Location of hearing.* Subject to modification by the hearing officer for good cause shown or upon the agreement of the parties, the hearing shall be held:

(i) In the DoDEA school district attended by the child (ages 3 through 21, inclusive):

(ii) On the military installation of the EDIS serving infants and toddlers with disabilities; or

(iii) At a suitable video teleconferencing facility convenient for the parents of the child involved in the hearing and available for the duration of a hearing.

(13) *Witnesses and documentary evidence.* (i) At least 5 business days prior to a hearing, the parties shall exchange lists of all documents and materials

that each party intends to use at the hearing, including all evaluations and reports. Each party also shall disclose the names of all witnesses it intends to call at a hearing along with a proffer of the anticipated testimony of each witness.

(ii) At least 10 business days prior to a hearing, each party must provide the name, title, description of professional qualifications, and summary of proposed testimony of any expert witness it intends to call at the hearing.

(iii) Failure to disclose documents, materials, or witnesses may result in the hearing officer barring their introduction at the hearing.

(iv) Parties must limit evidence to the issues pleaded, except by order of the hearing officer or with the consent of the parties.

(v) The rules of evidence shall be relaxed to permit the development of a full evidentiary record with the Federal Rules of Evidence, 28 U.S.C. appendix, serving as guide.

(vi) All witnesses testifying at the hearing shall be advised by the hearing officer that under 18 U.S.C. 1001, it is a criminal offense to knowingly and willfully make a materially false, fictitious, or fraudulent statement or representation to a department or agency of the U.S. Government as to any matter within the jurisdiction of that department or agency, and may result in a fine or imprisonment.

(vii) A party calling a witness shall bear the witness' travel and incidental expenses associated with testifying at the hearing. The DoDEA school system or the Military Department concerned shall pay such expenses if a witness is called by the hearing officer.

(viii) The parties shall have the right to cross-examine witnesses testifying at the hearing.

(ix) The hearing officer may issue an order compelling a party to make a specific witness employed by or under control of the party available for testimony at the party's expense or to submit specific documentary or physical evidence for inspection by the hearing officer or for submission into the record on motion of either party or on the hearing officer's own motion.

(x) When the hearing officer determines that a party has failed to obey an order to make a specific witness available for testimony or to submit specific documentary or physical evidence in accordance with the hearing officer's order, and that such failure is in knowing and willful disregard of the order, the hearing officer shall so certify as a part of the written record in the case and may order appropriate sanctions.

(14) *Transcripts.* (i) A verbatim written transcription of any deposition taken by a party shall be provided to the opposing party in hardcopy written format or as attached to an electronic email with prior permission of the recipient. If a Military Department or DoDEA takes a deposition, the verbatim written transcript of that deposition shall be provided to the parent(s) without charge.

(ii) A verbatim written transcription of the due process hearing shall be arranged by the hearing officer and shall be made available to the parties in hardcopy written format, or as an attachment to an electronic email, with prior permission of the recipient, on request and without cost to the parent(s), and a copy of the verbatim written transcript of the hearing shall become a permanent part of the record

(15) *Hearing officer's written decision.* (i) The hearing officer shall make written findings of fact and conclusions of law and shall set forth both in a written decision addressing the issues raised in the due process complaint, the resolution of those issues, and the rationale for the resolution.

(ii) The hearing officer's decision of the case shall be based on the record, which shall include the petition, the answer, the transcript of the hearing, exhibits admitted into evidence, pleadings or correspondence properly filed and served on all parties, and such other matters as the hearing officer may include in the record, if such matter is made available to all parties before the record is closed.

(iii) The hearing officer shall file the written decision with the Director, DOHA, and additionally provide the Director, DOHA with a copy of that decision from which all personally identifiable information has been redacted.

(iv) The Director, DOHA, shall forward to parents and to the DoDEA or

the EDIS concerned, copies, unredacted and with all personally identifiable information redacted, of the hearing officer's decision.

(v) The decision of the hearing officer shall become final unless a timely notice of appeal is filed in accordance with paragraph (d)(17) of this section.

(vi) The DoDEA or the EDIS concerned shall implement the decision as soon as practicable after it becomes final.

(16) *Determination without hearing.* (i) At the request of a parent of an infant or toddler, birth to 3 years of age, when EIS are at issue, or of a parent of a child age 3 through 21, inclusive, or child who has reached the age of majority, when special education (including related services) are at issue, the requirement for a hearing may be waived, and the case may be submitted to the hearing officer on written documents filed by the parties. The hearing officer shall make findings of fact and conclusions of law and issue a written decision within the period fixed by paragraph (d)(5)(x) of this section.

(ii) DoDEA or the EDIS concerned may oppose a request to waive a hearing. In that event, the hearing officer shall rule on the request.

(iii) Documentary evidence submitted to the hearing officer in a case determined without a hearing shall comply with the requirements of paragraph (d)(13) of this section. A party submitting such documents shall provide copies to all other parties.

(17) *Appeal of hearing officer decision.* (i) A party may appeal the hearing officer's findings of fact and decision by filing a written notice of appeal within 15 business days of receipt of the hearing officer's decision with the Chairperson, DOHA Appeal Board by mail to P.O. Box 3656, Arlington, Virginia 22203, by fax to 703–696–1831, by email to *specialedcomplaint@osdgc.osd.mil*, or by hand delivery to the office of the Chairperson, DOHA Appeal Board if approval from the Chairperson, DOHA Appeal Board is obtained in advance of delivery. The notice of appeal must contain the appealing party's certification that a copy of the notice of appeal has been provided to the other party by mail.

(ii) Within 30 business days of filing the notice of appeal, the appealing party shall file a written statement of issues and arguments on appeal with the Chairperson, DOHA Appeal Board by mail to P.O. Box 3656, Arlington, Virginia 22203, by fax to 703–696–1831, by email to *specialedcomplaint@osdgc.osd.mil*, or by hand delivery to the office of the Chairperson, DOHA Appeal Board if approval from the Chairperson, DOHA Appeal Board is obtained in advance of filing. The appealing party shall deliver a copy to the other party by mail.

(iii) The non-appealing party shall file any reply within 20 business days of receiving the appealing party's statement of issues and arguments on appeal with the Chairperson, DOHA Appeal Board by mail to P.O. Box 3656, Arlington, Virginia 22203, by fax to 703–696–1831, by email to *specialedcomplaint@osdgc.osd.mil*, or by hand delivery to the office of the Chairperson, DOHA Appeal Board if approval from the Chairperson, DOHA Appeal Board is obtained in advance of filing The non-appealing party shall deliver a copy of the reply to the appealing party by mail.

(iv) Appeal filings with DOHA are complete upon transmittal. It is the burden of the appealing party to provide timely transmittal to and receipt by DOHA.

(v) The DOHA Appeal Board, shall issue a decision on all parties' appeals within 45 business days of receipt of the matter.

(vi) The determination of the DOHA Appeal Board shall be a final administrative decision and shall be in written form. It shall address the issues presented and set forth a rationale for the decision reached. A determination denying the appeal of a parent in whole or in part shall state that the parent has the right, in accordance with the IDEA, to bring a civil action on the matters in dispute in a district court of the United States of competent jurisdiction without regard to the amount in controversy.

(vii) No provision of this part or other DoD guidance may be construed as conferring a further right of administrative review. A party must exhaust all administrative remedies afforded by

this section before seeking judicial review of a determination.

(18) *Maintenance of current educational placement.* (i) Except when a child is in an interim AES for disciplinary reasons, during the pendency of any proceeding conducted pursuant to this section, unless the school and the parents otherwise agree, the child will remain in the then current educational placement.

(ii) When the parent has appealed a decision to place a child in an interim AES, the child shall remain in the interim setting until the expiration of the prescribed period or the hearing officer makes a decision on placement, whichever occurs first, unless the parent and the school agree otherwise.

(19) *General hearing administration.* The Director, DOHA, shall:

(i) Exercise administrative responsibility for ensuring the timeliness, fairness, and impartiality of the hearing and appeal procedures to be conducted in accordance with this section.

(ii) Appoint hearing officers from the DOHA Administrative judges who shall:

(A) Be attorneys who are active members of the bar of the highest court of a State, U.S. Commonwealth, U.S. Territory, or the District of Columbia and permitted to engage in the active practice of law, who are qualified in accordance with DoD Instruction 1442.02, ''Personnel Actions Involving Civilian Attorneys'' (available at *http://www.dtic.mil/whs/directives/ corres/pdf/144202p.pdf*).

(B) Possess the knowledge of and ability to:

(*1*) Understand the provisions of the IDEA and this part, and related Federal laws and legal interpretations of those regulations by Federal courts.

(*2*) Conduct hearings in accordance with appropriate, standard legal practice.

(*3*) Render and write decisions in accordance with the requirements of this part.

(C) Be disqualified from presiding in any individual case if the hearing officer:

(*1*) Has a personal or professional interest that conflicts with the hearing officer's objectivity in the hearing.

(*2*) Is a current employee of, or military member assigned to, DoDEA or the Military Medical Department providing services in accordance with the IDEA and this part.

(20) *Publication and reporting of final decisions.* The Director, DOHA, shall ensure that hearing officer and appeal board decisions in cases arising in accordance with this section are published and indexed with all personally identifiable information redacted to protect the privacy rights of the parents who are parties in the due process hearing and the children of such parents, in accordance with 32 CFR part 310.

(21) *Civil actions.* Any party aggrieved by the final administrative decision of a due process complaint shall have the right to file a civil action in a district court of the United States of competent jurisdiction without regard to the amount in controversy. The party bringing the civil action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the date of the decision of the DOHA Appeal Board, to file a civil action.

(e) *DoD–CC on early intervention, special education, and related services*—(1) *Committee membership.* The DoD-CC shall meet at least annually to facilitate collaboration in early intervention, special education, and related services in the Department of Defense. The Secretary of Defense shall appoint representatives to serve on the DoD-CC who shall be full-time or permanent part-time government employees or military members from:

(i) USD(P&R), who shall serve as the Chair.

(ii) Secretaries of the Military Departments.

(iii) Defense Health Agency.

(iv) DoDEA.

(v) GC, DoD.

(2) *Responsibilities.* The responsibilities of the DoD-CC include:

(i) Implementation of a comprehensive, multidisciplinary program of EIS for infants and toddlers with disabilities and their families.

(ii) Provision of a FAPE, including special education and related services, for children with disabilities who are enrolled full-time in the DoDEA school system, as specified in their IEP.

(iii) Designation of a subcommittee on compliance to:

(A) Advise and assist the USD(P&R) in the performance of his or her responsibilities.

(B) At the direction of the USD(P&R), advise and assist the Military Departments and DoDEA in the coordination of services among providers of early intervention, special education, and related services.

(C) Monitor compliance in the provision of EIS for infants and toddlers and special education and related services for children ages 3 to 21, inclusive.

(D) Identify common concerns, facilitate coordination of effort, and forward issues requiring resolution to the USD(P&R).

(E) Assist in the coordination of assignments of sponsors who have children with disabilities who are or who may be eligible for special education and related services through DoDEA or EIS through the Military Departments.

(F) Perform other duties as assigned by the USD(P&R), including oversight for monitoring the delivery of services consistent with the IDEA and this part.

(f) *Monitoring*—(1) *Program monitoring and oversight.* (i) The USD(P&R) shall monitor the implementation of the provisions of the IDEA and this part in the programs operated by the Department of Defense. The USD(P&R) will carry out his or her responsibilities under this section primarily through the DoD-CC.

(ii) The primary focus of monitoring shall be on:

(A) Improving educational results and functional outcomes for all children with disabilities.

(B) Ensuring the DoD programs meet the requirements of the IDEA and this part.

(iii) Monitoring shall include the following priority areas and any additional priority areas identified by the USD(P&R):

(A) Provision of a FAPE in the LRE and the delivery of early intervention services.

(B) Child-find.

(C) Program management.

(D) The use of dispute resolution including administrative complaints, due process and the mandatory resolution process, and voluntary mediation.

(E) A system of transition services.

(iv) The USD(P&R) shall develop quantifiable indicators in each of the priority areas and such qualitative indicators necessary to adequately measure performance.

(v) DoDEA and the Military Departments shall establish procedures for monitoring special services and reviewing program compliance in accordance with the requirements of this section.

(vi) By January 1 of each calendar year, the DoD-CC shall identify any additional information required to support compliance activities that will be included in the next annual compliance report to be submitted no later than September 30 of that year. The results of monitoring program areas described in paragraph (f)(1)(iii) of this section shall be reported in a manner that does not result in the disclosure of data identifiable to individual children.

(2) *Compliance reporting.* The Director, DoDEA, and the Military Departments shall submit reports to the DoD-CC not later than September 30 each year that summarize the status of compliance. The reports shall:

(i) Identify procedures conducted at headquarters and at each subordinate level, including on-site visits, to evaluate compliance with the IDEA and this part.

(ii) Summarize the findings and indicate the status of program compliance.

(iii) Describe corrective actions required of the programs that did not meet the requirements of the IDEA and this part and identify the technical assistance that was or shall be provided to ensure compliance.

(iv) Include applicable data on the operation of special education and early intervention in the Department of Defense. Data must be submitted in the format required by the DoD-CC to enable the aggregation of data across components. March 31 shall be the census date for counting children for the reporting period that begins on July 1 and ends on June 30 of the following year.

(3) *School level reporting.* (i) The reporting requirements for school aged children (3 through 21, inclusive) with disabilities shall also include:

(A) Data to determine if significant disproportionality based on race and ethnicity is occurring with respect to:

(*1*) The identification of school-aged children as children with disabilities including the identification of children as children with disabilities affected by a particular impairment described in paragraph (g) of this section.

(*2*) The placement of these children in particular educational settings.

(*3*) The incidence, duration, and type of disciplinary suspensions and expulsions.

(*4*) Removal to an interim AES, the acts or items precipitating those removals, and the number of children with disabilities who are subject to long-term suspensions or expulsions.

(*5*) The number and percentage of school-aged children with disabilities, by race, ethnicity, limited English proficiency status, gender, and disability category, who are:

(*i*) Receiving special education and related services.

(*ii*) Participating in regular education.

(*iii*) In separate classes, separate schools or facilities, or public or private residential facilities.

(B) The number of due process complaints requested, the number of hearings conducted, and the number of changes in placement ordered as a result of those hearings.

(C) The number of mediations held and the number of settlement agreements reached through such mediations.

(ii) For each year of age from age 16 through 21, children who stopped receiving special education and related services because of program completion (including graduation with a regular secondary school diploma) or other reasons, and the reasons why those children stopped receiving special education and related services.

(4) *Early intervention reporting.* The reporting requirements for infants and toddlers with disabilities shall also include:

(i) Data to determine if significant disproportionality based on race, gender, and ethnicity is occurring with respect to infants and toddlers with disabilities who:

(A) Received EIS by criteria of developmental delay or a high probability of developing a delay.

(B) Stopped receiving EIS because of program completion or for other reasons.

(C) Received EIS in natural environments.

(D) Received EIS in a timely manner as defined in paragraph (a) of this section.

(ii) The number of due process complaints requested and the number of hearings conducted.

(iii) The number of mediations held and the number of settlement agreements reached through such mediations.

(5) *USD(P&R) oversight.* (i) On behalf of the USD(P&R), the DoD-CC shall make or arrange for periodic visits, not less than annually, to selected programs to ensure the monitoring process is in place; validate the compliance data and reporting; and address select focus areas identified by the DoD-CC and priority areas identified in paragraph (f)(1) of this section. The DoD-CC may use other means in addition to periodic visits to ensure compliance with the requirements established in this part.

(ii) The DoD-CC shall identify monitoring team members to conduct monitoring activities.

(iii) For DoD-CC monitoring visits, the Secretaries of the Military Departments shall:

(A) Provide necessary technical assistance and logistical support to monitoring teams during monitoring visits to facilities for which they are responsible.

(B) Provide necessary travel funding and support for their respective team members.

(C) Cooperate with monitoring teams, including making all pertinent records available to the teams.

(D) Promptly implement monitoring teams' recommendations concerning early intervention and related services for which the Secretary concerned has responsibility, including those to be furnished through an inter-Service agreement.

(iv) For DoD-CC monitoring visits, the Director, DoDEA, shall:

(A) Provide necessary technical assistance and logistical support to monitoring teams during monitoring visits to facilities for which he or she is responsible.

(B) Cooperate with monitoring teams, including making all pertinent records available to the teams.

(C) Promptly implement monitoring teams' recommendations concerning special education and related services for which the DoDEA school system concerned has responsibility.

(v) The ASD(HA) shall provide technical assistance to the DoD monitoring teams when requested.

(vi) The GC, DoD shall:

(A) Provide legal counsel to the USD(P&R), and, where appropriate, to DoDEA, monitored agencies, and monitoring teams regarding monitoring activities conducted pursuant to this part.

(B) Provide advice about the legal requirements of this part and Federal law to the DoDEA school systems, military medical commanders, military installation commanders, and to other DoD personnel as appropriate, in connection with monitoring activities conducted pursuant to this part.

(g) *Types of disabilities in children ages 3 through 21.* A child may be eligible for services under paragraph (b) of this section if by reason of one of the following disabilities the child needs special education and related services.

(1) *Autism Spectrum Disorder.* A developmental disability significantly affecting verbal and nonverbal communication and social interaction that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences. Essential features are typically but not necessarily manifested before age 3. Autism may include autism spectrum disorders such as but not limited to autistic disorder, pervasive developmental disorder not otherwise specified, and Asperger's syndrome. The term does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance.

(2) *Deafness.* A hearing loss or deficit so severe that it impairs a child's ability to process linguistic information through hearing, with or without amplification, and affects the child's educational performance adversely.

(3) *Deaf-blindness.* A combination of hearing and visual impairments causing such severe communication, developmental, and educational needs that the child cannot be accommodated in programs specifically for children with deafness or children with blindness.

(4) *Developmental delay.* A significant discrepancy, as defined and measured in accordance with paragraph (a)(4)(ii)(A) and confirmed by clinical observation and judgment, in the actual functioning of a child, birth through age 7, or any subset of that age range including ages 3 through 5, when compared with the functioning of a non-disabled child of the same chronological age in any of the following developmental areas: Physical, cognitive, communication, social or emotional, or adaptive development. A child determined to have a developmental delay before the age of 7 may maintain that eligibility through age 9.

(5) *Emotional disturbance.* A condition confirmed by clinical evaluation and diagnosis and that, over a long period of time and to a marked degree, adversely affects educational performance and exhibits one or more of the following characteristics:

(i) Inability to learn that cannot be explained by intellectual, sensory, or health factors.

(ii) Inability to build or maintain satisfactory interpersonal relationships with peers and teachers.

(iii) Inappropriate types of behavior or feelings under normal circumstances.

(iv) A general pervasive mood of unhappiness or depression.

(v) A tendency to develop physical symptoms or fears associated with personal or school problems.

(vi) Includes children who are schizophrenic, but does not include children who are socially maladjusted unless it is determined they are emotionally disturbed.

(6) *Hearing impairment.* An impairment in hearing, whether permanent or fluctuating, that adversely affects a

child's educational performance but is not included under the definition of deafness.

(7) *Intellectual disability*. Significantly below-average general intellectual functioning, existing concurrently with deficits in adaptive behavior. This disability is manifested during the developmental period and adversely affects a child's educational performance.

(8) *Orthopedic impairment*. A severe orthopedic impairment that adversely affects a child's educational performance. That term includes congenital impairments such as club foot or absence of some member; impairments caused by disease, such as poliomyelitis and bone tuberculosis; and impairments from other causes such as cerebral palsy, amputations, and fractures or burns causing contractures.

(9) *Other health impairment*. Limited strength, vitality, or alertness including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems and that adversely affects a child's educational performance. Such impairments may include, but are not necessarily limited to, attention deficit disorder, attention deficit hyperactivity disorder, heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, seizure disorder, lead poisoning, leukemia, or diabetes.

(10) *Specific learning disability*. A disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written language that may manifest itself as an imperfect ability to listen, think, speak, read, write, spell, remember, or do mathematical calculations. That term includes such conditions, recognizing that they may have been otherwise labeled with terms such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. This term does not include learning problems that are primarily the result of visual, hearing, or motor disabilities; intellectual disability; emotional disturbance; or environmental, cultural, or economic differences.

(11) *Speech or language impairments*. A communication disorder such as stuttering; impaired articulation; limited, impaired or delayed capacity to use expressive and/or receptive language; or a voice impairment that adversely affects a child's educational performance.

(12) *Traumatic brain injury*. An acquired injury to the brain caused by an external physical force resulting in total or partial functional disability or psychosocial impairment (or both) that adversely affects educational performance. Includes open or closed head injuries resulting in impairments in one or more areas including cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem solving, sensory, perceptual and motor abilities, psychosocial behavior, physical function, information processing, and speech. The term does not include brain injuries that are congenital or degenerative or brain injuries that are induced by birth trauma.

(13) *Visual impairment, including blindness*. An impairment of vision that, even with correction, adversely affects a child's educational performance. Term includes both partial sight and blindness. DoD also recognizes that a child may be eligible for services under paragraph (b) if they demonstrate ''Multiple Disabilities'' which DoD defines as: ''Concomitant impairments (such as intellectual disability-blindness or intellectual disability-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness, which is set forth as its own type of disability at §57.6(g)(3).

PART 60—FAMILY ADVOCACY COMMAND ASSISTANCE TEAM (FACAT)

Sec.

60.1 Purpose.
60.2 Applicability.
60.3 Definitions.
60.4 Policy.
60.5 Responsibilities.
60.6 Procedures.

AUTHORITY: 10 U.S.C. 1794; 42 U.S.C. 13031.

SOURCE: 79 FR 25676, May 6, 2014, unless otherwise noted.

§ 60.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for implementation and use of the FACAT in accordance with 10 U.S.C. 1794.

§ 60.2 Applicability.

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

(b) The term ''Military Services,'' as used herein, refers to the Army, Navy, Air Force, and Marine Corps.

§ 60.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Child. An unmarried person under 18 years of age for whom a parent, guardian, foster parent, caregiver, employee of a residential facility, or any staff person providing out-of-home care is legally responsible. The term ''child'' means a biological child, adopted child, stepchild, foster child, or ward. The term also includes a sponsor's family member (except the sponsor's spouse) of any age who is incapable of self-support because of a mental or physical incapacity, and for whom treatment in a DoD medical treatment program is authorized.

Child abuse. The physical or sexual abuse, emotional abuse, or neglect of a child by a parent, guardian, foster parent, or by a caregiver, whether the caregiver is intrafamilial or extrafamilial, under circumstances indicating the child's welfare is harmed or threatened. Such acts by a sibling, other family member, or other person shall be deemed to be child abuse only when the individual is providing care under express or implied agreement with the parent, guardian, or foster parent.

Child sexual abuse. The employment, use, persuasion, inducement, enticement, or coercion of any child to engage in, or assist any other person to engage in, any sexually explicit conduct or simulation of such conduct for the purpose of producing a visual depiction of such conduct; or the rape, and in cases of caretaker or inter-familial relationships, statutory rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children.

DoD-sanctioned activity. A U.S. Government activity or a nongovernmental activity authorized by appropriate DoD officials to perform child care or supervisory functions on DoD controlled property. The care and supervision of children may be either its primary mission or incidental in carrying out another mission (e.g., medical care). Examples include Child Development Centers, Department of Defense Dependents Schools, Youth Activities, School Age/Latch Key Programs, Family Day Care providers, and child care activities that may be conducted as a part of a chaplain's program or as part of another Morale, Welfare, or Recreation Program.

FACAT. A multidisciplinary team composed of specially trained and experienced individuals who are on-call to provide advice and assistance on cases of child sexual abuse that involve DoD-sanctioned activities.

Family Advocacy Program Director (FAPD). An individual designated by the Secretary of the Military Department or the head of another DoD Component to manage, monitor, and coordinate the FAP at the headquarters level.

Family Advocacy Program Manager (FAPM). An individual designated by the Secretary of the Military Department to manage, monitor, and coordinate the FAP at the headquarters level.

Military criminal investigative organization (MCIO). U.S. Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations.

Out-of-home care. The responsibility of care for and/or supervision of a child

in a setting outside the child's home by an individual placed in a caretaker role sanctioned by a DoD Component or authorized by a DoD Component as a provider of care. Examples include a child development center, school, recreation program, family child care, and child care activities that may be conducted as a part of a chaplain's program or as part of another morale, welfare, or recreation program.

§ 60.4 Policy.

It is DoD policy to:

(a) Provide a safe and secure environment for DoD personnel and their families by promoting the prevention, early identification, and intervention in all allegations of child abuse and neglect in accordance with DoD Directive 6400.1, ''Family Advocacy Program (FAP)'' (see *http://www.dtic.mil/whs/directives/ corres/pdf/640001p.pdf*).

(b) Promote early identification and intervention in allegations of extrafamilial child sexual abuse in accordance with DoD Directive 6400.1 as it applies to DoD-sanctioned activities.

(c) Provide a coordinated and comprehensive DoD response through the deployment of the FACAT to assist the Military Department upon DoD Component request to address allegations of extrafamilial child sexual abuse in DoD-sanctioned activities.

(d) Foster cooperation among the DoD, other Federal agencies, and responsible civilian authorities when addressing allegations of extrafamilial child sexual abuse in DoD-sanctioned activities.

(e) Promote timely and comprehensive reporting of all incidents covered by this part.

(f) As appropriate, actively seek prosecution of alleged perpetrators to the fullest extent of the law.

(g) Ensure that personally identifiable information, to include protected health information collected, used, and released by covered entities in the execution of this part is protected as required by DoD 6025.18–R, ''DoD Health Information Privacy Regulation'' (see *http://www.dtic.mil/whs/directives/ corres/pdf/602518r.pdf*) and 5 U.S.C. 552a as implemented in the Department of Defense by 32 CFR part 310.

§ 60.5 Responsibilities.

(a) The Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MC&FP)), under the authority, direction, and control of the Assistant Secretary of Defense for Readiness and Force Management, shall:

(1) Monitor compliance with this part.

(2) Train, maintain, and support a team of full-time or permanent part-time federal officers or employees from various disciplines to comprise the FACAT and respond to child sexual abuse in DoD-sanctioned activities.

(3) Develop and coordinate criteria for determining the appropriate professional disciplines, support staff, and the required capabilities of FACAT members.

(4) Ensure that policies and guidelines on activation and use of the FACAT are shared and coordinated with the DoD Components.

(5) Program, budget, and allocate funds for the FACAT.

(6) Appoint the chief of the FACAT and team members, and provide required logistical support when the FACAT is deployed.

(7) Coordinate the management and interaction of this effort with other Federal and civilian agencies as necessary.

(8) Foster general awareness of FACAT goals and responsibilities.

(b) The Secretaries of the Military Departments shall:

(1) Ensure compliance with this part throughout their respective Departments.

(2) Establish departmental procedures to implement with this part.

(3) Designate nominees for the FACAT upon request and ensure replacements are nominated when vacancies are indicated.

(4) Ensure that commanders and staff are aware of the availability and proper use of the FACAT and the procedures for requesting a FACAT to assist in addressing extrafamilial child sexual abuse allegations covered by this part.

(5) Encourage timely and comprehensive reporting in accordance with this part.

§ 60.6 Procedures.

(a) *Reporting requirements.* Any person with a reasonable belief that an incident of child abuse has occurred in a DoD-sanctioned activity must report it to:

(1) The appropriate civilian agency in accordance with 42 U.S.C. 13031 and 28 CFR 81.1–81.5.

(2) The installation FAP as required by DoD Directive 6400.1.

(b) *Notification of suspected abuse*—(1) *Physical or emotional abuse or neglect.* If a report of suspected child physical abuse, emotional abuse, or neglect in a DoD-sanctioned activity is made to the FAP, the FAPM shall:

(i) Notify the appropriate military or civilian law enforcement agency, or multiple law enforcement agencies as appropriate.

(ii) Contact the appropriate civilian child protective services agency, if any, to request assistance.

(2) *Sexual abuse.* If a report of suspected child sexual abuse in a DoD-sanctioned activity is made to the FAP, the FAPM, in addition to the procedures noted in paragraph (b)(1) of this section, shall:

(i) Immediately notify the servicing MCIO and civilian law enforcement as appropriate.

(ii) Forward the report DD Form 2951, ''Initial Report of Suspected Child Sexual Abuse in DoD Operated or Sponsored Activities,'' required by 10 U.S.C. 1794 through DoD Component FAP channels to the DASD(MC&FP) within 72 hours.

(iii) Consult with the person in charge of the DoD-sanctioned activity and the appropriate law enforcement agency to estimate the number of potential victims and determine whether an installation response team may be appropriate to address the investigative, medical, psychological, and public affairs issues that may arise.

(iv) Notify the installation commander of the allegation and recommend whether an installation response team may be appropriate to assess the current situation and coordinate the installation's response to the incidents.

(v) Submit a written follow-up report using DD Form 2952, ''Closeout Report of Suspected Child Sexual Abuse in DoD Operated or Sponsored Activities,'' through DoD Component channels regarding all allegations of child sexual abuse to the DASD(MC&FP) when:

(A) There have been significant changes in the status of the case;

(B) There are more than five potential victims;

(C) The sponsors of the victims are from different Military Services or DoD Components;

(D) There is increased community sensitivity to the allegation; or

(E) The DASD(MC&FP) has requested a follow-up report.

(c) *Requesting a FACAT.* An installation commander may request a FACAT through appropriate DoD Component channels from the DASD(MC&FP) when alleged child sexual abuse by a care provider in a DoD-sanctioned-activity has been reported and at least one of the following apply:

(1) Additional personnel are needed to:

(i) Fully investigate a report of child sexual abuse by a care provider or employee in a DoD-sanctioned activity;

(ii) Assess the needs of the child victims and their families; or

(iii) Provide supportive treatment to the child victims and their families.

(2) The victims are from different Military Services or DoD Components, or there are multiple care providers who are the subjects of the report from different Military Services or DoD Components.

(3) Significant issues in responding to the allegations have arisen between the Military Services or DoD Components and other Federal agencies or civilian authorities.

(4) The situation has potential for widespread public interest that could negatively impact performance of the DoD mission.

(d) *Deployment of a FACAT.* (1) The DASD(MC&FP) shall deploy a FACAT at the request of a DoD Component.

(2) The DASD(MC&FP) may deploy a FACAT at the request of the Head of the DoD Component without a request from the installation commander. Such circumstances include a case where:

(i) The victims are from different Military Services or DoD Components, or there are multiple care providers

who are the subjects of the report from different Military Services or DoD Components;

(ii) Significant issues in responding to the allegations have arisen between the Military Services or DoD Components and other Federal agencies or civilian authorities; or

(iii) The situation has potential for widespread public interest that could negatively impact performance of the DoD mission.

(3) The DASD(MC&FP) shall configure the FACAT based on the information and recommendations of the requestor, the installation FAPM, and the FAPD of the DoD Component.

(4) The DASD(MC&FP) shall:

(i) Request the FAPDs to identify several individuals from the FACAT roster who are available for deployment.

(ii) Request, through the appropriate channels of the DoD Component, that the individuals' supervisors release them from normal duty positions to serve on temporary duty with the deploying FACAT.

(5) The DASD(MC&FP) shall provide fund citations to the FACAT members for their travel orders and per diem and shall provide information regarding travel arrangements. The FACAT members shall be responsible for preparing travel orders and making travel arrangements.

(6) FACAT members who are subject to DoD Instruction 6025.13, ''Medical Quality Assurance (MQA) and Clinical Quality Management in the Military Health System (MHS)'' (see *http://www.dtic.mil/whs/directives/corres/pdf/602513p.pdf*) shall be responsible for arranging temporary clinical privileges in accordance with DoD 6025.13–R, ''Military Health System (MHS) Clinical Quality Assurance (CQA) Program Regulation'' (see *http://www.dtic.mil/whs/directives/corres/pdf/602513r.pdf*) at the installation to which they shall be deployed.

(e) *FACAT tasks.* The FACAT shall meet with the installation's commanding officer, the MCIO, or designated response team to assess the current situation and assist in coordinating the installation's response to the incidents. Depending on the composition of the team, such tasks may include:

(1) Investigating the allegations.

(2) Conducting medical and mental health assessment of the victims and their families.

(3) Developing and implementing plans to provide appropriate treatment and support for the victims and their families and for the non-abusing staff of the DoD-sanctioned activity.

(4) Coordinating with local officials to manage public affairs tasks.

(f) *Reports of FACAT activities.* The FACAT chief shall prepare three types of reports:

(1) Daily briefs for the installation commander or designee.

(2) Periodic updates to the FAPD of the DoD Component and to the DASD(MC&FP).

(3) An after-action brief for the installation commander briefed at the completion of the deployment and transmitted to the DASD(MC&FP) and the FAPD of the DoD Component.

PART 61—FAMILY ADVOCACY PROGRAM (FAP)

Subpart A—Family Advocacy Program (FAP)

Sec.

61.1 Purpose.
61.2 Applicability.
61.3 Definitions.
61.4 Policy.
61.5 Responsibilities.
61.6 Procedures.

Subpart B—FAP Standards

61.7 Purpose.
61.8 Applicability.
61.9 Definitions.
61.10 Policy.
61.11 Responsibilities.
61.12 Procedures.

Subparts C–D [Reserved]

Subpart E—Guidelines for Clinical Intervention for Persons Reported as Domestic Abusers

61.25 Purpose.
61.26 Applicability.
61.27 Definitions.
61.28 Policy.
61.29 Responsibilities.
61.30 Procedures.

Subpart A—Family Advocacy Program (FAP)

AUTHORITY: 5 U.S.C. 552a; 10 U.S.C. 1058(b), 1783, 1787, and 1794; Public Law 103–337, Section 534(d)(2).

SOURCE: 80 FR 11780, Mar. 4, 2015, unless otherwise noted.

§61.1 Purpose.

This part is composed of several subparts, each containing its own purpose. This subpart establishes policy and assigns responsibilities for addressing child abuse and domestic abuse through the FAP.

§61.2 Applicability.

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

§61.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purposes of this subpart.

Alleged abuser. An individual reported to the FAP for allegedly having committed child abuse or domestic abuse.

Child. An unmarried person under 18 years of age for whom a parent, guardian, foster parent, caregiver, employee of a residential facility, or any staff person providing out-of-home care is legally responsible. The term means a biological child, adopted child, stepchild, foster child, or ward. The term also includes a sponsor's family member (except the sponsor's spouse) of any age who is incapable of self-support because of a mental or physical incapacity, and for whom treatment in a DoD medical treatment program is authorized.

Child abuse. The physical or sexual abuse, emotional abuse, or neglect of a child by a parent, guardian, foster parent, or by a caregiver, whether the caregiver is intrafamilial or extrafamilial, under circumstances indicating the child's welfare is harmed or threatened. Such acts by a sibling, other family member, or other person shall be deemed to be child abuse only when the individual is providing care under express or implied agreement with the parent, guardian, or foster parent.

DoD-sanctioned activity. A DoD-sanctioned activity is defined as a U.S. Government activity or a nongovernmental activity authorized by appropriate DoD officials to perform child care or supervisory functions on DoD controlled property. The care and supervision of children may be either its primary mission or incidental in carrying out another mission (*e.g.*, medical care). Examples include Child Development Centers, Department of Defense Dependents Schools, or Youth Activities, School Age/Latch Key Programs, Family Day Care providers, and child care activities that may be conducted as a part of a chaplain's program or as part of another Morale, Welfare, or Recreation Program.

Domestic abuse. Domestic violence or a pattern of behavior resulting in emotional/psychological abuse, economic control, and/or interference with personal liberty that is directed toward a person who is:

(1) A current or former spouse.

(2) A person with whom the abuser shares a child in common; or

(3) A current or former intimate partner with whom the abuser shares or has shared a common domicile.

Domestic violence. An offense under the United States Code, the Uniform Code of Military Justice (UCMJ), or State law involving the use, attempted use, or threatened use of force or violence against a person, or a violation of a lawful order issued for the protection of a person who is:

(1) A current or former spouse.

(2) A person with whom the abuser shares a child in common; or

(3) A current or former intimate partner with whom the abuser shares or has shared a common domicile.

Family Advocacy Command Assistance Team (FACAT). A multidisciplinary team composed of specially trained and experienced individuals who are on-call to provide advice and assistance on

cases of child sexual abuse that involve DoD-sanctioned activities.

Family advocacy committee (FAC). The policy-making, coordinating, recommending, and overseeing body for the installation FAP.

FAP. A program designed to address prevention, identification, evaluation, treatment, rehabilitation, follow-up, and reporting of family violence. FAPs consist of coordinated efforts designed to prevent and intervene in cases of family distress, and to promote healthy family life.

Family Advocacy Program Manager (FAPM). An individual designated by a Secretary of a Military Department or the head of another DoD Component to manage, monitor, and coordinate the FAP at the headquarters level.

Incident determination committee (IDC). A multidisciplinary team of designated individuals working at the installation level, tasked with determining whether a report of domestic abuse or child abuse meets the relevant DoD criteria for entry into the Service FAP Central Registry as child abuse and domestic abuse incident. Formerly known as the Case Review Committee.

Incident status determination. The IDC determination of whether or not the reported incident meets the relevant criteria for alleged child abuse or domestic abuse for entry into the Service FAP central registry of child abuse and domestic abuse reports.

New Parent Support Program (NPSP). A standardized secondary prevention program under the FAP that delivers intensive, voluntary, strengths based home visitation services designed specifically for expectant parents and parents of children from birth to 3 years of age to reduce the risk of child abuse and neglect.

Restricted reporting. A process allowing an adult victim of domestic abuse, who is eligible to receive military medical treatment, including civilians and contractors who are eligible to receive military healthcare outside the Continental United States on a reimbursable basis, the option of reporting an incident of domestic abuse to a specified individual without initiating the investigative process or notification to the victim's or alleged offender's commander.

Unrestricted reporting. A process allowing a victim of domestic abuse to report an incident using current reporting channels, *e.g.* chain of command, law enforcement or criminal investigative organization, and FAP for clinical intervention.

§ 61.4 Policy.

It is DoD policy to:

(a) Promote public awareness and prevention of child abuse and domestic abuse.

(b) Provide adult victims of domestic abuse with the option of making restricted reports to domestic abuse victim advocates and to healthcare providers in accordance with DoD Instruction 6400.06, ''Domestic Abuse Involving DoD Military and Certain Affiliated Personnel'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/640006p.pdf*).

(c) Promote early identification; reporting options; and coordinated, comprehensive intervention, assessment, and support to:

(1) Victims of suspected child abuse, including victims of extra-familial child abuse.

(2) Victims of domestic abuse.

(d) Provide assessment, rehabilitation, and treatment, including comprehensive abuser intervention.

(e) Provide appropriate resource and referral information to persons who are not covered by this subpart, who are victims of alleged child abuse or domestic abuse.

(f) Cooperate with responsible federal and civilian authorities and organizations in efforts to address the problems to which this subpart applies.

(g) Ensure that personally identifiable information (PII) collected in the course of FAP activities is safeguarded to prevent any unauthorized use or disclosure and that the collection, use, and release of PII is in compliance with 5 U.S.C. 552a.

(h) Develop program standards (PSs) and critical procedures for the FAP that reflect a coordinated community risk management approach to child abuse and domestic abuse.

(i) Provide appropriate individualized and rehabilitative treatment that supplements administrative or disciplinary action, as appropriate, to persons reported to FAP as domestic abusers.

(j) Maintain a central child abuse and domestic abuse database to:

(1) Analyze the scope of child abuse and domestic abuse, types of abuse, and information about victims and alleged abusers to identify emerging trends, and develop changes in policy to address child abuse and domestic abuse.

(2) Support the requirements of DoD Instruction 1402.5, ''Criminal History Background Checks on Individuals in Child Care Services'' (available at *http://www.dtic.mil/whs/directives/ corres/pdf/140205p.pdf*).

(3) Support the response to public, congressional, and other government inquiries.

(4) Support budget requirements for child abuse and domestic abuse program funding.

§61.5 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) will:

(1) Collaborate with the DoD Component heads to establish programs and guidance to implement the FAP elements and procedures in §61.6 of this subpart.

(2) Program, budget, and allocate funds and other resources for FAP, and ensure that such funds are only used to implement the policies described in §61.6 of this subpart.

(b) Under the authority, direction, and control of the USD(P&R), the Assistant Secretary of Defense for Readiness and Force Management (ASD(R&FM)) or designee will review FAP instructions and policies prior to USD(P&R) signature.

(c) Under the authority, direction, and control of the USD(P&R) through the ASD(R&FM), the Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MC&FP)) will:

(1) Develop DoD-wide FAP policy, coordinate the management of FAP with other programs serving military families, collaborate with federal and State agencies addressing FAP issues, and serve on intra-governmental advisory committees that address FAP-related issues.

(2) Ensure that the information included in notifications of extra-familial child sexual abuse in DoD-sanctioned activities is retained for 1 month from the date of the initial report to determine whether a request for a FACAT in accordance with DoD Instruction 6400.03, ''Family Advocacy Command Assistance Team'' (available at *http://www.dtic.mil/whs/directives/ corres/pdf/640003p.pdf*) may be forthcoming.

(3) Monitor and evaluate compliance with this subpart.

(4) Review annual summaries of accreditation/inspection reviews submitted by the Military Departments.

(5) Convene an annual DoD Accreditation/Inspection Review Summit to review and respond to the findings and recommendations of the Military Departments' accreditation/inspection reviews.

(d) The Secretaries of the Military Departments will:

(1) Establish DoD Component policy and guidance on the development of FAPs, including case management and monitoring of the FAP consistent with 10 U.S.C. 1058(b), this subpart, and published FAP guidance, including DoD Instruction 6400.06 and DoD 6400.1–M, ''Family Advocacy Program Standards and Self-Assessment Tool'' (available at *http://www.dtic.mil/whs/directives/ corres/pdf/640001m.pdf*).

(2) Designate a FAPM to manage the FAP. The FAPM will have, at a minimum:

(i) A masters or doctoral level degree in the behavioral sciences from an accredited U.S. university or college.

(ii) The highest licensure in good standing by a State regulatory board in either social work, psychology, or marriage and family therapy that authorizes independent clinical practice.

(iii) 5 years of post-license experience in child abuse and domestic abuse.

(iv) 3 years of experience supervising licensed clinicians in a clinical program.

(3) Coordinate efforts and resources among all activities serving families to promote the optimal delivery of services and awareness of FAP services.

(4) Establish standardized criteria, consistent with DoD Instruction 6025.13, ''Medical Quality Assurance (MQA) and Clinical Quality Management in the Military Health System (MHS)'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/602513p.pdf*) and DoD 6025.13–R, ''Military Health System (MHS) Clinical Quality Assurance (CQA) Program'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/602513r.pdf*), for selecting and certifying FAP healthcare and social service personnel who provide clinical services to individuals and families. Such staff will be designated as healthcare providers who may receive restricted reports from victims of domestic abuse as set forth in DoD Instruction 6400.06.

(5) Establish a process for an annual summary of installation accreditation/inspection reviews of installation FAP.

(6) Ensure that installation commanders or Service-equivalent senior commanders or their designees:

(i) Appoint persons at the installation level to manage and implement the local FAPs, establish local FACs, and appoint the members of IDCs in accordance with DoD 6400.1–M and supporting guidance issued by the USD(P&R).

(ii) Ensure that the installation FAP meets the standards in DoD 6400.1–M.

(iii) Ensure that the installation FAP immediately reports allegations of a crime to the appropriate law enforcement authority.

(7) Notify the DASD(MC&FP) of any cases of extra-familial child sexual abuse in a DoD-sanctioned activity within 72 hours in accordance with the procedures in §61.6 of this subpart.

(8) Submit accurate quarterly child abuse and domestic abuse incident data from the DoD Component FAP central registry of child abuse and domestic abuse incidents to the Director of the Defense Manpower Data Center in accordance with DoD 6400.1–M–1, ''Manual for Child Maltreatment and Domestic Abuse Incident Reporting System'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/640001m1.pdf*).

(9) Submit reports of DoD-related fatalities known or suspected to have resulted from an act of domestic abuse; child abuse; or suicide related to an act of domestic abuse or child abuse on DD Form 2901, ''Child Abuse or Domestic Violence Related Fatality Notification,'' by fax to the number provided on the form in accordance with DoD Instruction 6400.06 or by other method as directed by the DASD(MC&FP). The DD Form 2901 can be found at *http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm*.

(10) Ensure that fatalities known or suspected to have resulted from acts of child abuse or domestic violence are reviewed annually in accordance with DoD Instruction 6400.06.

(11) Ensure the annual summary of accreditation/inspection reviews of installation FAPs are forwarded to OSD FAP as directed by DASD(MC&FP).

(12) Provide essential data and program information to the USD(P&R) to enable the monitoring and evaluation of compliance with this subpart in accordance with DoD 6400.1–M–1.

(13) Ensure that PII collected in the course of FAP activities is safeguarded to prevent any unauthorized use or disclosure and that the collection, use, and release of PII is in compliance with 5 U.S.C. 552a, also known as ''The Privacy Act of 1974,'' as implemented in the DoD by 32 CFR part 310).

§ 61.6 Procedures.

(a) *FAP Elements.* FAP requires prevention, education, and training efforts to make all personnel aware of the scope of child abuse and domestic abuse problems and to facilitate cooperative efforts. The FAP will include:

(1) *Prevention.* Efforts to prevent child abuse and domestic abuse, including public awareness, information and education about the problem in general, and the NPSP, in accordance with DoD Instruction 6400.05, specifically directed toward potential victims, offenders, non-offending family members, and mandated reporters of child abuse and neglect.

(2) *Direct Services.* Identification, treatment, counseling, rehabilitation, follow-up, and other services, directed toward the victims, their families, perpetrators of abuse, and their families. These services will be supplemented locally by:

(i) A multidisciplinary IDC established to assess incidents of alleged

abuse and make incident status determinations.

(ii) A clinical case staff meeting (CCSM) to make recommendations for treatment and case management.

(3) *Administration*. All services, logistical support, and equipment necessary to ensure the effective and efficient operation of the FAP, including:

(i) Developing local memorandums of understanding with civilian authorities for reporting cases, providing services, and defining responsibilities when responding to child abuse and domestic abuse.

(ii) Use of personal service contracts to accomplish program goals.

(iii) Preparation of reports, consisting of incidence data.

(4) *Evaluation*. Needs assessments, program evaluation, research, and similar activities to support the FAP.

(5) *Training*. All educational measures, services, supplies, or equipment used to prepare or maintain the skills of personnel working in the FAP.

(b) *Responding to FAP Incidents*. The USD(P&R) or designee will establish procedures for:

(1) Reporting and responding to suspected child abuse consistent with 10 U.S.C. 1787 and 1794, 42 U.S.C. 13031, and 28 CFR part 81.

(2) Providing victim advocacy services to victims of domestic abuse consistent with DoD Instruction 6400.06 and section 534(d)(2) of Public Law 103–337, ''National Defense Authorization Act for Fiscal Year 1995.''

(3) Responding to restricted and unrestricted reports of domestic abuse consistent with DoD Instruction 6400.06 and 10 U.S.C. 1058(b).

(4) Collection of FAP data into a central registry and analysis of such data in accordance with DoD 6400.1–M–1.

(5) Coordinating a comprehensive DoD response, including the FACAT, to allegations of extra-familial child sexual abuse in a DoD-sanctioned activity in accordance with DoD Instruction 6400.03 and 10 U.S.C. 1794.

(c) *Notification of Extra-Familial Child Sexual Abuse in DoD-Sanctioned Activities*. The names of the victim(s) and alleged abuser(s) will not be included in the notification. Notification will include:

(1) Name of the installation.

(2) Type of child care setting.

(3) Number of children alleged to be victims.

(4) Estimated number of potential child victims.

(5) Whether an installation response team is being convened to address the investigative, medical, and public affairs issues that may be encountered.

(6) Whether a request for the DASD(MC&FP) to deploy a FACAT in accordance with DoD Instruction 6400.03 is being considered.

Subpart B—FAP Standards

AUTHORITY: 5 U.S.C. 552a, 10 U.S.C. chapter 47, 42 U.S.C. 13031.

§61.7 Purpose.

(a) This part is composed of several subparts, each containing its own purpose. The purpose of the overall part is to implement policy, assign responsibilities, and provide procedures for addressing child abuse and domestic abuse in military communities.

(b) This subpart prescribes uniform program standards (PSs) for all installation FAPs.

§61.8 Applicability.

This subpart applies to OSD, the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the DoD (referred to collectively in this subpart as the ''DoD Components'').

§61.9 Definitions.

Unless otherwise noted, the following terms and their definitions are for the purposes of this subpart.

Alleged abuser. Defined in subpart A of this part.

Case. One or more reported incidents of suspected child abuse or domestic abuse pertaining to the same victim.

Clinical case staff meeting (CCSM). An installation FAP meeting of clinical service providers to assist the coordinated delivery of supportive services and clinical treatment in child abuse

and domestic abuse cases, as appropriate. They provide: clinical consultation directed to ongoing safety planning for the victim; the planning and delivery of supportive services, and clinical treatment, as appropriate, for the victim; the planning and delivery of rehabilitative treatment for the alleged abuser; and case management, including risk assessment and ongoing safety monitoring.

Child. Defined in subpart A of this part.

Child abuse. The physical or sexual abuse, emotional abuse, or neglect of a child by a parent, guardian, foster parent, or by a caregiver, whether the caregiver is intrafamilial or extrafamilial, under circumstances indicating the child's welfare is harmed or threatened. Such acts by a sibling, other family member, or other person shall be deemed to be child abuse only when the individual is providing care under express or implied agreement with the parent, guardian, or foster parent.

Clinical case management. The FAP process of providing or coordinating the provision of clinical services, as appropriate, to the victim, alleged abuser, and family member in each FAP child abuse and domestic abuse incident from entry into until exit from the FAP system. It includes identifying risk factors; safety planning; conducting and monitoring clinical case assessments; presentation to the Incident Determination Committee (IDC); developing and implementing treatment plans and services; completion and maintenance of forms, reports, and records; communication and coordination with relevant agencies and professionals on the case; case review and advocacy; case counseling with the individual victim, alleged abuser, and family member, as appropriate; other direct services to the victim, alleged abuser, and family members, as appropriate; and case transfer or closing.

Clinical intervention. A continuous risk management process that includes identifying risk factors, safety planning, initial clinical assessment, formulation of a clinical treatment plan, clinical treatment based on assessing readiness for and motivating behavioral change and life skills development, periodic assessment of behavior in the treatment setting, and monitoring behavior and periodic assessment of outside-of-treatment settings.

Domestic abuse. Domestic violence or a pattern of behavior resulting in emotional/psychological abuse, economic control, and/or interference with personal liberty that is directed toward a person who is:

(1) A current or former spouse.

(2) A person with whom the abuser shares a child in common; or

(3) A current or former intimate partner with whom the abuser shares or has shared a common domicile.

Domestic violence. An offense under the United States Code, the Uniform Code of Military Justice (UCMJ), or State law involving the use, attempted use, or threatened use of force or violence against a person, or a violation of a lawful order issued for the protection of a person who is:

(1) A current or former spouse.

(2) A person with whom the abuser shares a child in common; or

(3) A current or former intimate partner with whom the abuser shares or has shared a common domicile.

Family Advocacy Committee (FAC). Defined in subpart A of this part.

Family Advocacy Command Assistance Team (FACAT). Defined in subpart A of this part.

Family Advocacy Program (FAP). Defined in subpart A of this part.

High risk for violence. A level of risk describing families or individuals experiencing severe abuse or the potential for severe abuse, or offenders engaging in high risk behaviors such as making threats to cause grievous bodily harm, preventing victim access to communication devices, stalking, etc. Such cases require coordinated community safety planning that actively involves installation law enforcement, command, legal, and FAP.

Home visitation. A strategy for delivering services to parents in their homes to improve child and family functioning.

Home visitor. A person who provides FAP services to promote child and family functioning to parents in their homes.

IDC. Defined in subpart A of this part.

Installation. Any more or less permanent post, camp, station, base for the support or carrying on of military activities.

Installation Family Advocacy Program Manager (FAPM). The individual at the installation level designated by the installation commander in accordance with Service FAP headquarters implementing guidance to manage the FAP, supervise FAP staff, and coordinate all FAP activities. If the Service FAP headquarters implementing guidance assigns the responsibilities of the local FAPM between two individuals, the FAPM is the individual who has been assigned the responsibility for implementing the specific procedure.

NPSP. A standardized secondary prevention program under the FAP that delivers intensive, voluntary, strengths based home visitation services designed specifically for expectant parents and parents of children from birth to 3 years of age to reduce the risk of child abuse and neglect.

Non-DoD eligible extrafamilial caregiver. A caregiver who is not sponsored or sanctioned by the DoD. It includes nannies, temporary babysitters certified by the Red Cross, and temporary babysitters in the home, and other non-DoD eligible family members who provide care for or supervision of children.

Non-medical counseling. Short term, non-therapeutic counseling that is not appropriate for individuals needing clinical therapy. Non-medical counseling is supportive in nature and addresses general conditions of living, life skills, improving relationships at home and at work, stress management, adjustment issues (such as those related to returning from a deployment), marital problems, parenting, and grief and loss. This definition is not intended to limit the authority of the Military Departments to grant privileges to clinical providers modifying this scope of care consistent with current Military Department policy.

Out-of-home care. The responsibility of care for and/or supervision of a child in a setting outside the child's home by an individual placed in a caretaker role sanctioned by a Military Service or Defense Agency or authorized by the Service or Defense Agency as a provider of care, such as care in a child development center, school, recreation program, or family child care. part.

Primary managing authority (PMA). The installation FAP that has primary authority and responsibility for the management and incident status determination of reports of child abuse and unrestricted reports of domestic abuse.

Restricted reporting. Defined in subpart A of this part.

Risk management. The process of identifying risk factors associated with increased risk for child abuse or domestic abuse, and controlling those factors that can be controlled through collaborative partnerships with key military personnel and civilian agencies, including the active duty member's commander, law enforcement personnel, child protective services, and victim advocates. It includes the development and implementation of an intervention plan when significant risk of lethality or serious injury is present to reduce the likelihood of future incidents and to increase the victim's safety, continuous assessment of risk factors associated with the abuse, and prompt updating of the victim's safety plan, as needed.

Safety planning. A process whereby a victim advocate, working with a domestic abuse victim, creates a plan, tailored to that victim's needs, concerns, and situation, that will help increase the victim's safety and help the victim to prepare for, and potentially avoid, future violence.

Service FAP headquarters. The office designated by the Secretary of the Military Department to develop and issue Service FAP implementing guidance in accordance with DoD policy, manage the Service-level FAP, and provide oversight for Service FAP functions.

Unrestricted reporting. Defined in subpart A of this part.

Victim. A child or current or former spouse or intimate partner who is the subject of an alleged incident of child maltreatment or domestic abuse because he/she was allegedly maltreated by the alleged abuser.

Victim advocate. An employee of the Department of Defense, a civilian

working under contract for the Department of Defense, or a civilian providing services by means of a formal memorandum of understanding between a military installation and a local victim advocacy service agency, whose role is to provide safety planning services and comprehensive assistance and liaison to and for victims of domestic abuse, and to educate personnel on the installation regarding the most effective responses to domestic abuse on behalf of victims and at-risk family members. The advocate may also be a volunteer military member, a volunteer civilian employee of the Military Department, or staff assigned as collateral duty.

§ 61.10 Policy.

According to subpart A of this part, it is DoD policy to:

(a) Promote early identification; reporting; and coordinated, comprehensive intervention, assessment, and support to victims of child abuse and domestic abuse.

(b) Ensure that personally identifiable information (PII) collected in the course of FAP activities is safeguarded to prevent any unauthorized use or disclosure and that the collection, use, and release of PII is in compliance with 5 U.S.C. 552a.

§ 61.11 Responsibilities.

(a) Under the authority, direction, and control of the USD(P&R) through the Assistant Secretary of Defense for Readiness and Force Management, the Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MC&FP)):

(1) Monitors compliance with this subpart.

(2) Collaborates with the Secretaries of the Military Departments to develop policies and procedures for monitoring compliance with the PSs in § 61.12 of this subpart.

(3) Convenes an annual DoD Accreditation and Inspection Summit to review and respond to the findings and recommendations of the Military Departments' accreditation or inspection results.

(b) The Secretaries of the Military Departments:

(1) Develop Service-wide FAP policy, supplementary standards, and instructions to provide for unique requirements within their respective installation FAPs to implement the PSs in this subpart as appropriate.

(2) Require all installation personnel with responsibilities in this subpart receive appropriate training to implement the PSs in § 61.12 of this subpart.

(3) Conduct accreditation and inspection reviews outlined in § 61.12 of this subpart.

§ 61.12 Procedures.

(a) *Purposes of the standards*—(1) *Quality Assurance (QA) to address child abuse and domestic abuse.* The FAP PSs provide DoD and Service FAP headquarters QA guidelines for installation FAP-sponsored prevention and clinical intervention programs. Therefore, the PSs presented in this section and cross referenced in the Index of FAP Topics in the Appendix to § 61.12 represent the minimal necessary elements for effectively dealing with child abuse and domestic abuse in installation programs in the military community.

(2) *Minimum requirements for oversight, management, logistical support, procedures, and personnel requirements.* The PSs set forth minimum requirements for oversight, management, logistical support, procedures, and personnel requirements necessary to ensure all military personnel and their family members receive family advocacy services from the installation FAPs equal in quality to the best programs available to their civilian peers.

(3) *Measuring quality and effectiveness.* The PSs provide a basis for measuring the quality and effectiveness of each installation FAP and for systematically projecting fiscal and personnel resources needed to support worldwide DoD FAP efforts.

(b) *Installation response to child abuse and domestic abuse*—(1) *FAC*—(i) *PS 1: Establishment of the FAC.* The installation commander must establish an installation FAC and appoint a FAC chairperson in accordance with subpart A of this part and Service FAP headquarters implementing policies and guidance to serve as the policy-making, coordinating, and advisory body to address child abuse and domestic abuse at the installation.

(ii) *PS 2: Coordinated community response and risk management plan.* The FAC must develop and approve an annual plan for the coordinated community response and risk management of child abuse and domestic abuse, with specific objectives, strategies, and measurable outcomes.

The plan is based on a review of:

(A) The most recent installation needs assessment.

(B) Research-supported protective factors that promote and sustain healthy family relationships.

(C) Risk factors for child abuse and domestic abuse.

(D) The most recent prevention strategy to include primary, secondary, and tertiary interventions.

(E) Trends in the installation's risk management approach to high risk for violence, child abuse, and domestic abuse.

(F) The most recent accreditation review or DoD Component Inspector General inspection of the installation agencies represented on the FAC.

(G) The evaluation of the installation's coordinated community response to child abuse and domestic abuse.

(iii) *PS 3: Monitoring coordinated community response and risk management plan.* The FAC monitors the implementation of the coordinated community response and risk management plan. Such monitoring includes a review of:

(A) The development, signing, and implementation of formal memorandums of understanding (MOUs) among military activities and between military activities and civilian authorities and agencies to address child abuse and domestic abuse.

(B) Steps taken to address problems identified in the most recent accreditation review of the FAP and evaluation of the installation's coordinated community response and risk management approach.

(C) FAP recommended criteria to identify populations at higher risk to commit or experience child abuse and domestic abuse, the special needs of such populations, and appropriate actions to address those needs.

(D) Effectiveness of the installation coordinated community response and risk management approach in responding to high risk for violence, child abuse, and domestic abuse incidents.

(E) Implementation of the installation prevention strategy to include primary, secondary, and tertiary interventions.

(F) The annual report of fatality reviews that Service FAP headquarters fatality review teams conduct. The FAC should also review the Service FAP headquarters' recommended changes for the coordinated community response and risk management approach. The coordinated community response will focus on strengthening protective factors that promote and sustain healthy family relationships and reduce the risk factors for future child abuse and domestic abuse-related fatalities.

(2) *Coordinated Community Response*—(i) *PS 4: Roles, functions, and responsibilities.* The FAC must ensure that all installation agencies involved with the coordinated community response to child abuse and domestic abuse comply with the defined roles, functions, and responsibilities in DoD Instruction 6400.06 and the Service FAP headquarters implementing policies and guidance.

(ii) *PS 5: MOUs.* The FAC must verify that:

(A) Formal MOUs are established as appropriate with counterparts in the local civilian community to improve coordination on: Child abuse and domestic abuse investigations; emergency removal of children from homes; fatalities; arrests; prosecutions; and orders of protection involving military personnel.

(B) Installation agencies established MOUs setting forth the respective roles and functions of the installation and the appropriate federal, State, local, or foreign agencies or organizations (in accordance with status-of-forces agreements (SOFAs)) that provide:

(*1*) Child welfare services, including foster care, to ensure ongoing and active collaborative case management between the respective courts, child protective services, foster care agencies, and FAP.

(*2*) Medical examination and treatment.

(*3*) Mental health examination and treatment.

(*4*) Domestic abuse victim advocacy.

(*5*) Related social services, including State home visitation programs when appropriate.

(*6*) Safety shelter.

(iii) *PS 6: Collaboration between military installations.* The installation commander must require that installation agencies have collaborated with counterpart agencies on military installations in geographical proximity and on joint bases to ensure coordination and collaboration in providing child abuse and domestic abuse services to military families. Collaboration includes developing MOUs, as appropriate.

(iv) *PS 7: Domestic abuse victim advocacy services.* The installation FAC must establish 24 hour access to domestic abuse victim advocacy services through personal or telephone contact in accordance with DoD Instruction 6400.06 and Service FAP headquarters implementing policy and guidance for restricted reports of domestic abuse and the domestic abuse victim advocate services.

(v) *PS 8: Domestic abuse victim advocate personnel requirements.* The installation commander must require that qualified personnel provide domestic abuse victim advocacy services in accordance with DoD Instruction 6400.06 and Service FAP headquarters implementing policy and guidance.

(A) Such personnel may include federal employees, civilians working under contract for the DoD, civilians providing services through a formal MOU between the installation and a local civilian victim advocacy service agency, volunteers, or a combination of such personnel.

(B) All domestic abuse victim advocates are supervised in accordance with Service FAP headquarters policies.

(vi) *PS 9: 24-hour emergency response plan.* An installation 24-hour emergency response plan to child abuse and domestic abuse incidents must be established in accordance with DoD Instruction 6400.06 and the Service FAP headquarters implementing policies and guidance.

(vii) *PS 10: FAP Communication with military law enforcement.* The FAP and military law enforcement reciprocally provide to one another:

(A) Within 24 hours, FAP will communicate all reports of child abuse involving military personnel or their family members to the appropriate civilian child protective services agency or law enforcement agency in accordance with subpart A of this part, 42 U.S.C. 13031, and 28 CFR 81.2.

(B) Within 24 hours, FAP will communicate all unrestricted reports of domestic abuse involving military personnel and their current or former spouses or their current or former intimate partners to the appropriate civilian law enforcement agency in accordance with subpart A of this part, 42 U.S.C. 13031, and 28 CFR 81.2.

(viii) *PS 11: Protection of children.* The installation FAC in accordance with Service FAP headquarters implementing policies and guidance must set forth the procedures and criteria for:

(A) The safety of child victim(s) of abuse or other children in the household when they are in danger of continued abuse or life-threatening child neglect.

(B) Safe transit of such child(ren) to appropriate care. When the installation is located outside the continental United States, this includes procedures for transit to a location of appropriate care within the United States.

(C) Ongoing collaborative case management between FAP, relevant courts, and child welfare agencies when military children are placed in civilian foster care.

(D) Notification of the affected Service member's command when a dependent child has been taken into custody or foster care by local or State courts, or child welfare or protection agencies.

(3) *Risk Management*—(i) *PS 12: PMA.* When an installation FAP receives a report of a case of child abuse or domestic abuse in which the victim is at a different location than the abuser, PMA for the case must be:

(A) In child abuse cases:

(*1*) The sponsor's installation when the alleged abuser is the sponsor; a non-sponsor DoD-eligible family member; or a non-sponsor, status unknown.

(*2*) The alleged abuser's installation when the alleged abuser is a non-sponsor active duty Service member; a non-sponsor, DoD-eligible extrafamilial

caregiver; or a DoD-sponsored out-of-home care provider.

(*3*) The victim's installation when the alleged abuser is a non-DoD-eligible extrafamilial caregiver.

(B) In domestic abuse cases:

(*1*) The alleged abuser's installation when both the alleged abuser and the victim are active duty Service members.

(*2*) The alleged abuser's installation when the alleged abuser is the only sponsor.

(*3*) The victim's installation when the victim is the only sponsor.

(*4*) The installation FAP who received the initial referral when both parties are alleged abusers in bi-directional domestic abuse involving dual military spouses or intimate partners.

(ii) *PS 13: Risk management approach*—(A) All installation agencies involved with the installation's coordinated community risk management approach to child abuse and domestic abuse must comply with their defined roles, functions, and responsibilities in accordance with 42 U.S.C. 13031 and 28 CFR 81.2 and Service FAP headquarters implementing policies and guidance.

(B) When victim(s) and abuser(s) are assigned to different servicing FAPs or are from different Services, the PMA is assigned according to PS 12 (paragraph (b)(3)(i) of this section), and both serving FAP offices and Services are kept informed of the status of the case, regardless of who has PMA.

(iii) *PS 14: Risk assessments*. FAP conducts risk assessments of alleged abusers, victims, and other family members to assess the risk of re-abuse, and communicate any increased levels of risk to appropriate agencies for action, as appropriate. Risk assessments are conducted:

(A) At least quarterly on all open FAP cases.

(B) Monthly on FAP cases assessed as high risk and those involving court involved children placed in out-of-home care, child sexual abuse, and chronic child neglect.

(C) Within 30 days of any change since the last risk assessment that presents increased risk to the victim or warrants additional safety planning.

(iv) *PS 15: Disclosure of information in risk assessments*. Protected information collected during FAP referrals, intake, and risk assessments is only disclosed in accordance with DoD 6025.18–R, ''DoD Health Information Privacy Regulation'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf*) when applicable, 32 CFR part 310, and the Service FAP headquarters implementing policies and guidance.

(v) *PS 16: Risk management and deployment*. Procedures are established to manage child abuse and domestic abuse incidents that occur during the deployment cycle of a Service member, in accordance with subpart A of this part and DoD Instruction 6400.06, and Service FAP headquarters implementing policies and guidance, so that when an alleged abuser Service member in an active child abuse or domestic abuse case is deployed:

(A) The forward command notifies the home station command when the deployed Service member will return to the home station command.

(B) The home station command implements procedures to reduce the risk of subsequent child abuse and domestic abuse during the reintegration of the Service member into the FAP case management process.

(4) *IDC*—(i) *PS 17: IDC established*. An installation IDC must be established to review reports of child abuse and unrestricted reports of domestic abuse.

(ii) *PS 18: IDC operations*. The IDC reviews reports of child abuse and unrestricted reports of domestic abuse to determine whether the reports meet the criteria for entry into the Service FAP headquarters central registry of child abuse and domestic abuse incidents in accordance with subpart A of this part and Service FAP headquarters implementing policies and guidance.

(iii) *PS 19: Responsibility for training FAC and IDC members*. All FAC and IDC members must receive:

(A) Training on their roles and responsibilities before assuming their positions on their respective teams.

(B) Periodic information and training on DoD policies and Service FAP headquarters policies and guidance.

(iv) *PS 20: IDC QA*. An IDC QA process must be established for monitoring

and QA review of IDC decisions in accordance with Service FAP headquarters implementing policy and guidance.

(c) *Organization and management of the FAP*—(1) *General organization of the FAP*—(i) *PS 21: Establishment of the FAP*. The installation commander must establish a FAP to address child abuse and domestic abuse in accordance with DoD policy and Service FAP headquarters implementing policies and guidance.

(ii) *PS 22: Operations policy*. The installation FAC must ensure coordination among the following key agencies interacting with the FAP in accordance with subpart A of this part and Service FAP headquarters implementing policies and guidance:

(A) Family center(s).

(B) Substance abuse program(s).

(C) Sexual assault and prevention response programs.

(D) Child and youth program(s).

(E) Program(s) that serve families with special needs.

(F) Medical treatment facility, including:

(*1*) Mental health and behavioral health personnel.

(*2*) Social services personnel.

(*3*) Dental personnel.

(G) Law enforcement.

(H) Criminal investigative organization detachment.

(I) Staff judge advocate or servicing legal office.

(J) Chaplain(s).

(K) Department of Defense Education Activity (DoDEA) school personnel.

(L) Military housing personnel.

(M) Transportation office personnel.

(iii) *PS 23: Appointment of an installation FAPM*. The installation commander must appoint in writing an installation FAPM to implement and manage the FAP. The FAPM must direct the development, oversight, coordination, administration, and evaluation of the installation FAP in accordance with subpart A of this part and Service FAP headquarters implementing policy and guidance.

(iv) *PS 24: Funding*. Funds received for child abuse and domestic abuse prevention and treatment activities must be programmed and allocated in accordance with the DoD and Service FAP headquarters implementing policies and guidance, and the plan developed under PS 3, described in paragraph (b)(1)(ii) of this section.

(A) Funds that OSD provides for the FAP must be used in direct support of the prevention and intervention for domestic abuse and child maltreatment; including management, staffing, domestic abuse victim advocate services, public awareness, prevention, training, intensive risk-focused secondary prevention services, intervention, record keeping, and evaluation as set forth in this subpart.

(B) Funds that OSD provides for the NPSP must be used only for secondary prevention activities to support the screening, assessment, and provision of home visitation services to prevent child abuse and neglect in vulnerable families in accordance with DoD Instruction 6400.05.

(v) *PS 25: Other resources*. FAP services must be housed and equipped in a manner suitable to the delivery of services, including but not limited to:

(A) Adequate telephones.

(B) Office automation equipment.

(C) Handicap accessible.

(D) Access to emergency transport.

(E) Private offices and rooms available for interviewing and counseling victims, alleged abusers, and other family members in a safe and confidential setting.

(F) Appropriate equipment for 24/7 accessibility.

(2) *FAP personnel*—(i) *PS 26: Personnel requirements*. The installation commander is responsible for ensuring there are a sufficient number of qualified FAP personnel in accordance with subpart A of this part, DoD Instruction 6400.06, and DoD Instruction 6400.05, and Service FAP headquarters implementing policy and guidance. FAP personnel may consist of military personnel on active duty, employees of the federal civil service, contractors, volunteers, or a combination of such personnel.

(ii) *PS 27: Criminal history record check*. All FAP personnel whose duties involve services to children require a criminal history record check in accordance with DoD Instruction 1402.5, ''Criminal History Background Checks on Individuals in Child Care Services''

(available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 140205p.pdf*).

(iii) *PS 28: Clinical staff qualifications.* All FAP personnel who conduct clinical assessment of or provide clinical treatment to victims of child abuse or domestic abuse, alleged abusers, or their family members must have all of the following minimum qualifications:

(A) A Master in Social Work, Master of Science, Master of Arts, or doctoral-level degree in human service or mental health from an accredited university or college.

(B) The highest licensure in a State or clinical licensure in good standing in a State that authorizes independent clinical practice.

(C) Two years of experience working in the field of child abuse and domestic abuse.

(D) Clinical privileges or credentialing in accordance with Service FAP headquarters policies.

(iv) *PS 29: Prevention and Education Staff Qualifications.* All FAP personnel who provide prevention and education services must have the following minimum qualifications:

(A) A Bachelor's degree from an accredited university or college in any of the following disciplines:

(*1*) Social work.

(*2*) Psychology.

(*3*) Marriage, family, and child counseling.

(*4*) Counseling or behavioral science.

(*5*) Nursing.

(*6*) Education.

(*7*) Community health or public health.

(B) Two years of experience in a family and children's services public agency or family and children's services community organization, 1 year of which is in prevention, intervention, or treatment of child abuse and domestic abuse.

(C) Supervision by a qualified staff person in accordance with the Service FAP headquarters policies.

(v) *PS 30: Victim advocate staff qualifications.* All FAP personnel who provide victim advocacy services must have these minimum qualifications:

(A) A Bachelor's degree from an accredited university or college in any of the following disciplines:

(*1*) Social work.

(*2*) Psychology.

(*3*) Marriage, family, and child counseling.

(*4*) Counseling or behavioral science.

(*5*) Criminal justice.

(B) Two years of experience in assisting and providing advocacy services to victims of domestic abuse or sexual assault.

(C) Supervision by a Master's level social worker.

(vi) *PS 31: NPSP staff qualifications.* All FAP personnel who provide services in the NPSP must have qualifications in accordance with DoD Instruction 6400.05.

(3) *Safety and home visits*—(i) *PS 32: Internal and external duress system established.* The installation FAPM must establish a system to identify and manage potentially violent clients and to promote the safety and reduce the risk of harm to staff working with clients and to others inside the office and when conducting official business outside the office.

(ii) *PS 33: Protection of home visitors.* The installation FAPM must:

(A) Issue written FAP procedures to ensure minimal risk and maximize personal safety when FAP or NPSP staff perform home visits.

(B) Require that all FAP and NPSP personnel who conduct home visits are trained in FAP procedures to ensure minimal risk and maximize personal safety before conducting a home visit.

(iii) *PS 34: Home visitors' reporting of known or suspected child abuse and domestic abuse.* All FAP and NPSP personnel who conduct home visits are to report all known or suspected child abuse in accordance with subpart A of this part and 42 U.S.C. 13031, and domestic abuse in accordance with DoD Instruction 6400.06 and the Service FAP headquarters implementing policy and guidance.

(4) *Management information system*—(i) *PS 35: Management information system policy.* The installation FAPM must establish procedures for the collection, use, analysis, reporting, and distributing of FAP information in accordance with subpart A of this part, DoD 6025.18–R, 32 CFR part 310, DoD 6400.1–M–1 and Service FAP headquarters implementing policy. These procedures ensure:

(A) Accurate and comparable statistics needed for planning, implementing, assessing, and evaluating the installation coordinated community response to child abuse and domestic abuse.

(B) Identifying unmet needs or gaps in services.

(C) Determining installation FAP resource needs and budget.

(D) Developing installation FAP guidance.

(E) Administering the installation FAP.

(F) Evaluating installation FAP activities.

(ii) *PS 36: Reporting of statistics*. The FAP reports statistics annually to the Service FAP headquarters in accordance with subpart A of this part and the Service FAP headquarters implementing policies and guidance, including the accurate and timely reporting of:

(A) *FAP metrics*—(*1*) The number of new commanders at the installation whom the Service FAP headquarters determined must receive the FAP briefing, and the number of new commanders who received the FAP briefing within 90 days of taking command.

(*2*) The number of senior noncommissioned officers (NCOs) in pay grades E–7 and higher whom the Service FAP headquarters determined must receive the FAP briefing annually, and the number of senior NCOs who received the FAP briefing within the year.

(B) *NPSP metric*—(*1*) The number of high risk families who began receiving NPSP intensive services (two contacts per month) for at least 6 months in the previous fiscal year.

(*2*) The number of these families with no reports of child maltreatment incidents that met criteria for abuse for entry into the central registry (formerly, ''substantiated reports'') within 12 months after their NPSP services ended, in accordance with DoD Instruction 6400.05.

(C) *Domestic abuse treatment metric*—(*1*) The number of allegedly abusive spouses in incidents that met FAP criteria for domestic abuse who began receiving and successfully completed FAP clinical treatment services during the previous fiscal year.

(*2*) The number of these spouses who were not reported as allegedly abusive in any domestic abuse incidents that met FAP criteria within 12 months after FAP clinical services ended.

(D) *Domestic abuse victim advocacy metrics*. The number of domestic abuse victims:

(*1*) Who receive domestic abuse victim advocacy services, and of those, the respective totals of domestic abuse victims who receive such services from domestic abuse victim advocates or from FAP clinical staff.

(*2*) Who initially make restricted reports to domestic abuse victim advocates and the total of domestic abuse victims who initially make restricted reports to FAP clinical staff, and of each of those, the total of domestic abuse victims who report being sexually assaulted.

(*3*) Whose initially restricted reports to domestic abuse victim advocates became unrestricted reports, and the total of domestic abuse victims whose initially restricted reports to FAP clinical staff became unrestricted reports.

(*4*) Initially making unrestricted reports to domestic abuse victim advocates and making unrestricted reports to FAP clinical staff and, of each of those, the total of domestic abuse victims who report being sexually assaulted.

(d) *Public awareness, prevention, NPSP, and training*—(1) *Public awareness activities*—(i) *PS 37: Implementation of public awareness activities in the coordinated community response and risk management plan*. The FAP public awareness activities highlight community strengths; promote FAP core concepts and messages; advertise specific services; use appropriate available techniques to reach out to the military community, especially to military families who reside outside of the military installation; and are customized to the local population and its needs.

(ii) *PS 38: Collaboration to increase public awareness of child abuse and domestic abuse*. The FAP partners and collaborates with other military and civilian organizations to conduct public awareness activities.

(iii) *PS 39: Components of public awareness activities*. The installation public

awareness activities promote community awareness of:

(A) Protective factors that promote and sustain healthy parent/child relationships.

(*1*) The importance of nurturing and attachment in the development of young children.

(*2*) Infant, childhood, and teen development.

(*3*) Programs, strategies, and opportunities to build parental resilience.

(*4*) Opportunities for social connections and mutual support.

(*5*) Programs and strategies to facilitate children's social and emotional development.

(*6*) Information about access to community resources in times of need.

(B) The dynamics of risk factors for different types of child abuse and domestic abuse, including information for teenage family members on teen dating violence.

(C) Developmentally appropriate supervision of children.

(D) Creating safe sleep environments for infants.

(E) How incidents of suspected child abuse should be reported in accordance with subpart A of this part, 42 U.S.C. 13031, 28 CFR 81.2, and DoD Instruction 6400.03, ''Family Advocacy Command Assistance Team'' (available at *http://www.dtic.mil/whs/ directives/corres/ pdf/ 640003p.pdf*) and the Service FAP headquarters implementing policy and guidance.

(F) The availability of domestic abuse victim advocates.

(G) Hotlines and crisis lines that provide 24/7 support to families in crisis.

(H) How victims of domestic abuse may make restricted reports of incidents of domestic abuse in accordance with DoD Instruction 6400.06.

(I) The availability of FAP clinical assessment and treatment.

(J) The availability of NPSP home visitation services.

(K) The availability of transitional compensation for victims of child abuse and domestic abuse in accordance with DoD Instruction 1342.24, ''Transitional Compensation for Abused Dependents'' (available at *http://www.dtic.mil/whs/ directives/corres/ pdf/ 134224p.pdf*) and Service FAP headquarters implementing policy and guidance.

(2) *Prevention activities*—(i) *PS 40: Implementation of prevention activities in the coordinated community response and risk management plan*. The FAP implements coordinated child abuse and domestic abuse primary and secondary prevention activities identified in the annual plan.

(ii) *PS 41: Collaboration for prevention of child abuse and domestic abuse*. The FAP collaborates with other military and civilian organizations to implement primary and secondary child abuse and domestic abuse prevention programs and services that are available on a voluntary basis to all persons eligible for services in a military medical treatment facility.

(iii) *PS 42: Primary prevention activities*. Primary prevention activities include, but are not limited to:

(A) Information, classes, and nonmedical counseling as defined in §61.3 to assist Service members and their family members in strengthening their interpersonal relationships and marriages, in building their parenting skills, and in adapting successfully to military life.

(B) Proactive outreach to identify and engage families during pre-deployment, deployment, and reintegration to decrease the negative effects of deployment and other military operations on parenting and family dynamics.

(C) Family strengthening programs and activities that facilitate social connections and mutual support, link families to services and opportunities for growth, promote children's social and emotional development, promote safe, stable, and nurturing relationships, and encourage parental involvement.

(iv) *PS 43: Identification of populations for secondary prevention activities*. The FAP identifies populations at higher risk for child abuse or domestic abuse from a review of:

(A) Relevant research findings.

(B) One or more relevant needs assessments in the locality.

(C) Data from unit deployments and returns from deployment.

(D) Data of expectant parents and parents of children 3 years of age or younger.

(E) Lessons learned from Service FAP headquarters and local fatality reviews.

(F) Feedback from the FAC, the IDC, and the command.

(v) *PS 44: Secondary prevention activities*. The FAP implements secondary prevention activities that are results-oriented and evidence-supported, stress the positive benefits of seeking help, promote available resources to build and sustain protective factors for healthy family relationships, and reduce risk factors for child abuse or domestic abuse. Such activities include, but are not limited to:

(A) Educational classes and counseling to assist Service members and their family members with troubled interpersonal relationships and marriages in improving their interpersonal relationships and marriages.

(B) The NPSP, in accordance with DoD Instruction 6400.05 and Service FAP headquarters implementing policy and guidance.

(C) Educational classes and counseling to help improve the parenting skills of Service members and their family members who experience parenting problems.

(D) Health care screening for domestic abuse.

(E) Referrals to essential services, supports, and resources when needed.

(3) *NPSP*—(i) *PS 45: Referrals to NPSP*. The installation FAPM ensures that expectant parents and parents with children ages 0–3 years may self-refer to the NPSP or be encouraged to participate by a health care provider, the commander of an active duty Service member who is a parent or expectant parent, staff of a family support program, or community professionals.

(ii) *PS 46: Informed Consent for NPSP*. The FAPM ensures that parents who ask to participate in the NPSP are provided informed consent in accordance with subpart A of this part and DoD Instruction 6400.05 and Service FAP headquarters implementing policy and guidance to be:

(A) Voluntarily screened for factors that may place them at risk for child abuse and domestic abuse.

(B) Further assessed using standardized and more in-depth measurements if the screening indicates potential for risk.

(C) Receive home visits and additional NPSP services as appropriate.

(D) Assessed for risk on a continuing basis.

(iii) *PS 47: Eligibility for NPSP*. Pending funding and staffing capabilities, the installation FAPM ensures that qualified NPSP personnel offer intensive home visiting services on a voluntary basis to expectant parents and parents with children ages 0–3 years who:

(A) Are eligible to receive services in a military medical treatment facility.

(B) Have been assessed by NPSP staff as:

(*1*) At-risk for child abuse or domestic abuse.

(*2*) Displaying some indicators of high risk for child abuse or domestic abuse, but whose overall assessment does not place them in the at-risk category.

(*3*) Having been reported to FAP for an incident of abuse of a child age 0–3 years in their care who have previously received NPSP services.

(iv) *PS 48: Review of NPSP screening*. Results of NPSP screening are reviewed within 3 business days of completion. If the screening indicates potential for risk, parents are invited to participate in further assessment by a NPSP home visitor using standardized and more in-depth measurements.

(v) *PS 49: NPSP services*. The NPSP offers expectant parents and parents with children ages 0–3, who are eligible for the NPSP, access to intensive home visiting services that:

(A) Are sensitive to cultural attitudes and practices, to include the need for interpreter or translation services.

(B) Are based on a comprehensive assessment of research-based protective and risk factors.

(C) Emphasize developmentally appropriate parenting skills that build on the strengths of the parent(s).

(D) Support the dual roles of the parent(s) as Service member(s) and parent(s).

(E) Promote the involvement of both parents when applicable.

(F) Decrease any negative effects of deployment and other military operations on parenting.

(G) Provide education to parent(s) on how to adapt to parenthood, children's developmental milestones, age-appropriate expectations for their child's development, parent-child communication skills, parenting skills, and effective discipline techniques.

(H) Empower parents to seek support and take steps to build proactive coping strategies in all domains of family life.

(I) Provide referral to additional community resources to meet identified needs.

(vi) *PS 50: NPSP protocol.* The installation FAPM ensures that NPSP personnel implement the Service FAP headquarters protocol for NPSP services, including the NPSP intervention plan with clearly measurable goals, based on needs identified by the standard screening instrument, assessment tools, the NPSP staff member's clinical assessment, and active input from the family.

(vii) *PS 51: Frequency of NPSP home visits.* NPSP personnel exercise professional judgment in determining the frequency of home visits based on the assessment of the family, but make a minimum of two home visits to each family per month. If at least two home visits are not provided to a high risk family enrolled in the program, NPSP personnel will document what circumstance(s) occurred to preclude twice monthly home visits and what services/contacts were provided instead.

(viii) *PS 52: Continuing NPSP risk assessment.* The installation FAPM ensures that NPSP personnel assess risk and protective factors impacting parents receiving NPSP home visitation services on an ongoing basis to continuously monitor progress toward intervention goals.

(ix) *PS 53: Opening, transferring, or closing NPSP cases.* The installation FAPM ensures that NPSP cases are opened, transferred, or closed in accordance with Service FAP headquarters policy and guidance.

(x) *PS 54: Disclosure of information in NPSP cases.* Information gathered during NPSP screening, clinical assessments, and in the provision of supportive services or treatment that is protected from disclosure under 5 U.S.C. 552a, DoD 6025.18–R, and 32 CFR part 310 is only disclosed in accordance with 5 U.S.C. 552a, DoD 6025.18–R, 32 CFR part 310, and the Service FAP headquarters implementing policies and guidance.

(4) *Training*—(i) *PS 55: Implementation of training requirements.* The FAP implements coordinated training activities for commanders, senior enlisted advisors, Service members, and their family members, DoD civilians, and contractors.

(ii) *PS 56: Training for commanders and senior enlisted advisors.* The installation commander or senior mission commander must require that qualified FAP trainers defined in accordance with Service FAP headquarters implementing policy and guidance provide training on the prevention of and response to child abuse and domestic abuse to:

(A) Commanders within 90 days of assuming command.

(B) Annually to NCOs who are senior enlisted advisors.

(iii) *PS 57: Training for other installation personnel.* Qualified FAP trainers as defined in accordance with Service FAP headquarters implementing policy and guidance conduct training (or help provide subject matter experts who conduct training) on child abuse and domestic abuse in the military community to installation:

(A) Law enforcement and investigative personnel.

(B) Health care personnel.

(C) Sexual assault prevention and response personnel.

(D) Chaplains.

(E) Personnel in DoDEA schools.

(F) Personnel in child development centers.

(G) Family home care providers.

(H) Personnel and volunteers in youth programs.

(I) Family center personnel.

(J) Service members.

(iv) *PS 58: Content of training.* FAP training for personnel, as required by PS 56 and PS 57, located at paragraphs (d)(4)(ii) and (d)(4)(iii) of this section, includes:

(A) Research-supported protective factors that promote and sustain healthy family relationships.

(B) Risk factors for and the dynamics of child abuse and domestic abuse.

(C) Requirements and procedures for reporting child abuse in accordance with subpart A of this part, 42 U.S.C. 13031, 28 CFR 81.2, and DoD Instruction 6400.03.

(D) The availability of domestic abuse victim advocates and response to restricted and unrestricted reports of incidents of domestic abuse in accordance with DoD Instruction 6400.06.

(E) The dynamics of domestic abuse, reporting options, safety planning, and response unique to the military culture that establishes and supports competence in performing core victim advocacy duties.

(F) Roles and responsibilities of the FAP and the command under the installation's coordinated community response to a report of a child abuse, including the response to a report of child sexual abuse in a DoD sanctioned child or youth activity in accordance with subpart A of this part and DoD 6400.1–M–1, or domestic abuse incident, and actions that may be taken to protect the victim in accordance with subpart A of this part and DoD Instruction 6400.06.

(G) Available resources on and off the installation that promote protective factors and support families at risk before abuse occurs.

(H) Procedures for the management of child abuse and domestic abuse incidents that happen before a Service member is deployed, as set forth in PS 16, located at paragraph (b)(3)(v) of this section.

(I) The availability of transitional compensation for victims of child abuse and domestic abuse in accordance with 5 U.S.C. 552a and DoD Instruction 6400.03, and Service FAP headquarters implementing policy and guidance.

(v) *PS 59: Additional FAP training for NPSP personnel.* The installation FAPM ensures that all personnel offering NPSP services are trained in the content specified in PS 58, located at paragraph (d)(4)(iv) of this section, and in DoD Instruction 6400.05.

(e) *FAP Response to incidents of child abuse or domestic abuse*—(1) *Reports of child abuse*—(i) *PS 60: Responsibilities in responding to reports of child abuse.* The installation commander in accordance with subpart A of this part and Service FAP headquarters implementing policy and guidance must issue local policy that specifies the installation procedures for responding to reports of:

(A) Suspected incidents of child abuse in accordance with subpart A of this part, 42 U.S.C. 13031, 28 CFR 81.2, and Service FAP headquarters implementing policies and guidance, federal and State laws, and applicable SOFAs.

(B) Suspected incidents of child abuse involving students, ages 3–18, enrolled in a DoDEA school or any children participating in DoD-sanctioned child or youth activities or programs.

(C) Suspected incidents of the sexual abuse of a child in DoD-sanctioned child or youth activities or programs that must be reported to the DASD(MC&FP) in accordance with DoD Instruction 6400.03 and Service FAP headquarters implementing policies and guidance.

(D) Suspected incidents involving fatalities or serious injury involving child abuse that must be reported to OSD FAP in accordance with subpart A of this part and Service FAP headquarters implementing policies and guidance.

(ii) *PS 61: Responsibilities during emergency removal of a child from the home.* (A) In responding to reports of child abuse, the FAP complies with subpart A of this part and Service FAP headquarters implementing policy and guidance and installation policies, procedures, and criteria set forth under PS 11, located at paragraph (b)(2)(vii) of this section, during emergency removal of a child from the home.

(B) The FAP provides ongoing and direct case management and coordination of care of children placed in foster care in collaboration with the child welfare and foster care agency, and will not close the FAP case until a permanency plan for all involved children is in place.

(iii) *PS 62: Coordination with other authorities to protect children.* The FAP coordinates with military and local civilian law enforcement agencies, military

investigative agencies, and civilian child protective agencies in response to reports of child abuse incidents in accordance with subpart A of this part, 42 U.S.C. 13031, 28 CFR 81.2, and DoD 6400.1–M–1 and appropriate MOUs under PS 5, located at paragraph (b)(2)(i) of this section.

(iv) *PS 63: Responsibilities in responding to reports of child abuse involving infants and toddlers from birth to age 3.* Services and support are delivered in a developmentally appropriate manner to infants and toddlers, and their families who come to the attention of FAP to ensure decisions and services meet the social and emotional needs of this vulnerable population.

(A) FAP makes a direct referral to the servicing early intervention agency, such as the Educational and Developmental Intervention Services (EDIS) where available, for infants and toddlers from birth to 3 years of age who are involved in an incident of child abuse in accordance with 20 U.S.C. 921 through 932 and chapter 33.

(B) FAP provides ongoing and direct case management services to families and their infants and toddlers placed in foster care or other out-of-home placements to ensure the unique developmental, physical, social-emotional, and mental health needs are addressed in child welfare-initiated care plans.

(v) *PS 64: Assistance in responding to reports of multiple victim child sexual abuse in dod sanctioned out-of-home care.* (A) The installation FAPM assists the installation commander in assessing the need for and implementing procedures for requesting deployment of a DoD FACAT in cases of multiple-victim child sexual abuse occurring in DoD-sanctioned or operated activities, in accordance with DoD Instruction 6400.03 and Service FAP headquarters implementing policies and guidance.

(B) The installation FAPM acts as the installation coordinator for the FACAT before it arrives at the installation.

(2) *PS 65: Responsibilities in Responding to Reports of Domestic Abuse.* Installation procedures for responding to unrestricted and restricted reports of domestic abuse are established in accordance with DoD Instruction 6400.06 and Service FAP headquarters implementing policy and guidance.

(3) *Informed consent*—(i) *PS 66: Informed consent for FAP clinical assessment, intervention services, and supportive services or clinical treatment.* Every person referred for FAP clinical intervention and supportive services must give informed consent for such assessment or services. Clients are considered voluntary, non-mandated recipients of services except when the person is:

(A) Issued a lawful order by a military commander to participate.

(B) Ordered by a court of competent jurisdiction to participate.

(C) A child, and the parent or guardian has authorized such assessment or services.

(ii) *PS 67: Documentation of informed consent.* FAP staff document that the person gave informed consent in the FAP case record, in accordance with DoD Instruction 6400.06 and the Service FAP headquarters implementing policies and guidance.

(iii) *PS 68: Privileged communication.* Every person referred for FAP clinical intervention and support services is informed of their right to the provisions of privileged communication by specified service providers in accordance with Military Rules of Evidence 513 and 514 in the Manual for Courts Martial, current edition (available at *http://www.apd.army.mil/ pdffiles/mcm.pdf*, Section III, pages III–34 to III–36.).

(4) *Clinical case management and risk management*—(i) *PS 69: FAP case manager.* A clinical service provider is assigned to each FAP referral immediately when the case enters the FAP system in accordance with Service FAP headquarters implementing policy and guidance.

(ii) *PS 70: Initial risk monitoring.* FAP monitoring of the risk of further abuse begins when the report of suspected child abuse or domestic abuse is received and continues through the initial clinical assessment. The FAP case manager requests information from a variety of sources, in addition to the victim and the abuser (whether alleged or adjudicated), to identify additional risk factors and to clarify the context of the use of any violence, and ascertains the level of risk and the risk of

lethality using standardized instruments in accordance with subpart A of this part and DoD Instruction 6400.06, and Service FAP headquarters policies and guidance.

(iii) *PS 71: Ongoing risk assessment.* (A) FAP risk assessment is conducted from the clinical assessment until the case closes:

(*1*) During each contact with the victim;

(*2*) During each contact with the abuser (whether alleged or adjudicated);

(*3*) Whenever the abuser is alleged to have committed a new incident of child abuse or domestic abuse;

(*4*) During significant transition periods for the victim or abuser;

(*5*) When destabilizing events for the victim or abuser occur; or

(*6*) When any clinically relevant issues are uncovered during clinical intervention services.

(B) The FAP case manager monitors risk at least quarterly when civilian agencies provide the clinical intervention services or child welfare services through MOUs with such agencies.

(C) The FAP case manager monitors risk at least monthly when the case is high risk or involves chronic child neglect or child sexual abuse.

(iv) *PS 72: Communication of increased risk.* The FAPM communicates increases in risk or risk of lethality to the appropriate commander(s), law enforcement, or civilian officials. FAP clinical staff assess whether the increased risk requires the victim or the victim advocate to be urged to review the victim's safety plan.

(5) *Clinical assessment*—(i) *PS 73: Clinical assessment policy.* The installation FAPM establishes procedures for the prompt clinical assessment of victims, abusers (whether alleged or adjudicated), and other family members, who are eligible to receive treatment in a military medical facility, in reports of child abuse and unrestricted reports of domestic abuse in accordance with subpart A of this part and DoD 6025.18–R when applicable and Service FAP headquarters policies and guidance, including:

(A) A prompt response based on the severity of the alleged abuse and further risk of child abuse or domestic abuse.

(B) Developmentally appropriate clinical tools and measures to be used, including those that take into account relevant cultural attitudes and practices.

(C) Timelines for FAP staff to complete the assessment of an alleged abuse incident.

(ii) *PS 74: Gathering and disclosure of information.* Service members who conduct clinical assessments and provide clinical services to Service member abusers (whether alleged or adjudicated) must adhere to Service policies with respect to advisement of rights in accordance with 10 U.S.C. chapter 47, also known as ''The Uniform Code of Military Justice''. Clinical service providers must also seek guidance from the servicing legal office when a question of applicability arises. Before obtaining information about and from the person being assessed, FAP staff fully discuss with such person:

(A) The nature of the information that is being sought.

(B) The sources from which such information will be sought.

(C) The reason(s) why the information is being sought.

(D) The circumstances in accordance with 5 U.S.C. 552a, DoD 6025.18–R, 32 CFR part 310, and Service FAP headquarters policies and guidance under which the information may be released to others.

(E) The procedures under 5 U.S.C. 552a, DoD 6025.18–R, 32 CFR part 310, and Service FAP headquarters policies and guidance for requesting the person's authorization for such information.

(F) The procedures under 5 U.S.C. 552a, DoD 6025.18–R, 32 CFR part 310, and Service FAP headquarters policies and guidance by which a person may request access to his or her record.

(iii) *PS 75: Components of clinical assessment.* FAP staff conducts or ensures that a clinical service provider conducts a clinical assessment of each victim, abuser (whether alleged or adjudicated), and other family member who is eligible for treatment in a military

medical treatment facility, in accordance with PS 73, located at paragraph (e)(5)(i) of this section, including:

(A) An interview.

(B) A review of pertinent records.

(C) A review of information obtained from collateral contacts, including but not limited to medical providers, schools, child development centers, and youth programs.

(D) A psychosocial assessment, including developmentally appropriate assessment tools for infants, toddlers, and children.

(E) An assessment of the basic health, developmental, safety, and special health and mental health needs of infants and toddlers.

(F) An assessment of the presence and balance of risk and protective factors.

(G) A safety assessment.

(H) A lethality assessment.

(iv) *PS 76: Ethical conduct in clinical assessments*. When conducting FAP clinical assessments, FAP staff treat those being clinically assessed with respect, fairness, and in accordance with professional ethics.

(6) *Intervention strategy and treatment plan*—(i) *PS 77: Intervention strategy and treatment plan for the alleged abuser*. The FAP case manager prepares an appropriate intervention strategy based on the clinical assessment for every abuser (whether alleged or adjudicated) who is eligible to receive treatment in a military treatment facility and for whom a FAP case is opened. The intervention strategy documents the client's goals for self, the level of client involvement in developing the treatment goals, and recommends appropriate:

(A) Actions that may be taken by appropriate authorities under the coordinated community response, including safety and protective measures, to reduce the risk of another act of child abuse or domestic abuse, and the assignment of responsibilities for carrying out such actions.

(B) Treatment modalities based on the clinical assessment that may assist the abuser (whether alleged or adjudicated) in ending his or her abusive behavior.

(C) Actions that may be taken by appropriate authorities to assess and monitor the risk of recurrence.

(ii) *PS 78: Commanders' access to relevant information for disposition of allegations*. FAP provides commanders and senior enlisted personnel timely access to relevant information on child abuse incidents and unrestricted reports of domestic abuse incidents to support appropriate disposition of allegations. Relevant information includes:

(A) The intervention goals and activities described in PS 77, located at paragraph (e)(6)(i) of this section.

(B) The alleged abuser's prognosis for treatment, as determined from a clinical assessment.

(C) The extent to which the alleged abuser accepts responsibility for his or her behavior and expresses a genuine desire for treatment, provided that such information obtained from the alleged abuser was obtained in compliance with Service policies with respect to advisement of rights in accordance with 10 U.S.C. chapter 47.

(D) Other factors considered appropriate for the command, including the results of any previous treatment of the alleged abuser for child abuse or domestic abuse and his or her compliance with the previous treatment plan, and the estimated time the alleged abuser will be required to be away from military duties to fulfill treatment commitments.

(E) Status of any child taken into protective custody.

(iii) *PS 79: Supportive services plan for the victim and other family members*. The FAP case manager prepares a plan for appropriate supportive services or clinical treatment, based on the clinical assessments, for every victim or family member who is eligible to receive treatment in a military treatment facility, who expresses a desire for FAP services, and for whom a FAP case is opened. The plan recommends one or more appropriate treatment modalities or support services, in accordance with subpart A of this part and DoD Instruction 6400.05 and Service FAP headquarters policies and guidance.

(iv) *PS 80: Clinical consultation*. All FAP clinical assessments and treatment plans for persons in incidents of

child abuse or domestic abuse are reviewed in the CCSM, in accordance with DoD 6025.18–R when applicable, 32 CFR part 310, and Service FAP headquarters policies and guidance.

(7) *Intervention and treatment*—(i) *PS 81: Intervention services for abusers.* Appropriate intervention services for an abuser (whether alleged or adjudicated) who is eligible to receive treatment in a military medical program are available either from the FAP or from other military agencies, contractors, or civilian services providers, including:

(A) Psycho-educationally based programs and services.

(B) Supportive services that may include financial counseling and spiritual support.

(C) Clinical treatment specifically designed to address risk and protective factors and dynamics associated with child abuse or domestic abuse.

(D) Trauma informed clinical treatment when appropriate.

(ii) *PS 82: Supportive services or treatment for victims who are eligible to receive treatment in a military treatment facility.* Appropriate supportive services and treatment are available either from the FAP or from other military agencies, contractors, or civilian services providers, including:

(A) Immediate and ongoing domestic abuse victim advocacy services, available 24 hours per day through personal or telephone contact, as set forth in DoD Instruction 6400.06 and Service FAP headquarters policies and guidance.

(B) Supportive services that may include financial counseling and spiritual support.

(C) Psycho-educationally based programs and services.

(D) Appropriate trauma informed clinical treatment specifically designed to address risk and protective factors and dynamics associated with child abuse or domestic abuse victimization.

(E) Supportive services, information and referral, safety planning, and treatment (when appropriate) for child victims and their family members of abuse by non-caretaking offenders.

(iii) *PS 83: Supportive services for victims or offenders who are not eligible to receive treatment in a military treatment facility.* Victims must receive initial safety-planning services only and must be referred to civilian support services for all follow-on care. Offenders must receive referrals to appropriate civilian intervention or treatment programs.

(iv) *PS 84: Ethical conduct in supportive services and treatment for abusers and victims.* When providing FAP supportive services and treatment, FAP staff treats those receiving such supportive services or clinical treatment with respect, fairness, and in accordance with professional ethics.

(v) *PS 85: CCSM review of treatment progress.* Treatment progress and the results of the latest risk assessment are reviewed periodically in the CCSM in accordance with subpart A of this part.

(A) Child sexual abuse cases are reviewed monthly in the CCSM.

(B) Cases involving foster care placement of children are reviewed monthly in the CCSM.

(C) All other cases are reviewed at least quarterly in the CCSM.

(D) Cases must be reviewed within 30 days of any significant event or a pending significant event that would impact care, including but not limited to a subsequent maltreatment incident, geographic move, deployment, pending separation from the Service, or retirement.

(vi) *PS 86: Continuity of services.* The FAP case manager ensures continuity of services before the transfer or referral of open child abuse or domestic abuse cases to other service providers:

(A) At the same installation or other installations of the same Service FAP headquarters.

(B) At installations of other Service FAP headquarters.

(C) In the civilian community.

(D) In child welfare services in the civilian community.

(8) *Termination and case closure*—(i) *PS 87: Criteria for case closure.* FAP services are terminated and the case is closed when treatment provided to the abuser (whether alleged or adjudicated) is terminated and treatment or supportive services provided to the victim are terminated.

(A) Treatment provided to the abuser(s) (whether alleged or adjudicated) is terminated only if either:

(*1*) The CCSM discussion produced a consensus that clinical objectives have been substantially met and the results of a current risk assessment indicate that the risk of additional abuse and risk of lethality have declined; or

(*2*) The CCSM discussion produced a consensus that clinical objectives have not been met due to:

(*i*) Noncompliance of such abuser(s) with the requirements of the treatment program.

(*ii*) Unwillingness of such abuser(s) to make changes in behavior that would result in treatment progress.

(B) Treatment and supportive services provided to the victim are terminated only if either:

(*1*) The CCSM discussion produced a consensus that clinical objectives have been substantially met; or

(*2*) The victim declines further FAP supportive services.

(ii) *PS 88: Communication of case closure*. Upon closure of the case the FAP notifies:

(A) The abuser (whether alleged or adjudicated) and victim, and in a child abuse case, the non-abusing parent.

(B) The commander of an active duty victim or abuser (whether alleged or adjudicated).

(C) Any appropriate civilian court currently exercising jurisdiction over the abuser (whether alleged or adjudicated), or in a child abuse case, over the child.

(D) A civilian child protective services agency currently exercising protective authority over a child victim.

(E) The NPSP, if the family has been currently receiving NPSP intensive home visiting services.

(F) The domestic abuse victim advocate if the victim has been receiving victim advocacy services.

(iii) *PS 89: Disclosure of information*. Information gathered during FAP clinical assessments and during treatment or supportive services that is protected from disclosure under 5 U.S.C. 552a, DoD 6025.18–R, and 32 CFR part 310 is only disclosed in accordance with 5 U.S.C. 552a, DoD 6025.18–R, 32 CFR part 310, and Service FAP headquarters implementing policies and guidance.

(f) *Documentation and records management*—(1) *Documentation of NPSP cases*—(i) *PS 90: NPSP case record documentation*. For every client screened for NPSP services, NPSP personnel must document in accordance with Service FAP headquarters policies and guidance, at a minimum:

(A) The informed consent of the parents based on the services offered.

(B) The results of the initial screening for risk and protective factors and, if the risk was high, document:

(*1*) The assessment(s) conducted.

(*2*) The plan for services and goals for the parents.

(*3*) The services provided and whether suspected child abuse or domestic abuse was reported.

(*4*) The parents' progress toward their goals at the time NPSP services ended.

(ii) *PS 91: Maintenance, storage, and security of NPSP case records*. NPSP case records are maintained, stored, and kept secure in accordance with DoD 6025.18–R when applicable, 32 CFR part 310, and Service FAP headquarters policies and guidance.

(iii) *PS 92: Transfer of NPSP case records*. NPSP case records are transferred in accordance with DoD 6025.18–R when applicable, 32 CFR part 310, and Service FAP headquarters policies and procedures.

(iv) *PS 93: Disposition of NPSP records*. NPSP records are disposed of in accordance with DoD 6025.18–R when applicable, 32 CFR part 310, and Service FAP headquarters policies and guidance.

(2) *Documentation of reported incidents*—(i) *PS 94: Reports of child abuse and unrestricted reports of domestic abuse*. For every new reported incident of child abuse and unrestricted report of domestic abuse, the FAP documents, at a minimum, an accurate accounting of all risk levels, actions taken, assessments conducted, foster care placements, clinical services provided, and results of the quarterly CCSM from the initial report of an incident to case closure in accordance with Service FAP headquarters policies and guidance.

(ii) *PS 95: Documentation of multiple incidents*. Multiple reported incidents of child abuse and unrestricted reports of domestic abuse involving the same Service member or family members are documented separately within one FAP case record.

(iii) *PS 96: Maintenance, storage, and security of FAP case records*. FAP case

records are maintained, stored, and kept secure in accordance with Service FAP headquarters policies and procedures.

(iv) *PS 97: Transfer of FAP case records.* FAP case records are transferred in accordance with DoD 6025.18–R when applicable, 32 CFR part 310, and Service FAP headquarters policies and procedures.

(v) *PS 98: Disposition of FAP records.* FAP records are disposed of in accordance with DoD Directive 5015.2, ''DoD Records Management Program'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 501502p.pdf*) and Service FAP headquarters policies and guidance.

(3) *Central registry of child abuse and domestic abuse incidents*—(i) *PS 99: Recording data into the Service FAP headquarters central registry of child abuse and domestic abuse incidents.* Data pertaining to child abuse and unrestricted domestic abuse incidents reported to FAP are added to the Service FAP headquarters central registry of child and domestic abuse incidents. Quarterly edit checks are conducted in accordance with Service FAP headquarters policies and procedures. Data that personally identifies the sponsor, victim, or alleged abuser are not retained in the central registry for any incidents that did not meet criteria for entry or on any victim or alleged abuser who is not an active duty member or retired Service member, DoD civilian employee, contractor, or eligible beneficiary.

(ii) *PS 100: Access to the DoD central registry of child and domestic abuse incidents.* Access to the DoD central registry of child and domestic abuse incidents and disclosure of information therein complies with DoD 6400.1–M–1 and Service FAP headquarters policies and guidance.

(iii) *PS 101: Access to Service FAP headquarters central registry of child and domestic abuse reports.* Access to the Service FAP headquarters central registry of child and domestic abuse incidents and disclosure of information therein complies with DoD 6400.1–M–1 and Service FAP headquarters policies and procedures.

(4) *Documentation of restricted reports of domestic abuse*—(i) *PS 102: Documentation of restricted reports of domestic abuse.* Restricted reports of domestic abuse are documented in accordance with DoD Instruction 6400.06 and Service FAP headquarters policies and guidance.

(ii) *PS 103: Maintenance, storage, security, and disposition of restricted reports of domestic abuse.* Records of restricted reports of domestic abuse are maintained, stored, kept secure, and disposed of in accordance with DoD Instruction 6400.06 and Service FAP headquarters policies and procedures.

(g) *Fatality notification and review*—(1) *Fatality notification*—(i) *PS 104: Domestic abuse fatality and child abuse fatality notification.* The installation FAC establishes local procedures in compliance with Service FAP headquarters implementing policy and guidance to report fatalities known or suspected to have resulted from an act of domestic abuse, child abuse, or suicide related to an act of domestic abuse or child abuse that involve personnel assigned to the installation or within its area of responsibility. Fatalities are reported through the Service FAP headquarters and the Secretaries of the Military Departments to the DASD(MC&FP) in compliance with subpart A of this part and DoD Instruction 6400.06, and Service FAP headquarters implementing policy and guidance.

(ii) *PS 105: Timeliness of reporting domestic abuse and child abuse fatalities to DASD(MC&FP).* The designated installation personnel report domestic abuse and child abuse fatalities through the Service FAP headquarters channels to the DASD(MC&FP) within the timeframe specified in DoD Instruction 6400.06 in accordance with the Service FAP headquarters implementing policy and guidance.

(iii) *PS 106: Reporting format for domestic abuse and child abuse fatalities.* Installation reports of domestic abuse and child abuse fatalities are reported on the DD Form 2901, ''Child Abuse or Domestic Abuse Related Fatality Notification,'' and in accordance with subpart A of this part.

(2) *Review of fatalities*—(i) *PS 107: Information forwarded to the Service FAP headquarters fatality review.* The installation provides written information concerning domestic abuse and child

abuse fatalities that involve personnel assigned to the installation or within its area of responsibility promptly to the Service FAP headquarters fatality review team in accordance with DoD Instruction 6400.06 and in the format specified in the Service FAP headquarters implementing policy and guidance.

(ii) *PS 108: Cooperation with non-DoD fatality review teams*. Authorized installation personnel provide information about domestic abuse and child abuse fatalities that involve personnel assigned to the installation or within its area of responsibility to non-DoD fatality review teams in accordance with written MOUs and 5 U.S.C. 552a and 32 CFR part 310.

(h) *QA and accreditation or inspections*—(1) *QA*—(i) *PS 109: Installation FAP QA program*. The installation FAC will establish local QA procedures that address compliance with the PSs in this section in accordance with subpart A of this part and Service FAP headquarters implementing policy and guidance.

(ii) *PS 110: QA Training*. All FAP personnel must be trained in installation QA procedures.

(iii) *PS 111: Monitoring FAP compliance with PSs*. The installation FAPM monitors compliance of FAP personnel to installation QA procedures and the PSs in this section.

(2) *Accreditation or inspections*—(i) *PS 112: Accreditation or inspections*. The installation FAP undergoes accreditation or inspection at least every 4 years to monitor compliance with the PSs in this section, in accordance with subpart A of this part and Service FAP headquarters policies and guidance.

(ii) *PS 113: Review of accreditation and inspection results*. The installation FAC reviews the results of the FAP accreditation review or inspection and submits findings and corresponding corrective action plans to the Service FAP headquarters in accordance with its implementing policy and guidance.

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Subparts C–D [Reserved]

Subpart E—Guidelines for Clinical Intervention for Persons Reported as Domestic Abusers

AUTHORITY: 10 U.S.C. chapter 47, 42 U.S.C. 5106g, 42 U.S.C. 13031.

§ 61.25 Purpose.

(a) This part is composed of several subparts, each containing its own purpose. This subpart implements policy, assigns responsibilities, and provides procedures for addressing child abuse and domestic abuse in military communities.

(b) Restricted reporting guidelines are provided in DoD Instruction 6400.06, ''Domestic Abuse Involving DoD Military and Certain Affiliated Personnel'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 640006p.pdf*). This subpart prescribes guidelines for Family Advocacy Program (FAP) assessment, clinical rehabilitative treatment, and ongoing monitoring of individuals who have been reported to FAP by means of an unrestricted report for domestic abuse against:

(1) Current or former spouses, or

(2) Intimate partners.

§ 61.26 Applicability.

This subpart applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to in this subpart as the ''DoD Components'').

§ 61.27 Definitions.

Unless otherwise noted, the following terms and their definitions are for the purpose of this subpart.

Abuser. An individual adjudicated in a military disciplinary proceeding or civilian criminal proceeding who is found guilty of committing an act of domestic violence or a lesser included offense, as well as an individual alleged to have committed domestic abuse, including domestic violence, who has not had such an allegation adjudicated.

Abuser contract. The treatment agreement between the clinician and the abuser that specifies the responsibilities and expectations of each party. It includes specific abuser treatment goals as identified in the treatment plan and clearly specifies that past, present, and future allegations and threats of domestic abuse and child abuse or neglect will be reported to the active duty member's commander, to local law enforcement and child protective services, as appropriate, and to the potential victim.

Clinical case management. Defined in subpart B of this part.

Clinical case staff meeting (CCSM). Defined in subpart B of the part.

Clinical intervention. Defined in subpart B of this part.

Domestic abuse. Domestic violence or a pattern of behavior resulting in emotional/psychological abuse, economic control, and/or interference with personal liberty that is directed toward a person who is:

(1) A current or former spouse;

(2) A person with whom the abuser shares a child in common; or

(3) A current or former intimate partner with whom the abuser shares or has shared a common domicile.

Domestic violence. An offense under the United States Code, the UCMJ, or State law involving the use, attempted use, or threatened use of force or violence against a person, or a violation of a lawful order issued for the protection of a person, who is:

(1) A current or former spouse.

(2) A person with whom the abuser shares a child in common; or

(3) A current or former intimate partner with whom the abuser shares or has shared a common domicile.

FAP Manager. Defined in subpart A of this part.

Incident determination committee. Defined in subpart A of this part.

Intimate partner. A person with whom the victim shares a child in common, or a person with whom the victim shares or has shared a common domicile.

Risk management. Defined in subpart B of this part.

Severe abuse. Exposure to chronic pattern of emotionally abusive behavior with physical or emotional effects requiring hospitalization or long-term mental health treatment. In a spouse emotional abuse incident, this designation requires an alternative environment to protect the physical safety of the spouse. Exposure to a chronic pattern of neglecting behavior with physical, emotional, or educational effects requiring hospitalization, long-term mental health treatment, or long-term special education services. Physical abuse resulting in major physical injury requiring inpatient medical treatment or causing temporary or permanent disability or disfigurement; moderate or severe emotional effects requiring long-term mental health treatment; and may require placement in an alternative environment to protect the physical safety or other welfare of the victim. Sexual abuse involving oral, vaginal, or anal penetration that may or may not require one or more outpatient visits for medical treatment; may be accompanied by injury requiring inpatient medical treatment or causing temporary or permanent disability or disfigurement; moderate or severe emotional effects requiring long-term mental health treatment; and may require placement in an alternative environment to protect the physical safety or welfare of the victim.

Unrestricted report. A process allowing a victim of domestic abuse to report an incident using current reporting channels, *e.g.* chain of command, law enforcement or criminal investigative organization, and FAP for clinical intervention.

§ 61.28 Policy.

In accordance with subpart A of this part and DoD Instruction 6400.06, it is DoD policy to:

(a) Develop PSs and critical procedures for the FAP that reflect a coordinated community response to domestic abuse.

(b) Address domestic abuse within the military community through a coordinated community risk management approach.

(c) Provide appropriate individualized and rehabilitative treatment that supplements administrative or disciplinary action, as appropriate, to persons reported to FAP as domestic abusers.

§ 61.29 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)):

(1) Sponsors FAP research and evaluation and participates in other federal research and evaluation projects relevant to the assessment, treatment, and risk management of domestic abuse.

(2) Ensures that research is reviewed every 3 to 5 years and that relevant progress and findings are distributed to the Secretaries of the Military Departments using all available Web-based applications.

(3) Assists the Secretaries of the Military Departments to:

(i) Identify tools to assess risk of recurrence.

(ii) Develop and use pre- and post-treatment measures of effectiveness.

(iii) Promote training in the assessment, treatment, and risk management of domestic abuse.

(b) The Secretaries of the Military Departments issue implementing guidance in accordance with this part. The guidance must provide for the clinical assessment, rehabilitative treatment, and ongoing monitoring and risk management of Service members and eligible beneficiaries reported to FAP for domestic abuse by means of an unrestricted report.

§ 61.30 Procedures.

(a) *General principles for clinical intervention*—(1) *Components of clinical intervention*. The change from abusive to appropriate behavior in domestic relationships is a process that requires clinical intervention, which includes ongoing coordinated community risk management, assessment, and treatment.

(2) *Military administrative and disciplinary actions and clinical intervention*. The military disciplinary system and FAP clinical intervention are separate processes. Commanders may proceed with administrative or disciplinary actions at any time.

(3) *Goals of clinical intervention*. the primary goals of clinical intervention

in domestic abuse are to ensure the safety of the victim and community, and promote stopping abusive behaviors.

(4) *Therapeutic alliance*—(i) Although clinical intervention must address abuser accountability, clinical assessment and treatment approaches should be oriented to building a therapeutic alliance with the abuser so that he or she is sincerely motivated to take responsibility for his or her actions, improve relationship skills, and end the abusive behavior.

(ii) Clinical intervention will neither be confrontational nor intentionally or unintentionally rely on the use of shame to address the abuser's behavior. Such approaches have been correlated in research studies with the abuser's premature termination of or minimal compliance with treatment.

(A) It is appropriate to encourage abusers to take responsibility for their use of violence; however, in the absence of a strong, supportive, therapeutic relationship, confrontational approaches may induce shame and are likely to reduce treatment success and foster dropout. Approaches that create and maintain a therapeutic alliance are more likely to motivate abusers to seek to change their behaviors, add to their relationship skills, and take responsibility for their actions. Studies indicate that a strong therapeutic alliance is related to decreased psychological and physical aggression.

(B) A clinical style that helps the abuser identify positive motivations to change his or her behavior is effective in strengthening the therapeutic alliance while encouraging the abuser to evaluate his or her own behavior. Together, the therapist and abuser attempt to identify the positive consequences of change, identify motivation for change, determine the obstacles that lie in the path of change, and identify specific behaviors that the abuser can adopt.

(5) *Criteria for clinical intervention approaches.* Clinical intervention approaches should reflect the current state of knowledge. This subpart recommends an approach (or multiple approaches) and procedures that have one or more of these characteristics:

(i) Demonstrated superiority in formal evaluations in comparison to one or more other approaches.

(ii) Demonstrated statistically significant success in formal evaluations, but not yet supported by a consensus of experts.

(iii) The support of a consensus due to significant potential in the absence of statistically significant success.

(iv) Significant potential when consensus does not yet exist.

(6) *Clinical intervention for female abusers.* Findings from research and clinical experience indicate that women who are domestic abusers may require clinical intervention approaches other than those designed specifically for male abusers.

(i) Attention should be given to the motivation and context for their use of abusive behaviors to discover whether or not using violence against their spouse, former spouse, or intimate partner has been in response to his or her domestic abuse.

(ii) Although both men and women who are domestic abusers may have undergone previous traumatic experiences that may warrant treatment, women's traumatic experiences may require additional attention within the context of domestic abuse.

(7) *Professional standards.* Domestic abusers who undergo clinical intervention will be treated with respect, fairness, and in accordance with professional ethics. All applicable rights of abusers will be observed, including compliance with the rights and warnings in 10 U.S.C. 831, chapter 47, also known and referred to in this subpart as the ''Uniform Code of Military Justice (UCMJ)'' for abusers who are Service members.

(i) Clinical service providers who conduct clinical assessments of or provide clinical treatment to abusers will adhere to Service policies with respect to the advisement of rights pursuant to the UCMJ, will seek guidance from the supporting legal office when a question of applicability arises, and will notify the relevant military law enforcement investigative agency if advisement of rights has occurred.

(ii) Clinical service providers and military and civilian victim advocates must follow the Privacy Act of 1974, as

amended, and other applicable laws, regulations, and policies regarding the disclosure of information about victims and abusers.

(iii) Individuals and agencies providing clinical intervention to persons reported as domestic abusers will not discriminate based on race, color, religion, gender, disability, national origin, age, or socioeconomic status. All members of clinical intervention teams will treat abusers with dignity and respect regardless of the nature of their conduct or the crimes they may have committed. Cultural differences in attitudes will be recognized, respected, and addressed in the clinical assessment process.

(8) *Clinical case management.* The FAP clinical service provider has the responsibility for clinical case management.

(b) *Coordinated community risk management*—(1) *General.* A coordinated community response to domestic abuse is the preferred method to enhance victim safety, reduce risk, and ensure abuser accountability. In a coordinated community response, the training, policies, and operations of all civilian and military human service and FAP clinical service providers are linked closely with one another. Since no particular response to a report of domestic abuse can ensure that a further incident will not occur, selection of the most appropriate response will be considered one of coordinated community risk management.

(2) *Responsibility for coordinated community risk management.* Overall responsibility for managing the risk of further domestic abuse, including developing and implementing an intervention plan when significant risk of lethality or serious injury is present, lies with:

(i) The Service member's commander when a Service member is a domestic abuser or is the victim (or their military dependent is the victim) of domestic abuse.

(ii) The commander of the installation or garrison on which a Service member who is a domestic abuser or who is the victim (or their military dependent who is the victim) of domestic abuse may live.

(iii) The commander of the military installation on which the civilian is housed for a civilian abuser accompanying U.S. military forces outside the United States.

(iv) The FAP clinical service provider or case manager for liaison with civilian authorities in the event the abuser is a civilian.

(3) *Implementation.* Coordinated community risk management requires:

(i) The commander of the military installation to participate in local coalitions and task forces to enhance communication and strengthen program development among activities. In the military community, this may include inviting State, local, and tribal government representatives to participate in their official capacity as non-voting guests in meetings of the Family Advocacy Committee (FAC) to discuss coordinated community risk management in domestic abuse incidents that cross jurisdictions. (See subpart B of this part for FAC standards.)

(A) Agreements with non-federal activities will be reflected in signed MOU.

(B) Agreements may be among military installations of different Military Services and local government activities.

(ii) Advance planning through the installation FAC by:

(A) The commander of the installation.

(B) FAP and civilian clinical service providers.

(C) Victim advocates in the military and civilian communities.

(D) Military chaplains.

(E) Military and civilian law enforcement agencies.

(F) Military supporting legal office and civilian prosecutors.

(G) Military and civilian mental health and substance abuse treatment agencies.

(H) DoDEA school principals or their designees.

(I) Other civilian community agencies and personnel including:

(1) Criminal and family court judges.

(2) Court probation officials.

(3) Child protective services agencies.

(4) Domestic abuse shelters.

(iii) FAP clinical service providers to address:

(A) Whether treatment approaches under consideration are based on individualized assessments and directly address other relevant risk factors.

(B) Whether the operational tempo of frequent and lengthy deployments to accomplish a military mission affects the ability of active duty Service members to complete a State-mandated treatment program.

(C) Respective responsibilities for monitoring abusers' behavior on an ongoing basis, developing procedures for disclosure of relevant information to appropriate authorities, and implementing a plan for intervention to address the safety of the victim and community.

(4) *Deployment.* Risk management of a Service member reported to FAP as a domestic abuser prior to a military deployment, when his or her deployment is not cancelled, or reported to FAP as a domestic abuser while deployed requires planning for his or her return to their home station.

(i) The installation FAC should give particular attention to special and early returns so during deployment of a unit, the forward command is aware of the procedures to notify the home station command of regularly-scheduled and any special or early returns of such personnel to reduce the risk of additional abuse.

(ii) An active duty Service member reported as a domestic abuser may be returned from deployment early for military disciplinary or civilian legal procedures, for rest and recuperation (R&R), or, if clinical conditions warrant, for treatment not otherwise available at the deployed location and if the commander feels early return is necessary under the circumstances. To prevent placing a victim at higher risk, the deployed unit commander will notify the home station commander and the installation FAP in advance of the early return, unless operational security prevents such disclosure.

(5) *Clinical case management.* Ongoing and active case management, including contact with the victim and liaison with the agencies in the coordinated community response, is necessary to ascertain the abuser's sincerity and changed behavior. Case management requires ongoing liaison and contact with multiple information sources involving both military and surrounding civilian community agencies. Clinical case management includes:

(i) *Initial clinical case management.* Initial case management begins with the intake of the report of suspected domestic abuse, followed by the initial clinical assessment.

(ii) *Periodic clinical case management.* Periodic case management includes the FAP clinical service provider's assessment of treatment progress and the risk of recurrence of abuse. Treatment progress and the results of the latest risk assessment should be discussed whenever the case is reviewed at the CCSM.

(iii) *Follow-up.* As a result of the risk assessment, if there is a risk of imminent danger to the victim or to another person, the FAP clinical service provider may need to notify:

(A) The victim or other person at risk and the victim advocate to review, and possibly revise, the safety plan.

(B) The appropriate military command, and military or civilian law enforcement agency.

(C) Other treatment providers to modify their intervention with the abuser. For example, the provider of substance abuse treatment may need to change the requirements for monitored urinalysis.

(c) *Clinical assessment*—(1) *Purposes.* A structured clinical assessment of the abuser is a critical first step in clinical intervention. The purposes of clinical assessment are to:

(i) Gather information to evaluate and ensure the safety of all parties—victim, abuser, other family members, and community.

(ii) Assess relevant risk factors, including the risk of lethality.

(iii) Determine appropriate risk management strategies, including clinical treatment; monitoring, controlling, or supervising the abuser's behavior to protect the victim and any individuals who live in the household; and victim safety planning.

(2) *Initial information gathering.* Initial information gathering and risk assessment begins when the unrestricted report of domestic abuse is received by FAP.

(i) Since the immediacy of the response is based on the imminence of risk, the victim must be contacted as soon as possible to evaluate her or his safety, safety plan, and immediate needs. If a domestic abuse victim advocate is available, the victim advocate must contact the victim. If a victim advocate is not available, the clinician must contact the victim. Every attempt must be made to contact the victim via telephone or email to request a face-to-face interview. If the victim is unable or unwilling to meet face-to-face, the victim's safety, safety plan, and immediate needs will be evaluated by telephone.

(ii) The clinician must interview the victim and abuser separately to maximize the victim's safety. Both victim and abuser must be assessed for the risk factors in paragraphs (c)(4) and (c)(6) of this section.

(A) The clinician must inform the victim and abuser of the limits of confidentiality and the FAP process before obtaining information from them. Such information must be provided in writing as early as practical.

(B) The clinician must build a therapeutic alliance with the abuser using an interviewing style that assesses readiness for and motivates behavioral change. The clinician must be sensitive to cultural considerations and other barriers to the client's engagement in the process.

(iii) The clinician must also gather information from a variety of other sources to identify additional risk factors, clarify the context of the use of any violence, and determine the level of risk. The assessment must include information about whether the Service member is scheduled to be deployed or has been deployed within the past year, and the dates of scheduled or past deployments. Such sources of information may include:

(A) The appropriate military command.

(B) Military and civilian law enforcement.

(C) Medical records.

(D) Children and other family members residing in the home.

(E) Others who may have witnessed the acts of domestic abuse.

(F) The FAP central registry of child maltreatment and domestic abuse reports.

(iv) The clinician will request disclosure of information and use the information disclosed in accordance with 32 CFR part 310 and DoD 6025.18–R, ''DoD Health Information Privacy Regulation'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/602518r.pdf*).

(3) *Violence contextual assessment.* The clinical assessment of domestic abuse will include an assessment of the use of violence within the context of relevant situational factors to guide intervention. Relevant situational factors regarding the use of violence include, but are not limited to:

(i) *Exacerbating factors.* Exacerbating factors include whether either victim or domestic abuser:

(A) Uses violence as an inappropriate means of expressing frustrations with life circumstances.

(B) Uses violence as a means to exert and maintain power and control over the other party.

(C) Has inflicted injuries on the other party during the relationship, and the extent of such injuries.

(D) Fears the other.

(ii) *Mitigating factors.* Mitigating factors include whether either victim or domestic abuser uses violence:

(A) In self-defense.

(B) To protect another person, such as a child.

(C) In retaliation, as noted in the most recent incident or in the most serious incident.

(4) *Lethality risk assessment.* The clinician must assess the risk for lethality in every assessment for domestic abuse, whether or not violence was used in the present incident. The lethality assessment will assess the presence of these factors:

(i) For both victim and domestic abuser:

(A) Increased frequency and severity of violence in the relationship.

(B) Ease of access to weapons.

(C) Previous use of weapons or threats to use weapons.

(D) Threats to harm or kill the other party, oneself, or another (especially a child of either party).

(E) Excessive use of alcohol and use of illegal drugs.

(F) Jealousy, possessiveness, or obsession, including stalking.

(ii) For the domestic abuser only:

(A) Previous acts or attempted acts of forced or coerced sex with the victim.

(B) Previous attempts to strangle the victim.

(iii) For the victim only:

(A) The victim's attempts or statements of intent to leave the relationship.

(B) If the victim is a woman, whether the victim is pregnant and the abuser's attitude regarding the pregnancy.

(C) The victim's fear of harm from the abuser to himself or herself or any child of either party or other individual living in the household.

(5) *Results of lethality risk assessment.* When one or more lethality factors are identified:

(i) The clinician will promptly contact the appropriate commander and military or civilian law enforcement agency and the victim advocate.

(ii) The commander or military law enforcement agency will take immediate steps to protect the victim, addressing the lethality factor(s) identified.

(iii) The victim advocate will contact the victim to develop or amend any safety plan to address the lethality factor(s) identified.

(iv) The commander will intensify ongoing coordinated community risk management and monitoring of the abuser.

(6) *Assessment of other risk factors.* The clinician will separately assess the victim and abuser for other factors that increase risk for future domestic abuse. Such risk factors to be assessed include, but are not limited to, the abuser's:

(i) Previous physical and sexual violence and emotional abuse committed in the current and previous relationships. The greater the frequency, duration, and severity of such violence, the greater the risk.

(ii) Use of abuse to create and maintain power and control over others.

(iii) Attitudes and beliefs directly or indirectly supporting domestic abusive behavior. The stronger the attitudes and beliefs, the greater the risk.

(iv) Blaming of the victim for the abuser's acts. The stronger the attribution of blame to the victim, the greater the risk.

(v) Denial that his or her abusive acts were wrong and harmful, or minimization of their wrongfulness and harmfulness.

(vi) Lack of motivation to change his or her behavior. The weaker the motivation, the greater the risk.

(vii) Physical and/or emotional abuse of any children in the present or previous relationships. The greater the frequency, duration, and severity of such abuse, the greater the risk.

(viii) Physical abuse of pets or other animals. The greater the frequency, duration, and severity of such abuse, the greater the risk.

(ix) Particular caregiver stress, such as the management of a child or other family member with disabilities.

(x) Previous criminal behavior unrelated to domestic abuse. The greater the frequency, duration, and severity of such criminal behavior, the greater the risk.

(xi) Previous violations of civil or criminal court orders. The greater the frequency of such violations, the greater the risk.

(xii) Relationship problems, such as infidelity or significant ongoing conflict.

(xiii) Financial problems.

(xiv) Mental health issues or disorders, especially disorders of emotional attachment or depression and issues and disorders that have not been treated successfully.

(xv) Experience of traumatic events during military service, including events that resulted in physical injuries.

(xvi) Any previous physical harm, including head or other physical injuries, sexual victimization, or emotional harm suffered in childhood and/or as a result of violent crime outside the relationship.

(xvii) Fear of relationship failure or of abandonment.

(7) *Periodic risk assessment.* The FAP clinical service provider will periodically conduct a risk assessment with input from the victim, adding the results of such risk assessments to the

abuser's treatment record in accordance with subpart B of this part, and incorporating them into the abuser's clinical treatment plan and contract. Risk assessment will be conducted:

(i) At least quarterly, but more frequently as required to monitor safety when the current situation is deemed high risk.

(ii) Whenever the abuser is alleged to have committed a new incident of domestic abuse or an incident of child abuse.

(iii) During significant transition periods in clinical case management, such as the change from assessment to treatment, changes between treatment modalities, and changes between substance abuse or mental health treatment and FAP treatment.

(iv) After destabilizing events such as accusations of infidelity, separation or divorce, pregnancy, deployment, administrative or disciplinary action, job loss, financial issues, or health impairment.

(v) When any clinically relevant issues are uncovered, such as childhood trauma, domestic abuse in a prior relationship, or the emergence of mental health problems.

(8) *Assessment of events likely to trigger the onset of future abuse.* The initial clinical assessment will include a discussion of potential events that may trigger the onset of future abuse, such as pregnancy, upcoming deployment, a unilateral termination of the relationship, or conflict over custody and visitation of children in the relationship.

(9) *Tools and instruments for assessment.* The initial clinical assessment process will include the use of appropriate standardized tools and instruments, Service-specific tools, and clinical interviewing. Unless otherwise indicated, the results from one or more of these tools will not be the sole determinant(s) for excluding an individual from treatment. The tools should be used for:

(i) Screening for suitability for treatment.

(ii) Tailoring treatment approaches, modalities, and content.

(iii) Reporting changes in the level of risk.

(iv) Developing risk management strategies.

(v) Making referrals to other clinical service providers for specialized intervention when appropriate.

(d) *Clinical treatment*—(1) *Theoretical approaches.* Based on the results of the clinical assessment, the FAP clinical service provider will select a treatment approach that directly addresses the abuser's risk factors and his or her use of violence. Such approaches include, but are not limited to, cognitive and dialectical behavioral therapy, psychodynamic therapy, psycho-educational programs, attachment-based intervention, and combinations of these and other approaches. See paragraph (a)(5) of this section for criteria for clinical intervention approaches.

(2) *Treatment Planning.* A FAP clinical service provider will develop a treatment plan for domestic abuse that is based on a structured assessment of the particular relationship and risk factors present.

(i) The treatment plan will not be based on a generic ''one-size-fits-all'' approach. The treatment plan will consider that people who commit domestic abuse do not compose a homogeneous group, and may include people:

(A) Of both sexes.

(B) With a range of personality characteristics.

(C) With mental illness and those with no notable mental health problems.

(D) Who abuse alcohol or other substances and/or use illegal drugs and those who do not.

(E) Who combine psychological abuse with coercive techniques, including violence, to maintain control of their spouse, former spouse, or intimate partner and those who do not attempt to exert coercive control.

(F) In relationships in which both victim and domestic abuser use violence (excluding self-defense).

(ii) Due to the demographics of the military population, structure of military organizations, and military culture, it is often possible to intervene in a potentially abusive relationship before the individual uses coercive techniques to gain and maintain control of the other party. Thus, a reliance on addressing the abuser's repeated use of power and control tactics as the sole or

primary focus of treatment is frequently inapplicable in the military community.

(iii) Treatment objectives, when applicable, will seek to:

(A) Educate the abuser about what domestic abuse is and the common dynamics of domestic abuse in order for the abuser to learn to identify his or her own abusive behaviors.

(B) Identify the abuser's thoughts, emotions, and reactions that facilitate abusive behaviors.

(C) Educate the abuser on the potential for re-abusing, signs of abuse escalation and the normal tendency to regress toward previous unacceptable behaviors.

(D) Identify the abuser's deficits in social and relationship skills. Teach the abuser non-abusive, adaptive, and pro-social interpersonal skills and healthy sexual relationships, including the role of intimacy, love, forgiveness, development of healthy ego boundaries, and the appropriate role of jealousy.

(E) Increase the abuser's empathic skills to enhance his or her ability to understand the impact of violence on the victim and empathize with the victim.

(F) Increase the abuser's self-management techniques, including assertiveness, problem solving, stress management, and conflict resolution.

(G) Educate the abuser on the sociocultural basis for violence.

(H) Identify and address issues of gender role socialization and the relationship of such issues to domestic abuse.

(I) Increase the abuser's understanding of the impact of emotional abuse and violence directed at children and violence that is directed to an adult but to which children in the family are exposed.

(J) Facilitate the abuser's acknowledgment of responsibility for abusive actions and consequences of actions. Although the abuser's history of victimization should be addressed in treatment, it should never take precedence over his or her responsibility to be accountable for his or her abusive and/or violent behavior, or be used as an excuse, rationalization, or distraction from being held so accountable.

(K) Identify and confront the abuser's issues of power and control and the use of power and control against victims.

(L) Educate the abuser on the impact of substance abuse and its correlation to violence and domestic abuse.

(iv) These factors should inform treatment planning:

(A) *Special objectives for female abusers.* Findings from research and clinical experience indicate that clinical treatment based solely on analyses of male power and control may not be applicable to female domestic abusers. Clinical approaches must give special attention to the motivation and context for use of violence and to self-identified previous traumatic experiences.

(B) *Special Strategies for Grieving Abusers.* When grief and loss issues have been identified in the clinical assessment or during treatment, the clinician will incorporate strategies for addressing grief and loss into the treatment plan. This is especially important if a victim has decided to end a relationship with a domestic abuser because of the abuse.

(*1*) Abusers with significant attachment issues who are facing the end of a relationship with a victim are more likely to use lethal violence against the victim and children in the family. This is exemplified by the statement: ''If I can't have you no one else can have you.''

(*2*) They are also more likely to attempt suicide. This is exemplified by the statement: ''Life without you is not worth living.''

(C) *Co-Occurrence of substance abuse.* The coordinated community management of risk is made more difficult when the person committing domestic abuse also abuses alcohol or other substances. When the person committing domestic abuse also abuses alcohol or other substances:

(*1*) Treatment for domestic abuse will be coordinated with the treatment for substance abuse and information shared between the treatment providers in accordance with applicable laws, regulations, and policies.

(*2*) Special consideration will be given to integrating the two treatment programs or providing them at the same time.

(*3*) Information about the abuser's progress in the respective treatment programs will be shared between the treatment providers. Providing separate treatment approaches with no communication between the treatment providers complicates the community's management of risk.

(D) *Co-occurrence of child abuse.* When a domestic abuser has allegedly committed child abuse, the clinician will:

(*1*) Notify the appropriate law enforcement agency and other civilian agencies as appropriate in accordance with 42 U.S.C. 13031.

(*2*) Notify the appropriate child protective services agency and the FAP supervisor to ascertain if a FAP child abuse case should be opened in accordance with DoD Instruction 6400.06 and 42 U.S.C. 5106g.

(*3*) Address the impact of such abuse of the child(ren) as a part of the domestic abuser clinical treatment.

(*4*) Seek to improve the abuser's parenting skills if appropriate in conjunction with other skills.

(*5*) Continuously assess the abuser as a parent or caretaker as appropriate throughout the treatment process.

(*6*) Address the impact of the abuser's domestic abuse directed against the victim upon children in the home as a part of the domestic abuser clinical treatment.

(E) *Occurrence of sexual abuse within the context of domestic abuse.* Although sexual abuse is a subset of domestic abuse, victims may not recognize that sexual abuse can occur in the context of a marital or intimate partner relationship. Clinicians should employ specific assessment strategies to identify the presence of sexual abuse within the context of domestic abuse.

(F) *Deployment.* Deployment of an active duty Service member who is a domestic abuser is a complicating factor for treatment delivery.

(*1*) A Service member who is scheduled to deploy in the near future may be highly stressed and therefore at risk for using poor conflict management skills.

(*2*) While on deployment, a Service member is unlikely to receive clinical treatment for the abuse due to mission requirements and unavailability of such treatment.

(*3*) A deployed Service member reported to FAP as a domestic abuser may return from deployment early for military disciplinary or civilian legal procedures, for R&R, or if clinical conditions warrant early return from deployment for treatment not otherwise available at the deployed location and if the commander feels early return is necessary under the circumstances. The home station command and installation FAP must be notified in advance of the early return of a deployed Service member with an open FAP case, unless operational security prevents disclosure, so that the risk to the victim can be assessed and managed.

(*4*) A Service member who is deployed in a combat operation or in an operation in which significant traumatic events occur may be at a higher risk of committing domestic abuse upon return.

(*5*) The Service member may receive head injuries. Studies indicate that such an injury increases the risk of personality changes, including a lowered ability to tolerate frustration, poor impulse control, and an increased risk of using violence in situations of personal conflict. If the Service member has a history of a head injury prior to or during deployment, the clinician should ascertain whether the Service member received a medical assessment, was prescribed appropriate medication, or is undergoing current treatment.

(*6*) The Service member may suffer from depression prior to, during, or after deployment and may be at risk for post-traumatic stress disorder. Studies indicate that males who are depressed are at higher risk of using violence in their personal relationships. If the Service member presents symptoms of depression, the clinician should ascertain whether the Service member has received a medical assessment, was prescribed appropriate medication, or is undergoing current treatment.

(3) *Treatment modalities.* Clinical treatment may be provided in one or more of these modalities as appropriate to the situation:

(i) *Group therapy.* Group therapy is the preferred mode of treatment for domestic abusers because it applies the

concept of problem universality and offers opportunities for members to support one another and learn from other group members' experiences.

(A) The decision to assign an individual to group treatment is initially accomplished during the clinical assessment process; however, the group facilitator(s) should assess the appropriateness of group treatment for each individual on an ongoing basis.

(B) The most manageable maximum number of participants for a domestic abuser treatment group with one or two facilitators is 12.

(C) A domestic abuser treatment group may be restricted to one sex or open to both sexes. When developing a curriculum or clinical treatment agenda for a group that includes both sexes, the clinician should consider that the situations in paragraphs (d)(3)(i)(C)(*1*) through (d)(3)(i)(C)(*3*) are more likely to occur in a group that includes both sexes.

(*1*) Treatment-disruptive events such as sexual affairs or emotional coupling.

(*2*) Jealousy on the part of the nonparticipant victim.

(*3*) Intimidation of participants whose sex is in the minority within the group.

(D) A group may have one or two facilitators; if there are two facilitators, they may be of the same or both sexes.

(ii) *Individual treatment.* In lieu of using a group modality, approaches may be applied in individual treatment if the number of domestic abusers at the installation entering treatment is too small to create a group.

(iii) *Conjoint treatment with substance abusers.* When small numbers of both domestic abusers and substance abusers make separate treatment groups impractical, therapists should consider combining abusers into the same group because co-occurrence of domestic abuse and substance abuse has been documented in scientific literature and the content for clinical treatment of domestic abuse and substance abuse is very similar. When domestic abusers and substance abusers are combined into the same group, the facilitator(s) must be certified in substance abuse treatment as well as meeting the conditions in paragraph (e) of this section.

(iv) *Conjoint treatment of victim and abuser.* Domestic abuse in a relationship may be low-level in severity and frequency and without a pervasive pattern of coercive control.

(A) *Limitations on Use.* Conjoint treatment may be considered in such cases where the abuser and victim are treated together, but only if all of these conditions are met:

(*1*) Each of the parties separately and voluntarily indicates a desire for this approach.

(*2*) Any abuse, especially any violence, was infrequent, not severe, and not intended or likely to cause severe injury.

(*3*) The risk of future violence is periodically assessed as low.

(*4*) Each party agrees to follow safety guidelines recommended by the clinician.

(*5*) The clinician:

(*i*) Has the knowledge, skills, and abilities to provide conjoint treatment therapy as well as treat domestic abuse.

(*ii*) Fully understands the level of abuse and violence and specifically addresses these issues.

(*iii*) Takes appropriate measures to ensure the safety of all parties, including regular monitoring of the victim and abuser, using all relevant sources of information. The clinician will take particular care to ensure that the victim participates voluntarily and without fear and is contacted frequently to ensure that violence has not recurred.

(B) *Contra-indications.* Conjoint treatment will be suspended or discontinued if monitoring indicates an increase in the risk for abuse or violence. Conjoint treatment will not be used if one or more of these factors are present:

(*1*) The abuser:

(*i*) Has a history or pattern of violent behavior and/or of committing severe abuse.

(*ii*) Lacks a credible commitment or ability to maintain the safety of the victim or any third parties. For example, the abuser refuses to surrender personal firearms, ammunition, and other weapons.

(*2*) Either the victim or the abuser or both:

(*i*) Participates under threat, coercion, duress, intimidation, or censure,

and/or otherwise participates against his or her will.

(*ii*) Has a substance abuse problem that would preclude him or her from substantially benefiting from conjoint treatment.

(*iii*) Has one or more significant mental health issues (*e.g.*, untreated mood disorder or personality disorder) that would preclude him or her from substantially benefiting from conjoint treatment.

(v) *Couple's meetings*. Periodic case management meetings with the couple, as opposed to the ongoing conjoint therapy of a single victim and abuser, may be used only after the clinician (or clinicians) has made plans to ensure the safety of the victim. All couples meetings must be structured and co-facilitated by the clinician(s) providing treatment to the abusers and support for the victims to ensure support and protection for the victims.

(4) *Treatment contract*. Properly informing the abuser of the treatment rules is a condition for treating violations as a risk management issue. The clinician will prepare and discuss with the abuser an agreement between them that will serve as a treatment contract. The agreement will be in writing and the clinician will provide a copy to the abuser and retain a copy in the treatment record. The contract will include:

(i) *Goals*. Specific abuser treatment goals, as identified in the treatment plan.

(ii) *Time and attendance requirements*. The frequency and duration of treatment and the number of absences permitted.

(A) Clinicians may follow applicable State standards specifying the duration of treatment as a benchmark unless otherwise indicated.

(B) An abuser may not be considered to have successfully completed clinical treatment unless he or she has completed the total number of required sessions. An abuser may not miss more than 10 percent of the total number of required sessions. On a case-by-case basis, the facilitator should determine whether significant curriculum content has been missed and make-up sessions are required.

(iii) *Crisis plan*. A response plan for abuser crisis situations (information on referral services for 24-hour emergency calls and walk-in treatment when in crisis).

(iv) *Abuser responsibilities*. The abuser must agree to:

(A) Abstain from all forms of domestic abuse.

(B) Accept responsibility for previous abusive and violent behavior.

(C) Abstain from purchasing or possessing personal firearms or ammunition.

(D) Talk openly and process personal feelings.

(E) Provide financial support to his or her spouse and children per the terms of an agreement with the spouse or court order.

(F) Treat group members, facilitators, and clinicians with respect.

(G) Contact the facilitator prior to the session when unable to attend a treatment session.

(H) Comply with the rules concerning the frequency and duration of treatment, and the number of absences permitted.

(v) *Consequences of treatment contract violations*. Violation of any of the terms of the abuser contract may lead to termination of the abuser's participation in the clinical treatment program.

(A) Violations of the abuser contract may include, but are not limited to:

(*1*) Subsequent incidents of abuse.

(*2*) Unexcused absences from more than 10 percent of the total number of required sessions.

(*3*) Statements or behaviors of the abuser that show signs of imminent danger to the victim.

(*4*) Behaviors of the abuser that are escalating in severity and may lead to violence.

(*5*) Non-compliance with co-occurring treatment programs that are included in the treatment contract.

(B) If the abuser violates any of the terms of the abuser contract, the clinician or facilitator may terminate the abuser from the treatment program; notify the command, civilian criminal justice agency, and/or civilian court as appropriate; and notify the victim if contact will not endanger the victim.

(C) The command should take any action it deems appropriate when notified that the abuser's treatment has been terminated due to a contract violation.

(vi) *Conditions of information disclosure.* The circumstances and procedures, in accordance with applicable laws, regulations, and policies, under which information may be disclosed to the victim and to any court with jurisdiction.

(A) Past, present, and future acts and threats of child abuse or neglect will be reported to the member's commander; child protective services, when appropriate; and the appropriate military and/or civilian law enforcement agency in accordance with applicable laws, regulations, and policies.

(B) Recent and future acts and threats of domestic abuse will be reported to the member's commander, the appropriate military and/or civilian law enforcement agency, and the potential victim in accordance with applicable laws, regulations, and policies.

(vii) *Complaints.* The procedures according to which the abuser may complain regarding the clinician or the treatment.

(5) *Treatment outside the FAP.* If the abuser's treatment is provided by a clinician outside the FAP, the FAP clinical service provider will follow procedures in accordance with relevant laws, regulations, and policies regarding the confidentiality and disclosure of information. FAP may not close an open FAP case as resolved if the abuser does not consent to release of information from the outside provider confirming goal achievement, treatment progress, or risk reduction.

(6) *Criteria for evaluating treatment progress and risk reduction.* The FAP clinical service provider will assess progress in treatment and reduction of risk consistent with subpart B of this part. If a risk factor is not addressed within the FAP but is being addressed by a secondary clinical service provider, the FAP clinical service provider will ascertain the treatment progress or results in consultation with the secondary clinical service provider. Treatment progress should be assessed periodically using numerous sources, especially, but not limited to, the victim. In making contact with the victim and in using the information, promoting victim safety is the priority. Progress in clinical treatment and risk reduction is indicated by a combination of:

(i) *Abuser behaviors and attitudes.* An abuser is demonstrating progress in treatment when, among other indicators, he or she:

(A) Demonstrates the ability for self-monitoring and assessment of his or her behavior.

(B) Is able to develop a relapse prevention plan.

(C) Is able to monitor signs of potential relapse.

(D) Has completed all treatment recommendations.

(ii) *Information from the victim and other relevant sources.* The abuser is demonstrating progress in treatment when the victim and other relevant sources of information state any one or combination of the following: That the abuser has:

(A) Ceased all domestic abuse.

(B) Reduced the frequency of non-violent abusive behavior.

(C) Reduced the severity of non-violent abusive behavior.

(D) Delayed the onset of abusive behavior.

(E) Demonstrated the use of improved relationship skills.

(iii) *Reduced ratings on risk assessment variables that are subject to change.* The abuser has successfully reduced risk when the assessment of his or her risk is rated at the level the Military Service has selected for case closure.

(e) *Personnel qualifications*—(1) *Minimum qualifications.* All personnel who conduct clinical assessments of and provide clinical treatment to domestic abusers must have these minimum qualifications:

(i) A master's or doctoral-level human service and/or mental health professional degree from an accredited university or college.

(ii) The highest license in a State or clinical license in good standing in a State that authorizes independent clinical practice.

(iii) 1 year of experience in domestic abuse and child abuse counseling or treatment.

(2) *Additional training.* All personnel who conduct clinical assessments of and/or provide clinical treatment to

domestic abusers must undergo this additional training:

(i) Within 6 months of employment, orientation into the military culture. This includes training in the Service rank structures and military protocol.

(ii) A minimum of 15 hours of continuing education units within every 2 years that are relevant to domestic abuse and child abuse. This includes, but is not limited to, continuing education in interviewing adult victims of domestic abuse, children, and domestic abusers, and conducting treatment groups.

(iii) Service FAP Managers must develop policies and procedures for continued education with clinical skills training that validates clinical competence, and not rely solely on didactic or computer disseminated training to meet continuing education requirements.

(f) *QA*—(1) *QA procedures*. The FAP Manager must ensure that clinical intervention undergoes these QA procedures:

(i) A quarterly peer review of a minimum of 10 percent of open clinical records that includes procedures for addressing any deficiencies with a corrective action plan

(ii) A quarterly administrative audit of a minimum of 10 percent of open records that includes procedures for addressing any deficiencies with a corrective action plan.

(2) *FAC responsibilities*. The installation FAC will analyze trends in risk management, develop appropriate agreements and community programs with relevant civilian agencies, promote military interagency collaboration, and monitor the implementation of such agreements and programs on a regular basis consistent with subpart B of this part.

(3) *Evaluation and accreditation review*. The installation domestic abuse treatment program will undergo evaluation and/or accreditation every 4 years, including an evaluation and/or accreditation of its coordinated community risk management program consistent with subpart B of this part.

PART 66—QUALIFICATION STANDARDS FOR ENLISTMENT, APPOINTMENT, AND INDUCTION

Sec.

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AUTHORITY: 10 U.S.C. 504, 505, 520, 532, 12102, 12201, and 12205.

SOURCE: 80 FR 16270, Mar. 27, 2015, unless otherwise noted.

§ 66.1 Purpose.

In accordance with the authority in DoD Directive 5124.02, ''Under Secretary of Defense for Personnel and Readiness (USD(P&R))'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 512402p.pdf*), this part:

(a) Updates established policies and responsibilities for basic entrance qualification standards for enlistment, appointment, and induction into the Military Services and delegates the authority to specify certain standards to the Secretaries of the Military Departments.

(b) Establishes the standards for age, aptitude, citizenship, dependents, education, medical, character/conduct, physical fitness, and other disqualifying conditions, which are cause for non-qualification for military service. Other standards may be prescribed in the event of national emergency.

(c) Sets standards designed to ensure that individuals under consideration for enlistment, appointment, or induction are able to perform military duties successfully, and to select those who are the most trainable and adaptable to Service life.

§ 66.2 Applicability.

This part applies to:

(a) Office of the Secretary of Defense, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of

Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the ''DoD Components'').

(b) Applicants for initial enlistment into the Military Services Regular and Reserve Components.

(c) Applicants for appointment as commissioned or warrant officers in the Regular and Reserve Components.

(d) Applicants for reenlistment following release from active duty into subsequent Regular or Reserve Components (including the Army National Guard of the United States and the Air National Guard of the United States) after a period of more than 6 months has elapsed since discharge.

(e) Applicants for contracting into the Reserve Officer Training Corps (ROTC), and all other Military Services special officer personnel procurement programs, including the Military Service Academies.

(f) All individuals being inducted into the Military Services.

§ 66.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purposes of this part.

Adjudicating authority. Any government official who is empowered to make findings or determinations concerning an alleged criminal offense (adult and juvenile) and establish responsibility for commission of the offense. Examples include judges, courts, magistrates, prosecutors, hearing officers, military commanders (for Article 15 actions pursuant to 10 U.S.C. chapter 47, suspension of dependent privileges, or similar actions), probation officers, juvenile referees, and parole officers or boards.

Adverse adjudication (adult or juvenile).

(1) A finding, decision, sentence, or judgment by an adjudicating authority, against an individual, that was other than unconditionally dropped or dismissed or the individual was acquitted is considered adverse adjudication. If the adjudicating authority places a condition or restraint that leads to dismissal, drops the charges, acquits, or the records are later expunged, or the charge is dismissed after a certain period of time, the adjudication is still considered adverse. A suspension of sentence, not processed, or a dismissal after compliance with imposed conditions is also adverse adjudication. This includes fines and forfeiture of bond in lieu of trial.

(2) A conviction for violating any federal law (including 10 U.S.C. chapter 47), or any State or municipal law or ordinance) is considered an adverse adjudication. For example, a shoplifter is reprimanded and required by the on-scene police officer, store security guard, or manager to pay for the item before leaving the store but is not charged, not found guilty, or is not convicted. In this situation, there is no adverse adjudication because no legal proceedings occurred and no adjudicating authority was involved.

Conviction. The act of finding a person guilty of a crime, offense, or other violation of the law by an adjudicating authority.

Dependent.

(1) A spouse of an applicant for enlistment.

(2) An unmarried step-child under the age of 18 living with the applicant.

(3) An unmarried biological child or unmarried adopted child of the applicant under the age of 18.

(4) Any person living with the applicant who is, by law or in fact, dependent upon the applicant for support, or who is not living with the applicant and is dependent upon the applicant for over one-half of his or her support.

Reserve components. Includes the Army National Guard of the United States, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard of the United States, the Air Force Reserve, and the Coast Guard Reserve.

Restitution. Any compensation in time, labor, or money for the adverse effects of an offense as a result of agreements from judicial or prosecutorial involvement. For example, an individual is adversely adjudicated for vandalism and is ordered by the adjudicating authority to replace or repair the damaged property.

Service review. A formal review of condition(s) or event(s) that, based on Service-specific standards, may make an applicant for enlistment ineligible to serve. Once a Service review is complete, the Service may grant an exception to policy to allow an individual to serve. These standards are subject to change at the discretion of the Service.

Waiver. A formal request to consider the suitability for service of an applicant who because of inappropriate conduct, dependency status, current or past medical conditions, or drug use may not be qualified to serve. Upon the completion of a thorough examination using a ''whole person'' review, the applicant may be granted a waiver. The applicant must have displayed sufficient mitigating circumstances that clearly justify waiver consideration. The Secretaries of the Military Departments may delegate the final approval authority for all waivers.

[80 FR 16270, Mar. 27, 2015, as amended at 81 FR 64062, Sept. 19, 2016]

§ 66.4 Policy.

It is DoD policy to:

(a) Use common entrance qualification standards for enlistment, appointment, and induction into the Military Services.

(b) Avoid inconsistencies and inequities based on ethnicity, gender, race, religion, or sexual orientation in the application of these standards by the Military Services.

(c) Judge the suitability of individuals to serve in the Military Services on the basis of their adaptability, potential to perform, and conduct.

§ 66.5 Responsibilities.

(a) Under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), the Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD(M&RA)):

(1) Acts as an advisor to the USD(P&R) on the Reserve enlistment and appointment standards.

(2) Acts as an advisor to the USD(P&R) on the height and weight requirements of the standards in § 66.6.

(3) Ensures the U.S. Military Entrance Processing Command assists the Military Services in implementing the standards in § 66.6.

(b) Under the authority, direction, and control of the USD(P&R), the Assistant Secretary of Defense for Health Affairs (ASD(HA)) acts as an advisor to the USD(P&R) on the medical requirements of the standards in § 66.6.

(c) The Secretaries of the Military Departments:

(1) Oversee conformance with this part.

(2) Recommend suggested changes to this part to the USD(P&R) as necessary.

(3) Establish other Service-specific standards as necessary to implement this part.

(4) Review all standards on an annual basis.

(5) Establish procedures to grant waivers, accomplish reviews, and require individuals to meet the appropriate standards or be granted an exception pursuant to 10 U.S.C. 504(a).

(6) Request approval from the USD(P&R) for generalized exceptions to these standards as permitted by law.

(7) Use the standards in § 66.6 to determine the entrance qualifications for all individuals being enlisted, appointed, or inducted into any component of the Military Services.

[80 FR 16270, Mar. 27, 2015, as amended at 81 FR 64063, Sept. 19, 2016]

§ 66.6 Enlistment, appointment, and induction criteria.

(a) *General eligibility criteria*—(1) *Entrance considerations.* Accession of qualified individuals will be a priority when processing applicants for the Military Services.

(2) *Eligibility determination.* Eligibility will be determined by the applicant's ability to meet all requirements of this part, to include obtaining waivers. Applicants will not be enlisted, appointed, or inducted unless all requirements of this part are met.

(b) *Basic eligibility criteria*—(1) *Age.* (i) To be eligible for Regular enlistment, the minimum age for enlistment is 17 years and the maximum age is 42 years in accordance with 10 U.S.C. 505. The maximum age for a prior service enlistee is determined by adding the individual's years of prior service to age 42. The Secretary concerned will establish

enlistment age standards for the Reserve Components in accordance with 10 U.S.C. 12102.

(ii) Age limitations for appointment as a commissioned or warrant officer normally depend on the Military Service concerned. In accordance with 10 U.S.C. 532, most persons appointed as commissioned officers must be able to complete 20 years of active commissioned service before their 62nd birthday to receive a Regular commission.

(iii) In accordance with 10 U.S.C. 12201, a person will be at least 18 years of age for appointment as a Reserve Officer. The maximum age qualification for initial appointment as a Reserve Officer will not be less than 47 years of age for individuals in a health profession specialty designated by the Secretary concerned as a specialty critically needed in wartime.

(iv) In accordance with 32 U.S.C. 313, to be eligible for original enlistment in the National Guard, a person must be at least 17 years of age and under 45, or under 64 years of age and a former member of the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps. To be eligible for reenlistment, a person must be under 64 years of age.

(v) In accordance with 32 U.S.C. 313, to be eligible for appointment as an officer of the National Guard, a person must be at least 18 years of age and under 64 years of age.

(2) *Citizenship.* (i) To be eligible for Regular or Reserve enlistment, an individual must meet one of the conditions outlined in 10 U.S.C. 504(b); however, the Secretary concerned may authorize the enlistment of a person not described in this section if the Secretary determines that such enlistment is vital to the national interest.

(ii) To be eligible for appointment as a commissioned officer (other than as a commissioned warrant officer) in the Regular Army, Regular Navy, Regular Air Force, or Regular Marine Corps, the individual must be a citizen of the United States as outlined in 10 U.S.C. 532. The Secretary of Defense (or the Secretary of Homeland Security for the Coast Guard, when not operating as a Service under the Navy), may waive the requirement of U.S. citizenship with respect to a person who has been lawfully admitted to the United States for permanent residence, or for a United States national otherwise eligible for appointment as a cadet or midshipman in accordance with 10 U.S.C. 2107(a), when the Secretary determines that the national security so requires, but only for an original appointment in a grade below the grade of major or lieutenant commander.

(iii) To be eligible for appointment as a Reserve Officer in an armed force, the individual must be a citizen of the United States or lawfully admitted to the United States for permanent residence in accordance with 8 U.S.C. 1101 *et seq.* (also known as the ''Immigration and Nationality Act'') or have previously served in the Military Services or in the National Security Training Corps as outlined under 10 U.S.C. 12201.

(iv) To be eligible for enlistment in the National Guard, a person must meet one of the conditions in 10 U.S.C. 504(b); however, the Secretary concerned may authorize the enlistment of a person not described in this section if the Secretary determines that such enlistment is vital to the national interest.

(v) To become an officer of the Army National Guard of the United States or the Air National Guard of the United States, the individual must first be appointed to, and be federally recognized in, the same grade in the Army National Guard or the Air National Guard. In accordance with 10 U.S.C. 12201, the individual must be a citizen of the United States or lawfully admitted to the United States for permanent residence in accordance with 8 U.S.C. 1101 *et seq.* or have previously served in Military Service or in the National Security Training Corps.

(3) *Education.* (i) Possession of a high school diploma is desirable, although not mandatory, for enlistment in any component of the Military Services. 10 U.S.C. 520 states that a person who is not a high school graduate may not be accepted for enlistment in the Military Services unless the score of that person on the Armed Forces Qualification Test (AFQT) is at or above the thirty-first percentile. 10 U.S.C. 520 also states that a person may not be denied enlistment in the Military Services solely because he or she does not have

a high school diploma if his or her enlistment is needed to meet established strength requirements.

(ii) Bearers of an alternative credential (*e.g.*, General Educational Development certificates and certificates of attendance) and non-graduates may be assigned lower enlistment priority based on first-term attrition rates for those credentials. DoD Instruction 1145.01, ''Qualitative Distribution of Military Manpower'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 114501p.pdf*) identifies the authority for establishing the qualitative distribution objectives for accessions.

(iii) Educational requirements for appointment as a commissioned or warrant officer are determined by each Military Service. 10 U.S.C. 12205 establishes education requirements for certain Reserve appointments. Generally, and unless excepted under 10 U.S.C. 12205, a baccalaureate degree is required for appointment above the grade of first lieutenant in the Army, Air Force, and Marine Corps Reserves or lieutenant junior grade in the Navy Reserve, or to be federally recognized in a grade above the grade of first lieutenant as a member of the Army National Guard or Air National Guard. In addition, special occupations (*e.g.*, physician or chaplain) may require additional vocational credentials as determined by the Secretary concerned.

(4) *Aptitude.* (i) Overall aptitude requirements for enlistment and induction are based on applicant scores on the AFQT derived from the Armed Services Vocational Aptitude Battery. Applicant scores are grouped into percentile categories. Persons who score in AFQT Category V (percentiles 1–9) are ineligible to enlist. In accordance with 10 U.S.C. 520, the number of persons who enlist in any Armed Force during any fiscal year (*i.e.*, accession cohort) who score in AFQT Category IV (percentiles 10–30) may not exceed 20 percent of the total number of persons enlisted by Service. DoD Instruction 1145.01 identifies the authority for establishing the qualitative distribution objectives for accessions.

(ii) For officers and warrant officers, no single test or instrument is used as an aptitude requirement for appointment.

(5) *Medical.* (i) In accordance with DoD Instruction 6130.03, ''Medical Standards for Appointment, Enlistment, or Induction in the Military Services'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 613003p.pdf*), the pre-accession screening process will be structured to identify any medical condition, including mental health, that disqualifies an applicant for military service.

(ii) Individuals who fail to meet established medical standards, as defined in DoD Instruction 6130.03, may be considered for a medical waiver. Each Service's waiver authority for medical conditions will make a determination based on all available information regarding the issue or condition. Waiver requirements are outlined in §66.7.

(6) *Physical fitness.* (i) In accordance with DoD Instruction 1308.3, ''DoD Physical Fitness and Body Fat Programs Procedures'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 130803p.pdf*), all individuals must meet the pre-accession height and weight standards as prescribed in Table 1 of DoD Instruction 1308.3.

(ii) The Military Services may have additional physical fitness screening requirements.

(7) *Dependency status.* (i) The Military Services may not enlist married individuals with more than two dependents under the age of 18 or unmarried individuals with custody of any dependents under the age of 18; however, the Secretary concerned may grant a waiver for particularly promising entrants. Waiver requirements are outlined in §66.7 of this part.

(ii) The Military Services will specify the circumstances under which individuals who have dependents may become commissioned officers or warrant officers; variations in policy may be affected by the commissioning source (*e.g.*, Service Academies, ROTC, or Officer Candidate School).

(8) *Character/conduct.* The underlying purpose of these enlistment, appointment, and induction standards is to minimize entrance of persons who are likely to become disciplinary cases, security risks, or who are likely to disrupt good order, morale, and discipline. The Military Services are responsible for the defense of the Nation and

should not be viewed as a source of rehabilitation for those who have not subscribed to the legal and moral standards of society at-large. As a minimum, an applicant will be considered ineligible if he or she:

(i) Is under any form of judicial restraint (bond, probation, imprisonment, or parole).

(ii) Has a significant criminal record. 10 U.S.C. 504 prohibits any person who has been convicted of a felony from being enlisted in any of the Military Services; however, 10 U.S.C. 504 authorizes a waiver in meritorious cases. Except as limited by paragraph (b)(8)(iii) of this section, persons convicted of felonies may request a waiver to permit their enlistment. The waiver procedure is not automatic, and approval is based on each individual case. Waiver requirements are outlined in § 66.7 of this part.

(iii) Has a State or federal conviction, or a finding of guilty in a juvenile adjudication, for a felony crime of rape, sexual abuse, sexual assault, incest, any other sexual offense, or when the disposition requires the person to register as a sex offender. In these cases, the enlistment, appointment, or induction will be prohibited and no waivers are allowed.

(iv) Has been previously separated from the Military Services under conditions other than honorable or for the good of the Military Service concerned.

(v) Has exhibited antisocial behavior or other traits of character that may render the applicant unfit for service.

(vi) Receives an unfavorable final determination by the DoD Consolidated Adjudication Facility on a completed National Agency Check with Law and Credit (NACLC) or higher-level investigation, which is adjudicated to the National Security Standards in accordance with Executive Order 12968, during the accession process.

(A) An applicant may be accessed (including shipping him or her to training or a first duty assignment) provided that a NACLC or higher-level investigation was submitted and accepted by the investigative service provider (Office of Personnel Management (OPM)) and an advanced fingerprint was conducted, and OPM did not identify any disqualifying background information.

(B) If NACLC adjudication is not completed until after accession, any additional disqualifying information identified during the adjudication should be transmitted to the appropriate personnel or human resource offices, as determined by the Services, for appropriate action.

(9) *Drugs and alcohol.* A current or history of alcohol dependence, drug dependence, alcohol abuse, or other drug abuse is incompatible with military life and does not meet military standards in accordance with DoD Instruction 6130.03. Pursuant to DoD Instruction 1010.01, ''Military Personnel Drug Abuse Testing Program (MPDATP)'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 101001p.pdf*), the preaccession screening process is structured to identify individuals with a history of drug (including pharmaceutical medications, illegal drugs and other substances of abuse) and alcohol abuse.

(i) Drug use (to include illegal drugs, other illicit substances, and pharmaceutical medications), drug abuse, and alcohol abuse may be self-admitted by an applicant, discovered during the medical screening process, or identified by the drug and alcohol test (DAT), which is administered at the Military Entrance Processing Stations (MEPS) or other approved military processing facility.

(ii) Current or history of alcohol dependence, drug dependence, alcohol abuse, or other drug abuse may be a medically disqualifying condition based on the standards in accordance with DoD Instruction 6130.03. The MEPS Chief Medical Officer or equivalent, when the physical is not performed at MEPS, will make that determination based on all of the information available on a case-by-case basis. These instances will be treated as a medical disqualification and handled in accordance with the guidance provided in paragraphs (b)(5)(i) through (b)(5)(ii) of this section.

(iii) Individuals who test positive for illegal drugs on the DAT, which is administered as part of the accession physical, will be disqualified. A waiver may be requested. Waiver requirements are outlined in § 66.7.

(iv) Service qualification standards, regarding drugs and alcohol, may be more restrictive.

[80 FR 16270, Mar. 27, 2015, as amended at 81 FR 64063, Sept. 19, 2016]

§ 66.7 Enlistment waivers.

(a) *Waiver requirements.* In accomplishing whole person reviews of enlistment eligibility, the following categories and combinations of categories would require a favorable waiver determination by the Secretary of the Military Department concerned for the applicant to be considered qualified. The waiver procedure is not automatic, and approval is based on each individual case.

(1) *Medical waiver.* A medical waiver is required for enlistment qualification of an applicant who has or may have had a disqualifying medical condition in accordance with DoD Instruction 6130.03.

(2) *Dependent waiver.* A dependent waiver is required when an applicant is married with more than two dependents under the age of 18 or when an applicant is unmarried and has custody of any dependents under the age of 18.

(3) *Conduct waiver.* In processing conduct waiver requests, the Military Services will require information about the ''who, what, when, where, and why'' of the offense in question; and letters of recommendation from responsible community leaders, such as school officials, clergy, and law enforcement officials, attesting to the applicant's character or suitability for enlistment. Waivers are not authorized for cases noted in § 66.6(b)(8)(iii).

(i) A Conduct Waiver is required when the final finding of the courts or other adjudicating authority is a conviction or other adverse adjudication of:

(A) One ''major misconduct'' offense, or;

(B) Two ''misconduct'' offenses, or;

(C) A pattern of misconduct.

(*1*) One ''misconduct'' offense and four ''non-traffic'' offenses.

(*2*) Five or more ''non-traffic'' offenses.

(ii) Use the Table of this section to determine the appropriate level of offense and applicable code. See paragraph (b) of this section for additional guidance.

(4) *Drug waiver.* A drug waiver is required when an applicant or enlistee is confirmed positive for the presence of drugs at the time of the original or subsequent physical examination (*i.e.*, tests positive on the DAT at a MEPS or equivalent facility). Drug waivers for these applicants may be considered and granted or rejected only after the disqualification period established in section 6 of Enclosure 7 of DoD Instruction 1010.16, ''Technical Procedures for the Military Personnel Drug Abuse Testing Program (MPDATP)'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 101016p.pdf*) ends.

(b) *Classifying conduct offenses.* The procedures that will be used in the classifying and coding of all conduct offenses are:

(1) *Initial classification.* Align the offense that is the subject of adverse adjudication with an offense from the Table of this section. As an exception, any offense classified as a felony under the appropriate State or federal jurisdiction will be treated as a major misconduct offense for DoD purposes regardless of where similar charges are listed.

(2) *Non-similar offenses.* If unable to find a similar charge, the Military Services will:

(i) Treat the offense as a major misconduct offense if the adjudicating authority can impose a maximum period of confinement that exceeds 1 year.

(ii) Treat the offense as a misconduct offense if the adjudicating authority can impose a maximum period of confinement that exceeds 6 months but is not more than 1 year.

(iii) Treat all other offenses as either other non-traffic offenses or traffic offenses, depending on the nature of the offense.

TABLE TO § 66.7—CONDUCT WAIVER CODES

Offense code	Offense title
	TRAFFIC OFFENSES
100	Bicycle ordinance violation.
101	Blocking or retarding traffic.
102	Contempt of court for minor traffic offenses.
103	Crossing yellow line; driving left of center.
104	Disobeying traffic lights, signs, or signals.
105	Driving on shoulder.
106	Driving uninsured vehicle.
107	Driving with blocked vision and/or tinted window.
108	Driving with expired plates or without plates.
109	Driving with suspended or revoked license.
110	Driving without license.
111	Driving without registration or with improper registration.
112	Driving wrong way on one-way street.
113	Failure to appear for traffic violations.
114	Failure to comply with officer's directive.
115	Failure to have vehicle under control.
116	Failure to signal.
117	Failure to stop or yield to pedestrian.
118	Failure to submit report after accident.
119	Failure to yield right-of-way.
120	Faulty equipment such as defective exhaust, horn, lights, mirror, muffler, signal device, steering device, tail pipe, or windshield wipers.
121	Following too closely.
122	Hitchhiking.
123	Improper backing such as backing into intersection or highway, backing on expressway, or backing over crosswalk.
124	Improper blowing of horn.
125	Improper passing such as passing on right, passing in no-passing zone, passing stopped school bus, or passing pedestrian in crosswalk.
126	Improper turn.
127	Invalid or unofficial inspection sticker or failure to display inspection sticker.
128	Jaywalking.
129	Leaving key in ignition.
130	Leaving scene of accident (when not considered hit and run).
131	License plates improperly displayed or not displayed.
132	Operating overloaded vehicle.
133	Racing, dragging, or contest for speed.
134	Reckless, careless, or imprudent driving (considered a traffic offense when the fine is less than $300 and there is no confinement). Court costs are not part of a fine.
135	Reserved for future use.
136	Seat belt and/or child restraint violation.
137	Skateboard, roller skate, or inline skate violation.
138	Speeding.
139	Spilling load on highway.
140	Spinning wheels, improper start, zigzagging, or weaving in traffic.
141	Violation of noise control ordinance.
142	Other traffic offenses not specifically listed.
143	Reserved for future use.
144	Reserved for future use.
	NON-TRAFFIC OFFENSES
200	Altered driver's license or identification.
201	Assault (simple assault with fine or restitution of $500 or less and no confinement).
202	Carrying concealed weapon (other than firearm); possession of brass knuckles.
203	Check, worthless, making or uttering, with intent to defraud or deceive (less than $500).
204	Committing a nuisance.
205	Conspiring to commit misdemeanor.
206	Curfew violation.
207	Damaging road signs.
208	Discharging firearm through carelessness or within municipal limits.
209	Disobeying summons; failure to appear (other than traffic).
210	Disorderly conduct; creating disturbance; boisterous conduct.
211	Disturbing the peace.
212	Drinking alcoholic beverages on public transportation.
213	Drunk in public.
214	Dumping refuse near highway.
215	Failure to appear, contempt of court (all offenses except felony proceedings).
216	Failure to appear, contempt of court (felony proceedings).
217	Failure to stop and render aid after accident.

TABLE TO §66.7—CONDUCT WAIVER CODES—Continued

Offense code	Offense title
218	Fare and/or toll evasion.
219	Harassment, menacing, or stalking.
220	Illegal betting or gambling; operating illegal handbook, raffle, lottery, or punchboard; cockfighting.
221	Indecent exposure.
222	Indecent, insulting, or obscene language communicated directly or by telephone to another person.
223	Jumping turnstile (to include those States that adjudicate jumping a turnstile as petty larceny).
224	Juvenile adjudications such as beyond parental control, incorrigible, runaway, truant, or wayward.
225	Killing a domestic animal.
226	Littering.
227	Loitering.
228	Malicious mischief (fine or restitution of $500 or less and no confinement).
229	Pandering.
230	Poaching.
231	Purchase, possession, or consumption of alcoholic beverages or tobacco products by minor.
232	Removing property from public grounds.
233	Removing property under lien.
234	Robbing an orchard.
235	Shooting from highway.
236	Throwing glass or other material in roadway.
237	Trespass (non-criminal or simple).
238	Unlawful assembly.
239	Unlawful manufacture, sale, possession, or consumption of liquor in public place.
240	Unlawful use of long-distance telephone calling card.
241	Using or wearing unlawful emblem and/or identification.
242	Vagrancy.
243	Vandalism (fine or restitution of $500 or less and no confinement).
244	Violation of fireworks laws.
245	Violation of fish and game laws.
246	Violation of leash laws.
247	Violation of probation.
248	Other non-traffic offenses not specifically listed.
249	Reserved for future use.
	MISCONDUCT OFFENSES
300	Aggravated assault, fighting, or battery (more than $500 fine or restitution or confinement).
301	Carrying of weapon on school grounds (other than firearm).
302	Concealment of or failure to report a felony.
303	Contributing to delinquency of minor.
304	Crimes against the family (non-payment of court-ordered child support and/or alimony).
305	Criminal mischief (more than $500 fine or restitution or confinement).
306	Criminal trespass.
307	Desecration of grave.
308	Domestic battery and/or violence not considered covered by 18 U.S.C. 922, referred to in this issuance as the ''Lautenberg Amendment'').
309	Driving while drugged or intoxicated; driving while ability impaired; permitting driving under the influence.
310	Illegal or fraudulent use of a credit card or bank card (value less than $500).
311	Larceny or conversion (value less than $500).
312	Leaving scene of an accident or hit and run.
313	Looting.
314	Mailbox destruction.
315	Mailing of obscene or indecent matter (including e-mail).
316	Possession of marijuana or drug paraphernalia.
317	Prostitution or solicitation for prostitution.
318	Reckless, careless, or imprudent driving (considered a misdemeanor when the fine is $300 or more or when confinement is imposed; otherwise, considered a minor traffic offense).
319	Reckless endangerment.
320	Resisting arrest or eluding police.
321	Selling or leasing weapons.
322	Stolen property, knowingly receiving (value less than $500).
323	Throwing rocks on a highway; throwing missiles at sporting events; throwing objects at vehicles.
324	Unauthorized use or taking of a vehicle or conveyance from family member; joy riding.
325	Unlawful carrying of firearms or carrying concealed firearm.
326	Unlawful entry.
327	Use of telephone, Internet, or other electronic means to abuse, annoy, harass, threaten, or torment another.
328	Vandalism (more than $500 fine or restitution or confinement).
329	Willfully discharging firearm so as to endanger life; shooting in public.
330	Other misconduct offenses not specifically listed.
331	Reserved for future use.
332	Reserved for future use.

TABLE TO § 66.7—CONDUCT WAIVER CODES—Continued

Offense code	Offense title
	MAJOR MISCONDUCT OFFENSES
400	Aggravated assault; assault with dangerous weapon; maiming.
401	Arson.
402	Attempt to commit a felony.
403	Breaking and entering with intent to commit a felony.
404	Bribery.
405	Burglary.
406	Carjacking.
407	Carnal knowledge of a child.
408	Carrying of weapon on school grounds (firearm).
409	Check, worthless, making or uttering, with intent to defraud or deceive (over $500).
410	Child abuse.
411	Child pornography.
412	Conspiring to commit a felony.
413	Criminal libel.
414	Domestic battery and/or violence as defined in the Lautenberg Amendment. (Waiver not authorized if applicant was convicted of this offense.)
415	Embezzlement.
416	Extortion.
417	Forgery, knowingly uttering or passing forged instrument (except for altered identification cards).
418	Grand larceny or larceny (value of $500 or more).
419	Grand theft auto.
420	Hate crimes.
421	Illegal and/or fraudulent use of a credit card, bank card, or automated card (value of $500 or more).
422	Indecent acts or liberties with a child; molestation.
423	Indecent assault.
424	Kidnapping or abduction.
425	Mail matter; abstracting, destroying, obstructing, opening, secreting, stealing, or taking (not including the destruction of mailboxes).
426	Manslaughter.
427	Murder.
428	Narcotics or habit-forming drugs, wrongful possession or use (not including marijuana).
429	Negligent or vehicular homicide.
430	Perjury or subornation of perjury.
431	Possession or intent to use materials in a manner to make a bomb or explosive device to cause bodily harm or destruction of property.
432	Public record; altering, concealing, destroying, mutilating, obligation, or removing.
433	Rape, sexual abuse, sexual assault, criminal sexual abuse, incest, or other sex crimes. (See paragraph (b)(8)(iii) of § 66.6 of this part; waivers for these offenses are not authorized.)
434	Riot.
435	Robbery (including armed).
436	Sale, distribution, or trafficking of cannabis (marijuana) or any other controlled substance (including intent).
437	Sodomy (only when it is nonconsensual or involves a minor).
438	Stolen property, knowingly received (value of $500 or more).
439	Terrorist threats (including bomb threats).
440	Violation of civil rights.
441	Other major misconduct offenses not specifically listed.
442	Reserved for future use.
443	Reserved for future use.

[80 FR 16270, Mar. 27, 2015, as amended at 81 FR 64063, Sept. 19, 2016]

PART 67—EDUCATIONAL REQUIREMENTS FOR APPOINTMENT OF RESERVE COMPONENT OFFICERS TO A GRADE ABOVE FIRST LIEUTENANT OR LIEUTENANT (JUNIOR GRADE)

Sec.

67.1 Purpose.
67.2 Applicability.
67.3 Definitions.
67.4 Policy.
67.5 Responsibilities.
67.6 Procedures.

AUTHORITY: 10 U.S.C. 12205.

SOURCE: 62 FR 55517, Oct. 27, 1997, unless otherwise noted.

§ 67.1 Purpose.

This part provides guidance for implementing policy, assigns responsibilities, and prescribes under 10 U.S.C.

12205 for identifying criteria for determining educational institutions that award baccalaureate degrees which satisfy the educational requirement for appointment of officers to a grade above First Lieutenant in the Army Reserve, Air Force Reserve, and Marine Corps Reserve, or Lieutenant (Junior Grade) in the Naval Reserve, or for officers to be federally recognized in a grade level above First Lieutenant as a member of the Army National Guard or Air National Guard.

§67.2 Applicability.

This part applies to the Office of the Secretary of Defense, and the Military Departments; the Chairman of the Joint Chiefs or Staff; and the Defense Agencies referred to collectively in this part as the ''DoD Components''). The term ''Military Departments,'' as used in this part, refers to the Departments of the Army, the Navy, and the Air Force. The term ''Secretary concerned'' refers to the Secretaries of the Military Departments. The term ''Military Services'' refers to the Army, the Navy, the Air Force, the Marine Corps. The term ''Reserve components'' refers to the Army Reserve, Army National Guard of the United States, Air Force Reserve, Air National Guard of the United States, Naval Reserve, Marine Corps Reserve.

§67.3 Definitions.

Accredited educational institution. An educational institution accredited by an agency recognized by the Secretary of Education.

Qualifying educational institution. An educational institution that is accredited, or an unaccredited educational institution that the Secretary of Defense designates pursuant to §67.6(a) and §67.6(b).

Unaccredited educational institution. An educational institution not accredited by an agency recognized by the Secretary of Education.

§67.4 Policy.

(a) It is DoD policy under 10 U.S.C. 12205 to require Reserve component officers to have at least a baccalaureate degree from a qualifying educational institution before appointment to a grade above First Lieutenant in the Army Reserve, Air Force Reserve or Marine Corps Reserve, or Lieutenant (Junior Grade) in the Naval Reserve, or for officers to be federally recognized in a grade above First Lieutenant as a member of the Army National Guard or Air National Guard.

(b) Exempt from this policy is any officer who was:

(1) Appointed to or recognized in a higher grade for service in a health profession for which a baccalaureate degree is not a condition of original appointment or assignment.

(2) Appointed in the Naval Reserve or Marine Corps Reserve as a limited duty officer.

(3) Appointed in the Naval Reserve for service under the Naval Aviation Cadet (NAVCAD) program or the Seaman to Admiral program.

(4) Appointed to or recognized in a higher grade if appointed to, or federally recognized in, the grade of captain or, in the case of the Navy, lieutenant before October 1, 1995.

(5) Recognized in the grade of captain or major in the Alaska Army National Guard, who resides permanently at a location in Alaska that is more than 50 miles from each of the cities of Anchorage, Fairbanks, and Juneau, Alaska, by paved road, and who is serving in a Scout unit or a Scout support unit.

(c) The Department of Defense will designate an unaccredited educational institution as a qualifying educational institution for the purpose of meeting this educational requirement if that institution meets the criteria established in this part.

§67.5 Responsibilities.

(a) The Assistant Secretary of Defense for Reserve Affairs, under the Under Secretary of Defense for Personnel and Readiness, shall:

(1) Establish procedures by which an unaccredited educational institution can apply for DoD designation as a qualifying educational institution.

(2) Publish in the FEDERAL REGISTER DoD requirements and procedures for an unaccredited educational institution to apply for designation as a qualifying education institution.

(3) Annually, provide to the Secretaries of the Military Departments a list of those unaccredited educational

institutions that have been approved by the Department of Defense as a qualifying educational institution. This list shall include the year or years for which unaccredited educational institutions are designed as qualifying educational institutions.

(b) The Secretaries of the Military Departments shall establish procedures to ensure that after September 30, 1995, those Reserve component officers selected for appointment to a grade above First Lieutenant in the Army Reserve, Air Force Reserve, or Marine Corps Reserve, or Lieutenant (Junior Grade) in the Naval Reserve, or for officers to be federally recognized in a grade above First Lieutenant as a member of the Army National Guard or Air National Guard, who are required to hold a baccalaureate degree, were awarded a baccalaureate degree from a qualifying educational institution before appointment to the next higher grade. For a degree from an unaccredited educational institution that has been recognized as qualifying educational institution by the Department of Defense to satisfy the educational requirements of 10 U.S.C. 12205, the degree must not have been awarded more than 8 years before the date the officer is to be appointed, or federally recognized, in the grade of Captain in the Army Reserve, Army National Guard, Air Force Reserve, Air National Guard, or Marine Corps Reserve, or in the grade of Lieutenant in the Naval Reserve.

§ 67.6 Procedures.

(a) An unaccredited educational institution may obtain designation as a qualifying educational institution for a specific Reserve component officer who graduated from that educational institution by providing certification from registrars at three accredited educational institutions that maintain ROTC programs that their educational institutions would accept at least 90 percent of the credit hours earned by that officer at the unaccredited educational institution, as of the year of graduation.

(b) For an unaccredited educational institution to be designated as a qualifying educational institution for a specific year, that educational institution must provide the Office of the Assistant Secretary of Defense for Reserve Affairs certification from the registrars at three different accredited educational institutions that maintain ROTC programs listing the major field(s) of study in which that educational institution would accept at least 90 percent of the credit hours earned by a student who was awarded a baccalaureate degree in that major field of study at the unaccredited educational institution.

(c) For an unaccredited educational institution to be considered for designation as a qualifying educational institution, the unaccredited educational institution must submit the required documentation no later than January 1 of the year for which the unaccredited educational institution seeks to be designated a qualifying educational institution.

(d) The required documentation must be sent to the following address: Office of the Assistant Secretary of Defense for Reserve Affairs, Attn: DASD (M&P), 1500 Defense Pentagon, Washington, DC 20301–1500.

(e) Applications containing the required documentation may also be submitted at any time from unaccredited educational institutions requesting designation as a qualifying educational institution for prior school years.

PART 68—VOLUNTARY EDUCATION PROGRAMS

Sec.

68.1 Purpose.
68.2 Applicability.
68.3 Definitions.
68.4 Policy.
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68.6 Procedures.

APPENDIX A TO PART 68—DOD VOLUNTARY EDUCATION PARTNERSHIP MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN DOD OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)) AND [NAME OF EDUCATIONAL INSTITUTION]

APPENDIX B TO PART 68—ADDENDUM FOR EDUCATION SERVICES BETWEEN [NAME OF EDUCATIONAL INSTITUTION] AND THE U.S. AIR FORCE (USAF)

APPENDIX C TO PART 68—ADDENDUM FOR EDUCATION SERVICES BETWEEN [NAME OF EDUCATIONAL INSTITUTION] AND THE U.S. ARMY

APPENDIX D TO PART 68—ADDENDUM FOR EDUCATION SERVICES BETWEEN [NAME OF EDUCATIONAL INSTITUTION] AND THE U.S. MARINE CORPS
APPENDIX E TO PART 68—ADDENDUM FOR EDUCATION SERVICES BETWEEN [NAME OF EDUCATIONAL INSTITUTION] AND THE U.S. NAVY

AUTHORITY: 10 U.S.C. 2005, 2006a, 2007.

SOURCE: 79 FR 27737, May 15, 2014, unless otherwise noted.

§ 68.1 Purpose.

This part:

(a) Implements policy, assigns responsibilities, and prescribes procedures for the operation of voluntary education programs in the DoD.

(b) Establishes policy stating the eligibility criteria for tuition assistance (TA) and the requirement for a memorandum of understanding (MOU) from all educational institutions providing educational programs through the DoD TA Program.

(c) Establishes policy that:

(1) All educational institutions providing education programs through the DoD Tuition Assistance (TA) Program:

(i) Will provide meaningful information to students about the financial cost and attendance at an institution so military students can make informed decisions on where to attend school.

(ii) Will not use unfair, deceptive, and abusive recruiting practices.

(iii) Will provide academic and student support services to Service members and their families.

(2) Creates rules to strengthen existing procedures for access to DoD installations by educational institutions.

(3) Requires an annual review and notification process of uniform semester-hour (or equivalent) TA caps and annual TA ceilings.

(4) Requires the Military Departments to provide their Service members with a joint services transcript (JST).

(5) Implements the DoD Postsecondary Education Complaint System for Service members, spouses, and adult family members to register student complaints.

(6) Authorizes the Military Departments to establish Service-specific TA eligibility criteria and management controls.

(d) Establishes the Interservice Voluntary Education Board.

§ 68.2 Applicability.

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

§ 68.3 Definitions.

The following terms and their definitions are for the purpose of this part:

Academic. Relating to education, educational studies, an educational institution, or the educational system.

Academic skills. Competencies in English, reading, writing, speaking, mathematics, and computer skills that are essential to successful job performance and new learning. Also referred to as functional or basic skills.

Active Guard and Reserve (AGR). National Guard or Reserve members of the Selected Reserve (SELRES) who are ordered to active duty or full-time National Guard duty for a period of 180 consecutive days or more for the purpose of organizing, administering, recruiting, instructing, or training the Reserve Component (RC) units or duties as prescribed in 10 U.S.C. 12310. All AGR members must be assigned against an authorized mobilization position in the unit they support. (Includes Navy full-time support (FTS), Marine Corps Active Reserve (ARs), and Coast Guard Reserve Personnel Administrators (RPAs)).

American Council on Education (ACE). The major coordinating body for all of the Nation's higher education institutions. Seeks to provide leadership and a unifying voice on key higher education issues and publishes the ''Guide to the Evaluation of Educational Experiences in the Armed Services.''

Annual TA Ceiling. The maximum dollar amount authorized for each Service member for TA per fiscal year. Each Service member participating in off-duty voluntary education programs

will be entitled to the full amount authorized each fiscal year in accordance with DoD policy.

Army/American Council on Education Registry Transcript System. A document sent directly from the Army American Council on Education Registry Transcript System Center to the educational institution to articulate a soldier's military experience and training and the American Council on Education-recommended college credit for this training and experience. The JST consolidates data from the legacy Army/ACE Registry Transcript System.

Degree requirements. A document provided by the educational institution that outlines required courses and conditions to complete an educational program. The document presents the general education, major-related, and elective course requirements, degree competencies (e.g., foreign language, computer literacy), and other requirements (e.g., examination, thesis, dissertation, practicum, grade point average, credits by course level, or academic residency) for the specified program of study. This document becomes the basis for the evaluated educational plan.

DoD Installation. For the purposes of this Instruction, any active duty military, Reserve or National Guard owned, leased, or operated base, reservation, post, site, camp, building, or other facility to which DoD personnel are assigned for duty.

Education advisor. A professionally qualified, subject matter expert or program manager in the Education Services Series 1740 or possessing equivalent qualifications at the education center. The following position titles may also be used for an education advisor: Education Services Specialist, Education Services Officer (ESO), Voluntary Education Director, Navy College Office Director, and Education and Training Section (ETS) Chief.

Education center. A DoD installation facility, including office space, classrooms, laboratories, or other features, that is staffed with professionally qualified personnel and to conduct voluntary education programs. This may be located at an active duty military installation, Reserve and National Guard facility (state readiness center, armory, unit, etc.), or recruiting center (leased space inside a shopping mall or office building). For Navy, this is termed the ''Navy College Office.''

Educational institution. A college, university, or other institution of higher education. For the purposes of this Instruction, the parent/home/main campus and any sub-campuses included in the signed MOU with DoD.

Educational institution agent. A lawful agent of the educational institution is limited to persons who have written authorization to act on behalf of the educational institutions.

Educational institution representative. An employee of the educational institution.

Eligible adult family member. The adult family member, over the age of 18, of an active duty, Reserve, National Guardsman, or DoD civilian with a valid DoD identification card.

Evaluated educational plan. An individualized official academic document provided by the educational institution that:

(1) Articulates all degree requirements for degree completion or in the case of a non-degree program, all educational requirements for completion of the program;

(2) Identifies all courses required for graduation in the individual's intended academic discipline and level of postsecondary study; and

(3) Includes an evaluation of all successfully completed prior coursework, and evaluated credit for military training and experience, and other credit sources applied to the institutional degree requirements. At a minimum, the evaluated educational plan will identify required courses and where appropriate, College Level Examination Program, DSST (formerly known as the DANTES Subject Standardized Tests) Program, and potential American Council on Education recommended college credits for training and experiences. For participating SOC Degree Network System institutions, the SOC Degree Network System Student Agreement serves as this evaluated educational plan. For some educational institutions this may be termed a degree audit.

Individual Ready Reserve (IRR). A manpower pool consisting principally

of individuals who have had training, have previously served in the Active Component or in the SELRES, and have some period of their military service obligation or other contractual obligation remaining. Some individuals volunteer to remain in the IRR beyond their military service or contractual obligation and participate in programs providing a variety of professional assignments and opportunities for earning retirement points and military benefits.

Joint services transcript (JST). An official education transcript tool for documenting the recommended ACE college credits for a variety of professional military education, training courses, and occupational experience of Service members across the Services. The JST consolidates data from legacy documents such as the Army/ACE Registry Transcript System, the Sailor/Marine ACE Registry Transcript System, the Community College of the Air Force transcript, and the Coast Guard Institute transcript.

Needs assessment. A process used to determine the staffing requirements, course offerings, size of facilities, funding, or other standards for delivery of educational programs.

Off-duty. Time when the Service member is not scheduled to perform official duties.

Ready Reserve. Composed of military members of the Reserve and National Guard, organized in units or as individuals, or both, and liable for involuntary order to active duty in time of war or national emergency pursuant to 10 U.S.C. 12310 and 12301 and 14 U.S.C. 712 in the case of members of the Coast Guard Reserve. The Ready Reserve consists of the SELRES, the IRR, and the Inactive National Guard.

Sailor/Marine American Council on Education Registry Transcript System. A document sent directly from the Sailor/Marine ACE Registry Transcript System Operations Center to the educational institution to articulate a Sailor's or Marine's military experience and training and the American Council on Education recommended college credit for this training and experience. The JST consolidates data from the legacy Sailor/Marine ACE Registry Transcript System.

Semester-hour TA cap. The maximum dollar amount authorized for TA per semester-hour (or equivalent) credit. A Service will pay no more than the established DoD cap per semester-unit (or equivalent) for tuition.

Servicemembers Opportunity Colleges (SOC). A consortium of over 1,800 colleges and universities, created in 1972 that seeks to enhance the educational opportunities to Service members who may have difficulty in completing college programs due to frequent military moves.

Third Party Education Assessment. A third-party evaluation of voluntary education programs covered by the DoD Voluntary Education Partnership MOU.

Top-Up. An option, under the Montgomery G.I. Bill and the Post-9/11 G.I. Bill, that enables active duty Service members and certain Reservists to receive from the VA those tuition costs that exceed or are not authorized in the amount of TA provided to the Service member by his or her Service. Entitlement is charged differently depending on which G.I. Bill program a Service member uses. The Montgomery G.I. Bill entitlement is charged based on the dollar amount of benefits VA pays to the individual. The Service member will be charged one month of entitlement for each payment received that is equal to the full-time monthly rate for the Montgomery G.I. Bill. The Post-9/11 entitlement is charged based on the enrolled amount of time and the individual's rate of pursuit during the period of enrollment. If a Service member is attending classes part-time or at the 1/2 time level, the charge is 1/2 month of Post-9/11 G.I. Bill benefits for each month enrolled and receiving G.I. Bill benefits.

Troops-to-Teachers program (TTT). A DoD program to assist transitioning Service members and veterans in meeting the requirements necessary to become a teacher and facilitating their subsequent employment.

Tuition assistance (TA). Funds provided by the Military Services or U.S. Coast Guard to pay a percentage of the charges of an educational institution for the tuition of an active duty, Reserve or National Guard member of the Military Services, or Coast Guard

member, enrolled in approved courses of study during off-duty time.

Voluntary education programs. Continuing, adult, or postsecondary education programs of study that Service members elect to participate in during their off-duty time, and that are available to other members of the military community.

§ 68.4 Policy.

It is DoD policy, consistent with DoD Directive 1322.08E, ''Voluntary Education Programs for Military Personnel'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/132208p.pdf*), that:

(a) Members of the Military Services serving on active duty and members of the Selected Reserve (SELRES) will be afforded the opportunity to complete their high school education through a state-funded or Service component sponsored program; earn an equivalency diploma, improve their academic skills or level of literacy, enroll in career and technical education schools, receive college credit for military training and experience in accordance with the American Council on Education (ACE) Guide to the Evaluation of Educational Experiences in the Armed Services (available at *http://www.acenet.edu/ news-room/Pages/ Military-Guide-Online.aspx*), take tests to earn college credit, and enroll in postsecondary education programs that lead to industry-recognized credentials, and undergraduate and graduate degrees.

(b) Service members' costs to participate in the DoD Voluntary Education Program as authorized by 10 U.S.C. 2007, will be reduced through financial support, including TA that is administered uniformly across the Military Services. On an annual basis and no later than the end of the second quarter of the fiscal year, the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), in coordination with the Military Departments, will review the uniform semester-hour (or equivalent) TA caps and annual TA ceilings to determine possible changes for the upcoming fiscal year. If there are any changes in the uniform semester-hour (or equivalent) caps and annual TA ceilings, a memorandum will be released from the USD(P&R), in coordination with the Military Departments, and a corresponding notice will be published in the FEDERAL REGISTER.

(c) Professional education counseling will be readily available and easy to access so that Service members can make informed decisions concerning available educational opportunities and benefits. Education counseling will be provided by qualified professional (Education Services Series 1740 or an individual with equivalent qualifications) in sufficient numbers to operate voluntary education programs as determined by individual Service standards.

(d) In accordance with Executive Order (E.O.) 13607:

(1) Educational institutions receiving funding from federal military educational benefits programs, such as the DoD TA Program, will:

(i) Provide meaningful information to students on the financial cost and attendance at an educational institution so military students can make informed decisions on where to attend school as stated in section 3 of Appendix A.

(ii) Prevent unfair, deceptive, and abusive recruiting practices that target Service members as defined by the Dodd-Frank Wall Street Reform and Consumer Protection Act and as stated in section 3 of Appendix A.

(iii) Provide academic and student support services specific to the institutions' programs to all enrolled Service members, spouses and adult family members.

(2) DoD will implement a centralized online complaint system for Service members, spouses, and adult family members that will register, track, and respond to student complaints. DoD or the assigned Military Service will work with educational institutions to resolve any filed complaints. Educational institutions having recurring, substantive complaints or demonstrating an unwillingness to resolve complaints may face a range of penalties from a directed Third Party Education Assessment to revocation of the DoD Voluntary Education Partnership MOU and removal from participation in the DoD TA Program. As appropriate, DoD will refer student complaints to other

government agencies/regulators including but not limited to the Federal Trade Commission (FTC), Department of Justice (DOJ), Consumer Financial Protection Bureau (CFPB), Department of Veterans Affairs (VA), and Department of Education (ED).

(e) Educational institutions accredited by a national or regional accrediting agency recognized by ED will be encouraged to provide degree programs on DoD installations and the Military Services will facilitate their operations on the DoD installations referred to in § 68.6(c).

(f) To the extent that space is otherwise available, eligible adult family members of Service members, DoD civilian employees and their eligible adult family members, and military retirees may enroll in postsecondary education programs offered on a DoD installation at no cost to the individual Service TA programs.

§ 68.5 Responsibilities.

(a) The USD(P&R) will:

(1) Monitor implementation of and ensure compliance with this part and DoD Directive 1322.08E.

(2) Establish rates of TA and ensure uniformity across the Military Services as required by DoD Directive 1322.08E and this part. The uniform semester-hour (or equivalent) TA caps and annual TA ceilings will be reviewed annually and if changed, a memorandum from the USD(P&R) will be released following coordination with each of the Military Departments. Additionally, if the uniform TA rates are changed, a notice will be published in the FEDERAL REGISTER at approximately the start of the fiscal year.

(3) Establish, under the provisions of DoD Instruction 5105.18, ''DoD Intergovernmental and Intragovernmental Committee Management Program'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/510518p.pdf*), the Interservice Voluntary Education Board, which will be composed of full-time or permanent part-time federal employees.

(4) Maintain a program to assess the effectiveness of the voluntary education programs.

(5) Issue written supplemental guidance annually for the funding and operation of the Defense Activity for Non-Traditional Education Support (DANTES) for those items not reflected in paragraph (f) of § 68.6.

(b) The Assistant Secretary of Defense for Readiness and Force Management (ASD(R&FM)), under the authority, direction, and control of the USD(P&R) will:

(1) Provide administrative assistance to the Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MCFP)), in support of the voluntary education programs.

(2) Respond to matters that are referred by the DASD(MCFP).

(c) The DASD(MCFP), under the authority, direction, and control of the ASD(R&FM), will:

(1) Monitor compliance with this part and DoD Directive 1322.08E and related issuances by personnel under his or her authority, direction, and control.

(2) Oversee the DoD Voluntary Education Program.

(3) Provide ongoing and routine clarifying guidance for the DoD Voluntary Education Program.

(4) Provide representatives to professional education and cross-agency panels addressing issues impacting the DoD Voluntary Education Program, its regulatory scope, clientele, and partners.

(5) Designate the Voluntary Education Chief within the Office of the DASD(MCFP) as the Chair of the Interservice Voluntary Education Board and oversee implementation of Board and DANTES procedures as detailed in § 68.6 of this part.

(6) Oversee the DoD Postsecondary Education Complaint System through which Service members, spouses, and adult family members receiving federal military and veterans educational benefits can register on-line complaints that will be tracked and responded to by DoD, VA, ED, CFPB, DOJ, FTC, and other relevant agencies. The DoD Postsecondary Education Complaint System is web-based and accessible on-line at *https://afaems.langley.af.mil/pecs/DoDPECS*. This complaint system contains the uniform procedures for the processing of the complaint intake (DD Form 2961, ''DoD Postsecondary Education Complaint Intake'').

(7) Oversee the Third-Party Education Assessment, which is a third party review process to assess the quality, delivery, and coordination of the voluntary education programs provided to military personnel on the DoD installation, in the community, and via distance learning (DL). It assists in improving the quality of the delivery of these programs through recommendation to educational institutions, DoD installations, and the Military Services. DASD(MCFP) will monitor actions:

(i) By the Military Services to resolve recommendations for improvement identified on the respective Military Service's installation during the Third Party Education Assessment.

(ii) By the DoD Voluntary Education Chief to resolve recommendations for improvement concerning educational institutions operating off the DoD installation or via DL identified during Third Party Education Assessments. These educational institutions will provide corrective actions taken within 6 months of the assessment to the DoD Voluntary Education Chief. In instances when the issue cannot be resolved within the 6 month timeframe, the educational institution will submit a status report every 3 months to the DoD Voluntary Education Chief until the recommendation is resolved.

(8) Prepare written supplemental guidance annually for the USD(P&R) regarding the funding and operation of DANTES for those items not reflected in paragraph (f) of § 68.6.

(9) Oversee the policy of the JST.

(d) The Assistant Secretary of Defense for Reserve Affairs (ASD(RA)), under the authority, direction, and control of the USD(P&R), will:

(1) Monitor compliance with this part and DoD Directive 1322.08E and related issuances by personnel under his or her authority, direction, and control.

(2) Appoint a representative to serve on the Interservice Voluntary Education Board.

(3) Arrange the assignment of, on a rotating basis, a field grade officer, to serve as the RC Advisor to the Voluntary Education Chief and a representative on the Interservice Voluntary Education Board.

(e) The Secretaries of the Military Departments will:

(1) Monitor compliance with this part and DoD Directive 1322.08E and related issuances by personnel under their respective authority, direction, and control.

(2) Establish, maintain, coordinate, and operate voluntary education programs that encompass a broad range of educational experiences including, but not limited to, academic skills development, high school completion programs, vocational programs, career and technical programs, and programs leading to the award of undergraduate and graduate degrees.

(3) Require that sufficient funding is available to provide Service members with TA support consistent with the requirements in § 68.6 and appendices A, B, C, D, and E to this part.

(4) Require that educational counseling is available to Service members so they will have sufficient information and guidance to plan an appropriate program of study. Educational counseling will be provided by qualified professional (Education Services Series 1740 or an individual with equivalent qualifications) individuals.

(5) Require that voluntary education programs participate in the DoD-established third-party review process titled the Third Party Education Assessment.

(i) Within 6 months of the Third Party Education Assessment on their installation, the responsible Military Service will resolve recommendations received as a result of the assessment and provide the resolutions to the DoD Voluntary Education Chief. In instances when the issue cannot be resolved within the 6 month timeframe, the Military Service will submit a status report every 3 months to the DoD Voluntary Education Chief until the recommendation is resolved.

(ii) If the recommendation(s) requires involvement of an educational institution operating on their respective installation, the Military Service will coordinate the submission of corrective actions taken by the educational institution(s) through the appropriate Education Advisor, and forward the submission through their respective Military Service leadership to the DoD Voluntary Education Chief.

(iii) Waivers to the Third Party Education Assessment must be submitted to and approved by the DoD Voluntary Education Chief.

(6) Provide one representative to serve on the Interservice Voluntary Education Board responsible for their Services' voluntary education policy from each of the following Military Services: Army, Navy, Air Force, and Marine Corps. Each Service representative's membership will be on a permanent basis and changed only when their voluntary education policy position is changed.

(7) Assign, on a rotating basis, a senior enlisted Service member in the military pay grade E–9 to serve as the DANTES enlisted advisor.

(8) Assign, on a rotating basis, a field-grade officer to serve as the DANTES RC advisor.

(9) Require that military test control officers and test centers comply with the guidance and procedures published in the DANTES Examination Program Handbook, available at *http://www.dantes.doded.mil/ Programs/Docs/ DEPH_part1.pdf*.

(10) Require that personnel who provide counseling, advice, and program management related to voluntary education programs have access to the DoD Voluntary Education homepage and other Web sites so they can provide current and accurate information to Service members.

(11) Provide opportunities for Service members to access the Internet, where available, to enroll in and complete postsecondary courses that are part of their evaluated educational plan leading to an educational goal.

(12) Submit requested quarterly and annual information for the Voluntary Education Management Information System (VEMIS) by the 20th day of the month after the end of each fiscal quarter for the quarterly reports and November 15th each year for the annual report. Reporting information includes, but is not limited to, voluntary education program data on enrollments, participation, and costs.

(13) Respond to and resolve Service-specific student complaints received and managed through the DoD Postsecondary Education Complaint System.

(14) Provide Service members with a JST. At a minimum, the JST will include documented military student data, courses, and military occupations evaluated by ACE, including descriptions, learning outcomes, and equivalent college credit recommendations, as well as national college-level exam results. The U.S. Air Force (USAF) will continue to use the Community College of the Air Force (CCAF) to document its members' academic and military credit.

(f) *Secretary of the Navy*. The Secretary of the Navy, as the DoD Executive Agent (DoD EA) for DANTES pursuant to DoD Directive 1322.08E and DoD Directive 5101.1, ''DoD Executive Agent'' (available at *http://www.dtic.mil/ whs/ directives/corres/pdf/ 510101p.pdf*), and in addition to the responsibilities in this section, will:

(1) Transmit supplemental annual guidance issued by the USD(P&R) to DANTES for those items not reflected in paragraph (f) of §68.6.

(2) Require that the Director, DANTES, provide updates on DANTES plans, operations, and activities to the USD(P&R).

(3) Through its civilian personnel system, advertise the position of Director, DANTES, when the position is vacated and appoint the Director, DANTES, in accordance with the procedures outlined in §68.6.

§68.6 Procedures.

(a) *TA for Service members participating in education programs*. (1) TA will be available for Service members participating in high school completion and approved courses from accredited undergraduate or graduate education programs or educational institutions. Approved courses are those that are part of an identified course of study leading to a postsecondary certificate or degree and non-degree oriented language courses integral to the Defense Language Transformation Roadmap (available at *http://www.defense.gov/news/ Mar2005/d20050330roadmap.pdf*).

(i) Use of TA for non-degree oriented language courses is limited to those published by the Under Secretary of Defense (P&R) on the DoD Strategic Language List.

(ii) Dominant-in-the-force languages and languages deemed by DoD as already having sufficient strategic capacity will not be funded under 10 U.S.C. 2007, except for assignments outside the continental United States.

(2) TA will be applied as follows:

(i) For 100 percent of the cost of approved high school completion programs for Service members who have not been awarded a high school or equivalency diploma and who are enrolled in such programs.

(ii) In support of the voluntary education of active duty Service members during their off-duty periods, each Military Service will pay all or a portion, as specified in paragraphs (a)(2)(ii)(A) through (F) of this section, of the charges of an educational institution for education during the member's off-duty periods. TA funding will only be paid to educational institutions accredited by an accrediting organization recognized by ED, approved VA funding, and certified to participate in federal student aid programs through the ED under Title IV of Public Law 89–329, also known and referred to in this part as the Higher Education Act of 1965. Whenever ED withdraws the recognition of any accrediting agency, an institution of higher education that meets the requirements of accreditation, eligibility, and certification on the day before such withdrawal, may, notwithstanding the withdrawal, continue to participate in the TA program for a period not to exceed 18 months from the date of the withdrawal of recognition.

(A) When an educational institution's charges are equal to or less than the established cap per semester-hour of credit or its equivalent, the responsible Service will pay the entire amount charged by the educational institution. In computing credit equivalency, the following conversions will apply: 1 quarter-hour credit = 2/3 semester-hour credit; and 45 contact hours will be considered equivalent to 1 semester-hour credit when neither semester- nor quarter-hours are specified for the education for which the Service member is enrolled.

(B) When an educational institution's charges exceed the established cap per semester-hour of credit, or its equivalent, the responsible Service, will pay no more than the established cap per semester-unit (or equivalent) for tuition.

(C) Each Service member participating in off-duty, voluntary education will be allowed no more than the established annual ceiling, in aggregate, for each fiscal year.

(D) Covered charges include those that are submitted to the Service by the educational institution for tuition only. Educational institutions that bundle tuition, fees, or books into a consolidated cost must detail the charges of fees and books separately for Service members participating in the TA program. Fees include any charge not directly related to course instruction including but not limited to costs associated with room, board, distance learning, equipment, supplies, books/materials, exams, insurance, parking, transportation, admissions, registration, or fines.

(E) TA funds are not to be used for the purchase of books to include textbooks, ebooks, CDs/DVDs, or reference or instructional materials. Additionally, institutional education revenue generated from military TA funds cannot be used to support textbook grants or scholarships.

(F) To be eligible to receive TA, a Service member must meet the minimum requirement of successfully completing basic training. RC members are exempt from the requirement to first attend basic training before authorized to receive TA. Additional, respective Service requirements must be met to include training qualification, unit assignment, and time in service criteria.

(iii) The TA rate, credit-cap, and annual per capita ceiling, will be reviewed annually in consideration of inflation and other effects, and will be applicable uniformly whether instruction is delivered traditionally in-the-classroom or through distance education. Rates of TA other than as identified in paragraphs (a)(2)(ii)(A) through (F) of this section are not authorized.

(3) *Service-specific TA eligibility requirements.* (i) Service-specific eligibility criteria and management controls are determined by each Military Service.

(ii) Service-specific TA eligibility criteria and management controls may include, but are not limited to, applying TA:

(A) For courses leading to a certificate or required for a credentialing program. All payments for courses must comply with the allowable caps and ceilings.

(B) For graduate studies through the master's degree level. All payments for courses must comply with the allowable caps and ceilings.

(C) For same level degrees, subject to the availability of funds. However, TA is primarily intended to raise the academic degree level of the Service member.

(4) TA is available to a commissioned officer on active duty, other than an officer serving in the Ready Reserves (addressed in paragraphs (a)(5)(i) and (a)(6)(i) of this section), only if the officer agrees to remain on active duty, for a period of at least 2 years after the completion of the education or training for which TA was paid (see 10 U.S.C. 2007).

(5) The Secretary of the Military Department concerned may only make TA available to a member of the SELRES, pursuant to 10 U.S.C. 2007, under the following conditions:

(i) In the case of a commissioned officer, the officer must agree to remain a member of the SELRES for at least 4 years after completion of the education or training for which TA is paid.

(ii) In the case of an enlisted member, the Secretary concerned may require the member of the SELRES to enter into an agreement to remain a member of the SELRES for up to 4 years after completion of the education or training for which TA is paid.

(6) The Secretary of the Military Department concerned may only make TA available to a member of the IRR who has a military occupational specialty designated by the Secretary concerned pursuant to 10 U.S.C. 2007 and only under the following conditions:

(i) In the case of a commissioned officer, the officer must agree to remain a member of the SELRES or IRR for at least 4 years after completion of the education or training for which TA was paid.

(ii) In the case of an enlisted member, the Secretary concerned may require the member of the IRR to enter into an agreement to remain a member of the IRR for up to 4 years after completion of the education or training for which TA is paid.

(7) Members performing Active Guard and Reserve (AGR) duty under either 10 U.S.C. 12310 or active duty under 14 U.S.C. 712 are eligible for TA under paragraph (a)(4) of this section.

(8) The Secretary of the Military Department concerned may make TA available to National Guard members in accordance with paragraph (a)(4), except for National Guard members assigned to the Inactive National Guard.

(9) Reimbursement and repayment requirements:

(i) If a commissioned officer or member of the RR does not fulfill a specified Service obligation as required by 10 U.S.C. 2007, they are subject to the repayment provisions of 37 U.S.C. 303a(e).

(ii) For other conditions pursuant to 10 U.S.C. 2005, the Secretary concerned may require a Service member to enter into a written agreement when providing advanced education assistance. If the Service member does not fulfill any terms or conditions as prescribed by the Secretary concerned, the Service member will be subject to the repayment provisions of 37 U.S.C. 303a(e).

(iii) Pursuant to 37 U.S.C. 303a(e), the Secretary concerned may establish procedures for determining the amount of the repayment required from the Service member and the circumstances under which an exception to the required repayment may be granted.

(iv) Reimbursement will be required from the Service member if a successful course completion is not obtained. For the purpose of reimbursement, a successful course completion is defined as a grade of ''C'' or higher for undergraduate courses, a ''B'' or higher for graduate courses and a ''Pass'' for ''Pass/Fail'' grades. Reimbursement will also be required from the Service member if he or she fails to make up a grade of ''I'' for incomplete within the time limits stipulated by the educational institution or 6 months after the completion of the class, whichever

comes first. The Secretary of the Military Department will establish recoupment processes for unsuccessful completion of courses.

(10) Students using TA must maintain a cumulative grade point average (GPA) of 2.0 or higher after completing 15 semester hours, or equivalent, in undergraduate studies, or a GPA of 3.0 or higher after completing 6 semester hours, or equivalent, in graduate studies, on a 4.0 grading scale. If the GPA for TA funded courses falls below these minimum GPA limits, TA will not be authorized and Service members will use alternative funding (such as financial aid or personal funds) to enroll in courses to raise the cumulative GPA to 2.0 for undergraduate studies or 3.0 for graduate studies.

(11) TA will not be authorized for any course for which a Service member receives reimbursement in whole or in part from any other Federal source such as veterans' education benefits (GI Bill and other programs) and Service-funded programs (ROTC scholarship, education-related incentive or bonus, and advanced civil schooling) when the payment would constitute a duplication of benefits paid to that educational institution. Federal student aid loan, grant, and work-study programs will not be considered a duplication of benefit. Educational institutions have the responsibility to notify the Service if there is any duplication of benefits, determine the amount of credit that should be returned, and credit the amount back to the Service. The use of funds related to veterans' education benefits to supplement TA received by active duty and RC personnel is authorized in accordance with applicable VA guidelines.

(12) Pell Grants may be used in conjunction with TA assistance to pay that portion of tuition costs not covered by TA.

(13) TA will be provided for courses provided by educational institutions awarding degrees based on demonstrated competency, if:

(i) Competency rates are equated to semester or quarter units of credit, and

(ii) The educational institution publishes traditional grade correlations with ''Pass/Fail'' grades, and

(iii) The educational institution provides a breakdown by course equivalent for Service members.

(14) Enrollment in a professional practicum integral to these types of programs is also authorized. However, normal DoD TA caps and ceilings apply; the cost of expanded levels of enrollment over and above these enrollment levels and normal caps and ceilings must be borne by the student.

(15) When used for postsecondary education, TA will be provided only for courses offered by postsecondary educational institutions whose home campus is operating within the United States, to include the District of Columbia and U.S. territories, which are accredited by a national or regional accrediting body recognized by the ED.

(16) On a date to be determined, but not earlier than 60 days following the publication of this part in the FEDERAL REGISTER, to receive TA, all educational institution home campuses must sign the revised DoD Voluntary Education Partnership Memorandum of Understanding (MOU) in appendices A, B, C, D, and E to this part, and the name of the educational institution must be posted on the DoD MOU Web site under the 'Participating Institutions' tab (located at *http://www.dodmou.com*). One signed, revised DoD Voluntary Education Partnership MOU with the educational institution's home campus will cover any program offered by the educational institution, regardless of location. The requirement to sign the revised DoD Voluntary Education Partnership MOU contained in this part applies to institutions with a previously approved and signed DoD Voluntary Education Partnership MOU posted on the DoD MOU Web site.

(17) To the extent that any provision of the standard language of the DoD Voluntary Education Partnership MOU template in appendices A, B, C, D, and E to this part, results from DoD policy that conflicts with a state law or regulation, the DASD(MCFP) may authorize amending the standard language of the DoD Voluntary Education Partnership MOU template on a case-by-case basis to the extent permissible by Federal law or regulation.

(18) A DoD Voluntary Education Partnership MOU with an educational

institution may be suspended or terminated by DoD in these circumstances:

(i) The DoD Voluntary Education Partnership MOU with an educational institution may be terminated by the ASD(R&FM) following written notice and an opportunity to respond for the failure to comply with any element of this part of the DoD Voluntary Education Partnership MOU. In addition, an otherwise qualified educational institution may be suspended from participating in the tuition assistance program by the ASD(R&FM) following written notice and an opportunity to respond through either the termination of an existing DoD Voluntary Education Partnership MOU or the refusal by DoD to enter into a new DoD Voluntary Education Partnership MOU upon indictment of the educational institution or any senior official of the educational institution on a criminal charge related to the operation of the educational institution. The decision of the ASD(R&FM) in either of these cases may be appealed to the USD(P&R), and the decision of the USD(P&R) will be deemed to be the final administrative action by DoD on the matter.

(ii) An otherwise qualified educational institution may also be immediately suspended from participating in the tuition assistance program through either the termination of an existing DoD Voluntary Education Partnership MOU or the refusal to enter into a new DoD Voluntary Education Partnership MOU by the USD(P&R) on national security grounds. Written notice of the action will be provided to the educational institution, and, if practicable without damaging national security, the written notice will include a short unclassified summary of the reasons for the action. Such a decision of the USD(P&R) is only appealable to the Secretary of Defense, who has authorized the Deputy Secretary of Defense to act on such an appeal.

(iii) The authorities pursuant to this paragraph are not delegable.

(b) *Guidelines for establishing, maintaining, and operating voluntary education programs.* (1) Education programs established under this part by each Military Service will:

(i) Provide for the academic, technical, intellectual, personal, and professional development of Service members, thereby contributing to the readiness of the Military Services and the quality of life of Service members and their families.

(ii) Increase Service members' opportunities for advancement and leadership by reinforcing their academic skills and occupational competencies with new skills and knowledge.

(iii) Lead to a credential, such as a high school diploma, certificate, or college degree, signifying satisfactory completion of the educational program.

(iv) Include an academic skills program, which allows personnel to upgrade their reading, writing, computation, and communication abilities in support of academic skills and military occupations and careers. Academic skills programs may include English as a Second Language, mathematics and basic science.

(v) Include programs and college offerings that support findings from periodic needs assessments conducted by the appropriate DoD installation official (normally the Education Services Officer) for programs provided on the DoD installation. The DoD installation needs assessment process is used to determine such items as staffing requirements, course offerings, size of facilities, funding, or other standards for delivery of educational programs. Duplication of course offerings on a DoD installation should be avoided. However, the availability of similar courses through correspondence or electronic delivery will not be considered duplication.

(vi) Be described in a publication or on-line source that includes on-installation educational programs, programs available at nearby DoD installations, and colleges and universities nearby the DoD installation.

(2) Each Military Service, in cooperation with community educational service providers, will provide support essential to operating effective education programs. This support includes:

(i) Adequate funds for program implementation, administration, and TA.

(ii) Adequately trained staff to determine program needs, counsel students,

provide testing services, and procure educational programs and services. Education counseling will be provided by qualified professional (Education Services Series 1740 or an individual with equivalent qualifications) individuals.

(iii) Adequate and appropriate classroom, laboratory, and office facilities and equipment, including computers to support local needs.

(iv) Access to telecommunications networks, computers, and physical or online libraries at times convenient to active duty personnel.

(3) In operating its programs, each Military Service will:

(i) Provide to newly assigned personnel, as part of their orientation to each new DoD installation or unit of assignment for RC personnel, information about voluntary education programs available at that DoD installation, unit, or State for RC personnel.

(ii) Maintain participants' educational records showing education accomplishments and educational goals.

(iii) Provide for the continuing professional development of their education services staff, including the participation of field staff in professional, as well as Service-sponsored, conferences, symposiums, and workshops.

(iv) Provide educational services, including TA counseling, academic advice and testing to their personnel and to personnel of other Services (including the U.S. Coast Guard when operating as a service in the Navy) who are assigned for duty at DoD installations of the host Service. These educational services will be provided by qualified professional (Education Services Series 1740 or an individual with equivalent qualifications) individuals in sufficient numbers to operate voluntary education programs as determined by individual Service standards. Outcomes from these educational services will include:

(A) A prior learning assessment that includes a review of all education transcripts to include the JST, the CCAF transcript, and academic transcript recommendations for ACE recommended credit.

(B) An assessment of the Service members' readiness to accomplish the degree requirements as outlined in the evaluated educational plan and a discussion of academic skills development programs.

(C) Discussion and review of technical credentials that can be obtained concurrent to academic pursuits.

(D) Discussion of credit-by-examination options.

(E) Review of academic program options, leading to a degree plan.

(F) Discussion with prospective military students on payment options and the use of education benefits for postsecondary courses to include the DoD TA Program, VA education benefit programs, State and federal grants and loans, commercial lending, and out-of-pocket costs for the Service member. Discussion will include streamlined tools and information to compare educational institutions using key measures of affordability and value through the VA eBenefits portal at *http://www.ebenefits.va.gov*. The eBenefits portal is updated by VA to facilitate access to school performance information and key federal financial aid documents.

(v) Continually assess the state of its voluntary education programs and periodically conduct a formal needs assessment by the appropriate DoD installation official (normally the Education Services Officer) to ensure that the best possible programs are available to their members at each DoD installation or in their State or area command for RC personnel. It is essential that a formal needs assessment be conducted if there is a significant change in the demographic profile of the DoD installation population.

(4) Eligible adult family members of Service members, DoD civilian employees and their eligible adult family members, and military retirees may participate in installation postsecondary education programs on a space-available basis at no cost to the individual Service TA programs.

(5) At locations where an educational program that is offered on a DoD installation is not otherwise conveniently available outside the DoD installation, civilians who are not directly employed by the DoD or other Federal agencies, and who are not eligible adult family members of DoD personnel, may

be allowed to participate in DoD installation educational programs. While such participation contributes to positive community relations, participation must be on a student-funded, space-available basis at no cost to the individual Service TA programs, after the registration of Service members, DoD civilian employees, eligible adult family members, and military retirees. Additionally, a review of these potential participants by the relevant DoD installation ethics counselor may be required as part of the installation commander's access requirements. Participation may also be subject to the terms of status-of-forces or other regulating agreements.

(6) Education centers will maintain liaison with appropriate State planning and approving agencies and coordinating councils to ensure that planning agencies for continuing, adult, or postsecondary education are aware of the educational needs of military personnel located within their jurisdiction.

(7) In supporting a high school completion program, each Military Service will:

(i) Ensure that all Service members with less than a high school education have the opportunity to attain a high school diploma or its equivalent.

(ii) Ensure that neither a Military Service nor DANTES issues a certificate or similar document to Service members based on performance on high school equivalency tests. Military Services will recognize attainment of high school completion or equivalency only after a State- or territory-approved agency has awarded the appropriate credential.

(iii) Pay 100 percent of the cost of high school equivalency instruction or proficiency testing and credentialing for Service members.

(iv) Ensure that Service sponsored high school diploma programs are delivered by institutions that are State-funded or a Service component program accredited by a regional accrediting body or recognized by a State's secondary school authority.

(c) *Procedures for the responsible education advisor, on behalf of the installation commander, to follow to provide voluntary education programs and services from postsecondary educational institutions.* (1) Contacts by an educational institution with a Service member for the purpose of asking or encouraging the member to sign up for one of the educational institution's programs (assuming the program has some cost) are considered personal commercial solicitations. The responsible education advisor will ensure educational institutions comply with DoD Instruction 1344.07, ''Personal Commercial Solicitation on DoD Installations'' (available at *http://www.dtic.mil/ whs/directives/ corres/pdf/ 134407p.pdf*) and all requirements established by the installation commander for solicitation. Materials available through the education center that provide basic information about the educational institution or its programs or services in compliance with this MOU will not be considered personal commercial solicitation including, but not limited to, brochures, flyers, and catalogs provided by the educational institution. The responsible education advisor will ensure adequate and appropriate materials are available at no cost to the Service member and at no additional charge to the educational institution meeting the requirements as stated in the policy section of this part and in compliance with the DoD Voluntary Education Partnership MOU.

(2) The responsible education advisor will limit DoD installation access to educational institutions or their agents meeting the requirements as stated in the policy section of this part and in compliance with the DoD Voluntary Education Partnership MOU. Agents representing education institutions in the performance of contracted services are permitted DoD installation access only in accordance with the requirements of their contract and/or agreement.

(3) Educational institutions interested in providing education, guidance, training opportunities, and participating in sanctioned education fairs on a DoD installation provide their requests to the responsible education advisor, who will review and analyze these requests on behalf of the installation commander.

(4) The responsible education advisor will ensure all educational institutions

and its agents granted access to DoD installations to provide education, guidance, training opportunities, and participate in sanctioned education fairs to Service members:

(i) Adhere to federal law, DoD Instruction 1344.07, DoD Instruction 1322.19, ''Voluntary Education Programs in Overseas Areas'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/ 132219p.pdf;* and the cognizant Military Service's policies and regulations.

(ii) Comply with applicable DoD installation policies and procedures designated by the installation commander on such matters as fire and safety, environment, physical security, personnel background checks, vehicle inspection and registration, and any other applicable statues or regulations designated by the installation commander.

(5) Monitor educational institutions and its agents granted access to a DoD installation to ensure they do not:

(i) Use unfair, deceptive, abusive or fraudulent devices, schemes, or artifices, including misleading advertising or sales literature.

(ii) Engage in unfair, deceptive, or abusive marketing tactics, such as during unit briefings or assemblies; engaging in open recruiting efforts; or distributing marketing materials on the DoD installation at unapproved locations or events.

(iii) Market to or recruit newly assigned military personnel to the DoD installation, unless the Service member has received information about voluntary education programs and educational services available at that DoD installation, to include TA, from their education services staff or as part of their orientation to the new DoD installation.

(6) Ensure educational institutions granted access to DoD installations to provide programs, services, or education guidance to their students meet these criteria:

(i) Have a signed Voluntary Education Partnership MOU with DoD.

(ii) Are in compliance with State authorization requirements consistent with regulations issued by ED including 34 CFR 600.9. Educational institutions must meet the requirements of the state where services will be rendered to include compliance with all state laws as they relate to distance education.

(iii) Are State approved for the use of veterans' education benefits. Copies of the certification will be filed with the appropriate State approving agency for the military or veteran student.

(iv) Are certified to participate in federal student aid programs through the ED under Title IV of the Higher Education Act of 1965. Title IV certification may be provisional so long as the educational institution maintains eligibility to participate in the Federal Direct Loan Program.

(v) Are accredited by a national or regional accrediting body recognized by the ED and conduct programs only from among those offered or authorized by the main administrative and academic office in accordance with standard procedures for authorization of degree programs by the educational institution.

(7) DoD installations seeking an educational institution to provide on-installation education programs, through the responsible education advisor, must:

(i) Communicate the educational needs of the DoD installation to a wide variety of potential providers.

(ii) Seek favorable tuition rates, student services, and instructional support from providers.

(iii) Provide to interested providers:

(A) The level of services and instruction desired, and specific degree programs being sought.

(B) A demographic profile of the DoD installation population and probable volume of participation in the program.

(C) Facilities and level of security at no charge to the educational institution.

(D) Cost associated with equipment and supporting services provided at the discretion of the DoD installation.

(E) A copy of this part.

(F) Special requirements, such as:

(*1*) Format (e.g., distance, evening, or weekend classes), independent study, short seminar, or other mode of delivery of instruction.

(*2*) Unique scheduling problems related to the operational mission of the DoD installation.

(*3*) Any DoD installation restrictions, limitations, or special considerations relevant to using an alternate delivery system (e.g., DL).

(*4*) Available computer hardware and supporting equipment.

(*5*) Electrical, satellite, and network capabilities at the site.

(8) In evaluating proposals, responsible education advisors must ensure potential providers meet, at a minimum, these criteria:

(i) Programs satisfy objectives defined by the most recent needs assessment.

(ii) Programs, courses, and completion requirements are the same as those at the provider's main administrative and academic campus.

(iii) The educational institution granting undergraduate academic credit must adhere to the Servicemembers Opportunity Colleges (SOC) Principles and Criteria (available at *http://www.soc.aascu.org/socconsortium/PublicationsSOC.html*) regarding the transferability of credit, the awarding of credit for military training and experience, and residency requirements.

(iv) The provider is prepared to:

(A) Offer academic counseling and flexibility in accommodating special military schedules.

(B) Ensure main administrative and academic office approval in faculty selection, assignment, and orientation; and participation in monitoring and evaluation of programs. Adjunct or part-time faculty will possess comparable qualifications as full-time permanent faculty members.

(C) Conduct on-installation or online courses that carry identical credit values, represent the same content and experience, and use the same student evaluation procedures as courses offered through the main administrative and academic campus. All substantive course change requirements must follow the schools accreditation agencies requirements. If the educational institution's accrediting agency's substantive change policy requires new courses or program offerings to be submitted to the agency for approval, the educational institution will be required to submit such items for approval before admitting Service members using military TA.

(D) Maintain the same admission and graduation standards that exist for the same programs at the main administrative and academic office, and include credits from courses taken at a branch or auxiliary campus of the same educational institution in establishing academic residency to meet degree requirements.

(E) Provide library and other reference and research resources, in either print or electronic format, that are appropriate and necessary to support course offerings.

(F) Establish procedures to maintain regular communication among central institutional academic leadership and administrators, and off-campus representatives and faculty. Any educational institution's proposal must specify these procedures.

(G) Provide students with regular and accessible academic and financial counseling services either electronically or in-person. At a minimum, this includes Title IV and VA education benefits.

(H) Charge tuition that is not more than tuition charged to nonmilitary students.

(I) Have established policies for awarding credit for military training by examinations, experiential learning, and courses completed using modes of delivery other than instructor-delivered, on-site classroom instruction.

(J) Conduct programs only from among those offered or authorized by the main administrative and academic office in accordance with standard procedures for authorization of degree programs by the educational institution.

(d) *Requirements and procedures for educational institutions seeking access to the DoD installation solely to provide academic counseling or student support services to students.* (1) Educational institutions must meet the criteria in paragraphs (c)(6)(i) through (v) of this section.

(2) Educational institutions must request access through the responsible education advisor via a written proposal. If a request is received from an educational institution seeking access

to a joint DoD installation, the responsible education advisor from the education center will determine the appropriate Military Service to work the request. The request should include as a minimum:

(i) Educational institution name and intent or purpose of the visit.

(ii) Number and names of educational institution representatives that will be available.

(iii) Counseling delivery method: By appointment or walk-in.

(iv) Communication process used to inform students of their availability for counseling.

(3) The responsible education advisor will review and analyze the request on behalf of the installation commander. The installation commander has the final authority to approve, deny, suspend, or withdraw DoD installation access permission from an educational institution, as deemed appropriate.

(4) If a request is received from an educational institution seeking access to a DoD installation, the responsible education advisor will:

(i) Fully consider requests from those educational institutions complying with requirements as stated in paragraphs (d)(1) through (3) of this section and be consistent in treatment of educational institutions in accordance with this part. Also, consider the value to the Service member as it relates to geographic location, accessibility and mission tempo.

(ii) If request is denied, provide a timely response to the educational institution and inform the educational institution they may reapply for access once reasons for denial are addressed.

(iii) Maintain copies of all correspondence in accordance with the DoD installation records management schedule and disposition, with a minimum time requirement of 2 years.

(5) If a DoD installation grants access to an educational institution to provide guidance to their students, the educational institution and its agents will:

(i) Only advise or counsel students at the education center or at a location approved by the responsible education advisor.

(ii) Maintain a record of students counseled and provide a copy to the education office. The record will annotate the type of program and the status of the Service member (current or reenrollment).

(iii) Comply with applicable DoD installation policies and procedures designated by the installation commander on such matters as fire and safety, environment, physical security, personnel background checks, vehicle inspection and registration, and any other applicable statues or regulations designated by the installation commander.

(e) *Interservice Voluntary Education Board.* Under the direction of the Voluntary Education Chief, the Interservice Voluntary Education Board is composed of full-time or permanent part-time employees of DoD or military members, and consists of one representative responsible for policy from the Office of the ASD(RA), and the senior voluntary education advisor responsible for policy each from the Army, Navy, Air Force, and Marine Corps. The Director, DANTES, will serve as an ex-officio member. Meeting quarterly, the Board will:

(1) Provide a forum for the exchange of information and discussion of issues related to voluntary education programs.

(2) Develop recommendations for changes in policies and procedures.

(3) Develop recommendations for DANTES' activities and operations that support voluntary education programs.

(4) Review and prioritize DANTES activities that support DoD voluntary education programs, to include budget execution and recommend execution year adjustments.

(5) Develop recommended policy and program guidance for DANTES for the Future-Year Defense Program.

(f) *DANTES.* (1) Guidance and recommendations for DANTES will be developed with the advice of the Interservice Voluntary Education Board.

(2) The selection and rating of the Director, DANTES will be as follows:

(i) The DASD(MCFP) will convene and chair the search committee responsible for replacing the Director, DANTES, when the position is vacated. At the request of the USD(P&R), the

Secretaries of the Military Departments will provide a senior manager to sit on the search committee. The committee will recommend the best qualified candidate to the DoD EA for DANTES, for possible appointment as the Director, DANTES.

(ii) The DoD EA for DANTES will designate the rater of the Director, DANTES. The Director, State Liaison and Educational Opportunity within the Office of the USD(P&R), MCFP, will provide input to the DoD EA designated rater concerning the performance of the Director, DANTES.

(3) DANTES will:

(i) Support the Service voluntary education programs by executing the program outlined in this part and the annual USD(P&R) supplemental guidance for those items not reflected in this paragraph of this section.

(ii) Provide execution information to the Interservice Voluntary Education Board quarterly and provide information required to assist with the program objective memorandum development as requested by the Board.

(iii) Support DoD off-duty, voluntary education programs and conduct special projects and developmental activities in support of education-related DoD functions.

(iv) Assist the Military Services in providing high-quality and valuable educational opportunities for Service members, their eligible adult family members, and DoD personnel, and assist personnel in achieving professional and personal educational objectives. This role includes the consolidated management of programs that prevent duplication of effort among the Services. Through its activities, DANTES supports DoD recruitment, retention, and the transition efforts.

(v) Assume responsibilities and functions that include:

(A) Managing and facilitating the delivery of a wide variety of examinations including the General Equivalency Diploma test, college admissions, and credit-by-examination programs.

(B) Upon request, issuing transcripts for the United States Armed Forces Institute and the examination and certification programs.

(C) Managing the contract through which former DoD Dependents Schools students can obtain copies of archived transcripts.

(D) Managing the contract and functions related to the evaluation of educational experiences in the Military Services that are covered by the contract.

(E) Providing or developing and distributing educational materials, reference books, counseling publications, educational software, and key educational resource information to Defense Agencies and DoD installations.

(F) Managing the SOC program contract and related functions.

(G) Managing the DoD contract that provides for periodic third-party reviews of DoD voluntary education programs titled the Third Party Education Assessment.

(H) Managing the contract and data received on the voluntary education programs for the VEMIS, which includes gathering, collating, and verifying participation and cost data from the Services. Providing requisite consolidated reports to USD(P&R). Requested data from the Military Services on voluntary education programs is located and stored at *https://afaems.langley.af. mil/vemis*. A user guide containing voluntary education program data and report information for the Military Services and DANTES is also available at this Web site, under the ''Resources'' tab.

(I) Managing the DoD independent study catalog and its support systems, as required.

(J) Negotiating, administering, and coordinating contracts for DoD Worldwide Education Symposiums in support of and in conjunction with the Interservice Voluntary Education Board.

(K) Establishing, refining, updating, and maintaining information on worldwide education support of DoD offduty, voluntary education programs on the Internet. Maintaining necessary infrastructure to ensure that information on the Internet is always current and available to leadership, agency personnel, the public, and others.

(L) Administering the TTT program in accordance with section 1154 of chapter 58 of 10 U.S.C.

(M) Monitoring new technological developments, providing reports, cost

analyses, and recommendations on educational innovations, and conducting special projects requested by the Department of Defense and the Services, approved by the Interservice Voluntary Education Board, and as reflected and approved in DANTES' annual policy guidance.

(N) Conducting staff development training on DANTES' policies, procedures, and practices related to voluntary education testing programs, and providing additional training as requested by the Office of the Secretary of Defense and the Services.

(O) Serving as the Defense Media Activity's point of contact for information on DANTES programs for military personnel.

(P) Providing support, as requested, to DoD and Service Quality of Life and Transition support programs.

(Q) Providing other support in mission areas as directed by the USD(P&R) and the DASD(MCFP).

(R) Managing DoD contingency Tri-Service contracts, which provide educational opportunities for deployed Service members with guidance and oversight from the DoD Voluntary Education Chief.

(S) Monitoring and maintaining liaison with the office responsible for consolidating and distributing the JST for the Services.

(vi) Maintain liaison with education services officials of the Military Services, and appropriate Federal and State agencies and educational associations, in matters related to the DANTES mission and assigned functions.

(vii) Serve on panels and working groups designated by the DASD(MCFP).

(viii) Serve as the Executive Secretary at the Interservice Voluntary Education Board meeting convened annually to review DANTES programs and to develop recommendations for inclusion in annual policy guidance for DANTES. In this role, the Director, DANTES, will coordinate the meeting, prepare the agenda, review and analyze DANTES programs and initiatives outlined in the prior year's operational plan, and provide minutes after the meeting.

(ix) Assist the Services in screening candidates for the DANTES Senior Enlisted Advisor and DANTES RC Advisor positions.

(x) Maintain the repository for the DoD Voluntary Education Partnership MOU between USD(P&R) and partner educational institutions, to include Service-specific addendums (see the Appendix to this section for the template of the DoD Voluntary Education Partnership MOU). DANTES will:

(A) Administer and update the system that is the repository of the MOUs per guidance from USD(P&R).

(B) Create, track, and maintain a centrally managed database for all signed documents.

(C) Publish an Internet-based list of all educational institutions that have a signed DoD Voluntary Education Partnership MOU.

(D) Generate reports in accordance with guidance from the USD(P&R) and procedures in DTM 12–004, ''DoD Internal Information Collections'' (available at *http://www.dtic.mil/whs/ directives/ corres/pdf/ DTM-12-004.pdf*) and DoD 8910–1–M, ''Department of Defense Procedures for Management of Information Requirements'' (available at *http:// www.dtic.mil/ whs/directives/corres/ pdf/ 891001m.pdf*).

(x) Provide data analyses and generate reports required by DoD and the Interservice Voluntary Education Board as needed.

[79 FR 27737, May 15, 2014, as amended at 86 FR 27976, May 25, 2021]

APPENDIX A TO PART 68—DOD VOLUNTARY EDUCATION PARTNERSHIP MEMORANDUM OF UNDERSTANDING (MOU) BETWEEN DOD OFFICE OF THE UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)) AND [NAME OF EDUCATIONAL INSTITUTION]

1. *Preamble.*

a. Providing access to quality postsecondary education opportunities is a strategic investment that enhances the U.S. Service member's ability to support mission accomplishment and successfully return to civilian life. A forward-leaning, lifelong learning environment is fundamental to the maintenance of a mentally powerful and adaptive leadership-ready force. Today's fast-paced and highly mobile environment, where frequent deployments and mobilizations are required to support the Nation's policies and

objectives, requires DoD to sponsor postsecondary educational programs using a variety of learning modalities that include instructor-led courses offered both on- and off-installation, as well as distance learning options. All are designed to support the professional and personal development and progress of the Service members and our DoD civilian workforce.

b. Making these postsecondary programs available to the military community as a whole further provides Service members, their eligible adult family members, DoD civilian employees, and military retirees ways to advance their personal education and career aspirations and prepares them for future vocational pursuits, both inside and outside of DoD. This helps strengthen the Nation by producing a well-educated citizenry and ensures the availability of a significant quality-of-life asset that enhances recruitment and retention efforts in an all-volunteer force.

2. *Purpose.*

a. This MOU articulates the commitment and agreement educational institutions provide to DoD by accepting funds via each Service's tuition assistance (TA) program in exchange for education services.

b. This MOU is not an obligation of funds, guarantee of program enrollments by DoD personnel, their eligible adult family members, DoD civilian employees, or retirees in an educational institution's academic programs, or a guarantee for DoD installation access.

c. This MOU covers courses delivered by educational institutions through all modalities. These include, but are not limited to, classroom instruction, distance education (*i.e.*, web-based, CD–ROM, or multimedia) and correspondence courses.

d. This MOU includes high school programs, academic skills programs, and adult education programs for military personnel and their eligible adult family members.

e. This MOU articulates regulatory and governing directives and instructions:

(1) Eligibility of DoD recipients is governed by Federal law, DoD Instruction 1322.25, DoD Directive 1322.08E, and the cognizant Military Service's policies, regulations, and fiscal constraints.

(2) Postsecondary educational programs provided to Service members using TA on DoD installations outside of the United States, will be operated in accordance with guidance from DoD Instruction 1322.25, DoD Instruction 1322.19, section 1212 of Public Law 99–145, as amended by section 518 of Public Law 101–189; and under the terms of the Tri-Services contract currently in effect.

f. This MOU is subject at all times to Federal law and the rules, guidelines, and regulations of DoD. Any conflicts between this MOU and such Federal law, rules, guidelines, and regulations will be resolved in favor of the Federal law, rules, guidelines, or regulations.

3. *Educational Institution (Including Certificate and Degree Granting Educational Institutions) Requirements for TA.* Educational institutions must:

a. Sign and adhere to requirements of this MOU, including Service-specific addendums as appropriate, prior to being eligible to receive TA payments.

(1) Those educational institutions that have a current Voluntary Education Partnership MOU with DoD will sign this MOU:

(a) At the expiration of their current MOU (renewal);

(b) At the request of DoD or the specific Military Service holding a separate current MOU. The DoD Voluntary Education Partnership MOU (which includes the Service-specific addendums) is required for an educational institution to participate in the DoD TA Program. An ''installation MOU'' (which is separate from this MOU) is only required if an educational institution is operating on a DoD installation. The installation MOU:

1. Contains the installation-unique requirements that the responsible education advisor coordinated, documented, and retained; is approved by the appropriate Service voluntary education representative; and is presented to the installation commander for final approval.

2. Cannot conflict with the DoD Voluntary Education Partnership MOU and governing regulations.

(2) Educational institutions must comply with this MOU and the requirements in Service-specific addendums that do not conflict with governing Federal law and rules, guidelines, and regulations, which include, but are not limited to, Title 10 of the U.S. Code; DoD Directive 1322.08E, ''Voluntary Education Programs for Military Personnel''; DoD Instruction 1322.25, ''Voluntary Education Programs''; DoD Instruction 1322.19, ''Voluntary Education Programs in Overseas Areas''; and all DoD installation requirements imposed by the installation commander, if the educational institution has been approved to operate on a particular base. Educational institutions failing to comply with the requirements set forth in this MOU may receive a letter of warning, be denied the opportunity to establish new programs, have their MOU terminated, be removed from the DoD installation, and may have the approval of the issuance of TA withdrawn by the Service concerned.

b. Be accredited by a national or regional accrediting agency recognized by ED, approved for VA funding, and certified to participate in Federal student aid programs through ED under Title IV of the Higher Education Act of 1965.

c. Comply with the regulatory guidance provided by DoD and the Services.

d. Comply with state authorization requirements consistent with regulations issued by ED, including 34 CFR 600.9. Educational institutions must meet all State laws as they relate to distance education as required.

e. Participate in the Third Party Education Assessment process when requested. This requirement applies not only to educational institutions providing courses on DoD installations, but also to those educational institutions that provide postsecondary instruction located off the DoD installation or via DL. Educational institutions may be selected for Third Party Education Assessment based on provider offerings (on-installation, off-installation, or DL), education benefits received (large provider in terms of enrollments or TA funds), or an observed promising practice. Educational institutions may also be selected as a result of reports of non-compliance with the DoD Voluntary Education Partnership MOU, complaint(s) received, or negative information received from other government agencies and regulators. Educational institutions demonstrating an unwillingness to resolve findings may receive a range of penalties from a written warning to revocation of the DoD Voluntary Education Partnership MOU and removal from participation in the DoD TA Program. As appropriate, Third Party Education Assessment findings will be shared with other government agencies/regulators including but not limited to CFPB, VA, ED, DOJ, and FTC.

(1) If an educational institution is operating on the DoD installation, the educational institution will resolve the assessment report findings and provide corrective actions taken within 6 months of the Third Party Education Assessment to the responsible education advisor on the DoD installation, the appropriate Service Voluntary Education Chief, and the DoD Voluntary Education Chief.

(2) If an educational institution is operating off the DoD installation or via DL, the educational institution will resolve the assessment report findings and provide corrective actions taken within 6 months of the Third Party Education Assessment to the DoD Voluntary Education Chief.

(3) In instances when the resolution action cannot be completed within the 6 month timeframe, the educational institution will submit a status report every 3 months to the responsible education advisor on the DoD installation if the educational institution is operating on the DoD installation, and the DoD Voluntary Education Chief, until the recommendation is resolved.

f. Before enrolling a Service member, provide each prospective military student with specific information to locate, explain, and properly use the following ED and CFPB tools:

(1) The College Scorecard which is a consumer planning tool and resource to assist prospective students and their families as they evaluate options in selecting a school and is located at: *http://collegecost.ed.gov/scorecard/*.

(2) The College Navigator which is a consumer tool that provides school information to include tuition and fees, retention and graduation rates, use of financial aid, student loan default rates and features a cost calculator and school comparison tool. The College Navigator is located at: *http://nces.ed.gov/collegenavigator/*.

(3) The Financial Aid Shopping Sheet which is a model aid award letter designed to simplify the information that prospective students receive about costs and financial aid so they can easily compare institutions and make informed decisions about where to attend school. The shopping sheet can be accessed at: *http://www2.ed.gov/ policy/ highered/guid/ aid-offer/index.html*.

(4) The 'Paying for College' Web page which can be used by prospective students to enter the names of up to three schools and receive detailed financial information on each one and to enter actual financial aid award information. The tool can be accessed at: *http://www.consumerfinance.gov/ paying-for-college/*.

g. Designate a point of contact or office for academic and financial advising, including access to disability counseling, to assist Service members with completion of studies and with job search activities.

(1) The designated person or office will serve as a point of contact for Service members seeking information about available, appropriate academic counseling, financial aid counseling, and student support services at the educational institution;

(2) The point of contact will have a basic understanding of the military tuition assistance program, ED Title IV funding, education benefits offered by the VA, and familiarity with institutional services available to assist Service members.

(3) The point of contact does not need to be exclusively dedicated to providing these services and, as appropriate, may refer the Service member to other individuals with an ability to provide these services, both on- and off-campus.

h. Before offering, recommending, arranging, signing-up, dispersing, or enrolling Service members for private student loans, provide Service members access to an institutional financial aid advisor who will make available appropriate loan counseling, including, but not limited to:

(1) Providing a clear and complete explanation of available financial aid, including Title IV of the Higher Education Act of 1965, as amended.

(2) Describing the differences between private and federal student loans to include

terms, conditions, repayment and forgiveness options.

(3) Disclosing the educational institution's student loan Cohort Default Rate (CDR), the percentage of its students who borrow, and how its CDR compares to the national average. If the educational institution's CDR is greater than the national average CDR, it must disclose that information and provide the student with loan repayment data.

(4) Explaining that students have the ability to refuse all or borrow less than the maximum student loan amount allowed.

i. Have a readmissions policy for Service members that:

(1) Allows Service members and reservists to be readmitted to a program if they are temporarily unable to attend class or have to suspend their studies due to service requirements.

(2) Follows the regulation released by ED (34 CFR 668.18) regarding readmissions requirements for returning Service members seeking readmission to a program that was interrupted due to a Military service obligation, and apply those provisions to Service members that are temporarily unable to attend classes for less than 30 days within a semester or similar enrollment period due to a Military service obligation when such absence results in a withdrawal under institution policies. A description of the provisions for U.S. Armed Forces members and their families is provided in Chapter 3 of Volume 2 of the Federal Student Aid Handbook.

j. Have policies in place compliant with program integrity requirements consistent with the regulations issued by ED (34 CFR 668.71–668.75 and 668.14) related to restrictions on misrepresentation, recruitment, and payment of incentive compensation. This applies to the educational institution itself and its agents including third party lead generators, marketing firms, or companies that own or operate the educational institution. As part of efforts to eliminate unfair, deceptive, and abusive marketing aimed at Service members, educational institutions will:

(1) Ban inducements including any gratuity, favor, discount, entertainment, hospitality, loan, transportation, lodging, meals, or other item having a monetary value of more than a de minimis amount to any individual, entity, or its agents including third party lead generators or marketing firms other than salaries paid to employees or fees paid to contractors in conformity with all applicable laws for the purpose of securing enrollments of Service members or obtaining access to TA funds. Educational institution sponsored scholarships or grants and tuition reductions available to military students are permissible.

(2) Refrain from providing any commission, bonus, or other incentive payment based directly or indirectly on securing enrollments or federal financial aid (including TA funds) to any persons or entities engaged in any student recruiting, admission activities, or making decisions regarding the award of student financial assistance.

(3) Refrain from high-pressure recruitment tactics such as making multiple unsolicited contacts (3 or more), including contacts by phone, email, or in-person, and engaging in same-day recruitment and registration for the purpose of securing Service member enrollments.

k. Refrain from automatic program renewals, bundling courses or enrollments. The student and Military Service must approve each course enrollment before the start date of the class.

l. The educational institution will obtain the approval of their accrediting agency for any new course or program offering, provided such approval is required under the substantive change requirements of the accrediting agency. Approval must be obtained before the enrollment of a Service member into the new course or program offering.

m. If the educational institution is a member of the Servicemembers Opportunity Colleges (SOC), in addition to the requirements stated in paragraphs 3.a through 3.l of this MOU, the educational institution will:

(1) Adhere to the SOC Principles, Criteria, and Military Student Bill of Rights. (located at *http://www.soc.aascu.org/ socconsortium/ PublicationsSOC.html*).

(2) Provide processes to determine credit awards and learning acquired for specialized military training and occupational experience when applicable to a Service member's degree program.

(3) Recognize and use the ACE Guide to the Evaluation of Educational Experiences in the Armed Services to determine the value of learning acquired in military service. Award credit for appropriate learning acquired in military service at levels consistent with ACE Guide recommendations and/or those transcripted by CCAF, when applicable to a Service member's program.

n. If an educational institution is not a member of SOC, in addition to the requirements stated in paragraphs 3.a. through 3.l. of this MOU, the educational institution will:

(1) Disclose its transfer credit policies and articulated credit transfer agreements before a Service member's enrollment. Disclosure will explain acceptance of credits in transfer is determined by the educational institution to which the student wishes to transfer and refrain from making unsubstantiated representations to students about acceptance of credits in transfer by another institution.

(a) If the educational institution accepts transfer credit from other accredited institutions, then the educational institution agrees to evaluate these credits in conformity with the principles set forth in the Joint Statement on the Transfer and Award

of Credit developed by members of the American Association of Collegiate Registrars and Admissions Officers, the American Council on Education, and the Council for Higher Education Accreditation. The educational institution will then award appropriate credit, to the extent practicable within the framework of its institutional mission and academic policies.

(b) Decisions about the amount of transfer credit accepted, and how it will be applied to the student's program, will be left to the educational institution.

(2) Disclose its policies on how they award academic credit for prior learning experiences, including military training and experiential learning opportunities provided by the Military Services, at or before a Service member's enrollment.

(a) In so far as the educational institution's policies generally permit the award of credit for comparable prior learning experiences, the educational institution agrees to evaluate the learning experiences documented on the Service member's official Service transcripts, and, if appropriate, award credit.

(b) The JST is an official education transcripts tool for documenting the recommended college credits for professional military education, training courses, and occupational experiences of Service members across the Services. The JST incorporates data from documents such as the Army/ACE Registry Transcript System, the Sailor/Marine ACE Registry Transcript System, the Community College of the Air Force transcript, and the Coast Guard Institute transcript.

(c) Decisions about the amount of experiential learning credit awarded, and how it will be applied to the student's program, will be left to the educational institution. Once an educational institution has evaluated a particular military training or experiential learning opportunity for a given program, the educational institution may rely on its prior evaluation to make future decisions about awarding credit to Service members with the same military training and experience documentation, provided that the course content has not changed.

(3) If general policy permits, award transfer credit or credit for prior learning to:

(a) Replace a required course within the major;

(b) Apply as an optional course within the major;

(c) Apply as a general elective;

(d) Apply as a basic degree requirement; or

(e) Waive a prerequisite.

(4) Disclose to Service members any academic residency requirements pertaining to the student's program of study, including total and any final year or final semester residency requirement at or before the time the student enrolls in the program.

(5) Disclose basic information about the educational institution's programs and costs, including tuition and other charges to the Service member. This information will be made readily accessible without requiring the Service member to disclose any personal or contact information.

(6) Before enrollment, provide Service members with information on institutional ''drop/add,'' withdrawal, and readmission policies and procedures to include information on the potential impact of military duties (such as unanticipated deployments or mobilization, activation, and temporary duty assignments) on the student's academic standing and financial responsibilities. For example, a Service member's military duties may require relocation to an area where he or she is unable to maintain consistent computer connectivity with the educational institution, which could have implications for the Service member's enrollment status. This information will also include an explanation of the educational institution's grievance policy and process.

(7) Conduct academic screening and competency testing; make course placement based on student readiness.

4. *TA Program Requirements for Educational Institutions.*

a. *One Single Tuition Rate.* All Service members attending the same educational institution, at the same location, enrolled in the same course, will be charged the same tuition rate without regard to their Service component. This single tuition rate includes active duty Service members and the National Guard and Reservists who are activated under Title 10 and using Title 10 Military Tuition Assistance, in order to assure that tuition rate distinctions are not made based on the Service members' branches of Service.

(1) It is understood tuition rates may vary by mode of delivery (traditional or online), at the differing degree levels and programs, and residency designations (in-state or out-of-state). Tuition rates may also vary based on full-time or part-time status, daytime vs. evening classes, or matriculation date, such as in the case of a guaranteed tuition program.

(2) It is also understood that some States have mandated State rates for Guard and Reservists within the State. (Those Guard and Reservists not activated on Title 10, U.S. Code orders).

b. *Course Enrollment Information.* The educational institutions will provide course enrollment, course withdrawal, course cancellation, course completion or failure, grade, verification of degree completion, and billing information to the TA issuing Service's education office, as outlined in the Service's regulations and instructions.

(1) Under section 1232g of title 20, United States Code (also known as ''The Family

Educational Rights and Privacy Act'' and hereinafter referred to as ''FERPA''), DoD recognizes that educational institutions are required to obtain consent before sharing personally identifiable non-directory information with a third party. Service members must authorize the educational institutions to release and forward course enrollment information required in 4.b. to DoD prior to approval of course enrollment using tuition assistance.

(2) If an educational institution wants to ensure confidentiality during the transmission of data to the third party, then the educational institution can contact the appropriate Service TA management point of contact to discuss security and confidentiality concerns prior to transmitting information.

c. *Degree Requirements and Evaluated Educational Plans*.

(1) Educational institutions will disclose general degree requirements for the Service member's educational program (evaluated educational plan) to the member and his or her Service before the enrollment of the Service member at the educational institution. These requirements, typically articulated in the educational institution's course catalog, should:

(a) Include the total number of credits needed for graduation.

(b) Divide the coursework students must complete in accordance with institutional academic policies into general education, required, and elective courses.

(c) Articulate any additional departmental or graduate academic requirements, such as satisfying institutional and major field grade point average requirements, a passing grade in any comprehensive exams, or completion of a thesis or dissertation.

(2) In addition to providing degree requirements, the educational institution will provide to Service members who have previous coursework from other accredited institutions and relevant military training and experiential learning an evaluated educational plan that indicates how many, if any, transfer credits it intends to award and how these will be applied toward the Service member's educational program. The evaluated educational plan will be provided within 60 days after admission to the educational institution in which the individual has selected a degree program and all required official transcripts have been received.

(3) When a Service member changes his or her educational goal or major at the attending school and the Services' education advisor approves the change, then the educational institution will provide a new evaluated educational plan to the Service member and the Service within 60 days. Only courses listed in the Service member's evaluated educational plan will be approved for TA.

(4) Degree requirements in effect at the time of each Service member's enrollment will remain in effect for a period of at least 1 year beyond the program's standard length, provided the Service member is in good academic standing and has been continuously enrolled or received an approved academic leave of absence. Adjustments to degree requirements may be made as a result of formal changes to academic policy pursuant to institutional or departmental determination, provided that:

(a) They go into effect at least 2 years after affected students have been notified; or

(b) In instances when courses or programs are no longer available or changes have been mandated by a State or accrediting body, the educational institution will identify low or no cost solutions, working with affected Service members to identify substitutions that would not hinder the student from graduating in a timely manner.

(5) Degree requirements and evaluated educational plans will meet educational requirements for credentialing in stated career field and graduates of a program will be eligible for relevant professional license or certification. Educational institutions will disclose any conditions (state or agency limitations) or additional requirements (training, experience, or exams) required to obtain relevant credentials.

d. *Approved and TA Eligible Courses*.

(1) *Approved Courses*. If an eligible Service member decides to use TA, educational institutions will enroll him or her only after the TA is approved by the individual's Service. Service members will be solely responsible for all tuition costs without this prior approval. This requirement does not prohibit an educational institution from pre-registering a Service member in a course in order to secure a slot in the course. If a school enrolls the Service member before the appropriate Service approves Military TA, then the Service member could be responsible for the tuition. All Military TA must be requested and approved prior to the start date of the course. The Military TA is approved on a course-by-course basis and only for the specific course(s) and class dates that a Service member requests. If a military student ''self-identifies'' their eligibility and the Service has not approved the funding, then the Service member will be solely responsible for all tuition costs, not the Service.

(2) *TA Eligible Courses*. Courses will be considered eligible for TA if they are:

(a) Part of an individual's evaluated educational plan; or

(b) Prerequisites for courses within the individual's evaluated educational plan; or

(c) Required for acceptance into a higher-level degree program, unless otherwise specified by Service regulations.

e. *Use of Financial Aid with TA*.

(1) ''Top-Up'' eligible active duty DoD personnel may use their Montgomery or Post-9/11 G.I. Bill benefit in conjunction with TA funds from their Service to cover those course costs to the Service member that exceed the amount of TA paid by his or her Service. RC members who qualify for Montgomery G.I. Bill benefits may use those benefits concurrently with TA. RC members who have earned entitlement for the Post-9/11 G.I. Bill can use both VA education benefits and TA, but VA will only pay for the portion of tuition not covered by TA; therefore, the combination of VA education benefits and TA will not exceed 100 percent of the actual costs of tuition.

(2) DoD personnel are entitled to consideration for all forms of financial aid that educational institutions make available to students at their home campus. Educational institution financial aid officers will provide information and application processes for Title IV student aid programs, scholarships, fellowships, grants, loans, etc., to DoD TA recipients.

(3) Service members identified as eligible DoD TA recipients, who qualify for Pell Grants through ED's student aid program, will have their TA benefits applied to their educational institution's account prior to the application of their Pell Grant funds to their account. Unlike TA funds, which are tuition-restricted, Pell Grant funds are not tuition-restricted and may be applied to other allowable charges on the account.

f. *Administration of Tuition.*

(1) The Services will provide TA in accordance with DoD- and Service-appropriate regulations.

(2) Educational institutions will comply with these requirements for the return of TA funds:

(a) Return any TA Program funds directly to the Military Service, not to the Service member.

(b) Up to the start date, return all (100 percent) TA funds to the appropriate Military Service when the Service member does not:

(i) begin attendance at the institution or

(ii) start a course, regardless of whether the student starts other courses

(c) Return any TA funds paid for a course that is cancelled by the educational institution.

(d) Have an institutional policy that returns any unearned TA funds on a proportional basis through at least the 60 percent portion of the period for which the funds were provided. TA funds are earned proportionally during an enrollment period, with unearned funds returned based upon when a student stops attending. In instances when a Service member stops attending due to a military service obligation, the educational institution will work with the affected Service member to identify solutions that will not result in a student debt for the returned portion.

(3) Tuition charged to a Service member will in no case exceed the rate charged to nonmilitary students, unless agreed upon in writing by both the educational institution and the Service.

(4) Educational institutions will provide their tuition charges for each degree program to the Services on an annual basis. Any changes in the tuition charges will be provided to and explained to all the Services, as soon as possible, but not fewer than 90 days prior to implementation.

(a) Tuition charges at many public institutions are established by entities over which they have no jurisdiction, such as State legislatures and boards. As such, in some instances tuition decisions will not be made within the 90-day requirement window.

(b) When this happens, the educational institution will request a waiver (via the DoD MOU Web page) and provide the Services with the new tuition charges. To the extent practicable by State law or regulation, Service members already enrolled will not be impacted by changes in tuition charges.

(5) TA invoicing information is located in the Service-specific addendums attached to this MOU.

g. *Course Cancellations.* Educational institutions are responsible for notifying Service members of class cancellations for both classroom and DL courses.

h. *Materials and Electronic Accessibility.*

(1) Educational institutions will ensure that course materials are readily available, either electronically or in print medium, and provide information about where the student may obtain class materials at the time of enrollment or registration.

(2) Educational institution representatives will refrain from encouraging or requiring students to purchase course materials prior to confirmation of sufficient enrollments to conduct the class. Students will be encouraged to verify course acceptance by CCAF (Air Force only) or other program(s), with the responsible education advisor before enrolling or requesting TA.

(3) Educational institutions will provide, where available, electronic access to their main administrative and academic center's library materials, professional services, relevant periodicals, books, and other academic reference and research resources in print or online format that are appropriate or necessary to support the courses offered. Additionally, educational institutions will ensure adequate print and non-print media resources to support all courses being offered are available at base or installation library facilities, on-site Institution resource areas, or via electronic transmission.

i. *Graduation Achievement Recognition.*

(1) The educational institution will issue, at no cost to the Government, documentation as proof of completion, such as a diploma or certificate, to each student who completes the respective program requirements and meets all financial obligations.

(2) In accordance with Service requirements, the educational institution will report to the Service concerned those TA recipients who have completed a certificate, diploma, or degree program. Reporting will occur at least annually and include the degree level, major, and program requirements completion date.

(3) The academic credentials for certificate, diploma, or degree completion will reflect the degree-granting educational institution and campus authorized to confer the degree.

(a) If the Service member attends a branch of a large, multi-branch university system, the diploma may indicate the credential of the specific campus or branch of the educational institution from which the student received his or her degree.

(b) Credentials will be awarded to Service members with the same institutional designation as non-Service members who completed the same course work for a degree from the same institution.

(4) The educational institution will provide students with the opportunity to participate in a graduation ceremony.

j. *Reporting Requirements and Performance Metrics.*

(1) The educational institution will provide reports via electronic delivery on all DoD TA recipients for programs and courses offered to personnel as required by the cognizant Service. This includes, but is not limited to, TA transactions, final course grades to include incompletes and withdrawals, degrees awarded, certificates earned, evaluated educational plans, courses offered, and military graduation. Educational institutions providing face-to-face courses on a DoD installation will provide a class roster to the responsible education advisor. The class roster will include information such as the name of the instructor, the first and last name of each student (military and non-military), the course title, the class meeting day(s), the start and ending time of the class, and the class location (e.g., building and room number).

(a) All reporting and transmitting of this information will be done in conformity with all applicable privacy laws, including FERPA.

(b) Educational institutions will respond to these requests in a timely fashion, which will vary based on the specific nature and scope of the information requested.

(2) The cognizant Service may evaluate the educational institution's overall effectiveness in administering its academic program, courses, and customer satisfaction to DoD. A written report of the findings will be provided to the educational institution. The educational institution will have 90 calendar days to review the report, investigate if required, and provide a written response to the findings.

(3) The Services may request reports from an educational institution at any time, but not later than 2 years after termination of the MOU with such educational institution. Responses to all requests for reports will be provided within a reasonable period of time, and generally within 14 calendar days. Institutional response time will depend on the specific information sought by the Services in the report.

5. *Requirements and Responsibilities for the Delivery of On-Installation Voluntary Education Programs and Services*

a. The requirements in this section pertain to educational institutions operating on a DoD installation.

An installation MOU:

(1) Is required if an educational institution is operating on a DoD installation.

(2) Contains only the installation-unique requirements coordinated by the responsible education advisor, with concurrence from the appropriate Service voluntary education representative, and approved by the installation commander.

(3) Cannot conflict with the DoD Voluntary Education Partnership MOU and governing regulations.

b. Educational institutions will:

(1) Agree to have a separate installation MOU if they have a Service agreement to provide on-installation courses or degree programs.

(2) Comply with the installation-unique requirements in the installation MOU.

(3) Agree to coordinate degree programs offered on the DoD installation with the responsible education advisor, who will receive approval from the installation commander, prior to the opening of classes for registration.

(4) Admit candidates to the educational institution's on-installation programs at their discretion; however, priority for registration in DoD installation classes will be given in the following order:

(a) Service members.

(b) Federally funded DoD civilian employees.

(c) Eligible adult family members of Service members and DoD civilian employees.

(d) Military retirees.

(e) Non-DoD personnel.

(5) Provide the responsible education advisor, as appropriate, a tentative annual schedule of course offerings to ensure that the educational needs of the military population on the DoD installation are met and to ensure no course or scheduling conflicts with other on-installation programs.

(6) Provide instructors for their DoD installation courses who meet the criteria established by the educational institution to qualify for employment as a faculty member on the main administrative and academic center.

(7) Inform the responsible education advisor about cancellations for classroom-based classes on DoD installations per the guidelines set forth in the separate installation MOU.

c. The Services' designated installation representative (usually the responsible education advisor), will be responsible for determining the local voluntary education program needs for the serviced military population and for selecting the off-duty educational programs to be provided on the DoD installation, in accordance with the Services' policies. The Service, in conjunction with the educational institution, will provide support services essential to operating effective educational programs. All services provided will be commensurate with the availability of resources (personnel, funds, and equipment). This support includes:

(1) Classroom and office space, as available. The Service will determine the adequacy of provided space.

(2) Repairs as required to maintain office and classroom space in ''good condition'' as determined by the Service, and utility services for the offices and classrooms of the educational institution located on the DoD installation (e.g., electricity, water, and heat).

(3) Standard office and classroom furnishings within available resources. No specialized equipment will be provided.

(4) Janitorial services in accordance with DoD installation facility management policies and contracts.

d. The Service reserves the right to disapprove DoD installation access to any employee or agent of the educational institution employed to carry out any part of this MOU.

e. Operation of a privately owned vehicle by educational institution employees on the DoD installation will be governed by the DoD installation's policies.

f. The responsible education advisor will check with his or her Service's responsible office for voluntary education before allowing an educational institution to enter into an MOU with the DoD installation.

6. *Review, Modifications, Signatures, Effective Date, Expiration Date, and Cancellation Provision.*

a. *Review.* The signatories (or their successors) will review this MOU periodically in coordination with the Services, but no less than every 5 years to consider items such as current accreditation status, updated program offerings, and program delivery services.

b. *Modifications.* Modifications to this MOU will be in writing and, except for those required due to a change in State or Federal law, will be subject to approval by both of the signatories below, or their successors.

c. *Signatures.* The authorized signatory for DoD will be designated by the USD(P&R). The authorized signatory for the educational institution will be determined by the educational institution.

d. *Effective Date.* This MOU is effective on the date of the later signature.

e. *Expiration Date.* This MOU will expire 5 years from the effective date, unless terminated or updated prior to that date in writing by DoD or the educational institution.

f. *Cancellation Provision.* This MOU may be cancelled by either DoD or the educational institution 30 days after receipt of the written notice from the cancelling party. In addition, termination and suspension of an MOU with an educational institution may be done at any time for failure to follow a term of this MOU or misconduct in accordance paragraphs (a)(18)(i) through (a)(18)(iii) of §68.6.

FOR THE DEPARTMENT OF DEFENSE:

DESIGNATED SIGNATORY

DATE

FOR THE EDUCATIONAL INSTITUTION:

PRESIDENT or Designee

DATE

APPENDIX B TO PART 68—ADDENDUM FOR EDUCATION SERVICES BETWEEN [NAME OF EDUCATIONAL INSTITUTION] AND THE U.S. AIR FORCE (USAF)

1. *Purpose.* This addendum is between (Name of Educational Institution), hereafter referred to as the ''Institution,'' and the United States Air Force (USAF). The purpose of this agreement is to provide guidelines and procedures for the delivery of educational services to Service members, DoD civilian employees, eligible adult family members, military retirees, and non-DoD personnel not covered in the DoD Voluntary Education Partnership Memorandum of Understanding (MOU) between the DoD Office of the Under Secretary of Defense for Personnel and Readiness and the Institution. This addendum is not to be construed in any way as giving rise to a contractual obligation of the USAF to provide funds to the Institution that would be contrary to Federal law.

2. *Responsibilities.*

a. USAF Education and Training Section (ETS) Chief. The USAF ETS Chief will:

(1) Maintain a continuing liaison with the designated Institution representative and be responsible for inspections and the acceptance of the Institution's services. The ETS Chief will assist the Institution representative to provide military and USAF culture orientation to the Institution personnel.

(2) Review requests from Institutions with no on-installation MOU for permission of DoD installation access and space within the ETS to counsel current students, provide information briefings and materials, attend education fairs, and provide other informational services approved by the installation commander. Approval depends on the installation commander. Approval of any school eligible for Military TA will be extended equally to all such schools; same time allotment, space, and frequency.

(3) Assist the Institution or refer them to the information technology contractor for training in the use of the Academic Institution Portal (AI Portal) regarding input of Institution information, degree offerings, tuition rates, grades, invoices, degree completions, and search tools pre-built into the USAF online Voluntary Education System.

b. Institutions will:

(1) Appoint and designate an Institution representative to maintain a continuing liaison with the USAF ETS Chief.

(2) Provide general degree requirements to each member for his or her education program and the ETS as soon as he or she makes known their intention to register with the Institution and while awaiting final evaluation of transfer credits.

(3) Assume responsibility for the administration and proctoring of all course examinations not normally administered and proctored within the traditional, in-the-classroom setting.

(4) Provide to airmen, upon their request, information on Institution policies including, but not limited to, course withdrawal dates and penalties, course cancellation procedures, course grade publication, billing practices, and policy regarding incompletion of a course. Face-to-face counseling is not required.

(5) Register and use the AI Portal to input Institution basic information, degree offerings, tuition rates, invoice submission, course grades submission, degree completions, and to pull pre-established educational institution reports while conducting business with the USAF.

(6) Submit one consolidated invoice per term via the AI Portal for each class in which active duty military airmen are enrolled using Mil TA. Submission will be made during the term, no earlier than after the final add/drop/census date, and no later than 30 calendar days after the end of the term.

(7) Submit course grades via the AI Portal for each class in which active duty military airmen are enrolled using Mil TA. Submission will be made no later than 30 calendar days after the end of the term.

(8) Adopt the AI Portal procedures for all payment processing. Institutions with a current waiver may continue to participate at the discretion of Air Force Voluntary Education Branch.

(9) Provide a list of program graduates via the AI Portal consisting of student name, program title, program type (such as bachelor's degree), and date of graduation no later than 30 calendar days after the end of the term in which graduation requirements are completed. If the AI Portal is not available, provide directly to the base Education and Training Section.

c. Institutions with no on-installation MOU are authorized to request permission for DoD installation access and space within the ETS to counsel current students, provide information briefings and materials, attend education fairs, and other informational services. Approval depends on the installation commander. If approval is granted, then all other permissions will be authorized equally for any school eligible for Military TA; the same time allotment, space, and frequency.

d. All Institutions with an on-installation MOU or invitation for an on-installation activity, such as an educational fair, are authorized to counsel or provide information on any of their programs.

3. *Additional Guidelines*

a. In addition to DoD policy outlined in the DoD Voluntary Education Partnership MOU, the authorization of Mil TA is further governed by Air Force Instruction (AFI) 36–2306, as well as applicable policy and guidance.

b. DoD installation access of non-DoD and non-installation personnel is at the discretion of the installation commander. Access once provided can be revoked at any time due to military necessity or due to conduct that violates DoD installation rules or policies.

c. No off-base school will be given permanent space or scheduled for regularly recurring time on-base for student counseling.

APPENDIX C TO PART 68—ADDENDUM FOR EDUCATION SERVICES BETWEEN [NAME OF EDUCATIONAL INSTITUTION] AND THE U.S. ARMY

1. *Purpose.* This addendum is between (Name of Educational Institution), hereafter referred to as the ''Institution,'' and the United States Army. The purpose of this agreement is to provide guidelines and procedures for the delivery of educational services to Service members, DoD civilian employees, eligible adult family members, military retirees, and non-DoD personnel not covered in the DoD Voluntary Education Partnership Memorandum of Understanding

between the DoD Office of the Under Secretary of Defense for Personnel and Readiness and the Institution. This addendum is not to be construed in any way as giving rise to a contractual obligation of the U.S. Army to provide funds to the Institution that would be contrary to Federal law.

2. *Responsibilities.*

a. *Army Education Services Officer (ESO):* In support of this addendum, the Army ESO will maintain a continuing liaison with a designated Institution representative and be responsible for inspections and the acceptance of the Institution's services. The ESO will provide assistance to the Institution representative to provide military and Army culture orientation to the Institution personnel.

b. *Institutions.* The Institution will:

(1) Appoint and designate an Institution representative to maintain a continuing liaison with the Army ESO.

(2) Adopt the GoArmyEd processes. GoArmyEd is the Army Continuing Education System (ACES) centralized and streamlined management system for the Army's postsecondary voluntary education programs. Existing MOUs or Memorandums of Agreement, Tri-Services contracts, or other contracts that Institutions may have with DoD installations and ACES remain in place and will be supplemented with DoD Instruction 1322.25.

(3) Agree to all of the terms in the ACES policies and procedures, available at *https://www.hrc.army.mil/ site/education/GoArmyEd_School_Instructions.html,* such as: Invoicing, grades, reports, library references, etc. For non-Letter of Instruction (LOI) institutions satisfying paragraph 3.f. of this MOU, any requirements in ACES policies and procedures requiring institutions to be a member of SOC are hereby waived.

(4) Institutions currently participating with GoArmyEd as LOI and non-LOI schools, may continue to do so at the discretion of Headquarters, ACES. Non-LOI schools will be subject to the requirements of paragraphs 2.b.(2) and 2.b.(3) of this MOU only to the extent that their existing non-LOI agreement with the U.S. Army provides.

APPENDIX D TO PART 68—ADDENDUM FOR EDUCATION SERVICES BETWEEN [NAME OF EDUCATIONAL INSTITUTION] AND THE U.S. MARINE CORPS

1. *Purpose.* This addendum is between (Name of Educational Institution), hereafter referred to as the ''Institution,'' and the U.S. Marine Corps. The purpose of this agreement is to provide guidelines and procedures for the delivery of educational services to Service members, DoD civilian employees, eligible adult family members, military retirees, and non-DoD personnel not covered in the DoD Voluntary Education Partnership Memorandum of Understanding between the DoD Office of the Under Secretary of Defense for Personnel and Readiness and the Institution. This addendum is not to be construed in any way as giving rise to a contractual obligation of the U.S. Marine Corps to provide funds to the Institution that would be contrary to Federal law.

2. *Responsibilities.*

a. *Marine Corps Education Services Officer (ESO):* In support of this addendum, the Marine Corps ESO will maintain a continuing liaison with a designated Institution representative and be responsible for inspections and the acceptance of the Institution's services. The ESO will provide assistance to the Institution representative to provide military and Marine Corps culture orientation to the Institution personnel.

b. *Institution.* The Institution will:

(1) Appoint and designate an Institution representative to maintain a continuing liaison with the Marine Corps ESO.

(2) Provide open enrollment during a designated time periods in courses conducted through media (e.g., portable media devices or computer-aided). Those courses will be on an individual enrollment basis.

(3) When operating on a Marine Corps installation, provide all required equipment when the Institution provides instruction via media.

(4) When operating on a Marine Corps installation, provide library services to the Marine Corps installation for students in the form of research and reference materials (e.g., books, pamphlets, magazines) of similar quality to the support provided students on the institution's home campus. Services will also include research and reference material in sufficient quantity to meet curriculum and program demands. Materials will be, at a minimum, the required readings of the instructor(s) for a particular course or program, or the ability for the student to request a copy of such material, from the institution's main library, without any inconvenience or charge to the student (e.g., a library computer terminal that may allow students to order material and have it mailed to their residence).

(5) Permit employment of off-duty military personnel or Government civilian employees by the institution, provided such employment does not conflict with the policies set forth in DoD Regulation 5500.7–R. However, Government personnel employed in any way in the administration of this addendum will be excluded from such employment because of conflict of interest.

3. *Billing Procedures, And Formal Grades.*

a. Comply with wide area work flow process for invoicing tuition assistance available at *https://www.navycollege.navy.mil/links.*

b. Grades will be submitted through the Navy College Management Information System grade entry application.

c. Grade reports will be provided to the Naval Education and Training Professional Development and Technology Center within 30 days of term ending or completion of the course, whichever is earlier.

APPENDIX E TO PART 68—ADDENDUM FOR EDUCATION SERVICES BETWEEN [NAME OF EDUCATIONAL INSTITUTION] AND THE U.S. NAVY

1. *Purpose.* This addendum is between (Name of Educational Institution), hereafter referred to as the ''Institution,'' and the U.S. Navy. The purpose of this agreement is to provide guidelines and procedures for the delivery of educational services to Service members, DoD civilian employees, eligible adult family members, military retirees, and non-DoD personnel not covered in the DoD Voluntary Education Partnership Memorandum of Understanding (MOU) between the DoD Office of the Under Secretary of Defense for Personnel and Readiness and the Institution. This addendum is not to be construed in any way as giving rise to a contractual obligation of the Department of the Navy to provide funds to the Institution that would be contrary to Federal law.

2. *Responsibilities.*

a. *Commanding Officer responsible for execution of the Voluntary Education Program.* The commanding officer responsible for execution of the voluntary education program will:

(1) Determine the local voluntary education program needs for the Navy population to be served and recommend to the installation commander the educational programs to be offered on the base;

(2) Administer this agreement and provide program management support;

(3) Manage the Navy College Program Distance Learning Partnership (NCPDLP) agreements.

b. *Navy College Office (NCO):* In support of this addendum, the NCO will maintain a continuing liaison with the designated Institution representative and be responsible for inspections and the acceptance of the Institution's services. The NCO will provide assistance to the Institution representative to provide military and Navy culture orientation to the Institution personnel.

c. *Institution.* The Institution will:

(1) If a distance learning partner institution:

(i) Comply with NCPDLP agreements, if an institution participates in NCPDLP.

(ii) Provide a link to the institution through the Navy College Program Web site, only if designated as an NCPDLP school.

(iii) Display the Institution's advertising materials (*i.e.*, pamphlets, posters, and brochures) at all NCOs, only if designated as an NCPDLP school.

(2) Appoint and designate an Institution representative to maintain a continuing liaison with the NCO staff.

(3) Comply with wide area work flow processes for invoicing of tuition assistance available at *https://www.navycollege.navy.mil/links.* Grades will be submitted to the Navy College Management Information System grade entry application.

(4) Ensure library resource arrangements are in accordance with the standards of the Institution's accrediting association and the State regulatory agency having jurisdiction over the Institution.

(5) Respond to email messages from students within a reasonable period of time—generally within two workdays, unless extenuating circumstances would justify additional time.

(6) Comply with host command procedures before starting instructor-based courses on any Navy installation. The NCO will negotiate a separate agreement with the Institution in concert with the host command procedures.

(7) Mail an official transcript indicating degree completion, at no cost to the sailor or the Government to: Center for Personal and Professional Development, ATTN: Virtual Education Center, 1905 Regulus Ave., Suite 234, Virginia Beach, VA 23461–2009.

PART 69—SCHOOL BOARDS FOR DEPARTMENT OF DEFENSE DOMESTIC DEPENDENT ELEMENTARY AND SECONDARY SCHOOLS

Sec.

69.1 Purpose.
69.2 Applicability and scope.
69.3 Definitions.
69.4 Policy.
69.5 Responsibilities.
69.6 Procedures.

AUTHORITY: 10 U.S.C. 2164.

SOURCE: 61 FR 60563, Nov. 29, 1996, unless otherwise noted.

§ 69.1 Purpose.

This part prescribes policies and procedures for the establishment and operation of elected School Boards for schools operated by the Department of Defense (DoD) under 10 U.S.C. 2164, 32 CFR part 345, and Public Law 92–463.

§ 69.2 Applicability and scope.

This part applies to:

(a) The Office of the Secretary of Defense (OSD), the Military Departments, the Coast Guard when operating as a service of the Department of the Navy

or by agreement between DoD and the Department of Transportation, the Chairman of the Joint Chiefs of Staff, the Unified and Specified Combatant Commands, the Inspector General of the Department of Defense, the Uniformed Services University of the Health Sciences, the Defense Agencies, and the DoD Field Activities.

(b) The schools (prekindergarten through grade 12) operated by the DoD under 10 U.S.C. 2164 and 32 CFR part 345 within the continental United States, Alaska, Hawaii, Puerto Rico, Wake Island, Guam, American Samoa, the Northern Mariana Islands, and the Virgin Islands, known as DoD DDESS Arrangements.

(c) This part does not apply to elected school boards established under state or local law for DoD DDESS special arrangements.

§ 69.3 Definitions.

(a) *Arrangements.* Actions taken by the Secretary of Defense to provide a free public education to dependent children under 10 U.S.C. 2164 through DoD DDESS arrangements or DoD DDESS special arrangements:

(1) *DDESS arrangement.* A school operated by the Department of Defense under 10 U.S.C. 2164 and 32 CFR 345 to provide a free public education for eligible children.

(2) *DDESS special arrangement.* An agreement, under 10 U.S.C. 2164, between the Secretary of Defense, or designee, and a local public education agency whereby a school or a school system operated by the local public education agency provides educational services to eligible dependent children of U.S. military personnel and federally employed civilian personnel. Arrangements result in partial or total Federal funding to the local public education agency for the educational services provided.

(b) *Parent.* The biological father or mother of a child when parental rights have not been legally terminated; a person who, by order of a court of competent jurisdiction, has been declared the father or mother of a child by adoption; the legal guardian of a child; or a person in whose household a child resides, provided that such person stands in *loco parentis* to that child and contributes at least one-half of the child's support.

§ 69.4 Policy.

(a) Each DoD DDESS arrangement shall have an elected school board, established and operated in accordance with this part and other pertinent guidance.

(b) Because members of DoD DDESS elected school boards are not officers or employees of the United States appointed under the Appointments Clause of the United States Constitution (Art. II, Sec. 2, Cl. 2), they may not exercise discretionary governmental authority, such as the taking of personnel actions or the establishment of governmental policies. This part clarifies the role of school boards in the development and oversight of fiscal, personnel, and educational policies, procedures, and programs for DoD DDESS arrangements, subject to these constitutional limitations.

(c) The DoD DDESS chain of command for matters relating to school arrangements operated under 10 U.S.C. 2164 and 32 CFR part 345 shall be from the Director, DoD DDESS, to the Superintendent of each school arrangement. The Superintendent will inform the school board of all matters affecting the operation of the local school arrangement. Direct liaison among the school board, the Director, and the Superintendent is authorized for all matters pertaining to the local school arrangement.

§ 69.5 Responsibilities.

The Assistant Secretary of Defense for Force Management Policy (ASD (FMP)), under the Under Secretary of Defense for Personnel and Readiness, shall:

(a) Make the final decision on all formal appeals to directives and other guidance submitted by the school board or Superintendent.

(b) Ensure the Director, DoD DDESS shall:

(1) Ensure the establishment of elected school boards in DoD DDESS arrangements.

(2) Monitor compliance by the Superintendent and school boards with applicable statutory and regulatory requirements, and this part. In the event of

suspected noncompliance, the Director, DoD DDESS, shall take appropriate action, which will include notification of the Superintendent and the school board president of the affected DoD DDESS arrangement.

(3) Determine when the actions of a school board conflict with an applicable statute, regulation, or other guidance or when there is a conflict in the views of the school board and the Superintendent. When such conflicts occur, the Director, DoD DDESS, shall assist the Superintendent and the school board in resolving them or direct that such actions be discontinued. Such disapprovals must be in writing to the school board and the Superintendent concerned and shall state the specific supporting reason or reasons.

(c) Ensure the school board for DoD DDESS arrangements shall:

(1) Participate in the development and oversight of fiscal, personnel, and educational policies, procedures, and programs for the DoD DDESS arrangement concerned, consistent with this part.

(2) Approve agendas and prepare minutes for school board meetings. A copy of the approved minutes of school board meetings shall be forwarded to the Director, DoD DDESS, within 10 working days after the date the minutes are approved.

(3) Provide to the Director, DoD DDESS, names of applicants for a vacancy in the Superintendent's position after a recruitment has been accomplished. The school board shall submit to the Director, DoD DDESS, a list of all applicants based on its review of the applications and interviews (either in person or telephonically) of the applicants. The list of applicants will be accompanied by the recommended choice of the school board. The Director will select the Superintendent and will submit written notice with justification to the school board if the recommendation of the school board is not followed.

(4) Prepare an annual written on-site review of the Superintendent's performance for consideration by the Director, DoD DDESS. The written review shall be based on critical elements recommended by the school board and Superintendent and approved by the Director, DoD DDESS. The school board's review will be an official attachment to the Superintendent's appraisal.

(5) Participate in the development of the school system's budget for submission to the Director, DoD DDESS, for his or her approval as endorsed by the school board; and participate in the oversight of the approved budget, in conjunction with the Superintendent, as appropriate for operation of the school arrangement.

(6) Invite the Superintendent or designee to attend all school board meetings.

(7) Provide counsel to the Superintendent on the operation of the school and the implementation of the approved budget.

(8) Channel communications with school employees to the DoD DDESS Superintendent. Refer all applications, complaints, and other communications, oral or written, to the DoD DDESS Arrangement Superintendents.

(9) Participate in the development of school policies, rules, and regulations, in conjunction with the Superintendent, and recommend which policies shall be reflected in the School Policy Manual. At a minimum, the Policy Manual, which shall be issued by the Superintendent, shall include following:

(i) A statement of the school philosophy.

(ii) The role and responsibilities of school administrative and educational personnel.

(iii) Provisions for promulgation of an annual school calendar.

(iv) Provisions on instructional services, including policies for development and adoption of curriculum and textbooks.

(v) Regulations affecting students, including attendance, grading, promotion, retention, and graduation criteria, and the student code of rights, responsibilities, and conduct.

(vi) School policy on community relations and noninstructional services, including maintenance and custodial services, food services, and student transportation.

(vii) School policy and legal limits on financial operations, including accounting, disbursing, contracting, and

procurement; personnel operations, including conditions of employment, and labor management regulations; and the processing of, and response to, complaints.

(viii) Procedures providing for new school board member orientation.

(ix) Any other matters determined by the school board and the superintendent to be necessary.

(10) Under 10 U.S.C. 2164(b)(4)(B), prepare and submit formal appeals to directives and other guidance that in the view of the school board adversely impact the operation of the school system either through the operation and management of DoD DDESS or a specific DoD DDESS arrangement. Written formal appeals with justification and supporting documentation shall be submitted by the school board or Superintendent to ASD(FMP). The ASD(FMP) shall make the final decision on all formal appeals. The Director, Dod DDESS, will provide the appealing body written review of the findings relating to the merits of the appeal. Formal appeals will be handled expeditiously by all parties to minimize any adverse impact on the operation of the DoD DDESS system.

(d) Ensure school board operating procedures are as follows:

(1) The school board shall operate from a written agenda at all meetings. Matters not placed on the agenda before the start of the meeting, but approved by a majority of the school board present, may be considered at the ongoing meeting and added to the agenda at that time.

(2) A majority of the total number of school board members authorized shall constitute a quorum.

(3) School board meetings shall be conducted a minimum of 9 times a year. The school board President or designee will provide school board members timely notice of all meetings. All regularly scheduled school board meetings will be open to the public. Executive session meetings may be closed under 10 U.S.C. 2164(d)(6).

(4) The school board shall not be bound in any way by any action or statement of an individual member or group of members of the board except when such action or statement is approved by a majority of the school board members during a school board meeting.

(5) School board members are eligible for reimbursement for official travel in accordance with the DoD Joint Travel Regulations and guidance issued by the Director, DoD DDESS.

(6) School board members may be removed by the ASD (FMP) for dereliction of duty, malfeasance, or other grounds for cause shown. The school board concerned may recommend such removal with a two-thirds majority vote. Before a member may be removed, the member shall be afforded due process, to include written notification of the basis for the action, review of the evidence or documentation considered by the school board, and an opportunity to respond to the allegations.

§ 69.6 Procedures.

(a) *Composition of school board.* (1) The school board shall recommend to the Director, DoD DDESS, the number of elected school board voting members, which shall be not fewer than 3 and no more than 9, depending upon local needs. The members of the school board shall select by majority vote of the total number of school board members authorized at the beginning of each official school board term, one member to act as President and another to act as Vice President. The President and Vice President shall each serve for 1 year. The President shall preside over school board meetings and provide leadership for related activities and functions. The Vice President shall serve in the absence of the President. If the position of President is vacated for any reason, the Vice President shall be the President until the next regularly scheduled school board election. The resulting vacancy in the position of the Vice President shall be filled by the majority vote of all members of the incumbent board.

(2) The DoD DDESS Arrangement Superintendent, or designee, shall serve as a non-voting observer to all school board meetings. The Installation Commander, or designee, shall convey command concerns to the school board and the Superintendent and keep the school board and the Superintendent informed of changes and other matters

within the host installation that affect school expenditures or operations.

(3) School board members may not receive compensation for their service on the school board.

(4) Members of the school board may not have any financial interest in any company or organization doing business with the school system. Waivers to this restriction may be granted on a case-by-case basis by the Director, DoD DDESS, in coordination with the Office of General Counsel of the Department of Defense.

(b) *Electorate of the school board.* The electorate for each school board seat shall be composed of parents of the students attending the school. Each member of the electorate shall have one vote.

(c) *Election of school board members.* (1) To be elected as a member of the school board, an individual must be a resident of the military installation in which the DoD DDESS arrangement is located, or in the case of candidates for the Antilles Consolidated School System School Board, be the parent of an eligible child currently enrolled in the school system. Personnel employed by a DoD DDESS arrangement may not serve as school board members.

(2) The board shall determine the term of office for elected members, not to exceed 3 years, and the limit on the number of terms, if any. If the board fails to set these terms by the first day of the first full month of the school year, the terms will be set at 3 years, with a maximum of 2 consecutive terms.

(3) When there is a sufficient number of school board vacancies that result in not having a quorum, which is defined as a majority of seats authorized, a special election shall be called by the DoD DDESS Arrangement Superintendent or designee. A special election is an election that is held between the regularly scheduled annual school board election. The nomination and election procedures for a special election shall be the same as those of regularly scheduled school board elections. Individuals elected by special election shall serve until the next regularly scheduled school board election. Vacancies may occur due to the resignation, death, removal for cause, transfer, or disenrollment of a school board member's child(ren) from the DoD DDESS arrangement.

(4) The board shall determine a schedule for regular elections. Parents shall have adequate notice of the time and place of the election. The election shall be by secret ballot. All votes must be cast in person at the time and place of the election. The candidate(s) receiving the greatest number of votes shall be elected as school board member(s).

(5) Each candidate for school board membership must be nominated in writing by at least one member of the electorate to be represented by the candidate. Votes may be cast at the time of election for write-in candidates who have not filed a nomination petition if the write-in candidates otherwise are qualified to serve in the positions sought.

(6) The election process shall provide staggered terms for board members; e.g., on the last day of the last month of each year, the term for some board members will expire.

(7) The DoD DDESS Superintendent, in consultation with the school board, shall be responsible for developing the plans for nominating school board members and conducting the school board election and the special election process. The DoD DDESS Superintendent shall announce election results within 7 working days of the election.

PART 70—DISCHARGE REVIEW BOARD (DRB) PROCEDURES AND STANDARDS

Sec.

70.1 Reissuance and purpose.
70.2 Applicability.
70.3 Definitions.
70.4 Responsibilities.
70.5 Procedures.
70.6 Information requirements.
70.7 Effective date and implementation.
70.8 Discharge review procedures.
70.9 Discharge review standards.
70.10 Complaints concerning decisional documents and index entries.
70.11 DoD semiannual report.

AUTHORITY: 10 U.S.C. 1553 and 38 U.S.C. 101 and 3103, as amended.

SOURCE: 47 FR 37785, Aug. 26, 1982, unless otherwise noted.

§ 70.1 Reissuance and purpose.

This part is reissued and:

(a) Establishes uniform policies, procedures, and standards for the review of discharges or dismissals under 10 U.S.C. 1553.

(b) Provides guidelines for discharge review by application or on motion of a DRB, and the conduct of discharge reviews and standards to be applied in such reviews which are designed to ensure historically consistent uniformity in execution of this function, as required under Pub. L. 95–126.

(c) Assigns responsibility for administering the program.

(d) Makes provisions for public inspection, copying, and distribution of DRB documents through the Armed Forces Discharge Review/Correction Board Reading Room.

(e) Establishes procedures for the preparation of decisional documents and index entries.

(f) Provides guidance for processing complaints concerning decisional documents and index entries.

§ 70.2 Applicability.

The provisions of this part 70 apply to the Office of the Secretary of Defense (OSD) and the Military Departments. The terms, ''Military Services,'' and ''Armed Forces,'' as used herein, refer to the Army, Navy, Air Force and Marine Corps.

§ 70.3 Definitions.

(a) *Applicant.* A former member of the Armed Forces who has been discharged or dismissed administratively in accordance with Military Department regulations or by sentence of a court-martial (other than a general court-martial) and under statutory regulatory provisions whose application is accepted by the DRB concerned or whose case is heard on the DRB's own motion. If the former member is deceased or incompetent, the term ''applicant'' includes the surviving spouse, next-of-kin, or legal representative who is acting on behalf of the former member. When the term ''applicant'' is used in §§ 70.8 through 70.10, it includes the applicant's counsel or representative, except that the counsel or representative may not submit an application for review, waive the applicant's right to be present at a hearing, or terminate a review without providing the DRB an appropriate power of attorney or other written consent of the applicant.

(b) *Complainant.* A former member of the Armed Forces (or the former member's counsel) who submits a complaint under § 70.10 with respect to the decisional document issued in the former member's own case; or a former member of the Armed Forces (or the former member's counsel) who submits a complaint under § 70.10 stating that correction of the decisional document will assist the former member in preparing for an administrative or judicial proceeding in which the former member's own discharge will be at issue.

(c) *Counsel or Representative.* An individual or agency designated by the applicant who agrees to represent the applicant in a case before the DRB. It includes, but is not limited to: a lawyer who is a member of the bar of a Federal court or of the highest court of a State; an accredited representative designated by an organization recognized by the Administrator of Veterans Affairs; a representative from a State agency concerned with veterans affairs; and representatives from private organizations or local government agencies.

(d) *Discharge.* A general term used in this Directive that includes dismissal and separation or release from active or inactive military status, and actions that accomplish a complete severance of all military status. This term also includes the assignment of a reason for such discharge and characterization of service (32 CFR part 41).

(e) *Discharge Review.* The process by which the reason for separation, the procedures followed in accomplishing separation, and the characterization of service are evaluated. This includes determinations made under the provisions of 38 U.S.C. 3103(e)(2).

(f) *Discharge Review Board (DRB).* An administrative board constituted by the Secretary of the Military Department concerned and vested with discretionary authority to review discharges and dismissals under the provisions of 10 U.S.C. 1553. It may be configured as

one main element or two or more elements as designated by the Secretary concerned.

(g) *DRB Panel.* An element of a DRB, consisting of five members, authorized by the Secretary concerned to review discharges and dismissals.

(h) *DRB Traveling or Regional Panel.* A DRB panel that conducts discharge reviews in a location outside the National Capital Region (NCR).

(i) *Hearing.* A review involving an appearance before the DRB by the applicant or on the applicant's behalf by a counsel or representative.

(j) *Hearing Examination.* The process by which a designated officer of a DRB prepares a presentation for consideration by a DRB in accordance with regulations prescribed by the Secretary concerned.

(k) *National Capital Region (NCR).* The District of Columbia; Prince Georges and Montgomery Counties in Maryland; Arlington, Fairfax, Loudoun, and Prince William Counties in Virginia; and all cities and towns included within the outer boundaries of the foregoing counties.

(l) *President, DRB.* A person designated by the Secretary concerned and responsible for the supervision of the discharge review function and other duties as assigned.

§ 70.4 Responsibilities.

(a) The *Secretaries of the Military Departments* have the authority for final decision and the responsibility for the operation for their respective discharge review programs under 10 U.S.C. 1553.

(b) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)* (ASD(MRA&L)) shall:

(1) Resolve all issues concerning DRBs that cannot be resolved among the Military Departments.

(2) Ensure uniformity among the Military Departments in the rights afforded applicants in discharge reviews.

(3) Modify or supplement the enclosures to this part.

(4) Maintain the index of decisions and provide for timely modification of index categories to reflect changes in discharge review policies, procedures, and standards issued by the OSD and the Military Departments.

(c) The *Secretary of the Army*, as the designated administrative focal point for DRB matters, shall:

(1) Effect necessary coordination with other governmental agencies regarding continuing applicability of this part and resolve administrative procedures relating thereto.

(2) Review suggested modifications to this part, including implementing documents; monitor the implementing documents of the Military Departments; resolve differences, when practicable; recommend specific changes; provide supporting rationale to the ASD(MRA&L) for decision; and include appropriate documentation through the Office of the ASD(MRA&L) and the OSD Federal Register liaison officer to effect publication in the FEDERAL REGISTER.

(3) Maintain the DD Form 293, ''Application for Review of Discharge or Separation from the Armed Forces of the United States,'' and republish as necessary with appropriate coordination of the other Military Departments and the Office of Management and Budget.

(4) Respond to all inquiries from private individuals, organizations, or public officials with regard to DRB matters. When the specific Military Service can be identified, refer such correspondence to the appropriate DRB for response or designate an appropriate activity to perform this task.

(5) Provide overall guidance and supervision to the Armed Forces Discharge Review/Correction Board Reading Room with staff augmentation, as required, by the Departments of the Navy and Air Force.

(6) Ensure that notice of the location, hours of operation, and similar types of information regarding the Reading Room is published in the FEDERAL REGISTER.

§ 70.5 Procedures.

(a) Discharge review procedures are prescribed in § 70.8.

(b) Discharge Review Standards are prescribed in § 70.9 and constitute the basic guidelines for the determination whether to grant or deny relief in a discharge review.

(c) Complaint Procedures about decisional documents are prescribed in §70.10.

§ 70.6 Information requirements.

(a) *Reporting requirements.* (1) The reporting requirement prescribed in §70.8(n) is assigned Report Control Symbol DD-M(SA)1489.

(2) All reports must be consistent with DoD Directive 5000.11, ''Data Elements and Data Codes Standardization Program,'' December 7, 1964.

(b) *Use of standard data elements.* The data requirements prescribed by this part shall be consistent with DoD 5000.12–M, ''DoD Manual for Standard Data Elements,'' December 1981. Any reference to a date should appear as (YYMMDD), while any name entry should appear as (Last name, first name, middle initial).

§ 70.7 Effective date and implementation.

This part is effective immediately for the purpose of preparing implementing documents. DoD Directive 1332.28, March 29, 1978, is officially canceled, effective November 27, 1982. This part applies to all discharge review proceedings conducted on or after November 27, 1982. §70.10 applies to all complaint proceedings conducted on or after September 28, 1982. Final action on complaints shall not be taken until September 28, 1982, unless earlier corrective action is requested expressly by the applicant (or the applicant's counsel) whose case is the subject of the decisional document. If earlier corrective action is requested, it shall be taken in accordance with §70.10.

§ 70.8 Discharge review procedures.

(a) *Application for review*—(1) *General.* Applications shall be submitted to the appropriate DRB on DD Form 293, ''Application for Review of Discharge or Separation from the Armed Forces of the United States,'' with such other statements, affidavits, or documentation as desired. It is to the applicant's advantage to submit such documents with the application or within 60 days thereafter in order to permit a thorough screening of the case. The DD Form 293 is available at most DoD installations and regional offices of the Veterans Administration, or by writing to: DA Military Review Boards Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington, DC 20310.

(2) *Timing.* A motion or request for review must be made within 15 years after the date of discharge or dismissal.

(3) *Applicant's responsibilities.* An applicant may request a change in the character of or reason for discharge (or both).

(i) *Character of discharge.* Block 7 of DD Form 293 provides an applicant an opportunity to request a specific change in character of discharge (for example, General Discharge to Honorable Discharge; Other than Honorable Discharge to General or Honorable Discharge). Only a person separated on or after 1 October 1982 while in an entry level status may request a change from Other than Honorable Discharge to Entry Level Separation. A request for review from an applicant who does not have an Honorable Discharge shall be treated as a request for a change to an Honorable Discharge unless the applicant requests a specific change to another character of discharge.

(ii) *Reason for discharge.* Block 7 of DD Form 293 provides an applicant an opportunity to request a specific change in the reason for discharge. If an applicant does not request a specific change in the reason for discharge, the DRB shall presume that the request for review does not involve a request for change in the reason for discharge. Under its responsibility to examine the propriety and equity of an applicant's discharge, the DRB shall change the reason for discharge if such a change is warranted.

(iii) The applicant must ensure that issues submitted to the DRB are consistent with the request for change in discharge set forth in block 7 of the DD Form 293. If an ambiguity is created by a difference between an applicant's issue and the request in block 7, the DRB shall respond to the issue in the context of the action requested in block 7. In the case of a hearing, the DRB shall attempt to resolve the ambiguity under paragraph (a)(5) of this section.

(4) *Request for consideration of specific issues.* An applicant may request the

DRB to consider specific issues which, in the opinion of the applicant, form a basis for changing the character of or reason for discharge, or both. In addition to the guidance set forth in this section, applicants should consult the other sections in this part (particularly paragraphs (c), (d), and (e) of this section and §§ 70.9 and 70.10 before submitting issues for consideration by the DRB.

(i) *Submission of issues on DD Form 293.* Issues must be provided to the DRB on DD Form 293 before the DRB closes the review process for deliberation.

(A) *Issues must be clear and specific.* An issue must be stated clearly and specifically in order to enable the DRB to understand the nature of the issue and its relationship to the applicant's discharge.

(B) *Separate listing of issues.* Each issue submitted by an applicant should be listed separately. Submission of a separate statement for each issue provides the best means of ensuring that the full import of the issue is conveyed to the DRB.

(C) *Use of DD Form 293.* DD Form 293 provides applicants with a standard format for submitting issues to the DRB, and its use:

(*1*) Provides a means for an applicant to set forth clearly and specifically those matters that, in the opinion of the applicant, provide a basis for changing the discharge;

(*2*) Assists the DRB in focusing on those matters considered to be important by an applicant;

(*3*) Assists the DRB in distinguishing between a matter submitted by an applicant in the expectation that it will be treated as a decisional issue under paragraph (e) of this section, and those matters submitted simply as background or supporting materials;

(*4*) Provides the applicant with greater rights in the event that the applicant later submits a complaint under § 70.10(d)(1)(iii) concerning the decisional document;

(*5*) Reduces the potential for disagreement as to the content of an applicant's issue.

(D) *Incorporation by reference.* If the applicant makes an additional written submission, such as a brief, in support of the application, the applicant may incorporate by reference specific issues set forth in the written submission in accordance with the guidance on DD Form 293. The reference shall be specific enough for the DRB to identify clearly the matter being submitted as an issue. At a minimum, it shall identify the page, paragraph, and sentence incorporated. Because it is to the applicant's benefit to bring such issues to the DRB's attention as early as possible in the review, applicants who submit a brief are strongly urged to set forth all such issues as a separate item at the beginning of the brief. If it reasonably appears that the applicant inadvertently has failed expressly to incorporate an issue which the applicant clearly identifies as an issue to be addressed by the DRB, the DRB shall respond to such an issue under paragraphs (d) and (e) of this section.

(E) *Effective date of the new Form DD 293.* With respect to applications received before November 27, 1982, the DRB shall consider issues clearly and specifically stated in accordance with the rules in effect at the time of submission. With respect to applications received on or after November 27, 1982, if the applicant submits an obsolete DD Form 293, the DRB shall accept the application, but shall provide the applicant with a copy of the new form and advise the applicant that it will only respond to issues submitted on the new form in accordance with this part.

(ii) *Relationship of issues to character of or reason for discharge.* If the application applies to both character of and reason for discharge, the applicant is encouraged, but not required, to identify the issue as applying to the character of or reason for discharge (or both). Unless the issue is directed at the reason for discharge expressly or by necessary implication, the DRB will presume that it applies solely to the character of discharge.

(iii) *Relationship of issues to the standards for discharge review.* The DRB reviews discharges on the basis of issues of propriety and equity. The standards used by the DRB are set forth in § 70.9. The applicant is encouraged to review those standards before submitting any issue upon which the applicant believes a change in discharge should be based.

(A) *Issues concerning the equity of the discharge.* An issue of equity is a matter that involves a determination whether a discharge should by changed under the equity standards of §70.9. This includes any issue, submitted by the applicant in accordance with paragraph (a)(4)(i) of this section, that is addressed to the discretionary authority of the DRB.

(B) *Issues concerning the propriety of a discharge.* An issue of propriety is a matter that involves a determination whether a discharge should be changed under the propriety standards of §70.9. This includes an applicant's issue, submitted in accordance with paragraph (a)(4)(i) of this section, in which the applicant's position is that the discharge must be changed because of an error in the discharge pertaining to a regulation, statute, constitutional provision, or other source of law (including a matter that requires a determination whether, under the circumstances of the case, action by military authorities was arbitrary, capricious, or an abuse of discretion). Although a numerical reference to the regulation or other sources of law alleged to have been violated is not necessarily required, the context of the regulation or a description of the procedures alleged to have been violated normally must be set forth in order to inform the DRB adequately of the basis for the applicant's position.

(C) *The applicant's identification of an issue.* The applicant is encouraged, but not required, to identify an issue as pertaining to the propriety or the equity to the discharge. This will assist the DRB in assessing the relationship of the issue to propriety or equity under paragraph (e)(1)(iii) of this section.

(iv) *Citation of matter from decisions.* The primary function of the DRB involves the exercise of dicretion on a case-by-case basis. See §70.9(b)(3). Applicants are not required to cite prior decisions as the basis for a change in discharge. If the applicant wishes to bring the DRB's attention to a prior decision as background or illustrative material, the citation should be placed in a brief or other supporting documents. If, however, it is the applicant's intention to submit an issue that sets forth specific principles and facts from a specific cited decision, the following requirements apply with respect to applications received on or after November 27, 1982.

(A) The issue must be set forth or expressly incorporated in the ''Applicant's Issue'' portion of DD Form 293.

(B) If an applicant's issue cites a prior decision (of the DRB, another Board, an agency, or a court), the applicant shall describe the specific principles and facts that are contained in the prior decision and explain the relevance of cited matter to the applicant's case.

(C) To ensure timely consideration of principles cited from unpublished opinions (including decisions maintained by the Armed Forces Discharge Review Board/Corrective Board Reading Room), applicants must provide the DRB with copies of such decisions or of the relevant portion of the treatise, manual, or similar source in which the principles were discussed. At the applicant's request, such materials will be returned.

(D) If the applicant fails to comply with the requirements in paragraphs (a)(4)(iv) (A), (B), and (C), the decisional document shall note the defect, and shall respond to the issue without regard to the citation.

(5) *Identification by the DRB of issues submitted by an applicant.* The applicant's issues shall be identified in accordance with this section after a review of the materials noted under paragraph (c)(4), is made.

(i) *Issues on DD Form 293.* The DRB shall consider all items submitted as issues by an applicant on DD Form 293 (or incorporated therein) in accordance with paragraph (a)(4)(i). With respect to applications submitted before November 27, 1982, the DRB shall consider all issues clearly and specifically stated in accordance with the rules in effect at the time of the submission.

(ii) *Amendment of issues.* The DRB shall not request or instruct an applicant to amend or withdraw any matter submitted by the applicant. Any amendment or withdrawal of an issue by an applicant shall be confirmed in writing by the applicant. Nothing in this provision:

(A) Limits the DRB's authority to question an applicant as to the meaning of such matter;

(B) Precludes the DRB from developing decisional issues based upon such questions;

(C) Prevents the applicant from amending or withdrawing such matter any time before the DRB closes the review process for deliberation; or

(D) Prevents the DRB from presenting an applicant with a list of proposed decisional issues and written information concerning the right of the applicant to add to, amend, or withdraw the applicant's submission. The written information will state that the applicant's decision to take such action (or decline to do so) will not be used against the applicant in the consideration of the case.

(iii) *Additional issues identified during a hearing.* The following additional procedure shall be used during a hearing in order to promote the DRB's understanding of an applicant's presentation. If, before closing the case for deliberation, the DRB believes that an applicant has presented an issue not listed on DD Form 293, the DRB may so inform the applicant, and the applicant may submit the issue in writing or add additional written issues at that time. This does not preclude the DRB from developing its own decisional issues.

(6) *Notification of possible bar to benefits.* Written notification shall be made to each applicant whose record indicates a reason for discharge that bars receipt of benefits under 38 U.S.C. 3103(a). This notification will advise the applicant that separate action by the Board for Correction of Military or Naval Records or the Veterans Administration may confer eligibility for VA benefits. Regarding the bar to benefits based upon the 180 days consecutive unauthorized absence, the following applies:

(i) Such absence must have been included as part of the basis for the applicant's discharge under other than honorable conditions.

(ii) Such absence is computed without regard to the applicant's normal or adjusted expiration of term of service.

(b) *Conduct of reviews*—(1) *Members.* As designated by the Secretary concerned, the DRB and its panels, if any, shall consist of five members. One member of the DRB shall be designated as the president and may serve as a presiding officer. Other officers may be designated to serve as presiding officers for DRB panels under regulations prescribed by the Secretary concerned.

(2) *Locations.* Reviews by a DRB will be conducted in the NCR and such other locations as designated by the Secretary concerned.

(3) *Types of review.* An applicant, upon request, is entitled to:

(i) *Record review.* A review of the application, available service records, and additional documents (if any) submitted by the applicant.

(ii) *Hearing.* A review involving an appearance before the DRB by the applicant or counsel or representative (or both).

(4) *Applicant's expenses.* Unless otherwise specified by law or regulation, expenses incurred by the applicant, witnesses, counsel or representative will not be paid by the Department of Defense.

(5) *Withdrawal of application.* An applicant shall be permitted to withdraw an application without prejudice at any time before the scheduled review.

(6) *Failure to appear at a hearing or respond to a scheduling notice.* (i) Except as otherwise authorized by the Secretary concerned, further opportunity for a hearing shall not be made available in the following circumstances to an applicant who has requested a hearing:

(A) When the applicant has been sent a letter containing the month and location of a proposed hearing and fails to make a timely response; or

(B) When the applicant, after being notified by letter of the time and place of the hearing, fails to appear at the appointed time, either in person or by representative, without having made a prior, timely request for a continuation, postponement, or withdrawal.

(ii) In such cases, the applicant shall be deemed to have waived the right to a hearing, and the DRB shall complete its review of the discharge. Further request for a hearing shall not be granted unless the applicant can demonstrate that the failure to appear or respond was due to circumstances beyond the applicant's control.

(7) *Continuance and postponements.* (i) A continuance of a discharge review hearing may be authorized by the president of the DRB or presiding officer of the panel concerned, provided that such continuance is of reasonable duration and is essential to achieving a full and fair hearing. When a proposal for continuance is indefinite, the pending application shall be returned to the applicant with the option to resubmit when the case is fully ready for review.

(ii) Postponements of scheduled reviews normally shall not be permitted other than for demonstrated good and sufficient reason set forth by the applicant in a timely manner, or for the convenience of the government.

(8) *Reconsideration.* A discharge review shall not be subject to reconsideration except:

(i) When the only previous consideration of the case was on the motion of the DRB;

(ii) When the original discharge review did not involve a hearing and a hearing is now desired, and the provisions of paragraph (b)(6) of this section do not apply;

(iii) When changes in discharge policy are announced after an earlier review of an applicant's discharge, and the new policy is made expressly retroactive;

(iv) When the DRB determines that policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration, provided that such changes in policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings;

(v) When an individual is to be represented by a counsel or representative, and was not so represented in any previous consideration of the case by the DRB;

(vi) When the case was not previously considered under uniform standards published pursuant to Pub. L. 95–126 and such application is made within 15 years after the date of discharge; or

(vii) On the basis of presentation of new, substantial, relevant evidence not available to the applicant at the time of the original review. The decision whether evidence offered by an applicant in support of a request for reconsideration is in fact new, substantial, relevant, and was not available to the applicant at the time of the original review will be based on a comparison of such evidence with the evidence considered in the previous discharge review. If this comparison shows that the evidence submitted would have had a probable effect on matters concerning the propriety or equity of the discharge, the request for reconsideration shall be granted.

(9) *Availability of records and documents.* (i) Before applying for discharge review, potential applicants or their designated representatives may obtain copies of their military personnel records by submitting a General Services Administration Standard Form 180, ''Request Pertaining to Military Records,'' to the National Personnel Records Center (NPRC), 9700 Page Boulevard, St. Louis, MO 62132. Once the application for discharge review (DD Form 293) is submitted, an applicant's military records are forwarded to the DRBs where they cannot be reproduced. Submission of a request for an applicant's military records, including a request under the Freedom of Information Act (32 CFR part 286) or Privacy Act (32 CFR part 286a) after the DD Form 293 has been submitted, shall result automatically in the temporary suspension of processing of the application for discharge review until the requested records are sent to an appropriate location for copying, are copied, and are returned to the headquarters of the DRB. Processing of the application shall then be resumed at whatever stage of the discharge review process is practicable. Applicants are encouraged to submit any request for their military records before applying for discharge review rather than after submitting DD Form 293, to avoid delays in processing of applications and scheduling of reviews. Applicants and their counsel also may examine their military personnel records at the site of their scheduled review before the hearing. DRBs shall notify applicants of the dates the records are available for examination in their standard scheduling information.

(ii) If the DRB is not authorized to provide copies of documents that are under the cognizance of another government department, office, or activity, applications for such information must be made by the applicant to the cognizant authority. The DRB shall advise the applicant of the mailing address of the government department, office, or activity to which the request should be submitted.

(iii) If the official records relevant to the discharge review are not available at the agency having custody of the records, the applicant shall be so notified and requested to provide such information and documents as may be desired in support of the request for discharge review. A period of not less than 30 days shall be allowed for such documents to be submitted. At the expiration of this period, the review may be conducted with information available to the DRB.

(iv) A DRB may take steps to obtain additional evidence that is relevant to the discharge under consideration beyond that found in the official military records or submitted by the applicant, if a review of available evidence suggests that it would be incomplete without the additional information, or when the applicant presents testimony or documents that require additional information to evaluate properly. Such information shall be made available to the applicant, upon request, with appropriate modifications regarding classified material.

(A) In any case heard on request of an applicant, the DRB shall provide the applicant and counsel or representative, if any, at a reasonable time before initiating the decision process, a notice of the availability of all regulations and documents to be considered in the discharge review, except for documents in the official personnel or medical records and any documents submitted by the applicant. The DRB shall also notify the applicant or counsel or representative:

(*1*) Of the right to examine such documents or to be provided with copies of the documents upon request;

(*2*) Of the date by which such requests must be received; and

(*3*) Of the opportunity to respond within a reasonable period of time to be set by the DRB.

(B) When necessary to acquaint the applicant with the substance of a classified document, the classifying authority, on the request of the DRB, shall prepare a summary of or an extract from the document, deleting all references to sources of information and other matters, the disclosure of which, in the opinion of the classifying authority, would be detrimental to the national security interests of the United States. Should preparation of such summary be deemed impracticable by the classifying authority, information from the classified sources shall not be considered by the DRB in its review of the case.

(v) Regulations of a Military Department may be obtained at many installations under the jurisdiction of the Military Department concerned or by writing to the following address: DA Military Review Boards Agency, Attention: SFBA (Reading Room), room 1E520, Washington, DC 20310.

(10) *Recorder/Secretary or Assistant.* Such a person shall be designated to assist in the functioning of each DRB in accordance with the procedures prescribed by the Secretary of the Military Department concerned.

(11) *Hearings.* Hearings (including hearing examinations) that are conducted shall recognize the rights of the individual to privacy. Accordingly, presence at hearings of individuals other than those required shall be limited to persons authorized by the Secretary concerned or expressly requested by the applicant, subject to reasonable limitations based upon available space. If, in the opinion of the presiding officer, the presence of other individuals could be prejudicial to the interests of the applicant or the government, hearings may be held in closed session.

(12) *Evidence and testimony.* (i) The DRB may consider any evidence obtained in accordance with this part.

(ii) Formal rules of evidence shall not be applied in DRB proceedings. The presiding officer shall rule on matters

of procedure and shall ensure that reasonable bounds of relevancy and materiality are maintained in the taking of evidence and presentation of witnesses.

(iii) Applicants undergoing hearings shall be permitted to make sworn or unsworn statements, if they so desire, or to introduce witnesses, documents, or other information on their behalf, at no expense to the Department of Defense.

(iv) Applicants may also make oral or written arguments personally or through counsel or representatives.

(v) Applicants who present sworn or unsworn statements and witnesses may be questioned by the DRB. All testimony shall be taken under oath or affirmation unless the applicant specifically requests to make an unsworn statement.

(vi) There is a presumption of regularity in the conduct of governmental affairs. This presumption can be applied in any review unless there is substantial credible evidence to rebut the presumption.

(c) *Decision process.* (1) The DRB or the DRB panel, as appropriate, shall meet in plenary session to review discharges and exercise its discretion on a case-by-case basis in applying the standards set forth in § 70.9.

(2) The presiding officer is responsible for the conduct of the discharge review. The presiding officer shall convene, recess, and adjourn the DRB panel as appropriate and shall maintain an atmosphere of dignity and decorum at all times.

(3) Each DRB member shall act under oath or affirmation requiring careful, objective consideration of the application. DRB members are responsible for eliciting all facts necessary for a full and fair hearing. They shall consider all information presented to them by the applicant. In addition, they shall consider available Military Service and health records, together with other records that may be in the files of the Military Department concerned and relevant to the issues before the DRB, and any other evidence obtained in accordance with this part.

(4) The DRB shall identify and address issues after a review of the following material obtained and presented in accordance with this part and the implementing instructions of the DRB: Available official records, documentary evidence submitted by or on behalf of an applicant, presentation of a hearing examination, testimony by or on behalf of an applicant, oral or written arguments presented by or on behalf of an applicant, and any other relevant evidence.

(5) If an applicant who has requested a hearing does not respond to a notification letter or does not appear for a scheduled hearing, the DRB may complete the review on the basis of material previously submitted.

(6) *Application of standards.* (i) When a DRB determines that an applicant's discharge was improper (§ 70.9(b)), the DRB will determine which reason for discharge should have been assigned based upon the facts and circumstances before the discharge authority, including the Service regulations governing reasons for discharge at the time the applicant was discharged. Unless it is also determined that the discharge was inequitable (§ 70.9(c)), the provisions as to characterization in the regulation under which the applicant should have been discharged will be considered in determining whether further relief is warranted.

(ii) When the DRB determines that an applicant's discharge was inequitable (see § 70.9(c)), any change will be based on the evaluation of the applicant's overall record of service and relevant regulations of the Military Service of which the applicant was a member.

(7) Voting shall be conducted in closed session, a majority of the five members' votes constituting the DRB decision. Voting procedures shall be prescribed by the Secretary of the Military Department concerned.

(8) Details of closed session deliberations of a DRB are privileged information and shall not be divulged.

(9) There is no requirement for a statement of minority views in the event of a split vote. The minority, however, may submit a brief statement of its views under procedures established by the Secretary concerned.

(10) DRBs may request advisory opinions from staff officers of their Military Departments. These opinions are advisory in nature and are not binding

on the DRB in its decision-making process.

(11) The preliminary determinations required by 38 U.S.C. 3103(e) shall be made upon majority vote of the DRB concerned on an expedited basis. Such determination shall be based upon the standards set forth in § 70.9 of this part.

(12) *The DRB shall:* (i) Address items submitted as issues by the applicant under paragraph (d) of this section;

(ii) Address decisional issues under paragraph (e) of this section; and

(iii) Prepare a decisional document in accordance with paragraph (h) of this section.

(d) *Response to items submitted as issues by the applicant*—(1) *General guidance.* (i) If an issue submitted by an applicant contains two or more clearly separate issues, the DRB should respond to each issue under the guidance of this paragraph as if it had been set forth separately by the applicant.

(ii) If an applicant uses a ''building block'' approach (that is, setting forth a series of conclusions on issues that lead to a single conclusion purportedly warranting a change in the applicant's discharge), normally there should be a separate response to each issue.

(iii) Nothing in this paragraph precludes the DRB from making a single response to multiple issues when such action would enhance the clarity of the decisional document, but such response must reflect an adequate response to each separate issue.

(2) *Decisional issues.* An item submitted as an issue by an applicant in accordance with this part shall be addressed as a decisional issue under paragraph (e), in the following circumstances:

(i) When the DRB decides that a change in discharge should be granted, and the DRB bases its decision in whole or in part on the applicant's issue; or

(ii) When the DRB does not provide the applicant with the full change in discharge requested, and the decision is based in whole or in part on the DRB's disagreement on the merits with an issue submitted by the applicant.

(3) *Response to items not addressed as decisional issues.* (i) If the applicant receives the full change in discharge requested (or a more favorable change), that fact shall be noted and the basis shall be addressed as a decisional issue. No further response is required to other issues submitted by the applicant.

(ii) If the applicant does not receive the full change in discharge requested with respect to either the character of or reason for discharge (or both), the DRB shall address the items submitted by the applicant under paragraph (e) of this section (decisional issues) unless one of the following responses is applicable:

(A) *Duplicate issues.* The DRB may state that there is a full response to the issue submitted by the applicant under a specified decisional issue. This response may be used only when one issue clearly duplicates another or the issue clearly requires discussion in conjunction with another issue.

(B) *Citations without principles and facts.* The DRB may state that the applicant's issue, which consists of a citation to a decision without setting forth any principles and facts from the decision that the applicant states are relevant to the applicant's case, does not comply with the requirements of paragraph (a)(4)(iv)(A).

(C) *Unclear issues.* The DRB may state that it cannot respond to an item submitted by the applicant as an issue because the meaning of the item is unclear. An issue is unclear if it cannot be understood by a reasonable person familiar with the discharge review process after a review of the materials considered under paragraph (c)(4) of this section.

(D) *Nonspecific issues.* The DRB may state that it cannot respond to an item submitted by the applicant as an issue because it is not specific. A submission is considered not specific if a reasonable person familiar with the discharge review process after a review of the materials considered under paragraph (c)(4) of this section, cannot determine the relationship between the applicant's submission and the particular circumstances of the case. This response may be used only if the submission is expressed in such general terms that no other response is applicable. For example, if the DRB disagrees with the applicant as to the relevance of matters set forth in the submission,

the DRB normally will set forth the nature of the disagreement under the guidance in paragraph (e) of this section, with respect to decisional issues, or it will reject the applicant's position on the basis of paragraphs (d)(3)(ii)(A) or (d)(3)(ii)(B) of this section. If the applicant's submission is so general that none of those provisions is applicable, then the DRB may state that it cannot respond because the item is not specific.

(e) *Decisional issues*—(1) *General.* Under the guidance in this section, the decisional document shall discuss the issues that provide a basis for the decision whether there should be a change in the character of or reason for discharge. In order to enhance clarity, the DRB should not address matters other than issues relied upon in the decision or raised by the applicant.

(i) *Partial change.* When the decision changes a discharge, but does not provide the applicant with the full change in discharge requested, the decisional document shall address both the issues upon which change is granted and the issues upon which the DRB denies the full change requested.

(ii) *Relationship of issue to character of or reason for discharge.* Generally, the decisional document should specify whether a decisional issue applies to the character of or reason for discharge (or both), but it is not required to do so.

(iii) *Relationship of an issue to propriety or equity.* (A) If an applicant identifies an issue as pertaining to both propriety and equity, the DRB will consider it under both standards.

(B) If an applicant identifies an issue as pertaining to the propriety of the discharge (for example, by citing a propriety standard or otherwise claiming that a change in discharge is required as a matter of law), the DRB shall consider the issue solely as a matter of propriety. Except as provided in paragraph (e)(1)(iii)(D) of this section, the DRB is not required to consider such an issue under the equity standards.

(C) If the applicant's issue contends that the DRB is required as a matter of law to follow a prior decision by setting forth an issue of propriety from the prior decision and describing its relationship to the applicant's case, the issue shall be considered under the propriety standards and addressed under paragraph (e)(2) or (e)(3) of this section.

(D) If the applicant's issue sets forth principles of equity contained in a prior DRB decision, describes the relationship to the applicant's case, and contends that the DRB is required as a matter of law to follow the prior case, the decisional document shall note that the DRB is not bound by its discretionary decisions in prior cases under the standards in §70.9. However, the principles cited by the applicant, and the description of the relationship of the principles to the applicant's case, shall be considered under the equity standards and addressed under paragraph (e)(5) or (e)(6) of this section.

(E) If the applicant's issue cannot be identified as a matter of propriety or equity, the DRB shall address it as an issue of equity.

(2) *Change of discharge: issues of propriety.* If a change in the discharge is warranted under the propriety standards in §70.9 the decisional document shall state that conclusion and list the errors of expressly retroactive changes in policy that provide a basis for the conclusion. The decisional document shall cite the facts in the record that demonstrate the relevance of the error or change in policy to the applicant's case. If the change in discharge does not constitute the full change requested by the applicant, the reasons for not granting the full change shall be addressed under the guidance in paragraph (e)(3) or (e)(6) of this section.

(3) *Denial of the full change requested: issues of propriety.* (i) If the decision rejects the applicant's position on an issue of propriety, or if it is otherwise decided on the basis of an issue of propriety that the full change in discharge requested by the applicant is not warranted, the decisional document shall note that conclusion.

(ii) The decisional document shall list reasons for its conclusion on each issue of propriety under the following guidance:

(A) If a reason is based in whole or in part upon a regulation, statute, constitutional provision, judicial determination, or other source of law, the DRB shall cite the pertinent source of law and the facts in the record that

demonstrate the relevance of the source of law to the particular circumstances in the case.

(B) If a reason is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstance, including a factor required by applicable Service regulations to be considered for determination of the character of and reason for the applicant's discharge, the DRB shall make a finding of fact for each such event or circumstance.

(*1*) For each such finding, the decisional document shall list the specific source of the information relied upon. This may include the presumption of regularity in appropriate cases. If the information is listed in the service record section of the decisional document, a citation is not required.

(*2*) If a finding of fact is made after consideration of contradictory evidence in the record (including information cited by the applicant or otherwise identified by members of the DRB), the decisional document shall set forth the conflicting evidence and explain why the information relied upon was more persuasive than the information that was rejected. If the presumption of regularity is cited as the basis for rejecting such information, the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption. In an appropriate case, the explanation as to why the contradictory evidence was insufficient to overcome the presumption of regularity may consist of a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption.

(C) If the DRB disagrees with the position of the applicant on an issue of propriety, the following guidance applies in addition to the guidance in paragraphs (e)(3)(ii) (A) and (B) of this section:

(*1*) The DRB may reject the applicant's position by explaining why it disagrees with the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph (e)(4)(iv) of this section).

(*2*) The DRB may reject the applicant's position by explaining why the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph (a)(4)(iv) of this section) are not relevant to the applicant's case.

(*3*) The DRB may reject an applicant's position by stating that the applicant's issue of propriety is not a matter upon which the DRB grants a change in discharge, and by providing an explanation for this position. When the applicant indicates that the issue is to be considered in conjunction with one or more other specified issues, the explanation will address all such specified issues.

(*4*) The DRB may reject the applicant's position on the grounds that other specified factors in the case preclude granting relief, regardless of whether the DRB agreed with the applicant's position.

(*5*) If the applicant takes the position that the discharge must be changed because of an alleged error in a record associated with the discharge, and the record has not been corrected by the organization with primary responsibility for corrective action, the DRB may respond that it will presume the validity of the record in the absence of such corrective action. If the organization empowered to correct the record is within the Department of Defense, the DRB should provide the applicant with a brief description of the procedures for requesting correction of the record. If the DRB on its own motion cites this issue as a decisional issue on the basis of equity, it shall address the issue under paragraph (d)(5) or (d)(6) of this section.

(*6*) When an applicant's issue contains a general allegation that a certain course of action violated his or her constitutional rights, the DRB may respond in appropriate cases by noting that the action was consistent with statutory or regulatory authority, and by citing the presumption of constitutionality that attaches to statutes and regulations. If, on the other hand, the applicant makes a specific challenge to the constitutionality of the action by

challenging the application of a statute or regulation in a particular set of circumstances, it is not sufficient to respond solely by citing the presumption of constitutionality of the statute or regulation when the applicant is not challenging the constitutionality of the statute or regulation. Instead, the response must address the specific circumstances of the case.

(4) *Denial of the full change in discharge requested when propriety is not at issue.* If the applicant has not submitted an issue of propriety and the DRB has not otherwise relied upon an issue of propriety to change the discharge, the decisional document shall contain a statement to that effect. The DRB is not required to provide any further discussion as to the propriety of the discharge.

(5) *Change of discharge: issues of equity.* If the DRB concludes that a change in the discharge is warranted under the equity standards in § 70.9 the decisional document shall list each issue of equity upon which this conclusion is based. The DRB shall cite the facts in the record that demonstrate the relevance of the issue to the applicant's case. If the change in discharge does not constitute the full change requested by the applicant, the reasons for not giving the full change requested shall be discussed under the guidance in paragraph (e)(6) of this section.

(6) *Denial of the full change in discharge requested: issues of equity.* (i) If the DRB rejects the applicant's position on an issue of equity, or if the decision otherwise provides less than the full change in discharge requested by the applicant, the decisional document shall note that conclusion.

(ii) The DRB shall list reasons for its conclusion on each issue of equity under the following guidance:

(A) If a reason is based in whole or in part upon a regulation, statute, constitutional provision, judicial determination, or other source of law, the DRB shall cite the pertinent source of law and the facts in the record that demonstrate the relevance of the source of law to the exercise of discretion on the issue of equity in the applicant's case.

(B) If a reason is based in whole or in part on a determination as to the occurrence or nonoccurrence of an event or circumstance, including a factor required by applicable Service regulations to be considered for determination of the character of and reason for the applicant's discharge, the DRB shall make a finding of fact for each such event or circumstance.

(*1*) For each such finding, the decisional document shall list the specific source of the information relied upon. This may include the presumption of regularity in appropriate cases. If the information is listed in the service record section of the decisional document, a citation is not required.

(*2*) If a finding of fact is made after consideration of contradictory evidence in the record (including information cited by the applicant or otherwise identified by members of the DRB), the decisional document shall set forth the conflicting evidence and explain why the information relied upon was more persuasive than the information that was rejected. If the presumption of regularity is cited as the basis for rejecting such information, the decisional document shall set forth the basis for relying on the presumption of regularity and explain why the contradictory evidence was insufficient to overcome the presumption. In an appropriate case, the explanation as to why the contradictory evidence was insufficient to overcome the presumption of regularity may consist of a statement that the applicant failed to provide sufficient corroborating evidence, or that the DRB did not find the applicant's testimony to be sufficiently credible to overcome the presumption.

(C) If the DRB disagrees with the position of the applicant on an issue of equity, the following guidance applies in addition to the guidance in paragraphs (e)(6)(ii) (A) and (B) of this section:

(*1*) The DRB may reject the applicant's position by explaining why it disagrees with the principles set forth in the applicant's issue (including principles derived from cases cited by the applicant in accordance with paragraph (a)(4)(iv) of this section).

(*2*) The DRB may reject the applicant's position by explaining why the principles set forth in the applicant's issue (including principles derived from

cases cited by the applicant) are not relevant to the applicant's case.

(*3*) The DRB may reject an applicant's position by explaining why the applicant's issue is not a matter upon which the DRB grants a change in discharge as a matter of equity. When the applicant indicates that the issue is to be considered in conjunction with other specified issues, the explanation will address all such specified issues.

(*4*) The DRB may reject the applicant's position on the grounds that other specified factors in the case preclude granting relief, regardless of whether the DRB agreed with the applicant's position.

(*5*) If the applicant takes the position that the discharge should be changed as a matter of equity because of an alleged error in a record associated with the discharge, and the record has not been corrected by the organization with primary responsibility for corrective action, the DRB may respond that it will presume the validity of the record in the absence of such corrective action. However, the DRB will consider whether it should exercise its equitable powers to change the discharge on the basis of the alleged error. If it declines to do so, it shall explain why the applicant's position did not provide a sufficient basis for the change in the discharge requested by the applicant.

(D) When the DRB concludes that aggravating factors outweigh mitigating factors, the DRB must set forth reasons such as the seriousness of the offense, specific circumstances surrounding the offense, number of offenses, lack of mitigating circumstances, or similar factors. The DRB is not required, however, to explain why it relied on any such factors unless the applicability or weight of such a factor is expressly raised as an issue by the applicant.

(E) If the applicant has not submitted any issues and the DRB has not otherwise relied upon an issue of equity for a change in discharge, the decisional document shall contain a statement to that effect, and shall note that the major factors upon which the discharge was based are set forth in the service record portion of the decisional document.

(f) *The recommendation of the DRB President*—(1) *General.* The president of the DRB may forward cases for consideration by the Secretarial Reviewing Authority (SRA) under rules established by the Secretary concerned. There is no requirement that the President submit a recommendation when a case is forwarded to the SRA. If the president makes a recommendation with respect to the character of or reason for discharge, however, the recommendation shall be prepared under the guidance in paragraph (f)(2) of this section.

(2) *Format for recommendation.* If a recommendation is provided, it shall contain the president's views whether there should be a change in the character of or reason for discharge (or both). If the president recommends such a change, the particular change to be made shall be specified. The recommendation shall set forth the president's position on decisional issues and issues submitted by the applicant under the following guidance:

(i) *Adoption of the DRB's decisional document.* The recommendation may state that the president has adopted the decisional document prepared by the majority. The president shall ensure that the decisional document meets the requirements of this section.

(ii) *Adoption of the specific statements from the majority.* If the President adopts the views of the majority only in part, the recommendation shall cite the specific matter adopted from the majority. If the president modifies a statement submitted by the majority, the recommendation shall set forth the modification.

(iii) *Response to issues not included in matter adopted from the majority.* The recommendation shall set forth the following if not adopted in whole or in part from the majority:

(A) The issues on which the president's recommendation is based. Each such decisional issue shall be addressed by the president under paragraph (e) of this section,

(B) The president's response to items submitted as issues by the applicant under paragraph (d) of this section.

(C) Reasons for rejecting the conclusions of the majority with respect to decisional issues which, if resolved in

the applicant's favor, would have resulted in greater relief for the applicant than that afforded by the president's recommendation. Suh issues shall be addressed under the principles in paragraph (e) of this section.

(g) *Secretarial reviewing authority (SRA)*—(1) *Review by the SRA.* The Secretarial Reviewing Authority (SRA) is the Secretary concerned or the official to whom Secretary's discharge review authority has been delegated.

(i) The SRA may review the following types of cases before issuance of the final notification of a decision:

(A) Any specific case in which the SRA has an interest.

(B) Any specific case that the president of the DRB believes is of significant interest to the SRA.

(ii) Cases reviewed by the SRA shall be considered under the standards set forth in § 70.9.

(2) *Processing the decisional document.* (i) The decisional document shall be transmitted by the DRB president under paragraph (e) of this section.

(ii) The following guidance applies to cases that have been forwarded to the SRA except for cases reviewed on the DRB's own motion without the participation of the applicant or the applicant's counsel:

(A) The applicant and counsel or representative, if any, shall be provided with a copy of the proposed decisional document, including the DRB president's recommendation to the SRA, if any. Classified information shall be summarized.

(B) The applicant shall be provided with a reasonable period of time, but not less than 25 days, to submit to the SRA a rebuttal. An issue in rebuttal consists of a clear and specific statement by the applicant in support of or in opposition to the statements of the DRB or DRB president on decisional issues and other clear and specific issues that were submitted by the applicant in accordance with paragraph (a)(4)(i) of this section. The rebuttal shall be based solely on matters in the record before when the DRB closed the case for deliberation or in the president's recommendation.

(3) *Review of the decisional document.* If corrections in the decisional document are required, the decisional document shall be returned to the DRB for corrective action. The corrected decisional document shall be sent to the applicant (and counsel, if any), but a further opportunity for rebuttal is not required unless the correction produces a different result or includes a substantial change in the discussion by the DRB (or DRB president) of the issues raised by the majority or the applicant.

(4) *The Addendum of the SRA.* The decision of the SRA shall be in writing and shall be appended as an addendum to the decisional document under the guidance in this subsection.

(i) *The SRA's decision.* The addendum shall set forth the SRA's decision whether there will be a change in the character of or reason for discharge (or both); if the SRA concludes that a change is warranted, the particular change to be made shall be specified. If the SRA adopts the decision recommended by the DRB or the DRB president, the decisional document shall contain a reference to the matter adopted.

(ii) *Discussion of issues.* In support of the SRA's decision, the addendum shall set forth the SRA's position on decisional issues, items submitted as issues by an applicant in accordance with paragraph (a)(4)(i) of this section, and issues raised by the DRB and the DRB president in accordance with the following guidance:

(A) *Adoption of the DRB president's recommendation.* The addendum may state that the SRA has adopted the DRB president's recommendation.

(B) *Adoption of the DRB's proposed decisional document.* The addendum may state that the SRA has adopted the proposed decisional document prepared by the DRB.

(C) *Adoption of specific statements from the majority or the DRB president.* If the SRA adopts the views of the DRB or the DRB president only in part, the addendum shall cite the specific statements adopted. If the SRA modifies a statement submitted by the DRB or the DRB president, the addendum shall set forth the modification.

(D) *Response to issues not included in matter adopted from the DRB or the DRB president.* The addendum shall set forth the following if not adopted in whole or

in part from the DRB or the DRB president:

(*1*) A list of the issues on which the SRA's decision is based. Each such decisional issue shall be addressed by the SRA under paragraph (e) of this section. This includes reasons for rejecting the conclusion of the DRB or the DRB president with respect to decisional issues which, if resolved in the applicant's favor, would have resulted in change to the discharge more favorable to the applicant than that afforded by the SRA's decision. Such issues shall be addressed under the principles in paragraph (e) of this section.

(*2*) The SRA's response to items submitted as issues by the applicant under paragraph (d) of this section.

(iii) *Response to the rebuttal.* (A) If the SRA grants the full change in discharge requested by the applicant (or a more favorable change), that fact shall be noted, the decisional issues shall be addressed under paragraph (e) of this section, and no further response to the rebuttal is required.

(B) If the SRA does not grant the full change in discharge requested by the applicant (or a more favorable change), the addendum shall list each issue in rebuttal submitted by an applicant in accordance with this section, and shall set forth the response of the SRA under the following guidance:

(*1*) If the SRA rejects an issue in rebuttal, the SRA may respond in accordance with the principles in paragraph (e) of this section.

(*2*) If the matter adopted by the SRA provides a basis for the SRA's rejection of the rebuttal material, the SRA may note that fact and cite the specific matter adopted that responds to the issue in rebuttal.

(*3*) If the matter submitted by the applicant does not meet the requirements for rebuttal material in paragraph (b)(2)(ii)(B) of this section.

(iv) *Index entries.* Appropriate index entries shall be prepared for the SRA's actions for matters that are not adopted from the DRB's proposed decisional document.

(h) *The decisional document.* A decisional document shall be prepared for each review. At a minimum, this document shall contain:

(1) The circumstances and character of the applicant's service as extracted from available service records, including health records, and information provided by other Government authorities or the applicant, such as, but not limited to:

(i) Information concerning the discharge at issue in the review, including:

(A) Date (YYMMDD) of discharge.

(B) Character of discharge.

(C) Reason for discharge.

(D) The specific regulatory authority under which the discharge was issued.

(ii) Date (YYMMDD) of enlistment.

(iii) Period of enlistment.

(iv) Age at enlistment.

(v) Length of service.

(vi) Periods of unauthorized absence.

(vii) Conduct and efficiency ratings (numerical or narrative).

(viii) Highest rank received.

(ix) Awards and decorations.

(x) Educational level.

(xi) Aptitude test scores.

(xii) Incidents of punishment pursuant to Article 15, Uniform Code of Military Justice (including nature and date (YYMMDD) of offense or punishment).

(xiii) Convictions by court-martial.

(xiv) Prior military service and type of discharge received.

(2) A list of the type of documents submitted by or on behalf of the applicant (including a written brief, letters of recommendation, affidavits concerning the circumstances of the discharge, or other documentary evidence), if any.

(3) A statement whether the applicant testified, and a list of the type of witnesses, if any, who testified on behalf of the applicant.

(4) A notation whether the application pertained to the character of discharge, the reason for discharge, or both.

(5) The DRB's conclusions on the following:

(i) Whether the character of or reason for discharge should be changed.

(ii) The specific changes to be made, if any.

(6) A list of the items submitted as issues on DD Form 293 or expressly incorporated therein and such other

items submitted as issues by the applicant that are identified as inadvertently omitted under paragraph (a)(4)(i)(D) of this section. If the issues are listed verbatim on DD Form 293, a copy of the relevant portion of the Form may be attached. Issues that have been withdrawn or modified with the consent of the applicant need not be listed.

(7) The response to the items submitted as issues by the applicant under the guidance in paragraph (d) of this section.

(8) A list of decisional issues and a discussion of such issues under the guidance in paragraph (e) of this section.

(9) Minority views, if any, when authorized under rules of the Military Department concerned.

(10) The recommendation of the DRB president when required by paragraph (f) of this section.

(11) The addendum of the SRA when required by paragraph (g) of this section.

(12) Advisory opinions, including those containing factual information, when such opinions have been relied upon for final decision or have been accepted as a basis for rejecting any of the applicant's issues. Such advisory opinions or relevant portions thereof that are not fully set forth in the discussion of decisional issues or otherwise in response to items submitted as issues by the application shall be incorporated by reference. A copy of opinions incorporated by reference shall be appended to the decision and included in the record of proceedings.

(13) A record of the voting, including:

(i) The number of votes for the DRB's decision and the number of votes in the minority, if any.

(ii) The DRB member's names (last name, first name, M.I.) and votes. The copy provided to the applicant may substitute a statement that the names and votes will be made available to the applicant at the applicant's request.

(14) Index entries for each decisional issue under appropriate categories listed in the index of decisions.

(15) An authentication of the document by an appropriate official.

(i) *Issuance of decisions following discharge review.* The applicant and counsel or representative, if any, shall be provided with a copy of the decisional document and of any further action in review. The applicant (and counsel, if any) shall be notified of the availability of the complaint process under §70.10. Final notification of decisions shall be issued to the applicant with a copy to the counsel or representative, if any, and to the Military Service concerned.

(1) Notification to applicants, with copies to counsel or representatives, shall normally be made through the U.S. Postal Service. Such notification shall consist of a notification of decision, together with a copy of the decisional document.

(2) Notification to the Military Services shall be for the purpose of appropriate action and inclusion of review matter in personnel records. Such notification shall bear appropriate certification of completeness and accuracy.

(3) Actions on review by superior authority, when occurring, shall be provided to the applicant and counsel or representative in the same manner as the notification of the review decision.

(j) *Record of DRB proceedings.* (1) When the proceedings in any review have been concluded, a record thereof will be prepared. Records may include written records, electromagnetic records, videotape recordings, or a combination thereof.

(2) At a minimum, the record will include the following:

(i) The application for review;

(ii) A record of the testimony in verbatim, summarized, or recorded form at the option of the DRB concerned;

(iii) Documentary evidence or copies thereof, considered by the DRB other than the Military Service record;

(iv) Briefs and arguments submitted by or on behalf of the applicant;

(v) Advisory opinions considered by the DRB, if any;

(vi) The findings, conclusions, and reasons developed by the DRB;

(vii) Notification of the DRB's decision to the cognizant custodian of the applicant's records, or reference to the notification document;

(viii) Minority reports, if any;

(ix) A copy of the decisional document.

(k) *Final disposition of the Record of Proceedings*. The original record of proceedings and all appendices thereto shall in all cases be incorporated in the Military Service record of the applicant and the Military Service record shall be returned to the custody of the appropriate records holding facility. If a portion of the original record of the proceedings cannot be stored with the Military Service record, the Military Service record shall contain a notation as to the place where the record is stored. Other copies shall be filed and disposed of in accordance with appropriate Military Service regulations.

(l) *Availability of Discharge Review Board documents for inspection and copying*. (1) A copy of the decisional document prepared in accordance with paragraph (d) of this section shall be made available for public inspection and copying promptly after a notice of final decision is sent to the applicant.

(2) To prevent a clearly unwarranted invasion of personal privacy, identifying details of the applicant and other persons will be deleted from documents made available for public inspection and copying.

(i) Names, addresses, social security numbers, and Military Service numbers must be deleted. Written justification shall be made for all other deletions and shall be available for public inspection.

(ii) Each DRB shall ensure that there is a means for relating a decisional document number to the name of the applicant to permit retrieval of the applicant's records when required in processing a complaint under § 70.10.

(3) Any other privileged or classified material contained in or appended to any documents required by this part to be furnished the applicant and counsel or representative or made available for public inspection and copying may be deleted therefrom only if a written statement of the basis for the deletions is provided the applicant and counsel or representative and made available for public inspection. It is not intended that the statement be so detailed as to reveal the nature of the withheld material.

(4) DRB documents made available for public inspection and copying shall be located in the Armed Forces Discharge Review/Correction Board Reading Room. The documents shall be indexed in a usable and concise form so as to enable the public, and those who represent applicants before the DRBs, to isolate from all these decisions that are indexed, those cases that may be similar to an applicant's case and that indicate the circumstances under or reasons for (or both) which the DRB or the Secretary concerned granted or denied relief.

(i) The reading file index shall include, in addition to any other items determined by the DRB, the case number, the date, character of, reason and authority for the discharge. It shall also include the decisions of the DRB and reviewing authority, if any, and the issues addressed in the statement of findings, conclusions, and reasons.

(ii) The index shall be maintained at selected permanent locations throughout the United States. This ensures reasonable availability to applicants at least 30 days before a traveling panel review. A list of these locations shall be published in the FEDERAL REGISTER by the Department of the Army. The index shall also be made available at sites selected for traveling panels or hearing examinations for such periods as the DRB or a hearing examiner is present and in operation. An applicant who has requested a traveling panel review or a hearing examination shall be advised in the notice of such review of the permanent index locations.

(iii) The Armed Forces Discharge Review/Correction Board Reading Room shall publish indexes quarterly for all DRBs. All DRBs shall be responsible for timely submission to the Reading Room of individual case information required for update of the indexes. In addition, all DRBs shall be responsible for submission of new index categories based upon published changes in policy, procedures, or standards. These indexes shall be available for public inspection or purchase (or both) at the Reading Room. When the DRB has accepted an application, information concerning the availability of the index shall be provided in the DRB's response to the application.

(iv) Copies of decisional documents will be provided to individuals or organizations outside the NCR in response

to written requests for such documents. Although the Reading Room shall try to make timely responses to such requests, certain factors such as the length of a request, the volume of other pending requests, and the impact of other responsibilities of the staff assigned to such duties may cause some delays. A fee may be charged for such documents under appropriate DoD and Department of the Army directives and regulations. The manual that accompanies the index of decisions shall notify the public that if an applicant indicates that a review is scheduled for a specific date, an effort will be made to provide requested decisional documents before that date. The individual or organization will be advised if that cannot be accomplished.

(v) Correspondence relating to matters under the cognizance of the Reading Room (including requests for purchase of indexes) shall be addressed to: DA Military Review Boards Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington, DC 20310.

(m) *Privacy Act information.* Information protected under the Privacy Act is involved in the discharge review functions. The provisions of part 286a of this title shall be observed throughout the processing of a request for review of discharge or dismissal.

(n) *Information requirement.* Each Military Department shall provide the Deputy Assistant Secretary of Defense (Military Personnel and Force Management) DASD (MP&FM), Office of the ASD (MRA&L), with a semiannual report of discharge review actions in accordance with § 70.11.

[47 FR 37785, Aug. 26, 1982, as amended at 48 FR 9855, Mar. 9, 1983; 48 FR 35644, Aug. 5, 1983]

§ 70.9 Discharge review standards.

(a) *Objective of review.* The objective of a discharge review is to examine the propriety and equity of the applicant's discharge and to effect changes, if necessary. The standards of review and the underlying factors that aid in determining whether the standards are met shall be historically consistent with criteria for determining honorable service. No factors shall be established that require automatic change or denial of a change in discharge. Neither a DRB nor the Secretary of the Military Department concerned shall be bound by any methodology of weighting of the factors in reaching a determination. In each case, the DRB or the Secretary of the Military Department concerned shall give full, fair, and impartial considerations to all applicable factors before reaching a decision. An applicant may not rceive a less favorable discharge than that issued at the time of separation. This does not preclude correction of clerical errors.

(b) *Propriety.* (1) A discharge shall be deemed proper unless, in the course of discharge review, it is determined that:

(i) There exists an error of fact, law, procedure, or discretion associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby (such error shall constitute prejudicial error if there is substantial doubt that the discharge would have remained the same if the error had not been made); or

(ii) A change in policy by the Military Service of which the applicant was a member, made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

(2) When a record associated with the discharge at the time of issuance involves a matter in which the primary responsibility for corrective action rests with another organization (for example, another Board, agency, or court), the DRB will recognize an error only to the extent that the error has been corrected by the organization with primary responsibility for correcting the record.

(3) The primary function of the DRB is to exercise its discretion on issues of equity by reviewing the individual merits of each application on a case-by-case basis. Prior decisions in which the DRB exercised its discretion to change a discharge based on issues of equity (including the factors cited in such decisions or the weight given to factors in such decisions) do not bind the DRB in its review of subsequent cases because no two cases present the same issues of equity.

(4) The following applies to applicants who received less than fully Honorable administrative discharges because of their civilian misconduct while in an inactive reserve component and who were discharged or had their discharge reviewed on or after April 20, 1971: the DRB shall either recharacterize the discharge to Honorable without any additional proceedings or additional proceedings shall be conducted in accordance with the Court's Order of December 3, 1981, in *Wood v. Secretary of Defense* to determine whether proper grounds exist for the issuance of a less than Honorable discharge, taking into account that;

(i) An Other than Honorable (formerly undesirable) Discharge for an inactive reservist can only be based upon civilian misconduct found to have affected directly the performance of military duties;

(ii) A General Discharge for an inactive reservist can only be based upon civilian misconduct found to have had an adverse impact on the overall effectiveness of the military, including military morale and efficiency.

(c) *Equity*. A discharge shall be deemed to be equitable unless:

(1) In the course of a discharge review, it is determined that the policies and procedures under which the applicant was discharged differ in material respects from policies and procedures currently applicable on a Service-wide basis to discharges of the type under consideration provided that:

(i) Current policies or procedures represent a substantial enhancement of the rights afforded a respondent in such proceedings; and

(ii) There is substantial doubt that the applicant would have received the same discharge if relevant current policies and procedures had been available to the applicant at the time of the discharge proceedings under consideration.

(2) At the time of issuance, the discharge was inconsistent with standards of discipline in the Military Service of which the applicant was a member.

(3) In the course of a discharge review, it is determined that relief is warranted based upon consideration of the applicant's service record and other evidence presented to the DRB viewed in conjunction with the factors listed in this section and the regulations under which the applicant was discharged, even though the discharge was determined to have been otherwise equitable and proper at the time of issuance. Areas of consideration include, but are not limited to:

(i) Quality of service, as evidenced by factors such as:

(A) Service history, including date of enlistment, period of enlistment, highest rank achieved, conduct or efficiency ratings (numerical or narrative);

(B) Awards and decorations;

(C) Letters of commendation or reprimand;

(D) Combat service;

(E) Wounds received in action;

(F) Records of promotions and demotions;

(G) Level of responsibility at which the applicant served;

(H) Other acts of merit that may not have resulted in a formal recognition through an award or commendation;

(I) Length of service during the service period which is the subject of the discharge review;

(J) Prior military service and type of discharge received or outstanding postservice conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review;

(K) Convictions by court-martial;

(L) Records of nonjudicial punishment;

(M) Convictions by civil authorities while a member of the Service, reflected in the discharge proceedings or otherwise noted in military service records;

(N) Records of periods of unauthorized absence;

(O) Records relating to a discharge instead of court-martial.

(ii) Capability to serve, as evidenced by factors such as:

(A) *Total capabilities*. This includes an evaluation of matters, such as age, educational level, and aptitude scores. Consideration may also be given whether the individual met normal military standards of acceptability for military service and similar indicators

of an individual's ability to serve satisfactorily, as well as ability to adjust to military service.

(B) *Family and Personal Problems.* This includes matters in extenuation or mitigation of the reason for discharge that may have affected the applicant's ability to serve satisfactorily.

(C) *Arbitrary or capricious action.* This includes actions by individuals in authority that constitute a clear abuse of such authority and that, although not amounting to prejudicial error, may have contributed to the decision to discharge or to the characterization of service.

(D) *Discrimination.* This includes unauthorized acts as documented by records or other evidence.

§ 70.10 Complaints concerning decisional documents and index entries.

(a) *General.* (1) The procedures in this section—are established for the sole purpose of ensuring that decisional documents and index entries issued by the DRBs of the Military Departments comply with the decisional document and index entry principles of this part.

(2) This section may be modified or supplemented by the DASD(MP&FM).

(3) The following persons may submit complaints:

(i) A former member of the Armed Forces (or the former member's counsel) with respect to the decisional document issued in the former member's own case; and

(ii) A former member of the Armed Forces (or the former member's counsel) who states that correction of the decisional document will assist the former member in preparing for an administrative or judicial proceeding in which the former member's own discharge will be at issue.

(4) The Department of Defense is committed to processing of complaints within the priorities and processing goals set forth in paragraph (d)(1)(iii) of this section. This commitment, however, is conditioned upon reasonable use of the complaint process under the following considerations. The DRBs were established for the benefit of former members of the Armed Forces. The complaint process can aid such persons most effectively if it is used by former members of the Armed Forces when necessary to obtain correction of their own decisional documents or to prepare for discharge reviews. If a substantial number of complaints submitted by others interferes with the ability of the DRBs to process applications for discharge review in a timely fashion, the Department of Defense will adjust the processing goals to ensure that the system operates to the primary advantage of applicants.

(5) The DASD(MP&FM) is the final authority with respect to action on such correspondence.

(b) *The Joint Service Review Activity (JSRA).* A three member JSRA consisting of one judge advocate from each Military Department shall advise the DASD(MP&FM). The operations of the JSRA shall be coordinated by a full-time administrative director, who shall serve as recorder during meetings of the JSRA. The members and the administrative director shall serve at the direction of the DASD(MP&FM).

(c) *Classification and control of correspondence*—(1) *Address of the JSRA.* Correspondence with the OSD concerning decisional documents or index entries issued by the DRBs shall be addressed as follows: Joint Service Review Activity, OASD(MRA&L) (MP&FM), Washington, DC 20301.

(2) *Docketing.* All such correspondence shall be controlled by the administrative director through the use of a uniform docketing procedure.

(3) *Classification.* Correspondence shall be reviewed by the administrative director and categorized either as a complaint or an inquiry in accordance with the following:

(i) *Complaints.* A complaint is any correspondence in which it is alleged that a decisional document issued by a DRB or SRA contains a specifically identified violation of the Stipulation of Dismissal, Settlement Agreement, or related Orders in the *Urban Law* case or the decisional document or index entry principles of this Directive. A complainant who alleges error with respect to a decisional document issued to another person is encouraged to set forth specifically the grounds for determining that a reasonable person familiar with the discharge review process

cannot understand the basis for the decision. *See* paragraph (d)(1)(i)(B) of this section.

(ii) *Inquiries.* An inquiry is any correspondence other than a complaint.

(d) *Review of complaints*—(1) *Guidance.* The following guidance applies to review of complaints:

(i) *Standards.* Complaints shall be considered under the following standards:

(A) *The applicant's case.* A complaint by an applicant with respect to the decisional document issued in the applicant's own discharge review shall be considered under the Stipulation of Dismissal in the *Urban Law* case and other decisional document requirements applicable at the time the document was issued, including those contained in the Settlement Agreement and related Orders, subject to any limitations set forth therein with respect to dates of applicability. If the authority empowered to take corrective action has a reasonable doubt whether a decisional document meets applicable requirements of the *Urban Law* case or other applicable rules, the complaint shall be resolved in the applicant's favor.

(B) *Other cases.* With respect to all other complaints, the standard shall be whether a reasonable person familiar with the discharge review process can understand the basis for the decision, including the disposition of issues raised by the applicant. This standard is designed to ensure that the complaint process is not burdened with the need to correct minor errors in the preparation of decisional documents.

(ii) *Use of DD Form 293.* With respect to any decisional document issued on or after November 27, 1982, a complaint alleging failure of the DRB to address adequately matter not submitted on DD Form 293 or expressly incorporated therein will be resolved in the complainant's favor only if the failure to address the issue was arbitrary, capricious, or an abuse of discretion.

(iii) *Scope of review.* When a complaint concerns a specific issue in the applicant's own discharge review, the complaint review process shall involve a review of all the evidence that was before the DRB or SRA, including the testimony and written submissions of the applicant, to determine whether the issue was submitted, and if so, whether it was addressed adequately with respect to the Stipulation of Dismissal, Settlement Agreement, or related Orders in the *Urban Law* case and other applicable provisions of this Directive. With respect to all other complaints about specific issues, the complaint review process may be based solely on the decisional document, except when the complainant demonstrates that facts present in the review in question raise a reasonable likelihood of a violation of applicable provisions of the Stipulation of Dismissal and a reasonable person, familiar with the discharge review process, could resolve the complaint only after a review of the evidence that was before the DRB.

(iv) *Allegations pertaining to an applicant's submission.* The following additional requirements apply to complaints about modification of an applicant's issue or the failure to list or address an applicant's issue:

(A) When the complaint is submitted by the applicant, and the record of the hearing is ambiguous on the question whether there was a meeting of minds between the applicant and the DRB as to modification or omission of the issue, the ambiguity will be resolved in favor of the applicant.

(B) When the complaint is submitted by a person other than the applicant, it must set forth facts (other than the mere omission or modification of an issue) demonstrating a reasonable likelihood that the issue was omitted or modified without the applicant's consent.

(C) When the complaint is rejected on the basis of the presumption of regularity, the response to the complaint must be set forth the reasons why the evidence submitted by the complainant was not sufficient to overcome the presumption.

(D) With respect to decisional documents issued on or after the effective date of the amendments to § 70.8, any change in wording of an applicant's issue which is effected in violation of the principles set forth in § 70.8(a)(5)(iii) constitutes an error requiring corrective action. With respect to a decisional document issued before

that date, corrective action will be taken only when there has been a complaint by the applicant or counsel with respect to the applicant's own decisional document and it is determined that the wording was changed or the issue was omitted without the applicant's consent.

(E) If there are references in the decisional document to matters not raised by the applicant and not otherwise relied upon in the decision, there is no requirement under the *Urban Law* case that such matters be accompanied by a statement of findings, conclusions, or reasons. For example, when the DRB discusses an aspect of the service record not raised as an issue by the applicant, and the issue is not a basis for the DRB's decision, the DRB is not required to discuss the reasons for declining to list that aspect of the service record as an issue.

(v) *Guidance as to other types of complaints.* The following guidance governs other specified types of complaints:

(A) The Stipulation of Dismissal requires only that those facts that are essential to the decision be listed in the decisional document. The requirement for listing specified facts from the military record was not established until March 29, 1978, in 32 CFR part 70 Decisional documents issued prior to that date are sufficient if they meet the requirements of the Stipulation.

(B) When an applicant submits a brief that contains material in support of a proposed conclusion on an issue, the DRB is not required to address each aspect of the supporting material in the brief. However, the decisional document should permit the applicant to understand the DRB's position on the issue and provide reviewing authorities with an explanation that is sufficient to permit review of the DRB's decision. When an applicant submits specific issues and later makes a statement before the DRB that contains matter in support of that issue, it is not necessary to list such supporting matter as a separate issue.

(C) For all decisional documents issued before November 27, 1982, failure to respond to an issue raised by an applicant constitutes error unless it reasonably may be inferred from the record that the DRB response relied on one of the exceptions listed in §70.8(d)(3)(ii); (e)(3)(ii)(C) (*3*) through (*4*) and (e)(6)(ii)(C) (*3*) through (*4*). If the decisional document supports a basis for not addressing an issue raised by the applicant (for example, if it is apparent that resolving the issue in the applicant's favor would not warrant an upgrade), there is no requirement in the Stipulation of Dismissal that the decisional document explain why the DRB did not address the issue. With respect to decisional documents issued on or after November 27, 1982, a response shall be prepared in accordance with the decisional document principles set forth in §70.8.

(D) When a case is reviewed upon request of an applicant, and the DRB upgrades the discharge to ''General,'' the DRB must provide reasons why it did not upgrade to ''Honorable'' unless the applicant expressly requests lesser relief. This requirement applies to all requests for corrective action submitted by an applicant with respect to his or her decisional document. In all other cases, this requirement applies to decisional documents issued on or after November 9, 1978. When the DRB upgrades to General, its explanation for not upgrading to Honorable may consist of reference to adverse matter from the applicant's military record. When a discharge is upgraded to General in a review on the DRB's own motion, there is no requirement to explain why the discharge was not upgraded to Honorable.

(E) There is no requirement under the Stipulation of Dismissal to provide reasons for uncontested findings. The foregoing applies to decisional documents issued before November 27, 1982. With respect to decisional documents issued on or after that date, the following guidance applies with respect to an uncontested issue of fact that forms the basis for a grant or denial of a change in discharge: the decisional document shall list the specific source of information relied upon in reaching the conclusion, except when the information is listed in the portion of the decisional document that summarizes the service record.

(F) The requirements of §70.8(e)(3)(ii)(B)(*2*) and (e)(6)(ii)(B)(*2*) with respect to explaining use of the presumption of regularity apply only to decisional documents issued on or after November 27, 1982. When a complaint concerning a decisional document issued before that date addresses the adequacy of the DRB's use of the presumption of regularity, or words having a similar import, corrective action will be required only if a reasonable person familiar with the discharge review process can not understand the basis for relying on the presumption.

(G) When the DRB balances mitigrating factors against aggravating factors as the reason for a conclusion, the Stipulation of Dismissal does not require the statement of reasons to set forth the specific factors that were balanced if such factors are otherwise apparent on the fact of the decisional document. The foregoing applies to decisional documents prepared before November 27, 1982. With respect to decisional documents prepared after that date, the statements addressing decisional issues in such a case will list or refer to the factors supporting the conclusion in accordance with §70.8(e)(6)(ii).

(vi) *Documents that were the subject of a prior complaint.* The following applies to a complaint concerning a decisional document that has been the subject of prior complaints:

(A) If the complaint concerns a decisional document that was the subject of a prior complaint in which action was completed, the complainant will be informed of the substance and disposition of the prior complaint, and will be further informed that no additional action will be taken unless the complainant within 30 days demonstrates that the prior disposition did not produce a decisional document that comports with the requirements of paragraph (d)(1)(i)(A) of this section.

(B) If the complaint concerns a decisional document that is the subject of a pending complaint, the complainant will be informed that he or she will be provided with the results of the pending complaint.

(C) These limitations do not apply to the initial complaint submitted on or after the effective date of the amendments to this section by an applicant with respect to his or her own decisional document.

(2) *Duties of the administrative director.* The administrative director shall take the following actions:

(i) Acknowledge receipt of the complaint;

(ii) Assign a docket number and note the date of receipt; and

(iii) Forward the complaint to the Military Department concerned, except that the case may be forwarded directly to the DASD (MP&FM) when the administrative director makes an initial determination that corrective action is not required.

(3) *Administrative processing.* The following guidance applies to administrative processing of complaints:

(i) Complaints normally shall be processed on a first-in/first-out basis, subject to the availability of records, pending discharge review actions, and the following priorities:

(A) The first priority category consists of cases in which (*1*) there is a pending discharge review and the complainant is the applicant; and (*2*) the complainant sets forth the relevance of the complaint to the complainant's pending discharge review application.

(B) The second priority category consists of requests for correction of the decisional document in the complainant's own discharge review case.

(C) The third priority category consists of complaints submitted by former members of the Armed Forces (or their counsel) who state that the complaint is submitted to assist the former member's submission of an application for review.

(D) The fourth priority category consists of other complaints in which the complainant demonstrates that correction of the decisional document will substantially enhance the ability of applicants to present a significant issue to the DRBs.

(E) The fifth priority category consists of all other cases.

(ii) Complainants who request consideration in a priority category shall set forth in the complaint the facts that give rise to the claim of placement in

the requested category. If the complaint is relevent to a pending discharge review in which the complainant is applicant or counsel, the scheduled date of the review should be specified.

(iii) The administrative director is responsible for monitoring compliance with the following processing goals:

(A) The administrative director normally shall forward correspondence to the Military Department concerned within 3 days after the date of receipt specified in the docket number. Correspondence forwarded directly to the DASD(MP&FM) under paragraph (d)(2)(iii) of this section, normally shall be transmitted within 7 days after the date of receipt.

(B) The Military Department normally shall request the necessary records within 5 working days after the date of receipt from the administrative director. The Military Department normally shall complete action under paragraph (d)(4) of this section within 45 days after receipt of all necessary records. If action by the Military Department is required under paragraph (d)(9) of this section, normally it shall be completed within 45 days after action is taken by the DASD(MP&FM).

(C) The JSRA normally shall complete action under paragraph (d)(7) of this section at the first monthly meeting held during any period commencing 10 days after the administrative director receives the action of the Military Department under paragraph (d)(5) of this section.

(D) The DASD(MP&FM) normally shall complete action under paragraph (d)(8) of this section within 30 days after action is taken by the JSRA under paragraph (d)(7) of this section or by the administrative director under paragraph (d)(2)(iii) of this section.

(E) If action is not completed within the overall processing goals specified in this paragraph, the complainant shall be notified of the reason for the delay by the administrative director and shall be provided with an approximate date for completion of the action.

(iv) If the complaints are submitted in any 30 day period with respect to more than 50 decisional documents, the administrative director shall adjust the processing goals in light of the number of complaints and discharge review applications pending before the DRBs.

(v) At the end of each month, the administrative director shall send each Military Department a list of complaints, if any, in which action has not been completed within 60 days of the docket date. The Military Department shall inform the administrative director of the status of each case.

(4) *Review of complaints by the Military Departments.* The Military Department shall review the complaint under the following guidance:

(i) *Rejection of complaint.* If the Military Department determines that all the allegations contained in the complaint are not specific or have no merit, it shall address the allegations using the format at attachment 1 (Review of Complaint).

(ii) *Partial agreement.* If the Military Department determines that some of the allegations contained in the complaint are not specific or have no merit and that some of the allegations contained in the complaint have merit, it shall address the allegations using the format at attachment 1 and its DRB shall take appropriate corrective action in accordance with paragraph (d)(4)(v) of this section.

(iii) *Full agreement.* If the Military Department determines that all of the allegations contained in the complaint have merit, its DRB shall take appropriate corrective action in accordance with paragraph (d)(4)(v) of this section.

(iv) *Other defects.* If, during the course of its review, the Military Department notes any other defects in the decisional document or index entries (under the applicable requirements of the *Urban Law* case or under this part) the DRB shall take appropriate corrective action under paragraph (d)(4)(v) of this section. This does not establish a requirement for the Military Department to review a complaint for any purpose other than to determine whether the allegations contained in the complaint are specific and have merit; rather, it simply provides a format for the Military Department to address other defects noted during the course of processing the complaint.

(v) *Appropriate corrective action.* The following procedures govern appropriate corrective action:

(A) If a complaint concerns the decisional document in the complainant's own discharge review case, appropriate corrective action consists of amending the decisional document or providing the complainant with an opportunity for a new discharge review. An amended decisional document will be provided if the applicant requests that form of corrective action.

(B) If a complaint concerns a decisional document involving an initial record review under the Special Discharge Review Program or the Pub. L. 95–126 rereview program, appropriate corrective action consists of (*1*) amending the decisional document; or (*2*) notifying the applicant and counsel, if any, of the opportunity to obtain a priority review using the letter providing at attachment 6. When the DRB takes corrective action under this provision by amending a decisional document, it shall notify the applicant and counsel, if any, of the opportunity to request a *de novo* review under the Special Discharge Review Program or under Pub. L. 95–126 rereview program, as appropriate.

(C) When corrective action is taken with respect to a decisional document in cases prepared under Pub. L. 95–126 the DRB must address issues previously raised by the DRB or the applicant during review of the same case during the SDRP only insofar as required by the following guidance:

(*1*) When the DRB bases its decision upon issues previously considered during the SDRP, the new decisional document under Pub. L. 95–126 must address those issues;

(*2*) If, during consideration of the case under Pub. L. 95–126 the applicant presents issues previously considered during the SDRP, the new decisional document must address those issues; and

(*3*) If a decisional document concerning an initial record review under Pub. L. 95–126 is otherwise defective and corrective action is taken after a request by the applicant for a priority review in response to the letter at attachment 6, the new decisional document shall address all issues previously raised by the applicant during the SDRP.

(D) Except for cases falling under paragraph (d)(4)(v)(B) of this section, if a complaint concerns a decisional document in which the applicant received an Honorable Discharge and the full relief requested, if any, with respect to the reason for discharge, appropriate corrective action consists of amending the decisional document.

(E) In all other cases, appropriate corrective action consists of amending the decisional document or providing the applicant with the opportunity for a new review, except that an amended decisional document will be provided when the complainant expressly requests that form of corrective action.

(vi) *Amended decisional documents.* One that reflects a determination by a DRB panel (or the SRA) as to what the DRB panel (or SRA) that prepared the defective decisional document would have entered on the decisional document to support its decision in this case.

(A) The action of the amending authority does not necessarily reflect substantive agreement with the decision of the original DRB panel (or SRA) on the merits of the case.

(B) A corrected decisional document created by amending a decisional document in response to a complaint will be based upon the complete record before the DRB (or the SRA) at the time of the original defective statement was issued, including, if available, a transcript, tape recording, videotape or other record of a hearing, if any. The new decisional document will be indexed under categories relevant to the new statements.

(C) When an amended decisional document is required under paragraphs (d)(4)(v)(A) and (d)(4)(v)(D) of this section and the necessary records cannot be located, a notation to that effect will be made on the decisional document, and the applicant and counsel, if any, will be afforded an opportunity for a new review, and the complainant will be informed of the action.

(D) When an amended decisional document is requested under paragraph (d)(4)(v)(C) and the necessary records cannot be located, a notation to that effect will be made on the decisional

document, and the complainant will be informed that the situation precludes further action.

(vii) *Time limit for requesting a new review.* An applicant who is afforded an opportunity to request a new review may do so within 45 days.

(viii) *Interim notification.* When the Military Department determines that some or all of the allegations contained in the complaint are not specific or have no merit but its DRB takes corrective action under paragraph (d)(4)(ii) or (d)(4)(iv) of this section, the DRB's notification to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel, should include the following or similar wording: ''This is in partial response to (your)/(a) complaint to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) dated _____ concerning _____ Discharge Review Board decisional document _____. A final response to (your)/(the) complaint, which has been returned to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) for further review, will be provided to you in the near future.''

(ix) *Final notification.* When the Discharge Review Board takes corrective action under paragraphs (d)(4)(iii) and (d)(9) of this section _____ its notification to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel, should include the following or similar wording: ''This is in response to (your)/(a) complaint to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) dated _____ concerning _____ Discharge Review Board decisional document _____.

(5) *Transmittal to the administrative director.* The Military Department shall return the complaint to the administrative Director with a copy of the decisional document and, when applicable, any of the following documents:

(i) The ''Review of Complaint.''

(ii) A copy of the amendment to the decisional document and the accompanying transmittal letter or letters to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel.

(iii) A copy of the notification to the applicant and counsel, if any, of the opportunity to request a new review, and a copy of the notification to the complainant, if other than the applicant or counsel, that the applicant has been authorized a new review.

(6) *Review by the administrative director.* The administrative director shall review the complaint and accompanying documents to ensure the following:

(i) If the Military Department determined that any of the allegations contained in the complaint are not specific or have no merit, the JSRA shall review the complaint and accompanying documents. The JSRA shall address the allegations using the format at attachment 2 (Review of and Recommended Action on Complaint) and shall note any other defects in the decisional document or index entries not previously noted by the Military Department. This does not establish a requirement for the JSRA to review such complaints for any purpose other than to address the allegations contained in the complaint; rather, it simply provides a format for the JSRA to address other defects noted in the course of processing the complaint.

(ii) If the Military Department determined that all of the allegations contained in the complaint have merit and its DRB amended the decisional document, the amended decisional document shall be subject to review by the JSRA on a sample basis each quarter using the format at attachment 3 (Review of any Recommendation on Amended Decisional Document).

(iii) If the Military Department determined that all of the allegations contained in the complaint have merit and its DRB notified the applicant and counsel, if any, of the opportunity to request a new review, review of such corrective action is not required.

(7) *Review by the JSRA.* The JSRA shall meet for the purpose of conducting the reviews required in paragraphs (d)(6)(i), (d)(6)(ii), and (d)(9)(iii)(A) of this section. The Administrative director shall call meetings once a month, if necessary, or more frequently depending upon the number of matters before the JSRA.

Matters before the JSRA shall be presented to the members by the recorder. Each member shall have one vote in determining matters before the JSRA, a majority vote of the members determining all matters. Determinations of the JSRA shall be reported to the DASD(MP&FM) as JSRA recommendations using the prescribed format. If a JSRA recommendation is not unanimous, the minority member may prepare a separate recommendation for consideration by the DASD(MP&FM) using the same format. Alternatively, the minority member may indicate ''dissent'' next to his signature on the JSRA recommendation.

(8) *Review by the DASD(MP&FM).* The DASD(MP&FM) shall review all recommendations of the JSRA and the administrative director as follows:

(i) The DASD(MP&FM) shall review complaints using the format at Attachment 4 (Review of and Action on Complaint). The DASD(MP&FM) is the final authority in determining whether the allegations contained in a complaint are specific and have merit. If the DASD(MP&FM) determines that no further action by the Military Department is warranted, the complainant and the Military Department shall be so informed. If the DASD(MP&FM) determines that further action by the Military Department is required, the Military Department shall be directed to ensure that appropriate corrective action is taken by its DRB and the complainant shall be provided an appropriate interim response.

(ii) The DASD(MP&FM) shall review amended decisional documents using the format at attachment 5 (Review of and Action on Amended Decisional Document). The DASD(MP&FM) is the final authority in determining whether an amended decisional document complies with applicable requirements of the *Urban Law* case and, when applicable, this Directive. If the DASD(MP&FM) determines that no further corrective action by the Military Department is warranted, the Military Department shall be so informed. If the DASD(MP&FM) determines that further corrective action by the Military Department is required, the Military Department shall be directed to ensure that appropriate corrective action is taken by its DRB.

(iii) It is noted that any violation of applicable requirements of the *Urban Law* case is also a violation of this part. However, certain requirements under this part are not requirements under the *Urban Law* case. If the allegations contained in a complaint are determined to have merit or if an amended decisional document is determined to be defective on the basis of one of these additional requirements under this part the DASD(MP&FM) determination shall reflect this fact.

(9) *Further action by the Military Department.* (i) With respect to a determination by the DASD (MP&FM) that further action by the Military Department is required, its DRB shall take appropriate corrective action in accordance with paragraph (d)(4) of this section.

(ii) The Military Department shall provide the administrative director with the following documents when relevant to corrective action taken in accordance with paragraph (d)(4) of this section:

(A) A copy of the amendment to the decisional document and the accompanying transmittal letter or letters to the applicant and counsel, if any, and to the complainant, if other than the applicant or counsel.

(B) A copy of the notification to the applicant and counsel, if any, of the opportunity to request a new review, and a copy of the notification to the complainant, if other than the applicant or counsel, that the applicant has been authorized a new review.

(iii) The administrative director shall review the documents relevant to corrective action taken in accordance with paragraph (d)(4) of this section, and ensure the following:

(A) If the DRB amended the decisional document, the amended decisional document shall be subject to review by the JSRA on a sample basis each quarter using the format at attachment 3 (Review of and Recommended Action on Amended Decisional Document).

(B) If the DRB notified the applicant and counsel, if any, of the opportunity to request a new review, review of such corrective action is not required.

(10) *Documents required by the JSRA or DASD (MP&FM).* Upon request, the Military Department shall provide the administrative director with other documents required by the JSRA or the DASD (MP&FM) in the conduct of their reviews.

(e) *Responses to inquiries.* The following procedures shall be used in processing inquiries:

(1) The administrative director shall assign a docket number to the inquiry.

(2) The administrative director shall forward the inquiry to the Military Department concerned.

(3) The Military Department shall prepare a response to the inquiry and provide the administrative director with a copy of the response.

(4) The Military Department's response shall include the following or similar wording: ''This is in response to your inquiry to the Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) dated _____ concerning _____.

(f) *Indexing.* The DRB concerned shall reindex all amended decisional documents and shall provide copies of the amendments to the decisional documents to the Armed Forces Discharge Review/Correction Board Reading Room.

(g) *Disposition of documents.* The administrative director is responsible for the disposition of all Military Department, DRB, JSRA, and DASD (MP&FM) documents relevant to processing complaints and inquiries.

(h) *Referral by the General Counsel, Department of Defense.* The Stipulation of Dismissal permits *Urban Law* plaintiffs to submit complaints to the General Counsel, DoD, for comment. The General Counsel, DoD, may refer such complaints to the Military Department concerned or to the JSRA for initial comment.

(i) *Decisional document and index entry principles.* The DASD (MP&FM) shall identify significant principles concerning the preparation of decisional documents and index entries as derived from decisions under this section and other opinions of the Office of General Counsel, DoD. This review shall be completed not later than October 1 and April 1 of each year, or more frequently if deemed appropriate by the DASD (MP&FM). The significant principles identified in the review shall be coordinated as proposed as amendments to the sections of this part.

(j) *Implementation of amendments.* The following governs the processing of any correspondence that is docketed prior to the effective date of amendments to this section except as otherwise provided in such amendments:

(1) Any further action on the correspondence shall be taken in accordance with the amendments; and

(2) No revision of any action taken prior to the effective date of such amendments is required.

ATTACHMENT 1—REVIEW OF COMPLAINT

Military Department:

Decisional Document Number:

Name of Complainant:

Docket Number:

Date of this Review:

1. Specific allegation(s) noted:

2. With respect in support of the conclusion, enter the following information:

a. Conclusion whether corrective action is required.

b. Reasons in support of the conclusion, including findings of fact upon which the conclusion is based.

3. Other defects noted in the decisional document or index entries:

(Authentication)

ATTACHMENT 2—JOINT SERVICE REVIEW ACTIVITY

Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)

Review by the Joint Service Review Activity

Military Department:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

1. The Military Department's ''Review of Complaint'' is attached as enclosure 1.

2. Specific Allegations: See part 1 of Military Department's ''Review of Complaint'' (enclosure 1).

3. Specific allegation(s) not noted by the Military Department:

4. With respect to each allegation, enter the following information:

a. Conclusion as to whether corrective action is required.

b. Reasons in support of the conclusion, including findings of fact upon which conclusion is based.

NOTE. If JSRA agrees with the Military Departments, the JSRA may respond by entering a statement of adoption.

5. Other defects in the decisional document or index entries not noted by the Military Departments:

6. *Recommendation:*

[ ] The complainant and the Military Department should be informed that no further action on the complaint is warranted.

[ ] The Military Department should be directed to take corrective action consistent with the above comments.

Army Member, JSRA
Air Force Member, JSRA
Navy Member, JSRA
Recorder, JSRA

ATTACHMENT 3—JOINT SERVICE REVIEW ACTIVITY

Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)

Review of Amended Decisional Document (Quarterly Review)

Military Department:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

Recommendation:

[ ] The amended decisional document complies with the requirements of the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28. The Military Department should be informed that no further corrective action is warranted.

[ ] The amended decisional document does not comply with the Stipulation of Dismissal or DoD Directive 1332.28 as noted herein. The Military Department should be directed to ensure that corrective action consistent with the defects noted is taken by its Discharge Review Board.

Army Member, JSRA
Air Force Member, JSRA
Navy Member, JSRA
Recorder, JSRA

Yes	No	NA	Item	Source
☐	☐	☐	1. *Date of discharge*	1. DoD Directive 1332.28, enclosure 3, subsection H.1.; Stipulation (Jan. 31, 1977) para. 5.A.(1)(d)(i) (reference (1)).
☐	☐	☐	a. Date of discharge.	
☐	☐	☐	b. Character of discharge.	
☐	☐	☐	c. Reason for discharge.	
☐	☐	☐	d. Specific regulatory authority under which discharge was issued.	
☐	☐	☐	2. *Service data.* (This requirement applies only in conjunction with Military Department Implementation of General Counsel, DoD, letter dated July 20, 1977, or to discharge reviews conducted on or after March 29, 1978.)	2. DoD Directive 1332.28, enclosure 3, subsection H.1.; Annex B, (June ____, 1982) para. 2–2 (reference (1)).
☐	☐	☐	a. Date of enlistment.	
☐	☐	☐	b. Period of enlistment.	
☐	☐	☐	c. Age at enlistment.	
☐	☐	☐	d. Length of service.	
☐	☐	☐	e. Periods of unauthorized absence*.	
☐	☐	☐	f. Conduct and efficiency ratings (numerical and narrative)*.	
☐	☐	☐	g. Highest rank achieved.	
☐	☐	☐	h. Awards and decorations*.	
☐	☐	☐	i. Educational level.	
☐	☐	☐	j. Aptitude test scores.	
☐	☐	☐	k. Art. 15s (including nature and date of offense or punishment)*.	
☐	☐	☐	l. Convictions by court-martial*.	
☐	☐	☐	m. Prior military service and type of discharge(s) received*.	

Yes	No	NA	Item	Source
☐	☐	☐	3. *Reference to materials presented by applicant.* (This requirement applies only to discharge reviews conducted on or after March 29, 1978.)	3. DoD Directive 1332.28, enclosure 3, subsection H.2.; H.3.
☐	☐	☐	a. Written brief*.	
☐	☐	☐	b. Documentary evidence*.	
☐	☐	☐	c. Testimony*.	
☐	☐	☐	4. *Items submitted as issues.* (See issues worksheet)	4. DoD Directive 1332.28, enclosure 3, subsection H.6.
☐	☐	☐	5. *Conclusions.* The decisional document must indicate clearly the DRB's conclusion concerning:	5. Dod Directive 1332.28, enclosure 3, subsection H.5.; Stipulation (Jan. 31, 1977), paragraph 5.A.(1)(d)(iv) (reference (1)).
☐	☐	☐	a. Determination of whether a discharge upgraded under SDRP would have been upgraded under DoD Directive 1332.28. (This applies only to mandatory reviews under P.L. 95–126 or Special Discharge Review Program (SDRP).	
☐	☐	☐	b. Character of discharge, when applicable [1].	
☐	☐	☐	c. Reason for discharge, when applicable [2].	
☐	☐	☐	6. *Reasons for conclusions.* The decisional document must list and discuss the items submitted as issues by the applicant; and list and discuss the decisional issues providing the basis for the DRB's conclusion concerning:	6. DoD Directive 1332.28, enclosure 3, subsection H.7., H.8.; Stipulation (Jan. 31, 1977) para. 5.A.(1)(d)(v) (reference (1)).
☐	☐	☐	a. Whether a discharge upgraded under the SDRP would have been upgraded under DoD Directive 1332.28. (This applies only to mandatory rereviews under P.L. 95–126 or SDRP reviews.).	
☐	☐	☐	b. Character of discharge, where applicable [1].	
☐	☐	☐	c. Reason for discharge, where applicable [2].	
☐	☐	☐	7. *Advisory opinions**	7. DoD Directive 1332.28, enclosure 3, subsection H.12., Stipulation (Jan. 31, 1977) para. 5.A.(1)(f) (reference (1)).
☐	☐	☐	8. *Recommendation of DRB President*	8. DoD Directive 1332.28, enclosure 3, subsection H.12., Stipulation (Jan. 31, 1977) para. 5.A.(1)(g) (reference (1)).
☐	☐	☐	9. *A record of voting*	9. DoD Directive 1332.28, enclosure 3, subsection H.13., Stipulation (Jan. 31, 1977) para. 5.A.(3) (reference (1)).
☐	☐	☐	10. *Indexing of decisional document*	10. DoD Directive 1332.28, enclosure 3, subsection H.14., Stipulation (Jan. 31, 1977) para. 5.A.(5)(a) (reference (1)).
☐	☐	☐	11. *Authentication of decisional document.* (This requirement applies only to discharge reviews conducted on or after March 29, 1978.)	11. DoD Directive 1332.28, enclosure 3, subsection H.15.
☐	☐	☐	12. *Other*	12. As appropriate.

Explanation of items marked "No."

Key:

Yes: The decisional document meets the requirements of the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28.

No: The decisional document does not meet the requirements of the Stipulation of Dismissal or DoD Directive 1332.28.

NA: Not applicable.

*Items marked by an asterisk do not necessarily pertain to each review. If the decisional document contains no reference to such an item, NA shall be indicated. When there is a specific complaint with respect to an item, the underlying discharge review record shall be examined to address the complaint.

[1] In this instance "when applicable" means all reviews except:

a. Mandatory rereviews under P.L. 95–126 or SDRP reviews.

b. Reviews in which the applicant requested only a change in the reason for discharge and the DRB did not raise the character of discharge as a decisional issue.

[2] In this instance "when applicable" means all reviews in which:

a. The applicant requested a change in the reason for discharge.

b. The DRB raised the reason for discharge as a decisional issue.

c. A change in the reason for discharge is a necessary component of a change in the character of discharge.

ATTACHMENT 4—ISSUES WORKSHEETS [1]

	Listed	Addressed	Corrective action required
A. Decisional issues providing a basis for the conclusion regarding a change in the character of or reason for discharge. (DoD Directive 1332.28, enclosure 3, subsection D.2):			
1.	☐	☐	☐
2.	☐	☐	☐
3.	☐	☐	☐
B. Items submitted as issues by the applicant that are not identified as decisional issues. (DoD Directive 1332.28, enclosure 3, subsection D.3):			
1.	☐	☐	☐
2.	☐	☐	☐
3.	☐	☐	☐
C. Remarks:			

[1] This review may be made based upon the decisional document without reference to the underlying discharge review record except as follows: if there is an allegation that a specific contention made by the applicant to the DRB was not addressed by the DRB. In such a case, the complaint review process shall involve a review of all the evidence that was before the DRB, including the testimony and written submissions of the applicant, to determine whether the contention was made, and if so, whether it was addressed adequately with respect to the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28.

This review may be based upon the decisional document without reference to the regulation governing the discharge in question except as follows: if there is a specific complaint that the DRB failed to address a specific factor required by applicable regulations to be considered for determination of the character of and reason for the discharge in question [where such factors are a basis for denial of any of the relief requested by the applicant]. (The material in brackets pertains only to discharge reviews conducted on or before March 28, 1978.)

ATTACHMENT 5—OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS, AND LOGISTICS)

Review of Complaint (DASD(MP&FM))

Military Department:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

1. Each allegation is addressed as follows:

a. Allegation.

b. Conclusion whether corrective action is required.

c. Reasons in support of the conclusion, including findngs of fact upon which the conclusion is based.

NOTE: If the DASD(MP&FM) agrees with the JSRA, he may respond by entering a statement of adoption.

2. Other defects noted in the decisional document or index entries:

3. *Determinations:*

[ ] No further action on the complaint is warranted.

[ ] Corrective action consistent with the above comments is required.

Deputy Assistant Secretary of Defense
(Military Personnel & Force Management)

ATTACHMENT 6—OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS, AND LOGISTICS)

Review of Amended Decisional Document (DASD (MP&FM))

Military Department:

Decisional Document Number:

Name of Complainant:

Name of Applicant:

Docket Number:

Date of this Review:

Recommendation:

[ ] The amended decisional document complies with the requirements of the Stipulation of Dismissal and, when applicable, DoD Directive 1332.28. No further corrective action is warranted.

[ ] The amended decisional document does not comply with the Stipulation of Dismissal or DoD Directive 1332.28 as noted herein. Further corrective action is required consistent with the defects noted in the attachment.

Deputy Assistant Secretary of Defense
(Military Personnel & Force Management)

Remarks:

ATTACHMENT 7

Dear _____:

It has been determined that the decisional document issued in your case by the (Army) (Navy) (Air Force) Discharge Review Board

during the (Special Discharge Review Program) (rereview program under Pub. L. No. 95–126) should be reissued to improve the clarity of the statement of findings, conclusions, and reasons for the decision in your case.

In order to obtain a new decisional document you may elect one of the following options to receive a new review under the (Special Discharge Review Program) (rereview program mandated by Pub. L. No. 95–126):

1. You may request a new review, including a personal appearance hearing if you so desire, by responding on or before the suspense date noted at the top of this letter. Taking this action will provide you with a priority review before all other classes of cases.

2. You may request correction of the original decisional document issued to you by responding on or before the suspense date noted at the top of this letter. After you receive a corrected decisional document, you will be entitled to request a new review, including a personal appearance hearing if you so desire. If you request correction of the original decisional document, you will not receive priority processing in terms of correcting your decisional document or providing you with a new review; instead, your case will be handled in accordance with standard processing procedures, which may mean a delay of several months or more.

If you do not respond by the suspense date noted at the top of this letter, no action will be taken. If you subsequently submit a complaint about this decisional document, it will be processed in accordance with standard procedures.

To ensure prompt and accurate processing of your request, please fill out the form below, cut it off at the dotted line, and return it to the Discharge Review Board of the Military Department in which you served at the address listed at the top of this letter.

Check only one:

[ ] I request a new review of my case on a priority basis. I am requesting this priority review rather than requesting correction of the decisional document previously issued to me. I have enclosed DD Form 293 as an application for my new review.

[ ] I request correction of the decisional document previously issued to me. I understand that this does not entitle me to priority action in correcting my decisional document. I also understand that I will be able to obtain a further review of my case upon my request after receiving the corrected decisional document, but that such a review will not be held on a priority basis.

Dates _____

Signatures _____

Printed Name and Address

[47 FR 37785, Aug. 26, 1982, as amended at 48 FR 9856, Mar. 9, 1983]

§ 70.11 DoD semiannual report.

(a) Semiannual reports will be submitted by the 20th of April and October for the preceding 6-month reporting period (October 1 through March 31 and April 1 through September 30).

(b) The reporting period will be inclusive from the first through the last days of each reporting period.

(c) The report will contain four parts:

(1) *Part 1.* Regular Cases.

(2) *Part 2.* Reconsideration of President Ford's Memorandum of January 19, 1977, and Special Discharge Review Program Cases.

(3) *Part 3.* Cases Heard under Pub. L. 95–126 by waiver of 10 U.S.C. 1553, with regard to the statute of limitations.

(4) *Part 4.* Total Cases Heard.

SEMIANNUAL DRB REPORT—RCS DD-M(SA) 1489; SUMMARY OF STATISTICS FOR DISCHARGE REVIEW BOARD (FY)

[Sample format]

Name of board	Nonpersonal appearance			Personal appearance				Total	
	Applied	Number approved	Percent approved	Applied	Number approved	Percent approved	Applied	Number approved	Percent approved
.....	.....	.....	.....	.....	.....	.....	.....	.....	.....

Note:
Identify numbers separately for traveling panels, regional panels, or hearing examiners, as appropriate.
Use of additional footnotes to clarify or amplify the statistics being reported is encouraged.

PART 74—APPOINTMENT OF DOCTORS OF OSTEOPATHY AS MEDICAL OFFICERS

Sec.

74.1 Purpose.
74.2 Policy.

AUTHORITY: 10 U.S.C. 3294, 5574, 8294.

SOURCE: 25 FR 14370, Dec. 31, 1960, unless otherwise noted.

§ 74.1 Purpose.

The purpose of this part is to implement the provisions of Pub. L. 763, 84th Congress (70 Stat. 608), relating to the appointment of doctors of osteopathy as medical officers.

§ 74.2 Policy.

In the interest of obtaining maximum uniformity, the following criteria are established for the appointment of doctors of osteopathy as medical officers:

(a) To be eligible for appointment as Medical Corps officers in the Army and Navy or designated as medical officers in the Air Force, a doctor of osteopathy must:

(1) Be a citizen of the United States;

(2) Be a graduate of a college of osteopathy whose graduates are eligible for licensure to practice medicine or surgery in a majority of the States, and be licensed to practice medicine, surgery, or osteopathy in one of the States or Territories of the United States or in the District of Columbia;

(3) Possess such qualifications as the Secretary concerned may prescribe for his service, after considering the recommendations for such appointment by the Surgeon General of the Army or the Air Force or the Chief of the Bureau of Medicine and Surgery of the Navy;

(4) Have completed a minimum of three years college work prior to entrance into a college of osteopathy;

(5) Have completed a four-year course with a degree of Doctor of Osteopathy from a school of osteopathy approved by the American Osteopathic Association; and

(6) Have had subsequent to graduation from an approved school of osteopathy 12 months or more of intern or residency training approved by the American Osteopathic Association.

(b) [Reserved]

PART 75—EXCEPTIONAL FAMILY MEMBER PROGRAM (EFMP)

Subpart A—General

Sec.

75.1 Purpose.
75.2 Applicability.
75.3 Definitions.

Subpart B—Policy

75.4 Policy.

Subpart C—Procedures

75.5 DoD criteria for identifying family members with special needs.
75.6 Civilian employees on overseas assignment.

AUTHORITY: 10 U.S.C. 1781c.

SOURCE: 84 FR 3690, Feb. 13, 2019, unless otherwise noted.

Subpart A—General

§ 75.1 Purpose.

This part:

(a) Provides guidance and prescribes procedures for:

(1) Identifying a family member with special needs who is eligible for services as defined in this part.

(2) Processing DoD civilian employees who have family members with special needs for an overseas assignment.

(b) Does not create any rights or remedies in addition to those already otherwise existing in law or regulation, and may not be relied upon by any person, organization, or other entity to allege a denial of such rights or remedies.

§ 75.2 Applicability.

This part applies to:

(a) Service members who have family members with special needs as described in this part.

(b) All DoD civilian employees in overseas locations and selectees for overseas positions who have family members with special needs as described in this part.

§ 75.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Assistive technology device. Any item, piece of equipment, or product system, whether acquired commercially off the shelf modified, or customized, that is used to increase, maintain, or improve functional capabilities of individuals with disabilities.

Assistive technology service. Any service that directly assists an individual

with a disability in the selection, acquisition, or use of an assistive technology device.

CONUS. The 48 contiguous states of the United States, excluding Alaska, Hawaii, and U.S. territories or other overseas insular areas of the United States.

Early Intervention Services (EIS). Developmental services for infants and toddlers with disabilities, as defined in 32 CFR part 57, that are provided under the supervision of a Military Department, including evaluation, IFSP development and revision, and service coordination provided at no cost to the child's parents.

Evaluations. Medical, psychological, and educational assessments required to define a medical or educational condition suspected after a screening procedure.

Family member. A dependent as defined by 37 U.S.C. 401, to include a spouse and certain children of a Service member, who is eligible to receive a DoD identification card, medical care in a DoD Military Treatment Facility, and command sponsorship or DoD-sponsored travel. To the extent authorized by law and in accordance with Service implementing guidance, the term may also include other non-dependent family members of a Service member. For the purposes of §75.6 of this part only, this definition also includes the dependents of a civilian employee on an overseas assignment, or being considered for an overseas assignment, who are, or will be, eligible to receive a DoD identification card during that overseas assignment. To the extent authorized by law and in accordance with Service implementing guidance, the term may also include other nondependent family members of a civilian employee on an overseas assignment, or being considered for an overseas assignment.

Family member travel. Refers to family member permanent change of station authorization that is requested by a Service member or civilian employee for the purposes of §75.6 of this part only.

Family support services. Encompasses the non-clinical case management delivery of information and referral for families with special needs, including the development and maintenance of an individualized Services Plan (SP).

Individualized Education Program (IEP). A written document that is developed, reviewed, and revised at a meeting of the Case Study Committee, identifying the required components of the individualized education program for a child with a disability.

Individualized Family Service Plan (IFSP). A written document identifying the specially designed services for an infant or toddler with a disability and the family of such infant or toddler.

Overseas. Any location outside of the 48 contiguous United States including Alaska, Hawaii, and all U.S. Territories or other overseas insular areas of the United States.

Related services. Transportation and such developmental, corrective, and other supportive services required to assist a child with a disability to benefit from special education under the child's IEP. The term includes services or consults in the areas of speech-language pathology, audiology services, interpreting services, psychological services, physical and occupational therapy, recreation (including therapeutic recreation), social work services, school nurse services designed to enable a child with a disability to receive a Free Appropriate Public Education (FAPE) as described in the child's IEP, early identification and assessment of disabilities in children, counseling services (including rehabilitation counseling), orientation and mobility services, and medical services for diagnostic or evaluative purposes.

Related services assigned to the military medical departments overseas. Services provided by Educational and Developmental Intervention Services to Department of Defense Dependent School students for the development or implementation of an IEP, which are necessary for the student to benefit from special education. Those services may include medical services for diagnostic or evaluative purposes, social work, community health nursing, nutrition, occupational therapy, physical therapy, audiology, ophthalmology, and psychological testing and therapy.

Responsible military department. The Military Department responsible for providing EIS or related services in the

geographic areas assigned under 32 CFR part 57.

Special education. Specially designed instruction (including instruction in physical education) provided at no cost to the parent to meet the unique needs of a child with a disability, conducted in the classroom, in the home, in hospitals and institutions, and in other settings.

Special needs. Includes special medical and educational needs of family members who meet the DoD criteria for enrollment in the EFMP as found in § 75.5 of this part.

Specialty care. Specialized health care required for health maintenance and provided by a physician whose training focused primarily in a specific field, such as neurology, cardiology, rheumatology, dermatology, oncology, orthopedics, or ophthalmology.

Subpart B—Policy

§ 75.4 Policy.

It is DoD policy that:

(a) The EFMP identifies family members with special needs, enrolls sponsors in the program, and participates in the coordination of assignments for active duty Service members in order for the special needs of family members to be considered during the assignment process.

(b) Active duty Service members whose families include a member with special needs must enroll in the EFMP to ensure their family member's special needs are considered during the assignment process.

(c) The special needs of a civilian employee's family member will not be considered in the selection of a civilian for an overseas position.

Subpart C—Procedures

§ 75.5 DoD criteria for identifying family members with special needs.

(a) *Special medical needs.* Individuals who meet one or more of the criteria in this section will be identified as a family member with special medical needs:

(1) Potentially life-threatening conditions or chronic (duration of 6 months or longer) medical or physical conditions requiring follow-up care from a primary care manager (to include pediatricians) more than once a year or specialty care.

(2) Current and chronic (duration of 6 months or longer) mental health conditions (such as bi-polar, conduct, major affective, thought, or personality disorders); inpatient or intensive (greater than one visit monthly for more than 6 months) outpatient mental health service within the last 5 years; or intensive mental health services required at the present time. This includes medical care from any provider, including a primary care manager.

(3) A diagnosis of asthma or other respiratory-related diagnosis with chronic recurring symptoms that involves one or more of the following:

(i) Scheduled use of inhaled or oral anti-inflammatory agents or bronchodilators.

(ii) History of emergency room use or clinic visits for acute asthma exacerbations or other respiratory-related diagnosis within the last year.

(iii) History of one or more hospitalizations for asthma, or other respiratory-related diagnosis within the past 5 years.

(4) A diagnosis of attention deficit disorder or attention deficit hyperactivity disorder that involves one or more of the following:

(i) Includes a co-morbid psychological diagnosis.

(ii) Requires multiple medications, psycho-pharmaceuticals (other than stimulants) or does not respond to normal doses of medication.

(iii) Requires management and treatment by a mental health provider (*e.g.*, psychiatrist, psychologist, social worker or psychiatric nurse practitioner).

(iv) Requires the involvement of a specialty consultant, other than a primary care manager, more than twice a year on a chronic basis.

(v) Requires modifications of the educational curriculum or the use of behavioral management staff.

(5) A chronic condition that requires:

(i) Adaptive equipment (such as an apnea home monitor, home nebulizer, wheelchair, custom-fit splints/braces/orthotics (not over-the-counter), hearing aids, home oxygen therapy, home ventilator, etc.).

(ii) Assistive technology devices (such as communication devices) or services.

(iii) Environmental or architectural considerations (such as medically required limited numbers of steps, wheelchair accessibility, or housing modifications and air conditioning).

(b) *Special educational needs.* Family members of active duty Service members (regardless of location) and civilian employees appointed to an overseas location eligible for enrollment in a DoDEA school on a space-required basis will be identified as having special educational needs if they have, or are found eligible for, either an IFSP or an IEP under 32 CFR part 57.

§ 75.6 Civilian employees on overseas assignment.

(a) *Vocabulary.* Section 75.3 provides definitions of ''family member'' that apply only to this section.

(b) *Employee rights.* (1) The DoD Components must select civilian employees for specific positions based on job requirement and merit factors in accordance with 5 U.S.C. 2302, and 29 U.S.C. 791 through 794d. Selection for an overseas position must not be influenced by the special needs of a civilian employee's family member(s), or any other prohibited factor.

(2) The civilian employee or selectee will be given comprehensive medical, dental, and educational information about the overseas community where the position is located to help the employee make an informed choice about accepting the position.

(3) Refer to the Joint Travel Regulations (available at *https://www.defensetravel.dod.mil/ Docs/perdiem/JTR.pdf*) for PCS travel and transportation allowances for eligible civilian employees and their family members.

(4) Civilian employees or selectees assigned to positions overseas are generally responsible for obtaining medical and dental services and paying for such services, except services provided pursuant to 32 CFR part 57. Their family members may have access to the MHS on a space-available, reimbursable basis only, except for services pursuant to 32 CFR part 57.

(i) DoDEA and the Military Medical Department responsible for the provision of related services to support DoDEA at the duty station are required to evaluate school-aged children (ages 3 through 21 years, inclusive) eligible for enrollment in a DoDEA school on a space- required basis and provide them with the special education and related services included in their IEPs in accordance with 32 CFR part 57.

(ii) The Military Departments are required to provide infants and toddlers (from birth up to 3 years of age, inclusive) eligible for enrollment in a DoDEA school on a space-required basis with the EIS identified in the IFSPs in accordance with 32 CFR part 57.

(c) *Processing a civilian employee for an overseas position.* (1) When recruiting for an overseas position, DoD human resources representatives will:

(i) Provide information on the requirements of this part related to civilian employees or applicants for employment, including employee rights provided in DoD Instruction 1315.19.

(ii) Provide information on the availability of medical and educational services, including a point of contact for the applicant to ask about specific special needs. This information must be contained in any document used for recruitment for overseas positions.

(iii) Include the following statements in recruitment information:

(A) If an employee brings a child to an overseas location and that child is entitled to attend a DoD school on a space-required basis in accordance with DoDEA Regulation 1342.13 (available at *http://www.dodea.edu/aboutDoDEA/upload/1342__13.pdf*), DoDEA and the Military Department responsible for providing related services will ensure that the child, if eligible for special education, receives a free appropriate public education, including special education and related services pursuant to 32 CFR part 57.

(B) If an employee brings an infant or toddler (up to 3 years of age) to an overseas location, and that infant or toddler, but for the child's age, is entitled to attend the DoDEA on a space-required basis in accordance with DoDEA Regulation 1342.13, then the Military Department responsible for EIS will provide the infant or toddler with the required EIS in accordance

with the eligibility criteria consistent with 32 CFR part 57.

(C) If an employee brings a family member to an overseas location who requires medical or dental care, then the employee will be responsible for obtaining and paying for such care. Access for civilian employees and their families to military medical and dental treatment facilities is on a space-available and reimbursable basis only.

(2) When the gaining human resources representatives process a civilian for an overseas position where family member travel is authorized at government expense, then they must ask the selectee to determine whether a family member has special needs, using the criteria provided in §75.5 of this part. All selectees must be asked only after they have been notified of their selection in accordance with 29 U.S.C. 791 through 794d, and 29 CFR 1630.14. If the selectee indicates that a family member has special needs:

(i) The DoD civilian human resources representatives may not coerce or pressure the selectee to decline the job offer in light of that information.

(ii) The selectee may voluntarily forward to the civilian human resources representative completed DD Forms 2792 or 2792–1 for each family member with special needs to provide information on the availability of medical and educational services. DD Form 2792–1 must be submitted if the selectee intends to enroll his or her child in a school funded by the DoD or a school in which DoD is responsible for paying the tuition for a space-required family member.

(3) The gaining human resources activity will coordinate with the appropriate military medical and educational personnel on availability of services and inform the selectee in writing of the availability of medical, educational, and early intervention resources and services to allow the civilian employee to make an informed choice whether to accept the position. The notice will include:

(i) Comprehensive medical, dental, and educational information on the overseas community where the position is located.

(ii) A description of the local DoDEA facility and programs, specifying the programs for children with special education needs.

(iii) A description of the local EIS available for infants and toddlers with disabilities.

(iv) A statement indicating that the lack of EIS or special education resources (including related services assigned to the military medical departments) cannot serve as a basis for the denial of family travel at government expense and required services will be provided even if a local program is not currently established in accordance with 32 CFR part 57.

(d) *Use of EFMP Family Support Services.* Civilian employees may utilize EFMP family support services on a space-available basis.

PART 79—CHILD DEVELOPMENT PROGRAMS (CDPs)

Sec.

79.1 Purpose.
79.2 Applicability.
79.3 Definitions.
79.4 Policy.
79.5 Responsibilities.
79.6 Procedures.

AUTHORITY: 10 U.S.C. 1783, 1791 through 1800, 2809, and 2812.

SOURCE: 79 FR 28409, May 16, 2014, unless otherwise noted.

§79.1 Purpose.

This part:

(a) Reissues DoD Instruction (DoDI) 6060.2 in accordance with the authority in DoD Directive (DoDD) 5124.02, ''Under Secretary of Defense for Personnel and Readiness (USD(P&R))'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 512402p.pdf*) and DoD Instruction 1342.22, ''Military Family Readiness'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 134222p.pdf*) and the requirements of DoDD 1020.1

(b) Updates established policy, assigns responsibilities, and prescribes procedures for providing care to minor children (birth through age 12 years) of individuals who are eligible for care in DoD CDPs. This includes:

(1) Center-based care and community-based care.

(2) Family child care (FCC).

(3) School-age care (SAC).

(4) Supplemental child care.

(c) Cancels DODI 6060.3

(d) Implements 10 United States Code (U.S.C.) 1791 through 1800.

(e) Authorizes the publication of supporting guidance for the implementation of CDP policies and responsibilities, including child development training modules, program aids, and other management tools.

(f) Establishes the DoD Effectiveness Rating and Improvement System (ERIS), in accordance with 10 U.S.C. 1791 through 1800.

§ 79.2 Applicability.

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

§ 79.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Accreditation. Verification that a CDP has been assessed by an appropriate, external national accrediting body and meets the standards of quality established by that body.

Affiliated family child care (FCC). Home-based child care services that are provided by licensed individuals in homes located off of the installation, who agree to comply with the standards outlined in this part.

Appropriated funds (APF). Funds appropriated by Congress and received by the U.S. Government as tax dollars.

APF employees. Civilian employees hired by DoD Components with APF. Includes temporary employees, 18 years or older.

Caregiver. For the purpose of determining priority, a parent or an individual who performs the functions of a parent.

Caregiving personnel. Civilian employees of a CDP who are directly involved with the care and supervision of children and are counted in the staff to child ratios.

Child development program (CDP). Child care services for children of DoD personnel from birth through 12 years of age.

CDP employee. A civilian employed by the DoD to work in a DoD CDP (regardless of whether the employee is paid from APF or NAF).

Child(ren). A person under 18 years of age for whom a parent, guardian, or foster parent, is legally responsible.

Child care fees. NAF derived from fees paid by Military members and other authorized users of child care services provided at a military CDC or other DoD-approved facility-based CDP. Also referred to as user fees or parent fees.

Child care hour. One hour of care provided to one child. If a provider cares for six children for 10 hours, that is the equivalent of 60 child care hours.

Combat related wounded warrior. A term referring to the entire population of wounded, ill and injured Service members and veterans who have incurred a wound, illness, or injury for which the member was awarded the Purple Heart or whose wound, illness, or injury was incurred as a direct result of armed conflict or while engaged in hazardous service or in the performance of duty under conditions simulating war, or through an instrumentality of war.

Direct care personnel. Staff members whose main responsibility focuses on providing care to children and youth.

DoD CDP Employee Wage Plan. The wage plan that uses a NAF pay banding system to provide direct service personnel with rates of pay substantially equivalent to other employees at the installation with similar training, seniority, and experience. Pay increases and promotions are tied to completion of training. Completion of training is a condition of employment. This wage plan does not apply to CDPs constructed and operated by contractors under DoDI 1015.15, ''Establishment, Management and Control of Nonappropriated Fund Instrumentalities and Financial Management of Supporting Resources'' (see *http://www.dtic.mil/whs/directives/corres/pdf/101515p.pdf*).

DoD Certification to Operate. Certification issued to each DoD CDP after the program has been inspected by a

representative(s) of the DoD Component or a major command, and found to be in compliance with DoD standards in §79.6, paragraphs (a), (c)–(f), (i) and (j).

DoD Child Abuse and Safety Hotline. A hotline (found at DoD's Military Homefront Web site) required by 10 U.S.C. 1794 that enables parents and visitors to anonymously report suspected child abuse or safety violations at a military CDP or home.

Eligible patron. Patrons who qualify for CDP services, to include active duty Military Service members, DoD civilian employees paid from APF and NAF, Reserve Component Military Service members on inactive duty training, combat related wounded warriors, surviving spouses of military members who died from a combat related incident, eligible employees of DoD contractors, other Federal employees, and those acting in loco parentis of the aforementioned eligible patrons.

Eligible employee of a DoD contractor. An employee of a DoD contractor or subcontractor, or individual under contract or subcontract to DoD, who requires physical access to DoD facilities at least two days out of a work week.

Facility-based program. Refers to child care that is provided within a building, structure, or other improvement to real property. Does not include FCC homes.

Family child care (FCC). Home-based child care services that are provided for Military Service members, DoD civilian employees, or eligible employees of a DoD contractor by an individual who is certified by the Secretary of the Military Department or Director of the Defense Agency or DoD Field Activity concerned as qualified to provide those services, and provides those services for 10 hours or more per week per child on a regular basis for compensation. Also referred to as family home day care, family home care, child development homes, and family day care.

FCC administrator. DoD civilian employees or contract personnel, either APF or NAF, who are responsible for FCC program management, training, inspections, and other services to assist FCC providers. Includes program directors, monitors, outreach workers, United States Department of Agriculture (USDA) CACFP monitors, and administrative personnel.

FCC provider. An individual 18 years of age or older who provides child care for 10 hours or more per week per child on a regular basis in his or her home with the approval and certification of the commanding officer, and has responsibility for planning and carrying out a program that meets the children's needs at their various stages of development and growth.

Family member. For a Military Service member, the member's spouse or unmarried dependent child, or an unmarried dependent child of the member's spouse. For an eligible DoD civilian employee or eligible employee of a DoD contractor, the employee's spouse or same-sex domestic partner, or unmarried dependent child of the employee, employee's spouse, or the employee's same-sex domestic partner.

Financial hardship. A severe hardship resulting from, but not limited to: Sudden and unexpected illness or accident of the spouse or the same-sex domestic partner of an eligible DoD Civilian employee; loss of the spouse's or eligible DoD Civilian's same-sex domestic partner's employment or wages; property damage not covered by insurance; extraordinary and unforeseeable circumstances arising as a result of events beyond the control of the patron.

Full-day care. This care meets the needs of parents working outside the home who require child care services 6 hours or more per day on a regular basis, usually at least 4 days per week.

Hourly care. Care provided in a CDP that meets the needs of parents requiring short-term child care services on an intermittent basis. Hourly care includes on-site group care.

Individual with a disability. A handicapped person as defined in 32 CFR part 56, in accordance with 29 U.S.C. 705, also known as ''Section 7 of The Rehabilitation Act of 1973,'' as amended, and consistent with 42 U.S.C. 12102, also known as ''The Americans with Disabilities Act, as amended''. Synonymous with the phrase ''person with a disability.''

Identification Action Team. A multidisciplinary team that supports families of children with special needs that consider the needs of the child, the disability, and the environment of group care in child development facilities or home-based care, staffing needs and training requirements, and the resources of the program.

Infant. A child, aged birth through 12 months.

In loco parentis. In the place or position of a parent. An ''in loco parentis'' relationship is one in which a person takes on the role of a lawful parent by assuming the obligations and discharging the duties of a parent without formally becoming an adoptive parent or legal guardian. The child(ren) must reside with and be supported by the person. A special power of attorney to act ''in loco parentis'' is required to be on file.

Military approved community based program. Military approved child care available to geographically dispersed eligible families.

Military CDP facility. A facility on a military installation or operated by a DoD Component at which child care services are provided for Military Service members or DoD civilian employees or any other facility at which such child care services are provided that is operated by the Secretary of a Military Department.

Military installation. Defined in 32 CFR 238.3.

Mixed-age group. A group of children that includes children from more than one age group.

Multidisciplinary inspection team. An inspection team led by a representative of the installation commander with authority to verify compliance with standards.

Non-appropriated funds (NAF). Funds derived from CDP fees paid by eligible patrons.

NAF employees. Civilian employees hired by DoD Components and compensated from NAFI funds. Includes temporary employees, 18 years or older.

Off-site group care. An option which provides child care on an occasional rather than a daily basis and allows on-site hourly group care when parents of children in care are attending command functions in the same facility.

On-site group care. A child care program that provides on-site hourly group child care when a parent or guardian of the children in care are attending the same function and are in the same facility.

Operational hardship. A program's inability to operate at full capacity due to documented staffing shortages.

Parent. The biological father or mother of a child; a person who, by order of a court of competent jurisdiction, has been declared the father or mother of a child by adoption; the legal guardian of a child; or a person in whose household a child resides at least 25 percent of the time in any month, provided that such person stands in loco parentis to that child and contributes at least one-half of the child's support.

Parent board. A group established pursuant to 10 U.S.C. 1783 and 1795 comprised of parents who are also Military Service members, retired Military Service members, or spouses of Military Service members or retired Military Service members of children attending DoD CDPs, including FCC. This board shall act in an advisory capacity, providing recommendations for improving services. The board shall meet periodically with staff of the CDP. The board, with the advice of the program staff, shall be responsible for developing and overseeing the implementation of the parent participation program in accordance with 10 U.S.C. 1795.

Parent participation plan. A planned group of activities and projects established by the Parent Board to encourage parents to volunteer in CDPs, including special events and activities (such as field trips, holiday events, and special curriculum programs), small group activities, special projects (such as playground improvement, procurement of equipment, and administrative aid), and parent education programs and training workshops to include child abuse prevention education for parents.

Part-day care. This care meets the needs of parents working outside the home who require child care services on a seasonal or regularly scheduled

part-day basis for fewer than 6 hours per day, usually fewer than 4 days per week.

Preschool-age. Children 36 months through 5 years of age.

Pre-toddler. A child 13 months through 24 months of age.

Qualifying children. Children of an eligible patron or their spouse or the same-sex domestic partner of eligible DoD civilian employees.

Resource and referral (R&R). A service that provides information about child care services on and off the installation to meet patrons' child care needs and maximize use of available sources of child care.

Respite child care. Care for children that provides a parent or guardian temporary respite from their role as a primary caregiver.

Same-sex domestic partner. A person in a same-sex domestic partnership with a uniformed service member, civilian employee or employee of a DoD contractor of the same-sex.

Same-sex domestic partnership. A committed relationship between two adults of the same-sex in which the partners:

(1) Are each other's sole same-sex domestic partner and intend to remain so indefinitely;

(2) Are not married (legally or by common law) to, joined in civil union with, or in a same-sex domestic partnership with anyone else;

(3) Are at least 18 years of age and mentally competent to consent to contract;

(4) Share responsibility for a significant measure of each other's common welfare and financial obligations;

(5) Are not related in a way that, if they were of opposite sex, would prohibit legal marriage in the state or U.S. jurisdiction in which they reside; and,

(6) Maintain a common residence and intend to continue the arrangement (or would maintain a common residence but for the requirements of military service, an assignment abroad, or other employment-related, financial, or similar obstacle).

School age care (SAC). Either facility-based or home-based care for children ages 6–12, or those attending kindergarten, who require supervision before and after school, or during duty hours, school holidays, or school closures.

School-age children. Children aged 6 years through 12, or attending kindergarten through sixth grade, enrolled in a SAC program.

Screen time. Time spent watching television, playing video games, or on the computer.

Special needs. Children with special needs are children who may need accommodations to make child care accessible or may otherwise require more than routine and basic care; including children with or at risk of disabilities, chronic illnesses and physical, developmental, behavioral, or emotional conditions that require health and related services of a type or amount beyond that required by children in general.

Staff:child ratio. The number of children for whom individual caregiving personnel or FCC providers shall be responsible.

Sudden Infant Death Syndrome (SIDS). The sudden, unexplained death of an infant younger than 1 year old.

Supplemental child care. Child care programs and services that augment and support CDC and FCC programs to increase the availability of child care for military and DoD civilian employees. These may include, but are not limited to, resource and referral services, contract-provided services, short-term, hourly child care at alternative locations, and interagency initiatives.

Support staff. Person(s) responsible for providing services not directly related to direct child care services, such as, but not limited to, janitorial, food service, clerical, and administrative duties.

Surviving spouse. A spouse of a Service member who dies on active duty, active duty training, inactive duty training, or within 120 days after release from active duty if the death is due to a service-related disability.

Third party administrator (TPA). An independent organization or entity contracted to perform identified services on behalf of the plan administrator. These services may include clerical and administrative functions such as enrollment and claims administration, payment of subsidies to providers and information services.

Toddler. A child between the ages of 24 and 36 months of age.

Total family income (TFI). Includes all earned income including wages, salaries, tips, long-term disability benefits, voluntary salary deferrals, basic allowance for housing Reserve Component/Transit (BAH RC/T) and subsistence allowances and in-kind quarters and subsistence received by a Military Service member, civilian employee, a spouse, or, in the case of an eligible DoD civilian employee, the same-sex domestic partner, and anything else of value, even if not taxable, that was received for providing services. BAH RC/T and subsistence allowances mean the Basic Allowance for Quarters and the Basic Allowance for Subsistence received by military personnel and civilian personnel when provided (with respect to grade and status) and the value of meals and lodging furnished in-kind to military personnel residing on military bases.

Training & curriculum specialist—Personnel whose main responsibility is providing training and oversight to other CDC or SAC employees.

Unmet need. The number of children whose parents cannot work outside the home because child care is not available.

Waiting list. List of children waiting for a CDP space and whose parents have requested space in a CDP and none is available.

§ 79.4 Policy.

In accordance with DoD Instruction 1342.22, and 10 U.S.C. 1783, 1791 through 1800, 2809, and 2812, it is DoD policy to:

(a) Ensure that the CDPs support the mission readiness, family readiness, retention, and morale of the total force during peacetime, overseas contingency operations, periods of force structure change, relocation of military units, base realignment and closure, and other emergency situations (e.g. natural disasters, and epidemics). Although child care supports working parents, it is not an entitlement and parents must pay their share of the cost of child care.

(b) Reduce the stress of families who have the primary responsibility for the health, safety and well-being of their children and help them balance the competing demands of family life and the DoD mission. CDPs provide access and referral to available, affordable, quality programs and services that meet the basic needs of children, from birth through 12 years of age, in a safe, healthy, and nurturing environment.

(c) Conduct an annual internal certification process to ensure that all installation-operated CDPs are operating in accordance with all applicable Federal mandates and statutory requirements.

(d) Provide child care to support the personnel and the mission of DoD. Eligibility is contingent on the status of the sponsor.

(1) Eligible patrons include:

(i) Active duty military personnel

(ii) DoD civilian employees paid from either appropriated funds (APF) or non-appropriated funds (NAF).

(iii) Reserve Component military personnel on active duty or inactive duty training status.

(iv) Combat related wounded warriors.

(v) Surviving spouses of Military members who died from a combat related incident.

(vi) Those acting in loco parentis for the dependent child of an otherwise eligible patron.

(vii) Eligible employees of DoD contractors.

(viii) Others authorized on a space available basis.

(2) In the case of unmarried, legally separated parents with joint custody, or divorced parents with joint custody, children are eligible for child care only when they reside with the Military Service member or eligible civilian sponsor at least 25 percent of the time in a month that the child receives child care through a DoD program. There may be exceptions as addressed in §79.6.

(e) Promote the cognitive, social, emotional, cultural, language and physical development of children through programs and services that recognize differences in children and encourage self-confidence, curiosity, creativity, self-discipline, and resiliency.

(f) Employ qualified direct program staff whose progression from entry

level to positions of greater responsibility is determined by training, education, experience, and competency. Ensure that civilian employees maintain their achieved position and salary as they move within the military child care system.

(g) Certify qualified FCC providers who can support the mission requirements of the installation.

(h) Facilitate the availability and expansion of quality, affordable, child care off of military installations that meet the standards of this part to ensure that geographically dispersed eligible families have access to legally operating military-approved community-based child care programs.

(i) Promote the early identification and reporting of alleged child abuse and neglect in DoD CDPs in accordance with DoD Directive 6400.1, ''Family Advocacy Program (FAP)'' (see *http://www.dtic.mil/whs/ directives/corres/pdf/640001p.pdf*).

(j) Ensure that funding is available to meet Military Child Care Act requirements pursuant to 10 U.S.C. 1791 through 1800 and protect the health, safety, and well-being of children in care.

§ 79.5 Responsibilities.

(a) The Assistant Secretary of Defense for Readiness and Force Management (ASD(R&FM)), under the authority, direction, and control of the USD (P&R) shall:

(1) Monitor compliance with this part by personnel under his or her authority, direction, and control.

(2) Annually review and issue a child care fee policy based upon total family income (TFI) for use by programs in the DoD child development system of care.

(b) The Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MC&FP)), under the authority, direction, and control of the ASD(R&FM), shall:

(1) Work across functional areas of responsibility and collaborate with other federal and non-governmental organizations to ensure access to a continuum of quality, affordable CDPs.

(2) Program, budget, and allocate funds and other resources to meet the objectives of this part.

(3) Issue DD Form 2636, ''Child Development Program, Department of Defense Certificate to Operate,'' to the Military Departments for each CDP found to be in compliance with this part.

(4) Require that the policies and related documents are updated and relevant to the program.

(5) Report DoD Component program data to support legislative, research, and other requirements.

(c) The Heads of the DoD Components shall:

(1) Establish implementing guidance and ensure full implementation within 12 months of the publication date, consistent with this part, to monitor compliance through regular inspection of CDPs and follow-up oversight actions as needed.

(2) Program, budget, and allocate funds and other resources to meet the requirements of this part.

(3) Establish a priority system for all patrons seeking to enroll children in CDPs in accordance with paragraph (a) of § 79.6.

(4) Assess DoD Component demand and take appropriate action to address the child care capability needed on and off the installation in accordance with paragraph (g) of § 79.6.

(5) Establish a hardship waiver policy to address financial and operational situations.

(6) Submit fiscal year annual summary of operations reports to the DASD(MC&FP) by December 30 of each year using Report Control Symbol DD–P&R(A) 1884, ''Department of Defense Child Development Program (CDP) Annual Summary of Operations.''

(7) Require that background checks are conducted for individuals who have contact with children in DoD CDPs in accordance with DoDI 1402.5, ''Criminal History Background Checks on Individuals in Child Care Services'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 140205p.pdf*) and 32 CFR part 86 and paragraph (c)(1) of § 79.6.

(8) Require that all individuals who have contact with children in a DoD CDP complete a DD Form X656 ''Basic Criminal History and Statement of Admission''.

(9) Require that each CDP establishes a Parent Board in accordance with 10 U.S.C. 1783 and 1795.

(10) Forward the results of DoD Component inspections to the DASD(MC&FP).

(11) Ensure that all incidents that occur within a DoD CDP and involve allegations of child abuse or neglect, revocation of accreditation, or hospitalization of a child, are reported to DASD (MC&FP) through the Office of Family Policy (OFP/CY) within 72 hours of the incident.

(12) Notify the DASD(MC&FP) through OFP/CY if, at any time, a facility in the CDP is closed due to a violation (see paragraph (c)(4)(ii) of §79.6, for more information on violations).

(13) Provide the DASD(MC&FP) through OFP/CY with a copy of applications made in accordance with DoD Instruction 5305.5, ''Space Management Procedures, National Capital Region'' (see *http://www.dtic.mil/whs/ directives/ corres/pdf/ 530505p.pdf*) and 40 U.S.C. 590 to the U.S. General Services Administration (GSA) for building space for use in providing child care for DoD personnel, and comply with GSA standards for funding and operation of child care programs in GSA-controlled space.

(i) Where the DoD is the sole sponsoring agency and the space has been delegated to the DoD by the GSA, the space must comply with the requirements prescribed in this part.

(ii) For the National Capital Region, space acquisition procedures in DoD Instruction 5305.5 shall be used to gain the assignment of space in Government-owned or Government-leased facilities from the GSA.

(14) Require that CDPs follow the recommendations of the Advisory Committee on Immunization Practices (ACIP) and comply with generally accepted practices endorsed by the American Academy of Pediatrics (AAP) and Centers for Disease Control or the latest guidance provided by OFP/CY.

(15) Establish and implement DoD Component-specific child care fees based on the DoD-issued fee policy on an annual basis, and issue supplemental guidance on fees for school-age programs, hourly care, preschool programs, DoD Component approved community-based programs, and FCC subsidies. Submit DoD Component-specific requests for waiver for any deviation from DoD policy, including selection of the high or low cost fee option, to the Office of the DASD (MC&FP) through OFP/CY for approval.

(16) Establish guidelines for communication between command, installation, and educational and behavioral support systems.

(17) Require that all military installations under their authority follow guidance that addresses the ages and circumstances under which a child under 13 years of age can be left at home alone without adult supervision, also known as a ''home alone policy,'' or ''self-care policy.'' The installation commander should approve this policy in consultation with the installation director of the Family Advocacy Program. Guidance is consistent with or more stringent than applicable laws and ordinances of the State and country in which the installations are located.

(18) Establish guidance and operating procedures to provide services for children with special needs in accordance with 32 CFR part 56, ''Nondiscrimination on the Basis of Handicap in Programs and Activities Assisted or conducted by the Department of Defense'' that implement section 504 of the Rehabilitation Act for federally conducted and federally assisted programs and 42 U.S.C. 12102, ''The American Disabilities Act'' as they apply to children and youth with special needs.

(i) Require procedures for reviewing and making reasonable accommodation for children with special needs that do not fundamentally alter the nature of the program.

(ii) Consider the needs of the child, the disability, and the environment of group care in child development facilities or home-based care, staffing needs and training requirements, and the resources of the program.

(iii) Include CDPs as part of the Multidisciplinary Inclusion Action Team that supports families of children with special needs.

(19) Establish guidance and operating procedures to provide services for children of the deployed.

(20) Establish standard risk management procedures for responding to

emergency or contingency situations. This includes, but is not limited to, natural disasters, pandemic disease outbreaks, allegations of child abuse or neglect, active shooter, or an installation or facility lockdown.

(21) Require that vehicles used to transport children comply with Federal motor vehicle safety standards in accordance with 49 U.S.C. 30125 and applicable State or host nation requirements.

(22) Notify applicable civilian patrons annually of their potential tax liability associated with child care subsidies, and ensure that information required by the third party administrator (TPA) is provided in accordance with 26 U.S.C. 129.

(23) Require that a current plan to implement direct cash subsidies to military-approved child care providers to expand the availability of child care spaces and meet specialized child care needs, such as weekend and evening care, special needs, deployment support, and respite child care support, is in place.

(d) The Secretaries of the Military Departments, in addition to the responsibilities in paragraph (c) of this section, shall:

(1) Work with the Heads of the DoD Components to implement CDPs in accordance with this part.

(2) Notify the OFP/CY of any Service-wide specific requirements that will require a waiver to deviate from existing policy.

(e) The Installation Commanders (under the authority, direction, and control of the Secretary of the Military Department concerned) shall:

(1) Require that CDPs within his or her jurisdiction are in compliance with this part.

(2) Require that child care fees are used in accordance with DoD Instruction 5305.5 and paragraph (c)(2) of §79.6.

(3) Require that CDP direct program staff are paid in accordance with Volume 1405 of DoD Instruction 1400.25, ''DoD Civilian Personnel Management System: Nonappropriated Fund (NAF) Pay and Allowances'' (available at *http://www.dtic.mil/whs/ directives/corres/ pdf/ 1400.25-V1405.pdf*). Ensure 75 percent of the program's direct program staff total labor hours are paid to direct program staff who are in benefit status.

(4) Require that there are adequate numbers of qualified professional staff to manage the CDPs according to the Service manpower and child space staffing requirements and referenced in paragraphs (c) and (d) of §79.6 of this part.

(5) Manage child care priority policy, as directed by their respective DoD Component.

(6) Manage hardship waiver policy (financial and operational), as directed by their respective DoD Component.

(7) Review and validate the demand for installation child care capacity and take appropriate action to expand the availability of care as needed. See paragraph (h) of §79.6 of this part.

(8) Convene a Parent Board, and ensure that a viable Parent Participation Program is in accordance with 10 U.S.C. 1783 and 1795.

(9) Implement mandated annual and periodic inspections and complete required corrective and follow-up actions within timeframes specified by their respective DoD Component.

(f) *Directors of the Defense Agencies and DoD Field Activities.* In addition to the responsibilities in paragraph (c) of this section, the Directors of the Defense Agencies and DoD Field Activities shall:

(1) Require that CDPs within his or her jurisdiction are in compliance with this part.

(2) Require that child care fees are used in accordance with DoD Instruction 5305.5 and paragraph (c)(2) of §79.6.

(3) Require that CDP direct program staff are paid in accordance with Volume 1405 of DoD Instruction 1400.25. Ensure 75 percent of the program's direct program staff total labor hours are paid to direct program staff who are in benefit status.

(4) Require that there are adequate numbers of qualified professional staff to manage the CDPs according to the Service manpower and child space staffing requirements and referenced in paragraphs (c) and (d) of §79.6 of this part.

(5) Manage child care priority policy, as directed by their respective DoD Component.

(6) Manage hardship waiver policy (financial and operational), as directed by their respective DoD Component.

(7) Review and validate the demand for installation child care capacity and take appropriate action to expand the availability of care, as needed. See paragraph (h) of § 79.6 of this part.

(8) Convene a Parent Board, and require that a viable Parent Participation Program is in accordance with 10 U.S.C. 1783 and 1795.

(9) Implement mandated annual and periodic inspections and complete required corrective and follow-up actions within timeframes specified by their respective DoD Component.

§ 79.6 Procedures.

(a) *Priority System.* To the extent possible, CDPs shall be offered to the qualifying children of eligible patrons.

(1) *Priority 1.* The highest priority for full-time care shall be given to qualifying children from birth through 12 years of age of combat related wounded warriors, child development program direct care staff, single or dual active duty Military Service members, single or dual DoD civilian employees paid from APF and NAF, surviving spouses of military members who died from a combat related incident, and those acting in loco parentis on behalf of the aforementioned eligible patrons. With the exception of combat related wounded warriors, ALL eligible parents or caregivers residing with the child are employed outside the home.

(2) *Priority 2.* The second priority for full-time care shall be given equally to qualifying children from birth through 12 years of age of active duty Military Service members, DoD civilian employees paid from APF and NAF, surviving spouses of military members who died from a combat related incident, and those acting in loco parentis on behalf of the aforementioned eligible patrons, where a non-working spouse, or in the case of a DoD civilian employee with a same-sex domestic partner, is actively seeking employment. The status of actively seeking employment must be verified every 90 days.

(3) *Priority 3.* The third priority for full-time care shall be given equally to qualifying children from birth through 12 years of age of active duty Military Service members, DoD civilian employees paid from APF and NAF, surviving spouses of military members who died from a combat related incident, and those acting in loco parentis on behalf of the aforementioned eligible patrons, where a non-working spouse, or in the case of a DoD civilian employee with a same-sex domestic partner, is enrolled in an accredited post-secondary institution. The status of post-secondary enrollment must be verified every 90 days.

(4) *Space Available.* After meeting the needs of parents in priorities 1, 2, and 3, CDPs shall support the need for full-time care for other eligible patrons such as active duty Military Service members with non-working spouses, DoD civilian employees paid from APF and NAF with non-working spouses or same-sex domestic partners, eligible employees of DoD Contractors, Federal employees from non-DoD agencies, and military retirees on a space available basis. In this category, CDPs may also authorize otherwise ineligible patrons in accordance with 10 U.S.C. 1783, 1791 through 1800, 2809, and 2812 to enroll in the CDP to make more efficient use of DoD facilities and resources.

(5) Individual priorities will be determined based on the date of application with the DoD Component. Components may only establish sub-priorities if unique mission related installation requirements are identified by higher headquarters.

(b) *Types of Care.* The types of care offered for children from birth through 12 years of age include 24/7 care and care provided on a full-day, part-day, short-term or intermittent basis.

(1) *Military-Operated CDPs.* Military-operated (on and off installation) CDPs generally include:

(i) *CDCs.* Reference Table 1 of this section of this part for standards of operation for CDCs. CDCs primarily offer care to children from birth to 5 years of age, but may also be used to provide SAC programs.

(ii) *SAC Programs.* Reference Table 1 of this section for SAC standards of operation. SAC programs primarily offer care to children from 6 to 12 years of age. Care may be offered in CDCs and other installation facilities, such as youth centers and schools.

(iii) *FCC*. Reference Table 2 of this section for FCC standards of operation. Child care services are available to children from infancy through 12 years of age and are provided in government housing or in state licensed/regulated homes in the community.

(iv) *Supplemental Child Care*. Services include short-term alternative child care options in approved settings on and off installation.

(v) *Part-Day and Hourly Programs*. CDP space used for part-day and hourly programs, including programs to provide respite child care, shall not exceed 20 percent of the CDP program's capacity during duty hours.

(2) *Military Department, Defense Agency, and DoD Field Activity-Approved Supplemental Child Care Programs*. See paragraph (g) of this section.

(c) *Administration, Funding and Oversight of Military Operated CDPs*. Unless otherwise noted, the requirements in this section apply to all DoD-operated CDPs.

(1) *Background Checks*. All background checks for individuals who have regular, recurring contact with children and youth in CDPs, including adult family members of FCC providers and any individual over the age of 18 living in a home where child care is provided, and persons who serve as substitute or backup providers, shall be conducted in accordance with 32 CFR part 86.

(2) *Funding*. CDPs are funded by a combination of APF and NAF.

(i) The amount of APF used to operate CDPs shall be no less than the amount collected through child care fees, except for CDCs that operate under a long-term facility's contract or lease-purchase agreement under 10 U.S.C. 2809 and 2812.

(A) A family's child care fee category is determined based on an initial and subsequent annual verification of TFI. Families pay the child care fee assigned to that TFI category. A family's fees may only be adjusted once per year, with exceptions listed in paragraph (c)(2)(i)(E) of this section. TFI is determined utilizing DD Form 2652.

(B) APF may be used to subsidize child care in military-approved civilian programs in accordance with 10 U.S.C. 1791 through 1800.

(C) DoD Components establishing child care fee assistance programs for their employees must contribute the amounts required to pay subsidies out of agency APFs.

(D) FCC providers are private contractors. Fees are established between the provider and parent, unless such providers receive direct monetary subsidies. When FCC providers receive direct monetary subsidies to reduce the cost of care for the families they service, the installation commander or DoD Component shall determine relevant fees charged by FCC providers.

(E) Fees may be adjusted:

(*1*) By the installation commander, Defense Agency Director, or DoD Field Activity Director:

(*i*) On a case-by-case basis for families who are facing financial hardship or unusual circumstances that merit review, in accordance with established DoD Component guidance.

(*ii*) For parents participating in an approved parent participation program.

(*2*) By the DoD Components, Defense Agency Director, or DoD Field Activity Director:

(*i*) To accommodate an optional high market rate when it is necessary to pay higher wages to compete with local labor or at those installations where wages are affected by non-foreign area cost of living allowance (COLA), post differential or locality pay. The optional low market rate may be used in areas where costs for comparable care within the installation catchment area are significantly lower. A request to utilize the high or low market rate options must be submitted to OFP/CY for approval.

(*ii*) To reflect changes in employment status, relocation, and annual internal reviews that find inaccurate determination or calculation of TFI.

(*iii*) For CDP employees when CDC programs are facing operational hardships.

(ii) Child Development Program Element APF may be used for:

(A) Salaries of CDP employees.

(B) Food.

(C) Training and education.

(D) Program accreditation fees and support services.

(E) Travel and transportation.

(F) Marketing, to include recruitment, retention, and participation efforts.

(G) Supplies and equipment, to include lending libraries and training materials for use by FCC providers.

(H) Local travel expenses incurred by FCC program staff using their private vehicles to perform government functions.

(I) Direct monetary subsidies to FCC providers.

(iii) To the maximum extent possible, child care fees shall cover the NAF cost of care, and NAF costs not covered by child care fees are to be minimized. Child care fees shall only be used for:

(A) Compensation of direct care CDP employees who are classified as NAF employees, to include training and education, and recruitment and retention initiatives approved by the DoD Component.

(B) Food-related expenses not paid by the USDA or DoD APFs.

(C) Consumable supplies.

(3) *Facility Requirements and Construction*.

(i) Minimum prescribed construction standards:

(A) For all Marine Corps, Navy, and Air Force CDC facility construction, the Unified Facilities Criteria (UFC) 4–740–14, ''Design: Child Development Centers'' (see *http://www.wbdg.org/ ccb/DOD/UFC/ufc_ 4_740_14.pdf*) apply.

(B) For all Army CDC facility construction, the Army Standard for Child Development Centers (see *https://mrsi.usace.army.mil/ fdt/Army%20Standards/ CDC%20age%206 wk%20to%205yr% 20Army%20Standard.pdf*) apply.

(C) When SAC is provided in youth facilities, UFC 4–740–06, ''Youth Centers'' (see *http://www.wbdg.org/ ccb/DOD/UFC/ufc_ 4_740_06.pdf*) and Service-specific exceptions to the UFC apply.

(D) State and local construction standards may be used but are not required, except if the CDC facility is located on an area over which the United States has no legislative jurisdiction and then only if State and local standards are more stringent than those in UFC 4–740–14.

(ii) All facilities shall comply with the structural requirements of the National Fire Protection Association 101, ''Life Safety Code®'' 2012 (available at *http://www.nfpa.org/aboutthecodes/AboutTheCodes.asp? DocNum=101& cookie%5Ftest=1*)

(4) *Oversight*.

(i) *DoD Certification Inspection*. Installation-operated CDPs in which care is provided for 10 or more child care hours per week on a regular basis shall be certified to operate through inspections occurring no fewer than four (4) times a year. Inspections must be unannounced, and parent and staff feedback shall be solicited as part of the inspection process.

(A) Three local inspections and one higher headquarters inspection shall be conducted to verify compliance with this part and DoD Component implementing guidance. Local inspection teams are led by a representative of the installation commander, Defense Agency Director, or Defense Field Activity Director, and a multidisciplinary team, to include human resource, fire, health, and safety proponents, with expertise and authority to verify compliance with this part.

(*1*) Local inspections include an annual comprehensive health and sanitation inspections, annual comprehensive fire and safety inspections, and a multidisciplinary inspection whose team that includes parent representation. Community representation on the team by appropriate professionals is highly encouraged.

(*2*) DoD Component inspection teams inspecting CDPs serving children birth through 12 years of age shall include staff possessing:

(*i*) A baccalaureate degree in child development, early childhood education (ECE), home economics (early childhood emphasis), elementary education, special education, or other degree appropriate to the position filled from an accredited college;

(*ii*) Knowledge of child/youth development programs; or

(*iii*) A combination of education and experience that provide knowledge comparable to that normally acquired through the successful completion of a 4-year degree (experience must include at least 3 years of full-time teaching or management experience with children of the appropriate age group).

(*3*) Parents shall be interviewed as part of the DoD Component inspection. Additional inspections shall be conducted in response to program complaints in accordance with paragraph (b) of § 79.5.

(*4*) Results of DoD Component inspections shall be provided by the DoD Component to the ODASD(MC&FP) through OFP/CY. CDPs whose inspection results demonstrate compliance with this part shall receive DD Form 2636. Certificates shall be displayed in a prominent location in the CDP.

(*5*) Inspection results shall be made available to parents. Results from inspections of CDC programs shall be available online.

(*6*) Periodic, unannounced inspections shall be made by the ODASD(MC&FP) to ensure compliance with the requirements in this part.

(*7*) In response to each inspection, a corrective action plan with appropriate timelines shall be developed to address any deficiencies identified during inspection.

(ii) *Violations*. The installation commander, Defense Agency Director or DoD Field Activity Director shall ensure the immediate remedy of any life-threatening violation of this part or other safety, health, and child welfare laws or regulations (discovered at an inspection or otherwise) at a DoD CDP, or he or she will close the facility (or affected parts of the facility).

(A) In the case of a violation that is not life-threatening, the commander of the major command under which the installation concerned operates, or the Director of the Defense Agency or DoD Field Activity concerned, may waive the requirement that the violation be remedied immediately for up to 90 days beginning on the date of discovery of the violation.

(B) If the violation that is not life-threatening is not remedied by the end of that 90-day period, the facility or parts involved will be closed until the violation is remedied.

(C) The Secretary of the Military Department, or Director of the Defense Agency or DoD Field Activity concerned, may request a waiver of the requirements of the preceding sentence to authorize the program to remain open in a case where the violation cannot reasonably be remedied within the 90-day period or in which major facility reconstruction is required. A waiver request must be submitted to OFP/CY for approval.

(iii) *Accreditation*. Eligible CDP facilities (excluding FCC) shall be accredited by a DoD-approved national accrediting body. CDP oversight is a statutory requirement involving an external nationally recognized accreditation process and internal DoD Certification process.

(A) FCC providers shall be encouraged to seek accreditation from an appropriate national accrediting body.

(B) The percentage of CDP facilities successfully achieving accreditation shall be reflected in the Annual Summary of Operations report referenced in § 79.5.

(iv) *Monitoring*. There shall be a system in place to monitor FCC homes on a regular basis during all hours of operation. The following information shall be maintained for FCC providers:

(A) Results of family interview.

(B) Background check with suitability determination.

(C) Inspection results.

(D) Insurance.

(E) Training records.

(F) Monitoring visit records.

(5) *Parent Board*. In accordance with 10 U.S.C. 1783 and 1795, each CDP shall establish a Parent Board to discuss problems and concerns and to provide recommendations for improving CDPs. The Board, with the staff of the program, is responsible for coordinating a parent participation program.

(i) The Board shall be composed only of parents of children enrolled in the installation CDP facilities that are Military Service members, retired Military Service members, or spouses of Military Service members or retired Military Service members, and chaired by such a parent.

(ii) The Board shall meet periodically with the staff of the program and the installation commander, Defense Agency Director, or DoD Field Activity Director to discuss problems and concerns. Board recommendations shall be forwarded to the installation commander, Defense Agency Director, or DoD Field Activity Director for review

and disposition. These recommendations are reviewed during the DoD certification inspection.

(iii) The Board shall coordinate a parent participation program with CDP staff to ensure parents are involved in CDP planning and evaluation. In accordance with 10 U.S.C. 1795, parents participating in such program may be eligible for child care fees at a rate lower than the rate that otherwise applies.

(6) *Enrollment.* To enroll in the CDP, parents shall complete DD Form 2606 or electronic equivalent, DoD Child Development Program Request for Care Record. At the time of enrollment in an installation-based CDP, parents shall provide:

(i) Child(ren)'s health and emergency contact information.

(ii) Documentation that children have been fully immunized.

(A) Children who have not received their age-appropriate immunizations prior to enrollment and do not have a documented religious or medical exemption from routine childhood immunizations shall show evidence of an appointment for immunizations; the immunization series must be initiated within 30 days.

(B) Children in SAC are not required to provide documentation if they are enrolled in a local public school system where proof of currency of vaccination is required.

(iii) Children's records shall be updated annually or as needed for their health, safety, or well-being.

(7) *Immunizations.* Children enrolling in or currently enrolled in DoD CDPs must provide written documentation of immunizations appropriate for the child's age. Per AR 40–562/BUMEDINST 6230.15A/AFJI 48–110/CG COMDTINST M6230.4F, ''Immunizations and Chemoprophylaxis'' (see *http://www.vaccines.mil/documents/969r40_562.pdf*), immunizations recommended by the ACIP are required.

(i) All records shall be updated at least annually and kept on file. Any child not enrolled in a school system where proof of currency of vaccination is required must provide proof of currency.

(ii) Children enrolled in a local public school system and volunteer sports coaches are excluded from this requirement.

(iii) A waiver for an immunization exemption may be granted for medical or religious reasons. Philosophical exemptions are not permitted. The DoD Component must provide guidance on the waiver process.

(A) A statement from the child's health care provider is required if an immunization may not be administered because of a medical condition. The statement must document the reason why the child is exempt.

(B) If an immunization is not administered because of a parent's religious beliefs, the parent must provide a written statement stating that he or she objects to the vaccination based upon religious beliefs.

(C) During a documented outbreak of a contagious disease (as determined by local DoD Medical authorities) that has a vaccine, the child who is attending the program under an immunization waiver for that vaccine, will be excluded from the program for his or her protection and the safety of the other children and staff until the contagious period is over.

(iv) Civilian employees (including specified regular volunteers) and FCC providers shall obtain appropriate immunization against communicable diseases in accordance with recommendations from the ACIP. The requirement for appropriate immunization is a condition of continued employment or active participation in the program or organization.

(A) This requirement is waived if a current immunization, a protective titer, or a medical exemption is approved and documented. A waiver for an immunization exemption may also be granted for religious reasons. Philosophical exemptions are not permitted.

(B) The DoD Component must provide guidance on the waiver process. The DoD Component must approve all waivers and documentation of the waiver kept on file.

(C) During a documented outbreak of a contagious disease, staff with a waiver will be excluded from the program for their protection and the safety of the other children and staff until the contagious period is over.

(8) *Child Abuse Prevention and Reporting*. In accordance with 10 U.S.C. 1794, CDPs shall minimize the risk for child abuse.

(i) CDPs shall have standard operating procedures for reporting cases of suspected child abuse and neglect, and all employees, employees of DoD contractors, individuals working with CDPs, providers, volunteers and parents shall be informed of child abuse prevention, and identification and reporting requirements. Staff shall be knowledgeable of the child abuse reporting requirements.

(ii) In accordance with 10 U.S.C. 1794, the DoD Child Abuse and Safety Hotline telephone number shall be posted in highly visible areas, including the facility lobby, where parents have easy access to the telephone number. The hotline number shall be published in parent handbooks and other media.

(9) *Programming and Standards of Operation*. All CDPs shall establish a planned program of developmentally appropriate activities, and adhere to the standards of operation outlined in Tables 1 and 2 of this section.

(d) *Personnel*. Installation-based CDP personnel and FCC providers shall meet the following requirements:

(1) *CDC Directors*. CDC directors shall have at a minimum:

(i) A baccalaureate degree in child development, ECE, home economics (early childhood emphasis), elementary education, special education, or other degree appropriate to the position filled from an accredited college; or

(ii) A combination of education and experiences, which provide knowledge comparable to that normally acquired through the successful completion of the 4-year course of study in a child-related field.

(2) *SAC Directors*. Directors shall have at a minimum:

(i) A baccalaureate degree in a field of child or youth development, such as youth recreation, physical education, elementary education, secondary education, child development, psychology, social work, or other degree appropriate to the position filled from an accredited college; or

(ii) A combination of education and experiences, which provide knowledge comparable to that normally acquired through the successful completion of the 4-year course of study in a child development or youth-related field.

(3) *Training and Curriculum Specialists*. Each program within the CDP shall employ at least one training and curriculum specialist. Training and curriculum specialists shall have at a minimum:

(i) A baccalaureate degree with a major course of study directly related to child or youth development, ECE or an equivalent field of study from an accredited college, or a combination of education and experiences, which provide knowledge comparable to that normally acquired through the successful completion of the 4-year course of study in the field of child or youth development or ECE.

(ii) Knowledge of early childhood or youth education principles, concepts, and techniques to develop, interpret, monitor, and evaluate the execution of curriculum and age-appropriate activities.

(iii) Knowledge of adult learning techniques and strategies and experience training adult learners.

(iv) Ability to support DoD certification, accreditation, and staff credentialing (Child Development Associate (CDA), Associate of Arts (AA) Degree) by ensuring that required training is administered and successfully accomplished to meet statutory and program requirements.

(4) *FCC Administrators*. FCC administrators shall have at a minimum:

(i) A baccalaureate degree with a major course of study directly related to child or youth development, family studies, or an equivalent field of study from an accredited university; or

(ii) A combination of education and experiences, which provide knowledge comparable to that normally acquired through the successful completion of the 4-year course of study in the field of child or youth development or family studies.

(5) *CDP Direct Care Personnel, Support Staff, and FCC Providers*. CDP direct care personnel and support staff, as a condition of employment, and FCC providers shall, as a condition of participation:

(i) Be at least 18 years of age.

(ii) Hold a high school diploma or equivalent.

(iii) Read, speak, and write English.

(iv) Successfully pass a pre-employment physical, maintain current immunizations and be physically and behaviorally capable of performing the duties of the job.

(e) *Training.* Each CDP must have a DoD Component-approved training program. Satisfactory completion of training is a condition of employment for staff in a center-based program and for providers offering care in FCC homes.

(1) *CDP Management Personnel.* CDP management personnel, including CDP directors (CDC directors, FCC administrators, and SAC directors), shall receive annual training, which includes the following topics:

(i) Child abuse prevention, identification, and reporting.

(ii) Program administration, including APF and NAF financial management, funding metrics, and fiscal accountability.

(iii) Staff development and personnel management.

(iv) Prevention of illness and injury and promotion of health.

(v) Emergency procedures and preparedness.

(vi) Working with children with special needs.

(vii) Developmentally appropriate practices.

(2) *Training and Curriculum Specialists.* Training and curriculum specialists shall receive annual training, to include the following topics:

(i) Child abuse prevention, identification, and reporting.

(ii) Developmentally appropriate practices.

(iii) Principles of adult learning.

(iv) Prevention of illness and injury and promotion of health.

(v) Emergency procedures.

(vi) Working with children with special needs.

(3) *CDP Direct Care Personnel and FCC Providers.*

(i) Training requirements for direct care personnel (excluding FCC providers) shall be linked to the DoD CDP Employee Wage Plan implemented in response to 10 U.S.C. 1783, and 1791 through 1800 to include completion of the DoD-approved competency based training modules within DoD Component specified time frames.

(ii) All newly hired CDP direct care personnel and FCC providers shall complete 40 hours of orientation. Orientation shall begin prior to working with children, with the full 40 hours completed within the first 90 days of employment. Orientation completion shall be documented for each direct care personnel or FCC provider. Orientation includes:

(A) Working with children of different ages, including developmentally appropriate activities and environmental observations.

(B) Age-appropriate guidance and discipline techniques.

(C) Applicable regulations, policies, and procedures.

(D) Child safety and fire prevention.

(E) Child abuse prevention, identification, and reporting.

(F) Parent and family relations.

(G) Health and sanitation procedures, including blood-borne pathogens, occupational health hazards for direct care personnel, and recognizing symptoms of illness.

(H) Emergency health and safety procedures, including pediatric cardiopulmonary resuscitation (CPR) and first aid.

(I) Safe infant sleep practices and Sudden Infant Death Syndrome (SIDS) prevention.

(J) Nutrition, obesity prevention, and meal service.

(K) Working with children with special needs.

(L) Accountability and child supervision training.

(M) For FCC providers only, infant and child (pediatric) CPR and first aid must be completed prior to accepting children for care. Training shall be updated as necessary to maintain current certifications.

(N) For FCC providers only, training in business operations.

(iii) CDP direct care personnel and FCC providers shall complete additional training specified by the DoD Component within 90 days of beginning work. The training shall include, at a minimum, in-depth training on the subjects covered in the orientation as well as infant and child (pediatric) CPR

and first aid, which shall be updated as necessary to maintain current certifications.

(iv) CDP direct care personnel and FCC providers shall complete a minimum of 24 hours per year of ongoing training by the DoD Component approved training program. Training shall include child abuse prevention, identification and reporting, safe infant sleep practices and SIDS prevention, working with children with special needs, and if required, administering medication.

(v) Substitute FCC providers must complete a basic orientation and background checks prior to providing care. Such orientation includes child abuse prevention, identification and reporting, working with children with special needs, safety procedures and pediatric CPR and first aid, and SIDS prevention. The FCC provider's spouse may serve as a backup provider on a limited basis, as designated by the DoD Component and must complete the required substitute FCC provider training.

(4) *CDP Support Staff.* CDP support staff shall participate in annual training related to the latest techniques and procedures in child care, including topics on child abuse prevention, identification and reporting, and other training related to their position.

(f) *Volunteers.* All volunteers shall be screened, trained, and supervised in accordance with DoD Instruction 1402.5 and 32 CFR part 86; and DoD Instruction 1100.21, ''Voluntary Services in the Department of Defense'' (see *http://www.dtic.mil/whs/directives/corres/pdf/110021p.pdf*) and DoD Component implementing guidance, as appropriate to their role. Volunteers may not be alone with children and are not counted in the staff ratio. All regularly scheduled volunteers shall be trained in:

(1) Program orientation.

(2) Age-appropriate learning activities.

(3) Child abuse identification, reporting and prevention.

(4) Age-appropriate guidance and discipline.

(5) Working with children with special needs.

(6) Child health and safety.

(7) Safe infant sleep practices and SIDS prevention.

(8) Emergency procedures.

(9) Applicable regulations and installation policy.

(10) Role of the volunteer in the CDP.

(g) *Supplemental Child Care.* On-site group care services are designed to provide occasional, intermittent care to children on an hourly basis, including respite child care.

(1) When on-site group care is provided in an installation CDP facility by CDP staff members, the requirements of this part apply.

(2) When on-site group care is provided in a non-CDP facility by CDP personnel and parents are not on site, the requirements of this part apply.

(3) When on-site group care is provided in a non-CDP facility by CDP personnel and parents remain on site, the facility is not required to meet the requirements of this part.

(4) When on-site group care is provided in an alternative facility by volunteers or parents, and the parent or guardian remain on site, the requirements of this part do not apply.

(h) *Administration and Oversight of Community-Based Care Providers.* (1) *Types of Care.* Efforts shall be made to expand the availability of these programs through referrals to comparable programs off of the installation through participation in consortiums with other Federal and non-governmental entities.

(i) Efforts shall be made to ensure quality, affordable child care options exist for all eligible patrons, including those who are geographically dispersed active duty military and their families. Community-based child care options are designed to supplement, not replace, child care programs on the installation.

(ii) Care may be delivered through military-approved community-based CDPs, utilizing a myriad of delivery systems, including existing child care facilities, schools, recreation and after-school and summer programs, and home-based care programs.

(iii) Programs that support the needs of eligible deployed families in military-approved community-based child care programs where care is needed for a short-term basis during the deployment phase must meet the State licensing regulations and requirements

and be inspected by an outside agency once a year. All other types of care must meet the intent of this part.

(iv) Programs shall meet State licensing standards for background checks.

(v) Military-approved community-based child care programs will be encouraged to participate in an evaluation process utilizing the ERIS in this section, a detailed assessment tool developed by the DoD to evaluate facility-based child care providers.

(2) *Subsidies.*

(i) The DoD Components may subsidize a portion of the cost of child care incurred by eligible active duty and DoD civilian employees.

(ii) Subsidies resulting from the child care provided to children of active duty military members are excluded from gross income pursuant to 26 U.S.C. 134.

(iii) Subsidies provided to DoD civilian employees may qualify for exclusion from gross income, provided the specific program used qualifies under 26 U.S.C. 129(d) and the employee receives the subsidy for an eligible purpose on behalf of an eligible child as described in 26 U.S.C. 21(a) and 21(b). Subsidies in excess of the excludable amounts will be treated as gross income under 26 U.S.C. 61. Employees are advised to consult with a qualified tax expert with questions or concerns related to taxability of child care subsidies.

(iv) Child care programs and providers who offer their services under this provision must comply with the standards outlined in this part and must be approved by the plan administrator or designee prior to issuance of subsidy payments by a DoD Component.

(v) The DoD Components are responsible for budgeting for child care subsidies and are not to establish a special fund out of which child care subsidies are paid, nor will eligible users of Military Child Development Programs be required to make a contribution as a condition of receiving a child care subsidy.

(vi) The DoD Components have the discretion to amend or terminate their participation in a child care subsidy program under this plan at any time. The benefits in this section are not guaranteed and may be reduced by plan amendment.

(vii) The OFP/CY will designate a TPA to administer the Military Department, Defense Agency, and DoD Field Activity civilian child care subsidy program for all DoD Components. Each civilian sponsor must register with the TPA contracted by the Defense Department.

(A) The TPA shall annually document family and provider eligibility, TFI, child data, and other information required to comply with reporting requirements, in accordance with 26 U.S.C. 21(a), 21(b), 61, 129, and 134.

(B) The TPA shall provide authorization and payment of child care subsidies to the provider. All subsidy payments shall be made to the child care provider.

(C) The TPA shall comply with fee assistance guidelines established by the individual DoD Components.

(i) *Augmented Program Support.* When possible, CDPs should utilize personnel, such as behavioral health consultants and school liaison officers to assist the program staff and parents with children's social-emotional development and behavior. These personnel shall assist staff, parents, and children in developing skills to respond to challenging behaviors and reduce stress for staff and participating children.

(j) *CDC and SAC Standards of Operation, FCC Standards of Operation, and the ERIS.* (1) Table 1 outlines the minimum operational standards required for installation-based CDCs and SACs to receive the DoD Certificate to Operate. These standards implement the policy requirements of paragraphs (a), (c)–(f), and (i) of this section. When a SAC program operates within a CDC, SAC standards of operation shall be used for the SAC portion of the program.

(2) Table 2 outlines the minimum operational standards required for installation-based and affiliated FCC providers to receive the DoD Certificate to Operate. These standards implement the policy requirements outlined in the body of this part.

(3) Table 3 outlines the operational standards for community-based child

care facilities. These standards, in addition to the state licensing requirements, may be used to determine eligibility of child care subsidies under conditions designated by the DoD Components. Programs eligible to receive child care subsidies when the Service member is deployed must meet the state licensing requirements and be annually inspected.

TABLE 1—CDC AND SCHOOL-AGE PROGRAMS STANDARDS OF OPERATIONS

A. Administrative
Both CDC and SAC
The program has implemented the fee policy in accordance with current DoD and DoD Component guidance. If appropriate, the program has an approved waiver to utilize the high cost fee option.
75 percent of the program's total labor hours are paid to direct program staff who are in benefit status.
Unannounced inspections are conducted by program staff following complaints.
B. Facility
Facility: Both CDC and SAC
The DoD Certificate to Operate is displayed in a prominent location.
Newly constructed CDP facilities follow the UFC or Service guidance for program capacity and capability.
The facility food service area supports the sanitary preparation and service of healthy foods.
All playgrounds, playground surfaces, and equipment meet American Society for Testing and Materials and Consumer Product Safety Commission (CPSC) guidelines.
There is a balance of sun and shade on the playground and a variety of surfaces, such as resilient surfaces, and natural elements. CDC playgrounds include equipment for riding, climbing, balancing, and swinging.
The program provides opportunities for active play every day, indoors and outdoors. Children have ample opportunity to do vigorous activities such as running, climbing, dancing, skipping, and jumping.
Programs use gardens to educate children about healthy eating.
The square footage of useable space for each child in each activity room meets the requirements of the UFC or Service-specific guidelines.
Sound absorbing materials, such as ceiling tiles and rugs are used to minimize noise levels.
Areas used by children have adequate lighting for safety, evacuation, and security measures, are ventilated and kept at a comfortable temperature.
There is adequate and convenient storage space for equipment and materials.
Individual space is provided for each child's belongings.
Supervised private areas where children can play or work alone or with a friend are available indoors and outdoors.
Bathrooms, drinking water, and hand-washing facilities are easily accessible to children.
Clean, sanitary drinking water is readily available at all times.
The facility includes a place for adults to take a break away from children, an adult bathroom, a secure place for staff to store their personal belongings, and an administrative area for planning or preparing materials that is separated from the children's areas.
The facility includes soft elements that help create a home-like environment.
Facility: CDC ONLY
The square footage of activity space per child meets the requirements of the UFC or Service specifications for facilities built after 2002. A minimum of 50 square feet per child of activity space is provided for infants in facilities built prior to 2002.
If more than one care group occupies a single room, each group has its own defined physical space and primary interest centers.

TABLE 1—CDC AND SCHOOL-AGE PROGRAMS STANDARDS OF OPERATIONS—Continued

Outdoor play areas directly adjoin CDCs. Playgrounds for alternative program options must be accessible via a route free from hazards and are located within 1/8 mile from the facility.
Playgrounds are enclosed by a fence and meet the requirements of the UFC.
The square footage of playground space per child meets the requirements of the UFC or Service specific guidelines. The playground area is capable of supporting 30 percent of the total capacity of the CDC in a center of 100 or more children, and all the children in centers with a capacity of fewer than 100 children.
The facility has a designated place set aside for breastfeeding mothers who want to come during work to breastfeed, as well as a private area with an outlet (not a bathroom) for mothers to pump their breast milk.
Facility: SAC ONLY
There are separate male and female bathrooms for children as well as separate multi-unit restrooms for staff and visitors or a system to ensure that adults and teens do not use the bathrooms at the same time as children in SAC.
C. Health and Sanitation
Health and Sanitation: Both CDC and SAC
A comprehensive health and sanitation inspection has been conducted within the last 12 months, corrective actions have been completed per specified timelines, and the inspection report is available for review.
The program shall require that all children enrolling in CDPs provide written documentation of immunizations appropriate for the child's age in accordance with Army Standard for Child Development Center. Children enrolled in the SAC program are not required to provide documentation if they are enrolled in a local public school system.
Staff employed by the CDP and regular volunteers shall be current for all immunizations recommended for adults by the ACIP of the Centers for Disease Control and Prevention. All must provide written documentation of immunization.
There is a policy in place that addresses the daily informal screening for illness based on criteria established by the DoD Component. This policy also addresses admission back into the CDP after an illness.
There is a policy in place that addresses food or other allergies, special accommodations, or potentially life-threatening conditions.
Individual medical problems and accidents are recorded and reported to management staff and families, and a written record is kept of such incidents.
Only physician-prescribed medications are administered; medications are only given with the written approval of the child's parents; and medications given are documented.
Providers have documented parental permission to apply basic topical care items such as sunscreen, insect repellant, and lotion.
A plan exists for dealing with medical emergencies that include written parental consent forms, and transportation arrangements approved by the DoD Component.
Policies and procedures are followed for administering and storing medication. Designated staff are trained to administer medications, and the training is updated annually or as required by state laws.
The facility is cleaned daily, and as needed throughout the day. Food preparation areas, bathrooms, diapering areas, hand-washing facilities, and drinking fountains are sanitary.
A sink with running water at a comfortable temperature of no more than 110 degrees temperature is very close to bathrooms and diapering areas.
Staff and children wash hands before and after eating, after toileting and diapering, after handling animals, after entering the facility from outdoors, before water play, after wiping their nose, and after any other activity when the hands become contaminated. Signs are posted reminding staff and children of proper hand-washing procedures.

TABLE 1—CDC AND SCHOOL-AGE PROGRAMS STANDARDS OF OPERATIONS—Continued

Staff and volunteers follow universal precautions to prevent transmission of blood-borne diseases and the program has a blood-borne pathogen procedure, as required by the Occupational Safety and Health Administration (OSHA).
The program requires parents to provide proper attire for active play indoors and outdoors.
At least one staff member, who has certification in first aid treatment, including CPR for infants and children and emergency management of choking, is always present. Current certificates are kept on file.
Health and Sanitation: CDC ONLY
Infant equipment is washed and disinfected at least daily. Toys that are mouthed are removed immediately after mouthing and are washed and sanitized prior to being used by another child.
Individual bedding is washed at least once a week and used by only one child between washings. Individual cribs, cots, and mats are washed if soiled.
Diapering procedures are in accordance with national recommendations and are posted in diapering areas.
Sinks used for diapering are not co-located with food service areas or the sink used for dishwashing.
D. Fire and Safety
Fire and Safety: Both CDC and SAC
Comprehensive fire and safety inspections have been completed within the last 12 months, corrective actions have been completed per specified timelines, and the inspection reports are available for review.
A safety walk-through of all play areas is conducted daily. Safety concerns are identified, documented, and corrected immediately or put off limits to children until they can be corrected.
The building, playground, and all equipment are maintained in safe, clean condition, are in good repair, and there are no observable safety hazards in the indoor and outdoor program space.
Stairways and ramps are well lighted and equipped with handrails, where appropriate.
Fire extinguishers, smoke detectors, and carbon monoxide detectors, where required, are in working order, and documentation shows status is checked monthly.
Adequate first aid supplies are readily available and maintained. First aid supplies are available during field trips and outings.
Toys and materials do not present a choking hazard for children under age 3 years.
Chemicals and potentially dangerous products, such as medicine or cleaning supplies, are stored in original, labeled containers in locked cabinets inaccessible to children. Diluted bleach solution must be accessible to staff in an unlocked location, but inaccessible to children.
There is a written plan for reporting and managing emergencies, including terrorist attacks, severe storm warnings, medical and pandemic emergencies, or a lost or missing child, which includes shelter in place and evacuation procedures. Staff and volunteers understand the plan.
Evacuation drills are conducted monthly at different times of the day or evening when children are in care. The drills are documented.
Emergency telephone numbers including police, fire, rescue, and poison control services are posted by telephones and are available at all times.
Staff and regular volunteers are familiar with primary and secondary evacuation routes and practice evacuation procedures monthly with children.
A system is in place to keep unauthorized people from taking children from the program.
Smoking and use of tobacco is not permitted in the facility or in the sight or presence of children.
Fire and Safety: CDC ONLY

TABLE 1—CDC AND SCHOOL-AGE PROGRAMS STANDARDS OF OPERATIONS—Continued

Cribs meet the current CPSC guidelines.
CPSC crib safety guidelines are followed: infants are placed on their backs for sleeping; soft cushions, such as pillows, comforters, thick blankets, quilts, or bumper pads are not used in cribs.
E. Parent Involvement/Participation
Parent Involvement/Participation: Both CDC and SAC
Parents have access to their children at all times, are helped to feel welcome and comfortable, and are treated with respect.
Written information is available to families, including operating policies and procedures, program philosophy, and a parent participation plan.
Programs are encouraged to include the culture and language of the families they serve. Families are encouraged to share their heritage and culture.
Parents are offered a program orientation as a part of the child enrollment process.
Parents are informed about the program and curriculum and about policy or regulatory changes and other critical issues that could potentially affect the program, through newsletters, bulletin boards, technology, and other appropriate means.
Families are encouraged to participate in the planning and evaluation of the CDC and SAC programs with regards to their child's care and development. They are encouraged to be involved in the program in various ways, taking into consideration working parents and those with little spare time.
There is a parent board that meets on a scheduled basis through in-person or virtual meetings. The board meets periodically to provide opportunities for families to have input regarding policies, procedures, and plans for meeting children's needs.
Staff work in collaborative partnerships with families, establishing and maintaining daily or ongoing two-way communication with children's parents to build trust, share changes in a child's physical or emotional state regularly, facilitate smooth transitions for children, and ensure that children's learning and developmental needs are met.
Policies ensure that staff and parents have an effective way of negotiating difficulties and differences that arise in their interactions.
Programs inform families on how to increase physical activity, improve nutrition, and reduce screen time (TV, video games, computers, etc.).
The program provides information to parents to ensure that each child has routine health assessment by the child's primary care provider, according to standards of the AAP, to include evaluation for nutrition-related medical problems.
Parent Involvement/Participation: CDC ONLY
Conferences are held at least once per year and at other times, as needed, to discuss children's progress, accomplishments, and difficulties at home and at the program.
F. Learning Activities and Interaction with Children
Both CDC and SAC
Learning activities reflect the program's written statement of its philosophy and goals for children. This statement is available to all staff and families.
The program is designed to reasonably accommodate and be inclusive of all children, including those with identified disabilities as well as special learning, medical, and developmental needs.
Programs have established a planned program of developmentally appropriate activities that recognizes the individual differences of children and provides an environment that encourages children's self-confidence, self-help, life skills, curiosity, creativity, and self-discipline.
Staff include age-appropriate nutrition education activities in the curriculum.
The daily schedule provides a balance of activities in consideration of the child's daily routine and experience.

TABLE 1—CDC AND SCHOOL-AGE PROGRAMS STANDARDS OF OPERATIONS—Continued

Staff are engaged and interact frequently with children, speaking in a friendly, positive, and courteous manner, respectful of gender, race, religion, family background, special needs, and culture. The physical environment supports these interactions.
Staff conduct smooth and unregimented transitions between activities and are flexible in changing planned or routine activities, as appropriate. Infants and toddlers are not expected to function in large group activities.
Staff use a variety of teaching strategies to enhance children's learning and development throughout the day.
Staff addresses bullying and supports positive behavior by modeling appropriate behavior, responding consistently to issues, and encouraging children to resolve their own conflicts, when possible and appropriate.
The outdoor environment meets the needs of children, allows them to be independent and creative, and have access to a variety of age-appropriate outdoor equipment and games. Staff plan and participate in children's active play.
Program materials are in good condition, sufficient for the number of children in the program, developmentally appropriate for the age of the children, and appropriate to the activities offered.
Screen time and the use of passive media is limited and developmentally appropriate. Media viewing and computer use is not permitted for children younger than 2 years.
CDC Only
There is a DoD Component-approved curriculum that supports school readiness. It is based on knowledge of child and youth development and learning, and assessment of individual needs and interests.
Developmentally appropriate activities emphasize concrete experiential learning and promote development in six developmental domains: social, physical, language and literacy, cognitive and intellectual, emotional, and cultural.
Individual observations of children's development and learning are written, compiled, assessed, and are used as a basis for planning appropriate learning activities.
Staff plan with families to make toileting, feeding, and the development of other self-regulation skills a positive experience for children.
SAC Only
Developmentally appropriate activities encourage physical fitness; positive self-esteem; intellectual, social, and physical achievement; leadership skills and initiative; lifelong recreation skill; positive use of leisure time; moral development and community leadership; self-reliance and independence; and respect for diversity.
SAC daily schedules are flexible, provide stability without being rigid, allow youth to
meet their physical needs (e.g., water, food, restrooms) in a relaxed way, allow children to move smoothly from one activity to another (usually at their own pace), and facilitate smooth transitions when it is necessary for children to move as a group.
Appropriate protected internet access and programs that teach technology are available.
G. Nutrition and Food Service
Both CDC and SAC
Meals and snacks are a pleasant, social learning experience for children.
The DoD Components will establish policies that are consistent with USDA guidelines for meals provided by parents. Under limited circumstances when meals are provided by parents, food storage and handling procedures are approved by local health and sanitation authorities.
Unless documented circumstances approved by the DoD Component prevent enrollment, all programs must enroll in the USDA CACFP (United States Department of Agriculture Child and Adult Care Food Program).

TABLE 1—CDC AND SCHOOL-AGE PROGRAMS STANDARDS OF OPERATIONS—Continued

Dietary modifications are made on the basis of recommendations by the child's primary medical care provider and are documented. Documentation is available for religious and medical dietary substitutions. Menus contain some vegetarian meals.
The program provides or posts menus showing all foods to be served during that month. Core and cyclical menus are approved by a nutritionist or registered dietician. Foods typical of the child's culture and religious preferences, as well as a variety of healthful foods that may not be familiar to the child, are included.
The program provides healthy meals and snacks that include restrictions on the provision of juice and beverages with added sweeteners and no fried, high-fat, or highly salted foods.
Meals and snacks are conducted using family-style dining. In SAC programs, snacks may be served buffet style.
CDC Only
The program encourages, provides arrangements for, and supports breastfeeding.
There is an accountability system in place for bottles, including bottles for breast milk. Bottle-feeding is done in such a way as to minimize disease and promote interaction. Infants are held for bottle-feeding, bottles are never propped, never heated in a crock pot or microwave, and infants are never put to sleep with a bottle.
One adult should not feed more than one infant for bottle feeding, two children in high chairs, or three children who need assistance with feeding at the same time.
H. Supervision of Children
Both CDC and SAC
The following staffing requirements are met at all times, except during nap time (for CDC): a. For infants from birth to 12 months, there are never more than four children per staff member. b. For pre-toddlers 13 months to 24 months, there are never more than five children per staff member. c. For toddlers, 25 months to 36 months, there are never more than seven children per staff member. d. For children 37 months through 5 years, there are never more than twelve children per staff member. e. For children 6 years through 12 years, there are never more than fifteen children per staff member.
During rest time, the staff-to-child ratios for children over 24 months of age may increase to twice the non-napping staff-to-child ratio. Sufficient staff are required to remain in the building during rest time to meet the non-napping ratios and be available to assist with emergencies.
The following maximum group sizes are followed at all times: a. For infants birth to 12 months, there are never more than eight children per group. b. For pre-toddlers 13 months to 24 months, there are never more than ten children per group. c. For toddlers, 25 to 36 months, there are never more than fourteen children per group. d. For children thirty-seven months through five years, there are never more than twenty-four children per group. e. For SAC, there are never more than thirty children per group.
In multi-age groupings, the Service may follow the ratio per age group. For example, four infants and five pre-toddlers equal a group of nine with two direct care personnel, or seven toddlers and twelve preschoolers equal a group of nineteen with two direct care personnel.
Volunteers or persons under 18 years of age may not be counted in determining compliance with staff-to-child ratios and are not allowed to work alone with children.
The program has an accountability system in place. Each staff member has primary responsibility and accountability for a group of children. There is specific accountability for each child by one staff member. Systems are in place for accounting for children's whereabouts, especially during periods of transition and emergencies.

TABLE 1—CDC AND SCHOOL-AGE PROGRAMS STANDARDS OF OPERATIONS—Continued

Children are released only to their parents or guardian. Children may be released to a designee when signed permission is given by the parent or guardian.
Families are notified about procedures and policies for field trips. Families are notified of all activities outside the center.
Children are under adult supervision at all times. Staff are not permitted to use personal electronic devices (including, but not limited to cell phones, iPods, smart phones, etc.) when supervising children.
CDC Only
At least two staff members must be present with each group of children at all times. When one staff person is alone with a single ratio of children, the program director or designee frequently monitors the room through closed circuit television or visual access panels to ensure oversight by more than one adult. In this case, the staff member must have an initiated National Agency Check Investigation (NACI) and the program director or designee must have a completed NACI.
Infants and toddlers spend the majority of the time interacting with staff who have primary responsibility for them each day.
SAC Only
At least two paid staff members shall be present whenever children are in the facility.
Adult volunteers may supplement paid staff during field trips and other activities away from the facility. Only paid staff are counted in the ratio.
Signed permission is given by the parent allowing the child to self-release for a specific organized activity. Self-release procedures are consistent with the installation home alone policy or self-care policy.
I. Child Abuse Prevention and Reporting
Both CDC and SAC
A NACI to include a name-based criminal history record check (State and Federal) and fingerprint check has been initiated on all staff. Background checks are tracked to ensure completion in a timely manner.
All individuals in a CDP who have contact with children have completed a DD Form X656 ''Basic Criminal History and Statement of Admission''
Updates to the background checks are completed every five years.
Newly hired staff without a completed background check are readily identifiable and work within line of sight of a staff member with a completed check.
Hiring practices include careful checking of references of all potential employees and volunteers.
The program has a written guidance, discipline, and touch policy that is available to staff and families. Staff do not use corporal punishment or other negative discipline methods that hurt, humiliate, or frighten children.
The program has a child abuse and neglect policy that includes reporting requirements for staff as well as procedures to be followed should a staff member be accused of abuse or neglect. This information is included in employee handbooks. All staff are knowledgeable of the policy.
The DoD Child Abuse and Safety Hotline telephone number is displayed in a highly visible area where parents can see it. The telephone number is published in parent handbooks and other brochures.
The facility is designed in accordance with the Unified Facilities Criteria (UFC) 4–740–14, ''Design: Child Development Centers,'' to help minimize the risk of child abuse: a. Access to children by those not employed by the program is restricted. b. Areas to which a child or children can be taken out of view of others are limited. c. All exit doors that do not open onto a fenced area have operating alarms, except the main entrance to the facility and the kitchen entrance.

TABLE 1—CDC AND SCHOOL-AGE PROGRAMS STANDARDS OF OPERATIONS—Continued

d. Evening or weekend care is provided in rooms located near the front entryway to facilitate additional supervision by the front desk staff and parents.
e. In the CDC:
1) Children can be observed at all times by parents and supervisors.
2) There is visual access into and throughout activity rooms used for care, including nap time. Closed-circuit television, vision panels, and convex mirrors are used as necessary to facilitate visual access.
3) Diapering areas are visible.
All persons other than employees and family members bringing in or picking up children sign in and out at the front desk or with appropriate personnel. Visitors to the CDP shall sign in and out of the facility and wear a visitors badge at all times while they are in the facility or on playgrounds.
If transportation is provided for children by the program, vehicles are equipped with age-appropriate restraint devices in accordance with State and Federal requirements. The program maintains documentation that vehicles used in transporting children are appropriately licensed, inspected, and maintained. A current copy of the appropriate driver's license and Department of Motor Vehicles driving record is on file for staff members who transport children.
In SAC programs, a procedure for accountability when a child fails to show for the program is in place and followed.

TABLE 2—FCC STANDARDS OF OPERATION

A. Administrative
The installation regulates FCC in accordance with DoD Component requirements, ensuring care is not permitted unless subject to inspection and approval.
Processes are in place to support recruitment and retention of FCC providers.
Unannounced inspections are conducted by program staff following complaints.
B. Home
Where applicable, the DoD Component has a process to register and certify homes located off the installation or in privatized government housing.
The Certificate to Operate, issued by the DoD Component or designee, is displayed in a prominent location.
Providers can demonstrate proof of current liability insurance.
There is a signed contract between each family and provider. Parents are informed of changes in the provider's household composition.
Children are cared for by the provider or an approved substitute. Parents and the FCC administrator are informed when a substitute provider will be caring for their children. Civilian members of the provider's household providing care as a substitute must be approved and trained. Active duty Military Service members may serve as substitute providers only under circumstances approved by the DoD component.
There is adequate space indoors and outdoors in the home for the number of children in care to play, rest, and eat.
C. Health and Sanitation
On installations, comprehensive fire, safety, and sanitation inspections have been completed within the last 12 months, and the inspection reports are available for review.
The provider notifies parents and FCC of medical emergencies, communicable diseases or illness of the children, the provider, or the provider's family member(s). Health consultants will be informed based on installation policy.
Children are informally screened daily for illness based on criteria established by the DoD Component. Children are readmitted after illness only when their presence no longer endangers the health of other children.

TABLE 2—FCC STANDARDS OF OPERATION—Continued

Only physician-prescribed medications are administered; medications are only given with the written approval of the child's parents; and medications given are documented.
Providers have documented parental permission to apply basic topical care items such as sunscreen, insect repellant, and lotion.
Procedures for diapering, hand washing, and toileting are followed in accordance with national recommendations.
Providers follow universal precautions to prevent transmission of blood-borne diseases, and the provider has a blood-borne pathogen procedure, as required by OSHA.
Providers and children wash hands before and after eating, after toileting and diapering, after handling animals, after entering the home from outdoors, before water play, after wiping their nose, and after any other activity when the hands become contaminated. Signs are posted reminding providers and children of proper hand-washing procedures.
Homes are maintained in a sanitary manner.
Individual bedding is washed at least once a week and used by only one child between washings. Individual cribs, cots, and mats are washed if soiled.
Infant equipment is washed and disinfected at least daily. Toys that are mouthed are removed immediately after mouthing and are washed and sanitized prior to being used by another child.
All windows used for ventilation are properly screened.
Providers do not consume alcohol while children are in care.
Smoking is not permitted in the home or outdoor area while children are in care.
D. Fire and Safety
There are policies in place to ensure the home operates to protect children against the risk of fire and safety hazards.
There is a policy to keep children protected from hazards stemming from poisoning, toxic materials, electrical shock, standing water, unsafe playground equipment, and strangulation.
There is a written plan for reporting and managing emergencies, including terrorist attacks, severe storm warnings, medical and pandemic emergencies, or a lost or missing child, which includes shelter in place and evacuation procedures. Providers and volunteers understand the plan.
First aid supplies are readily available for emergencies and maintained.
Evacuation drills are conducted monthly at different times of the day or evening when children are in care. The drills are documented.
There is a working landline or cellular phone within the home. Emergency telephone numbers including police, fire, rescue, and poison control services, and instructions are accessible or kept with the telephone(s).
Providers use safety gates to prevent children from falls. Door locks that can entrap children inside a bathroom or bedroom may be opened from the outside.
If there are firearms in the home, the ammunition must be removed from the firearm. Firearms and ammunition are stored separately in locked cabinets that are inaccessible to children.
Young infants are placed on their backs for sleeping to lower the risk of SIDS. Soft cushions, pillows, thick blankets, and comforters are not used in cribs.
Providers shall not permit children to sleep in family beds unless a separate bed is designated for the child and clean linens are provided.
Cribs meet CPSC guidelines. The sides of infants' cribs shall be in a locked position when cribs are occupied and do not present a strangulation or entrapment hazard.
Providers inform parents if they will be taking children from the home while they are in care.
If transportation is provided for children by the provider, age-appropriate restraint devices are used, and appropriate safety precautions are taken.
A current copy of the driver's license and proof of insurance is on file for providers who transport children.
E. Parent Involvement/Participation
Parents are given access to the home at all times when their children are present.
Parents are provided with a copy of policies governing FCC.

TABLE 2—FCC STANDARDS OF OPERATION—Continued

The provider communicates regularly with parents and recognizes them as partners in the care of children, and there is a prominent place to display information for parents.
Parents are provided with information about the importance of routine health supervision by the child's primary care provider, according to standards of the AAP, to include evaluation for nutrition-related medical problems.
F. Learning Activities and Interaction with Children
Activities and experiences are provided daily that enhance children's physical, social, emotional, and cognitive development.
Activities include age-appropriate nutrition education.
There are enough toys and materials, home-made or purchased, to engage all the children in developmentally appropriate ways.
Toys, materials, and equipment are in good repair and are arranged so children are able to select and put toys and materials away with little or no assistance.
A variety of daily activities is planned for indoors and outdoors. There is a balance between child-initiated and adult-directed activities. A daily schedule of activities is posted for parents to see.
The provider plans and participates in children's active play.
The provider interacts frequently with the children and shows them affection and respect. The provider speaks to children in a friendly, courteous manner.
Children's routines are handled in a relaxed and individualized manner that promotes respect and opportunities to develop self-esteem, self-discipline, and learning by doing.
Screen time (e.g., non-active video games) and the use of passive media, (e.g., television, audio tapes), are limited and developmentally appropriate. Media viewing and computer use are not permitted for children younger than 2 years.
The provider observes and evaluates each child's growth and development for program planning.
G. Nutrition and Meal Service
Unless documented circumstances prevent enrollment, providers are offered the opportunity to enroll in the USDA CACFP and all meals and snacks are prepared, handled, transported, and served according to USDA CACFP guidelines found in 7 CFR part 226.
Providers develop written menus showing all foods to be served during that month, and the menus are available to parents and guardians. Menus are posted for meals and snacks.
Dietary modifications are made on the basis of recommendations by the child's primary care provider and are documented. Documentation is available for religious and medical dietary substitutions. Menus contain some vegetarian meals.
Meals and snacks include restrictions on the provision of juice and beverages with added sweeteners and limited high-fat and salted foods.
Food is prepared, served and stored in a sanitary manner. If meals are provided by parents, food storage and handling procedures are approved by local health and sanitation authorities.
All children present are served meals or snacks. Meals and snacks for toddlers, preschool, and school-age children use family-style dining.
Bottle-feeding is done in such a way as to minimize disease and promote interaction. Infants are held for bottle-feeding. Bottles are never propped, never heated in a crock pot or microwave, and infants are never put to sleep with a bottle.
There is an accountability system in place for bottles, including bottles for breast milk.
The provider encourages, provides arrangements for, and supports breastfeeding. There is an accountability system in place for bottles.
H. Supervision of Children
The maximum group size in a home is six children per provider, including the provider's own children under the age of eight.

TABLE 2—FCC STANDARDS OF OPERATION—Continued

a. When all children are under the age of two, the maximum group size at any one time is three.
b. In mixed-age groups, the number of children under two years of age is limited to two children.
c. When all children are school-age, the maximum group size is eight.

Parents sign children in and out of the home on a daily basis. Children are only released to persons that parents have authorized in writing. Children may sign themselves out of the home consistent with the installation home alone policy or self-care policy and parental consent.

Providers supervise all children in care both inside and outdoors. School-age children may be outside without direct supervision as long as they are within sight or sound of the provider.

I. Child Abuse Prevention and Reporting

Providers, substitute providers, and individuals age 18 and older living in the home, must complete a background check annually.

All individuals in a CDP who have contact with children have completed a DD Form X656 ''Basic Criminal History and Statement of Admission''.

The DoD Child Abuse and Safety Hotline telephone number is displayed in a highly visible area where parents can see it. The telephone number is published in parent materials.

Children are never left alone with a visitor or another adult who is not authorized to care for children.

There is a guidance policy in place, and providers do not use corporal punishment or other negative discipline methods that hurt, humiliate, or frighten children.

TABLE 3—ERIS

Oversight

The State Child Care Licensing/Regulating Agency conducts an annual on-site inspection of the facility and program.

SCR 01—Staff-Child Ratio/Group Size (SCR)

	Standard
SCR 01.01	RATIO (number of children per child care provider/staff). Ratios must be equal to or lower than: 1:4 or less for infants (birth to 12 months). 1:5 or less for pre-toddlers (13–24 months). 1:7 or less for toddlers (25–36 months). 1:12 or less for preschool (37 months-5 years). 1:15 or less for school age (6–12 years).
SCR 01.02	GROUP SIZE (the total number of children within various age groups). Group size must be equal to or lower than: Eight or less for infants (birth to 12 months) with two caregiving staff per eight infants. Ten or less for pre-toddlers (13–24 months) with two caregiving staff per ten pre-toddlers. Fourteen or less for toddlers (25–36 months) with two caregiving staff per fourteen toddlers. Twenty four or less for preschool (27 months–5 years) with two caregiving staff per twenty four preschoolers. Twenty four/thirty or less for school age (6–12 years) with two caregiving staff per twenty four/thirty school agers.

TABLE 3—ERIS—Continued

SCR 01.03	MULTI–AGE GROUPINGS (more than one age group in a room). No more than TWO AGE GROUPs may be combined within 18 month range (THIS DOES NOT APPLY TO SAC). Each age group is represented by appropriate ratio. Examples: two caregiving staff: four infants and five pre-toddlers; twp caregiving staff: five pre-toddlers and seven toddlers; two caregiving staff: seven toddlers and twelve preschoolers.
BAC 02—Background Check/Child Abuse Prevention (BAC)	
	Standard
BAC 2.01	Background checks are completed and documented for each employee or regular volunteer who is in contact with children, including management, administration, classroom, support staff, and individuals contracted for hire.
BAC 02.02	Background checks are renewed and documented every 5 years for each employee or regular volunteer who is in contact with children, including management and administration, classroom staff, and support staff.
BAC 02.03.a	Background checks include documentation of State Criminal History Repository completed for all states that an employee or prospective employee lists as current and former residences, in an employment application by using fingerprints.
BAC 02.03.b	Background checks include documentation of FBI fingerprint check and name-based criminal history records check of law enforcement records completed for any States lived in by applicant during the past 5 years.
BAC 02.03.c	Background checks include documentation of a review of the State Child Abuse Registry.
BAC 02.03.d	Background checks include a review of the State Sex Offender Registry.
BAC 02.04	Each employee and regular volunteer is trained annually about child abuse prevention, common symptoms, and signs of child abuse.
BAC 02.05	All employees and regular volunteers are trained annually on HOW to report, WHERE to report, and WHEN to report possible child abuse or neglect.
SR 03—Staff Requirements (SR)	
	Standard
SR 03.01.a	Director has a minimum of a Bachelor's Degree (BA) in childhood education, child development, social work, nursing, or other child-related field AND experience working with the age groups enrolled in the program. In the event that the director does not have a BA degree in those areas, the director must have an AA degree and must be working toward the completion of a BA degree.
SR 03.01.b	The director is not responsible for a classroom of children.
SR 03.02	The direct care personnel are at least 18 years old and have a high school diploma or a graduation equivalency diploma (GED).
TRG 04—Training Requirements (TRG)	

TABLE 3—ERIS—Continued

Standard	
TRG 04.01	Orientation is provided for each staff member and includes training on the following: early childhood development and education; child abuse recognition, prevention, and reporting; safety; first aid; proper hygiene; and positive guidance.
TRG 04.02.a	There is an annual training plan for directors. Topics shall include, but are not limited to: Child abuse prevention and positive guidance. Universally accepted health and safety practices to include hand washing. Emergency preparedness and evacuation procedures. Social and emotional needs of children. Developmentally appropriate practices. General management practices, such as financial management, facility management, staff development, and working with parents. Safe sleep practices.
TRG 04.02.b	There is an annual training plan for staff that include topics such as: Child abuse prevention and positive guidance. Universally accepted health and safety practices to include hand washing. Social and emotional needs of children. Developmentally appropriate practices.
TRG 04.03	Staff complete forty hours of initial orientation training within the first three months.
TRG 04.04	Staff are required to complete at least 24 hours of training per year.
TRG 04.05	At least one staff member certified in emergency pediatric first aid treatment, including CPR for infants and children and emergency management of choking, is present in the facility during hours of operation.

IMM 05—Immunizations (IMM)

Standard	
IMM 05.01	Children's records include EITHER: Documentation of current age-appropriate immunizations, as recommended by the AAP; OR A letter of exception on file and a statement of medical religious exception.
IMM 05.02	Staff files include a copy of a TB screening. Also included is documentation of a general health assessment or a physical examination completed during employment in-processing. Information is available at: *http://www.cdc.gov/media/.*

SUP 06—Supervision/Guidance (SUP)

Standard	
SUP 06.01.a	The written policies and practices of the program specify that staff supervise children at all times, including nap times. No child is left alone or unsupervised.
SUP 06.01.b	The written policies and practices of the program specify that children are released only to persons listed on the child's registration form or for whom the parents have provided written authorization.
SUP 06.01.c	The written policies and practices of the program specify that parent, or authorized adult, signs children in and out upon arrival and departure each day, and attendance records are kept.

TABLE 3—ERIS—Continued

	A system is in place for accounting for school-age arriving from school or other activities without the parent (for example, children transported to the program by a school bus).
SUP 06.02	Organizational policy prohibits: punishment by spanking or hitting or other physical means, to include corporal punishment; isolation from adult sight; confinement, binding, humiliation, or verbal abuse; deprivation of food and water, outdoor play or activities, or other program components; inappropriate touch; and punishment for lapses in toilet training or refusing food.
DRL 07—Evacuation and Fire Drills (DRL)	
	Standard
DRL 07.01	The program has a written plan for emergency evacuation (for example, a plan for evacuating building occupants in case of fire, tornado, earthquake, hurricane, or other disaster that could pose a health and safety hazard).
DRL 07.02	Procedures are in place to ensure all children in attendance are accounted for during an evacuation drill or event.
DRL 07.03	There is an automatic fire detection and alarm system in place, and it is operational.
DRL 07.04	A fire extinguisher is accessible and in operating condition.
DRL 07.05	Fire and emergency evacuation drill procedures are practiced at least monthly.
HWD 08—Hand Washing and Diapering (HWD)	
	Standard
HWD 08.01	Policies are in place to ensure staff and children wash their hands with soap and warm running water: Before eating or food preparation. After toileting or changing diapers. After handling animals, and after any other activity when the hands may become contaminated to include returning from outside.
HWD 08.02	Toileting and diapering areas are not located in food preparation areas. The areas are in easily visible locations and are sanitary.
MED 09—Medication and Health (MED)	
	Standard
	If the program does not administer medications, proceed to 09.02.
MED 09.01.a	The program has a written policy and clear procedures on administering medicine, proper storage, and labeling.
MED 09.01.b	If medication (prescription and/or over-the-counter) is administered, written parental permission is kept on file and instructions from a physician are required (“N/A” is allowed if no children currently receive medication).
MED 09.01.c	Designated staff are trained to administer the medicine, and the training is updated annually.
MED 09.02	First aid kits are readily available and maintained.
MED 09.03.a	Programs provide healthy meals and snacks consistent the U.S. Dietary Guidelines and are encouraged to participate in the USDA CACFP.
MED 09.03.b	Programs are encouraged to limit sugar-sweetened juices, beverages, and snacks, and high-fat and high-salt foods.

TABLE 3—ERIS—Continued

MED 09.04	Bottle-feeding is done in such a way to minimize disease and promote interaction. For example, infants are held for bottle-feeding, bottles are never propped, never heated in a crock pot or microwave, and infants are never put to sleep with a bottle.
EMG 10—Emergency Plan/Contact Information (EMG)	
	Standard
EMG 10.01.a	There is a written plan for reporting and managing a lost or missing child.
EMG 10.01.b	There is a written plan for reporting and managing injuries requiring medical or dental care, including hospitalization or serious injury.
EMG 10.01.c	There is a written plan for reporting and managing abuse or neglect of a child.
EMG 10.01.d	There is a written policy that requires all parents to provide emergency information to include: Multiple contact phone numbers (work, cellular, home). Emergency contact phone numbers (relatives or friends) authorized to pick up the child if parent cannot be reached. The child's physician, dentist, and emergency room preference.
OUT 11—Outdoor Play Area (OUT)	
	Standard
OUT 11.01	The playground and all equipment are maintained in safe, clean condition, in good repair, and there are no observable safety hazards and no entrapment areas.
OUT 11.02	Playground equipment is surrounded by resilient surfaces (e.g., fine, loose sand, wood chips, wood mulch) of an acceptable depth (9 inches) or by rubber mats manufactured for such use.
OUT 11.03	The playground equipment is arranged to ensure that a child is visible and supervision is maintained.
OUT 11.04	There is a plan to check and inspect playgrounds on a weekly basis. Each staff member is responsible for immediately reporting hazards or unsafe areas to the director.
HAZ 12—Hazardous Materials and General Safety (HAZ)	
	Standard
HAZ 12.01	Accident protection and liability insurance coverage are maintained for children and adults.
HAZ 12.02	All chemicals and potentially dangerous products, such as medicine or cleaning supplies are stored in original, labeled containers in locked cabinets inaccessible to children.
HAZ 12.03	Poisonous or potentially harmful plants on the premises are inaccessible to children.
HAZ 12.04	Children are protected from accidental drowning by limiting access to all bodies of water.
HAZ 12.05	Electrical outlets are covered in all areas accessible to children, including corridors.
HAZ 12.06	Toys and art supplies are made of safe, non-toxic, durable, and cleanable materials.
HAZ 12.07	There are no items that could cause choking or strangulation. Additional information is available at: *http://www.cpsc.gov/.*

TABLE 3—ERIS—Continued

HAZ 12.08.a	Infants are placed on their backs for sleeping to lower the risk of SIDS.
HAZ 12.08.b	Staff make sure that soft surfaces such as pillows, quilts, thick blankets, and soft bumpers are not used in the crib.
HAZ 12.09	The building has been inspected for dangerous substances such as lead, radon, formaldehyde, asbestos, etc., in accordance with State requirements.
PAR 13—Parent Involvement (PAR)	
	Standard
PAR 13.01	Families are offered an orientation and information prior to enrolling to include: hours of operation, enrollment policies, program costs, inclusion of special needs children, and opportunities for parent involvement.
PAR 13.02	The program policy clearly includes open door policy; family members are welcome visitors in the program at all times.
PAR 13.03	The program provides opportunities for communication between parents and staff verbally or in writing on a daily basis.
DEV 14—Developmentally Appropriate Environment and Materials (DEV)	
	Standard
DEV 14.01	Classrooms are arranged to facilitate a variety of activities for each age group and provide areas where children can play and work independently or with friends.
DEV 14.02	Classrooms are well lit, ventilated, and kept at a comfortable temperature.
DEV 14.03.a	Staff offer a variety of developmentally appropriate activities and materials for children indoors and outdoors that are respective of children's race, gender, religion, family background, culture, age, and special needs and include: Language and literacy. Physical development. Health, safety, and nutrition. Creative expression. Cognitive development. Social and emotional development.
DEV 14.03.b	Weekly classroom schedules include opportunities for alternating periods of quiet and active play, child-initiated and teacher-initiated activity, and individual, small group, and large group activities. Schedules are available for parents to review.
DEV 14.03.c	Programs provide an opportunity for physical activity on a daily basis.
DEV 14.03.d	Screen time (e.g., non-active video games) and the use of passive media (e.g., television, audio tapes) are limited and developmentally appropriate.

PART 86—BACKGROUND CHECKS ON INDIVIDUALS IN DOD CHILD CARE SERVICES PROGRAMS

Sec.

86.1 Purpose.
86.2 Applicability.
86.3 Definitions.
86.4 Policy.
86.5 Responsibilities.
86.6 Procedures.

AUTHORITY: 5 U.S.C. 2105, 10 U.S.C. chapter 47, and 42 U.S.C. 13041.

SOURCE: 80 FR 55756, Sept. 17, 2015, unless otherwise noted.

§ 86.1 Purpose.

This part establishes policy, assigns responsibilities, and provides procedures to conduct criminal history checks on individuals involved in the provision of child care services for children under the age of 18 in DoD programs.

§ 86.2 Applicability.

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

§ 86.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purposes of this part.

Adjudication. The evaluation of pertinent data in a background investigation, as well as any other available information that is relevant and reliable, to determine whether an individual is suitable for work.

Adult. An individual 18 years of age or older regarded in the eyes of the law as being able to manage his or her own affairs.

Applicant. A person upon whom a criminal history background check is, will be, or has been conducted, including individuals who have been selected or are being considered for a position subject to a criminal history background check, and individuals undergoing a recurring criminal history background check. Includes current employees.

Child. A person under 18 years of age.

Care provider. Current or prospective individuals hired with appropriated funds (APF) and nonappropriated funds (NAFs) for education, treatment or healthcare, child care or youth activities; individuals employed under contract who work with children; and those who are certified for care. Individuals working within programs that include: Child Development Programs, DoD dependents schools, DoD-operated or -sponsored activities, foster care, private organizations on DoD installations, and youth programs.

Child care services. Care or services provided to children under the age of 18 in settings including child protective services (including the investigation of child abuse and neglect reports), social services, health and mental health care, child (day) care, education (whether or not directly involved in teaching), foster care, residential care, recreational or rehabilitative programs, and detention, correctional, or treatment services, as defined in 42 U.S.C. 13041.

Class. With regard to the designation of positions, a categorical descriptor identifying employee, contractor, provider, or volunteer positions by group rather than by individual position or title (*e.g.*, ''doctors'' or ''individuals supervising children in a school'').

Contractor. Any individual, firm, corporation, partnership, association, or other legal non-Federal entity that enters into a contract directly with DoD or a DoD Component to furnish supplies, services, or both including construction. Foreign governments or representatives of foreign governments that are engaged in selling to DoD or a DoD Component are defense contractors when acting in that context. A subcontractor is any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime contractor or another subcontractor.

Covered position. Defined in volume 731 of DoD Instruction 1400.25, ''DoD Civilian Personnel Management System'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/140025v731.pdf*).

Criminal history background checks. A review of records, investigative reports, and other investigative elements to generate criminal history background findings to be used to make fitness or suitability determinations.

Derogatory information. Information that may reasonably justify an unfavorable personnel suitability or fitness determination because of the nexus between the issue or conduct and the core duties of the position.

DoD affiliation. A prior or current association, relationship, or involvement

with the DoD or any elements of DoD, including the Military Departments.

DoD-sanctioned programs. Any program, facility, or service funded, or operated by the DoD, a Military Department or Service, or any agency, unit, or subdivision thereof. Examples include, but are not limited to, chapel programs, child development centers, family child care (FCC) programs, medical treatment facilities, Department of Defense Education Activity (DoDEA) schools, recreation and youth programs. These do not include programs operated by other State or Federal government agencies or private organizations without the official sanction of a DoD entity.

Duties. Those activities performed as an employee, contractor, provider, or volunteer that involve interaction with children, including any work performed in a child development program or DoDEA school.

Employee. An individual, paid from funds appropriated by the Congress of the United States, or an individual employed by a NAF instrumentality in accordance with 5 U.S.C. 2105(c). Includes foreign nationals in accordance with Volume 1231 of DoD Instruction 1400.25, ''DoD Civilian Personnel Management System'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/1400.25–V1231.pdf*), Military Service members working during their off-duty hours, and non-status, non-continuing temporary positions with specified employment periods not to exceed 1 year such as summer hires, student interns, and seasonal hires.

FAP. Defined in DoD Directive 6400.1, ''Family Advocacy Program (FAP)'' (available at *http://www.dtic.mil/ whs/directives/corres/pdf/ 640001p.pdf*).

FAP records check. A review of FAP records maintained on an individual, including records maintained by the installation office and records in the Service Child and Spouse Abuse Central Registry in accordance with DoD Directive 6400.1. If the individual is the spouse or dependent of a Service member, this may entail review of records maintained on the sponsoring Service member. Installation and Service Central Registry checks are limited to identifying pending and met criteria incidents of maltreatment and do not include information related to incidents that did not meet criteria or any information contained in the clinical case record that is protected by section 1320d–6 or 5 U.S.C. 552a.

Federal Bureau of Investigation (FBI) criminal history background check. An FBI identification record—often referred to as a criminal history record or a ''rapsheet''—is a listing of certain information taken from fingerprint submissions retained by the FBI in connection with arrests and, in some instances, federal employment, naturalization, or military service. The process of responding to an identification record request is generally known as a criminal history background check.

FCC. Defined in DoD Instruction 6060.2, ''Child Development Programs (CDPs)'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/606002p.pdf*).

FCC provider. Defined in DoD Instruction 6060.2.

FCC adult family members. Any adult, 18 years of age or older, who resides in the home of an FCC provider for 30 or more consecutive days.

Fitness. The reference to a person's level of character and conduct determined necessary for an individual to perform work for, or on behalf of, a Federal Agency as an employee in the excepted service (other than in a position subject to suitability) or as a contractor employee.

Fitness determination. A decision, based on review of criminal history background check findings, that an individual is fit to perform duties in a position subject to criminal history background check. Fitness determinations will be ''favorable,'' meaning that the individual is fit to perform the duties, or ''unfavorable,'' meaning that the individual is not.

Foreign nationals. Individuals who are not citizens of the United States.

Foster care providers. A voluntary or court-mandated program that provides 24-hour care and supportive services in a family home or group facility, within government-owned or -leased quarters, for children and youth who cannot be properly cared for by their own family.

Healthcare personnel. Military, civilian, or contract staff involved in the delivery of healthcare services.

Host-government check. A criminal history background check conducted on foreign nationals in accordance with U.S. and host country treaties or agreements.

Interim suitability or fitness determination. Part of the pre-screening process in the identification and resolution of suitability or fitness issues, which occurs prior to the initiation of the required investigation. It involves the review of applications and other employment related documents. A favorable interim suitability or fitness determination is a status granted on a temporary basis, which permits individuals to work under line-of-sight supervision (LOSS) after the return of the advance FBI fingerprint check, pending completion of full investigative requirements and a final suitability determination.

Investigative elements. The records, reports, or other individual elements that comprise the whole of information collected during a criminal history background check and used to make a fitness or suitability determination.

Installations records check (IRC). A query of records maintained on an individual by programs and entities at the military installation where the individual lives, is assigned, or works, including military law enforcement and installation security records, drug and alcohol records, and FAP records for a minimum of 2 years before the date of the application.

Investigative service provider (ISP). The company or agency authorized to perform background investigations on personnel on behalf of the agency.

Line of Sight Supervision (LOSS). Continuous visual observation and supervision of an individual whose background check has not yet cleared, and has a favorable interim suitability or fitness determination, while engaged in child interactive duties, or in the presence of children in a DoD-sanctioned program or activity. The person providing supervision must have undergone a background check and received a final favorable suitability or fitness determination and be current on all periodic reinvestigations as required by this part.

Met criteria. Reported incident of alleged maltreatment found to meet DoD incident determination criteria for child abuse or domestic abuse and entry into the Service FAP central registry of child abuse and domestic abuse reports.

Position. An employee, contractor, provider, or volunteer role or function.

Preliminary investigations. Those investigative elements of a criminal history background check, including those specified in §86.6(f), which must be favorably completed and reviewed before an individual may be permitted to perform duties under LOSS.

Providers. Individuals involved in child care services who have regular contact with children or may be alone with children in the performance of their duties. Includes FCC providers and individuals with overall management responsibility for child and youth programs.

Regular contact with children. Recurring and more than incidental contact with or access to children in the performance of their duties on a DoD installation, program, or as part of a DoD-sanctioned activity.

Reinvestigation. A criminal history background check conducted after the period of time prescribed by this part to ensure the individual remains eligible to provide child care services. Reinvestigation includes the same checks conducted for the initial investigation as outlined in §86.6(b).

Respite care providers. Individuals who provide short-term care and supportive services in a family home or group facility within government-owned or -leased quarters.

State criminal history repository (SCHR). A repository of criminal information that lists past state convictions, current offender information, and criminal identification information (fingerprints, photographs, and other information or descriptions) that identify a person as having been the subject of a criminal arrest or prosecution. Checks of the SCHR may include the State child abuse and neglect repository and the State sex offender registry.

Suitability determination. A decision that a person is or is not suitable for a covered position within the DoD.

Supervisor. The person supervising individuals who are permitted to perform duties only under LOSS, who is not necessarily the same as an employee's supervisor for employment purposes (*e.g.*, ratings, assignment of duties).

Volunteer. There are two types of volunteers:

(1) *Specified volunteers*. Individuals who could have extensive or frequent contact with children over a period of time. They include, but are not limited to, positions involving extensive interaction alone, extended travel, or overnight activities with children or youth. Coaches and long-term instructors are among those who fall in this category. Specified volunteers are designated by the DoD Component head. Background checks are required in accordance with § 86.6(b)(4).

(2) *Non-specified volunteers*. Individuals who provide services that are shorter in duration than is required to perform a criminal history background check (*e.g.*, one-day class trip, class party). Because non-specified volunteers do not receive the same level of background checks as specified volunteers, non-specified volunteers must always be in line of sight of a staff member with a complete background check.

Youth program. Defined in DoD Instruction 6060.4, ''Department of Defense (DoD) Youth Programs (YPs)'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 606004p.pdf*).

§ 86.4 Policy.

It is DoD policy that:

(a) Individuals who have regular contact with children under 18 years of age in DoD-sanctioned child care services programs will undergo a criminal history background check in order to protect the health, safety and well-being of children in such programs.

(b) All individuals who have regular contact with children under 18 years of age in DoD-sanctioned child care services programs and who also have a current or prior DoD affiliation must also undergo an IRC.

(c) DoD Component heads are delegated the authority to make suitability determinations and take subsequent actions in cases involving applicants and appointees to covered positions as defined by 5 CFR 731.101, subject to the conditions in 5 CFR 731.103. This authority may be further delegated to authorized management officials, in writing, in accordance with volume 731 of DoD Instruction 1400.25.

(1) The DoD Consolidated Adjudications Facility is responsible for making favorable suitability determinations for civilian personnel in accordance with Deputy Assistant Secretary of Defense for Civilian Personnel and Policy Memorandum, ''Responsibilities Under the Department of Defense Suitability and Fitness Adjudications for Civilians Employees Programs,'' August 26, 2013.

(2) Military members are not subject to suitability adjudication under Volume 731 of DoD Instruction 1400.25, ''DoD Civilian Personnel Management System'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 140025v731.pdf*). Military members are subject to the background check requirements of DoD Instruction 5200.02, ''Personnel Security Program'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 520002_2014.pdf*) and § 86.6.

(d) Suitability and fitness determinations for individuals subject to this part will follow the guidance of Volume 731 of DoD Instruction 1400.25 for APF employees and Subchapter 1403 of DoD Instruction 1400.25 for NAF employees. Suitability and fitness are to be applied for the child care worker population in accordance with Volume 731 of DoD Instruction 1400.25 for appropriated fund employees in covered positions as defined by 5 CFR part 731.

(e) Individuals who have received a favorable interim suitability or fitness determination based on the FBI criminal history background check are permitted to work under LOSS pursuant to 42 U.S.C. 13041(b)(3).

§ 86.5 Responsibilities.

(a) Under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), the Assistant Secretary of Defense for Readiness and Force Management (ASD(R&FM)):

(1) Ensures the conduct of criminal history background checks complies with DoD policy and the Criminal Justice Information Services Division of

the FBI's operational and security policies and procedures.

(2) Monitors DoD Component compliance with this part, applicable laws, and subsequent guidance issued by the applicable ISP.

(b) Under the authority, direction, and control of the ASD(R&FM), the Deputy Assistant Secretary of Defense for Civilian Personnel Policy (DASD(CPP)) oversees development of DoD Component policies and procedures for the background check initiation, completion, adjudication, and suitability or fitness determination process for civilian employees in accordance with this part.

(c) Under the authority, direction, and control of the ASD(R&FM), the Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MC&FP)) oversees development of DoD Component policies and procedures related to the background check initiation, completion, adjudication, and fitness determination process for specified volunteers, FCC providers and adults residing in their home, and others as identified in accordance with this part.

(d) Under the authority, direction, and control of the ASD(R&FM), the Deputy Assistant Secretary of Defense for Military Personnel Policy (DASD(MPP)):

(1) Implements this part for military personnel in accordance with DoD Instruction 5200.02.

(2) Institutes effective quality assurance and quality control systems for chaplains, support staff, specified volunteers, and contractors who provide support to religious programs and activities identified in §86.6(a)(5)(v) and in accordance with this part.

(e) Under the authority, direction, and control of the Deputy Chief Management Officer (DCMO) of the Department of Defense, the Director of Administration ensures that the adjudication of background investigations of individuals who have regular contact with children under 18 years of age in DoD-sanctioned programs considers the criteria for presumptive and automatic disqualification as specified in this part.

(f) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) establishes policies and procedures for the background check initiation, completion, adjudication, and fitness determination process for contractors in accordance with the requirements of this part.

(g) The DoD Component heads:

(1) Ensure Component compliance with the requirements of this part, applicable laws, and guidance for civilian employees.

(2) Ensure compliance with suitability and fitness determination policies, requirements, and procedures for individuals in child care services in DoD programs as defined in 42 U.S.C. 13041 and DoD Instruction 1400.25.

(3) Ensure compliance with policies, requirements, and procedures for LOSS of individuals with a favorable interim suitability determination.

(4) Provide support and resources as required to implement this part and any Component-specific policies, requirements, and procedures, and ensure implementation.

§86.6 Procedures.

(a) *Requirements for criminal history background checks.* (1) All criminal history background checks required by this part must be initiated, tracked, and overseen by properly trained and vetted individuals who have been determined to be responsible for personnel security pursuant to DoD Instruction 5200.02 or human resource functions pursuant to Volume 731 of DoD Instruction 1400.25. Program managers, supervisors, and others not routinely performing personnel security and human resource functions are prohibited from managing the criminal history checks.

(2) All employment applications completed by individuals subject to this part must comply with the requirements of 42 U.S.C. 13041(d).

(3) The DoD Component will ensure that only authorized ISPs are used.

(4) When permitted by the host government, foreign government checks of individuals serving on DoD installations overseas must be requested directly by the employing Military Service or agency in accordance with Volume 1231 of DoD Instruction 1400.25. As an alternative, DoD Components may request that overseas Military Service

investigative elements obtain appropriate host-government checks and accept such checks if they are comparable to those required by 42 U.S.C. 13041. Where it is not possible to obtain criminal history checks comparable to those required by 42 U.S.C. 13041, foreign nationals will not be eligible for employment in child care services.

(5) Individuals subject to criminal history background checks are:

(i) All personnel employed or performing duties in DoD Child and Youth or other sanctioned child care services programs.

(ii) Individuals providing in-home FCC.

(iii) Personnel employed or performing duties in child and youth recreational and athletic programs (*e.g.*, Morale, Welfare, and Recreation), including instructors and, when working in a facility when children and youth are present, custodial personnel.

(iv) Individuals employed or performing duties in a DoDEA school (whether or not directly involved with teaching), including but not limited to teachers, administrators, other professional staff, aides, bus drivers, janitors, cafeteria workers, nurses, and attendants.

(v) Chaplains, chaplains' assistants, religious program specialists, and other individuals employed or performing child care services duties for children under 18 years of age on a DoD installation or as part of a military-sanctioned program.

(vi) Foster and respite child care providers on a DoD installation, program, or as part of a military-sanctioned activity.

(vii) Health and mental health care personnel, employed or performing child care services duties on a DoD installation, in a DoD sanctioned program, or as part of a military-sanctioned activity, including but not limited to physicians, dentists, nurse practitioners, clinical social workers, physical therapists, speech-language pathologists, clinical support staff (including residents), registered nurses, licensed practical nurses, nursing assistants, play therapists, and technicians.

(viii) Individuals employed or performing child care duties in social services, residential care, rehabilitation programs, detention, and correctional services on a DoD installation, program, or as part of a military-sanctioned activity.

(ix) Any other individuals reasonably expected to have regular contact with children on a DoD installation, in a DoD sanctioned program, or as part of a military-sanctioned activity, including specified volunteers and any person 18 years of age or older residing in an FCC, foster, or respite care home. Healthcare providers participating in TRICARE shall be governed by TRICARE policy.

(6) The DoD Components will also determine any other classes of positions subject to criminal history background checks, taking care to ensure that all individuals who have regular contact with children when providing child care services are investigated and the requirement must pertain to the class as a whole.

(7) Individuals designated in nonspecified volunteer positions must always be under direct LOSS in accordance with paragraph (g) of this section.

(b) *Types of background checks.* Procedures for conducting a background check on individuals in paragraphs (a)(5)(i) through (ix) of this section differ based on the employment status of the individual. Military members are subject to the background check requirements of DoD Instruction 5200.02 and this section. The FBI criminal history background checks for all categories of individuals must be fingerprint-based and fingerprints must be captured using an FBI-approved system. SCHR checks may require hardcopy fingerprint submissions. State checks must include the state child abuse and neglect repository and the state sex offender registry. The Component must request a check of the state child abuse and neglect repository and the State sex offender registry if they are not automatically checked as part of the standard SCHR check.

(1) *Criminal history background checks for DoD civilian and military personnel who are investigated at the NACI or a higher level pursuant to DoD's personnel security program.* (i) DoD civilian and

military personnel required by DoD Instruction 5200.02 to be investigated according to the requirements of the National Agency Check and Inquiries (NACI) or a higher level investigation and who have regular contact with children under 18 years of age in DoD-sanctioned programs will be investigated and adjudicated in accordance with the provisions of DoD Instruction 5200.02.

(ii) These personnel will also be subject to the additional requirements of the Child Care National Agency Check and Inquiries (CNACI) and the criteria for presumptive and automatic disqualification as specified in paragraph (c) of this section.

(2) *Criminal history background checks for civilian employees (APF and NAF).* (i) In accordance with 42 U.S.C. 13041 and Volume 731 and Subchapter 1403 of DoD Instruction 1400.25, complete a CNACI, which includes an FBI criminal history background check conducted through the Criminal Justice Information Services Division of the FBI and SCHR checks through State repositories of all States that an employee or prospective employee lists as current and former residences on an employment application. Results of an advanced FBI fingerprint check must be provided before completion of the full CNACI to determine employment under LOSS.

(ii) Individuals with a prior DoD affiliation must also complete an IRC, which includes an installation law enforcement check, drug and alcohol records check, and a check of the Family Advocacy Program (FAP) records for a minimum of 2 years before the date of the application.

(3) *Criminal history background checks for FCC providers and contractors.* (i) In accordance with 42 U.S.C. 13041, complete a CNACI, which includes an FBI criminal history background check conducted through the Criminal Justice Identification Services Division of the FBI and SCHR checks through State repositories of all States that a provider or contractor or prospective provider or contractor lists as current and former residences in an employment application. Results of an advanced FBI fingerprint check must be provided before completion of the full CNACI. Results for contractors may be used to determine employment under LOSS.

(ii) Individuals with a prior DoD affiliation must also complete an IRC, including an installation law enforcement check, drug and alcohol records check, and a check of the FAP records for a minimum of 2 years before the date of the application.

(4) *Criminal history background checks for others.* (i) In accordance with 42 U.S.C. 13041, only an FBI advanced fingerprint check is required for criminal history background checks for volunteers and persons 18 years of age or older residing in an FCC, foster, or respite care home.

(ii) Individuals with a prior DoD affiliation must also complete an IRC to include: an installation law enforcement check, drug and alcohol records check, and a check of the FAP records for a minimum of 2 years before the date of the application.

(5) *Timely completion.* To ensure timely completion, the DoD Components will establish procedures to initiate or request criminal history background check results, follow up to ensure checks have been completed, and address situations where there is a delay in receiving results. In no event will an individual subject to this part be presumed to have a favorable background check merely because there has been a delay in receiving the results of the requisite background check. If no response from the state(s) is received within 60 days, determinations based upon the CNACI report may be made.

(c) *Criteria for disqualification based on results on criminal history background checks.* The ultimate decision to determine how to use information obtained from the criminal history background checks in selection for positions involving the care, treatment, supervision, or education of children must incorporate a common sense decision based upon all known facts. Adverse information is evaluated by the DoD Component who is qualified at the appropriate level of command in interpreting criminal history background checks. All information of record both

favorable and unfavorable will be assessed in terms of its relevance, recentness, and seriousness. Likewise, positive mitigating factors should be considered. Final suitability decisions shall be made by that commander or designee. Criteria that will result in disqualification of an applicant require careful screening of the data. A disqualifying event may be the basis for a non-selection, withdrawal of a tentative offer of employment, ineligibility for facility access, removal from a contract, a suitability action under 5 CFR part 731, a probationary termination, an adverse action, or other appropriate action.

(1) *Criteria for automatic disqualification.* No person, regardless of circumstances, will be approved to provide child care services pursuant to this part if the background check discloses:

(i) That the individual has been convicted in either a civilian or military court (to include any general, special or summary court-martial conviction) or received non-judicial punishment (under Article 15 or chapter 47 of Title 10, U.S.C., also known and referred to in this part as ''the Uniform Code of Military Justice (UCMJ)'') for any of the following:

(A) A sexual offense.

(B) Any criminal offense involving a child victim.

(C) A felony drug offense.

(ii) That the individual has been held to be negligent in a civil adjudication or administrative proceeding concerning the death or serious injury to a child or dependent person entrusted to the individual's care.

(2) [Reserved]

(d) *Suitability and fitness determinations for individuals involved with the provision of child care services.* Suitability and fitness determinations for individuals subject to this part will be made in accordance with Volume 731, Volume 1231, and Subchapter 1403 of DoD Instruction 1400.25, and part 1201 of 5 U.S.C., as appropriate. The following may be the basis for non-selection, withdrawal of a tentative offer of employment, ineligibility for facility access, removal from a contract, a suitability action under DoD Instruction 1400.25, a probationary termination, an adverse action, or other appropriate action.

(1) *Criteria for presumptive disqualification.* Officials charged with making determinations pursuant to this part must include in the record a written justification for any favorable determination made where background check findings include any of the following presumptively disqualifying information:

(i) A FAP record indicating that the individual met criteria for child abuse or neglect or civil adjudication that the individual committed child abuse or neglect.

(ii) Evidence of an act or acts by the individual that tend to indicate poor judgment, unreliability, or untrustworthiness in providing child care services.

(iii) Evidence or documentation of the individual's past or present dependency on or addiction to any controlled or psychoactive substances, narcotics, cannabis, or other dangerous drug without evidence of rehabilitation.

(iv) A conviction, including any general, special, or summary court-martial conviction, or non-judicial punishment under Article 15 of the UCMJ for:

(A) A crime of violence committed against an adult.

(B) Illegal or improper use, possession, or addiction to any controlled or psychoactive substances, narcotics, cannabis, or other dangerous drug.

(v) A civil adjudication that terminated the individual's parental rights to his or her child, except in cases where the birth parent places his or her child for adoption.

(2) *Evaluation of presumptively disqualifying information.* The DoD Components will establish and oversee procedures for the evaluation of presumptively disqualifying information for all categories of individuals in paragraph (b) of this section. Evaluation of presumptively disqualifying information for APF and NAF personnel must be in accordance with Volume 731 and Subchapter 1403 of DoD Instruction 1400.25, respectively.

(3) *Criteria for disqualification under LOSS.* If an investigation of an individual who is currently working under

LOSS subsequently results in an unfavorable determination, the DoD Components will take action to protect children by reassigning or removing the individual from employment, contract, or volunteer status.

(4) *Disputes and appeals.* The DoD Components will establish and oversee procedures for the communication of determinations and the appeal of unfavorable determinations for all categories of individuals in paragraph (b) of this section. The procedures for civilian personnel are subject to Volume 731 of DoD Instruction 1400.25 for APF employees and Subchapter 1403 of DoD Instruction 1400.25 for NAF employees.

(e) *Reinvestigation.* (1) All DoD civilian employees (both APF and NAF), contractors, military personnel, and any other individuals reasonably expected to have regular contact with children on a DoD installation, program, or as part of a military-sanctioned activity, including specified volunteers and any person 18 years of age or older residing in an FCC, foster, or respite care home, who continue to perform duties in the position for which their initial background check was conducted, must undergo a reinvestigation every 5 years. The reinvestigation must consist of the same check conducted for the initial investigation as outlined in paragraph (b) of this section.

(2) All FCC providers and adults residing in an FCC home must undergo an annual reinvestigation utilizing the Special Agreement Check (SAC) for childcare providers. The SAC reinvestigation consists of an update to the initial investigation as outlined in paragraph (b) of this section.

(3) If the reinvestigation results in an unfavorable determination, the DoD Components will take action to protect children by reassigning or removing the individual from employment, contract, or volunteer status.

(4) If derogatory information surfaces within the 5 years before the reinvestigation, the DoD Component will take action to protect children by reassigning or suspending from having contact with children, any individual, contractor or volunteer until the case is resolved.

(f) *Self-reporting.* (1) Individuals who have regular contact with children under 18 years of age in DoD-sanctioned programs who have a completed background check are required to immediately report subsequent automatic disqualification criteria under paragraph (c)(1) of this section and presumptive disqualification criteria under paragraphs (c)(2)(i), (iv), and (v) of this section.

(2) The DoD Components will establish procedures for:

(i) Informing individuals of the requirement to immediately report any incident or conviction that may invalidate their prior background check and make them ineligible to work or have contact with children.

(ii) Responding to and evaluating reports made by such individuals, and taking appropriate action until the case has been resolved or closed.

(g) *Eligibility to perform duties under LOSS.* The DoD Components will establish Component-specific procedures, policies, and requirements, subject to the requirements of this paragraph, to permit applicants for whom a criminal history background check has been initiated but not yet completed, to perform duties under LOSS upon favorable findings of preliminary investigations.

(1) *No presumption of right.* No individual will be permitted to perform duties under LOSS in a position subject to criminal history background check without authorizing policy or other written permission from a DoD Component head.

(2) *Preliminary investigations required.* No individual will be permitted to perform duties under LOSS in a position subject to criminal history background check unless the following investigative elements have been reviewed and determined favorably:

(i) An IRC, including installation law enforcement records check, drug and alcohol records, and FAP records check for a minimum of 2 years before the date of the application if the individual has a preexisting DoD affiliation.

(ii) Initial results from the advanced FBI fingerprint criminal history background check (not the full check).

(3) *Exception for non-specified volunteers.* Due to the controlled, limited duration of an activity for these individuals, an advanced FBI fingerprint criminal history background check is not required. Non-specified volunteers will be permitted to perform duties and services under LOSS for the duration of the activity.

(4) *Supervisor requirements.* The supervisor must be a person who:

(i) Has undergone and successfully completed the required background check.

(ii) Has complied, as required, with the periodic reinvestigation requirement for a recurring criminal history background check.

(iii) Has not previously exhibited reckless disregard for an obligation to supervise an employee, contractor, or volunteer.

(5) *Video surveillance.* The use of video surveillance equipment to provide temporary oversight for individuals whose required background checks have been initiated but not completed is acceptable provided it is continuously monitored by an individual who has undergone and successfully completed all required background checks. This provision shall meet the intent of a flexible and reasonable alternative for ''direct sight supervision.''

(6) *Conspicuous identification of individuals subject to LOSS.* Individuals permitted to perform duties solely under LOSS must be conspicuously marked by means of distinctive clothing, badges, wristbands, or other visible and apparent markings. The purpose of such markings must be communicated to staff, customers, parents, and guardians by conspicuous posting or printed information.

(7) *Permissible performance of duties without supervision.* Individuals otherwise required to perform duties only under LOSS may perform duties without supervision if:

(i) Interaction with a child occurs in the presence of the child's parent or guardian;

(ii) Interaction with children is in a medical facility, subject to supervisory policies of the facility, and in the presence of a mandated reporter of child abuse; or

(iii) Interaction is necessary to prevent death or serious harm to the child, and supervision is impractical or unfeasible (*e.g.*, response to a medical emergency, emergency evacuation of a child from a hazardous location).

PART 89—INTERSTATE COMPACT ON EDUCATIONAL OPPORTUNITY FOR MILITARY CHILDREN

Sec.

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AUTHORITY: 10 U.S.C. 2164, 20 U.S.C. 921–932.

SOURCE: 81 FR 92659, Dec. 20, 2016, unless otherwise noted.

§ 89.1 Purpose.

In accordance with the sense of Congress as set forth in section 539 of Public Law 111–84, this part establishes policy, assigns responsibilities, and provides procedures to implement the Interstate Compact on Educational Opportunity for Military Children (referred to in this part as the ''Compact'') within the DoD.

§ 89.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the DoD, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

§ 89.3 Definitions.

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

504 plan. A plan required pursuant to 29 U.S.C. 794 specifying the modifications and accommodations for a child with a disability to meet the individual educational needs of that child as adequately as the needs of children without disabilities are met. The plans can include accommodations such as

wheelchair ramps, blood sugar monitoring, an extra set of textbooks, a peanut-free lunch environment, home instruction, or a tape recorder or keyboard for taking notes.

Children of military families. School-aged children who are enrolled in kindergarten through twelfth grade and are in the households of Service members who:

(1) Are on active duty, including members of the National Guard and Reserve on active duty orders pursuant to 10 U.S.C. 1211;

(2) Are active duty or veterans who are severely wounded, ill, or injured; or

(3) Die on active duty or as a result of injuries sustained on active duty;

Children of military members who are severely wounded, ill, or injured retain this designation for 1 year after discharge or retirement. Children of military members who die on active duty or as a result of injuries sustained on active duty, retain this designation for 1 year after death.

Deployment. The period 1 month prior to the military members' departure from their home station on military orders through 6 months after return to their home station.

DoDEA Committee. A DoD committee established pursuant to this part by Director, DoDEA to advise DoDEA on compliance with provisions in § 89.8 by DoDEA schools. The DoDEA Committee also provides input to the ex-officio member of the Commission on issues arising from DoDEA school interactions with member States of the Compact, and acts as a counterpart to State Councils of member States.

Education records. Those official records, files, and data directly related to a child and maintained by the school or local educational agency (LEA) or state educational agency (SEA), including but not limited to, records encompassing all the material kept in the child's cumulative folder such as general identifying data, records of attendance and of academic work completed, records of achievement and results of evaluative tests, health data, disciplinary status, test protocols, and individualized education programs (IEPs).

Ex-officio member of the Commission. Non-voting member of the Commission who may include, but not be limited to, members of the representative organizations of military family advocates, LEA officials, parent and teacher groups, the DoD, the Education Commission of the State, the Interstate Agreement on the Qualification of Educational Personnel, and other interstate compacts affecting the education of children of military members.

Extracurricular activity. A voluntary activity sponsored by the school or LEA or SEA or an organization sanctioned by the LEA or SEA. Extracurricular activities include, but are not limited to, preparation for and involvement in public performances, contests, athletic competitions, demonstrations, displays, and club activities.

IEP. When a child is identified as a child with disabilities in accordance with Individuals With Disabilities Education Act (IDEA), he or she must have a written document that describes the special education supports and services the child will receive. The IEP is developed by a team that includes the child's parents and school staff.

Interstate Compact on Education Opportunity for Military Children (the Compact). An agreement approved through State legislation that requires member States to follow provisions supporting the transition of children of military families between school systems in member States. As part of joining the Compact, States agree to participate in the Commission and pay dues to the Commission to support its oversight of the Compact.

LEA. A public authority legally constituted by the State as an administrative agency to provide control of and direction for kindergarten through twelfth grade public educational institutions. For the purpose of administering the provisions of the Compact in § 89.8 of this part, DoDEA school districts as defined in 20 U.S.C. 932 are equivalent to an LEA.

Member State. A State that has enacted the Compact.

MIC3. The MIC3, also known as the Interstate Commission on Educational Opportunity for Military Children (sometimes referred to as the ''Interstate Commission'' or ''the Commission''), is the governing body of the

Compact composed of representatives from each member State, as well as various ex-officio members. The Commission provides general oversight of the agreement, creates and enforces rules governing the Compact, and promotes training and compliance with the Compact. Each member State will be allowed one vote on Compact matters, and the Commission will provide the venue for solving interstate issues and disputes.

Military Family Education Liaison. Individual appointed or designated by State Council of each member state to assist military families and the State in facilitating the implementation of the Compact. Military members and DoD civilian employees cannot perform this function.

Military installation. A base, camp, post, station, yard, center, homeport facility for any ship, or other activity under DoD jurisdiction, including any leased facility. (This term does not include any facility used primarily for civil works, rivers and harbors projects, or flood control projects.)

Military representative as a liaison to a State Council. Incumbent of a position designated by the DASD(MC&FP), who performs the duties and responsibilities defined in §89.5 of this part. The military representative is responsible for representing the interest of the DoD in fostering easier transition of children of military families according to their designation (installation representative, Military Department representative or statewide representative). The military representative will be a military member or DoD civilian who can remain in the position for at least 2 years and whose position has a direct interface with the State education system as part of official duties or has supervisory responsibility for those who do.

Military representative to the DoDEA Committee. Individual nominated to represent all four Services by the Office of the Assistant Secretary of the Army for Manpower and Reserve Affairs (OASA(M&RA)), the Office of the Assistant Secretary of the Navy for Manpower and Reserve Affairs (OASN(M&RA)), or the Office of the Assistant Secretary of the Air Force for Manpower and Reserve Affairs (OASAF(M&RA)) on a rotational basis and appointed by the DASD(MC&FP) for a 2-year term. Because DoDEA is a DoD Component the military representative may act as a full participant in the DoDEA Committee.

Receiving State. The State to which a child of a military family is sent, brought, or caused to be sent or brought.

SEA. A public authority similar to an LEA, legally constituted by the State as an administrative agency to provide control of and direction for kindergarten through twelfth grade public educational institutions for the entire State.

Sending State. The State from which a child of a military family is sent, brought, or caused to be sent or brought.

State. State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the U.S. Virgin Islands, Guam, American Samoa, the Northern Marianas Islands and any other U.S. territory or possession. For purposes of administering the provisions of the Compact in §89.8 of this part, DoD is considered a State and DoDEA is considered the equivalent of a State department of education for DoD.

State Council. A body that coordinates among government agencies, LEAs, and military installations concerning the member State's participation in and compliance with the Compact and the Commission activities. A member State may determine the membership of its own Council, but membership must include at least: The State superintendent of education; superintendent of a school district with a high concentration of military children; representative (as a liaison) from a military installation; one representative each from the legislative and executive branches of State government; and other offices and stakeholder groups the State Council deems appropriate.

Transition. The formal and physical process of transferring from school to school; or the period of time in which a child moves from a school in the sending State to a school in the receiving State.

Veteran. A person who served in the military and who was discharged or released from the military under conditions other than dishonorable.

§ 89.4 Policy.

In accordance with the sense of Congress as set forth in section 539 of Public Law 111–84, ''National Defense Authorization Act for Fiscal Year 2010'' and DoD 5500.07–R, ''Joint Ethics Regulations (JER)'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/550007r.pdf*), it is DoD policy to support the intent of the Compact by reducing the difficulty children of military families (referred to in this part as ''children'' or ''the child'') have in transferring between school systems because of frequent moves and deployment of their parents. DoD will support the Compact by:

(a) Designating military liaisons, by position, to State Councils of member States, the DoDEA Committee, and the MIC3.

(b) Implementing the intent of the Compact in the DoDEA to ensure:

(1) Timely enrollment of children in school so they are not penalized due to:

(i) Late or delayed transfers of education records from the previous school district(s); or

(ii) Differences in entrance or age requirements.

(2) Placement of children in educational courses and programs, including special educational services, so they are not penalized due to differences in attendance requirements, scheduling, sequencing, grading, or course content.

(3) Flexible qualification and eligibility of children so they can have an equitable chance at participation in extracurricular, academic, athletic, and social activities.

(4) Graduation within the same timeframe as the children's peers.

(c) Promoting through DoDEA and the Military Departments:

(1) Flexibility and cooperation among SEAs or LEAs, DoDEA, Military Departments, parents, and children to achieve educational success.

(2) Coordination among the various State agencies, LEAs, and military installations regarding the State's participation in the Compact.

§ 89.5 Responsibilities.

(a) Under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness, the Assistant Secretary of Defense for Manpower and Reserve Affairs (ASD(M&RA)) oversees the implementation of this part.

(b) Under the authority, direction, and control of the ASD(M&RA), the DASD(MC&FP):

(1) Designates military representatives by position as liaisons to State councils, nominated by the Secretaries of the Military Departments by the procedures outlined in § 89.7 of this part.

(2) Designates the DoD ex-officio member serving as a liaison to MIC3, insofar as DoD is invited to do so by MIC3.

(3) Maintains a roster of designated liaisons to State councils in accordance with 32 CFR part 310.

(4) Monitors issues arising under the Compact:

(i) Affecting children of military families attending and transferring between member State schools; and

(ii) The implementation of § 89.8 of this part, affecting children of military families transferring between member state schools and DoDEA's schools (consisting of the Department of Defense Schools (DoDDS)—Europe, DoDDS—Pacific, and DDESS.

(c) Under the authority, direction, and control of ASD(M&RA), the Director, DoDEA:

(1) To the extent allowable by 10 U.S.C. 2164 and 20 U.S.C. 921–932, adjusts operating policies and procedures issued pursuant to DoD Directive 1342.20, ''Department of Defense Education Activity (DoDEA)'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/134220p.pdf*) to implement the provisions of the Compact described in § 89.8 of this part.

(2) Informs boards and councils, described in DoD Instruction 1342.15, ''Educational Advisory Committees and Councils'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/134215p.pdf*) and DoD Instruction 1342.25, ''School Boards for Department of Defense Domestic Dependent Elementary and Secondary Schools (DDESS)'' (available at *http://*

www.dtic.mil/ whs/directives/corres/ pdf/ 134225p.pdf), of the Compact provisions in §89.8 of this part and the DoDEA administration of these provisions.

(3) Addresses disputes over provisions in §89.8 of this part between member States and DoDEA. When differences cannot be resolved with a member State, works with MIC3 to resolve these disputes.

(4) Establishes the DoDEA Committee to review compliance with the provisions in §89.8 of this part and to address issues raised by the Secretaries of the Military Departments concerning the implementation of these provisions.

(5) Ensures all personally identifiable information is collected, maintained, disseminated, and used in accordance with 32 CFR part 310.

(6) Ensures that DoDEA schools comply with §89.8 and that DoDEA school-level officials inform DoDEA students transferring to schools in member States of the benefits extended by receiving States under the Compact.

(d) The Secretaries of the Military Departments:

(1) Nominate military representatives by position, in accordance with the procedures outlined in §89.7 of this part, for designation as liaisons to State Councils by the DASD(MC&FP) when such DoD liaison is requested.

(2) Establish departmental policies and procedures to inform military communities of:

(i) The provisions of this part as it affects children of military families attending and transferring between member State schools; and

(ii) The provisions in §89.8 of this part concerning students transferring between DoDEA and member State schools.

(3) Procedures to resolve issues or challenges raised by parents concerning the provisions of §89.8 of this part.

§89.6 Procedures.

DoD implements policy in this part by:

(a) Establishing a committee within DoDEA (referred to in this part as the ''DoDEA Committee'').

(b) Designating military representatives by position to serve as liaisons to the State Councils of the member States and the DoDEA Committee in accordance with procedures in §89.7.

(c) Designating the ex-officio member to serve as a liaison to MIC3 in accordance with §89.5 and §89.7.

(d) Ensuring DoDEA compliance with the selected provisions of the Compact described in §89.8.

§89.7 Representatives to State Councils, the DoDEA Committee and MIC3.

(a) *Military Representatives designated by position as Liaisons to State Councils.* In accordance with section 3–201 of DoD 5500.07–R, incumbents of positions designated as liaisons to State Councils will:

(1) Be a military member or a civilian employee of DoD who has a direct interface with the State education system as part of official duties or has supervisory responsibility for those who do.

(2) Only represent DoD interests (not the interests of the State Council), and consequently may not:

(i) Engage in management or control of the State Council (therefore, may not vote or make decisions on daily administration of council);

(ii) Endorse or allow the appearance of DoD endorsement of the State Council or its events, products, services, or enterprises;

(iii) Represent the State Council to third parties; or

(iv) Represent the State Council to the U.S. Government, as prohibited by federal criminal statues.

(3) Make clear to the State Council that:

(i) The opinions expressed by the representative do not bind DoD or any DoD Component to any action.

(ii) If included on State Council Web sites, all references to the representative by name or title must indicate that they are the ''Military Representative'' as opposed to a council member.

(4) Notify the chain of command of issues requiring policy decisions or actions requested of the military community within the State.

(5) When called upon to act as the spokesperson for one or more than one installation:

(i) Get feedback from the designated points of contact at each military installation within his or her responsibility.

(ii) Coordinate proposed input to the State Council with the appropriate points of contact for each military installation within his or her responsibility.

(iii) Act as a conduit for information between the State Council and each military installation within his or her responsibility.

(iv) Provide feedback through the chain of command to the points of contact for each military installation within his or her responsibility and, as appropriate, to the OASA(M&RA), the OASN(M&RA), or the OASAF(M&RA).

(b) *Nomination Process for Positions Designated as Liaisons to State Councils.* (1) In accordance with DoD 5500.07–R, liaison positions are nominated by the Military Departments and designated by the DASD(MC&FP), not by State officials. Depending on the number of liaison positions required by State policy, designating liaison positions to a State Council will be accomplished according to the processes outlined in Table 1:

TABLE 1—PROCESS FOR DESIGNATING LIAISON POSITIONS TO STATE COUNCILS

If State statute concerning military representatives provides for:	The State Commissioner contacts:	Who requests a selection be made by:	Whereupon the official written designation is made by:
One representative for all military children in the State.	DASD(MC&FP)	OASA(M&RA), OASN(M&RA), or OASAF(M&RA) responsible for providing a representative for the State listed in Table 2.	DASD(MC&FP).
One representative for each Military Service.	DASD(MC&FP)	OASA(M&RA), OASN(M&RA), and OASAF(M&RA).	DASD(MC&FP).
One representative for each military installation in the State.	DASD(MC&FP)	OASA(M&RA), OASN(M&RA) and OASAF(M&RA).	DASD(MC&FP).

(2) When there is more than one military representative to a State Council (*e.g.*, one per installation or one per Military Department represented in the State), the incumbent of the position nominated by the responsible Military Department (Table 2) will serve as the lead military representative when DoD must speak with a single voice.

(3) In circumstances where the State requests an individual by name, the DASD(MC&FP) will forward the request to the individual's Military Department for consideration of designating the position which the individual encumbers. If that Military Department is different from the one designated in Table 2, the DASD(MC&FP) will first obtain the concurrence of the responsible Military Department.

(4) In accordance with the Compact, State officials appoint or designate the Military Family Education Liaison for the State. Service members and DoD civilians cannot be appointed or designated to fill this position for the State.

TABLE 2—MILITARY DEPARTMENT AREAS OF AUTHORITY FOR SELECTING A SINGLE MILITARY REPRESENTATIVE POSITION TO SERVE AS A LIAISON TO THE STATE COUNCIL

Military department	Areas of Authority
Army	Alabama, Alaska, Colorado, Georgia, Hawaii, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Missouri, New York, Oklahoma, Pennsylvania, South Carolina, Texas, Vermont, Washington, West Virginia, Wisconsin.
Navy	American Samoa, California, Connecticut, District of Columbia, Florida, Guam, Maine, Mississippi, New Hampshire, North Carolina, Northern Marianas, Oregon, Puerto Rico, Rhode Island, Tennessee, Virginia, Virgin Islands.
Air Force	Arizona, Arkansas, Delaware, Idaho, Illinois, Massachusetts, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Dakota, Ohio, South Dakota, Utah, Wyoming.

(c) *Military Representative to the DoDEA Committee.* Membership of the DoDEA Committee will include a representative from one of the Military Services to represent all four Services. OASA(M&RA), OASN(M&RA), or OASAF(M&RA) will nominate a representative on a rotational basis who will be designated for a 2-year term by the DASD(MC&FP).

(d) *Ex-Officio Member Serving as a Liaison to MIC3.* In accordance with section 3–201 of DoD 5500.07–R, the DoD ex-officio member to the Commission, must:

(1) Be a military member or a civilian employee of DoD who can remain in the position for at least 2 years and who has a direct interface with DoDEA and the U.S. public education system as part of official duties or has supervisory responsibility for those who do.

(2) Attend as a liaison meetings of MIC3, its Executive Committee, and other standing committees where requested by the Commission.

(3) Only represent DoD interests (not the interests of MIC3), and consequently may not:

(i) Engage in management or control of MIC3 (therefore, may not vote or make decisions on daily administration of MIC3);

(ii) Endorse or allow the appearance of DoD endorsement of MIC3, or its events, products, services, or enterprises;

(iii) Represent the Commission to third parties; or

(iv) Represent MIC3 to the U.S. Government, as prohibited by criminal statutes.

(4) Make clear to MIC3 that:

(i) The opinions expressed by the incumbent do not bind DoD or any DoD Component to any action.

(ii) If included on MIC3 Web sites, all references to the incumbent by name or title must indicate that they are the ''DoD Ex-Officio Member'' as opposed to a MIC3 member.

(5) Notify the chain of command of issues requiring policy decisions or actions requested of DoD.

§ 89.8 Compact provisions.

(a) *DoDEA Area School Districts Relationship With SEAs or LEAs in Member States.*

(1) For the purposes of DoD's implementation of the Compact in the schools it operates, DoDEA's area offices (DoDDS—Europe, DoDDS—Pacific, and DDESS) and their schools are considered as the equivalent of LEAs and SEAs, respectively.

(2) Each DoDEA area acts as the ''receiving LEA'' and ''sending LEA'' in working with LEAs or SEAs in member States.

(b) *Articles IV Through VII of the Compact.* This section describes the specific duties that DoDEA's LEAs have as ''sending'' or ''receiving'' LEAs. DoDEA's duties under this section will reciprocate the duties assumed by member State LEAs or SEAs to children of military families, as expressed by their respective State's implementation of the Compact Articles IV through VII. DoDEA will implement the provisions described below, which, while retaining the intent of the Compact, have been modified as needed in the DoDEA context.

(1) *Article IV: Education Records and Enrollment*—(i) *Unofficial or ''Hand-Carried'' Education Records.* (A) If official education records cannot be released to the parents for transfer, the DoDEA custodian of the records, as the sending LEA shall provide to the parent a complete set of unofficial education records.

(B) Upon receipt of the unofficial education records, the DoDEA school, as the school in the receiving LEA shall enroll and appropriately place the child as quickly as possible based on the information in the unofficial records, pending validation by the official records.

(ii) *Official education records or transcripts.* (A) The DoDEA school, acting as the receiving LEA shall request the child's official education record from the school in the sending State at the same time as DoDEA school enrolls and conditionally places the child.

(B) Upon receipt of the request for a child's records, the school in DoDEA, acting as the sending LEA will provide the child's official education records to the school in the receiving State, within 10 work days. If there is a designated school staff break, records will be provided as soon as possible; however, the time will not exceed 10 work days after

the return of staff. DoDEA will initiate actions to meet these deadlines without violating the disclosure rules of the Privacy Act, 5 U.S.C. 552a.

(iii) *Immunizations.* (A) Parents have 30 days from the date of enrolling their child in a DoDEA school to have their child(ren) immunized in accordance with DoDEA's immunization requirements, as the receiving LEA.

(B) For a series of immunizations, parents must begin initial vaccinations of their child(ren) within 30 days.

(iv) *Entrance age.* (A) At the time of transition and regardless of the age of the child, the DoDEA school, acting as the receiving LEA, shall enroll the transitioning child at the grade level as the child's grade level (*i.e.,* in kindergarten through grade 12) in the sending state's LEA.

(B) A child who has satisfactorily completed the prerequisite grade level in the sending state's LEA will be eligible for enrollment in the next higher grade level in DoDEA school, acting as the receiving LEA, regardless of the child's age.

(C) To be admitted to a school in the receiving State, the parent or guardian of a child transferring from a DoDEA (sending) LEA must provide:

(*1*) Official military orders showing the military member or the member's spouse was assigned to the sending State or commuting area of the State in which the child was previously enrolled. If the child was residing with a guardian other than the military member during the previous enrollment, proof of guardianship (as specified in the Compact) should be provided by the parent or guardian to the receiving LEA or SEA to establish eligibility under the Compact.

(*2*) An official letter or transcript from the sending school authority that shows the student's record of attendance, academic information, and grade placement.

(*3*) Evidence of immunization against communicable diseases.

(*4*) Evidence of date of birth.

(2) *Article V: Placement and Attendance*—(i) *Course placement.* (A) As long as the course is offered by DoDEA, as the receiving LEA, it shall honor placement of a transfer student in courses based on the child's placement or educational assessment in the sending State school.

(B) Course placement includes, but is not limited to, Honors, International Baccalaureate, Advanced Placement, vocational, technical, and career pathways courses.

(C) Continuing the child's academic program from the previous school and promoting placement in academically and career challenging courses shall be a primary consideration when DoDEA considers the placement of a transferring child.

(D) DoDEA, acting as the receiving LEA, may perform subsequent evaluations to ensure the child's appropriate course placement.

(ii) *Educational Program Placement.* (A) As long as the program is offered by DoDEA, acting as a receiving LEA, it will honor placement of the child in educational programs based on current educational assessments and placement in like programs in the sending State. Such programs include, but are not limited to, gifted and talented programs and English language learners.

(B) The receiving State school may perform subsequent evaluations to ensure the child's appropriate educational program placement.

(iii) *Special Education Services.* (A) DoDEA, acting as the receiving LEA, will initially provide comparable services to a child with disabilities based on his or her current IEP in compliance with 20 U.S.C. chapter 33, also known and referred to in this part as the ''Individuals with Disabilities Education Act (IDEA),'' as amended, and the requirements of Executive Order 13160. DoDEA may perform subsequent evaluations to ensure the child's appropriate placement consistent with IDEA.

(B) DoDEA, acting as the receiving LEA, will make reasonable accommodations and modifications to address the needs of incoming children with disabilities, in compliance with the requirements of 29 U.S.C. 794 and Executive Order 13160, and subject to an existing 504 plan to provide the child with equal access to education.

(iv) *Placement Flexibility.* DoDEA's administrative officials must have flexibility in waiving course or program prerequisites or other preconditions for

placement in courses or programs offered under the jurisdiction of DoDEA.

(v) *Absences Related to Deployment Activities.* A child whose parent or legal guardian is an active duty Service member and has been called to duty for, is on leave from, or has immediately returned from deployment to a combat zone or combat support posting, will be granted additional excused absences under governing DoDEA rules.

(3) *Article VI: Eligibility for enrollment.* (i) *Eligibility in DoDEA Schools.* Eligibility of dependents of military members is governed by the laws in 10 U.S.C. 2164 and 20 U.S.C. 921 through 932 and their implementing regulations. Only children who are eligible to attend DoDEA schools may do so, regardless of their transition status.

(ii) *Eligibility for extracurricular participation.* DoDEA, acting as the receiving LEA, will facilitate the opportunity for transitioning children's inclusion in extracurricular activities, regardless of application deadlines, to the extent the children are otherwise qualified.

(4) *Article VII: Graduation.* To facilitate the child's on-time graduation, DoDEA will incorporate the following procedures:

(i) *Waiver requirements.* (A) DoDEA administrative officials will waive specific courses required for graduation if similar course work has been satisfactorily completed in another LEA or provide reasonable justification for denial.

(B) If DoDEA, as a receiving LEA, does not grant a waiver to a child who would qualify to graduate from the sending school, DoDEA will provide an alternative means of acquiring required coursework so that graduation may occur on time.

(C) If DoDEA, as the receiving LEA, requires a graduation project, volunteer community service hours, or other DoDEA specific requirement, DoDEA may waive those requirements.

(ii) *Exit exams.* (A) DoDEA, as a receiving LEA, must:

(*1*) Accept exit or end-of-course exams required for graduation from the sending State.

(*2*) Accept national norm-referenced achievement tests.

(*3*) Provide alternative testing in lieu of testing requirements for graduation in the receiving from a DoDEA school.

(B) If the alternatives in paragraph (b)(2)(i) of this section cannot be accommodated by DoDEA as the receiving LEA for a child transferring in his or her senior year, then the provisions of paragraph (b)(1)(iv)(C) of this section will apply.

(iii) *Transfers during senior year.* (A) If a child transferring at the beginning or during his or her senior year is ineligible to graduate from DoDEA, as the receiving LEA, after all alternatives have been considered, DoDEA will request a diploma from the sending LEA or SEA. DoDEA will ensure the receipt of a diploma from the sending LEA or SEA, if the child meets the graduation requirements of the sending LEA or SEA.

(B) If one of the States in question is not a member of this Compact, DoDEA, as a receiving state, will use best efforts to facilitate a transferring child's on-time graduation in accordance with paragraphs (b)(1)(iv)(A) and (b)(1)(iv)(B) of this section.

PART 93—ACCEPTANCE OF SERVICE OF PROCESS; RELEASE OF OFFICIAL INFORMATION IN LITIGATION; AND TESTIMONY BY NSA PERSONNEL AS WITNESSES

Sec.

93.1 References.
93.2 Purpose and applicability.
93.3 Definitions.
93.4 Policy.
93.5 Procedures.
93.6 Fees.
93.7 Responsibilities.

AUTHORITY: E.O. 12333, 3 CFR, 1981 Comp., p. 200; 50 U.S.C. apps. 401, 402.

SOURCE: 56 FR 51328, Oct. 11, 1991, unless otherwise noted.

§ 93.1 References.

(a) DoD Directive 5405.2,[1] ''Release of Official Information in Litigation and

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

Testimony by DoD Personnel as Witnesses,'' July 23, 1985, reprinted in 32 CFR part 97.

(b) E.O. 12333, United States Intelligence Activities, 3 CFR, 1981 Comp., p. 200, reprinted in 50 U.S.C. app. 401.

(c) The National Security Agency Act of 1959, Public Law No. 86–36, as amended, 50 U.S.C. app. 402.

(d) Rule 4, Federal Rules of Civil Procedure.

(e) DoD Instruction 7230.7,[2] ''User Charges'', January 29, 1985.

(f) 28 CFR 50.15.

§93.2 Purpose and applicability.

(a) This part implements §93.1(a) in the National Security Agency/Central Security Service including all field sites (hereinafter referred to collectively as NSA). The procedures herein are also promulgated pursuant to the NSA's independent authority, under §1.12(b)(10) of E.O. 12333 referenced under §93.1(b), to protect the security of its activities, information and employees. This part establishes policy, assigns responsibilities, and prescribes mandatory procedures for service of process at NSA and for the release of official information in litigation by NSA personnel, through testimony or otherwise.

(b) This part is intended only to provide guidance for the internal operation of the NSA and does not create any right or benefit, substantive or procedural, enforceable at law against the United States, the Department of Defense, or NSA. This part does not override the statutory privilege against the disclosure of the organization or any function of the NSA, of any information with respect to the activities thereof, or of the names, titles, salaries, or numbers of the persons employed by the NSA. See section 6(a) of the DoD Directive referenced under §93.1(a).

§93.3 Definitions.

(a) *Service of process*. Refers to the delivery of a summons and complaint, or other document the purpose of which is to give notice of a proceeding or to establish the jurisdiction of a court or administrative proceeding, in the manner prescribed by §93.1(d), to an officer or agency of the United States named in court or administrative proceedings.

(b) *Demand*. Refers to the delivery of a subpoena, order, or other directive of a court of competent jurisdiction, or other specific authority, for the production, disclosure, or release of official information, or for the appearance and testimony of NSA personnel as witnesses.

(c) *NSA personnel*. (or NSA person) Includes present and former civilian employees of NSA (including non-appropriated fund activity employees), and present and former military personnel assigned to NSA. NSA personnel also includes non-U.S. nationals who perform services overseas for NSA under the provisions of status of forces or other agreements, and specific individuals hired through contractual agreements by or on behalf of NSA.

(d) *Litigation*. Refers to all pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards, or other tribunals, foreign and domestic. It includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving litigation.

(e) *Official information*. Is information of any kind, in any storage medium, whether or not classified or protected from disclosure by §93.1(c) that:

(1) Is in the custody and control of NSA; or

(2) Relates to information in the custody and control of NSA; or

(3) Was acquired by NSA personnel as part of their official duties or because of their official status within NSA.

(f) *General Counsel*. Refers to the NSA General Counsel (GC), or in the GC's absence, the NSA Deputy GC, or in both of their absences, the NSA Assistant GC (Administration/Litigation).

(g) *NSA attorney*. Refers to an attorney in the NSA Office of General Counsel (OGC).

[2] See footnote 1 to §93.1(a).

§ 93.4 Policy.

Official information that is not classified, privileged, or otherwise protected from public disclosure, should generally be made reasonably available for use in Federal and State courts and by other governmental bodies.

§ 93.5 Procedures.

(a) *Release of official information in litigation.* NSA personnel shall not produce, disclose, release, comment upon, or testify concerning any official information during litigation without the prior written approval of the GC. In exigent circumstances, the GC may issue oral approval, but a record of such approval will be made and retained in the OGC. NSA personnel shall not provide, with or without compensation, opinion or expert testimony concerning official NSA information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice (DoJ). Upon a showing by the requester of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the NSA or the United States, the GC may, in writing, grant special authorization for NSA personnel to appear and testify at no expense to the United States. Official information may be released in litigation only in compliance with the following procedures.

(1) If official information is sought, through testimony or otherwise, by a litigation demand, the individual seeking such release or testimony must set forth, in writing and with as much specificity as possible, the nature and relevance of the official information sought. Subject to paragraph (a)(5) of this section, NSA personnel may only produce, disclose, release, comment upon or testify concerning those matters that were specified in writing and approved by the GC.

(2) Whenever a litigation demand is made upon NSA personnel for official information or for testimony concerning such information, the person upon whom the demand was made shall immediately notify the OGC. After consultation and coordination with the DoJ, if required, the GC shall determine whether the individual is required to comply with the demand and shall notify the requester or the court or other authority of that determination.

(3) If a litigation demand requires a response before instructions from the GC are received, the GC shall furnish the requester or the court or other authority with a copy of § 93.1(a) and this part 93. The GC shall also inform the requester or the court or other authority that the demand is being reviewed, and seek a stay of the demand pending a final determination.

(4) If a court or other authority declines to stay the demand in response to action taken pursuant to paragraph 3 of this section, or if such court or other authority orders that the demand must be complied with notwithstanding the final decision of the GC, the NSA personnel upon whom the demand was made shall notify the GC of such ruling or order. If the GC determines that no further legal review of or challenge to the ruling or order will be sought, the affected NSA personnel shall comply with the demand or order. If directed by the GC, however, the affected NSA personnel must decline to provide the information.[3] The NSA personnel shall state the following to the Court:

> ''I must respectfully advise the Court that under instructions given to me by the General Counsel of the National Security Agency, in accordance with Department of Defense Directive 5405.2 and NSA Regulation 10–62, I must respectfully decline to [produce/disclose] that information.''

(5) In the event NSA personnel receive a litigation demand for official information originated by another U.S. Government component, the GC shall forward the appropriate portions of the request to the other component. The GC shall notify the requester, court, or other authority of the transfer, unless such notice would itself disclose classified information.

(b) *Acceptance of service of process.* The following are mandatory procedures for accepting service of process

[3] *See* United States ex rel. *Touhy* v. *Ragen*, 340 U.S. 462 (1951) wherein the Supreme Court held that a government employee could not be held in contempt for following an agency regulation requiring agency approval before producing government information in response to a court order.

for NSA personnel sued or summoned in their official capacities, and for attempting service of process on NSA premises.

(1) *Service on NSA or on NSA personnel in their official capacities.* §93.1(d) requires service of process on the NSA or NSA personnel sued or summoned in their official capacity to be made by serving the United States Attorney for the district in which the action is brought, and by sending copies of the summons and complaint by registered or certified mail to the Attorney General of the United States and to the NSA or such NSA personnel. Only the GC or an NSA attorney is authorized to accept the copies of the summons and complaint sent to the NSA or NSA personnel pursuant to §93.1(d). Acceptance of the copies of the summons and complaint by the GC or an NSA attorney does not constitute an admission or waiver with respect to the validity of the service of process or of the jurisdiction of the court or other body. Such copies shall be sent by registered or certified mail to: General Counsel, National Security Agency, 9800 Savage Road, Fort George G. Meade, MD 20755–6000. The envelope shall be conspicuously marked ''Copy of Summons and Complaint Enclosed.'' Except as provided in paragraph (b)(3) of this section, no other person may accept the copies of the summons and complaint for NSA or NSA personnel sued or summoned in their official capacities, including the sued or summoned NSA personnel, without the prior express authorization of the GC.

(i) Parties who wish to deliver, instead of sending by registered or certified mail, the copies of the service of process to NSA or to NSA personnel sued or summoned in their official capacities, will comply with the procedures for service of process on NSA premises in paragraph (b) of this section.

(ii) Litigants may attempt to serve process upon NSA personnel in their official capacities at their residences or other places. Because NSA personnel are not authorized to accept such service of process, such service is not effective under §93.1(d). NSA personnel should refuse to accept service. However, NSA personnel may find it difficult to determine whether they are being sued or summoned in their private or official capacity. Therefore, NSA personnel shall notify the OGC as soon as possible if they receive any summons or complaint that appears to relate to actions in connection with their official duties so that the GC can determine the scope of service.

(2) *Service upon NSA personnel in their individual capacities on NSA premises.* Service of process is not a function of NSA. An NSA attorney will not accept service of process for NSA personnel sued or summoned in their individual capacities, nor will NSA personnel be required to accept service of process on NSA premises. Acceptance of such service of process in a person's individual capacity is the individual's responsibility. NSA does, however, encourage cooperation with the courts and with judicial officials.

(i) When the NSA person works at NSA Headquarters at Fort George G. Meade, Maryland, the process server should first telephone the OGC on (301) 688–6054, and attempt to schedule a time for the NSA person to accept process. If the NSA person's affiliation with NSA is not classified, the NSA attorney will communicate with the NSA person and serve as the contact point for the person and the process server. If the person consents to accept service of process, the NSA attorney will arrange a convenient time for the process server to come to NSA, and will notify the Security Duty Officer of the arrangement.

(ii) A process server who arrives at NSA during duty hours without first having contacted the OGC, will be referred to the Visitor Control Center (VCC) at Operations Building 2A. The VCC will contact the OGC. If an NSA attorney is not available, the process server will be referred to the Security Duty Officer, who will act in accordance with Office of Security (M5) procedures approved by the GC. Service of process will not be accepted during non-duty hours unless prior arrangements have been made by the OGC. For purposes of this part, duty hours at NSA Headquarters are 0800 to 1700, Monday through Friday, excluding legal holidays. A process server who arrives at NSA during non-duty hours

without having made arrangements through the OGC to do so will be told to call the OGC during duty hours to arrange to serve process.

(iii) Upon being notified that a process server is at the VCC, an NSA attorney will review the service of process and determine whether the NSA person is being sued or summoned in his official or individual capacity. (If the person is being sued or summoned in his or her official capacity, the NSA attorney will accept service of process by noting on the return of service form that ''service is accepted in official capacity only.'') If the person is being sued or summoned in his or her individual capacity, the NSA attorney will contact that person to see if that person will consent to accept service.

(3) *Procedures at field activities.* Chiefs of NSA field activities may accept copies of service of process for themselves or NSA personnel assigned to their field component who are sued or summoned in their official capacities. Field Chiefs or their designees will accept by noting on the return of service form that ''service is accepted in official capacity only.'' The matter will then immediately be referred to the GC. Additionally, Field Chiefs will establish procedures at the field site, including a provision for liaison with local judge advocates, to ensure that service of process on persons in their individual capacities is accomplished in accordance with local law, relevant treaties, and Status of Forces Agreements. Such procedures must be approved by the GC. Field Chiefs will designate a point of contact to conduct liaison with the OGC.

(4) No individual will confirm or deny that the person sued or summoned is affiliated with NSA until a NSA attorney or the Field Chief has ascertained that the individual's relationship with NSA is not classified. If the NSA person's association with NSA is classified, service of process will not be accepted. In such a case, the GC must be immediately informed. The GC will then contact the DoJ for guidance.

(5) *Suits in Foreign Courts.* If any NSA person is sued or summoned in a foreign court, that person, or the cognizant Field Chief, will immediately telefax a copy of the service of process to the OGC. Such person will not complete any return of service forms unless advised otherwise by an NSA attorney. OGC will coordinate with the DoJ to determine whether service is effective and whether the NSA person is entitled to be represented at Government expense pursuant to § 93.1(f).

§ 93.6 Fees.

Consistent with the guidelines in § 93.1(e), NSA may charge reasonable fees to parties seeking, by request or demand, official information not otherwise available under the Freedom of Information Act, 5 U.S.C. 552. Such fees are calculated to reimburse the Government for the expense of providing such information, and may include:

(a) The costs of time expended by NSA employees to process and respond to the request or demand;

(b) Attorney time for reviewing the request or demand and any information located in response thereto, and for related legal work in connection with the request or demand; and

(c) Expenses generated by materials and equipment used to search for, produce, and copy the responsive information.

§ 93.7 Responsibilities.

(a) *The General Counsel.* The GC is responsible for overseeing NSA compliance with § 93.1(a) and this part 93, and for consulting with DoJ when appropriate. In response to a litigation demand requesting official information or the testimony of NSA personnel as witnesses, the GC will coordinate NSA action to determine whether official information may be released and whether NSA personnel may be interviewed, contacted, or used as witnesses. The GC will determine what, if any, conditions will be imposed upon such release, interview, contact, or testimony. In most cases, an NSA attorney will be present when NSA personnel are interviewed or testify concerning official information. The GC may delegate these authorities.

(b) *The Deputy Director for Plans and Policy (DDPP).* The DDPP will assit the GC, upon request, in identifying and coordinating with NSA components

that have cognizance over official information requested in a litigation demand. Additionally, the DDPP will advise the GC on the classified status of official information, and, when necessary, assist in declassifying, redacting, substituting, or summarizing official information for use in litigation. The DDPP may require the assistance of other Key Component Chiefs.

(c) *Chiefs of Key Components and Field Activities.* Chiefs of Key Components and Field Activities shall ensure that their personnel are informed of the contents of this part 93, particularly of the requirements to consult with the OGC prior to responding to any litigation demand, and to inform the OGC whenever they receive service of process that is not clearly in their individual capacities. Field Chiefs will notify the OGC of the persons they designate under § 93.5(b)(3).

(d) *The Deputy Director for Administration (DDA).* Within 60 days of the date of this part, the DDA shall submit to the GC for approval procedures for the attempted delivery of service of process during duty hours when an attorney of the OGC is not available.

PART 94—NATURALIZATION OF ALIENS SERVING IN THE ARMED FORCES OF THE UNITED STATES AND OF ALIEN SPOUSES AND/OR ALIEN ADOPTED CHILDREN OF MILITARY AND CIVILIAN PERSONNEL ORDERED OVERSEAS

Sec.
94.1 Purpose.
94.2 Applicability.
94.3 Definitions.
94.4 Policy and procedures.
94.5 Forms required.

AUTHORITY: Sec. 301, 80 Stat. 379; 5 U.S.C. 301.

SOURCE: 35 FR 17540, Nov. 14, 1970, unless otherwise noted.

§ 94.1 Purpose.

This part prescribes uniform procedures acceptable to the Immigration and Naturalization Service of the Department of Justice, to (a) facilitate the naturalization of aliens who have served honorably in the Armed Forces of the United States and to (b) militarily certify alien dependents seeking naturalization under the provisions of Immigration and Nationality Act of 1952, as amended, sections 319(b) and 323(c) (8 U.S.C. 1430(b) and 1434(c)); and furnishes policy guidance to the Secretaries of the Military Departments governing discharge or release from active duty in the Armed Forces of the United States of permanent-residence aliens who desire to be naturalized as U.S. citizens under the provisions of Act of June 27, 1952, section 328 (66 Stat. 249); 8 U.S.C. 1439.

§ 94.2 Applicability.

The provisions of this part apply to the Military Departments.

§ 94.3 Definitions.

(a) *Permanent-residence alien* is an alien admitted into the United States under an immigration visa for permanent residence; or an alien, who, after admission without an immigrant visa, has had his status adjusted to that of an alien lawfully admitted for permanent residence.

(b) *Armed Forces of the United States* denotes collectively all components of the Army, Navy, Air Force, Marine Corps, and Coast Guard.

§ 94.4 Policy and procedures.

(a) *Naturalization of an alien who has served honorably in the Armed Forces of the United States at any time.* (1) Under the provisions of Act of June 27, 1952, section 328 (66 Stat. 249); 8 U.S.C. 1439, an alien who has served in the Armed Forces of the United States for a period(s) totaling three (3) years may be naturalized if he:

(i) Has been lawfully admitted to the United States for permanent residence;

(ii) Was separated from the military service under honorable conditions;

(iii) Files a petition while still in the military service, or within six (6) months after the termination of such service; and

(iv) Can comply in all other respects with the Immigration and Nationality Act of 1952, except that (*a*) no period of residence or specified period of physical presence in the United States or the State in which the petition for naturalization is filed is required, and (*b*)

residence within the jurisdiction of the court is not required.

(2) The prescribed 3-year period may be satisfied by a combination of active duty and inactive duty in a reserve status.

(3) An alien member desiring to fulfill naturalization requirements through military service shall not be separated prior to completion of three (3) full years of active duty unless:

(i) His performance or conduct does not justify retention, in which case he shall be separated in accordance with the provisions of part 41 of this subchapter and chapter 47, title 10, United States Code (Uniform Code of Military Justice), as appropriate; or

(ii) He is to be transferred to inactive duty in a reserve component in order to:

(*a*) Complete a reserve obligation under the provisions of part 50 of this subchapter, or

(*b*) Attend a recognized institution of learning under the early release program, as provided in DoD Instruction 1332.15, ''Early Release of Military Enlisted Personnel for College or Vocational/Technical School Enrollment,'' January 26, 1970. [1]

(4) Caution shall be exercised to ensure that an alien's affiliation with the Armed Forces of the United States, whether on active duty or on inactive duty in a reserve status, is not terminated even for a few days short of the 3-year statutory period, since failure to comply with the exact 3-year requirement of Act of June 27, 1952, section 328 (66 Stat. 249); 8 U.S.C. 1439 will automatically preclude a favorable determination by the Immigration and Naturalization Service on any petition for naturalization based on an alien's military service.

(5) During a period of hostilities, as designated by the President of the United States, the expeditious naturalization provisions outlined in paragraph (b) of this section, will take precedence over the foregoing.

(b) *Naturalization of an alien who has served in the Armed Forces of the United States during a period of hostilities as designated by the President of the United States.* (1) Under the provisions of Immigration and Nationality Act of 1952, as amended, section 329 (8 U.S.C. 1440), an alien who serves honorably on active duty in the Armed Forces of the United States during the period beginning February 28, 1961, and ending on a date designated by the President, by Executive order, as the date of termination of the Vietnam hostilities, or during any future period which President, by Executive order, shall designate as a period in which the Armed Forces of the United States are or were engaged in military operations involving armed conflict with a hostile foreign force, and who is otherwise eligible, may be naturalized whether or not he has been lawfully admitted to the United States for permanent residence, if the member was inducted, enlisted, or reenlisted in the United States (inclusive of Puerto Rico, Guam, Virgin Islands, Canal Zone, American Samoa, or Swains Island).

(i) The induction, enlistment, or reenlistment in the United States or its stated possessions must actually be in these land areas, in ports, harbors, bays, enclosed sea areas along their routes, or within a marginal belt of the sea extending from the coastline outward three (3) geographical miles.

(ii) Enlistment or reenlistment aboard a ship on the high seas or in foreign waters does not meet the requirements of Immigration and Nationality Act of 1952, as amended, section 329 (8 U.S.C. 1440). In such instances, the provisions of paragraph (a) of this section may apply.

(2) Each Military Department will establish procedures containing the provisions outlined in paragraphs (b)(2) (i) and (ii) of this section. In addition, each qualifying alien shall be advised of the liberalized naturalization provisions of the Immigration and Nationality Act of 1952, as amended, section 329 (8 U.S.C. 1440), i.e., that the usual naturalization requirements concerning age, residence, physical presence, court jurisdiction and waiting periods are not applicable, and will be given appropriate assistance in processing his naturalization application in consonance with procedures contained in ''Naturalization Requirements and

[1] Filed as part of original. Copies available from the U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, PA. 19120, Attention: Code 300.

General Information,'' published by the U.S. Department of Justice (Form N–17).

(i) Military basic training and orientation programs will include advice and assistance to interested aliens in completing and submitting the application and other forms required to initiate naturalization proceedings.

(ii) In addition, applicants should be advised that:

(*a*) Under the laws of certain foreign countries, military service in the Armed Forces of the United States may result in the loss of their native country citizenship but this same service may make them eligible for U.S. citizenship.

(*b*) Their eligibility for naturalization, based upon the honorable service in an active duty status prescribed in the Immigration and Nationality Act of 1952, as amended, section 329 (8 U.S.C. 1440) will be retained, even though they apply for naturalization after their return to the United States following the termination or completion of their overseas assignment, or after their honorable discharge from the Armed Forces of the United States.

(*c*) If they are stationed at a base in the continental United States, Alaska, Hawaii, Puerto Rico, Guam, or the Virgin Islands, they should apply for citizenship only if they expect to be stationed at the base for at least 60 days following application. Unless the Immigration and Naturalization Service has at least 60 days in which to complete the case, there is no assurance that it can be completed before the applicant is transferred, since the processing procedures outlined below take time and are not entirely within the control of the Immigration and Naturalization Service.

(*1*) Every naturalization application must be processed when received by the Immigration and Naturalization Service. Special arrangements have been made to expedite the processing of petitions of alien members of the Armed Forces.

(*2*) After processing, the alien applicant and two citizen witnesses must personally appear for examination by an officer of the Immigration and Naturalization Service in connection with the filing of a petition for naturalization in court.

(*3*) Finally, the applicant must appear in person before the naturalization court on a date set by the court so that he may be admitted to citizenship.

(*d*) If the alien member is scheduled for overseas assignment where naturalization courts are not available, he should apply for naturalization on the earliest possible date but no later than 60 days before departure for overseas assignment. No assurance that processing will be completed before the applicant's departure for overseas will be given by the Immigration and Naturalization Service unless it has 60 days to complete the matter.

(*1*) An alien serviceman who is serving overseas and has submitted or submits the required naturalization application and forms to the Immigration and Naturalization Service may not be granted ordinary leave, or Rest and Recuperation (R&R) leave (where authorized in overseas areas) for naturalization purposes, unless a written notification from the Immigration and Naturalization Service has been received by the serviceman informing him that the processing of his application has been completed, and requesting him to appear with two U.S. citizen witnesses before a representative of the Immigration and Naturalization Service at a designated location for the purpose of completing the naturalization.

(*2*) If possible, an applicant granted leave for such purposes should advise the Immigration and Naturalization Service when he expects to arrive in the leave area and, in any event, should contact the Immigration and Naturalization Service office immediately upon arrival in the area. Every effort will be made to complete the naturalization within the leave period.

(c) *Naturalization of alien spouses and/or alien adopted children of military and civilian personnel ordered overseas.* Alien spouses and/or alien adopted children of military and civilian personnel of the Department of Defense who are authorized to accompany or join their sponsors overseas and who wish to obtain U.S. citizenship prior to departure will be given maximum assistance by commanders of military installations.

(1) DD Form 1278, ''Certificate of Overseas Assignment to Support Application to File Petition for Naturalization,''[2] will be issued to alien dependents by military commanders at the times indicated below in order that the alien may file such certificate with the nearest Immigration and Naturalization Service Office to initiate naturalization proceedings. Only DD Form 1278 will be accepted by the Immigration and Naturalization Service. Military commanders will not issue memoranda or letters of any kind in lieu thereof.

(i) When dependents are authorized automatic concurrent travel, DD Form 1278 will be issued not earlier than 90 days prior to the dependents' schedule date of travel.

(ii) When advance application for concurrent travel is required, DD Form 1278 will be issued after approval is received and not earlier than 90 days prior to the dependents' scheduled date of departure.

(iii) When concurrent travel is not authorized, DD Form 1278 will be issued after authorization for dependents' movement is received and not earlier than 90 days prior to the dependents' scheduled date of travel.

(2) Upon receipt of DD Form 1278, the alien will file this form, together with the application for petition for naturalization, Immigration and Naturalization Form N–400 (adult) or N–402 (child) as appropriate, if not previously filed, with the nearest office of the Immigration and Naturalization Service. The application must be accompanied by:

(i) Three identical photographs.

(ii) Form FD–358, Applicant Fingerprint Card, and

(iii) Form G–325, Biographic Information.

(3) Further processing of the application for citizenship is as prescribed by the Immigration and Naturalization Service.

(4) Upon completion of the naturalization process, immediate application for passport should be made, in order that it can be issued prior to scheduled departure of the dependent for overseas.

[2] Filed as part of original. Copies may be obtained from Departments of the Army, Navy, and Air Force.

§ 94.5 Forms required.

The following forms required for naturalization purposes may be obtained from any office of the Immigration and Naturalization Service:

(a) N–400 Application to File a Petition for Naturalization (Adult) (Submit original form only).

(b) N–402 Application to File a Petition for Naturalization (Child) (Submit original form only).

(c) G–325 Biographic Information (Submit original and duplicate of multileaf form).

(d) G–325B Biographic Information (Submit original form only).

(e) FD–258 Applicant Fingerprint Card (Submit one completed card).

(f) N–426 Certificate of Military or Naval Service (Submit in triplicate). (Should be handled on a priority basis so as to avoid prejudicing the early completion of the naturalization process, particularly for an alien who may receive an overseas assignment.)

(g) ''Naturalization Requirements and General Information,'' published by the U.S. Department of Justice (Form N–17) describes the naturalization requirements and lists Immigration and Naturalization offices which process applications.

PART 97—RELEASE OF OFFICIAL INFORMATION IN LITIGATION AND TESTIMONY BY DoD PERSONNEL AS WITNESSES

Sec.
97.1 Purpose.
97.2 Applicability and scope.
97.3 Definitions.
97.4 Policy.
97.5 Responsibilities.
97.6 Procedures.

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 133.

SOURCE: 50 FR 32056, Aug. 8, 1985, unless otherwise noted.

§ 97.1 Purpose.

This directive establishes policy, assigns responsibilities, and prescribes procedures for the release of official DoD information in litigation and for testimony by DoD personnel as witnesses during litigation.

§ 97.2 Applicability and scope.

(a) This directive applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Organization of the Joint Chiefs of Staff (OJCS), the Unified and Specified Commands, and the Defense Agencies (hereafter referred to as ''DoD Components''), and to all personnel of such DoD Components.

(b) This directive does not apply to the release of official information or testimony by DoD personnel in the following situations:

(1) Before courts-martial convened by the authority of the Military Departments or in administrative proceedings conducted by or on behalf of a DoD Component;

(2) Pursuant to administrative proceedings conducted by or on behalf of the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB), or pursuant to a negotiated grievance procedure under a collective bargaining agreement to which the Government is a party;

(3) In response to requests by Federal Government counsel in litigation conducted on behalf of the United States;

(4) As part of the assistance required pursuant to DoD Directive 5220.6, ''Industrial Personnel Security Clearance Program,'' December 20 1976; or,

(5) Pursuant to disclosure of information to Federal, State, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DoD criminal investigative organization.

(c) This Directive does not supersede or modify existing laws or DoD program governing the testimony of DoD personnel or the release of official DoD information during grand jury proceedings, the release of official information not involved in litigation, or the release of official information pursuant to the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a, nor does this Directive preclude treating any written request for agency records that is not in the nature of legal process as a request under the Freedom of Information or Privacy Acts.

(d) This Directive is not intended to infringe upon or displace the responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States in appropriate cases.

(e) This Directive does not preclude official comment on matters in litigation in appropriate cases.

(f) This Directive is intended only to provide guidance for the internal operation of the Department of Defense and is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law against the United States or the Department of Defense.

§ 97.3 Definitions.

(a) *Demand.* Subpoena, order, or other demand of a court of competent jurisdiction, or other specific authority, for the production, disclosure, or release of official DoD information or for the appearance and testimony of DoD personnel as witnesses.

(b) *DoD personnel.* Present and former U.S. military personnel; Service Academy cadets and midshipmen; and present and former civilian employees of any Component of the Department of Defense, including nonappropriated fund activity employees; non-U.S. nationals who perform services overseas, under the provisions of status of forces agreements, for the U.S. Armed Forces; and other specific individuals hired through contractual agreements by or on behalf of the Department of Defense.

(c) *Litigation.* All pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before civilian courts, commissions, boards (including the Armed Services Board of Contract Appeals), or other tribunals, foreign and domestic. This term includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving litigation.

(d) *Official information.* All information of any kind, however stored, that is in the custody and control of the Department of Defense, relates to information in the custody and control of the Department, or was acquired by

DoD personnel as part of their official duties or because of their official status within the Department while such personnel were employed by or on behalf of the Department or on active duty with the U.S. Armed Forces.

§ 97.4 Policy.

It is DoD policy that official information should generally be made reasonably available for use in Federal and State courts and by other governmental bodies unless the information is classified, privileged, or otherwise protected from public disclosure.

§ 97.5 Responsibilities.

(a) The *General Counsel, Department of Defense*, shall provide general policy and procedural guidance by the issuance of supplemental instructions or specific orders concerning the release of official DoD information in litigation and the testimony of DoD personnel as witnesses during litigation.

(b) The *Heads of DoD Components* shall issue appropriate regulations to implement this Directive and to identify official information that is involved in litigation.

§ 97.6 Procedures.

(a) *Authority to act.* (1) In response to a litigation request or demand for official DoD information or the testimony of DoD personnel as witnesses, the General Counsels of DoD, Navy, and the Defense Agencies; the Judge Advocates General of the Military Departments; and the Chief Legal Advisors to the JCS and the Unified and Specified Commands, with regard to their respective Components, are authorized—after consulting and coordinating with the appropriate Department of Justice litigation attorneys, as required—to determine whether official information may be released in litigation; whether DoD personnel assigned to or affiliated with the Component may be interviewed, contacted, or used as witnesses concerning official DoD information or as expert witnesses; and what, if any, conditions will be imposed upon such release, interview, contact, or testimony. Delegation of this authority, to include the authority to invoke appropriate claims of privilege before any tribunal, is permitted.

(2) In the event that a DoD Component receives a litigation request or demand for official information originated by another Component, the receiving Component shall forward the appropriate portions of the request or demand to the originating Component for action in accordance with this Directive. The receiving Component shall also notify the requestor, court, or other authority of its transfer of the request or demand.

(3) Notwithstanding the provisions of paragraph (a) (1) and (2) of this section, the General Counsel, DoD, in litigation involving terrorism, espionage, nuclear weapons, intelligence means or sources, or otherwise as deemed necessary, may notify Components that General Counsel, DoD, will assume primary responsibility for coordinating all litigation requests and demands for official DoD information or testimony of DoD personnel, or both; consulting with the Department of Justice, as required; and taking final action on such requests and demands.

(b) *Factors to consider.* In deciding whether to authorize the release of official DoD information or the testimony of DoD personnel concerning official information (hereafter referred to as ''the disclosure'') pursuant to paragraph (a), DoD officials should consider the following types of factors:

(1) Whether the request or demand is unduly burdensome or otherwise inappropriate under the applicable court rules;

(2) Whether the disclosure, including release *in camera*, is appropriate under the rules of procedure governing the case or matter in which the request or demand arose;

(3) Whether the disclosure would violate a statute, executive order, regulation, or directive;

(4) Whether the disclosure, including release *in camera*, is appropriate or necessary under the relevant substantive law concerning privilege;

(5) Whether the disclosure, except when *in camera* and necessary to assert a claim of privilege, would reveal information properly classified pursuant to DoD 5200.1–R, ''Information Security

Program Regulation,'' August 1982; unclassified technical data withheld from public release pursuant to DoD Directive 5230.25, ''Withholding of Unclassified Technical Data from Public Disclosure,'' November 6, 1984; or other matters exempt from unrestricted disclosure; and,

(6) Whether disclosure would interfere with ongoing enforcement proceedings, compromise constitutional rights, reveal the identity of an intelligence source or confidential informant, disclose trade secrets or similarly confidential commercial or financial information, or otherwise be inappropriate under the circumstances.

(c) *Decisions on litigation requests and demands.* (1) Subject to paragraph (c)(5) of this section, DoD personnel shall not, in response to a litigation request or demand, produce, disclose, release, comment upon, or testify concerning any official DoD information without the prior written approval of the appropriate DoD official designated in §97.6(a). Oral approval may be granted, but a record of such approval will be made and retained in accordance with the applicable implementing regulations.

(2) If official DoD information is sought, through testimony or otherwise, by a litigation request or demand, the individual seeking such release or testimony must set forth, in writing and with as much specificity as possible, the nature and relevance of the official information sought. Subject to paragraph (c)(5), DoD personnel may only produce, disclose, release, comment upon, or testify concerning those matters that were specified in writing and properly approved by the appropriate DoD official designated in paragraph (a) of this section. *See United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

(3) Whenever a litigation request or demand is made upon DoD personnel for official DoD information or for testimony concerning such information, the personnel upon whom the request or demand was made shall immediately notify the appropriate DoD official designated in §97.6(a) for the Component to which the individual contacted is or, for former personnel, was last assigned. In appropriate cases, the responsible DoD official shall thereupon notify the Department of Justice of the request or demand. After due consultation and coordination with the Department of Justice, as required, the DoD official shall determine whether the individual is required to comply with the request or demand and shall notify the requestor or the court or other authority of the determination reached.

(4) If, after DoD personnel have received a litigation request or demand and have in turn notified the appropriate DoD official in accordance with paragraph (c)(3) of this section , a response to the request or demand is required before instructions from the responsible official are received, the responsible official designated in paragraph (a) shall furnish the requestor or the court or other authority with a copy of this directive and applicable implementing regulations, inform the requestor or the court or other authority that the request or demand is being reviewed, and seek a stay of the request or demand pending a final determination by the Component concerned.

(5) If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken pursuant to §97.6(c)(4), or if such court or other authority orders that the request or demand must be complied with notwithstanding the final decision of the appropriate DoD official, the DoD personnel upon whom the request or demand was made shall notify the responsible DoD official of such ruling or order. If the DoD official determines that no further legal review of or challenge to the court's order or ruling will be sought, the affected DoD personnel shall comply with the request, demand, or order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully decline to comply with the demand. *See United States ex rel. Touhy* v. *Ragen,* 340 U.S. 462 (1951).

(d) *Fees.* Consistent with the guidelines in DoD Instruction 7230.7, ''User Charges,'' January 29, 1985, the appropriate officials designated in §97.6(a) are authorized to charge reasonable fees, as established by regulation and to the extent not prohibited by law, to parties seeking, by request or demand,

official DoD information not otherwise available under DoD 5400.7–R, ''DoD Freedom of Information Act Program,'' March 24, 1980. Such fees, in amounts calculated to reimburse the government for the expense of providing such information, may include the costs of time expended by DoD employees to process and respond to the request or demand; attorney time for reviewing the requst or demand and any information located in response thereto and for related legal work in connection with the request or demand; and expenses generated by materials and equipment used to search for, produce, and copy the responsive information. *See Oppenheimer Fund, Inc.* v. *Sanders*, 437 U.S. 340 (1978).

(e) *Expert or opinion testimony.* DoD personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DoD information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. Upon a showing by the requestor of exceptional need or unique circumstances and that the anticipated testimony will not be adverse to the interests of the Department of Defense or the United States, the appropriate DoD official designated in paragraph (a) of this section may, in writing, grant special authorization for DoD personnel to appear and testify at no expense to the United States. If, despite the final determination of the responsible DoD official, a court of competent jurisdiction or other appropriate authority, orders the appearance and expert or opinion testimony of DoD personnel, the personnel shall notify the responsible DoD official of such order. If the DoD official determines that no further legal review of or challenge to the court's order will be sought, the affected DoD personnel shall comply with the order. If directed by the appropriate DoD official, however, the affected DoD personnel shall respectfully decline to comply with the demand. *See United States ex rel. Touhy* v. *Ragen*, 340 U.S. 462 (1951).

PART 99—PROCEDURES FOR STATES AND LOCALITIES TO REQUEST INDEMNIFICATION

Sec.

99.1 Scope and purpose.
99.3 General definitions.
99.5 Eligibility for indemnification.
99.7 Procedures for requesting an indemnification agreement.
99.9 Terms of indemnification.

APPENDIX TO PART 99—ADDRESSES OF RELEVANT U.S. GOVERNMENT AGENCIES

AUTHORITY: Access to Criminal History Records for National Security Purposes, of The Intelligence Authorization Act for Fiscal Year 1986, Pub. L. No. 99–169, secs. 801–803, 99 Stat. 1002, 1008–1011 (1985) (codified in part at 5 U.S.C. 9101).

SOURCE: 51 FR 42555, Nov. 25, 1986, unless otherwise noted.

§ 99.1 Scope and purpose.

(a) The Department of Defense (DoD), Office of Personnel Management (OPM), or Central Intelligence Agency (CIA) has the right to criminal history information of States and local criminal justice agencies in order to determine whether a person may:

(1) Be eligible for access to classified information;

(2) Be assigned to sensitive national security duties; or

(3) Continue to be assigned to national security duties.

(b) This part sets out the conditions under which the DoD, OPM, or CIA may sign an agreement to indemnify and hold harmless a State or locality against claims for damages, costs, and other monetary loss caused by disclosure or use of criminal history record information by one of these agencies.

(c) The procedures set forth in this part do not apply to situations where a Federal agency seeks access to the criminal history records of another Federal agency.

(d) By law these provisions implementing 5 U.S.C. 9101 (b)(3) shall expire December 4, 1988, unless the duration of said section is extended or limited by Congress.

§ 99.3 General definitions.

For the purposes of §§ 99.1 through 99.9 of this part:

Criminal history record information: information collected by criminal justice agencies on individuals consisting of identifiable descriptions and notations of arrests, indictments, information, or other formal criminal charges and any disposition arising therefrom, sentencing, correction supervision, and release. The term does not include identification information such as fingerprint records to the extent that such information does not indicate involvement of the individual in the criminal justice system. The term does not include those records of a State or locality sealed pursuant to law from access by State and local criminal justice agencies of that State or locality.

Criminal justice agency: Federal, State, and local agencies including (a) courts, or (b) a government agency or any subunit thereof which performs the administration of criminal justice pursuant to a statute or executive order, and which allocates a substantial part of its annual budget to the administration of criminal justice.

Department of Defense: the Defense Investigative Service, National Security Agency, Naval Investigative Service, Air Force Office of Special Investigations, and Army Intelligence and Security Command.

Federal agency: the Department of Defense, the Office of Personnel Management, or the Central Intelligence Agency, or any other Federal agency subsequently authorized by Congress to obtain access to criminal history records information.

Locality: any local government authority or agency or component thereof within a State having jurisdiction over matters at a county, municipal or other local government level.

State: any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Northern Mariana Islands, Guam, the Virgin Islands, American Samoa, the Trust Territory of Pacific Islands, and any other territory or possession of the United States.

§ 99.5 Eligibility for indemnification.

As provided for under 5 U.S.C. 9101(b)(3), a State or locality may request an indemnification agreement.

(a) To be eligible for an indemnification agreement a State or locality must have had a law in effect on December 4, 1985 that prohibited or had the effect of prohibiting the disclosure of criminal history record information to the DoD, OPM, or CIA.

(b) A State or locality is also eligible for an indemnification agreement if it meets the conditions of paragraph (a) of this section, but nevertheless provided criminal history record information to the DoD, OPM, or CIA on or before December 4, 1985.

§ 99.7 Procedures for requesting an indemnification agreement.

When requesting an indemnification agreement, the State or locality must notify each Federal agency as appropriate, at the address listed in the appendix to this part, of its eligibility of an indemnification agreement. It must also:

(a) Certify that on December 4, 1985, the State or locality had in effect a law which prohibited or had the effect of prohibiting the disclosure of criminal history record information to the DoD, OPM, or CIA; and

(b) Append to the request for an indemnification agreement a copy of such law.

§ 99.9 Terms of indemnification.

The terms of the Uniform Federal Agency Indemnification Agreement (UFAIA), must conform to the following provisions:

(a) *Eligibility:* The State or locality must certify that its law prohibits or has the effect of prohibiting the disclosure of criminal history record information to the DoD, OPM, or CIA for the purposes described in section 910.101(a) and that such law was in effect on December 4, 1985.

(b) *Liability:* (1) The Federal agency agrees to indemnify and hold harmless the State or locality from any claim for damages, costs and other monetary loss arising from the disclosure or negligent use by the DoD, OPM, or CIA of criminal history record information obtained from that State or locality pursuant to 5 U.S.C. 9101(b). The indemnification will include the officers, employees, and agents of the State or locality.

(2) The indemnification agreement will not extend to any act or omission prior to the transmittal of the criminal history record information to the Federal agency.

(3) The indemnification agreement will not extend to any negligent acts on the part of the State or locality in compiling, transcribing or failing to delete or purge any of the information transmitted.

(c) *Consent and access requirements:* (1) The Federal agency when requesting criminal history record information from the State or locality for the release of such information will attest that it has obtained the written consent of the individual under investigation after advising him or her of the purposes for which that information is intended to be used.

(2) The Federal agency will attest that it has advised that individual of the right to access that information.

(d) *Purpose requirements:* The Federal agency will use the criminal history record information only for the purposes stated in §910.101(a).

(e) *Notice, litigation and settlement procedures:* (1) The State or locality must give notice of any claim against it on or before the 10th day after the day on which claim against it is received, or it has notice of such a claim.

(2) The notice must be given to the Attorney General and to the U.S. Attorney of the district embracing the place wherein the claim is made.

(3) The Attorney General shall make all determinations regarding the settlement or defense of such claims.

APPENDIX TO PART 99—ADDRESSES OF RELEVANT U.S. GOVERNMENT AGENCIES

Department of Defense, Office of the General Counsel, Room 3E988, Washington, DC 20301–1600

Office of Personnel Management, Office of Federal Investigations, P.O. Box 886, Washington, DC 20044

Central Intelligence Agency, Attention: Office of General Counsel, Washington, DC 20505

PART 103—SEXUAL ASSAULT PREVENTION AND RESPONSE (SAPR) PROGRAM

Sec.

103.1 Purpose.
103.2 Applicability.
103.3 Definitions.
103.4 Policy.
103.5 Responsibilities.
103.6 Reporting options and sexual assault reporting procedures.
103.7 Case management for unrestricted reports of sexual assault.

APPENDIX A TO PART 103—RELATED POLICIES

AUTHORITY: 10 U.S.C. 113, and Public Laws 106–65, 108–375, 109–163, 109–364, 110–417, 111–84, 111–383, 112–81, 112–239, 113–291, 113–66,113–291, and 114–92.

SOURCE: 85 FR 42710, July 15, 2020, unless otherwise noted.

§103.1 Purpose.

This part is the Department of Defense's comprehensive SAPR program that provides policy guidance and assigns responsibilities for the prevention, response, and oversight of sexual assaults involving members of the U.S. Armed Forces and Reserve Component, to include the National Guard. The SAPR Program is supported by the policies identified in Appendix A to this part.

§103.2 Applicability.

(a) This part applies to:

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

(2) National Guard and Reserve Component members who are sexually assaulted when performing active service, as defined in 10 U.S.C. 101(d)(3), and inactive duty training. Refer to paragraph (c) of Appendix A to this part for information on how to access DoD internal policy containing additional SAPR and healthcare services provided to such personnel and eligibility criteria for Restricted Reporting.

(3) Military dependents 18 years of age and older who are eligible for treatment in the military healthcare system, at installations in the continental United States and outside of the continental United States (OCONUS), and

who were victims of sexual assault perpetrated by someone other than a spouse or intimate partner. An adult military dependent may file unrestricted or restricted reports of sexual assault.

(4) The following non-military personnel who are only eligible for limited healthcare (medical and mental health) services in the form of emergency care (see §103.3), unless otherwise eligible to receive treatment in a military medical treatment facility. They will also be offered the limited SAPR services of a Sexual Assault Response Coordinator (SARC) and a SAPR Victim Advocate (VA) while undergoing emergency care OCONUS. For further information see paragraph (c) of Appendix A to this part. These limited healthcare and SAPR services shall be provided to:

(i) DoD civilian employees and their family dependents 18 years of age and older when they are stationed or performing duties OCONUS and eligible for treatment in the military healthcare system at military installations or facilities OCONUS. For further information see paragraph (c) of Appendix A to this part.

(ii) U.S. citizen DoD contractor personnel when they are authorized to accompany the Armed Forces in a contingency operation OCONUS and their U.S. citizen employees (See 32 CFR part 158 and paragraph (c) of Appendix A to this part).

(5) Service members who are on active duty but were victims of sexual assault prior to enlistment or commissioning. They are eligible to receive full SAPR services and either reporting option.

(b) This part does not apply to victims of sexual assault perpetrated by a spouse or intimate partner, or military dependents under the age of 18 who are sexually assaulted. For further information see paragraph (e) of Appendix A to this part.

(c) This part supersedes all policy and regulatory guidance within the DoD not expressly mandated by law that is inconsistent with its provisions, or that would preclude execution.

§ 103.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Accessions training. Training that a Service member receives upon initial entry into Military Service through basic military training.

Case management group (CMG). A multi-disciplinary group that meets monthly to review individual cases of Unrestricted Reports of sexual assault. The group facilitates monthly victim updates and system coordination, program accountability, and victim access to quality services. At a minimum, each group shall consist of the following additional military or civilian professionals who are involved and working on a specific case: SARC, SAPR VA, military criminal investigator, DoD law enforcement, healthcare provider and mental health and counseling services, chaplain, command legal representative or SJA, and victim's commander.

Certification. Refers to the process by which the Department credentials SARCs and SAPR VAs, assesses the effectiveness of sexual assault advocacy capabilities using a competencies framework, and evaluates and performs oversight over SARC and SAPR VA training. The certification criteria are established by the Department in consultation with subject-matter experts.

Collateral misconduct. Victim misconduct that might be in time, place, or circumstance associated with the victim's sexual assault incident. Collateral misconduct by the victim of a sexual assault is one of the most significant barriers to reporting assault because of the victim's fear of punishment. Some reported sexual assaults involve circumstances where the victim may have engaged in some form of misconduct (*e.g.*, underage drinking or other related alcohol offenses, adultery, fraternization, or other violations of certain regulations or orders).

Confidential communication. Oral, written, or electronic communications of personally identifiable information (PII) concerning a sexual assault victim and the sexual assault incident provided by the victim to the SARC, SAPR VA, or healthcare personnel in a Restricted Report. This confidential

communication includes the victim's SAFE Kit and its information. See *https://www.archives.gov/cui*.

Consent. A freely given agreement to the conduct at issue by a competent person. An expression of lack of consent through words or conduct means there is no consent. Lack of verbal or physical resistance or submission resulting from the use of force, threat of force, or placing another person in fear does not constitute consent. A current or previous dating or social or sexual relationship by itself or the manner of dress of the person involved with the accused in the conduct at issue shall not constitute consent. A sleeping, unconscious, or incompetent person cannot consent.

Credible information. Information that, considering the source and nature of the information and the totality of the circumstances, is sufficiently believable to presume that the fact or facts in question are true.

Credible report. Either a written or verbal report made in support of an Expedited Transfer that is determined to have credible information.

Crisis intervention. Emergency nonclinical care aimed at assisting victims in alleviating potential negative consequences by providing safety assessments and connecting victims to needed resources. Either the SARC or SAPR VA will intervene as quickly as possible to assess the victim's safety and determine the needs of victims and connect them to appropriate referrals, as needed.

Culturally competent care. Care that provides culturally and linguistically appropriate services.

Defense Sexual Assault Incident Database (DSAID). A DoD database that captures uniform data provided by the Military Services and maintains all sexual assault data collected by the Military Services. This database shall be a centralized, case-level database for the uniform collection of data regarding incidence of sexual assaults involving persons covered by this part. DSAID will include information when available, or when not limited by Restricted Reporting, or otherwise prohibited by law, about the nature of the assault, the victim, the offender, and the disposition of reports associated with the assault. DSAID shall be available to the SAPRO and the DoD to develop and implement congressional reporting requirements. Unless authorized by law, or needed for internal DoD review or analysis, disclosure of data stored in DSAID will only be granted when disclosure is ordered by a military, Federal, or State judge or other officials or entities as required by law or applicable U.S. international agreement.

Designated activity. The agency that processes PCS or PCA for Expedited Transfers.

(1) *Air Force:* Air Force Personnel Center.

(2) *Army:* Human Resources Command for inter-installation transfers and the installation personnel center for intra-installation transfers.

(3) *Navy:* Bureau of Naval Personnel.

(4) *U.S. Marine Corps:* The order writing section of Headquarters Marine Corps.

(5) *Air and Army National Guard:* The NGB or the Joint Forces Headquarters-State for the State involved.

Emergency. A situation that requires immediate intervention to prevent the loss of life, limb, sight, or body tissue to prevent undue suffering. Regardless of appearance, a sexual assault victim needs immediate medical intervention to prevent loss of life or undue suffering resulting from internal or external physical injuries, sexually transmitted infections, pregnancy, or psychological distress. Sexual assault victims shall be given priority as emergency cases regardless of evidence of physical injury.

Emergency care. Emergency medical care includes physical and emergency psychological medical services and a SAFE consistent with the most current version of U.S. Department of Justice, Office on Violence Against Women, ''A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents.''

Executive agent. The Head of a DoD Component to whom the Secretary of Defense or the Deputy Secretary of Defense has assigned specific responsibilities, functions, and authorities to provide defined levels of support for operational missions, or administrative or

other designated activities that involve two or more of the DoD Components.

FAP. A DoD program designated to address child abuse and domestic abuse in military families in cooperation with civilian social service agencies and military and civilian law enforcement agencies. Prevention, advocacy, and intervention services are provided to individuals who are eligible for treatment in military medical treatment facilities.

Final disposition. Actions taken to resolve the reported incident, document case outcome, and address the misconduct by the alleged perpetrator, as appropriate. It includes, but is not limited to, military justice proceedings, nonjudicial punishment, or administrative actions, including separation actions taken in response to the offense, whichever is the most serious action taken.

Gender-responsive care. Care that acknowledges and is sensitive to gender differences and gender-specific issues.

Healthcare. Medical (physical) and mental healthcare.

Healthcare personnel. Persons assisting or otherwise supporting healthcare providers in providing healthcare services (*e.g.*, administrative personnel assigned to a military MTF). Includes all healthcare providers.

Healthcare provider. Those individuals who are employed or assigned as healthcare professionals or are credentialed to provide healthcare services at an MTF, or who provide such care at a deployed location or otherwise in an official capacity. This also includes military personnel, DoD civilian employees, and DoD contractors who provide healthcare at an occupational health clinic for DoD civilian employees or DoD contractor personnel. Healthcare providers may include, but are not limited to:

(1) Licensed physicians practicing in the MHS with clinical privileges in obstetrics and gynecology, emergency medicine, family practice, internal medicine, pediatrics, urology, general medical officer, undersea medical officer, flight surgeon, psychiatrists, or those having clinical privileges to perform pelvic examinations or treat mental health conditions.

(2) Licensed advanced practice registered nurses practicing in the MHS with clinical privileges in adult health, family health, midwifery, women's health, mental health, or those having clinical privileges to perform pelvic examinations.

(3) Licensed physician assistants practicing in the MHS with clinical privileges in adult, family, women's health, or those having clinical privileges to perform pelvic examinations.

(4) Licensed registered nurses practicing in the MHS who meet the requirements for performing a SAFE as determined by the local privileging authority. This additional capability shall be noted as a competency, not as a credential or privilege.

(5) A psychologist, social worker, or psychotherapist licensed and privileged to provide mental health care or other counseling services in a DoD or DoD-sponsored facility.

Hospital facilities (Level 3). Minimum operational functions required for a Level 3 hospital include: Command, control, and communications; patient administration; nutritional care; supply and services; triage; emergency medical treatment; preoperative care; orthopedics; general surgery; operating rooms and central materiel and supply services; anesthesia; nursing services (to include intensive and intermediate care wards); pharmacy; clinical laboratory and blood banking; radiology services; and hospital ministry team services.

Installation. A base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility. It does not include any facility used primarily for civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense. For additional information see paragraph (ii) of Appendix A to this part.

Installation commander. Commander of a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility. It does not include any facility used primarily for

civil works, rivers and harbors projects, flood control, or other projects not under the primary jurisdiction or control of the Department of Defense.

Intimate partner. A person with whom the victim shares a child in common or with whom the victim shares or has shared a common domicile. For additional information see paragraph (e) of Appendix A to this part.

Law enforcement. Includes all DoD law enforcement units, security forces, and MCIOs.

MCIOs. The U.S. Army Criminal Investigation Command, Naval Criminal Investigative Service, and Air Force Office of Special Investigations.

Medical care. Includes physical and psychological medical services.

Military OneSource. A DoD-funded program providing comprehensive information on every aspect of military life at no cost to active duty, National Guard, and Reserve members, and their families. Military OneSource has a mandatory reporting requirement.

Military Services. The term, as used in the SAPR Program, includes Army, Air Force, Navy, Marines, Reserve Components, and their respective Military Academies.

Non-identifiable personal information. Non-identifiable personal information includes those facts and circumstances surrounding the sexual assault incident or that information about the individual that enables the identity of the individual to remain anonymous. In contrast, personal identifying information is information belonging to the victim and alleged assailant of a sexual assault that would disclose or have a tendency to disclose the person's identity.

Non-participating victim. Victim choosing not to participate in the military justice system.

Official investigative process. The formal process a law enforcement organization uses to gather evidence and examine the circumstances surrounding a report of sexual assault.

Open with limited information. Entry in DSAID to be used in the following situations: Victim refused or declined services, victim opt-out of participating in investigative process, third-party reports, local jurisdiction refused to provide victim information, or civilian victim with military subject.

Personal Identifiable Information. Includes the person's name, other particularly identifying descriptions (*e.g.*, physical characteristics or identity by position, rank, or organization), or other information about the person or the facts and circumstances involved that could reasonably be understood to identify the person (*e.g.*, a female in a particular squadron or barracks when there is only one female assigned).

Qualifying conviction. A State or Federal conviction, or a finding of guilty in a juvenile adjudication, for a felony crime of sexual assault and any general or special court-martial conviction for a UCMJ offense, which otherwise meets the elements of a crime of sexual assault, even though not classified as a felony or misdemeanor within the UCMJ. In addition, any offense that requires registration as a sex offender is a qualifying conviction.

Re-victimization. A pattern wherein the victim of abuse or crime has a statistically higher tendency to be victimized again, either shortly thereafter or much later in adulthood in the case of abuse as a child. This latter pattern is particularly notable in cases of sexual abuse.

Recovery-oriented care. Focus on the victim and on doing what is necessary and appropriate to support victim recovery, and also, if a Service member, to support that Service member to be fully mission capable and engaged.

Respond, response, or response capability. All locations, including deployed areas, have a 24 hour, 7 days per week, sexual assault response capability. The SARC shall be notified, respond, or direct a SAPR VA to respond, assign a SAPR VA, and offer the victim healthcare treatment and a SAFE. In geographic locations where there is no SARC onsite, the on-call SAPR VA shall respond, offer the victim healthcare treatment and a SAFE, and immediately notify the SARC of the sexual assault. The initial response is generally composed of personnel in the following disciplines or positions: SARCs, SAPR VAs, healthcare personnel, law enforcement, and MCIOs. Other responders are judge advocates,

chaplains, and commanders. When victims geographically detached from a military installation, the SARC or SAPR VA will refer to local civilian providers or the DoD Safe Helpline for resources.

Responders. Includes first responders, who are generally composed of personnel in the following disciplines or positions: SARCs, SAPR VAs, healthcare personnel, law enforcement, and MCIOs. Other responders are judge advocates, chaplains, and commanders, but they are usually not first responders.

Restricted Reporting. Reporting option that allows sexual assault victims to confidentially disclose the assault to specified individuals (*i.e.,* SARC, SAPR VA, or healthcare personnel), and receive medical treatment, including emergency care, counseling, and assignment of a SARC and SAPR VA, without triggering an investigation. The victim's report provided to healthcare personnel (including the information acquired from a SAFE Kit), SARCs, or SAPR VAs will NOT be reported to law enforcement or to the command to initiate the official investigative process unless the victim consents or an established exception applies. The Restricted Reporting Program applies to Service members and their military dependents 18 years of age and older. Additional persons who may be entitled to Restricted Reporting are NG and Reserve members. DoD civilians and contractors are only eligible to file an Unrestricted Report. Only a SARC, SAPR VA, or healthcare personnel may receive a Restricted Report, previously referred to as Confidential Reporting.

Safe Helpline. A crisis support service for members of the DoD community affected by sexual assault. The DoD Safe Helpline is available 24/7 worldwide with ''click, call, or text'' user options for anonymous and confidential support; can be accessed by logging on to *www.safehelpline.org* or by calling 1–877–995–5247, and through the Safe Helpline mobile application; is to be utilized as the sole DoD hotline. However, the local base and installation SARC or SAPR VA contact information is not replaced.

SAFE Kit. The medical and forensic examination of a sexual assault victim under circumstances and controlled procedures to ensure the physical examination process and the collection, handling, analysis, testing, and safekeeping of any bodily specimens and evidence meet the requirements necessary for use as evidence in criminal proceedings. The victim's SAFE Kit is treated as a confidential communication when conducted as part of a Restricted Report.

Safety assessment. A set of guidelines and considerations post-sexual assault that the responsible personnel designated by the Installation Commander can follow to determine if a sexual assault survivor is likely to be in imminent danger of physical or psychological harm as a result of being victimized by or reporting sexual assault(s). The guidelines and considerations consist of a sequence of questions, decisions, referrals, and actions that responders can enact to contribute to the safety of survivors during the first 72 hours after a report, and during other events that can increase the lethality risk for survivors (*e.g.*, arrests or command actions against the alleged perpetrators). Types of imminent danger may include non-lethal, lethal, or potentially lethal behaviors; the potential harm caused by the alleged perpetrator, family/friend(s)/acquaintance(s) of the alleged perpetrator, or the survivors themselves (*e.g.*, harboring self-harm or suicidal thoughts). The safety assessment includes questions about multiple environments, to include home and the workplace. Survivors are assessed for their perception or experience of potential danger from their leadership or peers via reprisal or ostracism. The safety assessment contains a safety plan component that survivors can complete and take with them to help improve coping, social support, and resource access during their recovery period.

SAPR Integrated Product Team (IPT). A team of individuals that advises the USD(P&R) and the Secretary of Defense on policies for sexual assault issues. The SAPR IPT serves as the implementation and oversight arm of the SAPR Program. It coordinates policy

and reviews the DoD's SAPR policies and programs and monitors the progress of program elements. For additional information see paragraph (c) of Appendix A to this part.

SAPR Program. A DoD program for the Military Departments and the DoD Components that establishes SAPR policies to be implemented worldwide. The program objective is an environment and military community intolerant of sexual assault.

SAPR VA. A person who, as a victim advocate, shall provide non-clinical crisis intervention, referral, and ongoing non-clinical support to adult sexual assault victims. Support will include providing information on available options and resources to victims. The SAPR VA, on behalf of the sexual assault victim, provides liaison assistance with other organizations and agencies on victim care matters and reports directly to the SARC when performing victim advocacy duties. Personnel who are interested in serving as a SAPR VA are encouraged to volunteer for this duty assignment.

SAPRO. Serves as the DoD's single point of authority, accountability, and oversight for the SAPR program, except for legal processes and criminal investigative matters that are the responsibility of the Judge Advocates General of the Military Departments and the IG, respectively.

SARC. The single point of contact at an installation or within a geographic area who oversees sexual assault awareness, prevention, and response training; coordinates medical treatment, including emergency care, for victims of sexual assault; and tracks the services provided to a victim of sexual assault from the initial report through final disposition and resolution.

Secondary victimization. The re-traumatization of the sexual assault, abuse, or rape victim. It is an indirect result of assault that occurs through the responses of individuals and institutions to the victim. The types of secondary victimization include victim blaming, inappropriate behavior or language by medical personnel and by other organizations with access to the victim post assault.

Senior commander. An officer, usually in the grade of O–6 or higher, who is the commander of a military installation or comparable unit and has been designated by the Military Service concerned to oversee the SAPR Program.

Service member. An active duty member of a Military Service. In addition, National Guard and Reserve Component members who are sexually assaulted when performing active service, as defined in 10 U.S.C. 101(d)(3), and inactive duty training.

Sexual assault. Intentional sexual contact characterized by use of force, threats, intimidation, or abuse of authority or when the victim does not or cannot consent. The term includes a broad category of sexual offenses consisting of the following specific UCMJ offenses: Rape, sexual assault, aggravated sexual contact, abusive sexual contact, forcible sodomy (forced oral or anal sex), or attempts to commit these acts.

SVC. Attorneys who are assigned to provide legal services in accordance with section 1716 of Public Law 113–66 and Service regulations. The Air Force, Army, National Guard, and Coast Guard refer to these attorneys as SVC. The Navy and Marine Corps refer to these attorneys as VLC.

SVIP capability. A distinct, recognizable group of appropriately skilled professionals, including MCIO investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel, who work collaboratively to:

(1) Investigate and prosecute allegations of child abuse (involving sexual assault or aggravated assault with grievous bodily harm), domestic violence (involving sexual assault or aggravated assault with grievous bodily harm), and adult sexual assault (not involving domestic offenses)

(2) Provide support for the victims of such offenses. For additional information see paragraph (bb) of Appendix A to this part.

Trauma informed care. An approach to engage people with histories of trauma that recognizes the presence of trauma symptoms and acknowledges the role that trauma has played in their lives. Trauma-informed services are based on an understanding of the vulnerabilities

or triggers of trauma survivors that traditional service delivery approaches may exacerbate, so that these services and programs can be more supportive and avoid re-traumatization.

Victim. A person who asserts direct physical, emotional, or pecuniary harm as a result of the commission of a sexual assault. The term encompasses all persons 18 and over eligible to receive treatment in military medical treatment facilities.

VLC. Attorneys who are assigned to provide legal services in accordance with section 1716 of Public Law 113–66, ''The National Defense Authorization Act for Fiscal Year 2014,'' and Service regulations. The Air Force, Army, National Guard, and Coast Guard refer to these attorneys as SVC. The Navy and Marine Corps refer to these attorneys as VLC.

VWAP. Provides guidance for assisting victims and witnesses of crime from initial contact through investigation, prosecution, and confinement. Particular attention is paid to victims of serious and violent crime, including child abuse, domestic violence, and sexual misconduct. For additional information see paragraph (aa) of Appendix A to this part.

§ 103.4 Policy.

(a) This part implements the DoD SAPR policy and the DoD SAPR Program Unrestricted and Restricted Reporting options are available to Service members and their adult military dependents. For further information see paragraph (c) of Appendix A to this part.

(b) The DoD SAPR Program focuses on prevention, education and training, response capability (defined in §103.3), victim support, reporting procedures, and appropriate accountability.

(c) While a sexual assault victim may disclose information to whomever he or she chooses, an official report is made only when a DD Form 2910 is signed and filed with a SARC or SAPR VA, or when a Military Criminal Investigative Organization (MCIO) investigator initiates an investigation.

(d) For Restricted and Unrestricted Reporting purposes, a report can be made to healthcare personnel, but healthcare personnel then immediately contact the SARC or SAPR VA to fill out the DD Form 2910.

(e) State laws or regulations that require disclosure of PII of the adult sexual assault victim or alleged perpetrator to local or State law enforcement shall not apply, except when reporting is necessary to prevent or mitigate a serious and imminent threat to the health or safety of an individual.

(f) Unless a DD Form 2910 is filed with a SARC, a report to a Chaplain or military attorney may not result in the rendering of SAPR services or investigative action because of the privileges associated with speaking to these individuals. A Chaplain or military attorney should advise the victim to consult with a SARC to understand the full scope of services available or facilitate, with the victim's consent, contact with a SARC.

(g) The SAPR Program shall:

(1) Focus on the victim and on doing what is necessary and appropriate to support victim recovery, and also, if a Service member, to support that Service member to be fully mission capable and engaged. The SAPR Program shall provide care that is gender-responsive, culturally competent, and recovery-oriented. For further information see paragraph (c) of Appendix A to this part.

(2) Not provide policy for legal processes within the responsibility of the Judge Advocates General of the Military Departments provided in 10 U.S.C. chapter 47 and the Manual for Courts-Martial or for criminal investigative matters assigned to the IG DoD.

(h) Standardized SAPR requirements, terminology, guidelines, protocols, and guidelines for instructional materials shall focus on awareness, prevention, and response at all levels as appropriate.

(i) The terms ''Sexual Assault Response Coordinator (SARC)'' and ''SAPR Victim Advocate (VA),'' as defined in §103.3, shall be used as standard terms throughout the DoD to facilitate communications and transparency regarding SAPR capacity. For further information regarding SARC and SAPR VA roles and responsibilities, see paragraph (c) of Appendix A to this part.

(1) *SARC*. The SARC shall serve as the single point of contact for coordinating appropriate and responsive care for sexual assault victims. SARCs shall coordinate sexual assault victim care and sexual assault response when a sexual assault is reported. The SARC shall supervise SAPR VAs but may be called on to perform victim advocacy duties.

(2) *SAPR VA*. The SAPR VA shall provide non-clinical crisis intervention and on-going support, in addition to referrals for adult sexual assault victims. Support will include providing information on available options and resources to victims.

(j) An immediate, trained sexual assault response capability shall be available for each report of sexual assault in all locations, including in deployed locations. The response time may be affected by operational necessities but will reflect that sexual assault victims shall be treated as emergency cases. For further information see paragraph (c) of Appendix A to this part.

(k) Victims of sexual assault shall be protected from coercion, retaliation, and reprisal. For additional information see paragraph (g) of Appendix A to this part.

(l) Victims of sexual assault shall be protected, treated with dignity and respect, and shall receive timely access to comprehensive healthcare (medical and mental health) treatment, including emergency care treatment and services. For additional information see paragraph (c) of Appendix A to this part.

(m) Emergency care for victims of sexual assault shall consist of emergency healthcare and the offer of a sexual assault forensic examination (SAFE). For additional information see paragraph (h) of Appendix A to this part.

(1) Sexual assault patients shall be given priority and shall be treated as emergency cases. A sexual assault victim needs immediate medical intervention to prevent loss of life or suffering resulting from physical injuries (internal or external), sexually transmitted infections, pregnancy, and psychological distress. Individuals disclosing a recent sexual assault shall, with their consent, be quickly transported to the exam site, promptly evaluated, treated for serious injuries, and then, with the patient's consent, undergo a SAFE. For additional information see paragraph (ff) of Appendix A to this part.

(2) Sexual assault patients shall be treated as emergency cases, regardless of whether physical injuries are evident. Patients' needs shall be assessed for immediate medical or mental health intervention. Sexual assault victims shall be treated uniformly regardless of their behavior because when severely traumatized, sexual assault patients may appear to be calm, indifferent, submissive, jocular, angry, emotionally distraught, or even uncooperative or hostile towards those who are trying to help. For additional information see paragraph (h) of Appendix A to this part.

(n) There will be a safety assessment capability for the purposes of ensuring the victim, and possibly other persons, are not in physical jeopardy. A safety assessment will be available to all Service members, adult military dependents, and civilians who are eligible for SAPR services, even if the victim is not physically located on the installation. The installation commander or the deputy installation commander will identify installation personnel who have been trained and are able to perform a safety assessment of each sexual assault victim, regardless of whether he or she filed a Restricted or Unrestricted Report. Individuals tasked to conduct safety assessments must occupy positions that do not compromise the victim's reporting options. The safety assessment will be conducted as soon as possible, understanding that any delay may impact the safety of the victim.

(o) Service members and their dependents who are 18 years of age or older covered by this part who are sexually assaulted have two reporting options: Unrestricted or Restricted Reporting. Unrestricted Reporting of sexual assault is favored by the DoD. For additional information see paragraph

(c) of Appendix A to this part. Protections are taken with PII solicited, collected, maintained, accessed, used, disclosed, and disposed during the treatment and reporting processes. For additional information see paragraph (j) of Appendix A to this part. The two reporting options are as follows:

(1) Unrestricted Reporting allows an eligible person who is sexually assaulted to access healthcare and counseling and request an official investigation of the allegation using existing reporting channels (*e.g.*, chain of command, law enforcement, healthcare personnel, the SARC). When a sexual assault is reported through Unrestricted Reporting, a SARC shall be notified as soon as possible, respond, assign a SAPR VA, and offer the victim healthcare and a SAFE.

(2) Restricted Reporting allows sexual assault victims to confidentially disclose the assault to specified individuals (*i.e.*, SARC, SAPR VA, or healthcare personnel), in accordance with this part, and receive healthcare treatment, including emergency care, counseling, and assignment of a SARC and SAPR VA, without triggering an official investigation. The victim's report to healthcare personnel (including the information acquired from a SAFE Kit), SARCs, or SAPR VAs will not be reported to law enforcement or to the victim's command, to initiate the official investigative process, unless the victim consents or an established exception exists in State laws or federal regulations. When a sexual assault is reported through Restricted Reporting, a SARC shall be notified as soon as possible, respond, assign a SAPR VA, and offer the victim healthcare and a SAFE. For additional information see paragraph (c) of Appendix A to this part).

(i) *Eligibility for Restricted Reporting*. The Restricted Reporting option applies to Service members and their military dependents 18 years of age and older. For additional information, see paragraph (c) of Appendix A to this part.

(ii) *DoD dual objectives*. The DoD is committed to ensuring victims of sexual assault are protected; treated with dignity and respect; and provided support, advocacy, and care. The DoD also strongly supports applicable law enforcement and criminal justice procedures that enable persons to be held accountable for sexual assault offenses and criminal dispositions, as appropriate. To achieve these dual objectives, DoD preference is for Unrestricted Reporting of sexual assaults to allow for the provision of victims' services and to pursue accountability. However, Unrestricted Reporting may represent a barrier for victims to access services, when the victim desires no command or law enforcement involvement. Consequently, the DoD recognizes a fundamental need to provide a confidential disclosure vehicle via the Restricted Reporting option.

(iii) *Designated personnel authorized to accept a Restricted Report*. Only the SARC, SAPR VA, or healthcare personnel are designated as authorized to accept a Restricted Report.

(iv) *SAFE confidentiality under Restricted Reporting*. A SAFE and its information shall be afforded the same confidentiality as is afforded victim statements under the Restricted Reporting option. See paragraph (c) of Appendix A to this part for additional information.

(v) *Disclosure of confidential communications*. In cases where a victim elects Restricted Reporting, the SARC, assigned SAPR VA, and healthcare personnel may not disclose confidential communications or SAFE Kit information to law enforcement or command authorities, either within or outside the DoD. In certain situations when information about a sexual assault comes to the commander's or law enforcement official's attention from a source independent of the Restricted Reporting avenues and an independent investigation is initiated, a SARC, SAPR VA, or healthcare personnel may not disclose confidential communications if obtained under Restricted Reporting. Improper disclosure of confidential communications protected under Restricted Reporting, improper release of healthcare information, and other violations of this policy or other laws and regulations are prohibited and may result in discipline pursuant to the UCMJ, or other adverse personnel or administrative actions. See paragraph

(c) of Appendix A to this part for additional information.

(p) Eligible victims must be informed of the availability of legal assistance and the right to consult with an SVC/VLC in accordance with section 1716 of the NDAA for Fiscal Year (FY) 2014 (Pub. L. 113–66).

(q) Enlistment or commissioning of personnel in the Military Services shall be prohibited and no waivers are allowed when the person has a qualifying conviction (see §103.3) for a crime of sexual assault.

(r) The DoD shall provide support to an active duty Service member regardless of when or where the sexual assault took place.

(s) Information regarding Unrestricted Reports should only be released to personnel with an official need to know or as authorized by law. Improper disclosure of confidential communications under Unrestricted Reporting or improper release of medical information are prohibited and may result in disciplinary action pursuant to the UCMJ or other adverse personnel or administrative actions.

(t) The DoD will retain the DD Forms 2910, ''Victim Reporting Preference Statement,'' and 2911, ''DoD Sexual Assault Forensic Examination (SAFE) Report,'' for 50 years, regardless of whether the Service member filed a Restricted or Unrestricted Report as defined in this part. PII will be protected in accordance with 5 U.S.C. 552a, also known as the Privacy Act of 1974 (5 U.S.C. 552a) and 32 CFR part 310 and Public Law 104–191.

(u) For document retention and SAFE Kit retention for Unrestricted Reports:

(1) The SARC will enter the Unrestricted Report DD Form 2910 in the DSAID (see §103.3) as an electronic record within 48 hours of the report, where it will be retained for 50 years from the date the victim signed the DD Form 2910. The DD Form 2910 is located at the DoD Forms Management Program website at *https://www.esd.whs.mil/Directives/forms/*.

(2) The DD Form 2911 shall be retained in accordance with the Department's internal policies. For further information, see paragraph (n) of Appendix A to this part. The DD Form 2911 is located at the DoD Forms Management Program website at *https://www.esd.whs.mil/Directives/forms/*.

(3) If the victim had a SAFE, the SAFE Kit will be retained for 5 years in accordance with section 586 of Public Law 112–81, as amended by section 538 of Public Law 113–291. For further information see paragraph (n) of Appendix A to this part. When the forensic examination is conducted at a civilian facility through a memorandum of understanding (MOU) or a memorandum of agreement (MOA) with the DoD, the requirement for the handling of the forensic kit will be explicitly addressed in the MOU or MOA. The MOU or MOA with the civilian facility will address the processes for contacting the SARC and for contacting the appropriate DoD agency responsible for accepting custody of the SAFE.

(4) Personal property retained as evidence collected in association with a sexual assault investigation will be retained for a period of 5 years. Personal property may be returned to the rightful owner of such property after the conclusion of all legal, adverse action and administrative proceedings related to such incidents in accordance with section 586 of the NDAA for FY 2012, as amended by section 538 of Public Law 113–291 and DoD regulations.

(v) For document retention and SAFE Kit retention for Restricted Reports:

(1) The SARC will retain a copy of the Restricted Report DD Form 2910 for 50 years, consistent with DoD guidance for the storage of PII. The 50-year time frame for the DD Form 2910 will start from the date the victim signs the DD Form 2910. For Restricted Reports, forms will be retained in a manner that protects confidentiality.

(2) If the victim had a SAFE, the Restricted Report DD Form 2911 will be retained for 50 years, consistent with DoD guidance for the storage of PII. The 50-year time frame for the DD Form 2911 will start from the date the victim signs the DD Form 2910, but if there is no DD Form 2910, the timeframe will start from the date the SAFE Kit is completed. Restricted Report forms will be retained in a manner that protects confidentiality.

(3) If the victim had a SAFE, the SAFE Kit will be retained for 5 years in a location designated by the Military Service concerned. When the forensic examination is conducted at a civilian facility through an MOU or a MOA with the DoD, the requirement for the handling of the forensic kit will be explicitly addressed in the MOU or MOA. The MOU or MOA with the civilian facility will address the processes for contacting the SARC and for contacting the appropriate DoD agency responsible for accepting custody of the forensic kit. The 5-year time frame will start from the date the victim signs the DD Form 2910, but if there is no DD Form 2910, the timeframe will start from the date the SAFE Kit is completed.

(4) Personal property retained as evidence collected in association with a sexual assault investigation will be retained for a period of 5 years. In the event the report is converted to Unrestricted or an independent investigation is conducted, personal property may be returned to the rightful owner of such property after the conclusion of all legal, adverse action and administrative proceedings related to such incidents in accordance with section 586 of Public Law 112–81, as amended by section 538 of Public Law 113–291, and DoD regulations. However, victims who filed a Restricted Report may request the return of personal property obtained as part of the sexual assault forensic examination at any time in accordance with section 536 of Public Law 116–92, and DoD regulations.

§ 103.5 Responsibilities.

(a) In accordance with the authority in DoD policy (see paragraph (t) of Appendix A to this part), the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) shall:

(1) Develop overall policy and provide oversight for the DoD SAPR Program, except legal processes in the UCMJ and criminal investigative matters assigned to the Judge Advocates General of the Military Departments, the Staff Judge Advocate to the Commandant of the Marine Corps, and IG DoD, respectively.

(2) Develop strategic program guidance, joint planning objectives, standard terminology, and identify legislative changes needed to ensure the future availability of resources in support of DoD SAPR policies.

(3) Develop metrics to measure compliance and effectiveness of SAPR training, awareness, prevention, and response policies and programs. Analyze data and make recommendations regarding the SAPR policies and programs to the Secretaries of the Military Departments.

(4) Monitor compliance with this part and internal policy (see paragraph (c) of Appendix A to this part), and coordinate with the Secretaries of the Military Departments regarding Service SAPR policies.

(5) Collaborate with Federal and State agencies that address SAPR issues and serve as liaison to them as appropriate. Strengthen collaboration on sexual assault policy matters with U.S. Department of Veterans Affairs on the issues of providing high quality and accessible health care and benefits to victims of sexual assault.

(6) Oversee the DoD Sexual Assault Prevention and Response Office (SAPRO). Serving as the DoD single point of authority, accountability, and oversight for the SAPR program, SAPRO provides recommendations to the USD(P&R) on the issue of DoD sexual assault policy matters on prevention, response, and oversight. The SAPRO Director will be appointed from among general or flag officers of the Military Services or DoD employees in a comparable Senior Executive Service position in accordance with Public Law 112–81, ''National Defense Authorization Act for Fiscal Year 2012.'' The SAPRO Director is responsible for:

(i) Implementing and monitoring compliance with DoD sexual assault policy on prevention and response, except for legal processes in accordance with paragraph (kk) of Appendix A to this part and Public Law 114–92, ''National Defense Authorization Act for Fiscal Year 2016,'' and criminal investigative matters assigned to the Judge Advocates General of the Military Departments, the Staff Judge Advocate to the Commandant of the Marine Corps, and IG DoD, respectively.

(ii) Providing technical assistance to the Heads of the DoD Components in addressing matters concerning SAPR.

(iii) Acquiring quarterly and annual SAPR data from the Military Services, assembling annual congressional reports involving persons covered by this part and DoD Instruction 6495.02, and consulting with and relying on the Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant of the Marine Corps in questions concerning disposition results of sexual assault cases in their respective Departments.

(iv) Establishing reporting categories and monitoring specific goals included in the annual SAPR assessments of each Military Service, in their respective Departments.

(v) Overseeing the creation, implementation, maintenance, and function of the DSAID, an integrated database that will meet congressional reporting requirements, support Service SAPR Program management, and inform DoD SAPRO oversight activities.

(vi) Overseeing development of strategic program guidance and joint planning objectives for resources in support of the SAPR Program, and making recommendations on modifications to policy, law, and regulations needed to ensure the continuing availability of such resources (Pub. L. 113–66).

(b) The Assistant Secretary of Defense for Health Affairs (ASD(HA)), under the authority, direction, and control of the USD(P&R), shall advise the USD(P&R) on DoD sexual assault healthcare policies, clinical practice guidelines, related procedures, and standards governing DoD healthcare programs for victims of sexual assault. The ASD(HA) shall:

(1) Direct that all sexual assault patients be given priority, so that they shall be treated as emergency cases.

(2) Require standardized, timely, accessible, and comprehensive medical care at MTFs for eligible persons who are sexually assaulted.

(3) Require that medical care be consistent with established community standards for the healthcare of sexual assault victims and the collection of forensic evidence from victims. For further information see paragraphs (h) and (ff) of Appendix A to this part.

(4) Establish guidance for medical personnel that requires a SARC or SAPR VA to be called in for every incident of sexual assault for which treatment is sought at the MTFs, regardless of the reporting option.

(c) The Director of Department of Defense Human Resources Activity (DoDHRA), under the authority, direction, and control of USD(P&R), shall provide operational support to the USD(P&R) as outlined in paragraph (a)(6) of this section.

(d) The General Counsel of the DoD (GC DoD) shall provide legal advice and assistance on all legal matters, including the review and coordination of all proposed issuances and exceptions to policy and the review of all legislative proposals, affecting mission and responsibilities of the DoD SAPRO.

(e) The Inspector General of the Department of Defense (IG DoD) shall:

(1) Develop and oversee the promulgation of criminal investigative and law enforcement policy regarding sexual assault and establish guidelines for the collection and preservation of evidence with non-identifiable personal information on the victim, for the Restricted Reporting process, in coordination with the ASD(HA).

(2) Oversee criminal investigations of sexual assault conducted by the DoD Components.

(3) Collaborate with the DoD SAPRO in the development of investigative policy in support of sexual assault prevention and response.

(f) The Secretaries of the Military Departments shall:

(1) Establish departmental policies and procedures to implement the SAPR Program consistent with the provisions of this part to include the military academies within their cognizance; monitor departmental compliance with this part and DoD internal policy. For further information see paragraph (c) of Appendix A to this part.

(2) Coordinate all Military Service SAPR policy changes with the USD(P&R).

(3) In coordination with the USD(P&R), implement recommendations regarding Military Service compliance and effectiveness of SAPR training, awareness, prevention, and response policies and programs.

(4) Align Service SAPR strategic plans with the DoD SAPR Strategic Plan.

(5) Align Service prevention strategies with the DoD Sexual Assault Prevention Strategy.

(6) Utilize the terms ''Sexual Assault Response Coordinator (SARC)'' and ''SAPR Victim Advocate (VA),'' as defined in this part as standard terms to facilitate communications and transparency regarding sexual assault response capacity.

(7) Establish the position of the SARC to serve as the SINGLE POINT OF CONTACT for ensuring that sexual assault victims receive appropriate and responsive care. The SARC should be a Service member, DoD civilian employee, or National Guard technician.

(8) Direct that the SARC or a SAPR VA be immediately called in every incident of sexual assault on a military installation. There will be situations where a sexual assault victim receives medical care and a SAFE outside of a military installation through an MOU or MOA with a local private or public sector entity. In these cases, the MOU or MOA will require that a SARC be notified as part of the MOU or MOA.

(9) Sexual assault victims shall be offered the assistance of a SARC and/or SAPR VA who has been credentialed by the D–SAACP. For further information see paragraph (w) of Appendix A to this part.

(10) Establish and codify Service SAPR Program support to Combatant Commands and Defense Agencies, either as a host activity or in a deployed environment.

(11) Provide SAPR Program and obligation data to the USD(P&R), as required.

(12) Submit required data to DSAID. Require confirmation that a multi-disciplinary CMG tracks each open Unrestricted Report, is chaired by the installation commander (or the deputy installation commander), and that CMG meetings are held monthly for reviewing all Unrestricted Reports of sexual assaults. For further information see paragraph (c) of Appendix A to this part.

(13) Provide annual reports of sexual assaults involving persons covered by this part and DoD Instruction 6495.02 to the DoD SAPRO for consolidation into the annual report to Congress in accordance with section 577 of Public Law 108–375.

(14) Provide data connectivity, or other means, to authorized users to ensure all sexual assaults reported in theater and other joint environments are incorporated into the DSAID, or authorized interfacing systems for the documentation of reports of sexual assault, as required by section 563 of Public Law 110–417.

(15) Ensure that Service data systems used to report case-level sexual assault information into the DSAID are compliant with DoD data reporting requirements, pursuant to section 563 of Public Law 110–417.

(16) Require extensive, continuing in-depth SAPR training for DoD personnel and specialized SAPR training for commanders, senior enlisted leaders, SARCs, SAPR VAs, investigators, law enforcement officials, chaplains, healthcare personnel, and legal personnel. For further information see paragraph (c) of Appendix A to this part.

(17) Require the installation SARC and the installation FAP staff to coordinate together when a sexual assault occurs as a result of domestic abuse or domestic violence or involves child abuse to ensure the victim is directed to FAP.

(18) Oversee sexual assault training within the DoD law enforcement community.

(19) Direct that Service military criminal investigative organizations require their investigative units to communicate with their servicing SARC and participate with the multidisciplinary CMG. For further information see paragraph (c) of Appendix A to this part.

(20) Establish procedures to ensure that, in the case of a general or special court-martial the trial counsel causes each qualifying victim to be notified of the opportunity to receive a copy of the record of trial (not to include sealed materials, unless approved by the presiding military judge or appellate court, classified information, or other portions of the record the release of which would unlawfully violate the privacy interests of any party, and

without a requirement to include matters attached to the record under Rule for Courts-Martial (R.C.M.) 1103(b)(3) in U.S. Department of Defense, ''Manual for Courts-Martial, United States''). A qualifying alleged victim is an individual named in a specification alleging an offense under Articles 120, 120b, 120c, or 125 of the UCMJ (10 U.S.C. 920, 920b, 920c, or 925), or any attempt to commit such offense in violation of Article 80 of the UCMJ (10 U.S.C. 880), if the court-martial resulted in any finding to that specification. If the alleged victim elects to receive a copy of the record of proceedings, it shall be provided without charge and within a timeframe designated by regulations of the Military Department concerned. The victim shall be notified of the opportunity to receive the record of the proceedings in accordance with R.C.M. 1103(g)(3)(C) in U.S. Department of Defense, ''Manual for Courts-Martial, United States''.

(21) Require that a completed DD Form 2701, ''Initial Information for Victims and Witnesses of Crime,'' be distributed to the victim. (DD Form 2701 is located at the DoD Forms Management Program website at *https://www.esd.whs.mil/Directives/forms/* and in DoD Instruction 1030.2). For further information see paragraph (n) of Appendix A to this part.

(22) When drafting MOUs or MOAs with local civilian medical facilities to provide DoD-reimbursable healthcare (to include psychological care) and forensic examinations for Service members and TRICARE eligible sexual assault victims, require commanders to include the following provisions:

(i) Local private or public sector providers notify the SARC or SAPR VA.

(ii) Local private or public sector providers shall have processes and procedures in place to assess that local community standards meet or exceed those set forth in U.S. Department of Justice, Office on Violence Against Women, ''A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents,'' current version as a condition of the MOUs or MOAs.

(23) Comply with collective bargaining obligations, if applicable.

(24) Provide SAPR training and education for civilian employees of the military departments in accordance with section 585 of Public Law 112–81.

(25) Require the SARCs and SAPR VAs to collaborate with designated Special Victim Investigation and Prosecution (SVIP) Capability personnel during all stages of the investigative and military justice process to ensure an integrated capability to the greatest extent possible. For further information see paragraphs (bb) and (cc) of Appendix A to this part.

§ 103.6 Reporting options and sexual assault reporting procedures.

(a) *Reporting options.* Service members and military dependents 18 years and older who have been sexually assaulted have two reporting options: Unrestricted or Restricted Reporting. Unrestricted Reporting of sexual assault is favored by the DoD. However, Unrestricted Reporting may represent a barrier for victims to access services, when the victim desires no command or DoD law enforcement involvement. Consequently, the DoD recognizes a fundamental need to provide a confidential disclosure vehicle via the Restricted Reporting option. Regardless of whether the victim elects Restricted or Unrestricted Reporting, DoD shall maintain confidentiality of medical information. For further information see paragraph (j) of Appendix A to this part. DoD civilian employees and their family dependents and DoD contractors are only eligible for Unrestricted Reporting and for limited emergency care medical services at an MTF, unless that individual is otherwise eligible as a Service member or TRICARE beneficiary of the military health system to receive treatment in an MTF at no cost to them in accordance with this part.

(1) *Unrestricted reporting.* This reporting option triggers an investigation, command notification, and allows a person who has been sexually assaulted to access healthcare treatment and the assignment of a SARC and a SAPR VA. When a sexual assault is reported through Unrestricted Reporting, a SARC shall be notified, respond or direct a SAPR VA to respond, offer the victim healthcare treatment and a

SAFE, and inform the victim of available resources. The SARC or SAPR VA will explain the contents of the DD Form 2910 and request that the victim elect a reporting option on the form. If the victim elects the Unrestricted Reporting option, a victim may not change from an Unrestricted to a Restricted Report. If the Unrestricted option is elected, the completed DD Form 2701, which sets out victims' rights and points of contact, shall be distributed to the victim in Unrestricted Reporting cases by DoD law enforcement agents. If a victim elects this reporting option, a victim may not change from an Unrestricted to a Restricted Report.

(2) *Restricted Reporting.* This reporting option does not trigger an investigation. The command is notified that ''an alleged sexual assault'' occurred but is not given the victim's name or other personally identifying information. Restricted Reporting allows Service members and military dependents who are adult sexual assault victims to confidentially disclose the assault to specified individuals (SARC, SAPR VA, or healthcare personnel) and receive healthcare treatment and the assignment of a SARC and SAPR VA. A sexual assault victim can report directly to a SARC, who will respond or direct a SAPR VA to respond, offer the victim healthcare treatment and a SAFE, and explain to the victim the resources available through the DD Form 2910, where the reporting option is elected. The Restricted Reporting option is only available to Service members and adult military dependents. Restricted Reporting may not be available in a jurisdiction that requires mandatory reporting if a victim first reports to a civilian facility or civilian authority, which will vary by state, territory, and overseas agreements. See paragraph (c) of Appendix A to this part for additional information. However, section 536 of the NDAA for FY 2016 preempts mandatory reporting laws, provided the victim first reports to an MTF, except when reporting is necessary to prevent or mitigate a serious and imminent threat to the health or safety of an individual, thereby preserving the Restricted Reporting option. If a victim elects this reporting option, a victim may convert a Restricted Report to an Unrestricted Report at any time. The conversion to an Unrestricted Report will be documented with a signature by the victim and the signature of the SARC or SAPR VA in the appropriate block on the DD Form 2910.

(i) Only the SARC, SAPR VA, and healthcare personnel are designated as authorized to accept a Restricted Report. Healthcare personnel, to include psychotherapists and other personnel listed in Military Rule of Evidence (MRE) 513 of Office of the Chairman of the Joint Chiefs of Staff, ''DoD Dictionary of Military and Associated Terms,'' who received a Restricted Report (meaning that a victim wishes to file a DD Form 2910 or have a SAFE) shall contact a SARC or SAPR VA. For further information see paragraph (c) of Appendix A to this part.

(ii) A SAFE and the information contained in its accompanying Kit are provided the same confidentiality as is afforded victim statements under the Restricted Reporting option. For further information see paragraph (c) of Appendix A to this part.

(iii) The victim's decision not to participate in an investigation or prosecution will not affect access to SARC and SAPR VA services, medical and psychological care, or services from an SVC or VLC. These services shall be made available to all eligible sexual assault victims.

(iv) If a victim approaches a SARC, SAPR VA, or healthcare provider and begins to make a report, but then changes his or her mind and leaves without signing the DD Form 2910 (the form where the reporting option is selected), the SARC, SAPR VA, or healthcare provider is not under any obligation or duty to inform investigators or commanders about this report and will not produce the report or disclose the communications surrounding the report.

(b) *Disclosure of confidential communications.* In cases where a victim elects Restricted Reporting, the SARC, SAPR VA, and healthcare personnel may not disclose confidential communications or the SAFE and the accompanying Kit to DoD law enforcement or command authorities, either within or outside the DoD. In certain situations, information about a sexual assault may

come to the commander's or DoD law enforcement official's (to include MCIO's) attention from a source independent of the Restricted Reporting avenues and an independent investigation is initiated. In these cases, SARCs, SAPR VAs, and healthcare personnel are prevented from disclosing confidential communications under Restricted Reporting, unless an exception applies. An independent investigation does not, in itself, convert the Restricted Report to an Unrestricted Report. For further information see paragraph (c) of Appendix A to this part.

(c) *Independent investigations.* Independent investigations are not initiated by the victim. If information about a sexual assault comes to a commander's attention from a source other than a victim (victim may have elected Restricted Reporting or where no report has been made by the victim), that commander shall immediately report the matter to an MCIO and an official (independent) investigation may be initiated based on that independently acquired information.

(1) If there is an ongoing independent investigation, the sexual assault victim will no longer have the option of Restricted Reporting when:

(i) DoD law enforcement informs the SARC of the investigation, and

(ii) The victim has not already elected Restricted Reporting.

(2) The timing of filing a Restricted Report is crucial. In order to take advantage of the Restricted Reporting option, the victim must file a Restricted Report by signing a DD Form 2910 before the SARC is informed of an ongoing independent investigation of the sexual assault.

(i) If a SARC is notified of an ongoing independent investigation and the victim has not signed a DD Form 2910 electing Restricted Report, the SARC must inform the victim that the option to file a Restricted Report is no longer available. However, all communications between the victim and the victim advocate will remain privileged, subject to regulatory exceptions, except for the minimum necessary to make the Unrestricted Report.

(ii) If an independent investigation begins after the victim has formally elected Restricted Reporting (by signing the DD Form 2910), the independent investigation has no impact on the victim's Restricted Report, and the victim's communications and SAFE Kit remain confidential, to the extent authorized by law and DoD regulations.

(d) *Mandatory reporting laws and cases investigated by civilian law enforcement.* Health care may be provided, and SAFE Kits may be performed in a civilian healthcare facility in civilian jurisdictions which may require certain personnel (usually health care personnel) to report the sexual assault to civilian agencies or law enforcement. In some cases, civilian law enforcement may take investigative responsibility for the sexual assault case, or the civilian jurisdiction may inform the military law enforcement or investigative community of a sexual assault that was reported to it. In such instances, it may not be possible for a victim to make a Restricted Report or it may not be possible to maintain the report as a Restricted Report. Consistent with the NDAA for FY 2016, to the extent possible, DoD will honor the Restricted Report; however, sexual assault victims need to be aware that the confidentiality afforded their Restricted Report is not guaranteed due to circumstances surrounding the independent investigation and requirements of individual State laws for civilian healthcare facilities.

(e) *Initiating medical care and treatment upon receipt of report.* Healthcare personnel will initiate the emergency care and treatment of sexual assault victims, notify the SARC or the SAPR VA and make appropriate medical referrals for specialty care, if indicated. Upon receipt of a Restricted Report, only the SARC or the SAPR VA will be notified. There will be NO report to DoD law enforcement, a supervisory official, or the victim's chain of command by the healthcare personnel, unless an exception to Restricted Reporting applies or applicable law requires other officials to be notified. For further information see paragraph (c) of Appendix A to this part.

(f) *Victim's perception of the military justice system.* The DoD seeks increased reporting by victims of sexual assault. The Restricted Reporting option is intended to give victims additional time

and increased control over the release and management of their personal information and empowers them to seek relevant information and support to make more informed decisions about participating in the criminal investigation. A victim who receives support, appropriate care and treatment, and is provided an opportunity to make an informed decision about a criminal investigation is more likely to develop increased trust of the system which may increase a victim's desire to cooperate with an investigation and convert the Restricted Report to an Unrestricted Report.

(g) *Resources for victims to report retaliation, reprisal, ostracism, maltreatment, sexual harassment, or to request an expedited/safety transfer or Military Protective Order (MPO)/Civilian Protective Order (CPO).* SARCs and SAPR VAs must inform victims of the resources available to report allegations of retaliation, reprisal, ostracism, maltreatment, sexual harassment, or to request a transfer or MPO. If the allegation is criminal in nature and the victim filed an Unrestricted Report, the crime should be immediately reported to an MCIO, even if the crime is not something normally reported to an MCIO (*e.g.*, victim's personal vehicle was defaced). Victims can seek assistance on how to report allegations by requesting assistance from:

(1) A SARC or SAPR VA or SVC/VLC.

(2) An SVC or VLC, trial counsel and VWAP, or a legal assistance attorney to facilitate reporting with a SARC or SAPR VA.

(3) IG DoD, invoking whistle-blower protections. For further information see paragraph (g) of Appendix A to this part.

(h) *SARC procedures.* The SARC shall:

(1) Serve as the single point of contact to coordinate sexual assault response when a sexual assault is reported. All SARCs shall be authorized to perform victim advocate duties in accordance with Military Service regulations and will be acting in the performance of those duties.

(2) Comply with DoD Sexual Assault Advocate Certification requirements.

(3) Be trained in and understand the confidentiality requirements of Restricted Reporting and MRE 514. Training must include exceptions to Restricted Reporting and MRE 514.

(4) Be authorized to accept reports of sexual assault along with the SAPR VA and healthcare personnel. For further information see paragraph (c) of Appendix A to this part.

(5) Provide a 24 hour, 7 days per week, response capability to victims of sexual assault, to include deployed areas.

(6) In accordance with policy, ensure a safety assessment is performed in every sexual assault case. For further information see paragraph (c) of Appendix A to this part.

(i) SARCs shall respond to every Restricted and Unrestricted Report of sexual assault on a military installation, and the response shall be in person, unless otherwise requested by the victim. For further information see paragraph (c) of Appendix A to this part.

(ii) Based on the locality, the SARC may ask the SAPR VA to respond and speak to the victim.

(A) There will be situations where a sexual assault victim receives medical care and a SAFE outside of a military installation under an MOU or MOA with local private or public sector entities. In these cases, pursuant to the MOU or MOA the SARC or SAPR VA shall be notified, and a SARC or SAPR VA shall respond.

(B) When contacted by the SARC or SAPR VA, a sexual assault victim can elect not to speak to the SARC or SAPR VA, or the sexual assault victim may ask to schedule an appointment at a later time to speak to the SARC or SAPR VA.

(iii) SARCs shall provide a response that recognizes the high prevalence of pre-existing trauma (prior to the present sexual assault incident) and empowers an individual to make informed decisions about all aspects in the reporting process and to access available resources.

(iv) SARCs shall provide a response that is gender-responsive, culturally competent, and recovery-oriented.

(v) SARCs shall offer appropriate referrals to sexual assault victims and facilitate access to referrals. Provide referrals at the request of the victim.

(A) Encourage sexual assault victims to follow-up with the referrals and facilitate these referrals, as appropriate.

(B) In order to competently facilitate referrals, inquire whether the victim is a Reservist or an NG member to ensure that victims are referred to the appropriate geographic location.

(7) Explain to the victim that the services of the SARC and SAPR VA are optional and these services may be declined, in whole or in part, at any time. The victim may decline advocacy services, even if the SARC or SAPR VA holds a position of higher rank or authority than the victim. Explain to victims the option of requesting a different SAPR VA (subject to availability, depending on locality staffing) or continuing without SAPR VA services.

(i) Explain the available reporting options to the victim.

(A) Assist the victim in filling out the DD Form 2910, where the victim elects to make a Restricted or Unrestricted Report. However, the victims, not the SARCs or SAPR VAs, must fill out the DD Form 2910. Explain that sexual assault victims have the right and ability to consult with an SVC/VLC before deciding whether to make a Restricted Report, Unrestricted Report, or no report at all. Additionally, the SARC or SAPR VA shall explain the eligibility requirements for an SVC/VLC, as well as the option to request SVC or VLC services even if the victim does not fall within the eligibility requirements.

(B) Inform the victim that the DD Form 2910 signed by the victim will be uploaded to DSAID and retained for 50 years in Unrestricted Reports. The DD Forms 2910 and 2911 filed in connection with the Restricted Report shall be retained for 50 years, in a manner that protects confidentiality.

(C) The SARC or SAPR VA shall inform the victim of any local or State sexual assault reporting requirements that may limit the possibility of Restricted Reporting. At the same time, the victims shall be briefed about the protections and exceptions to MRE 514.

(ii) Give the victim a hard copy of the DD Form 2910 with the victim's signature. Advise the victim to keep the copy of the DD Form 2910 and the DD Form 2911 in their personal permanent records as these forms may be used by the victim in other matters before other agencies (*e.g.*, Department of Veterans Affairs) or for any other lawful purpose.

(iii) Explain SAFE confidentiality to victims and the confidentiality of the contents of the SAFE Kit. Inform the victim that information concerning the prosecution shall be provided to them. For further information see paragraph (aa) of Appendix A to this part.

(iv) Activate victim advocacy 24 hours a day, 7 days a week, for all incidents of reported sexual assault occurring either on or off the installation involving Service members and other covered persons. For further information see paragraph (c) of Appendix A to this part.

(v) Consult with command legal representatives, healthcare personnel, and MCIOs, (or when feasible, civilian law enforcement), to assess the potential impact of State laws or exceptions governing compliance with the Restricted Reporting option and develop or revise applicable MOUs and MOAs, as appropriate.

(vi) Collaborate with MTFs within their respective areas of responsibility to establish protocols and procedures to direct notification of the SARC and SAPR VA for all incidents of reported sexual assault and facilitate ongoing training of healthcare personnel on the roles and responsibilities of the SARC and SAPR VAs.

(vii) Collaborate with local private or public sector entities that provide medical care to Service members or TRICARE eligible beneficiaries who are sexual assault victims and a SAFE outside of a military installation through an MOU or MOA.

(viii) Establish protocols and procedures with these local private or public sector entities to facilitate direct notification of the SARC for all incidents of reported sexual assault and facilitate training of healthcare personnel of local private or public sector entities on the roles and responsibilities of SARCs and SAPR VAs, for Service members and persons covered by this policy.

(ix) Provide off installation referrals to civilian resources available to sexual assault victims, as needed.

(x) Document and track the services referred to and requested by the victim from the time of the initial report of a sexual assault through the final case disposition or until the victim no longer desires services.

(xi) Maintain in DSAID an account of the services referred to and requested by the victim for all reported sexual assault incidents, from medical treatment through counseling, and from the time of the initial report of a sexual assault through the final case disposition or until the victim no longer desires services. Should the victim return to the SARC or SAPR VA and request SAPR services after indicating that he or she no longer desired services, the case will be reopened and addressed at the CMG meeting.

(xii) A SARC will open a case in DSAID as an ''Open with Limited Information'' case when there is no signed DD 2910 (*e.g.*, an independent investigation or third-party report, or when a civilian victim alleged sexual assault with a Service member subject) to comply with section 563(d) of Public Law 110–417 and to ensure system accountability.

(xiii) Participate in the CMG to review individual cases of Unrestricted Reports of sexual assault.

(xiv) Offer victims the opportunity to participate in surveys asking for victim feedback on the reporting experience. Inform victims regarding what the survey will ask them and uses of the data collected.

(i) *SAPR VA procedures.* (1) The SAPR VA shall:

(i) Comply with DoD Sexual Assault Advocate Certification requirements in D–SAACP.

(ii) Be trained in and understand the confidentiality requirements of Restricted Reporting and MRE 514. Training must include exceptions to Restricted Reporting and MRE 514.

(iii) Facilitate care and provide referrals and non-clinical support to the adult victim of a sexual assault. Provide a response consistent with requirements for the SARC response. For further information see paragraph (c) of Appendix A to this part.

(iv) Support will include providing information on available options and resources so the victim can make informed decisions about his or her case.

(v) Be notified and immediately respond upon receipt of a report of sexual assault.

(vi) Provide coordination and encourage victim service referrals and ongoing non-clinical support to the victim of a reported sexual assault and facilitate care in accordance with the Sexual Assault Response Protocols prescribed SAPR Policy Toolkit located on *www.sapr.mil*. Assist the victim in navigating those processes required to obtain care and services needed. It is neither the SAPR VA's role nor responsibility to be the victim's mental health provider or to act as an investigator.

(vii) Report directly to the SARC while carrying out sexual assault advocacy responsibilities.

(2) [Reserved]

(j) *Healthcare professional procedures.* This paragraph (j) provides guidance on medical management of victims of sexual assault to ensure standardized, timely, accessible, and comprehensive healthcare for victims of sexual assault, to include the ability to elect a SAFE Kit. This policy is applicable to all MHS personnel who provide or coordinate medical care for victims of sexual assault covered by this part.

(1) Require that a SARC be immediately notified when a victim discloses a sexual assault so that the SARC can inform the victim of both reporting options (Restricted and Unrestricted) and all available services (*e.g.*, SVC/VLC, Expedited Transfers, Military Protective Orders, document retention mandates). The victim can then make an informed decision as to which reporting option to elect and which services to request (or none at all). The victim is able to decline services in whole or in part at any time.

(2) There must be selection, training, and certification standards for healthcare providers performing SAFEs in MTFs.

(i) *Selection.* (A) Have specified screening and selection criteria consistent with Public Law 112–81. For further information see paragraphs (h) and (ff) of Appendix A to this part.

(B) In addition to the requirements in Public Law 104–191, licensed DoD providers eligible to take SAFE training must pass a National Agency Check that will determine if they have been convicted of sexual assault, child abuse, domestic violence, violent crime (as defined by the Federal Bureau of Investigation's Uniform Crime Reporting Program) or other felonies.

(C) If the candidate is a non-licensed professional, he or she must meet the same screening standards as those for SARCs in the D–SAACP certification program.

(ii) *Training for healthcare providers performing SAFEs in MTFs.* Healthcare providers who may be called on to provide comprehensive medical treatment to a sexual assault victim, including performing SAFEs, are: Obstetricians, gynecologists, and other licensed practitioners (preferably family physicians, emergency medicine physicians, and pediatricians); advanced practice nurses with specialties in midwifery, women's health, family health, and pediatrics; physician assistants trained in family practice or women's health; and registered nurses. These individuals must receive specialized training aimed at preparing them to proficiently perform the duties of conducting a SAFE.

(A) In addition to the responder training requirements and the healthcare personnel training requirements, healthcare providers performing SAFEs shall be trained and remain proficient in conducting SAFEs.

(B) All providers conducting SAFEs must have documented education, training, and clinical practice in sexual assault examinations. For further information see paragraphs (h) and (ff) of Appendix A to this part.

(iii) *Certification.* (A) Provider must pass all selection and screening criteria.

(B) Provider must submit documentation by trainer that healthcare provider has successfully completed SAFE training and is competent to conduct SAFEs independently. Documentation can be in the form of a certificate or be recorded in an electronic medical training tracking system.

(C) Provider must obtain a letter of recommendation from her or his commander.

(D) Upon successful completion of the selection, training, and certification requirements, the designated medical certifying authority will issue the certification for competency. Certification is good for 3 years from date of issue and must be reassessed and renewed at the end of the 3-year period.

(3) In cases of MTFs that do not have an emergency department that operates 24 hours per day, require that a sexual assault forensic medical examiner be made available to a patient of the facility when a determination is made regarding the patient's need for the services of a sexual assault medical forensic examiner. For further information see paragraphs (h) and (ff) of Appendix A to this part.

(i) The MOU or MOA will require that a SARC be notified and that SAFE Kits be collected. For further information see paragraph (c) of Appendix A to this part.

(ii) When the forensic examination is conducted at a civilian facility through an MOU or a MOA with the DoD, the requirements for the handling of the forensic kit will be explicitly addressed in the MOU or MOA. The MOU or MOA with the civilian facility will address the processes for contacting the SARC and for contacting the appropriate DoD agency responsible for accepting custody of the forensic kit.

(4) Require that MTFs that provide SAFEs for Service members or TRICARE eligible beneficiaries through an MOU or MOA with private or public sector entities verify initially and periodically that those entities meet or exceed standards of the recommendations for conducting forensic exams of adult sexual victims. For further information see paragraphs (h) and (ff) of Appendix A to this part. In addition, verify that as part of the MOU or MOA, a SARC or SAPR VA is notified and responds and meets with the victim in a timely manner.

(5) Require that medical providers providing healthcare to victims of sexual assault in remote areas or while deployed have access to the proper equipment for conducting forensic exams.

For further information see paragraphs (h) and (ff) of Appendix A to this part.

(6) Implement procedures to provide the victim information regarding the availability of a SAFE Kit, which the victim has the option of refusing. If performed in the MTF, the healthcare provider shall use a SAFE Kit and the most current edition of the DD Form 2911.

(7) Require that care provided to sexual assault victims shall be gender-responsive, culturally competent, and recovery-oriented.

(8) In the absence of a properly trained DoD healthcare provider, the victim shall be offered the option to be transported to a non-DoD healthcare provider for the SAFE Kit, if the victim wants a forensic exam. Victims who are not beneficiaries of the Military Healthcare System shall be advised that they can obtain a SAFE Kit through a local civilian healthcare provider at no cost. For further information see paragraphs (h) and (ff) of Appendix A to this part.

(9) Upon completion of the SAFE, the sexual assault victim shall be provided with a hard copy of the completed DD Form 2911. Advise the victim to keep the copy of the DD Form 2911 in his or her personal permanent records as this form may be used by the victim in other matters before other agencies (*e.g.*, Department of Veterans Affairs) or for any other lawful purpose.

(10) Require that healthcare personnel maintain the confidentiality of a Restricted Report to include communications with the victim, the SAFE, and the contents of the SAFE Kit, unless an exception to Restricted Reporting applies. For further information see paragraph (c) of Appendix A to this part.

(11) Require that psychotherapy and counseling records and clinical notes pertaining to sexual assault victims contain only information that is required for diagnosis and treatment. Any record of an account of a sexual assault incident created as part of a psychotherapy exercise will remain the property of the patient making the disclosure and should not be retained within the psychotherapist's record.

(i) *Timely medical care.* To comply with the requirement to provide timely medical care, the Surgeons General of the Military Departments shall provide sexual assault victims with priority treatment as emergency cases, regardless of evidence of physical injury, recognizing that every minute a patient spends waiting to be examined may cause loss of evidence and undue trauma. Priority treatment as emergency cases includes activities relating to access to healthcare, coding, and medical transfer or evacuation, and complete physical assessment, examination, and treatment of injuries, including immediate emergency interventions.

(ii) *Clinically stable.* Require the healthcare provider to consult with the victim, once clinically stable, regarding further healthcare options to the extent eligible, which shall include, but are not limited to:

(A) Testing, prophylactic treatment options, and follow-up care for possible exposure to human immunodeficiency virus and other sexually transmitted diseases or infections (STD/I).

(B) Assessment of the risk of pregnancy, options for emergency contraception, and any follow-up care and referral services to the extent authorized by law.

(C) Assessment of the need for behavioral health services and provisions for a referral, if necessary or requested by the victim.

(k) *Safe kit collection and preservation.* For the purposes of the SAPR Program, forensic evidence collection and document and evidence retention shall be completed in accordance with established policy, taking into account the medical condition, needs, requests, and desires of each sexual assault victim covered by this part. For further information see paragraph (c) of Appendix A to this part.

(1) Medical services offered to eligible victims of sexual assault include the ability to elect a SAFE in addition to the general medical management related to sexual assault response, to include medical services and mental healthcare.

(2) The forensic component includes gathering information in DD Form 2911 from the victim for the medical forensic history, an examination, documentation of biological and physical findings, collection of evidence from

the victim, and follow-up as needed to document additional evidence.

(3) The process for collecting and preserving sexual assault evidence for the Restricted Reporting option is the same as the Unrestricted Reporting option, except that the Restricted Reporting option does not trigger the official investigative process, and any evidence collected has to be placed inside the SAFE Kit, which is marked with the RRCN in the location where the victim's name would have otherwise been written. The victim's SAFE and accompanying Kit is treated as a confidential communication under this reporting option. The healthcare provider shall encourage the victim to obtain referrals for additional medical, psychological, chaplain, victim advocacy, or other SAPR services, as needed. The victim shall be informed that the SARC will assist them in accessing SAPR services.

(4) The SARC or SAPR VA shall inform the victim of any local or State sexual assault reporting requirements that may limit the possibility of Restricted Reporting before proceeding with the SAFE.

(5) Upon completion of the SAFE in an Unrestricted Reporting case, the healthcare provider shall package, seal, and label the evidence container(s) with the victim's name and notify the MCIO. The SAFE Kit will be retained for 5 years in accordance with section 586 of Public Law 112–81. When the forensic examination is conducted at a civilian facility through an MOU or a MOA with the DoD, the requirement for the handling of the forensic kit will be explicitly addressed in the MOU or MOA. The MOU or MOA with the civilian facility will address the processes for contacting the SARC and for contacting the appropriate DoD agency responsible for accepting custody of the forensic kit. Personal property retained as evidence collected in association with a sexual assault investigation may be returned to the rightful owner of such property after the conclusion of all legal, adverse action and administrative proceedings related to such incidents in accordance with section 538 of Public Law 113–291.

(6) MOUs and MOAs, with off-base, non-military facilities for the purposes of providing medical care to eligible victims of sexual assault shall include instructions for the notification of a SARC (regardless of whether a Restricted or Unrestricted Report of sexual assault is involved), and procedures for the receipt of evidence and disposition of evidence back to the DoD law enforcement agency or MCIO. For further information see paragraph (c) of Appendix A to this part.

(7) Upon completion of the SAFE in a Restricted Reporting case, the healthcare provider shall package, seal, and label the evidence container(s) with the RRCN and store it in accordance with Service regulations. The SAFE Kit will be retained for 5 years in a location designated by the Military Service concerned. When the forensic examination is conducted at a civilian facility through an MOU or an MOA with the DoD, the requirement for the handling of the forensic kit will be explicitly addressed in the MOU or MOA. The MOU or MOA with the civilian facility will address the processes for contacting the SARC and for contacting the appropriate DoD agency responsible for accepting custody of the forensic kit. The 5-year time frame will start from the date the victim signs the DD Form 2910, but if there is no DD Form 2910, the timeframe will start from the date the SAFE Kit is completed.

(8) Any evidence and the SAFE Kit in Restricted Reporting cases shall be stored for 5 years from the date of the victim's Restricted Report of the sexual assault.

(9) The SARC will contact the victim at the 1-year mark of the report to inquire whether the victim wishes to change his or her reporting option to Unrestricted.

(i) If the victim does not change to Unrestricted Reporting, the SARC will explain to the victim that the SAFE Kit will be retained for a total of 5 years from the time the victim signed the DD Form 2910 (electing the Restricted Report) and will then be destroyed. The DD Forms 2910 and 2911 will be retained for 50 years in a manner that protects confidentiality. The SARC will emphasize to the victim

that his or her privacy will be respected and he or she will not be contacted again by the SARC. The SARC will stress it is the victim's responsibility from that point forward, if the victim wishes to change from a Restricted to an Unrestricted Report, to affirmatively contact a SARC before the 5-year SAFE Kit retention period elapses.

(ii) If the victim needs another copy of either of these forms, he or she can request it at this point, and the SARC shall assist the victim in accessing the requested copies within 7 business days. The SARC will document this request in the DD Form 2910.

(iii) At least 30 days before the expiration of the 5-year SAFE Kit storage period, the DoD law enforcement or MCIO shall notify the installation SARC that the storage period is about to expire and confirm with the SARC that the victim has not made a request to change to Unrestricted Reporting or made a request for any personal effects.

(iv) If there has been no change, then at the expiration of the storage period in compliance with established procedures for the destruction of evidence, the designated activity, generally the DoD law enforcement agency or MCIO, may destroy the evidence maintained under that victim's RRCN.

(v) If, before the expiration of the 5-year SAFE Kit storage period, a victim changes his or her reporting preference to the Unrestricted Reporting option, the SARC shall notify the respective MCIO, which shall then assume custody of the evidence maintained by the RRCN from the DoD law enforcement agency or MCIO, pursuant to established chain of custody procedures. MCIO established procedures for documenting, maintaining, and storing the evidence shall thereafter be followed.

(A) The DoD law enforcement agency, which will receive forensic evidence from the healthcare provider if not already in custody, and label and store such evidence shall be designated.

(B) The designated DoD law enforcement agency must be trained and capable of collecting and preserving evidence in Restricted Reports prior to assuming custody of the evidence using established chain of custody procedures.

(10) Evidence will be stored by the DoD law enforcement agency until the 5-year storage period for Restricted Reporting is reached or a victim changes to Unrestricted Reporting.

§ 103.7 Case management for unrestricted reports of sexual assault.

(a) *General.* CMG oversight for Unrestricted Reports of adult sexual assaults is triggered by open cases in DSAID initiated by a DD Form 2910 or an investigation initiated by an MCIO. In a case where there is an investigation initiated by an MCIO, but no corresponding Unrestricted DD Form 2910:

(1) The SARC would have no information for the CMG members. During the CMG, the MCIO would provide case management information to the CMG, including the SARC.

(2) The SARC would open a case in DSAID indicating the case status as ''Open with Limited Information.'' The SARC will only use information from the MCIO to initiate an ''Open with Limited Information'' case in DSAID. In the event that there was a Restricted Report filed prior to the independent investigation, the SARC will not use any information provided by the victim, since that information is confidential.

(b) *Procedures.* (1) The CMG members shall carefully consider and implement immediate, short-term, and long-term measures to help facilitate and assure the victim's well-being and recovery from the sexual assault. They will closely monitor the victim's progress and recovery and strive to protect the victim's privacy, ensuring only those with an official need to know have the victim's name and related details. Consequently, where possible, each case shall be reviewed independently, bringing in only those personnel associated with the case, as well as the CMG chair and co-chair.

(2) The CMG chair shall:

(i) Confirm that the SARCs and SAPR VAs have what they need to provide an effective SAPR response to victims.

(ii) Require an update of the status of each MPO.

(iii) If the victim has informed the SARC of an existing CPO, the chair shall require the SARC to inform the CMG of the existence of the CPO and its requirements.

(iv) After protective order documentation is presented at the CMG from the SARC or the SAPR VA, the DoD law enforcement agents at the CMG will document the information provided in their investigative case file, to include documentation for Reserve Component personnel in title 10 status.

(v) At every CMG meeting, the CMG Chair will ask the CMG members if the victim, victim's family members, witnesses, bystanders (who intervened), SARCs and SAPR VAs, responders, or other parties to the incident have experienced any incidents of retaliation, reprisal, ostracism, or maltreatment. If any allegations are reported, the CMG Chair will forward the information to the proper authority or authorities (*e.g.*, MCIO, Inspector General, MEO). Discretion may be exercised in disclosing allegations of retaliation, reprisal, ostracism, or maltreatment when such allegations involve parties to the CMG. Retaliation, reprisal, ostracism, or maltreatment allegations involving the victim, SARCs, and SAPR VAs will remain on the CMG agenda for status updates, until the victim's case is closed or until the allegation has been appropriately addressed.

(vi) The CMG chair will confirm that each victim receives a safety assessment as soon as possible. There will be a safety assessment capability. The CMG chair will identify installation personnel who have been trained and are able to perform a safety assessment of each sexual assault victim.

(vii) The CMG chair will, if it has not already been done, immediately stand up a multi-disciplinary High-Risk Response Team if a victim is assessed to be in a high-risk situation. The purpose and the responsibility of the High-Risk Response Team is to continually monitor the victim's safety, by assessing danger and developing a plan to manage the situation.

(viii) The High-Risk Response Team (HRRT) shall be chaired by the victim's immediate commander and, at a minimum, include the alleged offender's immediate commander; the victim's SARC and SAPR VA; the MCIO, the judge advocate, and the VWAP assigned to the case; victim's healthcare provider or mental health and counseling services provider; and the personnel who conducted the safety assessment. The responsibility of the HRRT members to attend the HRRT meetings and actively participate in them will not be delegated.

APPENDIX A TO PART 103—RELATED POLICIES

The SAPR Program is supported by the following policies:

(a) DoD Directive 6495.01, ''Sexual Assault Prevention and Response (SAPR) Program,'' Change 3, April 11, 2017 (available at *https://www.esd.whs.mil/ Portals/54/Documents/DD/issuances/dodd/649501p.pdf*).

(b) Sections 101(d)(3) and 113, chapter 47,[1] and chapter 80 of title 10, United States Code.

(c) DoD Instruction 6495.02, ''Sexual Assault Prevention and Response (SAPR) Program Procedures,'' May 24, 2017, as amended (available at *https://www.esd.whs.mil/ Portals/54/Documents/ DD/issuances/dodi/649502p.pdf*).

(d) 32 CFR part 158, ''Operational Contract Support.''

(e) DoD Manual 6400.01, Volume 2, ''Family Advocacy Program (FAP): Child Abuse and Domestic Abuse Incident Reporting System,'' August 11, 2016 (available at *https://www.esd.whs.mil/ Portals/54/Documents/ DD/issuances/dodm/ 640001m_vol2.pdf*).

(f) Public Law 114–92, ''National Defense Authorization Act for Fiscal Year 2016,'' November 25, 2015.

(g) DoD Directive 7050.06, ''Military Whistleblower Protection,'' April 17, 2015 (available at *https://www.esd.whs.mil/Portals/ 54/Documents/DD/issuances/dodd/ 705006p.pdf*).

(h) U.S. Department of Justice, Office on Violence Against Women, ''A National Protocol for Sexual Assault Medical Forensic Examinations, Adults/Adolescents,'' current version (available at *https://www.ncjrs.gov/pdffiles1/ovw/241903.pdf*).

(i) 32 CFR part 310, ''DoD Privacy Program.''

(j) DoD Manual 6025.18, ''Implementation of the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule in DOD Health Care Programs,'' March 13, 2019 (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/d odm/602518m.pdf?ver =2019-03-13-123513-717*).

[1] Chapter 47 is also known and referred to in this part as ''The Uniform Code of Military Justice (UCMJ).''

(k) Public Law 113–66, ''The National Defense Authorization Act for Fiscal Year 2014,'' December 2013.

(l) Title 5, United States Code.

(m) Public Law 104–191, ''Health Insurance Portability and Accountability Act of 1996,'' August 21, 1996.

(n) DoD Instruction 5505.18, ''Investigation of Adult Sexual Assault in the Department of Defense,'' March 22, 2017, as amended (available at *https://www.esd.whs.mil/ Portals/ 54/Documents/DD/ issuances/dodi/ 550518p.pdf?ver =2018-02-13-125046-630*).

(o) Sections 584, 585, and 586 of Public Law 112–81, ''National Defense Authorization Act for Fiscal Year 2012,'' December 31, 2011.

(p) Public Law 113–291, ''Carl Levin and Howard P. 'Buck' McKeon National Defense Authorization Act for Fiscal Year 2015,'' December 29, 2014.

(q) DoD Manual 8910.01, Volume 1, ''DoD Information Collections Manual: Procedures for DoD Internal Information Collections,'' June 30, 2014, as amended (available at *https://www.esd.whs.mil/ Portals/54/Documents/ DD/issuances/dodm/ 891001m_vol1.pdf*).

(r) Public Law 110–417, ''The Duncan Hunter National Defense Authorization Act for Fiscal Year 2009,'' October 14, 2008.

(s) DoD Instruction 5545.02, ''DoD Policy for Congressional Authorization and Appropriations Reporting Requirements,'' December 19, 2008 (available at *https:// www.esd.whs.mil/ Portals/54/Documents /DD/ issuances/dodi/ 554502p.pdf*).

(t) DoD Directive 5124.02, ''Under Secretary of Defense for Personnel and Readiness (USD(P&R)),'' June 23, 2008 (available at *https://www.esd.whs.mil/ Portals/54/Documents/ DD/ issuances/dodd/512402p.pdf*).

(u) Public Law 112–81, ''National Defense Authorization Act for Fiscal Year 2012,'' December 31, 2011.

(v) Department of Defense 2014–2016 Sexual Assault Prevention Strategy,'' April 30, 2014, *https://www.sapr.mil/index.php/prevention*.

(w) DoD Instruction 6495.03, ''Defense Sexual Assault Advocate Certification Program (D–SAACP),'' September 10, 2015 (available at *https://www.esd.whs.mil/ Portals/54/Documents/ DD/ issuances/dodi/649503p.pdf*).

(x) Section 577 of Public Law 108–375, ''Ronald Reagan National Defense Authorization Act for Fiscal Year 2005,'' October 28, 2004.

(y) U.S. Department of Defense, ''Manual for Courts-Martial, United States,'' current edition (available at *https://jsc.defense.gov/ Portals/99/Documents/MCM2016.pdf? ver=2016-12-08-181411-957*).

(z) Title 10, United States Code.

(aa) DoD Instruction 1030.2, ''Victim and Witness Assistance Procedures,'' June 4, 2004 (available at *https://www.esd.whs.mil/ Portals/ 54/Documents/DD/ issuances/dodi/103002p.pdf*).

(bb) DoD Instruction 5505.19, ''Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military Criminal Investigative Organizations (MCIOs),'' February 3, 2015, as amended (available at *https://www.esd.whs.mil/ Portals/ 54/Documents/DD/ issuances/dodi/550519p.pdf*).

(cc) Directive-type Memorandum 14–003, ''DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support,'' February 12, 2014, as amended (available at *https://www.esd.whs.mil/ Portals/54/Documents/DD/issuances/ dtm/DTM14003_2014.pdf*).

(dd) Title 32, United States Code.

(ee) Sections 561, 562, and 563 of Public Law 110–417, ''Duncan Hunter National Defense Authorization Act for Fiscal Year 2009,'' October 14, 2008.

(ff) U.S. Department of Justice, Office on Violence Against Women, ''National Training Standards for Sexual Assault Medical Forensic Examiners,'' current version (available at *https://www.ncjrs.gov/pdffiles/ovw/ 241903*).

(gg) DoD Instruction 6025.13, ''Medical Quality Assurance (MQA) and Clinical Quality Management in the Military Health System (MHS),'' February 17, 2011, as amended (available at *https://www.esd.whs.mil/ Portals/ 54/Documents/DD/issuances/ dodi/602513p.pdf*).

(hh) Office of the Chairman of the Joint Chiefs of Staff, ''DoD Dictionary of Military and Associated Terms,'' current edition (available at *https://www.jcs.mil/ Portals/36/ Documents/Doctrine/ pubs/dictionary.pdf*).

(ii) DoD 4165.66–M, ''Base Redevelopment and Realignment Manual,'' March 1, 2006 (available at *https://www.esd.whs.mil/ Portals/ 54/Documents/DD/issuances/ dodm/416566m.pdf*).

(jj) Public Law 111–84, National Defense Authorization Act for Fiscal Year 2010.

(kk) 10 U.S.C. Chapter 47, Uniform Code of Military Justice.

PART 107—PERSONAL SERVICES AUTHORITY FOR DIRECT HEALTH CARE PROVIDERS

Sec.

107.1 Purpose.
107.2 Applicability and scope.
107.3 Definitions.
107.4 Policy.
107.5 Procedures.
107.6 Responsibilities.
ENCLOSURE 1 TO PART 107—TABLE OF AUTHORIZED COMPENSATION RATES

AUTHORITY: 10 U.S.C. 1091; Federal Acquisition Regulation (FAR), part 37.

SOURCE: 50 FR 11693, Mar. 25, 1985, unless otherwise noted.

§ 107.1 Purpose.

This part establishes policy under 10 U.S.C. 1091, ''Contracts For Direct

Health Care Providers,'' and assigns responsibility for implementing the authority for personal services contracts for direct health care providers.

§ 107.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense (OSD) and the Military Departments.

(b) It applies only to personal services contracts awarded under 10 U.S.C. 1091 for direct health care providers.

§ 107.3 Definitions.

(a) *Personal Services Contract.* A contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, to be government employees.

(b) *Direct Health Care Providers.* Health services personnel who participate in clinical patient care and services. This does not include personnel whose duties are primarily administrative or clerical, nor personnel who provide maintenance or security services.

§ 107.4 Policy.

(a) It is the policy of the Department of Defense that when in-house sources are insufficient to support the medical mission of the Military Departments, personal services contracts under 10 U.S.C. 1091 may be executed.

(b) It is the purpose of personal services contracts to facilitate mission accomplishment, maximize beneficiary access to military MTFs, maintain readiness capability, reduce use of the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), and enhance quality of care by promoting the continuity of the patient/provider relationship.

(c) Personal services contractors shall be subject to the same quality assurance, credentialing processes, and other standards as those required of military health care providers. In addition, providers, other than para-professionals, must be licensed in accordance with State or host country requirements to perform the contract services.

(d) In establishing lines of authority and accountability, DoD supervisors may direct the activities of personal services contractors on the same basis as DoD employees. However, the rights, benefits, and compensation of personal services contractors shall be determined solely in accordance with the personal service contract.

(e) Requests for personal services contracts contemplating reimbursement at the maximum rate of basic pay and allowances under 10 U.S.C. 1091 shall be approved at the major command level. The 0–6 grade shall be used sparingly and subsequently will be subject to review.

§ 107.5 Procedures.

(a) Each contract under 10 U.S.C. 1091 with an individual or with an entity, such as a professional corporation or partnership, for the personal services of an individual must contain language specifically acknowledging the individual as a personal services contractor whose performance is subject to supervision and direction by designated officials of the Department of Defense.

(b) The appearance of an employer-employee relationship created by the DoD supervision of a personal services contractor will normally support a limited recognition of the contractor as equal in status to a DoD employee in disposing of personal injury claims arising out of the contractor's performance. Personal injury claims alleging negligence by the contractor within the scope of his or her contract performance, therefore, will be processed as claims alleging negligence by DoD military or civil service personnel.

(c) Compensation for personal services contractors under 10 U.S.C. 1091 shall be within the limits established in the Table of Authorized Compensation Rates (see enclosure 1). Prorated compensation based upon hourly, daily, or weekly rates may be awarded when a contractor's services are not required on a full-time basis. In all cases, however, a contractor may be compensated only for periods of time actually devoted to the delivery of services required by the contract.

(d) Contracts for personal services entered into shall be awarded and administered pursuant to the provisions of the Federal Acquisition Regulation (FAR), part 37 and DoD and departmental supplementary contracting provisions.

§ 107.6 Responsibilities.

(a) The Military Departments shall be responsible for the management of the direct health care provider contracting program, ensuring that effective means of obtaining adequate quality care is achieved in compliance with the FAR, part 37. The portion of the Military Department regulations ensuring that compensation provided for a particular type of service is based on objective criteria and is not susceptible to individual favoritism shall be stressed.

(b) The Office of the Assistant Secretary of Defense (Health Affairs) (OASD(HA)) shall be responsible for monitoring the personal services contracting program.

ENCLOSURE 1 TO PART 107—TABLE OF AUTHORIZED COMPENSATION RATES

Occupation/specialty group	Compensation rate not to exceed	
	Pay grade	Years of service
I. Physicians and dentists	0–6	Over 26.
II. Other individuals, including nurse practitioners, nurse anesthetists, and nurse midwives, but excluding paraprofessionals.	0–5	Over 20 but less than 22.
III. All registered nurses, except those who are included in Group II.	0–4	Over 16 but less than 18.
IV. Paraprofessionals	0–3	Over 6 but less than 8.

PART 108—HEALTH CARE ELIGIBILITY UNDER THE SECRETARIAL DESIGNEE PROGRAM AND RELATED SPECIAL AUTHORITIES

Sec.

108.1 Purpose.
108.2 Applicability.
108.3 Definition.
108.4 Policy.
108.5 Eligible senior officials of the U.S. Government.
108.6 Responsibilities.

AUTHORITY: 10 U.S.C. 1074(c); 10 U.S.C. 2559.

SOURCE: 75 FR 72682, Nov. 26, 2010, unless otherwise noted.

§ 108.1 Purpose.

This part:

(a) Establishes policy and assigns responsibilities under 10 U.S.C. 1074(c) for health care eligibility under the Secretarial Designee Program.

(b) Implements the requirement of 10 U.S.C. 2559 that the United States receive reimbursement for inpatient health care provided in the United States to foreign military or diplomatic personnel or their dependents, except in certain cases covered by Reciprocal Health Care Agreements (RHCAs) between the Department of Defense and a foreign country.

§ 108.2 Applicability.

This part:

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

(b) Does not apply to health care services provided to coalition forces in operational settings, or to allied forces in overseas training exercises and similar activities. Also, does not apply to health care services provided to foreign nationals overseas under DoD Instruction 3000.05,[1] DoD Instruction 2205.2,[2] or DoD Instruction 2310.08E.[3]

§ 108.3 Definition.

Secretarial Designee Program. The program established under section 1074(c) to create by regulation an eligibility for health care services in military medical treatment facilities (MTFs) as well as dental treatment facilities for individuals who have no such eligibility under 10 U.S.C. chapter 55.

§ 108.4 Policy.

It is DoD policy that:

[1] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/300005p.pdf*.

[2] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/220502p.pdf*.

[3] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/231008p.pdf*.

(a) *General Policy*. The use of regulatory authority to establish DoD health care eligibility for individuals without a specific statutory entitlement or eligibility shall be used very sparingly, and only when it serves a compelling DoD mission interest. When used, it shall be on a reimbursable basis, unless non-reimbursable care is authorized by this part or reimbursement is waived by the Under Secretary of Defense (Personnel & Readiness) (USD(P&R)) or the Secretaries of the Military Departments when they are the approving authority.

(b) *Foreign Military Personnel and Their Dependents*. (1) *MTF Care in the United States*. Foreign military personnel in the United States under the sponsorship or invitation of the Department of Defense, and their dependents approved by the Department of Defense to accompany them, are eligible for space-available care as provided in DoD Instruction 1000.13.[4] Consistent with 10 U.S.C. 2559, in cases in which reimbursement is required by DoD Instruction 1000.13, a RHCA may provide a waiver of reimbursement for inpatient and/or outpatient care in the United States in a military medical treatment facility for military personnel from a foreign country and their dependents, if comparable care is made available to at least a comparable number of U.S. military personnel and their dependents in that foreign country. A disparity of 25 percent or less in the number of foreign personnel and dependents above U.S. personnel and dependents shall be considered within the range of comparable numbers.

(2) *Non-MTF Care in the United States*. Foreign military personnel in the United States under the sponsorship or invitation of the Department of Defense, and their dependents approved by the Department of Defense to accompany them, are not eligible for DoD payment for outpatient or inpatient care received from non-DoD providers, except for such personnel covered by the North Atlantic Treaty Organization Status of Forces Agreement (SOFA) or the Partnership for Peace SOFA and authorized care under the TRICARE Standard program according to §199.3 of title 32, Code of Federal Regulations, outpatient care may be provided as specified therein.

(c) *Foreign Diplomatic or Other Senior Foreign Officials*. Foreign diplomatic or other senior foreign officials and the dependents of such officials may be provided inpatient or outpatient services in MTFs only in compelling circumstances, including both medical circumstances and mission interests, and through case-by-case approval.

(1) In the United States, the approval authority is the USD(P&R). The authority to waive reimbursement for care provided in the United States, to the extent allowed by law, is the USD(P&R) or the Secretaries of the Military Departments when they are the approving authority.

(2) Requests from the State Department or other agency of the U.S. Government will be considered on a reimbursable basis.

(3) Under 10 U.S.C. 2559, reimbursement to the United States for care provided in the United States on an inpatient basis to foreign diplomatic personnel or their dependents is required.

(d) *Other Foreign Nationals*. Other foreign nationals (other than those described in paragraphs (b) and (c) of this section) may be designated as eligible for space-available care in MTFs only in extraordinary circumstances.

(1) The authority to waive reimbursement for care provided in the United States, to the extent allowed by law, is the USD(P&R) or the Secretaries of the Military Departments when they are the approving authority. Waiver requests will only be considered based on a direct and compelling relationship to a priority DoD mission objective.

(2) Requests from the State Department or other agency of the U.S. Government will be considered on a reimbursable basis. Such requests must be supported by the U.S. Ambassador to the country involved and the Geographical Combatant Commander for that area of responsibility and must be premised on critically important interests of the United States.

(e) *Invited Persons Accompanying the Overseas Force*. The Secretaries of the Military Departments and the

[4] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/100013p.pdf*.

USD(P&R) may designate as eligible for space-available care from the Military Health System outside the United States those persons invited by the Department of Defense to accompany or visit the military force in overseas locations or invited to participate in DoD-sponsored morale, welfare, and recreation activities. This authority is limited to health care needs arising in the course of the invited activities. Separate approval is needed to continue health care initiated under this paragraph in MTFs in the United States.

(1) In the case of employees or affiliates of news organizations, all care provided under the authority of introductory paragraph (e) of this section is reimbursable. For other individuals designated as eligible under this paragraph (e), the designation may provide, to the extent allowed by law, for outpatient care on a non-reimbursable basis, and establish a case-by-case authority for waiver of reimbursement for inpatient care.

(2) This paragraph (e) does not apply to employees of the Executive Branch of the United States or personnel affiliated with contractors of the United States.

(f) *U.S. Nationals Overseas.* Health care for U.S. nationals overseas is not authorized, except as otherwise provided in this part.

(g) *U.S. Government Civilian Employees and Contractor Personnel.* (1) Civilian employees of the Department of Defense and other government agencies, and employees of DoD contractors, and the dependents of such personnel are eligible for MTF care to the extent provided in DoD Instruction 1000.13.

(2) Occupational health care services provided to DoD employees under 5 U.S.C. 7901, authorities cited in DoD Instruction 6055.1,[5] or under other authorities except 10 U.S.C. 1074(c) are not affected by this Instruction. The Secretaries of the Military Departments and the USD(P&R) may designate DoD civilian employees, applicants for employment, and personnel performing services for the Department of Defense under Federal contracts as eligible for occupational health care services required by the Department of Defense as a condition of employment or involvement in any particular assignment, duty, or undertaking.

(3) Any health care services provided by the Military Health System to employees of DoD non-appropriated fund instrumentalities shall be on a reimbursable basis.

(4) In the case of DoD civilian employees forward deployed in support of U.S. military personnel engaged in hostilities, eligibility for MTF care (in addition to all eligibility for programs administered by the Department of Labor Office of Workers' Compensation Programs (OWCP)) is as follows:

(i) Consistent with Policy Guidance for Provision of Medical Care to DoD Civilian Employees Injured or Wounded While Forward Deployed in Support of Hostilities,[6] DoD civilian employees who become ill, contract diseases, or are injured or wounded while so deployed are eligible for medical evacuation or health care treatment and services in MTFs at the same level and scope provided to military personnel, all on a non-reimbursable basis, until returned to the United States.

(ii) DoD civilian employees who, subsequent to such deployment, and have been determined to have OWCP-compensable conditions are eligible for MTF care for such conditions, all on a non-reimbursable basis.

(iii) USD(P&R) may, under compelling circumstances, approve additional eligibility for care in MTFs for other U.S. Government civilian employees who become ill or injured while so deployed, or other DoD civilian employees overseas.

(5) *Contractor Personnel Authorized to Accompany U.S. Armed Forces.* In the case of contractor personnel authorized to accompany U.S. Armed Forces in deployed settings under DoD Instruction 3020.41,[7] MTF care may be provided as stated in DoD Instruction 3020.41.

[5] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/605501p.pdf*.

[6] Copies available at OASD (Health Affairs/TMA FHP&RP), 1200 Defense Pentagon, Room 3E1073, Washington, DC 20301–1200.

[7] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/302041p.pdf*.

(h) *Emergency Health Care.* The Secretaries of the Military Departments and the USD(P&R) may designate emergency patients as eligible for emergency health care from MTFs in the United States pursuant to arrangements with local health authorities or in other appropriate circumstances. Such care shall be on a reimbursable basis, unless waived by the USD(P&R) or the Secretaries of the Military Departments when they are the approving authority.

(i) *Research Subject Volunteers.* Research subjects are eligible for health care services from MTFs to the extent DoD Components are required by DoD Directive 3216.02[8] to establish procedures to protect subjects from medical expenses that are a direct result of participation in the research. Such care is on a non-reimbursable basis and limited to research injuries (unless the volunteer is otherwise an eligible health care beneficiary). Care is authorized during the pendency of the volunteer's involvement in the research, and may be extended further upon the approval of the USD(P&R).

(j) *Continuity of Care Extensions of Eligibility.* The Secretaries of the Military Departments and the USD(P&R) may establish temporary eligibility on a space-available basis for former members and former dependents of members of the seven Uniformed Services for a limited period of time, not to exceed 6 months, or in the case of pregnancy the completion of the pregnancy, after statutory eligibility expires when appropriate to allow completion or appropriate transition of a course of treatment begun prior to such expiration. In the case of a pregnancy covered by this paragraph, the designation of eligibility may include initial health care for the newborn infant. Care under this paragraph is authorized on a non-reimbursable basis for the former member or former dependent of member. Care under this paragraph for the newborn of those former members or former dependents is authorized but on a full reimbursable basis unless the Secretary of the Military Department elect to use Secretarial Designee status for the newborn.

(k) *Members of the Armed Forces.* The Secretaries of the Military Departments and the USD(P&R) may establish eligibility not specifically provided by statute for critical mission-related health care services for designated members of the Armed Forces, such as Reserve Component members not in a present duty status. This authority includes payment for health care services in private facilities to the extent authorized by 10 U.S.C. 1074(c). Care under this paragraph is non-reimbursable.

(l) *Certain Senior Officials of the U.S. Government.* The officials and others listed in §108.5 of this part are designated as eligible for space-available inpatient and outpatient health care services from the Military Health System on a reimbursable basis.

(m) *Nonmedical Attendants.* The Secretaries of the Military Departments and the USD(P&R) may designate as eligible for space available MTF care persons designated as nonmedical attendants as defined by 37 U.S.C. 411k(b). Costs of medical care rendered are reimbursable unless reimbursement is waived by the Secretary of the Military Department concerned or USD(P&R). This authority is limited to health care needs arising while designated as a nonmedical attendant.

(n) *Patient Movement.* Provisions of this Instruction concerning inpatient care shall also apply to requests for patient movement through the medical evacuation system under DoD Instruction 6000.11.[9] Aeromedical evacuation transportation assets are reserved for those individuals designated as Secretarial Designees who need transportation to attain necessary health care.

(o) *Other Individuals Entitled to DoD Identification (ID) Card.* Other individuals entitled to a DoD ID card under DoD Instruction 1000.13 are eligible for space-available MTF health care to the extent provided in DoD Instruction 1000.13.

(p) *Reciprocity Among Military Departments.* Subject to the capabilities of the

[8] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/321602p.pdf.*

[9] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/600011p.pdf.*

professional staff, the availability of space and facilities, and any other limitation imposed by the approving authority, all Services will provide medical treatment to individuals who have been granted Secretarial designee status by any of the Secretaries of the Military Departments. Each agreement must identify the specific MTF or geographical region in which medical care is requested, requiring close coordination among service program managers.

§ 108.5 Eligible senior officials of the U.S. government.

(a) The following individuals are Secretarial Designees for space-available care in MTFs on a reimbursable basis, unless specified otherwise by a Service Secretary:

(1) The President and Vice President, and their spouses and minor children.

(2) Members of Congress.

(3) Members of the Cabinet.

(4) Officials of the Department of Defense appointed by the President and confirmed by the Senate.

(5) Article III Federal Judges. (Article III courts are: The Supreme Court of the United States, U.S. Courts of Appeal, U.S. District Courts, U.S. Court of International Trade, United States Foreign Intelligence Surveillance Court, United States Foreign Intelligence Surveillance Court of Review.)

(6) Judges of the U.S. Court of Appeals for the Armed Forces.

(7) Assistants to the President.

(8) Director of the White House Military Office.

(9) Former Presidents of the United States and their spouses, widows, and minor children.

(b) [Reserved]

§ 108.6 Responsibilities.

(a) The USD(P&R) shall:

(1) Evaluate requests for and where appropriate, grant exceptions to policy established by this part and DoD Directive 5124.02,[10] including waiver of reimbursement, to the extent allowed by law.

(2) Following approval of the USD(P) and in coordination with USD(P) and the GC, DoD, and in accordance with DoD Directive 5530.3,[11] begin negotiations, negotiate, and have the authority to sign RHCAs.

(b) The USD(P) shall evaluate requests and determine DoD mission interest for Secretarial Designee Status and RHCAs to identify those agreements that would be in the best interest of the Department of Defense and approve negotiations of RHCAs by the USD(P&R).

(c) The USD(C) shall in coordination with USD(P&R), establish appropriate reimbursement rates, including appropriate interagency rates and rates applicable to students in International Military Education and Training programs.

(d) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall evaluate requests for Exception to the Transportation Policy. The authority to grant such a exception is by USD(P&R) or the Secretary of the Military Department concerned.

(e) The Secretaries of the Military Departments shall:

(1) Issue, revise or modify as appropriate, regulations to comply with this part.

(2) Appoint a Military Department representative who will administer the Secretarial Designee Program within the Military Department and coordinate with other DoD Components in its effective operation.

(3) Where and when appropriate, the Military Department concerned shall coordinate with U.S. Transportation Command/Global Patient Movement Requirements Center.

(4) Identify Secretarial Designees treated at MTFs.

(5) Provide an annual consolidated list reflecting the number of Secretarial Designees within their departments, reasons for such designation, location where designee is receiving treatment, the costs and sources of funding, nature and duration of treatment and expiration date of designee status to USD(P&R) and USD(C). The annual report is due 30 days after the

[10] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/512402p.pdf*.

[11] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/553003p.pdf*.

start of the fiscal year reflecting the prior fiscal year's information.

(i) In cases where the USD(P&R) designates an individual as a Secretarial Designee, the Military Department concerned shall include this individual on any lists provided to USD(P&R) and USD(C) for reporting purposes.

(ii) Annually consolidate Secretarial Designee patient costs and forward those data to USD(P&R) and OSD(C), along with a report of collection for reimbursable costs.

(f) The Commanders of the Geographic Combatant Commands (GCCs) shall:

(1) Refer requests to waive reimbursement through the Chairman of the Joint Chiefs of Staff to the USD(P&R).

(2) Refer requests for Secretarial Designee status for medical care in the United States through the Chairman of the Joint Chiefs of Staff to USD(P&R).

(3) Through the Chairman of the Joint Chiefs of Staff, provide written annual reports to the USD(P&R) and USD(C) reflecting the number of individuals designated as Secretarial Designees within their geographic area of responsibility, the reasons for such designation, the expected duration of such designation, the costs and sources of funding authorizing the support of such designee status for each designee.

(4) Identify Secretarial Designees treated at MTFs within their geographic area of responsibility.

(5) Provide for an accounting and collection system for reimbursement of medical costs within their geographic area of responsibility.

(g) The Commander, United States Transportation Command shall:

(1) Coordinate patient movement with all concerned Military Departments.

(2) Upon request of the Military Department concerned or Commanders of the GCCs, determine availability of DoD transportation assets, or when cost effective, coordinate with civilian ambulance authorities, to effect transportation of Secretarial Designee as appropriate.

(3) Ensure the Global Patient Movement Requirements Center, as the regulating agency, will consistently serve as the single point of contact for patient movement for Secretarial Designee patients using DoD assets upon request.

(4) Annually consolidate Secretarial Designee patient listing who utilized the DoD patient movement system and forward to USD(P&R) and USD(C).

PART 111—TRANSITIONAL COMPENSATION FOR ABUSED DEPENDENTS

Sec.
111.1 Purpose.
111.2 Applicability.
111.3 Definitions.
111.4 Policy.
111.5 Responsibilities.
111.6 Procedures.

AUTHORITY: 10 U.S.C. 1059.

SOURCE: 84 FR 49459, Sept. 20, 2019, unless otherwise noted.

§ 111.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for the payment of monthly Transitional Compensation (TC) to dependents of Service members separated for dependent abuse.

§ 111.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense (DoD), the Defense Agencies, the DoD Field Activities, and all other organizational entities in the DoD.

§ 111.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purposes of this part.

Dependent abuse offense. Conduct by an individual while a Military Service member on active duty for a period of more than 30 days that involves abuse of a then-current spouse or a dependent child of the Service member and that is a criminal offense under the Uniform Code of Military Justice or another criminal code applicable to the jurisdiction where the act of abuse is committed. The term ''involves abuse of the then-current spouse or a dependent

child'' means that the criminal offense is against the person of that spouse or a dependent child. Crimes that may qualify as dependent-abuse offenses include sexual assault, rape, sodomy, assault, battery, murder, and manslaughter. (This is not an exhaustive or exclusive listing of dependent-abuse offenses, but is provided for illustrative purposes only. The facts and circumstances of a particular case should always be interpreted in a manner most favorable to the spouse or a dependent child of the member when determining whether the conduct constitutes a ''dependent abuse offense.'')

Dependent child. As defined in 10 U.S.C. 1059.

Exchange stores. The Army and Air Force Exchange Service, the Navy Exchange, the Marine Corps Exchange, and the Coast Guard Exchange.

Parent. The natural father or mother, or father or mother through adoption. For purposes of TC, parent does not include persons who have stood ''in loco parentis'' to a dependent child.

Secretary concerned. Includes the Secretary of the cognizant Military Department and the Secretary of the Department of Homeland Security, when applicable.

Service member. Includes former Service members, where appropriate.

Spouse. An individual married to a Service member, but does not include a domestic partner.

§ 111.4 Policy.

The DoD will make monthly TC payments and provide other benefits described in this part for spouses or dependents of Service members who meet the eligibility requirements of 10 U.S.C. 1059 and this part.

§ 111.5 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)):

(1) Establishes and prescribes procedures for the payment of TC to dependents of Service members separated for dependent abuse.

(2) Oversees compliance with this part.

(b) The Secretaries of the Military Departments and the Secretary of the Department of Homeland Security, when applicable:

(1) Appoint representatives to coordinate requests for TC, approve requests (except exceptional eligibility requests), and forward those requests for payment in accordance with Chapter 60, Volume 7B of DoD 7000.14–R, ''Department of Defense Financial Management Regulations (FMRs): Military Pay Policy—Retired Pay'' (available at *http://comptroller.defense.gov/ Portals/45/ documents/fmr/ Volume_07b.pdf*).

(2) Review and approve or disapprove requests for TC benefits in accordance with the exceptional eligibility authority in accordance with 10 U.S.C. 1059. This responsibility may not be delegated.

(3) Ensure dependents who are victims of a dependent-abuse offense are aware of their eligibility to apply for TC.

(4) Establish departmental guidance to implement this part.

§ 111.6 Procedures.

(a) *Recipients of payment*. The Secretary concerned makes TC payments to Service member dependents, former dependents, or court-appointed guardians as described by 10 U.S.C. 1059. If a recipient is incapable of handling his or her own affairs, payments may be made only to a court-appointed guardian.

(b) *Payments*. (1) Payments begin in accordance with 10 U.S.C. 1059.

(2) Payments must continue for at least 12 months and no more than 36 months, as prescribed by the Secretary concerned. When the unserved portion of the Service member's obligated active duty service, as of the starting date of payment, is greater than 12 months and less than or equal to 36 months, payments continue for no less than the unserved portion.

(i) For enlisted Service members, obligated active duty service is the time remaining on their terms of enlistment.

(ii) For officers, obligated active duty service is indefinite unless an officer has a date of separation established. In that case, it is the time remaining until the date of separation.

(3) The amount of payment will be in accordance with 10 U.S.C. 1059. Partial

month entitlements are pro-rated. If a recipient dies, arrears of payments are not paid.

(4) Payments will be stopped in accordance with 10 U.S.C. 1059.

(i) Payments will end on the first day of the first month following the month in which the Secretary concerned notifies the recipient of such transitional compensation in writing that the payment of TC will stop.

(ii) Recipients are not required to repay amounts of TC received before the effective date payment is stopped, in accordance with paragraph (b)(4)(i) of this section; however, TC may be recouped for erroneous payments or payments made based on false information provided.

(c) *Forfeiture provisions.* In addition to 10 U.S.C. 1059, the following requirements apply:

(1) The former spouse receiving TC must notify the Defense Finance and Accounting Services (DFAS) within 30 days of remarriage or if the spouse or former spouse begins residing in the same household as the spouse or former spouse.

(2) If a Service member's dependent child is not living in the same household as the spouse or former spouse who forfeits TC, payments are made to each dependent child or his or her court-appointed guardian.

(3) In order to continue benefits, the spouse or former spouse must annually certify to DFAS that he or she is not remarried and is not cohabitating with the Service member separated for the abuse. DFAS will provide a form for recertification of benefits.

(d) *Coordination of benefits.* A spouse or former spouse may not concurrently receive TC payments and retired pay payments pursuant to 10 U.S.C. 1059 and 1408(h), respectively. If a spouse or former spouse is eligible for both TC payments and retired pay payments, the spouse or former spouse chooses which of the two payments to receive. If the spouse or former spouse receives TC payments and later receives payments from a Service member's retired pay, any TC received concurrently with retired pay must be recouped.

(e) *Source of funds.* TC must be paid from operations and maintenance funds of the Department of the Service member.

(f) *Application of procedures.* An individual must initiate a request for TC through a Service-appointed representative. The Service-appointed representative:

(1) Collects data and validates the claim using DD Form 2698 (available at *http://www.esd.whs.mil/ Portals/54/Documents/DD/ forms/dd/dd2698.pdf*).

(2) Approves payment and forwards the application to DFAS unless otherwise submitted by the Secretary concerned in accordance with 10 U.S.C. 1059.

(g) Commissary and exchange benefits. (1) A recipient of TC is entitled to use commissary and exchange stores while receiving payments.

(2) If a recipient entitled to use commissary and exchange stores is also entitled to use commissary and exchange stores under another provision of law, the entitlement is determined under the other provision of law and not paragraph (g)(1).

(h) *Medical benefits.* (1) The Secretary concerned will determine appropriate medical and dental care eligibility for TC recipients and affected dependents. At a minimum, an abused dependent who is receiving TC in accordance with paragraph (a) of this section may receive medical and dental care, including mental health services, in facilities of the Uniformed Services or through the TRICARE program as outlined in 10 U.S.C. 1076, 1077, and 1079.

(2) Dental care may be provided on a space-available basis in facilities of the Military Services.

(3) Eligible dependents of a Service member who is retirement eligible, but who loses eligibility for retirement pay because of dependent-abuse misconduct, may receive medical and dental care in accordance with 10 U.S.C. 1408(h).

PART 113—INDEBTEDNESS PROCEDURES OF MILITARY PERSONNEL

Sec.

113.1 Purpose.
113.2 Applicability.
113.3 Definitions.
113.4 Policy.
113.5 Responsibilities.
113.6 Procedures.

APPENDIX A TO PART 113—CERTIFICATE OF COMPLIANCE
APPENDIX B TO PART 113—STANDARDS OF FAIRNESS
APPENDIX C TO PART 113—SAMPLE DD FORM 2653, ''INVOLUNTARY ALLOTMENT APPLICATION''
APPENDIX D TO PART 113—SAMPLE DD FORM 2654, ''INVOLUNTARY ALLOTMENT NOTICE AND PROCESSING''

AUTHORITY: 5 U.S.C. 5520a(k) and 10 U.S.C. 113(d).

SOURCE: 60 FR 1722, Jan. 5, 1995, unless otherwise noted.

§ 113.1 Purpose.

This part implements policy, assigns responsibilities, and prescribes procedures under 32 CFR part 112 governing delinquent indebtedness of members of the Military Services.

§ 113.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is not operating as a Military Service in the Navy by agreement with the Department of Transportation), the Chairman of the Joint Chiefs of Staff, the Unified Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as ''the DoD Components''). The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.

§ 113.3 Definitions.

(a) *Appearance.* The presence and participation of a member of the Military Services, or an attorney of the member's choosing, throughout the judicial proceeding from which the judgment was issued that is the basis for a request for enforcement through involuntary allotment.

(b) *Applicant.* The original judgment holder, a successor in interest, or attorney or agent thereof who requests an involuntary allotment from a member of the Military Services pursuant to DoD Directive 1344.9.[1]

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

(c) *Pay subject to involuntary allotment.* For purposes of complying with 32 CFR part 112 and 5 U.S.C. 5520a(k), pay subject to involuntary allotment shall be determined by:

(1) Including:

(i) Basic pay but excluding reduction for education for education benefits under section 38 U.S.C. 1411 (''New G.I. Bill'').

(ii) Special pay (including enlistment and reenlistment bonuses).

(iii) Incentive pay.

(iv) Accrued leave payments (basic pay portion only).

(v) Readjustment pay.

(vi) Severance pay (including disability severance pay).

(vii) Lump-sum Reserve bonus.

(viii) Inactive duty training pay.

(2) Excluding:

(i) Retired pay (including) disability retired pay).

(ii) Retainer pay.

(iii) Separation pay, Voluntary Separation Incentive (VSI), and Special Separation Benefit (SSB).

(iv) Allowances paid under titles 10 and 37 of the United States Code (e.g., Chapter 53 of title 10 and Chapter 7 of title 37, respectively) and other reimbursements for expenses incurred in connection with duty in the Military Service or allowances in lieu thereof.

(v) Payments not specifically enumerated in §113.3(c)(1).

(3) After including the items in §113.3(c)(1), subtracting the following pay items to compute the final earnings value of the pay subject to involuntary allotment:

(i) Federal and State employment and income tax withholding (amount limited only to that which is necessary to fulfill member's tax liability).

(ii) FICA tax.

(iii) Amounts mandatorily withheld for the United States Soldiers' and Airmen's Home.

(iv) Deductions for the Servicemen's Group Life Insurance coverage.

(v) Retired Serviceman's Family Protection Plan.

(vi) Indebtedness to the United States.

(vii) Fines and forfeitures ordered by a court-martial or a commanding officer.

(viii) Amounts otherwise required by law to be deducted from a member's pay (except payments under 42 U.S.C. 659, 661, 662, and 665).

(d) *Preponderence of the evidence.* A greater weight of evidence that is more credible and convincing to the mind. That which best accords with reason and probability. (See Black's Law Dictionary [2])

(e) *Proper and Timely Manner*. A manner that under the circumstances does not reflect discredit on the Military Service.

§ 113.4 Policy.

(a) It is DoD policy under 32 CFR part 112 that procedures be established for the processing of debt complaints against members of the Military Services and involuntary allotments from the pay of members of the Military Services.

(b) An involuntary allotment shall not exceed the lesser of 25 percent of a member's pay subject to involuntary allotment or the maximum percentage of pay subject to garnishment proceedings under the applicable State law.

(c) The amount of an involuntary allotment under 32 CFR part 112 and this part when combined with deductions as a result of garnishments or statutory allotments for spousal support and child support under 42 U.S.C. 659, 661, 662, or 665, may not exceed the lesser of 25 percent of a member's pay subject to involuntary allotment or the maximum percentage of pay subject to garnishment proceedings under applicable State law. In any case in which the maximum percentage would be exceeded, garnishments and involuntary allotments for spousal and child support shall take precedence over involuntary allotments authorized under 32 CFR part 112 and this part. Involuntary allotments established under 32 CFR part 112 and this part shall be reduced or stopped as necessary to avoid exceeding the maximum percentage allowed.

(d) The Truth in Lending Act (15 U.S.C. 1601 note, 1601–1614, 1631–1646, 1661–1666j, and 1667–1667e) prescribes the general disclosure requirements that must be met by those offering or extending consumer credit and Federal Reserve Board Regulation Z (12 CFR 226) prescribes the specific disclosure requirements for both open-end and installment credit transactions. In place of Federal Government requirements, State regulations apply to credit transactions when the Federal Reserve Board has determined that the State regulations impose substantially similar requirements and provide adequate enforcement measures. Commanding officers, with the assistance of judge advocates, should check regulations of the Federal Reserve Board to determine whether Federal or State laws and regulations govern.

§ 113.5 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness shall monitor compliance with this part.

(b) The Under Secretary of Defense (Comptroller) shall ensure Defense Finance and Accounting Service (DFAS) implementation of this part.

(c) The Heads of the DoD Components shall ensure compliance with this part.

§ 113.6 Procedures.

(a) The following procedures apply to the processing of debt complaints against members of the Military Services.

(1) It is incumbent on those submitting indebtedness complaints to show that they have met the disclosure requirements of the Truth in Lending Act (15 U.S.C. 1601 note, 1601–1614, 1631–1646, 1661–1666j, and 1667–1667e) and Federal Reserve Board Regulation Z (12 CFR 226), and that they complied with the Standards of Fairness (appendix B to this part).

(2) Creditors subject to Federal Reserve Board Regulation Z (12 CFR 226), and assignees claiming thereunder, shall submit with their debt complaint an executed copy of the Certificate of Compliance (appendix A to this part), and a true copy of the general and specific disclosures provided the member of the Military Service as required by the Truth in Lending Act (15 U.S.C. 1601 note, 1601–1614, 1631–1646, 1661–1666j, and 1667–1667e). Debt complaints that request assistance but do not meet

[2] Black's Law Dictionary, Fourth Edition, West Publishing Company, Saint Paul, Minnesota (1952).

these requirements will be returned without action to the claimant.

(3) A creditor not subject to Federal Reserve Board Regulation Z (12 CFR 226), such as a public utility company, shall submit with the request a certificate that no interest, finance charge, or other fee is in excess of that permitted by the law of the State in which the obligation was incurred.

(4) A foreign-owned company having debt complaints shall submit with its request a true copy of the terms of the debt (English translation) and shall certify that it has subscribed to the Standards of Fairness (appendix B to this part).

(5) Debt complaints that meet the requirements of this part shall be processed by Department of Defense Components. ''Processed'' means that Heads of the Department of Defense Components, or designees, shall:

(i) Review all available facts surrounding the transaction forming the basis of the complaint, including the member's legal rights and obligations, and any defenses or counterclaims the member may have.

(ii) Advise the member concerned that:

(A) Just financial obligations are expected to be paid in a proper and timely manner, and what the member should do to comply with that policy;

(B) Financial and legal counseling services are available under DoD Directive 1344.7[3] in resolving indebtedness; and

(C) That a failure to pay a just debt may result in the creditor obtaining a judgment from a court that could form the basis for collection of pay from the member pursuant to an involuntary allotment.

(iii) If a member acknowledges a debt as a result of creditor contact with a DoD Component, advise the member that assistance and counseling may be available from the on-base military banking office, the credit union serving the military field of membership, or other available military community service organizations.

(iv) Direct the appropriate commander to advise the claimant that:

(A) Those aspects of DoD policy prescribed in 32 CFR part 112.4, are pertinent to the particular claim in question; and

(B) The member concerned has been advised of his or her obligations on the claim.

(v) The commander's response to the claimant shall not undertake to arbitrate any disputed debt, or admit or deny the validity of the claim. Under no circumstances shall the response indicate whether any action has been taken, or will be taken, against the member as a result of the complaint.

(b) The following procedures apply to the processing of involuntary allotments from the pay of members of the Military Services.

(1) *Involuntary allotment application.* (i) Regardless of the Service Affiliation of the member involved, with the exception of members of the Coast Guard an application to establish an involuntary allotment from the pay of a member of the Military Services shall be made by sending a completed DD Form 2653, ''Involuntary Allotment Application'' (appendix C to this part) to the appropriate address listed below. Applications sent to any other address shall be returned without action to the applicant.

(For Army, Navy, Air Force, or Marine Corps)

Defense Finance and Accounting Service, Cleveland Center, Code L, P.O. Box 998002, Cleveland, OH 44199–8002

(For Coast Guard only)

Coast Guard Pay and Personnel Center (LGL), 444 S.E. Quincy Street, Topeka, KS 66683–3591

(ii) Each application must include a copy of the final judgment certified by the clerk of court and such other documents as may be required by §113.6(b)(1)(iv).

(iii) A garnishment summons or order is insufficient to satisfy the final judgment requirement of §113.6(b)(1)(ii) and is not required to apply for an involuntary allotment under this part.

(iv) Involuntary allotment applications must contain the following information, certifications, and acknowledgment:

(A) The full name, social security number, and branch of Service of the

[3] See footnote 1 to §113.3(b).

military member against whose pay an involuntary allotment is sought. Although not required, inclusion of the member's current duty station and duty address on the application form will facilitate processing of the application.

(B) The applicant's full name and address. If the applicant is not a natural person, the application must be signed by an individual with the authority to act on behalf of such entity. If the allotment is to be in favor of a person other than the original judgment holder, proof of the right to succeed to the interest of the original judgment holder is required and must be attached to the application.

(C) The dollar amount of the judgment. Additionally, if the judgment awarded interest, the total dollar amount of the interest on the judgment accrued to the date of application.

(D) A certification that the judgment has not been amended, superseded, set aside, or satisfied; or, if the judgment has been satisfied in part, the extent to which the judgment remains unsatisfied.

(E) A certification that the judgment was issued while the member was not on active duty (in appropriate cases). If the judgment was issued while the member was on active duty, a certification that the member was present or represented by an attorney of the member's choosing in the proceedings, or if the member was not present or represented by an attorney of the member's choosing, that the judgment complies with the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 U.S.C. appendix sections 501–591).

(F) A certification that the member's pay could be garnished under applicable State law and section 5520a(k) of the United States Code, if the member were a civilian employee.

(G) A certification that, to the knowledge of the applicant, the debt has not been discharged in bankruptcy, nor has the member filed for protection from creditors under the bankruptcy laws of the United States.

(H) A certification that if the judgment is satisfied prior to the collection of the total amount through the involuntary allotment process, the applicant will provide prompt notice that the involuntary allotment must be discontinued.

(I) A certification that if the member overpays the amount owed on the judgment, the applicant shall refund the amount of overpayment to the member within 30 days of discovery or notice of the overpayment, whichever, is earlier, and that if the applicant fails to repay the member, the applicant understands he or she may be denied the right to collect by involuntary allotment on other debt reduced to judgments.

(J) Acknowledgment that as a condition of application, the applicant agrees that neither the United States, nor any disbursing official or Federal employee whose duties include processing involuntary allotment applications and payments, shall be liable for any payment or failure to make payment from moneys due or payable by the United States to any person pursuant to any application made in accordance herewith.

(v) The original and three copies of the application and supporting documents must be submitted by the applicant to DFAS.

(vi) A complete ''application package'' (the DD Form 2653, supporting documentation, and three copies of the application and supporting documents), is required for processing of any request to establish an involuntary allotment pursuant to this part and 32 CFR part 112.

(vii) Applications that do not conform to the requirements of this part shall not be processed. If an application is ineligible for processing, the application package shall be returned to the applicant with an explanation of the deficiency. In cases involving repeated false certifications by an applicant, the designated DFAS official may refuse to accept or process additional applications by that applicant for such period of time as the official deems appropriate to deter against such violations in the future.

(2) *Processing of involuntary allotment applications.* (i) Promptly upon receipt of DD Form 2653 (Appendix C to this part), the designated DFAS official shall review the ''application package'' to ensure compliance with the requirements of this part. If the application

package is complete, the DFAS official shall:

(A) Complete Section I of DD Form 2654, ''Involuntary Allotment Notice and Processing'' (Appendix D to this part), by inserting the name, social security number, rank, and branch of service of the military member against whom an application for involuntary allotment is being processed. Additionally, the DFAS official shall provide the due date for receipt of a response at DFAS. The due date shall be 90 days from the date DFAS mails the DD Form 2654 to the commander and member concerned as provided for in §113.6(b)(2)(i)(B).

(B) Mail one copy of the application package to the member and two copies of the application package, along with DD Form 2654, to the commander of the military member or other official as designated by the Military Service concerned during times of war, national emergency, deployment, or other similar circumstances, who may act for the commander, provided the Military Service concerned has provided DFAS with the name or position of the official and the appropriate address (hereinafter, the meaning of the term ''commander'' includes such other official).

(C) Within 60 days of mailing the copies of the application package and DD Form 2654, DFAS shall provide notice to the member and the member's commander that automatic processing of the involuntary allotment application shall occur if a response (including notice of an approved extension as authorized in §113.6(b)(2)(iii)(B) and (F), is not received by the due date specified in Section I of DD Form 2654. In the absence of a response, DFAS may automatically process the involuntary allotment application on the fifteenth calendar day after the date a response was due. When DFAS has received notice of an extension, automatice processing shall not begin until the fifteenth calendar day after the approved extension date.

(D) Retain the original of the application package and DD Form 2654.

(ii) Upon receipt of an application, the commander shall determine if the member identified in Section I of DD Form 2654 is assigned or attached to the commander's unit and available to respond to the involuntary allotment application. If the member is not assigned or attached, or not available to respond (e.g., retired, in a prisoner of war status, or in a missing in action status), the commander will promptly complete Section II of DD Form 2654 and attach appropriate documentation supporting the determination. The commander will then mail the application package and DD Form 2654 to DFAS. Section II shall also be used by the commander to notify DFAS of extensions beyond the due date for a response contained in Section I of DD Form 2654. When such extensions are authorized, the commander will complete Section II, make a copy of Sections I and II, and promptly mail the copy to DFAS.

(iii) Within 5 days of receipt of an application package and DD Form 2654 from the designated DFAS official, the commander shall notify the member of the receipt of the application, provide the member a copy of the entire application package, and counsel the member using and completing Section III of DD Form 2654 about the following:

(A) That an application for the establishment of an involuntary allotment for the lesser of 25 percent of the member's pay subject to involuntary allotment or the maximum percentage of pay subject to garnishment proceedings under the applicable State law has been received.

(B) That the member has 15 calendar days from the date of receipt of the commander's notice to complete Section IV of DD Form 2654. That for good cause shown, the commander may grant an extension of reasonable time (normally not exceeding 30 calendar days) to submit a response. That during times of deployment, war, national emergency, assignment outside the United States, hospitalization, or other similar situations that prevent the member from obtaining necessary evidence or from responding in a timely manner, extensions exceeding 30 calendar days may be granted. That if the member fails to respond within the time allowed, the commander will note the member's failure to respond in Section V of DD Form 2654 and send the form to DFAS for appropriate action.

(C) That the member's response will either consent to the involuntary allotment or contest it.

(D) That the member may contest the application for any one of the following reasons:

(*1*) There has not been compliance with the procedural requirements of the Soldiers' and Sailors' Civil Relief Act of 1940, as amended (50 U.S.C. appendix sections 501–591) during the judicial proceeding upon which the involuntary allotment application is sought.

(*2*) ''Exigencies of military duty'' (as defined in 32 CFR part 112.3(d)) caused the ''absence'' of the member from appearance in a judicial proceeding forming the basis for the judgment upon which the application is sought.

(*3*) Information in the application is patently false or erroneous in material part.

(*4*) The judgment has been fully satisfied, superseded, or set aside.

(*5*) The judgment has been materially amended, or partially satisfied. When asserting this defense, the member shall include evidence of the amount of the judgment that has been satisfied.

(*6*) There is a legal impediment to the establishment of the involuntary allotment (for example, the judgment debt has been discharged in bankruptcy, the judgment debtor has filed for protection from the creditors under the bankruptcy laws of the United States, the applicant is not the judgment holder nor a proper successor in interest to that holder, or the applicant has been enjoined by a Federal or state court from enforcing the judgment debt).

(*7*) Or other appropriate reasons that must be clearly specified and explained by the member.

(E) That, if the member contests the involuntary allotment, the member shall provide evidence (documentary or otherwise) in support thereof. Furthermore, that any evidence submitted by the member may be disclosed to the applicant for the involuntary allotment.

(F) That the member may consult with a legal assistance attorney, if reasonably available, or a civilian attorney at no expense to the government. That if a legal assistance attorney is available, the member should immediately arrange for an appointment. That the member may request a reasonable delay from the commander to obtain legal assistance (in cases where an approved delay will cause DFAS to receive the member's response after the due date identified in Section I of DD Form 2654, the commander must immediately notify the designated DFAS official of the delay, the date for an expected response, and the reason for the delay by completing Section II of DD Form 2654 and forwarding a copy of Sections I and II to DFAS). Additionally, that requests for extensions of time based on the need for legal assistance shall be denied to members who fail to exercise due diligence in seeking such assistance.

(G) That if the member contests the involuntary allotment on the grounds that exigencies of military duty caused the absence of the member from the judicial proceeding at which the judgment was rendered, then the member's commander shall review and make the final determination on this contention, and notify the designated DFAS official of the commander's decision by completing Section V of DD Form 2654 and forwarding the form to DFAS.

(*1*) In determining whether exigencies of military duty caused the absence of the member, the commander at the level designated by the Service concerned shall consider the definition of ''exigencies of military duty'' (as defined in 32 CFR part 112.3(d)).

(*2*) Additionally, consideration shall be given to whether the commander at the time determined the military duties in question to be of such paramount importance that they prevented making the member available to attend the judicial proceedings, or rendered the member unable to timely respond to process, motions, pleadings, or orders of the court.

(H) That if the member contests the involuntary allotment on any basis other than exigencies of military duty, the application package and DD Form 2654 shall be returned to the commander who shall forward it to the designated DFAS official for appropriate action.

(I) That if the member fails to respond to the commander within the time allowed under §113.6(b)(2)(iii)(B), the commander shall notify the designated DFAS official of the member's

failure to respond by completing Section V of DD Form 2654, and forwarding the form to DFAS.

(iv) After counseling the member in accordance with §113.6(b)(2)(iii)(A)–(I), the commander shall:

(A) Date and sign Section III of DD Form 2654.

(B) Obtain the member's acknowledgment of counseling by having the member sign the appropriate space on Section III of DD Form 2654.

(C) Determine if the member consents to the involuntary allotment or needs the time authorized under this part to review the application package and take appropriate action. If the member consents to the involuntary allotment, the commander shall direct the member to appropriately complete Section IV of DD Form 2654. The commander must then complete the appropriate item in Section V and promptly forward the completed DD Form 2654 to the designated DFAS official.

(D) Complete the appropriate items in Section V of DD Form 2654 when the member fails to respond within the time authorized for a response, or asserts that exigencies of military duty caused the absence of the member from an appearance in the judicial proceeding upon which the Involuntary Allotment Application is sought.

(*1*) In determining whether exigencies of military duty caused the absence of the member, the commander, at the level designated by the Service concerned, shall consider the definition of ''exigencies of military duty'' (as defined in 32 CFR part 112.3(d)), the evidence provided by the member, any other reasonably available evidence (e.g., a copy of the member's personnel record), and whether the commander at the time determined the military duties in question to be of such paramount importance that they prevented making the member available to attend the judicial proceedings, or rendered the member unable to timely respond to process, motions, pleadings, or orders of the court.

(*2*) The evidentiary standard for a commander to determine whether existences of military duty caused the absence of the member from an appearance in the judicial proceeding upon which the Involuntary Allotment Application is sought is a ''preponderance of the evidence'' (as defined in §113.3(d) of this part).

(*3*) If the commander has made a determination on exigencies of military duty, the commander must insert in Section V of DD Form 2654, the title and address of the appeal authority.

(E) Promptly following the date the member's response is due to the commander as determined by §113.6(b)(2)(iii)(B), ensure that the DD Form 2654 is appropriately completed and mail the form, along with any response received from the member, to DFAS.

(F) Provide the member a copy of the completed DD Form 2654 within 5 days of mailing to the designated DFAS official.

(v) Upon receipt of DD Form 2654 and any additional evidence submitted by the member, the designated DFAS official shall conduct a review of the entire application package, DD Form 2654, and any evidence submitted by the member, to determine whether the application for an involuntary allotment should be approved and established.

(A) In those cases where the member's commander has completed Section V of DD Form 2654, and determined that exigencies of military duty caused the absence of the member from an appearance in a judicial proceeding upon which the involuntary allotment application is sought, the designated DFAS official shall deny the involuntary allotment application and provide the applicant written notice of the denial and the reason therefor. The designated DFAS official shall also advise the applicant that:

(*1*) The responsibility for determining whether exigencies of military duty existed belonged to the member's commander and the Military Department concerned.

(*2*) The commander's decision may be appealed within 60 days of the date DFAS mailed the notice of the decision to the applicant.

(*3*) An Appeal must be submitted to the appeal authority at the address provided by DFAS (as found in Section V of the DD Form 2654) in their written notice of denial, and that an appeal submitted to an appeal authority and

address different from the one provided by DFAS may be returned without action.

(*4*) An appeal must be submitted in writing and contain sufficient evidence to overcome the presumption that the commander's exigency determination was correct.

(*5*) The appellate authority shall decide an appeal within 30 days of its receipt and promptly notify the applicant in writing of the decision. The 30 day decision period may be extended during times of deployment, war, national emergency, or other similar situations.

(*6*) If an appeal is successful, the applicant must submit a written request, along with a copy of the appellate authority's decision, to DFAS within 15 days of receipt of the appellate authority's decision.

(B) Upon receiving written notice that an applicant has successfully appealed a commander's determination on exigencies of military duty that resulted in denial of an involuntary allotment application, DFAS shall review the application in accordance with §113.6(b)(2)(v)(C), and determine whether the involuntary allotment should be approved and initiated.

(C) In all cases, other than as described in §113.6(b)(2)(v)(A), the designated DFAS official shall deny an involuntary allotment application, and give written notice to the applicant of the reason(s) for denial, if the designated DFAS official determines that:

(*1*) There has not been compliance with the procedural requirements of the Soldier's and Sailor's Civil Relief Act of 1940, as amended (50 U.S.C. appendix sections 501–591) during the judicial proceeding upon which the involuntary allotment application is sought.

(*2*) Information in the application is patently false or erroneous in material part.

(*3*) The judgment has been fully satisfied, superseded, or set aside.

(*4*) The judgment has been materially amended, or partially satisfied. In such a case, the request for involuntary allotment may be approved only to satisfy that portion of the judgment that remains in effect and unsatisfied; the remainder of the request shall be denied.

(*5*) There is a legal impediment to the establishment of the involuntary allotment (for example, the judgment debt has been discharged in bankruptcy, the judgment debtor has filed for protection from the creditors under the bankruptcy laws of the United States, the applicant is not the judgment creditor nor a proper successor in interest to that creditor, or the applicant has been enjoined by a Federal or State court from enforcing the judgment debt).

(*6*) The member's pay is already subject to one or more involuntary allotments or garnishments that equal the lesser of 25 percent of the member's pay subject to involuntary allotment or the maximum percentage of pay subject to garnishment proceedings under the applicable State law.

(*7*) The applicant has abused the processing privilege (e.g., an applicant, having been notified of the requirements of this part, repeatedly refuses or fails to comply therewith).

(*8*) Or other appropriate reasons that must be clearly explained to the applicant.

(D) In all cases other than as described in §113.6(b)(2)(v) (A) and (C), the designated DFAS official shall approve the involuntary allotment application and establish an involuntary allotment against the pay subject to involuntary allotment of the member.

(vi) The designated DFAS official shall, at any time after establishing an involuntary allotment, cancel or suspend such allotment and notify the applicant of that cancellation if the member concerned, or someone acting on his or her behalf, submits legally sufficient proof, by affidavit or otherwise, that the allotment should not continue because of the existence of the factors enumerated in §113.6(b)(2)(v)(A) and (C)(*1*)–(*8*).

(3) *Payments.* (i) Payment of an approved involuntary allotment under 32 CFR part 112 and this part shall commence within 30 days after the designated DFAS official has approved the involuntary allotment.

(ii) Payments under this part shall not be required more frequently than once each month, and the designated official shall not be required to vary normal pay and disbursement cycles.

(iii) If the designated DFAS official receives several applications on the same member of a Military Service, payments shall be satisfied on a first-come, first-served basis.

(iv) Payments shall continue until the judgment is satisfied or until canceled or suspended.

(A) DFAS shall collect the total judgment, including interest when awarded by the judgment. Within 30 days following collection of the amount of the judgment, including interest as annotated by the applicant in Section I of DD Form 2654, the applicant may submit a final statement of interest that accrued during the pay-off period. This final statement of interest request must be accompanied by a statement of account showing how the applicant computed the interest amount. DFAS will collect this post-application interest provided it is an amount owed pursuant to the judgment. DFAS shall not accept any further interest requests.

(B) Interest or other costs associated with the debt forming the basis for the judgment, but not included as an amount awarded by the judgment, shall not be paid to applicants for involuntary allotments.

(v) If the member is found not to be entitled to money due from or payable by the Military Services, the designated official shall return the application and advise the applicant that no money is due from or payable by the Military Service to the member. When it appears that pay subject to an involuntary allotment is exhausted temporarily or otherwise unavailable, the applicant shall be told why and for how long that money is unavailable, if known. Involuntary allotments shall be canceled on or before the date a member retires, is discharged, or is released from active duty. The designated DFAS official shall notify the applicant of the reason for cancellation.

(vi) Upon receiving notice from an applicant that a judgment upon which an involuntary allotment is based has been satisfied, vacated, modified, or set aside, the designated DFAS official shall promptly adjust or discontinue the involuntary allotment.

(vii) The Under Secretary of Defense (Comptroller) may, in DoD 7000.14–R[4] Volume 7, Part A, designate the priority to be given to involuntary allotments pursuant to 32 CFR part 112 and this part, among the deductions and collections taken from a member's pay, except that they may not give precedence over deductions required to arrive at a member's disposable pay for garnishments or involuntary allotments authorized by statute for alimony and child support payments. In the absence of a contrary designation by the Comptroller, all other lawful deductions (except voluntary allotments by the member) and collections shall take precedence over these involuntary allotments.

APPENDIX A TO PART 113—CERTIFICATE OF COMPLIANCE

I certify that the (Name of Creditor) upon extending credit

to _____

on _____

(Date)

complied with the full disclosure requirements of the Truth-in-Lending Act and Regulation Z, and the Fair Debt Collection Practices Act (or the laws and regulations of State of _____), and that the attached statement is a true copy of the general and specific disclosures provided the obligor as required by law.

I further certify that the Standards of Fairness set forth in DoD Directive 1344.9[1] have been applied to the consumer credit transaction to which this form refers. (If the unpaid balance has been adjusted as a consequence, the specific adjustments in the finance charge and the annual percentage rate should be set forth below.)

_____

(Adjustments)

_____

_____

_____

(Date of Certification)

_____

(Signature of Creditor or Authorized Representative)

_____

(Street)

[4] See footnote 1 to §113.3(b).

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

(City, State and Zip Code)

APPENDIX B TO PART 113—STANDARDS OF FAIRNESS

1. No finance charge contracted for, made, or received under any contract shall be in excess of the charge that could be made for such contract under the law of the place in which the contract is signed in the United States by the military member.

a. In the event a contract is signed with a U.S. company in a foreign country, the lowest interest rate of the State or States in which the company is chartered or does business shall apply.

b. However, interest rates and service charges applicable to overseas military banking facilities shall be as established by the Department of Defense.

2. No contract or loan agreement shall provide for an attorney's fee in the event of default unless suit is filed, in which event the fee provided in the contract shall not exceed 20 percent of the obligation found due. No attorney fees shall be authorized if the attorney is a salaried employee of the holder.

3. In loan transactions, defenses that the debtor may have against the original lender or its agent shall be good against any subsequent holder of the obligation. In credit transactions, defenses against the seller or its agent shall be good against any subsequent holder of the obligation, provided that the holder had actual knowledge of the defense or under conditions where reasonable inquiry would have apprised the holder of this fact.

4. The military member shall have the right to remove any security for the obligation beyond State or national boundaries if the military member or family moves beyond such boundaries under military orders and notifies the creditor, in advance of the removal, of the new address where the security will be located. Removal of the security shall not accelerate payment of the obligation.

5. No late charge shall be made in excess of 5 percent of the late payment, or $5.00, whichever is the lesser amount, or as provided by law or applicable regulatory agency determination. Only one late charge may be made for any tardy installment. Late charges shall not be levied where an allotment has been timely filed, but payment of the allotment has been delayed. Late charges by overseas banking facilities are a matter of contract with the Department of Defense.

6. The obligation may be paid in full at any time or through accelerated payments of any amount. There shall be no penalty for prepayment. In the event of prepayment, that portion of the finance charges that has inured to the benefit of the seller or creditor shall be prorated on the basis of the charges that would have been ratably payable had finance charges been calculated and payable as equal periodic payments over the terms of the contract, and only the prorated amount to the date of prepayment shall be due. As an alternative, the ''Rule of 78'' may be applied.

7. If a charge is made for loan insurance protection, it must be evidenced by delivery of a policy or certificate of insurance to the military member within 30 days.

8. If the loan or contract agreement provides for payments in installation, each payment, other than the down payment, shall be in equal or substantially equal amounts, and installments shall be successive and of equal or substantially equal duration.

9. If the security for the debt is repossessed and sold in order to satisfy or reduce the debt, the repossession and resale shall be governed by the laws of the State in which the security is requested.

10. A contract for personal goods and services may be terminated at any time before delivery of the goods or services without charge to the purchaser. However, if goods made to the special order of the purchaser result in preproduction costs, or require preparation for delivery, such additional costs shall be listed in the order form or contract.

a. No termination charge shall be made in excess of this amount. Contracts for delivery at future intervals may be terminated as to the undelivered portion.

b. The purchaser shall be chargeable only for that proportion of the total cost that the goods or services delivered bear to the total goods called for by the contract. (This is in addition to the right to rescind certain credit transactions involving a security interest in real estate provided by the Truth in Lending Act (15 U.S.C. 1601 note, 1601–1614, 1631–1646, 1661–1665a, 1666–1666j, and 1667–1667e) and Federal Reserve Board Regulation Z (12 CFR 226)).

APPENDIX C TO PART 113—SAMPLE DD FORM 2653, "INVOLUNTARY ALLOTMENT APPLICATION"

Appendix C to Part 113

INVOLUNTARY ALLOTMENT APPLICATION

Form Approved
OMB No. 0704-0367
Expires Sep 30, 1997

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302, and to the Office of Management and Budget, Paperwork Reduction Project (0704-0367), Washington, DC 20503.
PLEASE DO NOT RETURN YOUR FORM TO EITHER OF THESE ADDRESSES. SEND YOUR COMPLETED FORM TO THE ADDRESS IN THE INSTRUCTIONS BELOW.

PRIVACY ACT STATEMENT

AUTHORITY: 5 USC 5520a, EO 9397.

PRINCIPAL PURPOSE: To make an application for the involuntary allotment of pay from a member of the Armed Services or the Coast Guard.

ROUTINE USES: None.

DISCLOSURE: Voluntary; however, failure to provide the requested information may result in denial of the involuntary allotment application.

INSTRUCTIONS

1. These instructions govern an application for involuntary allotment payment from Military Service (or Coast Guard) member's active or reserve/guard's pay under 5 USC Section 5520a.

2. In order to be processed, this form must be filled out completely, signed, and the following supporting documents attached:
   a. A copy of the judgment, certified by the clerk of the appropriate court;
   b. If the applicant is other than the original judgment holder, proof of the applicant's right to succeed to the interest of the original judgment holder.

3. Submit the original and three copies of this application and all supporting documents to:
   For Army, Navy, Air Force and Marine Corps:
   Defense Finance and Accounting Service
   Cleveland Center, Code L
   PO Box 998002
   Cleveland, OH 44199-8002
   For Coast Guard:
   Coast Guard Pay and Personnel Center (LGL)
   444 S.E. Quincy Street
   Topeka, KS 66683-3591

SECTION I - IDENTIFICATION

1. APPLICANT

I hereby request that an involuntary allotment be established from the pay of the following identified member of the Military Services/ Coast Guard pursuant to the provisions of Pub. L. No. 103-94, the Hatch Act Reform Amendments of 1993. The debt in question has been reduced to a judgment. A copy of the judgment, as certified by the appropriate Clerk of Court, is attached.

a. APPLICANT NAME *(Provide whole name whether a person or business)*

b. ADDRESS

(1) STREET AND APARTMENT OR SUITE NUMBER	(2) CITY	(3) STATE	(4) ZIP CODE *(9 digit)*

2. SERVICE MEMBER

a. NAME *(Last, First, Middle Initial)*	b. SSN	c. BRANCH OF SERVICE

d. CURRENT DUTY ASSIGNMENT *(If known)*

e. CURRENT ADDRESS *(If known)*

(1) STREET AND APARTMENT OR SUITE NUMBER	(2) CITY	(3) STATE	(4) ZIP CODE *(9 digit)*

3. CASE

a. CASE NUMBER *(As assigned by court)*	b. NAME OF ORIGINAL JUDGMENT HOLDER *(If different from applicant)*	c. ACCOUNT NUMBER OF DEBTOR

d. JUDGMENT AMOUNT

(1) DOLLAR AMOUNT OF JUDGMENT	(2) DOLLAR AMOUNT OF INTEREST OWED TO DATE OF APPLICATION *(Only if awarded by the judgment)*
$	$

DD FORM 2653, NOV 94

Appendix C to Part 113

SECTION II - APPLICANT CERTIFICATION

4. I HEREBY CERTIFY THAT:

a. *(X as applicable)*

☐ (1) The judgment has not been amended, superseded, set aside, or satisfied;

☐ (2) If the judgment has been satisfied in part, that the judgment remains unsatisfied to the extent of $_____

b. *(X as applicable)*

☐ (1) The judgment was issued while the member was not on active duty; or

☐ (2) If the judgment was issued while the member was on active duty, that the member was present or represented by an attorney of the member's choosing in the proceedings; or

☐ (3) If the member was not present or represented by an attorney at the judicial proceedings, that the judgment complies with the Soldiers' and Sailors' Civil Relief Act of 1940, as amended, 5 USC app. 501-592.

c. The member's pay could be garnished under applicable State law and 5 USC 5520a if the member were a civilian employee;

d. To the best of my knowledge, the debt has not been discharged in bankruptcy nor has the member filed for protection from creditors under the bankruptcy laws of the United States;

e. I will promptly notify you to discontinue the involuntary allotment at any time the judgment is satisfied prior to the collection of the total amount of the judgment through the involuntary allotment process;

f. If the member overpays the amount owed on the judgment, I will refund the amount of overpayment to the member within 30 days of discovery or notice of the overpayment, whichever is earlier, and that if I fail to repay the member, I understand that I may be denied the right to collect by involuntary allotment on other debts reduced to judgments.

5. I HEREBY ACKNOWLEDGE THAT:

As a condition of application, I agree that neither the United States, nor any disbursing official or Federal employee whose duties include processing involuntary allotment applications and payments, shall be liable with respect to any payment or failure to make payment from moneys due or payable by the United States to any person pursuant to this application.

6. CERTIFICATION

I make the foregoing statement as part of my application with full knowledge of the penalties involved for willfully making a false statement (U.S. Code, Title 18, Section 1001, provides a penalty as follows: A maximum fine of $10,000 or maximum imprisonment of 5 years, or both).

a. TYPED NAME *(Last, First, Middle Initial)*	b. SIGNATURE	c. DATE SIGNED

DD FORM 2653, NOV 94 (BACK)

APPENDIX D TO PART 113—SAMPLE DD FORM 2654, "INVOLUNTARY ALLOTMENT NOTICE AND PROCESSING"

Appendix D to Part 113

INVOLUNTARY ALLOTMENT NOTICE AND PROCESSING

PRIVACY ACT STATEMENT

AUTHORITY: 5 USC 5520a, EO 9397.

PRINCIPAL PURPOSE: To notify a member of the Armed Services or the Coast Guard of an involuntary allotment application against the member's disposable pay; to provide the member an opportunity to respond to the involuntary allotment application; and to provide for action by the member's commander to forward the member's response to the Defense Finance and Accounting Service (or the Coast Guard Pay and Personnel Center) and, as appropriate, to make determinations concerning exigencies of military duty; and to provide for appeals of exigency determinations.

ROUTINE USES: None.

DISCLOSURE: Voluntary for the member; however, failure to provide a response may result in the involuntary allotment of the member's disposable pay.

INSTRUCTIONS

1. These instructions govern notice and processing of an application for an involuntary allotment from the pay of a member of the Armed Forces or the Coast Guard under 5 USC 5520a.

2. Section I, item 1 is to be completed by the designated Defense Finance and Accounting Service (DFAS) (or Coast Guard Pay and Personnel Center) representative. After completing this section, the representative will mail the form, along with two copies of the DD Form 2653, "Involuntary Allotment Application" and associated paperwork, to the commander of the member identified, and one copy to the member.

3. Upon receipt, the commander will determine if the member identified in Section I is in his or her unit. If the member is no longer assigned or available, or, after receiving the notice required by Section III, requests an extension to respond that is granted, the commander will complete Section II. If the member is no longer available under Section II, item 3, the commander will return the entire form and application package to DFAS (or the Coast Guard Pay and Personnel Center); if an extension is authorized under Section II, item 4, that will cause the member's response to be received by DFAS (or the Coast Guard Pay and Personnel Center) later than the date the response is due, then the commander must immediately provide a copy of Sections I and II to DFAS (or the Coast Guard Pay and Personnel Center). The address for mailing is: "DFAS, Cleveland Center, Code L, PO Box 998002, Cleveland, OH 44199-8002" (or other address as specified by DFAS). For the Coast Guard, the address is: "Coast Guard Pay and Personnel Center (LGL), 444 S.E. Quincy Street, Topeka, KS 66683-3591." If the member is assigned, the commander will provide the member a complete copy of DD Form 2653, "Involuntary Allotment Application," and counsel the member in accordance with Section III, items 7a - g.

4. After counseling, the commander will complete Section III, item 8, and the member will complete Section III, item 9. The commander will then make and retain one copy of the form with Section III completed. After obtaining a copy, the commander will provide the member the signed original and advise the member to complete Section IV prior to the date the commander specifies that the member's response is due.

5. The member will complete Section IV and return the original form and accompanying evidence or additional matters, if any, to the commander on or before the due date as specified by the commander.

6. Following receipt of the member's response, the commander will complete Section V and forward the original form, to include any additional evidence or other matters from the member, to DFAS (or the Coast Guard Pay and Personnel Center) at the address listed in paragraph 3 above. Note, if the member fails to respond by the due date, the commander will complete Section V on a copy of the DD Form 2654 previously retained in accordance with the instructions in paragraph 4 above, and forward the form to DFAS (or the Coast Guard Pay and Personnel Center).

7. Within 5 working days from the date of forwarding to DFAS (or the Coast Guard Pay and Personnel Center), the commander will provide the member a copy of the completed DD Form 2654.

SECTION I - NOTIFICATION OF APPLICATION FOR INVOLUNTARY ALLOTMENT

1. MEMBER IDENTIFICATION

a. NAME *(Last, First, Middle Initial)*	b. SSN	c. RANK	d. BRANCH OF SERVICE

2. DATE RESPONSE DUE *(If not received by this date, an involuntary allotment may be automatically processed.)*

SECTION II - COMMANDER'S DETERMINATION OF MEMBER'S AVAILABILITY AND EXTENSIONS TO RESPOND

3. MEMBER AVAILABILITY

On _____ *(date - YYMMDD)*, I received this form and an application for an involuntary allotment from the pay of the member identified. The above named member is not available for purposes of processing an involuntary allotment because the member is as indicated below. Official documentation supporting this determination is attached.

	a. Retired (Including placement on the Temporary or Permanent Disabled Retired List).
	b. In a prisoner of war status.
	c. In a missing in action status.
	d. Not assigned or attached to this unit or organization.

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SECTION II *(Continued)*

4. EXTENSION

I have determined that an extension is necessary until _____ *(YYMMDD)* because the member is not available for notice and counseling or unable to respond in a timely manner *(explain in Remarks section below)*. I will notify you prior to the above date if any further extensions are necessary.

5. REMARKS

6. COMMANDER OR DESIGNEE

a. SIGNATURE	b. SIGNATURE BLOCK	c. DATE SIGNED

SECTION III - NOTICE TO MEMBER BY COMMANDER OR AUTHORIZED DESIGNEE

7. NOTICE

You are hereby notified that an application for the establishment of an involuntary allotment for the lesser of 25% of your pay subject to involuntary allotment or the maximum percentage of pay subject to garnishment proceedings under the applicable state law has been received. Along with this notice, I am providing you a copy of the entire application package.

Additionally, you are notified that:

a. You must respond within 15 calendar days from the date of this notification by either consenting to the involuntary allotment or contesting it. For good cause shown, I may grant an extension of reasonable time (normally not exceeding 30 calendar days, except during times of deployment, war, national emergency, or other similar situations) to submit a response. Additionally, if you fail to respond within the specified date (or any approved extended date), your failure to respond will be indicated in Section V of this form, which will then be sent back to the designated Defense Finance and Accounting Service (DFAS) (or Coast Guard Pay and Personnel Center) official for appropriate action.

b. You may contest this application for any of the reasons described in Section IV of this form.

c. If you contest the application, you must provide evidence (documentary or otherwise) supporting your reasons for contesting the application. Any evidence you submit may be disclosed to the applicant for this involuntary allotment.

d. You may, if reasonably available, consult with a legal assistance attorney, or a civilian attorney at no expense to the government. If a legal assistance attorney is available, you should immediately arrange for an appointment. If a legal assistance attorney is not available, you may request a reasonable delay to enable you to obtain legal assistance. If you have failed to exercise due diligence in seeking assistance, I will deny a request for delay.

e. If you contest the involuntary allotment on the grounds that exigencies of military duty caused your absence from an appearance at the judicial proceeding at which the judgment was rendered, then I will review and make the final determination on this contention. My decision will be reflected in Section V of this form which will be forwarded to the designated DFAS (or Coast Guard Pay and Personnel Center) official for appropriate action. I will consider the following when making this determination:

(1) That exigencies of military duty are defined as "a military assignment or mission essential duty that, because of its urgency, importance, duration, location, or isolation, necessitates the absence of a member of the military services from appearance at a judicial proceeding. Absence from an appearance in a judicial proceeding is normally presumed to be caused by exigencies of military duty during periods of war, national emergency, or when the member is deployed."

(2) Whether the military duties in question were of such paramount importance that they prevented making you available to attend the judicial proceedings, or rendered you unable to timely respond to process, motions, pleadings, or orders of the court.

f. If you contest the involuntary allotment on any basis other than exigencies of military duty, you must return this form and your response to me. This form, the application package, and your response will then be returned to the designated DFAS (or Coast Guard Pay and Personnel Center) official who will consider your response and determine whether to establish the involuntary allotment. The designated DFAS (or Coast Guard Pay and Personnel Center) official has decision authority on all issues other than exigencies of military duty.

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SECTION III *(Continued)*

g. If you fail to respond to me within the time period specified (including any extensions authorized by me), I shall indicate your failure to respond in Section V of this form, and mail this form and the application package back to the designated DFAS (or Coast Guard Pay and Personnel Center) official for appropriate action.

8. COMMANDER OR DESIGNEE

a. SIGNATURE	b. SIGNATURE BLOCK	c. DATE SIGNED

9. MEMBER ACKNOWLEDGMENT

I hereby acknowledge that the commander or his or her designee has counseled me in accordance with Section III of this form; that I am being given an opportunity to review this form and the application package; I may seek legal assistance prior to responding; I have received a copy of DD Form 2653 and the entire application package for this involuntary allotment; and that I must complete Section IV of this form and return the form to my commander.

a. SIGNATURE	b. DATE SIGNED

SECTION IV - MEMBER RESPONSE

10. MEMBER WILL INITIAL IN THE APPROPRIATE SPACE(S):

	a. I acknowledge that this is a valid judgment and consent to the establishment of an involuntary allotment.
	b. I contest this Involuntary Allotment Application for the following reasons *(If contesting, you must explain the reason in item 11, "Remarks," and provide appropriate evidence to support the reason.)*:
	(1) That my rights under the Soldiers' and Sailors' Civil Relief Act were not complied with during the judicial proceeding upon which this application is based.
	(2) That exigencies of military duty caused my absence from appearance in a judicial proceeding forming the basis for the judgment upon which this application is sought.
	(3) That information contained in the application is false or erroneous in material part.
	(4) The judgment has been fully satisfied, superseded, or set aside.
	(5) The judgment has been materially amended, or partially satisfied. *(Provide evidence of the amount satisfied and the amount which remains in effect.)*
	(6) There is a legal impediment to the establishment of the involuntary allotment. *(For example, the judgment debt has been discharged in bankruptcy, or you have filed for protection from the creditor(s) under the bankruptcy laws of the United States, or the applicant is not the judgment creditor or a proper successor in interest to the creditor.)*

11. REMARKS *(Use additional sheets if necessary.)*

12. MEMBER

a. SIGNATURE	b. DATE SIGNED

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SECTION V - COMMANDER'S ACTION AND DETERMINATIONS							
13. COMMANDER OR DESIGNEE WILL INITIAL IN THE APPROPRIATE SPACE:							
	a. The member has completed Section IV of this form and the member's response (to include any additional submissions) is hereby forwarded for appropriate action.						
	b. The member refused to respond by the authorized suspense date and this form is hereby returned without Section IV completed by the member.						
14. COMPLETE ONLY IF THE MEMBER ASSERTED "EXIGENCIES OF MILITARY DUTY" AS REASON FOR CONTESTING THE INVOLUNTARY ALLOTMENT APPLICATION *(Initial in the appropriate space)*							
	a. Exigencies of military duty DID NOT CAUSE the absence of the member from an appearance in the judicial proceeding upon which this Involuntary Allotment Application is sought.						
	b. Exigencies of military duty CAUSED the absence of the member from an appearance in the judicial proceeding upon which this application for involuntary allotment is sought. Exigency existed due to: *(X as applicable and explain in item 15, "Remarks.")*						
		(1) Deployment		(2) War		(3) National Emergency		(4) Other *(e.g., Major Exercise)*
15. REMARKS							
NOTE: Commander must provide member a copy of this form within 5 days of mailing to the designated DFAS (or Coast Guard Pay and Personnel Center) official.							
16. IF THE APPLICANT CHOOSES TO APPEAL MY EXIGENCY DETERMINATION, THE APPEAL MUST BE SENT TO:							
a. TITLE OF APPEAL AUTHORITY							
b. STREET ADDRESS		c. CITY			d. STATE	e. ZIP CODE	
17. COMMANDER OR DESIGNEE							
a. SIGNATURE		b. SIGNATURE BLOCK				c. DATE SIGNED	

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PART 114—VICTIM AND WITNESS ASSISTANCE

Sec.

114.1 Purpose.
114.2 Applicability.
114.3 Definitions.
114.4 Policy.
114.5 Responsibilities.
114.6 Procedures.

AUTHORITY: 10 U.S.C. chapter 47; 10 U.S.C. 113, 1034, 1044, 1044e, 1058, 1059, and 1408; 18 U.S.C. 1512 through 1514; section 573 of Pub. L. 112–239, 126 Stat. 1632; sections 1701 and 1706 of Pub. L. 113–66, 127 Stat. 672; and section 533 of Pub. L. 113–291, 128 Stat. 3292.

SOURCE: 85 FR 23476, Apr. 28, 2020, unless otherwise noted.

§ 114.1 Purpose.

This part:

(a) Establishes policy, assigns responsibilities, and prescribes procedures to assist victims and witnesses of alleged crimes committed in violation of 10 U.S.C. chapter 47, also known and referred to in this part as the Uniform Code of Military Justice (UCMJ).

(b) Establishes policy, assigns responsibilities, and prescribes procedures for:

(1) The rights of crime victims under the UCMJ and required mechanisms for enforcement, in accordance with section 1701 of Public Law 113–66, ''National Defense Authorization Act for Fiscal Year 2014,'' and in accordance with DoD standards for victim witness assistance services in the military community established in DoD Instruction 6400.07, ''Standards for Victim Assistance Services in the Military Community,'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/640007p.pdf?ver=2018-07-06-073608-400*).

(2) Providing timely notification of information and assistance available to victims and witnesses of crime from initial contact through investigation, prosecution, and confinement in accordance with 18 U.S.C. 1512 through 1514, 32 CFR part 286, ''DoD Freedom of Information Act (FOIA) Program,'' 32 CFR part 111, ''Transitional Compensation for Abused Dependents,'' DoD Instruction 1325.07, ''Administration of Military Correctional Facilities and Clemency and Parole Authority,'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/132507p.pdf?ver=2019-02-19-075650-100*), DoD Directive 7050.06, ''Military Whistleblower Protection,'' (available at *http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/705006p.pdf*), and 10 U.S.C. 113, 1034, 1059, and 1408; and section 1706 of Public Law 113–66.

(3) Annual reporting requirements on assistance provided across the DoD to victims and witnesses of alleged crimes.

(c) Provides for legal assistance for crime victims entitled to such services pursuant to 10 U.S.C. 1044 and 1044e, and in accordance with Under Secretary of Defense for Personnel and Readiness (USD(P&R)) Memorandum, ''Legal Assistance for Victims of Crimes'' (available at *http://www.sapr.mil/public/docs/directives/Legal_Assistance_for_Victims_of_Crime-Memo.pdf*), and 10 U.S.C. 1565b, and as further prescribed by the Military Departments and National Guard Bureau policies.

(d) Adopts section 573 of Public Law 112–239, ''The National Defense Authorization Act for Fiscal Year 2013,'' January 2, 2013, requiring each Military Service to establish a special victim capability comprised of specially trained criminal investigators, judge advocates, paralegals, and victim and witness assistance personnel to support victims of covered special victim offenses. To de-conflict with victims' counsel programs, this distinct group of recognizable professionals will be referred to, at the DoD level, as the Special Victim Investigation and Prosecution (SVIP) capability.

(e) Adopts the victim and witness portion of the special victim capability in accordance with) DoDI 5505.19, ''Establishment of Special Victim Investigation and Prosecution (SVIP) Capability within the Military Criminal Investigative Organizations (MCIOs),'' March 23, 2017 (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/550519p.pdf?ver=2019-08-12-152401-387*), and Directive-type Memorandum (DTM) 14–003, ''DoD Implementation of Special Victim Capability (SVC) Prosecution and Legal Support,'' February 12, 2014, Incorporating Change 6, August 15, 2019 (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dtm/DTM-14-003.pdf?ver=2019-08-15-102432-590*).

(f) Adopts section 1716 of Public Law 113–66, and section 533 of the National Defense Authorization Act for 2015 (NDAA 2015), requiring the Military Services to provide legal counsel, known as Special Victims' Counsel or Victims' Legal Counsel, (SVC/VLC) to

assist victims of alleged sex-related offenses in violation of Articles 120, 120a, 120b, 120c, 125 (before January 1, 2019) of the UCMJ, and attempts to commit any of these offenses under Article 80 of the UCMJ, who are eligible for legal assistance in accordance with 10 U.S.C. 1044 and 1044e, and as further prescribed by the Military Departments and National Guard Bureau policies.

§ 114.2 Applicability.

This part applies to any military or civilian victims or witnesses of alleged offenses under the UCMJ. This part also applies to OSD, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the ''DoD Components'').

§ 114.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part:

Central repository. A headquarters office, designated by Service regulation, to serve as a clearinghouse of information on a confinee's status and to collect and report data on the delivery of victim and witness assistance, including notification of confinee status changes.

Confinement facility victim witness assistance coordinator. A staff member at a military confinement facility who is responsible for notifying victims and witnesses of changes in a confinee's status and reporting those notifications to the central repository.

Court proceeding. A preliminary hearing held pursuant to Article 32 of the UCMJ; a hearing under Article 39(a) of the UCMJ; a court-martial; a military presentencing hearing; or a military appellate hearing. Conferences, such as those between attorneys and the military judge pursuant to Rule for Courts-Martial (R.C.M.) 802 or between attorneys and preliminary hearing officers pursuant to Article 32, are not court proceedings for purposes of this part. If all or part of a court proceeding has been closed to the public by the military judge, preliminary hearing officer, or other official, the victims and witnesses will still be notified of the closed hearing as provided in this part, and of the reasons for the closure. In such a case, the military judge, preliminary hearing officer, or other official may place reasonable limits on the reasons disclosed, if such limits are necessary to protect the safety of any person, the fairness of the proceeding, or are otherwise in the interests of national security.

DoD Component responsible official. Person designated by each DoD Component head to be primarily responsible in the DoD Component for coordinating, implementing, and managing the victim and witness assistance program established by this part.

Equal opportunity. The right of all persons to participate in, and benefit from, programs and activities for which they are qualified. These programs and activities will be free from social, personal, or institutional barriers that prevent people from rising to the highest level of responsibility possible. Persons will be evaluated on individual merit, fitness, and capability, regardless of race, color, sex, national origin, or religion.

Local responsible official. Person designated by the DoD Component responsible official who has primary responsibility for identifying victims and witnesses of crime and for coordinating the delivery of services described in this part through a multidisciplinary approach. The position or billet of the local responsible official will be designated in writing by Service regulation. The local responsible official may delegate responsibilities in accordance with this part.

Local Victim and Witness Assistance Council. A regular forum held at the DoD installation, or regional command level, that promotes efficiencies, coordinates victim assistance-related programs, and assesses the implementation of victim assistance standards and victim assistance-related programs, in accordance with this part, DoD Instruction 6400.07, and any other applicable Service guidance.

Military Department Clemency and Parole Board. In accordance with DoD Instruction 1325.07, a board which assists

the Military Department Secretary as the primary authority for administration and execution of clemency, parole, and mandatory supervised release policy and programs.

Military services. Refers to the Army, the Navy, the Air Force, and the Marine Corps, the Coast Guard, and the Reserve Components, which include the Army and Air National Guards of the United States.

Protected communication. (1) Any lawful communication to a Member of Congress or an IG.

(2) A communication in which a member of the Armed Forces communicates information that the member reasonably believes evidences a violation of law or regulation, including a law or regulation prohibiting sexual harassment or unlawful discrimination, gross mismanagement, a gross waste of funds or other resources, an abuse of authority, or a substantial and specific danger to public health or safety, when such communication is made to any of the following:

(i) A Member of Congress, an IG, or a member of a DoD audit, inspection, investigation, or law enforcement organization.

(ii) Any person or organization in the chain of command; or any other person designated pursuant to regulations or other established administrative procedures to receive such communications.

Reprisal. Taking or threatening to take an unfavorable personnel action, or withholding or threatening to withhold a favorable personnel action, for making or preparing to make a protected communication.

Restricted reporting. Defined in 32 CFR part 103.

Special victim investigation and prosecution (SVIP) capability. A distinct, recognizable group of appropriately skilled professionals, consisting of specially trained and selected military criminal investigative organization (MCIO) investigators, judge advocates, victim witness assistance personnel, and administrative paralegal support personnel who work collaboratively to:

(1) Investigate allegations of adult sexual assault, domestic violence involving sexual assault and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm.

(2) Provide support for the victims of such covered offenses.

Special victim offenses. The designated criminal offenses of sexual assault, domestic violence involving sexual assault, and/or aggravated assault with grievous bodily harm, and child abuse involving sexual assault and/or aggravated assault with grievous bodily harm, in violation of the UCMJ. Sexual assault includes offenses under Articles 120 (rape and sexual assault in general), 120b (rape and sexual assault of a child), and 120c (other sexual misconduct), or forcible sodomy under Article 125 (before January 1, 2019) of the UCMJ or attempts to commit such offenses under Article 80 of the UCMJ. Aggravated assault with grievous bodily harm, in relation to domestic violence and child abuse cases, includes an offense as specified under Article 128 of the UCMJ (assault). The Military Services and National Guard Bureau may deem other UCMJ offenses appropriate for SVIP support, based on the facts and circumstances of specific cases, and the needs of victims.

Special Victims' Counsel/Victims' Legal Counsel (SVC/VLC). Legal counsel provided to assist eligible victims of alleged sex-related offenses in violation of Articles 120, 120a, 120b, 120c, and 125 (before January 1, 2019) of the UCMJ and attempts to commit any of these offenses under Article 80 of the UCMJ (or other offenses as defined by the Military Services), in accordance with 10 U.S.C. 1044, 1044e, and 1565b; section 1716 of Public Law 113–66; and section 533 of Public Law 113–291.

Specially trained prosecutors. Experienced judge advocates detailed by Military Department Judge Advocates Generals (TJAGs), the Staff Judge Advocate to the Commandant of the Marine Corps, or other appropriate authority to litigate or assist with the prosecution of special victim cases and provide advisory support to MCIO investigators and responsible legal offices. Before specially trained prosecutors are detailed, their Service TJAG, Staff Judge Advocate to the Commandant of the Marine Corps, or other appropriate authority has determined they have the

necessary training, maturity, and advocacy and leadership skills to carry out those duties.

Unrestricted reporting. Defined in 32 CFR part 103.

Victim. A person who has suffered direct physical, emotional, or pecuniary harm as a result of the commission of a crime committed in violation of the UCMJ. Victim assistance is limited to individuals eligible for military legal assistance under 10 U.S.C. 1044 and 1044e, and as further prescribed by the Military Departments' and National Guard Bureau's policies. Federal Departments and State and local agencies, as entities, are not eligible for services available to individual victims.

Victim assistance personnel. Personnel who are available to provide support and assistance to victims of alleged crimes consistent with their assigned responsibilities and in accordance with this part. They include part-time, full-time, collateral duty, and other authorized individuals, and may be domestic violence or sexual assault prevention and response coordinators (to include unit and uniformed victim advocates), Sexual Assault Response Coordinators, victim-witness assistance personnel, or military equal opportunity advisors.

Victim assistance-related programs. The SAPR Program; FAP; and the VWAP. A complainant under the DoD MEO Program may be referred by the MEO office to one of the victim assistance-related programs for additional assistance.

Witness. A person who has information or evidence about a criminal offense within the investigative jurisdiction of a DoD Component and who provides that knowledge to a DoD Component. When the witness is a minor, that term includes a parent or legal guardian, or other person responsible for the child. The term does not include an individual involved in the crime as an alleged perpetrator or accomplice.

§ 114.4 Policy.

It is DoD policy that:

(a) The DoD is committed to protecting the rights of victims and witnesses of alleged crimes and supporting their needs in the criminal justice process. The DoD Components will comply with all statutory and policy mandates and will take all additional actions within the limits of available resources to assist victims and witnesses of alleged crimes without infringing on the constitutional or other legal rights of a suspect or an accused.

(b) DoD victim assistance services will focus on the victim and will respond, protect, and care for the victim from initiation of a report through offense disposition, if applicable, and will continue such support until the victim is no longer eligible for such services or the victim specifies to the local responsible official that he or she no longer requires or desires services.

(c) Each DoD Component will provide particular attention and support to victims of serious, violent alleged crimes, including child abuse, domestic violence, and sexual assault. In order to ensure the safety of victims, and their families, victim assistance personnel shall respect the dignity and the privacy of persons receiving services, and carefully observe any safety plans and military or civilian protective orders in place.

(d) Victim assistance services must meet DoD competency, ethical, and foundational standards established in DoD Instruction 6400.07, ''Standards for Victim Assistance Services in the Military Community,'' (available at *http://www.esd.whs.mil/ Portals/54/Documents/DD/ issuances/dodi/640007p.pdf*).

(e) Making or preparing to make or being perceived as making or preparing to make a protected communication, to include reporting a violation of law or regulation, including a law or regulation prohibiting rape, sexual assault, or other sexual misconduct, in violation of 10 U.S.C. 920 through 920c, sexual harassment, or unlawful discrimination, in accordance with 10 U.S.C. 1034, section 1709 of Public Law 113–66, and DoD Directive 7050.06, ''Military Whistleblower Protection,'' (available at *http://www.esd.whs.mil/ Portals/54/Documents/DD/ issuances/dodd/705006p.pdf*), shall not result in reprisal activity from management officials.

(f) This part is not intended to, and does not, create any entitlement, cause of action, or defense at law or in equity, in favor of any person or entity

arising out of the failure to accord to a victim or a witness the assistance outlined in this part. No limitations are hereby placed on the lawful prerogatives of the DoD or its officials.

§ 114.5 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)):

(1) Establishes overall policy for victim and witness assistance and monitors compliance with this part.

(2) Approves procedures developed by the Secretaries of the Military Departments that implement and are consistent with this part.

(3) Maintains the DoD Victim Assistance Leadership Council, in accordance with DoD Instruction 6400.07, which advises the Secretary of Defense on policies and practices related to the provision of victim assistance and provides a forum that promotes efficiencies, coordinates victim assistance-related policies, and assesses the implementation of victim assistance standards across the DoD's victim assistance-related programs.

(4) Submits an annual report to the Office for Victims of Crime, Department of Justice, identifying the number of specified notifications made to victims and witnesses of alleged crimes.

(b) The Director, DoD Human Resources Activity, through the Defense Manpower Data Center, and under the authority, direction, and control of the USD(P&R), assists in formulating a data collection mechanism to track and report victim notifications from initial contact through investigation to disposition, to include prosecution, confinement, and release.

(c) The Inspector General of the Department of Defense (DoD IG):

(1) Establishes investigative policy and performs appropriate oversight reviews of the management of the Victim Witness Assistance Program (VWAP) by the DoD military criminal investigative organizations (MCIOs). This is not intended to substitute for the routine managerial oversight of the program provided by the MCIOs, the USD(P&R), the DoD Component heads, the DoD Component responsible officials, or the local responsible officials.

(2) Investigates and oversees DoD Component Inspector General investigations of allegations or reprisal for making or preparing to make or being perceived as making or preparing to make a protected communication, in accordance with 10 U.S.C. 1034.

(d) The DoD Component heads:

(1) Ensure compliance with this part, and establish policies and procedures to implement the VWAP within their DoD Components.

(2) Designate the DoD Component responsible official for the VWAP, who will report annually to the USD(P&R) using DD Form 2706, ''Victim and Witness Assistance Annual Report'' (available at *http://www.esd.whs.mil/ Portals/ 54/Documents/DD/ forms/dd/dd2706.pdf*)

(3) Provide for the assignment of personnel in sufficient numbers to enable those programs identified in the 10 U.S.C. 113 note to be carried out effectively.

(4) Designate a central repository for confinee information for each Military Service, and establish procedures to ensure victims who so elect are notified of changes in inmate status.

(5) Maintain a Victim and Witness Assistance Council, when practicable, at each military installation, to ensure victim and witness service providers follow an interdisciplinary approach. These providers may include chaplains, sexual assault prevention and response personnel, family advocacy personnel, military treatment facility health care providers and emergency room personnel, family service center personnel, military equal opportunity personnel, judge advocates, SVC/VLCs, unit commanding officers, corrections personnel, and other persons designated by the Secretaries of the Military Departments.

(6) Maintain training programs to ensure Victim Witness Assistance Program (VWAP) providers receive instruction to assist them in complying with this part. Training programs will include specialized training for VWAP personnel assigned to the SVIP capability, in accordance with §114.6(c).

(7) Designate local responsible officials in writing in accordance with Military Service regulations and §114.6(a)(1).

(8) Maintain oversight procedures to ensure establishment of an integrated support system capable of providing the services outlined in §114.6, and meet the competency, ethical, and foundational standards established in DoD Instruction 6400.07. Such oversight may include coverage by DoD Component Inspectors General, staff assistance visits, surveys, and status reports.

(9) Establish mechanisms for ensuring that victims are notified of and afforded the rights specified in the UCMJ, including the rights specified in Article 6b of the UCMJ (10 U.S.C. 806b) and R.C.M. 306.

(10) Establish mechanisms for the enforcement of the rights specified in the UCMJ, including mechanisms for the application for such rights and for consideration and disposition of applications for such rights. At a minimum, such enforcement mechanisms will include the designation of an authority within each Military Service to receive and investigate complaints relating to the provision or violation of such rights and the establishment of disciplinary sanctions for responsible military and civilian personnel who wantonly fail to comply with the requirements relating to such rights.

§114.6 Procedures.

(a) *Local responsible officials.* Local responsible officials:

(1) Will coordinate to ensure that systems are in place at the installation level to provide information on available benefits and services, assist in obtaining those benefits and services, and provide other services required by this section.

(2) May delegate their duties as appropriate, but retain responsibility to coordinate the delivery of required services.

(3) May use an interdisciplinary approach involving the various service providers listed in paragraph (b)(7) of this section, to coordinate the delivery of information and services to be provided to victims and witnesses.

(b) *Comprehensive information and services to be provided to victims and witnesses*—(1) *Rights of crime victims.* Personnel directly engaged in the prevention, detection, investigation, and disposition of offenses, to include courts-martial, including law enforcement and legal personnel, commanders, trial counsel, and staff judge advocates, will ensure that victims are accorded their rights in accordance with Article 6b of UCMJ. A crime victim has the right to:

(i) Be reasonably protected from the accused offender.

(ii) Be provided with reasonable, accurate, and timely notice of:

(A) A public hearing concerning the continuation of confinement before the trial of the accused.

(B) A preliminary hearing pursuant to Article 32 of the UCMJ relating to the offense.

(C) A court-martial relating to the offense.

(D) A public proceeding of the Military Department Clemency and Parole Board hearing relating to the offense.

(E) The release or escape of the accused, unless such notice may endanger the safety of any person.

(iii) Be present at, and not be excluded from any public hearing or proceeding described in paragraph (b)(1)(ii) of this section, unless the military judge or preliminary hearing officer of a hearing conducted pursuant to Article 32 of the UCMJ determines, after receiving clear and convincing evidence, that testimony by the victim would be materially altered if the victim observed that hearing or proceeding.

(iv) Be reasonably heard, personally or through counsel at:

(A) A public hearing concerning the continuation of confinement before the court-martial of the accused.

(B) Preliminary hearings conducted pursuant to Article 32 of the UCMJ and court-martial proceedings relating to Rules 412, 513, and 514 of the Military Rules of Evidence (M.R.E.) or regarding other rights provided by statute, regulation, or case law.

(C) A public sentencing hearing relating to the offense.

(D) A public Military Department Clemency and Parole Board hearing relating to the offense. A victim may make a personal appearance before the Military Department Clemency and Parole Board or submit an audio, video, or written statement.

(v) Confer with the attorney for the U.S. Government in the case. This will

include the reasonable right to confer with the attorney for the U.S. Government at any proceeding described in paragraph (b)(1)(ii) of this section.

(A) Crime victims who are eligible for legal assistance may consult with a military legal assistance attorney in accordance with paragraph (c)(1) of this section.

(B) Victims of an alleged offense under Articles 120, 120a, 120b, or 120c or forcible sodomy under the UCMJ or attempts to commit such offenses under Article 80 of the UCMJ, who are eligible for legal assistance per Military Department or National Guard Bureau policies or in accordance with 10 U.S.C. 1044 or 1044e, may consult with a SVC/VLC in accordance with paragraph (d)(1) of this section. Victims of these covered alleged offenses shall be informed by a sexual assault response coordinator (SARC), victim advocate, victim witness liaison, military criminal investigator, trial counsel, or other local responsible official that they have the right to consult with a SVC/VLC as soon as they seek assistance from the individual in accordance with 10 U.S.C. 1565b, and as otherwise authorized by Military Department and National Guard Bureau policy.

(C) All victims may also elect to seek the advice of a private attorney, at their own expense.

(vi) Receive restitution as provided in accordance with State and Federal law.

(vii) Proceedings free from unreasonable delay.

(viii) Be treated with fairness and respect for his or her dignity and privacy.

(ix) Express his or her views to the commander or convening authority as to disposition of the case.

(x) Be prevented from, or charged for, receiving a medical forensic examination.

(xi) Have a sexual assault evidence collection kit or its probative contents preserved, without charge.

(xii) Be informed of any result of a sexual assault evidence collection kit, including a DNA profile match, toxicology report, or other information collected as part of a medical forensic examination, if such disclosure would not impede or compromise an ongoing investigation.

(xiii) Be informed in writing of policies governing the collection and preservation of a sexual assault evidence collection kit.

(xiv) Upon written request, receive written notification from the appropriate official with custody not later than 60 days before the date of the intended destruction or disposal.

(xv) Upon written request, be granted further preservation of the kit or its probative contents.

(xvi) Express a preference regarding whether the offense should be prosecuted by court-martial or in a civilian court with jurisdiction over the offense (for a victim of an alleged sex-related offense that occurs in the United States).

(A) Victims expressing a preference for prosecution of the offense in a civilian court shall have the civilian authority with jurisdiction over the offense notified of the victim's preference for civilian prosecution by the convening authority.

(B) The convening authority shall notify the victim of any decision by the civilian authority to prosecute or not prosecute the offense in a civilian court, if the convening authority learns of any decision.

(2) *Initial information and services.* (i) Immediately after identification of a crime victim or witness, the local responsible official, law enforcement officer, or criminal investigation officer will explain and provide information to each victim and witness, as appropriate, including:

(A) The DD Form 2701, ''Initial Information for Victims and Witnesses of Crime'' (available at *http://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2701.pdf*) or computer-generated equivalent will be used as a handout to convey basic information. Specific points of contact will be recorded on the appropriate form authorized for use by the particular Military Service.

(B) Proper completion of this form serves as evidence that the local responsible official or designee, law enforcement officer, or criminal investigative officer notified the victim or

witness of his or her rights, as described in paragraph (b)(1) of this section. The date the form is given to the victim or witness shall be recorded by the delivering official. This serves as evidence the victim or witness was timely notified of his or her statutory rights.

(ii) The local responsible official will explain the form to victims and witnesses at the earliest opportunity. This will include:

(A) Information about available military and civilian emergency medical and social services, victim advocacy services for victims of domestic violence or sexual assault, and, when necessary, assistance in securing such services.

(B) Information about restitution or other relief a victim may be entitled to, and the manner in which such relief may be obtained.

(C) Information to victims of intrafamilial abuse offenses on the availability of limited transitional compensation benefits and possible entitlement to some of the active duty Service member's retirement benefits pursuant to 10 U.S.C. 1059 and 1408 and 32 CFR part 111.

(D) Information about public and private programs available to provide counseling, treatment, and other support, including available compensation through Federal, State, and local agencies.

(E) Information about the prohibition against intimidation and harassment of victims and witnesses, and arrangements for the victim or witness to receive reasonable protection from threat, harm, or intimidation from an accused offender and from people acting in concert with or under the control of the accused offender.

(F) Information concerning military and civilian protective orders, as appropriate.

(G) Information about the military criminal justice process, the role of the victim or witness in the process, and how the victim or witness can obtain additional information concerning the process and the case in accordance with section 1704 of Public Law 113–66. This includes an explanation of:

(*1*) Victims' roles and rights during pretrial interviews with law enforcement, investigators, government counsel, and defense counsel and during preliminary hearings pursuant to Article 32 of the UCMJ, and section 1702 of Public Law 113–66.

(*2*) Victims' rights when action is taken by the convening authority pursuant to Article 60 of the UCMJ, and during the post-trial/clemency phase of the process.

(H) If necessary, assistance in contacting the people responsible for providing victim and witness services and relief.

(I) If necessary, how to file a military whistleblower complaint with an Inspector General regarding suspected reprisal for making, preparing to make, or being perceived as making or preparing to make a protected communication in accordance with 10 U.S.C. 1034 and DoD Directive 7050.06.

(J) Information about the victim's right to seek the advice of an attorney with respect to his or her rights as a crime victim pursuant to Federal law and DoD policy. This includes the right of Service members and their dependents to consult a military legal assistance attorney in accordance with paragraph (d)(1) of this section, or a SVC/VLC in accordance with paragraph (e)(1) of this section.

(3) *Information to be provided during investigation of a crime.* (i) If a victim or witness has not already received the DD Form 2701 from the local responsible official or designee, it will be provided by a law enforcement officer or investigator.

(ii) Local responsible officials or law enforcement investigators and criminal investigators will inform victims and witnesses, as appropriate, of the status of the investigation of the crime, to the extent providing such information does not interfere with the investigation.

(4) *Information and services to be provided concerning the prosecution of a crime.* (i) The DD Form 2702, ''Court-Martial Information for Victims and Witnesses of Crime'' (available at *http://www.esd.whs.mil/ Portals/54/Documents/DD/ forms/dd/dd2702.pdf*) will be used as a handout to convey basic information about the court-martial process. The date it is given to the victim or witness shall be recorded by the

delivering official. If applicable, the following will be explained and provided by the U.S. Government attorney, or designee, to victims and witnesses:

(A) Notification of crime victims' rights, to include the victim's right to express views as to disposition of the case to the responsible commander and convening authority.

(B) Notification of the victim's right to seek the advice of an attorney with respect to his or her rights as a crime victim pursuant to Federal law and DoD policy. This includes the right of service members and their dependents to consult a military legal assistance attorney in accordance with paragraph (d)(1) of this section or a SVC/VLC in accordance with paragraph (e)(1) of this section.

(C) Consultation concerning the decisions to prefer or not prefer charges against the accused offender and the disposition of the offense if other than a trial by court-martial.

(D) Consultation concerning the decision to refer or not to refer the charges against the accused offender to trial by court-martial and notification of the decision to pursue or not pursue court-martial charges against the accused offender.

(E) Notification of the initial appearance of the accused offender before a reviewing officer or military judge at a public pretrial confinement hearing or at a preliminary hearing in accordance with Article 32 of the UCMJ.

(F) Notification of the release of the suspected offender from pretrial confinement.

(G) Explanation of the court-martial process.

(H) Before any court proceedings (as defined to include preliminary hearings conducted pursuant to Article 32 of the UCMJ, pretrial hearings conducted pursuant to Article 39(a) of the UCMJ, trial, and presentencing hearings), help with locating available services such as transportation, parking, child care, lodging, and courtroom translators or interpreters that may be necessary to allow the victim or witness to participate in court proceedings.

(I) During the court proceedings, a private waiting area out of the sight and hearing of the accused and defense witnesses. In the case of proceedings conducted aboard ship or in a deployed environment, provide a private waiting area to the greatest extent practicable.

(J) Notification of the scheduling, including changes and delays, of a preliminary hearing conducted pursuant to Article 32 of the UCMJ, and each court proceeding the victim is entitled to or required to attend will be made without delay. On request of a victim or witness whose absence from work or inability to pay an account is caused by the alleged crime or cooperation in the investigation or prosecution, the employer or creditor of the victim or witness will be informed of the reasons for the absence from work or inability to make timely payments on an account. This requirement does not create an independent entitlement to legal assistance or a legal defense against claims of indebtedness.

(K) Notification of the recommendation of a preliminary hearing officer when an Article 32 preliminary hearing is held.

(L) Consultation concerning any decision to dismiss charges or to enter into a pretrial agreement.

(M) Notification of the disposition of the case, to include the acceptance of a plea of ''guilty,'' the rendering of a verdict, the withdrawal or dismissal of charges, or disposition other than court-martial, to specifically include non-judicial punishment under Article 15 of the UCMJ, administrative processing or separation, or other administrative actions.

(N) Notification to victims of the opportunity to present to the court at sentencing, in compliance with applicable law and regulations, a statement of the impact of the crime on the victim, including financial, social, psychological, and physical harm suffered by the victim. The right to submit a victim impact statement is limited to the sentencing phase and does not extend to the providence (guilty plea) inquiry before findings.

(O) Notification of the offender's sentence and general information regarding minimum release date, parole, clemency, and mandatory supervised release.

(P) Notification of the opportunity to receive a copy of proceedings. The convening authority or subsequent responsible official must authorize release of a copy of the record of trial without cost to a victim of sexual assault as defined in R.C.M. 1104 of the MCM and Article 54(e) of the UCMJ. Victims of offenses other than sexual assault, and witnesses of any offenses, may also receive a copy of the record of trial, without cost, as determined by the Military Departments, which may be on a case-by-case basis, in categories of cases, or on the basis of particular criteria, for example, when it might lessen the physical, psychological, or financial hardships suffered as a result of a criminal act.

(ii) After court proceedings, the local responsible official will take appropriate action to ensure that property of a victim or witness held as evidence is safeguarded and returned as expeditiously as possible.

(iii) Except for information that is provided by law enforcement officials and U.S. Government counsel in accordance with paragraphs (b)(3) and (4) of this section, requests for information relating to the investigation and prosecution of a crime (*e.g.*, investigative reports and related documents) from a victim or witness will be processed in accordance with 32 CFR part 286.

(iv) Any consultation or notification required by paragraph (b)(5)(i) of this section may be limited to avoid endangering the safety of a victim or witness, jeopardizing an ongoing investigation, disclosing classified or privileged information, or unduly delaying the disposition of an offense. Although the victim's views should be considered, this part is not intended to limit the responsibility or authority of the Military Service or the Defense Agency officials to act in the interest of good order and discipline.

(5) *Information and services to be provided on conviction.* (i) Trial counsel will explain and provide services to victims and witnesses on the conviction of an offender in a court-martial. The DD Form 2703, ''Post-Trial Information for Victims and Witnesses of Crime'' (*http://www.esd.whs.mil/ Portals/54/Documents/DD/ forms/dd/dd2703.pdf*), will be used as a handout to convey basic information about the post-trial process.

(ii) When appropriate, the following will be provided to victims and witnesses:

(A) General information regarding the convening authority's action, the appellate process, the corrections process, work release, furlough, probation, parole, mandatory supervised release, or other forms of release from custody, and eligibility for each.

(B) Specific information regarding the election to be notified of further actions in the case, to include the convening authority's action, hearings and decisions on appeal, changes in inmate status, and consideration for parole. The DD Form 2704, ''Victim/Witness Certification and Election Concerning Prisoner Status'' (available at *http://www.esd.whs.mil/ Portals/54/Documents/DD/ forms/dd/dd2704.pdf*) will be explained and used for victims and appropriate witnesses to elect to be notified of these actions, hearings, decisions, and changes in the offender's status in confinement. The DD Form 2704–1, ''Victim Election of Post-Trial Rights'' (under development, will be available at *http://www.esd.whs.mil/ Directives/forms/ dd2500_2999/* once finalized) will be explained and used for victims to make elections about records of trial, submission of matters in clemency, and notifications of certain appellate proceedings.

(*1*) For all cases resulting in a sentence to confinement, the DD Form 2704 will be completed and forwarded to the Service central repository, the gaining confinement facility, the local responsible official, and the victim or witness, if any, with appropriate redactions made by the delivering official.

(*i*) Incomplete DD Forms 2704 received by the Service central repository must be accompanied by a signed memorandum detailing the reasons for the incomplete information, or they will be sent back to the responsible legal office for correction.

(*ii*) Do not allow an inmate access to DD Forms 2704 or attach a copy of the forms to any record to which the inmate has access. Doing so could endanger the victim or witness.

(*2*) For all cases resulting in conviction but no sentence to confinement, the DD Form 2704 will be completed and forwarded to the Service central repository, the local responsible official, and the victim or witness, if any.

(*3*) For all convictions with a qualifying victim, a DD Form 2704–1 will be completed for each victim and forwarded to the appropriate points of contact, as determined by the Military Department. This form may be included in the record of trial with appropriate redactions. If a qualifying victim personally signs and initials a declination to receive the record of trial or to submit matters in clemency, this form may satisfy the requirement for a written waiver. *See.* Rules for Courts-Martial 1103(g)(3)(C) and 1105A(f)(3).

(*4*) The DD Forms 2704, 2704–1, and 2705, ''Notification to Victim/Witness of Prisoner Status'' (available at *http://www.esd.whs.mil/ Portals/54/Documents/DD/ forms/dd/dd2705.pdf*), are exempt from release in accordance with 32 CFR part 286.

(C) Specific information regarding the deadline and method for submitting a written statement to the convening authority for consideration when taking action on the case in accordance with Article 60 of the UCMJ and R.C.M. 1105A.

(6) *Information and services to be provided on entry into confinement facilities.* (i) The victim and witness assistance coordinator at the military confinement facility will:

(A) On entry of an offender into post-trial confinement, obtain the DD Form 2704 to determine victim or witness notification requirements. If the form is unavailable, ask the Service central repository whether any victim or witness has requested notification of changes in inmate status in the case.

(B) When a victim or witness has requested notification of changes in inmate status on the DD Form 2704, and one of the events listed in paragraph (b)(6) of this section occurs, use the DD Form 2705, ''Notification to Victim/Witness of Prisoner Status,'' to notify the victim or witness.

(*1*) The date the DD Form 2705 is given to the victim or witness shall be recorded by the delivering official. This serves as evidence that the officer notified the victim or witness of his or her statutory rights.

(*2*) Do not allow the inmate access to DD Form 2705 or attach a copy of the forms to any record to which the inmate has access. Doing so could endanger the victim or witness.

(C) Provide the earliest possible notice of:

(*1*) The scheduling of a clemency or parole hearing for the inmate.

(*2*) The results of the Service Clemency and Parole Board.

(*3*) The transfer of the inmate from one facility to another.

(*4*) The escape, immediately on escape, and subsequent return to custody, work release, furlough, or any other form of release from custody of the inmate.

(*5*) The release of the inmate to supervision.

(*6*) The death of the inmate, if the inmate dies while in custody or under supervision.

(*7*) A change in the scheduled release date of more than 30 days from the last notification due to a disposition or disciplinary and adjustment board.

(D) Make reasonable efforts to notify all victims and witnesses who have requested notification of changes in inmate status of any emergency or special temporary home release granted an inmate.

(E) On transfer of an inmate to another military confinement facility, forward the DD Form 2704 to the gaining facility, with an information copy to the Service central repository.

(ii) The status of victim and witness notification requests will be reported annually to the Service central repository.

(7) *Information and services to be provided on appeal.* (i) When an offender's case is docketed for review by a Court of Criminal Appeals, or is granted review by the Court of Appeals for the Armed Forces (C.A.A.F.) or by the U.S. Supreme Court, the U.S. Government appellate counsel or appropriate Military Service designee will ensure that all victims who have indicated a desire to be notified receive this information, if applicable:

(A) Notification of the scheduling, including changes and delays, of each

public court proceeding that the victim is entitled to attend.

(B) Notification of the decision of the court.

(ii) When an offender's case is reviewed by the Office of the Judge Advocate General (TJAG) of the Military Department concerned, pursuant to Article 69 and Article 73 of the UCMJ, TJAG will ensure that all victims who have indicated a desire to be notified on DD Form 2704–1 receive notification of the outcome of the review.

(iii) The Military Services may use the sample appellate notification letter found at Figure 1 of this section, or develop their own templates to keep victims informed of appellate court proceedings and decisions.

(8) *Information and services to be provided on consideration for parole or supervised release.* (i) Before the parole or supervised release of a prisoner, the military confinement facility staff will review the DD Form 2704 to ensure it has been properly completed. If there is a question concerning named persons or contact information, it will be immediately referred to the appropriate staff judge advocate for correction.

(ii) When considering a prisoner for release on supervision, the military confinement facility commander will ensure that all victims and witnesses on the DD Form 2704 indicating a desire to be notified were given an opportunity to provide information to the Military Department Clemency and Parole Board in advance of its determination, as documented in the confinement file.

(9) *Reporting procedures.* (i) The DoD Component responsible official will submit an annual report using the DD Form 2706 to: Office of the Under Secretary of Defense for Personnel and Readiness, Attention: Legal Policy Office, 4000 Defense Pentagon, Washington, DC 20301–4000.

(ii) The report will be submitted by March 15 for the preceding calendar year and will address the assistance provided to victims and witnesses of crime.

(iii) The report will include:

(A) The number of victims and witnesses who received a DD Form 2701 from law enforcement or criminal investigations personnel.

(B) The number of victims and witnesses who received a DD Form 2702 from U.S. Government counsel, or designee.

(C) The number of victims and witnesses who received a DD Form 2703 from U.S. Government counsel or designee.

(D) The number of victims and witnesses who elected via the DD Form 2704 to be notified of changes in inmate status.

(E) The number of victims who received a DD Form 2704–1 from U.S. Government counsel or designee.

(F) The number of victims and witnesses who were notified of changes in inmate status by the confinement facility victim witness assistance coordinators via the DD Form 2705 or a computer-generated equivalent.

(G) The cumulative number of inmates in each Military Service for whom victim witness notifications must be made by each Service's confinement facilities. These numbers are derived by totaling the number of inmates with victim or witness notification requirements at the beginning of the year, adding new inmates with the requirement, and then subtracting those confinees who were released, deceased, or transferred to another facility (*e.g.*, Federal, State, or sister Military Service) during the year.

(iv) The Office of the USD(P&R) will consolidate all reports submitted by each Military Service, and submit an annual report to the Bureau of Justice Statistics, and Office for Victims of Crime, Department of Justice.

(c) *Special victim investigation and prosecution (SVIP) capability.* (1) In accordance with DTM 14–003, section 573 of Public Law 112–239, and DoD Instruction 5505.19, the Military Services will maintain a distinct, recognizable group of professionals to provide effective, timely, and responsive worldwide victim support, and a capability to support the investigation and prosecution of special victim offenses within the respective Military Departments.

(2) Covered special victim offenses include:

(i) Unrestricted reports of adult sexual assault.

(ii) Unrestricted reports of domestic violence involving sexual assault and/

or aggravated assault with grievous bodily harm.

(iii) Child abuse involving child sexual abuse and/or aggravated assault with grievous bodily harm.

(3) Military Service SVIP programs will include, at a minimum, specially trained and selected:

(i) Investigators from within MCIOs of the Military Departments.

(ii) Judge advocates to serve as prosecutors.

(iii) VWAP personnel.

(iv) Paralegal or administrative legal support personnel.

(4) Each Military Service will maintain standards for the selection, training, and certification of personnel assigned to provide this capability. At a minimum, SVIP training must:

(i) Focus on the unique dynamics of sexual assault, aggravated domestic violence, and child abuse cases.

(ii) Promote methods of interacting with and supporting special victims to ensure their rights are understood and respected.

(iii) Focus on building advanced litigation, case management, and technical skills.

(iv) Ensure that all SVIP legal personnel understand the impact of trauma and how this affects an individual's behavior and the memory of a traumatic incident when interacting with a victim.

(v) Train SVIP personnel to identify any safety concerns and specific needs of victims.

(vi) Ensure SVIP personnel understand when specially trained pediatric forensic interviewers are required to support the investigation and prosecution of complex child abuse and child sexual abuse cases.

(5) Each Military Service will maintain and periodically review measures of performance and effectiveness to objectively assess Service programs, policies, training, and services. At a minimum, these Service-level review measures will include:

(i) Percentage of all preferred court-martial cases that involve special victim offenses in each fiscal year.

(ii) Percentage of special victim offense courts-martial tried by, or with the direct advice and assistance of, a specially trained prosecutor.

(iii) Compliance with DoD VWAP informational, notification, and reporting requirements specified in paragraphs (b)(1) through (9) of this section, to ensure victims are consulted with and regularly updated by special victim capability legal personnel.

(iv) Percentage of specially trained prosecutors and other legal support personnel having received additional and advanced training in topical areas.

(6) The Military Services will also consider victim feedback on effectiveness of special victim prosecution and legal support services and recommendations for possible improvements, as provided in DoD survivor experience surveys or other available feedback mechanisms. This information will be used by the Military Services to gain a greater understanding of the reasons why a victim elected to participate or declined to participate at trial, and whether SVIP, VWAP, and other legal support services had any positive impact on this decision.

(7) Designated SVIP capability personnel will collaborate with local DoD SARCs, sexual assault prevention and response victim advocates, Family Advocacy Program (FAP) managers, and domestic abuse victim advocates during all stages of the military justice process to ensure an integrated capability.

(8) To support this capability, active liaisons shall be established at the installation level with these organizations and key individuals:

(i) Local military and civilian law enforcement agencies.

(ii) SARCs.

(iii) Victim advocates.

(iv) FAP managers.

(v) Chaplains.

(vi) Sexual assault forensic examiners and other medical and mental health care providers.

(vii) Unit commanding officers.

(viii) Other persons designated by the Secretaries of the Military Departments necessary to support special victims.

(9) In cases of adult sexual assault the staff judge advocate or designated representative of the responsible legal office will participate in case management group meetings, in accordance with 32 CFR part 105, on a monthly

basis to review individual cases. Cases involving victims who are assaulted by a spouse or intimate partner will be reviewed by FAP.

(10) The staff judge advocate or designated representative of the responsible legal office will participate in FAP case review or incident determination meetings of domestic violence, spouse or intimate partner sexual assault, and child abuse cases in accordance with DoD Instruction 6400.06, ''Domestic Abuse Involving DoD Military and Certain Affiliated Personnel'' (available at *http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/640006p.pdf*).

(11) In the case of a victim who is under 18 years of age and not a member of the Military Services, or who is incompetent, incapacitated, or deceased, the legal guardians of the victim or the representatives of the victim's estate, family members, or any other person designated as suitable by proper authority, may assume the victim's legal rights. Under no circumstances will an individual designated as representative have been accused of any crime against the victim.

(i) The Secretaries of the Military Departments may publish additional guidance or regulation regarding who, before referral, may designate an appropriate representative, such as the convening authority or other qualified local responsible official.

(ii) In making a decision to appoint a representative, the designating authority should consider:

(A) The age and maturity, relationship to the victim.

(B) The physical proximity to the victim.

(C) The costs incurred in effecting the appointment.

(D) The willingness of the proposed designee to serve in such a role.

(E) The previous appointment of a guardian by a court of competent jurisdiction or appropriate designating authority.

(F) The preference of the victim, if known.

(G) Any potential delay in any proceeding that may be caused by a specific appointment.

(H) Any other relevant information.

(iii) The representative, legal guardian, or equivalent of a victim who is eligible, or in the case of a deceased victim, was eligible at the time of death for legal assistance provided by SVC/VLC, may elect legal representation for a SVC/VLC on behalf of the victim.

(iv) A military judge's responsibilities for designating a representative are listed in R.C.M. 801(a)(6).

(v) In the absence of an appointment of a legal representative, the victim may exercise his/her own legal and regulatory rights, as described herein. Where an appointment is required or discretionary, nothing in this policy precludes a victim from being appointed as his/her own legal representative, as appropriate.

(d) *Legal assistance for crime victims*—(1) *Eligibility*. Active and retired Service members and their dependents are eligible to receive legal assistance pursuant to 10 U.S.C. 1044 and 1565b and Under Secretary for Defense for Personnel and Readiness Memorandum, ''Legal Assistance for Sexual Assault Victims,'' October 17, 2011.

(2) *Information and services*. Legal assistance services for crime victims will include confidential advice and assistance for crime victims to address:

(i) Rights and benefits afforded to the victim under law and DoD policy.

(ii) Role of the VWAP coordinator or liaison.

(iii) Role of the victim advocate.

(iv) Privileges existing between the victim and victim advocate.

(v) Differences between restricted and unrestricted reporting, if applicable.

(vi) Overview of the military justice system.

(vii) Services available from appropriate agencies for emotional and mental health counseling and other medical services.

(viii) The right to an expedited transfer, if applicable.

(ix) Availability of and protections offered by civilian and military protective orders.

(e) *Special Victims' Counsel/Victims' Legal Counsel programs*—(1) *Eligibility*. In accordance with 10 U.S.C. 1044, 1044e, and 1565b, section 1716 of Public Law 113–66, and section 533 of the Public

Law 113–291, the Military Services provide legal counsel, known as SVC/VLC, to assist victims of alleged sex-related offenses including Articles 120, 120a, 120b, and 120c, forcible sodomy under Article 125 (before January 1, 2019) of the UCMJ, attempts to commit such offenses under Article 80 of the UCMJ, or other crimes under the UCMJ as authorized by the Service, who are eligible for legal assistance pursuant to 10 U.S.C. 1044e and as further prescribed by the Military Departments and National Guard Bureau policies. Individuals eligible for SVC/VLC representation include any of the following:

(i) Individuals entitled to military legal assistance under 10 U.S.C. 1044 and 1044e, and as further prescribed by the Military Departments and National Guard Bureau policies.

(ii) Members of a reserve component of the armed forces, in accordance with section 533 of Public Law 113–291, and as further prescribed by the Military Departments and National Guard Bureau policies.

(iii) Civilian employees of the Department of Defense not otherwise entitled to legal assistance, as provided for in section 532 of Public Law 114–92.

(2) *Attorney-client information and services.* The types of legal services provided by SVC/VLC programs in each Military Service will include:

(i) Legal consultation regarding the VWAP, including:

(A) The rights and benefits afforded the victim.

(B) The role of the VWAP liaison.

(C) The nature of communication made to the VWAP liaison in comparison to communication made to a SVC/VLC or a legal assistance attorney pursuant to 10 U.S.C. 1044.

(ii) Legal consultation regarding the responsibilities and support provided to the victim by the SARC, a unit or installation sexual assault victim advocate, or domestic abuse advocate, to include any privileges that may exist regarding communications between those persons and the victim.

(iii) Legal consultation regarding the potential for civil litigation against other parties (other than the DoD).

(iv) Legal consultation regarding the military justice system, including, but not limited to:

(A) The roles and responsibilities of the military judge, trial counsel, the defense counsel, and military criminal investigators.

(B) Any proceedings of the military justice process in which the victim may observe or participate in person or through his or her SVC/VLC.

(v) Accompanying or representing the victim at any proceedings when necessary and appropriate, including interviews, in connection with the reporting, investigation, and prosecution of the alleged sex-related offense.

(vi) Legal consultation regarding eligibility and requirements for services available from appropriate agencies or offices for emotional and mental health counseling and other medical services.

(vii) Legal representation or consultation and assistance:

(A) In personal civil legal matters in accordance with 10 U.S.C. 1044.

(B) In any proceedings of the military justice process in which a victim can participate as a witness or other party.

(C) In understanding the availability of, and obtaining any protections offered by, civilian and military protecting or restraining orders.

(D) In understanding the eligibility and requirements for, and obtaining, any available military and veteran benefits, such as transitional compensation benefits found in 10 U.S.C. 1059, 32 CFR part 111, ''Transitional Compensation for Abused Dependents,'' and other State and Federal victims' compensation programs.

(E) The victim's rights and options at trial, to include the option to state a preference to decline participation or withdraw cooperation as a witness and the potential consequences of doing so.

(viii) Legal representation or consultation regarding the potential criminal liability of the victim stemming from or in relation to the circumstances surrounding the alleged sex-related offense (collateral misconduct), regardless of whether the report of that offense is restricted or unrestricted in accordance with 32 CFR part 105. Victims may also be referred

to the appropriate defense services organization for consultation on the potential criminal implications of collateral misconduct.

(ix) Other legal assistance as the Secretary of Defense or the Secretaries of the Military Departments may authorize.

Figure 1 to §114.6. Sample Appellate Notification Letter

[Victim Name]
[Address]

Dear [Mr.][Mrs.][Ms.] [Victim Name]:

The United States [Military Department] believes it is important to keep victims of crimes under the Uniform Code of Military Justice informed of court proceedings and decisions. Based on your election, and in accordance with Department of Defense Instruction 1030.02, "Victim and Witness Assistance," we are providing you with information about the military appellate process. An appeal is a legal proceeding by which a case is brought before a higher court for review of a decision made by a lower court. Convicted military members are generally entitled to appellate review even if they do not specifically allege any errors in the trial process.

[Name of Accused]'s case was submitted for appellate review on [Date] at the [Military Department] Court of Criminal Appeals. The Court of Criminal Appeals may consider briefs about the case or ask for briefs on specific issues in the case. The Court may also decide to hold a public courtroom proceeding to hear arguments about the case. If the Court determines a courtroom proceeding is warranted, you will be notified of the date and location so that you may attend. If the Court declines to hold a courtroom proceeding and decides the issue on the basis of briefs (or in the absence of any briefs), you will be notified of the ultimate decision.

A decision by the [Military Department] Court of Criminal Appeals is not necessarily the final resolution of this case. There are two superior courts from which the Appellant could also seek review. The [Military Department] Court of Criminal Appeals' decision may be appealed to the Court of Appeals for the Armed Forces (C.A.A.F.). If C.A.A.F. declines to review the appeal, the case becomes final and you will be informed. If C.A.A.F. decides to consider the appeal, you will be informed of the review taking place, of any courtroom proceedings, and of the final decision. If C.A.A.F. renders a decision on the case, further review may be sought from the Supreme Court of the United States. If this were to occur, you will be notified. Cases are also sometimes returned to the [Military Department] Court of Criminal Appeals for further proceedings. In addition, the Appellant may also petition the [Military Department Judge Advocate General] for a new trial based on newly discovered evidence or fraud upon the court. If that were to occur, you will be notified.

Right now, the case is before the [Military Department] Court of Criminal Appeals. Nothing is required of you but if you have questions or desire additional information, please contact [DESIGNATED REPRESENTATIVE/OFFICE] at [CONTACT INFORMATION].

Sincerely,
(Military Department designee)

PART 117—NATIONAL INDUSTRIAL SECURITY PROGRAM OPERATING MANUAL (NISPOM)

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117.18 Information system security.
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117.20 Critical Nuclear Weapon Design Information (CNWDI).
117.21 COMSEC.
117.22 DHS CCIPP.
117.23 Supplement to this rule: Security Requirements for Alternative Compensatory Control Measures (ACCM), Special Access Programs (SAPs), Sensitive Compartmented Information (SCI), Restricted Data (RD), Formerly Restricted Data (FRD), Transclassified Foreign Nuclear Information (TFNI), and Naval Nuclear Propulsion Information (NNPI).
117.24 Cognizant Security Office information.

AUTHORITY: 32 CFR part 2004; E.O. 10865; E.O. 12333; E.O. 12829; E.O. 12866; E.O. 12968; E.O. 13526; E.O. 13563; E.O. 13587; E.O. 13691; Public Law 108–458; Title 42 U.S.C. 2011 *et seq.*; Title 50 U.S.C. Chapter 44; Title 50 U.S.C. 3501 *et seq.*

SOURCE: 85 FR 83312, Dec. 21, 2020, unless otherwise noted.

§ 117.1 Purpose.

(a) This rule implements policy, assigns responsibilities, establishes requirements, and provides procedures, consistent with E.O. 12829, ''National Industrial Security Program''; E.O. 10865, ''Safeguarding Classified Information within Industry''; 32 CFR part 2004; and DoD Instruction (DoDI) 5220.22, ''National Industrial Security Program (NISP)'' (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/522022p.pdf?ver=2018-05-01-073158-710*) for the protection of classified information that is disclosed to, or developed by contractors of the U.S. Government (USG) (hereinafter referred to in this rule as contractors).

(b) This rule, also in accordance with E.O. 12829, E.O. 13587,''Structural Reforms To Improve the Security of Classified Networks and the Responsible Sharing and Safeguarding of Classified Information''; E.O. 13691, ''Promoting Private Sector Cybersecurity Information Sharing''; E.O. 12333, ''United States Intelligence Activities''; 42 U.S.C. 2011 *et seq.* (also known as and referred to in this rule as the ''AEA of 1954,'' as amended); '' 50 U.S.C. Ch. 44 (also known as the ''National Security Act of 1947,'' as amended); 50 U.S.C. 3501 *et seq.* (also known as the ''Central Intelligence Agency Act of 1949,'' as amended); Public Law 108–458 (also known as the ''Intelligence Reform and Terrorism Prevention Act of 2004''); and 32 CFR part 2004:

(1) Prescribes industrial security procedures and practices, under E.O. 12829 or successor orders, to safeguard USG classified information that is developed by or disclosed to contractors of the USG.

(2) Prescribes requirements, restrictions, and other safeguards to prevent unauthorized disclosure of classified information and protect special classes of classified information.

(3) Prescribes that contractors will implement the provisions of this rule no later than 6 months from the effective date of this rule.

§ 117.2 Applicability.

(a) This rule applies to:

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

(2) All executive branch departments and agencies.

(3) All industrial, educational, commercial, or other non-USG entities granted access to classified information by the USG executive branch departments and agencies or by foreign governments.

(4) The release of classified information by the USG to contractors, who are required to safeguard classified information released during all phases of the contracting, agreement (including cooperative research and development agreements), licensing, and grant processes, *i.e.,* the preparation and submission of bids and proposals, negotiation, award, performance, and termination. Also, it applies in situations involving a contract, agreement, license, or grant when actual knowledge of classified information is not required, but reasonable physical security measures cannot be employed to prevent aural or visual access to classified information, because there is the ability and opportunity to gain knowledge of classified information. It also applies to any other situation in which classified information or FGI that is furnished to a contractor requires protection in the interest of national security, but which is not released under a contract, license, certificate or grant.

(b) This rule does not:

(1) Limit in any manner the authority of USG executive branch departments and agencies to grant access to classified information under the cognizance of their department or agency to any individual designated by them. The granting of such access is outside the scope of the NISP and is accomplished pursuant to E.O. 12968, E.O. 13526, E.O. 13691, the AEA, and applicable disclosure policies.

(2) Apply to criminal proceedings in the courts or authorize contractors or their employees to disclose classified information in connection with any criminal proceedings. Defendants and their representative in criminal proceedings in U.S. District Courts, Courts of Appeal, and the U.S. Supreme Court may gain access to classified information in accordance with 18 U.S.C. Appendix 3, Section 1, also known as and referred to in this rule as the ''Classified Information Procedures Act,'' as amended.

§ 117.3 Acronyms and Definitions.

(a) *Acronyms.* Unless otherwise noted, these acronyms and their terms are for the purposes of this rule.

ACCM alternative compensatory control measures
AEA Atomic Energy Act of 1954, as amended
AUS Australia
CAGE commercial and government entity
CCIPP classified critical infrastructure protection program
CDC cleared defense contractor
CFIUS Committee on Foreign Investment in the United States
CFR Code of Federal Regulations
CI Counterintelligence
CIA Central Intelligence Agency
CNSS Committee on National Security Systems
CNWDI critical nuclear weapons design information
COMSEC communications security
COR central office of record
CSA cognizant security agency
CSO cognizant security office
CUSR Central United States Registry
DCSA Defense Counterintelligence and Security Agency
DD Department of Defense (forms only)
DDTC Directorate of Defense Trade Controls
DGR designated government representative
DHS Department of Homeland Security
DNI Director of National Intelligence
DoD Department of Defense
DoDD Department of Defense Directive
DoDI Department of Defense Instruction
DoDM Department of Defense Manual
DOE Department of Energy
ECP electronic communications plan
E.O. Executive order
FBI Federal Bureau of Investigation
FCL facility (security) clearance
FGI foreign government information
FOCI foreign ownership, control, or influence
FRD Formerly Restricted Data
FSCC Facility Security Clearance Certificate (NATO)
FSO facility security officer
GCA government contracting activity
GCMS government contractor monitoring station
GSA General Services Administration
GSC government security committee
IDE intrusion detection equipment
IDS intrusion detection system
IFB invitation for bid
ISOO Information Security Oversight Office
ISSM information system security manager
ISSO information systems security officer
ITAR International Traffic in Arms Regulations
ITPSO insider threat program senior official

KMP key management personnel
LAA limited access authorization
MFO multiple facility organization
NATO North Atlantic Treaty Organization
NDA nondisclosure agreement
NIAG NATO Industrial Advisory Group
NID national interest determination
NISP National Industrial Security Program
NISPOM National Industrial Security Program Operating Manual
NIST National Institute for Standards and Technology
NNPI Naval Nuclear Propulsion Information
NNSA National Nuclear Security Administration
NPLO NATO Production Logistics Organization
NRC Nuclear Regulatory Commission
NRTL nationally recognized testing laboratory
NSA National Security Agency
NSI national security information
NTIB National Technology and Industrial Base
OCA original classification authority
OMB Office of Management and Budget
PA proxy agreement
PCL personnel (security) clearance
RD Restricted Data
RFP request for proposal
RFQ request for quotation
SAP special access program
SCA security control agreement
SCI sensitive compartmented information
SD Secretary of Defense (forms only)
SEAD Security Executive Agent directive
SF standard form
SMO senior management official
SSA special security agreement
SSP systems security plan
TCP technology control plan
TFNI Transclassified Foreign Nuclear Information
TP transportation plan
UK United Kingdom
UL Underwriters' Laboratories
U.S.C. United States Code
USD (I&S) Under Secretary of Defense for Intelligence and Security
USG United States Government
USML United States Munitions List
VAL visit authorization letter
VT voting trust

(b) *Definitions.* Unless otherwise noted, these terms and their definitions are for the purposes of this rule.

Access means the ability and opportunity to gain knowledge of classified information.

Access Permittee means the holder of an Access Permit issued pursuant to the regulations set forth in 10 CFR part 725, ''Permits For Access to Restricted Data.''

ACCM are security measures used by USG agencies to safeguard classified intelligence or operations when normal measures are insufficient to achieve strict need-to-know controls and where SAP controls are not required.

Adverse information means any information that adversely reflects on the integrity or character of a cleared employee, that suggests that his or her ability to safeguard classified information may be impaired, that his or her access to classified information clearly may not be in the interest of national security, or that the individual constitutes an insider threat.

Affiliate means each entity that directly or indirectly controls, is directly or indirectly controlled by, or is under common control with, the ultimate parent entity.

Agency(ies) means any ''Executive agency'' as defined in 5 U.S.C. 105; any ''Military department'' as defined in 5 U.S.C. 102; and any other entity within the executive branch that releases classified information to private sector entities. This includes component agencies under another agency or under a cross-agency oversight office (such as ODNI with CIA), which are also agencies for purposes of this rule.

Alarm service company means an entity or branch office from which all of the installation, service, and maintenance of alarm systems are provided, and the monitoring and investigation of such systems are either provided by its own personnel or with personnel assigned by this location.

Alarm system description form means a form describing an alarm system and monitoring information.

Approved security container means a GSA approved security container originally procured through the Federal Supply system. The security containers bear the GSA Approval label on the front face of the container, which identifies them as meeting the testing requirements of the assigned federal specification and having been maintained according to Federal Standard 809.

Approved vault means a vault built to Federal Standard 832 and approved by the CSA.

AUS community consists of the Government of Australia entities and Australian non-governmental facilities identified on the DDTC website (*https://pmddtc.state.gov/*) at the time of export or transfer.

Authorized person means a person who has a favorable determination of eligibility for access to classified information, has signed an approved nondisclosure agreement, and has a need-to-know.

Branch office means an office of an entity which is located somewhere other than the entity's main office location. A branch office is simply another location of the same legal business entity, and is still involved in the business activities of the entity.

CCIPP means security sharing of classified information under a designated critical infrastructure protection program with such authorized individuals and organizations as determined by the Secretary of Homeland Security.

CDC means a subset of contractors cleared under the NISP who have classified contracts with the DoD.

Certification means comprehensive evaluation of an information system component that establishes the extent to which a particular design and implementation meets a set of specified security requirements.

Classification guide means a document issued by an authorized original classifier that identifies the elements of information regarding a specific subject that must be classified and prescribes the level and duration of classification and appropriate declassification instructions.

Classified contract means any contract, license, agreement, or grant requiring access to classified information by a contractor and its employees for performance. A contract is referred to in this rule as a ''classified contract'' even when the contract document and the contract provisions are not classified. The requirements prescribed for a ''classified contract'' also are applicable to all phases of precontract, license or grant activity, including solicitations (bids, quotations, and proposals), precontract negotiations, post-contract activity, or other government contracting activity (GCA) programs or projects which require access to classified information by a contractor.

Classified covered information system means an information system that is owned or operated by or for a cleared defense contractor and that processes, stores, or transmits information created by or for the DoD with respect to which such contractor is required to apply enhanced protection (*e.g.*, classified information). A classified covered information system is a type of covered network consistent with the requirements of Section 941 of Public Law 112–239 and 10 U.S.C. 391.

Classified information means information that has been determined, pursuant to E.O. 13526, or any predecessor or successor order, and the AEA of 1954, as amended, to require protection against unauthorized disclosure in the interest of national security and which has been so designated. The term includes NSI, RD, and FRD.

Classified meetings means a conference, seminar, symposium, exhibit, convention, training course, or other such gathering during which classified information is disclosed.

Classified visit means a visit during which a visitor will require, or is expected to require, access to classified information.

Classifier means any person who makes a classification determination and applies a classification category to information or material. The determination may be an original classification action or it may be a derivative classification action. Contractors make derivative classification determinations based on classified source material, a security classification guide, or a contract security classification specification, or equivalent.

Cleared commercial carrier means a carrier that is authorized by law, regulatory body, or regulation to transport SECRET and CONFIDENTIAL material and has been granted a SECRET facility clearance in accordance with the NISP.

Cleared employees means all employees of industrial or commercial contractors, licensees, certificate holders, or grantees of an agency, as well as all employees of subcontractors and personal services contractor personnel,

and who are granted favorable eligibility determinations for access to classified information by a CSA or are being processed for eligibility determinations for access to classified information by a CSA. A contractor may give an employee access to classified information in accordance with the provisions of § 117.10(a)(1)(iii).

Closed area means an area that meets the requirements of this rule for safeguarding classified material that, because of its size, nature, or operational necessity, cannot be adequately protected by the normal safeguards or stored during nonworking hours in approved containers.

CNWDI means a DoD category of TOP SECRET RD or SECRET RD information that reveals the theory of operation or design of the components of a thermonuclear or fission bomb, warhead, demolition munition, or test device. Specifically excluded is information concerning arming, fusing, and firing systems; limited life components; and total contained quantities of fissionable, fusionable, and high explosive materials by type. Among these excluded items are the components that DoD personnel set, maintain, operate, test or replace.

Compromise means an unauthorized disclosure of classified information.

COMSEC means the protective measures taken to deny unauthorized persons information derived from USG telecommunications relating to national security and to ensure the authenticity of such communications.

CONFIDENTIAL means the classification level applied to information, the unauthorized disclosure of which reasonably could be expected to cause damage to the national security that the original classification authority (OCA) is able to identify or describe.

Consignee means a person, firm, or Government (*i.e.,* USG or foreign government) activity named as the receiver of a shipment; one to whom a shipment is consigned.

Consignor means a person, firm, or Government (*i.e.,* USG or foreign government) activity by which articles are shipped. The consignor is usually the shipper.

Constant surveillance service means a transportation protective service provided by a commercial carrier qualified by the Surface Deployment and Distribution Command to transport CONFIDENTIAL shipments. The service requires constant surveillance of the shipment at all times by a qualified carrier representative; however, an FCL is not required for the carrier. The carrier providing the service must maintain a signature and tally record for the shipment.

Consultant means an individual under contract, and compensated directly, to provide professional or technical assistance to a contractor in a capacity requiring access to classified information.

Continuous evaluation as defined in SEAD 6 is a personnel security investigative process to review the background of a covered individual who has been determined to be eligible for access to classified information or to hold a sensitive position at any time during the period of eligibility. Continuous evaluation leverages a set of automated records checks and business rules, to assist in the ongoing assessment of an individual's continued eligibility. It supplements, but does not replace, the established personnel security program for scheduled periodic reinvestigations of individuals for continuing eligibility.

Continuous monitoring program means a system that facilitates ongoing awareness of threats, vulnerabilities, and information security to support organizational risk management decisions.

Contracting officer means a USG official who, in accordance with departmental or agency procedures, has the authority to enter into and administer contracts, licenses or grants and make determinations and findings with respect thereto, or any part of such authority. The term also includes the designated representative of the contracting officer acting within the limits of his or her authority.

Contractor means any industrial, educational, commercial, or other entity that has been granted an entity eligibility determination by a CSA. This term also includes licensees, grantees, or certificate holders of the USG with an entity eligibility determination granted by a CSA. As used in this rule,

''contractor'' does not refer to contractor employees or other personnel.

Cooperative agreement means a legal instrument which, consistent with 31 U.S.C. 6305, is used to enter into the same kind of relationship as a grant (see definition of ''grant'' in this subpart), except that substantial involvement is expected between USG and the recipient when carrying out the activity contemplated by the cooperative agreement. The term does not include ''cooperative research and development agreements'' as defined in 15 U.S.C. 3710a.

Cooperative research and development agreement means any agreement between one or more Federal laboratories and one or more non-Federal parties under which the Government, through its laboratories, provides personnel, services, facilities, equipment, intellectual property, or other resources with or without reimbursement (but not funds to non-Federal parties) and the non-Federal parties provide funds, personnel, services, facilities, equipment, intellectual property, or other resources toward the conduct of specified research or development efforts which are consistent with the missions of the laboratory; except that such term does not include a procurement contract or cooperative agreement as those terms are used in sections 6303, 6304, and 6305 of title 31.

Corporate family means an entity, its parents, subsidiaries, divisions, and branch offices.

Counterintelligence means information gathered and activities conducted to protect against espionage, other intelligence activities, sabotage, or assassinations conducted for or on behalf of foreign powers, organizations or persons, or international terrorist activities, but not including personnel, physical, document or communications security programs.

Courier means a cleared employee, designated by the contractor, whose principal duty is to transmit classified material to its destination, ensuring that the classified material remains under their constant and continuous protection and that they make direct point-to-point delivery.

CRYPTO means the marking or designator that identifies unencrypted COMSEC keying material used to secure or authenticate telecommunications carrying classified or sensitive USG or USG-derived information. This includes non-split keying material used to encrypt or decrypt COMSEC critical software and software based algorithms.

CSA means an agency designated as having NISP implementation and security responsibilities for its own agencies (including component agencies) and any entities and non-CSA agencies under its cognizance. The CSAs are: DoD; DOE; NRC; ODNI; and DHS.

CSO means an organizational unit to which the head of a CSA delegates authority to administer industrial security services on behalf of the CSA.

CUI means information the USG creates or possesses, or that an entity creates or possesses for or on behalf of the USG, that a law, regulation, or USG-wide policy requires or permits an agency to handle using safeguarding or dissemination controls. However, CUI does not include classified information or information a non-executive branch entity possesses and maintains in its own systems that did not come from, or was not created or possessed by or for, an executive branch agency or an entity acting for an agency.

Custodian means an individual who has possession of, or is otherwise charged with, the responsibility for safeguarding classified information.

Cybersecurity means prevention of damage to, protection of, and restoration of computers, electronic communications systems, electronic communications services, wire communication, and electronic communication, including information contained therein, to ensure its availability, integrity, authentication, confidentiality, and nonrepudiation.

Cyber incident means actions taken through the use of computer networks that result in an actual or potentially adverse effect on an information system or the information residing therein.

Declassification means a date or event which coincides with the lapse of the information's national security sensitivity, as determined by the OCA. Declassification occurs when the OCA has

determined that the classified information no longer requires, in the interest of national security, any degree of protection against unauthorized disclosure, and the information has had its classification designation removed or cancelled.

Defense articles means those articles, services, and related technical data, including software, in tangible or intangible form, which are listed on the United States Munitions List (USML) of the International Traffic in Arms Regulations (ITAR), as modified or amended. Defense articles exempt from the scope of ITAR section 126.17 are identified in Supplement No. 1 to Part 126 of the ITAR.

Defense services means:

(1) Furnishing assistance (including training) to foreign persons, whether in the United States or abroad, in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles;

(2) Furnishing to foreign persons any controlled technical data, whether in the United States or abroad; or

(3) Providing military training of foreign units and forces, regular and irregular, including formal or informal instruction of foreign persons in the United States or abroad or by correspondence courses, technical, educational, or information publications and media of all kinds, training aid, orientation, training exercise, and military advice.

Derivative classification means the incorporating, paraphrasing, restating, or generating in new form information that is already classified, and marking the newly developed material consistent with the classification markings that apply to the source information. Derivative classification includes classifying information based on classification guidance. Duplicating or reproducing existing classified information is not derivative classification.

Document means any recorded information, regardless of the nature of the medium, or the method or circumstances of recording.

Downgrade means a determination by a declassification authority that information classified and safeguarded at a specified level will be classified and safeguarded at a lower level.

Embedded system means an information system that performs or controls a function, either in whole or in part, as an integral element of a larger system or subsystem, such as, ground support equipment, flight simulators, engine test stands, or fire control systems.

Empowered official is defined in 22 CFR part 120.

Entity is a generic and comprehensive term which may include sole proprietorships, partnerships, corporations, limited liability companies, societies, associations, institutions, contractors, licensees, grantees, certificate holders, and other organizations usually established and operating to carry out a commercial, industrial, educational, or other legitimate business, enterprise, or undertaking, or parts of these organizations. It may reference an entire organization, a prime contractor, parent organization, a branch or division, another type of sub-element, a sub-contractor, subsidiary, or other subordinate or connected entity (referred to as ''sub-entities'' when necessary to distinguish such entities from prime or parent entities). It may also reference a specific location or facility, or the headquarters or official business location of the organization, depending upon the organization's business structure, the access needs involved, and the responsible CSA's procedures. The term ''entity'' as used in this rule refers to the particular entity to which an agency might release, or is releasing, classified information, whether that entity is a parent or subordinate organization. The term ''entity'' in this rule includes contractors.

Entity eligibility determination means an assessment by the CSA as to whether an entity is eligible for access to classified information of a certain level (and all lower levels). Entity eligibility determinations may be broad or limited to specific contracts, sponsoring agencies, or circumstances. A favorable entity eligibility determination results in eligibility to access classified information under the cognizance of the responsible CSA to the level approved. When the entity would be accessing categories of information such as RD

or SCI for which the CSA for that information has set additional requirements, CSAs must also assess whether the entity is eligible for access to that category of information. Some CSAs refer to their favorable entity eligibility determinations as FCLs. However, a favorable entity eligibility determination for the DHS CCIPP is not equivalent to an FCL and does not meet the requirements for FCL reciprocity. A favorable entity eligibility determination does not convey authority to store classified information.

Escort means a cleared person, designated by the contractor, who accompanies a shipment of classified material to its destination. The classified material does not remain in the personal possession of the escort but the conveyance in which the material is transported remains under the constant observation and control of the escort.

Extent of protection means the designation (such as ''Complete'') used to describe the degree of alarm protection installed in an alarmed area.

Facility means a plant, laboratory, office, college, university, or commercial structure with associated warehouses, storage areas, utilities, and components, that, when related by function and location, form an operating entity.

FCL means an administrative determination that, from a security viewpoint, an entity is eligible for access to classified information of a certain level (and all lower levels) (*e.g.*, a type of favorable entity eligibility determination used by some CSAs). An entity eligibility determination for the DHS CCIPP is not the equivalent of an FCL and does not meet the requirements for FCL reciprocity.

FGI means information that is:

(1) Provided to the United States by a foreign government or governments, an international organization of governments, or any element thereof with the expectation, expressed or implied, that the information, the source of the information, or both, are to be held in confidence; or

(2) Produced by the United States pursuant to, or as a result of, a joint arrangement with a foreign government or governments, an international organization of governments, or any element thereof, requiring that the information, the arrangement, or both are to be held in confidence.

Foreign interest means any foreign government, agency of a foreign government, or representative of a foreign government; any form of business enterprise or legal entity organized, chartered or incorporated under the laws of any country other than the United States or its territories, and any person who is not a citizen or national of the United States.

Foreign national means any person who is not a citizen or national of the United States.

Foreign person is defined in 31 CFR 800.224 for CFIUS purposes.

FRD means classified information removed from the Restricted Data category upon a joint determination by the DOE and DoD that such information relates primarily to the military utilization of atomic weapons and that such information can be adequately safeguarded as classified defense information.

Freight forwarder (transportation agent) means any agent or facility designated to receive, process, and transship U.S. material to foreign recipients. In the context of this rule, it means an agent or facility cleared specifically to perform these functions for the transfer of U.S. classified material to foreign recipients.

GCA means an element of an agency that the agency head has designated and delegated broad authority regarding acquisition functions. A foreign government may also be a GCA.

Governing board means an entity's board of directors, board of managers, board of trustees, or equivalent governing body.

Grant means a legal instrument which, consistent with 31 U.S.C. 6304, is used to enter into a relationship: (a) Of which the principal purpose is to transfer a thing of value to the recipient to carry out a public purpose of support or stimulation authorized by a law of the United States, rather than to acquire property or services for the USG's direct benefit or use; or, (b) In which substantial involvement is not expected between DoD and the recipient when carrying out the activity contemplated by the award. Throughout

this rule, the term grant will include both the grant and cooperative agreement.

Grantee means the entity that receives a grant or cooperative agreement.

Hand carrier means a cleared employee, designated by the contractor, who occasionally hand carries classified material to its destination in connection with a classified visit or meeting. The classified material remains in the personal possession of the hand carrier except for authorized overnight storage.

Home office means the headquarters of a multiple facility entity.

Industrial security means that portion of information security concerned with the protection of classified information in the custody of U.S. industry.

Information means any knowledge that can be communicated or documentary material, regardless of its physical form or characteristics.

Information security means the system of policies, procedures, and requirements established pursuant to executive order, statute, or regulation to protect information that, if subjected to unauthorized disclosure, could reasonably be expected to cause damage to national security. The term also applies to policies, procedures, and requirements established to protect unclassified information that may be withheld from release to the public.

Information system means an assembly of computer hardware, software, and firmware configured for the purpose of automating the functions of calculating, computing, sequencing, storing, retrieving, displaying, communicating, or otherwise manipulating data, information and textual material.

Insider means cleared contractor personnel with authorized access to any USG or contractor resource, including personnel, facilities, information, equipment, networks, and systems.

Insider threat means the likelihood, risk, or potential that an insider will use his or her authorized access, wittingly or unwittingly, to do harm to the national security of the United States. Insider threats may include harm to contractor or program information, to the extent that the information impacts the contractor or agency's obligations to protect classified NSI.

Joint venture means an association of two or more persons or entities engaged in a single defined project with all parties contributing assets and efforts, and sharing in the management, profits and losses, in accordance with the terms of an agreement among the parties.

KMP means an entity's senior management official (SMO), facility security officer (FSO), insider threat program senior official (ITPSO), and all other entity officials who either hold majority interest or stock in, or have direct or indirect authority to influence or decide issues affecting the management or operations of, the entity or classified contract performance.

L access authorization means an access determination that is granted by DOE or NRC based on a Tier 3 or successor background investigation as set forth in applicable national-level requirements and DOE directives. Within DOE and NRC, an ''L'' access authorization permits an individual who has an official ''need to know'' to access Confidential Restricted Data, Secret and Confidential Formerly Restricted Data, Secret and Confidential Transclassified Foreign Nuclear Information, or Secret and Confidential National Security Information, required in the performance of official duties. An ''L'' access authorization determination is required for individuals with a need to know outside of DOE, NRC, DoD, and in limited cases NASA, to access Confidential Restricted Data.

LAA means security access authorization to CONFIDENTIAL or SECRET information granted to non-U.S. citizens requiring only limited access in the course of their regular duties.

Material means any product or substance on or in which information is embodied.

Matter means anything in physical form that contains or reveals classified information.

Media means physical devices or writing surfaces including but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts (but not including display media) onto which

information is recorded, stored, or printed within an information system.

MFO means a legal entity (single proprietorship, partnership, association, trust, or corporation) composed of two or more entities (facilities).

National of the United States means a person who owes permanent allegiance to the United States. All U.S. citizens are U.S. nationals; however, not all U.S. nationals are U.S. citizens (for example, persons born in American Samoa or Swains Island).

NATO information means information bearing NATO markings, indicating the information is the property of NATO, access to which is limited to representatives of NATO and its member nations unless NATO authority has been obtained to release outside of NATO.

NATO visits means visits by personnel representing a NATO entity and relating to NATO contracts and programs.

Need-to-know means a determination made by an authorized holder of classified information that a prospective recipient has a requirement for access to, knowledge of, or possession of the classified information to perform tasks or services essential to the fulfillment of a classified contract or program.

Network means a system of two or more information systems that can exchange data or information.

NNPI is classified or unclassified information concerning the design, arrangement, development, manufacture, testing, operation, administration, training, maintenance, and repair of the propulsion plants of naval nuclear-powered ships and prototypes, including the associated shipboard and shore-based nuclear support facilities.

Non-DoD executive branch agencies means the non-DoD agencies that have entered into agreements with DoD to receive NISP industrial security services from DoD. A list of these agencies is on the Defense Counterintelligence and Security Agency website at *https://www.dcsa.mil*.

Non-Federal information system is defined in 32 CFR part 2002.

NRTL means a private sector organizations recognized by the Occupational Safety and Health Administration to perform certification for certain products to ensure that they meet the requirements of both the construction and general industry Occupational Safety and Health Administration electrical standards. Each NRTL is recognized for a specific scope of test standards.

NSI means information that has been determined pursuant to E.O. 13526 or predecessor order to require protection against unauthorized disclosure and marked to indicate its classified status.

NTIB means the industrial bases of the United States and Australia, Canada, and the United Kingdom.

NTIB entity means a person that is a subsidiary located in the United States for which the ultimate parent entity and any intermediate parent entities of such subsidiary are located in a country that is part of the national technology and industrial base (as defined in section 2500 of title 10, United States Code); and that is subject to the foreign ownership, control, or influence requirements of the National Industrial Security Program.

Nuclear weapon data means Restricted Data or Formerly Restricted Data concerning the design, manufacture, or utilization (including theory, development, storage, characteristics, performance and effects) of nuclear explosives, nuclear weapons or nuclear weapon components, including information incorporated in or related to nuclear explosive devices. Nuclear weapon data is matter in any combination of documents or material, regardless of physical form or characteristics.

OCA means an individual authorized in writing, either by the President, the Vice President, or by agency heads or other officials designated by the President, to classify information in the first instance.

Original classification means an initial determination that information requires, in the interest of national security, protection against unauthorized disclosure. Only USG officials who have been designated in writing may apply an original classification to information.

Parent means an entity that owns at least a majority of another entity's voting securities.

PCL means an administrative determination that an individual is eligible,

from a security point of view, for access to classified information of the same or lower category as the level of the personnel clearance being granted.

Prime contract means a contract awarded by a GCA to a contractor for a legitimate USG purpose.

Prime contractor means the contractor who receives a prime contract from a GCA.

Privileged user means a user that is authorized (and, therefore, trusted) to perform security-relevant functions that ordinary users are not authorized to perform.

Proscribed information means:

(1) TOP SECRET information;

(2) COMSEC information or material, excluding controlled cryptographic items when unkeyed or utilized with unclassified keys.

(3) RD;

(4) SAP information; or.

(5) SCI.

Protective security service means a transportation protective service provided by a cleared commercial carrier qualified by DoD's Surface Deployment and Distribution Command to transport SECRET shipments.

Q access authorization means an access determination that is granted by DOE or NRC based on a Tier 5 or successor background investigation as set forth in applicable national-level requirements and DOE directives. Within DOE and the NRC, a ''Q'' access authorization permits an individual with an official ''need to know'' to access Top Secret, Secret and Confidential Restricted Data, Formerly Restricted Data, Transclassified Foreign Nuclear Information, National Security Information, or special nuclear material in Category I or II quantities, as required in the performance of official duties. A ''Q'' access authorization is required for individuals with a need to know outside of DOE, NRC, DoD, and in a limited case NASA, to access Top Secret and Secret Restricted Data.

Remote terminal means a device communicating with an automated information system from a location that is not within the central computer facility.

Restricted area means a controlled access area established to safeguard classified material that, because of its size or nature, cannot be adequately protected during working hours by the usual safeguards, but is capable of being stored during non-working hours in an approved repository or secured by other methods approved by the CSA.

RD means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but does not include data declassified or removed from the RD category pursuant to section 142 of the AEA.

SAP means any program that is established to control access and distribution and to provide protection for particularly sensitive classified information beyond that normally required for TOP SECRET, SECRET, or CONFIDENTIAL information. A SAP can be created or continued only as authorized by a senior agency official delegated such authority pursuant to E.O. 13526.

Schedule 13D means a form required by the Securities and Exchange Commission when a person or group of persons acquires beneficial ownership of more than 5% of a voting class of a company's equity securities registered under Section 12 of the ''Securities Exchange Act of 1934'' (available at: *https://www.sec.gov/fast-answers/answerssched13htm.html*).

SCI means a subset of classified national intelligence concerning or derived from intelligence sources, methods or analytical processes that is required to be protected within formal access control systems established by the DNI.

SECRET means the classification level applied to information, the unauthorized disclosure of which reasonably could be expected to cause serious damage to the national security that the OCA is able to identify or describe.

Security in depth means a determination made by the CSA that a contractor's security program consists of layered and complementary security controls sufficient to deter and detect unauthorized entry and movement within the facility. Examples include, but are not limited to, use of perimeter fences, employee and visitor access controls, use of an Intrusion Detection System

(IDS), random guard patrols throughout the facility during nonworking hours, closed circuit video monitoring, or other safeguards that mitigate the vulnerability of open storage areas without alarms and security storage cabinets during nonworking hours.

Security violation means failure to comply with the policy and procedures established by this part that reasonably could result in the loss or compromise of classified information.

Shipper means one who releases custody of material to a carrier for transportation to a consignee. (See also ''Consignor.'')

SMO is the contractor's official responsible for the entity policy and strategy. The SMO is an entity employee occupying a position in the entity with ultimate authority over the facility's operations and the authority to direct actions necessary for the safeguarding of classified information in the facility. This includes the authority to direct actions necessary to safeguard classified information when the access to classified information by the facility's employees is solely at other contractor facilities or USG locations.

Source document means an existing document that contains classified information that is incorporated, paraphrased, restated, or generated in new form into a new document.

Standard practice procedures means a document prepared by a contractor that implements the applicable requirements of this rule for the contractor's operations and involvement with classified information at the contractor's facility.

Subcontract means any contract entered into by a contractor to furnish supplies or services for performance of a prime contract or a subcontract. It includes a contract, subcontract, purchase order, lease agreement, service agreement, request for quotation (RFQ), request for proposal (RFP), invitation for bid (IFB), or other agreement or procurement action between contractors that requires or will require access to classified information to fulfill the performance requirements of a prime contract.

Subcontractor means a supplier, distributor, vendor, or firm that enters into a contract with a prime contractor to furnish supplies or services to or for the prime contractor or another subcontractor. For the purposes of this rule, each subcontractor will be considered as a prime contractor in relation to its subcontractors.

Subsidiary means an entity in which another entity owns at least a majority of its voting securities.

System software means computer programs that control, monitor, or facilitate use of the information system; for example, operating systems, programming languages, communication, input-output controls, sorts, security packages, and other utility-type programs. Also includes off-the-shelf application packages obtained from manufacturers and commercial vendors, such as for word processing, spreadsheets, data base management, graphics, and computer-aided design.

Technical data means:

(1) Information, other than software, which is required for the design, development, production, manufacture, assembly, operation, repair, testing, maintenance or modification of defense articles. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation.

(2) Classified information relating to defense articles and defense services on the U.S. Munitions List and 600-series items controlled by the Commerce Control List.

(3) Information covered by an invention secrecy order.

(4) Software directly related to defense articles.

TFNI means classified information concerning the nuclear energy programs of other nations (including subnational entities) removed from the RD category under section 142(e) of the AEA after the DOE and the Director of National Intelligence jointly determine that it is necessary to carry out intelligence-related activities under the provisions of the National Security Act of 1947, as amended, and that it can be adequately safeguarded as NSI instead. This includes information removed from the RD category by past joint determinations between DOE and the CIA. TFNI does not include information transferred to the United States under an Agreement for Cooperation

under the Atomic Energy Act or any other agreement or treaty in which the United States agrees to protect classified information.

TOP SECRET means the classification level applied to information, the unauthorized disclosure of which reasonably could be expected to cause exceptionally grave damage to the national security that the OCA is able to identify or describe.

Transmission means sending information from one place to another by radio, microwave, laser, or other nonconnective methods, as well as by cable, wire, or other connective medium. Transmission also includes movement involving the actual transfer of custody and responsibility for a document or other classified material from one authorized addressee to another.

Transshipping activity means a government activity to which a carrier transfers custody of freight for reshipment by another carrier to the consignee.

UK community consists of the UK Government entities with facilities and UK non-governmental facilities identified on the DDTC website (*https://www.pmddtc.state.gov/*) at the time of export.

Unauthorized person means a person not authorized to have access to specific classified information in accordance with the requirements of this rule.

United States means the 50 states and the District of Columbia.

United States and its territorial areas means the 50 states, the District of Columbia, Puerto Rico, Guam, American Samoa, the Virgin Islands, Wake Island, Johnston Atoll, Kingman Reef, Palmyra Atoll, Baker Island, Howland Island, Jarvis Island, Midway Islands, Navassa Island, and Northern Mariana Islands.

Upgrade means a determination that certain classified information, in the interest of national security, requires a higher degree of protection against unauthorized disclosure than currently provided, coupled with a change to the classification designation to reflect the higher degree.

U.S. classified cryptographic information means a cryptographic key and authenticators that are classified and are designated as TOP SECRET CRYPTO or SECRET CRYPTO. This means all cryptographic media that embody, describe, or implement classified cryptographic logic, to include, but not limited to, full maintenance manuals, cryptographic descriptions, drawings of cryptographic logic, specifications describing a cryptographic logic, and cryptographic software, firmware, or repositories of such software such as magnetic media or optical disks.

U.S. person means a United States citizen, an alien known by the intelligence agency concerned to be a permanent resident alien, an unincorporated association substantially composed of United States citizens or permanent resident aliens, or a corporation incorporated in the United States, except for a corporation directed and controlled by a foreign government or governments.

Voting securities means any securities that presently entitle the owner or holder thereof to vote for the election of directors of the issuer or, with respect to unincorporated entities, individuals exercising similar functions.

Working hours means the period of time when:

(1) There is present in the specific area where classified material is located, a work force on a regularly scheduled shift, as contrasted with employees working within an area on an overtime basis outside of the scheduled work shift; and

(2) The number of employees in the scheduled work force is sufficient in number and so positioned to be able to detect and challenge the presence of unauthorized personnel. This would, therefore, exclude janitors, maintenance personnel, and other individuals whose duties require movement throughout the facility.

Working papers means documents or materials, regardless of the media, which are expected to be revised prior to the preparation of a finished product for dissemination or retention.

§ 117.4 Policy.

E.O. 12829 established the NISP to serve as a single, integrated, cohesive industrial security program to protect classified information and preserve our

Nation's economic and technological interests.

(a) When contracts, licenses, agreements, and grants to contractors require access to classified information, national security requires that this information be safeguarded in a manner equivalent to its protection within the executive branch of the USG.

(b) National security requires that the industrial security program promote the economic and technological interests of the United States. Redundant, overlapping, or unnecessary requirements impede those interests.

§ 117.5 Information collections.

The information collection requirements are:

(a) *Standard Form (SF) 328* ''Certificate Pertaining to Foreign Interest'' (available at: *https://www.gsa.gov/forms-library/ certificate-pertaining-foreign-interests*) in § 117.8 and § 117.11, is assigned Office of Management and Budget (OMB) Control Number 0704–0579. The expiration date of this information collection is listed in the DoD Information Collections System at *https://apps.sp.pentagon.mil/ sites/dodiic/Pages/default.aspx*.

(b) *NRC collection.* ''Facility Security Clearance and Safeguarding of National Security Information and Restricted Data,'' is assigned OMB Control Number: 3150–0047. Under this collection, NRC-regulated facilities and other organizations are required to provide information and maintain records to ensure that an adequate level of protection is provided to NRC-classified information and material.

(c) *DOE collection.* ''Security,'' a NISP CSA information collection, is assigned OMB Control Number: 1910–1800. This information collection, which includes facility security clearance information, is used by the DOE to exercise management, oversight, and control over its contractors' management and operation of DOE's Government-owned contractor-operated facilities, and over its offsite contractors. The contractor management, oversight, and control functions relate to the ways in which DOE contractors provide goods and services for DOE organizations and activities in accordance with the terms of their contracts and the applicable statutory, regulatory, and mission support requirements of the Department. Information collected from private industry and private individuals is used to protect national security and critical assets entrusted to the Department.

(d) *DoD collection.* ''DoD Security Agreement,'' is assigned OMB Control Number: 0704–0194. ''National Industrial Security System,'' a CSA information collection, is assigned OMB Control Number: 0704–0571, and is a DoD information collection used to conduct its monitoring and oversight of contractors. Department of Defense ''Contract Security Classification Specification,'' (available at: *https://www.esd.whs.mil/Portals/54/Documents/DD/forms/ dd/dd0254.pdf* and available at: *https://www.dcsa.mil/is/nccs/*), is assigned OMB Control Number 0704–0567 and used by both DoD and agencies which have an industrial security agreement with DoD. ''Defense Information System for Security,'' is assigned OMB Control Number: 0704–0573. Defense Information System for Security is a DoD automated system for personnel security, providing a common, comprehensive medium to record, document, and identify personal security actions within DoD including submitting adverse information, verification of security clearance status, requesting investigations, and supporting continuous evaluation activities. It requires personal data collection to facilitate the initiation, investigation and adjudication of information relevant to DoD security clearances and employment suitability determinations for active duty military, civilian employees and contractors seeking such credentials. Joint Personnel Adjudicative System is assigned OMB Control Number: 0704–0496. Joint Personnel Adjudicative System is an information system which requires personal data collection to facilitate the initiation, investigation and adjudication of information relevant to DoD security clearances and employment suitability determinations for active duty military, civilian employees and contractors seeking such credentials.

§ 117.6 Responsibilities.

(a) *Under Secretary of Defense for Intelligence & Security (USD(I&S))*. The USD(I&S), on behalf of the Secretary of Defense, and in accordance with E.O. 12829, 32 CFR part 2004, and DoDI 5220.22:

(1) Carries out the direction in section 201 of E.O. 12829 that the Secretary of Defense issue and maintain this rule and changes to it. The USD(I&S) does so in consultation with all affected agencies (E.O. 12829 section 201), with the concurrence of the Secretary of Energy, the Chairman of the NRC, the DNI, and the Secretary of Homeland Security (E.O.12829 section 201), and in consultation with the ISOO Director (E.O. 12829 section 102).

(2) Acts as the CSA for DoD.

(3) Provides policy and management of the NISP for non-DoD executive branch agencies who enter into interagency security agreements with DoD to provide industrial security services required when classified information is disclosed to contractors in accordance with E.O. 12829, as amended.

(b) *Director, DCSA*. Under the authority, direction, and control of the USD(I&S), and in accordance with DoDI 5220.22 and DoD Directive (DoDD) 5105.42, ''Defense Security Service (DSS)'' [1] (available at: *https://www.esd.whs.mil/ Portals/54/Documents/DD/ issuances/dodd/510542p.pdf?ver= 2019-01-14-090012-283*) the Director, DCSA:

(1) Oversees and manages DCSA, which serves as the DoD CSO.

(2) Administers the NISP as a separate program element on behalf of DoD GCAs and those agencies with agreements with DoD for security services.

(3) Provides security oversight of the NISP as the DoD CSO on behalf of DoD components and those non-DoD executive branch agencies who enter into agreements with DoD as noted in paragraph (a)(3) of this section. The Director, DCSA, will be relieved of this oversight function for DoD special access programs (SAPs) when the Secretary of Defense or the Deputy Secretary of Defense approves a carve-out provision in accordance with DoDD 5205.07, ''DoD SAP Policy'' (available at: *https://www.esd.whs.mil/ Portals/54/Documents/DD/ issuances/dodd/520507p.pdf?ver= 2020-02-04-142942-827*).

(c) *Secretary of Energy*. In addition to the responsibilities in paragraph (h) of this section, the Secretary of Energy:

(1) Prescribes procedures for the portions of this rule pertaining to information classified under the AEA (*i.e.*, RD, FRD, and TFNI), as nothing in the rule shall be construed to supersede the authority of the Secretary of Energy under the AEA.

(2) Retains authority over access to information classified under the AEA.

(3) Inspects and monitors contractor, licensee, certificate holder, and grantee programs and facilities that involve access to information classified under the AEA, as necessary.

(d) *Chairman of the NRC*. In addition to the responsibilities in paragraph (h) of this section, the Chairman of the NRC:

(1) Prescribes procedures for the portions of this rule that pertain to information under NRC programs classified under the AEA, other federal statutes, and executive orders.

(2) Retains authority over access to information under NRC programs classified under the AEA, other federal statutes, and executive orders.

(3) Inspects and monitors contractor, licensee, certificate holder, and grantee programs and facilities that involve access to information under NRC programs classified pursuant to the AEA, other federal statutes, and executive orders where appropriate.

(e) *DNI*. In addition to the responsibilities in paragraph (h) of this section, the DNI:

(1) Prescribes procedures for the portions of this rule pertaining to intelligence sources, methods, and activities, including, but not limited to, SCI.

(2) Retains authority over access to intelligence sources, methods, and activities, including SCI.

(3) Provides guidance on the security requirements for intelligence sources

[1] On June 20, 2020, the Secretary of Defense re-named the Defense Security Service (DSS) as the Defense Counterintelligence and Security Agency (DCSA), as required by Executive Oder 13467, section 2.6(b)(i) (as amended by Executive Order 13968, Apr. 24, 2019, 84 FR 18125). Pursuant to Section 4 of E.O. 13968, references to DSS in DoD issuances should be deemed or construed to refer to DCSA.

and methods of information, including, but not limited to, SCI.

(f) *Secretary of Homeland Security.* In accordance with E.O. 12829, E.O. 13691, and in addition to the responsibilities in paragraph (h) of this section, the Secretary of Homeland Security:

(1) Prescribes procedures for the portions of this rule that pertain to the CCIPP.

(2) Retains authority over access to information under the CCIPP.

(3) Inspects and monitors contractor, licensee, certificate holder, and grantee programs and facilities that involve access to CCIPP.

(g) *All the CSA heads.* The CSA heads:

(1) Oversee the security of classified contracts and activities under their purview.

(2) Provide oversight of contractors under their security cognizance.

(3) Minimize redundant and duplicative security review and audit activities of contractors, including such activities conducted at contractor locations where multiple CSAs have equities.

(4) Execute appropriate intra-agency and inter-agency agreements to avoid redundant and duplicate reviews.

(5) Designate one or more CSOs for security administration.

(6) Designate subordinate officials, in accordance with governing policies, to act as the authorizing official. Authorizing officials will:

(i) Assess and authorize contractors to process classified information on information systems.

(ii) Conduct oversight of such information system processing and provide information system security guidelines in accordance with Federal information system security control policies, standards, and procedures. Minimize redundant and duplicative security review and audit activity of contractors, including such activity conducted at contractor locations where multiple CSAs have equities.

(h) *Heads of component agencies.* In accordance with applicable CSA direction, the component agency heads:

(1) Oversee compliance with procedures identified by the applicable CSA or designated CSO.

(2) Provide oversight of contractor personnel visiting or working on USG installations.

(3) Promptly apprise the CSO of information received or developed that could adversely affect a cleared contractor, licensee, or grantee, and their employees, to hold an FCL or PCL, or that otherwise raises substantive doubt about their ability to safeguard classified information entrusted to them.

(4) Propose changes to this rule as deemed appropriate and provide them to the applicable CSA for submission to the OUSD(I&S) Counterintelligence, Law Enforcement and Security Directorate.

(i) *Director, ISOO.* The Director, ISOO:

(1) Oversees the NSIP and agency compliance with it, in accordance with E.O. 12829.

(2) Issues and maintains the NISP implementing directive (32 CFR part 2004), in accordance with E.O. 12829, to provide guidance to the CSAs and USG agencies under the NISP.

(3) Chairs the NISP Policy Advisory Committee. Addresses complaints and suggestions from contractors, as detailed in the NISP Policy Advisory Committee bylaws.

§ 117.7 Procedures.

(a) *General.* Contractors will protect all classified information that they are provided access to or that they possess. This responsibility applies at both contractor and USG locations.

(b) *Contractor Security Officials.* Contractors will appoint security officials who are U.S. citizens, except in exceptional circumstances (see § 117.9(m) and § 117.11(e)).

(1) Appointed security officials listed in paragraphs (b)(2), (b)(3), and (b)(4) of this section must:

(i) Oversee the implementation of the requirements of this rule. Depending upon the size and complexity of the contractor's security operations, a single contractor employee may serve in more than one position.

(ii) Undergo the same security training that is required for all other contractor employees pursuant to § 117.12, in addition to their position specific training.

(iii) Be designated in writing with their designation documented in accordance with CSA guidance.

(iv) Undergo a personnel security investigation and national security eligibility determination for access to classified information at the level of the entity's eligibility determination for access to classified information (*e.g.*, FCL level) and be on the KMP list for the cleared entity.

(2) *SMO*. The SMO will:

(i) Ensure the contractor maintains a system of security controls in accordance with the requirements of this rule.

(ii) Appoint a contractor employee or employees, in writing, as the FSO and appoint the same employee or a different employee as the ITPSO. The SMO may appoint a single employee for both roles or may appoint one employee as the FSO and a different employee as the ITPSO.

(iii) Remain fully informed of the facility's classified operations.

(iv) Make decisions based on classified threat reporting and their thorough knowledge, understanding, and appreciation of the threat information and the potential impacts caused by a loss of classified information.

(v) Retain accountability for the management and operations of the facility without delegating that accountability to a subordinate manager.

(3) *FSO*. The FSO will:

(i) Supervise and direct security measures necessary for implementing the applicable requirements of this rule and the related USG security requirements to ensure the protection of classified information.

(ii) Complete security training pursuant to §117.12 and as deemed appropriate by the CSA.

(4) *ITPSO*. The ITPSO will establish and execute an insider threat program.

(i) If the appointed ITPSO is not also the FSO, the ITPSO will ensure that the FSO is an integral member of the contractor's insider threat program.

(ii) The ITPSO will complete training pursuant to §117.12.

(iii) An entity family may choose to establish an entity family-wide insider threat program with one senior official appointed, in writing, to establish, and execute the program as the ITPSO. Each cleared entity using the entity-wide ITPSO must separately appoint that person as its ITPSO for that facility. The ITPSO will provide an implementation plan to the CSA for executing the insider threat program across the entity family.

(5) *ISSM*. Contractors who are, or will be, processing classified information on an information system located at the contractor facility will appoint an employee to serve as the ISSM. The ISSM must be eligible for access to classified information to the highest level of the information processed on the system(s) under their responsibility. The contractor will ensure that the ISSM is adequately trained and possesses technical competence commensurate with the complexity of the contractor's classified information system. The contractor will notify the applicable CSA if there is a change in the ISSM. The ISSM will oversee development, implementation, and evaluation of the contractor's classified information system program. ISSM responsibilities are in §117.18.

(6) *Employees performing security duties*. Those employees whose official duties include performance of NISP-related security functions will complete security training tailored to the security functions performed. This training requirement also applies to consultants whose official duties include security functions.

(c) *Other KMP*. In addition to the SMO, the FSO, and the ITPSO, the contractor will include on the KMP list, subject to CSA concurrence, any other officials who either hold majority interest or stock in the entity, or who have direct or indirect authority to influence or decide issues affecting the management or operations of the contractor or issues affecting classified contract performance. The CSA may either:

(1) Require these KMP to be determined to be eligible for access to classified information as a requirement for the entity's eligibility determination or;

(2) Allow the entity to formally exclude these KMP from access to classified information. The entity's governing board will affirm the exclusion by issuing a formal action (see table),

and provide a copy of the exclusion action to the CSA. The entity's governing board will document this exclusion action.

TABLE 1 TO PARAGRAPH (c)(2)—EXCLUSION RESOLUTIONS

Type of affirmation	Language to be used in exclusion action
Affirmation for Exclusion from Access to Classified Information.	[Insert name and address of entity or name and position of officer, director, partner, or similar entity official or officials] will not require, will not have, and can be effectively and formally excluded from, access to all classified information disclosed to the entity and does not occupy a position that would enable them to adversely affect the organization's policies or practices in the performance of classified contracts.
Affirmation for Exclusion from Higher-level Classified Information.	[Insert name and address of entity or name and position of officer, director, partner, or similar entity official or officials] will not require, will not have, and can be effectively and formally excluded from access to [insert SECRET or TOP SECRET] classified information and does not occupy a position that would enable them to adversely affect the organization's policies or practices in the performance of [insert SECRET or TOP SECRET] classified contracts.

(d) *Insider Threat Program.* Pursuant to this rule and CSA provided guidance to supplement unique CSA mission requirements, the contractor will establish and maintain an insider threat program to gather, integrate, and report relevant and available information indicative of a potential or actual insider threat, consistent with E.O. 13587 and Presidential Memorandum ''National Insider Threat Policy and Minimum Standards for Executive Branch Insider Threat Programs.''

(e) *Standard practice procedures.* The contractor will implement all applicable provisions of this rule at each of its cleared facility locations. The contractor will prepare written procedures when the CSA determines them to be necessary to reasonably exclude the possibility of loss or compromise of classified information, and in accordance with additional CSA-provided guidance, as applicable.

(f) *Cooperation with Federal agencies.* Contractors will cooperate with Federal agencies and their officially credentialed USG or contractor representatives during official reviews, investigations concerning the protection of classified information, or personnel security investigations of present or former employees and others (*e.g.*, consultants or visitors). At a minimum, cooperation includes:

(1) Providing suitable arrangements within the facility for conducting private interviews with employees during normal working hours;

(2) Providing, when requested, relevant employment or personnel files, security records, supervisory files, records pertinent to insider threat (*e.g.*, security, cybersecurity, and human resources) and any other records pertaining to an individual under investigation that are, in the possession or control of the contractor or the contractor's representatives or located in the contractor's offices;

(3) Providing access to employment and security records that are located at an offsite location; and

(4) Rendering other necessary assistance.

(g) *Security training and briefings.* Contractors will advise all cleared employees, including those assigned to USG locations or operations outside the United States, of their individual responsibility for classification management and for safeguarding classified information. Contractors will provide security training to cleared employees consisting of initial briefings, refresher briefings, and debriefings in accordance with §117.12.

(h) *Security reviews*—(1) *USG reviews.* The applicable CSA will conduct recurring oversight reviews of contractors' NISP security programs to verify that the contractor is protecting classified information and implementing the provisions of this rule. The contractor's participation in the security review is required for maintaining the entity's eligibility for access to classified information.

(i) *Review cycle.* The CSA will determine the scope and frequency of security reviews, which may be increased

or decreased consistent with risk management principles.

(ii) *Procedures.* (A) The CSA will generally provide notice to the contractor of a forthcoming review, but may also conduct unannounced reviews at its discretion. The CSA security review may subject contractor employees and all areas and receptacles under the control of the contractor to examination.

(B) The CSA will make every effort to avoid unnecessary intrusion into the personal effects of contractor personnel.

(C) The CSA may conduct physical examinations of the interior space of containers not authorized to secure classified material. Such examinations will always be accomplished in the presence of a representative of the contractor.

(iii) *Controlled unclassified information (CUI).* 32 CFR part 2002 requires agencies to implement CUI requirements, but compliance with CUI requirements is outside the scope of the NISP and this rule. However, CSAs may conduct CUI assessments in conjunction with NISP USG reviews when:

(A) The contractor is a participant in the NISP based on a requirement to access classified information;

(B) A classified contract under the CSA's cognizance includes provisions for access to, or protection or handling of, CUI; and

(C) The CSA has provided the contractor with specific guidance regarding the assessment criteria and methodology it will use for overseeing protection of the CUI being accessed, stored or transmitted by the contractor as part of the classified contract.

(2) *Contractor reviews.* Contractors will review their security programs on a continuing basis and conduct a formal self-inspection at least annually and at intervals consistent with risk management principles.

(i) Self-inspections will include the review of the classified activity, classified information, classified information systems, conditions of the overall security program, and the insider threat program. They will have sufficient scope, depth, and frequency, and will have management support during the self-inspection and during remedial actions taken as a result of the self-inspection. Self-inspections will include the review of samples representing the contractor's derivative classification actions, as applicable.

(ii) The contractor will prepare a formal report describing the self-inspection, its findings, and its resolution of issues discovered during the self-inspection. The contractor will retain the formal report for CSA review until after the next CSA security review is completed.

(iii) The SMO at the cleared facility will annually certify to the CSA, in writing, that a self-inspection has been conducted, that other KMP have been briefed on the results of the self-inspection, that appropriate corrective actions have been taken, and that management fully supports the security program at the cleared facility in the manner as described in the certification.

(i) *Contractors working at USG locations.* Contractor employees performing work within the confines of a USG facility will safeguard classified information according to the procedures of the host installation or agency.

(j) *Hotlines.* Federal agencies maintain hotlines to provide an unconstrained avenue for USG and contractor employees to report, without fear of reprisal, known or suspected instances of security irregularities and infractions concerning contracts, programs, or projects. These hotlines do not supplant the contractor's responsibility to facilitate reporting and timely investigations of security issues concerning its operations or personnel. Contractor personnel are encouraged to report information through established contractor channels. The hotline may be used as an alternate means to report this type of information. Contractors will inform all personnel that hotlines may be used for reporting issues of national security significance. Each CSA will post hotline information and telephone numbers on their websites for contractor access.

(k) *Agency agreements.* 32 CFR part 2004 and E.O. 12829 require non-CSA agency heads to enter into agreements with the Secretary of Defense as the Executive Agent for the NISP to provide industrial security services. The

Secretary of Defense may also enter into agreements to provide services for other CSA's in accordance with 32 CFR part 2004 and E.O. 12829. Agency agreements establish the terms of the Secretary of Defense's (or the Secretary of Defense's designee's) responsibilities when acting as the CSA on behalf of these agency heads. The list of agencies for which the Secretary of Defense has agreed to render industrial security services is on the DCSA website at *https://www.dcsa.mil*.

(l) *Security cognizance.* The CSA will inform contractors if oversight has been delegated to a CSO.

(m) *Rule interpretations.* Contractors will forward requests for interpretations of this rule to their CSA in accordance with their CSA-provided guidance to supplement unique CSA mission requirements.

(n) *Waivers to this rule.* Contractors will submit any requests to waive provisions of this rule in accordance with CSA procedures, which may include periodic review of approved waivers. When submitting a request for a waiver, the contractor will, in writing, explain why it is impractical or unreasonable for the contractor to comply with the requirement it is asking to waive, identify alternative measures as prescribed by this rule, and include a proposed duration for the waiver. The contractor cannot implement a waiver unless the waiver is approved by the applicable CSA.

(o) *Complaints and suggestions.* Contractors may forward NISP administration complaints and suggestions to the Director of ISOO. However, contractors are encouraged to forward NISP administration complaints and suggestions to their respective CSA prior to forwarding to the ISOO.

TABLE 2 TO PARAGRAPH (o) NISP ADMINISTRATION COMPLAINTS AND SUGGESTIONS

Addressee	Mailing address	Telephone No.	Facsimile	Email address
Director, ISOO, National Archives and Records Administration.	700 Pennsylvania Avenue NW, Room 100, Washington, DC 20408–0001.	202–357–5250	202–357–5907	*isoo@nara.gov.*

§ 117.8 Reporting requirements.

(a) *General.* Pursuant to this rule, Security Executive Agent Directive (SEAD) 3, (available at: *https://www.dni.gov/files/NCSC/documents/Regulations/SEAD-3-Reporting-U.pdf*) and CSA-provided guidance to supplement unique CSA mission requirements, contractors and their cleared employees are required to:

(1) Report certain events that may have an effect on the status of the entity's or an employee's eligibility for access to classified information; report events that indicate an insider threat to classified information or to employees with access to classified information; report events that affect proper safeguarding of classified information; and report events that indicate classified information has been, or is suspected to be, lost or compromised.

(2) Establish internal procedures to ensure employees with eligibility for access to classified information are aware of their responsibilities for reporting pertinent information to the FSO. The contractor will:

(i) Provide reports to the FBI, or other Federal authorities as required by this rule, the terms of a classified contract or other agreement, and by U.S. law.

(ii) Provide complete information to enable the CSA to ascertain whether classified information is adequately protected.

(iii) Submit reports to the FBI, the CSA, or the ISOO as specified in paragraphs (b), (c), and (g) of this section.

(3) Appropriately mark reports containing classified information in accordance with § 117.14.

(4) Clearly mark a report containing information submitted in confidence as containing that information. When reports contain information pertaining to an individual, 5 U.S.C. 552a (also known as and referred to in this rule as ''The Privacy Act of 1974, as amended,'') permits the withholding of certain information from the individual in accordance with specific exemptions,

which include authority to withhold release of information to the extent that the disclosure of the information would reveal the identity of a source who furnished the information to the USG under an express promise that the identity of the source would be held in confidence.

(b) *Reports to be submitted to the FBI.* The contractor will promptly submit a written report to the nearest field office of the FBI regarding information coming to the contractor's attention concerning actual, probable, or possible espionage, sabotage, terrorism, or subversive activities at any of its locations.

(1) An initial report may be made by phone, but it must be followed up in writing (*e.g.*, email or formal correspondence), regardless of the FBI's disposition of the report.

(2) The contractor will promptly notify the CSA when they make a report to the FBI and provide the CSA a copy of the written report.

(c) *Reports to be submitted to the CSA*—(1) *Adverse information.* Contractors are required to report adverse information coming to their attention concerning any of their employees determined to be eligible for access to classified information, in accordance with this rule, SEAD 3, and CSA-provided guidance. Contractors will not make reports based on rumor or innuendo.

(i) The termination of employment of an employee does not negate the requirement to submit this report. If a contractor employee is assigned to a USG location, the contractor will furnish a copy of the report and its final disposition to the USG security point of contact for that location.

(ii) Pursuant to *Becker* v. *Philco*, 372 F.2d 771 (4th Cir. 1967), cert. denied 389 U.S. 979 (1967), and subsequent cases, a contractor may not be liable for defamation of an employee because of communications that are required of and made by a contractor to an agency of the United States under the requirements of this rule or under the terms of applicable contracts.

(2) *Suspicious contacts.* Contractors will report information pertaining to suspicious contacts with employees determined to be eligible for access to classified information, and pertaining to efforts to obtain illegal or unauthorized access to the contractor's cleared facility by any means, including:

(i) Efforts by any individual, regardless of nationality, to obtain illegal or unauthorized access to classified information.

(ii) Efforts by any individual, regardless of nationality, to elicit information from an employee determined eligible for access to classified information, and any contact which suggests the employee may be the target of an attempted exploitation by an intelligence service of another country. See SEAD 3 for specific information to be reported.

(3) *Change in status of employees determined eligible for access to classified information.* Contractors will report by means of the CSA-designated reporting mechanism information pertaining to changes in status of employees determined eligible for access to classified information such as:

(i) Death.

(ii) Change in name.

(iii) Termination of employment.

(iv) Change in citizenship.

(4) *Citizenship by naturalization.* Contractors will report if a non-U.S. citizen employee granted an LAA becomes a citizen through naturalization. The report will include:

(i) City, county, and state where naturalized.

(ii) Date naturalized.

(iii) Court.

(iv) Certificate number.

(5) *Employees desiring not to be processed for a national security eligibility determination or not to perform classified work.* Contractors will report instances when an employee no longer wishes to be processed for a determination of eligibility for access to classified information or to continue having access to classified information, and the reason for that request.

(6) *Classified information nondisclosure agreement (NDA).* Contractors will report the refusal by an employee to sign the SF 312, ''Classified Information Nondisclosure Agreement,'' (available at: *https://www.gsa.gov/ cdnstatic/SF312-13.pdf? forceDownload=1*) or other approved NDA.

(7) *Changed conditions affecting the contractor's eligibility for access to classified information.* Contractors are required to report certain events that affect the status of the entity eligibility determination (*e.g.*, FCL), affect the status of an employee's PCL, may indicate an employee poses an insider threat, affect the proper safeguarding of classified information, or indicate classified information has been lost or compromised, including:

(i) Change of ownership or control of the contractor, including stock transfers that affect control of the entity.

(ii) Change of operating name or address of the entity or any of its locations determined eligible for access to classified information.

(iii) Any change to the information previously submitted for KMP including, as appropriate, the names of the individuals the contractor is replacing. A new complete KMP listing need be submitted only at the discretion of the contractor or when requested by the CSA. The contractor will provide a statement indicating:

(A) Whether the new KMP are cleared for access to classified information, and if cleared, to what level they are cleared and when they were cleared, their dates and places of birth, social security numbers, and citizenship.

(B) Whether they have been excluded from access to classified information in accordance with §117.7(b)(5)(ii).

(C) Whether they have been temporarily excluded from access to classified information pending the determination of eligibility for access to classified information in accordance with §117.9(g).

(iv) Any action to terminate business or operations for any reason, imminent adjudication or reorganization in bankruptcy, or any change that might affect the validity of the contractor's eligibility for access to classified information.

(v) Any material change concerning the information previously reported concerning foreign ownership, control, or influence (FOCI). This report will be made by the submission of an updated SF 328, ''Certificate Pertaining to Foreign Interests,'' in accordance with CSA-provided guidance. When submitting this information, it is not necessary to repeat answers that have not changed. When entering into discussion, consultations, or agreements that may reasonably lead to effective ownership or control by a foreign interest, the contractor will report the details to the CSA in writing. If the contractor has received a Schedule 13D from the investor, the contractor will forward a copy with the report.

(8) *Changes in storage capability.* The contractor will report any changes in their storage requirement or capability to safeguard classified material.

(9) *Inability to safeguard classified material.* The contractor will report any emergency situation that renders their location incapable of safeguarding classified material as soon as possible.

(10) *Unsatisfactory conditions of a prime or subcontractors.* (i) Prime contractors, including subcontractors who have in turn subcontracted work, will report any information coming to their attention that may indicate that classified information cannot be adequately protected by a subcontractor, or other circumstances that may impact the validity of the eligibility for access to classified information of any subcontractors.

(ii) Subcontractors will report any information coming to their attention that may indicate that classified information cannot be adequately protected or other circumstances that may impact the validity of the eligibility for access to classified information of their prime contractor.

(11) *Dispositioned material previously terminated.* The contractor will make a report when the location or disposition of material previously terminated from accountability is subsequently discovered and brought back into accountability.

(12) *Foreign classified contracts.* Contractors will report any pre-contract negotiation or award not placed through a CSA or U.S. GCA that involves, or may involve:

(i) The release or disclosure of U.S. classified information to a foreign interest.

(ii) Access to classified information furnished by a foreign interest.

(13) *Reporting of improper receipt of foreign government material.* The contractor will report to the CSA the receipt of classified material from foreign interests that is not received through USG channels.

(14) *Reporting by subcontractor.* Subcontractors will also notify their prime contractors if they make any reports to their CSA in accordance with the provisions of paragraphs (c)(7) through (c)(10) of this section.

(d) *Reports of loss, compromise, or suspected compromise.* The contractor will report any loss, compromise, or suspected compromise of classified information, U.S. or foreign, to the CSA in accordance with paragraph (d)(1) through (d)(3) of this section. Each CSA may provide additional guidance concerning the reporting time period. If the contractor is located on a USG facility, the contractor will submit the report to the CSA and to the head of the USG facility.

(1) *Preliminary inquiry.* Immediately upon receipt of a security violation report involving classified information, the contractor will initiate a preliminary inquiry to ascertain all of the circumstances surrounding the presumed loss, compromise, or suspected compromise, including validation of the classification of the information.

(2) *Initial report.* If the contractor's preliminary inquiry confirms that a loss, compromise, or suspected compromise of any classified information occurred, the contractor will promptly submit an initial report of the incident unless otherwise notified by the CSA.

(3) *Final report.* When the investigation has been completed, the contractor will submit a final report to the CSA which, in turn, will follow CSA procedures to notify the applicable GCA. The report will include:

(i) Material and relevant information that was not included in the initial report.

(ii) The full name and social security number of the individual or individuals primarily responsible for the incident, including a record of prior loss, compromise, or suspected compromise for which the individual had been determined responsible.

(iii) A statement of the corrective action taken to preclude a recurrence.

(iv) Disciplinary action taken against the responsible individual or individuals, if any.

(v) Specific reasons for reaching the conclusion that loss, compromise, or suspected compromise occurred or did not occur.

(4) *Employee information in compromise cases.* When requested by the CSA, the contractor will report information concerning an employee or other individual, determined to be responsible for the incident, when the information is needed by the CSA for the loss, compromise, or suspected compromise of classified information.

(e) *Individual culpability reports.* Contractors will establish and enforce policies that provide for appropriate administrative or disciplinary actions taken against employees who violate the requirements of this rule.

(1) Contractors will establish a system to manage and track information regarding employees with eligibility for access to classified information who violate the requirements of this rule in order to be able to identify patterns of negligence or carelessness, or to identify a potential insider threat.

(2) Contractors will establish and apply a graduated scale of administrative and disciplinary actions in the event of employee security violations or negligence in the handling of classified information. CSAs may provide guidance to contractors with examples of administrative or disciplinary actions that the contractor may consider implementing in the event of employee violations or negligence. Contractors are required to submit a final report to the CSA with the findings of an employee's culpability and what corrective actions were taken.

(3) Contractors will include a statement of the administrative or disciplinary actions taken against an employee in a final report to the CSA. A statement must be included when the individual responsible for a security violation can be determined. Contractors' final reports will indicate whether one or more of the following factors are evident:

(i) Involved a deliberate disregard of security requirements.

(ii) Involved negligence in the handling of classified material.

(iii) Was not deliberate in nature but reflects a recent or recurring pattern of questionable judgment, irresponsibility, negligence, or carelessness.

(f) *CDC cyber incident reports.* This paragraph applies only to CDCs and sets forth reporting requirements pursuant to 10 U.S.C. 391 and 393 and Defense Federal Acquisition Regulation Supplement Clause 252.204–7012. The reporting requirements of paragraph (f) of this section are in addition to the requirements in paragraphs (b) and (d) of this section, which can include certain activities occurring on unclassified information systems. DoD will provide detailed reporting instructions for contractors affected by these references via industrial security letter in accordance with DoDI 5220.22.

(1) *Reports to be submitted to the designated DoD CSO.* CDCs will immediately report to the DoD CSO, any cyber incident on a classified covered information system that has been approved by that CSO to process classified information.

(i) At a minimum, the report will include:

(A) A description of the technique or method used in the cyber incident.

(B) A sample of the malicious software involved in the cyber incident, if discovered and isolated by the CDC,

(C) A summary of information in connection with any DoD program that has been potentially compromised due to the cyber incident.

(ii) Information that is reported by the CDC (or derived from information reported by the CDC) will be safeguarded, used, and disseminated in a manner consistent with DoD procedures governing the handling of such information pursuant to Public Law 112–239 and 10 U.S.C. 391.

(iii) Reports involving classified foreign government information will be reported to the Director, Defense Technology Security Administration (DoD).

(2) *Reports on non-Federal information systems not authorized to process classified information.* CDCs will report cyber incidents on non-Federal, unclassified information systems in accordance with contract requirements.

(3) *Access to equipment and information by DoD personnel.* (i) The CDC will allow, upon request by DoD personnel, access by DoD personnel to additional equipment or information of the CDC that is necessary to conduct forensic analysis of reportable cyber incidents in addition to any analysis conducted by the CDC.

(ii) The CDC is only required to provide DoD access to equipment or information to determine whether information created by or for DoD in connection with any DoD program was successfully exfiltrated from a CDC's network or information system, and what information was exfiltrated from the CDC's network or information system.

(g) *Reports to ISOO.* (1) Contractors will report instances of redundant or duplicative security review and audit activity by the CSAs to the Director, ISOO, for resolution.

(2) Contractors will report instances of CSAs duplicating processing to determine an entity's eligibility for access to classified information when there is an existing determination of an entity's eligibility for access to classified information by another CSA.

§ 117.9 Entity eligibility determination for access to classified information.

(a) *General.* This section applies to all contractors with entity eligibility determinations, except as provided in § 117.22 for entity eligibility determinations for participation in the CCIPP under the cognizance of DHS.

(1) Prior to the entity being granted an entity eligibility determination for access to classified information, the responsible CSA must have determined that:

(i) The entity is eligible for access to classified information to meet a legitimate USG or foreign government need.

(ii) Access is consistent with national security interests.

(2) The CSA will provide guidance on processing entity eligibility determinations for entity access to classified information.

(3) The determination of entity eligibility for access is separate from the determination of a classified information safeguarding capability (see § 117.15).

(4) Neither the contractor nor its employees will be permitted access to classified information until the CSA

has made an entity eligibility determination (*e.g.*, issued an FCL).

(5) The requirement for a favorable entity eligibility determination (also referred to in some instances as an FCL) for a prime contractor includes instances where all access to classified information will be limited to subcontractors. A prime contractor must have a favorable entity eligibility determination at the same or higher classification level as its subcontractors.

(6) Contractors are eligible for storage of classified material in connection with a legitimate USG or foreign government requirement if they have a favorable entity eligibility determination and a classified information safeguarding capability approved by the CSA.

(7) An entity eligibility determination is valid for access to classified information at the same or lower classification level.

(8) Each CSA will maintain a record of entity eligibility determinations made by that CSA.

(9) A contractor will not use its favorable entity eligibility determination for advertising or promotional purposes. This does not prohibit the contractor from advertising employee positions that require a PCL in connection with the position.

(10) A contractor or prospective contractor cannot apply for its own entity eligibility determination. A GCA or a currently cleared contractor may sponsor an entity for an entity eligibility determination at any point during the contracting or agreement life cycle at which the entity must have access to classified information to participate (including the solicitation or competition phase).

(b) *Reciprocity*. If an entity has an appropriate, final entity eligibility determination, a CSA will not duplicate the entity eligibility determination processes performed by another CSA. If a CSA cannot acknowledge an entity eligibility determination to another CSA, the involved entity may be subject to duplicate processing in accordance with 32 CFR part 2004.

(c) *Eligibility requirements.* To be eligible for an initial entity eligibility determination or to maintain an existing entity eligibility determination, the entity must:

(1) Need access to classified information in connection with a legitimate USG or foreign government requirement, and access must be consistent with U.S. national security interests as determined by the CSA.

(2) Be organized and existing:

(i) Under the laws of the United States, one of the fifty States, the District of Columbia, or an organized U.S. territory (Guam, Commonwealth of the Northern Marianas Islands, Commonwealth of Puerto Rico, and the U.S. Virgin Islands); or

(ii) Under the laws of an American Indian/Alaska Native tribal entity if:

(A) The American Indian or Alaska Native tribe under whose laws the entity is chartered has been formally acknowledged by the Assistant Secretary—Indian Affairs, of the U.S. Department of the Interior.

(B) The contractor is organized and continues to exist, during the period of the eligibility under a tribal statue or code, or pursuant to a resolution of an authorized tribal legislative body.

(C) The contractor has submitted or will submit records such as a charter, certificate of organization, or other applicable tribal documents and statute or code provisions governing the formation and continuation of the entity, for CSA determination that the entity is tribally chartered.

(3) Be located in the United States or its territorial areas.

(4) Have a record of integrity and lawful conduct in its business dealings.

(5) Have a SMO, FSO, and ITPSO who have and who maintain eligibility for access to classified information and are not excluded from participating in USG contracts or agreements in accordance with § 117.7(b)(1) through § 117.7(b)(3).

(6) Not be under FOCI to such a degree that a favorable entity eligibility determination for access to classified information would be inconsistent with the national interest, in the judgment of the CSA.

(7) Maintain sufficient authorized and cleared employees to manage and implement the requirements of this rule in accordance with CSA guidance.

(8) Not pose an unacceptable risk to national security interests, in the judgment of the CSA.

(9) Meet all requirements governing access to classified information established by the CSA or the relevant authorizing law, regulation, or government-wide policy.

(d) *Processing the entity eligibility determination*. The CSA will assess the entity's eligibility for access to classified information based on its business structure.

(1) At a minimum, the entity will:

(i) Provide CSA-requested documentation within timelines established by the CSA.

(ii) Have and identify the SMO.

(iii) Appoint a U.S. citizen employee as the FSO.

(iv) Appoint a U.S. citizen employee as the ITPSO.

(v) Submit requests for personnel security investigations for the SMO, FSO, ITPSO, and those other KMP identified by the CSA as requiring eligibility for access to classified information in connection with the entity eligibility.

(2) If the entity is under FOCI with a special security agreement (SSA) as the proposed method of FOCI mitigation, and the GCA requires the entity to have access to proscribed information, the CSA must consider the measures listed in §117.11(d) as part of the entity eligibility determination.

(e) *Other personnel eligibility determinations concurrent with the entity eligibility determination*. (1) Contractors may designate employees who require access to classified information during the negotiation of a contract or the preparation of a bid or quotation pertaining to a prime contract or a subcontract. These designated employees will be processed for a determination of eligibility for access to classified information (*i.e.,* PCL eligibility) concurrent with entity's entity eligibility determination.

(2) The entity eligibility determination is not dependent on the PCL eligibility for access to classified information by such employees, provided none of these employees are among those listed in paragraph (c)(5) of this section. Even so, the employees will not be granted access to classified information until both a favorable entity eligibility determination and PCL eligibility has been granted.

(f) *Exclusion procedures*. If a CSA determines that certain KMP can be excluded from access to classified information, the contractor will follow the procedures in accordance with §117.7(b)(5)(ii).

(g) *Temporary exclusions*. As a result of a changed condition, the SMO or other KMP who require eligibility for access to classified information in connection with the facility entity eligibility determination may be temporarily excluded from access to classified information while in the process of a PCL eligibility determination provided:

(1) The SMO or other KMP are not appointed as the FSO or ITPSO. FSOs and ITPSOs may not be temporarily excluded. A cleared employee must always be appointed to fulfill the requirements of these positions in accordance with this rule.

(2) An employee, cleared to the level of the entity eligibility determination, must be able to fulfill the NISP responsibilities of the temporarily excluded KMP in accordance with this rule while the temporary exclusion is in effect.

(3) The applicable CSA may provide additional guidance on the duration of a temporary exclusion from access to classified information based on circumstances, business structure, and other relevant security information.

(4) The contractor's governing board affirms the exclusion action, and provides a copy of the exclusion action to the CSA. The organization's governing body will document this action.

TABLE 1 TO PARAGRAPH (g)(4) TEMPORARY EXCLUSION RESOLUTIONS

Type of affirmation	Language to be used in exclusion action
Affirmation for Temporary Exclusion from Access to Classified Information.	Pending a final determination of eligibility for access to classified information by the U.S. Government, [insert name and position] will not require, will not have, and can be effectively and formally excluded from access to all classified information disclosed to the entity.

TABLE 1 TO PARAGRAPH (g)(4) TEMPORARY EXCLUSION RESOLUTIONS—Continued

Type of affirmation	Language to be used in exclusion action
Affirmation for Temporary Exclusion from Higher Level Classified Information.	Pending a final determination of eligibility for access to classified information at the [insert SECRET or TOP SECRET] level, [insert name and position] will not have, and can be effectively and formally excluded from access to higher-level classified information [specify which higher level of information].

(h) *Interim entity eligibility determinations.* The CSA may make an interim entity eligibility determination for access to classified information, in the sole discretion of the CSA. See §117.10(l) for access limitations that also apply to interim entity eligibility determinations.

(i) An interim entity eligibility determination is made on a temporary basis pending completion of the full investigative requirements.

(ii) If the contractor with an interim entity eligibility determination is unable or unwilling to comply with the requirements of this rule and CSA-provided guidance regarding the process to obtain a final entity eligibility determination, the CSA will withdraw the interim entity eligibility.

(i) *Multiple facility organizations.* The home office must have an entity eligibility determination at the same level as the highest entity eligibility determination of an entity within the MFO. The CSA will determine whether branch offices are eligible for access to classified information if the branch offices need access and meet all other requirements.

(j) *Parent-subsidiary relationships.* When a parent-subsidiary relationship exists, the CSA will process the parent and the subsidiary separately for entity eligibility determinations.

(1) If the CSA determines the parent must be processed for an entity eligibility determination, then the parent must have an entity eligibility determination at the same or higher level as the subsidiary.

(2) When a parent and subsidiary or multiple cleared subsidiaries are collocated, a formal written agreement to use common security services may be executed by the entities, subject to the approval of the CSA.

(k) *Joint ventures.* A joint venture may be granted eligibility for access to classified information if it meets the eligibility requirements in paragraph (c) of this section, including:

(1) The joint venture must be established as a legal business entity (*e.g.* limited liability company, corporation, or partnership). A joint venture established by contract that is not also established as a legal business entity is not eligible for an entity eligibility determination.

(2) The business entity operating as a joint venture must have been awarded a classified contract or sponsored by a GCA or prime contractor for an entity eligibility determination in advance of a potential award for which the business entity has bid pursuant to paragraph (c) of this section.

(3) The business entity operating as a joint venture must have an employee or employees appointed as security officials or KMP pursuant to §117.7(b).

(l) *Consultants.* The responsible CSA will determine when there is a need for self-employed consultants requiring access to classified information to be considered for an entity eligibility determination.

(m) *Limited entity eligibility determination (Non-FOCI).* (1) The applicable CSA may choose to allow a GCA to request limited entity eligibility determinations for a single, narrowly defined contract, agreement, or circumstance and specific to the requesting GCA's classified information. This is not the same as a limited entity eligibility determination in situations involving FOCI, when the FOCI is not mitigated or negated.

(i) Limited entity eligibility determinations (or FCLs) involving FOCI will be processed in accordance with §117.11(e).

(ii) This paragraph (paragraph (m) of this section) applies to limited entity eligibility determinations for purposes other than FOCI mitigation in accordance with 32 CFR part 2004. Additional

guidance may be provided by the responsible CSA.

(2) An entity must be sponsored for a limited entity eligibility determination by a GCA in accordance with the sponsorship requirements contained in paragraph (c) of this section. The contractor should be aware that the sponsorship request from the GCA to the CSA must also include:

(i) Description of the compelling need for the limited entity eligibility determination that is in accordance with U.S. national security interests.

(ii) Specific reason(s) or rationale for limiting the entity eligibility determination.

(iii) The GCA's formal acknowledgement and acceptance of the risk associated with this rationale.

(3) The entity must otherwise meet the entity eligibility determination requirements set out in this rule.

(4) Access limitations are inherent with the limited entity eligibility determination and are imposed upon all of the entity's employees regardless of citizenship.

(5) Contractors should be aware that the CSA will document the requirements of each limited entity eligibility determination it makes, including the scope of, and any limitations on, access to classified information.

(6) Contractors should be aware that the CSA will verify limited entity eligibility determinations only to the requesting GCA. In the case of multiple limited entity eligibility determinations for a single entity, the CSA verifies each one separately only to its requestor.

(7) The applicable CSA administratively terminates the limited entity eligibility determination when there is no longer a need for access to the classified information for which the CSA approved the limited entity eligibility determination.

(n) *Termination of the entity eligibility determination.* Once granted, a favorable entity eligibility determination remains in effect until terminated or revoked. If the entity eligibility determination is terminated or revoked, the contractor will return all classified material in its possession to the appropriate GCA or dispose of the material as instructed by the CSA. The contractor should be aware that it may request an administrative termination or the CSA may:

(1) After coordination with applicable GCAs, administratively terminate the entity eligibility determination because the contractor no longer has a need for access to classified information.

(2) Revoke an entity eligibility determination if the contractor is unable or unwilling to protect classified information or is unable to comply with the security requirements of this rule.

(o) *Invalidation of the entity eligibility determination.* The CSA may invalidate an existing entity eligibility determination. While the entity eligibility determination is in an invalidated status, the contractor may not bid on or be awarded new classified contracts or solicitations. The contractor may continue to work on existing classified contracts if the GCA agrees.

(p) *Records maintenance.* Contractors will maintain the original CSA designated forms for the duration of the entity eligibility determination in accordance with CSA-provided guidance.

§ 117.10 Determination of eligibility for access to classified information for contractor employees.

(a) *General.* (1) The CSA is responsible for determining an employee's eligibility for access to classified information.

(i) The contractor must determine that access to classified information is essential in the performance of tasks or services related to the fulfillment of a classified contract.

(ii) Access must be clearly consistent with U.S. national security interests as determined by the CSA.

(iii) A contractor may give an employee access to classified information at the same or lower level of classification as the level of the contractor's entity eligibility determination if the employee has:

(A) A valid need-to-know for the classified information.

(B) A USG favorable eligibility determination for access to classified information at the appropriate level; and

(C) Signed a non-disclosure agreement.

(2) The CSA will determine eligibility for access to classified information in accordance with SEAD 4 (available at: *https://www.dni.gov/files/ NCSC/documents/Regulations/ SEAD-4-Adjudicative-Guidelines-U.pdf*) and notify the contractor when eligibility has been granted.

(i) The CSA will notify the contractor when an employee's eligibility has been denied, suspended, or revoked.

(ii) The contractor will immediately deny access to classified information to any employee when notified of a denial, revocation, or suspension of eligibility regardless of the contractor employee's location.

(iii) If the employee's performance is at a USG facility, the contractor will provide notification to the appropriate GCA of any denial, revocation, or suspension of eligibility for access to classified information.

(3) Contractors will annotate and maintain the accuracy of their employees' records in the system of record for contractor eligibility and access to classified information, when one has been designated by the CSA.

(4) Within an MFO or within the same business organization, contractors may centrally manage eligibility for access to classified information and access to classified information records.

(5) The contractor will limit requests for determinations of eligibility for access to classified information to the minimum number of employees and consultants necessary for operational efficiency in accordance with contractual obligations and other requirements of this rule. Requests for determinations of eligibility for access to classified information will not be used to establish a cache of cleared employees.

(6) The contractor will not submit a request for an eligibility determination to one CSA if the employee applicant is known to be cleared or in process for eligibility for access to classified information by another CSA. In such cases, reciprocity of eligibility determination in accordance with SEAD 7 (available at: *https://www.dni.gov/files/ NCSC/documents/Regulations/SEAD-7_BI_ ReciprocityU.pdf*) shall be used. The contractor will provide the new CSA with the full name, date, and place of birth, social security number, clearing agency, and type of investigation for verification.

(7) Contractors will not submit requests for determination of eligibility for access to classified information for individuals who are not their employees or consultants; nor will they submit requests for employees of subcontractors.

(8) Access to SCI, SAP, FRD, and RD information is a determination made by the granting authority by the applicable USG granting authority for each category of information.

(b) *Investigative requirements.* E.O. 13467, as amended, ''Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information,'' designates the Security and Suitability Executive Agents responsible for establishing the standards for investigative requirements that apply to contractors.

(1) *Investigative tiers.* The standards established in accordance with E.O. 13467, as amended, designate specific investigative tiers that are acceptable for access to classified information. An investigative tier is for positions designated as moderate risk, non-critical sensitive, and allow access to information classified at the L, CONFIDENTIAL, and SECRET levels. Another investigative tier is for positions designated as high risk, critical sensitive, special sensitive, and allow access to information classified at the Q, TOP SECRET, and SCI levels.

(2) *Investigative coverage.* (i) *Automated sources.* Investigative providers will use automation whenever possible to collect, verify, corroborate, or discover information about an individual, as documented on the request for investigation or developed from other sources, *i.e.,* automated record checks and inquiries.

(ii) *Interviews.* Interviews, if required, will cover areas of adjudicative concern.

(iii) *Information Covered in Previous Investigations.* Information validated in a prior investigation, the results of which are not expected to change (*e.g.,* verification of education degree), will

not be repeated as part of subsequent investigations.

(3) *Polygraph.* Agencies with policies authorizing the use of the polygraph for purposes of determining eligibility for access to classified information may require polygraph examinations when necessary. If adjudicatively relevant information arises during the investigation or the polygraph examination, the investigation may be expanded to resolve the adjudicative concerns.

(4) *Financial disclosure.* When a GCA requires that a contractor employee complete a financial disclosure form, the contractor will ensure that the employee has the opportunity to complete and submit the form in accordance with the Privacy Act of 1974, as amended, and other applicable provisions of law.

(5) *Reinvestigation and Continuous Evaluation.* Contractor employees determined eligible for access to classified information will follow CSA guidance to complete reinvestigation and continuous evaluation or continuous vetting requirements. The contractor will validate that the employee requires continued eligibility for access to classified information before initiating the reinvestigation.

(c) *Verification of U.S. citizenship.* A contractor will require each applicant for determination of eligibility for access to classified information who claims U.S. citizenship to provide evidence of citizenship to the FSO or other authorized representative of the contractor. All documentation must be the original or certified copies of the original documents.

(1) Any document, or its successor, listed in this paragraph is an acceptable document to corroborate U.S. citizenship by birth, including by birth abroad to a U.S. citizen.

(i) A birth certificate certified with the registrar's signature, which bears the raised, embossed, impressed, or multicolored seal of the registrar's office.

(ii) A current or expired U.S. passport or passport card that is unaltered and undamaged and was originally issued to the individual.

(iii) A Department of State Form FS–240, ''Consular Report of Birth Abroad of a Citizen of the United States of America.''

(iv) A Department of State Form FS–545 or DS–1350, ''Certification of Report of Birth.''

(2) Any document, or its successor, listed in this paragraph is an acceptable document to corroborate U.S. citizenship by certification, naturalization, or birth abroad to a U.S. citizen.

(i) A U.S. Citizenship and Immigration Services Form N–560 or N–561, ''Certification of U.S. Citizenship.''

(ii) A U.S. Citizenship and Immigration Services Form 550, 551, or 570, ''Naturalization Certificate.''

(iii) A valid or expired U.S. passport or passport card that is unaltered and undamaged and was originally issued to the individual.

(d) *Procedures for completing the electronic version of the SF 86, ''Questionnaire for National Security Positions.''* The electronic version of the SF 86 (available at: *https://www.opm.gov/forms/pdf_fill/sf86.pdf*) must be completed in e-QIP or its successor system by the contractor employee and reviewed by the FSO or other contractor employee(s) who has (have) been specifically designated by the contractor to review an employee's SF 86. The FSO or designee will:

(1) Provide the employee with written notification that review of the SF 86 by the FSO or other contractor employee is for adequacy and completeness and information will be used for no other purpose within the entity. The use and disclosure by the U.S. Government, and by U.S. Government contractors operating systems of records on behalf of a U.S. Government agency to accomplish an agency function, of the information provided by the employee on the SF–86 is governed by the Privacy Act of 1974, as amended, and by the routine uses published by the USG in the applicable System of Records Notice.

(2) Not share information from the employee's SF 86 within the entity and will not use the information for any purpose other than determining the adequacy and completeness of the SF 86.

(e) *Fingerprint collection.* The contractor will submit fingerprints in accordance with CSA guidance. Contractors will use digital fingerprints whenever possible.

(f) *Pre-employment eligibility determination action.* (1) If a potential employee requires access to classified information immediately upon commencement of employment, the contractor may submit a request for investigation prior to the date of employment, provided:

(i) A written commitment for employment has been made by the contractor.

(ii) The candidate has accepted the offer in writing.

(2) The commitment for employment must indicate employment will commence within 45 days of the employee being granted eligibility for access to classified information at a level that allows them to perform the tasks or services associated with the contract or USG requirement for which they were hired.

(3) Contractors will comply with the requirements pursuant to paragraph (a)(5) of this section.

(g) *Classified information NDA.* The NDA designated by the CSA (*e.g.,* SF 312), is an agreement between the USG and an individual who is determined eligible for access to classified information.

(1) An employee determined eligible for access to classified information must execute an NDA prior to being granted access to classified information.

(2) The employee must sign and date the NDA in the presence of a witness. The employee's and witness' signatures must bear the same date.

(3) The contractor will forward the executed NDA to the CSA for retention. The CSA may authorize the contractor to retain a copy of the form for administrative purposes, if appropriate.

(4) If the employee refuses to execute the NDA, the contractor will deny the employee access to classified information and submit a report to the CSA in accordance with § 117.8(c)(6).

(h) *Reciprocity.* The applicable CSA is responsible for determining whether contractor employees have been previously determined eligible for access to classified information or investigated by an authorized investigative activity in accordance with SEAD 7 (available at: *https://www.dni.gov/ files/ NCSC/documents/ Regulations/SEAD-7_ BI_ReciprocityU.pdf*).

(1) Any current eligibility determination for access to classified information that is based on an investigation of a scope that meets or exceeds that necessary for the required level of access will provide the basis for a new eligibility determination.

(2) The prior investigation will be used without further investigation or adjudication unless the CSA becomes aware of significant derogatory information that was not previously adjudicated.

(i) *Break in access.* There are circumstances when a contractor administratively terminates an employee's access to classified information solely because of no current requirement for such access. If the employee again requires access to classified information and has been in the contractor's continuous employment, and the employee again requires access to classified information, the contractor may provide access to classified information without further investigation, based on CSA guidance, so long as the employee remains eligible for access to classified information and has a current investigation of a scope that meets or exceeds that necessary for the access required and no new derogatory information is known. Any adverse information from or about the employee must continue to be reported while the employee maintains eligibility for access to classified information, even when access to classified information has been administratively terminated.

(j) *Break in employment.* (1) When an employee had a break in employment and now requires access to classified information, the contractor may provide access to classified information based on CSA guidance provided the employee remains eligible for access to classified information and has a current investigation of a scope that meets or exceeds that necessary for the access required.

(2) The contractor may not provide access to classified information to an

employee who previously was eligible for access to classified information, but has had a break in employment that resulted in a loss of eligibility without a new eligibility determination by the CSA.

(k) *Non-U.S. citizens.* (1) Contractors must make every effort to ensure that non-U.S. citizens are not employed in duties that may require access to classified information. However, compelling reasons may exist to grant access to classified information to a non-U.S. citizen. The CSA may grant such individuals a LAA in those rare circumstances where a non-U.S. citizen possesses unique or unusual skills or expertise that is urgently needed to support a specific USG contract involving access to specified classified information, and a cleared or clearable U.S. citizen is not readily available. The CSA will provide specific procedures for requesting an LAA, to include the need for approval by a GCA senior official.

(2) An LAA granted under the provisions of this rule is not valid for access to:

(i) TOP SECRET information.

(ii) RD or FRD.

(iii) Information that has not been determined releasable by a USG designated disclosure authority to the country of which the individual is a citizen.

(iv) Communications security (COMSEC) information.

(v) Intelligence information.

(vi) NATO information. Foreign nationals of a NATO member nation may be authorized access to NATO information provided:

(A) The CSA obtains a NATO security clearance certificate from the individual's country of citizenship.

(B) NATO access is limited to performance on a specific NATO contract.

(vii) Information for which foreign disclosure has been prohibited in whole or in part.

(viii) Information provided to the USG in confidence by a third-party government.

(ix) Classified information furnished by a third-party government.

(l) *Temporary eligibility for access to classified information.* In accordance with SEAD 8 (available at: *https://www.dni.gov/files/NCSC/documents/Regulations/SEAD-8_Temporary_Eligibility_U.pdf*), the CSA may grant temporary (previously called interim) eligibility for access to classified information, as appropriate, to applicants for access to TOP SECRET, SECRET, and CONFIDENTIAL information. This eligibility may only be granted if there is no evidence of adverse information that calls into question an individual's eligibility for access to classified information. If results are favorable following completion of full investigative requirements, the CSA will update the temporary eligibility determination for access to classified information to be final. In any case, a temporary eligibility determination shall not exceed one year unless approved by the applicable CSA in the system of record. Non-U.S. citizens are not eligible for access to classified information on a temporary basis.

(1) A temporary SECRET or CONFIDENTIAL eligibility determination is valid for access to classified information at the level of the eligibility granted. Access to RD, COMSEC information, and NATO information requires a final SECRET eligibility determination.

(2) A temporary TOP SECRET eligibility determination is valid for access to TOP SECRET information. If an individual has a temporary TOP SECRET eligibility determination and has a final SECRET eligibility determination based on a previously completed investigation, the temporary TOP SECRET eligibility determination is valid for access to RD, NATO, and COMSEC information at the SECRET or CONFIDENTIAL level.

(3) Access to SCI and SAP information based on a temporary eligibility determination is a determination made by the granting authority.

(4) When a temporary eligibility determination has been made and derogatory information is subsequently developed, the CSA may withdraw the temporary eligibility pending completion of the processing that is a prerequisite to the final eligibility determination.

(5) When a temporary eligibility determination is withdrawn for an individual who is required to be eligible for

access to classified information in connection with the entity eligibility determination for access to classified information, the contractor must remove the individual from access to classified information and any KMP position requiring PCL eligibility or the temporary entity eligibility determination will also be withdrawn.

(6) Withdrawal of a temporary eligibility determination is not a denial, termination, or revocation of eligibility under this rule and may not be appealed.

(m) *Consultants.* (1) A consultant will not access classified information off the premises of the using (hiring) contractor except in connection with authorized classified visits.

(2) A contractor may only assign a consultant outside the United States with responsibilities requiring access to classified information when:

(i) The consultant agreement between the contractor and consultant includes:

(A) Identification of the contract, license, or agreement that requires access to classified information, the level of classified information that is required, and access to FGI by the consultant while assigned outside the United States.

(B) A formal agreement that prohibits the consultant from disclosing any classified information related to the contract, license, or agreement as required in paragraph (m)(i)(A) of this section to any party other than the USG or foreign government with which the consultant is meeting, and who possesses the requisite clearance and need to know.

(ii) The consultant and the using contractor will jointly execute the consultant agreement setting forth respective security responsibilities. The contractor will retain an original signed copy of the agreement and will ensure its availability if requested by the CSA.

(iii) The contractor, in consultation with the applicable CSA as appropriate, will determine what threat briefing(s) the consultant should receive before the assignment, and conduct those briefings as part of the consultant's pre-assignment and recurring security training.

(iv) The contractor provides notice of any changes to the consultant agreement to the applicable CSA during assessments or upon CSA request.

(3) The using contractor will be the consumer of the consultant services as set forth in the consultant agreement.

(4) For security administration purposes, a consultant will be considered an employee of the using contractor for compliance with this rule.

(5) Consultants to GCAs are not under the purview of the NISP and will be processed for determination of eligibility by the GCA in accordance with GCA procedures.

§ 117.11 Foreign Ownership, Control, or Influence (FOCI).

(a) *General.* Foreign investment can play an important role in maintaining the vitality of the U.S. industrial base. Therefore, it is the intent of the USG to allow foreign investment consistent with the national security interests of the United States. The following FOCI procedures for cleared U.S. entities are intended to mitigate the risks associated with FOCI by ensuring that foreign firms cannot undermine U.S. security to gain unauthorized access to classified information.

(1) The CSA will consider a U.S. entity to be under FOCI when:

(i) A foreign interest has the power to direct or decide issues affecting the entity's management or operations in a manner that could either:

(A) Result in unauthorized access to classified information; or

(B) Adversely affect performance of a classified contract or agreement.

(ii) The foreign government is currently exercising, or could prospectively exercise, that power, whether directly or indirectly, such as:

(A) Through ownership of the U.S. entity's securities, by contractual arrangements, or other means, or;

(B) By the ability to control or influence the election or appointment of one or more members to the entity's governing board.

(2) When the CSA has determined that an entity is under FOCI, the primary consideration will be the protection of classified information. The CSA will take whatever action is necessary

to protect classified information, in coordination with other affected agencies as appropriate.

(3) A U.S. entity that is in process for an entity eligibility determination for access to classified information and subsequently determined to be under FOCI is ineligible for access to classified information unless and until effective security measures have been put in place to negate or mitigate FOCI to the satisfaction of the CSA.

(4) When a contractor determined to be under FOCI is negotiating an acceptable FOCI mitigation or negation measure in good faith, an existing entity eligibility determination may continue in effect so long as there is no indication that classified information is at risk of compromise in consultation with the applicable GCA. The applicable CSA may decide that circumstances involving the FOCI are such that the entity eligibility determination will be invalidated until implementation of an acceptable FOCI mitigation plan.

(5) An existing entity eligibility determination will be invalidated if the contractor is unable or unwilling to negotiate and implement an acceptable FOCI mitigation or negation measure. An existing entity eligibility determination will be revoked if security measures cannot be taken to remove the possibility of unauthorized access to classified information or adverse effect on performance of classified contracts.

(6) Changed conditions, such as a change in ownership, indebtedness, or a foreign intelligence threat, may justify certain adjustments to the security terms under which an entity is operating or, alternatively, that a different FOCI mitigation or negation method be employed. If a changed condition is of sufficient significance, it might also result in a determination that a contractor is no longer considered to be under FOCI, or, conversely, that a contractor is no longer eligible for access to classified information.

(7) The USG reserves the right, and has the obligation, to impose any security method, safeguard, or restriction (including denial, termination or revocation of an entity eligibility determination) it believes necessary to ensure that unauthorized access to classified information is effectively precluded and performance of classified contracts is not adversely affected.

(8) Nothing contained in this section affects the authority of a Federal agency head to limit, deny, or revoke access to classified information under its statutory, regulatory, or contract jurisdiction.

(b) *Factors.* Factors relating to the entity, relevant foreign interests, and the government of such foreign interests, as appropriate, will be considered in the aggregate to determine whether an applicant entity is under FOCI, its eligibility for access to classified information, and the protective measures required. These factors include:

(1) Record of espionage against U.S. targets, either economic or government.

(2) Record of enforcement actions against the entity for transferring technology without authorization.

(3) Record of compliance with pertinent U.S. laws, regulations, and contracts or agreements.

(4) Type and sensitivity of the information the entity would access.

(5) Source, nature, and extent of FOCI, including whether foreign interests hold a majority or minority position in the entity, taking into consideration the immediate, intermediate, and ultimate parent entities.

(6) Nature of any relevant bilateral and multilateral security and information exchange agreements.

(7) Ownership or control, directly or indirectly, in whole or in part, by a foreign government.

(8) Any other factor that indicates or demonstrates capability of foreign interests to control or influence the entity's operations or management.

(c) *Procedures.* An entity is required to complete an SF 328 during the process for an entity eligibility determination or when significant changes occur to information previously submitted. In the case of a corporate family, the form may be a consolidated response rather than separate submissions from individual members of the corporate family based on CSA guidance.

(1) If an entity provides any affirmative answers on the SF 328, or the CSA

receives other information which indicates that the applicant entity may be under FOCI, the CSA will make a risk-based determination regarding the relative significance of the information in regard to:

(i) Whether the applicant is under FOCI.

(ii) The extent and manner to which the FOCI represents a risk to the national security or may adversely impact classified contract performance.

(iii) The type of actions, if any, that would be necessary to mitigate or negate the effects of FOCI to a level deemed acceptable to the USG. The CSA will advise entities on the CSA's appeal channels for disputing CSA FOCI determinations.

(2) When an entity with a favorable eligibility determination enters into negotiations for the proposed merger, acquisition, or takeover by a foreign interest, the entity will submit notification to the CSA of the commencement of such negotiations.

(i) The submission will include the type of transaction under negotiation (*e.g.*, stock purchase, asset purchase), the identity of the potential foreign interest investor, and a plan to negate or mitigate the FOCI by a method outlined in paragraph (d) of this section.

(ii) The entity will submit copies of loan, purchase, and shareholder agreements, annual reports, bylaws, articles of incorporation, partnership agreements, other organizational documents, and reports filed with other Federal agencies to the CSA.

(d) *FOCI action plans.* (1) When FOCI factors not related to ownership are present, the CSA will determine if positive measures will assure the CSA that the foreign interest can be effectively mitigated and cannot otherwise adversely affect performance on classified contracts. Examples of such measures include:

(i) Modification or termination of loan agreements, contracts, and other understandings with foreign interests.

(ii) Diversification or reduction of foreign-source income.

(iii) Demonstration of financial viability independent of foreign interests.

(iv) Elimination or resolution of problem debt.

(v) Assignment of specific oversight duties and responsibilities to board members.

(vi) Formulation of special executive-level security committees to consider and oversee issues that affect the performance of classified contracts.

(vii) Physical or organizational separation of the contractor component performing on classified contracts.

(viii) Adoption of special board resolutions.

(ix) Other actions that negate or mitigate foreign control or influence.

(x) A combination of these methods, as determined by the CSA.

(2) When FOCI factors related to ownership are present, methods the CSA may apply to negate or mitigate the risk of foreign ownership include, but are not limited to:

(i) *Board resolution.* (A) When a foreign interest does not possess voting interests sufficient to elect, or otherwise is not entitled to representation on the entity's governing board, a resolution(s) by the governing board may be adequate. In the resolution, the governing board will:

(*1*) Identify the foreign shareholder.

(*2*) Describe the type and number of foreign-owned shares.

(*3*) Acknowledge the entity's obligation to comply with all industrial security program requirements.

(*4*) Certify that the foreign owner does not require, will not have, and can be effectively precluded from unauthorized access to all classified information entrusted to or held by the entity.

(B) The governing board will provide for annual certifications to the CSA acknowledging the continued effectiveness of the resolution.

(C) The entity will distribute to members of its governing board and to its KMP copies of such resolutions, and report in the entity's corporate records the completion of such distribution.

(ii) *Security control agreement (SCA).* When a foreign interest does not effectively own or control an entity (*i.e.*, the entity is under U.S. control), but the foreign interest is entitled to representation on the entity's governing board, an SCA may be adequate. At least one cleared U.S. citizen must

serve as an outside director on the entity's governing board. There are no access limitations under an SCA.

(iii) *SSA.* When a foreign interest effectively owns or controls an entity, an SSA may be adequate. An SSA is an arrangement that, based upon an assessment of the source and nature of FOCI and FOCI factors, imposes various industrial security measures within an institutionalized set of entity practices and procedures. The SSA preserves the foreign owner's right to be represented on the entity's board or governing body with a direct voice in the entity's business management, while denying the foreign owner majority representation and unauthorized access to classified information.

(A) *Requirement for a National Interest Determination (NID).* Unless otherwise prohibited by law or regulation (*e.g.*, Section 842 of Pub. L. 115–232), the applicable CSA must determine whether allowing an entity access to proscribed information under an SSA is consistent with national security interests of the U.S. with concurrence from controlling agencies, as applicable. Such NIDs will be made as part of an entity eligibility determination or because of a changed condition when a GCA requires an entity to have access to proscribed information and the CSA proposes an SSA as the mitigation measure. The NID can be program, project, or contract specific.

(B) *NID process:* (*1*) The CSA makes a NID for TOP SECRET or SAP information to which the entity requires access. Contractors should be aware that DOE Order 470.4B provides additional information and requirements for processing NID requests for access to RD.

(*2*) In cases in which any category of the proscribed information is controlled by another agency (ODNI for SCI, DOE for RD, the National Security Agency (NSA) for COMSEC), the CSA asks that controlling agency to concur or non-concur on the NID for that category of information.

(*3*) The CSA informs the GCA and the entity when the NID is complete. In cases involving SCI, RD, or COMSEC, the CSA also informs the GCA and the entity when a controlling agency concurs or non-concurs on that agency's category of proscribed information. The entity may begin accessing a category of proscribed information once the CSA informs the GCA and the entity that the controlling agency concurs, even if other categories of proscribed information are pending concurrence.

(*4*) An entity's access to SCI, RD, or COMSEC remains in effect so long as the entity remains eligible for access to classified information and the contract or agreement (or program or project) which imposes the requirement for access to those categories of proscribed information remains in effect, except under any of the following circumstances:

(*i*) The CSA, GCA, or controlling agency becomes aware of adverse information that impacts the entity eligibility determination.

(*ii*) The CSA's threat assessment pertaining to the entity indicates a risk to one of the categories of proscribed information.

(*iii*) The CSA becomes aware of any material change regarding the source, nature, and extent of FOCI.

(*iv*) The entity's record of NISP compliance, based on CSA reviews, becomes less than satisfactory. Consult DOE Order 470.4B for additional information and requirements for processing NID requests for access to RD.

(*5*) Under any of the circumstances in paragraphs (d)(2)(iii)(B)(*4*)(*i*) through (d)(2)(iii)(B)(*4*)(*iv*) in this section, the CSA determines whether the entity remains eligible for access to classified information, it must change the FOCI mitigation measure in order to remain eligible for access to classified information, or the CSA must terminate or revoke the access to classified information.

(*6*) When an entity is eligible for access to classified information that includes a favorable NID for SCI, RD, or COMSEC, the CSA does not have to request a new NID concurrence for the same entity if the access to classified information requirements for the relevant category of proscribed information and terms remain unchanged for:

(*i*) Renewing the contract or agreement.

(*ii*) New task orders issued under the contract or agreement.

(*iii*) A new contract or agreement that contains the same provisions as

the previous one (this usually applies when the contract or agreement is for a program or project.)

(*iv*) Renewing the SSA.

(*7*) Under certain conditions, entities under an SSA may not require a NID for one or more categories of proscribed information in accordance with CSA-provided guidance. Categories of proscribed information for entities under SSAs not requiring a NID will be recorded in the CSA's system of record for entity eligibility determinations.

(iv) *Voting Trust (VT) or Proxy Agreement (PA).* The VT and the PA are arrangements that vest the voting rights of the foreign-owned stock in cleared U.S. citizens approved by the USG. Under a VT, the foreign owner transfers legal title its ownership interests in the entity to the trustees. Under a PA, the foreign owner's voting rights are conveyed to the proxy holders. Neither arrangement imposes any restrictions on the entity's eligibility to have access to classified information or to compete for classified contracts.

(A) Establishment of a VT or PA involves the selection of trustees or proxy holders, all of whom must become members of the entity's governing board. Both arrangements must provide for the exercise of all prerogatives of ownership by the trustees or proxy holders with complete freedom to act independently from the foreign owners, except as provided in the VT or PA. The arrangements may limit the authority of the trustees or proxy holders by requiring approval be obtained from the foreign owner with respect to issues such as:

(*1*) The sale or disposal of the entity's assets or a substantial part thereof.

(*2*) Pledges, mortgages, or other encumbrances on the entity's assets, capital stock, or ownership interests.

(*3*) Mergers, consolidations, or reorganizations.

(*4*) Dissolution.

(*5*) Filing of a bankruptcy petition.

(B) The trustees or proxy holders may consult with the foreign owner, or vice versa, where otherwise consistent with U.S. laws, regulations, and the terms of the VT or PA.

(C) The trustees or proxy holders assume full responsibility for the foreign owner's voting interests and for exercising all governance and management prerogatives relating thereto to ensure the foreign owner will be insulated from the entity, thereby solely retaining the status of a beneficiary. The entity must be organized, structured, and financed to be capable of operating as a viable business entity and independent from the foreign owners' interests that required FOCI mitigation or negation.

(v) *Combination measures.* The CSA may apply combinations of the measures in paragraphs (d)(2)(i) through (d)(2)(iv) in this section or other similar measures that effectively mitigate or negate the risks involved with foreign ownership.

(e) *Limited entity eligibility determination due to FOCI.* In accordance with the provisions of this section and CSA-provided guidance, a limited entity eligibility determination may be an option for a single, narrowly defined contract, agreement, or circumstance for entities under FOCI without mitigation or negation. Limitations on access to classified information are inherent with the granting of limited entity eligibility determinations and are imposed upon all of the entity's employees regardless of citizenship.

(1) In exceptional circumstances, when an entity is under FOCI, the CSA may decide that a limited entity eligibility determination is appropriate when the entity is unable or unwilling to implement FOCI mitigation or negation measures, and the conditions in paragraphs (e)(1)(i) through (iii) of this section are met. This is not the same as a limited entity eligibility determination for purposes not related to FOCI. Information on limited entity eligibility determinations for purposes other than FOCI can be found in §117.9(m). A CSA may decide that a limited entity eligibility is appropriate for an entity under FOCI if:

(i) The limited entity eligibility determination is in accordance with national security interests and a GCA has informed the CSA that access to classified information by the contractor is essential to contract or agreement performance.

(ii) There is an industrial security agreement with the foreign government of the country from which the FOCI is derived.

(iii) The contractor meets all other entity eligibility requirements outlined in §117.9(c) except that KMP, other than the FSO, may be citizens of the country from which the FOCI derives and the United States has obtained security assurances at the appropriate level from that country.

(2) A U.S. subsidiary of a foreign entity may be sponsored for a limited entity eligibility determination by a foreign government when the foreign government desires to award a contract or agreement to the U.S. subsidiary that involves access to only that classified information for which the foreign government is the OCA.

(3) Limited entity eligibility determinations are specific to the classified information for the requesting GCA or foreign government and the single narrowly defined contract, agreement, or circumstance the request was based on. The limited entity eligibility determination will only be verified to that GCA or foreign government for the authorized level of access to classified information and any limitations to that access to classified information.

(4) A limited entity eligibility determination is not an option for contractors that require access to proscribed information when a foreign government has ownership or control over the entity.

(5) Release of classified information must be in conformity with the U.S. National Disclosure Policy-1 (provided to designated disclosure authorities on a need-to-know basis from the Office of the Under Secretary of Defense for Policy, Defense Technology Security Administration).

(6) A limited entity eligibility determination will be administratively terminated when there is no longer a need for the contractor to access the classified information for which it was sponsored. Administrative termination of one limited entity eligibility determination does not impact a contractor's other limited entity eligibility determinations.

(7) If there is no industrial security agreement with the foreign government of the country from which the FOCI is derived, in extraordinary circumstances, a limited entity eligibility determination may also be granted if there is a compelling need to do so consistent with U.S. national security interests and the GCA has informed the applicable CSA that access to classified information by the contractor is essential to contract or agreement performance. Under this circumstance, the entity must follow all provisions of this rule.

(f) *Qualifications of trustees, proxy holders, and outside directors.* Individuals who serve as trustees, proxy holders, or outside directors must meet the following criteria:

(1) Trustees and proxy holders must be resident U.S. citizens who can exercise governance and management prerogatives relating to their position in a way that ensures that the foreign owner can be effectively insulated from the entity.

(2) Outside directors must be resident U.S. citizens who can exercise governance and management prerogatives relating to their position in a way that ensures that the foreign owner can be effectively separated from the entity's classified work.

(3) New trustees, proxy holders, and outside directors must be completely disinterested individuals with no prior involvement with the entity, the entities with which it is affiliated, or the foreign owner.

(4) The CSA may consider other circumstances that may affect an individual's eligibility to serve effectively including the number of boards on which the individual serves, the length of time serving on any other governance boards, and other factors in accordance with CSA-provided guidance.

(5) Trustees, proxy holders, and outside directors must be determined eligible for access to classified information at the level of the entity eligibility determination for access to classified information. Individuals who are serving as trustees, proxy holders, or outside directors as part of a mitigation measure for the entity are not considered to have prior involvement solely by performing that role for purposes of paragraph (f)(3) of this section.

(g) *Government security committee (GSC).* Under a VT, PA, SSA, or SCA, the contractor is required to establish a permanent committee of its board of directors, known as the GSC.

(1) Unless otherwise approved by the CSA, the GSC consists of trustees, proxy holders, or outside directors and those officer directors who have been determined to be eligible for access to classified information.

(2) The members of the GSC are required to ensure that the contractor adheres to laws and regulations and maintains internal entity policies and procedures to safeguard classified information entrusted to it. The GSC ensures that violations of those policies and procedures are promptly investigated and reported to the appropriate authority when it has been determined that a violation has occurred.

(3) The contractor's FSO will be the principal advisor to the GSC and attend GSC meetings. The chairman of the GSC must concur with the appointment and replacement of FSOs selected by management. The FSO functions will be carried out under the authority of the GSC.

(h) *Additional procedures for FOCI mitigation or negation measures.* In addition to the basic requirements of the FOCI mitigation or negation agreement, the entity may be required to document and implement additional procedures based upon the circumstances of an entity's operations. Those additional procedures will be established in supplements to the FOCI mitigation agreement to allow for flexibility as circumstances change without having to renegotiate the entire agreement. When making use of supplements, the CSA does not consider the FOCI mitigation measure final until the CSA has approved the required supplements. These supplements may include:

(1) *Technology control plan (TCP).* A TCP approved by the CSA will be developed and implemented by those entities cleared under a VT, PA, SSA and SCA and when otherwise deemed appropriate by the CSA. The TCP will prescribe all security measures determined necessary to reasonably prevent the possibility of access by non-U.S. citizen employees and visitors to information for which they are not authorized. The TCP will also prescribe measures designed to assure that access by non-U.S. citizens is strictly limited to only that specific information for which appropriate USG disclosure authorization has been obtained, *e.g.*, an approved export license or technical assistance agreement. Unique badging, escort, segregated work area, security indoctrination schemes, and other measures will be included, as appropriate.

(2) *Electronic communications plan (ECP).* The contractor will develop and implement an ECP, subject to CSA approval, tailored to the contractor's operations to verify that electronic controls are in place for clear technical and logical separation of electronic communications and networks between the contractor, the foreign interest, and its affiliates. The purpose is to prevent the unauthorized disclosure of classified information to the foreign parent or its affiliates. The contractor will include in the ECP a detailed network description and configuration diagram that clearly delineates which networks will be shared and which will be protected from access by the foreign parent or its affiliates. The network description will address firewalls, remote administration, monitoring, maintenance, and separate email servers, as appropriate.

(3) *Affiliated operations plan.* There may be circumstances when the parties to a transaction propose in the FOCI action plan that the U.S. contractor provides certain services for the foreign interest or enters into arrangements with the foreign interest, or the foreign interest provides services for or enters into arrangements with the U.S. contractor. In such circumstances, the contractor will document a plan, subject to CSA approval, outlining the entity's consolidated policies and procedures regarding the control of affiliated operations, regardless of whether such endeavors are administrative, operational, or commercial, performed directly or through third-party service providers, within the entity, or among any of the entity's controlled entities, or the foreign interest and its affiliates.

(4) *Facilities location plan.* When a contractor is potentially collocated

with or in close proximity to its foreign parent or an affiliate, the contractor will prepare a facilities location plan to assist the CSA in determining if the contractor is collocated or if the close proximity can be allowed under the FOCI mitigation plan. A U.S. entity generally cannot be collocated with the foreign parent or affiliate, *i.e.*, at the same address or in the same location.

(i) *Annual review and certification*—(1) *Annual review*. The CSA will meet at least annually, and otherwise as required by circumstances, with the GSCs of contractors operating under a VT, PA, SSA, or SCA to review the purpose and effectiveness of the clearance arrangement and to establish a common understanding of the operating requirements and their implementation. These reviews will include an examination of:

(i) Acts of compliance or noncompliance with the approved security arrangement, standard rules, and applicable laws and regulations.

(ii) Problems or impediments associated with the practical application or utility of the security arrangement.

(iii) Whether security controls, practices, or procedures warrant adjustment.

(2) *Annual certification*. For contractors operating under a VT, PA, SSA, or SCA, the chairman of the GSC will submit to the CSA one year from the effective date of the agreement and annually thereafter, an implementation and compliance report. Such reports will include:

(i) A detailed description of the manner in which the contractor is carrying out its obligations under the agreement.

(ii) Changes to security procedures, implemented or proposed, and the reasons for those changes.

(iii) A detailed description of any acts of noncompliance, whether inadvertent or intentional, with a discussion of remedial measures, including steps taken to prevent such acts from recurring.

(iv) Any changes, or impending changes, of KMP or key board members, including the reasons therefore.

(v) Any changes or impending changes in the organizational structure or ownership, including any reorganizations, acquisitions, mergers, or divestitures.

(vi) Any other issues that could have a bearing on the effectiveness of the applicable agreement.

(j) *Transactions involving foreign persons, and the Committee on Foreign Investment in the United States (CFIUS)*.

(1) The CFIUS is a USG interagency committee chaired by the Treasury Department that conducts assessments, reviews and investigations of transactions that could result in foreign control of a U.S. business, and certain non-controlling investments and certain real estate transactions involving foreign persons under 50 U.S.C. 4565.

(2) In CFIUS cases where the acquired U.S. business requires access to classified information, the CFIUS assessment, review or investigation, as applicable, and the CSA industrial security FOCI review are carried out in parallel, but are separate processes with different time constraints and considerations.

(3) The CSA will promptly advise the parties in a transaction under CFIUS review that would require FOCI negation or mitigation measures if consummated, to submit to the CSA a plan to negate or mitigate FOCI. If it appears that an agreement cannot be reached on material terms of a FOCI action plan, or if the U.S. person that is a party, or in applicable cases, a subject of the proposed transaction fails to comply with the FOCI reporting requirements of this rule, the CSA may recommend a full investigation of the transaction by the CFIUS to determine the effects on national security.

§ 117.12 Security training and briefings.

(a) *General*. Contractors will provide all cleared employees with security training and briefings commensurate with their involvement with classified information.

(b) *Training materials*. Contractors may obtain security, threat awareness, and other education and training information and material from their CSA or other sources.

(c) *Government provided briefings*. The CSA is responsible for providing initial security briefings to the FSO and for

ensuring other briefings required for special categories of information are provided to the FSO.

(d) *FSO training.* Contractors will ensure the FSO and others performing security duties complete training considered appropriate by the CSA. Training requirements will be based on the contractor's involvement with classified information. Training may include an FSO orientation course, and for FSOs at contractor locations with a classified information safeguarding capability, an FSO program management course. Contractor FSOs will complete training within six months of appointment to the position of FSO. When determined by the applicable CSA, contractor FSOs must complete an FSO program management course within six months of the CSA approval to store classified information at the contractor.

(e) *Initial security briefings.* Prior to being granted access to classified information, contractors will provide employees with an initial security briefing that includes:

(1) Threat awareness, including insider threat awareness in accordance with paragraph (g) in this section.

(2) Counterintelligence (CI) awareness.

(3) Overview of the information security classification system.

(4) Reporting obligations and requirements, including insider threat.

(5) Cybersecurity training for all authorized information system users in accordance with CSA-provided guidance pursuant to §117.18(a)(1) and (a)(2).

(6) Security procedures and duties applicable to the employee's position requirements (*e.g.* marking and safeguarding of classified information) and criminal, civil, or administrative consequences that may result from the unauthorized disclosure of classified information, even though the individual has not yet signed an NDA.

(f) *CUI training.* While outside the requirements of the NISPOM, when a classified contract includes provisions for CUI training, contractors will comply with those contract requirements.

(g) *Insider threat training.* The designated ITPSO will ensure that contractor program personnel assigned insider threat program responsibilities and all other cleared employees complete training consistent with applicable CSA provided guidance.

(1) The contractor will provide training to insider threat program personnel, including the contractor's designated ITPSO, on:

(i) CI and security fundamentals.

(ii) Procedures for conducting insider threat response actions.

(iii) Applicable laws and regulations regarding the gathering, integration, retention, safeguarding, and use of records and data, including the consequences of misuse of such information.

(iv) Applicable legal, civil liberties, and privacy policies and requirements applicable to insider threat programs.

(2) The contractor will provide insider threat awareness training to all cleared employees on an annual basis. Depending upon CSA specific guidance, a CSA may instead conduct such training. The contractor must provide all newly cleared employees with insider threat awareness training before granting access to classified information. Training will address current and potential threats in the work and personal environment and will include at a minimum:

(i) The importance of detecting potential insider threats by cleared employees and reporting suspected activity to the insider threat program designee.

(ii) Methodologies of adversaries to recruit trusted insiders and collect classified information, in particular within information systems.

(iii) Indicators of insider threat behavior and procedures to report such behavior.

(iv) CI and security reporting requirements, as applicable.

(3) The contractor will establish procedures to validate all cleared employees who have completed the initial and annual insider threat training.

(h) *Derivative classification*—(1) *Initial training.* The contractor will ensure all employees authorized to make derivative classification decisions are trained in the proper application of the derivative classification principles, in accordance with CSA direction. Employees

are not authorized to conduct derivative classification until they receive such training.

(2) *Refresher training.* In addition to the initial training, contractors will ensure all employees who conduct derivative classification receive training at least once every two years. Contractors will suspend an employee's derivative classification authority for any employee who does not receive such training at least once every two years. Training will emphasize the avoidance of over-classification and address:

(i) Classification levels.

(ii) Duration of classification.

(iii) Identification and markings.

(iv) Classification prohibitions and limitations.

(v) Sanctions and classification challenges.

(vi) Security classification guides.

(vii) Information sharing.

(3) *Record of training.* Contractors will retain records of the date of the most recent training (initial or refresher) and type of training provided to employees.

(i) *Information systems security.* All information system authorized users will receive training on the security risks associated with their user activities and responsibilities under the NISP. The contractor will determine the appropriate content of the training, taking into consideration assigned roles and responsibilities, specific security requirements, and the information system to which personnel are authorized access.

(j) *Temporary help suppliers.* A cleared temporary help supplier, or other contractor who employs cleared individuals solely for dispatch elsewhere, will be responsible for ensuring that required briefings (both initial and refresher training) are provided to their cleared personnel. The temporary help supplier or the using contractor may conduct these briefings.

(k) *Refresher training.* The contractor will provide all cleared employees with security education and training every 12 months. Refresher training will reinforce the information provided during the initial security briefing and will keep cleared employees informed of changes in security regulations and should also address issues or concerns identified during contractor self-reviews. Training methods may include group briefings, interactive videos, dissemination of instructional materials, or other media and methods. Contractors will maintain records about the programs offered and employee participation in them.

(l) *Debriefings.* Contractors will debrief cleared employees and annotate the debriefing in the appropriate contractor records when access to classified information is no longer needed; at the time of termination of employment (discharge, resignation, or retirement); when an employee's eligibility for access to classified information is terminated, suspended, or revoked; and upon termination of the entity eligibility determination.

§ 117.13 Classification.

(a) *Original classification.* Only a USG official designated or delegated the authority in writing can make an original classification decision.

(1) An OCA classifies information pursuant to E.O. 13526 and 32 CFR part 2001, designates and marks it as TOP SECRET, SECRET, or CONFIDENTIAL, and, except as provided by statute, may use no other terms to identify classified information.

(2) The designation UNCLASSIFIED is used to identify information that does not meet the criteria for classification in accordance with E.O. 13526. In accordance with 32 CFR 2002, CUI implementing guidance (including the Marking Handbook) and any GCA-provided guidance, CUI commingled with classified information must be marked as CUI to alert users to its presence and sensitivity. The CUI regulation, guidance, and handbook are available at: *https://www.archives.gov/cui.*

(b) *Derivative classification.* (1) Contractor personnel make derivative classification decisions when they incorporate, paraphrase, restate, or generate in new form, information that is already classified. They must mark the newly developed material consistently with the classification markings that apply to the source information.

(2) Derivative classification is the classification of information based on guidance from an OCA, which may be

either a properly marked source document or a current security classification guide provided by a GCA in accordance with E.O. 13526. The duplication or reproduction of existing classified information is not derivative classification.

(3) A source document that does not contain portion markings, due to an ISOO-approved waiver, must contain a warning statement that it may not be used as a source for derivative classification in accordance with 32 CFR 2001.24(k)(4).

(4) Classified information in email messages is marked pursuant to E.O. 13526 and 32 CFR part 2001. If an email is transmitted on a classified system, includes a classified attachment, and contains no classified information within the body of the email itself, the email serves as a transmittal document and is not a derivatively classified document. The email's overall classification must reflect the highest classification level present in the attachment.

(c) *Derivative classification responsibilities.* Contractors will provide employees with pertinent classification guidance to fulfill their derivative classification responsibilities. All contractor employees authorized to make derivative classification decisions will:

(1) Mark the face of each derivatively classified document with a classification authority block that includes the employee's name and position or personal identifier, the entity name, and when applicable, the division or the branch.

FIGURE 1 TO PARAGRAPH (c)(1) EXAMPLE OF INDUSTRY CLASSIFICATION AUTHORITY BLOCK

UNCLASSIFIED: CLASSIFICATION MARKINGS FOR ILLUSTRATION PURPOSES ONLY

Classified by: John Doe, Security Specialist, Entity ABC Security Division
Derived From: SecDef Memo, dtd 20101024, Subj: _____
Declassify On: 20201024

(2) Observe and respect original classification decisions.

(3) Carry forward the pertinent classification markings to any newly created documents. For information derivatively classified based on multiple sources, the derivative classifier will carry forward:

(i) The date or event for declassification that corresponds to the longest period of classification among the sources.

(ii) A listing of the source materials.

(4) Be trained, in accordance with §117.12(h), in the proper application of the derivative classification principles at least once every two years.

(5) Whenever possible, use a classified addendum if classified information constitutes a small portion of an otherwise unclassified document.

(d) *Security classification guidance.* (1) Contractors should be aware the GCA will:

(i) Incorporate appropriate security requirement clauses in a classified contract, IFB, RFP, RFQ, or all solicitations leading to a classified contract.

(ii) Provide the contractor with the security classification guidance needed during performance of the contract.

(iii) Provide this guidance to the contractor in the contract security classification specification, or equivalent.

(2) The contract security classification specification, or equivalent, must identify the specific elements of classified information involved in the contract that require security protection.

(3) At the discretion of the CSA, contractors may, to the extent possible, advise and assist in the development and any updates to or any revisions to the contract security classification specification, or equivalent.

(4) The contractor will comply with all aspects of the classification guidance.

(i) Users of classification guides are encouraged to notify the originator of the guide when they acquire information that suggests the need for change in the instructions contained in the guide.

(ii) Classification guidance is the exclusive responsibility of the GCA, and the final determination of the appropriate classification for the information rests with that activity. The contract security classification specification, or equivalent, is a contractual specification necessary for the performance of a classified contract. Challenges to classification status are in paragraph (e) in this section.

(iii) If the contractor receives a classified contract without a contract security classification specification, or equivalent, the contractor will notify the GCA. If the GCA does not respond with the appropriate contract security classification specification, or equivalent, the contractor will notify the CSA.

(5) Upon completion of a classified contract, the contractor must return all USG provided or deliverable information to the custody of the USG.

(i) If the GCA does not advise to the contrary, the contractor may retain copies of the USG material for a period of two years following the completion of the contract. The contract security classification specification, or equivalent, will continue in effect for this two-year period.

(ii) If the GCA determines the contractor has a continuing need for the copies of the USG material beyond the two-year period, the GCA will issue a final contract security classification specification, or equivalent, for the classified contract and will include disposition instructions for the copies.

(e) *Challenges to classification status.* (1) The contractor will address challenges to classification status with the GCA and request remedy when:

(i) Information is classified improperly or unnecessarily.

(ii) Current security considerations justify downgrading to a lower classification level or upgrading to a higher classification level.

(iii) Security classification guidance is not provided, improper or inadequate.

(2) If the GCA does not provide a remedy, and the contractor still believes that corrective action is required, the contractor will make a formal written challenge to the GCA. The challenge will include:

(i) A description sufficient to identify the issue.

(ii) The reasons why the contractor thinks that corrective action is required.

(iii) Recommendations for appropriate corrective action.

(3) The contractor will safeguard the information as required for its assigned or proposed level of classification, whichever is higher, until action is completed.

(4) If the contractor does not receive a written answer from the GCA within 60 days, the contractor will request assistance from the CSA. If the contractor does not receive a response from the GCA within 120 days, the contractor may appeal the challenge to the Interagency Security Classification Appeals Panel through ISOO.

(5) The fact that a contractor has initiated such a challenge will not, in any way, serve as a basis for adverse action against the contractor by the USG. If a contractor believes that adverse action did result from a classification challenge, the contractor will promptly furnish full details to ISOO for resolution.

(f) *Contractor developed information.* Whenever a contractor develops an unsolicited proposal or originates information not in the performance of a classified contract, the provisions of this paragraph apply.

(1) If the information was previously identified as classified, it will be classified according to an appropriate classification guide, or source document, and appropriately marked.

(2) If the information was not previously classified, but the contractor believes the information may or should be classified, the contractor will:

(i) Protect the information as though classified at the appropriate level.

(ii) Submit the information to the agency that has an interest for a classification determination. In such cases, clearly mark the material ''CLASSIFICATION DETERMINATION PENDING; Protect as either TOP SECRET, SECRET, or CONFIDENTIAL.'' This marking will appear conspicuously at least once on the material but no further markings are necessary until a classification determination is received.

(iii) Not be precluded from marking such material as entity-private or entity-proprietary information, unless the material was based upon information obtained from prior deliverables to the USG or was developed from USG material.

(iv) Protect the information pending a final classification determination. The information may be CUI, if it is

not classified. Only information that is owned by, produced by, produced for, or is under the control of the USG can be classified in accordance with E.O. 13526.

(3) To be eligible for classification:

(i) The information must incorporate classified information to which the contractor was given prior access.

(ii) The information must be partially or wholly owned by, produced by or for, or under the control of the USG.

(4) 10 CFR 1045.21 includes provisions for the DOE with regard to privately generated RD, whereby the DOE may classify such information in accordance with the AEA.

(g) *Improperly released classified information appearing in public media.* Improperly released classified information is not automatically declassified. When classified information has been improperly released, and even when that classified information has become publicly available, contractors will:

(1) Continue to protect the information at the appropriate classification level until formally advised to the contrary by the GCA.

(2) Bring any questions about the propriety of continued classification in these cases to the immediate attention of the GCA.

(3) Notify the applicable CSA if an employee downloads the improperly released classified information to determine how to resolve a data spill.

(h) *Downgrading or declassifying classified information.* Information is downgraded or declassified based on the loss of sensitivity of the information due to the passage of time or on occurrence of a specific event. Downgrading or declassifying actions constitute implementation of a directed action based on a review by either the OCA or the USG-designated classification authority. Declassification is not an approval for public disclosure.

(1) *Downgrading.* Contractors will refer information for classification or downgrade to the GCA based on the guidance provided in a contract security classification specification, or equivalent, or upon formal notification.

(2) *Declassification.* Contractors are not authorized to implement downgrading or declassification instructions even when the material is marked for automatic downgrading or declassification. If the material is marked for automatic declassification and the contractor notes that the date or event for the automatic declassification has occurred, the contractor will seek guidance from the GCA.

(i) *RD, FRD, and TFNI.* Protection requirements for RD, FRD, and TFNI are pursuant to §117.23(e). Information about classification and declassification of RD, FRD, or TFNI documents is in §117.23(e)(5).

§117.14 Marking requirements.

(a) *Purpose for marking.* (1) Physically marking classified information with appropriate classification markings serves to warn and inform holders of the information of the degree of protection required. Other notations facilitate downgrading and declassification, and aid in derivative classification actions.

(2) Contractors will clearly mark all classified information and material to convey to the holder the level of classification assigned, the portions that contain or reveal classified information, the period of time protection is required, the identity (by name and position or personal identifier) of the classifier, the source(s) for derivative classification, and any other notations required for protection of the information.

(b) *Marking guidance for classified information and material.* Contractors will use the marking guidance conveyed in 32 CFR 2001.22 through 2001.26, and its companion document, ISOO booklet ''Marking Classified National Security Information,'' (available at: *https://www.archives.gov/ isoo/training/training-aids*) or CSA specific provided guidance for marking derivatively classified information and material and as required by applicable security classification guide. The special requirements for marking documents containing RD, FRD, and TFNI are addressed in §117.23.

(c) *Marking guidance for CUI.* Contractors will use marking guidance conveyed in 32 CFR 2002.20, the CUI Marking Handbook (available at: *https://www.archives.gov/ files/cui/*

documents/ 20161206-cui-marking-handbook -v1-1-20190524.pdf), and agency policy to mark CUI in accordance with contract requirements.

(d) *Working papers.* Working papers will be marked, destroyed, and retained in accordance with §117.15(e)(3).

(e) *Translations.* The contractor will mark translations of U.S. classified information into a language other than English with the appropriate U.S. markings and the foreign language equivalent to show the United States as the country of origin.

(f) *Marking wholly unclassified material.* The contractor will not mark or stamp wholly UNCLASSIFIED material as UNCLASSIFIED unless it is essential to convey to a recipient of such material that:

(1) The material has been examined specifically with a view to impose a security classification and has been determined not to require classification by the GCA.

(2) The material has been reviewed and has been determined to no longer require classification and it has been declassified by the applicable GCA.

(g) *Marking miscellaneous material.* The contractor will:

(1) Handle miscellaneous material developed in connection with the handling, processing, production, storage, and utilization of classified information in a manner that ensures adequate protection of the classified information involved.

(2) Destroy the miscellaneous material at the earliest practical time, unless a requirement exists to retain such material. Notwithstanding the provisions of paragraph (a) of this section, there is no requirement for the contractor to mark such material, but disposition and retention requirements in §117.15(i) and (j) apply.

(h) *Marking training material.* The contractor will clearly mark unclassified documents or materials that are created to simulate or demonstrate classified documents or material to indicate the actual UNCLASSIFIED status of the information. For example, the contractor may use: MARKINGS ARE FOR TRAINING PURPOSES ONLY, OTHERWISE UNCLASSIFIED or UNCLASSIFIED SAMPLE, or other similar marking.

(i) *Downgrading or declassification actions.* When a contractor removes documents or material that have been downgraded or declassified from storage for use or for transmittal outside the contractor location:

(1) The documents or material must be re-marked pursuant to paragraph (i)(1)(i) or (i)(1)(ii) in this section.

(i) Prior to taking any action to downgrade or declassify information, the contractor will seek guidance from the GCA. If the GCA approves such action, the contractor will cancel all old classification markings with the new markings substituted, whenever practical. For documents, at a minimum the outside of the front cover, the title page, the first page, and the outside of the back will reflect the new classification markings, or include the designation UNCLASSIFIED. The contractor will re-mark other material by the most practical method for the type of material involved to ensure that it is clear to the holder what level of classification is assigned to the material.

(ii) When the GCA notifies contractors of downgrading or declassification actions that are contrary to the markings shown on the material, the contractor will re-mark material to indicate the change and notify other holders if further dissemination was made. The contractor will mark the material to indicate the:

(A) Authority for the action.

(B) Date of the action.

(C) Identity and position of the individual taking the action.

(2) If the volume of material is such that prompt re-marking of each classified item cannot be accomplished without unduly interfering with operations, the contractor may attach a downgrading and declassification notice to the inside of the file drawers or other storage container instead of the re-marking otherwise required.

(3) When such documents or materials are withdrawn from the container solely for transfer to another container, or when the container is transferred from one place to another, the transfer may be made without re-marking if the notice is attached to the new container or remains with each shipment.

(4) For the purpose of paragraphs (i)(2) and (i)(3) in this section, the contractor must include in the downgrading and declassification notice:

(i) The authority for the downgrading or declassification action.

(ii) The date of the action.

(iii) The storage container to which it applies.

(j) *Upgrading action.* (1) When the contractor receives notice from the GCA to upgrade material to a higher level; for example, from CONFIDENTIAL to SECRET, the contractor will:

(i) Immediately enter the new markings on the material according to the notice to upgrade, and strike through all the superseded markings.

(ii) Enter the authority for and the date of the upgrading action on the material.

(iii) Ensure all records affected are stored at the appropriate level of security, including digital networks and systems. Upgrades requiring network or system adjustment will be coordinated with the GCA to mitigate or account for impact on the execution of the contract.

(2) The contractor will notify all holders to whom they disseminated the material. The contractor will not mark the notice as classified unless it contains additional information warranting classification.

(3) In the case of material which was inadvertently released as UNCLASSIFIED, the contractor will mark and protect the notice as classified at the CONFIDENTIAL level, unless it contains additional information warranting a higher classification. The contractor will cite the applicable Contract Security Classification Specification, or equivalent, or other classification guide on the ''Derived From'' line and mark the notice with an appropriate declassification instruction.

(k) *Dissemination of improperly marked information.* If the contractor inadvertently distributes classified material without the proper classification assigned to it, or without any markings to identify the material as classified, as appropriate, the contractor will:

(1) Determine whether all holders of the material are cleared and authorized access to it.

(2) If recipients are authorized persons, and the contractor disseminated the information through authorized channels, promptly provide written notice to all holders of the proper classification to be assigned. The contractor will also include the classification source as well as declassification instructions in the notification.

(3) Report compromises to the CSA in accordance with the provisions of §117.8(d), if:

(i) Any of the recipients of the material are not authorized persons.

(ii) Any material cannot be accounted for.

(iii) The material was transmitted through unauthorized channels.

(l) *Marking foreign government classified material.* Foreign government classified information will retain its original classification markings or will be assigned a U.S. classification that provides a degree of protection at least equivalent to that required by the foreign government entity that furnished the information in accordance with 32 CFR 2001.54. The equivalent U.S. classification and the country of origin will be marked on the front and back in English.

(m) *Foreign government restricted information and ''in confidence'' information.*

(1) Some foreign governments have a fourth level of classification that does not correspond to an equivalent U.S. classification that is identified as RESTRICTED information. In many cases, security agreements require RESTRICTED information to be protected as U.S. CONFIDENTIAL information.

(2) Some foreign governments may have a category of unclassified information that is protected by law. This latter category is normally provided to other governments with the expectation that the information will be treated ''In Confidence.'' The foreign government or international organization must state that the information is provided in confidence and that it must be protected from release.

(i) 10 U.S.C. 130c protects information provided ''In Confidence'' by foreign governments which is not classified but meets special requirements.

(ii) This provision also applies to RESTRICTED information which is not

required by an agreement to be protected as classified information.

(iii) The contractor will not disclose information protected by this statutory provision to anyone except personnel who require access to the information in connection with the contract.

(3) It is the responsibility of the foreign entity that awards the contract to incorporate requirements for the protection and marking of RESTRICTED or ''In Confidence'' information in the contract. The contractor will advise the CSA if requirements were not provided by the foreign entity.

(n) *Marking U.S. documents containing FGI.* (1) U.S. documents containing FGI must be marked on the front, ''THIS DOCUMENT CONTAINS (indicate country of origin) INFORMATION.'' In addition, the portions must be marked to identify both the country and classification level, (*e.g.*, (UK–C), (GE–C)). The ''Derived From'' line will identify U.S. as well as foreign classification sources.

(2) If the identity of the foreign government must be concealed, the front of the document will be marked ''THIS DOCUMENT CONTAINS FOREIGN GOVERNMENT INFORMATION;'' paragraphs will be marked FGI, together with the classification level (*e.g.*, (FGI–C)); and the ''Derived From'' line will indicate FGI in addition to any U.S. source. The identity of the foreign government will be maintained with the record copy of the document.

(3) A U.S. document that contains FGI will not be downgraded below the highest level of FGI contained in the document or be declassified without the written approval of the foreign government that originated the information. Recommendations concerning downgrading or declassification will be submitted to the GCA or foreign government contracting authority, as applicable.

(o) *Marking documents prepared for foreign governments.* Documents prepared for foreign governments that contain U.S. classified information and FGI will be marked as prescribed by the foreign government. In addition, they will be marked on the front, ''THIS DOCUMENT CONTAINS UNITED STATES CLASSIFIED INFORMATION.'' Portions will be marked to identify the U.S. classified information.

(p) *Marking requirements for transfers of defense articles to Australia (AUS) or the United Kingdom (UK).* Marking requirements for transfers of defense articles to AUS or the UK without a license or other written authorization are pursuant to §117.19(i).

(q) *Commingling of RD and FRD.* Commingling of RD, FRD, and TFNI with national security information (NSI) in the same document should be avoided to the greatest degree possible. When mixing this information cannot be avoided, the marking requirements in 10 CFR part 1045, section 140(f) and declassification requirements of 10 CFR part 1045, section 155 apply.

§117.15 Safeguarding classified information.

(a) *General safeguarding.* Contractors will be responsible for safeguarding classified information in their custody or under their control, with approval for such storage of classified information by the applicable CSA. Individuals are responsible for safeguarding classified information entrusted to them. Contractors will provide the extent of protection to classified information sufficient to reasonably protect it from loss or compromise.

(1) *Oral discussions.* Contractors will ensure that all cleared personnel are aware of the prohibition against discussing classified information over unsecured telephones, in public conveyances or places, or in any other manner that permits interception by unauthorized persons.

(2) *End of day security checks.* (i) Contractors that store classified material will establish a system of security checks at the close of each working day to verify that all classified material and security repositories have been appropriately secured.

(ii) Contractors that operate multiple work shifts will perform the security checks at the end of the last working shift in which classified material was removed from storage for use. The checks are not required during continuous 24-hour operations.

(3) *Perimeter controls.* (i) Contractors authorized to store classified material

will establish and maintain a system to deter and detect unauthorized introduction or removal of classified material from their facility without proper authority.

(ii) If the unauthorized introduction or removal of classified material can be reasonably prevented through technical means (*e.g.*, an intrusion detection system), which are encouraged, no further controls are necessary. The contractor will provide appropriate authorization to personnel who have a legitimate need to remove or transport classified material for passing through designated entry or exit points.

(iii) The contractor will:

(A) Provide appropriate authorization to personnel who have a legitimate need to remove or transport classified material for passing through designated entry or exit points.

(B) Conspicuously post notices at all pertinent entries and exits that persons who enter or depart the facility are subject to an inspection of their personal, except under circumstances where the possibility of access to classified material is remote.

(C) Limit inspections to buildings or areas where classified work is being performed.

(D) Establish the extent, frequency, and location of inspections in a manner consistent with contractual obligations and operational efficiency. The contractor may use any appropriate random sampling technique.

(E) Seek legal advice during the formulation of implementing procedures.

(F) Submit significant problems pertaining to perimeter controls and inspections to the CSA.

(iv) Contractors will develop procedures for safeguarding classified material in emergency situations.

(A) The procedures should be as simple and practical as possible and adaptable to any type of emergency that may reasonably arise.

(B) Contractors will promptly report to the CSA any emergency situation that renders them incapable of safeguarding classified material.

(b) *Standards for Security Equipment.* Contractors will follow guidelines established in 32 CFR part 2001, when procuring storage and destruction equipment. Authorized repairs for GSA-approved security containers and vaults must be in accordance with Federal Standard 809.

(c) *Storage.* Contractors will store classified information and material in General Services Administration (GSA)-approved security containers, vaults built to Federal Standard 832, or an open storage area constructed in accordance with 32 CFR 2001.53. In the instance that an open storage area has a false ceiling or raised floor, contractors shall develop and implement procedures to ensure their structural integrity. Nothing in 32 CFR part 2001, should be construed to contradict or inhibit compliance with local laws or building codes, but the contractor will notify the applicable CSA if there are any conflicting issues that would inhibit compliance. Contractors will store classified material in accordance with the specific sections of 32 CFR 2001.43:

(1) CONFIDENTIAL. See 32 CFR 2001.43(b)(3).

(2) SECRET. See 32 CFR 2001.43(b)(2).

(3) TOP SECRET Documents. See 32 CFR 2001.43(b)(1).

(d) *Intrusion Detection Systems (IDS).* This paragraph specifies the minimum standards for an approved IDS when used for supplemental protection of TOP SECRET and SECRET material. The CSA will provide additional guidance for contingency protection procedures in the event of IDS malfunction, including contractors located in USG owned contractor operated facilities.

(1) *CSA approval.* (i) CSA approval is required before installing an IDS. The CSA will base approval of a new IDS on the criteria of Intelligence Community Directive 705 (available at: *https://www.dni.gov/ files/documents/ICD/ICD_705_SCIFs.pdf*) and any applicable intelligence community standard, Underwriters Laboratories (UL) Standard 2050 (Government agencies with a role as a CSA or CSO may obtain this reference without charge; available at: *www.ul.com/contact*), or the CSA may base approval on written CSA-specific standards for the information to be protected.

(ii) Installation will be performed by an alarm services company certified by a NRTL that meets the requirements in 29 CFR 1910.7 to perform testing and

certification. The NRTL-approved alarm service company is responsible for completing the appropriate alarm system description form approved by the NRTL.

(iii) All the intrusion detection equipment (IDE) used in the IDS installation will be tested and approved (or listed) by a NRTL, ensuring its proper operation and resistance from tampering. Any IDE that has not been tested and approved by a NRTL will require CSA approval.

(2) *Central monitoring station.* (i) For the purpose of monitoring alarms, an equivalent level of monitoring service is available from multiple types of providers. The central monitoring station may be located at a one of the following:

(A) Government contractor monitoring station (GCMS), formerly called a proprietary central station.

(B) Cleared commercial central station.

(C) Cleared protective signal service station (*e.g.*, fire alarm monitor).

(D) Cleared residential monitoring station.

(E) National industrial monitoring station.

(ii) SECRET-cleared central station employees at the alarm monitoring station will be in attendance in sufficient number to monitor each alarmed area within the cleared contractor facility.

(iii) The central monitoring station will be supervised continuously by a U.S. citizen who has eligibility for access to SECRET information.

(iv) The IDS must be activated at the close of business whenever the area is not occupied by cleared personnel. Any IDS exit delay function must expire prior to the cleared personnel leaving the immediate area. A record will be maintained to identify the person or persons who are responsible for setting and deactivating the IDS.

(v) Records will be maintained for 12 months indicating time of receipt of alarm, name(s) of security force personnel responding, time dispatched to facility or area, time security force personnel arrived, nature of alarm, and what follow-up actions were accomplished.

(3) *Investigative response to alarms.* (i) Alarm response teams will ascertain if intrusion has occurred and, if possible, assist in the apprehension of the individuals involved.

(A) If an alarm activation resets in a reasonable amount of time and no damage to the area is visible, then entrance into the area is not required and an initial response team may consist of uncleared personnel.

(B) If the alarm activation does not reset and damage is observed, then a cleared response team must be dispatched. The initial uncleared response team must stay on station until relieved by the cleared response team. If a cleared response team does not arrive within 1 hour, then a report to the CSA must be made by the close of the next business day.

(ii) The following resources may be used to investigate alarms: Proprietary security force personnel, central station guards, local law enforcement personnel, or a subcontracted guard service. The CSA may approve procedures for the use of entity cleared employees who can meet the minimum response requirements outlined in this section.

(A) For a GCMS, trained proprietary or subcontractor security force personnel, cleared to the SECRET level and sufficient in number to be dispatched immediately to investigate each alarm, will be available at all times when the IDS is in operation.

(B) For a commercial central station, protective signaling service station, or residential monitoring station, there will be a sufficient number of trained guards available to respond to alarms. Guards will be cleared only if they have the ability and responsibility to access the area or container(s) housing classified material (*i.e.*, keys to the facility have been provided or the personnel are authorized to enter the building or check the container or area that contains classified material).

(C) Uncleared guards dispatched by a commercial central station, protective signaling service station, or residential monitoring station in response to an alarm will remain on the premises until a designated, cleared representative of the facility arrives, or for a period of not less than 1 hour, whichever comes first. If a cleared representative

of the facility does not arrive within 1 hour following the arrival of the guard, the central control station must provide the CSA with a report of the incident that includes the name of the subscriber facility, the date and time of the alarm, and the name of the subscriber's representative who was contacted to respond. A report will be submitted to the CSA by the end of business on the next business day.

(D) Subcontracted guards must be under a classified contract with either the installing alarm service company or the cleared facility.

(iii) The response time will be in accordance with the provisions in paragraphs (c)(1) through (c)(3) in this section as applicable. When environmental factors (*e.g.*, traffic, distance) legitimately prevent meeting the requirements for TOP SECRET information, as indicated in paragraph (c)(3) in this section, the CSA may authorize up to a 30-minute response time. The CSA approval will be documented on the alarm system description form and the specified response time will be noted on the alarm certificate. The requirement for response is 80 percent within the time limits.

(4) *Installation*. The IDS will be installed by an NRTL-approved entity or by an entity approved in writing by the CSA. When connected to a commercial central station, GCMS, national industrial monitoring station, or residential monitoring station, the service provided will include line security (*i.e.*, the connecting lines are electronically supervised to detect evidence of tampering or malfunction). The level of protection for the alarmed area will include all points of probable entry (perimeter doors and accessible windows) with magnetic contacts and motion detectors positioned in the probable intruder paths from the probable points of entry to the classified information. In accordance with Federal Standard 809, no IDS sensors (magnetic contacts or vibration detectors) will be installed on GSA-approved security containers. CSA authorization on the alarm system description form is required in the following circumstances:

(i) When line security is not available, installation will require two independent means of transmission of the alarm signal from the alarmed area to the monitoring station.

(ii) Alarm installation provides a level of protection, *e.g.* UL's Extent 5, based on patrolling employees and CSA approval of security-in-depth.

(iii) Where law enforcement personnel are the primary alarm response. Under those circumstances, the contractor must obtain written assurance from the police department regarding the ability to respond to alarms in the required response time.

(iv) Alarm signal transmission is over computer-controlled data-networks (*e.g.*, internet, intranet). The CSA will provide specific acceptance criteria (*e.g.*, encryption requirements) for alarms monitored over data networks.

(v) Alarm investigator response time exceeds the parameters outlined in paragraphs (c)(1) through (c)(3) in this section as applicable.

(5) *Certification of compliance*. Evidence of compliance with the requirements of this section will consist of a valid (current) certification by an approved NRTL for the appropriate category of service. This certificate:

(i) Will have been issued to the protected facility by the NRTL, through the alarm service company.

(ii) Serves as evidence that the alarm service company that did the installation is:

(A) Listed as furnishing security systems of the category indicated.

(B) Authorized to issue the certificate of installation as representation that the equipment is in compliance with requirements established by NRTL for the class of alarm system.

(C) Subject to the NRTL inspection program whereby periodic inspections are made of representative alarm installations by NRTL personnel to verify the correctness of certification practices.

(6) *Exceptional cases*. (i) If the requirements in paragraphs (d)(1) through (d)(5) in this section cannot be met, the contractor may request CSA approval for an alarm system meeting one of these conditions, which will be documented on the alarm system description form:

(A) Monitored by a central control station but responded to by a local

(municipal, county, state) law enforcement organization.

(B) Connected by direct wire to alarm receiving equipment located in a local (municipal, county, State) police station or public emergency service dispatch center. This alarm system is activated and deactivated by employees of the contractor, but the alarm is monitored and responded to by personnel of the monitoring police or emergency service dispatch organization. Personnel monitoring alarm signals at police stations or dispatch centers do not require PCLs. Police department response systems may be requested only when:

(*1*) The contractor facility is located in an area where central control station services are not available with line security or proprietary security force personnel, or a contractually-dispatched response to an alarm signal cannot be achieved within the time limits required by the CSA.

(*2*) It is impractical for the contractor to establish a GCMS or proprietary guard force at that location. In this case, installation of these systems must use NRTL-approved equipment and be accomplished by an NRTL-approved entity meeting the applicable testing standard for the category of service.

(ii) An installation proposal, explaining how the system would operate, will be submitted to the CSA. The proposal must include:

(A) Sufficient justification for the granting of an exception and the full name and address of the police department that will monitor the system and provide the required response.

(B) The name and address of the NRTL-approved entity that will install the system, and inspect, maintain, and repair the equipment.

(iii) The response times will be in accordance with the provisions in paragraphs (c)(1) through (c)(3) in this section as applicable. Arrangements will be made with the central monitoring station to immediately notify a contractor representative on receipt of the alarm. The contractor representative is required to go immediately to the facility to investigate the alarm and to take appropriate measures to secure the classified material.

(iv) In exceptional cases where central station monitoring service is available, but no proprietary security force, central station, or subcontracted guard response is available, and where the police department does not agree to respond to alarms, and no other manner of investigative response is available, the CSA may approve cleared employees as the sole means of response.

(e) *Information controls*—(1) *Information management system.* Contractors will establish:

(i) A system to verify that classified information in their custody is used or retained only for a lawful and authorized USG purpose.

(ii) An information management system to protect and control the classified information in their possession regardless of media, to include information processed and stored on authorized information systems.

(2) *Top secret information*. Contractors will establish controls for TOP SECRET information and material to validate procedures are in place to address accountability, need to know, and retention, e.g., demonstrating that TOP SECRET material stored in an electronic format on an authorized classified information system does not need to be individually numbered in series. These controls are in addition to the information management system and must be applied, unless otherwise directed by the applicable CSA, regardless of the media of the TOP SECRET information, to include information processed and stored on authorized information systems. Unless otherwise directed by the applicable CSA, the contractor will establish the following additional controls:

(i) Designate TOP SECRET control officials to receive, transmit, and maintain access and accountability records to TOP SECRET information.

(ii) Conduct an annual inventory of TOP SECRET information and material.

(iii) Establish a continuous receipt system for the transmittal of TOP SECRET information within and outside the contractor location.

(iv) Number each item of TOP SECRET material in a series. Place the

copy number on TOP SECRET documents, regardless of media, and on all associated transactions documents.

(v) Establish a record of TOP SECRET material when the material is:

(A) Completed as a finished document.

(B) Retained for more than 180 days after creation, regardless of the stage of development.

(C) Transmitted outside the contractor location.

(vi) Establish procedures for destruction of TOP SECRET material by two authorized persons.

(vii) Establish destruction records for TOP SECRET material and maintain the records for two years in accordance with §117.13(d)(5) or in accordance with GCA requirements.

(3) *Working papers.* Contractors will establish procedures for the control of classified working papers generated in the preparation of a finished document. The contractor will:

(i) Date working papers when they are created.

(ii) Mark each page of the working papers with the highest classification level of any information contained in them and with the annotation ''WORKING PAPERS.''

(iii) Destroy working papers when no longer needed.

(iv) Mark in the same manner prescribed for a finished document at the same classification level if released outside the contractor location or retained for more than 180 days from the date of origin.

(4) *Combinations to locks.* Contractors will follow the guidance in 32 CFR 2001.45(a)(1) and 2001.43 (c) to address thresholds when combinations will be changed. Combinations to locks used to secure vaults, open storage areas, and security containers that are approved for the safeguarding of classified information will be protected in the same manner as the highest level of classified information that the vault, open storage area, or security container is used to protect.

(5) *Information system passwords.* Contractors will follow the guidance established in 32 CFR 2001.45(a)(2) for the protection of passwords to information systems authorized to process and store classified information at the highest level of classification to which the information system is authorized.

(6) *Reproduction of classified information.* Contractors will follow the guidance established in 32 CFR 2001.45(b) for the reproduction of classified information.

(f) *Transmission of classified information.* Contractors will establish procedures for transmitting and receiving classified information and material in accordance with 32 CFR 2001.46.

(1) *Top secret.* The contractor must have written authorization from the GCA to transmit TOP SECRET material outside the contractor location.

(2) *Transmission outside the United States and its Territorial Areas.* The contractor may transmit classified material to a USG activity outside the United States or a U.S. territorial area only under the provisions of a classified contract or with written authorization from the GCA.

(3) *Commercial delivery entities.* The CSA may approve contractors to transmit SECRET or CONFIDENTIAL information within the United States and its territorial areas by means of a commercial delivery entity that is a current holder of the GSA contract for overnight delivery, and which provides nation-wide, overnight service with computer tracking and reporting features (a list of current contract holders may be found at: *https://www.archives.gov/isoo/faqs#what-is-overnightcarriers*). Such entities do not need to be determined eligible for access to classified information.

(i) Prior to CSA approval, the contractor must establish and document procedures to ensure the proper protection of incoming and outgoing classified packages, including the street delivery address, for each cleared facility intending to use GSA-listed commercial delivery entities for overnight services.

(ii) Contractors will establish procedures for the use of commercial delivery entities in accordance with 32 CFR part 2001. The procedures will:

(A) Confirm that the commercial delivery entity provides nationwide, overnight delivery service with automated in-transit tracking of the classified packages.

(B) Ensure the package integrity during transit and that incoming shipments are received by appropriately cleared personnel.

(C) Not be used for COMSEC, NATO, or FGI.

(4) *Couriers and hand carriers.* Contractors may designate cleared employees as couriers or hand carriers. Contractors will:

(i) Brief employees providing such services on their responsibility to safeguard classified information and keep classified material in their possession at all times.

(ii) Provide employees with an identification card or badge which contains the contractor's name and the name and a photograph of the employee.

(iii) Make arrangements in advance of departure for overnight storage at a USG installation or at a cleared contractor's facility that has appropriate storage capability, if needed.

(iv) Conduct an inventory of the material prior to departure and upon return. The employee will carry a copy of the inventory with them.

(5) *Use of commercial passenger aircraft.* The contractor may authorize cleared employees to hand carry classified material aboard commercial passenger aircraft.

(i) *Routine processing.* Employees hand carrying classified material are subject to routine processing by airline security agents. Hand-held packages will normally be screened by x-ray examination. If security personnel are not satisfied with the results of the inspection and requests the prospective passenger to open a classified package for visual examination, the traveler must inform the screener that the carry-on items contain USG classified information and cannot be opened. Under no circumstances may traveler or security personnel open the classified material unless required by customs or other government officials.

(ii) *Special processing.* The contractor will contact the appropriate air carrier in advance to explain the particular circumstances and obtain instructions on the special screening procedures to follow when:

(A) Routine processing would subject the classified material to compromise or damage.

(B) Visual examination is or may be required to successfully screen a classified package.

(C) Classified material is in specialized containers, which due to its size, weight, or other physical characteristics cannot be routinely processed.

(iii) *Authorization letter.* Contractors will provide employees with written authorization to hand carry classified material on commercial aircraft that includes:

(A) Full name, date of birth, height, weight, and signature of the traveler and statement that he or she is authorized to transmit classified material.

(B) Description of the type of identification the traveler will present on request.

(C) Description of the material being hand carried, with a request that it be exempt from opening.

(D) Identification of the points of departure, destination, and known transfer points.

(E) Name, telephone number, and signature of the FSO, and the location and telephone number of the CSA.

(6) *Escorts.* If an escort is necessary to ensure the protection of the classified information being transported, the contractor will assign a sufficient number to each classified shipment to ensure continuous surveillance and control over the shipment while in transit. The contractor will furnish escorts with specific written instructions and operating procedures prior to shipping that include:

(i) Name and address of persons, including alternates, to whom the classified material is to be delivered.

(ii) Receipting procedures.

(iii) Means of transportation and the route to be used.

(iv) Duties of each escort during movement, during stops end route, and during loading and unloading operations.

(v) Emergency and communication procedures.

(g) *Destruction.* Contractors will:

(1) Destroy classified material in their possession based on the disposition instructions in the contract security classification specification or equivalent.

(2) Follow the guidance for destruction of classified material in accordance with 32 CFR 2001.47 and the destruction equipment standards in accordance with 32 CFR 2001.42(b). See *https://www.nsa.gov/ resources/everyone/ media-destruction/* and any CSA provided guidance for additional information.

(h) *Disclosure.* Contractors will establish processes by which classified information is disclosed only to authorized persons.

(1) *Disclosure to employees.* Contractors are authorized to disclose classified information to their cleared employees with the appropriate eligibility for access to classified information and need to know as necessary, including cleared employees across the MFO, when applicable, for the performance of tasks or services essential to the fulfillment of a classified contract or subcontract.

(2) *Disclosure to subcontractors.* (i) Contractors:

(A) Are authorized to disclose classified information to a cleared subcontractor with the appropriate entity eligibility determination (also known as a facility security clearance) and need to know when access to classified information is necessary for the performance of tasks or services essential to the fulfillment of a prime contract or a subcontract.

(B) Will convey appropriate classification guidance for the classified information to be disclosed with the subcontract in accordance with §117.13.

(ii) The CSA must have:

(A) Made a determination of eligibility for access to classified information for the subcontractor, at the same level, or higher, than the classified information to be disclosed, to allow for such disclosures.

(B) Approved storage capability for classified material at the subcontractor location if a physical transfer of classified material occurs.

(3) *Disclosure between parent and subsidiaries.* (i) Contractors:

(A) Are authorized to disclose classified information between parent and subsidiary entities with the appropriate entity eligibility determination (also known as a facility security clearance) and need to know when access to classified information is necessary for the performance of tasks or services essential to the fulfillment of a prime or subcontract.

(B) Will convey appropriate classification guidance with the agreement or procurement action that necessitates the disclosure.

(ii) *The CSA must have:*

(A) Made a determination of eligibility for access to classified information for both the parent and subsidiary, at the same level, or higher, than the classified information to be disclosed, to allow for such disclosures.

(B) Approved storage capability for classified material at the parent and the subsidiary if a physical transfer of classified material occurs.

(4) *Disclosure to federal agencies.* Contractors will not disclose classified information received or generated under a contract from one agency to any other federal agency unless specifically authorized by the agency that has classification jurisdiction over the information.

(5) *Disclosure of classified information to foreign persons.* Contractors will not disclose classified information to foreign persons unless specified by the contract and release of the information is authorized in writing by the government agency having classification jurisdiction over the information involved, *i.e.* the DOE for RD and FRD (also see §117.23), the NSA for COMSEC, the DNI for SCI, and all other executive branch departments and agencies for classified information under their respective jurisdictions.

(6) *Disclosure to other contractors.* Contractors will not disclose classified information to another contractor except in furtherance of a contract, subcontract, or other GCA purpose without the authorization of the GCA, if such authorization is required by contract.

(7) *Disclosure of classified information in connection with litigation.* Contractors will not disclose classified information to:

(i) Attorneys hired solely to represent the contractor in any civil or criminal case in federal or State courts unless the disclosure is specifically authorized by the agency that has jurisdiction over the information.

(ii) Any federal or state court except on specific instructions of the agency, which has jurisdiction over the information or the attorney representing the United States in the case.

(8) *Disclosure to the public.* Contractors will not disclose classified information to the public. Contractors will not disclose unclassified information pertaining to a classified contract to the public without prior review and clearance as specified in the Contract Security Classification Specification, or equivalent, for the contract or as otherwise specified by the GCA. The procedures of this paragraph also apply to information pertaining to classified contracts intended for use in unclassified brochures, promotional sales literature, reports to stockholders, or similar material.

(i) The contractor will:

(A) Submit requests for approval through the activity specified in the GCA-provided classification guidance for the contract involved.

(B) Include in each request the approximate date the contractor intends to release the information for public disclosure and identify the media to be used for the initial release.

(C) Retain a copy of each approved request for release for a period of one inspection cycle for review by the CSA.

(D) Clear all information developed subsequent to the initial approval through the appropriate office prior to public disclosure.

(ii) Unless specifically prohibited by the GCA, the contractor does not need to request approval for disclosure of:

(A) The fact that a contract has been received, including the subject of the contract or type of item in general terms provided the name or description of the subject is not classified.

(B) The method or type of contract.

(C) Total dollar amount of the contract unless that information equates to:

(*1*) A level of effort in a sensitive research area.

(*2*) Quantities of stocks of certain weapons and equipment that are classified.

(D) Whether the contract will require the hiring or termination of employees.

(E) Other information that from time-to-time may be authorized on a case-by-case basis in a specific agreement with the contractor.

(F) Information previously officially approved for public disclosure.

(iii) Information that has been declassified is not authorized for public disclosure. If the information is comingled with CUI, or qualifies as CUI once declassified, it will be marked and protected as CUI until it is decontrolled pursuant to 32 CFR part 2002 and reviewed for public release. If the information does not qualify as CUI, it will be protected in accordance with the basic safeguarding requirements in 48 CFR 52.204–21 and subject to the agency's public release procedures. Contractors will request approval for public disclosure of declassified information in accordance with the procedures of this paragraph.

(i) *Disposition.* Contractors will:

(1) Establish procedures for review of their classified holdings on a recurring basis to ensure the classified holdings are in support of a current contract or authorization to retain beyond the end of the contract period.

(2) Destroy duplicate copies as soon as practical.

(3) For disposition of classified material not received under a specific contract:

(i) Return or destroy classified material received with a bid, proposal, or quote if the bid, proposal, or quote is not:

(A) Submitted or is withdrawn within 180 days after the opening date of bids, proposals, or quotes.

(B) Accepted within 180 days after notification that a bid, proposal, or quote has not been accepted.

(ii) If the classified material was not received under a specific contract, such as material obtained at classified meetings or from a secondary distribution center, return or destroy the classified material within one year after receipt.

(j) *Retention.* The provisions of §117.13(d)(5) apply for retention of classified material upon completion of a classified contract.

(1) If contractors propose to retain copies of classified material beyond 2 years, the contractor will identify:

(i) TOP SECRET material identified in a list of specific documents unless

the GCA authorizes identification by subject and approximate number of documents.

(ii) SECRET and CONFIDENTIAL material may be identified by general subject and the approximate number of documents.

(iii) Contractors will include a statement of justification for retention beyond two years based on if the material:

(A) Is necessary for the maintenance of the contractor's essential records.

(B) Is patentable or proprietary data to which the contractor has the title.

(C) Will assist the contractor in independent research and development efforts.

(D) Will benefit the USG in the performance of other prospective or existing agency contracts.

(E) Will benefit the USG in the performance of another active contract and will be transferred to that contract (specify contract).

(2) If the GCA does not authorize retention beyond two years, the contractor will destroy all classified material received or generated in the performance of a classified contract unless it has been declassified or the GCA has requested that the material be returned.

(k) *Termination of security agreement.* Notwithstanding the provisions for retention outlined in paragraph (i) in this section, in the event that the CSA terminates the contractor's eligibility for access to classified information, the contractor will return all classified material in its possession to the GCA concerned, or dispose of such material in accordance with instructions from the CSA.

(l) *Safeguarding CUI.* While outside the requirements of the NISPOM, when a classified contract also includes provisions for protection of CUI, contractors will comply with those contract requirements.

§ 117.16 Visits and meetings.

(a) *Visits.* This paragraph applies when, for a lawful and authorized USG purpose, it is anticipated that classified information will be disclosed during a visit to a cleared contractor facility or to a USG facility.

(1) *Classified visits.* The number of classified visits will be held to a minimum. The contractor:

(i) Must determine that the visit is necessary and the purpose of the visit cannot be achieved without access to, or disclosure of, classified information.

(ii) Will establish procedures to ensure positive identification of visitors, appropriate PCL, and need-to-know prior to the disclosure of any classified information.

(iii) Will establish procedures to ensure that visitors are only afforded access to classified information consistent with the purpose of the visit.

(2) *Need-to-know determination.* The responsibility for determining need-to-know in connection with a classified visit rests with the individual who will disclose classified information during the visit. Need-to-know is generally based on a contractual relationship between the contractors. In other circumstances, disclosure of the information will be based on an assessment that the receiving contractor has a bona fide need to access the information in furtherance of a GCA purpose.

(3) *Visits by USG representatives.* Representatives of the USG, when acting in their official capacities as inspectors, investigators, or auditors, may visit a contractor's facility, provided these representatives present appropriate USG credentials upon arrival.

(4) *Visit authorization.* (i) If a visit requires access to classified information, the host contractor will verify the visitor's PCL level. Verification of a visitor's PCL may be accomplished by a review of a CSA-designated database that contains the information or by a visit authorization letter (VAL) provided by the visitor's employer.

(ii) If a CSA-designated database is not available and a VAL is required, contractors will include in all VALs:

(A) Contractor's name, employee's name, address, and telephone number, assigned commercial and government entity (CAGE) code, if applicable, and certification of the level of the entity eligibility determination.

(B) Name, date and place of birth, and citizenship of the employee intending to visit.

(C) Certification of the proposed visitor's PCL and any special access authorizations required for the visit.

(D) Name of person(s) to be visited.

(E) Purpose and sufficient justification for the visit to allow for a determination of the necessity of the visit.

(F) Date or period during which the VAL is to be valid.

(5) *Long term visitors.* (i) When USG employees or employees of one contractor are temporarily stationed at another contractor's facility, the security procedures of the host contractor will govern.

(ii) USG personnel assigned to or visiting a contractor facility and engaged in oversight of an acquisition program will retain control of their work product. Classified work products of USG employees will be handled in accordance with this rule. Contractor procedures will not require USG employees to relinquish control of their work products, whether classified or not, to a contractor.

(iii) Contractor employees at USG installations will follow the security requirements of the host. This does not relieve the contractor from security oversight of their employees who are long-term visitors at USG installations.

(b) *Classified meetings.* This paragraph applies to a conference, seminar, symposium, exhibit, convention, training course, or other such gathering during which classified information is disclosed, hereafter called a ''meeting.'' Disclosure of classified information to large diverse audiences such as conferences increases security risks. Classified disclosure at such meetings may occur when it serves a government purpose and adequate security measures have been provided in advance.

(1) *Meeting conducted by a cleared contractor.* If conducted by a cleared contractor, the meeting is authorized by a USG agency that has agreed to assume security jurisdiction. The USG agency:

(i) Must approve security arrangements, announcements, attendees, and the location of the meeting.

(ii) May delegate certain responsibilities to a cleared contractor for the security arrangements and other actions necessary for the meeting under the general supervision of the USG agency.

(2) *Request for authorization.* Contractors desiring to conduct meetings that require sponsorship will submit their requests to the USG agency that has principal interest in the subject of each meeting. Requests for authorization will include:

(i) An explanation of the USG purpose to be served by disclosing classified information at the meeting and why the use of conventional channels for release of the classified information will not advance those interests.

(ii) The subject of the meeting and scope of classified topics, to include the classification level, to be disclosed at the meeting.

(iii) The expected dates and location of the meeting.

(iv) The general content of the proposed announcement or invitation to be sent to prospective attendees or participants.

(v) The identity of any other nongovernment organization involved and a full description of the type of support it will provide.

(vi) A list of any foreign representatives (including their nationality, name, organizational affiliation) whose attendance at the meeting is proposed.

(vii) A description of the security arrangements necessary for the meeting to comply with the requirements of this rule.

(3) *Locations of meetings.* Classified sessions will be held only at a USG installation or a cleared contractor facility where adequate physical security and procedural controls have been approved. The authorizing USG agency is responsible for evaluating and approving the location proposed for the meeting.

(4) *Security arrangements for meetings.* The contractor will develop the security measures and procedures to be used and obtain the authorizing agency's approval. The security arrangements must provide:

(i) *Announcements.* Approval of the authorizing agency will be obtained for all announcements of the meeting.

(A) Announcements will be unclassified and will be limited to a general description of topics expected to be presented, names of speakers, and administrative instructions for requesting invitations or participation. Classified

presentations will not be solicited in the announcement.

(B) When the meeting has been approved, announcements may only state that the USG agency has authorized the conduct of classified sessions and will provide necessary security assistance.

(C) The announcement will further specify that security clearances and justification to attend classified sessions are to be forwarded to the authorizing agency or its designee.

(D) Invitations to foreign persons will be sent by the authorizing USG agency.

(ii) *Clearance and need-to-know.* All persons in attendance at classified sessions will possess the requisite clearance and need-to-know for the information to be disclosed.

(A) Need-to-know will be determined by the authorizing agency or its designee based on the justification provided.

(B) Attendance will be authorized only to those persons whose security clearance and justification for attendance have been verified by the security officer of the organization represented.

(C) The names of all authorized attendees or participants must appear on an access list with entry permitted to the classified session only after verification of the attendee's identity based on presentation of official photographic identification such as a passport, contractor or USG identification card.

(iii) *Presentations.* Classified information must be authorized for disclosure in advance by the USG agency having jurisdiction over the information to be presented.

(A) Individuals making presentations at meetings will provide sufficient classification guidance to enable attendees to identify what information is classified and the level of classification.

(B) Classified presentations will be delivered orally or visually.

(C) Copies of classified presentation materials will not be distributed at the classified meeting, and any classified notes or electronic recordings of classified presentations will be classified, safeguarded, and transmitted as required by this rule.

(iv) *Physical security.* The physical security measures for the classified sessions will provide for control of, access to, and dissemination of, the classified information to be presented and will provide for secure storage capability, if necessary.

(5) *Disclosure authority at meetings.* Authority to disclose classified information at meetings, whether disclosure is by officials of industry or USG, must be granted by the USG agency or activity that has classification jurisdiction over the information to be disclosed. Each contractor that desires to disclose classified information at a meeting is responsible for requesting and obtaining disclosure approvals. Associations are not responsible for ensuring that classified presentations and papers of other organizations have been approved for disclosure. A contractor desiring to disclose classified information at a meeting will:

(i) Obtain prior written authorization for each proposed disclosure of classified information from the USG agency having jurisdiction over the information involved.

(ii) Furnish a copy of the disclosure authorization to the USG agency sponsoring the meeting.

(6) *Requests to attend classified meetings.* Before a contractor employee can attend a classified meeting, the contractor will provide justification for why the employee requires access to the classified information, cite the classified contract or GCA program or project involved, and forward the information to the authorizing USG agency.

§ 117.17 Subcontracting.

(a) *Prime contractor responsibilities*—(1) *Responsibilities.* Before a prime contractor may release or disclose classified information to a subcontractor, or cause classified information to be generated by a subcontractor, a determination that access to classified information will be required and such access serves a legitimate USG requirement for the performance of a ''classified contract'' in accordance with §117.9(a) must be made. Prime contractors are responsible for communicating the appropriate security requirements to all subcontractors.

(i) A ''security requirements clause'' and a ''Contract Security Classification Specification,'' or equivalent, will be incorporated in the solicitation and in the subcontract. (See the ''security requirements clause'' in the prime contract.)

(ii) The subcontractor must possess an appropriate entity eligibility determination and a classified information safeguarding capability if possession of classified information will be required.

(A) If access to classified information will not be required in the pre-award phase, prospective subcontractors are not required to possess an entity eligibility determination to receive or bid on the solicitation.

(B) If a prospective subcontractor requires access to classified information during the pre-award phase and does not have the appropriate entity eligibility determination or a classified information safeguarding capability, the prime contractor will request the CSA of the subcontractor to initiate the necessary action.

(iii) If access to classified information will not be required, the contract is not a classified contract within the meaning of this rule. If the prime contract contains requirements for release or disclosure of protected information that is not classified, such as CUI, the requirements will be incorporated in the solicitation and the subcontract and are not covered by this rule.

(2) *Prospective subcontractors entity eligibility determinations.* (i) The prime contractor will verify whether the prospective subcontractors have the appropriate entity eligibility determination and also a classified information safeguarding capability, if a subcontract requirement. This determination can be made if there is an existing contractual relationship between the parties involving classified information of the same or higher category, and must be verified by accessing the CSA-designated database, or by contacting the CSA.

(ii) If a prospective subcontractor does not have the appropriate entity eligibility determination or a classified information safeguarding capability, the prime contractor will request that the CSA of the subcontractor initiate the necessary action.

(A) Requests will include, at a minimum, the full name, address, and contact information for the requester; the full name, address, and contact information for a contact at the facility to be processed for an entity eligibility determination; the level of clearance and the required classified information safeguarding capability; and full justification for the request.

(B) Requests for safeguarding capability will include a description, quantity, end-item, and classification of the information related to the proposed subcontract.

(C) Other factors necessary to help the CSA determine if the prospective subcontractor meets the requirements of this rule will be identified, such as any special access requirements.

(3) *Lead time for entity eligibility determination when awarding to an uncleared subcontractor.* Requesting contractors will allow sufficient lead time in connection with the award of a classified subcontract to enable an uncleared bidder to be processed for the necessary entity eligibility determination. When the entity eligibility determination cannot be granted in sufficient time to qualify the prospective subcontractor for participation in the current procurement action, the CSA will continue the entity eligibility determination processing action to qualify the prospective subcontractor for future contract consideration provided:

(i) The delay in processing the entity eligibility determination was not caused by a lack of cooperation on the part of the prospective subcontractor.

(ii) Future classified negotiations may occur within 12 months.

(iii) There is reasonable likelihood the subcontractor may be awarded a classified subcontract.

(iv) *Subcontracting that involves access to FGI.* (A) A U.S. contractor may award a subcontract that involves access to FGI to another U.S. contractor after verifying with the CSA that the prospective subcontractor has the appropriate entity eligibility determination and a classified information storage capability, and review of the prime contract to determine if there are any contractual limitations for approval before awarding a subcontract. The contractor awarding a subcontract will

provide appropriate security classification guidance and incorporate the pertinent security provisions in the subcontract.

(B) The contractor cannot award subcontracts involving FGI to a contractor in a third country or to a U.S. entity with a limited entity eligibility determination based on third-country FOCI without the express written consent of the originating foreign government. The CSA will coordinate with the appropriate foreign government authorities.

(b) *Security classification guidance.* (1) Prime contractors will ensure that a Contract Security Classification Specification, or equivalent, is incorporated in each classified subcontract.

(i) When preparing classification guidance for a subcontract, the prime contractor may extract pertinent information from:

(A) The Contract Security Classification Specification, or equivalent, issued with the prime contract.

(B) Security classification guides issued with the prime contract.

(C) Any security guides that provide guidance for the classified information furnished to, or that will be generated by, the subcontractor.

(ii) The Contract Security Classification Specification, or equivalent, prepared by the prime contractor will be certified by a designated official of the contractor.

(iii) In the absence of exceptional circumstances, the classification specification will not contain any classified information. If classified supplements are required as part of the Contract Security Classification Specification, or equivalent, they will be identified and forwarded to the subcontractor by separate correspondence.

(2) An original Contract Security Classification Specification, or equivalent, will be included with each RFQ, RFP, IFB, or other solicitation to ensure that the prospective subcontractor is aware of the security requirements of the subcontract and can plan accordingly. An original Contract Security Classification Specification, or equivalent, will also be included in the subcontract awarded to the successful bidder.

(3) A revised Contract Security Classification Specification, or equivalent, will be issued as necessary during the lifetime of the subcontract when the security requirements change.

(4) Requests for public release by a subcontractor will be forwarded through the prime contractor to the GCA.

(c) *Responsibilities upon completion of the subcontracts.* (1) Upon completion of the subcontract, the subcontractor may retain classified material received or generated under the subcontract for a two-year period, in accordance with the provisions in §117.13(d)(5).

(2) If retention is required beyond the two-year period, the subcontractor must request written retention authority through the prime contractor to the GCA, including the information required by §117.15(j).

(3) If retention authority is approved by the GCA, the prime contractor will issue a final Contract Security Classification Specification, or equivalent, annotated to provide the retention period and final disposition instructions.

(d) *Notification of invalidation, marginal, or unsatisfactory conditions.* The prime contractor will be notified if the CSA discovers marginal or unsatisfactory conditions at the subcontractor's facility or if the CSA invalidates the subcontractor's facility clearance. Once notified, the prime contractor will follow the instructions received on what action, if any, should be taken in order to safeguard classified material relating to the subcontract.

§117.18 Information system security.

(a) *General.* (1) Contractor information systems that are used to capture, create, store, process, or distribute classified information must be properly managed to protect against unauthorized disclosure of classified information. The contractor will implement protective measures using a risk-based approach that incorporates minimum standards for their insider threat program in accordance with CSA-provided guidance.

(2) The CSA will issue guidance based on requirements for federal systems, pursuant to 44 U.S.C. Ch. 35 of subchapter II, also known as the ''Federal Information Security Modernization

Act,'' and as set forth in National Institute of Standards and Technology (NIST) Special Publication 800–37 (available at: *https://csrc.nist.gov/ publications/detail/sp/ 800-37/rev-2/final*), Committee on National Security Systems (CNSS) Instruction 1253 (available at: *https://www.cnss.gov/ CNSS/ openDoc.cfm?QwPYrAJ5Ldq +s+jvttTznQ==*), and other applicable CNSS and NIST publications (*e.g.*, NIST Special Publication 800–53).

(b) *Information system security program.* The contractor will maintain an information system security program that supports overall information security by incorporating a risk-based set of management, operational, and technical security controls in accordance with CSA-provided guidance. The contractor will incorporate into the program:

(1) Policies and procedures that reduce information security risks to an acceptable level and address information security throughout the information system life cycle.

(2) Plans and procedures to assess, report, isolate, and contain data spills and compromises, to include sanitization and recovery methods.

(3) Information system security training for authorized users, as required in CSA provided guidance.

(4) Policies and procedures that address key components of the contractor's insider threat program, such as:

(i) User activity monitoring network activity, either automated or manual.

(ii) Information sharing procedures.

(iii) A continuous monitoring program.

(iv) Protecting, interpreting, storing, and limiting access to user activity monitoring automated logs to privileged users.

(5) Processes to continually evaluate threats and vulnerabilities to contractor activities, facilities, and information systems to ascertain the need for additional safeguards.

(6) Change control processes to accommodate configuration management and to identify security relevant changes that may require re-authorization of the information system.

(7) Methods to ensure users are aware of rights and responsibilities through the use of banners and user agreements.

(c) *Contractor responsibilities*—(1) *Certification.* The contractor will:

(i) Certify to the CSA that the security program for information systems to process classified information addresses management, operation, and technical controls in accordance with CSA-provided guidelines.

(ii) Provide adequate resources to the information system security program and organizationally align to ensure prompt support and successful execution of a compliant information system security program.

(2) *ISSM.* Contractors that are or will be processing classified information on an information system will appoint an employee ISSM. The contractor will confirm that the ISSM is adequately trained, has sufficient experience, and possesses technical competence commensurate with the complexity of the information system. The ISSM will:

(i) Oversee the development, implementation, and evaluation of the contractor's information system program for contractor management, information system personnel, users, and others as appropriate.

(ii) Coordinate with the contractor's insider threat senior program official so that insider threat awareness is addressed in the contractor's information system security program.

(iii) Develop, document, and monitor compliance of the contractor's information system security program in accordance with CSA-provided guidelines for management, operational, and technical controls.

(iv) Verify self-inspections are conducted at least every 12 months on the contractor's information systems that process classified information, and that corrective actions are taken for all identified findings.

(v) Certify to the CSA in writing that the systems security plan (SSP) is implemented for each authorized information systems, specified in the SSP; the specified security controls are in place and properly tested; and the information system continues to function as described in the SSP.

(vi) Brief users on their responsibilities with regard to information system security and verify that contractor personnel are trained on the security restrictions and safeguards of the information system prior to access to an authorized information system.

(vii) Develop and maintain security documentation of the security authorization request to the CSA. Documentation may include:

(A) SSPs.

(B) Security assessment reports.

(C) Plans of actions and milestones.

(D) Risk assessments.

(E) Authorization decision letters.

(F) Contingency plans.

(G) Configuration management plans.

(H) Security configuration checklists.

(I) System interconnection agreements.

(3) *Information systems security officer (ISSO).* The ISSM may assign an ISSO. If assigned, the ISSO will:

(i) Verify the implementation of the contractor's information system security program as delegated by the ISSM.

(ii) Ensure continuous monitoring strategies and verify corrective actions to the ISSM.

(iii) Conduct self-inspections and verify corrective actions to the ISSM.

(4) *Information system users.* All information system users will:

(i) Comply with the information system security program requirements as part of their responsibilities for protecting classified information.

(ii) Be accountable for their actions on an authorized information system.

(iii) Not share any authentication mechanisms (including passwords) issued for the control of their access to an information system.

(iv) Protect authentication mechanisms at the highest classification level and most restrictive classification category of information to which the mechanisms permit access.

(v) Be subject to monitoring of their activity on any classified network, understanding that the results of such monitoring can be used against them in a criminal, security, or administrative proceeding or action.

(vi) Notify the ISSM or ISSO when access to a classified system is no longer required.

(d) *Information system security lifecycle.* The CSA-provided guidance on the information system security lifecycle is based on the risk management framework outlined in NIST special publication 800–37 that emphasizes:

(1) Building security into information systems during initial development.

(2) Maintaining continuous awareness of the current state of information system security.

(3) Keeping contractor management informed to facilitate risk management decisions.

(4) Supporting reciprocity of information system authorizations.

(e) *Risk management framework.* The risk management framework is a seven-step process used for managing information system security-related risks. These steps will be used to help ensure security capabilities provided by the selected security controls are implemented, tested, validated, and approved by the USG authorizing official with a degree of assurance appropriate for the information system. This process accommodates an on-going risk mitigation strategy.

(1) *Prepare.* The contractor will execute essential activities at the organization, mission and business process, and system levels of the organization to help prepare the organization to manage its security and privacy risks using the Risk Management Framework.

(2) *Categorize.* The contractor will categorize the information system and the information processed, stored, and transmitted by the information system based on an impact analysis. Unless imposed by contract, the information system baseline is moderate-confidentiality, low-integrity, and low-availability.

(3) *Select.* The contractor will select an initial set of baseline security controls for the information system based on the security categorization; tailoring and supplementing the security control baseline as needed based on an organizational assessment of risk and local conditions.

(4) *Implement.* The contractor will implement the security controls and document how the controls are deployed

within the information system and the operational environment.

(5) *Assess.* The contractor will assess the security controls to determine the extent to which the controls are implemented correctly, operating as intended, and producing the desired outcome with respect to meeting the security requirements for the information system. The contractor will review and certify to the CSA that all systems have the appropriate protection measures in place.

(6) *Authorize.* The CSA will use the information provided by the contractor to make a timely, credible, and risk-based decision to authorize the system to process classified information. The CSA must authorize the system before the contractor can use the system to process classified information.

(7) *Monitor.* The contractor will monitor and assess selected security controls in the information system on an ongoing basis:

(i) Effectiveness of security controls.

(ii) Documentation of changes to the information system and the operational environment.

(iii) Analysis of the security impact of changes to the information system.

(iv) Making appropriate reports to the CSA.

(f) *Unclassified information systems that process, store, or transmit CUI.* While outside the requirements of the NISPOM, contractors will comply with contract requirements regarding contractor information systems that process, store, or transmit CUI.

§ 117.19 International security requirements.

(a) *General.* This section provides information and procedures governing the protection of classified information in international programs.

(b) *Disclosure of classified U.S. information to foreign interests*—(1) *Applicable federal law.* The transfer of articles, services, and related data to a foreign person, within or outside the United States, or the movement of such material or information to any destination outside of the legal jurisdiction of the United States constitutes an export. Depending on the nature of the articles or data, most exports are pursuant to (1) 22 U.S.C. chapter 39, also known and referred to in this rule as the ''Arms Export Control Act,'' (2) 50 U.S.C. 4801 *et seq.*, also known as the ''Export Control Reform Act of 2018,'' or (3) the AEA. This section applies to those exports that involve classified information.

(2) *Security agreements*—(i) Bilateral security agreements (*e.g.*, General Security of Information Agreements and General Security of Military Information Agreements) are negotiated with various foreign governments. Confidentiality requested by some foreign governments prevents a listing of the countries that have executed these agreements. The bilateral security agreement, negotiated through diplomatic channels:

(A) Requires that each government provide substantially the same degree of protection to classified information released by the other government.

(B) Contains provisions concerning limits on the use of each government's information, including restrictions on third-party transfers and proprietary rights.

(C) Does not commit governments to share classified information, nor does it constitute authority to release classified material to that government.

(D) Satisfies, in part, the eligibility requirements of the Arms Export Control Act concerning the agreement of the recipient foreign government to protect U.S. classified defense articles and classified information.

(ii) The applicable CSA will provide a mechanism for contractors to access, for official purposes, classified general security agreements.

(iii) Industrial security agreements have been negotiated with certain foreign governments that identify the procedures to be used when foreign government classified information is provided to U.S. industry and UUSG classified information is provided to foreign defense industry.

(3) *Authorization for disclosure.* The GCA will provide disclosure guidance.

(i) Contractors will only disclose nonpublic USG information to foreign persons in accordance with specified requirements of the contract. In the absence of any specified requirements the contractor will not disclose non-public USG information to foreign persons.

(ii) Disclosure authorization may be in the form of an export license or other export authorization by a cognizant export authority.

(iii) The contractor may not use disclosure guidance provided by the GCA for a previous contract or program unless so instructed in writing by the GCA or the licensing authority.

(iv) Disclosure and export of classified information, authorized by an appropriate USG disclosure official, by a contractor will ensure the following:

(A) *International agreements.* Contractors may not disclose classified information until agreements are signed by the participating government and disclosure guidance and security arrangements are established. The export of technical data pursuant to such agreements may be exempt by approval of the Department of State or the Department of Commerce.

(B) *Symposia, seminars, exhibitions, and conferences.* Contractors must assure that any foreign nationals who will be attending a classified gathering have the appropriate export license, disclosure authority, and security assurance on file.

(C) *Visits by foreign nationals to the contractor.* The contractor will limit disclosure of classified information to that specific information authorized in connection with an approved visit request and an export authorization, as required.

(D) *Temporary exports.* Classified articles, including articles that require the use of classified information for operation, exported for demonstration purposes must remain under U.S. control. The contractor must obtain an export authorization from the relevant authority (*i.e.,* from the Department of State in accordance with 22 CFR parts 120–130, also known as and referred to in this rule as the ''International Traffic in Arms Regulations,'' or from the Department of Commerce in accordance with 15 CFR parts 730–774, also known as the ''Export Administration Regulations'').

(4) *Direct commercial arrangements.* (i) The disclosure of classified information may be authorized pursuant to a direct commercial sale with the appropriate export authorization. A direct commercial arrangement includes sales, loans, leases, or grants of classified items, including sales under a government agency sales financing program.

(ii) If a proposed disclosure is in support of a foreign government requirement, the contractor should consult with U.S. in-country officials, normally the U.S. Security Assistance/Armaments Cooperation Office or Commercial Counselor.

(A) Before a contractor makes a proposal to a foreign interest that involves the eventual disclosure of U.S. classified information, the contractor must obtain appropriate government disclosure authorization.

(B) Such disclosure authorization does not equate with authorization for export. Export authorization must be obtained from the appropriate regulatory body.

(iii) The contractor will request a FCL assurance for a foreign entity through the CSA from the security authority of the foreign entity's sponsoring government prior to entering into a contractual arrangement with the foreign entity.

(5) *Subcontract security provisions.* (i) A U.S. contractor may be authorized to enter into an agreement involving classified information with a foreign contractor. The U.S. contractor's empowered official will verify the contractor can release the information to a foreign person. Such agreements may include:

(A) Award of a subcontract.

(B) Department of State authorized manufacturing license agreement, technical assistance agreement, or other direct commercial arrangement.

(ii) The contractor will incorporate security provisions into the subcontract document or agreement, and provide security classification guidance by means of a Contract Security Classification Specification, or equivalent.

(iii) The contractor will provide a copy of the signed contract with the provisions and the classification guidance to the CSA.

(iv) If the export authorization specifies that additional security arrangements are necessary for performance on the contract, the contractor will incorporate those additional arrangements by appropriate provision in the

contract or in a separate security document.

(v) The contractor will prepare and maintain a written record that identifies the originator or source of classified information that will be used in providing classified defense articles, material or services to foreign customers. The contractor will maintain this listing with the contractor's record copy of the pertinent export authorization.

(vi) The contractor will include the security provisions in accordance with paragraph (b)(5) in this section in all contracts and subcontracts involving classified information that are awarded to foreign contractors. Contractors must insert the bracketed contract specific information (*e.g.*, applicable country and disposition of classified material) where noted, when using the following security clauses in the contract.

(A) All classified information and material furnished or generated under the contract will be protected to ensure that:

(*1*) The recipient will not release the information or material to any third party without disclosure authorization and export authorization, as appropriate.

(*2*) The recipient will afford the information and material a degree of protection equivalent to that afforded it by the releasing government.

(*3*) The recipient will not use the information and material for other than the purpose for which it was furnished without the prior written consent of the releasing government.

(B) Classified information and material furnished or generated under this contract will be transferred through government channels or other channels specified in writing by the governments of the United States and [insert applicable country]. It will only be transferred to persons who have an appropriate security clearance and an official need for access to the information in order to perform on the contract.

(C) Classified information and material furnished under the contract will be re-marked by the recipient with its government's equivalent security classification markings.

(D) Classified information and material generated under the contract must be assigned a security classification as specified by the Contract Security Classification Specifications, or equivalent, provided with this contract.

(E) All cases in which it is known or there is reason to believe that classified information or material furnished or generated under the contract has been lost or disclosed to unauthorized persons will be reported promptly and fully by the contractor to its government's security authorities.

(F) Classified information and material furnished or generated pursuant to the contract will not be further provided to another potential contractor or subcontractor unless:

(*1*) A potential contractor which is located in the United States or [insert applicable country] has been approved for access to classified information and material by the USG or [insert applicable country] security authorities; or

(*2*) If located in a third country, prior written USG consent is obtained.

(G) Upon completion of the contract, all classified material furnished or generated pursuant to the contract will be [insert whether the material is to be returned or destroyed, or provide other instructions].

(H) The recipient contractor will insert terms that substantially conform to the language of these provisions, including this one, in all subcontracts under this contract that involve access to classified information furnished or generated under this contract.

(c) *FGI*—(1) *General.* The contractor will notify the csa when awarded contracts by a foreign interest that will involve access to classified information. The csa will oversee and ensure implementation of the security requirements of the contract on behalf of the foreign government, including the establishment of channels for the transfer of classified material.

(2) *Contract security requirements.* The foreign entity that awards a classified contract is responsible for providing appropriate security classification guidance and any security requirements clauses. The contractor will report to the CSA when a foreign entity fails to provide classification guidance.

(3) *Marking foreign government classified material.* Foreign government classified material will be marked in accordance with § 117.14(l).

(4) *Foreign Government RESTRICTED Information and ''In Confidence'' Information.* Foreign government RESTRICTED information and ''in confidence'' information will be marked in accordance with § 117.14(m).

(5) *Marking U.S. documents containing FGI.* U.S. documents containing FGI will be marked in accordance with § 117.14(n).

(6) *Marking documents prepared for foreign governments.* Marking documents prepared for foreign governments will be marked in accordance with § 117.14(o).

(7) *Storage and control.* Contractors will store foreign government material and control access generally in the same manner as U.S. classified material of an equivalent classification. Contractors will store foreign government material in a manner that will separate it from other material. Separation can be accomplished by establishing distinct files in a storage container or on an information system.

(8) *Disclosure and use limitations.* (i) FGI is provided by the foreign government to the United States. The contractor will:

(A) Not disclose FGI to nationals of a third country, or to any other third party, or use it for any purpose other than that for which it was provided without the prior written consent of the originating foreign government.

(B) Submit requests for other uses or further disclosure to the GCA for U.S. contracts, and through the CSA for direct commercial contracts.

(ii) Approval of the request by the foreign government does not eliminate the requirement for the contractor to obtain an export authorization.

(9) *Transfer.* The contractor will transfer FGI within the United States and its territories using the same channels as specified for U.S. classified information of an equivalent classification, except that contractors cannot use non-cleared express overnight carriers for FGI.

(10) *Reproduction.* The reproduction of foreign government TOP SECRET or equivalent information requires the written approval of the originating government.

(11) *Disposition.* The contractor:

(i) Will destroy FGI on completion of the contract unless the contract specifically authorizes retention or return of the information to the U.S. GCA or foreign government that provided the information.

(ii) Must witness the destruction of TOP SECRET, execute a destruction certificate, and retain the destruction certificate for two years.

(12) *Reporting of improper receipt of foreign government material.* The contractor will report improper receipt of foreign government material in accordance with § 117.8(c)(13).

(13) *Subcontracting.* Subcontracting procedures will be in accordance with § 117.17(a)(4).

(d) *International transfers of classified material*—(1) *General.* This paragraph (d) contains the procedures for international transfers of classified material through government-to-government channels or other arrangements agreed to by the governments involved, otherwise referred to as government-to-government transfers. The requirements in this paragraph (d) do not apply to the transmission of classified material to usg activities outside the united states.

(i) All international transfers of classified material must take place through channels approved by both governments. U.S. control of classified material must be maintained until the material is officially transferred to the intended recipient government through its designated government representative (DGR).

(ii) To ensure government control, written transmission instructions must be prepared for all international transfers of classified material. The contractor is responsible for the preparation of instructions for direct commercial arrangements, and the GCA will prepare instructions for government arrangements.

(iii) The contractor will contact the CSA at the earliest possible stage in deliberations that will lead to the international transfer of classified material. The CSA will advise the contractor on the transfer arrangements, identify the recipient government's

DGR, appoint a U.S. DGR, and ensure that the transportation plan prepared by the contractor or foreign government is adequate.

(iv) The contractor's empowered official is responsible for requests for all export authorizations, including ones that will involve the transfer of classified information.

(2) *Transfers of freight*—(i) *Transportation plan (TP).* (A) A requirement to prepare a TP will be included in each arrangement that involves the international transfer of classified material as freight. The TP will:

(*1*) Describe requirements for the secure shipment of the material from the point of origin to the ultimate destination.

(*2*) Provide for security requirements in the event the transfer cannot be made promptly.

(B) The U.S. and recipient government DGRs will be identified in the TP as well as any requirement for an escort. When there are to be repetitive shipments, a notice of classified consignment will be used.

(ii) *Government agency arrangements.* Classified material to be furnished to a foreign government under such transactions normally will be shipped via government agency-arranged transportation and be transferred to the foreign government's DGR within the recipient government's territory.

(A) The government agency that executes the arrangement is responsible, in coordination with the recipient foreign government, for preparing a TP.

(B) When the point of origin is a U.S. contractor facility, the GCA will provide the contractor with a copy of the TP and the applicable letter of offer and acceptance. If a freight forwarder will be involved in processing the shipment, the GCA will provide a copy of the TP to the freight forwarder.

(C) *Commercial arrangements.* (*1*) The contractor will prepare a TP in coordination with the receiving government. This requirement applies whether the material is moved by land, sea, or air, and applies to U.S. and foreign classified contracts.

(*2*) After the CSA approves the TP, the CSA will forward it to the recipient foreign government security authorities for final coordination and approval. The CSA will notify the contractor upon the concurrence by the respective parties.

(D) *International carriers.* The international transfer of classified material will be made using only ships, aircraft, or other carriers that:

(*1*) Are owned or chartered by the USG or under U.S. registry;

(*2*) Are owned or chartered by or under the registry of the recipient government; or

(*3*) Are other than those described that are expressly authorized to perform this function in writing by the Designated Security Authority of the GCA and the security authorities of the foreign government involved. This authority cannot be delegated and this exception may be authorized only when a carrier described in paragraph (d)(2)(iv)(A) or (d)(2)(iv)(B) in this section is not available and an urgent operational requirement dictates use of the exception.

(E) *Escorts.* (*1*) The contractor must provide escorts for international shipments of SECRET or CONFIDENTIAL material by air.

(*2*) Escorts must have an eligibility determination and access to classified information at the classification level of the material being shipped.

(*3*) Escorts are responsible for ensuring that the classified material being shipped is safeguarded in the event of an emergency stop en route, re-routing of the aircraft, or in the event that the recipient government's representative fails to meet the shipment at its destination.

(*4*) The contractor does not have to provide escorts if:

(*i*) The classified material is shipped by the Defense Transportation System or a U.S. military carrier.

(*ii*) The recipient government DGR has signed for the receipt of the classified material within the United States.

(*iii*) The classified material is shipped via a military carrier of the recipient government or a carrier owned by or registered to the recipient government.

(*iv*) The classified material is shipped via a cleared U.S. commercial freight carrier, so long as the contractor has a written agreement from the U.S. commercial freight carrier to provide an

escort who is eligible for access to classified information and has access to classified information at the classification level of the material being shipped.

(*v*) There are exceptional circumstances, and procedures have been approved by both the USG and the recipient government.

(3) *Secure communications plan.* (i) The contractor is required to meet all requirements outlined in this section, as applicable, for the secure communications plan.

(ii) The secure communications plan may be approved within a program security instruction, SSP, or a government to government agreement by the designated security authorities. A separate memorandum of understanding or memorandum of agreement is not required.

(iii) Additionally, an SSP must be authorized in accordance with §117.18 and the CSA provided guidance.

(4) *Return of material for repair, modification, or maintenance.* (i) A foreign government or foreign contractor may return classified material to a U.S. contractor for repair, modification, or maintenance.

(ii) The approved methods of return will be specified in either the GCA sales arrangement, the security requirements section of a direct commercial sales arrangement or, in the case of material transferred as freight, in the original TP.

(iii) The contractor, on receipt of notification that classified material is to be received, will notify the applicable CSA.

(5) *Use of freight forwarders.* (i) A commercial freight forwarder may be used to arrange for the international transfer of classified material as freight.

(A) The freight forwarder must be under contract to a USG agency, U.S. contractor, or the recipient foreign government.

(B) The contract will describe the specific functions to be performed by the freight forwarder.

(C) The responsibility for security and control of the classified material that is processed by freight forwarders remains with the USG until the freight is transferred to a DGR of the recipient government.

(ii) Only freight forwarders that have a valid determination of eligibility for access to classified information and storage capability for classified material at the appropriate level are eligible to take custody or possession of classified material for delivery as freight to foreign recipients. Freight forwarders that only process unclassified paperwork and make arrangements for the delivery of classified material to foreign recipients do not require an eligibility determination for access to classified information.

(iii) A freight forwarder cannot serve as a DGR.

(6) *Hand carrying classified material.* To meet contractual requirements, the CSA may authorize contractor employees to hand carry classified material outside the United States. SECRET is the highest level of classified material to be carried and it must be of such size and weight that the courier can retain it in his or her possession at all times.

(i) The CSA will ensure that the contractor has made necessary arrangements with U.S. airport security and customs officials and that security authorities of the receiving government approve the plan. If the transfer is under a contract or a bilateral or multinational government program, the GCA will approve the request in writing. The contractor will notify the CSA of a requirement to hand carry at least 5 working days in advance of the transfer.

(ii) The courier must be a full-time employee of the dispatching or receiving contractor who has been determined eligible and has been granted access to classified information.

(iii) The employing contractor will provide the courier with a courier certificate that is consecutively numbered and valid for one journey only. The journey may include more than one stop if approved by the CSA and secure government storage has been arranged at each stop. The courier will return the courier certificate to the dispatching contractor immediately on completion of the journey.

(iv) Before commencement of each journey, the courier will read and initial the notes to the courier attached to the courier certificate and sign the

courier declaration. The contractor will maintain the declaration until completion of the next CSA security review.

(v) The dispatching contractor will inventory, wrap, and seal the material in the presence of the U.S. DGR. The contractor will place the address of the receiving security office and the return address of the dispatching contractor security office on the inner envelope or wrapping and mark it with the appropriate classification. The contractor will place the address of the receiving government's DGR on the outer envelope or wrapping along with the return address of the dispatching contractor.

(vi) The dispatching contractor will prepare three copies of a receipt based on the inventory and list the classified material that is being sent. The dispatching contractor will retain one copy of the receipt. The contractor will pack the other two copies with the classified material. The contractor will obtain a receipt for the sealed package from the courier.

(vii) The dispatching contractor will provide the receiving contractor with 24 work hours advance notification of the anticipated date and time of the courier's arrival and the identity of the courier. The receiving contractor must notify the dispatching contractor if the courier does not arrive within 8 hours of the expected time of arrival. The dispatching contractor will notify its DGR of any delay, unless officially notified otherwise of a change in the courier's itinerary.

(viii) The receiving DGR will verify the contents and sign the receipts enclosed in the consignment. The receiving DGR will return one copy to the courier. On return, the courier will provide the executed receipt to the dispatching contractor.

(ix) Throughout the journey, the courier will maintain the classified material under direct personal control. The courier will not leave the material unattended at any time during the journey, in the transport being used, in hotel rooms, in cloakrooms, or other such location, and will not deposit it in hotel safes, luggage lockers, or in luggage offices. In addition, the courier will not open envelopes or packages containing the classified material en route, unless required by customs or other government officials.

(x) When inspection by government officials is unavoidable, the courier will request that the officials provide written verification that they have opened the package. The courier will notify their employing contractor as soon as possible. The contractor will notify the U.S. DGR. If the inspecting officials are not of the same country as the dispatching contractor, the CSA will notify the designated security authority in the country whose officials inspected the consignment. Under no circumstances will the courier hand over the classified material to customs or other officials for their custody.

(xi) When carrying classified material, the courier will not travel by surface routes through third countries, except as authorized by the CSA. The courier will travel only on carriers described in paragraph (d)(2)(iv) in this section, and will travel direct routes between the United States and the destination.

(7) *Classified material receipts.* (i) The U.S. DGR and the DGR of the ultimate foreign recipient will maintain a continuous chain of receipts to record international transfers of all classified material from the contractor through the dispatching DGR and recipient DGR to the ultimate foreign recipient. The dispatching contractor will retain:

(A) An active suspense record until return of applicable receipts for the material.

(B) A copy of the external receipt that records the passing of custody of the package containing the classified material and each intermediate consignee in a suspense file until the receipt that is enclosed in the package is signed and returned.

(ii) The contractor will initiate follow-up action through the CSA if the signed receipt is not returned within 45 days.

(8) *Contractor preparations for international transfers of classified material pursuant to direct commercial and foreign military sales.* To prepare for international transfers the contractor will:

(i) Identify each party to be involved in the transfer in the applicable contract or agreement and in the license application or letter request.

(ii) Notify the appropriate U.S. DGR when the material is ready.

(iii) When the classified material is also ITAR-controlled, provide documentation or written certification by an empowered official (as defined in the ITAR) to the U.S. DGR. This documentation must verify that the classified shipment is within the limitation scope of the pertinent export authorization or an authorized exemption to the export authorization requirements, or is within the limitations of the pertinent GCA contract.

(iv) Have the classified shipment ready for visual review and verification by the DGR. As a minimum this will include:

(A) Preparing the packaging materials, address labels, and receipts for review.

(B) Marking the contents with the appropriate U.S. classification or the equivalent foreign government classification, downgrading, and declassification markings, as applicable.

(C) Ensuring that shipping documents (including, as appropriate, the shipper's export declaration) include the name and contact information for the CSA that validates the license or letter authorization, and the FSO or designee for the particular transfer.

(D) Sending advance notification of the shipment to the CSA, the recipient, and to the freight forwarder, if applicable. The notification will require that the recipient confirm receipt of the shipment or provide notice to the contractor if the shipment is not received in accordance with the prescribed shipping schedule.

(9) *Transfers pursuant to an ITAR exemption.* (i) The contractor will provide to the DGR valid documentation (*i.e.*, license, export authorization, letter of offer and acceptance, or agreement) to verify the export authorization for classified technical data information or certain defense articles to be transferred under an exemption to the ITAR exemption. The documentation must include a copy of the Department of State Form DSP–83 associated with the original export authorization.

(ii) Classified technical data information or certain defense articles to be exported pursuant to ITAR exemptions will be supported by a written authorization signed by an authorized exemption official or exemption certifying official who has been appointed by the GCA's responsible disclosure authority.

(A) The contractor will provide a copy of the authorization to the CSA.

(B) The CSA will provide a copy of the authorization to the Department of State Directorate of Defense Trade Controls (DDTC).

(e) *International visits*—(1) *General.* (i) The contractor will establish procedures to monitor international visits by their employees and visits or assignments of foreign nationals to the contractor location. Doing so will ensure that the disclosure of, and access to, classified export-controlled articles related to classified information are limited to those that are approved by an export authorization.

(ii) Contractors cannot use visit authorizations to employ or otherwise acquire the services of foreign nationals that require access to export-controlled information. An export authorization is required for such situations.

(2) *International visits by U.S. contractor employees*—(i) *Types and purpose of international visits*—(A) *One-time visits.* A visit for a single, short-term occasion (normally 30 days or fewer) for a specified purpose.

(B) *Recurring visits.* Intermittent, recurring visits over a specified period of time, normally up to one year in duration, in support of a government-approved arrangement, such as an agreement, contract, or license. By agreement of the governments, the term of the authorization may be for the duration of the arrangement, subject to annual review, and validation.

(C) *Long-term visits.* A single visit for an extended period of time, normally up to one year, in support of an agreement, contract, or license.

(D) *Emergency visits.* A visit related to a specific government-approved contract, international agreement or announced request for proposal, and failure to make the visit could be reasonably expected to seriously jeopardize performance on the contract or program, or result in the loss of a contract opportunity.

(ii) *Requests for visits.* Visit requests are necessary to make administrative

arrangements and disclosure decisions and obtain security assurances.

(A) Many foreign governments require the submission of a visit request for all visits to a government facility or a cleared contractor facility, even though classified information may not be involved. They may also require that the requests be received a specified number of days in advance of the visit.

(B) The contractor can obtain information pertaining to the visit requirements of other governments and the NATO from the CSA. The contractor must obtain an export authorization if classified export controlled articles or technical data is to be disclosed or if information to be divulged is related to a classified USG program, unless the disclosure of the information is covered by other agreements, authorizations, or exemptions.

(iii) *Request format.* Contractors will request a visit request template from the CSA. The contractor will forward the visit request to the security official designated by the CSA. The host for the visit should coordinate the visit in advance with appropriate government authorities who are required to approve the visit. It is the visitor's responsibility to ensure that such coordination has occurred.

(iv) *Government agency programs.* The contractor will submit a visit request when contractor employees are to visit foreign government facilities or foreign contractors on USG orders in support of a government contract or agreement.

(v) *Requests for emergency visits.* The requester will include in the emergency visit request, and any other requirements in accordance with applicable CSA guidance:

(A) The complete name, position, address, and telephone number of the person to be visited.

(B) A knowledgeable foreign government point of contact.

(C) The identification of the contract, agreement, or program and the justification for submission of the emergency visit request.

(vi) *Requests for recurring visits.* Contractors will request recurring visit authorizations at the beginning of each program. After approval of the request, the contractor may arrange individual visits directly with the security office of the location to be visited subject to 5 working days advance notice.

(vii) *Amendments.* (A) Once visit requests have been approved or are being processed, the contractor may amend them only to change, add, or delete names and change dates.

(B) The contractor cannot amend visit requests to specify dates that are earlier than originally specified.

(C) The contractor cannot amend emergency visit authorizations.

(3) *Classified visits by foreign nationals to U.S. contractors*—(i) *Requests for classified visits.* Requests for visits by foreign nationals to U.S. contractors that will involve the disclosure of classified information may require authorization by the Department of State. Classified visits by foreign nationals must be processed by government national security authorities on behalf of the contractor through the sponsoring foreign government (normally the visitor's embassy) to the USG for approval.

(ii) *USG approval.* The USG may approve or deny the request or decline to render a decision.

(A) *USG-Approved Visits.* (*1*) USG approved classified visits cannot be used to avoid the export licensing requirements for commercial initiatives.

(*2*) When the cognizant USG agency approves a classified visit, the notification of approval will contain instructions on the level and scope of classified and unclassified information authorized for disclosure, as well as any limitations.

(*3*) Final acceptance for the visit will be subject to the concurrence of the contractor. The contractor will notify the USG agency when a classified visit is not desired.

(B) *Visit request denials.* (*1*) If the USG agency does not approve the disclosure of the information related to the proposed classified visit, it will deny the classified visit request. The USG agency will advise the requesting government and the contractor to be visited of the reason for the denial.

(*2*) The contractor may accept the visitor(s), but only information that is in the public domain may be disclosed during the classified visit.

(C) *Non-sponsorship.* The USG agency will decline to render a decision on a classified visit request that is not in support of a USG program. The USG agency will furnish a declination notice indicating that the classified visit is not USG-approved (*i.e.,* the classified visit is non-sponsored) to the requesting foreign government with an information copy to the U.S. contractor to be visited.

(*1*) A declination notice does not preclude the classified visit, provided the contractor has, or obtains, an export authorization for the information involved and, has been notified that the requesting foreign government has provided the required security assurance of the proposed visitor to the USG agency in the original classified visit request.

(*2*) It is the contractor's responsibility to consult applicable export regulations to determine licensing requirements regarding the disclosure of export-controlled information during such classified visits by foreign nationals.

(D) *Visits to subsidiaries.* A classified visit request authorization for a classified visit to any element of a corporate family may be used for visits to other divisions or subsidiaries within the same corporate family in accordance with §117.15(h)(3), provided disclosures are for the same purpose and the information to be disclosed does not exceed the parameters of the approved classified visit request.

(E) *Long-term classified visits and assignments of foreign nationals.* Extended classified visits and assignments of foreign nationals to contractor locations can be authorized only when it is essential pursuant to a contract or government agreement (*e.g.,* joint venture, liaison representative to a joint or multinational program, and direct commercial sale). The contractor will:

(*1*) Consult with its empowered official for guidance.

(*2*) Notify the CSA in advance of all long-term classified visits and assignments of foreign nationals.

(*3*) Provide the CSA with a copy of the approved classified visit authorization or the USG export authorization.

(4) *Control of foreign visitors to U.S. contractors*—(i) *Contractor.* The contractor will:

(A) Establish procedures to ensure that foreign visitors are not afforded access to classified information except as authorized by an export license, approved visit request, or other exemption to the licensing requirements.

(B) Not inform the foreign visitor of the scope of access authorized or of the limitations imposed by the government.

(ii) *Foreign visitors.* Foreign visitors will not be given custody of classified material except when they are acting as official couriers of the government and the CSA authorizes the transfer.

(iii) *Visitor records.* The contractor will maintain a record of foreign visitors for one year when the visit involves access to classified information.

(iv) *Temporary approval of safeguarding.* (A) Classified U.S. and foreign government material at a U.S. contractor location is to remain under U.S. contractor custody and control and is subject to self-inspection and CSA security reviews.

(B) This does not preclude the contractor from furnishing a foreign visitor with a security container for the temporary storage of classified material, consistent with the purpose of the visit or assignment, provided the CSA approves and responsibility for the container and its contents remains with the U.S. contractor.

(*1*) The CSA may approve exceptions to this policy on a case-by-case basis for the storage of foreign government classified information furnished to the visitor by the visitor's government through government channels.

(*2*) The CSA must approve such exceptions in advance in writing with agreement from the visitor's government. The agreed procedures will be included in the contractor's TCP, will require the foreign nationals to provide receipts for the material, and will include an arrangement for the CSA to ensure compliance, including provisions for the CSA to inspect and inventory the material.

(v) *TCP.* A TCP is required to control access by foreign nationals assigned to, or employed by, cleared contractor facilities, and when foreign nationals

visit cleared contractor facilities on a long-term or extended basis, unless the CSA determines that procedures already in place at the contractor's facility are adequate. The TCP will contain procedures to control access for all export-controlled information. A sample TCP may be obtained from the CSA.

(f) *Contractor operations abroad*—(1) *Access by contractor employees assigned outside the United States.* (i) Contractor employees assigned outside the United States, its possessions, or territories may have access to classified information in connection with performance on a specified U.S., NATO, or foreign government classified contract.

(ii) The assignment of an employee who is a non-U.S. citizen outside the United States on programs that will involve access to classified information is prohibited.

(2) *Storage, custody, and control of classified information abroad by contractor employees.* (i) The USG is responsible for the storage, custody, and control of classified information required by a U.S. contractor employee abroad. Therefore, the storage of classified information by contractor employees at any location abroad that is not under USG control is prohibited. The storage may be at a U.S. military facility, an American Embassy or consulate, or other location occupied by a USG organization.

(ii) A contractor employee may be furnished a security container to temporarily store classified material at a USG agency overseas location. The decision to permit a contractor to temporarily store classified information must be approved in writing by the senior security official for the USG host organization.

(iii) A contractor employee may be permitted to temporarily remove classified information from an overseas USG-controlled facility when necessary for the performance of a GCA contract or pursuant to an approved export authorization.

(A) The responsible USG security official at the facility will verify that the contractor has an export authorization or other written USG approval to have the material, verify the need for the material to be removed from the facility, and brief the employee on handling procedures.

(*1*) In such cases, the contractor employee will sign a receipt for the classified material.

(*2*) Arrangements will also be made with the USG custodian for the return and storage of the classified material during non-duty hours.

(B) The security office at the USG facility will report violations of this policy to the applicable CSA.

(iv) A contractor employee will not store classified information at overseas divisions or subsidiaries of U.S. entities incorporated or located in a foreign country.

(A) The divisions or subsidiaries may possess classified information that has been transferred to the applicable foreign government through government-to-government channels pursuant to an approved export authorization or other written USG authorization.

(B) Access to this classified information at such locations by a U.S. contractor employee assigned abroad by the parent facility on a visit authorization in support of a foreign government contract or subcontract, is governed by the laws and regulations of the country in which the division or subsidiary is registered or incorporated. The division or subsidiary that has obtained the information from the foreign government will provide the access.

(v) U.S. contractor employees assigned to foreign government or foreign contractor locations under a direct commercial sales arrangement will be subject to the host-nation's industrial security policies.

(3) *Transmission of classified material to employees abroad.* The transmission of classified material to a cleared contractor employee located outside the United States will be through USG channels.

(i) If the material is to be used for other than USG purposes, an export authorization is required and a copy of the authorization, validated by the DGR, will accompany the material. The material will be addressed to a U.S. military organization or other USG organization (*e.g.*, an embassy).

(ii) USG organization abroad will be responsible for custody and control of the material.

(4) *Security briefings.* An employee being assigned outside the United States will be briefed on the security requirements of his or her assignment, including the handling, disclosure, and storage of classified information overseas.

(g) *NATO information security requirements*—(1) *General.* This section provides the security requirements needed to comply with the procedures established by the U.S. Security Authority for NATO Affairs Instruction 1–07 (available at: *http://archives.nato.int/informationobject/browse?topLod=0&query=United+States+Security+Authority+for+NATO+Affairs+Instruction+1-07*) for safeguarding NATO information provided to U.S. industry.

(2) *NATO security classification levels.*

TABLE 1 TO PARAGRAPH (g)(2) NATO SECURITY CLASSIFICATION LEVELS

NATO security classification	Classification level
COSMIC TOP SECRET	Top Secret.
NATO SECRET	Secret.
NATO CONFIDENTIAL	Confidential.
NATO RESTRICTED [1]	Does not correspond to an equivalent U.S. classification.

[1] Pursuant to applicable NATO security regulations and United States Security Authority, NATO Instruction 1–07, security accreditation may be delegated to contractors for information systems processing only NATO RESTRICTED information. The contractor will be responsible for executing specific provisions under contract for the accreditation of such systems, and shall provide the Contracting Authority with a written statement confirming the information system has been accredited in compliance with the minimum requirements established in the contract security clause or contract Security Aspects Letter.

(3) *ATOMAL Classification Markings.* ATOMAL is a marking applied to U.S. RESTRICTED DATA or FORMERLY RESTRICTED DATA and UK Atomic information that has been released to the NATO.

TABLE 2 TO PARAGRAPH (g)(3) ATOMAL CLASSIFICATION MARKINGS

ATOMAL marking	Classification level
COSMIC TOP SECRET ATOMAL	Top Secret.
NATO SECRET ATOMAL	Secret.
NATO CONFIDENTIAL ATOMAL	Confidential.

(4) *NATO contracts.* NATO contracts involving NATO-unique systems, programs, or operations are awarded by a NATO Production and Logistics Organization (NPLO), a designated NATO Management Agency, the NATO Research Staff, or a NATO Command. In the case of NATO infrastructure projects (*e.g.*, airfields, communications), the NATO contract is awarded by a contracting agency or prime contractor of the NATO nation responsible for the infrastructure project.

(5) *NATO facility security clearance certificate (FSCC).* A NATO FSCC is required for a contractor to negotiate or perform on a NATO classified contract.

(i) A U.S. entity qualifies for a NATO FSCC if it has an equivalent U.S. entity eligibility determination and its personnel have been briefed on NATO procedures.

(ii) The CSA will provide the NATO FSCC to the requesting activity.

(iii) A NATO FSCC is not required for GCA contracts involving access to NATO classified information.

(6) *Eligibility for personnel access to classified information.* Access to NATO classified information requires a final determination that an individual is eligible for access to classified information at the equivalent level.

(7) *NATO briefings.* Before having access to NATO classified information, the contractor will give employees a NATO security briefing that covers the requirements of this section and the consequences of negligent handling of NATO classified information. A representative of the CSA will give the initial briefing to the contractor. The contractor must conduct annual refresher briefings.

(i) When access to NATO classified information is no longer required, the contractor will debrief the employees. The employees will sign a certificate

stating that they have been briefed or debriefed, as applicable, and acknowledge their responsibility for safeguarding NATO information.

(ii) The contractor will maintain certificates for two years for NATO SECRET and CONFIDENTIAL, and three years for COSMIC TOP SECRET and all ATOMAL information. The contractor will maintain a record of all NATO briefings and debriefings in the CSA-designated database.

(8) *Access to NATO classified information by foreign nationals.* Foreign nationals of non-NATO nations may have access to NATO classified information only with the consent of the NATO Office of Security and the contracting activity.

(i) Requests will be submitted to the Central U.S. Registry (CUSR).

(ii) Access to NATO classified information may be permitted for citizens of NATO member nations, provided a NATO security clearance certificate is provided by their government and they have been briefed.

(9) *Subcontracting for NATO contracts.* The contractor will obtain prior written approval from the NATO contracting activity and a NATO FSCC must be issued prior to awarding the subcontract. The contractor will forward the request for approval through the CSA.

(10) *Preparing and marking NATO documents.* All classified documents created by a U.S. contractor will be portion-marked. Any portion extracted from a NATO document that is not portion marked, must be assigned the classification that is assigned to the NATO document.

(i) All U.S.-originated NATO classified documents will bear an assigned reference number and date on the first page. The reference numbers will be assigned as follows:

(A) The first element will be the abbreviation for the name of the contractor.

(B) The second element will be the abbreviation for the highest classification followed by a hyphen and the 4-digit sequence number for the document within that classification that has been generated for the applicable calendar year.

(C) The third element will be the year; *e.g.*, MM/NS–0013/17.

(ii) COSMIC TOP SECRET, NATO SECRET, and ATOMAL documents will bear the reference number on each page and a copy number on the cover or first page.

(A) Copies of NATO documents will be serially numbered.

(B) Pages will be numbered.

(C) The first page, index, or table of contents will include a list, including page numbers, of all annexes and appendices.

(D) The total number of pages will be stated on the first page.

(E) All annexes or appendices will include the date of the original document and the purpose of the new text (addition or substitution) on the first page.

(iii) One of the following markings will be applied to NATO documents that contain ATOMAL information:

(A) ''This document contains U.S. ATOMIC Information (RESTRICTED DATA or FORMERLY RESTRICTED DATA) made available pursuant to the NATO Agreement for Cooperation Regarding ATOMIC Information, dated 18 June 1964, and will be safeguarded accordingly.''

(B) ''This document contains UK ATOMIC Information. This information is released to NATO including its military and civilian agencies and member states on condition that it will not be released by the recipient organization to any other organization or government or national of another country or member of any other organization without prior permission from H.M. Government in the United Kingdom.''

(iv) Working papers will be retained only until a final product is produced and in accordance with §117.15(e)(3).

(11) *Classification guidance.* Classification guidance will be in the form of a NATO security aspects letter and a security requirements checklist for NATO contracts, or a Contract Security Classification Specification, or equivalent.

(i) If adequate classification guidance is not received, the contractor will contact the CSA for assistance.

(ii) NATO classified documents and NATO information in other documents will not be declassified or downgraded

without the prior written consent of the originating activity.

(iii) Recommendations concerning the declassification or downgrading of NATO classified information will be forwarded to the CUSR.

(12) *Further distribution.* The contractor will not release or disclose NATO classified information to a third party or outside the contractor's facility for any purpose without the prior written approval of the contracting agency.

(13) *Storage of NATO documents.* NATO classified documents will be stored as prescribed for U.S. documents of an equivalent classification level, except as follows:

(i) NATO classified documents will not be comingled with other documents.

(ii) Combinations for containers used to store NATO classified information will be changed annually. The combination also will be changed when an individual with access to the container departs or no longer requires access to the container, and if the combination is suspected of being compromised.

(iii) When the combination is recorded it will be marked with the highest classification level of documents stored in the container as well as to indicate the level and type of NATO documents in the container. The combination record must be logged and controlled in the same manner as NATO classified documents.

(14) *International transmission.* The NATO has a registry system for the receipt and distribution of NATO documents within each NATO member nation. The central distribution point for the United States is the CUSR now located at 9301 Chapek Road, Building 1458, Fort Belvoir, Virginia 22060.

(i) The CUSR establishes sub registries at USG organizations for further distribution and control of NATO documents. Sub registries may establish control points at contractor facilities.

(ii) COSMIC TOP SECRET, NATO SECRET, and all ATOMAL documents will be transferred through the registry system. NATO CONFIDENTIAL documents provided as part of NATO infrastructure contracts will be transmitted via government channels in compliance with paragraph (d) in this section.

(15) *Hand carrying.* NATO SECRET and NATO CONFIDENTIAL documents may be hand carried across international borders if authorized by the GCA. The courier will be issued a NATO Courier Certificate by the CSA. When hand carrying is authorized, the documents will be delivered to a U.S. organization at NATO, which will transfer them to the intended NATO recipient.

(16) *Reproduction.* Reproductions of COSMIC TOP SECRET and COSMIC TOP SECRET ATOMAL information will be performed by the responsible Registry. The reproduction of NATO SECRET and CONFIDENTIAL documents may be authorized to meet contractual requirements unless reproduction is prohibited by the contracting entity. Copies of COSMIC TOP SECRET, NATO SECRET, and ATOMAL documents will be serially numbered and controlled and accounted for in the same manner as the original.

(17) *Disposition.* (i) Generally, all NATO classified documents will be returned to the contracting activity that provided them on completion of the contract. Documents provided in connection with an invitation to bid also will be returned immediately if the bid is not accepted or submitted.

(ii) NATO classified documents may also be destroyed when permitted. COSMIC TOP SECRET and COSMIC TOP SECRET ATOMAL documents will be destroyed by the registry that provided the documents.

(A) Destruction certificates are required for all NATO classified documents except NATO CONFIDENTIAL.

(B) The destruction of COSMIC TOP SECRET, NATO SECRET, and all ATOMAL documents must be witnessed.

(18) *Accountability records.* Logs, receipts, and destruction certificates are required for NATO classified information. Records for NATO documents will be maintained separately from records of non-NATO documents (methods such as separate drawers of a container).

(i) COSMIC TOP SECRET and all ATOMAL documents will be recorded on logs maintained separately from

other NATO logs and will be assigned unique serial control numbers.

(ii) Additionally, disclosure records bearing the name and signature of each person who has access are required for all COSMIC TOP SECRET, COSMIC TOP SECRET ATOMAL, and all other ATOMAL or NATO classified documents to which special access limitations have been applied.

(iii) Minimum identifying data on logs, receipts, and destruction certificates will include the NATO reference number, short title, date of the document, classification, and serial copy numbers. Logs will reflect the short title, unclassified subject, and distribution of the documents.

(iv) Receipts are required for all NATO classified documents except NATO CONFIDENTIAL.

(v) Inventories will be conducted annually of all COSMIC TOP SECRET, NATO SECRET, and ATOMAL documents.

(vi) Accountability records for ATOMAL documents will be retained for 10 years after transfer or destruction of the ATOMAL document. Destruction certificates will be retained for 10 years after destruction of the related ATOMAL documents.

(19) *Security violations and loss, compromise, or possible compromise.* The contractor will immediately report the loss, compromise, or suspected loss or compromise, as well as any other security violations involving NATO classified information to the CSA.

(20) *Extracting from NATO documents.* Permission to extract from a COSMIC TOP SECRET or ATOMAL document will be obtained from the CUSR.

(i) If extracts of NATO information are included in a U.S. document prepared for a non-NATO contract, the document will be marked with U.S. classification markings. The caveat, ''THIS DOCUMENT CONTAINS NATO (level of classification) INFORMATION'' also will be marked on the front cover or first page of the document. Additionally, each paragraph or portion containing the NATO information will be marked with the appropriate NATO classification, abbreviated in parentheses (*e.g.*, ''NS'' for NATO SECRET) preceding the portion or paragraph. Declassification and downgrading instructions shall indicate that the NATO information is exempt from declassification or downgrading without the prior consent of NATO, in the absence of other originator instructions, citing the reason ''Foreign Government Information.''

(ii) The declassification or downgrading of NATO information in a U.S. document requires the approval of the originating NATO activity. Requests will be submitted to the CUSR for NATO contracts, through the GCA for U.S. contracts, and through the CSA for non-NATO contracts awarded by a NATO member nation.

(21) *Release of U.S. information to NATO.* (i) Release of U.S. classified or export-controlled information to NATO requires an export authorization or other written disclosure authorization. When a document containing U.S. classified information is being prepared for NATO, the appropriate NATO classification markings will be applied to the document.

(A) Documents containing U.S. classified information and U.S. classified documents that are authorized for release to NATO will be marked on the cover or first page ''THIS DOCUMENT CONTAINS U.S. CLASSIFIED INFORMATION. THE INFORMATION IN THIS DOCUMENT HAS BEEN AUTHORIZED FOR RELEASE TO (cite the NATO organization) BY (cite the applicable license or other written authority).''

(B) The CSA will provide transmission instructions to the contractor. The material will be addressed to a U.S. organization at NATO, which will then place the material into NATO security channels. The material will be accompanied by a letter to the U.S. organization that provides transfer instructions and assurances that the material has been authorized for release to NATO. The inner wrapper will be addressed to the intended NATO recipient.

(C) Material to be sent to NATO via mail will be routed through the U.S. Postal Service and U.S. military postal channels to the U.S. organization that will make the transfer.

(ii) A record will be maintained that identifies the originator and source of classified information that are used in

the preparation of documents for release to NATO. The record will be provided with any request for release authorization.

(22) *Visits.* NATO visits will be handled in accordance with the requirements in paragraph (e) of this section. A NATO Certificate of Security Clearance will be included with the visit request.

(i) *NPLO and NATO industrial advisory group (NIAG) recurring visits.* NATO has established special procedures for recurring visits involving contractors, government departments and agencies, and NATO commands and agencies that are participating in a NPLO or NIAG contract or program. The NATO management office or agency responsible for the NPLO program will prepare a list of the government and contractor facilities participating in the program. For NIAG programs, the list will be prepared by the responsible NATO staff element. The list will be forwarded to the appropriate clearance agency of the participating nations, which will forward it to the participating contractor.

(ii) *Visitor record.* The contractor will maintain a record of NATO visits including those by U.S. personnel assigned to NATO. The records will be maintained for three years.

(h) *Security and export control violations involving foreign nationals.* Contractors will report any violation of administrative security procedures or export control regulations that would subject classified information to possible compromise by foreign visitors or foreign national employees to the applicable CSA.

(i) *Transfers of defense articles to the UK or AUS without a license or other written authorization*—(1) *Treaties with AUS and UK.* Exemptions in ITAR parts 126.16 and 126.17 implement the Defense Trade Cooperation Treaty between the Government of the United States of America and the Government of the UK of Great Britain and Northern Ireland and the Defense Trade Cooperation Treaty between the Government of the United States of America and the Government of AUS, also known as the ''U.S.-UK Treaty'' and ''U.S.-AUS Treaty,'' respectively, referred to collectively in this rule as ''the Treaties.''

(i) The Treaties provide a comprehensive framework for exports and transfers to the UK or AUS of certain classified and unclassified defense articles without a license or other written authorization.

(ii) The ITAR part 126, supplement no. 1 identifies those defense articles and services that are not eligible for export via treaty exemptions.

(iii) This exemption applies to contractors registered with the DDTC and eligible to export defense articles.

(2) *Defense articles.* Defense articles fall under the scope of the Treaties when they are in support of:

(i) U.S. and UK or U.S. and AUS combined military or counter-terrorism operations.

(ii) U.S. and UK or U.S. and AUS cooperative security and defense research, development, production, and support programs.

(iii) Mutually agreed specific security and defense projects where the government of the UK or AUS is the end-user.

(iv) USG end-use.

(3) *Marking requirements.* Contractors are required to mark defense articles that fall under the scope of the treaty prior to transferring from the U.S. to the UK in accordance with the provisions of this paragraph. All other standard classification marking in accordance with §117.14 also apply. When defense articles are returned from the UK or AUS to the United States, any defense articles marked as RESTRICTED in the manner shown in Table 4 purely for the purposes of the treaties will be considered to be unclassified and such marking will be removed.

TABLE 3 TO PARAGRAPH (i)(3) CLASSIFIED U.S. DEFENSE ARTICLE MARKINGS
UNCLASSIFIED: CLASSIFICATION MARKINGS FOR ILLUSTRATION PURPOSES ONLY

Treaty with:	Marking	Example (for SECRET classified defense articles)
Government of UK	//CLASSIFICATION LEVEL USML/REL GBR AND USA TREATY COMMUNITY//.	//SECRET USML//REL GBR AND USA TREATY COMMUNITY//"
Government of AUS	//CLASSIFICATION LEVEL USML/REL AUS AND USA TREATY COMMUNITY//.	//SECRET USML//REL AUS AND USA TREATY COMMUNITY//"

TABLE 4 TO PARAGRAPH (i)(3) UNCLASSIFIED U.S. DEFENSE ARTICLE MARKINGS
UNCLASSIFIED: CLASSIFICATION MARKINGS FOR ILLUSTRATION PURPOSES ONLY

Treaty with:	Marking
Government of UK	//RESTRICTED–USML//REL GBR AND USA TREATY COMMUNITY//
Government of AUS	//RESTRICTED–USML//REL AUS AND USA TREATY COMMUNITY//

(4) *Notice.* A notice will be included (*e.g.*, as part of the bill of lading) whenever defense articles are exported in accordance with the provisions of these treaties and the ITAR.

TABLE 5 TO PARAGRAPH (i)(4) NOTICE TEXT FOR EXPORTED DEFENSE ARTICLES

Notice text	These U.S. Munitions List commodities are authorized by the U.S. Government under the U.S. [AUS or UK, as applicable] Defense Trade Cooperation Treaty for export only to [AUS or UK, as applicable] for use in approved projects, programs or operations by members of the [AUS or UK, as applicable] Community. They may not be retransferred or re-exported or used outside of an approve project, program, or operation, either in their original form or after being incorporated into other end-items, without the prior written approval of the U.S. Department of State.

(5) *Labeling.* (i) Defense articles (other than technical data) will be individually labeled with the appropriate identification; or, where such labeling is impracticable (*e.g.*, propellants, chemicals), will be accompanied by documentation (such as contracts or invoices) clearly associating the defense articles with the appropriate markings.

(ii) Technical data (including data packages, technical papers, manuals, presentations, specifications, guides and reports), regardless of media or means of transmission (*i.e.*, physical, oral, or electronic), will be individually labeled with the appropriate identification detailed. Where such labeling is impracticable, the data will be accompanied by documentation (such as contracts or invoices) or oral notification clearly associating the technical data with the appropriate markings.

(iii) Defense services will be accompanied by documentation (*e.g.* contracts, invoices, shipping bills, or bills of lading clearly labeled with the appropriate identification).

(6) *Transfers.* (i) All defense articles that fall under the scope of the Treaties must be transferred from the U.S. point of embarkation through channels approved by both the United States and the UK or the United States and AUS, as applicable.

(ii) For transfers of defense articles as freight, the contractor will prepare a transportation plan. For transfer of classified U.S. defense articles, a freight forwarder must have a valid entity eligibility determination and a classified information storage capability at the appropriate level. For unclassified U.S. defense articles transferred as freight, a freight forwarder is not required to be cleared.

(7) *Records.* Contractors will maintain records of exports, transfers, re-exports, or re-transfers of defense articles subject to the Treaties for a minimum

of five years. The contractor will make records available to the CSA upon request. In accordance with the ITAR parts 126.16 and 126.17 the records will contain:

(i) Port of entry or exit.

(ii) Date and time of export or import.

(iii) Method of export or import.

(iv) Commodity code and description of the commodity, including technical data.

(v) Value of export.

(vi) Justification for export under the Treaties.

(vii) End-user or end-use.

(viii) Identification of all U.S. and foreign parties to the transaction.

(ix) How export was marked.

(x) Security classification of the export.

(xi) All written correspondence with the USG on the export.

(xii) All information relating to political contributions, fees, or commissions furnished or obtained, offered, solicited, or agreed upon, as outlined in the ITAR parts 126.16(m) or 126.17(m).

(xiii) Purchase order, contract, or letter of intent.

(xiv) Technical data actually exported.

(xv) The internal transaction number for the electronic export information filing in the automated export system.

(xvi) All shipping documentation (including, but not limited to, the airway bill, bill of lading, packing list, delivery verification, and invoice).

(xvii) Statement of registration (Department of State Form DS–2032 (available at: *https://www.pmddtc.state.gov/sys_attachment.do?sysparm_referring_url= tear_off&view= true&sys_id= dabc05f6db6be344529d368d7c961984*)).

§ 117.20 Critical Nuclear Weapon Design Information (CNWDI).

(a) *General.* This section contains the special requirements for protection of CNDWI. The sensitivity of DoD CNWDI is such that access shall be granted to the absolute minimum number of employees who require it for the accomplishment of assigned responsibilities on a classified contract. Because of the importance of such information, special requirements have been established for its control. DoDI 5210.02, ''Access to and Dissemination of Restricted Data and Formerly Restricted Data'' (available at: *https://www.esd.whs.mil/ Portals/54/Documents/DD/ issuances/dodi/521002p.pdf?ver= 2019-01-14-072742-700*) establishes these controls in the DoD.

(b) *Briefings.* Prior to having access to CNWDI, employees will be briefed on its sensitivity by the FSO or his or her alternate. The FSO will be initially briefed by a USG representative.

(1) The briefing will include:

(i) The definition of CNWDI.

(ii) A reminder of the extreme sensitivity of the information.

(iii) An explanation of the individual's continuing responsibility for properly safeguarding CNWDI and for ensuring that dissemination is strictly limited to other personnel who have been authorized for access and have a need-to-know for the particular information.

(2) The briefing will also be tailored to cover any special local requirements. Upon termination of access to CNWDI, the employee will be given an oral debriefing.

(c) *Markings.* In addition to any other required markings, CNWDI material will be clearly marked in accordance with DoDI 5210.02. At a minimum, CNWDI documents will show such markings on the cover or first page. Portions of documents that contain CNWDI will be marked with an (N) or (CNWDI) following the classification of the portion; for example, TS (RD)(N) or TS(RD)(CNWDI).

(d) *Subcontractors.* Contractors will not disclose CNWDI to subcontractors without the prior written approval of the GCA. This approval may be included in a contract security classification specification, or equivalent, other contract-related document, or by separate correspondence.

(e) *Transmission outside the facility.* Transmission of CNWDI outside the contractor's facility is authorized only to the GCA, or to a subcontractor as described in paragraph (d) of this section. Any other transmission must be approved by the GCA.

(1) Prior to transmission to another cleared facility, the contractor will verify from the CSA that the facility

has been authorized access to CNWDI. When CNWDI is transmitted to another facility, the inner wrapping will be addressed to the personal attention of the FSO or his or her alternate, and in addition to any other prescribed markings, the inner wrapping will be marked: ''Critical Nuclear Weapon Design Information-DoD Instruction 5210.02 Applies.''

(2) The same marking will be used on the inner wrapping of transmissions addressed to the GCA or other USG.

(f) *Records.* Contractors will annotate CNWDI access in the CSA-designated database for all employees who have been authorized access to CNWDI.

(g) *Nuclear weapon data.* Some nuclear weapon data is divided into Sigma categories, the protection of which is prescribed by DOE Order 452.8 (available at: *https://www.directives.doe.gov/directives-documents/400-series/0452.8-border/@@images/file*). However, certain nuclear weapon data has been re-categorized as CNWDI and is protected as described in this section.

§ 117.21 COMSEC.

(a) *General.* The procedures in this section pertaining to classified COMSEC information will apply to contractors when the contractor:

(1) Requires the use of COMSEC systems in the performance of a contract.

(2) Is required to install, maintain, or operate COMSEC equipment for the USG.

(3) Is required to accomplish research, development, or production of COMSEC systems, COMSEC equipment, or related COMSEC material.

(b) *Instructions.* Specific requirements for the management and safeguarding of COMSEC material in industry are established in the COMSEC material control and operating procedures provided to the account manager of each industrial COMSEC account by the agency central office of record (COR) responsible for establishing the account. Such procedures that are above the baseline requirements detailed in the other sections of this rule will be contractually mandated.

(c) *Clearance and access requirements.* (1) Before a COMSEC account can be established and a contractor may receive or possess COMSEC material accountable to a COR, individuals occupying the positions of FSO, COMSEC account manager, and alternate COMSEC account manager must have a final PCL appropriate for the material to be held in the account.

(i) COMSEC account managers and alternate COMSEC account managers having access to operational TOP SECRET keying material marked as CRYPTO must have a final TOP SECRET security clearance based upon a current investigation of a scope that meets or exceeds that necessary for the access required.

(ii) This requirement does not apply to contractors using only data transfer devices and seed key.

(2) Before disclosure of COMSEC information to a contractor, GCAs must first verify with the CSA that appropriate COMSEC procedures are in place at the contractor facility. If procedures are not in place, the GCA will provide a written request and justification to the CSA to establish COMSEC procedures and a COMSEC account, if appropriate, at the facility and to conduct the initial COMSEC or cryptographic access briefings for the FSO and COMSEC account personnel.

(3) Access to COMSEC information by a contractor requires a final entity eligibility determination and a USG-issued final PCL at the appropriate level; however, an Interim TOP SECRET entity eligibility determination or PCL is valid for access to COMSEC at the SECRET and CONFIDENTIAL levels.

(4) If a COMSEC account will be required, the Contract Security Classification Specification, or equivalent, will contain a statement regarding the establishment of a COMSEC account as appropriate.

(d) *Establishing a COMSEC account.* (1) When COMSEC material that is accountable to a COR is to be provided, acquired, or produced under a contract, the contracting officer will inform the contractor that a COMSEC account must be established. The contractor will forward the names of U.S. citizen employees who will serve as the COMSEC account manager and alternate COMSEC account manager to the CSA. The CSA will forward the names

of the FSO, COMSEC account manager, and alternate COMSEC account manager, along with a contractual requirement for the establishment of a COMSEC account (using DD Form 254 or equivalent) to the appropriate COR, with a copy to the GCA, indicating that the persons have been cleared and COMSEC has been briefed.

(2) The COR will then establish the COMSEC account and notify the CSA that the account has been established.

(3) An individual may be appointed as the COMSEC account manager or alternate COMSEC account manager for more than one account only when approved by each COR concerned.

(e) *COMSEC briefing and debriefing.* (1) All contractor employees who require access to classified COMSEC information in the performance of their duties will be briefed before access is granted. Depending on the nature of COMSEC access required, either a COMSEC briefing or a cryptographic access briefing will be given. The FSO, the COMSEC account manager, and the alternate COMSEC account manager will be briefed by a USG representative or their designee. Other contractor employees will be briefed by the FSO, the COMSEC account personnel, or other individual designated by the FSO. The purpose of the briefing is to ensure that the contractor understands:

(i) The unique nature of COMSEC information and its unusual sensitivity.

(ii) The special security requirements for the handling and protection of COMSEC information.

(iii) The penalties prescribed in 18 U.S.C. 793, 794, and 798 for disclosure of COMSEC information.

(2) COMSEC debriefings are not required.

(3) The contractor will maintain a record of all COMSEC briefings as specified by the appropriate COR.

(f) *U.S. classified cryptographic information access briefing and debriefing requirements.* (1) U.S. classified cryptographic information does not include seed key or controlled cryptographic items.

(2) A contractor's employee may be granted access to U.S. classified cryptographic information only if the employee:

(i) Is a U.S. citizen.

(ii) Has a final USG-issued eligibility determination appropriate to the classification of the U.S. cryptographic information to be accessed.

(iii) Has a valid need-to-know to perform duties for, or on behalf of, the USG.

(iv) Receives a security briefing appropriate to the U.S. Classified Cryptographic Information to be accessed.

(v) Acknowledges the granting of access to classified information by executing Section I of Secretary of Defense (SD) Form 572, ''Cryptographic Access Certification and Termination'' (available at: *https://www.esd.whs.mil/Portals/54/Documents/DD/forms/sd/sd0572.pdf*).

(vi) Where so directed by a USG department or agency head, acknowledges the possibility of being subject to a CI scope polygraph examination that will be administered in accordance with department or agency directives and applicable law.

(3) An employee granted access to cryptographic information will be debriefed and execute Section II of the SD 572 not later than 90 days from the date access is no longer required.

(4) The contractor will maintain the SD 572 for a minimum of five years following the debriefing.

(5) Cryptographic access briefings must fully meet the requirements of paragraph (e) of this section.

(g) *Destruction and disposition of COMSEC material.* The appropriate GCA representative, *e.g.*, the contracting officer representative, will provide directions to the contractor when accountable COMSEC material is to be destroyed. These directions may be provided in superseding editions of publications or by specific instructions.

(h) *Subcontracting COMSEC work.* Subcontracts requiring the disclosure of classified COMSEC information will be awarded only upon the written approval of the GCA.

(i) *Unsolicited proposals.* Any unsolicited proposal for a COMSEC system, equipment, development, or study that may be submitted by a contractor to a USG agency will be forwarded to the Deputy National Manager for National Security Systems for review and follow up action at: Deputy National Manager

for National Security Systems, NSA, Fort George G. Meade, MD 20755–6000.

§ 117.22 DHS CCIPP.

(a) *General.* DHS will coordinate with other USG agencies that have an equity with a private sector entity and the CCIPP in accordance with § 117.6(f).

(b) *Authority.* (1) The Secretary of Homeland Security has the authority to determine the eligibility for personnel security clearances and to administer the sharing of relevant classified NSI with certain private sectors or non-federal partners for the purpose of furthering cybersecurity information sharing among critical infrastructure partners pursuant to E.O. 13691.

(2) DHS provides security oversight and assumes security responsibilities similar to those of an FSO, unless otherwise provided in this section. Participating entities will cooperate with DHS security officials to ensure the entity is in compliance with requirements in this rule.

§ 117.23 Supplement to this rule: Security Requirements for Alternative Compensatory Control Measures (ACCM), Special Access Programs (SAPs), Sensitive Compartmented Information (SCI), Restricted Data (RD), Formerly Restricted Data (FRD), Transclassified Foreign Nuclear Information (TFNI), and Naval Nuclear Propulsion Information (NNPI).

(a) *General.* Given the sensitive nature of Alternative Compensatory Control Measures (ACCM), SAPs, SCI, RD, FRD, TFNI, and NNPI, the security requirements prescribed in this section exceed baseline standards for this rule and must be applied, as applicable, through specific contract requirements.

(1) *Compliance.* The contractor will comply with the security measures reflected in this section and other documents specifically referenced, when applied by the GCA or designee as part of a contract. Acceptance of the contract security measures is a prerequisite to any negotiations leading to program participation and an area accreditation (*e.g.*, an SCI facility or SAP facility accreditation).

(2) *CSA-imposed higher standards.* In some cases, security or sensitive factors of a CSA-created program may require security measures that exceed the standards of this section. In such cases, the CSA-imposed higher standards specifically detailed in the contract or conveyed through other applicable directives will be binding on USG and contractor participants. In cases of doubt over the specific provisions, the contractor should consult the program security officer and the contracting officer before taking any action or expending program-related funds. In cases of extreme emergencies requiring immediate attention, the action taken should protect the USG's interest and the security of the program from loss or compromise.

(3) *Waivers.* Every effort will be made to avoid waivers to established standards unless they are in the best interest of the USG. In those cases where waivers are deemed necessary, a request will be submitted in accordance with the procedures established by the CSA.

(b) *Intelligence information.* National intelligence is under the jurisdiction and control of the DNI, who establishes security policy for the protection of national intelligence and intelligence sources, methods, and activities. In addition to the guidance in this rule, contractors will follow Intelligence Community directives, policy guidance, standards, and specifications for the protection of classified national intelligence and SCI.

(c) *ACCM.* Contractors may participate in ACCMs, or be directed to participate, only when such access and the associated security plan are identified in DD Form 254 or equivalent. Care must be taken to ensure identification of the security plan does not disclose ACCM-protected data.

(1) *ACCM contracts.* DoD contractors will implement the security requirements for ACCMs, when established by contract, in accordance with applicable statutes, E.O.s, CSA directives, instructions, manuals, regulations, standards, and memorandums.

(2) *Non-DoD with ACCMs.* Contractors performing on ACCM contracts issued by other than DoD GCAs will implement ACCM protection requirements imposed in their contracts.

(d) *SAPs*—(1) *DoD SAP contracts.* Contractors will implement the security requirements for SAPs codified in SAP-related policy, when established by contract. These documents include, but are not limited to, statutes, E.O.s, CSA directives, instructions, manuals, regulations, standards, memorandums, and other SAP security related policy documents.

(2) *Non-DoD SAPs.* Contractors performing on SAP contracts issued by non-DoD GCAs will implement SAP protection requirements imposed in their contracts. These requirements may be from, but are not limited to, statutes, E.O.s, CSA directives, instructions, manuals, regulations, standards, memorandums, and other SAP security related policy documents.

(e) *RD, FRD, and TFNI*—(1) *General.* This section describes some of the requirements for nuclear-related information designated RD, FRD, or TFNI in accordance with the AEA and 10 CFR part 1045. 10 CFR part 1045 contains the full requirements for classification and declassification of RD, FRD, and TFNI. Information on safeguarding of RD by access permittees is contained in 10 CFR part 1016. For RD that is NNPI, the additional provisions of paragraph (f) of this section apply.

(i) The DOE is the sole authority for establishing requirements for classifying, accessing, handling, securing, and protecting RD. The DOE and the DoD share authority for the requirements for FRD. The DOE and ODNI share authority for establishing requirements for TFNI.

(ii) RD, FRD, and TFNI categories are distinguished from the NSI category, which is governed in accordance with E.O. 13526.

(A) RD, FRD, and TFNI have unique marking requirements and are not subject to automatic declassification. In addition, RD and FRD have special restrictions regarding foreign release.

(B) It is necessary to differentiate between the handling of this information and NSI because of its direct relationship to our nation's nuclear deterrent.

(iii) Some access requirements for RD and FRD exceed the requirements for NSI. Due to the unique national security implications of RD and FRD, and to facilitate maintaining consistency of codified requirement, they are not repeated in the baseline of this rule, but may be applied through specific contract requirements.

(iv) When RD is transclassified as TFNI, it is safeguarded as NSI. Such information will be labeled as TFNI. The label TFNI will be included on documents to indicate it is exempt from automatic declassification as specified in 10 CFR part 1045, the AEA, E.O. 13526, and 32 CFR part 2001.

(2) *Unauthorized disclosures.* Contractors will report all unauthorized disclosures involving RD, FRD and TFNI information to the CSA.

(3) *International requirements.* The AEA provides for a program of international cooperation to promote common defense and security and to make available to cooperating nations the benefits of peaceful applications of atomic energy as widely as expanding technology and considerations of the common defense and security will permit.

(i) Information controlled in accordance with the AEA, RD, and FRD may be shared with another nation only under the terms of an agreement for cooperation. The disclosure by a contractor of RD and FRD will not be permitted until an agreement is signed by the United States and participating governments, and disclosure guidance and security arrangements are established.

(ii) RD and FRD will not be transmitted to a foreign national or regional defense organization unless such action is approved and undertaken under an agreement for cooperation between the United States and the cooperating entity and supporting statutory determinations, as prescribed in the AEA.

(4) *Personnel security clearance and access.* Only the DOE, the NRC, the DoD, and the National Aeronautics and Space Agency can grant access to RD and FRD that is under their cognizance. Access to RD and FRD must be granted in accordance with the AEA. Baseline requirements for access to RD and FRD are codified in specific DoD, DOE, NRC, and the National Aeronautics and Space Agency directives and regulations. In addition, need-to-

know and other restrictions on access apply.

(5) *Classification and declassification.* (i) All persons with access to RD and FRD must receive initial and periodic refresher training as required under §1045.120 10 CFR. The training must include the following information:

(A) What information is potentially RD and FRD.

(B) Matter that potentially contains RD or FRD must be reviewed by an RD derivative classifier to determine whether it is RD or FRD.

(C) The DOE must review matter that potentially contains RD or TFNI for public release and DOE or DoD must review matter that potentially contains FRD for public release.

(D) RD derivative classification authority is required to classify or upgrade matter containing RD or FRD, or to downgrade the level of matter containing RD or FRD.

(E) Only a person trained in accordance with §1045.120 10 CFR may classify matter containing TFNI.

(F) Matter containing RD, FRD, and TFNI is not automatically declassified and only DOE-authorized persons may downgrade the category or declassify matter marked as containing RD. Only DOE or DoD authorized persons may downgrade the category or declassify matter marked as containing FRD.

(G) How to submit a challenge if they believe RD, FRD, or TFNI information (*e.g.*, a guide topic) or matter containing RD, FRD, or TFNI is not properly classified.

(H) Access requirements for matter marked as containing RD or FRD.

(ii) All persons with access to TFNI must receive initial and periodic refresher training as required under §1045.120 10 CFR. This training may be combined with the training for access to RD and FRD. The training must include the following information:

(A) What information is potentially TFNI.

(B) Only a person with appropriate training may determine if matter contains TFNI.

(C) Marking requirements for matter containing TFNI.

(D) Matter containing TFNI is not automatically declassified and only DOE authorized persons may downgrade the category or declassify matter marked as containing TFNI.

(E) How to submit a challenge if they believe TFNI information (*e.g.*, a guide topic) or matter containing TFNI is not properly classified.

(iii) Persons with access to RD, FRD, or TFNI must submit matter that potentially contains RD or FRD to an RD derivative classifier for review. If matter potentially contains TFNI, it must be submitted to a person trained to make TFNI determinations. Matter potentially containing RD, FRD, or TFNI must be reviewed, even if the potential RD, FRD, or TFNI is derived from the open literature. Prior to review, the matter must be marked as a working paper under 10 CFR 1045.140(c). If the matter is intended for pubic release and potentially contains RD or TFNI, it must be submitted to the DOE for review. If the matter is intended for public release and contains FRD, it must be submitted to the DOE or the DoD.

(iv) Only RD derivative classifiers may classify matter containing RD or FRD. RD derivative classifiers must receive initial training and refresher training every two years as required under 10 CFR 1045.120. The training must include the content for persons with access to RD and FRD, along with the following:

(A) The use of classification guides, classification bulletins, and portion-marked source documents to classify matter containing RD and FRD.

(B) What to do if applicable classification guidance is not available.

(C) Limitations on an RD derivative classifier's authority to remove RD or FRD portions from matter.

(D) Marking requirements for matter containing RD and FRD.

(v) Only persons with appropriate training may review matter to determine if it contains TFNI. Training must be completed prior to making determinations and every two years after. The training must include the content for persons with access to TFNI and the following:

(A) The markings applied to matter containing TFNI.

(B) Limitations on their authority to remove TFNI portions from matter.

(C) Only DOE authorized persons may determine that classified matter no longer contains TFNI.

(D) Only DOE-authorized persons may declassify matter marked as containing TFNI.

(E) The DOE must review matter that potentially contains TFNI for public release.

(vi) RD derivative classifiers must use approved classification guides, classification bulletins, or portion-marked source documents as the basis for classifying matter containing RD and FRD.

(vii) Persons trained to make TFNI determinations must use approved TFNI guidelines, classification guides, classification bulletins, or portion-marked source documents as the basis for classifying or upgrade matter containing TFNI.

(6) *Marking matter containing RD, FRD, and TFNI.* The front page of matter containing RD or FRD must have the highest classification level of the information on the top and bottom of the first page, the RD or FRD admonishment, the subject or title marking, and the classification authority block. Matter containing TFNI must include the TFNI identifier on each page unless the matter also contains RD or FRD, in which case the RD or FRD takes precedence.

(i) Documents classified as RD or FRD must also include a Classification Authority Block with the RD derivative classifier's name and position, title, or unique identifier and the classification guide or source document (by title and date) used to classify the document. No declassification date or event may be placed on a document containing RD, FRD, or TFNI. If a document containing RD, FRD, or TFNI also contains NSI, ''N/A to RD/FRD/TFNI'' (as appropriate) must be placed on the ''Declassify On:'' line.

(ii) Each interior page of matter containing RD or FRD must be clearly marked at the top and bottom with the overall classification level and category of the matter or the overall classification level and category of the page, whichever is preferred. The abbreviations ''RD'' or ''FRD'' may be used in conjunction with the matter classification (*e.g.*, SECRET//RD, CONFIDENTIAL//FRD).

TABLE 1 TO PARAGRAPH (e)(6)(ii) RD AND FRD ADMONISHMENT MARKINGS

Document containing	Admonishment that must be included on the front page of the document
RD	"RESTRICTED DATA This document contains RESTRICTED DATA as defined in the Atomic Energy Act of 1954. Unauthorized disclosure is subject to administrative and criminal sanctions."
FRD	"FORMERLY RESTRICTED DATA Unauthorized disclosure subject to administrative and criminal sanctions. Handle as Restricted Data in foreign dissemination. Section 144b, AEA 1954."

(iii) Documents classified as RD or FRD must also include a Classification Authority Block with the RD derivative classifier's name and position, title, or unique identifier and the classification guide or source document (by title and date) used to classify the document.

(iv) Other than the required subject or title markings, portion marking is permitted, but not required, for matter containing RD or FRD. Each agency that generates matter containing RD or FRD determines the policy for portion-marking matter generated within the agency. If matter containing RD or FRD is portion-marked, each portion containing RD or FRD must be marked with the level and category of the information in the portion (*e.g.*, SRD, CFRD, S//RD, C//FRD).

(v) Additional information and requirements are in 10 CFR 1045.140. Requests for additional information about the classification and declassification of RD, FRD, and TFNI can be directed to Agency RD Management Officials or the DOE Office of Classification at *outreach@hq.doe.gov* or at (301) 903–7567.

(7) *Declassification.* (i) No date or event for automatic declassification ever applies to RD, FRD, or TFNI documents, even if they contain classified NSI. RD, FRD, or TFNI documents remain classified until a positive action by a designated DOE official (for RD, FRD, or TFNI) or an appropriate DoD official (for FRD) is taken to declassify them.

(ii) RD derivative classifiers may remove RD or FRD from portion-marked source matter if the resulting matter is not for public release. RD derivative classifiers cannot declassify matter marked as containing RD, FRD, and TFNI. Matter that potentially contains RD or TFNI must be sent to designated individuals in the DOE and those containing FRD must be sent to designated individuals in the DoD for declassification or removal of the RD, FRD, or TFNI prior to public release.

(iii) Matter containing TFNI is excluded from the automatic declassification provisions of E.O. 13526 until the TFNI designation is properly removed by the DOE. When the DOE determines that a TFNI designation may be removed, any remaining classified information must be referred to the appropriate agency.

(iv) Any matter marked as or that potentially contains RD, FRD, or TFNI within a document intended for public release that contains RD or FRD subject area indicators must be reviewed by the appropriate DOE organization.

(8) *Challenges to RD, FRD, and TFNI.* A contractor employee who believes RD, FRD, or TFNI is classified improperly or unnecessarily may challenge that classification following the procedures established by the GCA. They may also send challenges directly to the Director, Office of Classification, AU–60/Germantown Building; U.S. Department of Energy; 1000 Independence Avenue SW, Washington, DC 20585, at any time. Under no circumstance is an employee subject to retribution for challenging the classification status of RD, FRD, or TFNI.

(9) *Commingling.* Commingling of RD, FRD, and TFNI with NSI in the same document should be avoided to the greatest degree possible. When mixing this information cannot be avoided, the marking requirements in 10 CFR part 1045, section 140(f) and declassification requirements of 10 CFR part 1045, section 155 apply.

(10) *Protection of RD and FRD.* Most of the protection requirements for RD and FRD are similar to NSI and are based on the classification level. However, there are some protection requirements for certain RD information that may be applied through specific contract requirements by the GCA. These range from distribution limitations through the limitation of access to specifically authorized individuals to specific storage requirements, including the requirement for IDSs, and additional accountability records.

(i) Any DOE contractor that violates a classified information security requirement may be subject to a civil penalty under the provisions of 10 CFR part 824.

(ii) Certification is required for individuals authorized access to specific Sigma categories, as appropriate. Address questions regarding these requirements to *DOE's National Nuclear Security Administration, Office of Defense Programs.*

(iii) Storage and distribution requirements are determined by the classification level, category, and Sigma category. Sigma designation is not a requirement for all RD documents. Storage and distribution requirements will be dependent only on classification level and category.

(11) *Accountability.* In addition to TOP SECRET information, some SECRET RD information is considered accountable (*e.g.,* specific Sigma 14 matter). Each nuclear weapon data control point will keep a record of transactions involving Secret nuclear weapon data documents under its jurisdiction including origination, receipt, transmission, current custodian, reproduction, change of classification, declassification, and destruction.

(12) *Cybersecurity.* Classified databases, systems, and networks containing RD and FRD are protected under the requirements developed and distributed by the DOE Office of the Chief Information Officer.

(f) *NNPI.* NNPI is information associated with the Naval Nuclear Propulsion Program and is governed by Office of the Chief of Naval Operations Instruction (OPNAVINST) N9210.3, ''Safeguarding of Naval Nuclear Propulsion Information'' (available at: *https://www.secnav.navy.mil/ doni/Directives/09000%20General%*
20Ship%20Design%20and%20Support/09-200%20 Propulsion%20Plants%20Support/N9210.3%20(Unclas%20Portion).pdf). Naval Reactors, a joint DOE/Department of Navy organization established

under 50 U.S.C. 2406 and 2511, is responsible for the protection of this information. All contracts which grant access to NNPI must require compliance with the specific safeguarding requirements contained in OPNAVINST N9210.3. All waivers or deviations involving security requirements protecting NNPI require Naval Reactors' concurrence. Classified NNPI may not be processed on any contractor information system unless approved by the cognizant authorizing authority with concurrence from Naval Reactors.

§ 117.24 Cognizant Security Office information.

(a) *DoD*. Refer to the DCSA website (*https://www.dcsa.mil*) for a listing of office locations and areas of responsibility and for information on verification of facility clearances and safeguarding. In those cases where the cleared facility is located on a DoD installation the applicable DCSA field office can advise if the installation commander is providing security oversight.

TABLE 1 TO PARAGRAPH (a) DOD COGNIZANT SECURITY OFFICE

Designation	Office name	Mailing address	Telephone No.
Headquarters, CSO	Defense Counterintelligence and Security Agency.	27130 Telegraph Rd., Quantico, VA 22134.	(888) 282–7682

(b) *DOE*.

TABLE 2 TO PARAGRAPH (b) DOE COGNIZANT SECURITY OFFICES

Designation	Office name	Mailing address	Telephone No.
Headquarters	Headquarters Office of Security Operations (AU–40).	19901 Germantown Road, Germantown, MD 20874.	(301) 903–2177
CSO, Clearance Agency, Central Verification Activity, Adjudicative Authority, and PCL and FCL databases.	DOE/National Nuclear Security Administration Office of Personnel and Facility Clearances and Classifications.	Pennsylvania & H Street, Kirtland Air Force Base, Albuquerque, NM 87116.	(505) 845–4154
CSO	U.S. Department of Energy, Idaho Operations Office.	850 Energy Drive, Idaho Falls, ID 83401.	(208) 526–2216

TABLE 3 TO PARAGRAPH (b) DOE COGNIZANT SECURITY OFFICES CONTINUED

Designation	Office name	Mailing address	Telephone No.
CSO, Naval Nuclear Propulsion Information.	Director, Naval Reactors	NA–30, 1240 Isaac Hull Ave., SE., Washington Navy Yard, DC 20376.	(202) 781–6297
CSO	U.S. Department of Energy, Office of Science Consolidated Service Center.	200 Administration Road, P.O. Box 2001, Oak Ridge, TN 37830.	(865) 576–2140
CSO	U.S. Department of Energy, Pacific Northwest Site Office.	902 Battelle Boulevard, Richland, WA 99354.	(888) 375–7665
CSO	U.S. Department of Energy, Richland Operations Office.	825 Jadwin Avenue, P.O. Box 550, Richland, WA 99352.	(509) 376–7411
CSO	U.S. Department of Energy, Savannah River Operations Office.	Road 1A, Aiken, SC 29801	(803) 725–6211

(c) *NRC*.

TABLE 4 TO PARAGRAPH (c) NRC COGNIZANT SECURITY OFFICES

Designation	Mailing address	Telephone No.
CSO, Adjudicative Authority, PCL and FCL databases, and Industrial Security Program.	U.S. Nuclear Regulatory Commission, ATTN: Director of Facilities and Security, Washington, DC 20555.	(301) 415–8080
CSO, FCL Database and Industrial Security Program for Licensees.	U.S. Nuclear Regulatory Commission, ATTN: Information Security Branch, 11555 Rockville Pike, Rockville, MD 20853.	(301) 415–7048

TABLE 4 TO PARAGRAPH (c) NRC COGNIZANT SECURITY OFFICES—Continued

Designation	Mailing address	Telephone No.
Clearance Agency	U.S. Nuclear Regulatory Commission, ATTN: Director of Facilities and Security Personnel Security, 11545 Rockville Pike, Rockville, MD 20853.	(301) 415–8080
Central Verification Agency	U.S. Nuclear Regulatory Commission, ATTN: Director of Security Facilities Security, 11545 Rockville Pike, Rockville, MD 20853.	(301) 415–8080

(d) *DHS*.

TABLE 6 TO PARAGRAPH (d) DHS COGNIZANT SECURITY OFFICE

Designation	Mailing address	Telephone No.
CSO	DHS Cognizant Security Office, ATTN: Chief Security Officer, 245 Murray Lane, M/S 0120–3, Washington, DC 20528.	(202) 447–5424; (202) 447–5345

PART 142—COPYRIGHTED SOUND AND VIDEO RECORDINGS

Sec.
142.1 Purpose.
142.2 Applicability.
142.3 Policy.
142.4 Procedures.
142.5 Responsibilities.

AUTHORITY: 10 U.S.C. 133.

SOURCE: 49 FR 49452, Dec. 20, 1984, unless otherwise noted.

§ 142.1 Purpose.

This part provides policy, prescribes procedures, and assigned responsibilities regarding the use of copyrighted sound and video recordings within the Department of Defense.

§ 142.2 Applicability.

(a) The provisions of this part apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Unified and Specified commands, and the Defense Agencies (hereafter referred to collectively as ''DoD Components'').

(b) This part does not regulate the procurement or use of copyrighted works for authorized official purposes.

§ 142.3 Policy.

(a) It is DoD policy: (1) To recognize the rights to copyright owners by establishing specific guidelines for the use of copyrighted works by individuals within the DoD community, consistent with the Department's unique mission and worldwide commitments, and (2) Not to condone, facilitate, or permit unlicensed public performance or unlawful reproduction for private or personal use of copyrighted sound or video recordings, using government appropriated or nonappropriated-fund-owned or leased equipment or facilities.

(b) Although the policy expressed in this Directive takes into account the copyright law of the United States, the application of that law to specific situations is a matter for interpretation by the U.S. Copyright Office and the Department of Justice.

§ 142.4 Procedures.

(a) Permission or licenses from copyright owners shall be obtained for public performance of copyrighted sound and video recordings.

(b) Component procedures established pursuant to § 142.5, below provide guidance for determining whether a performance is ''public.'' These general principles will be observed:

(1) A performance in a residential facility or a physical extension thereof is not considered a public performance.

(2) A performance in an isolated area or deployed unit is not considered a public performance.

(3) Any performance at which admission is charged normally would be considered a public performance.

(c) Government audio and video duplicating equipment and appropriated funded playback equipment may not be used for reproduction of copyrighted sound or video recordings.

§ 142.5 Responsibilities.

Heads of DoD Components shall establish procedures to comply with this Directive and shall provide necessary local guidance and legal interpretation.

PART 145—COOPERATION WITH THE OFFICE OF SPECIAL COUNSEL OF THE MERIT SYSTEMS PROTECTION BOARD

Sec.
145.1 Purpose.
145.2 Applicability and scope.
145.3 Definitions.
145.4 Policy.
145.5 Responsibilities.
145.6 Procedures.
APPENDIX TO PART 145—LEGAL REPRESENTATION

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 133.

SOURCE: 51 FR 17178, May 9, 1986, unless otherwise noted.

§ 145.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for cooperation with the Office of Special Counsel (OSC) of the Merit Systems Protection Board (MSPB) in fulfilling the responsibilities of the Special Counsel under Pub. L. 95–454 and 5 CFR 1201 and 1250 to conduct investigations of alleged prohibited personnel practices and to ensure the investigation of other allegations of improper or illegal conduct referred to the Department of Defense by the OSC. This part provides internal guidance to DoD officials, and does not establish an independent basis for any person or organization to assert a right, benefit, or privilege.

§ 145.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Office of the Joint Chiefs of Staff (OJCS), the Inspector General, Department of Defense (IG, DoD) and the Defense Agencies (hereafter referred to collectively ''as DoD Components'').

(b) The provisions of this part that relate to prohibited personnel practices do not apply to the Defense Intelligence Agency (DIA) or the National Security Agency (NSA), as prescribed by 5 U.S.C. 2302(a)(2)(C)(ii.).

(c) This part does not restrict the IG, DoD, in coordinating investigative efforts on individual cases with the OSC where concurrent jurisdiction exists.

§ 145.3 Definitions.

Improper or illegal conduct. (a) A violation of any law, rule, or regulation in connection with Government misconduct; or

(b) Mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

Office of the Secretary of Defense (OSD). (a) The immediate offices of the Secretary, the Deputy Secretary, the Assistant Secretaries, Assistants to the Secretary, and other officials serving the Secretary of Defense directly.

(b) The field activities of the Secretary of Defense.

(c) The Organization of the Joint Chiefs of Staff.

(d) The Unified and Specified Commands.

Personnel action. (a) An appointment.

(b) A promotion.

(c) An adverse action under 5 U.S.C. 7501 *et seq.* or other disciplinary or corrective action.

(d) A detail, transfer, or reassignment.

(e) A reinstatement.

(f) A restoration.

(g) A reemployment.

(h) A performance evaluation under 5 U.S.C. 4301 *et seq.*

(i) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action.

(j) Any other significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level.

Prohibited personnel practice. Action taken by an employee who has authority to take, direct others to take, recommend, or approve any personnel action:

(a) That discriminates for or against any employee or applicant for employment on the basis of race, color, religion, sex, national origin, age, handicapping condition, marital status, or political affiliation, as prohibited by certain specified laws (see 5 U.S.C. 2302(b)(1).

(b) To solicit or consider any recommendation or statement, oral or written, with respect to any individual who requests, or is under consideration for, any personnel action, unless the recommendation or statement is based on the personal knowledge or records of the person furnishing it, and consists of an evaluation of the work performance, ability, aptitude, or general qualifications of the individual, or an evaluation of the character, loyalty, or suitability of such individual.

(c) To coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity.

(d) To deceive or willfully obstruct any person with respect to such person's right to compete for employment.

(e) To influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment.

(f) To grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment.

(g) To appoint, employ, promote, advance, or advocate for appointment, employment, promotion, or advancement, in or to a civilian position any individual who is a relative (as defined in 5 U.S.C. 3110) of the employee if the position is in the agency in which the employee is serving as a public official (as defined in 5 U.S.C. 3110) or over which the employee exercises jurisdiction or control as an official.

(h) To take or fail to take a personnel action with respect to any employee or applicant for employment as a reprisal for being a whistleblower. (See whistleblower)

(i) To take or fail to take a personnel action against an employee or applicant for employment as a reprisal for the exercise of any appeal right granted by law, rule, or regulation.

(j) To discriminate for or against any employee or applicant for employment on the basis of conduct that does not adversely affect the performance of the employee or applicant or the performance of others.

(k) To take or fail to take any other personnel action if the taking of, or failure to take, such action violates any law, rule, or regulation implementing, or directly concerning, the merit system principles contained in 5 U.S.C. 2301.

Whistleblower. A present or former Federal employee or applicant for Federal employment who discloses information he or she reasonably believes evidences:

(a) A violation of any law, rule, or regulation.

(b) Mismanagement, a gross waste of funds, or an abuse of authority.

(c) A substantial or specific danger to public health or safety.

(d) Such disclosure qualifies if it is not specifically prohibited by statute and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(e) Where the information disclosed affects only the personal situation of the complaintant, it is generally to be regarded as an allegation of a prohibited personnel practice or violation of other civil service law, rule, or regulation, and the complainant will not be considered a whistleblower.

§ 145.4 Policy.

It is DoD policy that:

(a) Civilian personnel actions taken by DoD management officials, civilian and military, shall conform to laws and regulations implementing established merit system principles and must be

free of any prohibited personnel practices, as described in 5 U.S.C. 2302 and §145.3 of this part.

(b) It is the responsibility of each DoD management official to take vigorous corrective action and, when appropriate, to initiate disciplinary measures when prohibited personnel practices occur.

(c) DoD Components shall cooperate with the Office of Special Counsel by:

(1) Promoting merit system principles in civilian employment programs within the Department of Defense.

(2) Investigating and reporting on allegations of improper or illegal conduct forwarded to the Component by the OSC pursuant to 5 U.S.C. 1206(b) (2) or (3).

(3) Facilitating orderly investigation by the OSC of alleged prohibited personnel practices and other matters assigned for investigation to the OSC by law, such as the Freedom of Information Act and the Hatch Act.

(d) DoD Components shall cooperate with the OSC by providing appropriate assistance and information to its representatives during their investigations and by furnishing to the OSC investigators copies of releasable documents requested under the authority of the Civil Service Reform Act of 1978, 5 CFR 1250, the Privacy Act, and Civil Service Rule V.

(e) Close coordination between DoD and OSC personnel during an OSC investigation is encouraged to eliminate duplication of effort, and to avoid unnecessary delay in initiating, when appropriate, corrective or disciplinary action. This coordination shall be conducted in full recognition of the independent statutory basis for the OSC, as provided in Pub. L. 95–454 and of the responsibilities of the Department of Defense.

(f) OSC investigative requests involving classified information shall be accorded special attention and prompt consideration under existing administrative procedures.

(g) When OSC and a DoD Component or an employee assigned DoD counsel are engaged in litigation, release of information shall be accomplished pursuant to MSPB rules of discovery (5 CFR 1201, subpart B.).

§ 145.5 Responsibilities.

(a) The *Secretaries of the Military Departments* and the *Director, Defense Logistics Agency (DLA)*, shall prescribe implementing documents to ensure that:

(1) The policies, standards, and procedures set forth in this part are administered in a manner that encourages consistency in responding to investigations of alleged prohibited personnel practices.

(2) Alleged illegal or improper conduct referred to a Military Department or the DLA by the OSC or by OSD is carefully investigated.

(3) There is full cooperation with the IG, DoD, and the General Counsel, Department of Defense (GC, DoD), including assignment of military and civilian attorneys to represent employees suspected or accused by the OSC of committing a prohibited personnel practice or an otherwise illegal or improper act.

(b) The *General Counsel, Department of Defense* (GC, DoD) shall provide overall legal guidance, whether by the issuance of regulations or otherwise, on all issues concerning cooperation with the OSC. This authority extends to:

(1) Ensuring that DoD legal counsel is assigned upon request to represent a DoD employee suspected or accused by the OSC of committing a prohibited personnel practice or an illegal or improper act when the act complained of was within the scope of the employee's official responsibilities and such representation is in the interest of the Department of Defense; or, in unusual situations, that outside legal counsel is engaged where the use of DoD counsel would be inappropriate, and the same conditions are satisfied.

(2) Providing DoD legal counsel to seek intervention for the purpose of representing the interests of OSD or a Defense agency (other than the DLA) in an MSPB hearing resulting from charges of misconduct against an employee of OSD or a Defense agency, under the authority of the Civil Service Reform Act of 1978.

(3) Seeking the assistance of the Department of Justice in responding to requests by employees for legal representation in obtaining judicial review of an order by the MSPB, under 5 U.S.C. 1207.

(4) Modifying §145.3 and Appendix to this part and issuing supplementary instructions concerning all aspects of DoD cooperation with the OSC, including instructions on OSC investigations of allegedly arbitrary and capricious withholding of information under the Freedom of Information Act or violations of the Hatch Act.

(5) Reviewing for adequacy and legal sufficiency with the IG, DoD, each report of an investigation that must be personally reviewed by the Secretary or Deputy Secretary of Defense on action taken or to be taken in response to an OSC finding of reasonable cause to believe there has been a violation of law, rule, or regulation, not including a prohibited personnel practice or allegation referred to the Attorney General of the United States for appropriate action.

(c) The *Inspector General, Department of Defense* (IG, DoD) shall:

(1) Investigate, or cause to be investigated, as appropriate, any complaint referred to the Department of Defense by OSC.

(2) Coordinate, where feasible, investigative efforts by DoD Components and the OSC, with particular emphasis on those conducted or initiated by action of the OSC.

(3) Submit the results of any investigation conducted under this part to the appropriate General Counsel.

(d) The *Deputy Assistant Secretary of Defense (Administration)* (DASD(A)) shall serve as the Senior Management Official, as described in §145.6(b) concerning allegations by the OSC of prohibited personnel practices or other illegal or improper acts in the OSD.

(e) The *General Counsels of the Military Departments* and the *General Counsel of the Defense Logistics Agency* shall have the same authority for their respective Components as given to the General Counsel, DoD, under paragraphs (b) (1) and (2) of this section.

§145.6 Procedures.

(a) *Allegations of improper or illegal conduct received from the OSC under 5 U.S.C. 1206(b)(2), (3), or (c)(3).* (1) Allegations of improper or illegal conduct referred by the OSC to the Secretary of Defense or to a Defense agency (other than the DLA) shall be forwarded to the IG, DoD.

(2) Allegations of improper or illegal conduct referred to a Military Department or to the DLA by the OSC shall be forwarded to the General Counsel of that Component.

(3) Upon receipt of a referral under paragraph (a) (1) or (2) of this section IG, DoD, or the GC of the Component concerned, as appropriate, shall ensure compliance with the Civil Service Reform Act of 1978 by obtaining a suitable investigation of an allegation, including compliance with time limits for reporting results of the investigation and personal review of the report by the head of the Component when required.

(4) Copies of each allegation referred under paragraph (a)(2) shall be forwarded by the General Counsel concerned to the IG, DoD.

(b) *OSC Investigations of Prohibited Personnel Practices.* (1) The head of each DoD Component shall designate a Senior Management Official to:

(i) Serve as a point of contact in providing assistance to the OSC in conducting investigations of alleged prohibited activities before any designation of an attorney of record for the Component or individual respondent for matters in litigation.

(ii) Monitor those investigations.

(iii) Ensure that appropriate Component personnel are fully apprised of the nature and basis for an OSC investigation, as well as the rights and duties of Component personnel in regard to such investigations.

(iv) Ensure that any corrective or disciplinary action considered appropriate because of facts disclosed by such an investigation is accomplished under paragraph (b)(2), in a timely manner.

(2) The designated Senior Management Official shall have authority to:

(i) Refer to responsible officials recommendations by the OSC for corrective action.

(ii) Seek OSC approval of proposed disciplinary action against an employee for an alleged prohibited personnel practice or illegal or improper act under investigation by the OSC when it is determined that such discipline is warranted.

(iii) Ensure that disciplinary action against an employee adjudged at fault following completion of an OSC investigation has been considered to avoid the need for a proceeding before the MSPB.

(iv) Ensure that information concerning members of the Armed Forces who are found by the Component to have committed a prohibited personnel practice or other violation of this Directive in the exercise of authority over civilian personnel is referred to appropriate military authority.

(3) The Senior Management Official shall:

(i) Establish a system under which an employee is identified to serve as the Liaison Officer for any OSC investigator who may initiate an investigation at a facility, base, or installation for which the employee is assigned liaison duties. It shall be the responsibility of the Liaison Officer to:

(A) Assist the OSC investigator.

(B) Ensure that all OSC requests for documents are in writing.

(C) Process such requests, as well as all requests for interviews.

(ii) Determine, to the extent practicable, whether an investigation is being, or has been, conducted that replicates in whole or in part the proposed or incomplete investigation by the OSC, and convey that information to the OSC whenever this might avoid redundant investigative effort.

(iii) Inform the General Counsel of the Component concerned of any OSC investigation and consult with the General Counsel on any legal issue related to an OSC investigation.

(iv) Ensure that Component personnel involved are given timely legal and policy advice, through arrangements effected by the Liaison Officer, on the nature and basis for an OSC investigation, the authority of the OSC, and the rights and duties of Component personnel, including those set forth in Appendix.

(v) Inform the IG, DoD, of any OSC investigation of an alleged prohibited personnel practice that is identified as having resulted from a whistleblower complaint or involves an allegation of otherwise illegal or improper conduct.

APPENDIX TO PART 145—LEGAL REPRESENTATION

1. An employee or member of the Armed Forces asked to provide information (testimonial or documentary) to the OSC in the course of an investigation by that office may obtain legal advice from DoD attorneys, both civilian and military, on that employee's or members's rights and obligations. This includes assistance at any interviews with OSC investigators. However, the attorney-client relationship shall not be established unless the employee is suspected or accused by the OSC of committing a prohibited personnel practice or other illegal or improper act and has been assigned DoD counsel.

2. An employee who believes that he or she is suspected or has been accused by the OSC of committing a prohibited personnel practice or other illegal or improper act may obtain legal representation from the Department of Defense under the conditions prescribed in §145(b)(1) of this part, except as provided in section 7, below. The attorney assigned shall be a military member or employee from another Component whenever an attorney from the same Component is likely to face a conflict between his or her ethical obligation to the employee client and to the Component employer, and in any case where the suspected or accused employee has requested representation from another Component. Outside legal counsel may be retained by the Component on behalf of the employee only under unusual circumstances and only with the personal approval of the General Counsel of the Department of Defense.

3. The General Counsel responsible for authorizing representation shall determine whether a conflict is liable to occur if an attorney from the same Component is assigned to represent the employee and, in that case or in a case in which the suspected or accused employee has requested representation from another Component, shall seek the assistance of another General Counsel in obtaining representation from outside the Component. The General Counsels of the Military Departments and the DLA shall ensure the availability of appropriately trained counsel for assignment to such cases.

4. To obtain legal representation the employee:

a. Must request legal representation, in writing, together with all process and pleadings served, and explain the circumstances that justify DoD legal assistance.

b. Indicate whether he or she has retained legal counsel from outside the Department of Defense.

c. Obtain a written certification from his or her supervisor that the employee was acting within the scope of his of her official duties, and that no adverse or disciplinary personnel action against the employee for the

conduct being investigated by the OSC has been initiated by the Component.

5. Employee requests for legal representation must be approved by the General Counsel, DoD, for employees of OSD or a Defense Agency (other than the DLA), or by the General Counsel of a Military Department or the General Counsel of the DLA for employees of those Components.

6. The conditions of legal representation must be explained to the accused employee in writing and accepted in writing by that employee.

7. DoD resources may not be used to provide legal representation for an employee with respect to a DoD disciplinary action against the employee for committing or participating in a prohibited personnel practice or for engaging in illegal or improper conduct, regardless of whether that participation or conduct is also the basis for disciplinary action proposed by the OSC.

8. After approval of an employee's request, under section 4, above, a DoD attorney shall be assigned (or, in unusual circumstances, outside counsel retained) as the employee's representative in matters pending before the OSC or MSPB. This approval may be limited to representing the employee only with respect to some of the pending matters if other specific matters of concern to the OSC or MSPB do not satisfy the requirements of his Directive.

9. An attorney-client relationship shall be established and continued between the suspected or accused employee and assigned DoD counsel.

10. In representing a DoD employee under this part, a DoD attorney designated counsel for the employee shall act as a vigorous advocate of the employee's individual legal interests before the OSC or MSPB; the attorney's professional responsibility to the Department of Defense and his or her employing Component will be satisfied by fulfilling this responsibility to the employee. Legal representation may be terminated only with the approval of the General Counsel who authorized representation, and normally only on the basis of information not available at the time the attorney was assigned.

11. The attorney-client relationship may be terminated if the assigned DoD counsel for the employee determines, with the approval of the General Counsel who authorizes representation, that:

a. The employee was acting outside the scope of his or her official duties when engaging in the conduct that is the basis for the OSC investigation or charge.

b. Termination of the professional representation is not in violation of the rules of professional conduct applicable to the assigned counsel.

12. The DoD attorney designated counsel may request relief from the duties of representation or counseling without being required to furnish explanatory information that might compromise the assurance to the client of confidentiality.

13. This part authorizes cognizant DoD officials to approve a represented employee's request for travel, per diem, witness appearances, or other departmental support necessary to ensure effective legal representation of the employee by the designated counsel.

14. An employee's participation in OSC investigations, MSPB hearings, and other related proceedings shall be considered official departmental business for time and attendance requirements and similar purposes.

15. The following advice to employees questioned during the course of an OSC investigation may be appropriate in response to the most frequent inquiries:

a. An employee may decline to provide a ''yes'' or ''no'' answer in favor of a more qualified answer when this is necessary to ensure accuracy in responding to an OSC interviewer's questions.

b. Requests for clarification of both questions and answers are appropriate to avoid misinterpretation.

c. Means to ensure verification of an interview by OSC investigators are appropriate, whether the employee is or is not accompanied by a legal representative. Tape recorders may only be used for this purpose when:

(1) The recorder is used in full view.

(2) All attendees are informed.

(3) The OSC interrogator agrees to the tape recording of the proceeding.

d. Any errors that appear in a written summary of an interview prepared by the interviewer should be corrected before the employee signs the statement. The employee is not required to sign any written summary that is not completely accurate. An employee may make a copy of the summary for his or her own use as a condition of signing.

PART 147—ADJUDICATIVE GUIDELINES FOR DETERMINING ELIGIBILITY FOR ACCESS TO CLASSIFIED INFORMATION

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AUTHORITY: E.O. 12968 (60 FR 40245, 3 CFR 1995 Comp., p 391).

SOURCE: 63 FR 4573, Jan. 30, 1998, unless otherwise noted.

Subpart A—Adjudication

§ 147.1 Introduction.

The following adjudicative guidelines are established for all United States Government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information. They apply to persons being considered for initial or continued eligibility for access to classified information, to include sensitive compartmented information and special access programs and are to be used by government departments and agencies in all final clearance determinations.

§ 147.2 Adjudicative process.

(a) The adjudicative process is an examination of a sufficient period of a person's life to make an affirmative determination that the person is eligible for a security clearance. Eligibility for access to classified information is predicated upon the individual meeting these personnel security guidelines. The adjudicative process is the careful weighing of a number of variables known as the whole person concept. Available, reliable information about the person, past and present, favorable and unfavorable, should be considered in reaching a determination. In evaluating the relevance of an individual's conduct, the adjudicator should consider the following actors:

(1) The nature, extent, and seriousness of the conduct;

(2) The circumstances surrounding the conduct, to include knowledgeable participation;

(3) The frequency and recency of the conduct;

(4) The individual's age and maturity at the time of the conduct;

(5) The voluntariness of participation;

(6) The presence or absence of rehabilitation and other pertinent behavioral changes;

(7) The motivation for the conduct;

(8) The potential for pressure, coercion, exploitation, or duress;

(9) The likelihood of continuation of recurrence.

(b) Each case must be judged on its own merits, and final determination remains the responsibility of the specific department or agency. Any doubt as to whether access to classified information is clearly consistent with national

security will be resolved in favor of the national security.

(c) The ultimate determination of whether the granting or continuing of eligibility for a security clearance is clearly consistent with the interests of national security must be an overall common sense determination based upon careful consideration of the following, each of which is to be evaluated in the context of the whole person, as explained further below:

(1) Guideline A: Allegiance to the United States.

(2) Guideline B: Foreign influence.

(3) Guideline C: Foreign preference.

(4) Guideline D: Sexual behavior.

(5) Guideline E: Personal conduct.

(6) Guideline F: Financial considerations.

(7) Guideline G: Alcohol consumption.

(8) Guideline H: Drug involvement.

(9) Guideline I: Emotional, mental, and personality disorders.

(10) Guideline J: Criminal conduct.

(11) Guideline K: Security violations.

(12) Guideline L: Outside activities.

(13) Guideline M: Misuse of Information Technology Systems.

(d) Although adverse information concerning a single criterion may not be sufficient for an unfavorable determination, the individual may be disqualified if available information reflects a recent or recurring pattern of questionable judgment, irresponsibility, or emotionally unstable behavior. Notwithstanding, the whole person concept, pursuit of further investigations may be terminated by an appropriate adjudicative agency in the face of reliable, significant, disqualifying, adverse information.

(e) When information of security concern becomes known about an individual who is currently eligible for access to classified information, the adjudicator should consider whether the person:

(1) Voluntarily reported the information;

(2) Was truthful and complete in responding to questions;

(3) Sought assistance and followed professional guidance, where appropriate;

(4) Resolved or appears likely to favorably resolve the security concern;

(5) Has demonstrated positive changes in behavior and employment;

(6) Should have his or her access temporarily suspended pending final adjudication of the information.

(f) If after evaluating information of security concern, the adjudicator decides that the information is not serious enough to warrant a recommendation of disapproval or revocation of the security clearance, it may be appropriate to recommend approval with a warning that future incidents of a similar nature may result in revocation of access.

§ 147.3 Guideline A—Allegiance to the United States.

(a) *The concern.* An individual must be of unquestioned allegiance to the United States. The willingness to safeguard classified information is in doubt if there is any reason to suspect an individual's allegiance to the Untied States.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) Involvement in any act of sabotage, espionage, treason, terrorism, sedition, or other act whose aim is to overthrow the Government of the United States or alter the form of government by unconstitutional means;

(2) Association or sympathy with persons who are attempting to commit, or who are committing, any of the above acts;

(3) Association or sympathy with persons or organizations that advocate the overthrow of the United States Government, or any state or subdivision, by force or violence or by other unconstitutional means;

(4) Involvement in activities which unlawfully advocate or practice the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any state.

(c) *Conditions that could mitigate security concerns include:* (1) The individual was unaware of the unlawful aims of the individual or organization and severed ties upon learning of these;

(2) The individual's involvement was only with the lawful or humanitarian aspects of such an organization;

(3) Involvement in the above activities occurred for only a short period of time and was attributable to curiosity or academic interest;

(4) The person has had no recent involvement or association with such activities.

§ 147.4 Guideline B—Foreign influence.

(a) *The concern.* A security risk may exist when an individual's immediate family, including cohabitants and other persons to whom he or she may be bound by affection, influence, or obligation are not citizens of the Untied States or may be subject to duress. These situations could create the potential for foreign influence that could result in the compromise of classified information. Contacts with citizens of other countries or financial interests in other countries are also relevant to security determinations if they make an individual potentially vulnerable to coercion, exploitation, or pressure.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) An immediate family member, or a person to whom the individual has close ties of affection or obligation, is a citizen of, or resident or present in, a foreign country;

(2) Sharing living quarters with a person or persons, regardless of their citizenship status, if the potential for adverse foreign influence or duress exists;

(3) Relatives, cohabitants, or associates who are connected with any foreign government;

(4) Failing to report, where required, associations with foreign nationals;

(5) Unauthorized association with a suspected or known collaborator or employee of a foreign intelligence service;

(6) Conduct which may make the individual vulnerable to coercion, exploitation, or pressure by a foreign government;

(7) Indications that representatives or nationals from a foreign country are acting to increase the vulnerability of the individual to possible future exploitation, coercion or pressure;

(8) A substantial financial interest in a country, or in any foreign owned or operated business that could make the individual vulnerable to foreign influence.

(c) *Conditions that could mitigate security concerns include:* (1) A determination that the immediate family member(s) (spouse, father, mother, sons, daughters, brothers, sisters), cohabitant, or associate(s) in question are not agents of a foreign power or in a position to be exploited by a foreign power in a way that could force the individual to choose between loyalty to the person(s) involved and the United States;

(2) Contacts with foreign citizens are the result of official United States Government business;

(3) Contact and correspondence with foreign citizens are casual and infrequent;

(4) The individual has promptly complied with existing agency requirements regarding the reporting of contacts, requests, or threats from persons or organizations from a foreign country;

(5) Foreign financial interests are minimal and not sufficient to affect the individual's security responsibilities.

§ 147.5 Guideline C—Foreign preference.

(a) *The concern.* When an individual acts in such a way as to indicate a preference for a foreign country over the United States, then he or she may be prone to provide information or make decisions that are harmful to the interests of the United States.

(b) Conditions that could raise a security concern and may be disqualifying include:

(1) The exercise of dual citizenship;

(2) Possession and/or use of a foreign passport;

(3) Military service or a willingness to bear arms for a foreign country;

(4) Accepting educational, medical, or other benefits, such as retirement and social welfare, from a foreign country;

(5) Residence in a foreign country to meet citizenship requirements;

(6) Using foreign citizenship to protect financial or business interests in another country;

(7) Seeking or holding political office in the foreign country;

(8) Voting in foreign elections;

(9) Performing or attempting to perform duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

(c) *Conditions that could mitigate security concerns include:* (1) Dual citizenship is based solely on parents' citizenship or birth in a foreign country;

(2) Indicators of possible foreign preference (e.g., foreign military service) occurred before obtaining United States citizenship;

(3) Activity is sanctioned by the United States;

(4) Individual has expressed a willingness to renounce dual citizenship.

§ 147.6 Guidance D—Sexual behavior.

(a) *The concern.* Sexual behavior is a security concern if it involves a criminal offense, indicates a personality or emotional disorder, may subject the individual to coercion, exploitation, or duress, or reflects lack of judgment or discretion.[1] Sexual orientation or preference may not be used as a basis for or a disqualifying factor in determining a person's eligibility for a security clearance.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) Sexual behavior of a criminal nature, whether or not the individual has been prosecuted;

(2) Compulsive or addictive sexual behavior when the person is unable to stop a pattern or self-destructive or high-risk behavior or that which is symptomatic of a personally disorder;

(3) Sexual behavior that causes an individual to be vulnerable to coercion, exploitation, or duress;

(4) Sexual behavior of a public nature and/or that which reflects lack of discretion or judgment.

(c) *Conditions that could mitigate security concerns include:* (1) The behavior occurred during or prior to adolescence and there is no evidence of subsequent conduct of a similar nature;

(2) The behavior was not recent and there is no evidence of subsequent conduct of a similar nature;

(3) There is no other evidence of questionable judgment, irresponsibility, or emotional instability;

(4) The behavior no longer serves as a basis for coercion, exploitation, or duress.

§ 147.7 Guideline E—Personal conduct.

(a) *The concern.* Conduct involving questionable judgment, untrustworthiness, unreliability, lack of candor, dishonesty, or unwillingness to comply with rules and regulations could indicate that the person may not properly safeguard classified information. The following will normally result in an unfavorable clearance action or administrative termination of further processing for clearance eligibility:

(1) Refusal to undergo or cooperate with required security processing, including medical and psychological testing;

(2) Refusal to complete required security forms, releases, or provide full, frank and truthful answers to lawful questions of investigators, security officials or other representatives in connection with a personnel security or trustworthiness determination.

(b) *Conditions that could raise a security concern and may be disqualifying also include:* (1) Reliable, unfavorable information provided by associates, employers, coworkers, neighbors, and other acquaintances;

(2) The deliberate omission, concealment, or falsification of relevant and material facts from any personnel security questionnaire, personal history statement, or similar form used to conduct investigations, determine employment qualifications, award benefits or status, determine security clearance eligibility or trustworthiness, or award fiduciary responsibilities;

(3) Deliberately providing false or misleading information concerning relevant and material matters to an investigator, security official, competent medical authority, or other representative in connection with a personnel security or trustworthiness determination;

[1] The adjudicator should also consider guidelines pertaining to criminal conduct (Guideline J) and emotional, mental and personality disorders (Guideline I) in determining how to resolve the security concerns raised by sexual behavior.

(4) Personal conduct or concealment of information that may increase an individual's vulnerability to coercion, exploitation, or duties, such as engaging in activities which, if known, may affect the person's personal, professional, or community standing or render the person susceptible to blackmail;

(5) A pattern of dishonesty or rule violations, including violation of any written or recorded agreement made between the individual and the agency;

(6) Association with persons involved in criminal activity.

(c) *Conditions that could mitigate security concerns include:* (1) The information was unsubstantiated or not pertinent to a determination of judgment, trustworthiness, or reliability;

(2) The falsification was an isolated incident, was not recent, and the individual has subsequently provided correct information voluntarily;

(3) The individual made prompt, good faith efforts to correct the falsification before being confronted with the facts;

(4) Omission of material facts was caused or significantly contributed to by improper or inadequate advice of authorized personnel, and the previously omitted information was promptly and fully provided;

(5) The individual has taken positive steps to significantly reduce or eliminate vulnerability to coercion, exploitation, or duress;

(6) A refusal to cooperate was based on advice from legal counsel or other officials that the individual was not required to comply with security processing requirements and, upon being made aware of the requirement, fully and truthfully provided the requested information;

(7) Association with persons involved in criminal activities has ceased.

§ 147.8 Guideline F—Financial considerations.

(a) *The concern.* An individual who is financially overextended is at risk of having to engage in illegal acts to generate funds. Unexplained affluence is often linked to proceeds from financially profitable criminal acts.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) A history of not meeting financial obligations;

(2) Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, and other intentional financial breaches of trust;

(3) Inability or unwillingness to satisfy debts;

(4) Unexplained affluence;

(5) Financial problems that are linked to gambling, drug abuse, alcoholism, or other issues of security concern.

(c) *Conditions that could mitigate security concerns include:* (1) The behavior was not recent;

(2) It was an isolated incident;

(3) The conditions that resulted in the behavior were largely beyond the person's control (e.g., loss of employment, a business downtrun, unexpected medical emergency, or a death, divorce or separation);

(4) The person has received or is receiving counseling for the problem and there are clear indications that the problem is being resolved or is under control;

(5) The affluence resulted from a legal source;

(6) The individual initiated a good-faith effort to repay overdue creditors or otherwise resolve debts.

§ 147.9 Guideline G—Alcohol consumption.

(a) *The concern.* Excessive alcohol consumption often leads to the exercise of questionable judgment, unreliability, failure to control impulses, and increases the risk of unauthorized disclosure of classified information due to carelessness.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) Alcohol-related incidents away from work, such as driving while under the influence, fighting, child or spouse abuse, or other criminal incidents related to alcohol use;

(2) Alcohol-related incidents at work, such as reporting for work or duty in an intoxicated or impaired condition, or drinking on the job;

(3) Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of alcohol abuse or alcohol dependence;

(4) Evaluation of alcohol abuse or alcohol dependence by a licensed clinical social worker who is a staff member of a recognized alcohol treatment program;

(5) Habitual or binge consumption of alcohol to the point of impaired judgment;

(6) Consumption of alcohol, subsequent to a diagnosis of alcoholism by a credentialed medical professional and following completion of an alcohol rehabilitation program.

(c) *Conditions that could mitigate security concerns include:* (1) The alcohol related incidents do not indicate a pattern;

(2) The problem occurred a number of years ago and there is no indication of a recent problem;

(3) Positive changes in behavior supportive of sobriety;

(4) Following diagnosis of alcohol abuse or alcohol dependence, the individual has successfully completed inpatient or outpatient rehabilitation along with aftercare requirements, participates frequently in meetings of Alcoholics Anonymous or a similar organization, has abstained from alcohol for a period of at least 12 months, and received a favorable prognosis by a credentialed medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

§ 147.10 Guideline H—Drug involvement.

(a) *The concern.* (1) Improper or illegal involvement with drugs raises questions regarding an individual's willingness or ability to protect classified information. Drug abuse or dependence may impair social or occupational functioning, increasing the risk of an unauthorized disclosure of classified information.

(2) Drugs are defined as mood and behavior altering substances, and include:

(i) Drugs, materials, and other chemical compounds identified and listed in the Controlled Substances Act of 1970, as amended (e.g., marijuana or cannabis, depressants, narcotics, stimulants, and hallucinogens),

(ii) Inhalants and other similar substances.

(3) Drug abuse is the illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) Any drug abuse (see above definition);

(2) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution;

(3) Diagnosis by a credentialed medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence;

(4) Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program;

(5) Failure to successfully complete a drug treatment program prescribed by a credentialed medical professional. Recent drug involvement, especially following the granting of a security clearance, or an expressed intent not to discontinue use, will almost invariably result in an unfavorable determination.

(c) *Conditions that could mitigate security concerns include:* (1) The drug involvement was not recent;

(2) The drug involvement was an isolated or aberration event;

(3) A demonstrated intent not to abuse any drugs in the future;

(4) Satisfactory completion of a prescribed drug treatment program, including rehabilitation and aftercare requirements, without recurrence of abuse, and a favorable prognosis by a credentialed medical professional.

§ 147.11 Guideline I—Emotional, mental, and personality disorders.

(a) *The concern:* Emotional, mental, and personality disorders can cause a significant deficit in an individual's psychological, social and occupation functioning. These disorders are of security concern because they may indicate a defect in judgment, reliability, or stability. A credentialed mental health professional (e.g., clinical psychologist or psychiatrist), employed by, acceptable to or approved by the

government, should be utilized in evaluating potentially disqualifying and mitigating information fully and properly, and particularly for consultation with the individual's mental health care provider.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) An opinion by a credentialed mental health professional that the individual has a condition or treatment that may indicate a defect in judgment, reliability, or stability;

(2) Information that suggests that an individual has failed to follow appropriate medical advice relating to treatment of a condition, e.g., failure to take prescribed medication;

(3) A pattern of high-risk, irresponsible, aggressive, anti-social or emotionally unstable behavior;

(4) Information that suggests that the individual's current behavior indicates a defect in his or her judgment or reliability.

(c) *Conditions that could mitigate security concerns include:* (1) There is no indication of a current problem;

(2) Recent opinion by a credentialed mental health professional that an individual's previous emotional, mental, or personality disorder is cured, under control or in remission and has a low probability of recurrence or exacerbation;

(3) The past emotional instability was a temporary condition (e.g., one caused by a death, illness, or marital breakup), the situation has been resolved, and the individual is no longer emotionally unstable.

§ 147.12 Guideline J—Criminal conduct.

(a) *The concern.* A history or pattern of criminal activity creates doubt about a person's judgment, reliability and trustworthiness.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) Allegations or admissions of criminal conduct, regardless of whether the person was formally charged;

(2) A single serious crime or multiple lesser offenses.

(c) *Conditions that could mitigate security concerns include:* (1) The criminal behavior was not recent;

(2) The crime was an isolated incident;

(3) The person was pressured or coerced into committing the act and those pressures are no longer present in that person's life;

(4) The person did not voluntarily commit the act and/or the factors leading to the violation are not likely to recur;

(5) Acquittal;

(6) There is clear evidence of successful rehabilitation.

§ 147.13 Guideline K—Security violations.

(a) *The concern.* Noncompliance with security regulations raises doubt about an individual's trustworthiness, willingness, and ability to safeguard classified information.

(b) *Conditions that could raise a security concern and may be disqualifying include.* (1) Unauthorized disclosure of classified information;

(2) Violations that are deliberate or multiple or due to negligence.

(c) *Conditions that could mitigate security concerns include actions that:* (1) Were inadvertent;

(2) Were isolated or infrequent;

(3) Were due to improper or inadequate training;

(4) Demonstrate a positive attitude towards the discharge of security responsibilities.

§ 147.14 Guideline L—Outside activities.

(a) *The concern.* Involvement in certain types of outside employment or activities is of security concern if it poses a conflict with an individual's security responsibilities and could create an increased risk of unauthorized disclosure of classified information.

(b) *Conditions that could raise a security concern and may be disqualifying include any service, whether compensated, volunteer, or employment with:* (1) A foreign country;

(2) Any foreign national;

(3) A representative of any foreign interest;

(4) Any foreign, domestic, or international organization or person engaged in analysis, discussion, or publication of material on intelligence, defense, foreign affairs, or protected technology.

(c) *Conditions that could mitigate security concerns include:* (1) Evaluation of the outside employment or activity indicates that it does not pose a conflict with an individual's security responsibilities;

(2) The individual terminates the employment or discontinues the activity upon being notified that it is in conflict with his or her security responsibilities.

§ 147.15 Guideline M—Misuse of Information technology systems.

(a) *The concern.* Noncompliance with rules, procedures, guidelines, or regulations pertaining to information technology systems may raise security concerns about an individual's trustworthiness, willingness, and ability to properly protect classified systems, networks, and information. Information Technology Systems include all related equipment used for the communication, transmission, processing, manipulation, and storage of classified or sensitive information.

(b) *Conditions that could raise a security concern and may be disqualifying include:* (1) Illegal or unauthorized entry into any information technology system;

(2) Illegal or unauthorized modification, destruction, manipulation or denial of access to information residing on an information technology system;

(3) Removal (or use) of hardware, software, or media from any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations;

(4) Introduction of hardware, software, or media into any information technology system without authorization, when specifically prohibited by rules, procedures, guidelines or regulations.

(c) *Conditions that could mitigate security concerns include:* (1) The misuse was not recent or significant;

(2) The conduct was unintentional or inadvertent;

(3) The introduction or removal of media was authorized;

(4) The misuse was an isolated event;

(5) The misuse was followed by a prompt, good faith effort to correct the situation.

Subpart B—Investigative Standards

§ 147.18 Introduction.

The following investigative standards are established for all United States Government civilian and military personnel, consultants, contractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information, to include Sensitive Compartmented Information and Special Access Programs, and are to be used by government departments and agencies as the investigative basis for final clearance determinations. However, nothing in these standards prohibits an agency from using any lawful investigative procedures in addition to these requirements in order to resolve any issue identified in the course of a background investigation or reinvestigation.

§ 147.19 The three standards.

There are three standards (Attachment D to this subpart part summarizes when to use each one):

(a) The investigation and reinvestigation standards for ''L'' access authorizations and for access to confidential and secret (including all secret-level Special Access Programs not specifically approved for enhanced investigative requirements by an official authorized to establish Special Access Programs by section in 4.4 of Executive Order 12958) (60 FR 19825, 3 CFR 1995 Comp., p. 33);

(b) The investigation standard for ''Q'' access authorizations and for access to top secret (including top secret Special Access Programs) and Sensitive Compartmented Information;

(c) The reinvestigation standard for continued access to the levels listed in paragraph (b) of this section.

§ 147.20 Exception to periods of coverage.

Some elements of standards specify a period of coverage (e.g. seven years). Where appropriate, such coverage may be shortened to the period from the subject's eighteenth birthday to the present or to two years, whichever is longer.

§ 147.21 Expanding investigations.

Investigations and reinvestigations may be expanded under the provisions of Executive Order 12968 (60 FR 40245, 3 CFR 1995 Comp., p. 391) and other applicable statutes and Executive Orders.

§ 147.22 Transferability.

Investigations that satisfy the requirements of a given standard and are current meet the investigative requirements for all levels specified for the standard. They shall be mutually and reciprocally accepted by all agencies.

§ 147.23 Breaks in service.

If a person who requires access has been retired or separated from U.S. government employment for less than two years and is the subject of an investigation that is otherwise current, the agency regranting the access will, as a minimum, review an updated Standard Form 86 and applicable records. A reinvestigation is not required unless the review indicates the person may no longer satisfy the standards of Executive Order 12968 (60 FR 40245, 3 CFR 1995 Comp., p. 391); (Attachment D to this subpart, Table 2).

§ 147.24 The national agency check.

The National Agency Check is a part of all investigations and reinvestigations. It consists of a review of;

(a) Investigative and criminal history files of the FBI, including a technical fingerprint search;

(b) OPM's Security/Suitability Investigations Index;

(c) DoD's Defense Clearance and Investigations Index;

(d) Such other national agencies (e.g., CIA, INS) as appropriate to the individual's background.

ATTACHMENT A TO SUBPART B OF PART 147—STANDARD A—NATIONAL AGENCY CHECK WITH LOCAL AGENCY CHECKS AND CREDIT CHECK (NACLC)

(a) *Applicability*. Standard A applies to investigations and reinvestigations for;

(1) Access to CONFIDENTIAL and SECRET (including all SECRET-level Special Access Programs not specifically approved for enhanced investigative requirements by an official authorized to establish Special Access Programs by sect. 4.4 of Executive Order 12958) (60 FR 19825, 3 CFR 1995 Comp., p. 333);

(2) ''L'' access authorizations.

(b) *For Reinvestigation: When to Reinvestigate*. The reinvestigation may be initiated at any time following completion of, but not later than ten years (fifteen years for CONFIDENTIAL) from the date of, the previous investigation or reinvestigation. (Attachment D to this subpart, Table 2, reflects the specific requirements for when to request a reinvestigation, including when there has been a break in service.)

(c) *Investigative Requirements*. Investigative requirements are as follows:

(1) *Completion of Forms:* Completion of Standard Form 86, including applicable releases and supporting documentation.

(2) *National Agency Check:* Completion of a National Agency Check.

(3) *Financial Review:* Verification of the subject's financial status, including credit bureau checks covering all locations where the subject has resided, been employed, or attended school for six months or more for the past seven years.

(4) *Date and Place of Birth:* Corroboration of date and place of birth through a check of appropriate documentation, if not completed in any previous investigation; a check of Bureau of Vital Statistics records when any discrepancy is found to exist.

(5) *Local Agency Checks:* As a minimum, all investigations will include checks of law enforcement agencies having jurisdiction where the subject has lived, worked, and/or attended school within the last five years, and, if applicable, of the appropriate agency for any identified arrests.

(d) *Expanding the Investigation:* The investigation may be expanded if necessary to determine if access is clearly consistent with the national security.

ATTACHMENT B TO SUBPART B OF PART 147—STANDARD B—SINGLE SCOPE BACKGROUND INVESTIGATION (SSBI)

(a) *Applicability*. Standard B applies to initial investigations for;

(1) Access to TOP SECRET (including TOP SECRET Special Access Programs) and Sensitive Compartment Information;

(2) ''Q'' access authorizations.

(b) *Investigative Requirements.* Investigative requirements are as follows:

(1) *Completion of Forms:* Completion of Standard Form 86, including applicable releases and supporting documentation.

(2) *National Agency Check:* Completion of a National Agency Check.

(3) *National Agency Check for the Spouse or Cohabitant (if applicable):* Completion of a National Agency Check, without fingerprint cards, for the spouse or cohabitant.

(4) *Date and Place of Birth:* Corroboration of date and place of birth through a check of appropriate documentation; a check of Bureau of Vital Statistics records when any discrepancy is found to exist.

(5) *Citizenship:* For individuals born outside the United States, verification of US citizenship directly from the appropriate registration authority; verification of US citizenship or legal status of foreign-born immediate family members (spouse, cohabitant, father, mother, sons, daughters, brothers, sisters).

(6) *Education:* Corroboration of most recent or most significant claimed attendance, degree, or diploma. Interviews of appropriate educational sources if education is a primary activity of the subject during the most recent three years.

(7) *Employment:* Verification of all employments for the past seven years; personal interviews of sources (supervisors, coworkers, or both) for each employment of six months or more; corroboration through records or sources of all periods of unemployment exceeding sixty days; verification of all prior federal and military service, including discharge type. For military members, all service within one branch of the armed forces will be considered as one employment, regardless of assignments.

(8) *References:* Four references, of whom at least two are developed; to the extent practicable, all should have social knowledge of the subject and collectively span at least the last seven years.

(9) *Former Spouse:* An interview of any former spouse divorced within the last ten years.

(10) *Neighborhoods:* Confirmation of all residences for the last three years through appropriate interviews with neighbors and through records reviews.

(11) *Financial Review:* Verification of the subject's financial status, including credit bureau checks covering all locations where subject has resided, been employed, and/or attended school for six months or more for the last seven years.

(12) *Local Agency Checks:* A check of appropriate criminal history records covering all locations where, for the last ten years, the subject has resided, been employed, and/or attended school for six months or more, including current residence regardless of duration.

NOTE: If no residence, employment, or education exceeds six months, local agency checks should be performed as deemed appropriate.

(13) *Public Records:* Verification of divorces, bankruptcies, and other court actions, whether civil or criminal, involving the subject.

(14) *Subject Interview:* A subject interview, conducted by trained security, investigative, or counterintelligence personnel. During the investigation, additional subject interviews may be conducted to collect relevant information, to resolve significant inconsistencies, or both. Sworn statements and unsworn declarations may be taken whenever appropriate.

(15) *Polygraph (only in agencies with approved personnel security polygraph programs):* In departments or agencies with policies sanctioning the use of the polygraph for personnel security purposes, the investigation may include a polygraph examination, conducted by a qualified polygraph examiner.

(c) *Expanding the Investigation.* The investigation may be expanded as necessary. As appropriate, interviews with anyone able to provide information or to resolve issues, including but not limited to cohabitants, relatives, psychiatrists, psychologists, other medical professionals, and law enforcement professionals may be conducted.

ATTACHMENT C TO SUBPART B OF PART 147—STANDARD C—SINGLE SCOPE BACKGROUND INVESTIGATION PERIODIC REINVESTIGATION (SSBI-PR)

(a) *Applicability.* Standard C applies to reinvestigation for;

(1) *Access to TOP SECRET (including TOP SECRET Special Access Programs) and Sensitive Compartmented Information;*

(2) ''Q'' access authorizations.

(b) *When to Reinvestigate.* The reinvestigation may be initiated at any time following completion of, but not later than five years from the date of, the previous investigation (see Attachment D to this subpart, Table 2).

(c) *Reinvestigative Requirements.* Reinvestigative requirements are as follows:

(1) *Completion of Forms:* Completion of Standard Form 86, including applicable releases and supporting documentation.

(2) *National Agency Check:* Completion of a National Agency Check (fingerprint cards are required only if there has not been a previous valid technical check of the FBI).

(3) *National Agency Check for the Spouse or Cohabitant (if applicable):* Completion of a National Agency Check, without fingerprint cards, for the spouse or cohabitant. The National Agency Check for the spouse or cohabitant is not required if already completed in conjunction with a previous investigation or reinvestigation.

(4) *Employment:* Verification of all employments since the last investigation. Attempts to interview a sufficient number of sources (supervisors, coworkers, or both) at all employments of six months or more. For military members, all services within one branch of the armed forces will be considered as one employment, regardless of assignments.

(5) *References:* Interviews with two character references who are knowledgeable of the subject; at least one will be a developed reference. To the extent practical, both should have social knowledge of the subject and collectively span the entire period of the reinvestigation. As appropriate, additional interviews may be conducted, including with cohabitants and relatives.

(6) *Neighborhoods:* Interviews of two neighbors in the vicinity of the subject's most recent residence of six months or more. Confirmation of current residence regardless of length.

(7) *Financial Review—Financial Status:* Verification of the subject's financial status, including credit bureau checks covering all locations where subject has resided, been employed, and/or attended school for six months or more for the period covered by the reinvestigation;

(ii) *Check of Treasury's Financial Data Base:* Agencies may request the Department of the Treasury, under terms and conditions prescribed by the Secretary of the Treasury, to search automated data bases consisting of reports of currency transactions by financial institutions, international transportation of currency or monetary instruments, foreign bank and financial accounts, and transactions under $10,000 that are reported as possible money laundering violations.

(8) *Local Agency Checks:* A check of appropriate criminal history records covering all locations where, during the period covered by the reinvestigation, the subject has resided, been employed, and/or attended school for six months or more, including current residence regardless of duration. (Note: If no residence, employment, or education exceeds six months, local agency checks should be performed as deemed appropriate.)

(9) *Former Spouse:* An interview with any former spouse unless the divorce took place before the date of the last investigation or reinvestigation.

(10) *Public Records:* Verification of divorces, bankruptcies, and other court actions, whether civil or criminal, involving the subject since the date of the last investigation.

(11) *Subject Interview:* A subject interview, conducted by trained security, investigative, or counterintelligence personnel. During the reinvestigation, additional subject interviews may be conducted to collect relevant information, to resolve significant inconsistencies, or both. Sworn statements and unsworn declarations may be taken whenever appropriate.

(d) *Expanding the Reinvestigation:* The reinvestigation may be expanded as necessary. As appropriate, interviews with anyone able to provide information or to resolve issues, including but not limited to cohabitants, relatives, psychiatrists, psychologists, other medical professionals, and law enforcement professionals may be conducted.

ATTACHMENT D TO SUBPART B OF PART 147—DECISION TABLES

TABLE 1—WHICH INVESTIGATION TO REQUEST

If the requirement is for	And the person has this access	Based on this investigation	Then the investigation required is	Using standard
Confidental Secret; "L"	None	None	NACLC	A
		Out of date NACLC or SSBI.		
	Conf, Sec; "L"			
Top Secret, SCI; "Q"	None	None	SSBI	B
	None; Conf, Sec; "L".	Current or out of date NACLC		
		Out of date SSBI		
	TS, SCI; "Q"		SSBI-PR	C

TABLE 2—REINVESTIGATION REQUIREMENTS

If the requirement is for	And the age of the investigation is	Type required if there has been a break in service of	
		0–23 months	24 month's or more
Confidential	0 to 14 years. 11 mos	None (note 1)	NACLC
	15 yrs. or more	NACLC.	
Secret; "L"	0 to 9 yrs 11 mos	None (note 1).	
	10 yrs. or more	NACLC	
Top Secret, SCI; "Q"	0 to 4 yrs. 11 mos	None (note 1)	SSBI

TABLE 2—REINVESTIGATION REQUIREMENTS—Continued

If the requirement is for	And the age of the investigation is	Type required if there has been a break in service of	
		0–23 months	24 month's or more
	5 yrs or more	SSBI-PR.	

NOTE: As a minimum, review an updated Standard Form 84 and applicable records. A reinvestigation (NACLC or SSBI-PR) is not required unless the review indicates the person may no longer satisfy the standards of Executive Order 12968.

Subpart C—Guidelines for Temporary Access

§ 147.28 Introduction.

The following minimum investigative standards, implementing section 3.3 of Executive Order 12968, *Access to Classified Information*, are established for all United States Government and military personnel, consultants, contractors, subcontractors, employees of contractors, licensees, certificate holders or grantees and their employees and other individuals who require access to classified information before the appropriate investigation can be completed and a final determination made.

§ 147.29 Temporary eligibility for access.

Based on a justified need meeting the requirements of section 3.3 of Executive Order 12968, temporary eligibility for access may be granted before investigations are complete and favorably adjudicated, where official functions must be performed prior to completion of the investigation and adjudication process. The temporary eligibility will be valid until completion of the investigation and adjudication; however, the agency granting it may revoke it at any time based on unfavorable information identified in the course of the investigation.

§ 147.30 Temporary eligibility for access at the confidential and secret levels and temporary eligibility for "L" access authorization.

As a minimum, such temporary eligibility requires completion of the Standard Form 86, including any applicable supporting documentation, favorable review of the form by the appropriate adjudicating authority, and submission of a request for an expedited National Agency Check with Local Agency Checks and Credit (NACLC).

§ 147.31 Temporary eligibility for access at the top secret levels and temporary eligibility for "Q" access authorization: For someone who is the subject of a favorable investigation not meeting the investigative standards for access at those levels.

As a minimum, such temporary eligibility requires completion of the Standard Form 86, including any applicable supporting documentation, favorable review of the form by the appropriate adjudicating authority, and expedited submission of a request for a Single Scope Background Investigation (SSBI).

§ 147.32 Temporary eligibility for access at the top secret and SCI levels and temporary eligibility for "Q" access authorization: For someone who is not the subject of a current, favorable personnel or personnel-security investigation of any kind.

As a minimum, such temporary eligibility requires completion of the Standard Form 86, including any applicable supporting documentation, favorable review of the form by the appropriate adjudicating authority, immediate submission of a request for an expedited Single Scope Background Investigation (SSBI), and completion and favorable review by the appropriate adjudicating authority of relevant criminal history and investigative records of the Federal Bureau of Investigation and of information in the Security/Suitability Investigations Index (SII) and the Defense Clearance and Investigations Index (DCII).

§ 147.33 Additional requirements by agencies.

Temporary eligibility for access must satisfy these minimum investigative standards, but agency heads may

establish additional requirements based on the sensitivity of the particular, identified categories of classified information necessary to perform the lawful and authorized functions that are the basis for granting temporary eligibility for access. However, no additional requirements shall exceed the common standards for background investigations developed under section 3.2(b) of Executive Order 12968. Temporary eligibility for access is valid only at the agency granting it and at other agencies who expressly agree to accept it and acknowledge understanding of its investigative basis. It is further subject to limitations specified in sections 2.4(d) and 3.3 of Executive Order 12968, *Access to Classified Information*.

PART 148—NATIONAL POLICY AND IMPLEMENTATION OF RECIPROCITY OF FACILITIES

Subpart A—National Policy on Reciprocity of Use and Inspections of Facilities

Sec.
148.1 Interagency reciprocal acceptance.
148.2 Classified programs.
148.3 Security review.
148.4 Policy documentation.
148.5 Identification of the security policy board.
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Subpart B—Guidelines for the Implementation and Oversight of the Policy on Reciprocity of Use and Inspections of Facilities

148.10 General.
148.11 Policy.
148.12 Definitions.
148.13 Responsibilities.
148.14 Procedures.

AUTHORITY: E.O. 12968 (60 FR 40245, 3 CFR 1995 Comp., p. 391.)

SOURCE: 63 FR 4580, Jan. 30, 1998, unless otherwise noted.

Subpart A—National Policy on Reciprocity of Use and Inspections of Facilities

§ 148.1 Interagency reciprocal acceptance .

Interagency reciprocal acceptance of security policies and procedures for approving, accrediting, and maintaining the secure posture of shared facilities will reduce aggregate costs, promote interoperability of agency security systems, preserve vitality of the U.S. industrial base, and advance national security objectives.

§ 148.2 Classified programs.

Once a facility is authorized, approved, certified, or accredited, all U.S. Government organizations desiring to conduct classified programs at the facility at the same security level shall accept the authorization, approval, certification, or accreditation without change, enhancements, or upgrades. Executive Order, Safeguarding Directives, National Industrial Security Program Operating Manual (NISPOM), the NISPOM Supplement, the Director of Central Intelligence Directives, interagency agreements, successor documents, or other mutually agreed upon methods shall be the basis for such acceptance.

§ 148.3 Security review.

After initial security authorization, approval, certification, or accreditation, subsequent security reviews shall normally be conducted no more frequently than annually.

Additionally, such reviews shall be aperiodic or random, and be based upon risk management principles. Security reviews may be conducted ''for cause'', to follow up on previous findings, or to accomplish close-out actions. Visits may be made to a facility to conduct security support actions, administrative inquiries, program reviews, and approvals as deemed appropriate by the cognizant security authority or agency.

§ 148.4 Policy documentation.

Agency heads shall ensure that any policy documents their agency issues setting out facilities security policies and procedures incorporate the policy set out herein, and that such policies are reasonable, effective, efficient, and enable and promote interagency reciprocity.

§ 148.5 Identification of the security policy board.

Agencies which authorize, approve, certify, or accredit facilities shall provide to the Security Policy Board Staff a points of contact list to include names and telephone numbers of personnel to be contacted for verification of authorized, approved, certified, or accredited facility status. The Security Policy Board Staff will publish a comprehensive directory of points of contact.

§ 148.6 Agency review.

Agencies will continue to review and assess the potential value added to the process of co-use of facilities by development of electronic data retrieval across government. As this review continues, agencies creating or modifying facilities databases will do so in a manner which facilitates community data sharing, interest of national defense or foreign policy.

Subpart B—Guidelines for the Implementation and Oversight of the Policy on Reciprocity of use and Inspections of Facilities

§ 148.10 General.

(a) Redundant, overlapping, and duplicative policies and practices that govern the co-use of facilities for classified purposes have resulted in excessive protection and unnecessary expenditure of funds. Lack of reciprocity has also impeded achievement of national security objectives and adversely affected economic and technological interest.

(b) Interagency reciprocal acceptance of security policies and procedures for approving, accrediting, and maintaining the secure posture of shared facilities will reduce the aggregate costs, promote interoperability of agency security systems, preserve the vitality of the U.S. industrial base, and advance national security objectives.

(c) Agency heads, or their designee, are encouraged to periodically issue written affirmations in support of the policies and procedures prescribed herein and in the Security Policy Board (SPB) policy, entitled ''Reciprocity of Use and Inspections of Facilities.''

(d) The policies and procedures prescribed herein shall be applicable to all agencies. This document does not supersede the authority of the Secretary of Defense under Executive Order 12829 (58 FR 3479, 3 CFR 1993 Comp., p. 570); the Secretary of Energy or the Chairman of the Nuclear Regulatory Commission under the Atomic Energy Act of 1954, as amended; the Secretary of State under the Omnibus Diplomatic Security and Anti-Terrorism Act of 1986; the Secretaries of the military departments and military department installation Commanders under the Internal Security Act of 1950; the Director of Central Intelligence under the National Security Act of 1947, as amended, or Executive Order 12333; the Director of the Information Security Oversight Office under Executive Order 12829 or Executive Order 12958 (60 FR 19825, 3 CFR 1995 Comp., p. 333); or substantially similar authority instruments assigned to any other agency head.

§ 148.11 Policy.

(a) Agency heads, or their designee, shall ensure that security policies and procedures for which they are responsible are reasonable, effective, and efficient, and that those policies and procedures enable and promote interagency reciprocity.

(b) To the extent reasonable and practical, and consistent with US law, Presidential decree, and bilateral and international obligations of the United States, the security requirements, restrictions, and safeguards applicable to industry shall be equivalent to those applicable within the Executive Branch of government.

(c) Once a facility is authorized approved, certified, or accredited, all government organizations desiring to conduct classified programs at the facility at the same security level shall accept the authorization, approval, certification, or accreditation without change, enhancements, or upgrades.

§ 148.12 Definitions.

Agency. Any ''executive agency,'' as defined in 5 U.S.C. 105; any ''Military department'' as defined in 5 U.S.C. 102;

and any other entity within the Executive Branch that comes into possession of classified information.

Classified Information. All information that requires protection under Executive Order 12958, or any of its antecedent orders, and the Atomic Energy Act of 1954, as amended.

Cognizant Security Agency (CSA). Those agencies that have been authorized by Executive Order 12829 to establish an industrial security program for the purpose of safeguarding classified information disclosed or released to industry.

Cognizant Security Office (CSO). The office or offices delegated by the head of a CSA to administer industrial security in a contractor's facility on behalf of the CSA.

Facility. An activity of a government agency or cleared contractor authorized by appropriate authority to conduct classified operations or to perform classified work.

Industry. Contractors, licensees, grantees, and certificate holders obligated by contract or other written agreement to protect classified information under the National Industrial Security Program.

National Security. The national defense and foreign relations of the United States.

Senior Agency Official. Those officials, pursuant to Executive Order 12958, designated by the agency head who are assigned the responsibility to direct and administer the agency's information security program.

§ 148.13 Responsibilities.

(a) Each Senior Agency Official shall ensure that adequate reciprocity provisions are incorporated within his or her regulatory issuances that prescribe agency safeguards for protecting classified information.

(b) Each Senior Agency Official shall develop, implement, and oversee a program that ensures agency personnel adhere to the policies and procedures prescribed herein and the reciprocity provisions of the National Industrial Security Program Operating Manual (NISPOM).

(c) Each Senior Agency Official must ensure that implementation encourages reporting of instances of non-compliance, without fear of reprisal, and each reported instance is aggressively acted upon.

(d) The Director, Information Security Oversight Office (ISOO), consistent with his assigned responsibilities under Executive Order 12829, serves as the central point of contact within Government to consider and take action on complaints and suggestions from industry concerning alleged violations of the reciprocity provisions of the NISPOM.

(e) The Director, Security Policy Board Staff (D/SPBS) or his/her designee, shall serve as the central point of contact within Government to receive from Federal Government employees alleged violations of the reciprocity provisions prescribed herein and the policy ''Reciprocity of Use and Inspections of Facilities'' of the SPB.

§ 148.14 Procedures.

(a) Agencies that authorize, approve, certify, or accredit facilities shall provide to the SPB Staff a points of contact list to include names and telephone numbers of personnel to be contacted for verification of the status of facilities. The SPB Staff will publish a comprehensive directory of agency points of contact.

(b) After initial security authorization, approval, certification, or accreditation, subsequent reviews shall normally be conducted no more frequently than annually. Additionally, such reviews shall be aperiodic or random, and be based upon risk-management principles. Security Reviews may be conducted ''for cause'', to follow up on previous findings, or to accomplish closeout actions.

(c) The procedures employed to maximize interagency reciprocity shall be based primarily upon existing organizational reporting channels. These channels should be used to address alleged departures from established reciprocity requirements and should resolve all, including the most egregious instances of non-compliance.

(d) Two complementary mechanisms are hereby established to augment existing organizational channels: (1) An accessible and responsive venue for reporting and resolving complaints/reported instances of non-compliance.

Government and industry reporting channels shall be as follows:

(1) *Governnment.* (A) Agency employees are encouraged to bring suspected departures from applicable reciprocity requirements to the attention of the appropriate security authority in accordance with established agency procedures.

(B) Should the matter remain unresolved, the complainant (employee, Security Officer, Special Security Officer, or similar official) is encouraged to report the matter formally to the Senior Agency Official for resolution.

(C) Should the Senior Agency Official response be determined inadequate by the complainant, the matter should be reported formally to the Director, Security Policy Board Staff (D/SPBS). The D/SPBS, may revisit the matter with the Senior Agency Official or refer the matter to the Security Policy Forum as deemed appropriate.

(D) Should the matter remain unresolved, the Security Policy Forum may consider referral to the SPB, the agency head, or the National Security Council as deemed appropriate.

(ii) *Industry.* (A) Contractor employees are encouraged to bring suspected departures from the reciprocity provisions of the NISPOM to the attention to their Facility Security Officer (FSO) or Contractor Special Security Officer (CSSO), as appropriate, for resolution.

(B) Should the matter remain unresolved, the complainant (employee, FSO, or CSSO) is encouraged to report the matter formally to the Cognizant Security Office (CSO) for resolution.

(C) Should the CSO responses be determined inadequate by the complainant, the matter should be reported formally to the Senior Agency Official within the Cognizant Security Agency (CSA) for resolution.

(D) Should the Senior Agency Official response be determined inadequately by the complainant, the matter should be reported formally to the Director, information Security Oversight Office (ISOO) for resolution.

(E) The Director, ISOO, may revisit the matter with the Senior Agency Official or refer the matter to the agency head or the National Security Council as deemed appropriate.

(2) An annual survey administered to a representative sampling of agency and private sector facilities to assess overall effectiveness of agency adherence to applicable reciprocity requirements.

(i) In coordination with the D/SPBS, the Director, ISOO, as Chairman of the NISP Policy Advisory Committee (NISPPAC), shall develop and administer an annual survey to a representative number of cleared contractor activities/employees to assess the effectiveness of interagency reciprocity implementation. Administration of the survey shall be coordinated fully with each affected Senior Agency Official.

(ii) In coordination with the NISPPAC, the D/SPBS shall develop and administer an annual survey to a representative number of agency activities/personnel to assess the effectiveness of interagency reciprocity implementation. Administration of the survey shall be coordinated fully with each affected Senior Agency Official.

(iii) The goal of annual surveys should not be punitive but educational. All agencies and departments have participated in the crafting of these facilities policies, therefore, non-compliance is a matter of internal education and direction.

(e) Agencies will continue to review and assess the potential value added to the process of co-use of facilities by development of electronic data retrieval across government.

SUBCHAPTER E—REGULATIONS PERTAINING TO MILITARY JUSTICE

PART 150—COURTS OF CRIMINAL APPEALS RULES OF PRACTICE AND PROCEDURE

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APPENDIX A TO PART 150—FORMAT FOR DIRECTION FOR REVIEW IN A COURT OF CRIMINAL APPEALS

APPENDIX B TO PART 150—FORMAT FOR ASSIGNMENT OF ERRORS AND BRIEF ON BEHALF OF ACCUSED (§150.15)

AUTHORITY: Article 66(f), Uniform Code of Military Justice (10 U.S.C. §866(f) (1994)).

SOURCE: 62 FR 2017, Jan. 15, 1997, unless otherwise noted.

§150.1 Name and seal.

(a) The titles of the Courts of Criminal Appeals of the respective services are:

(1) ''United States Army Court of Criminal Appeals.''

(2) ''United States Navy-Marine Corps Court of Criminal Appeals.''

(3) ''United States Air Force Court of Criminal Appeals.''

(4) ''United States Coast Guard Court of Criminal Appeals.''

(b) Each Court is authorized a seal in the discretion of the Judge Advocate General concerned. The design of such seal shall include the title of the Court.

§150.2 Jurisdiction.

(a) The jurisdiction of the Court is as follows:

(1) *Review under Article 66.* All cases of trial by court-martial in which the sentence as approved extends to:

(i) Death; or

(ii) Dismissal of a commissioned officer, cadet or midshipman, dishonorable or bad-conduct discharge, or confinement for 1 year or longer; and in which the accused has not waived or withdrawn appellate review.

(2) *Review upon direction of the Judge Advocate General under Article 69.* All cases of trial by court-martial in which there has been a finding of guilty and a sentence:

(i) For which Article 66 does not otherwise provide appellate review, and

(ii) Which the Judge Advocate General forwards to the Court for review pursuant to Article 69(d), and

(iii) In which the accused has not waived or withdrawn appellate review.

(3) *Review under Article 62.* All cases of trial by court-martial in which a punitive discharge may be adjudged and a military judge presides, and in which the government appeals an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification or excludes evidence that is substantial proof of a fact material to the proceedings, or directs the disclosure of classified information, imposes sanctions for nondisclosure of classified information, or refuses to issue or enforce a protective order sought by the United States to prevent the disclosure of classified information.

(4) *Review under Article 73.* All petitions for a new trial in cases of trial by court-martial which are referred to the Court by the Judge Advocate General.

(b) *Extraordinary writs.* The Court may, in its discretion, entertain petitions for extraordinary relief including, but not limited to, writs of mandamus, writs of prohibition, writs of habeas corpus, and writs of error coram nobis.

(c) *Effect of rules on jurisdiction.* Nothing in this part shall be construed to extend or limit the jurisdiction of the Courts of Criminal Appeals as established by law.

§ 150.3 Scope of review.

In cases referred to it for review pursuant to Article 66, the Court may act only with respect to the findings and sentence as approved by the convening authority. In reviewing a case or action under Article 69(d) or in determining an appeal under Article 62, the Court may act only with respect to matters of law. The Court may, in addition, review such other matters and take such other action as it determines to be proper under substantive law.e

§ 150.4 Quorum.

(a) *In panel.* When sitting in panel, a majority of the judges assigned to that panel constitutes a quorum for the purpose of hearing or determining any matter referred to the panel. The determination of any matter referred to the panel shall be according to the opinion of a majority of the judges participating in the decision. However, any judge present for duty may issue all necessary orders concerning any proceedings pending on panel and any judge present for duty, or a clerk of court or commissioner to whom the Court has delegated authority, may act on uncontested motions, provided such action does not finally dispose of a petition, appeal, or case before the Court.

(b) *En banc.* When sitting as a whole, a majority of the judges of the Court constitutes a quorum for the purpose of hearing and determining any matter before the Court. The determination of any matter before the Court shall be according to the opinion of a majority of the judge participating in the decision. In the absence of a quorum, any judge present for duty may issue all necessary orders concerning any proceedings pending in the Court preparatory to hearing or decision thereof.

§ 150.5 Place for filing papers.

When the filing of a notice of appearance, brief, or other paper in the office of a Judge Advocate General is required by this part, such papers shall be filed in the office of the Judge Advocate General of the appropriate armed force or in such other place as the Judge Advocate General or rule promulgated pursuant to §150.26 may designate. If transmitted by mail or other means, they are not filed until received in such office.

§ 150.6 Signing of papers.

All formal papers shall be signed and shall show, typewritten or printed, the signer's name, address, military grade (if any), and the capacity in which the paper is signed. Such signature constitutes a certification that the statements made therein are true and correct to the best of the knowledge, information, and belief of the persons signing the paper and that the paper is filed in good faith and not for purposes of unnecessary delay.

§ 150.7 Computation of time.

In computing any period of time prescribed or allowed by this part, by order of the Court, or by any applicable statute, the day of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or legal holiday, or, when the act to be done is the filing of a paper in court, a day on which the office of the Clerk of the Court is closed due to weather or other conditions or by order of the Chief Judge, in which event the period runs until the end of the next day which is neither a Saturday, Sunday, nor a holiday.

§ 150.8 Qualification of counsel.

(a) *All counsel.* Counsel in any case before the Court shall be a member in good standing of the bar of a Federal Court, the highest court of a State or another recognized bar.

(b) *Military counsel.* Assigned appellate defense and appellate government counsel shall, in addition, be qualified in accordance with Articles 27(b)(1) and

70(a), Uniform Code of Military Justice.

(c) *Admission.* Each Court may license counsel to appear before it. Otherwise, upon entering an appearance, counsel shall be deemed admitted pro hac vice, subject to filing a certificate setting forth required qualifications if directed by the Court.

(d) *Suspension.* No counsel may appear in any proceeding before the Court while suspended from practice by the Judge Advocate General of the service concerned.

§ 150.9 Conduct of counsel.

The conduct of counsel appearing before the Court shall be in accordance with rules of conduct prescribed pursuant to Rule for Courts-Martial 109 by the Judge Advocate General of the service concerned. However, the Court may exercise its inherent power to regulate counsel appearing before it, including the power to remove counsel from a particular case for misconduct in relation to that case. Conduct deemed by the Court to warrant consideration of suspension from practice or other professional discipline shall be reported by the Court to the Judge Advocate General concerned.

§ 150.10 Request for appellate defense counsel.

An accused may be represented before the Court by appellate counsel detailed pursuant to Article 70(a) or by civilian counsel provided by the accused, or both. An accused who does not waive appellate review pursuant to Rule for Courts-Martial 1110 shall, within 10 days after service of a copy of the convening authority's action under Rule for Courts-Martial 1107(h), forward to the convening authority or the Judge Advocate General:

(a) A request for representation by military appellate defense counsel, or

(b) Notice that civilian counsel has been retained or that action has been taken to retain civilian counsel (must include name and address of civilian counsel), or

(c) Both a request for representation by military appellate defense counsel under paragraph (a) for this section and notice regarding civilian counsel under paragraph (b) of this section, or

(d) A waiver of representation by counsel.

§ 150.11 Assignment of counsel.

(a) When a record of trial is referred to the court—

(1) If the accused has requested representation by appellate defense counsel, pursuant to Article 70(c)(1), counsel detailed pursuant to Article 70(a) will be assigned to represented the accused; or

(2) If the accused gives notice that he or she has retained or has taken action to retain civilian counsel, appellate defense counsel shall be assigned to represent the interests of the accused pending appearance of civilian counsel. Assigned defense counsel will continue to assist after appearance by civilian counsel unless excused by the accused; or

(3) If the accused has neither requested appellate counsel nor given notice of action to retain civilian counsel, but has not waived representation by counsel, appellate defense counsel will be assigned to represent the accused, subject to excusal by the accused or by direction of the Court.

(b) In any case—

(1) The Court may request counsel when counsel have not been assigned.

(2) Pursuant to Article 70(c)(2), and subject to paragraph (a)(2) of this section, appellate defense counsel will represent the accused when the United States is represented by counsel before the Court.

§ 150.12 Retention of civilian counsel.

When civilian counsel represents an accused before the Court, the Court will notify counsel when the record of trial is received. If both civilian and assigned appellate defense counsel represent the accused, the Court will regard civilian counsel as primary counsel unless notified otherwise. Ordinarily, civilian counsel will use the accused's copy of the record. Civilian counsel may reproduce, at no expense to the government, appellate defense counsel's copy of the record.

§ 150.13 Notice of appearance of counsel.

Military and civilian appellate counsel shall file a written notice of appearance with the Court. The filing of any pleading relative to a case which contains the signature of counsel constitutes notice of appearance of such counsel.

§ 150.14 Waiver or withdrawal of appellate review.

Withdrawals from appellate review, and waivers of appellate review filed after expiration of the period prescribed by the Rule for Courts-Martial 1110(f)(1), will be referred to the Court for consideration. At its discretion, the Court may require the filing of a motion for withdrawal, issue a show cause order, or grant the withdrawal without further action, as may be appropriate. The Court will return the record of trial, in a case withdrawn from appellate review, to the Judge Advocate General for action pursuant to Rule for Courts-Martial 1112.

§ 150.15 Assignments of error and briefs.

(a) *General provisions.* Appellate counsel for the accused may file an assignment of error if any are to be alleged, setting forth separately each error asserted. The assignment of errors should be included in a brief for the accused in the format set forth in Appendix B to this part. An original of all assignments of error and briefs, and as many additional copies as shall be prescribed by the Court, shall be submitted. Briefs and assignments of errors shall be typed or printed, double-spaced on white paper, and securely fastened at the top. All references to matters contained in the record shall show record page numbers and any exhibit designations. A brief on behalf of the government shall be of like character as that prescribed for the accused.

(b) *Time for filing and number of briefs.* Any brief for an accused shall be filed within 60 days after appellate counsel has been notified of the receipt of the record in the Office of the Judge Advocate General. If the Judge Advocate General has directed appellate government counsel to represent the United States, such counsel shall file an answer on behalf of the government within 30 days after any brief and assignment of errors has been filed on behalf of an accused. Appellate counsel for an accused may file a reply brief no later than 7 days after the filing of a response brief on behalf of the government. If no brief is filed on behalf of an accused, a brief on behalf of the government may be filed within 30 days after expiration of the time allowed for the filing of a brief on behalf of the accused.

(c) *Appendix.* The brief of either party may include an appendix. If an unpublished opinion is cited in the brief, a copy shall be attached in an appendix. The appendix may also include extracts of statutes, rules, or regulations. A motion must be filed under §150.23, *infra*, to attach any other matter.

§ 150.16 Oral arguments.

Oral arguments may be heard in the discretion of the Court upon motion by either party or when otherwise ordered by the Court. The motion of a party for oral argument shall be made no later than 7 days after the filing of an answer to an appellant's brief. Such motion shall identify the issue(s) upon which counsel seek argument. The Court may, on its own motion, identify the issue(s) upon which it wishes argument.

§ 150.17 En banc proceedings.

(a)(1) A party may suggest the appropriateness of consideration or reconsideration by the Court as a whole. Such consideration or reconsideration ordinarily will not be ordered except:

(i) When consideration by the full Court is necessary to secure or maintain uniformity of decision, or

(ii) When the proceedings involve a question of exceptional importance, or

(iii) When a sentence being reviewed pursuant to Article 66 extends to death.

(2) In cases being reviewed pursuant to Article 66, a party's suggestion that a matter be considered initially by the Court as a whole must be filed with the Court within 7 days after the government files its answer to the assignment of errors, or the appellant files a reply under §150.15(b). In other proceedings, the suggestion must be filed with the party's initial petition or other initial

pleading, or within 7 days after the response thereto is filed. A suggestion for reconsideration by the Court as a whole must be made within the time prescribed by §150.19 for filing a motion for reconsideration. No response to a suggestion for consideration or reconsideration by the Court as a whole may be filed unless the Court shall so order.

(b) The suggestion of a party for consideration or reconsideration by the Court as a whole shall be transmitted to each judge of the Court who is present for duty, but a vote need not be taken to determine whether the cause shall be considered or reconsidered by the Court as a whole on such a suggestion made by a party unless a judge requests a vote.

(c) A majority of the judges present for duty may order that any appeal or other proceeding be considered or reconsidered by the Court sitting as a whole. However, en banc reconsideration of an en banc decision will not be held unless at least one member of the original majority concurs in a vote for reconsideration.

(d) This rule does not affect the power of the Court *sua sponte* to consider or reconsider any case sitting as a whole.

§150.18 Orders and decisions of the Court.

The Court shall give notice of its orders and decisions by immediately serving them, when rendered, on appellate defense counsel, including civilian counsel, if any, government counsel and the Judge Advocate General, or designee, as appropriate.

§150.19 Reconsideration.

(a) The Court may, in its discretion and on its own motion, enter an order announcing its intent to reconsider its decision or order in any case not later than 30 days after service of such decision or order on appellate defense counsel or on the appellant, if the appellant is not represented by counsel, provided a petition for grant of review or certificate for review has not been filed with the United States Court of Appeals for the Armed Forces, or a record of trial for review under Article 67(b) has not been received by that Court. No briefs or arguments shall be received unless the order so directs.

(b) Provided a petition for grant of review or certificate for review has not been filed with the United States Court of Appeals for the Armed Forces, or a record of trial for review under Article 67(b) or writ appeal has not been received by the United States Court of Appeals for the Armed Forces, the Court may, in its discretion, reconsider its decision or order in any case upon motion filed either:

(1) By appellate defense counsel within 30 days after receipt by counsel, or by the appellant if the appellant is not represented by counsel, of a decision or order, or

(2) By appellate government counsel within 30 days after the decision or order is received by counsel.

(c) A motion for reconsideration shall briefly and directly state the grounds for reconsideration, including a statement of facts showing jurisdiction in the Court. A reply to the motion for reconsideration will be received by the Court only if filed within 7 days of receipt of a copy of the motion. Oral arguments shall not be heard on a motion for reconsideration unless ordered by the Court. The original of the motion filed with the Court shall indicate the date of receipt of a copy of the same by opposing counsel.

(d) The time limitations prescribed by this part shall not be extended under the authority of §§150.24 or 150.25 beyond the expiration of the time for filing a petition for review or writ appeal with the United States Court of Appeals for the Armed Forces, except that the time for filing briefs by either party may be extended for good cause.

§150.20 Petitions for extraordinary relief, answer, and reply.

(a) *Petition for extraordinary relief.* A petition for extraordinary relief in the number of copies required by the Court shall be accompanied by proof of service on each party respondent and will contain:

(1) A previous history of the case including whether prior actions have been filed or are pending for the same relief in this or any other court and the disposition or status of such actions;

(2) A concise and objective statement of all facts relevant to the issue presented and of any pertinent opinion, order or ruling;

(3) A copy of any pertinent parts of the record and all exhibits related to the petition if reasonably available and transmittable at or near the time the petition is filed;

(4) A statement of the issue;

(5) The specific relief sought;

(6) Reasons for granting the writ;

(7) The jurisdictional basis for relief sought and the reasons why the relief sought cannot be obtained during the ordinary course of appellate review;

(8) If desired, a request for appointment of appellate counsel.

(b) *Format.* The title of the petition shall include the name, military grade and service number of each named party and, where appropriate, the official military or civilian title of any named party acting in an official capacity as an officer or agent of the United States. When an accused has not been named as a party, the accused shall be identified by name, military grade and service number by the petitioner and shall be designated as the real party in interest.

(c) *Electronic petitions.* The Court will docket petitions for extraordinary relief submitted by electronic means. A petition submitted by electronic means will conclude with the full name and address of petitioner's counsel, if any, and will state when the written petition and brief, when required, were forwarded to the Court and to all named respondents, and by what means they were forwarded.

(d) *Notice to the Judge Advocate General.* Immediately upon receipt of any petition, the clerk shall forward a copy of the petition to the appropriate Judge Advocate General or designee.

(e) *Briefs.* Each petition for extraordinary relief must be accompanied by a brief in support of the petition unless it is filed in propria persona. The Court may issue a show cause order in which event the respondent shall file an answer within 10 days of the receipt of the show cause order. The petitioner may file a reply to the answer within 7 days of receipt of the answer.

(f) *Initial action by the Court.* The Court may dismiss or deny the petition, order the respondent to show cause and file an answer within the time specified, or take whatever other action it deems appropriate.

(g) *Oral argument and final action.* The Court may set the matter for oral argument. However, on the basis of the pleading alone, the Court may grant or deny the relief sought or make such other order in the case as the circumstances may require. This includes referring the matter to a special master, who need not be a military judge, to further investigate; to take evidence; and to make such recommendations as the Court deems appropriate.

§ 150.21 Appeals by the United States.

(a) *Restricted filing.* Only a representative of the government designated by the Judge Advocate General of the respective service may file an appeal by the United States under Article 62.

(b) *Counsel.* Counsel must be qualified and appointed, and give notice of appearance in accordance with this part and those of the Judge Advocate General concerned.

(c) *Form of appeal.* The appeal must include those documents specified by Rule for Courts-Martial 908 and by applicable regulations of the Secretary concerned. A certificate of the Notice of Appeal described in Rule for Courts-Martial 908(b)(3) must be included. The certificate of service must reflect the date and time of the military judge's ruling or order from which the appeal is taken, and the time and date of service upon the military judge.

(d) *Time for filing.* All procedural Rules of the Court shall apply except as noted in this paragraph:

(1) The representative of the government designated by the Judge Advocate General shall decide whether to file the appeal with the Court. The trial counsel shall have 20 days from the date written notice to appeal is filed with the trial court to forward the appeal, including an original and two copies of the record of trial, to the representative of the government designated by the Judge Advocate General. The person designated by the Judge Advocate General shall promptly file the original record with the Clerk of the Court and forward one copy to

opposing counsel. Appellate government counsel shall have 20 days (or more upon a showing of good cause made by motion for enlargement within the 20 days) from the date the record is filed with the Court to file the appeal with supporting brief with the Court. Should the government decide to withdraw the appeal after the record is received by the Court, appellate government counsel shall notify the Court in writing. Appellate brief(s) shall be prepared in the manner prescribed by §150.15.

(2) Appellee shall prepare an answer in the manner prescribed by §150.15 and shall file such answer within 20 days after any filing of the government brief.

(e) The government shall diligently prosecute all appeals by the United States and the Court will give such appeals priority over all other proceedings where practicable.

§150.22 Petitions for new trial.

(a) Whether submitted to the Judge Advocate General by the accused in propria persona or by counsel for the accused, a petition for new trial submitted while the accused's case is undergoing review by a Court of Criminal Appeals shall be filed with an original and two copies and shall comply with the requirements of Rule for Courts-Martial 1210(c).

(b) Upon receipt of a petition for new trial submitted by other than appellate defense counsel, the Court will notify all counsel of record of such fact.

(c) A brief in support of a petition for new trial, unless expressly incorporated in or filed with the petition, will be filed substantially in the format specified by §150.15 no later than 30 days after the filing of the petition or receipt of the notice required by paragraph (b) of this section, whichever is later. An appellate's answer shall be filed no later than 30 days after the filing of an appellant's brief. A reply may be filed no later than 10 days after the filing of the appellee's answer.

§150.23 Motions.

(a) *Content.* All motions, unless made during the course of a hearing, shall state with particularity the relief sought and the grounds therefor. Motions, pleading, and other papers desired to be filed with the Court may be combined in the same document, with the heading indicating, for example ''MOTION TO FILE (SUPPLEMENTAL ASSIGNMENT OF ERRORS) (CERTIFICATE OF CORRECTION) (SUPPLEMENTAL PLEADING)''; or ''ASSIGNMENT OF ERRORS AND MOTION TO FILE ATTACHED REPORT OF MEDICAL BOARD''.

(b) *Motions to attach documents.* If a party desires to attach a statement of a person to the record for consideration by the Court on any matter, such statement shall be made either as an affidavit or as an unsworn declaration under penalty of perjury pursuant to 28 U.S.C. 1746. All documents containing language other than English shall have, attached, a certified English translation.

(c) *Opposition.* Any opposition to a motion shall be filed within 7 days after receipt by the opposing party of service of the motion.

(d) *Leave to file.* Any pleading not authorized or required by this part, shall be accompanied by a motion for leave to file such pleading.

(e) *Oral argument.* Oral argument shall not normally be permitted on motions.

§150.24 Continuances and interlocutory matters.

Except as otherwise provided in §150.19(d), the Court, in its discretion, may extend any time limits prescribed and may dispose of any interlocutory or other appropriate matter not specifically covered by this part, in such manner as may appear to be required for a full, fair, and expeditious consideration of the case. See §150.4.

§150.25 Suspension of rules.

For good cause shown, the Court acting as a whole or in panel may suspend the requirements or provisions of any of this part in a particular case on petition of a party or on its own motion and may order proceedings in accordance with its direction.

§150.26 Internal rules.

The Chief Judge of the Court has the authority to prescribe internal rules for the Court.

§ 150.27 Recording, photographing, broadcasting, or telecasting of hearings.

The recording, photographing, broadcasting, or televising of any session of the Court or other activity relating thereto is prohibited unless specifically authorized by the Court.

§ 150.28 Amendments.

Proposed amendments to this part may be submitted to the Chief Judge of any Court named in §150.1 or to a Judge Advocate General. Before acting on any proposed amendments not received from the Chief Judges, the Judge Advocates General shall refer them to the Chief Judges of the Courts for comment. The Chief Judges shall confer on any proposed changes, and shall report to the Judge Advocates General as to the suitability of proposed changes and their impact on the operation of the Courts and on appellate justice.

APPENDIX A TO PART 150—FORMAT FOR DIRECTION FOR REVIEW IN A COURT OF CRIMINAL APPEALS

In the United States _____[1] Court of Criminal Appeals

United States v. _____
(Fulltyped name, rank, service, & service number of accused)
Direction for Review Case No. _____

Tried at (location), on (date(s)) before a (type in court-martial) appointed by (convening authority)

To the Honorable, the Judges of the United States _____ Court of Criminal Appeals

1. Pursuant to Article 69 of the Uniform Code of Military Justice, 10 U.S.C. §869 (1994) and the Rules of Practice and Procedure for Courts of Criminal Appeals, Rule 2(b), the record of trial in the above-entitled case is forwarded for review.

2. The accused was found guilty by a (type of court-martial) of a violation of Article(s) _____ of the Uniform Code of Military Justice, and was sentenced to (include entire adjudged sentence) on (insert trial date). The convening authority (approved the sentence as adjudged) (approved the following findings and sentence: _____). The officer exercising general court-martial jurisdiction (where applicable) took the following action: _____. The case was received for review pursuant to Article 69 on (date).

3. In review, pursuant to Uniform Code of Military Justice, Article 66, it is requested that action be taken with respect to the following issues:

[set out issues here]

_____
The Judge Advocate General

Received a copy of the foregoing Direction for Review this _____ (date).

_____
Appellate Government Counsel

_____
Address and telephone number

_____
Appellate Defense Counsel

_____
Address and telephone number

APPENDIX B TO PART 150—FORMAT FOR ASSIGNMENT OF ERRORS AND BRIEF ON BEHALF OF ACCUSED (§150.15)

In the United States _____[2] Court of Criminal Appeals

United States v. _____
(Full typed name, rank, service, & service number of accused), Appellant
Assignment of Errors and Brief on Behalf of Accused Case No. _____

Tried at (location), on (date(s)) before a (type of court-martial) appointed by (convening authority)

To the Honorable, the Judges of the United States _____ Court of Criminal Appeals

Statement of the Case

[Set forth a concise summary of the chronology of the case, including the general nature of the charges, the pleas of the accused, the findings and sentence at trial, the action by the convening authority, and any other pertinent information regarding the proceedings.]

Statement of Facts

[Set forth those facts necessary to a disposition of the assigned errors, including specific page references and exhibit numbers. Answers may adopt appellant's or petitioner's statement of facts if there is no dispute, may state additional facts, or, if there is a dispute, may restate the facts as they appear from appellee's or respondent's viewpoint. The repetition of uncontroverted matters is not desired.]

[1] Use ''Army,'' ''Navy-Marine Corps,'' ''Air Force,'' or ''Coast Guard,'' as applicable.

[2] Use ''Army,'' ''Navy-Marine Corps,'' ''Air Force,'' or ''Coast Guard,'' as applicable.

Errors and Argument

[Set forth each error alleged in upper case letters, followed by separate arguments for each error. Arguments shall discuss briefly the question presented, citing and quoting such authorities as are deemed pertinent. Each argument shall include a statement of the applicable standard of review, and shall be followed by a specific prayer for the relief requested.]

Appendix

[The brief of either party may include an appendix containing copies of unpublished opinions cited in the brief, and extracts of statutes, rules or regulations pertinent to the assigned errors.]

(Signature of counsel)

Name (and rank) of counsel, address and telephone number

Certificate of Filing and Service

I certify that a copy of the foregoing was mailed or delivered to the Court and opposing counsel on (date).

Name (rank) (and signature)

Address and telephone number

(Date)

PART 151—FOREIGN CRIMINAL AND CIVIL JURISDICTION

Sec.
151.1 Purpose.
151.2 Applicability.
151.3 Definitions.
151.4 Policy.
151.5 Responsibilities.
151.6 Procedures.

AUTHORITY: 10 U.S.C. chapter 47, 10 U.S.C. 1037.

SOURCE: 84 FR 18384, May 1, 2019, unless otherwise noted.

§ 151.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures, supplemental to those provided in DoD Instruction 5525.01, ''Foreign Criminal and Civil Jurisdiction,'' which will be made available at *http://www.esd.whs.mil/Directives/issuances/dodi/,* concerning trial by foreign criminal courts of, treatment in foreign prisons of, and the payment of counsel fees in certain civil cases for the following individuals, referred to collectively in this part as ''dependents of DoD personnel,'' when those individuals are in a foreign country as a result of accompanying DoD personnel who are assigned duty in that country:

(a) Command-sponsored and non-command sponsored dependents of Armed Forces members;

(b) Dependents of nationals and non-nationals of the United States who are serving with or accompanying the Military Services (referred to in this rule as ''non-military DoD personnel'') in an area outside the United States and its territories and possessions, the Commonwealth of the Northern Mariana Islands, and the Commonwealth of Puerto Rico (referred to collectively in this rule as ''outside the United States'');

(c) Dependents of DoD personnel serving under a U.S. Chief of Mission are not considered to be ''dependents of DoD personnel'' for the purposes of this part.

§ 151.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

§ 151.3 Definitions.

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

Armed Forces. As set forth in 10 U.S.C. 101(a)(4), the Army, Navy, Air Force, Marine Corps, and Coast Guard.

Designated commanding officer (DCO). The military officer who is designated by the appropriate geographic Combatant Commander to fulfill the duties outlined in this part.

DoD personnel. Armed Forces members and non-military DoD personnel. Armed Forces members and non-military DoD personnel serving under a

U.S. Chief of Mission are not considered to be ''DoD personnel'' as defined in this part.

Non-military DoD personnel. Nationals and non-nationals of the United States who are serving with or accompanying the Armed Forces in an area outside the United States and its territories and possessions, the northern Mariana Islands, and the Commonwealth of Puerto Rico.

§ 151.4 Policy.

(a) The Department of Defense will, for dependents of DoD personnel when those dependents are in a foreign country accompanying DoD personnel who are assigned duty to that foreign country:

(1) Maximize the exercise of U.S. jurisdiction to the extent permissible under applicable status of forces agreements or other forms of jurisdiction arrangements.

(2) Protect, to the maximum extent possible, the rights of dependents of DoD personnel who may be subject to criminal trial by foreign courts and imprisonment in foreign prisons.

(3) Secure, where possible, the release of an accused to the custody of U.S. authorities pending completion of all foreign judicial proceedings.

(b) [Reserved]

§ 151.5 Responsibilities.

(a) The Secretaries of the Military Departments ensure the adequacy of regulations in establishing an information and education policy on the laws and customs of the host country for dependents of DoD personnel assigned to foreign areas.

(b) For each country in their respective assigned area of responsibility (AOR), the geographic Combatant Commanders:

(1) Oversee Command implementation of the procedures in this part.

(2) Oversee DCO responsibilities, as described in paragraphs (c)(1) through (4) of this section.

(c) *DCO responsibilities.* The DCOs:

(1) Are responsible for formal invocation, where applicable, of the Senate resolution procedure in each foreign country where dependents of DoD personnel are present, consistent with the U.S. Senate Resolution of Ratification, with reservations, to the North Atlantic Treaty Organization Status of Forces Agreement, as agreed to by the Senate on July 15, 1953.

(2) In cooperation with the appropriate U.S. Chief of Mission and to the maximum extent possible, ensure dependents of DoD personnel receive the same treatment, rights, and support as Armed Forces members when in the custody of foreign authorities, or when confined (pre-trial and post-trial) in foreign penal institutions. DCOs will work with the appropriate U.S. Chief of Mission to make appropriate diplomatic contacts for dependents of DoD personnel who are not U.S. nationals.

(3) Report informally and immediately to the General Counsel of the Department of Defense, the applicable geographic Combatant Commander, and the General Counsel and the Judge Advocate General of the respective Military Department or, in the case of the U.S. Marine Corps (USMC), to the General Counsel of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps, or, in the case of the Coast Guard, the Judge Advocate General of the Coast Guard, about important new cases or important developments in pending cases. Important cases include, but are not limited to, instances of denial of the procedural safeguards under any applicable agreement; deficiency in the treatment or conditions of confinement in foreign penal institutions; or arbitrary denial of permission to visit dependents of DoD personnel.

(4) Take additional steps that may be authorized under relevant international agreements with the receiving State to implement the policy of this part.

§ 151.6 Procedures.

(a) *Request to foreign authorities not to exercise their criminal and civil jurisdiction over dependents.* The procedures in this section will be followed when it appears that foreign authorities may exercise criminal jurisdiction over dependents of DoD personnel:

(1) When the DCO determines, after a careful consideration of all the circumstances, including consultation with the Department of Justice where

the matter involves possible prosecution in U.S. civilian courts, that suitable action can be taken under existing U.S. laws or administrative regulations, the DCO may request the local foreign authorities to waive the exercise of criminal jurisdiction.

(2) When it appears possible that the accused may not obtain a fair trial, the commander exercising general court-martial jurisdiction over the command to which such persons are attached or with which they are associated will communicate directly with the DCO, reporting the full facts of the case. The DCO will then determine, in the light of legal procedures in effect in that country, if there is a risk that the accused will not receive a fair trial. If the DCO determines that there is a risk that the accused will not receive a fair trial, the DCO will decide, after consultation with the U.S. Chief of Mission, whether a request should be submitted through diplomatic channels to foreign authorities seeking their assurances of a fair trial for the accused or, in appropriate circumstances, that they waive the exercise of jurisdiction over the accused. If the DCO so decides, a recommendation will be submitted through the geographic Combatant Commander and the Chairman of the Joint Chiefs of Staff to the Secretary of Defense. Copies must be provided to the Secretary concerned and the GC DoD.

(b) *Trial observers and trial observers' reports.* (1) U.S. observers at trials before courts of the receiving country (referred to in this section as ''trial observers'') must attend and prepare formal reports in all cases of trials by foreign courts or tribunals of dependents of DoD personnel, except for minor offenses. In cases of minor offenses, the observer will attend the trial at the discretion of the DCO, but will not be required to make a formal report.

(i) Unless directed by the DCO, trial observers are not required to attend all preliminary proceedings, such as scheduling hearings, but will attend the trial on the merits and other pre- and post-trial proceedings where significant procedural or substantive matters are decided.

(ii) Trial observer reports regarding dependents of DoD personnel will be handled and processed pursuant to DoD Instruction 5525.01(4)(b–c).

(2) The DCO, upon receipt of a trial observer report, will be responsible for determining whether:

(i) There was any failure to comply with the procedural safeguards secured by the pertinent status of forces agreement.

(ii) The accused received a fair trial under all the circumstances. Due regard should be given to those fair trial rights listed in DoD Instruction 5525.01 ''Foreign Criminal and Civil Jurisdiction,'' Enclosure 5, ''Fair Trial Guarantees'' that are relevant to the particular facts and circumstances of the trial. A trial will not be determined to be unfair merely because it is not conducted in a manner identical to trials held in the United States.

(A) If the DCO believes that the procedural safeguards specified in pertinent agreements were denied or that the trial was otherwise unjust, the DCO will submit a recommendation as to appropriate action to rectify the trial deficiencies and otherwise to protect the rights or interests of the accused. This recommendation must include a statement of efforts taken or to be taken at the local level to protect the rights of the accused.

(B) The DCO will submit the recommendation to the Secretary of Defense, through the Under Secretary of Defense for Policy (with an advance copy to the General Counsel of the Department of Defense); copies must be provided to the geographic Combatant Commander concerned, the General Counsel and the Judge Advocate General of the Military Department concerned or, in the case of the USMC, to the General Counsel of the Navy and the Staff Judge Advocate to the Commandant of the Marine Corps, or, in the case of the Coast Guard, the Judge Advocate General of the Coast Guard, and the Chairman of the Joint Chiefs of Staff.

(c) *Counsel fees and related assistance for U.S. personnel not subject to the UCMJ.* In cases of exceptional interest to the Military Department concerned or the Department of Homeland Security involving non-military DoD personnel, the Secretary of that Military

Department or the Secretary of Homeland Security may approve, pursuant to 10 U.S.C. 1037, under the following circumstances:

(1) *Criminal cases.* Requests for the provision of counsel fees and payment of expenses in criminal cases may be approved in pre-trial, trial, appellate, and post-trial proceedings in any criminal case where:

(i) The sentence that is normally imposed includes confinement, whether or not such sentence is suspended;

(ii) Capital punishment might be imposed;

(iii) An appeal is made from any proceeding in which there appears to have been a denial of the substantial rights of the accused;

(iv) The case, although not within the criteria established in paragraphs (c)(1)(i) through (iii) of this section, is considered to have significant impact on U.S. interests, including upon the relations of the Armed Forces with the host country.

(2) *Civil cases.* Requests for provision of counsel fees and payment of expenses in civil cases may be granted in trial and appellate proceedings in civil cases where the case is considered to have a significant impact on the relations of the Armed Forces with the host country; or in cases brought against eligible non-military DoD personnel (and in exceptional cases, by such personnel) if the case is considered to involve any other U.S. interest.

(3) *Funding restrictions.* (i) No funds will be provided under this part in cases where the U.S. Government is—in actuality or in legal effect—the plaintiff or the defendant; all such cases shall be referred to the Department of Justice, Office of Foreign Litigation. No funds will be provided under this part in cases where the non-military DoD personnel member is a plaintiff without prior authorization of the Secretary of the Military Department concerned or the Secretary of Homeland Security. The provisions of this paragraph also are applicable to proceedings with civil aspects that are brought by eligible personnel as criminal cases in accordance with local law. Funds for the posting of bail or bond to secure the release of non-military DoD personnel from confinement will be used as provided by applicable Armed Force regulations.

(ii) No funds will be provided under paragraph (c)(2) of this section to a plaintiff who, if successful, will receive an award, in whole or in part, from the United States.

(iii) As provided for in 10 U.S.C. 1037, a person on whose behalf a payment is made under this provision is not liable to reimburse the United States for that payment, unless he or she is responsible for the forfeiture of bail provided for him or her under this provision.

(d) *Treatment of dependents confined in foreign penal institutions.* In cooperation with the appropriate U.S. Chief of Mission and to the maximum extent possible, military commanders will ensure that dependents of DoD personnel receive the same treatment, rights, and support as would be extended to Armed Forces members when in the custody of foreign authorities, or when confined (pretrial and post-trial) in foreign penal institutions. Commanders will work with the appropriate U.S. Chief of Mission to make appropriate diplomatic contacts for the categories of dependents described in this section who are not U.S. nationals.

(e) *Information policy.* The general public and the Congress must be provided promptly with the maximum information concerning status of forces matters that are consistent with the national interest. Information will be coordinated and provided to the public and the Congress in accordance with established procedures, including those in DoD Directive 5122.05, ''Assistant to the Secretary of Defense for Public Affairs (ATSD(PA))'' (available at *http://www.esd.whs.mil/ Portals/54/Documents/DD/issuances/ dodd/512205_dodd_2017.pdf?ver= 2017-08-07-125832-023*), 32 CFR part 286, 32 CFR part 310, and DoD Instruction 5400.04, ''Provision of Information to Congress'' (available at *http://www.esd.whs.mil/ Portals/54/Documents/DD/issuances/ dodi/540004p.pdf*).

PART 152—REVIEW OF THE MANUAL FOR COURTS-MARTIAL

Sec.

152.1 Purpose.
152.2 Applicability.
152.3 Policy.

152.4 Responsibilities.
152.5 Implementation.
APPENDIX A TO PART 152—GUIDANCE TO THE JOINT SERVICE COMMITTEE (JSC)

AUTHORITY: E.O. 12473; 10 U.S.C. 47.

SOURCE: 68 FR 36916, June 20, 2003, unless otherwise noted.

§ 152.1 Purpose.

This part:

(a) Implements the requirement established by the President in Executive Order 12473 that the Manual for Courts-Martial (MCM), United States, 1984, and subsequent editions, be reviewed annually.

(b) Formalizes the Joint Service Committee (JSC) and defines the roles, responsibilities, and procedures of the JSC in reviewing and proposing changes to the MCM and proposing legislation to amend the Uniform Code of Military Justice (UCMJ) (10 U.S.C., Chapter 47).

(c) Provides for the designation of a Secretary of a Military Department to serve as the Executive Agent for the JSC.

§ 152.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard by agreement with the Department of Homeland Security when it is not operating as a Service of the Department of the Navy), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter collectively referred to as ''the DoD Components'').

§ 152.3 Policy.

To assist the President in fulfilling his responsibilities under the UCMJ, and to satisfy the requirements of Executive Order 12473, the Department of Defense shall review the Manual for Courts-Martial annually, and, as appropriate, propose legislation amending the UCMJ to ensure that the MCM and the UCMJ fulfill their fundamental purpose as a comprehensive body of military criminal law and procedure. The role of the JSC furthers these responsibilities. Under the direction of the General Counsel of the Department of Defense, the JSC is responsible for reviewing the MCM and proposing amendments to it and, as necessary, to the UCMJ.

§ 152.4 Responsibilities.

(a) The General Counsel to the Department of Defense shall:

(1) Administer this part, to include coordination on and approval of legislative proposals to amend the UCMJ, approval of the annual review of the MEM, and coordination of any proposed changes to the MCM under OMB Circular A–19.[1]

(2) Designate the Secretary of a Military Department to serve as the joint Service provider for the JSC. The joint Service provider shall act on behalf of the JSC for maintaining the JSC's files and historical records, and for publication of the updated editions of the MCM to be distributed throughout the Department of Defense, as appropriate.

(3) Invite the Secretary of Homeland Security to appoint representatives to the JSC.

(4) Invite the Chief Judge of the United States Court of Appeals for the Armed Forces to provide a staff member to serve as an advisor to the JSC.

(5) Invite the Chairman of the Joint Chiefs of Staff to provide a staff member from the Chairman's Office of Legal Counsel to serve as an advisor to the JSC.

(6) Ensure that the Associate Deputy General Counsel (Military Justice and Personnel Policy), Office of the General Counsel, Department of Defense, shall serve as the General Counsel's representative to the JSC in a non-voting capacity. In addition, the United States Court of Appeals for the Armed Forces (USCAAF) and the Legal Counsel to the Chairman of the Joint Chiefs of Staff shall be invited to provide a staff member to serve as an advisor to the JSC in a non-voting capacity.

(b) The Secretaries of the Military Departments shall ensure that the Judge Advocates General of the Military Departments and the Staff Judge Advocate to the Commandant of the

[1] Available at *http://www.whitehouse.gov/omb/circulars/index.html*.

Marine Corps appoint representatives to the JSC.

(c) The JSC shall further the DoD policy established in section 3 of this part and perform additional studies or other duties related to the administration of military justice, as the General Counsel of the Department of Defense may direct. (See DoD Directive 5105.18, ''DoD Committee Management Program''.[2]) The membership of the JSC shall consist of one representative of each of the following, who shall comprise the JSC Voting Group:

(1) The Judge Advocate General of the Army.

(2) The Judge Advocate General of the Navy.

(3) The Judge Advocate General of the Air Force.

(4) The Staff Judge Advocate to the Commandant of the Marine Corps; and

(5) By agreement with the Department of Homeland Security, the Chief Counsel, United States Coast Guard.

(d) The JSC Working Group (WG) shall assist the JSC Voting Group in fulfilling its responsibilities under this part. The WG consists of non-voting representatives from each of the Services and may include the representatives from the USCAAF, and the Office of the Legal Counsel to the Chairman of the Joint Chiefs of Staff.

(e) The JSC chairmanship rotates biennially among the Services in the following order: The Army, the Air Force, the Marine Corps, the Navy, and the Coast Guard. Due to its size and manning constraints, a Coast Guard's request not to be considered for JSC chairmanship shall be honored. The Military Service of the JSC Chairman shall provide an Executive Secretary for the JSC.

§ 152.5 Implementation.

The foregoing policies and procedures providing guidelines for implementation of this part, as well as those contained in the appendix, are intended exclusively for the guidance of military personnel and civilian employees of the Department of Defense, and the United States Coast Guard by agreement of the Department of Homeland Security. These guidelines are intended to improve the internal management of the Federal Government and are not intended to create any right, privilege, or benefit, substantive of procedural, to any person or enforceable at law by any party against the United States, its agencies, its officers, or any person.

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

APPENDIX A TO PART 152—GUIDANCE TO THE JOINT SERVICE COMMITTEE (JSCA)

(a) *Review the Manual for Courts-Martial.* (1) The Joint Service Committee (JSC) shall conduct an annual review of the Manual for Courts-Martial (MCM), in light of judicial and legislative developments in military and civilian practice, to ensure:

(i) The MCM implements the Uniform Code of Military Justice (UCMJ) and reflects current military practice and judicial precedent.

(ii) The rules and procedures of the MCM are uniform insofar as practicable.

(iii) The MCM applies, to the extent practicable, the principles of law and the rules of evidence generally recognized in the trial of criminal cases in United States district courts, but which are not contrary to or inconsistent with the UCMJ.

(iv) The MCM is workable throughout the worldwide jurisdiction of the UCMJ; and,

(v) The MCM is workable across the spectrum of circumstances in which courts-martial are conducted, including combat conditions.

(2) During this review, any JSC voting member may propose for the Voting Group's consideration an amendment to the MCM. Proposed amendments to the MCM shall ordinarily be referred to the JSC Working Group (WG) for study. The WG assists the JSC in staffing various proposals, conducting studies of proposals and other military justice related topics at the JSC's direction, and making reports to the JSC. Any proposed amendment to the MCM, if approved by a majority of the JSC voting members, becomes a part of the annual review.

(3) The JSC shall prepare a draft of the annual review of the MCM and forward it to the General Counsel of the Department of Defense, on or about December 31st. The General Counsel of the Department of Defense may submit the draft of the annual review to the Code Committee established by Article 146 of the UCMJ, with an invitation to submit comments.

(4) The draft of the annual review shall set forth any specific recommendations for changes to the MCM, including, if not adequately addressed in the accompanying discussion or analysis, a concise statement of the basis and purpose of any proposed change. If no changes are recommended, the

draft review shall so state. If the JSC recommends changes to the MCM, the draft review shall so state. If the JSC recommends changes to the MCM, the public notice procedures of paragraph (d)(3) of this appendix are applicable.

(b) *Changes to the Manual for Courts-Martial.* (1) By January 1st of each year, the JSC voting members shall ensure that a solicitation for proposed changes to the MCM is sent to appropriate agencies within their respective Services that includes, but is not limited to, the judiciary, the trial counsel and defense counsel organizations, and the judge advocate general schools.

(2) The FEDERAL REGISTER announcement of each year's annual review of proposed changes to the MCM shall also invite members of the public to submit any new proposals for JSC consideration during subsequent JSC annual reviews.

(3) When the JSC receives proposed changes to the MCM either by solicitation or FEDERAL REGISTER notice, the JSC shall determine whether the proposal should be considered under paragraph (a)(2) of this appendix by determining if one or more of the JSC voting member(s) intends to sponsor the proposed change. The JSC shall determine when such sponsored proposals should be considered under the annual review process, taking into account any other proposals under consideration and any other reviews or studies directed by the General Counsel of the Department of Defense.

(4) Changes to the MCM shall be proposed as part of the annual review conducted under paragraph (a) of this appendix. When earlier implementation is required, the JSC may send proposed changes to the General Counsel of the Department of Defense, for coordination under DoD Directive 5500.1.[3]

(c) *Proposals to Amend the Uniform Code of Military Justice.* The JSC may determine that the efficient administration of military justice within the Armed Services requires amendments to the UCMJ, or that a desired amendment to the MCM makes necessary an amendment to the UCMJ. In such cases, the JSC shall forward to the General Counsel of the Department of Defense, a legislative proposal to change the UCMJ. The General Counsel of the Department of Defense may direct that the JSC forward any such legislative proposal to the Code Committee for its consideration under Article 146, UCMJ.

(d) *Public Notice and Meeting.* (1) Proposals to amend the UCMJ are not governed by the procedures set out in this paragraph. (See DoD Directive 5105. 18. This paragraph applies only to the JSC recommendations to amend the MCM.)

(2) It is DoD policy to encourage public participation in the JSC's review of the MCM. Notice that the Department of Defense, through the JSC, intends to propose changes to the MCM normally shall be published in the FEDERAL REGISTER before submission of such changes to the President. This notice is not required when the Secretary of Defense in his sole and unreviewable discretion proposes that the President issue the change without such notice on the basis that public notice procedures, as set forth in this part, are unnecessary or contrary to the sound administration of military justice, or a MCM change corresponding to legislation is expeditiously required to keep the MCM current and consistent with changes in applicable law.

(3) The Office of General Counsel of the Department of Defense shall facilitate publishing the FEDERAL REGISTER notice required under this paragraph.

(4) The notice under this paragraph shall consist of the publication of the full text of the proposed changes, including discussion and analysis, unless the General Counsel of the Department of Defense determines that such publication in full would unduly burden the FEDERAL REGISTER, the time and place where a copy of the proposed change may be examined, and the procedure for obtaining access to or a copy of the proposed change.

(5) A period of not fewer than 60 days after publication of notice normally shall be allowed for public comment, but a shorter period may be authorized when the General Counsel of the Department of Defense determines that a 60-day period is unnecessary or is contrary to the sound administration of military justice. The FEDERAL REGISTER notice shall normally indicate that public comments shall be submitted to the Executive Secretary of the JSC.

(6) The JSC shall provide notice in the FEDERAL REGISTER and hold a public meeting during the public comments period, where interested persons shall be given a reasonable opportunity to submit views on any of the proposed changes contained in the annual review. Public proposals and comments to the JSC should include a reference to the specific provision to be changed, a rational for the proposed change, and specific and detailed proposed language to replace the current language. Incomplete submissions might be insufficient to receive the consideration desired. The JSC shall seek to consider all views presented at the public meeting as well as any written comments submitted during the 60-day period when determining the final form of any proposed amendments to the MCM.

(E) *Internal Rules and Record-Keeping.* (1) In furthering DoD policy, studying issues, or performing other duties relating to the administration of military justice, the JSC

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

may establish internal rules governing its operation.

(2) The JSC shall create a file system and maintain appropriate JSC records.

PART 153—CRIMINAL JURISDICTION OVER CIVILIANS EMPLOYED BY OR ACCOMPANYING THE ARMED FORCES OUTSIDE THE UNITED STATES, CERTAIN SERVICE MEMBERS, AND FORMER SERVICE MEMBERS

Sec.
153.1 Purpose.
153.2 Applicability and scope.
153.3 Definitions.
153.4 Responsibilities.
153.5 Procedures.

APPENDIX A TO PART 153—GUIDELINES

APPENDIX B TO PART 153—ACKNOWLEDGEMENT OF LIMITED LEGAL REPRESENTATION (SAMPLE)

AUTHORITY: 10 U.S.C. 301.

SOURCE: 71 FR 8947, Feb. 22, 2006, unless otherwise noted.

§ 153.1 Purpose.

This part:

(a) Implements policies and procedures, and assigns responsibilities under the Military Extraterritorial Jurisdiction Act of 2000, as amended by section 1088 of the ''Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005,'' October 28, 2004 (hereinafter referred to as ''the Act'') for exercising extraterritorial criminal jurisdiction over certain military personnel, former service members of the United States Armed Forces, and over civilians employed by or accompanying the Armed Forces outside the United States (U.S.).

(b) Implements section 3266 of the Act.

§ 153.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard by agreement with the Department of Homeland Security when it is not operating as a Service of the Department of the Navy), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as ''the DoD Components''). The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

(b) *Coast Guard.* The Coast Guard ordinarily operates as a separate branch of the Armed Forces in the Department of Homeland Security (DHS). However, upon Presidential Directive, the Coast Guard operates as a Service within the Department of the Navy and becomes part of the Department of Defense. By agreement with the Secretary of the Department of Homeland Security, when the Coast Guard is operating as a separate Service within the DHS, this part shall apply to the Coast Guard to the extent permitted by the Act. Whether a provision of this Instruction applies to a Coast Guard case is determined by whether the Coast Guard is operating as a Service in the DHS or as a Service within the Department of the Navy.

(c) While some Federal criminal statutes are expressly or implicitly extraterritorial, many acts described therein are criminal only if they are committed within ''the special maritime and territorial jurisdiction of the United States'' or if they affect interstate or foreign commerce. Therefore, in most instances, Federal criminal jurisdiction ends at the nation's borders. State criminal jurisdiction, likewise, normally ends at the boundaries of each State. Because of these limitations, acts committed by military personnel, former service members, and civilians employed by or accompanying the Armed Forces in foreign countries, which would be crimes if committed in the U.S., often do not violate either Federal or State criminal law. Similarly, civilians are generally not subject to prosecution under the Uniform Code of Military Justice (UCMJ), unless Congress had declared a ''time of war'' when the acts were committed. As a result, these acts are crimes, and therefore criminally punishable, only under the law of the foreign country in which they occurred. See section 2 of Report Accompanying the Act (Report to Accompany H.R. 3380, House of Representatives Report 106–778, July 20,

2000 hereafter referred to as ''the Report Accompanying the Act''). While the U.S. could impose administrative discipline for such actions, the Act and this part are intended to address the jurisdictional gap with respect to criminal sanctions.

(d) Nothing in this part may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by court-martial, military commission, provost court, or other military tribunal (Section 3261(c) of title 18). In some cases, conduct that violates section 3261(a) of the Act may also violate the UCMJ, or the law of war generally. Therefore, for military personnel, military authorities would have concurrent jurisdiction with a U.S. District Court to try the offense. The Act was not intended to divest the military of jurisdiction and recognizes the predominant interest of the military in disciplining its service members, while still allowing for the prosecution of members of the Armed Forces with non-military co-defendants in a U.S. District Court under section 3261(d) of the Act.

(e) This part, including its enclosures, is intended exclusively for the guidance of military personnel and civilian employees of the Department of Defense, and of the United States Coast Guard by agreement with the Department of Homeland Security. Nothing contained herein creates or extends any right, privilege, or benefit to any person or entity. See *United States* v. *Caceres*, 440 U.S. 741 (1979).

§ 153.3 Definitions.

Accompanying the Armed Forces Outside the United States. As defined in section 3267 of the Act, the dependent of:

(1) A member of the Armed Forces; or

(2) A civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department); or

(3) A DoD contractor (including a subcontractor at any tier); or

(4) An employee of a DoD contractor (including a subcontractor at any tier); and

(5) Residing with such member, civilian employee, contractor, or contractor employee outside the United States; and

(6) Not a national of or ordinarily resident in the host nation.

Active Duty. Full-time duty in the active military service of the United States. It includes full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the Military Department concerned. See section 101(d)(1) of title 10, United States Code.

Armed Forces. The Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard. See section 101(a)(4) of title 10, United States Code.

Arrest. To be taken into physical custody by law enforcement officials.

Charged. As used in the Act and this part, this term is defined as an indictment or the filing of information against a person under the Federal Rules of Criminal Procedure. See the analysis to Section 3264 of the Report Accompanying the Act.

Civilian Component. A person or persons employed by the Armed Forces outside the United States, as defined in this section and section 3267(a)(1), as amended, of the Act. A term used in Status of Forces Agreements.

Dependent. A person for whom a member of the Armed Forces, civilian employee, contractor (or subcontractor at any tier) has legal responsibility while that person is residing outside the United States with or accompanying that member of the Armed Forces, civilian employee, contractor (or subcontractor at any tier), and while that responsible person is so assigned, employed or obligated to perform a contractual obligation to the Department of Defense. For purposes of this part, a person's ''command sponsorship'' status while outside the United States is not to be considered in determining whether the person is a dependent within the meaning of this part, except that there shall be a rebuttable presumption that a command-sponsored individual is a dependent.

Designated Commanding Officer (DCO). A single military commander in each foreign country where U.S. Forces are

stationed and as contemplated by DoD Directive 5525.1, Status of Forces Policy and Information.

Detention. To be taken into custody by law enforcement officials and placed under physical restraint.

District. A District Court of the United States.

Employed by the Armed Forces Outside the United States. Any person employed as:

(1) A civilian employee of the Department of Defense (including a non-appropriated fund instrumentality of the Department); or

(2) A civilian employee of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or

(3) A contractor (including a subcontractor at any tier) of the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense); or

(4) A contractor (including a subcontractor at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; or

(5) An employee of a contractor (including a subcontractor at any tier) of the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense); or

(6) An employee of a contractor (including a subcontractor at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas; and, when the person:

(i) Is present or resides outside the United States in connection with such employment; and

(ii) Is not a national of or ordinarily resident in the host nation.

Federal Magistrate Judge. As used in the Act and this part, this term includes both Judges of the United States and U.S. Magistrate Judges, titles that, in general, should be given their respective meanings found in the Federal Rules of Criminal Procedure. (See footnote 32 of the Report Accompanying the Act) The term does not include Military Magistrates or Military Judges, as prescribed by the UCMJ, or regulations of the Military Departments or the Department of Defense.

Felony Offense. Conduct that is an offense punishable by imprisonment for more than one year if the conduct had been engaged in the special maritime and territorial jurisdiction of the United States. See sections 3261 of the Act and 18 U.S.C. 7. Although the Act, uses the conditional phrase ''if committed within the special maritime and territorial jurisdiction of the United States,'' acts that would be a Federal crime regardless of where they are committed in the U.S., such as drug crimes contained in chapter 13 of title 21, United States Code, also fall within the scope of section 3261(a) of the Act. See the analysis to section 3261 of the Report Accompanying the Act.

Host Country National. A person who is not a citizen of the United States, but who is a citizen of the foreign country in which that person is located.

Inactive Duty Training. Duty prescribed for Reservists by the Secretary of the Military Department concerned under section 206 of title 37, United States Code, or any other provision of law; and special additional duties authorized for Reservists by an authority designated by the Secretary of the Military Department concerned and performed by them on a voluntary basis in connection with the prescribed training or maintenance activities of the units to which they are assigned. Inactive Duty Training includes those duties performed by Reservists in their status as members of the National Guard while in Federal service. See section 101(d)(7) of title 10, United States Code.

Juvenile. A person who has not attained his or her eighteenth birthday, as defined in section 5031 of title 18, United States Code.

Military Department. The Department of the Army, the Department of the Navy, and the Department of the Air Force. See section 101(a)(8) of title 10, United States Code.

National of the United States. As defined in section 1101(a)(22), of title 8, United States Code.

Outside the United States. Those places that are not within the definition of ''United States'' below and, with the exception of subparagraph 7(9), those geographical areas and locations that are not within the special maritime and territorial jurisdiction of the United States, as defined in sections 7 of title 18, United States Code. The locations defined in subparagraph 7(9) of title 18, United States Code are to be considered ''Outside the United States'' for the purposes of this part. See 3261–3267 of title 18, United States Code.

Qualified Military Counsel. Judge advocates assigned to or employed by the Military Services and designated by the respective Judge Advocate General, or a designee, to be professionally qualified and trained to perform defense counsel responsibilities under the Act.

Staff Judge Advocate. A judge advocate so designated in the Army, the Air Force, the Marine Corps, or the Coast Guard; the principal legal advisor of a command in the Navy who is a judge advocate, regardless of job title. See Rule for Courts-Martial 103(17), Manual for Courts-Martial, United States (2002 Edition).

Third Country National. A person whose citizenship is that of a country other than the U.S. and the foreign country in which the person is located.

United States. As defined in section 5 of title 18, United States Code, this term, as used in a territorial sense, includes all places and waters, continental or insular, subject to the jurisdiction of the United States, except for the Panama Canal Zone.

§ 153.4 Responsibilities.

(a) The *General Counsel of the Department of Defense* shall provide initial coordination and liaison with the Departments of Justice and State, on behalf of the Military Departments, regarding a case for which investigation and/or Federal criminal prosecution under the Act is contemplated. This responsibility may be delegated entirely, or delegated for categories of cases, or delegated for individual cases. The General Counsel, or designee, shall advise the Domestic Security Section of the Criminal Division, Department of Justice (DSS/DOJ), as soon as practicable, when DoD officials intend to recommend that the DOJ consider the prosecution of a person subject to the Act for offenses committed outside the United States. The Assistant Attorney General, Criminal Division, Department of Justice, has designated the Domestic Security Section (DSS/DOJ) as the Section responsible for the Act.

(b) The *Inspector General of the Department of Defense* shall:

(1) Pursuant to Section 4(d) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3), ''report expeditiously to the Attorney General whenever the Inspector General has reasonable grounds to believe there has been a violation of Federal criminal law.'' This statutory responsibility is generally satisfied once an official/special agent of the Office of the Inspector General of the Department of Defense notifies either the cognizant Department of Justice representative or the Assistant Attorney General (Criminal Division) of the ''reasonable grounds.''

(2) Pursuant to Section 8(c)(5) of the Inspector General Act of 1978, as amended (5 U.S.C. App. 3), and 10 U.S.C. 141(b), ensure the responsibilities described in DoD Directive 5525.7, ''Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes,'' January 22, 1985,[1] to ''implement the investigative policies [,m]onitor compliance by DoD criminal investigative organizations [, and p]rovide specific guidance regarding investigative matters, as appropriate'' are satisfied relative to violations of the Military Extraterritorial Jurisdiction Act of 2000.

(c) The *Heads of Military Law Enforcement Organizations and Military Criminal Investigative Organizations, or their Designees,* shall:

(1) Advise the Commander and Staff Judge Advocate (or Legal Advisor) of the Combatant Command concerned, or designees, of an investigation of an alleged violation of the Act. Such notice

[1] Available from Internet site *http://www.dtic.mil/whs/directives.*

shall be provided as soon as practicable. In turn, the General Counsel of the Department of Defense, or designee, shall be advised so as to ensure notification of and consultation with the Departments of Justice and State regarding information about the potential case, including the host nation's position regarding the case. At the discretion of the General Counsel of the Department of Defense, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate. Effective investigations lead to successful prosecutions and, therefore, these cases warrant close coordination and cooperation between the Departments of Defense, Justice, and State.

(2) Provide briefings to, and coordinate with, appropriate local law enforcement authorities in advance or, if not possible, as soon thereafter as is practicable, of investigations or arrests in specific cases brought under the Act. If not previously provided to local law enforcement authorities, such briefings about the case shall, at a minimum, describe the Host Nation's position regarding the exercise of jurisdiction under the Act that followed from any briefings conducted pursuant to appendix A of this part.

(d) The *Domestic Security Section, Criminal Division, Department of Justice (DSS/DOJ)* has agreed to:

(1) Provide preliminary liaison with the Department of Defense, coordinate initial notifications with other entities of the Department of Justice and Federal law enforcement organizations; make preliminary decisions regarding proper venue; designate the appropriate U.S. Attorney's Office; and coordinate the further assignment of DOJ responsibilities.

(2) Coordinate with the designated U.S. Attorney's office arrangements for a Federal Magistrate Judge to preside over the initial proceedings required by the Act. Although the assignment of a particular Federal Magistrate Judge shall ordinarily be governed by the jurisdiction where a prosecution is likely to occur, such an assignment does not determine the ultimate venue of any prosecution that may be undertaken. Appropriate venue is determined in accordance with the requirements of section 3238 of title 18, United States Code.

(3) Coordinate the assistance to be provided the Department of Defense with the U.S. Attorney's office in the district where venue for the case shall presumptively lie.

(4) Continue to serve as the primary point of contact for DoD personnel regarding all investigations that may lead to criminal prosecutions and all associated pretrial matters, until such time as DSS/DOJ advises that the case has become the responsibility of a specific U.S. Attorney's Office.

(e) The *Commanders of the Combatant Commands* shall:

(1) Assist the DSS/DOJ on specific cases occurring within the Commander's area of responsibility. These responsibilities include providing available information and other support essential to an appropriate and successful prosecution under the Act with the assistance of the Commanders' respective Staff Judge Advocates (or Legal Advisors), or their designees, to the maximum extent allowed and practicable.

(2) Ensure command representatives are made available, as necessary, to participate in briefings of appropriate host nation authorities concerning the operation of this Act and the implementing provisions of this part.

(3) Determine when military necessity in the overseas theater requires a waiver of the limitations on removal in section 3264(a) of the Act and when the person arrested or charged with a violation of the Act shall be moved to the nearest U.S. military installation outside the United States that is adequate to detain the person and facilitate the initial proceedings prescribed in section 3265(a) of the Act and this part. Among the factors to be considered are the nature and scope of military operations in the area, the nature of any hostilities or presence of hostile forces, and the limitations of logistical support, available resources, appropriate personnel, or the communications infrastructure necessary to comply with the requirements of section 3265 of the Act governing initial proceedings.

(4) Annually report to the General Counsel of the Department of Defense, by the last day of February for the immediately preceding calendar year, all cases involving the arrest of persons for violations of the Act; persons placed in temporary detention for violations of the Act; the number of requests for Federal prosecution under the Act, and the decisions made regarding such requests.

(5) Determine the suitability of the locations and conditions for the temporary detention of juveniles who commit violations of the Act within the Commander's area of responsibility. The conditions of such detention must, at a minimum, meet the following requirements: Juveniles alleged to be delinquent shall not be detained or confined in any institution or facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges; insofar as possible, alleged juvenile delinquents shall be kept separate from adjudicated delinquents; and every juvenile in custody shall be provided adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, and medical care, including necessary psychiatric, psychological, or other care and treatment.

(6) As appropriate, promulgate regulations consistent with and implementing this part. The Combatant Commander's duties and responsibilities pursuant to this part may be delegated.

(f) The *Secretaries of the Military Departments* shall:

(1) Consistent with the provisions of paragraph (c) of this section, make provision for defense counsel representation at initial proceedings conducted outside the United States pursuant to the Act for those persons arrested or charged with violations of section 3261(a) of the Act.

(2) Issue regulations establishing procedures that, to the maximum extent practicable, provide notice to all persons covered by the Act who are not nationals of the United States but who are employed by or accompanying the Armed Forces outside the United States, with the exception of individuals who are nationals of or ordinarily resident in the host nation, that they are potentially subject to the criminal jurisdiction of the United States under the Act. At a minimum, such regulations shall require that employees and persons accompanying the Armed Forces outside the United States, who are not nationals of the United States, be informed of the jurisdiction of the Act at the time that they are hired for overseas employment, or upon sponsorship into the overseas command, whichever event is earlier applicable. Such notice shall also be provided during employee training and any initial briefings required for these persons when they first arrive in the foreign country. For employees and persons accompanying the Armed Forces outside the United States who are not nationals of the United States, but who have already been hired or are present in the overseas command at the time this part becomes effective, such notice shall be provided within 60 days of the effective date of this part.

(3) Ensure orientation training, as described in paragraph (f)(2) of this section, is also provided for all U.S. nationals who are, or who are scheduled to be, employed by or accompanying the Armed Forces outside the United States, including their dependents, and include information that such persons are potentially subject to the criminal jurisdiction of the United States under the Act.

(i) For members of the Armed Forces, civilian employees of the Department of Defense and civilians accompanying the Armed Forces overseas, notice and briefings on the applicability of the Act shall, at a minimum, be provided to them and their dependents when travel orders are issued and, again, upon their arrival at command military installations or place of duty outside the United States.

(ii) For civilian employees, contractors (including subcontractors at any tier), and employees of contractors (including subcontractors at any tier) of any other Federal agency, or any provisional authority, permit such persons to attend the above-referenced briefings on a voluntary basis. In addition, to the maximum extent practicable, make available to representatives of such other Federal agencies or provisional authorities such notice and

briefing materials as is provided to civilian employees, contractors, and contractor employees of the Department of Defense overseas.

(4) Failure to provide notice or orientation training pursuant to paragraphs (f)(2) and (f)(3) of this section shall not create any rights or privileges in the persons referenced and shall not operate to defeat the jurisdiction of a court of the United States or provide a defense or other remedy in any proceeding arising under the Act or this part.

(5) Provide training to personnel who are authorized under the Act and designated pursuant to this part to make arrests outside the United States of persons who allegedly committed a violation of section 3261(a) of the Act. The training, at a minimum, shall include the rights of individuals subject to arrest.

§ 153.5 Procedures.

(a) *Applicability*—(1) *Offenses and Punishments.* Section 3261(a) of the Act establishes a separate Federal offense under 18 U.S.C. for an act committed outside the United States that would be a felony crime as if such act had been committed within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of 18 U.S.C. Charged as a violation of section 3261(a) of the Act, the elements of the offense and maximum punishment are the same as the crime committed within the geographical limits of section 7 of 18 U.S.C., but without the requirement that the conduct be committed within such geographical limits. See section 1 of the Section-By-Section Analysis and Discussion to section 3261 in the Report Accompanying the Act.

(2) *Persons subject to this part.* This part applies to certain military personnel, former military service members, and persons employed by or accompanying the Armed Forces outside the United States, and their dependents, as those terms are defined in section 153.3 of this part, alleged to have committed an offense under the Act while outside the United States. For purposes of the Act and this part, persons employed by or accompanying the Armed Forces outside the U.S. are subject to the ''military law'' of the U.S., but only to the extent to which this term has been used and its meaning and scope have been understood within the context of a SOFA or any other similar form of international agreement.

(3) *Military Service Members.* Military service members subject to the Act's jurisdiction are:

(i) Only those active duty service members who, by Federal indictment or information, are charged with committing an offense with one or more defendants, at least one of whom is not subject to the UCMJ. See section 3261(d)(2) of the Act.

(ii) Members of a Reserve component with respect to an offense committed while the member was not on active duty or inactive duty for training (in the case of members of the Army National Guard of the United States or the Air National Guard of the United States, only when in Federal service), are not subject to UCMJ jurisdiction for that offense and, as such, are amenable to the Act's jurisdiction without regard to the limitation of section 3261(d)(2) of the Act.

(4) *Former Military Service Members.* Former military service members subject to the Act's jurisdiction are:

(i) Former service members who were subject to the UCMJ at the time the alleged offenses were committed, but are no longer subject to the UCMJ with respect to the offense due to their release or separation from active duty.

(ii) Former service members, having been released or separated from active duty, who thereafter allegedly commit an offense while in another qualifying status, such as while a civilian employed by or accompanying the Armed Forces outside the United States, or while the dependent of either or of a person subject to the UCMJ.

(5) *Civilians Employed by the Armed Forces.* Civilian employees employed by the U.S. Armed Forces outside the United States (as defined in section 153.3), who commit an offense under the Act while present or residing outside the U.S. in connection with such employment, are subject to the Act and the provisions of this part. Such civilian employees include:

(i) Persons employed by the Department of Defense (including a non-appropriated fund instrumentality of the Department of Defense).

(ii) Persons employed as a DoD contractor (including a subcontractor at any tier).

(iii) Employees of a DoD contractor (including a subcontractor at any tier).

(iv) Civilian employees, contractors (including subcontractors at any tier), and civilian employees of a contractor (or subcontractor at any tier) of any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas.

(6) *Civilians Accompanying the Armed Forces.* Subject to the requirements of paragraph (a)(6)(ii) of this section, the following persons are civilians accompanying the Armed Forces outside the United States who are covered by the Act and the provisions of this part:

(i) Dependents of:

(A) An active duty service member.

(B) A member of the reserve component while the member was on active duty or inactive duty for training, but in the case of members of the Army National Guard of the United States or the Air National Guard of the United States, only when in Federal service.

(C) A former service member who is employed by or is accompanying the Armed Forces outside the United States.

(D) A civilian employee of the Department of Defense (including non-appropriated fund instrumentalities of the Department of Defense).

(E) A contractor (including a subcontractor at any tier) of the Department of Defense.

(F) An employee of a contractor (including a subcontractor at any tier) of the Department of Defense.

(ii) In addition to the person being the dependent of a person who is listed in paragraph (a)(6)(i) of this section, jurisdiction under the Act requires that the dependent also:

(A) Reside with one of the persons listed in paragraph (a)(6)(i) of this section.

(B) Allegedly commit the offense while outside the United States; and

(C) Not be a national of, or ordinarily resident in, the host nation where the offense is committed.

(iii) Command sponsorship of the dependent is not required for the Act and this part to apply.

(iv) If the dependent is a juvenile, as defined in section 153.3, who engaged in conduct that is subject to prosecution under section 3261(a) of the Act, then the provisions of chapter 403 of title 18, United States Code would apply to U.S. District Court prosecutions.

(7) *Persons NOT Subject to the Act or the Procedures of this part.* (i) Persons who are the nationals of, or ordinarily resident in, the host nation where the offense is committed, regardless of their employment or dependent status.

(ii) Persons, including citizens of the United States, whose presence outside the United States at the time the offense is committed, is not then as a member of the Armed Forces, a civilian employed by the Armed Forces outside the United States, or accompanying the Armed Forces outside the United States.

(A) Persons (including members of a Reserve component) whose presence outside the United States at the time the offense is committed, is solely that of a tourist, a student, or a civilian employee or civilian accompanying any other non-federal agency, organization, business, or entity (and thereby can not be said to be employed by or accompanying the Armed Forces within the definitions of those terms as established by the Act, as modified) are not subject to the Act. Civilian employees of an agency, organization, business, or entity accompanying the Armed Forces outside the U.S. may, by virtue of the agency, organization, business, or entity relationship with the Armed Forces, be subject to the Act and this part.

(B) Persons who are subject to the Act and this part remain so while present, on official business or otherwise (e.g., performing temporary duty or while in leave status), in a foreign country other than the foreign country to which the person is regularly assigned, employed, or accompanying the Armed Forces outside the United States.

(iii) Persons who have recognized dual citizenship with the United States

and who are the nationals of, or ordinarily resident in, the host nation where the alleged conduct took place are not persons ''accompanying the Armed Forces outside the United States'' within the meaning of the Act and this part.

(iv) Juveniles whose ages are below the minimum ages authorized for the prosecution of juveniles in U.S. District Court under the provisions of chapter 403 of title 18, United States Code.

(v) Persons subject to the UCMJ (See sections 802 and 803 of title 10, United States Code) are not subject to prosecution under the Act unless, pursuant to section 3261(d) of the Act, the member ceases to be subject to the UCMJ or an indictment or information charges that the member committed the offense with one or more other defendants, at least one of whom is not subject to the UCMJ. A member of a Reserve component who is subject to the UCMJ at the time the UCMJ offense was committed is not relieved from amenability to UCMJ jurisdiction for that offense. Such reserve component members are not subject to the Act unless section 3261(d)(2) of the Act applies. Retired members of a regular component who are entitled to pay remain subject to the UCMJ after retiring from active duty. Such retired members are not subject to prosecution under the Act unless section 3261(d)(2) of the Act applies.

(vi) Whether Coast Guard members and civilians employed by or accompanying the Coast Guard outside the United States, and their dependents, are subject to the Act and this part depends on whether at the time of the offense the Coast Guard was operating as a separate Service in the Department of Homeland Security or as a Service in the Department of the Navy.

(8) *Persons Having a Tenuous Nexus to the United States.* Third Country Nationals who are not ordinarily resident in the host nation, and who meet the definition of ''a person accompanying the Armed Forces outside the United States,'' may have a nexus to the United States that is so tenuous that it places into question whether the Act's jurisdiction should be applied and whether such persons should be subject to arrest, detention, and prosecution by U.S. authorities. Depending on the facts and circumstances involved, and the relationship or connection of the foreign national with the U.S. Armed Forces, it may be advisable to consult first with the DSS/DOJ before taking action with a view toward prosecution. In addition, to facilitate consultation with the government of the nation of which the Third Country National is a citizen, the State Department should be notified of any potential investigation or arrest of a Third Country National.

(b) *Investigation, Arrest, Detention, And Delivery Of Persons To Host Nation Authorities*—(1) *Investigation.* (i) Investigations of conduct reasonably believed to constitute a violation of the Act committed outside the United States must respect the sovereignty of the foreign nation in which the investigation is conducted. Such investigations shall be conducted in accordance with recognized practices with host nation authorities and applicable international law, SOFA and other international agreements. After general coordination with appropriate host nation authorities, as referenced in Appendix A of this part, specific investigations shall, to the extent practicable, be coordinated with appropriate local law enforcement authorities, unless not required by agreement with host nation authorities.

(ii) When a Military Criminal Investigative Organization is the lead investigative organization, the criminal investigator, in order to assist DSS/DOJ and the designated U.S. Attorney representative in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the Office of the Staff Judge Advocate of the Designated Commanding Officer (DCO) at the location where the offense was committed for review and transmittal, through the Combatant Commander, to the DSS/DOJ and the designated U.S. Attorney representative. The Office of the Staff Judge Advocate shall also furnish the DSS/DOJ and the designated U.S. Attorney representative an affidavit or declaration from the

criminal investigator or other appropriate law enforcement official that sets forth the probable cause basis for believing that a violation of the Act has occurred and that the person identified in the affidavit or declaration has committed the violation.

(iii) When the Defense Criminal Investigative Service (DCIS) is the lead investigative organization, the criminal investigator, in order to assist the DSS/DOJ and the designated U.S. Attorney representative in making a preliminary determination of whether the case warrants prosecution under the Act, shall provide a copy of the Investigative Report, or a summary thereof, to the DSS/DOJ and the designated U.S. Attorney representative. The criminal investigator shall also furnish the DSS/DOJ and the designated U.S. Attorney representative, an affidavit or declaration that sets forth the probable cause basis for believing that a violation of the Act has occurred and that the person identified in the affidavit or declaration has committed the violation. Within the parameters of 10 U.S.C. Chapter 47, the Inspector General may also notify the General Counsel of the Department of Defense and the DCO's Office of the Staff Judge Advocate at the location where the offense was committed, as appropriate.

(2) *Residence Information.* To the extent that it can be determined from an individual's personnel records, travel orders into the overseas theater, passport, or other records, or by questioning upon arrest or detention, as part of the routine ''booking'' information obtained, an individual's last known residence in the United States shall be determined and forwarded promptly to the DSS/DOJ and the designated U.S. Attorney representative. See *Pennsylvania* v. *Muniz,* 496 U.S. 582, at 601 (1990) and *United States* v. *D'Anjou,* 16 F. 3d 604 (4th Cir. 1993). The information is necessary to assist in determining what law enforcement authorities and providers of pretrial services, including those who issue probation reports, shall ultimately have responsibility for any case that may develop. Determination of the individual's ''last known address'' in the United States is also important in determining what Federal district would be responsible for any possible future criminal proceedings.

(i) Due to the venue provisions of section 3238 of 18 U.S.C. Chapter 212, Sections 3261–3267, the DSS/DOJ and the designated U.S. Attorney representative shall be consulted prior to removal of persons arrested or charged with a violation of the Act by U.S. law enforcement officials. The venue for Federal criminal jurisdiction over offenses committed on the high seas or elsewhere beyond the jurisdiction of a particular State or District (as would be required under the Act), is in the Federal district in which the offender is arrested or first brought. However, if the individual is not so arrested in or brought into any Federal district in the United States (i.e., is to be indicted, or information obtained, prior to the individual's return to the United States), then an indictment or information may be sought in the district of the person's last known residence. If no such residence is known, the indictment or information may be filed in the District of Columbia.

(ii) ''First brought'' connotes the location within the U.S. to which the person is returned in a custodial status.

(iii) ''Last known residence'' refers to that U.S. location where the person lived or resided. It is not necessarily the same as the person's legal domicile or home of record.

(iv) Prompt transmittal of venue information to the DSS/DOJ and the designated U.S. Attorney representative in the United States may prove helpful in determining whether a particular case may be prosecuted, and may ultimately be a pivotal factor in determining whether the host nation or the U.S. shall exercise its jurisdiction over the matter.

(v) The Investigative Report, and any affidavit or declaration, as well as all other documents associated with a case shall be transmitted promptly by the command Staff Judge Advocate to the DSS/DOJ and the designated U.S. Attorney representative. This may be accomplished through the use of facsimile or other means of electronic communication.

(3) *Notice of Complaint or Indictment.* Upon receipt of information from command authorities or Defense Criminal Investigation Organizations (the Defense Criminal Investigation Service, the Army's Criminal Investigation Command, the Naval Criminal Investigative Service, and the Air Force Office of Special Investigations) that a person subject to jurisdiction under this Act has violated section 3261(a), the U.S. Attorney for the District in which there would be venue for a prosecution may, if satisfied that probable cause exists to believe that a crime has been committed and that the person identified has committed this crime, file a complaint under Federal Rule of Criminal Procedure 3. As an alternative, the U.S. Attorney may seek the indictment of the person identified. In either case, a copy of the complaint or indictment shall be provided to the Office of the Staff Judge Advocate of the overseas command that reported the offense. The DSS/DOJ and the designated U.S. Attorney representative will ordinarily be the source from which the command's Staff Judge Advocate is able to obtain a copy of any complaint or indictment against a person outside the United States who is subject to the jurisdiction under the Act. This may be accomplished through the use of facsimile or other means of electronic communication.

(4) *Arrest.* (i) Federal Rule of Criminal Procedure 4 takes the jurisdiction of the Act into consideration in stating where arrest warrants may be executed: ''Location. A warrant may be executed, or a summons served, within the jurisdiction of the United States or anywhere else a federal statute authorizes an arrest.'' The Advisory Committee Note explains that the new language reflects the enactment of the Military Extraterritorial Jurisdiction Act permitting arrests of certain military and Department of Defense personnel overseas.

(ii) The Act specifically authorizes persons in DoD law enforcement positions, as designated by the Secretary of Defense, to make arrests outside the United States, upon probable cause and in accordance with recognized practices with host nation authorities and applicable international agreements, those persons subject to the Act who violate section 3261(a) of the Act. Section 3262(a) of the Act constitutes authorization by law to conduct such functions pursuant to 10 U.S.C. 801–946 and therefore avoids possible restrictions of the Posse Comitatus Act regarding military personnel supporting civilian law enforcement agencies.

(iii) When the host nation has interposed no objections after becoming aware of the Act, arrests in specific cases shall, to the extent practicable, be first coordinated with appropriate local law enforcement authorities, unless not required by agreement with host nation authorities.

(iv) Military and civilian special agents assigned to the Defense Criminal Investigative Organizations are hereby authorized by the Secretary of Defense to make an arrest, outside the United States, of a person who has committed an offense under section 3261(a) of the Act. Civilian special agents assigned to Defense Criminal Investigative Organizations while performing duties outside the U.S. shall make arrests consistent with the standardized guidelines established for such agents, as approved in accordance with sections 1585a, 4027, 7480, and 9027 of title 10, United States Code.

(v) Military personnel and DoD civilian employees (including local nationals, either direct hire or indirect hire) assigned to security forces, military police, shore patrol, or provost offices at military installations and other facilities located outside the United States are also authorized to make an arrest, outside the United States, of a person who has committed an offense under section 3261(a) of the Act. This authority includes similarly-assigned members of the Coast Guard law enforcement community, but only when the Coast Guard is operating at such locations as a Service of the Department of the Navy.

(vi) Law enforcement personnel thus designated and authorized by the Secretary of Defense in this part may arrest a person, outside the United States, who is suspected of committing a felony offense in violation of section 3261(a) of the Act, when the arrest is based on probable cause to believe that such person violated section 3261(a) of

the Act, and when made in accordance with applicable international agreements. Because the location of the offense and offender is outside the United States, it is not normally expected that the arrest would be based on a previously-issued Federal arrest warrant. Law enforcement personnel authorized to make arrests shall follow the Secretaries of the Military Departments' guidelines for making arrests without a warrant, as prescribed by 10 U.S.C. 1585a, 4027, 7480, and 9027. Authorizations issued by military magistrates under the UCMJ may not be used as a substitute for Federal arrest warrant requirements.

(vii) The foregoing authorization to DoD law enforcement personnel to arrest persons subject to Chapter 212 of title 18, United States Code, for violations of the Act is not intended as a limitation upon the authority of other Federal law enforcement officers to effect arrests when authorized to do so. (E.g., see 18 U.S.C. 3052 authorizing agents of the Federal Bureau of Investigation to make arrests ''for any felony cognizable under the laws of the United States, 21 U.S.C. 878(a)(3) for the same authority for Drug Enforcement Administration agents, and 18 U.S.C. 3053 for the same authority for U.S. Marshals and their deputies.)

(5) *Temporary Detention.* (i) The Commander of a Combatant Command, or designee, may order the temporary detention of a person, within the Commander's area of responsibility outside the United States, who is arrested or charged with a violation of the Act. The Commander of the Combatant Command, or designee, may determine that a person arrested need not be held in custody pending the commencement of the initial proceedings required by section 3265 of the Act and paragraph (d) of this section. The Commander of the Combatant Command may designate those component commanders or DCO commanders who are also authorized to order the temporary detention of a person, within the commanding officer's area of responsibility outside the United States, who is arrested or charged with a violation of the Act.

(ii) A person arrested may be temporarily detained in military detention facilities for a reasonable period, in accordance with regulations of the Military Departments and subject to the following:

(A) Temporary detention should be ordered only when a serious risk is believed to exist that the person shall flee and not appear, as required, for any pretrial investigation, pretrial hearing or trial proceedings, or the person may engage in serious criminal misconduct (e.g., the intimidation of witnesses or other obstructions of justice, causing injury to others, or committing other offenses that pose a threat to the safety of the community or to the national security of the United States). The decision as to whether temporary detention is appropriate shall be made on a case-by-case basis. Section 3142 of title 18, United States Code provides additional guidance regarding conditions on release and factors to be considered.

(B) A person arrested or charged with a violation of the Act who is to be detained temporarily shall, to the extent practicable, be detained in areas that separate them from sentenced military prisoners and members of the Armed Forces who are in pretrial confinement pending trial by courts-martial.

(C) Separate temporary detention areas shall be used for male and female detainees.

(D) Generally, juveniles should not be ordered into temporary detention. However, should circumstances warrant temporary detention, the conditions of such temporary detention must, at a minimum, meet the following requirements: juveniles alleged to be delinquent shall not be detained or confined in any institution or facility in which the juvenile has regular contact with adult persons convicted of a crime or awaiting trial on criminal charges; insofar as possible, alleged juvenile delinquents shall be kept separate from adjudicated delinquents; and every juvenile in custody shall be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, and medical care, including necessary psychiatric, psychological, or other care and treatment. Appointment of a guardian ad litem may be required under 18 U.S.C. 5034 to represent the interests of the juvenile when the

juvenile's parents are not present or when the parents' interests may be adverse to that of the juvenile.

(iii) Persons arrested or charged with a violation of the Act, upon being ordered into temporary detention and processed into the detention facility, shall, as part of the processing procedures, be required to provide the location address of their last U.S. residence as part of the routine booking questions securing ''biographical data necessary to complete booking or pretrial services.'' See *United States* v. *D'Anjou*, 16 F. 3d 604 (4th Cir.1993). This information shall be recorded in the detention documents and made available to the DCO's Office of the Staff Judge Advocate. This information shall be forwarded with other case file information, including affidavits in support of probable cause supporting the arrest and detention, to the DSS/DOJ. The information is provided so that the DSS/DOJ may make appropriate preliminary decisions about venue. See paragraph (b)(2) of this section.

(A) Notice of the temporary detention of any person for a violation of the Act shall be forwarded through command channels, without unnecessary delay, to the Combatant Commander, who shall advise the General Counsel of the Department of Defense, as the representative of the Secretary of Defense, of all such detentions. At the discretion of the General Counsel of the Department of Defense, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate.

(B) Such notice shall include a summary of the charges, facts and circumstances surrounding the offenses, information regarding any applicable SOFA or other international agreements affecting jurisdiction in the case, and the reasons warranting temporary detention.

(iv) If military command authorities at the military installation outside the United States intend to request a person's detention by order of the Federal Magistrate Judge, the military representative assigned to the case shall gather the necessary information setting forth the reasons in support of a motion to be brought by the attorney representing the government at the initial proceeding conducted pursuant to section 3265 of the Act.

(v) This part is not intended to eliminate or reduce existing obligations or authorities to detain persons in foreign countries as required or permitted by agreements with host countries. See generally, *United States* v. *Murphy*, 18 M.J. 220 (CMA 1984).

(6) *Custody and Transport of Persons While in Temporary Detention.* (i) The Department of Defense may only take custody of and transport the person as specifically set forth in the Act. This is limited to delivery as soon as practicable to the custody of U.S. civilian law enforcement authorities for removal to the United States for judicial proceedings; delivery to appropriate authorities of the foreign country in which the person is alleged to have committed the violation of section 3261(a) of the Act in accordance with section 3263; or, upon a determination by the Secretary of Defense, or the Secretary's designee, that military necessity requires it, removal to the nearest U.S. military installation outside the United States adequate to detain the person and to facilitate the initial appearance described in 3265(a) of the Act.

(ii) Responsibility for a detained person's local transportation, escort, and custody requirements remains with the command that placed the person in temporary detention for a violation of section 3261(a) of the Act. This responsibility includes:

(A) Attendance at official proceedings and other required health and welfare appointments (e.g., appointments with counsel, medical and dental appointments, etc.).

(B) Delivery to host nation officials under section 3263 of the Act.

(C) Attendance at Initial Proceedings conducted under section 3265 of the Act.

(D) Delivery under the Act to the custody of U.S. civilian law enforcement authorities for removal to the United States.

(iii) A person who requires the continued exercise of custody and transportation to appointments and locations away from the detention facility, including delivery of the person to host nation officials under section 3263 of the Act, may be transferred under the custody of command authorities or those law enforcement officers authorized to make arrests in paragraphs (b)(4)(iv) and (b)(4)(v) of this section. Transportation of a detainee outside an installation shall be coordinated with the host nation's local law enforcement, as appropriate and in accordance with recognized practices.

(iv) Military authorities retain responsibility for the custody and transportation of a person arrested or charged with a violation of the Act who is to be removed from one military installation outside the United States to another military installation outside the United States, including when the person is transferred under the provisions of section 3264(b)(5) of the Act. Unless otherwise agreed to between the sending and receiving commands, it shall be the responsibility of the sending command to make arrangements for the person's transportation and custody during the transport or transfer to the receiving command.

(v) In coordination with appropriate host nation authorities, U.S. civilian law enforcement authorities shall be responsible for taking custody of a person arrested or charged with a violation of the Act and for the removal of that person to the United States for any pretrial or trial proceedings. DoD officials shall consult with the DSS/DOJ to determine which civilian law enforcement authority (i.e., U.S. Marshals Service, Federal Bureau of Investigations, Drug Enforcement Agency, or other Federal agency) shall dispatch an officer to the overseas' detention facility to assume custody of the person for removal to the United States. Until custody of the person is delivered to such U.S. civilian law enforcement authorities, military authorities retain responsibility for the custody and transportation of the person arrested or charged with a violation of the Act, to include transportation within the host nation to help facilitate the removal of the person to the United States under the Act.

(7) *Release From Temporary Detention.* When a person subject to the Act has been placed in temporary detention, in the absence of a Criminal Complaint or Indictment pursuant to the Federal Rules of Criminal Procedure, only the Commander who initially ordered detention, or a superior Commander, or a Federal Magistrate Judge, may order the release of the detained person. If a Criminal Complaint or Indictment exists, or if a Federal Magistrate Judge orders the person detained, only a Federal Magistrate Judge may order the release of the person detained. If a Federal Magistrate Judge orders the person temporarily detained to be released from detention, the Commander who ordered detention, or a superior Commander, shall cause the person to be released. When a person is released from detention under this provision, the Commander shall implement, to the extent practicable within the commander's authority, any conditions on liberty directed in the Federal Magistrate Judge's order. When the commander who independently ordered the person's temporary detention without reliance on a Federal Magistrate Judge's order, or a superior commander, orders a person's release before a Federal Magistrate Judge is assigned to review the matter, the commander may, within the commander's authority, place reasonable conditions upon the person's release from detention.

(i) A person's failure to obey the conditions placed on his or her release from detention, in addition to subjecting that person to the commander's, or Federal Magistrate Judge's order to be returned to detention, may consistent with the commander's authority and applicable policy, laws, and regulations, subject the person to potential criminal sanctions, or to administrative procedures leading to a loss of command sponsorship to the foreign country, as well as the possibility of additional disciplinary or adverse action.

(ii) A copy of all orders issued by a Federal Magistrate Judge concerning initial proceedings, detention, conditions on liberty, and removal to the

United States shall promptly be provided to the Commander of the Combatant Command concerned and the Commander of the detention facility at which the person is being held in temporary detention.

(8) *Delivery of Persons to Host Nation Authorities.* (i) Persons arrested may be delivered to the appropriate authorities of the foreign country in which the person is alleged to have violated section 3261(a) of the Act, when:

(A) Authorities of a foreign country request that the person be delivered for trial because the conduct is also a violation of that foreign country's laws, and

(B) Delivery of the person is authorized or required by treaty or another international agreement to which the United States is a party.

(ii) Coast Guard personnel authorized to make arrests pursuant to paragraph (b)(4)(v) of this section are also authorized to deliver persons to foreign country authorities, as provided in section 3263 of the Act.

(iii) Section 3263(b) of the Act calls upon the Secretary of Defense, in consultation with the Secretary of State, to determine which officials of a foreign country constitute appropriate authorities to which persons subject to the Act may be delivered. For purposes of the Act, those authorities are the same foreign country law enforcement authorities as are customarily involved in matters involving foreign criminal jurisdiction under an applicable SOFA or other international agreement or arrangement between the United States and the foreign country.

(iv) No action may be taken under this part with a view toward the prosecution of a person for a violation of the Act if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense(s), except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity). See section 3261(b) of the Act. Requests for an exception shall be written and forwarded to the Combatant Commander. The Combatant Commander shall forward the request to the General Counsel of the Department of Defense, as representative for the Secretary of Defense, for review and transmittal to the Attorney General of the United States. At the discretion of the General Counsel of the Department of Defense, other agencies and organizations (such as the Legal Counsel to the Chairman of the Joint Chiefs of Staff and the Secretary of the Military Department that sponsored the person into the foreign country) shall be informed, as appropriate.

(v) Except for persons to be delivered to a foreign country, and subject to the limitations of section 3264 of the Act and paragraph (e)(5) of this section, persons arrested for conduct in violation of the Act shall, upon the issuance of a removal order by a Federal Magistrate Judge under section 3264(b) of the Act, be delivered, as soon as practicable, to the custody of U.S. civilian law enforcement authorities. See paragraph (b)(6)(iv) of this section.

(c) *Representation.* (1) *Civilian Defense Counsel.* (i) Civilian defense counsel representation shall not be at the expense of the Department of Defense or the Military Departments.

(ii) The Act contemplates that a person arrested or charged with a violation of the Act shall be represented by a civilian attorney licensed to practice law in the United States. However, it is also recognized that in several host nations where there has been a longstanding military presence, qualified civilian attorneys (including lawyers who are U.S. citizens) have established law practices in these host nations to assist assigned U.S. personnel and to represent service members in courts-martial, or before host nation courts. With the consent of the person arrested or charged with a violation of the Act who wishes to remain in the foreign country, these lawyers can provide adequate representation for the limited purpose of any initial proceedings required by the Act. When the person entitled to an attorney or requests counsel, staff judge advocates at such locations should assemble a list of local civilian attorneys for the person's consideration. The list shall contain a disclaimer stating that no endorsement by the United States government or the command is expressed or implied

by the presence of an attorney's name on the list.

(A) To the extent practicable, military authorities shall establish procedures by which persons arrested or charged with a violation of the Act may seek the assistance of civilian defense counsel by telephone. Consultation with such civilian counsel shall be in private and protected by the attorney-client privilege.

(B) Civilian defense counsel, at no expense to the Department of Defense, shall be afforded the opportunity to participate personally in any initial proceedings required by the Act that are conducted outside the United States. When civilian defense counsel cannot reasonably arrange to be personally present for such representation, alternative arrangements shall be made for counsel's participation by telephone or by such other means that enables voice communication among the participants.

(C) When at least one participant cannot arrange to meet at the location outside the United States where initial proceedings required by the Act are to be conducted, whenever possible arrangements should be made to conduct the proceedings by video teleconference or similar means. Command video teleconference communication systems should be used for this purpose, if resources permit, and if such systems are not otherwise unavailable due to military mission requirements. When these capabilities are not reasonably available, the proceedings shall be conducted by telephone or such other means that enables voice communication among the participants. See section 3265 of the Act.

(D) The above provisions regarding the use of teleconference communication systems apply to any detention proceedings that are conducted outside the United States under section 3265(b) of the Act.

(E) Civilian defense counsel practicing in host nations do not gain Department of Defense sponsorship, nor any diplomatic status, as a result of their role as defense counsel. To the extent practicable, notice to this effect shall be provided to the civilian defense counsel when the civilian defense counsel's identity is made known to appropriate military authorities.

(2) *Qualified Military Counsel.* (i) Counsel representation also includes qualified military counsel that the Judge Advocate General of the Military Department concerned determines is reasonably available for the purpose of providing limited representation at initial proceedings required by the Act and conducted outside the United States. By agreement with the Department of Homeland Security, Coast Guard commands and activities located outside the United States shall seek to establish local agreements with military commands for qualified military counsel from the Military Departments to provide similar limited representation in cases arising within the Coast Guard. The Secretaries of the Military Departments shall establish regulations governing representation by qualified military counsel. These regulations, at a minimum, shall require that the command's Staff Judge Advocate:

(ii) Prepare, update as necessary, and make available to a Federal Magistrate Judge upon request, a list of qualified military counsel who are determined to be available for the purpose of providing limited representation at initial proceedings.

(iii) Ensure that the person arrested or charged under the Act is informed that any qualified military counsel shall be made available only for the limited purpose of representing that person in any initial proceedings that are to be conducted outside the United States, and that such representation does not extend to further legal proceedings that may occur either in a foreign country or the United States. The person arrested or charged shall also be required, in writing, to acknowledge the limited scope of qualified military counsel's representation and therein waive that military counsel's further representation in any subsequent legal proceedings conducted within a foreign country or the United States. The ''Acknowledgement of Limited Representation,'' at appendix B of this part, may be used for this purpose. A copy of the ''Acknowledgement of Limited Representation'' shall be provided to the person arrested or

charged under the Act, as well as to the qualified military counsel. The original acknowledgment shall be kept on file in the DCO's Office of the Staff Judge Advocate.

(iv) Provide available information that would assist the Federal Magistrate Judge make a determination that qualified civilian counsel are unavailable, and that the person arrested or charged under the Act is unable financially to retain civilian defense counsel, before a qualified military counsel who has been made available is assigned to provide limited representation. See Analysis and Discussion of Section 3265 (c), Report Accompanying the Act.

(3) *Union Representation.* Agency law enforcement officials shall comply with applicable Federal civilian employee rights and entitlements, if any, regarding collective bargaining unit representation under Chapter 71 of title 5, United States Code, during pretrial questioning and temporary detention procedures under this part.

(4) *Military Representative.* (i) To assist law enforcement officers and the U.S. Attorney's representative assigned to a case, a judge advocate, legal officer, or civilian attorney-advisor may be appointed as a military representative to represent the interests of the United States. As appropriate, the military representative may be appointed as a Special Assistant U.S. Attorney. The military representative shall be responsible for assisting the command, law enforcement, and U.S. Attorney representatives during pretrial matters, initial proceedings, and other procedures required by the Act and this part. These responsibilities include assisting the U.S. Attorney representative determine whether continued detention is warranted, and to provide information to the presiding Federal Magistrate Judge considering the following:

(ii) If there is probable cause to believe that a violation of the Act has been committed and that the person arrested or charged has committed it,

(iii) If the person being temporarily detained should be kept in detention or released from detention, and, if released, whether any conditions practicable and reasonable under the circumstances, should be imposed.

(d) *Initial Proceedings.* (1) A person arrested for or charged with a violation of the Act may be entitled to an initial appearance before a judge and/or a detention hearing (collectively, the ''initial proceedings''). The initial proceedings are intended to meet the requirements of the Federal Rules of Criminal Procedure. The initial proceedings are not required when the person under investigation for violating the Act has not been arrested or temporarily detained by U.S. military authorities, or the person's arrest or temporary detention by U.S. law enforcement authorities occurs after the person ceases to accompany or be employed by the Armed Forces outside the United States, or the arrest or detention takes place within the United States.

(2) The initial proceedings to be conducted pursuant to the Act and this part shall not be initiated for a person delivered to foreign country authorities and against whom the foreign country is prosecuting or has prosecuted the person for the conduct constituting such offense, except when the Attorney General or Deputy Attorney General (or a person acting in either such capacity) has approved an exception that would allow for prosecution in the United States may initial proceedings under the Act be conducted, under these circumstances. Requests for approval of such an exception shall be forwarded through the Commander of the Combatant Command to the General Counsel of the Department of Defense, in accordance with paragraph (b)(8)(iv) of this section.

(3) Initial proceedings required by the Act and this part shall be conducted, without unnecessary delay. In accordance with the U.S. Supreme Court decision in *County of Riverside* v. *McLaughlin*, 500 U.S. 44 (1991), the initial appearance shall be conducted within 48 hours of the arrest. The initial proceedings required by the Act shall be conducted when:

(i) The person arrested has not been delivered to foreign country authorities under the provisions of section 3263 of the Act; or

(ii) The foreign country authorities having custody of the person delivers the person to U.S. military authorities without first prosecuting the person for such conduct as an offense under the laws of that foreign country.

(4) A Federal Magistrate Judge shall preside over the initial proceedings that are required by the Act and this part. The proceedings should be conducted from the United States using video teleconference methods, if practicable, and with all parties to the proceedings participating. In the event that there is no video teleconference capability, or the video teleconference capability is unavailable due to military requirements or operations, the parties to the proceeding shall, at a minimum, be placed in contact by telephone.

(5) Initial proceedings conducted pursuant to the Act and this part shall include the requirement for the person's initial appearance under the Federal Rules of Criminal Procedure. The Federal Magistrate Judge shall determine whether probable cause exists to believe that an offense under section 3261(a) of the Act has been committed and that the identified person committed it. This determination is intended to meet the due process requirements to which the person is entitled, as determined by the U.S. Supreme Court in *Gerstein* v. *Pugh*, 420 U.S. 103 (1975).

(6) Initial proceedings shall also include a detention hearing where required under 18 U.S.C. 3142 and the Federal Rules of Criminal Procedure. A detention hearing may be required when:

(i) The person arrested or charged with a violation of the Act has been placed in temporary detention and the intent is to request continued detention; or

(ii) The United States seeks to detain a person arrested or charged with a violation of the Act who has not previously been detained.

(7) A detention hearing shall be conducted by a Federal Magistrate Judge. When the person arrested or charged requests, the detention hearing be conducted while the person remains outside the United States, detention hearing shall be conducted by the same Federal Magistrate Judge presiding over the initial proceeding and shall be conducted by telephone or other means that allow for voice communication among the participants, including the person's defense counsel. If the person does not so request, or if the Federal Magistrate Judge so orders, the detention hearing shall be held in the United States after the removal of the person to the United States.

(8) In the event that the Federal Magistrate Judge orders the person's release prior to trial, and further directs the person's presence in the district in which the trial is to take place, the U.S. Attorney Office's representative responsible for prosecuting the case shall inform the military representative and the DCO's Office of the Staff Judge Advocate.

(9) Under circumstances where the person suspected of committing an offense in violation of the Act has never been detained or an initial proceeding conducted, the presumption is that a trial date shall be established at which the defendant would be ordered to appear. Such an order would constitute an order under section 3264(b)(4) of the Act that ''otherwise orders the person to be removed.'' The person's failure to appear as ordered shall be addressed by the Court as with any other failure to comply with a valid court order.

(10) The DCO's Office of the Staff Judge Advocate shall assist in arranging for the conduct of initial proceedings required by the Act and this part, and shall provide a military representative to assist the U.S. Attorney's Office representative in presenting the information for the Federal Magistrate Judge's review. The military representative shall also provide any administrative assistance the Federal Magistrate Judge requires at the location outside the United States where the proceedings shall be conducted.

(e) *Removal Of Persons To The United States Or Other Countries.* (1) In accordance with the limitation established by section 3264 of the Act, military authorities shall not remove, to the United States or any other foreign country, a person suspected of violating section 3261(a) of the Act, except when:

(i) The person's removal is to another foreign country in which the person is believed to have committed a violation of section 3261(a) of the Act; or

(ii) The person is to be delivered, upon request, to authorities of a foreign country under section 3263 of the Act and paragraph (b)(8) of this section; or

(iii) The person is arrested or charged with a violation of the Act and the person is entitled to, and does not waive, a preliminary examination under Federal Rule of Criminal Procedure 5.1, in which case the person shall be removed to the U.S. for such examination; or

(iv) The person's removal is ordered by a Federal Magistrate Judge. See paragraph (e)(2) of this section; or

(v) The Secretary of Defense, or the Secretary's designee, directs the person be removed, as provided in section 3264(b)(5) of the Act and paragraph (e)(3) of this section.

(2) *Removal By Order Of A Federal Magistrate Judge*. Military authorities may remove a person suspected of violating section 3261(a) of the Act to the United States, when:

(i) A Federal Magistrate Judge orders that the person be removed to the United States to be present at a detention hearing; or

(ii) A Federal Magistrate Judge orders the detention of the person prior to trial (See 18 U.S.C. 3142(e)) in which case the person shall be promptly removed to the United States for such detention; or

(iii) A Federal Magistrate Judge otherwise orders the person be removed to the United States.

(3) *Removal By Direction of the Secretary of Defense or Designee*. The Secretary of Defense, or designee, may order a person's removal from a foreign country within the Combatant Command's geographic area of responsibility when, in his sole discretion, such removal is required by military necessity. See section 3264(b)(5) of the Act. Removal based on military necessity may be authorized in order to take into account any limiting factors that may result from military operations, as well as the capabilities and conditions associated with a specific location.

(i) When the Secretary of Defense, or designee, determines that a person arrested or charged with a violation of the Act should be removed from a foreign country, the person shall be removed to the nearest U.S. military installation outside the United States where the limiting conditions requiring such a removal no longer apply, and where there are available facilities and adequate resources to temporarily detain the person and conduct the initial proceedings required by the Act and this part.

(ii) The relocation of a person under this paragraph does not authorize the further removal of the person to the United States, unless that further removal is authorized by an order issued by a Federal Magistrate Judge under paragraph (e)(2) of this section.

(iii) *Delegation*. The Commander of a Combatant Command, and the Commander's principal assistant, are delegated authority to make the determination, based on the criteria stated in paragraph (e)(3) of this section, that a person arrested or charged with a violation of the Act shall be removed from a foreign country under section 3264(b)(5) of the Act and this part. Further delegation is authorized, but the delegation of authority is limited to a subordinate commander within the command who is designated as a general court-martial convening authority under the UCMJ.

(4) A person who is removed to the United States under the provisions of the Act and this part and who is thereafter released from detention, and otherwise at liberty to return to the location outside the United States from which he or she was were removed, shall be subject to any requirements imposed by a Federal District Court of competent jurisdiction.

(5) Where a person has been removed to the United States for a detention hearing or other judicial proceeding and a Federal Magistrate Judge orders the person's release and permits the person to return to the overseas location, the Department of Defense (including the Military Department originally sponsoring the person to be employed or to accompany the Armed Forces outside the United States) shall not be responsible for the expenses associated with the return of the person

to the overseas location, or the person's subsequent return travel to the United States for further court proceedings that may be required.

APPENDIX A TO PART 153—GUIDELINES

(a) Civilians employed by the Armed Forces outside the United States who commit felony offenses while outside the U.S. are subject to U.S. criminal jurisdiction under the Act, and shall be held accountable for their actions, as appropriate.

(b) Civilians accompanying the Armed Forces outside the United States who commit felony offenses while outside the U.S. are subject to U.S. criminal jurisdiction under the Act, and shall be held accountable for their actions, as appropriate.

(c) Former members of the Armed Forces who commit felony offenses while serving as a member of the Armed Forces outside the U.S., but who ceased to be subject to UCMJ court-martial jurisdiction without having been tried by court-martial for such offenses, are subject to U.S. criminal jurisdiction under the Act and shall be held accountable for their actions, as appropriate.

(d) The procedures of this part and DoD actions to implement the Act shall comply with applicable Status of Forces Agreements, and other international agreements affecting relationships and activities between the respective host nation countries and the U.S. Armed Forces. These procedures may be employed outside the United States only if the foreign country concerned has been briefed or is otherwise aware of the Act and has not interposed an objection to the application of these procedures. Such awareness may come in various forms, including but not limited to Status of Forces Agreements containing relevant language, Diplomatic Notes or other acknowledgements of briefings, or case-by-case arrangements, agreements, or understandings with appropriate host nation officials.

(e) Consistent with the long-standing policy of maximizing U.S. jurisdiction over its citizens, the Act and this part provide a mechanism for furthering this objective by closing a jurisdictional gap in U.S. law and thereby permitting the criminal prosecution of covered persons for offenses committed outside the United States. In so doing, the Act and this part provide, in appropriate cases, an alternative to a host nation's exercise of its criminal jurisdiction should the conduct that violates U.S. law also violate the law of the host nation, as well as a means of prosecuting covered persons for crimes committed in areas in which there is no effective host nation criminal justice system.

(f) In addition to the limitations imposed upon prosecutions by section 3261(b) of the Act, the Act and these procedures should be reserved generally for serious misconduct for which administrative or disciplinary remedies are determined to be inadequate or inappropriate. Because of the practical constraints and limitations on the resources available to bring these cases to successful prosecution in the United States, initiation of action under this part would not generally be warranted unless serious misconduct were involved.

(g) The procedures set out in the Act and this part do not apply to cases in which the return of fugitive offenders is sought through extradition and similar proceedings, nor are extradition procedures applicable to cases under the Act.

APPENDIX B TO PART 153—ACKNOWLEDGMENT OF LIMITED LEGAL REPRESENTATION (SAMPLE)

1. I, _____, have been named as a suspect or defendant in a matter to which I have been advised is subject to the jurisdiction of the Military Extraterritorial Jurisdiction Act of 2000 (section 3261, *et seq.,* of title 18, United States Code.); hereinafter referred to as ''the Act''). I have also been informed that certain initial proceedings under 18 U.S.C. 3265 may be required under this Act, for which I am entitled to be represented by legal counsel.

2. I acknowledge and understand that the appointment of military counsel for the limited purpose of legal representation in proceedings conducted pursuant to the Act is dependent upon my being unable to retain civilian defense counsel representation for such proceedings, due to my indigent status, and that qualified military defense counsel has been made available.

3. Pursuant to the Act, _____, a Federal Magistrate Judge, has issued the attached Order and has directed that that military counsel be made available:

____ For the limited purpose of representing me at an initial proceeding to be conducted outside the United States pursuant to 18 U.S.C. 3265,

____ For the limited purpose of representing me in an initial detention hearing to be conducted outside the United States pursuant to 18 U.S.C. 3265(b),

4. _____, military counsel, has been made available in accordance with Department of Defense Instruction 5525.bb, and as directed by the attached Order of a Federal Magistrate Judge.

5. I (do) (do not) wish to be represented by _____, military counsel ____ (initials).

6. I understand that the legal representation of _____, military counsel, is limited to:

a. Representation at the initial proceedings conducted outside the United States pursuant to 18 U.S.C. 3265.

____ (Initials)

b. The initial detention hearing to be conducted outside the United States pursuant to the Military Extraterritorial Jurisdiction Act of 2000 (18 U.S.C. 3261, *et seq.*).

____ (Initials)

c. Other proceedings (Specify):

_____. ____ (Initials)

_____

Signature of Person To Be Represented By Military Counsel

_____

Signature of Witness*

Attachment:

Federal Magistrate Judge Order

(NOTE: The witness must be a person other than the defense counsel to be made available for this limited legal representation.)

SUBCHAPTER F—SECURITY

PART 155—DEFENSE INDUSTRIAL PERSONNEL SECURITY CLEARANCE PROGRAM

Sec.
155.1 Purpose.
155.2 Applicability and scope.
155.3 Definitions.
155.4 Policy.
155.5 Responsibilities.
155.6 Procedures.

APPENDIX A TO PART 155—ADDITIONAL PROCEDURAL GUIDANCE

AUTHORITY: E.O. 10865, 3 CFR 1959–1963 Comp., p. 398, as amended by E.O. 10909, 3 CFR 1959–1963 Comp., p. 437; E.O. 11382, 3 CFR 1966–1970 Comp., p. 690; and E.O. 12829, 3 CFR 1993 Comp., p. 570.

SOURCE: 57 FR 5383, Feb. 14, 1992, unless otherwise noted.

§ 155.1 Purpose.

This part updates policy, responsibilities, and procedures of the Defense Industrial Personnel Security Clearance Review Program implementing E.O. 10865, as amended.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 48565, Sept. 22, 1994]

§ 155.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Inspector General of the Department of Defense (IG, DoD), and the Defense Agencies (hereafter referred to collectively as ''the DoD Components'').

(b) By mutual agreement, also extends to other Federal Agencies that include:

(1) Department of Agriculture.
(2) Department of Commerce.
(3) Department of Interior.
(4) Department of Justice.
(5) Department of Labor.
(6) Department of State.
(7) Department of Transportation.
(8) Department of Treasury.
(9) Environmental Protection Agency.
(10) Federal Emergency Management Agency.
(11) Federal Reserve System.
(12) General Accounting Office.
(13) General Services Administration.
(14) National Aeronautics and Space Administration.
(15) National Science Foundation.
(16) Small Business Administration.
(17) United States Arms Control and Disarmament Agency.
(18) United States Information Agency.
(19) United States International Trade Commission.
(20) United States Trade Representative.

(c) Applies to cases that the Defense Industrial Security Clearance Office (DISCO) forwards to the ''Defense Office of Hearings and Appeals (DOHA)'' for action under this part to determine whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.

(d) Provides a program that may be extended to other security cases at the direction of the Assistant Secretary of Defense for Command, Control, Communications, and Intelligence (ASD(C^3I)).

(e) Does not apply to cases in which:

(1) A security clearance is withdrawn because the applicant no longer has a need for access to classified information;

(2) An interim security clearance is withdrawn by the DISCO during an investigation; or

(3) A security clearance is withdrawn for administrative reasons that are without prejudice as to a later determination of whether the grant or continuance of the applicant's security clearance would be clearly consistent with the national interest.

(f) Does not apply to cases for access to sensitive compartmented information or a special access program.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 35464, July 12, 1994]

§ 155.3 Definitions.

(a) *Applicant.* Any U.S. citizen who holds or requires a security clearance or any immigrant alien who holds or requires a limited access authorization for access to classified information

needed in connection with his or her employment in the private sector; any U.S. citizen who is a direct-hire employee or selectee for a position with the North Atlantic Treaty Organization (NATO) and who holds or requires NATO certificates of security clearance or security assurances for access to U.S. or foreign classified information; or any U.S. citizen nominated by the Red Cross or United Service Organizations for assignment with the Military Services overseas. The term ''applicant'' does not apply to those U.S. citizens who are seconded to NATO by U.S. Departments and Agencies or to U.S. citizens recruited through such Agencies in response to a request from NATO.

(b) *Clearance Decision.* A decision made in accordance with this part concerning whether it is clearly consistent with the national interest to grant an applicant a security clearance for access to Confidential, Secret, or Top Secret information. A favorable clearance decision establishes eligibility of the applicant to be granted a security clearance for access at the level governed by the documented need for such access, and the type of investigation specified for that level in 32 CFR part 154. An unfavorable clearance decision denies any application for a security clearance and revokes any existing security clearance, thereby preventing access to classified information at any level and the retention of any existing security clearance.

§ 155.4 Policy.

It is DoD policy that:

(a) All proceedings provided for by this part shall be conducted in a fair and impartial manner.

(b) A clearance decision reflects the basis for an ultimate finding as to whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant.

(c) Except as otherwise provided for by E.O. 10865, as amended, or this part, a final unfavorable clearance decision shall not be made without first providing the applicant with:

(1) Notice of specific reasons for the proposed action.

(2) An opportunity to respond to the reasons.

(3) Notice of the right to a hearing and the opportunity to cross-examine persons providing information adverse to the applicant.

(4) Opportunity to present evidence on his or her own behalf, or to be represented by counsel or personal representative.

(5) Written notice of final clearance decisions.

(6) Notice of appeal procedures.

(d) Actions pursuant to this part shall cease upon termination of the applicant's need for access to classified information except in those cases in which:

(1) A hearing has commenced;

(2) A clearance decision has been issued; or

(3) The applicant's security clearance was suspended and the applicant provided a written request that the case continue.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 48565, Sept. 22, 1994]

§ 155.5 Responsibilities.

(a) The Assistant Secretary of Defense of Command, Control, Communications and Intelligence shall:

(1) Establish investigative policy and adjudicative standards and oversee their application.

(2) Coordinate with the General Counsel of the Department of Defense (GC, DoD) on policy affecting clearance decisions.

(3) Issue clarifying guidance and instructions as needed.

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

(1) Establish guidance and provide oversight as to legal sufficiency of procedures and standards established by this part.

(2) Establish the organization and composition of the DOHA.

(3) Designate a civilian attorney to be the Director, DOHA.

(4) Issue clarifying guidance and instructions as needed.

(5) Administer the program established by this part.

(6) Issue invitational travel orders in appropriate cases to persons to appear and testify who have provided oral or

written statements adverse to the applicant relating to a controverted issue.

(7) Designate attorneys to be Department Counsels assigned to the DOHA to represent the Government's interest in cases and related matters within the applicability and scope of this part.

(8) Designate attorneys to be Administrative Judges assigned to the DOHA.

(9) Designate attorneys to be Administrative Judge members of the DOHA Appeal Board.

(10) Provide for supervision of attorneys and other personnel assigned or attached to the DOHA.

(11) Develop and implement policy established or coordinated with the GC, DoD, in accordance with this part.

(12) Establish and maintain qualitative and quantitative standards for all work by DOHA employees arising within the applicability and scope of this part.

(13) Ensure that the Administrative Judges and Appeal Board members have the requisite independence to render fair and impartial decisions consistent with DoD policy.

(14) Provide training, clarify policy, or initiate personnel actions, as appropriate, to ensure that all DOHA decisions are made in accordance with policy, procedures, and standards established by this part.

(15) Provide for maintenance and control of all DOHA records.

(16) Take actions as provided for in §155.6(b), and the additional procedural guidance in appendix A to this part.

(17) Establish and maintain procedures for timely assignment and completion of cases.

(18) Issue guidance and instructions, as needed, to fulfill the foregoing responsibilities.

(19) Designate the Director, DOHA, to implement paragraphs (b)(5) through (b)(18) of this section, under general guidance of the GC, DoD.

(c) The Heads of the DoD Components shall provide (from resources available to the designated DoD Component) financing, personnel, personnel spaces, office facilities, and related administrative support required by the DOHA.

(d) The ASD(C^3I) shall ensure that cases within the scope and applicability of this part are referred promptly to the DOHA, as required, and that clearance decisions by the DOHA are acted upon without delay.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 35464, July 12, 1994]

§155.6 Procedures.

(a) Applicants shall be investigated in accordance with the standards in 32 CFR part 154.

(b) An applicant is required to give, and to authorize others to give, full, frank, and truthful answers to relevant and material questions needed by the DOHA to reach a clearance decision and to otherwise comply with the procedures authorized by this part. The applicant may elect on constitutional or other grounds not to comply; but refusal or failure to furnish or authorize the providing of relevant and material information or otherwise cooperate at any stage in the investigation or adjudicative process may prevent the DOHA from making a clearance decision. If an applicant fails or refuses to:

(1) Provide relevant and material information or to authorize others to provide such information; or

(2) Proceed in a timely or orderly fashion in accordance with this part; or

(3) Follow directions of an Administrative Judge or the Appeal Board; then the Director, DOHA, or designee, may revoke any security clearance held by the applicant and discontinue case processing. Requests for resumption of case processing and reinstatement of a security clearance may be approved by the Director, DOHA, only upon a showing of good cause. If the request is denied, in whole or in part, the decision is final and bars reapplication for a security clearance for 1 year from the date of the revocation.

(c) Each clearance decision must be a fair and impartial common sense determination based upon consideration of all the relevant and material information and the pertinent criteria in 32 CFR 154.7 and adjudication policy in appendix H to 32 CFR part 154, including as appropriate:

(1) Nature and seriousness of the conduct and surrounding circumstances.

(2) Frequency and recency of the conduct.

(3) Age of the applicant.

(4) Motivation of the applicant, and the extent to which the conduct was negligent, willful, voluntary, or undertaken with knowledge of the consequences involved.

(5) Absence or presence of rehabilitation.

(6) Probability that the circumstances or conduct will continue or recur in the future.

(d) Whenever there is a reasonable basis for concluding that an applicant's continued access to classified information poses an imminent threat to the national interest, any security clearance held by the applicant may be suspended by the ASD(C³I), with the concurrence of the GC, DoD, pending a final clearance decision. This suspension may be rescinded by the same authorities upon presentation of additional information that conclusively demonstrates that an imminent threat to the national interest no longer exists. Procedures in appendix A to this part shall be expedited whenever an applicant's security clearance has been suspended pursuant to this section.

(e) Nothing contained in this part shall limit or affect the responsibility and powers of the Secretary of Defense or the head of another Department or Agency to deny or revoke a security clearance when the security of the nation so requires. Such authority may not be delegated and may be exercised only when the Secretary of Defense or the head of another Department or Agency determines that the hearing procedures and other provisions of this part cannot be invoked consistent with the national security. Such a determination shall be conclusive.

(f) Additional procedural guidance is in appendix A to this part.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 35464, July 12, 1994]

APPENDIX A TO PART 155—ADDITIONAL PROCEDURAL GUIDANCE

1. When the DISCO cannot affirmatively find that it is clearly consistent with the national interest to grant or continue a security clearance for an applicant, the case will be promptly referred to the DOHA.

2. Upon referral, the DOHA shall make a prompt determination whether to grant or continue a security clearance, issue a statement of reasons (SOR) as to why it is not clearly consistent with the national interest to do so, or take interim actions, including but not limited to:

a. Direct further investigation.

b. Propound written interrogatories to the applicant or other persons with relevant information.

c. Requiring the applicant to undergo a medical evaluation by a DoD Psychiatric Consultant.

d. Interviewing the applicant.

3. An unfavorable clearance decision shall not be made unless the applicant has been provided with a written SOR that shall be as detailed and comprehensive as the national security permits. A letter of instruction with the SOR shall explain that the applicant or Department Counsel may request a hearing. It shall also explain the adverse consequences for failure to respond to the SOR within the prescribed time frame.

4. The applicant must submit a detailed written answer to the SOR under oath or affirmation that shall admit or deny each listed allegation. A general denial or other similar answer is insufficient. To be entitled to a hearing, the applicant must specifically request a hearing in his or her answer. The answer must be received by the DOHA within 20 days from receipt of the SOR. Requests for an extension of time to file an answer may be submitted to the Director, DOHA, or designee, who in turn may grant the extension only upon a showing of good cause.

5. If the applicant does not file a timely and responsive answer to the SOR, the Director, DOHA, or designee, may discontinue processing the case, deny issuance of the requested security clearance, and direct the DISCO to revoke any security clearance held by the applicant.

6. Should review of the applicant's answer to the SOR indicate that allegations are unfounded, or evidence is insufficient for further processing, Department Counsel shall take such action as appropriate under the circumstances, including but not limited to withdrawal of the SOR and transmittal to the Director for notification of the DISCO for appropriate action.

7. If the applicant has not requested a hearing with his or her answer to the SOR and Department Counsel has not requested a hearing within 20 days of receipt of the applicant's answer, the case shall be assigned to an Administrative Judge for a clearance decision based on the written record. Department Counsel shall provide the applicant with a copy of all relevant and material information that could be adduced at a hearing. The applicant shall have 30 days from receipt of the information in which to submit a documentary response setting forth objections, rebuttal, extenuation, mitigation, or explanation, as appropriate.

8. If a hearing is requested by the applicant or Department Counsel, the case shall be assigned to an Administrative Judge for a

clearance decision based on the hearing record. Following issuance of a notice of hearing by the Administrative Judge, or designee, the applicant shall appear in person with or without counsel or a personal representative at a time and place designated by the notice of hearing. The applicant shall have a reasonable time to prepare his or her case. The applicant shall be notified at least 15 days in advance of the time and place of the hearing, which generally shall be held at a location in the United States within a metropolitan area near the applicant's place of employment or residence. A continuance may be granted by the Administrative Judge only for good cause. Hearings may be held outside of the United States in NATO cases, or in other cases upon a finding of good cause by the Director, DOHA, or designee.

9. The Administrative Judge may require a prehearing conference.

10. The Administrative Judge may rule on questions of procedure, discovery, and evidence and shall conduct all proceedings in a fair, timely, and orderly manner.

11. Discovery by the applicant is limited to non-privileged documents and materials subject to control by the DOHA. Discovery by Department Counsel after issuance of an SOR may be granted by the Administrative Judge only upon a showing of good cause.

12. A hearing shall be open except when the applicant requests that it be closed, or when the Administrative Judge determines that there is a need to protect classified information or there is other good cause for keeping the proceeding closed. No inference shall be drawn as to the merits of a case on the basis of a request that the hearing be closed.

13. As far in advance as practical, Department Counsel and the applicant shall serve one another with a copy of any pleading, proposed documentary evidence, or other written communication to be submitted to the Administrative Judge.

14. Department Counsel is responsible for presenting witnesses and other evidence to establish facts alleged in the SOR that have been controverted.

15. The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision.

16. Witnesses shall be subject to cross-examination.

17. The SOR may be amended at the hearing by the Administrative Judge on his or her own motion, or upon motion by Department Counsel or the applicant, so as to render it in conformity with the evidence admitted or for other good cause. When such amendments are made, the Administrative Judge may grant either party's request for such additional time as the Administrative Judge may deem appropriate for further preparation or other good cause.

18. The Administrative Judge hearing the case shall notify the applicant and all witnesses testifying that 18 U.S.C. 1001 is applicable.

19. The Federal Rules of Evidence (28 U.S.C. 101 *et seq.*) shall serve as a guide. Relevant and material evidence may be received subject to rebuttal, and technical rules of evidence may be relaxed, except as otherwise provided herein, to permit the development of a full and complete record.

20. Official records or evidence compiled or created in the regular course of business, other than DoD personnel background reports of investigation (ROI), may be received and considered by the Administrative Judge without authenticating witnesses, provided that such information has been furnished by an investigative agency pursuant to its responsibilities in connection with assisting the Secretary of Defense, or the Department or Agency head concerned, to safeguard classified information within industry under to E.O. 10865, as amended. An ROI may be received with an authenticating witness provided it is otherwise admissible under the Federal Rules of Evidence (28 U.S.C. 101 *et seq.*).

21. Records that cannot be inspected by the applicant because they are classified may be received and considered by the Administrative Judge, provided the GC, DoD, has:

a. Made a preliminary determination that such evidence appears to be relevant and material.

b. Determined that failure to receive and consider such evidence would be substantially harmful to the national security.

22. A written or oral statement adverse to the applicant on a controverted issue may be received and considered by the Administrative Judge without affording an opportunity to cross-examine the person making the statement orally, or in writing when justified by the circumstances, only in either of the following circumstances:

a. If the head of the Department or Agency supplying the statement certifies that the person who furnished the information is a confidential informant who has been engaged in obtaining intelligence information for the Government and that disclosure of his or her identity would be substantially harmful to the national interest; or

b. If the GC, DoD, has determined the statement concerned appears to be relevant, material, and reliable; failure to receive and consider the statement would be substantially harmful to the national security; and the person who furnished the information cannot appear to testify due to the following:

(1) Death, severe illness, or similar cause, in which case the identity of the person and

the information to be considered shall be made available to the applicant; or

(2) Some other cause determined by the Secretary of Defense, or when appropriate by the Department or Agency head, to be good and sufficient.

23. Whenever evidence is received under item 21. or 22., the applicant shall be furnished with as comprehensive and detailed a summary of the information as the national security permits. The Administrative Judge and Appeal Board may make a clearance decision either favorable or unfavorable to the applicant based on such evidence after giving appropriate consideration to the fact that the applicant did not have an opportunity to confront such evidence, but any final determination adverse to the applicant shall be made only by the Secretary of Defense, or the Department or Agency head, based on a personal review of the case record.

24. A verbatim transcript shall be made of the hearing. The applicant shall be furnished one copy of the transcript, less the exhibits, without cost.

25. The Administrative Judge shall make a written clearance decision in a timely manner setting forth pertinent findings of fact, policies, and conclusions as to the allegations in the SOR, and whether it is clearly consistent with the national interest to grant or continue a security clearance for the applicant. The applicant and Department Counsel shall each be provided a copy of the clearance decision. In cases in which evidence is received under items 21. and 22., the Administrative Judge's written clearance decision may require deletions in the interest of national security.

26. If the Administrative Judge decides that it is clearly consistent with the national interest for the applicant to be granted or to retain a security clearance, the DISCO shall be so notified by the Director, DOHA, or designee, when the clearance decision becomes final in accordance with item 36., below.

27. If the Administrative Judge decides that it is not clearly consistent with the national interest for the applicant to be granted or to retain a security clearance, the Director, DOHA, or designee, shall expeditiously notify the DISCO, which shall in turn notify the applicant's employer of the denial or revocation of the applicant's security clearance. The letter forwarding the Administrative Judge's clearance decision to the applicant shall advise the applicant that these actions are being taken, and that the applicant may appeal the Administrative Judge's clearance decision.

28. The applicant or Department Counsel may appeal the Administrative Judge's clearance decision by filing a written notice of appeal with the Appeal Board within 15 days after the date of the Administrative Judge's clearance decision. A notice of appeal received after 15 days from the date of the clearance decision shall not be accepted by the Appeal Board, or designated Board Member, except for good cause. A notice of cross appeal may be filed with the Appeal Board within 10 days of receipt of the notice of appeal. An untimely cross appeal shall not be accepted by the Appeal Board, or designated Board Member, except for good cause.

29. Upon receipt of a notice of appeal, the Appeal Board shall be provided the case record. No new evidence shall be received or considered by the Appeal Board.

30. After filing a timely notice of appeal, a written appeal brief must be received by the Appeal Board within 45 days from the date of the Administrative Judge's clearance decision. The appeal brief must state the specific issue or issues being raised, and cite specific portions of the case record supporting any alleged error. A written reply brief, if any, must be filed within 20 days from receipt of the appeal brief. A copy of any brief filed must be served upon the applicant or Department Counsel, as appropriate.

31. Requests for extension of time for submission of briefs may be submitted to the Appeal Board or designated Board Member.

A copy of any request for extension of time must be served on the opposing party at the time of submission. The Appeal Board, or designated Board Member, shall be responsible for controlling the Appeal Board's docket, and may enter an order dismissing an appeal in an appropriate case or vacate such an order upon a showing of good cause.

32. The Appeal Board shall address the material issues raised by the parties to determine whether harmful error occurred. Its scope of review shall be to determine whether or not:

a. The Administrative Judge's findings of fact are supported by such relevant evidence as a reasonable mind might accept as adequate to support a conclusion in light of all the contrary evidence in the same record. In making this review, the Appeal Board shall give deference to the credibility determinations of the Administrative Judge;

b. The Administrative Judge adhered to the procedures required by E.O. 10865, as amended and this part; or

c. The Administrative Judge's rulings or conclusions are arbitrary, capricious, or contrary to law.

33. The Appeal Board shall issue a written clearance decision addressing the material issues raised on appeal. The Appeal Board shall have authority to:

a. Affirm the decision of the Administrative Judge;

b. Remand the case to an Administrative Judge to correct identified error. If the case is remanded, the Appeal Board shall specify the action to be taken on remand; or

c. Reverse the decision of the Administrative Judge if correction of identified error mandates such action.

34. A copy of the Appeal Board's written clearance decision shall be provided to the parties. In cases in which evidence was received under items 21. and 22., the Appeal Board's clearance decision may require deletions in the interest of national security.

35. Upon remand, the case file shall be assigned to an Administrative Judge for correction of error(s) in accordance with the Appeal Board's clearance decision. The assigned Administrative Judge shall make a new clearance decision in the case after correcting the error(s) identified by the Appeal Board. The Administrative Judge's clearance decision after remand shall be provided to the parties. The clearance decision after remand may be appealed pursuant to items 28. to 35.

36. A clearance decision shall be considered final when:

a. A security clearance is granted or continued pursuant to item 2.;

b. No timely notice of appeal is filed;

c. No timely appeal brief is filed after a notice of appeal has been filed;

d. The appeal has been withdrawn;

e. When the Appeal Board affirms or reverses an Administrative Judge's clearance decision; or

f. When a decision has been made by the Secretary of Defense, or the Department or Agency head, under item 23.

The Director, DOHA, or designee, shall notify the DISCO of all final clearance decisions.

37. An applicant whose security clearance has been finally denied or revoked by the DOHA is barred from reapplication for 1 year from the date of the initial unfavorable clearance decision.

38. A reapplication for a security clearance must be made initially by the applicant's employer to the DISCO and is subject to the same processing requirements as those for a new security clearance application. The applicant shall thereafter be advised he is responsible for providing the Director, DOHA, with a copy of any adverse clearance decision together with evidence that circumstances or conditions previously found against the applicant have been rectified or sufficiently mitigated to warrant reconsideration.

39. If the Director, DOHA, determines that reconsideration is warranted, the case shall be subject to this part for making a clearance decision.

40. If the Director, DOHA, determines that reconsideration is not warranted, the DOHA shall notify the applicant of this decision. Such a decision is final and bars further reapplication for an additional one year period from the date of the decision rejecting the application.

41. Nothing in this part is intended to give an applicant reapplying for a security clearance any greater rights than those applicable to any other applicant under this part.

42. An applicant may file a written petition, under oath or affirmation, for reimbursement of loss of earnings resulting from the suspension, revocation, or denial of his or her security clearance. The petition for reimbursement must include as an attachment the favorable clearance decision and documentation supporting the reimbursement claim. The Director, DOHA, or designee, may in his or her discretion require additional information from the petitioner.

43. Claims for reimbursement must be filed with the Director, DOHA, or designee, within 1 year after the date the security clearance is granted. Department Counsel generally shall file a response within 60 days after receipt of applicant's petition for reimbursement and provide a copy thereof to the applicant.

44. Reimbursement is authorized only if the applicant demonstrates by clear and convincing evidence to the Director, DOHA, that all of the following conditions are met:

a. The suspension, denial, or revocation was the primary cause of the claimed pecuniary loss; and

b. The suspension, denial, or revocation was due to gross negligence of the Department of Defense at the time the action was taken, and not in any way by the applicant's failure or refusal to cooperate.

45. The amount of reimbursement shall not exceed the difference between the earnings of the applicant at the time of the suspension, revocation, or denial and the applicant's interim earnings, and further shall be subject to reasonable efforts on the part of the applicant to mitigate any loss of earnings. No reimbursement shall be allowed for any period of undue delay resulting from the applicant's acts or failure to act. Reimbursement is not authorized for loss of merit raises and general increases, loss of employment opportunities, counsel's fees, or other costs relating to proceedings under this part.

46. Claims approved by the Director, DOHA, shall be forwarded to the Department or Agency concerned for payment. Any payment made in response to a claim for reimbursement shall be in full satisfaction of any further claim against the United States or any Federal Department or Agency, or any of its officers or employees.

47. Clearance decisions issued by Administrative Judges and the Appeal Board shall be indexed and made available in redacted form to the public.

[57 FR 5383, Feb. 14, 1992, as amended at 59 FR 35464, July 12, 1994; 59 FR 48565, Sept. 22, 1994]

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

Sec.
156.1 Purpose.
156.2 Applicability.
156.3 Policy.
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156.7 Definitions.

AUTHORITY: E.O. 12968, as amended; E.O. 10450, as amended; E.O. 10865, as amended; E.O. 13526; E.O. 12829, as amended; E.O. 13467; E.O. 13488; E.O. 12333, as amended; 5 U.S.C 301 and 7532; section 1072 of Pub. L. 110–181, as amended; 15 U.S.C. 278g–3; 40 U.S.C. 11331; 10 U.S.C. 1564; 50 U.S.C. 3343; 5 CFR parts 731, 731.101, 732, and 736; and HSPD–12.

SOURCE: 79 FR 18163, Apr. 1, 2014, unless otherwise noted.

§ 156.1 Purpose.

This part updates policies and responsibilities for the DoD Personnel Security Program (PSP) consistent with E.O. 12968, as amended; E.O. 10450, as amended; E.O. 10865, as amended; E.O. 13526; E.O. 12829, as amended; E.O. 13467; E.O. 13488; E.O. 12333, as amended; 5 U.S.C. 301 and 7532; section 1072 of Public Law 110–181, as amended; 15 U.S.C. 278g–3; 40 U.S.C. 11331; 10 U.S.C. 1564; 32 CFR parts 147, 154 through 156; 50 U.S.C. 3343; 5 CFR parts 731, 731.101, 732 and 736; and HSPD–12.

§ 156.2 Applicability.

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

§ 156.3 Policy.

It is DoD policy that:

(a) The Department shall establish and maintain a uniform DoD PSP to the extent consistent with standards and procedures in E.O. 12968, as amended; E.O. 10450, as amended; E.O. 10865, as amended; E.O. 13526; E.O. 12829, as amended; E.O. 13467; E.O. 13488; E.O. 12333, as amended; 32 CFR parts 147, 154 through 156; 5 CFR parts 731, 731.101, 732 and 736; 5 U.S.C. 301 and 7532; section 1072 of Public Law 110–181, as amended; 15 U.S.C. 278g–3; section 11331 of 40 U.S.C.; 10 U.S.C. 1564; 50 U.S.C. 3343; and the Intelligence Community Directive Number 704 (ICD 704) (available on the Internet at *http://www.dni.gov*).

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

(c) Discretionary judgments used to determine eligibility for national security positions are an inherently governmental function and shall be performed by appropriately trained and favorably adjudicated Federal Government personnel or appropriate automated procedures.

(d) No negative inference may be raised solely on the basis of mental health counseling. Such counseling may be a positive factor that, by itself, shall not jeopardize the rendering of eligibility determinations or temporary eligibility for access to national security information. However, mental health counseling, where relevant to adjudication for a national security position, may justify further inquiry to assess risk factors that may be relevant to the DoD PSP.

(e) The DoD shall not discriminate nor may any inference be raised on the basis of race, color, religion, sex, national origin, disability, or sexual orientation.

(f) Discretionary judgments that determine eligibility for national security positions shall be clearly consistent with the national security interests of the United States. Any doubt shall be resolved in favor of national security.

(g) No person shall be deemed to be eligible for a national security position merely by reason of Federal service or contracting, licensee, certificate holder, or grantee status, or as a matter of

right or privilege, or as a result of any particular title, rank, position, or affiliation.

(h) No person shall be appointed or assigned to a national security position when an unfavorable personnel security determination has been rendered.

(i) Eligibility for national security positions shall be granted only to persons who are U.S. citizens for whom the investigative and adjudicative process has been favorably completed. However, based on exceptional circumstances where official functions must be performed prior to completion of the investigative and adjudicative process, temporary eligibility for access to classified information may be granted while the investigation is underway.

(j) As an exception, a non-U.S. citizen who possesses an expertise that cannot be filled by a cleared or clearable U.S. citizen, may hold a national security position or be granted a limited access authorization to classified information in support of a specific DoD program, project, or contract following a favorable security determination by an authorized adjudication facility.

(k) The DoD shall establish investigative and adjudicative policy and procedures to determine whether to issue, deny or revoke common access cards (CACs) in accordance with the standards of the Homeland Security Presidential Directive (HSPD)–12 (available in the Public Papers of the Presidents of the United States: George W. Bush (2004, Book II, page 1765) found on the Internet at *http://www.gpo.gov/*); Office of Management and Budget Memorandum (OMB) M–05–24 (available on the Internet at *http://www.whitehouse.gov/omb*); Federal Information Processing Standards Publication 201–1 (FIPS 201–1) or successor (available on the Internet at *http://csrc.nist.gov/*); 48 CFR, Chapter 1, Parts 1–99 (Federal Acquisition Regulation); 48 CFR, Chapter 2, Parts 201–253 (Defense Federal Acquisition Regulation Supplement), and the Office of Personnel Management (OPM) Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12,'' dated July 31, 2008 (available on the Internet at *http://www.opm.gov/*), as applicable.

(l) Information about individuals collected as part of the investigative and adjudicative process shall be managed in accordance with applicable laws and DoD policies, including those related to privacy and confidentiality, security of information, and access to information.

§ 156.4 Responsibilities.

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

(1) Develop, coordinate, and oversee the implementation of policy, programs, and guidance for the DoD PSP.

(2) In coordination with the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and the General Counsel of the DoD (GC, DoD), develop policy for DoD personnel for the CAC personnel security investigation (PSI) and adjudication in accordance with HSPD–12; OMB Memorandum M–05–24; FIPS 201–1; and OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12.''

(3) In coordination with the Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) and the GC, DoD, develop policy for contractor investigations for CAC adjudication, outside the purview of the National Industrial Security Program, under the terms of applicable contracts in accordance with HSPD–12; OMB Memorandum M–05–24; FIPS 201–1; the Federal Acquisition Regulation; the Defense Federal Acquisition Regulation Supplement; and OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12.''

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

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

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

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

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

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

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

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

(7) Develop guidance, interpretation, and clarification regarding the DoD PSP as needed.

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

(9) In furtherance of coordinated Government-wide initiatives under E.O. 13467, develop a framework setting forth an overarching strategy identifying goals, performance measures, roles and responsibilities, a communications strategy, and metrics to measure the quality of security clearance investigations and adjudications to ensure a sound DoD PSP that will continue to meet the needs of DoD.

(c) The USD(AT&L) shall:

(1) Establish acquisition policy, procedures, and guidance, in coordination with the USD(I) that facilitate DoD Component compliance with the DoD PSP.

(2) Establish regulatory requirements within the Federal Acquisition Regulation and Defense Federal Acquisition Regulation for contracts and agreements that require non-DoD personnel to adhere to personnel security procedures in the performance of a contract or agreement.

(d) The Under Secretary of Defense for Policy (USD(P)) is the approval authority for requests for exceptions to the DoD PSP involving access to NATO classified information.

(e) The GC, DoD shall:

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

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

(f) The Heads of the DoD Components shall:

(1) Designate a senior agency official, consistent with the provisions of E.O. 12968, as amended, who shall direct and administer the DoD PSP consistent with this part.

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

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

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

(5) Perform functions relating to the DoD Security Professional Education Development Program to ensure the security workforce in their respective Component has the knowledge and skills required to perform security functional tasks.

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

(7) Enforce the requirement that DoD personnel security adjudication system(s) of records, within their respective Components, shall only be used as a personnel security system of records and shall not be used as a pre-hiring screening tool.

§ 156.5 National security positions.

(a) *Procedures*. The objective of the PSP is to ensure persons deemed eligible for national security positions remain reliable and trustworthy.

(1) Duties considered sensitive and critical to national security do not always involve classified activities or classified matters. Personnel security procedures for national security positions are set forth in E.O. 12968, as amended; E.O. 10865, 32 CFR parts 154–155; ICD 704; and DoD Regulation 5220.22–R. The specific procedures applicable in each case type are set forth in DoD issuances.

(2) Employees with access to automated systems that contain active duty, guard, or military reservists' personally identifiable information or information pertaining to Service members that are otherwise protected from disclosure by section 552a of title 5 United States Code, may be designated as national security positions within DoD, where such access has the potential to cause damage to national security.

(b) *Sensitive Compartmented Information (SCI) Eligibility*. Investigative and adjudicative requirements for SCI eligibility shall be executed in accordance with this part and ICD 704.

(c) *Adjudication*. (1) Personnel security criteria and adjudicative standards are described in E.O. 12968, as amended; 32 CFR parts 147, 154 and 155; ICD 704, and DoD Regulation 5220.22–R, as applicable, in accordance with Adjudicative Guidelines for Determining Eligibility for Access to Classified Information and other types of protected information or assignment to national security positions. Adjudications of eligibility for national security positions, regardless of whether they involve access to classified information, must be made in accordance with the Adjudicative Guidelines for Determining Eligibility for Access to Classified Information.

(2) When an unfavorable personnel security determination is rendered:

(i) Individuals cannot be appointed or assigned to national security positions.

(ii) An individual currently occupying a national security position will be immediately removed from the national security position and placed, in accordance with agency policy, in an existing non-sensitive position if available. Placement in a non-sensitive position requires compliance with employment suitability standards. The national security position is not to be modified or a new position created to circumvent an unfavorable personnel security determination. The individual is to be placed in an appropriate status, in accordance with agency policy, until a final security determination is made. A final security determination is the granting, denial or revocation by an appropriate central adjudications facility or an appeal board decision, whichever is later.

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

(d) *Appeal Procedures—Denial or Revocation of Eligibility*. Individuals may elect to appeal unfavorable personnel security determinations in accordance with the procedures set forth in E.O. 12968, as amended; parts 154 and 155 of 32 CFR; ICD 704, and DoD Regulation 5220.22–R as applicable or as otherwise authorized by law.

(e) *Polygraph*. Under certain conditions, DoD Components are authorized to use polygraph examinations to resolve credible derogatory information developed in connection with a personnel security investigation; to aid in the related adjudication; or to facilitate classified access decisions.

(f) *Continuous Evaluation*. All personnel in national security positions shall be subject to continuous evaluation.

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

(h) *Reciprocal Acceptance of Eligibility Determinations*. (1) DoD reciprocally accepts existing national security eligibility determinations or clearances

from other government agencies in accordance with E.O. 13467, OMB Memorandums ''Reciprocal Recognition of Existing Personnel Security Clearances'' dated December 12, 2005 (Copies available on the Internet at *http://www.whitehouse.gov/omb*) and July 17, 2006 (Copies available on the Internet at *http://www.whitehouse.gov/omb*).

(2) Reciprocity for SCI eligibility shall be executed in accordance with ICD 704 and associated Director of National Intelligence guidance.

(3) Personnel who have been determined eligible for national security positions should not be subjected to additional security reviews, completion of a new security questionnaire, or initiation of a new investigative check, unless credible derogatory information that was not previously adjudicated becomes known, or the previous adjudication was granted by a condition, deviation, or waiver pursuant the provisions of OMB Memorandums ''Reciprocal Recognition of Existing Personnel Security Clearances'' dated December 12, 2005, or there has been a break in service of more than 24 months. Exceptions for access to SCI or special access programs are listed in the OMB Memorandums ''Reciprocal Recognition of Existing Personnel Security Clearances'' dated July 17, 2006.

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

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

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

(2) The investigations will be funded by the DoD Component that is offering the internship. If the DoD Component does not have funds available, the Military Service in which the uniform service personnel served may choose to fund the investigation.

§ 156.6 Common access card (CAC) investigation and adjudication.

(a) *General.* Individuals entrusted with access to Federal property, information systems, and any other information bearing on national security must not put the Government at risk or provide an avenue for terrorism.

(1) All individuals requiring a CAC must meet credentialing standards of OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12.'' For those individuals who are subject to an interim credentialing decision before a security, suitability, or equivalent adjudication is completed, the OPM credentialing standards will be the basis for issuing or denying a CAC. The subsequent credentialing decision will be made upon receipt of the completed investigation from the ISP.

(2) If an individual is found unsuitable for employment in a covered position under 5 CFR 731.101, ineligible for access to classified information under E.O. 12968, or disqualified from appointment in the excepted service or from working on a contract, the unfavorable decision is a sufficient basis for nonissuance or revocation of a CAC, but does not necessarily mandate this result.

(b) *Investigation.* A favorably adjudicated National Agency Check with Inquiries (NACI) is the minimum investigation required for a final credentialing determination for CAC.

(1) An interim credentialing determination can be made based on the results of a completed National Agency Check or an Federal Bureau of Investigation National Criminal History Check (fingerprint check), and submission of a request for investigation (NACI or greater).

(2) Individuals identified as having a favorably adjudicated investigation on

record, equivalent to (or greater than) the NACI do not require an additional investigation for CAC issuance.

(3) There is no requirement to reinvestigate CAC holders unless they are subject to reinvestigation for national security or suitability reasons as specified in applicable DoD issuances.

(4) Existing CAC holders without the requisite background investigation on record must be investigated in accordance with OMB Memorandum M–05–24, ''Implementation of Homeland Security Presidential Directive (HSPD) 12—Policy for a Common Identification Standard for Federal Employees and Contractors,'' dated August 5, 2005.

(c) *Adjudication.* The ultimate determination whether to authorize CAC issuance or revoke the CAC must be an overall common-sense judgment after careful consideration of the basic and, if applicable, supplemental credentialing standards in OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12,'' each of which is to be evaluated in the context of the whole person. These standards shall be evaluated to determine if there is a reasonable basis to believe that issuing a CAC to the individual poses an unacceptable risk.

(1) Each case is unique and must be judged on its own merits. To the extent pertinent to the individual case, when evaluating the conduct, the adjudicator should consider: the nature and seriousness of the conduct, the circumstances surrounding the conduct, the recency and frequency of the conduct, the individual's age and maturity at the time of the conduct, contributing external conditions, and the presence or absence of rehabilitation or efforts toward rehabilitation.

(2) Final credentialing standards are:

(i) *Basic Credentialing Standards.* All CAC adjudications must apply the basic credentialing standards. CAC shall not be issued when a disqualifying factor cannot be mitigated.

(ii) *Supplemental Credentialing Standards.* The supplemental credentialing standards, in addition to the basic credentialing standards, shall apply generally to individuals who are not subject to adjudication for eligibility for a sensitive position or access to classified information, suitability for Federal employment or fitness. These standards may be applied based on the risk associated with the position or work on the contract.

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

(4) Adjudication decisions of CAC investigations shall be incorporated into the Consolidated Central Adjudication Facility as directed by the Deputy Secretary of Defense.

(5) CAC adjudicators must successfully complete formal training through a DoD adjudicator course from the DSS Center for Development of Security Excellence to achieve maximum consistency and fairness of decisions rendered.

(6) Federal Government credentialing standards do not prohibit employment of convicted felons who have been released from correctional institutions, absent other issues, if they have demonstrated clear evidence of rehabilitation.

(d) *Appeals.* CAC applicants or holders may appeal CAC denial or revocation.

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

(2) Initial civilian and contractor applicants who have been denied a CAC, and for whom an appeal is allowed under this paragraph, may elect to appeal to a three member board containing no more than one security representative from the sponsoring activity.

(3) Contractor employees who have had their CAC revoked, and for whom an appeal is allowed under this paragraph, may appeal to DOHA under the established administrative process set out in 32 CFR Part 155.

(4) Decisions following appeal are final.

(5) Individuals whose CACs have been denied or revoked are eligible for reconsideration 1 year after the date of final denial or revocation, provided the sponsoring activity supports reconsideration. Individuals with a statutory or regulatory bar are not eligible for reconsideration while under debarment.

(e) *Foreign Nationals.* Special considerations for conducting background investigations of non-U.S. nationals (foreign nationals) are addressed in OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12.'' The following criteria shall be met prior to CAC issuance to foreign nationals:

(1) The background investigation must be completed and favorably adjudicated before issuing CACs to foreign nationals.

(2) Foreign nationals are not eligible to receive CAC on an interim basis.

(3) At foreign locations:

(i) Foreign national background investigations may vary based on standing reciprocity treaties concerning identity assurance and information exchange that exist between the United States and its allies. This includes foreign military, civilian, or contract support with a visit status and security assurance that has been confirmed, documented, and processed in accordance with USD(P) policy.

(ii) The type of background investigation may also vary based upon agency agreements with the host country when the foreign national CAC applicant (such as a DoD direct or indirect hire) has not resided in the United States for at least 3 of the past 5 years or is residing in a foreign country. The investigation must be consistent with NACI, to the extent possible, and include a fingerprint check against the Federal Bureau of Investigation (FBI) criminal history database, an FBI Investigations Files (name check) search, and a name check against the Terrorist Screening Database.

(4) At U.S.-based locations and in U.S. territories:

(i) Foreign nationals who have resided in the United States or U.S. territory for 3 years or more must have a NACI or greater investigation.

(ii) Components may delay the background investigation of foreign nationals who have resided in the U.S. or U.S. territory for less than 3 years until the individual has been in the U.S. or U.S. territory for 3 years. When the investigation is delayed, the Component may, in lieu of a CAC, issue an alternative facility access credential at the discretion of the relevant Component official based on a risk determination.

(f) *Recording Final Adjudication.* Immediately following final adjudication, the sponsoring activity shall record the final eligibility determination (active, revoked, denied, etc.) in the OPM Central Verification System as directed by OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12,'' and maintain local records for posting in a DoD repository when available.

(g) *Reciprocity of CAC Determinations.* (1) The sponsoring activity shall not re-adjudicate CAC determinations for individuals transferring from another Federal department or agency, provided:

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

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

(iii) There is no break in service greater than 24 months and the individual has no actionable information since the date of the last completed investigation.

(2) Interim CAC determinations are not eligible to be transferred or reciprocally accepted. Reciprocity shall be based on final favorable adjudication only.

§ 156.7 Definitions.

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

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

Contractor. Defined in E.O. 13467.

Employee. Defined in E.O. 12968, as amended.

Limited access authorization. Defined in 32 CFR Part 154.

National security position. (1) Any position in a department or agency, the occupant of which could bring about, by virtue of the nature of the position, a material adverse effect on the national security.

(i) Such positions include those requiring eligibility for access to classified information.

(ii) Other such positions include, but are not limited to, those whose duties include:

(A) Protecting the nation, its citizens and residents from acts of terrorism, espionage, or foreign aggression, including those positions where the occupant's duties involve protecting the nation's borders, ports, critical infrastructure or key resources, and where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(B) Developing defense plans or policies;

(C) Planning or conducting intelligence or counterintelligence activities, counterterrorism activities and related activities concerned with the preservation of the military strength of the United States;

(D) Protecting or controlling access to facilities or information systems where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(E) Controlling, maintaining custody, safeguarding, or disposing of hazardous materials, arms, ammunition or explosives, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(F) Exercising investigative or adjudicative duties related to national security, suitability, fitness or identity credentialing, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security;

(G) Exercising duties related to criminal justice, public safety or law enforcement, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security; or

(H) Conducting investigations or audits related to the functions described in paragraphs (1)(ii)(B) through (G) of this definition, where the occupant's neglect, action, or inaction could bring about a material adverse effect on the national security.

(2) The requirements of this part apply to positions in the competitive service, positions in the excepted service where the incumbent can be noncompetitively converted to the competitive service, and career appointments in the Senior Executive Service within the executive branch. Departments and agencies may apply the requirements of this part to other excepted service positions within the executive branch and contractor positions, to the extent consistent with law.

Unacceptable risk. Threat to the life, safety, or health of employees, contractors, vendors, or visitors; to the Government's physical assets or information systems; to personal property; to records, privileged, proprietary, financial, or medical records; or to the privacy of data subjects, which will not be tolerated by the Government.

PART 157—DOD INVESTIGATIVE AND ADJUDICATIVE GUIDANCE FOR ISSUING THE COMMON ACCESS CARD (CAC)

Sec.

157.1 Purpose.
157.2 Applicability.
157.3 Definitions.
157.4 Policy.
157.5 Responsibilities.
157.6 Procedures.

AUTHORITY: HSPD–12, E.O 13467, E.O. 13488, FIPS 201–2, and OPM Memorandum.

SOURCE: 79 FR 55624, Sept. 17, 2014, unless otherwise noted.

§ 157.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for investigating and adjudicating eligibility to hold a Common Access Card (CAC). The CAC is the DoD personal identity verification (PIV) credential.

§ 157.2 Applicability.

This part applies to:

(a) the Office of the Secretary of Defense, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (hereinafter referred to collectively as the ''DoD Components'').

(b) The Commissioned Corps of the U.S. Public Health Service (USPHS), under agreement with the Department of Health and Human Services, and the National Oceanic and Atmospheric Administration (NOAA), under agreement with the Department of Commerce.

§ 157.3 Definitions.

These terms and their definitions are for the purpose of this part.

Actionable information. Information that potentially justifies an unfavorable credentialing determination.

CAC. The DoD Federal PIV card.

Contractor. Defined in Executive Order 13467, ''Reforming Processes Related to Sustainability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information''.

Contractor employee fitness. Defined in E.O. 13467.

Debarment. A prohibition from taking a competitive service examination or from being hired (or retained in) a covered position for a specific time period..

Drugs. Mood and behavior-altering substances, including drugs, materials, and other chemical compounds identified and listed in 21 U.S.C. 801–830 (also known as ''The Controlled Substances Act of 1970, as amended'') (e.g., marijuana or cannabis, depressants, narcotics, stimulants, hallucinogens), and inhalants and other similar substances.

Drug abuse. The illegal use of a drug or use of a legal drug in a manner that deviates from approved medical direction.

Employee. Defined in E.O. 12968, ''Access to Classified Information''.

Fitness. Defined in E.O. 13488, ''Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust''.

Fitness determination. Defined in E.O. 13488.

Logical and physical access. Defined in E.O. 13467.

Material. Defined in 5 CFR part 731.

Reasonable basis. A reasonable basis to believe occurs when a disinterested observer, with knowledge of the same facts and circumstances, would reasonably reach the same conclusion.

Terrorism. Defined in 19 U.S.C. 2331.

Unacceptable risk. A threat to the life, safety, or health of employees, contractors, vendors, or visitors; to the U.S. Government physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, and medical records; or to the privacy rights established by The Privacy Act of 1974, as amended, or other law that is deemed unacceptable when making risk management determinations.

U.S. National. Defined in U.S. OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12'' (available at *http://www.opm.gov/ investigate/resources/final_credentialing_standards.pdf*).

§ 157.4 Policy.

It is DoD policy that:

(a) Individuals appropriately sponsored for a CAC consistent with DoD Manual 1000.13, Volume 1, ''DoD Identification Cards: ID Card Life-Cycle,'' January 23, 2014, (available at *http://www.dtic.mil/whs/ directives/corres/pdf/*

100013 _vol1.pdf) must be investigated and adjudicated in accordance with this part. Individuals not CAC eligible may be processed for local or regional base passes in accordance with Under Secretary of Defense for Intelligence (USD(I)) policy guidance for DoD physical access control consistent with DoD Regulation 5200.08–R, ''Physical Security Program'' (available at *http:// www.dtic.mil/ whs/directives/corres/ pdf/ 520008r.pdf*) and local installation security policies and procedures.

(b) A favorably adjudicated National Agency Check with Inquiries (NACI) or equivalent in accordance with revised Federal investigative standards is the minimum investigation required for a final credentialing determination for a CAC.

(c) Individuals requiring a CAC must meet the credentialing standards in accordance with the U.S. Office of Personnel Management (OPM) Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12''; and U.S. Office of Personnel Management Memorandum, ''Introduction of Credentialing, Suitability, and Security Clearance Decision-Making Guide (available at *http://www.opm.gov/ investigate/resources/decision_ making_guide.pdf*) and this part.

(d) A CAC may be issued on an interim basis based on a favorable National Agency Check or a Federal Bureau of Investigation (FBI) National Criminal History Check (fingerprint check) adjudicated by appropriate approved automated procedures or by a trained security or human resource (HR) specialist and successful submission to the investigative service provider (ISP) of a NACI, or a personnel security investigation (PSI) equal to or greater in scope than a NACI. Additionally, the CAC applicant must present two identity source documents, at least one of which is a valid Federal or State government-issued picture identification.

(e) The subsequent final credentialing determination will be made upon receipt of the completed investigation from the ISP.

(f) Discretionary judgments used to render an adjudicative determination for issuing the CAC are inherently governmental functions and must only be performed by trained U.S. Government personnel who have successfully completed required training and possess a minimum level of investigation (NACI or equivalent in accordance with revised Federal investigative standards). Established administrative processes in 32 CFR part 156 and DoD Directive 5220.6, ''Defense Industrial Personnel Security Clearance Review Program'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/522006p.pdf*) must be applied.

(g) Adjudications rendered for eligibility for access to classified information, eligibility to hold a sensitive position, suitability, or fitness for Federal employment based on a NACI or higher level investigation may result in a concurrent CAC decision for that position.

(h) Favorable credentialing adjudications from another Federal department or agency will be reciprocally accepted in accordance with conditions stated in the procedural guidance in this part. Reciprocity must be based on final favorable adjudication only.

(i) CAC applicants or holders may appeal CAC denial or revocation in accordance with the conditions stated in the procedural guidance in this part. Appeals must be processed as indicated in the procedural guidance in this part.

(j) Non-U.S. nationals at foreign locations are not eligible to receive a CAC on an interim basis. Special considerations for conducting background investigations of non-U.S. nationals are addressed in U.S. OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12.'' An interim CAC may be issued to non-U.S. nationals in the U.S. or U.S. territories if they have resided in the U.S. or U.S. territory for at least 3 years, and they satisfy the requirements of paragraph (e) of this section and paragraph (a)(4)(ii)(A) of §157.6.

(k) Individuals who have been denied a CAC or have had a CAC revoked due to an unfavorable credentialing determination are eligible to reapply for a credential 1 year after the date of final adjudicative denial or revocation.

(l) Individuals with a statutory or regulatory bar are not eligible for reconsideration while under debarment, see paragraph (d)(6) of §157.6.

(m) The Deputy Secretary of Defense directed all reports of investigations conducted as required for compliance with Homeland Security Presidential Directive-12, ''Policy for a Common Identification Standard for Federal Employees and Contractors'' (available at *http://www.dhs.gov/ homeland-security-presidential- directive-12*) to be sent to the consolidated DoD Central Adjudications Facility.

(n) When eligibility is denied or revoked, CACs shall be recovered whenever practicable, and shall immediately be rendered inoperable. In addition, agencies' physical and logical access systems shall be immediately updated to eliminate the use of a CAC for access.

§ 157.5 Responsibilities.

(a) The USD(I) must:

(1) In coordination with the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) and the General Counsel of the Department of Defense (GC, DoD), establish adjudication procedures to support CAC credentialing decisions in accordance with DoD Manual 1000.13, Volume 1, ''DoD Identification (ID) Cards; ID Card Life-Cycle''; U.S. Office of Personnel Management Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12''; U.S. Office of Personnel Management Memorandum, ''Introduction of Credentialing, Suitability, and Security Clearance Decision-Making Guide; Office of Management and Budget Memorandum M–05–24, ''Implementation of Homeland Security Presidential Directive (HSPD) 12—Policy for a Common Identification Standard for Federal Employees and Contractors'' (available at *http://www.whitehouse.gov/sites/default/files/omb/memoranda/ fy2005/m05-24.pdf*); U.S. Office of Personnel Management Federal Investigations Notice Number 06–04, ''HSPD 12—Advanced Fingerprint Results'' (available at *http://www.opm.gov/ extra/investigate/FIN06_04.pdf*); Homeland Security Presidential Directive-12, ''Policy for a Common Identification Standard for Federal Employees and Contractors''; 5 U.S.C. 552, 552a and 7313; Federal Information Processing Standards Publication 201–2, ''Personal Identity Verification (PIV) of Federal Employees and Contractors'' (available at *http://csrc.nist.gov/ publications/PubsFIPS.html*); Executive Order 13467, ''Reforming Processes Related to Suitability for Government Employment, Fitness for Contractor Employees, and Eligibility for Access to Classified National Security Information''; Executive Order 13488, ''Granting Reciprocity on Excepted Service and Federal Contractor Employee Fitness and Reinvestigating Individuals in Positions of Public Trust''; 15 U.S.C. 278g–3; 40 U.S.C. 11331; and U.S. Office of Personnel Management Federal Investigations Notice Number 10–05, ''Reminder to Agencies of the Standards for Issuing Identity Credentials Under HSPD–12'' (available at *http://www.opm.gov/investigate/ fins/2010/fin10-05.pdf*) for issuing a CAC to Service members and DoD civilian personnel.

(2) In coordination with the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) and the GC, DoD, establish adjudication procedures to support a CAC credentialing decision for contractors in accordance with the terms of applicable contracts and the references cited in paragraph (a)(1) of this section, the Federal Acquisition Regulation (available at *http://www.acquisition.gov/ far/current/pdf/FAR.pdf*), and the Defense Federal Acquisition Regulation Supplement (available at *http://www.acq.osd.mil/dpap/dars/dfarspgi/current/ index.html*).

(3) Issue, interpret, and clarify CAC investigative and adjudicative guidance in coordination with the Suitability Executive Agent as necessary.

(b) The USD(P&R) must, in coordination with the GC, DoD, implement CAC PSI and adjudication procedures established herein as necessary to support issuance of a CAC to Service members and DoD civilian personnel in accordance with the references cited in paragraph (a)(1) of this section.

(c) The USD(AT&L) must, in coordination with the GC, DoD, implement CAC PSI and adjudication procedures

established by the USD(I) for contractors in accordance with the terms of applicable contracts and the references cited in paragraph (a)(1) of this section, Federal Acquisition Regulation, current edition; and Defense Federal Acquisition Regulation Supplement, current edition.

(d) The GC, DoD must:

(1) Provide advice and guidance as to the legal sufficiency of procedures and standards involved in adjudicating CAC investigations.

(2) Perform functions relating to the DoD Homeland Security Presidential Directive (HSPD)–12 Program in accordance with DoD Directive 5220.6, ''Defense Industrial Personnel Security Clearance Review Program'' (available at *http://www.dtic.mil/ whs/directives/ corres/ pdf/522006p.pdf*) and DoD Directive 5145.01, ''General Counsel of the Department of Defense'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/514501p.pdf*) including maintenance and oversight of the Defense Office of Hearings and Appeals (DOHA) and its involvement in contractor CAC revocations as specified in paragraph (b)(6)(i)(B) of §157.6 of this part.

(3) Coordinate on USD(P&R) implementation of CAC PSI and adjudication procedures, in accordance with the references cited in paragraph (a)(1) of this section, for Service members and DoD civilian personnel, and USD(AT&L) implementation of USD(I) procedures for CAC PSI and adjudication in accordance with the terms of applicable contracts and the references cited in paragraph (a)(1) of this section, Federal Acquisition Regulation and Defense Federal Acquisition Regulation Supplement.

(e) The Heads of the DoD Components must:

(1) Comply with and implement this part.

(2) Provide resources for PSIs, adjudication, appeals, and recording of final adjudicative results in a centralized database.

(3) Require individuals sponsored for a CAC to meet eligibility requirements stated in DTM 08–003.

(4) Provide appeals boards for those individuals appealing CAC denial or revocation as specified in paragraph (b)(6)(i)(A) of §157.6.

(5) Enforce requirements for reporting of derogatory information, unfavorable administrative actions, and adverse actions to personnel security, HR, and counterintelligence official(s), as appropriate.

(6) Require all PSIs submitted for non-DoD personnel to be supported by and comply with DoD PIV procedures in contracts that implement requirements of paragraphs 4.1303 and 52.204–9 of Federal Acquisition Regulation, current edition.

(7) Require all investigations and adjudications required for non-DoD personnel to be in response to a current, active contract or agreement and that the number of personnel submitted for investigation and adjudication does not exceed the specific requirements of that contract or agreement while ensuring compliance with HSPD–12.

§ 157.6 Procedures.

(a) *CAC Investigative Procedures*—(1) *Investigative Requirements.* (i) A personnel security investigation (NACI or greater) completed by an authorized ISP is required to support a CAC credentialing determination based on the established credentialing standards promulgated by OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12''.

(ii) Individuals identified as having a favorably adjudicated investigation on record, equivalent to or greater than the NACI, do not require an additional investigation for CAC issuance.

(iii) There is no requirement to reinvestigate CAC holders unless they are subject to reinvestigation for national security or suitability reasons as specified in applicable DoD issuances.

(2) *Submission of Investigations.* Investigative packages must be submitted promptly by HR or security personnel to the authorized ISP. Fingerprints for CAC applicants must be taken by HR or security personnel. DoD Components using the OPM as the ISP may request advanced fingerprint check results in accordance with OPM Federal Investigations Notice Number 06–04.

(3) *Reciprocity.* (i) The sponsoring Component must not re-adjudicate CAC determinations for individuals

transferring from another Federal department or agency, provided:

(A) The individual's former department or agency verifies possession of a valid PIV.

(B) The individual has undergone the required NACI or other equivalent (or greater) suitability or national security investigation and received favorable adjudication from the former department or agency.

(C) There is no break in service 2 years or more and the individual has no actionable information since the date of the last completed investigation.

(ii) Interim CAC determinations are not eligible to be transferred or reciprocally accepted. Reciprocity must be based on final favorable adjudication only.

(4) *Foreign (Non-U.S.) Nationals.* DoD Components must apply the credentialing process and standards in this part to non-U.S. nationals who work as employees or contractor employees for the DoD. However, special considerations apply to non-U.S. nationals.

(i) *At Foreign Locations.* (A) DoD Components must initiate and ensure completion of a background investigation before applying the credentialing standards to a non-U.S. national at a foreign location. The background investigation must be favorably adjudicated before a CAC can be issued to a non-U.S. national at a foreign location. The type of background investigation may vary based on standing reciprocity treaties concerning identity assurance and information exchanges that exist between the U.S. and its allies or agency agreements with the host country.

(B) The investigation of a non-U.S. national at a foreign location must be consistent with a NACI, to the extent possible, and include a fingerprint check against the FBI criminal history database, an FBI investigations files (name check) search, and a name check against the terrorist screening database.

(ii) *At U.S.-Based Locations and in U.S. Territories (Other than American Samoa and Commonwealth of the Northern Mariana Islands).* (A) Individuals who are non-U.S. nationals in the United States or U.S. territory for 3 years or more must have a NACI or equivalent investigation initiated after employment authorization is appropriately verified.

(B) Non-U.S. nationals who have been in the United States or U.S. territory for less than 3 years do not meet the investigative requirements for CAC issuance. DoD Components may delay the background investigation of a Non-U.S. national who has been in the U.S. or U.S. territory for less than 3 years until the individual has been in the United States or U.S. territory for at least 3 years. In the event of such a delay, an alternative facility access identity credential may be issued at the discretion of the relevant DoD Component official, as appropriate based on a risk determination in accordance with DoD 5200.08–R, ''Physical Security Program'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/ 520008r.pdf*) and U.S. Office of Personnel Management Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12.''

(C) The U.S. territories of American Samoa and the Commonwealth of the Northern Mariana Islands are not included in the ''United States'' as defined by the Immigration and Nationality Act of 1952, as amended (Pub. L. 82–414).

(5) *Investigations Acceptable for CAC Adjudication.* A list of investigations acceptable for CAC adjudication is located in the Table. These investigations are equivalent to or greater than a NACI. This list will be updated by the USD(I) as revisions to the Federal investigative standards are implemented.

TABLE—FAVORABLY ADJUDICATED INVESTIGATIONS ACCEPTABLE FOR CAC ADJUDICATION

Investigation	Description
ANACI	Access National Agency Check and Inquires.
BGI–0112	Upgrade Background Investigation (1–12 months from LBI).
BGI–1336	Upgrade Background Investigation (13–36 months from LBI).
BGI–3760	Upgrade Background Investigation (37–60 months from LBI).
BI	Background Investigation.

TABLE—FAVORABLY ADJUDICATED INVESTIGATIONS ACCEPTABLE FOR CAC ADJUDICATION—Continued

Investigation	Description
BIPN	Background Investigation plus Current National Agency Check.
BIPR	Periodic Reinvestigation of Background Investigation.
BITN	Background Investigation (10 year scope).
CNCI	Child Care National Agency Check plus Written Inquires and Credit.
IBI	Interview Oriented Background Investigation.
LBI	Limited Background Investigation.
LBIP	Limited Background Investigation plus Current National Agency Check.
LBIX	Limited Background Investigation—Expanded.
MBI	Moderate Risk Background Investigation.
MBIP	Moderate Risk Background Investigation plus Current National Agency Check.
MBIX	Moderate Risk Background Investigation—Expanded.
NACB	National Agency Check/National Agency Check plus Written Inquires and Credit Check plus Background Investigation Requested.
NACI	National Agency Check and Inquires.
NACLC	National Agency Check with Law and Credit.
NACS	National Agency Check/National Agency Check plus Written Inquires and Credit Check plus Single Scope B.I. Requested.
NACW	National Agency Check plus Written Inquires and Credit.
NACZ	National Agency Check plus Written Inquires and Credit plus Special Investigative Inquiry.
NLC	National Agency Check, Local Agency Check and Credit.
NNAC	National Agency Check plus Written Inquires and Credit Plus Current National Agency Check.
NSI	NSI—NACI/Suitability Determination.
PRI	Periodic Reinvestigation.
PRS	Periodic Reinvestigation Secret.
PRSC	Periodic Reinvestigation Secret or Confidential.
PPR	Phased Periodic Reinvestigation.
SPR	Secret Periodic Reinvestigation.
SSBI	Single Scope Background Investigation.
SSBI–PR	Periodic Reinvestigation for SSBI.

(b) *CAC Adjudicative Procedures*—(1) *Guidance for Applying Credentialing Standards During Adjudication*. (i) As established in Homeland Security Presidential Directive–12, credentialing adjudication considers whether or not an individual is eligible for long-term access to Federally controlled facilities and/or information systems. The ultimate determination to authorize, deny, or revoke the CAC based on a credentialing determination of the PSI must be made after consideration of applicable credentialing standards in OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12.''

(ii) Each case is unique. Adjudicators must examine conditions that raise an adjudicative concern, the overriding factor for all of these conditions is unacceptable risk. Factors to be applied consistently to all information available to the adjudicator are:

(A) The nature and seriousness of the conduct. The more serious the conduct, the greater the potential for an adverse CAC determination.

(B) The circumstances surrounding the conduct. Sufficient information concerning the circumstances of the conduct must be obtained to determine whether there is a reasonable basis to believe the conduct poses a risk to people, property or information systems.

(C) The recency and frequency of the conduct. More recent or more frequent conduct is of greater concern.

(D) The individual's age and maturity at the time of the conduct. Offenses committed as a minor are usually treated as less serious than the same offenses committed as an adult, unless the offense is very recent, part of a pattern, or particularly heinous.

(E) Contributing external conditions. Economic and cultural conditions may be relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk if the conditions are currently removed or countered (generally considered in cases with relatively minor issues).

(F) The absence or presence of efforts toward rehabilitation, if relevant, to address conduct adverse to CAC determinations.

(*1*) Clear, affirmative evidence of rehabilitation is required for a favorable adjudication (e.g., seeking assistance and following professional guidance, where appropriate; demonstrating positive changes in behavior and employment).

(*2*) Rehabilitation may be a consideration for most conduct, not just alcohol and drug abuse. While formal counseling or treatment may be a consideration, other factors (such as the individual's employment record) may also be indications of rehabilitation.

(iii) CAC adjudicators must successfully complete formal training through a DoD CAC adjudicator course from the Defense Security Service Center for Development of Security Excellence or a course approved by the Suitability Executive Agent.

(2) *Credentialing Standards.* HSPD–12 credentialing standards contained in OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12'' must be used to render a final determination whether to issue or revoke a CAC based on results of a qualifying PSI.

(i) *Basic Standards.* CAC credentialing standards and the adjudicative guidelines described in paragraph (c) of this section are designed to guide the adjudicator who must determine, based on results of a qualifying PSI, whether CAC issuance is consistent with the basic standards, would create an unacceptable risk for the U.S. Government, or would provide an avenue for terrorism.

(ii) *Supplemental Standards.* The supplemental standards are intended to ensure that the issuance of a CAC to an individual does not create unacceptable risk. The supplemental credentialing standards must be applied, in addition to the basic credentialing standards. In this context, an unacceptable risk refers to an unacceptable risk to the life, safety, or health of employees, contractors, vendors, or visitors; to the Government's physical assets or information systems; to personal property; to records, including classified, privileged, proprietary, financial, or medical records; or to the privacy of data subjects.

The supplemental credentialing standards, in addition to the basic credentialing standards, must be used for CAC adjudication of individuals who are not also subject to the following types of adjudication:

(A) Eligibility to hold a sensitive position or for access to classified information,

(B) Suitability for Federal employment in the competitive service, or

(C) Qualification for Federal employment in the excepted service.

(3) *Application of the Standards.* (i) CAC credentialing standards shall be applied to all DoD civilian employees, Service members, and contractors who are CAC eligible, have been sponsored by a DoD entity, and require: (a) Physical access to DoD facilities or non-DoD facilities on behalf of DoD; (b) logical access to information systems (whether on site or remotely); or (c) remote access to DoD networks that use only the CAC logon for user authentication.

(ii) If an individual is found unsuitable for competitive civil service consistent with 5 CFR part 731, ineligible for access to classified information pursuant to E.O. 12968, or disqualified from appointment in the excepted service or from working on a contract, the unfavorable decision may be sufficient basis for non-issuance or revocation of a CAC, but does not necessarily mandate this result.

(4) *Adjudication.* The CAC adjudicators will consider the information provided by the CAC PSI in rendering a CAC credentialing determination. The determination will be unfavorable if there is a reasonable basis to conclude that a disqualifying factor in accordance with the basic CAC credentialing standards is substantiated, or when there is a reasonable basis to conclude that derogatory information or conduct relating to supplemental CAC credentialing standards presents an unacceptable risk for the U.S. Government.

(i) If a DoD Component or DOHA proposes to deny or revoke a CAC under conditions other than those cited in paragraph (b)(3)(ii) of this section, the DoD Component or DOHA, as appropriate in accordance with paragraph (b)(6)(i) of this section, must issue the

individual a written statement (also known as a letter of denial (LOD) or revocation (LOR)) identifying the disqualifying condition(s). The statement must contain a summary of the concerns and supporting adverse information, instructions for responding, and copies of the relevant CAC credentialing standards and adjudicative guidelines from this section. The written LOD or LOR must be as comprehensive and detailed as permitted by the requirements of national security and to protect sources that were granted confidentiality, and as allowed pursuant to provisions of 5 U.S.C. 552 and 552a. (Section 552a is also known and hereinafter referred to as ''The Privacy Act of 1974, as amended.'')

(ii) The individual may elect to respond in writing to the DoD Component or DOHA, as appropriate, within 30 calendar days from the date of the LOD or LOR. Failure to respond to the LOD or LOR will result in automatic CAC denial or revocation.

(iii) When, subsequent to issuance of an interim or final CAC, the U.S. Government receives credible information that raises questions as to whether a current CAC holder continues to meet the applicable credentialing standards, the DoD Component may reconsider the credentialing determination using the procedures in this part.

(5) *Denial or Revocation.* (i) DoD Components must deny or revoke a CAC if the individual fails to respond to the LOD or LOR within the specified timeframe or the response to the written statement has not provided a basis to reverse the decision.

(ii) Denial or revocation of a CAC must comply with applicable governing laws and regulations:

(A) The U.S. Coast Guard shall afford individuals appeal rights as established in applicable Department of Homeland Security and U.S. Coast Guard Issuances.

(B) CAC provides Service members with Geneva Convention protection in accordance with DoD Instruction 1000.1, ''Identification (ID) Cards Required by the Geneva Conventions'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/100001p.pdf*), and authorized benefits (e.g. medical) and must not be revoked or denied pursuant to the provisions of this part. CAC for Military Service members will be surrendered only upon separation, discharge, or retirement.

(C) In certain instances a CAC provides other benefits or specific privileges to civilian employees (e.g. medical, post exchange and commissary) when assigned overseas long-term; or protected status to civilian employees and contractors who are accompanying U.S. forces during overseas deployments in accordance with DoD Instruction 1000.1. CAC for DoD civilians or contractors in this circumstance will not be revoked pursuant to the provisions of this part, but may be surrendered as part of other adverse employment or contracting actions or procedures.

(iii) When eligibility is denied or revoked, the CAC shall be recovered whenever practicable, and shall immediately be rendered inoperable. In addition, agency's physical and logical access systems shall immediately be updated to eliminate the use of the CAC for access.

(6) *Appeals.* (i) Individuals who have been denied a CAC or have had a CAC revoked due to an unfavorable credentialing determination must be entitled to appeal the determination in accordance with the following procedures:

(A) Except as stated in paragraph (b)(6)(ii) of this section, new civilian and contractor applicants who have been denied a CAC may elect to appeal to a three member board composed of not more than one security representative and one human resources representative.

(B) Contractor employees who have had their CAC revoked may appeal the unfavorable determination to the DOHA in accordance with the established administrative process set out in DoD Directive 5220.6.

(ii) This appeal process does not apply when a CAC is denied or revoked as a result of either an unfavorable suitability determination consistent with 5 CFR part 731 or a decision to deny or revoke eligibility for access to classified information or eligibility for a sensitive national security position, since the person is already entitled to

seek review in accordance with applicable suitability or national security procedures. Likewise, there is no right to appeal when the decision to deny the CAC is based on the results of a separate determination to disqualify the person from an appointment in the excepted service or to bar the person from working for or on behalf of a Federal department or agency.

(iii) The DoD Component will notify the individual in writing of the final determination and provide a statement that this determination is not subject to further appeal.

(7) *Recording Final Determination.* Immediately following final adjudication, the sponsoring activity must record the final eligibility determination (e.g., active, revoked, denied) in the OPM Central Verification System as directed by OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards Under HSPD–12.'' DoD Component records will document the adjudicative rationale. Adjudicative records shall be made available to authorized recipients as required for appeal purposes.

(c) *Basic Adjudicative Standards.* (1) A CAC will not be issued to a person if the individual is known to be or reasonably suspected of being a terrorist.

(i) A CAC must not be issued to a person if the individual is known to be or reasonably suspected of being a terrorist. Individuals entrusted with access to Federal property and information systems must not put the U.S. Government at risk or provide an avenue for terrorism.

(ii) Therefore, conditions that may be disqualifying include evidence that the individual has knowingly and willfully been involved with reportable domestic or international terrorist contacts or foreign intelligence entities, counterintelligence activities, indicators, or other behaviors described in DoD Directive 5240.06, ''Counterintelligence Awareness and Reporting (CIAR)'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/524006p.pdf*).

(2) A CAC will not be issued to a person if the employer is unable to verify the individual's claimed identity.

(i) A CAC must not be issued to a person if the DoD component is unable to verify the individual's claimed identity. To be considered eligible for a CAC, the individual's identity must be clearly authenticated. The CAC must not be issued when identity cannot be authenticated.

(ii) Therefore, conditions that may be disqualifying include:

(A) The individual claimed it was not possible to provide two identity source documents from the list of acceptable documents in Form I–9, Office of Management and Budget No. 1115–0136, ''Employment Eligibility Verification,''(available at *http:// www.uscis.gov/ files/form/i-9.pdf*) or provided only one identity source document from the list of acceptable documents.

(B) The individual did not appear in person as required by Federal Information Processing Standards Publication 201–2.

(C) The individual refused to cooperate with the documentation and investigative requirements to validate his or her identity.

(D) The investigation failed to confirm the individual's claimed identity.

(iii) No conditions can mitigate inability to verify the applicant's identity.

(3) A CAC will not be issued to a person if there is a reasonable basis to believe the individual has submitted fraudulent information concerning his or her identity.

(i) A CAC must not be issued to a person if there is a reasonable basis to believe the individual has submitted fraudulent information concerning his or her identity in an attempt to obtain the current credential.

(A) Substitution occurred in the identity proofing process; the individual who appeared on one occasion was not the same person that appeared on another occasion.

(B) The fingerprints associated with the identity do not belong to the person attempting to obtain a CAC.

(ii) No conditions can mitigate submission of fraudulent information in an attempt to obtain a current credential.

(4) A CAC will not be issued to a person if there is a reasonable basis to believe the individual will attempt to gain unauthorized access to classified documents, information protected by

the Privacy Act, information that is proprietary in nature, or other sensitive or protected information.

(i) Individuals must comply with information-handling regulations and rules. Individuals must properly handle classified and protected information such as sensitive or proprietary information.

(ii) Individuals should not attempt to gain unauthorized access to classified documents or other sensitive or protected information. Unauthorized access to U.S. Government information or improper use of U.S. Government information once access is granted may pose a significant risk to national security, may compromise individual privacy, and may make public information that is proprietary in nature, thus compromising the operations and missions of Federal agencies.

(iii) A CAC must not be issued if there is a reasonable basis to believe the individual will attempt to gain unauthorized access to classified documents, information protected by the Privacy Act of 1974, as amended, information that is proprietary in nature, or other sensitive or protected information.

(iv) Therefore, conditions that may be disqualifying include any attempt to gain unauthorized access to classified, sensitive, proprietary or other protected information.

(v) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) Since the time of the last act or activities, the person has demonstrated a favorable change in behavior.

(B) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's ability to safeguard protected information.

(5) A CAC will not be issued to a person if there is a reasonable basis to believe the individual will use an identity credential outside the workplace unlawfully or inappropriately.

(i) A CAC must not be issued to a person if there is a reasonable basis to believe the individual will use an identity credential outside the workplace unlawfully or inappropriately.

(ii) Therefore, conditions that may be disqualifying include:

(A) Documented history of fraudulent requests for credentials or other official documentation.

(B) Previous incidents in which the individual used credentials or other official documentation to circumvent rules or regulations.

(C) A history of incidents involving misuse of credentials that put physical assets or personal property at risk.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's ability and willingness to use credentials lawfully and appropriately.

(6) A CAC will not be issued to a person if there is a reasonable basis to believe the individual will use Federally-controlled information systems unlawfully, make unauthorized modifications to such systems, corrupt or destroy such systems, or engage in inappropriate uses of such systems.

(i) Individuals must comply with rules, procedures, guidelines, or regulations pertaining to information technology systems and properly protect sensitive systems, networks, and information. The individual should not attempt to use federally-controlled information systems unlawfully, make unauthorized modifications, corrupt or destroy, or engage in inappropriate uses of such systems. A CAC must not be issued to a person if there is a reasonable basis to believe the individual will do so or has done so in the past.

(ii) Therefore, conditions that may be disqualifying include:

(A) Illegal, unauthorized, or inappropriate use of an information technology system or component.

(B) Unauthorized modification, destruction, manipulation of information, software, firmware, or hardware to corrupt or destroy information technology systems or data.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's ability and willingness to conform to rules and regulations for use of information technology systems.

(d) *Supplemental Adjudicative Standards.* (1) A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's misconduct or negligence in employment, that issuance of a CAC poses an unacceptable risk.

(i) An individual's employment misconduct or negligence may put people, property, or information systems at risk.

(ii) Therefore, conditions that may be disqualifying include:

(A) A previous history of intentional wrongdoing on the job, disruptive, violent, or other acts that may pose an unacceptable risk to people, property, or information systems.

(B) A pattern of dishonesty or rule violations in the workplace which put people, property or information at risk.

(C) A documented history of misusing workplace information systems to view, download, or distribute pornography.

(D) Violation of written or recorded commitments to protect information made to an employer, such as breach(es) of confidentiality or the release of proprietary or other information.

(E) Failure to comply with rules or regulations for the safeguarding of classified, sensitive, or other protected information.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's current trustworthiness or good judgment relating to the safety of people and proper safeguarding of property and information systems.

(B) The individual was not adequately warned that the conduct was unacceptable and could not reasonably be expected to know that the conduct was wrong.

(C) The individual made prompt, good-faith efforts to correct the behavior.

(D) The individual responded favorably to counseling or remedial training and has since demonstrated a positive attitude toward the discharge of information-handling or security responsibilities.

(2) A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's criminal or dishonest conduct, that issuance of a CAC poses an unacceptable risk.

(i) An individual's conduct involving questionable judgment, lack of candor, dishonesty, or unwillingness to comply with rules and regulations can raise questions about his or her reliability or trustworthiness and may put people, property, or information systems at risk. An individual's past criminal or dishonest conduct may put people, property, or information systems at risk.

(ii) Therefore, conditions that may be disqualifying include:

(A) A single serious crime or multiple lesser offenses which put the safety of people at risk or threaten the protection of property or information. A person's convictions for burglary may indicate that granting a CAC poses an unacceptable risk to the U.S. Government's physical assets and to employees' personal property on a U.S. Government facility.

(B) Charges or admission of criminal conduct relating to the safety of people and proper protection of property or information systems, regardless of whether the person was formally charged, formally prosecuted, or convicted.

(C) Dishonest acts (e.g., theft, accepting bribes, falsifying claims, perjury, forgery, or attempting to obtain identity documentation without proper authorization).

(D) Deceptive or illegal financial practices such as embezzlement, employee theft, check fraud, income tax evasion, expense account fraud, filing deceptive loan statements, or other intentional financial breaches of trust.

(E) Actions involving violence or sexual behavior of a criminal nature that

poses an unacceptable risk if access is granted to federally-controlled facilities or federally-controlled information systems. For example, convictions for sexual assault may indicate that granting a CAC poses an unacceptable risk to the life and safety of persons on U.S. Government facilities.

(F) Financial irresponsibility may raise questions about the individual's honesty and put people, property or information systems at risk, although financial debt should not in and of itself be cause for denial.

(G) Deliberate omission, concealment, or falsification of relevant facts or deliberately providing false or misleading information to an employer, investigator, security official, competent medical authority, or other official U.S. Government representative, particularly when doing so results in personal benefit or which results in a risk to the safety of people and proper safeguarding of property and information systems.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was minor in nature, or happened under such unusual circumstances that it is unlikely to recur.

(B) Charges were dismissed or evidence was provided that the person did not commit the offense and details and reasons support his or her innocence.

(C) Improper or inadequate advice from authorized personnel or legal counsel significantly contributed to the individual's omission, of information. When confronted, the individual provided an accurate explanation and made prompt, good-faith effort to correct the situation.

(D) Evidence has been supplied of successful rehabilitation, including but not limited to remorse or restitution, job training or higher education, good employment record, constructive community involvement, or passage of time without recurrence.

(3) A CAC will not be issued to a person if there is a reasonable basis to believe, based on the individual's material, intentional false statement, deception, or fraud in connection with Federal or contract employment, that issuance of a CAC poses an unacceptable risk.

(i) The individual's conduct involving questionable judgment, lack of candor, or unwillingness to comply with rules and regulations can raise questions about an individual's honesty, reliability, trustworthiness, and put people, property, or information systems at risk.

(ii) Therefore, conditions that may be disqualifying include material, intentional falsification, deception or fraud related to answers or information provided during the employment process for the current or a prior Federal or contract employment (e.g., on the employment application or other employment, appointment or investigative documents, or during interviews.)

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The misstated or omitted information was so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur.

(B) The misstatement or omission was unintentional or inadvertent and was followed by a prompt, good-faith effort to correct the situation.

(4) A CAC will not be issued to a person if there is a reasonable basis to believe, based on the nature or duration of the individual's alcohol abuse without evidence of substantial rehabilitation, that issuance of a CAC poses an unacceptable risk.

(i) An individual's abuse of alcohol may put people, property, or information systems at risk. Alcohol abuse can lead to the exercise of questionable judgment or failure to control impulses, and may put people, property, or information systems at risk, regardless of whether he or she is diagnosed as an abuser of alcohol or alcohol dependent. A person's long-term abuse of alcohol without evidence of substantial rehabilitation may indicate that granting a CAC poses an unacceptable safety risk in a U.S. Government facility.

(ii) Therefore, conditions that may be disqualifying include:

(A) A pattern of alcohol-related arrests.

(B) Alcohol-related incidents at work, such as reporting for work or

duty in an intoxicated or impaired condition, or drinking on the job.

(C) Current continuing abuse of alcohol.

(D) Failure to follow any court order regarding alcohol education, evaluation, treatment, or abstinence.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The individual acknowledges his or her alcoholism or issues of alcohol abuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence (if alcohol dependent) or responsible use (if an abuser of alcohol).

(B) The individual is participating in counseling or treatment programs, has no history of previous treatment or relapse, and is making satisfactory progress.

(C) The individual has successfully completed inpatient or outpatient counseling or rehabilitation along with any required aftercare. He or she has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations, such as participation in an alcohol treatment program. The individual has received a favorable prognosis by a duly qualified medical professional or a licensed clinical social worker who is a staff member of a recognized alcohol treatment program.

(5) A CAC will not be issued to a person if there is a reasonable basis to believe, based on the nature or duration of the individual's illegal use of narcotics, drugs, or other controlled substances without evidence of substantial rehabilitation, that issuance of a CAC poses an unacceptable risk.

(i) An individual's abuse of drugs may put people, property, or information systems at risk. Illegal use of narcotics, drugs, or other controlled substances, to include abuse of prescription or over-the-counter drugs, can raise questions about his or her trustworthiness, or ability or willingness to comply with laws, rules, and regulations. For example, a person's long-term illegal use of narcotics without evidence of substantial rehabilitation may indicate that granting a CAC poses an unacceptable safety risk in a U.S. Government facility.

(ii) Therefore, conditions that may be disqualifying include:

(A) Current or recent illegal drug use, serious narcotic, or other controlled substance offense.

(B) A pattern of drug-related arrests or problems in employment.

(C) Illegal drug possession, including cultivation, processing, manufacture, purchase, sale, or distribution of illegal drugs, or possession of drug paraphernalia.

(D) Diagnosis by a duly qualified medical professional (e.g., physician, clinical psychologist, or psychiatrist) of drug abuse or drug dependence.

(E) Evaluation of drug abuse or drug dependence by a licensed clinical social worker who is a staff member of a recognized drug treatment program.

(F) Failure to successfully complete a drug treatment program prescribed by a duly qualified medical professional.

(G) Any illegal drug use after formally agreeing to comply with rules or regulations prohibiting drug use.

(H) Any illegal use or abuse of prescription or over-the-counter drugs.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur (e.g., clear, lengthy break since last use; strong evidence the use will not occur again).

(B) A demonstrated intent not to abuse any drugs in the future, such as:

(*1*) Abstaining from drug use.

(*2*) Disassociating from drug-using associates and contacts.

(*3*) Changing or avoiding the environment where drugs were used.

(C) Abuse of prescription drugs followed a severe or prolonged illness during which these drugs were prescribed and abuse has since ended.

(D) Satisfactory completion of a prescribed drug treatment program, including but not limited to rehabilitation and aftercare requirements without recurrence of abuse, and a favorable prognosis by a duly qualified medical professional.

(6) A CAC will not be issued to a person if a statutory or regulatory bar prevents the individual's contract employment; or would prevent Federal employment under circumstances that furnish a reasonable basis to believe that issuance of a CAC poses an unacceptable risk.

(i) The purpose of this standard is to verify whether there is a bar on contract employment, and whether the contract employee is subject to a Federal employment debarment for reasons that also pose an unacceptable risk in the contracting context. For example, a person's 5-year bar on Federal employment based on a felony conviction related to inciting a riot or civil disorder, as specified in 5 U.S.C. 7313, may indicate that granting a CAC poses an unacceptable risk to persons, property, and assets in U.S. Government facilities.

(ii) Therefore, conditions that may be disqualifying include:

(A) A debarment was imposed by OPM, DoD, or other Federal agencies when the conduct poses an unacceptable risk to people, property, or information systems.

(B) The suitability debarment was based on the presence of serious suitability issues when the conduct poses an unacceptable risk to people, property, or information systems.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) Applicant proves the reason(s) for the debarment no longer exists.

(B) The debarment is job or position-specific and is not applicable to the job currently under consideration.

(7) A CAC will not be issued to a person if the individual has knowingly and willfully engaged in acts or activities designed to overthrow the U.S. Government by force.

(i) Individuals entrusted with access to U.S. Government property and information systems must not put the U.S. Government at risk.

(ii) Therefore, conditions that may be disqualifying include:

(A) Illegal involvement in, support of, training to commit, or advocacy of any act of sabotage, espionage, treason or sedition against the United States of America.

(B) Association or agreement with persons who attempt to or commit any of the acts in paragraph (d)(7)(ii)(A) of this section with the specific intent to further those unlawful aims.

(C) Association or agreement with persons or organizations that advocate, threaten, or use force or violence, or use any other illegal or unconstitutional means in an effort to overthrow or influence the U.S. Government.

(iii) Circumstances relevant to the determination of whether there is a reasonable basis to believe there is an unacceptable risk include:

(A) The behavior happened so long ago, was minor, or happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual's current trustworthiness.

(B) The person was not aware of the person's or organization's dedication to illegal, treasonous, or seditious activities or did not have the specific intent to further the illegal, treasonous, or seditious ends of the person or organization.

(C) The individual did not have the specific intent to incite others to advocate, threaten, or use force or violence, or use any other illegal or unconstitutional means to engage in illegal, treasonous, or seditious activities.

(D) The individual's involvement in the activities was for an official purpose.

PART 158—OPERATIONAL CONTRACT SUPPORT

Sec.

158.1 Purpose.
158.2 Applicability.
158.3 Definitions.
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158.5 Responsibilities.
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158.7 Guidance for contractor medical and dental fitness.

AUTHORITY: Public Law 110–181; Public Law 110–417.

SOURCE: 76 FR 81808, Dec. 29, 2011, unless otherwise noted.

§ 158.1 Purpose.

This part establishes policy, assigns responsibilities, and provides procedures for operational contract support (OCS), including OCS program management, contract support integration, and integration of defense contractor personnel into contingency operations outside the United States in accordance with the guidance in DoD Directive 3020.49 (see *http://www.dtic.mil/ whs/ directives/corres/ pdf/302049p.pdf*) and the authority in DOD Directive 5134.01 (see *http://www.dtic.mil/ whs/directives/corres /pdf/513401p.pdf*).

§ 158.2 Applicability.

This part applies to:

(a) The Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense agencies, the DoD field activities, and all other organizational entities within the Department of Defense (hereinafter referred to collectively as the ''DoD Components'').

(b) DoD operations (contingency, humanitarian assistance, and other peace operations) outside the United States; other military operations as determined by a Combatant Commander (CCDR); or as directed by the Secretary of Defense (hereinafter referred to collectively as ''applicable contingency operations'').

§ 158.3 Definitions.

Unless otherwise noted, the following terms and their definitions are for the purposes of this part.

Acquisition. Defined in 48 CFR 2.101.

Contingency acquisition. The process of acquiring supplies, services, and construction in support of contingency operations.

Contingency contract. A legally binding agreement for supplies, services, and construction let by Government contracting officers in the operational area, as well as other contracts that have a prescribed area of performance within a designated operational area. Contingency contracts include theater support, external support, and systems support contracts.

Contingency contractor personnel. Individual contractors, individual subcontractors at all tiers, contractor employees, and sub-contractor employees at all tiers under all contracts supporting the Military Services during contingency operations.

Contingency operation. Defined in Joint Publication 1–02 (see *http:// www.dtic.mil/ doctrine/new_pubs/ jp1_02.pdf*).

Contingency program management. The process of planning, organizing, staffing, controlling, and leading the operational contract support (OCS) efforts to meet joint force commander (JFC) objectives.

Contract administration. A subset of contracting that includes efforts that ensure supplies and services are delivered in accordance with the conditions and standards expressed in the contract. Contract administration is the oversight function, from contract award to contract closeout, performed by contracting professionals and designated non-contracting personnel.

Contract administration delegation. A CCDR policy or process related to theater business clearance that allows the CCDR to exercise control over the assignment of contract administration for that portion of contracted effort that relates to performance in, or delivery to, designated area(s) of operations and allows the CCDR to exercise oversight to ensure the contractor's compliance with CCDR and subordinate task force commander policies, directives, and terms and conditions. Whether the CCDR chooses to implement such a process depends on the situation.

Contracting. Defined in 48 CFR 2.101.

Contracting officer. Defined in 48 CFR 2.101.

Contracting Officer's Representative (COR). Defined in 48 CFR 202.101.

Contractor management. The oversight and integration of contractor personnel and associated equipment providing support to the joint force in a designated operational area.

Contractors Authorized to Accompany the Force (CAAF). Contractor personnel,

including all tiers of subcontractor personnel, who are authorized to accompany the force in applicable contingency operations and who have been afforded CAAF status through Letter of Authorization (LOA). CAAF generally include all U.S. citizen and Third Country National (TCN) employees not normally residing within the operational area whose area of performance is in the direct vicinity of U.S. forces and who routinely are co-located with U.S. forces (especially in non-permissive environments). Personnel co-located with U.S. forces shall be afforded CAAF status through LOA. In some cases, CCDR subordinate commanders may designate mission-essential Host Nation (HN) or Local national (LN) contractor employees (e.g., interpreters) as CAAF. CAAF includes contractors identified as contractors deploying with the force in DoD Instruction 3020.41 and DoD Directive 3002.01E (see *http://www.dtic.mil/whs/directives/corres/ pdf/300201p.pdf*). CAAF status does not apply to contractor personnel in support of contingencies within the boundaries and territories of the United States.

Defense contractor. Any individual, firm, corporation, partnership, association, or other legal non-Federal entity that enters into a contract directly with the DoD to furnish services, supplies, or construction. Foreign governments, representatives of foreign governments, or foreign corporations wholly owned by foreign governments that have entered into contracts with the DoD are not defense contractors.

Designated reception site. The organization responsible for the reception, staging, integration, and onward movement of contractors deploying during a contingency. The designated reception site includes assigned joint reception centers and other Service or private reception sites.

Essential contractor service. A service provided by a firm or an individual under contract to the DoD to support vital systems including ships owned, leased, or operated in support of military missions or roles at sea and associated support activities, including installation, garrison, base support, and linguist/translator services considered of utmost importance to the U.S. mobilization and wartime mission. The term also includes services provided to Foreign Military Sales customers under the Security Assistance Program. Services are considered essential because:

(1) The DoD Components may not have military or DoD civilian employees to perform the services immediately.

(2) The effectiveness of defense systems or operations may be seriously impaired and interruption is unacceptable when the services are not available immediately.

External support contracts. Prearranged contracts or contracts awarded during a contingency from contracting organizations whose contracting authority does not derive directly from theater support or systems support contracting authorities.

Functional Combatant Commands. U.S. Joint Forces Command (USJFCOM), U.S. Special Operations Command, U.S. Strategic Command, and U.S. Transportation Command.

*Geographic Combatant Command*s. U.S. Africa Command, U.S. Central Command, U.S. European Command, U.S. Northern Command, U.S. Pacific Command, and U.S. Southern Command.

Hostile environment. Defined in Joint Publication 1–02.

Host nation (HN). A nation that permits, either by written agreement or official invitation, government representatives and/or agencies of another nation to operate, under specified conditions, within its borders.

Letter of authorization (LOA). A document issued by a procuring contracting officer or designee that authorizes contractor personnel to accompany the force to travel to, from, and within an operational area, and outlines Government-furnished support authorizations within the operational area, as agreed to under the terms and conditions of the contract. For more information, see 48 CFR PGI 225.74.

Local national (LN). An individual who is a permanent resident of the nation in which the United States is conducting contingency operations.

Long-term care. A variety of services that help a person with comfort, personal, or wellness needs. These services assist in the activities of daily living, including such things as bathing and

dressing. Sometimes known as custodial care.

Non-CAAF. Personnel who are not designated as CAAF, such as LN employees and non-LN employees who are permanent residents in the operational area or TCNs not routinely residing with U.S. forces (and TCN expatriates who are permanent residents in the operational area) who perform support functions away from the close proximity of, and do not reside with, U.S. forces. Government-furnished support to non-CAAF is typically limited to force protection, emergency medical care, and basic human needs (e.g., bottled water, latrine facilities, security, and food when necessary) when performing their jobs in the direct vicinity of U.S. forces.

Operational contract support (OCS). The ability to orchestrate and synchronize the provision of integrated contract support and management of contractor personnel providing support to the joint force within a designated operational area.

Prime contract. Defined in 48 CFR 3.502.

Qualifying contingency operation. In accordance with Article 2(a)(10) of the Uniform Code of Military Justice (UCMJ) (see *http://www.au.af.mil/ au/awc/awcgate/ucmj.htm*), a military contingency operation conducted for the purpose of engaging an enemy or a hostile force in combat where disciplinary authority over civilians under Article 2(a)(10) is governed by the UCMJ, the Secretary of Defense Memorandum, ''UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations,'' dated March 10, 2008 (see *http://www.dtic.mil/ whs/directives/corres/ pdf/DTM-08-009.pdf*), and the Manual for Courts-Martial, United States, current edition (see *http://www.au.af.mil/ au/awc/awcgate/law/mcm.pdf*).

Replacement center. The centers at selected installations that ensure personnel readiness processing actions have been completed prior to an individual reporting to the aerial port of embarkation for deployment to a designated operational area.

Requiring activity. The organization charged with meeting the mission and delivering the requirements the contract supports. This activity is responsible for delivering the services to meet the mission if the contract is not in effect. The requiring activity may also be the organizational unit that submits a written requirement, or statement of need, for services required by a contract. This activity is responsible for ensuring compliance with DoD Instruction 1100.22 (see *http://www.dtic.mil/ whs/directives/corres/ pdf/110022p.pdf*) and Deputy Secretary of Defense Memorandums, ''In-sourcing Contracted Services—Implementation Guidance'' dated May 28, 2009, and ''Implementation of Section 324 of the National Defense Authorization Act for Fiscal Year 2008 (FY 2008 NDAA)—Guidelines and Procedures on In-Sourcing New and Contracted Out Functions'' dated April 4, 2008 (for both Deputy Secretary of Defense Memorandums see *http://prhome.defense.gov/ RSI/REQUIREMENTS/INSOURCE/INSOURCE_GUIDANCE.ASPX*).

Subcontract. Defined in 48 CFR 3.502.

Systems support contracts. Prearranged contracts awarded by Service acquisition program management offices that provide fielding support, technical support, maintenance support, and, in some cases, repair parts support, for selected military weapon and support systems. Systems support contracts routinely are put in place to provide support to many newly fielded weapons systems, including aircraft, land combat vehicles, and automated command and control systems. Systems support contracting authority, contract management authority, and program management authority reside with the Service system materiel acquisition program offices. Systems support contractors, made up mostly of U.S. citizens, provide support in continental U.S. (CONUS) and often deploy with the force in both training and contingency operations. The JFC generally has less control over systems support contracts than other types of contracts.

Theater business clearance. A CCDR policy or process to ensure visibility of and a level of control over systems support and external support contracts

executing or delivering support in designated area(s) of operations. The breadth and depth of such requirements will be situational. Theater business clearance is not necessarily discrete and can be implemented to varying degrees on a continuum during all phases of an operation.

Theater support contracts. Contingency contracts awarded by contracting officers deployed to an operational area serving under the direct contracting authority of the Service component, special operations force command, or designated joint contracting authority for the designated contingency operation.

Uniquely military functions. Defined in DoD Instruction 1100.22, ''Policy and Procedures for Determining Workforce Mix.''

§ 158.4 Policy.

It is DoD policy that:

(a) OCS actions (e.g., planning, accountability, visibility, deployment, protection, and redeployment requirements) shall be implemented to:

(1) Incorporate appropriate contingency program management processes during applicable contingency operations.

(2) Comply with applicable U.S., international, and local laws, regulations, policies, and agreements.

(3) Use contract support only in appropriate situations consistent with 48 CFR subpart 7.5, 48 CFR 207.503, and DoD Instruction 1100.22, ''Policy and Procedures for Determining Workforce Mix.''

(4) Fully consider, plan for, integrate, and execute acquisition of, contracted support, including synchronizing and integrating contracted support flowing into an operational area from systems support, external support and theater support contracts and managing the associated contractor personnel, into applicable contingency operations consistent with CCDR policies and procedures and Joint Publication (JP) 4–10, ''Operational Contract Support,'' (see *http://www.dtic.mil/ doctrine/new_pubs/ jp4_10.pdf*).

(b) Contractors are generally responsible for providing their own logistical support. However, in austere, uncertain, and/or hostile environments, the DoD may provide logistical support to ensure continuation of essential contractor services. CAAF may receive Government-furnished support commensurate with the operational situation in accordance with the terms and conditions of their contract.

(c) Contracting officers will ensure that contracts used to support DoD operations require:

(1) That CAAF deploying from outside the operational area be processed through formal deployment (replacement) centers or a DoD-approved equivalent process prior to departure, and through in-theater reception centers upon arrival in the operational area, as specified in §158.6 of this part.

(2) That contractors provide personnel who are medically, dentally, and psychologically fit, and if applicable, professionally tested and certified, to perform contract duties in applicable contingency operations. Section 158.6 of this part details medical support and evacuation procedures. Section 158.7 of this part provides guidance on contractor medical, psychological, and dental fitness.

(3) Solicitations and contracts address any applicable host country and designated operational area performance considerations.

(d) Contracts for highly sensitive, classified, cryptologic, and intelligence projects and programs shall implement this part to the maximum extent practicable, consistent with applicable laws, Executive orders, Presidential Directives, and DoD issuances.

(e) In applicable contingency operations, contractor visibility and accountability shall be maintained through a common joint database, the Synchronized Predeployment and Operational Tracker (SPOT) or its successor.

§ 158.5 Responsibilities.

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) shall develop, coordinate, establish, and oversee the implementation of DoD policy for managing OCS.

(b) The Director, Defense Procurement and Acquisition Policy (DPAP), under the authority, direction, and control of the USD(AT&L), shall:

(1) Oversee all acquisition and procurement policy matters including the development of DoD policies for contingency contracting and the coordinated development and publication of contract prescriptions and standardized contract clauses in 48 CFR 207.503, 252.225–7040, and 202.101, and associated contracting officer guidance in 48 CFR PGI 225.74. This includes working collaboratively with OSD Principal Staff Assistants, Chairman of the Joint Chiefs of Staff (CJCS) representatives, and the DoD Component Heads in the development of OCS related policies and ensuring that contracting equities are addressed.

(2) Develop contingency contracting policy and implement other OCS related policies into DFARS in support of applicable contingency operations.

(3) Ensure implementation by contracting officers and CORs of relevant laws and policies in 48 CFR Subparts 4.1301, 4.1303, 52.204–9, 7.5, 7.503(e), 2.101, and 3.502; 48 CFR Subparts 207.503, 252.225–7040 and 202.101; and 48 CFR PGI 225.74.

(4) Propose legislative initiatives that support accomplishment of the contingency contracting mission.

(5) Improve DoD business processes for contingency contracting while working in conjunction with senior procurement executives across the DoD. Assist other OSD Principal Staff Assistants, CJCS representatives, and DoD Component Heads in efforts to improve other OCS related business processes by ensuring contracting equities and interrelationships are properly addressed.

(6) Support efforts to resource the OCS toolset under the lead of the Deputy Assistant Secretary of Defense for Program Support (DASD(PS)) pursuant to paragraph (c)(6)(ii) of this section.

(7) Coordinate activities with other Government agencies to provide unity of effort. Maintain an open, user-friendly source for reports and lessons learned and ensure the coordinated development and publication, through participation on the FAR Council, of standardized contract clauses.

(8) As a member of the Contracting Functional Integrated Planning Team, collaborate with the Defense Acquisition University to offer education for all contingency contracting personnel.

(9) Participate in the OCS Functional Capability Integration Board (FCIB) to facilitate development of standard joint OCS concepts, policies, doctrine, processes, plans, programs, tools, reporting, and training to improve effectiveness and efficiency.

(10) In concert with the supported Combatant Commander, coordinate in advance of execution Executive Agency for Head of Contracting Activity requisite Operational Plans (OPLANS), Concept Plans (CONPLANS), and operations, where a lead service or a Joint Theater Support Contracting Command (JTSCC) will be established.

(c) The DASD(PS), under the authority, direction, and control of the USD(AT&L) through the Assistant Security of Defense for Logistics and Materiel Readiness (ASD(L&MR)), is responsible for oversight and management to enable the orchestration, integration, and synchronization of the preparation and execution of acquisitions for DoD contingency operations, and shall:

(1) Coordinate policy relating to field operations and contingency contractor personnel in forward areas and the battlespace. In cooperation with the Joint Staff, Military Departments, and OSD, serve as the DoD focal point for the community of practice and the community of interest for efforts to improve OCS program management and oversight.

(2) Co-chair with the Vice Director, Directorate for Logistics, Joint Staff, (VDJ4) the OCS FCIB to lead and coordinate OCS with OSD, Military Department, and Defense Agency senior procurement officers in accordance with the OCS FCIB Charter (see *http://www.acq.osd.mil/ log/PS/fcib/OCS_FCIB_charter_USA000737-09_ signed.pdf*).

(3) Ensure integration of joint OCS activities across other joint capability areas and joint warfighting functions.

(4) Provide input to the Logistics Capability Portfolio Manager and the CJCS in the development of capability priorities; review final capability priorities; and provide advice to the Under Secretary of Defense for Policy (USD(P)) in developing the Quadrennial Defense Review (see *http://*

www.defense.gov/ qdr/images/QDR_as_of_ 12Feb10_1000.pdf) and defense planning and programming guidance, as appropriate.

(5) Serve as the DoD lead to:

(i) Develop a programmatic approach for the preparation and execution of orchestrating, integrating, and synchronizing acquisitions for contingency operations.

(ii) Establish and oversee DoD policies for OCS program management in the planning and execution of combat, post-combat, and other contingency operations involving the Military Departments, other Government agencies, multinational forces, and non-governmental organizations, as required.

(6) Improve DoD business practices for OCS.

(i) In consultation with the Under Secretary of Defense for Personnel and Readiness (USD(P&R)); the Director, DPAP; and the CJCS, ensure a joint web-based contract visibility and contractor personnel accountability system (currently SPOT) is designated and implemented, including business rules for its use.

(ii) Lead the effort to resource the OCS toolset providing improved OCS program management, planning, OCS preparation of the battlefield, systems support, and theater support contracts, contractor accountability systems, and automated contract process capabilities, including reach back from remote locations to the national defense contract base (*e.g.*, hardware and software).

(7) In consultation with the Heads of the OSD and DoD Components, provide oversight of experimentation efforts focusing on concept development for OCS execution.

(8) Serve as the DoD lead for the oversight of training and education of non-acquisition, non-contracting personnel identified to support OCS efforts.

(d) The Director, DLA, under the authority, direction, and control of the USD(AT&L), through the ASD(L&MR) shall, through the Joint Contingency Acquisition Support Office (JCASO), provide enabler OCS support to CCDR OCS planning efforts and training events, and, when requested, advise, assist, and support JFC oversight of OCS operations. Specifically, the Director, JCASO, shall:

(1) Provide OCS planning support to the CCDR through Joint OCS Planners embedded within the geographic Combatant Command staff. Maintain situational awareness of all plans with significant OCS equity for the purposes of exercise support and preparation for operational deployment. From JCASO forward involvement in exercises and operational deployments, develop and submit lessons learned that result in improved best practices and planning.

(2) When requested, assist the Joint Staff in support of the Chairman's OCS responsibilities listed in paragraph (l) of this section.

(3) Facilitate improvement in OCS planning and execution through capture and review of joint OCS lessons learned. In cooperation with USJFCOM, Military Services, other DoD Components, and interagency partners, collect joint operations focused OCS lessons learned and best practices from contingency operations and exercises to inform OCS policy and recommend doctrine, organization, training, materiel, leadership, personnel, and facilities (DOTMLPF) solutions.

(4) Participate in joint exercises, derive OCS best practices from after-action reports and refine tactics/techniques/procedures, deployment drills, and personal and functional training (to include curriculum reviews and recommendations). Assist in the improvement of OCS related policy, doctrine, rules, tools, and processes.

(5) Provide the geographic CCDRs, when requested, with deployable experts to assist the CCDR and subordinate JFCs in managing OCS requirements in a contingency environment.

(6) Practice continuous OCS-related engagement with interagency representatives and multinational partners, as appropriate and consistent with existing authorities.

(7) Participate in the OCS FCIB to facilitate development of standard joint OCS concepts, policies, doctrine, processes, plans, programs, tools, reporting, and training to improve effectiveness and efficiency.

(e) The Director, Defense Contract Management Agency (DCMA) under the

authority, direction, and control of the USD(AT&L), through the Assistant Secretary of Defense for Acquisition (ASD(Acquisition)), plans for and performs contingency contract administration services in support of the CJCS and CCDRs in the planning and execution of military operations, consistent with DCMA's established responsibilities and functions.

(f) The Under Secretary of Defense for Intelligence (USD(I)), as the Principal Staff Assistant for intelligence, counterintelligence, and security in accordance with DoD Directive 5143.01 (see *http://www.dtic.mil/ whs/directives/ corres/ pdf/514301p.pdf*), shall:

(1) Develop, coordinate, and oversee the implementation of DoD security programs and guidance for those contractors covered in DoD Instruction 5220.22 (see *http://www.dtic.mil/ whs/directives/corres/ pdf/522022p.pdf*.

(2) Assist the USD(AT&L) in determining appropriate contract clauses for intelligence, counterintelligence, and security requirements.

(3) Establish policy for contractor employees under the terms of the applicable contracts that support background investigations in compliance with 48 CFR 4.1301, 4.1303, and 52.204–9.

(4) Coordinate security and counterintelligence policy affecting contract linguists with the Secretary of the Army pursuant to DoD Directive 5160.41E (see *http://www.dtic.mil/ whs/directives/corres/ pdf/516041p.pdf*).

(g) The Assistant Secretary of Defense for Health Affairs (ASD(HA)), under the authority, direction, and control of the USD(P&R), shall assist in the development of policy addressing the reimbursement of funds for qualifying medical support received by contingency contractor personnel in applicable contingency operations.

(h) The Deputy Assistant Secretary of Defense for Readiness (DASD(Readiness)) under the authority, direction, and control of the USD(P&R), shall develop policy and set standards for managing contract linguist capabilities supporting the total force to include requirements for linguists and tracking linguist and role players to ensure that force readiness and security requirements are met.

(i) The Director, Defense Manpower Data Center (DMDC), under the authority, direction, and control of the USD(P&R), through the Director, DoD Human Resources Activity, shall:

(1) Serve as the central repository of information for all historical data on contractor personnel who have been issued common access cards (CAC) and are included in SPOT or its successor, that is to be archived.

(2) Ensure all data elements of SPOT or its successor to be archived are USD(P&R)-approved and DMDC-system compatible, and ensure the repository is protected at a level commensurate with the sensitivity of the information contained therein.

(j) The Under Secretary of Defense (Comptroller)/Chief Financial Officer (USD(C)/CFO), DoD, shall develop policy addressing the reimbursement of funds for qualifying medical support received by contingency contractor personnel in applicable contingency operations.

(k) The Secretaries of the Military Departments and the Directors of the Defense Agencies and DoD Field Activities shall incorporate this part into applicable policy, doctrine, programming, training, and operations and ensure:

(1) Assigned contracting activities populate SPOT with the required data in accordance with Assistant Secretary of Defense for Logistics and Materiel Readiness Publication, ''Business Rules for the Synchronized Predeployment and Operational Tracker (SPOT),'' current edition (see *http://www.acq.osd.mil/ log/PS/spot.html*) and that information has been reviewed for security and operational security (OPSEC) concerns in accordance with paragraph (c)(3)(ii)(E) of §158.6.

(2) CAAF meet all theater and/or joint operational area (JOA) admission procedures and requirements prior to deploying to or entering the theater or JOA.

(3) Contracting officers include in the contract:

(i) Appropriate terms and conditions and clause(s) in accordance with 48 CFR 252.225–7040 and 48 CFR PGI 225.74.

(ii) Specific deployment and theater admission requirements according to 48

CFR 252.225–7040 and 48 CFR PGI 225.74, and the applicable CCDR Web sites.

(iii) Specific medical preparation requirements according to paragraph (c)(8) of §158.6.

(iv) The level of protection to be provided to contingency contractor personnel in accordance with paragraph (d)(5) of §158.6. Contracting officers shall follow the procedures on the applicable CCDR Web sites to obtain theater-specific requirements.

(v) Government-furnished support and equipment to be provided to contractor personnel with prior coordination and approval of theater adjudication authorities, as referenced on the applicable CCDR Web sites.

(vi) A requirement for contractor personnel to show and have verified by the COR, proof of professional certifications/proficiencies as stipulated in the contract.

(4) Standardized contract accountability financial and oversight processes are developed and implemented.

(5) Requirements packages are completed to include all required documentation (e.g., letter of justification, performance work statement, nominated COR, independent Government estimate (IGE)) are completed and funding strategies are articulated and updated as required.

(6) CORs are planned for, resourced, and sustained as necessary to ensure proper contract management capabilities are in place and properly executed.

(7) Assigned contracting activities plan for, and ensure the contractor plans for, the resources necessary to implement and sustain contractor accountability in forward areas through SPOT or its successor.

(8) Contract support integration plans (CSIPs) and contractor management plans (CMPs) are developed as directed by the supported CCDR.

(9) The risk of premature loss of mission-essential OCS is assessed and the mitigation of the loss of contingency contractor personnel in wartime or contingency operations who are performing essential contractor services is properly planned for.

(10) Assigned contracting activities comply with theater business clearance and contract administration delegation policies and processes when implemented by CCDRs to support any phase of a contingency operation.

(11) Agency equities are integrated and conducted in concert with the CCDR's plans for OCS intelligence of the battlefield.

(12) The implementation of a certification of, and a waiver process for, contractor-performed deployment and redeployment processing in lieu of a formally designated group, joint, or Military Department deployment center.

(13) Support the effort to resource the OCS toolset under the lead of the DASD(PS) pursuant to paragraph (c)(6)(ii) of this section.

(l) The CJCS shall:

(1) Where appropriate, incorporate program management and elements of this part into joint doctrine, joint instructions and manuals, joint training, joint education, joint capability development, joint strategic planning system (*e.g.*, Joint Operation Planning and Execution System (JOPES)), and CCDR oversight.

(2) Co-chair with the VDJ4 the OCS FCIB to lead and coordinate OCS with OSD, Military Department, and Defense Agency senior procurement officers in accordance with OCS FCIB charter. Provide the OCS FCIB with input and awareness of the CJCS functions and activities as defined in 10 U.S.C. 153 and 155.

(3) Perform OCS related missions and functions as outlined in the Joint Staff Manual 5100.01[1] and the Chairman's authorities as defined in 10 U.S.C. (see *http://uscode.house.gov/ download/ title_10.shtml*).

(m) The geographic CCDRs and the CDRUSSOCOM (when they are the supported commander) shall:

(1) Plan and execute OCS program management, contract support integration, and contractor management actions in all applicable contingency operations in their AOR.

(2) Conduct integrated planning to determine and synchronize contract support requirements to facilitate OCS

[1]This document is classified Restricted, and is available via Secure Internet Protocol Router Network at *http://js.smil.mil*. If the requester is not an authorized user of the classified network the requestor should contact Joint Staff J–1 at (703) 697–9645.

planning and contracting and contractor management oversight.

(3) In coordination with the Services and functional components, identify military capabilities shortfalls in all the joint warfighting functions that require contracted solutions. Ensure these requirements are captured in the appropriate CCDR, subordinate JFC, Service component and combat support agency CSIP or other appropriate section of the CONPLAN with time-phased force and deployment data (TPFDD), OPLAN or operation order (OPORD).

(4) Require Service component commanders and supporting Defense Agencies and DoD Field Activities to:

(i) Identify and incorporate contract support and operational acquisition requirements in supporting plans to OPLANs and CONPLANs with TPFDD, and to synchronize their supporting CSIPs, CMPs, and contracted requirements and execution plans within geographic CCDR OPLANs and CONPLANs with TPFDD.

(ii) Review their supporting CSIPs and CMPs and identify funding strategies for particular contracted capabilities identified to support each OPLAN and CONPLAN.

(iii) Develop acquisition-ready requirements documents as identified in CSIPs including performance work statements, IGEs, task order change documents, and sole source justifications.

(iv) Ensure CAAF and their equipment are incorporated into TPFDD development and deployment execution processes in accordance with CJCS Manual 3122.02C, JOPES Volume III, ''Crisis Action Time-Phased Force and Deployment Data Development and Deployment Execution,'' June 19, 2006.

(v) Ensure financial management policies and procedures are in place in accordance with DoD 7000.14–R (see *http://comptroller.defense.gov/fmr/*) and applicable service specific financial management implementation guidance.

(5) Develop and publish comprehensive OCS plans. Synchronize OCS requirements among all Service components and Defense Agencies and DoD Field Activities operating within or in support of their area of responsibility (AOR). Optimize operational unity of effort by analyzing existing and projected theater support and external support contracts to minimize, reduce, and eliminate redundant and overlapping requirements and contracted capabilities.

(6) Ensure OCS requirements for the Defense Agencies, multinational partners, and other Governmental agencies are addressed and priorities of effort for resources are deconflicted and synchronized with OCS to military forces.

(7) Ensure policies and procedures are in place for reimbursing Government-furnished support of contingency contractor personnel, including (but not limited to) subsistence, military air, intra-theater lift, and medical treatment, when applicable.

(8) Ensure CAAF and equipment requirements (regardless if provided by the Government or the contractor) in support of an operation are incorporated into plan TPFDDs.

(9) Review Service component assessments of the risk of premature loss of essential contractor services and review contingency plans to mitigate potential premature loss of essential contractor services.

(10) Establish and communicate to contracting officers theater and/or JOA CAAF admission procedures and requirements, including country and theater clearance, waiver authority, immunizations, required training or equipment, and any restrictions necessary to ensure proper deployment, visibility, security, accountability, and redeployment of CAAF to their AORs and/or JOAs. Implement DoD Foreign Clearance Guide, current edition (available at *https://www.fcg.pentagon.mil/*).

(11) Coordinate with the Office of the USD(P) to ensure special area, country, and theater personnel clearance requirements are current in accordance with DoD Foreign Clearance Guide, and coordinate with affected agencies (*e.g.*, Intelligence Community agencies) to ensure that entry requirements do not impact mission accomplishment.

(12) Determine and distribute specific theater OCS organizational guidance in plans, to include command, control, and coordination, and Head Contracting Authority (HCA) relationships.

(13) Develop and distribute AOR/JOA-wide contractor management requirements, directives, and procedures into a separate contractor management plan as an annex or the appropriate section of the appropriate plan.

(14) Establish, staff, and execute appropriate OCS-related boards, centers, and working groups.

(15) Integrate OCS into mission rehearsals and training exercises.

(16) When contracts are being or will be executed in an AOR/JOA, designate and identify the organization responsible for managing and prescribing processes to:

(i) Establish procedures and assign authorities for adjudicating requests for provision of Government-furnished equipment and services to contractors when such support is operationally required. This should include procedures for communicating approval to the requiring activity and the contracting officer for incorporation into contracts.

(ii) Authorize trained and qualified contractor personnel to carry weapons for personal protection not related to the performance of contract-specific duties.

(iii) Establish procedures for, including coordination of, inter-theater strategic movements and intra-theater operational and tactical movements of contractor personnel and equipment.

(iv) Collect information on and refer to the appropriate Government agency offenses, arrests, and incidents of alleged misconduct committed by contractor personnel on or off-duty.

(v) Collect and maintain information relating to CAAF and selected non-CAAF kidnappings, injuries, and deaths.

(vi) Identify the minimum standards for conducting and processing background checks, and for issuing access badges to HN, LN, and TCN personnel employed, directly or indirectly, through Government-awarded contracts.

(vii) Remove CAAF from the designated operational area who do not meet medical deployment standards, whose contract period of performance has expired, or who are noncompliant with contract requirements.

(viii) Designate additional contractor personnel not otherwise covered by personnel recovery policy for personnel recovery support in accordance with DoD Directive 3002.01E.

(ix) Ensure that contract oversight plans are developed, and that adequate personnel to assist in contract administration are identified and requested, in either a separate contractor management plan as an annex of plans and orders and/or within appropriate parts of plans and orders.

(x) Develop a security plan for the protection of contingency contractor personnel according to paragraph (d)(5) of §156.8.

(xi) Develop and implement theater business clearance and, if required, Contract Administration Delegation policies and procedures to ensure visibility of and a level of control over systems support and external support contracts providing or delivering contracted support in contingency operations.

(17) Enforce the individual arming policy and use of private security contractors in accordance with 32 CFR part 159 and DoD Directive 5210.56 (see *http://www.dtic.mil/ whs/directives/corres/pdf/521056p.pdf*).

(18) Establish a process for reviewing exceptions to medical standards (waivers) for the conditions in paragraph (j) of §158.7, including a mechanism to track and archive all approved and denied waivers and the medical conditions requiring waiver. Additionally, serve as the final approval/disapproval authority for all exceptions to this policy, except in special operations where the Theater Special Operations Command (TSOC) commander has the final approval or disapproval authority.

(19) Establish mechanisms for ensuring contractors are required to report offenses alleged to have been committed by or against contractor personnel to appropriate investigative authorities.

(20) Assign responsibility for providing victim and witness protection and assistance to contractor personnel in connection with alleged offenses.

(21) Ensure applicable predeployment, deployment, in-theater management, and redeployment guidance and procedures are readily available and accessible by planners, requiring activities, contracting officers,

contractors, contractor personnel and other interested parties on a Web page, and related considerations and requirements are integrated into contracts through contract terms, consistent with security considerations and requirements.

(22) Ensure OCS preparation of the battlefield is vetted with intelligence agencies when appropriate.

(23) Integrate OCS planning with operational planning across all primary and special staff sections.

(n) The functional CCDRs utilizing OCS shall ensure their Commands follow the procedures in this part and applicable operational-specific guidance provided by the supported geographic CCDR.

§ 158.6 Procedures.

(a) *Requirements, Relationships, and Restrictions.* In implementing this part, the Heads of DoD Components shall abide by applicable laws, regulations, DoD policy, and international agreements as they relate to contractor personnel supporting applicable contingency operations.

(1) *Status of Contractor Personnel.* (i) Pursuant to applicable law, contracted services may be utilized in applicable contingency operations for all functions not inherently governmental. Contractor personnel may be utilized in support of such operations in a noncombat role as long as contractor personnel residing with the force in foreign contingencies have been designated as CAAF by the force they accompany and are provided with an appropriate identification card pursuant to the Geneva Convention Relative to the Treatment of Prisoners of War (see *http://www.icrc.org/ ihl.nsf/FULL/375*). If captured during international armed conflict, contractors with CAAF status are entitled to prisoner of war status. Some contractor personnel may be covered by the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (see *http://www.icrc.org/ihl.nsf/ 385ec082b509e76c41256739003e636d/ 6756482d86146898c125641e004aa3c5*) should they be captured during armed conflict. All contractor personnel may be at risk of injury or death incidental to enemy actions while supporting military operations. CAAF status does not apply to contractor personnel supporting domestic contingencies.

(ii) Contractor personnel may support applicable contingency operations such as by providing communications support; transporting munitions and other supplies; performing maintenance functions for military equipment; providing private security services; providing foreign language interpretation and translation services, and providing logistic services such as billeting and messing. Each service to be performed by contractor personnel in applicable contingency operations shall be reviewed on a case-by-case basis in consultation with the cognizant manpower official and servicing legal office to ensure compliance with DoD Instruction 1100.22 and relevant laws and international agreements.

(2) *Local and Third-Country Laws.* Subject to the application of international agreements, all contingency contractor personnel must comply with applicable local and third country laws. Contractor personnel may be hired from U.S., LN, or third country sources and their status may change (*e.g.*, from non-CAAF to CAAF), depending on where they are detailed to work by their employer or on the provisions of the contract. The CCDRs, as well as subordinate commanders and Service component commanders, and the Directors of the Defense Agencies and DoD Field Activities should be cognizant of limiting factors regarding the employment of LN and TCN personnel. Limiting factors may include imported labor worker permits; workforce and hour restrictions; medical, life, and disability insurance coverage; taxes, customs, and duties; cost of living allowances; hardship differentials; access to classified information; and hazardous duty pay.

(3) *U.S. Laws.* CAAF, with some exceptions, are subject to U.S. laws and Government regulations. For example, all U.S. citizen and TCN CAAF may be subject to prosecution pursuant to Federal law including, but not limited to, 18 U.S.C. 3261 (also known and hereinafter referred to as ''The Military Extraterritorial Jurisdiction Act of

2000 (MEJA), as amended''). MEJA extends U.S. Federal criminal jurisdiction to certain defense contractor personnel for offenses committed outside U.S. territory. Additionally, CAAF are subject to prosecution pursuant to 10 U.S.C. chapter 47 (also known and hereinafter referred to as ''The Uniform Code of Military Justice (UCMJ)'') in accordance with Secretary of Defense Memorandum (''UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations,'' March 10, 2008). Other laws may allow prosecution of offenses by contactor personnel, such as 18 U.S.C. 7(9). Immediate consultation with the servicing legal office and the contracting officer is required in all cases of suspected MEJA and/or UCMJ application to conduct by CAAF personnel, especially in non-combat operations or in undeclared contingencies.

(4) *Contractual Relationships.* The contract is the only legal basis for the relationship between the DoD and the contractor. The contract shall specify the terms and conditions, to include minimum acceptable professional standards, under which the contractor is to perform, the method by which the contractor will be notified of the deployment procedures to process contractor personnel, and the specific support relationship between the contractor and the DoD. The contract shall contain standardized clauses to ensure efficient deployment, accountability, visibility, protection, authorized levels of health service, and other support, sustainment, and redeployment of contractor personnel. It shall also specify the appropriate flow-down of provisions and clauses to subcontracts, and shall state that the service performed by contractor personnel is not considered to be active duty or active service in accordance with DoD Directive 1000.20 (see *http://www.dtic.mil/whs/directives/corres/pdf/100020p.pdf*) and 38 U.S.C. 106.

(5) *Restrictions on Contracting Inherently Governmental Functions.* Inherently governmental functions and duties are barred from private sector performance in accordance with DoD Instruction 1100.22, 48 CFR 207.503, 48 CFR 7.5, Public Law (Pub. L.) 105–270, and Office of Management and Budget Circular A–76 (see *http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction*). As required by 48 CFR 7.503(e), 48 CFR 207.503, and Deputy Secretary of Defense Memorandum, ''In-sourcing Contracted Services—Implementation Guidance'' dated May 28, 2009, contracting officials shall request requiring officials to certify in writing that functions to be contracted (or to continue to be contracted) are not inherently governmental. Requiring officials shall determine whether functions are inherently governmental based on the guidance in DoD Instruction 1100.22.

(6) *Restrictions on Contracting Functions Exempted From Private Sector Performance.* As required by 48 CFR 207.503 and Deputy Secretary of Defense Memorandum, ''In-sourcing Contracted Services—Implementation Guidance,'' May 28, 2009, contracting officials shall request requiring officials to certify in writing that functions to be contracted (or continue to be contracted) are not exempted from private sector performance. Requiring officials shall determine whether functions are exempted from private sector performance based on the guidance in DoD Instruction 1100.22.

(7) *Requirements for Contracting Commercial Functions.* As required by 10 U.S.C. 2463 and Deputy Secretary of Defense Memorandum, ''In-sourcing Contracted Services—Implementation Guidance,'' in advance of contracting for commercial functions or continuing to contract for commercial functions, requiring officials shall consider using DoD civilian employees to perform the work. Requiring officials shall determine whether DoD civilian employees should be used to perform the work based on the guidance in Deputy Secretary of Defense Memorandum, ''Insourcing Contracted Services—Implementation Guidance'' and Deputy Secretary of Defense Memorandum ''Implementation of Section 324 of the National Defense Authorization Act for Fiscal Year 2008 (FY 2008 NDAA)—Guidelines and Procedures on In-Sourcing New and Contracted Out Functions,'' April, 4, 2008.

(8) *International Laws, Local Laws, and Host Nation (HN) Support Agreements.* Planners and requiring activities, in coordination with contracting officers shall take international laws, local laws, and HN support agreements into account when planning for contracted support, through assistance and coordination of the staff judge advocates (SJAs) office of the geographic CCDRs; the Commander, United States Special Operations Command (CDRUSSOCOM); the Commander, United States Transportation Command (CDRUSTRANSCOM); and the Service component commander SJA offices. These laws and support agreements may affect contracting by restricting the services to be contracted, limiting contracted services to LN or HN contractor sources or, in some cases, by prohibiting contractor use altogether.

(9) *Status-of-Forces Agreements (SOFAs).* Planners and requiring activities, in coordination with contracting officers shall review applicable SOFAs and related agreements to determine their affect on the status and use of contractors in support of applicable contingency operations, with the assistance and coordination of the geographic CCDR SJA offices.

(b) *OCS Planning.* Combatant and subordinate JFCs determine whether contracted support capabilities are appropriate in support of a contingency. When contractor personnel and equipment are anticipated to support military operations, military planners will develop orchestrated, synchronized, detailed, and fully developed CSIPs and CMPs as components CONPLANs and OPLANs, in accordance with appropriate strategic planning guidance. CONPLANS without TPFDD and OPORDs shall contain CSIP- and CMP-like guidance to the extent necessary as determined by the CCDR. OCS planning will, at a minimum, consider HN support agreements, acquisition cross-servicing agreements, and Military logistics support agreements.

(1) *CSIPs.* All CCDR CONPLANs with TPFDD and OPLANs shall include a separate CSIP (*i.e.,* Annex W) in accordance with Chairman of the Joint Chiefs of Staff Manual 3122.02C and Joint Publication 4–0, ''Joint Logistics,'' July 18, 2008. Further, plans and orders should contain additional contract support guidance, as appropriate, in applicable annexes and appendixes within the respective plans (*e.g.,* contracted bulk fuel support guidance should be addressed in the Class III(B) Appendix to the Logistic Annex). Service component commanders shall provide supporting CSIPs as directed by the CCDR.

(2) *CMPs.* All CCDR CONPLANs with TPFDD and OPLANs shall include a separate CMP and/or requisite contractor management requirements document in the applicable appendix or annex of these plans (*e.g.,* private security contractor rules for the use of force should be addressed in the Rules of Engagement Appendix to the Concept of the Operation Annex) in accordance with Chairman of the Joint Chiefs of Staff Manual 3122.02C and Joint Publication 4–0, ''Joint Logistics,'' July 18, 2008. Service component commanders shall provide supporting CMPs as directed by the CCDR.

(3) *Continuation of Essential Contractor Services.* To ensure that critical capabilities are maintained, it is necessary to assess the risk of premature loss of mission-essential contracted support. Supported and supporting commanders shall plan for the mitigation from the risk of premature loss of contingency contractor personnel who are performing essential contractor services. Planning for continuation of essential contractor services during applicable contingency operations includes:

(i) Determining all services provided overseas by defense contractors that must continue during an applicable contingency operation. Contracts shall obligate defense contractors to ensure the continuity of essential contractor services during such operations.

(ii) Developing mitigation plans for those tasks identified as essential contractor services to provide reasonable assurance of continuation during crisis conditions. These mitigation plans should be developed as part of the normal CSIP development process.

(iii) Ensuring the Secretaries of the Military Departments and the geographic CCDRs plan for the mitigation from the risk of premature loss of contingency contractor personnel who are

performing essential contractor services. When the cognizant DoD Component Commander or geographic CCDR has a reasonable doubt about the continuation of essential services by the incumbent contractor during applicable contingency operations, the commander shall prepare a mitigation plan for obtaining the essential services from alternative sources (military, DoD civilian, HN, or other contractor(s)). This planning requirement also applies when the commander has concerns that the contractor cannot or will no longer fulfill the terms of the contract:

(A) Because the threat level, duration of hostilities, or other factors specified in the contract have changed significantly;

(B) Because U.S., international, or local laws; HN support agreements; or SOFAs have changed in a manner that affect contract arrangements; or

(C) Due to political or cultural reasons.

(iv) Encouraging contingency contractor personnel performing essential contractor services overseas to remain in the respective operations area.

(4) *Requirements for Publication.* CCDRs shall make OCS planning factors, management policies, and specific contract support requirements available to affected contingency contractor personnel. To implement the OCS-related requirements of DoD Directive 1100.4 (see *http://www.dtic.mil/ whs/directives/corres/ pdf/110004p.pdf*), DoD Instruction 1100.19 (see *http://www.dtic.mil/ whs/ directives/corres/ pdf/110019p.pdf*), DoD Directive 5205.02 (see *http:// www.dtic.mil/ whs/directives/corres/ pdf/ 520502p.pdf*), the mandated CCDR Web site at *http://www.acq.osd.mil/ dpap/pacc/ cc/areas_of_ responsibility.html* shall include the information in paragraphs (b)(4)(i) through (b)(4)(ix) of this section (the data owner must review this information for security classification and OPSEC considerations prior to its posting).

(i) Theater Business Clearance and Contract Administration Delegation requirements for external support and systems support contracts executing or delivering contracted support in the CCDR's AOR (implemented at the CCDR's discretion).

(ii) Restrictions imposed by applicable international and local laws, SOFAs, and HN support agreements.

(iii) CAAF-related deployment requirements and theater reception.

(iv) Reporting requirements for accountability of contractor personnel and visibility of contracts.

(v) OPSEC plans and restrictions.

(vi) Force protection policies.

(vii) Personnel recovery procedures.

(viii) Availability of medical and other Government-furnished support.

(ix) Redeployment procedures.

(5) *Implementing OCS Plan Decisions Into Contracts.* (i) Specific contract-related considerations and requirements set forth in Annex Ws of CONPLANs with TPFDD and OPLANs shall be reflected and addressed in CCDR policies (*e.g.*, Theater Business Clearance/Contract Administration Delegation) and orders that apply to contractors and their personnel, maintained on CCDR OCS Web pages and integrated into contracts performing or delivering in a CCDR area of responsibility. When such CCDR policies potentially affect contracts other than those originated in the CCDR AOR, the CCDR should consult the contingency contracting section of the Office of the Director, DPAP, for advice on how best to implement these policies. All contracted services in support of contingency operations shall be included and accounted for in accordance with 10 U.S.C. 235 and 2330a. This accounting shall be completed by the operational CCDR requiring the service.

(ii) When making logistics sustainability recommendations, the DoD Components and acquisition managers shall consider the requirements of DoD Instruction 5000.02 (see *http:// www.dtic.mil/whs/ directives/corres/pdf/ 500002p.pdf*) and paragraph (a)(5) of this section. Early in the contingency or crisis action planning process, they shall coordinate with the affected supported and supporting commands any anticipated requirements for contractor logistics support arrangements that may affect existing CONPLANs, OPLANs, and OPORDs. As part of the supporting plans, supporting organizations (Service components, defense

agencies, others) must provide adequate data (*e.g.*, estimates of the numbers of contractors and contracts and the types of supplies or services that will be required to support their responsibilities within the OPLAN) to the supported command planners to ensure the supported commander has full knowledge of the magnitude of contracted support required for the applicable contingency operation.

(6) *TPFDD Development.* Deployment data for CAAF and their equipment supporting the Military Services must be incorporated into TPFDD development and deployment execution processes in accordance with Chairman of the Joint Chiefs of Staff Manual 3122.02C (see *https://ca.dtic.mil/cjcs_directives/cjcs/ manuals.htm*). The requirement to provide deployment data shall be incorporated into known system support and external support contracts and shall apply regardless of whether defense contractors will provide or arrange their own transportation.

(c) *Deployment and Theater Admission Requirements and Procedures.* The considerations in this section are applicable during CAAF deployment processing.

(1) *General.* (i) The CCDR or subordinate JFC shall provide specific deployment and theater admission requirements to the DoD Components for each applicable contingency operation. These requirements must be delineated in supporting contracts as explained in 48 CFR PGI 225.74. At a minimum, contracting officers shall ensure that contracts address operational area-specific contract requirements and the means by which the Government will inform contractors of the requirements and procedures applicable to a deployment.

(ii) A formally designated group, joint, or Military Department deployment center (*e.g.*, replacement center, Federal deployment center, unit deployment site) shall be used to conduct deployment and redeployment processing for CAAF, unless contractor-performed theater admission preparation is authorized according to paragraph (c)(5), or waived pursuant to paragraph (c)(15), of this section. However, a Government-authorized process that incorporates all the functions of a deployment center may be used if designated in the contract.

(2) *Country Entry Requirements.* Special area, country, and theater personnel clearance documents must be current in accordance with the DoD Foreign Clearance Guide (available at *https://www.fcg.pentagon.mil/*) and coordinated with affected agencies (*e.g.*, Intelligence Community agencies) to ensure that entry requirements do not impact accomplishment of mission requirements. CAAF employed in support of a DoD mission are considered DoD-sponsored personnel for DoD Foreign Clearance Guide purposes. Contracting officers shall ensure contracts include a requirement that CAAF must meet theater personnel clearance requirements and must obtain personnel clearances prior to entering applicable contingency operations. Contracts shall require CAAF to obtain proper identification credentials (*e.g.*, passport, visa) as required by the terms and conditions of the contract.

(3) *Accountability and Visibility of Contingency Contracts and Contractor Personnel.*

(i) DoD contracts and contractors supporting an applicable contingency operation shall be accountable and visible in accordance with this part, 48 CFR PGI 225.74, and section 862 of Public Law 110–181 (''National Defense Authorization Act for Fiscal Year 2008,'' January 28, 2008). Additionally, contract linguist utilization will be tracked using the Contract Linguist Enterprise-wide Database in accordance with DoD Directive 5160.41E. OCS requirements and contractor accountability and visibility must be preplanned and integrated into plans and OPORDs in accordance with Joint Publication 4–10 and Chairman of the Joint Chiefs of Staff Manual 3122.02C and U.S. citizen, U.S. legal alien contractor, LN, and TCN information provided in accordance with CJCS Manual 3150.13C (see *http://www.dtic.mil/cjcs_directives/cdata/ unlimit/m315013.pdf*).

(ii) As stated in the Deputy Under Secretary of Defense (Logistics and Materiel Readiness) and Deputy Under Secretary of Defense (Program Integration) Memorandum, ''Designation of

Synchronized Predeployment and Operational Tracker (SPOT) as Central Repository for Information on Contractors Deploying with the Force,'' January 25, 2007 (see *http://www2.centcom.mil/sites/ contracts/Synchronized%20 Predeployment %20and%20 Operational%20Tracker/ 01–SPOT%20DFARS% 20Deviation% 202007–00004, %2019%20MAR%2007.pdf*), SPOT was designated as the joint web-based database to assist the CCDRs in maintaining awareness of the nature, extent, and potential risks and capabilities associated with OCS for contingency operations, humanitarian assistance and peacekeeping operations, or military exercises designated by the CCDR. To facilitate integration of contingency contractors and other personnel as directed by the USD(AT&L) or the CCDR, and to ensure accountability, visibility, force protection, medical support, personnel recovery, and other related support can be accurately forecasted and provided, these procedures shall apply for establishing, maintaining, and validating the database:

(A) SPOT or its successor shall:

(*1*) Serve as the central repository for up-to-date status and reporting on contingency contractor personnel as directed by the USD(AT&L), 48 CFR 252.225–7040 and 48 CFR PGI 225.74, or the CCDR, as well as other Government agency contractor personnel as applicable.

(*2*) Track contract information for all DoD contracts supporting applicable contingency operations, as directed by the USD(AT&L), 48 CFR PGI 225.74 and Chairman of the Joint Chiefs of Staff Manual 3150.13C, or the CCDR. SPOT data elements are intended to provide planners and CCDRs an awareness of the nature, extent, and potential risks and capabilities associated with contracted support.

(*3*) Provide personnel accountability via unique identifier (*e.g.*, Electronic Data Interchange Personnel Identifier (EDI–PI)) of DoD contingency contractor personnel and other personnel as directed by the USD(AT&L), 48 CFR PGI 225.74, Chairman of the Joint Chiefs of Staff Manual 3150.13C, or the CCDR.

(*4*) Contain, or link to, minimum contract information (*e.g.*, contract number, contract category, period of performance, contracting agency and contracting office) necessary to establish and maintain accountability and visibility of the personnel in paragraph (c)(3)(ii)(A)*1.* of this section, to maintain information on specific equipment related to private security contracts, and the contract capabilities in contingency operations, humanitarian assistance, and peacekeeping operations, or military exercises designated by the CCDR.

(*5*) Comply with the personnel identity protection program requirements of DoD Directive 5205.02, DoD 5400.11–R (see *http://www.dtic.mil/whs/ directives/ corres/pdf/ 540011r.pdf*), and DoD 6025.18–R (see *http://www.dtic.mil/whs/ directives/ corres/pdf/ 602518r.pdf*); be consistent with the DoD Global Information Grid enterprise architecture in DoD Directive 8000.01 (see *http://www.dtic.mil/whs/ directives/corres/pdf/ 800001p.pdf*); and be compliant with DoD Directive 8320.02 (see *http://www.dtic.mil/whs/ directives/ corres/pdf/ 832002p.pdf*), DoD Directive 4630.05 (see *http://www.dtic.mil/whs/ directives/corres/pdf/ 463005p.pdf*), and DoD Directive 8500.01E (see *http://www.dtic.mil/ whs/directives/corres/ pdf/ 850001p.pdf*).

(B) All required data must be entered into SPOT or its successor before a contractor employee is permitted to deploy to or enter a military theater of operations. Contracting officers, through the terms of the contracts, shall require contractors to enter data before an employee's deployment and to maintain and update the information for all CAAF, as well as non-CAAF as directed by the USD(AT&L), 48 CFR PGI 225.74, or the CCDR. The contract shall require the contractor to use SPOT or its successor, to enter and maintain data on its employees.

(C) A summary of all DoD contract services or capabilities for all contracts that are awarded to support contingency, humanitarian assistance, and peacekeeping operations, to include theater, external, and systems support contracts, shall be entered into SPOT or its successor in accordance with 48 CFR 252.225–7040 and 48 CFR PGI 225.74.

(D) In accordance with applicable acquisition policy and regulations, all defense contractors awarded contracts that support applicable contingency operations shall be required, under the terms and conditions of each affected contract, to input employee data and maintain by-name accountability of designated contractor personnel in SPOT or its successor as required by 48 CFR 252.225–7040 and 48 CFR PGI 225.74. Contractors shall be required under the terms and conditions of their contracts to maintain policies and procedures for knowing the general location of their employees and to follow the procedures provided to them to submit up-to-date, real-time information reflecting all personnel deployed or to be deployed in support of contingency, humanitarian assistance, and peacekeeping operations. Prime contractors shall be required under the terms and conditions of their contract to follow the procedure provided to them to submit into SPOT or its successor, up-to-date, real-time information regarding their subcontractors at all tiers.

(E) In all cases, classified information responsive to the requirements of this part shall be reported and maintained on systems approved for the level of classification of the information provided.

(4) *LOA.* A SPOT-generated LOA shall be issued by the contracting officer or designee to all CAAF as required by the clause in 48 CFR subpart 252.225–7040 and selected non-CAAF (*e.g.*, LN private security contractors) as required under 48 CFR PGI 225.74 or otherwise designated by the CCDR. The contract shall require that all contingency contractor personnel who are issued an LOA will carry the LOA with them at all times. For systems authorized in accordance with paragraph (c)(3)(ii)(B) of this section, DoD Components shall coordinate with the SPOT program manager to obtain an LOA handled within appropriate security guidelines.

(5) *Deployment Center Procedures.*

(i) Affected contracts shall require that all CAAF process through a designated deployment center or a Government-authorized, contractor-performed deployment processing facility prior to deploying to an applicable contingency operation. Upon receiving the contracted company's certification that employees meet deployability requirements, the contracting officer or his/her representative will digitally sign the LOA. The LOA will be presented to officials at the deployment center. The deployment process shall be for, but not limited to:

(A) Verifying accountability information in SPOT or its successor.

(B) Issuing applicable Government-furnished equipment.

(C) Verifying medical and dental screening, including required military-specific vaccinations and immunizations (*e.g.*, anthrax, smallpox).

(D) Verifying and, when necessary, providing required training (*e.g.*, Geneva Conventions; law of armed conflict; general orders; standards of conduct; force protection; personnel recovery; first aid; operations security; anti-terrorism; counterintelligence reporting; the use of chemical, biological, radiological, nuclear (CBRN) protective ensemble), country and cultural awareness briefings, and other training and briefings as appropriate.

(ii) Affected contingency contracts shall require that, prior to deployment, contractors certify to the Government authorizing representative named in the contract that all required deployment processing actions have been completed for each individual.

(6) *CAAF Identification, Training, and Security Clearance Requirements.* Contracts shall require eligible CAAF to be issued an identification card with the Geneva Conventions Accompanying the Force designation in accordance with DoD Instruction 1000.13 (see *http://www.dtic.mil/whs/ directives/corres/pdf/100013p.pdf*) and DTM 08–003 (see *http://www.dtic.mil/ whs/directives/corres/ pdf/DTM-08-003.pdf*). CAAF shall be required to present their SPOT generated LOA as proof of eligibility at the time of ID card issuance. All CAAF shall receive training regarding their status under the law of war and the Geneva Convention. In addition and to the extent necessary, the contract shall require the defense contractor to provide personnel who have the appropriate security clearance or are able to satisfy

the appropriate background investigation to obtain access required for the applicable contingency operation.

(7) *Government Support.* Generally, contingency contracts shall require that contractors provide all life, mission, and administrative support to their employees necessary to perform the contract in accordance with DoD Instruction 4161.02 (see *http://www.dtic.mil/whs/directives/corres/pdf/416102p.pdf*) and CCDR guidance as posted on the CCDR OCS Web site. As part of preparing an acquisition requirement, the requiring activity will include an estimate of the Government support that is required to be provided to CAAF and selected non-CAAF in accordance with 48 CFR 4.1301, 4.1303, 52.204–9, 7.5, 7.503(e), 2.101, and 3.502 and 48 CFR PGI 225.74. The requiring activity will confirm with theater adjudication authorities that the Government has the capacity, capability, and willingness to provide the support. However, in many contingency operations, especially those in which conditions are austere, uncertain, and/or non-permissive, the contracting officer may decide it is in the interest of the Government to allow for selected life, mission, medical, and administrative support to some contingency contractor personnel. Prior to awarding the contract, the contracting officer will request the requiring activity to verify that proper arrangements for Government support at the deployment center and within the designated operational area have been made. The contract shall specify the level of Government-furnished support to be provided to CAAF and selected non-CAAF and what support is reimbursable to the Government. The requiring activity will ensure that approved GFS is available.

(8) *Medical Preparation.* (i) In accordance with §158.7 of this part, contracts shall require that contractors provide medically and physically qualified contingency contractor personnel to perform duties in applicable contingency operations as outlined in the contract. Any CAAF deemed unsuitable to deploy during the deployment process due to medical or dental reasons will not be authorized to deploy. The Secretary of Defense may direct immunizations as mandatory for CAAF performing DoD-essential contractor services in accordance with Joint Publication 4–0, ''Joint Logistics'', and Chairman of the Joint Chiefs of Staff Manual 3150.13C. For CAAF who are U.S. citizens, contracts shall require contractors to make available the medical and dental records (including current panographic x-ray) of the deploying employees who grant release authorization for this purpose, according to contract terms based on this section, DoD Directive 6485.02E (see *http://www.dtic.mil/whs/directives/corres/pdf/648502p.pdf*), applicable joint force command surgeon guidance, and relevant Military Department policy.

(ii) Government personnel cannot force a contractor employee to receive an immunization or disclose private medical records against his or her will; therefore, particularly for medical requirements that arise after contract award, the contracting officer will allow contractors time to notify and/or hire employees who are willing to meet Government medical requirements and disclose their private information.

(iii) Medical threat pre-deployment briefings will be provided to all CAAF to communicate health risks and countermeasures in the designated operational area in accordance with DoD Instruction 6490.03 (see *http://www.dtic.mil/whs/directives/corres/pdf/649003p.pdf*). Health readiness, force health protection capability, either as a responsibility of the contractor or the DoD Components, will be fully delineated in plans, orders, and contracts to ensure appropriate medical staffing in the operational area. Health surveillance activities shall also include plans for contingency contractor personnel who are providing essential contractor services (as detailed in DoD Directive 6490.02E (see *http://www.dtic.mil/whs/directives/corres/pdf/649002Ep.pdf*)). Deoxyribonucleic acid (DNA) collection and other medical requirements are further addressed in §158.7 of this part.

(9) *Individual Protective Equipment (IPE).* When necessary and directed by CCDR, the contracting officer will include language in the contract authorizing CAAF and selected non-CAAF, as designated by the CCDR, to be issued

military IPE (*e.g.*, CBRN protective ensemble, body armor, ballistic helmet) in accordance with DoD Directive 1100.4. This equipment shall typically be issued at the deployment center, before deployment to the designated operational area, and must be accounted for and returned to the Government or otherwise accounted for in accordance with appropriate DoD Component standing regulations (including DoD Instruction 4161.2 (see *http://www.dtic.mil/whs/ directives/corres/pdf/416102p.pdf*), directives, instructions, and supplementing publications). It is important to plan and resource IPE as required by the geographic CCDR or subordinate JFC, and the terms of the contract. Training on the proper care, fitting, and maintenance of issued protective equipment will be provided as part of contractor deployment training. This training will include practical exercises within the context of the various mission-oriented protective posture levels. When a contractor is required under the terms and conditions of the contract to provide IPE, such IPE shall meet minimum standards as defined by the contract.

(10) *Clothing*. Defense contractors or their personnel are responsible for providing their own personal clothing, including casual and working clothing required by the assignment. Generally, commanders shall not issue military clothing to contractor personnel or allow the wearing of military or military look-alike uniforms. However, a CCDR or subordinate JFC deployed forward may authorize contractor personnel to wear standard uniform items for operational reasons. Contracts shall require that this authorization be in writing and maintained in the possession of authorized contractor personnel at all times. When commanders issue any type of standard uniform item to contractor personnel, care must be taken to ensure, consistent with force protection measures, that contractor personnel are distinguishable from military personnel through the use of distinctive patches, arm bands, nametags, or headgear.

(11) *Weapons*. Contractor personnel shall not be authorized to possess or carry firearms or ammunition during applicable contingency operations except as provided in paragraphs (d)(5) and (d)(6) of this section and in 32 CFR part 159. The contract shall provide the terms and conditions governing the possession of firearms.

(12) *Training*. Joint training policy and guidance for the Military Services, including DoD contractors, is provided in CJCS Instruction 3500.01F (see *http://www.dtic.mil/doctrine/ training/cjcsi3500_01f.pdf*). Standing training requirements shall be placed on the CCDR OCS Web sites for reference by contractors. Training requirements that are specific to the operation shall be placed on the CCDR Web sites immediately after a declared contingency so contracting officers can incorporate them into the appropriate contracts as soon as possible. Training requirements must be contained or incorporated by reference in contracts employing contractor personnel in support of an applicable contingency operation. Training requirements include specific training requirements established by the CCDR and training required in accordance with this part, 32 CFR part 159, DoD Directive 2000.12 (see *http://www.dtic.mil/whs/ directives/corres/pdf/200012p.pdf*), and DoD Instruction 2000.16 (see *http://www.dtic.mil/whs/ directives/corres/pdf/ 200016p.pdf* and DoD Instruction 1300.23 (see *http://www.dtic.mil/whs/ directives/corres/pdf/130023p.pdf*).

(13) *Legal Assistance*. Individual contractor personnel are responsible to have their personal legal affairs in order (including preparing and completing powers of attorney, wills, trusts, estate plans, etc.) before reporting to deployment centers. Contractor personnel are not entitled to military legal assistance either in-theater or at the deployment center.

(14) *Contractor Integration*. It is critical that CAAF brought into an operational area are properly integrated into the military operation through a formal reception process. This shall include, at a minimum, ensuring as they move into and out of the operational area, and commensurate with local threat levels, that they:

(i) Have met theater entry requirements and are authorized to enter the theater.

(ii) Are accounted for.

(iii) Possess any required IPE, including CBRN protective ensemble.

(iv) Have been authorized any required Government-furnished support and force protection.

(15) *Waivers.* For contract support in the operational area that is required for less than 30 consecutive days, the CCDR or designee may waive a portion of the formal procedural requirements in paragraph (c)(5) of this section, which may include waiving the requirement for processing through a deployment center. However, the requirements to possess proper identification cards and to establish and maintain accountability and visibility for all defense contractors in accordance with applicable policy shall not be waived, nor shall any medical requirement be waived without the prior approval of qualified medical personnel. If contingency contractor personnel are authorized to be armed, the requirements of paragraphs (d)(5) and (d)(6) of this section cannot be waived.

(d) *Contractor In-Theater Management Requirements.* The DoD Components shall adhere to the in-theater management policies of this section in managing contingency contractor personnel in support of applicable contingency operations.

(1) *Reception.* All CAAF shall be processed into the operational area through a designated reception site. The site shall verify, based upon a visual inspection of the LOA, that contractor personnel are entered into SPOT or its successor, and verify that personnel meet theater-specific entry requirements. Contractor personnel already in the designated operational area when a contingency is declared must report to the appropriate designated reception site as soon as it is operational. If any CAAF does not have the proper documentation, the person will be refused entry into the theater, and the contracting officer will notify the contractor to take action to resolve the reason for the lack of proper documentation for performing in that area. Should the contractor fail to take that action, the person shall be sent back to his or her departure point, or directed to the Service component command or Defense Agency responsible for that specific contract for theater entrance processing.

(2) *Contractor Use Restrictions.* CCDRs, through their respective contracting officers or their representatives, may place specific restrictions on locations or timing of contracted support based on the prevailing operational situation, in coordination with subordinate commanders and the applicable Defense Agencies.

(3) *Contractor Security Screening.* Contractor screening requirements for CAAF and non-CAAF who require access to U.S. facilities will be integrated into OPSEC programs and plans.

(4) *Contractor Conduct and Discipline.* Terms and conditions of contracts shall require that CAAF comply with theater orders, applicable directives, laws, and regulations, and that employee discipline is maintained. Non-CAAF who require base access will be directed to follow base force protection and security-related procedures as applicable.

(i) Contracting officers are the legal link between the requiring activity and the contractor. The contracting officer may appoint a designee (usually a COR) as a liaison between the contracting officer and the contractor and requiring activity. This designee monitors and reports contractor performance and requiring activity concerns to the contracting officer. The requiring activity has no direct contractual relationship with or authority over the contractor. However, the ranking military commander may, in emergency situations (*e.g.*, enemy or terrorist actions or natural disaster), urgently recommend or issue warnings or messages urging that CAAF and non-CAAF personnel take emergency actions to remove themselves from harm's way or take other appropriate self-protective measures.

(ii) The contractor is responsible for disciplining contingency contractor personnel. However, in accordance with paragraph (h)(1) of 48 CFR 252.225–7040, the contracting officer may direct the contractor, at its own expense, to remove and replace any contingency contractor personnel who jeopardize or

interfere with mission accomplishment, or whose actual field performance (certification/professional standard) is well below that stipulated in the contract, or who fail to comply with or violate applicable requirements of the contract. Such action may be taken at Government discretion without prejudice to its rights under any other provision of the contract, including the Termination for Default. A commander also has the authority to take certain actions affecting contingency contractor personnel, such as the ability to revoke or suspend security access or impose restrictions from access to military installations or specific worksites.

(iii) CAAF, with some restrictions (*e.g.*, LN CAAF are not subject to MEJA), are subject to prosecution under MEJA and UCMJ in accordance with 18 U.S.C. 7(9), 2441, and 3261 and Secretary of Defense Memorandum, ''UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations,'' March 10, 2008. Commanders possess significant authority to act whenever criminal activity is committed by anyone subject to MEJA and UCMJ that relates to or affects the commander's responsibilities. This includes situations in which the alleged offender's precise identity or actual affiliation is to that point undetermined. Secretary of Defense Memorandum, ''UCMJ Jurisdiction Over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving With or Accompanying the Armed Forces Overseas During Declared War and in Contingency Operations,'' March 10, 2008, sets forth the scope of this command authority in detail. Contracting officers will ensure that contractors are made aware of their status and liabilities as CAAF and the required training requirements associated with this status. Subject to local or HN law, SOFA, and the jurisdiction of the Department of State (*e.g.*, consulate or chief of mission) over civilians in another country, commanders retain authority to respond to an incident, restore safety and order, investigate, apprehend suspected offenders, and otherwise address the immediate needs of the situation.

(iv) The Department of Justice may prosecute misconduct under applicable Federal laws, including MEJA and 18 U.S.C. 2441. Contingency contractor personnel are also subject to the domestic criminal laws of the local nation absent a SOFA or international agreement to the contrary. When confronted with disciplinary problems involving contingency contractor personnel, commanders shall seek the assistance of their legal staff, the contracting officer responsible for the contract, and the contractor's management team.

(v) In the event of an investigation of reported offenses alleged to have been committed by or against contractor personnel, appropriate investigative authorities shall keep the contracting officer informed, to the extent possible without compromising the investigation, if the alleged offense has a potential contract performance implication.

(5) *Force Protection and Weapons Issuance.* CCDRs shall develop security plans for protection of CAAF and selected non-CAAF (*e.g.*, those working on a military facility or as otherwise determined by the operational commander) in locations where the civil authority is either insufficient or illegitimate, and the commander determines it is in the interests of the Government to provide security because the contractor cannot obtain effective private security services; such services are unavailable at a reasonable cost; or threat conditions necessitate security through military means.

(i) In appropriate cases, the CCDR may provide security through military means commensurate with the level of security provided DoD civilians. Specific security measures shall be mission and situation dependent as determined by the CCDR and provided to the contracting officer. The contracting officer shall include in the contract the level of protection to be provided to contingency contractor personnel as determined by the CCDR or subordinate JFC. Specific procedures for determining requirements for and integrating contractors into the JOA force protection structure will be placed on the geographic CCDR Web sites.

(ii) Contracts shall require all contingency contractor personnel to comply with applicable CCDR and local commander force protection policies. Contingency contractor personnel working within a U.S. Military facility or in close proximity of U.S. Military forces may receive incidentally the benefits of measures undertaken to protect U.S. forces in accordance with DoD Directive 2000.12 (see *http://www.dtic.mil/whs/directives/corres/pdf/200012p.pdf*). However, it may be necessary for contingency contractor personnel to be armed for individual self-defense. Procedures for arming for individual self-defense are:

(A) According to applicable U.S., HN, or international law; relevant SOFAs; international agreements; or other arrangements with local authorities and on a case-by-case basis when military force protection and legitimate civil authority are deemed unavailable or insufficient, the CCDR (or a designee no lower than the general/flag officer level) may authorize contingency contractor personnel to be armed for individual self-defense.

(B) The appropriate SJA to the CCDR shall review all applications for arming contingency contractor personnel on a case-by-case basis to ensure there is a legal basis for approval. In reviewing applications, CCDRs shall apply the criteria mandated for arming contingency contractor personnel for private security services provided in paragraph (d)(6) of this section and 32 CFR part 159. In such cases, the contractor will validate to the contracting officer, or designee, that weapons familiarization, qualification, and briefings regarding the rules for the use of force have been provided to contingency contractor personnel in accordance with CCDR policies. Acceptance of weapons by contractor personnel shall be voluntary and permitted by the defense contractor and the contract. In accordance with paragraph (j) of 48 CFR 252.225–7040, the contract shall require that the defense contractor ensure such personnel are not prohibited by U.S. law from possessing firearms.

(C) When armed for personal protection, contingency contractor personnel are only authorized to use force for individual self-defense. Unless immune from local laws or HN jurisdiction by virtue of an international agreement or international law, the contract shall include language advising contingency contractor personnel that the inappropriate use of force could subject them to U.S. and local or HN prosecution and civil liability.

(6) *Use of Contractor Personnel for Private Security Services*. If, consistent with applicable U.S., local, and international laws; relevant HN agreements, or other international agreements and this part, a defense contractor may be authorized to provide private security services for other than uniquely military functions as identified in DoD Instruction 1100.22. Specific procedures relating to contingency contractor personnel providing private security services are provided in 32 CFR part 159.

(7) *Personnel Recovery, Missing Persons, and Casualty Reporting*. (i) DoD Directive 3002.01E (see *http://www.dtic.mil/whs/directives/corres/pdf/300201p.pdf*) outlines the DoD personnel recovery program and Joint Publication 3–50 (see *http://www.dtic.mil/dpmo/laws_directives/documents/joint_pu_3_50.pdf*) details its doctrine. The DoD personnel recovery program covers all CAAF employees regardless of their citizenship. If a CAAF becomes isolated or unaccounted for, the contractor must expeditiously file a search and rescue incident report (SARIR) (available at *http://www.armystudyguide.com/content/the_tank/army_report_and_message_formats/search-and-rescue-inciden.shtml*) to the theater's personnel recovery architecture, *i.e.*, the component personnel recovery coordination cell or the Combatant Command joint personnel recovery center.

(ii) Upon recovery following an isolating event, a CAAF returnee shall enter the first of three phases of reintegration in DoD Instruction 2310.4 (see *http://www.dtic.mil/whs/directives/corres/pdf/231004p.pdf*). The additional phases of reintegration in DoD Instruction 2310.4 shall be offered to the returnee to ensure his or her physical and psychological well being while adjusting to the post-captivity environment.

(iii) Accounting for missing persons, including contractors, is addressed in

DoD Directive 2310.07E (see *http://www.dtic.mil/whs/directives/corres/pdf/231007p.pdf*). Evacuation of dependents of contractor personnel is addressed in DoD Directive 3025.14 (see *http://www.dtic.mil/whs/directives/corres/pdf/302514p.pdf*). All CAAF and non-CAAF casualties shall be reported in accordance with Joint Publication 1–0, ''Personnel Support to Joint Operations,'' October 16, 2006 (see *http://www.dtic.mil/doctrine/new_pubs/jp1_0.pdf*) and ASD(L&MR) Publication, ''Business Rules for the Synchronized Predeployment and Operational Tracker (SPOT),'' current edition. (See *http://www.acq.osd.mil/log/PS/spot.html*)

(8) *Mortuary Affairs.* (i) CAAF who die while in support of U.S. forces shall be covered by the DoD mortuary affairs program as described in DoD Directive 1300.22 (see *http://www.dtic.mil/whs/directives/corres/pdf/130022p.pdf*). Every effort shall be made to identify remains and account for un-recovered remains of contractors and their dependents who die in military operations, training accidents, and other multiple fatality incidents. The remains of CAAF who are fatalities resulting from an incident in support of military operations deserve and shall receive the same dignity and respect afforded military remains.

(ii) The DoD may provide mortuary support for the disposition of remains and personal effects at the request of the Department of State. The USD(P&R) shall coordinate this support with the Department of State to include cost reimbursement, where appropriate. The disposition of non-CAAF contractors (LNs and TCNs) shall be given the same dignity and respect afforded U.S. personnel. The responsibility for coordinating the transfer of these remains to the HN or affected nation resides with the geographic CCDR in coordination and conjunction with the Department of State through the embassies or the International Red Cross, as appropriate, and in accordance with applicable contract provisions.

(9) *Medical Support and Evacuation.* Theater-specific contract language to clarify available healthcare can be found on the CCDR Web sites. During applicable contingency operations in austere, uncertain, and/or hostile environments, CAAF may encounter situations in which they are unable to access medical support on the local economy. Generally, the DoD will only provide resuscitative care, stabilization, hospitalization at Level III medical treatment facilities (MTFs), and assistance with patient movement in emergencies where loss of life, limb, or eyesight could occur. Hospitalization will be limited to stabilization and short-term medical treatment with an emphasis on return to duty or placement in the patient movement system in accordance with DoD Instruction 6000.11 (see *http://www.dtic.mil/whs/directives/corres/pdf/600011p.pdf*). All costs associated with the treatment and transportation of CAAF to the selected civilian facility are reimbursable to the Government and shall be the responsibility of contractor personnel, their employers, or their health insurance providers. Nothing in this paragraph is intended to affect the allowability of costs incurred under a contingency contract. Medical support and evacuation procedures are:

(i) *Emergency Medical and Dental Care.* All CAAF will normally be afforded emergency medical and dental care if injured while supporting contingency operations. Additionally, non-CAAF employees who are injured while in the vicinity of U.S. forces will also normally receive emergency medical and dental care. Emergency medical and dental care includes medical care situations in which life, limb, or eyesight is jeopardized. Examples of emergency medical and dental care include examination and initial treatment of victims of sexual assault; refills of prescriptions for life-dependent drugs; repair of broken bones, lacerations, infections; and traumatic injuries to the dentition.

(ii) *Primary Care.* Primary medical or dental care normally will not be authorized or be provided to CAAF by MTFs. When required and authorized by the CCDR or subordinate JFC, this support must be specifically authorized under the terms and conditions of the contract and detailed in the corresponding LOA. Primary care is not authorized for non-CAAF employees.

Primary care includes routine inpatient and outpatient services, nonemergency evacuation, pharmaceutical support, dental services, and other medical support as determined by appropriate military authorities based on recommendations from the joint force command surgeon and on the existing capabilities of the forward-deployed MTFs.

(iii) *Long-Term Care*. The DoD shall not provide long-term care to contractor personnel.

(iv) *Quarantine or Restriction of Movement*. The CCDR or subordinate commander has the authority to quarantine or restrict movement of contractor personnel according to DoD Instruction 6200.03 (see *http://www.dtic.mil/whs/ directives/corres/pdf/ 620003p.pdf*).

(v) *Evacuation*. Patient movement of CAAF shall be performed in accordance with DoD Instruction 6000.11 (see *http://www.dtic.mil/whs/ directives/corres/pdf/ 600011p.pdf*). When CAAF are evacuated for medical reasons from the designated operational area to MTFs funded by the Defense Health Program, normal reimbursement policies will apply for services rendered by the facility. Should CAAF require medical evacuation outside the continental United States (OCONUS), the sending MTF shall assist CAAF in making arrangements for transfer to a civilian facility of their choice. When U.S. forces provide emergency medical care to non-CAAF, these patients will be evacuated or transported via national means (when possible) to their local medical systems.

(10) *Other Government-Furnished Support*. In accordance with DoD Component policy and consistent with applicable laws and international agreements, Government-furnished support may be authorized or required when CAAF and selected non-CAAF are deployed with or otherwise provide support in the theater of operations to U.S. Military forces deployed OCONUS. Types of support are listed in 48 CFR PGI 225.74 and may include transportation to and within the operational area, mess operations, quarters, phone service, religious support, and laundry.

(i) In operations where no reliable or local mail service is available, CAAF who are U.S. citizens will be authorized postal support in accordance with DoD 4525.6–M (see *http://www.dtic.mil/whs/ directives/corres/pdf/ 452506m.pdf*). CAAF who are not U.S. citizens will be afforded occasional mail service necessary to mail their pay checks back to their homes of record.

(ii) Morale, welfare, and recreation (MWR) and exchange services will be authorized for CAAF who are U.S. citizens in accordance with 10 U.S.C. 133. CAAF who are not U.S. citizens and non-CAAF are not authorized MWR and exchange services.

(e) *Redeployment Procedures*. The considerations in this section are applicable during the redeployment of CAAF.

(1) *Transportation Out of Theater*. When the terms and conditions of the contract state that the Government shall provide transportation out of theater:

(i) Upon completion of the deployment or other authorized release, the Government shall, in accordance with each individual's LOA, provide contractor employees transportation from the theater of operations to the location from which they deployed, unless otherwise directed.

(ii) Prior to redeployment from the AOR, the contractor employee, through their defense contractor, shall coordinate contractor exit times and transportation with CONUS Replacement Center (CRC) or designated reception site. Additionally, intelligence out-briefs must be completed and customs and immigration briefings and inspections must be conducted. CAAF are subject to customs and immigration processing procedures at all designated stops and their final destination during their redeployment. CAAF returning to the United States are subject to U.S. reentry customs requirements in effect at the time of reentry.

(2) *Post-Deployment Health Assessment*. In accordance with DoD Instruction 6490.03, contracts shall require that CAAF complete a post-deployment health assessment in the Defense Medical Surveillance System (DMSS) at the termination of the deployment (within 30 days of redeployment). These assessments will only be used by the

DoD to accomplish population-wide assessments for epidemiological purposes, and to help identify trends related to health outcomes and possible exposures. They will not be used for individual purposes in diagnosing conditions or informing individuals they require a medical followup. Diagnosing conditions requiring medical referral is a function of the contractor.

(3) *Redeployment Center Procedures.* In most instances, the deployment center/site that prepared the CAAF for deployment will serve as the return processing center. As part of CAAF redeployment processing, the deployment center/site personnel will screen contractor records, recover Government-issued identification cards and equipment, and conduct debriefings as appropriate. The amount of time spent at the return processing center will be the minimum required to complete the necessary administrative procedures.

(i) A special effort will be made to collect all CACs from returning deployed contractors.

(ii) Contractor employees are required to return any issued clothing and equipment. Lost, damaged, or destroyed clothing and equipment shall be reported in accordance with procedures of the issuing facility. Contractor employees shall also receive a post-deployment medical briefing on signs and symptoms of diseases to watch for, such as tuberculosis. As some countries hosting an intermediate staging base may not permit certain items to enter their borders, some clothing and equipment, whether issued by the contractor, purchased by the employee, or provided by the Government, may not be permitted to exit the AOR. In this case, alternate methods of accounting for Government-issued equipment and clothing will be used according to CCDR or JFC guidance and contract language.

(4) *Update to SPOT.* Contracting officers or their designated representative must verify that defense contractors have updated SPOT to reflect their employee's change in status within 3 days of his or her redeployment as well as close out the deployment and collect or revoke the LOA.

(5) *Transportation to Home Destination.* Transportation of CAAF from the deployment center/site to the home destination is the employer's responsibility. Government reimbursement to the employer for travel will be determined by the terms and conditions of the contract.

§ 158.7 Guidance for contractor medical and dental fitness.

(a) *General.*

(1) DoD contracts requiring the deployment of CAAF shall include medical and dental fitness requirements as specified in this section. Under the terms and conditions of their contracts, defense contractors shall provide personnel who meet such medical and dental requirements as specified in their contracts.

(2) The geographic CCDR will establish theater-specific medical qualifications. When exceptions to these standards are requested through the contracting officer, the geographic CCDR will establish a process for reviewing such exceptions and ensuring that a mechanism is in place to track and archive all approved and denied waivers, including the medical condition requiring the waiver.

(3) The geographic CCDR shall also ensure that processes and procedures are in place to remove contractor personnel in theater who are not medically qualified, once so identified by a healthcare provider. The geographic CCDR shall ensure appropriate language regarding procedures and criteria for requiring removal of contractor personnel identified as no longer medically qualified is developed, is posted on the CCDR OCS Web site, and also ensure contracting officers incorporate the same into all contracts for performance in the AOR.

(4) Unless otherwise stated in the contract, all pre-, during-, and post-deployment medical evaluations and treatment are the responsibility of the contractor.

(b) *Medical and Dental Evaluations.* (1) All CAAF deploying in support of a contingency operation must be medically, dentally, and psychologically fit for deployment as stated in DoD Directive 6200.04 (see *http://www.dtic.mil/ whs/ directives/corres/ pdf/620004p.pdf*). Fitness specifically includes the ability to accomplish the tasks and duties unique

to a particular operation and the ability to tolerate the environmental and operational conditions of the deployed location. Under the terms and conditions of their contracts, defense contractors will provide medically, dentally, and psychologically fit contingency contractor personnel to perform contracted duties.

(2) Just as military personnel must pass a complete health evaluation, CAAF shall have a similar evaluation based on the functional requirements of the job. All CAAF must undergo a medical and dental assessment within 12 months prior to arrival at the designated deployment center or Government-authorized contractor-performed deployment processing facility. This assessment should emphasize diagnosing cardiovascular, pulmonary, orthopedic, neurologic, endocrinologic, dermatologic, psychological, visual, auditory, dental, and other systemic disease conditions that may preclude performing the functional requirements of the contract, especially in the austere work environments encountered in some contingency operations.

(3) In accordance with DoD Instruction 6490.03, contracts shall require that CAAF complete a pre-deployment health assessment in the DMSS at the designated deployment center or a Government-authorized contractor-performed deployment processing facility. These assessments will only be used by the DoD to accomplish population-wide assessments for epidemiological purposes, and to help identify trends related to health outcomes and possible exposures. They will not be used for individual purposes in diagnosing conditions or informing individuals they require a medical followup. Diagnosing conditions requiring medical referral is a function of the contractor.

(4) In general, CAAF who have any of the medical conditions in paragraph (j) of this section, based on an individual assessment pursuant to DoD Instruction 6490.03, should not deploy.

(5) Individuals who are deemed not medically qualified at the deployment center or at any period during the deployment process based upon an individual assessment, or who require extensive preventive dental care (see paragraph (j)(2)(xxv) of this section) will not be authorized to deploy.

(6) Non-CAAF shall be medically screened when specified by the requiring activity, for the class of labor that is being considered (*e.g.*, LNs working in a dining facility).

(7) Contracts shall require contractors to replace individuals who develop, at any time during their deployment, conditions that cause them to become medically unqualified.

(8) In accordance with DoD Instruction 6490.03, contracts shall require that CAAF complete a post-deployment health assessment in DMSS at the termination of the deployment (within 30 days of redeployment).

(c) *Glasses and Contact Lenses.* If vision correction is required, contractor personnel will be required to have two pair of glasses. A written prescription may also be provided to the supporting military medical component so that eyeglass inserts for use in a compatible chemical protective mask can be prepared. If the type of protective mask to be issued is known and time permits, the preparation of eyeglass inserts should be completed prior to deployment. Wearing contact lenses in a field environment is not recommended and is at the contingency contractor employee's own risk due to the potential for irreversible eye damage caused by debris, chemical or other hazards present, and the lack of ophthalmologic care in a field environment.

(d) *Medications.* Other than force health protection prescription products (FHPPPs) to be provided to CAAF and selected non-CAAF, contracts shall require that contractor personnel deploy with a minimum 90-day supply of any required medications obtained at their own expense. Contractor personnel must be aware that deployed medical units are equipped and staffed to provide emergency care to healthy adults. They will not be able to provide or replace many medications required for routine treatment of chronic medical conditions, such as high blood pressure, heart conditions, and arthritis. The contract shall require contractor personnel to review both the amount of the medication and its suitability in the foreign area with their personal

physician and make any necessary adjustments before deploying. The contract shall require the contractor to be responsible for the re-supply of required medications.

(e) *Comfort Items.* The contract shall require that CAAF take spare hearing-aid batteries, sunglasses, insect repellent, sunscreen, and any other supplies related to their individual physical requirements. These items will not be provided by DoD sources.

(f) *Immunizations.* A list of immunizations, both those required for entry into the designated area of operations and those recommended by medical authorities, shall be produced for each deployment; posted to the geographic CCDR Web site or other venue, as appropriate; and incorporated in contracts for performance in the designated AOR.

(1) The geographic CCDR, upon the recommendation of the appropriate medical authority (*e.g.*, Combatant Command surgeon), shall provide guidance and a list of immunizations required to protect against communicable diseases judged to be a potential hazard to the health of those deploying to the applicable theater of operation. The Combatant Command surgeon of the deployed location shall prepare and maintain this list.

(2) The contract shall require that CAAF be appropriately immunized before completing the pre-deployment process.

(3) The Government shall provide military-specific vaccinations and immunizations (*e.g.*, anthrax, smallpox) during pre-deployment processing. However, the contract shall stipulate that CAAF obtain all other immunizations (*e.g.*, yellow fever, tetanus, typhoid, flu, hepatitis A and B, meningococcal, and tuberculin (TB) skin testing) prior to arrival at the deployment center.

(4) Theater-specific medical supplies and FHPPPs, such as anti-malarials and pyridostigmine bromide, will be provided to CAAF and selected non-CAAF on the same basis as they are to active duty military members. Additionally, CAAF will be issued deployment medication information sheets for all vaccines or deployment-related medications that are dispensed or administered.

(5) A TB skin test is required within 3 months prior to deployment. Additionally, the contract shall stipulate that CAAF and selected non-CAAF bring to the JOA a current copy of Public Health Service Form 791, ''International Certificate of Vaccination,'' (also known as ''shot record,'' available for purchase at *http://bookstore.gpo.gov/ collections/vaccination.jsp*).

(g) *Human Immunodeficiency Virus (HIV) Testing.* HIV testing is not mandatory for contingency contractor personnel unless specified by an agreement or by local requirements. HIV testing, if required, shall occur within 1 year before deployment.

(h) *Armed Forces Repository of Specimen Samples for the Identification of Remains (AFRSSIR).* For identification of remains purposes, all CAAF who are U.S. citizens shall obtain a dental panograph and provide a specimen sample suitable for DNA analysis prior to or during deployment processing. The DoD Components shall ensure that all contracts require CAAF who are U.S. citizens to provide specimens for AFRSSIR as a condition of employment according to DoD Instruction 5154.30 (see *http://www.dtic.mil/ whs/directives/corres/ pdf/515430p.pdf*). Specimens shall be collected and managed as provided in paragraphs (h)(1) through (h)(3) of this section.

(1) All CAAF who are U.S. citizens processing through a deployment center will have a sample collected and forwarded to the AFRSSIR for storage. Contracts shall require contractors to verify in SPOT or its successor that AFRSSIR has received the sample or that the DNA reference specimen sample has been collected by the contractor.

(2) If CAAF who are U.S. citizens do not process through a deployment center or the defense contractor is authorized to process its own personnel, the contract shall require that the contractor make its own arrangements for collection and storage of the DNA reference specimen through a private facility, or arrange for the storage of the specimen by contacting AFRSSIR. Regardless of what specimen collection and storage arrangements are made, all

defense contractors deploying CAAF who are U.S. citizens must provide the CAAF name and Social Security number, location of the sample, facility contact information, and retrieval plan to AFRSSIR. If AFRSSIR is not used and a CAAF who is a U.S. citizen becomes a casualty, the defense contractor must be able to retrieve identification media for use by the Armed Forces Medical Examiner (AFME) or other competent authority to conduct a medical-legal investigation of the incident and identification of the victim(s). These records must be retrievable within 24 hours for forwarding to the AFME when there is a reported incident that would necessitate its use for human remains identification purposes. The defense contractor shall have access to:

(i) Completed DD Form 93 or equivalent record.

(ii) Location of employee medical and dental records, including panograph.

(iii) Location of employee fingerprint record.

(3) In accordance with DoD Instruction 5154.30 (see *http://www.dtic.mil/ whs/ directives/corres/ pdf/515430p.pdf*), AFRSSIR is responsible for implementing special rules and procedures to ensure the protection of privacy interests in the specimen samples and any DNA analysis of those samples. Specimen samples shall only be used for the purposes outlined in DoD Instruction 5154.30. Other details, including retention and destruction requirements of DNA samples, are addressed in DoD Instruction 5154.30.

(i) *Pre-Existing Medical Conditions.* All evaluations of pre-existing medical conditions should be accomplished prior to deployment. Personnel who have pre-existing medical conditions may deploy if all of these conditions are met:

(1) The condition is not of such a nature that an unexpected worsening is likely to have a medically grave outcome or a negative impact on mission execution.

(2) The condition is stable and reasonably anticipated by the pre-deployment medical evaluator not to worsen during the deployment under contractor-provided medical care in-theater in light of the physical, physiological, psychological, environmental, and nutritional effects of the duties and location.

(3) Any required ongoing health care or medications must be available or accessible to the contractor, independent of the military health system, and have no special handling, storage, or other requirements (*e.g.*, refrigeration requirements and/or cold chain, electrical power requirements) that cannot be met in the specific theater of operations. Personnel must deploy with a minimum 90-day supply of prescription medications other than FHPPPs.

(4) The condition does not and is not anticipated to require duty limitations that would preclude performance of duty or to impose accommodation. (The nature of the accommodation must be considered. The Combatant Command surgeon (or his delegated representative) is the appropriate authority to evaluate the suitability of the individual's limitations in-theater.)

(5) There is no need for routine out-of-theater evacuation for continuing diagnostics or other evaluations.

(j) *Conditions Usually Precluding Medical Clearance.* (1) This section is not intended to be comprehensive. A list of all possible diagnoses and their severity that should not be approved would be too expansive to list in this part. In general, individuals with the conditions in paragraphs (j)(2)(i) through (j)(2)(xxx) of this section, based on an individual assessment pursuant to DoD Instruction 6490.03, will not normally be approved for deployment. The medical evaluator must carefully consider whether climate; altitude; nature of available food and housing; availability of medical, behavioral health, and dental services; or other environmental and operational factors may be hazardous to the deploying person's health because of a known physical or mental condition.

(2) Medical clearance for deployment of persons with any of the conditions in this section shall be granted only after consultation with the appropriate Combatant Command surgeon. The Combatant Command surgeon makes recommendations and serves as the geographic CCDR advisor; however, the

geographic CCDR is the final approval or disapproval authority except as provided in paragraph (k)(3) of this section. The Combatant Command surgeon can determine if adequate treatment facilities and specialist support is available at the duty station for:

(i) Physical or psychological conditions resulting in the inability to effectively wear IPE, including protective mask, ballistic helmet, body armor, and CBRN protective ensemble, regardless of the nature of the condition that causes the inability to wear the equipment if wearing such equipment may be reasonably anticipated or required in the deployed location.

(ii) Conditions that prohibit immunizations or use of FHPPs required for the specific deployment. Depending on the applicable threat assessment, required FHPPs, vaccines, and countermeasures may include atropine, epinephrine and/or 2-pam chloride autoinjectors, certain antimicrobials, antimalarials, and pyridostigmine bromide.

(iii) Any chronic medical condition that requires frequent clinical visits, that fails to respond to adequate conservative treatment, or that necessitates significant limitation of physical activity.

(iv) Any medical condition that requires durable medical equipment or appliances or that requires periodic evaluation and/or treatment by medical specialists not readily available in theater (*e.g.*, CPAC machine for sleep apnea).

(v) Any unresolved acute or chronic illness or injury that would impair duty performance in a deployed environment during the duration of the deployment.

(vi) Active tuberculosis or known blood-borne diseases that may be transmitted to others in a deployed environment. (For HIV infections, see paragraph (j)(2)(xvii) of this section.)

(vii) An acute exacerbation of a physical or mental health condition that could affect duty performance.

(viii) Recurrent loss of consciousness for any reason.

(ix) Any medical condition that could result in sudden incapacitation including a history of stroke within the last 24 months, seizure disorders, and diabetes mellitus type I or II, treated with insulin or oral hypoglycemic agents.

(x) Hypertension not controlled with medication or that requires frequent monitoring to achieve control.

(xi) Pregnancy.

(xii) Cancer for which the individual is receiving continuing treatment or that requires periodic specialty medical evaluations during the anticipated duration of the deployment.

(xiii) Precancerous lesions that have not been treated and/or evaluated and that require treatment and/or evaluation during the anticipated duration of the deployment.

(xiiii) Any medical condition that requires surgery or for which surgery has been performed that requires rehabilitation or additional surgery to remove devices.

(xv) Asthma that has a Forced Expiratory Volume-1 (FEV–1) of less than or equal to 50 percent of predicted FEV–1 despite appropriate therapy, that has required hospitalization at least 2 times in the last 12 months, or that requires daily systemic oral or injectable steroids.

(xvi) Any musculoskeletal condition that significantly impairs performance of duties in a deployed environment.

(xvii) HIV antibody positive with the presence of progressive clinical illness or immunological deficiency. The Combatant Command surgeon should be consulted in all instances of HIV seropositivity before medical clearance for deployment.

(xviii) Hearing loss. The requirement for use of a hearing aid does not necessarily preclude deployment. However, the individual must have sufficient unaided hearing to perform duties safely.

(xviiii) Loss of vision. Best corrected visual acuity must meet job requirements to safely perform duties.

(xx) Symptomatic coronary artery disease.

(xxi) History of myocardial infarction within 1 year of deployment.

(xxii) History of coronary artery bypass graft, coronary artery angioplasty, carotid endarterectomy, other arterial stenting, or aneurysm repair within 1 year of deployment.

(xxiii) Cardiac dysrhythmias or arrhythmias, either symptomatic or requiring medical or electrophysiologic control (presence of an implanted defibrillator and/or pacemaker).

(xxiv) Heart failure.

(xxv) Individuals without a dental exam within the last 12 months or who are likely to require dental treatment or reevaluation for oral conditions that are likely to result in dental emergencies within 12 months.

(xxvi) Psychotic and/or bipolar disorders. For detailed guidance on deployment-limiting psychiatric conditions or psychotropic medications, see ASD(HA) Memorandum ''Policy Guidance for Deployment-Limiting Psychiatric Conditions and Medications'' November 7, 2006 (see *http://www.ha.osd.mil/policies/2006/061107_deployment-limiting_psych_conditions_meds.pdf*).

(xxvii) Psychiatric disorders under treatment with fewer than 3 months of demonstrated stability.

(xxviii) Clinical psychiatric disorders with residual symptoms that impair duty performance.

(xxviiii) Mental health conditions that pose a substantial risk for deterioration and/or recurrence of impairing symptoms in the deployed environment.

(xxx) Chronic medical conditions that require ongoing treatment with antipsychotics, lithium, or anticonvulsants.

(k) *Exceptions to Medical Standards (Waivers).* If a contractor believes an individual CAAF employee with one of the conditions listed in paragraphs (j)(2)(i) through (j)(2)(xxx) of this section can accomplish his or her tasks and duties and tolerate the environmental and operational conditions of the deployed location, the contractor may request a waiver for that individual through the contracting officer or designee.

(1) Waivers are unlikely for contractor personnel and an explanation should be given as to why other persons who meet the medical standards could not be identified to fulfill the deployed duties. Waivers and requests for waivers will include a summary of a detailed medical evaluation or consultation concerning the medical condition(s). Maximization of mission accomplishment and the protection of the health of personnel are the ultimate goals. Justification will include statements indicating the CAAF member's experience, position to be placed in, any known specific hazards of the position, anticipated availability and need for care while deployed, and the benefit expected to accrue from the waiver.

(2) Medical clearance to deploy or continue serving in a deployed environment for persons with any of the conditions in paragraphs (j)(2)(i) through (j)(2)(xxx) of this section must have the concurrence by the Combatant Command surgeon, or his designee, who will recommend approval or disapproval to the geographic CCDR. The geographic CCDR, or his designee, is the final decision authority for approvals and disapprovals.

(3) For CAAF employees working with Special Operations Forces personnel who have conditions in paragraphs (j)(2)(i) through (j)(2)(xxx) of this section, medical clearance may be granted after consultation with the appropriate Theater Special Operations Command (TSOC) surgeon. The TSOC surgeon, in coordination with the Combatant Command surgeon and senior in-theater medical authority, will ascertain the capability and availability of treatment facilities and specialist support in the general duty area versus the operational criticality of the particular SOF member. The TSOC surgeon will recommend approval or disapproval to the TSOC Commander. The TSOC Commander is the final approval or disapproval authority.

PART 159—PRIVATE SECURITY CONTRACTORS OPERATING IN CONTINGENCY OPERATIONS

Sec.

159.1 Purpose.
159.2 Applicability and scope.
159.3 Definitions.
159.4 Policy.
159.5 Responsibilities.
159.6 Procedures.

AUTHORITY: Pub. L. 110–181; Pub. L. 110–417.

SOURCE: 76 FR 49655, Aug. 11, 2011, unless otherwise noted.

§ 159.1 Purpose.

This part establishes policy, assigns responsibilities and provides procedures for the regulation of the selection, accountability, training, equipping, and conduct of personnel performing private security functions under a covered contract. It also assigns responsibilities and establishes procedures for incident reporting, use of and accountability for equipment, rules for the use of force, and a process for administrative action or the removal, as appropriate, of PSCs and PSC personnel.

§ 159.2 Applicability and scope.

This part:

(a) Applies to:

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

(2) The Department of State and other U.S. Federal agencies insofar as it implements the requirements of section 862 of Public Law 110–181, as amended. Specifically, in areas of operations which require enhanced coordination of PSC and PSC personnel working for U.S. Government (U.S.G.) agencies, the Secretary of Defense may designate such areas as areas of combat operations or other significant military operations for the limited purposes of this part. In such an instance, the standards established in accordance with this part would, in coordination with the Secretary of State, expand from covering only DoD PSCs and PSC personnel to cover all U.S.G.-funded PSCs and PSC personnel operating in the designated area. The requirements of this part shall not apply to a nonprofit nongovernmental organization receiving grants or cooperative agreements for activities conducted within an area of other significant military operations if the Secretary of Defense and the Secretary of State agree that such organization may be exempted. An exemption may be granted by the agreement of the Secretaries under this paragraph on an organization-by-organization or area-by-area basis. Such an exemption may not be granted with respect to an area of combat operations.

(b) Prescribes policies applicable to all:

(1) DoD PSCs and PSC personnel performing private security functions during contingency operations outside the United States.

(2) USG-funded PSCs and PSC personnel performing private security functions in an area of combat operations or, with the agreement of the Secretary of State, other significant military operations as designated by the Secretary of Defense.

§ 159.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

Area of combat operations. An area of operations designated as such by the Secretary of Defense for the purpose of this part, when enhanced coordination of PSCs working for U.S.G. agencies is required.

Contingency operation. A military operation that is either designated by the Secretary of Defense as a contingency operation or becomes a contingency operation as a matter of law (10 U.S.C. 101(a)(13)). It is a military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the Armed Forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301(a), 12302, 12304, 12305, 12406, of 10 U.S.C., chapter 15 of 10 U.S.C. or any other provision of law during a war or during a national emergency declared by the President or Congress.

Contractor. The contractor, subcontractor, grantee, or other party carrying out the covered contract.

Covered contract. (1) A DoD contract for performance of services and/or delivery of supplies in an area of contingency operations outside the United

States or a contract of a non-DoD Federal agency for performance of services and/or delivery of supplies in an area of combat operations or other significant military operations, as designated by the Secretary of Defense; a subcontract at any tier under such a contract; or a task order or delivery order issued under such a contract or subcontract.

(2) Also includes contracts or subcontracts funded under grants and subgrants by a Federal agency for performance in an area of combat operations or other significant military operations as designated by the Secretary of Defense.

(3) Excludes temporary arrangements entered into by non-DoD contractors or grantees for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company. Such arrangements must still be in compliance with local law.

Other significant military operations. For purposes of this part, the term 'other significant military operations' means activities, other than combat operations, as part of an overseas contingency operation that are carried out by United States Armed Forces in an uncontrolled or unpredictable high-threat environment where personnel performing security functions may be called upon to use deadly force.[1]

Private security functions. Activities engaged in by a contractor under a covered contract as follows:

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party.[2]

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties in accordance with the terms of their contract. For the DoD, DoDI Instruction 3020.41, ''Contractor Personnel Authorized to Accompany the U.S. Armed Forces,''[3] prescribes policies related to personnel allowed to carry weapons for self defense.

PSC. During contingency operations ''PSC'' means a company employed by the DoD performing private security functions under a covered contract. In a designated area of combat operations or other significant military operations, the term ''PSC'' expands to include all companies employed by U.S.G. agencies performing private security functions under a covered contract.

PSC personnel. Any individual performing private security functions under a covered contract.

§ 159.4 Policy.

(a) Consistent with the requirements of paragraph (a)(2) of section 862 of Public Law 110–181, the selection, training, equipping, and conduct of PSC personnel including the establishment of appropriate processes shall be coordinated between the DoD and the Department of State. Coordination shall encompass the contemplated use of PSC personnel during the planning stages of contingency operations so as to allow guidance to be developed under paragraphs (b) and (c) of this section and promulgated under section 159.5 of this part in a timely manner that is appropriate for the needs of the contingency operation.

(b) Geographic Combatant Commanders will provide tailored PSC guidance and procedures for the operational environment in their Area of Responsibility (AOR) in accordance with this part, the Federal Acquisition Regulation (FAR)[4] and the Defense Federal Acquisition Regulation Supplement (DFARS).[5]

(c) In a designated area of combat operations or other significant military operations, the relevant Chief of Mission will be responsible for developing

[1] With respect to an area of other significant military operations, the requirements of this part shall apply only upon agreement of the Secretary of Defense and the Secretary of State. Such an agreement of the Secretaries may be made only on an area-by-area basis. With respect to an area of combat operations, the requirements of this part shall always apply.

[2] Contractors performing private security functions are not authorized to perform inherently governmental functions. In this regard, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

[3] Available at *http://www.dtic.mil/ whs/directives/corres/ pdf/302041p.pdf*.

[4] Published in Title 48 of the Code of Federal Regulations.

[5] Published in Title 48 of the Code of Federal Regulations.

and issuing implementing instructions for non-DoD PSCs and their personnel consistent with the standards set forth by the geographic Combatant Commander in accordance with paragraph (b) of this section. The Chief of Mission has the option to instruct non-DoD PSCs and their personnel to follow the guidance and procedures developed by the geographic Combatant Commander and/or a sub unified commander or joint force commander (JFC) where specifically authorized by the Combatant Commander to do so and notice of that authorization is provided to non-DoD agencies.

(d) The requirements of this part shall not apply to contracts entered into by elements of the intelligence community in support of intelligence activities.

§ 159.5 Responsibilities.

(a) The Deputy Assistant Secretary of Defense for Program Support, under the authority, direction, and control of the Assistant Secretary of Defense for Logistics and Materiel Readiness, shall monitor the registering, processing, and accounting of PSC personnel in an area of contingency operations.

(b) The Director, Defense Procurement and Acquisition Policy, under the authority, direction, and control of the Under Secretary of Defense for Acquisition, Technology and Logistics, shall ensure that the DFARS and (in consultation with the other members of the FAR Council) the FAR provide appropriate guidance and contract clauses consistent with this part and paragraph (b) of section 862 of Public Law 110–181.

(c) The Deputy Chief Management Officer of the Department of Defense shall direct the appropriate component to ensure that information systems effectively support the accountability and visibility of contracts, contractors, and specified equipment associated with private security functions.

(d) The Chairman of the Joint Chiefs of Staff shall ensure that joint doctrine is consistent with the principles established by DoD Directive 3020.49, ''Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,''[6] DoD Instruction 3020.41, ''Contractor Personnel Authorized to Accompany the U.S. Armed Forces,'' and this part.

(e) The geographic Combatant Commanders in whose AOR a contingency operation is occurring, and within which PSCs and PSC personnel perform under covered contracts, shall:

(1) Provide guidance and procedures, as necessary and consistent with the principles established by DoD Directive 3020.49, ''Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,'' DoD Instruction 3020.41, ''Contractor Personnel Authorized to Accompany the U.S. Armed Forces,''[7] and this part, for the selection, training, accountability and equipping of such PSC personnel and the conduct of PSCs and PSC personnel within their AOR. Individual training and qualification standards shall meet, at a minimum, one of the Military Departments' established standards. Within a geographic combatant command, a sub unified commander or JFC shall be responsible for developing and issuing implementing procedures as warranted by the situation, operation, and environment, in consultation with the relevant Chief of Mission in designated areas of combat operations or other significant military operations.

(2) Through the Contracting Officer, ensure that PSC personnel acknowledge, through their PSC, their understanding and obligation to comply with the terms and conditions of their covered contracts.

(3) Issue written authorization to the PSC identifying individual PSC personnel who are authorized to be armed. Rules for the Use of Force shall be included with the written authorization, if not previously provided to the contractor in the solicitation or during the course of contract administration. Rules for the Use of Force shall conform to the guidance in the Chairman of the Joint Chiefs of Staff Instruction

[6] Available from *http://www.dtic.mil/ whs/directives/corres/ pdf/302040p.pdf*.

[7] Available at *http://www.dtic.mil/ whs/directives/corres/ html/302041.htm*.

3121.01B, ''Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces.'' Access by offerors and contractors to the rules for the use of force may be controlled in accordance with the terms of FAR 52.204–2 (Aug 1996), DFARS 252.204–7000 (Dec 1991), or both.[8]

(4) Ensure that the procedures, orders, directives and instructions prescribed in §159.6(a) of this part are available through a single location (to include an Internet Web site, consistent with security considerations and requirements).

(f) The Heads of the DoD Components shall:

(1) Ensure that all private security-related requirement documents are in compliance with the procedures listed in §159.6 of this part and the guidance and procedures issued by the geographic Combatant Command,

(2) Ensure private security-related contracts contain the appropriate clauses in accordance with the applicable FAR clause and include additional mission-specific requirements as appropriate.

§ 159.6 Procedures.

(a) *Standing Combatant Command Guidance and Procedures.* Each geographic Combatant Commander shall develop and publish guidance and procedures for PSCs and PSC personnel operating during a contingency operation within their AOR, consistent with applicable law; this part; applicable Military Department publications; and other applicable DoD issuances to include DoD Directive 3020.49, ''Orchestrating, Synchronizing, and Integrating Program Management of Contingency Acquisition Planning and Its Operational Execution,'' DFARS, DoD Directive 2311.01E, ''DoD Law of War Program,''[9] DoD 5200.8–R, ''Physical Security Program,''[10] CJCSI 3121.01B, ''Standing Rules of Engagement/Standing Rules for the Use of Force for U.S. Forces,'' and DoD Directive 5210.56, ''Use of Deadly Force and the Carrying of Firearms by DoD Personnel Engaged in Law Enforcement and Security Duties.''[11] The guidance and procedures shall:

(1) Contain, at a minimum, procedures to implement the following processes, and identify the organization responsible for managing these processes:

(i) Registering, processing, accounting for and keeping appropriate records of PSCs and PSC personnel in accordance with DoD Instruction 3020.41, ''Contractor Personnel Authorized to Accompany the U.S. Armed Forces.''

(ii) PSC verification that PSC personnel meet all the legal, training, and qualification requirements for authorization to carry a weapon in accordance with the terms and conditions of their contract and host country law. Weapons accountability procedures will be established and approved prior to the weapons authorization.

(iii) Arming of PSC personnel. Requests for permission to arm PSC personnel shall be reviewed on a case-by-case basis by the appropriate Staff Judge Advocate to the geographic Combatant Commander (or a designee) to ensure there is a legal basis for approval. The request will then be approved or denied by the geographic Combatant Commander or a specifically identified designee, no lower than the flag officer level. Requests to arm non-DOD PSC personnel shall be reviewed and approved in accordance with §159.4(c) of this part. Requests for permission to arm all PSC personnel shall include:

(A) A description of where PSC personnel will operate, the anticipated threat, and what property or personnel such personnel are intended to protect, if any.

[8] CJCSI 3121.01B provides guidance on the standing rules of engagement (SROE) and establishes standing rules for the use of force (SRUF) for DOD operations worldwide. This document is classified secret. CJCSI 3121.01B is available via Secure Internet Protocol Router Network at *http://js.smil.mil*. If the requester is not an authorized user of the classified network, the requester should contact Joint Staff J–3 at 703–614–0425.

[9] Available at *http://www.dtic.mil/ whs/directives/corres/ html/231101.htm*.

[10] Available at *http://www.dtic.mil/ whs/directives/corres/ pdf/520008r.pdf*.

[11] Available at *http://www.dtic.mil/ whs/directives/corres/ html/521056.htm*.

(B) A description of how the movement of PSC personnel will be coordinated through areas of increased risk or planned or ongoing military operations, including how PSC personnel will be rapidly identified by members of the U.S. Armed Forces.

(C) A communication plan, to include a description of how relevant threat information will be shared between PSC personnel and U.S. military forces and how appropriate assistance will be provided to PSC personnel who become engaged in hostile situations. DoD contractors performing private security functions are only to be used in accordance with DoD Instruction 1100.22, ''Guidance for Determining Workforce Mix,'' [12] that is, they are limited to a defensive response to hostile acts or demonstrated hostile intent.

(D) Documentation of individual training covering weapons familiarization and qualification, rules for the use of force, limits on the use of force including whether defense of others is consistent with host nation Status of Forces Agreements or local law, the distinction between the rules of engagement applicable to military forces and the prescribed rules for the use of force that control the use of weapons by civilians, and the Law of Armed Conflict.

(E) Written acknowledgment by the PSC and its individual PSC personnel, after investigation of background of PSC personnel by the contractor, verifying such personnel are not prohibited under U.S. law to possess firearms.

(F) Written acknowledgment by the PSC and individual PSC personnel that:

(*1*) Inappropriate use of force by contractor personnel authorized to accompany the U.S. Armed Forces may subject such personnel to United States or host nation prosecution and civil liability.[13]

(*2*) Proof of authorization to be armed must be carried by each PSC personnel.

(*3*) PSC personnel may possess only U.S.G.-issued and/or -approved weapons and ammunition for which they have been qualified according to paragraph (a)(1)(iii)(E) of this section.

(*4*) PSC personnel were briefed about and understand limitations on the use of force.

(*5*) Authorization to possess weapons and ammunition may be revoked for non-compliance with established rules for the use of force.

(*6*) PSC personnel are prohibited from consuming alcoholic beverages or being under the influence of alcohol while armed.

(iv) Registration and identification in the Synchronized Predeployment and Operational Tracker (or its successor database) of armored vehicles, helicopters, and other vehicles operated by PSC personnel.

(v) Reporting alleged criminal activity or other incidents involving PSCs or PSC personnel by another company or any other person. All incidents involving the following shall be reported and documented:

(A) A weapon is discharged by an individual performing private security functions;

(B) An individual performing private security functions is killed or injured in the performance of their duties;

(C) A person other than an individual performing private security functions is killed or injured as a result of conduct by PSC personnel;

(D) Property is destroyed as a result of conduct by a PSC or PSC personnel;

(E) An individual performing private security functions has come under attack including in cases where a weapon is discharged against an individual performing private security functions or personnel performing such functions believe a weapon was so discharged; or

(F) Active, non-lethal counter-measures (other than the discharge of a weapon) are employed by PSC personnel in response to a perceived immediate threat in an incident that

[12] Available at *http://www.dtic.mil/ whs/directives/corres/ pdf/110022p.pdf*.

[13] This requirement is specific to arming procedures. Such written acknowledgement should not be construed to limit potential civil and criminal liability to conduct arising from ''the use of weapons.'' For example, PSC personnel could be held criminally liable for any conduct that would constitute a Federal offense (see MEJA, 18 U.S.C. 3261(a)).

could significantly affect U.S. objectives with regard to the military mission or international relations. (Active non-lethal systems include laser optical distracters, acoustic hailing devices, electro-muscular TASER guns, blunt-trauma devices like rubber balls and sponge grenades, and a variety of riot-control agents and delivery systems).

(vi) The independent review and, if practicable, investigation of incidents reported pursuant to paragraphs (a)(1)(v)(A) through (a)(1)(v)(F) of this section and incidents of alleged misconduct by PSC personnel.

(vii) Identification of ultimate criminal jurisdiction and investigative responsibilities, where conduct of U.S.G.-funded PSCs or PSC personnel are in question, in accordance with applicable laws to include a recognition of investigative jurisdiction and coordination for joint investigations (*i.e.*, other U.S.G. agencies, host nation, or third country agencies), where the conduct of PSCs and PSC personnel is in question.

(viii) A mechanism by which a commander of a combatant command may request an action by which PSC personnel who are non-compliant with contract requirements are removed from the designated operational area.

(ix) Interagency coordination of administrative penalties or removal, as appropriate, of non-DoD PSC personnel who fail to comply with the terms and conditions of their contract, as they relate to this part.

(x) Implementation of the training requirements contained below in paragraph (a)(2)(ii) of this section.

(2) Specifically cover:

(i) Matters relating to authorized equipment, force protection, security, health, safety, and relations and interaction with locals in accordance with DoD Instruction 3020.41, ''Contractor Personnel Authorized to Accompany the U.S. Armed Forces.''

(ii) Predeployment training requirements addressing, at a minimum, the identification of resources and assistance available to PSC personnel as well as country information and cultural training, and guidance on working with host country nationals and military personnel.

(iii) Rules for the use of force and graduated force procedures.

(iv) Requirements and procedures for direction, control and the maintenance of communications with regard to the movement and coordination of PSCs and PSC personnel, including specifying interoperability requirements. These include coordinating with the Chief of Mission, as necessary, private security operations outside secure bases and U.S. diplomatic properties to include movement control procedures for all contractors, including PSC personnel.

(b) *Availability of Guidance and Procedures.* The geographic Combatant Commander shall ensure the guidance and procedures prescribed in paragraph (a) of this section are readily available and accessible by PSCs and their personnel (e.g., on a Web page and/or through contract terms), consistent with security considerations and requirements.

(c) *Subordinate Guidance and Procedures.* A sub unified commander or JFC, in consultation with the Chief of Mission, will issue guidance and procedures implementing the standing combatant command publications specified in paragraph (a) of this section, consistent with the situation and operating environment.

(d) *Consultation and Coordination.* The Chief of Mission and the geographic Combatant Commander/sub unified commander or JFC shall make every effort to consult and coordinate responses to common threats and common concerns related to oversight of the conduct of U.S.G.-funded PSCs and their personnel.

PART 161—IDENTIFICATION (ID) CARDS FOR MEMBERS OF THE UNIFORMED SERVICES, THEIR DEPENDENTS, AND OTHER ELIGIBLE INDIVIDUALS

Subpart A—Identification (ID) Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals

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Subpart D—DoD Identification (ID) Cards: Eligibility Documentation Required for Defense Enrollment Eligibility Reporting System (DEERS) Enrollment, Record Management, and ID Card Issuance

161.23 Procedures.

AUTHORITY: 10 U.S.C. 1061–1064, 1072–1074, 1074a–1074c, 1076, 1076a, 1077, and 1095(k)(2), and 18 U.S.C. 499, 506, 509, 701, and 1001; 5 U.S.C. 5703, 10 U.S.C. 1408(h), 10 U.S.C. 1044a, 10 U.S.C. chapter 1223.

SOURCE: 79 FR 709, Jan. 6, 2014, unless otherwise noted.

Subpart A—Identification (ID) Cards for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals

§ 161.1 Purpose.

This part:

(a) Establishes policy, assigns responsibilities, and provides procedures for the issuing of distinct DoD ID cards. The ID cards shall be issued to uniformed service members, their dependents, DoD civilian employees, and other eligible individuals and will be used as proof of identity and DoD affiliation.

(b) Sets forth responsibilities and procedures for the DoD ID card life-cycle in accordance with this part.

(c) Prescribes the benefits for commissary; exchange; morale, welfare, and recreation (MWR); Military Health Services direct care in military treatment facilities (MTFs); and TRICARE civilian health care (CHC) in support of the members of the uniformed services, their dependents, and other eligible individuals, in accordance with this part.

(d) Provides procedures and defines acceptable documentation for enrollment and eligibility verification, as necessary, for DoD ID card issuance and as described in DoD Instruction 1000.13 and subparts B and C of this part.

[79 FR 709, Jan. 6, 2014, as amended at 81 FR 74875, Oct. 27, 2016]

§ 161.2 Applicability.

This part applies to:

(a) The Office of the Secretary of Defense (OSD), the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the ''DoD Components'').

(b) The Commissioned Corps of the U.S. Public Health Service (USPHS), under agreement with the Department of Health and Human Services, and the National Oceanic and Atmospheric Administration (NOAA), under agreement with the Department of Commerce.

§ 161.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

20/20/20, 20/20/15, or 10/20/10. See definition of ''former spouse.''

Abused dependent. Dependents of active duty uniformed service members:

(1) Entitled to retired pay based on 20 or more years of service who, on or after October 23, 1992, while a member, are eligible to receive retired pay terminated as a result of misconduct involving the abuse of the spouse or dependent child pursuant to 10 U.S.C. 1408(h); or

(2) Not entitled to retired pay, who have received a dishonorable or bad-conduct discharge, dismissal from a uniformed service as a result of a court martial conviction for an offense involving physical or emotional abuse of a spouse or child, or were administratively discharged as a result of such an offense, separated on or after November 30, 1993.

Access to a DoD network. User logon to a Windows active directory account on the Nonsecure Internet Protocol Router Network (NIPRNet) or an authorized network operating system account on the NIPRNet.

Access to a DoD network (remote). Authorized NIPRNet users accessing a NIPRNet resource from:

(1) Another NIPRNet resource outside of the originating domain; or

(2) An authorized system that resides outside of the NIPRNet. This includes domain-level access from handheld devices. Remote access includes logon for the purposes of telework, Virtual Private Network, and remote administration by DoD or non-DoD personnel.

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. Active duty does not include full-time National Guard duty.

Active duty for a period of more than 30 days. Active duty under a call or order that does not specify a period of 30 days or less. When the ''Active Duty for a Period of More than 30 Days'' is established by consecutive sets of orders, their eligible dependents become entitled to TRICARE medical benefits on the first day of the set of orders that brings the period of active duty over 30 days.

Adopted child. A child adopted before the age of 21 or, if enrolled in a full-time course of study at an institution of higher learning, before the age of 23. Except for entitlement to medical care, a child with an incapacitating condition that existed before the age of 21 or that occurred while the child was a full-time student prior to the age of 23, may be adopted at any age provided it is determined that there is a BONA FIDE parent-child relationship. Surviving children adopted by a non-military member after the death of the sponsor remain eligible for medical care only.

Annulled. The status of an individual, whose marriage has been declared a nullity by a court of competent jurisdiction, that restores unremarried status to a widow, widower, or former spouse for reinstatement of benefits.

Annulment decree. An order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) that grants an annulment of a marriage.

Attainment of age 65. The first day of the month of the anniversary of the 65th birthday, unless the birthday falls on the first of the month. If the birthday is the first of the month, attainment of age 65 occurs on the first day of the preceding month.

Benefits. Entitlements or privileges that are assigned to a person or group of persons.

CAC PIN reset (CPR). A portable, single-purpose system capable of providing timely PIN reset capability to the field without requiring a Common Access Card (CAC) holder to return to a CAC issuance facility (i.e. Real-Time Automated Personnel Identification System (RAPIDS), workstation).

Certificate of live birth. A certificate authenticated by an attending physician or other responsible person from a U.S. hospital or a military treatment facility showing the name of at least one parent.

Certified document. A document that is certified as a true original and:

(1) Conveys the appropriate seal or markings of the issuer;

(2) Has a means to validate the authenticity of the document by a reference or source number;

(3) Is a notarized legal document or other document approved by a Judge Advocate, other members of the armed forces designated by law and regulations to have the powers set forth in 10 U.S.C 1044a, or other eligible persons in accordance with 10 U.S.C. 1044a; or

(4) Has the appropriate certificate of authentication by a U.S. Consular Officer in the foreign country of issuance which attests to the authenticity of the signature and seal.

Certified English translation. See requirements for certified document.

CHC. Medical care provided through the TRICARE program including networks of CHC professionals, institutions, pharmacies, and suppliers to provide access to high-quality health care services.

Child. A legitimate child, illegitimate child, stepchild, or adopted child of the sponsor, who is younger than 21 years of age. If 21 or older, the child may remain eligible if the child is:

(1) 21 or 22 years old and enrolled in a full-time course of higher learning;

(2) 21 or older but incapable of self-support because of a mental or physical incapacity that existed before the 21st birthday; or

(3) 21 or 22 years old and was enrolled full-time in an accredited institution of higher learning but became incapable of self-support because of a mental or physical condition while a full-time student.

Civilian employee. DoD civilian employees, as defined in 5 U.S.C. 2105 are individuals appointed to positions by designated officials. Appointments to appropriated fund positions are either permanent or time-limited and the employees are on full-time, part-time, or intermittent work schedules. In some instances, the appointments are seasonal with either a full-time, part-time, or intermittent work schedule. Positions are categorized further as Senior Executive Service (SES), Competitive Service, and Excepted Service positions. In addition, DoD employs individuals paid from NAFs, as well as foreign national citizens outside the United States, its territories, and its possessions, in DoD activities overseas. The terms and conditions of host-nation citizen employment are governed by controlling treaties, agreements, and memoranda of understanding with the foreign nations.

Civilian noncombatant personnel. Personnel who have been authorized to accompany military forces of the United States in regions of conflict, combat, and contingency operations and who are liable to capture and detention by the enemy as POWs.

Commissary. A benefit granted to eligible personnel in accordance with this part and DoD Instruction 1330.17 (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/133017p.pdf*).

Competitive service positions. See 5 U.S.C. 2102.

Contingency operation. Defined in Joint Publication 1–02 (available at *http://www.dtic.mil/ doctrine/new_pubs/ jp1_02.pdf*).

Contractor employee. An employee of a firm, or individual under contract or subcontract to the DoD, designated as providing services or support to the Department.

Contractors authorized to accompany the force. Defined in Joint Publication 1–02.

Cross-servicing. Agreement amongst all uniformed services to assist Service members, regardless of the Service member's responsible uniformed service, and their dependents, for all ID card or benefits-related matters, when appropriate and not restricted by subpart B of this part.

Defense Enrollment Eligibility Reporting System (DEERS). The definitive centralized person data repository of identity and enrollment and eligibility verification data and associated contact information on members of the DoD Components, members of the Uniformed Services, and other personnel as designated by the DoD, and their eligible dependents and associated contact information.

Dependent. An individual whose relationship to the sponsor leads to entitlement to benefits and privileges.

Direct Care (DC). Medical care that TRICARE provides through the health care resources of the uniformed services through their clinics and MTFs. This does not include any medical care

provided through the TRICARE CHC network.

Dissolution decree. An order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) that grants dissolution of a marriage.

Divorce decree. An order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) that grants termination of a marriage.

Dual eligible. A person who is entitled to Medicare Part A and enrolled in Medicare Part B and is also entitled to TRICARE medical benefits, in accordance with section 706 of Public Law 106–398 and Public Law 102–190, ''National Defense Authorization Act for Fiscal Years 1992 and 1993'' (available at *http://thomas.loc.gov/cgi-bin/query/C?c102:./temp/~c102UvpYbH*).

Dual status. A person who is entitled to privileges from two sources (e.g., a retired member, who is also the dependent of an active duty member; a retired-with-pay member who is employed overseas as a civilian by the U.S. Government and is qualified for logistical support because of that civilian employment; a member of a Reserve Component who is an eligible dependent of an active duty military sponsor; or a child, who is the natural child of one sponsor and the stepchild and member of a household of another sponsor).

Eligibility documentation. Properly certified birth certificate or certificate of live birth authenticated by attending physician or other responsible person from a U.S. hospital or a MTF showing the name of at least one parent; properly certified marriage certification; properly certified final decree of divorce, dissolution, or annulment of marriage and statements attesting to nonremarriage and status of employer-sponsored healthcare; court order for adoption or guardianship; statement of incapacity from a physician or personnel or medical headquarters of sponsor's parent uniformed service; letter from school registrar; retirement orders (providing entitlement to retired pay is established) or DD Form 214 ''Certificate of Release or Discharge from Active Duty;'' DD Form 1300, ''Report of Casualty;'' certification from the Department of Veterans' Affairs of 100 percent disabled status; orders awarding Medal of Honor (MOH); formal determination of eligibility for Medicare Part A benefits from the Social Security Administration (SSA); civilian personnel records; and invitational travel orders.

Entitlements. Rights or authorities that are provided based on legislative statute.

Entry level separation. As defined in DoD Instruction 1332.14, ''Enlisted Administrative Separations'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/133214p.pdf*), an enlisted service member is considered in an entry-level status during the first 180 days of continuous active military service, or the first 180 days of continuous active service after a service break of more than 92 days of active service. A Service member of a Reserve Component who is not on active duty or who is serving under a call or order to active duty for 180 days or less begins entry-level status upon enlistment in a Reserve Component. Entry-level status for such a Service member of a Reserve Component terminates as follows:

(1) 180 days after beginning training if the Service member is ordered to active duty for training for one continuous period of 180 days or more; or

(2) 90 days after the beginning of the second period of active duty training if the Service member is ordered to active duty for training under a program that splits the training into two or more separate periods of active duty. For the purposes of characterization of service or description of separation, the Service member's status is determined by the date of notification as to the initiation of separation proceedings.

Excepted service positions. Defined in 5 U.S.C. 2103.

Exchange. A benefit that is extended to eligible individuals in accordance with DoD Instruction 1330.21.

Family member. An individual who receives benefits based on his or her association to a sponsor. A family member is often a dependent.

Federal employee. Defined in 5 U.S.C. 2105.

Federally controlled facility. Defined in Office of Management and Budget

(OMB) Memorandum M–05–24, ''Implementation of Homeland Security Presidential Directive (HSPD) 12—Policy for a Common Identification Standard for Federal Employees and Contractors'' (available at *http://www.whitehouse.gov/sites/default/files/omb/ memoranda/fy2005/m05-24.pdf*).

Federally controlled information systems. (1) An information technology system (or information system), as defined by the Federal Information Security Management Act of 2002 (44 U.S.C. 3502(8)).

(2) Information systems used or operated by an agency or by a contractor of an agency or other organization on behalf of an agency (44 U.S.C. 3544(a)(1)(A)).

Financial dependency determination. Service-level process used to determine whether the financial dependency of a dependent on a sponsor meets the requirement for benefits eligibility.

Foreign affiliate. A foreign national, including foreign civilian, foreign contractor, or foreign uniformed services personnel, who is sponsored by their government in accordance with DoD Directive 5230.20, ''Visits and Assignments of Foreign Nationals'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/523020p.pdf*) through an official visit, assignment, temporary duty, school, training, policy board, or other defined agreement to work or reside on a DoD facility, or require access to DoD networks on-site or remotely.

Foreign affiliate. A foreign national, including foreign civilian, foreign contractor, or foreign uniformed services personnel, who is sponsored by their government in accordance with DoD Directive 5230.20, ''Visits and Assignments of Foreign Nationals'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/523020p.pdf*) through an official visit, assignment, temporary duty, school, training, policy board, or other defined agreement to work or reside on a DoD facility, or require access to DoD networks on-site or remotely.

Foreign national civilians and contractors. A category of personnel that are CAC-eligible if sponsored by their government as part of an official visit or assigned to work on a DoD facility and/or require access to DoD networks both on site or remotely (remote access must be on an exception only basis for this category).

Former member. An individual who is eligible to receive retired pay, at age 60, for non-regular service pursuant to 10 U.S.C. chapter 1223 but who has been discharged and who maintains no military affiliation. These former members, at age 60, and their eligible dependents are entitled to medical care, commissary, exchange, and MWR privileges. Under age 60, they and their eligible dependents are entitled to commissary, exchange, and MWR privileges only.

Former spouse. An individual who was married to a uniformed services member for at least 20 years, and the member had at least 20 years of service creditable toward retirement, and the marriage overlapped as follows:

(1) 20 years marriage, 20 years creditable service for retirement, and 20 years overlap between the marriage and the service (referred to as 20/20/20). The benefits eligibility begins on the date of divorce;

(2) 20 years marriage, 20 years creditable service for retirement, and 15 years overlap between the marriage and the service (referred to as 20/20/15). The benefits eligibility begins on the date of divorce; or

(3) A spouse whose marriage was terminated from a uniformed service member who has their eligibility to receive retired pay terminated as a result of misconduct based on Service-documented abuse of the spouse and has 10 years of marriage, 20 years of creditable service for retirement, 10 years of overlap between the marriage and the service (referred to as 10/20/10). The benefits eligibility begins on the date of divorce.

Foster child. A child without parental support and protection, placed with a person or family, usually by local welfare services or by court order. The foster parent(s) do not have custody, nor is there an adoption, but they are expected to treat the foster child as they would their own in regard to food, housing, clothing, and education. This is a non-medically entitled dependent.

Full-time student. A child who has not attained the age of 23, who is enrolled in a full-time course of study at 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, dependent on the member or former member for more than 50 percent of the child's support.

Full-time work schedule. Full-time employment with a basic 40-hour work week.

Inactive National Guard (ING). Part of the Army National Guard. These individuals are Reservists who are attached to a specific National Guard unit, but who do not participate in training activities. On mobilization, they shall mobilize with their assigned units. These members muster with their units once a year. Issuance of DD Form 1173–1 ''United States Uniformed Services Identification and Privilege Card (Guard and Reserve Family Member)'' to ING dependents is mandatory.

Incapacitated person. An individual who is impaired by physical disability, mental illness, mental deficiency, or other causes that prevent sufficient understanding or capacity to competently manage his or her own affairs.

Individual Ready Reserve (IRR). Trained individuals who have previously served in the active component or Selected Reserve (SelRes) and have time remaining on their military service obligation. Includes volunteers who do not have time remaining on the military service obligation, but are under contractual agreement to be a member of the IRR. These individuals are mobilization assets and may be called to active duty pursuant to the provisions of 10 U.S.C. chapter 1209. Issuance of DD Form 1173–1 to IRR dependents is mandatory.

Institution of higher learning. A college, university, or similar institution, including a technical or business school, offering post secondary-level academic instruction that leads to an associate or higher degree, if the school is empowered by the appropriate State education authority under State law to grant an associate or higher degree. When there is no State law to authorize the granting of a degree, the school may be recognized as an institution of higher learning if it is accredited for degree programs by a recognized accrediting agency. The term also includes a hospital offering educational programs at the post secondary level regardless of whether the hospital grants a post secondary degree. The term also includes an educational institution that is not located in a State that offers a course leading to a standard college degree or equivalent and is recognized as such by the Secretary of Education (or comparable official) of the country or other jurisdiction in which the institution is located.

Intergovernmental Personnel Act personnel. Employees covered by Public Law 91–648, ''Intergovernmental Personnel Act of 1970.'' The Intergovernmental Personnel Act mobility program provides temporary assignment of personnel between the Federal Government and State and local governments, colleges and universities, tribal governments, federally funded research and development centers, and other eligible organizations.

Intermittent work schedule. Employment without a regularly scheduled tour of duty.

Invitational travel order (ITO). The document authorizing travel by individuals either not employed by the government or employed in accordance with 5 U.S.C. 5703 intermittently in the government's service as consultants or experts and paid on a daily basis, when actually employed. ITOs include the names of accompanying dependents who may be eligible for DoD benefits in accordance with DoD policy and reciprocal international agreements.

Letter of authorization (LOA). A document generated by Synchronized Predeployment and Operational Tracker (SPOT) that states the intended length of assignment, planned use of government facilities and privileges, and name of the approving governmental official.

Letter from a school registrar. A letter certifying enrollment in a full-time in-residence, or online course of study, leading to an associate degree or higher and listing an anticipated graduation date. Students attending two institutions less than full-time may not combine courses from both institutions to meet full-time student status. Most colleges and universities contract with third parties, such as the National Student Clearinghouse, to verify student enrollment. These third parties must

comply with 20 U.S.C. 1232g and 34 CFR part 99 and are considered official agents of the institution for that purpose. Such documentation is considered equivalent to and accepted in lieu of a letter from the registrar's office. For graduate students, a letter of acceptance of enrollment signed by an authorized officer of the college or university is required to serve as the school letter.

Marriage certificate. State-certified record of marriage.

Medical sufficiency statement. A statement from a physician from a military treatment facility or approved TRICARE provider used in conjunction with eligibility and dependency determinations. The statement includes a recent medical or psychiatric evaluation and diagnosis, a statement of illness (including the date, child's age, and onset of incapacity), the current treatment being rendered, the prognosis for recovery, and the ability to become self-supporting.

Medicare. Health insurance for people age 65 or older, under 65 with certain disabilities, and any age with end-stage renal disease. The different parts of Medicare help cover specific services if certain conditions are met.

(1) *Medicare part A.* Covers hospice care, home health care, skilled nursing facilities, and inpatient hospital stays.

(2) *Medicare part B.* Covers doctors' services, outpatient hospital care, and other medical services that Part A does not cover, such as physical and occupational therapy. Other examples include X-rays, medical equipment, or limited ambulance service.

Member. An individual who is affiliated with a Service, either active duty, Reserve, active duty retired, or Retired Reserve. Retired members are not former members. Also referred to as the sponsor.

MWR. A benefit that is extended to eligible individuals in accordance with DoD Instruction 1015.10, ''Military Morale, Welfare, and Recreation (MWR) Programs'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/101510p.pdf*).

National Agency Check with Inquiries (NACI). Is the minimum investigation conducted by the Office of Personnel Management (OPM) for federal employment in nonsensitive positions and for individuals requiring eligibility for logical and physical access. The NACI consists of a records check (of designated agencies of the Federal Government that maintain record systems containing information relevant to making a personnel security determination) plus Written Inquiries to law enforcement agencies, former employers and supervisors, references and schools covering the last 5 years.

Nonappropriated fund (NAF) employees. NAF employees are Federal employees within the Department who are paid from NAFs. 5 U.S.C. 2105 explains the status of NAF employees as Federal employees.

Non-regular service retirement. A person who, as a member of the Ready Reserve, serves on active duty or performs active service, after the date of the enactment of sections 647 and 1106 of Public Law 110–181 and may receive retired pay in accordance with 10 U.S.C. 12731. Under these provisions the eligibility age for applying for retired pay shall be reduced below 60 years of age by 3 months for each aggregate of 90 days on which the member performs in any fiscal year after such date, providing the applicant is at least 50 years of age. However, the member must be age 60 to qualify for CHC and CD.

Notarization. The official fraud-deterrent process that assures that the signatures on a document are authentic and valid. The signature of any such person acting as notary, together with the title of that person's offices, is *prima facie* evidence that the signature is genuine, that the person holds the designated title, and that the person is authorized to perform a notarial act. A person acting as notary must be impartial.

Part-time work schedule. Part-time employment of 16 to 32 hours a week under a schedule consisting of an equal or varied number of hours per day.

Permanent employee. Career or career-conditional appointment in the Competitive or SES or an appointment in the Excepted Service that carries no restrictions or conditions.

Placement agency (recognized by the Secretary of Defense). An authorized placement agency in the United States or U.S. territories or possessions that

must be licensed for adoption by the State, territory, or possession in which the adoption procedures will be completed. In all other locations, a request for recognition must be approved by the appropriate Assistant Secretary of the Military Department concerned or an appropriate official who has been delegated approval authority.

Placement agreement. An agreement between the State and the parent(s) placing the child in the legal custody of the parent(s). To establish the child as a pre-adoptive child, the placement agreement must include the intent to adopt.

Pre-adoptive child. With respect to determinations of dependency made on or after October 5, 1994, an unmarried person who is placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by any other source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption of the child by the member or former member, and:

(1) Has not attained the age of 21; or

(2) Has not attained the age of 23, is enrolled in a full-time course of study at 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 or former member for over one-half of the child's support; or

(3) Is incapable of self-support because of a mental or physical incapacity that occurs while a dependent of a member or former member and is, or was at the time of the member's or former member's death, in fact dependent on the member or former member for over one-half of the child's support.

Privileges. Benefits or advantages allowed based on position, authority, relationship, or status and which may be removed by proper authority. Privileges are not necessarily ''rights'' specifically granted by law.

Ready Reserve. Military members of the National Guard and Reserve, organized in units or as individuals, liable for recall to active duty to augment the active components in time of war or national emergency. The Ready Reserve consists of three Reserve Component subcategories: The SelRes, the IRR, and the ING.

Remarried parent. A dependent parent of a deceased military member who loses dependency-based eligibility for benefits on remarriage.

Retired Reserve entitled to pay at age 60 (Gray Area Retirees). Reserve members who have completed 20 qualifying years for retirement and are entitled to receive pay at age 60, but have not yet reached age 60. Reserve Retirees and their dependents receive commissary, MWR, and exchange benefits until the sponsor receives retired pay. Individuals may be recalled to active duty in accordance with 10 U.S.C.

Seasonal employment. Annually recurring periods of work of less than 12 months each year. Seasonal employees generally are permanent employees who are placed in non-duty or non-pay status and recalled to duty in accordance with pre-established conditions of employment. Seasonal employees may have full-time, part-time, or intermittent work schedules.

Selected Reserve (SelRes). Those National Guard and Reserve units and individuals within the Ready Reserve designated by their respective Services and approved by the Chairman of the Joint Chiefs of Staff, as so essential to initial wartime missions that they have priority over all other Reserves. They must be prepared to mobilize within 24 hours. The issuance of DD Form 1173–1 to their dependents and participation in the Guard and Reserve DEERS Enrollment Program are mandatory.

Service Project Officer (SPO). The uniformed services, National Guard and Reserve Component, and agency-level office that coordinates with OUSD(P&R) on policy and functional matters related to DEERS, RAPIDS, and Trusted Associate Sponsorship System (TASS), and manages ID card operations within the respective organization.

SES positions. Appropriated fund positions in an agency classified above General Service-15 pursuant to 5 U.S.C. 5108 or in level 4 or 5 of the Executive Schedule, or an equivalent position, which is not required to be filled by an appointment by the President by and

with the advice and consent of the Senate.

Site security manager (SSM). The SPO-appointed individual that manages the daily operations at a RAPIDS site to include managing users, cardstock, and consumables.

Sponsor. The person affiliated to the DoD, uniformed service, or other Federal agency who is delegated the responsibility for verifying and authorizing an applicant's need for an ID card. This term also refers to the prime beneficiary who derives eligibility based on individual status rather than dependence upon or relationship to another person. This beneficiary receives benefits based on the beneficiary's direct affiliation to the DoD or other unformed service.

Spouse. A person legally married to a current, former, or retired uniformed service member, eligible civilian employee, or other eligible individual in accordance with subpart C of this part, regardless of gender or State of residence.

Standby Reserve. Personnel who maintain their military affiliation without being in the Ready Reserve, who have been designated key civilian employees, or who have a temporary hardship or disability. These individuals are not required to perform training and are not part of units. These individuals are trained and could be mobilized, if necessary, to fill manpower needs in specific skills.

Stepchild. A natural or adopted child of a spouse of a sponsor and who qualifies as a child.

Surviving dependent. The dependent of a member who died while on active duty under orders that specified a period of more than 30 days, or a member who died while in a retired with-pay status.

Temporary assignment. An appointment for a specified period not to exceed 1 year. A temporary assignment can be extended up to a maximum of 1 additional year.

Transitional Health Care (THC). A healthcare system, formerly known as Transition Assistance Management Program (TAMP), instituted in section 502 of Public Law 101–510. It includes pre-separation and separation services, the Continued Health Care Benefit Program, a voluntary insurance program for sponsors and eligible dependents separating from active service; pre-separation counseling service for separating uniformed services members; and various other transitional initiatives. Uniformed service members separated as uncharacterized entry-level separations do not qualify for THC. Section 706 of Public Law 108–375 replaced the TAMP with the THC program. Section 651 of Public Law 110–181 included the 2-year commissary and exchange privilege for involuntarily separated uniformed service members. The DoD added MWR to the benefit set and extended the same benefits to the eligible dependents. To qualify for benefits under this program, individuals must be separated with service characterized as honorable or general under honorable conditions meeting the separation reasons identified in 10 U.S.C. 1145. The THC program is a permanent program and made the medical eligibility 180 days for all eligible uniformed service members and eligible dependents. Enlisted uniformed service members discharged for reasons of misconduct, discharge in lieu of court-martial, or other reasons for which service normally is characterized as under other than honorable conditions are not eligible for transition benefits. Officers discharged as a result of resignation in lieu of trial by court-martial, or misconduct or moral or professional dereliction if the discharge could be characterized as under other than honorable conditions are not eligible for transition benefits. Pursuant to 10 U.S.C. 1145, the qualifying periods of active duty include:

(1) A member who is involuntarily separated from active duty.

(2) A member of a Reserve Component who is separated from active duty to which called or ordered in support of a contingency operation if the active duty is for a period of more than 30 days.

(3) A member who is separated from active duty for which the member is involuntarily retained in accordance with 10 U.S.C. 12305 in support of a contingency operation.

(4) A member who is separated from active duty served pursuant to a voluntary agreement of the member to remain on active duty for a period of less than 1 year in support of a contingency operation.

(5) A member who receives a sole survivorship discharge (as defined in 10 U.S.C. 1174); or

(6) A member who is separated from active duty who agrees to become a member of the SelRes. Section 734 of Public Law 110–417, which took effect on October 14, 2008 extended THC benefits to a uniformed service member who is separated from active duty who agrees to become a member of the SelRes of the Ready Reserve of a Reserve Component.

Trusted Agent (TA). An individual appointed by a TASM that serves as a sponsor for eligible populations within TASS, utilizes TASS to register data for the DD Form 1172–2 (available at *http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd1172–2.pdf*), reverifies CAC holder affiliation, and revokes CACs.

Trusted Agent Security Manager (TASM). An individual appointed by a SPO to oversee the activity for a specific TASS site and associated TAs. These individuals also serve in the TA role.

Trusted Associate Sponsorship System (TASS) (formerly known as Contractor Verification System (CVS)). A Web application used to verify that CAC applicants have the appropriate government sponsorship for the purpose of issuing CACs. The TASS web interface automates the DD Form 1172–2 for tracking the request process and updating DEERS with applicant information required for CAC issuance. The system also provides a mechanism for periodic re-verification of contractor eligibility to ensure that information is current and contractor CACs do not remain active when not appropriate. This capability will be expanded to support registration and background investigation confirmation for additional CAC eligible populations.

United States. The 50 United States and the District of Columbia.

Unmarried. A widow or widower who remarried and whose remarriage ended by death or divorce, or a former spouse of a sponsor whose subsequent remarriage ended by death or divorce.

Unremarried. A widow or widower who has never remarried, or a former spouse whose only remarriage was to the same military sponsor. Periods of marriage in this case may be combined to document eligibility for former spouse benefits.

U.S. territories and possessions. Puerto Rico, American Samoa, Guam, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands.

VA rating determination letter. A letter from the appropriate VA authorities that establishes that the uniformed service member has been rated as 100 percent disabled or incapable of pursuing substantially gainful employment by the VA.

Verifying Official (VO). An individual who is responsible for validating eligibility of bona fide beneficiaries to receive benefits and entitlements.

Voluntary acknowledgment of paternity. A document recognized by relevant and applicable State law as establishing legal paternity. Such documents must be certified as a ''true copy'' by the appropriate state office.

Ward. An unmarried person who is placed in the legal custody of the member or former member as a result of an order of a court of competent jurisdiction in the United States (or a U.S. territory or possession) for a period of at least 12 consecutive months; is dependent on the member or former member for more than 50 percent of the person's support; resides with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of disability or incapacitation or under such other circumstances as the administering Secretary may by regulation prescribe; is not a dependent of a member or a former member under 10 U.S.C. 1072(2); and either:

(1) Has not attained the age of 21;

(2) Has not attained the age of 23 and is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary; or

(3) Is incapable of self-support because of a mental or physical incapacity that occurred while the person

was considered a dependent of the member or former member.

Widow. The female spouse of a deceased member of the uniformed Services.

Widower. The male spouse of a deceased member of the uniformed Services.

[79 FR 709, Jan. 6, 2014, as amended at 81 FR 74875, Oct. 27, 2016]

§ 161.4 Policy.

(a) It is DoD policy that a distinct DoD ID card shall be issued to uniformed service members, their dependents, DoD civilian employees, and other eligible individuals and will be used as proof of identity and DoD affiliation.

(b) DoD ID cards shall serve as the Geneva Convention Card for eligible personnel in accordance with DoD Instruction 1000.1, ''Identity Cards Required by the Geneva Convention'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/100001p.pdf*).

(c) DoD ID cards shall be issued through a secure and authoritative process in accordance with DoD Instruction 1000.25, ''DoD Personnel Identity Protection (PIP) Program'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/100025p.pdf*).

(d) The CAC, a form of DoD ID card, shall serve as the Federal Personal Identity Verification (PIV) card for DoD implementation of Homeland Security Presidential Directive 12, ''Policy for a Common Identification Standard for Federal Employees and Contractors'' (available at *http://www.dhs.gov/ xabout/laws/gc_1217616624097.shtm*).

(e) ID cards, in a form distinct from the CAC, shall be issued and will serve as proof of identity and DoD affiliation for eligible communities that do not require the Federal PIV card that complies with Homeland Security Presidential Directive 12 and FIPS Publication 201–2, ''Personal Identity Verification (PIV) of Federal Employees and Contractors'' (available at *http://dx.doi.org/10.6028/ NIST.FIPS.201-2*).

[79 FR 709, Jan. 6, 2014, as amended at 81 FR 74877, Oct. 27, 2016]

§ 161.5 Responsibilities.

(a) The USD(P&R) shall:

(1) Oversee implementation of the procedures within this part.

(2) Establish overall policy and procedures for the issuance of ID cards to members of the uniformed services, their dependents, and other eligible individuals.

(3) Establish minimum acceptable criteria for establishment and confirmation of personal identity, policy for the issuance of the DoD enterprise personnel identity credentials, and approve of additional systems under the PIP Program in accordance with DoD Instruction 1000.25.

(4) Act as the Principal Staff Assistant (PSA) for the DEERS, the RAPIDS, and the Personnel Identity Protection (PIP) Program in accordance with DoD Instruction 1000.25.

(5) Maintain the DEERS data system in support of the Department of Defense in accordance with applicable law and directives.

(6) Develop and field the required RAPIDS infrastructure and all elements of field support to issue ID cards including but not limited to software distribution, hardware procurement and installation, on-site and depot-level hardware maintenance, on-site and Web-based user training and central telephone center support, and telecommunications engineering and network control center assistance.

(7) In coordination with the Under Secretary of Defense for Intelligence (USD(I)), the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)), and the DoD Chief Information Officer (DoD CIO) establish policy and oversight for CAC life-cycle compliance with FIPS Publication 201–2.

(8) Establish procedures that will uniquely identify personnel with specific associations with the Department of Defense and maintain the integrity of the unique personnel identifier in coordination with the DoD Components in accordance with DoD Directive 8320.03, ''Unique Identification (UID) Standards for a Net-Centric Department of Defense'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/832003p.pdf*).

(b) The Assistant Secretary of Defense for Reserve Affairs (ASD(RA)), under the authority, direction, and control of the USD(P&R), shall develop policies and establish guidance for the National Guard and Reserve Component communities that affect benefits, entitlements, identity, and ID cards.

(c) The Deputy Assistant Secretary of Defense for Military Community and Family Policy (DASD(MC&FP)), under the authority, direction, and control of the USD(P&R), shall develop policy and procedures to determine eligibility for access to DoD programs for MWR; commissaries; exchanges; lodging; children and youth; DoD schools; family support; voluntary and post-secondary education; and other military community and family benefits that affect identity and ID cards.

(d) The Director, Defense Human Resources Activity (DHRA), under the authority, direction, and control of the USD(P&R) and in addition to the responsibilities in paragraph (h) of this section, shall, in accordance with DoD Instruction 1000.25:

(1) Develop policies and procedures for the oversight, funding, personnel staffing, direction, and functional management of the PIP Program.

(2) Coordinate with the Principal Under Secretary of Defense for Health Affairs (ASD(HA)), and the ASD(RA) on changes to enrollment and eligibility policy and procedures pertaining to personnel, medical, and dental issues that affect the PIP Program.

(3) Develop policies and procedures to support the functional requirements of the PIP Program, DEERS, and the DEERS client applications.

(4) Secure funding in support of new requirements to support the PIP Program or the enrollment and eligibility functions of DEERS and RAPIDS.

(5) Approve the addition or elimination of population categories eligible for ID cards in accordance with applicable law.

(6) Establish the type and form of ID card issued to eligible populations categories and administer pilot programs to determine the suitable form of ID card for newly identified populations.

(7) Determines and maintains a list of forms of documentation that are acceptable for the purpose of eligibility verification, in accordance with applicable law.

(8) Through the Director, Defense Manpower Data Center:

(i) Provides and maintains training on the examination and inspection of documentation for the purpose of eligibility verification for DEERS enrollment, record management, and ID card issuance.

(ii) Supports and maintains the development of automated data feeds to DEERS that serve as authoritative eligibility sources for applicable DoD ID card-eligible personnel.

(iii) Supports and maintains the development of the Real-time Automated Personnel Identification System (RAPIDS) as the application used to incorporate and collect eligibility documentation.

(e) The USD(AT&L) shall:

(1) Update the Defense Federal Acquisition Regulation Supplement (DFARS), current edition (available at *http://www.acq.osd.mil/ dpap/dars/ dfarspgi/ current/index.html*) to support requirements for CAC and Homeland Security Presidential Directive 12 for contracts.

(2) Ensure that the requirement for contractors to return CACs at the completion or termination of each individual's support on a specific contract is included in all applicable contracts.

(f) The USD(I) shall:

(1) Establish policy for the use of DoD issued ID cards for physical access purposes in accordance with DoD 5200.08–R, ''Physical Security Program'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/520008r.pdf*).

(2) Establish policy for military, civilian, and contractor employee background investigation, submission, and adjudication across the Department of Defense, in compliance with Homeland Security Presidential Directive 12 and Office of Personnel Management Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification (PIV) Cards Under HSPD–12'' (available at *http://www.opm.gov/ investigate/resources/final_ credentialing_standards.pdf*).

(g) The DoD CIO shall:

(1) In coordination with the USD(I), USD(P&R), and USD(AT&L), establish policy and oversight for CAC life-cycle

compliance with Federal Information Processing Standards Publication 201–1.

(2) Provide guidance regarding the use of DoD and non-DoD identification credentials on DoD information systems, including the Federal PIV cards, for authenticating to DoD network accounts and DoD private Web sites.

(3) Ensure that the DoD Public Key Infrastructure (PKI) conforms to all applicable FIPS to the greatest extent possible.

(h) The OSD and DoD Component heads other than the Secretaries of the Military Departments, shall:

(1) Develop and implement Component-level procedures for DoD directed policies and statutory requirements to support benefits eligibility through DEERS.

(2) Develop and implement Component-level ID card life-cycle procedures to comply with the provisions of this Instruction.

(3) Ensure all DoD employees, uniformed service members, and all other eligible CAC applicants, including contractor employees and other affiliate CAC applicants, have met the background investigation requirements referenced in paragraph (a)(3) of §161.6 of this part prior to approving CAC sponsorship and registration. Background investigation status must be verified and documented by the sponsor or sponsoring organization in conjunction with application for CAC issuance.

(4) Establish processes and procedures as part of the normal check-in and check-out process for collection of the CAC for all categories of DoD personnel and contractor employees when there is a separation, retirement, termination, contract termination or expiration, or CAC revocation. Since CACs contain personally identifiable information (PII), they shall be treated and controlled in accordance with 32 CFR part 310, and DoD 5200.1–M, Volume 4, ''DoD Information Security Program: Controlled Unclassified Information (CUI)'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf*). CACs shall be returned to any RAPIDS issuance location for proper disposal in a timely manner once surrendered by the CAC holder.

(5) Provide appropriate space and staffing for all DoD ID card issuing operations, as well as reliable telecommunications to and from the Defense Information Systems Agency managed Non-Classified Internet Protocol Router Network.

(6) Provide funding for CAC cardstock, printer consumables, and electromagnetically opaque sleeves to Defense Manpower Data Center (DMDC).

(7) Protect cardstock and consumables in accordance with the guidelines and standards issued and maintained by DMDC.

(8) In accordance with FIPS Publication 201–2, provide electromagnetic opaque sleeves or other comparable technologies to protect against any unauthorized contactless access to the cardholder unique identification number stored on the CAC.

(9) Manage the distribution and locations of CAC personal identification number (PIN) reset workstations.

(10) To the maximum extent possible, and in accordance with DoD Components' designated accrediting authority guidelines, ensure networked workstations are properly configured and available for CAC holders to use the User Maintenance Portal-Post Issuance Portal (UMP–PIP) service.

(11) Oversee supervision of TASS TAs and TA security managers and ensure the number of contractors overseen by any TA is manageable.

(12) Comply with the provisions of this part and provide timely and accurate support to the provisions of this part.

(13) Ensure that the policies and procedures in subpart D of this part are implemented to protect the privacy of individuals in the collection, use, maintenance, and dissemination of personally identifiable information, in accordance with 32 CFR part 310.

(i) The Secretaries of the Military Departments; Director, Division of Commissioned Corps Personnel and Readiness, USPHS; and Administrator, NOAA, shall:

(1) Appoint project officers from a level that represents the Service position of the active, National Guard, and Reserve Components for personnel policy to serve on the Joint Uniformed

Services Personnel Advisory Committee.

(2) Comply with the provisions of this part and other related policy and procedural guidance from the Department of Defense.

(3) Coordinate with the Director, DoDHRA, through the Joint Uniformed Services Personnel Advisory Committee, to determine if the list of acceptable eligibility documentation needs to be amended to add new documents or remove outdated documents.

(4) Ensure that the policies and procedures in this subpart are implemented to protect the privacy of individuals in the collection, use, maintenance, and dissemination of personally identifiable information, in accordance with 32 CFR part 310.

[79 FR 709, Jan. 6, 2014, as amended at 81 FR 74878, Oct. 27, 2016]

§ 161.6 Procedures.

(a) The DoD ID card life cycle shall be supported by an infrastructure that is predicated on a systems-based model for credentialing as described in FIPS Publication 201–2. Paragraphs (a)(1) through (7) of this section represent the baseline requirements for the life cycle of all DoD ID cards. The specific procedures and sequence of order for these items will vary based on the applicant's employment status or affiliation with the DoD and the type of ID card issued. Detailed procedures of the ID card life cycle for each category of applicant and type of ID card shall be provided by the responsible agency.

(1) *Sponsorship and eligibility.* Sponsorship shall incorporate the processes for confirming eligibility for an ID card. The sponsor is the person affiliated with the DoD or other Federal agency who takes responsibility for verifying and authorizing the applicant's need for an ID card. Applicants for a CAC must be sponsored by a DoD government official or employee.

(2) *Registration and enrollment.* Sponsorship and enrollment information on the ID card applicant shall be registered in DEERS prior to card issuance.

(3) *Background investigation.* Background investigation is required for those individuals eligible for a CAC. A background investigation is not currently required for those eligible for other forms of DoD ID cards. Sponsored CAC applicants shall not be issued a CAC without a favorably adjudicated background investigation stipulated in FIPS Publication 201–2. Applicants that have been denied a CAC based on an unfavorable adjudication of the background investigation may submit an appeal in accordance with FIPS Publication 201–2 and Office of Personnel Management Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12.''

(4) *Identity and eligibility verification.* Identity and eligibility verification shall be completed at a RAPIDS workstation. Verifying officials (VOs) shall inspect identity and eligibility documentation and RAPIDS shall authenticate individuals to ensure that ID cards are provided only to those sponsored and with a current affiliation with the DoD. RAPIDS shall also capture uniquely identifying characteristics that bind an individual to the information maintained on that individual in DEERS and to the ID card issued by RAPIDS. These characteristics may include, but are not limited to, digital photographs and fingerprints.

(5) *Issuance.* ID cards shall be issued at the RAPIDS workstation after all sponsorship, enrollment and registration, background investigation (CAC only), and identity and eligibility verification requirements have been satisfied.

(6) *Use and maintenance.* ID cards shall be used as proof of identity and DoD affiliation to facilitate access to DoD facilities and systems. Additionally, ID cards shall represent authorization for entitled benefits and privileges in accordance with DoD policies.

(7) *Retrieval and revocation.* ID cards shall be retrieved by the sponsor or sponsoring organization when the ID card has expired, when it is damaged or compromised, or when the card holder is no longer affiliated with the DoD or no longer meets the eligibility requirements for the card. The active status of an ID card shall be revoked within the DEERS and RAPIDS infrastructure and the PKI certificates on the CAC shall be revoked.

(b) The guidelines and restrictions of this paragraph apply to all forms of DoD ID cards.

(1) Any person willfully altering, damaging, lending, counterfeiting, or using these cards in any unauthorized manner is subject to fine or imprisonment or both, as prescribed in 18 U.S.C. 499, 506, 509, 701, and 1001. Section 701 of 18 U.S.C. prohibits photographing or otherwise reproducing or possessing DoD ID cards in an unauthorized manner, under penalty of fine or imprisonment or both. Unauthorized or fraudulent use of ID cards would exist if bearers used the card to obtain benefits and privileges to which they are not entitled. Examples of authorized photocopying include photocopying of DoD ID cards to facilitate medical care processing, check cashing, voting, tax matters, compliance with 50 U.S.C. appendix 501 (also known as ''The Service member's Civil Relief Act''), or administering other military-related benefits to eligible beneficiaries. When possible, the ID card will be electronically authenticated in lieu of photographing the card.

(2) International agreements (including status-of-forces agreements) and host-nation law may limit and/or define the types of support available to personnel in overseas areas. Although an ID card may be used to verify eligibility in the United States for access to, for example, commissary or exchange facilities, the use of such facilities overseas may be limited to persons who are stationed or performing temporary duty in a foreign country under official orders in support of a mutual defense mission with the host nation. ID cards shall be issued only for the purposes identified in and in accordance with this Instruction, and the Heads of the DoD Components shall use other means, such as ration cards, to implement provisions in international agreements or to prevent violations of applicable host-nation law. ID cards shall not be issued for the sole purpose of implementing provisions of international agreements or restrictions based on applicable host-nation law.

(3) All ID cards are property of the U.S. Government and shall be returned upon separation, resignation, firing, termination of contract or affiliation with the DoD, or upon any other event in which the individual no longer requires the use of such ID card.

(4) To prevent any unauthorized use, ID cards that are expired, invalidated, stolen, lost, or otherwise suspected of potential or actual unauthorized use shall be revoked in DEERS along with the PKI certificates on the CACs immediately revoked.

(5) There are instances where graphical representations of ID cards are necessary to facilitate the DoD mission. When used and distributed, the replicas must not be the same size as the ID card, must have the word ''SAMPLE'' written on them, and shall not contain an individual's PII. All SAMPLE ID cards must be maintained in a controlled environment and shall not serve as a valid ID.

(6) Individuals within the DoD who have multiple personnel category codes (e.g., an individual who is both a reservist and a contractor) shall be issued a separate ID card in each personnel category for which they are eligible. Multiple current ID cards of the same form (e.g., CAC) shall not be issued or exist for an individual under a single personnel category code.

(7) ID cards shall not be amended, modified, or overprinted by any means. No stickers or other adhesive materials are to be placed on either side of an ID card. Holes shall not be punched into ID cards, except when a CAC has been requested by the next of kin for an individual who has perished in the line of duty. A CAC provided to next of kin shall have the status of the card revoked in DEERS, have the certificates revoked, and have a hole punched through the integrated circuit chip before it is released to the next of kin.

(8) An ID card shall be in the personal custody of the individual to whom it was issued at all times. If required by military authority, it shall be surrendered for ID or investigation.

(c) *CAC migration to Federal PIV requirements.* The DoD is migrating the CAC to meet the Federal requirements for credentialing contained within Homeland Security Presidential Directive 12 and FIPS Publication 201–2. Migration will take place over multiple years as the card issuance hardware, software, and supporting systems and

processes are upgraded. Successful migration will require coordination and collaboration within and among all CAC communities (e.g., personnel security, operational security, industrial security, information security, physical security, and information technology). The organizations listed in this section will support the migration in conjunction with the responsibilities listed in §161.5:

(1) The Director, DMDC shall:

(i) Procure and distribute CAC consumables, including card stock, electromagnetically opaque sleeves, and printer supplies, commensurate with funding received from the DoD Components.

(ii) In coordination with the Office of the Under Secretary of Defense for Policy, establish an electronic process for securing CAC eligibility information on foreign government military, employee, or contract support personnel whose visit status and background investigation has been confirmed, documented, and processed in accordance with DoD Directive 5230.20, ''Visits and Assignments of Foreign Nationals'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/523020p.pdf*).

(iii) In accordance with FIPS Publication 201–2, electronically capture and store source documents in the identity-proofing process at the accession points for eligible ID card holders.

(iv) Implement modifications to the CAC applets and interfaces, add contactless capability to the CAC platform and implement modifications to the CAC topology to support compliance with FIPS Publication 201–2.

(v) Establish and implement procedures for capturing biometrics required to support CAC issuance, which includes fingerprints and facial images specified in FIPS Publication 201–2 and National Institute of Standards and Technology Special Publication 800–76–1, ''Biometric Data Specification for Personal Identity Verification'' (available at *http://csrc.nist.gov /publications/ nistpubs/ 800-76-1/SP800-76-1_ 012407.pdf*).

(vi) In coordination with the Executive Manager for DoD Biometrics and the Office of the USD(AT&L), implement the capability to obtain two segmented images (primary and secondary) fingerprint minutiae from the full 10-print fingerprints captured as part of the initial background investigation process for CAC issuance.

(vii) Maintain a capability for a CAC holder to reset or unlock PINs from a system outside of the CAC issuance infrastructure.

(2) The Executive Manager for DoD Biometrics, as appointed by the Secretary of the Army as DoD Executive Agent for DoD Biometrics in accordance with DoD Directive 8521.01E, ''Department of Defense Biometrics'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/852101p.pdf*), shall:

(i) Establish biometric standards for collection, storage, and subsequent transmittal of biometric information in accordance with DoD Directive 8521.01E (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/852101p.pdf*).

(ii) In coordination with the USD(P&R), the USD(I), and the Heads of the DoD Components, establish capability for biometric collection and enrollment operations to support CAC issuance in accordance with 32 CFR part 310 and National Institute of Standards and Technology Special Publication 800–76–1 (available at *http://csrc.nist.gov/ publications/nistpubs/ 800-76-1/SP800-76-1_012407.pdf*).

(3) The Identity Protection and Management Senior Coordinating Group shall:

(i) Monitor the CAC and identity management related activities outlined within this Instruction in accordance with DoD Instruction 1000.25 (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/100025p.pdf*).

(ii) Maintain a configuration management process for the CAC and its related components to monitor DoD compliance with FIPS Publication 201–2.

[79 FR 709, Jan. 6, 2014, as amended at 81 FR 74878, Oct. 27, 2016]

Subpart B—DoD Identification (ID) Cards: ID Card Life-Cycle

§ 161.7 ID card life-cycle procedures.

(a) *Sponsorship and eligibility*. In accordance with this part, sponsorship shall incorporate the processes for confirming eligibility for an ID card. The sponsor is the person affiliated with

the DoD or other Federal agency who takes responsibility for verifying and authorizing the applicant's need for an ID card. Applicants for a CAC shall be sponsored by a DoD Government official or employee.

(1) The population categories and specific ID cards for which applicants are eligible are listed in Appendix 1 of this section. The majority of these populations are eligible to be sponsored for an ID card based on either their employment status with the DoD or their authorization to receive DoD benefits and entitlements. Examples of these population categories include, but are not limited to: Uniformed services personnel; DoD civilian employees; military retirees; certain DoD beneficiaries; and the eligible dependents for these categories.

(2) Specific populations, listed in paragraph (c)(2)(ii) of Appendix 1 of this section who are eligible to submit for the ''U.S. DoD/Uniformed Service ID Card'' may only be sponsored if they meet additional criteria. Examples of these population categories include DoD contractors, non-DoD Federal civilians, State employees, and other non-DoD personnel that have an affiliation with the DoD other than through employment or contract. Eligibility for these approved population categories is based on the DoD Government sponsor's determination of the type and frequency of access required to DoD facilities or networks. For the populations described in this paragraph, the applicant's sponsor must confirm that the applicant meets one of the requirements in paragraphs (a)(2)(i) and (iii) of this section:

(i) Both physical access to a DoD facility and access, via logon, to DoD networks on-site or remotely. Access to the DoD network must require the use of a computer with Government-controlled configuration or use of a DoD-approved remote access procedure in accordance with the Defense Information Systems Agency Security Technical Implementation Guide, ''Secure Remote Computing'' (available at *http://iase.disa.mil/ stigs/a-z.html* under ''Remote. . .'').

(ii) Remote access, via logon, to a DoD network using DoD-approved remote access procedures.

(iii) Physical access to multiple DoD facilities or multiple non-DoD federally controlled facilities on behalf of the DoD (applicable to DoD contractors only) on a recurring basis for a period of 6 months or more.

(A) The frequency of ''recurring basis'' for access shall be determined by the DoD Component concerned in coordination with installation security policies.

(B) CAC eligibility for applicants requiring physical access to multiple DoD facilities on a recurring basis for less than 6 months are risk-based decisions that shall be made by the DoD Component concerned in coordination with installation security policies. These applicants may instead be eligible for local or regional base passes in accordance with Office of the Under Secretary of Defense for Intelligence (USD(I)) and local installation security policies and procedures.

(b) *Registration and enrollment.* In accordance with this part, sponsorship and enrollment information about the ID card applicant shall be registered in the DEERS prior to card issuance.

(1) For uniformed services personnel and DoD civilians, all submissions to DEERS must be made electronically via an authorized data source feed (e.g., Civilian Personnel Management Service). Data source feeds for additional population categories shall be approved and incorporated by the Office of the USD(P&R) (OUSD(P&R)) as they become available.

(2) The population categories that are not registered via an authorized data source feed will be registered in DEERS via the RAPIDS using the DD Form 1172–2 or via the TASS (formerly known as CVS, as described in §161.8 of this subpart.

(c) *Background Investigation.* In accordance with this subpart and DoDI 5200.46, ''DoD Investigative and Adjudicative Guidance for Issuing the Common Access Card (CAC)'' (available at: *http://www.dtic.mil/whs/ directives/corres/ pdf/ 520046p.pdf*), a background investigation is required for those individuals eligible for a CAC. A background investigation is not currently required for those eligible for other forms of DoD ID cards. The use of the CAC, as the DoD Federal personal identity

verification (PIV) card, is governed and supported by additional policies when compared to non-CAC ID cards. Sponsored CAC applicants shall not be issued a CAC without the required background investigation stipulated in DoDI 5200.46 and FIPS Publication 201–2.

(1) A background investigation shall be initiated by the sponsoring organization before a CAC can be issued. The mechanisms required to verify completion of background investigation activities for DoD, military, and civilian CAC populations are managed within the DoD human resources and personnel security communities and are linked to the CAC issuance process. An automated means is not currently in place to confirm the vetting for populations other than DoD military and civilian personnel such as CAC-eligible contractors and non-DoD Federal civilian affiliates. When data is not available within the CAC issuance infrastructure on the background investigation status for an applicant, the sponsor shall be responsible for confirming that the required background investigation procedures comply with the DoD Instruction 5200.46 and FIPS Publication 201–2 before a CAC is authorized for issuance.

(2) Issuance of a CAC requires, at a minimum, the completion of the Federal Bureau of Investigation (FBI) fingerprint check with favorable results and successful submission of a NACI (or investigation approved in Federal Investigative Standards) to the Office of Personnel Management (OPM). Completed background investigations for CAC issuance shall be adjudicated in accordance with DoD Instruction 5200.46 and Office of Personnel Management Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12'' (available at *http://www.opm.gov/ investigate/resources/final_credentialing_standards.pdf*).

(3) Except for uniformed services members, special considerations for conducting background investigations of non-U.S. nationals are addressed in DoD Instruction 5200.46. Non-U.S. person CAC applicants that do not meet the criteria to complete a NACI (e.g., U.S. residency requirements), must meet one of the criteria in paragraph (c)(3)(i) or (ii) of this section prior to CAC issuance. CACs issued to these non-U.S. persons shall display a blue stripe as described in appendix 2 of this section. Procedures for the acceptance of this CAC shall be in accordance with DoD Instruction 5200.46 and Office of Personnel Management Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12.'' The specific background investigation conducted on the non-U.S. person may vary based on governing international agreements. Non-U.S. persons must:

(i) Possess (as foreign military, employee, or contract support personnel) a visit status and security assurance that has been confirmed, documented, and processed in accordance with international agreements pursuant to DoD Directive 5230.20, ''Visits and Assignments of Foreign Nationals'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 523020p.pdf*).

(ii) Meet (as direct or indirect DoD hire personnel overseas) the investigative requirements for DoD employment as recognized through international agreements pursuant to Volume 1231 of DoD Instruction 1400.25, ''DoD Civilian Personnel Management System: Employment of Foreign Nationals'' (available at *http://www.dtic.mil/ whs/directives/corres/ html/CPM_table2.html*). In addition to these investigative requirements, a fingerprint check against the FBI criminal history database, an FBI investigations files (name check search), and a name check against the Terrorist Screening Database shall be required prior to CAC issuance in accordance with Office of Personnel Management Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12.''

(d) *Identity and eligibility verification.* In accordance with this part, identity and eligibility verification shall be completed at a RAPIDS workstation. VOs shall inspect identity and eligibility documentation and RAPIDS shall authenticate individuals to ensure that ID cards are provided only to those sponsored and who have a current affiliation with the DoD. RAPIDS shall also capture uniquely identifying

characteristics that bind an individual to the information maintained in DEERS and to the ID card issued by RAPIDS. These characteristics may include, but are not limited to, digital photographs and fingerprints.

(1) *Identity documents.* Applicants for initial ID card issuance shall submit two identity documents in original form as proof of identity. A VO at a RAPIDS workstation shall inspect and verify the documents presented by the applicant before ID card issuance. The identity documents must come from the list of acceptable primary and secondary documents included in the FIPS Publication 201–2 PIV Identity Proofing and Registration Requirements, or, for non-U.S. persons, other sources as outlined within paragraph (d)(1)(ii) of this section. Copies of the identity documentation may be accepted so long as they are certified documents. In accordance with FIPS Publication 201–2 PIV Identity Proofing and Registration Requirements, the identity documents shall be neither expired nor cancelled. The primary identity document shall be a State or Federal Government-issued picture ID. The identity documents shall be inspected for authenticity and scanned and stored in the DEERS in accordance with the DMDC, ''Real-time Automated Personnel Identification System (RAPIDS) User Guide'' upon issuance of an ID card. The requirement for the primary identity document to have a photo cannot be waived for initial ID card issuance, consistent with applicable statutory requirements. Identity documentation requirements for renewal or re-issuance are provided in paragraph (e)(3) of this section. When it has been determined that a CAC applicant has purposely misrepresented or not provided the applicant's true identity, the case shall be referred by the relevant RAPIDS Service Project office (SPO) to the sponsoring DoD or other Uniformed Service Component organization. The DoD or other Uniformed Service Component organization concerned shall initiate an investigation or provide appeals procedures as appropriate. Exceptions to the identity documentation requirements for initial ID card issuance are provided in paragraphs (d)(1)(i) and (ii) of this section:

(i) *Children.* Children under the age of 18 applying for a dependent ID card are only required to provide documentation for the initial verification of eligibility or proof of relationship to the sponsor described in paragraph (d)(2) of this section.

(ii) *Documentation for non-U.S. persons.* At foreign locations, eligible non-U.S. persons may not possess identity documentation from the FIPS Publication 201–2 PIV Identity Proofing and Registration Requirements required for ID card issuance. These individuals shall still provide personal ID as required by the intent of this paragraph (d)(1). Non-U.S. persons within the continental United States (CONUS) shall present a valid (unexpired) foreign passport as the primary form of identity source documentation. DoD organizations based outside the CONUS should work with the local consular affairs office to determine guidelines for the appropriate identity documentation for eligible non-U.S. persons in accordance with agreements with host nations. It is recommended that a foreign passport be used as the primary form of identity source documentation for these individuals. The requirement for the primary identity document to have a photo cannot be waived. Additional documentation used to verify identity must be original or certified true copies. All documentation not in English must have a certified English translation.

(2) *Eligibility documents.* ID card applicants may be required to provide documentation as initial verification of eligibility for benefits or proof of relationship to the sponsor. The eligibility documents shall be inspected for authenticity by the VO and scanned and stored in DEERS in accordance with the procedures in DMDC, ''Real-time Automated Personnel Identification System (RAPIDS) User Guide.'' Specifications and the types of documents and how they are utilized to verify eligibility for a member or dependent based on their status (e.g., Retired, Reservist, spouse, former spouse, child) shall be established by the uniformed services subject to the guidelines in this subpart. All documentation used to verify eligibility must be original or

certified true copies. All documentation not in English must have a certified English translation. Eligibility documentation is not required when DEERS can verify eligibility via an authoritative source or process.

(3) *DEERS verification*. The VO shall utilize DEERS to verify affiliation and eligibility for benefits as described in subpart C of this part.

(4) *Biometrics*. In accordance with DoD Instruction 1000.25, ID card applicants shall provide two fingerprint biometric scans and a facial image, to assist with authenticating the applicant's identity and to bind the information maintained on that individual in DEERS and to the ID card issued by RAPIDS. These requirements shall be integrated into the ID card issuance processes in the following manner:

(i) A digitized, full-face passport-type photograph will be captured for the facial image and stored in DEERS and shall have a plain white or off-white background. No flags, posters, or other images shall appear in the photo. All ID cards issued will display a photograph.

(ii) Two fingerprints are captured for storage within DEERS for applicable ID card applicants. The right and left index fingers shall normally be designated as the primary and secondary finger, respectively. However, if those fingers cannot be imaged, the primary and secondary designations shall be taken in the following order of priority: Right thumb, left thumb, right middle finger, left middle finger, right ring finger, left ring finger, right little finger, left little finger.

(iii) If two fingerprints cannot be captured, the facial image will be the alternative for authenticating ID card applicants and ID card holders during the issuance process. Additionally, when verification or capture of biometrics is not possible, authorization will be provided by the RAPIDS SSM's digital signature. This transaction shall be subject to audit by DMDC and the uniformed services.

(e) *Issuance*. In accordance with this part, ID cards shall be issued at the RAPIDS workstation after all sponsorship, enrollment and registration, background investigation (CAC only), and identity and eligibility verification requirements have been satisfied. Initial issuance of an ID card to an applicant will be contingent on satisfying the criteria in paragraphs (a) through (d) of this section.

(1) *Cross-servicing*. The uniformed services agree to cross-service the issuance of ID cards when affiliation and eligibility can be verified in DEERS. When eligibility cannot be verified through DEERS, presentation of documentation shall be required. The uniformed services shall restrict cross-servicing for verification of the DD Form 1172–2 and eligibility documentation to the parent uniformed service for the categories in paragraphs (e)(1)(i) through (viii) of this section:

(i) Initial application for permanently incapacitated individuals over age 21 and temporarily incapacitated children over age 21.

(ii) All dependent parents and parents-in-law.

(iii) Illegitimate child of a male sponsor, whose paternity has not been judicially determined.

(iv) Illegitimate child of spouse or sponsor.

(v) Unremarried and unmarried former spouses applying for initial issuance of an ID card.

(vi) Retiree from other services, and former members not currently enrolled in DEERS.

(vii) Surviving dependents of Reserve Retirees on the sponsor's 60th birthday.

(viii) Abused dependents.

(ix) Wards.

(2) *Expiration dates*—(i) *CACs*. Except as noted in paragraphs (e)(2)(i)(A) and (B) of this section, CACs shall be issued for a period not to exceed 3 years from the date of issuance or contract expiration date, whichever is shorter. Unfunded contract options shall be considered in the determination of the length of contract. For example, a contractor hired under DoD contract with a base year plus 2 option years shall be issued a CAC with a 3-year expiration. The expiration date of the PKI certificates on the CAC shall match the expiration date on the card.

(A) CACs issued to DoD civilian employees, contractors, and other eligible

personnel assigned overseas or deploying in support of contingency operations shall have an expiration date coinciding with their deployment period end date.

(B) Service Academy students shall be issued 4-year cards with 3-year certificates.

(ii) *Non-CAC ID cards.* (A) DD Form 1173, ''United States Uniformed Services ID and Privilege Card'' issued to dependents of DoD civilian employees, contractors, and other eligible personnel assigned overseas or deploying in support of contingency operations shall have an expiration date coinciding with their deployment period end date.

(B) An indefinite DD Form 1173 will be issued to a dependent of retired Service members who are either 75 years of age or permanently incapacitated in accordance with 10 U.S.C. 1060b.

(C) All other non-CAC ID cards shall be given expiration dates in accordance with the guidance listed on *www.cac.mil*.

(3) *Renewal and reissuance.* Consistent with applicable law, the applicant for ID renewal or reissuance shall be required to surrender the current DoD ID card that is up for renewal or reissuance except as indicated for lost and stolen ID cards in paragraph (e)(3)(iii) of this section. To authenticate renewal or reissuance applicants, the VO shall visually compare the applicant against the facial image stored in DEERS. For applicants who have fingerprint biometrics stored in DEERS, live fingerprint biometrics samples shall be checked against the applicant's DEERS record. If the biometric check confirms the identity of the renewal or reissuance applicant then no additional documentation is required to verify identity other than the ID card that is being renewed or reissued (documentation may still be required to verify or re-verify eligibility as described in paragraph (d)(2) of this section). As a general practice for renewal or re-issuance, two fresh fingerprint biometric captures may be stored for applicable personnel through the initial procedures in paragraph (d)(4)(ii) of this section to support DMDC's biometric update schedule.

(i) An ID card holder may apply for a renewal starting 90 days prior to the expiration of a valid ID. The SPO can provide exceptions to this requirement.

(ii) An ID card shall be reissued when printed information requires changes (e.g., pay grade, rank, change in eligibility), when any of the media (including printed data, magnetic stripe, bar codes, or integrated circuit chip) becomes illegible or inoperable, or when a CAC is known or suspected to be compromised.

(iii) An ID card shall be reissued when it is reported lost or stolen. The individual reporting a lost or stolen ID card shall be required to provide a valid (unexpired) State or Federal Government-issued picture ID as noted in paragraph (d)(1) of this section, consistent with applicable law, when available. If the individual is unable to present the required identity documentation, a biometric verification shall be used as proof of identity as described in paragraph (e)(3)(iii)(A) of this section. The VO shall verify the cardholder's identity against the biometric information stored in DEERS and confirm the expiration date of the missing ID card. The individual shall also be required to present documentation from the local security office or ID card sponsor confirming that the ID card has been reported lost or stolen. This documentation must be scanned and stored in DEERS. For dependents, the DD Form 1172–2 serves as the supporting documentation for a lost or stolen card. For individuals sponsored through TASS, the replacement ID card shall have the same expiration date as the lost or stolen card.

(A) If no identity documentation is available but biometric information (facial image or fingerprint when applicable) in the DEERS database can be verified by the VO, an ID card can be reissued to the individual upon the additional approval of a SSM. This transaction shall be digitally signed and audited.

(B) If biometric information cannot be verified, the requirements for initial issuance shall apply or a temporary card may be issued in accordance with paragraph (e)(4) of this section.

(4) *Temporary cards—(i) Temporary issuance of a CAC.* During contingency

operations, in the event there is no communication with the DEERS database or the certificate authority, a temporary CAC may be issued with an abbreviated expiration date for a maximum of 10 days. The temporary card will not have PKI certificates and will be replaced as soon as the member can reach an online RAPIDS station or communications have been restored. Additionally, the temporary CAC does not communicate or imply eligibility to any DoD benefit. This capability will be enabled only at affected RAPIDS sites and must have approval granted by DMDC.

(ii) *Temporary issuance of a Uniformed Services Identification card.* There are multiple scenarios under which a temporary Uniformed Services Identification card may be issued. The uniformed services shall develop standard processes and procedures for scenarios requiring issuance of a temporary DD Forms 2765 ''Department of Defense/Uniformed Services Identification and Privilege Card'' or DD 1173, including but not limited to those situations where the applicant needs to obtain the necessary legal documentation or the sponsor is unavailable to provide an authorizing signature.

(5) *Multiple cards.* Individuals shall be issued a separate ID card for each population category for which they qualify as described in Appendix 1 of this section. In instances where an individual has been issued more than one ID card (e.g., an individual that is eligible for an ID card as both a Reservist and as a DoD contractor employee), only the ID card that most accurately depicts the capacity in which the individual is affiliated with the DoD should be utilized at any given time.

(f) *Use and maintenance.* In accordance with this part, ID cards shall be used as proof of identity and DoD affiliation to facilitate access to DoD facilities and systems. Additionally, ID cards shall represent authorization for entitled benefits and privileges in accordance with DoD policies. The CAC, as the DoD Federal PIV card, is governed and supported by additional policies and infrastructure when compared to non-CAC ID cards. This section provides additional guidance on CAC use and maintenance:

(1) *Access.* The granting of access privileges is determined by the facility or system owner as prescribed by the DoD.

(2) *Accountability.* CAC holders will maintain accountability of their CAC at all times while affiliated with the DoD.

(3) *PKI.* Using the RAPIDS platform, DoD PKI identity and PIV authentication certificates will be issued on the CAC at the time of card issuance in compliance with OPM Memorandum, ''Final Credentialing Standards for Issuing Personal Identity Verification Cards under HSPD–12.'' Email signature, email encryption, or PIV authentication certificates may also be available on the CAC either upon issuance or at a later time. If the person receiving a CAC does not have an organization email address assigned to them, they may return to a RAPIDS terminal or use milConnect to receive their email certificate when the email address has been assigned. To help prevent inadvertent disclosure of controlled information, email addresses assigned by an organization shall comply with DoD Instruction 8500.2, ''Information Awareness (IA) Implementation'' (available at *http://www.dtic.mil/whs/ directives/corres/pdf/ 850002p.pdf*).

(4) *milConnect.* DoD has a self-service Web site available that allows an authenticated CAC holder to add applets to the CAC, change the email address, add/update Email Signature and Email Encryption Certificates, and activate the Personal Identity Verification (PIV) Authentication certificate. This capability can be utilized from any properly configured UNCLASSIFED networked workstation. The milConnect Web site is *https://www.dmdc.osd.mil/milconnect.*

(5) *CAC Personal ID Number (PIN) Reset.* DoD has manned workstations capable of resetting the PINs of a CAC holder with a locked card or forgotten PIN. These workstations are intended to provide alternative locations for CAC holders to service their cards other than RAPIDS issuance locations. To authenticate cardholders, live biometric samples shall be checked against the biometrics stored in DEERS prior to resetting CACs. This process requires the presence of a CPR

trusted agent (CTA) or TASM or RAPIDS VO or SSM.

(g) *Retrieval and revocation.* In accordance with this part, ID cards shall be retrieved by the sponsor or sponsoring organization when the ID card has expired, when it is damaged or compromised, or when the card holder is no longer affiliated with the DoD or no longer meets the eligibility requirements for the card. The active status of the card shall be terminated within the DEERS and RAPIDS infrastructure. The CAC, as the DoD Federal PIV card, is governed and supported by additional policies and infrastructure when compared to non-CAC ID cards. This section provides additional guidance on CAC retrieval and revocation:

(1) CACs shall be retrieved as part of the normal organizational or command-level check-out processes. The active status of the CAC shall also be terminated in special circumstances (e.g., absent without leave, unauthorized absence, missing in action) in accordance with organization or command-level security policies.

(2) The DoD sponsor or sponsoring organization is ultimately responsible for retrieving CACs from their personnel who are no longer supporting their organization or activity. CAC retrieval will be documented and treated as personally identifiable information, in accordance with DoD Regulation 5200.1–R, and 32 CFR part 310 and receipted to a RAPIDS site for disposition in a timely manner.

(3) Upon loss, destruction, or revocation of the CAC, the certificates thereon are revoked and placed on the certificate revocation list in accordance with Assistant Secretary of Defense for Networks and Information Integration Certificate Policy, ''X.509 Certificate Policy for the United States Department of Defense'' (available at *http://jitc.fhu.disa.mil/ pki/documents/dod_x509_certificate_policy_ v9_0_9_ february_2005.pdf*). All other situations that pertain to the disposition of the certificates are handled in accordance with Assistant Secretary of Defense for Networks and Information Integration Certificate Policy, ''X.509 Certificate Policy for the United States Department of Defense'' as implemented.

APPENDIX 1 TO § 161.7—ID CARD DESCRIPTIONS AND POPULATION ELIGIBILITY CATEGORIES

(a) *Overview.* Paragraphs (b) through (e) of this appendix contain information on the CAC type of ID card. The remaining paragraphs in the appendix contain information on all other versions of DoD enterprise-wide ID cards. This appendix describes these cards and lists some of the categories of populations that are eligible to be sponsored for the cards under the guidelines described in paragraph (a) of § 161.7; additional ID-card eligible categories are codified in subpart C of this part. RAPIDS accesses DEERS information collected by the DD Form 1172–2 to generate all of the ID Cards identified in this appendix. The benefits and entitlements that support ID card eligibility for populations in this appendix are described in subpart C of this part. Guidelines and restrictions that pertain to all forms of DoD ID cards are included in this part.

(b) *Armed Forces of the United States Geneva Conventions ID Card*—(1) *Description.* This CAC is the primary ID card for uniformed services members and shall be used to identify the member's eligibility for benefits and privileges administered by the uniformed services as described in subpart C of this part. The CAC shall also be used to facilitate standardized, uniform access to DoD facilities, and installations in accordance with Directive Type Memorandum 09–012, ''Interim Policy Guidance for DoD Physical Access Control'' (available at: *http://www.dtic.mil/whs/directives/corres/ pdf/DTM-09-012.pdf*) and DoD 5200.08–R, ''Physical Security Program,'' and to computer systems in accordance with DoD Instruction 8520.02, ''Public Key Infrastructure (PKI) and Public Key (PK) Enabling,'' (available at: *http://www.dtic.mil/ whs/directives/corres/ pdf/852002p.pdf*).

(i) The card shall also serve as ID for purposes of Geneva Convention requirements in accordance with DoD Instruction 1000.01.

(ii) If a member is captured as a hostage, detainee, or prisoner of war (POW), the card shall be shown to the capturing authorities, but, insofar as possible, should not be surrendered.

(2) *Eligibility.* Those populations eligible for this type of CAC include:

(i) Members of the regular components of the Military Services.

(ii) Members of the Selected Reserve of the Ready Reserve of the Reserve Components.

(iii) Members of the IRR of the Ready Reserve authorized in accordance with regulations prescribed by the Secretary of Defense to perform duty in accordance with 10 U.S.C. 10147.

(iv) Uniformed services members of NOAA and USPHS.

(c) *U.S. DoD or Uniformed Services ID Card*—(1) *Description.* This CAC is the primary ID

card for eligible civilian employees, contractors, and foreign national affiliates and shall be used to facilitate standardized, uniform access to DoD facilities, and installations in accordance with Directive Type Memorandum 09–012, ''Interim Policy Guidance for DoD Physical Access Control'' and DoD 5200.08–R, ''Physical Security Program,'' and computer systems in accordance with DoD Instruction 8520.02, ''Public Key Infrastructure (PKI) and Public Key (PK) Enabling.''

(2) *Eligibility*. (i) DoD civilian employees are eligible for this CAC, to include:

(A) Individuals appointed to appropriated fund and NAF positions.

(B) USCG and NOAA civilian employees.

(C) Permanent or time-limited employees on full-time, part-time, or intermittent work schedules for 6 months or more.

(D) SES, Competitive Service, and Excepted Service employees.

(ii) Eligibility for additional populations shall be based on a combination of the personnel category and the DoD Government sponsor's determination of the type and frequency of access required to DoD networks and facilities described in paragraph (a) of §161.7 of this subpart. These personnel categories include:

(A) Non-DoD civilian employees to include:

(*1*) State employees working in support of the National Guard.

(*2*) IPA employees.

(*3*) Non-DoD Federal employees that are working in support of DoD but do not possess a Federal PIV card that is accepted by the sponsoring DoD Component. DoD Components shall obtain DHRA approval prior to sponsorship.

(B) DoD contractors.

(C) USCG and NOAA contractors.

(D) Persons whose affiliation with DoD is established through:

(*1*) *Direct and Indirect Hiring Overseas*. Non-U.S. citizens hired under an agreement with the host nation and paid directly by the uniformed services (direct hire) or paid by an entity other than the uniformed services for the benefits of the uniformed services (indirect hire).

(*2*) *Assignment as Foreign Military, Foreign Government Civilians, or Foreign Government Contractors to Support DoD Missions*. Non-U.S. citizens who are sponsored by their government as part of an official visit or assignment to work with DoD.

(*3*) *Procurement Contracts, Grant Agreements or Other Cooperative Agreements*. Individuals who have a established relationship between the U.S. Government and a State, a local government, or other recipient as specified in 31 U.S.C. 6303, 6304, and 6305.

(d) *U.S. DoD or Uniformed Services ID and Privilege Card*—(1) *Description*. This CAC is the primary ID card for civilian employees, contractors, and foreign national military, as well as other eligible individuals entitled to benefits and privileges administered by the uniformed services as described in subpart C of this part. The CAC shall be used to facilitate standardized, uniform access to DoD facilities, and installations in accordance with Directive Type Memorandum 09–012, ''Interim Policy Guidance for DoD Physical Access Control'' and DoD 5200.08–R, ''Physical Security Program,'' and computer systems in accordance with DoD Instruction 8520.02, ''Public Key Infrastructure (PKI) and Public Key (PK) Enabling.''

(2) *Eligibility*. Specific population categories are entitled to benefits and privileges, in accordance with subpart C of this part, and shall be eligible for this CAC, to include:

(i) DoD and uniformed services civilian employees (both appropriated and non-appropriated) when required to reside in a household on a military installation within the CONUS, Hawaii, Alaska, Puerto Rico, and Guam.

(ii) DoD and uniformed services civilian employees when stationed or employed and residing in foreign countries for a period of at least 365 days.

(iii) DoD contractors when stationed or employed and residing in foreign countries for a period of at least 365 days.

(iv) DoD Presidential appointees who have been appointed with the advice and consent of the Senate.

(v) Civilian employees of the Army and Air Force Exchange System, Navy Exchange System, and Marine Corps Exchange System and NAF activity employees of the Coast Guard Exchange Service.

(vi) Uniformed and non-uniformed full-time paid personnel of the Red Cross assigned to duty with the uniformed services within the CONUS, Hawaii, Alaska, Puerto Rico, and Guam, when required to reside in a household on a military installation.

(vii) Uniformed and non-uniformed, full-time, paid personnel of the Red Cross assigned to duty with the uniformed services in foreign countries.

(viii) Foreign military who meet the eligibility requirement of paragraph (a)(2) of §161.7 and are in one of the categories in paragraphs (d)(2)(viii)(A) through (C) of this appendix. Those foreign military not meeting the eligibility requirements for CAC as described in paragraph (a)(2) of §161.7 shall be issued a DD Form 2765 as described in paragraph (l) of this appendix.

(A) Active duty officers and enlisted personnel of North Atlantic Treaty Organization (NATO) and Partnership For Peace (PFP) countries serving in the United States under the sponsorship or invitation of the DoD or a Military Department.

(B) Active duty officers and enlisted personnel of non-NATO countries serving in the United States under the sponsorship or invitation of the DoD or a Military Department.

(C) Active duty officers and enlisted personnel of NATO and non-NATO countries when serving outside the United States and outside their own country under the sponsorship or invitation of the DoD or a Military Department, or when it is determined by the major overseas commander that the granting of such privileges is in the best interests of the United States and such personnel are connected with, or their activities are related to, the performance of functions of the U.S. military establishment.

(e) *U.S. DoD or Uniformed Service Geneva Conventions ID Card for Civilians Accompanying the Armed Forces*—(1) *Description*. This CAC serves as the DoD and/or Uniformed Services Geneva Conventions ID card for civilians accompanying the uniformed services and shall be used to facilitate standardized, uniform access to DoD facilities, and installations in accordance with Directive Type Memorandum 09–012, ''Interim Policy Guidance for DoD Physical Access Control'' and DoD 5200.08–R, ''Physical Security Program,'' and computer systems in accordance with DoD Instruction 8520.02, ''Public Key Infrastructure (PKI) and Public Key (PK) Enabling.''

(2) *Eligibility*. The following population categories are eligible for this CAC:

(i) Emergency-essential employees as defined in DoD Directive 1404.10, ''DoD Civilian Expeditionary Workforce'' (available at *http://www.dtic.mil/whs/ directives/corres/ pdf/ 140410p.pdf*).

(ii) Contractors authorized to accompany the force (contingency contractor employees) as defined in Joint Publication 1–02 (available at *http://www.dtic.mil/ doctrine/ new_pubs/ jp1_02.pdf*).

(f) *DD Form 2, ''Armed Forces of the United States Identification Card (Reserve).''*—(1) *Description*. This is the primary ID card for RC members not eligible for a CAC. Benefits and privileges shall be administered by the uniformed services as described in subpart C of this part.

(i) The DD Form 2S (RES) shall serve as ID for purposes of the Geneva Convention requirements in accordance with DoD Instruction 1000.01.

(ii) If a member is captured as a hostage, detainee, or POW, the DD Form 2S (RES), shall be shown to the capturing authorities, but, insofar as possible, should not be surrendered.

(2) *Eligibility*. Those populations eligible for the DD Form 2S (RES) include:

(i) Ready Reserve, who are not otherwise entitled to either DD Form 2S (RET), ''Armed Forces of the United States Geneva Conventions Identification Card (Retired) (Blue),'' or a CAC.

(ii) The Standby Reserve.

(iii) The Reserve Officers' Training Corps College Program students that have signed a contract leading to military service.

(g) *DD Form 2S (Ret)*—(1) *Description*. This is the primary ID card for retired uniformed services members entitled to retired pay. Benefits and privileges shall be administered by the uniformed services as described in subpart C of this part.

(2) *Eligibility*. Members of the uniformed services who are entitled and in receipt of retired pay, or entitled and have waived their retired pay, are eligible for the DD 2S (RET).

(h) *DD Form 2, ''United States Uniformed Services Identification Card (Reserve Retired).''*—(1) *Description*. This is the primary ID card for members of the National Guard or Reserves who have completed 20 creditable years of service and have elected to be transferred to the Retired Reserve. They will qualify for pay at age 60, or earlier if they have qualified contingency service.

(2) *Eligibility*. Members of the Reserve Components who are entitled to retired pay at age 60 (or earlier if they have qualified contingency service) and have not yet attained age 60 are eligible for the DD Form 2 (Reserve Retired).

(i) *DD Form 1173*—(1) *Description*. This is the primary ID card for dependents and other similar categories of individuals eligible for benefits and privileges administered by the uniformed services as described in subpart C of this part.

(2) *Eligibility*. Specific population categories entitled to benefits and privileges as described in subpart C of this part are eligible for the DD Form 1173 to include:

(i) Dependents of active duty Service members of the regular components, Reserve Component Service members on active duty for more than 30 days, and retirees.

(ii) Surviving dependents of active duty members.

(iii) Surviving dependents of retired military members.

(iv) Surviving dependents of MOH recipients and surviving dependents of honorably discharged veterans rated by the Department of Veterans Affairs (VA) as 100 percent disabled from a uniformed services-connected injury or disease at the time of his or her death.

(v) Accompanying dependents of foreign military.

(vi) Dependents of authorized civilian personnel overseas.

(vii) Other benefits eligible categories as described in subpart C of this part.

(j) *DD Form 1173–1, ''Department of Defense Guard and Reserve Family Member Identification Card.''*—(1) *Description*. This is the primary ID card for dependents of Ready Reserve and Standby Reserve members not on active duty in excess of 30 days. When accompanied by a set of the sponsor's valid active duty orders, the card shall be used in place of a DD Form 1173 for a period of time not to exceed 270 days, if the member is called to active duty by congressional decree

or Presidential call-up under 10 U.S.C. chapter 1209.

(2) *Eligibility*. Eligible dependents of Reserve Component members and retirees as described in subpart C of this part are eligible for the DD Form 1173–1.

(k) *DD Form 2764, ''United States DoD/Uniformed Services Geneva Conventions Card.''*—(1) *Description*. This is the primary ID for non-CAC eligible civilian noncombatant personnel who are deployed in conjunction with military operations overseas. The DD Form 2764 also replaces DD Form 489, ''Geneva Conventions Identity Card for Civilians Who Accompany the Armed Forces.''

(2) *Eligibility*. Civilian noncombatant personnel who have been authorized to accompany U.S. forces in regions of conflict, combat, and contingency operations and who are liable to capture and detention by the enemy as POWs are eligible for the DD Form 2764 in accordance with DoD Instruction 1000.01.

(l) *DD Form 2765*—(1) *Description*. This is the primary ID card for categories of individuals, other than current or retired members of the uniformed services, who are eligible for uniformed services benefits and privileges in their own right without requiring a current affiliation with another sponsor.

(2) *Eligibility*. Those populations eligible for the DD Form 2765 include:

(i) Foreign national military personnel described in paragraph (d)(2)(viii) of this appendix that cannot meet all criteria for CAC issuance.

(ii) Former members.

(iii) Members eligible for transitional health care (THC). These individuals shall be eligible for DD Form 2765 (with a ''TA'' overstamp) showing expiration date for each benefit, as shown on the reverse of the card.

(iv) MOH recipients.

(v) DAV (rated 100 percent disabled by the Department of Veterans Affairs).

(vi) Former spouse (that qualify as a DoD beneficiary).

(vii) Civilian personnel in the categories listed in paragraphs (l)(2)(vii)(A) through (D) of this appendix:

(A) Other U.S. Government agency civilian employees when stationed or employed and residing in foreign countries for a period of at least 365 days.

(B) Area executives, center directors, and assistant directors of the United Service Organization, when serving in foreign countries.

(C) United Seaman's Service (USS) personnel in foreign countries.

(D) Military Sealift Command (MSC) civil service marine personnel deployed to foreign countries on MSC-owned and -operated vessels.

(m) *DoD Civilian Retiree Card*—(1) *Description*. This ID shall only be used to establish DoD civilian retiree identity and affiliation with the DoD.

(2) *Eligibility*. Appropriated and NAF civilians that have retired from any DoD Service component or agency are eligible for the DoD Civilian Retiree Card. These civilians must have their retired status verified in DEERS before an ID card can be issued.

(n) *NOAA Retired Wage Mariner and Family Member Card*—(1) *Description*. The NOAA Retired Wage Mariner and Family Member Card is a sub-category of the DoD Civilian Retiree Card and shall be used to establish identity and affiliation with the DoD and to identify the individual's eligibility for benefits and privileges administered by the uniformed services as described in subpart C of this part.

(2) *Eligibility*. Retired Wage Mariners of NOAA and their dependents as described in subpart C of this part are eligible for the NOAA Retired Wage Mariners and Family Members Card.

APPENDIX 2 TO § 161.7—TOPOLOGY SPECIFICATIONS

(a) *Topology*. Graphical representations of all CACs are maintained at *www.cac.mil*.

(b) *CAC stripe color coding*. The CAC shall be color-coded as indicated in the Table to reflect the status of the holder of the card.

(1) If a person meets more than one condition as shown in the Table, priority will be given to the blue stripe to denote a non-U.S. citizen unless the card serves as a Geneva Conventions card.

(2) FIPS Publication 201–2 reserves the color red to distinguish emergency first responder officials. Until the DoD implementation of Homeland Security Presidential Directive 12 is complete, the color red will also be used to denote non-U.S. personnel in the same manner as the blue stripe in the Table (i.e., some cards with red stripes may continue to exist in circulation until the 3-year life cycle is complete).

TABLE—CAC STRIPE COLOR CODING

No stripe	U.S. military and DoD civilian personnel or any personnel eligible for a Geneva Conventions card
Blue	Non-U.S. personnel, including DoD contract employees (other than those persons requiring a Geneva Conventions card).
Green	All U.S. citizen personnel under contract to the DoD (other than those persons requiring a Geneva Conventions card).

(c) *CAC printed statements*—(1) Eligible individuals who are permanently assigned in foreign countries for at least 365 days (it should be noted that local nationals are in their home country, not a foreign country) will have the word ''OVERSEAS'' printed within the authorized patronage area of the CAC.

(2) The authorized patronage area for eligible individuals permanently assigned within CONUS will be blank. Travel orders authorize access for these individuals while en route to the deployment site.

(3) During a conflict, combat, or contingency operation, civilian employees with a U.S. DoD or Uniformed Services Geneva Conventions ID Card for Civilians Accompanying the Uniformed Services will be granted all commissary; exchange; MWR; and medical privileges available at the site of the deployment, regardless of the statements on the ID card. Contractor employees possessing this ID card shall receive the benefit of those commissary, exchange, MWR, and medical privileges that are accorded to such persons by international agreements in force between the United States and the host country concerned and their letter of authorization.

(4) The medical area on the card for individuals on permanent assignment in a foreign country will contain the statement: ''When TAD/TDY or stationed overseas on a space available fully reimbursable basis.'' However, civilian employees and contractor employees providing support when forward deployed during a conflict, combat, or contingency operation are treated in accordance with 10 U.S.C. 10147 and chapters 1209 and 1223 and DoD Instruction 3020.41, ''Operational Contract Support'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/ 302041p.pdf*), and the Deputy Secretary of Defense Memorandum, ''Policy Guidance for Provision of Medical Care to Department of Defense Civilian Employees Injured or Wounded While Forward Deployed in Support of Hostilities'' (available at *http:// cpol.army.mil/library/ nonarmy/dod_092407.pdf*).

(d) *Blood type indicators.* A blood type indicator is an optional data element on the ID card and will only appear on the card if the blood type is provided by an authoritative data source prescribed by TRICARE Management Activity.

(e) *Organ donor indicators.* An organ donor indicator is an optional data element on the ID card and will only appear if the card applicant opts for this feature at the time of card issuance.

[79 FR 709, Jan. 6, 2014, as amended at 81 FR 74878, Oct. 27, 2016]

§ 161.8 ID card life-cycle roles and responsibilities.

(a) *General.* This section provides the roles and responsibilities associated with a series of processes and systems that support the ID card life-cycle. The requirements provided in this section may be supplemented by military Service guidance, DoD Component-level procedures and DMDC procedural and system documentation on DEERS, RAPIDS, TASS, and CPR.

(b) *Separation of duties.* The ID card life-cycle includes a requirement for a separation of duties to support the issuance process. This rule requires more than one person to serve in an official role during the sponsorship and enrollment and issuance processes. Authorizing a RAPIDS SSM or VO to exercise the duties of a TASS TASM, TA, or sponsor would allow a single individual to control the ID card issuance process, from record creation to card issuance. Individuals serving in the role of a RAPIDS SSM or VO shall not exercise the role of the TASS TASM or TA or the role of the signatory sponsor on the DD Form 1172–2. (In the case of their own dependents, a RAPIDS SSM or VO can serve as the sponsor on the DD Form 1172–2 but cannot serve as the VO for card issuance.)

(c) *DD Form 1172–2.* The DD Form 1172–2 shall be used to collect the information necessary to register ID card and CAC applicants in DEERS via RAPIDS who are not enrolled through an authorized personnel data feed or are not registered through TASS. The DD Form 577, ''Appointment/Termination Record—Authorized Signature,'' shall be used to verify the sponsoring individual's signature, when verification through RAPIDS is unavailable. This form is to be used primarily for DEERS enrollment and verification of initial and continued association for dependents and DoD affiliates (e.g., foreign national military). The DD Form 1172–2 shall also be used to add benefits conditions for eligible personnel in accordance with DMDC, ''Real-time Automated Personnel Identification System (RAPIDS) User Guide'' and subpart C of this part. Retention and disposition of the DD Form 1172–2 shall be in accordance with the uniformed services' regulatory instructions. In the absence of electronic verification of sponsorship for the enrollment or reenrollment of dependents, the sponsor signing block 65 in

Section 5 of the DD Form 1172–2 for the ID card applicant:

(1) Shall be a uniformed services member, retiree, civilian employee working for the sponsoring organization, or an individual entitled to DoD benefits in their own right, without requiring relationship to another sponsor, as described in subpart C of this part.

(2) Must be a DoD ID card or CAC holder.

(3) Shall establish the applicant's initial and continued relationship to the sponsor, affiliation with DoD, and need for a CAC card in accordance with this subpart and DoD Component-level procedures.

(d) *TASS*. TASS shall serve as the sponsorship and DEERS data registration tool for CAC-eligible DoD contractors and other populations as determined by the Director, DHRA. TASS employs an automated version of the DD Form 1172–2 to collect information necessary for DEERS enrollment. Organizations that use TASS shall adhere to the following guidelines on user roles:

(1) *Service Point of Contact (SPOC)*. A DoD Component that utilizes TASS shall appoint a SPOC for TASS management and operation. The SPOC shall coordinate with the DMDC to establish a site with TASS capability. The SPOC shall create policies, operating procedures, and other supporting documentation in support of the Service or agency-specific implementation. The SPOC will oversee TASM registration, and provide any other required field support. The TASS SPOC:

(i) Must be a U.S. citizen.

(ii) Must be a uniformed services member, civilian employee working for the sponsoring organization, or a DoD contractor providing management support to the service or agency implementing TASS (a contractor cannot perform the TA or TASM role).

(iii) Must be capable of sending and receiving digitally signed and encrypted email.

(iv) Must be a CAC holder.

(v) Shall complete the training provided by DMDC for the TASM and TA roles.

(2) *TASM*. The TASM will act as a TA and oversee the activity for TASS site TAs. A TASS TASM:

(i) Must be a U.S. citizen.

(ii) Must be a uniformed services member or a DoD civilian employee working for the sponsoring organization.

(iii) Must be capable of sending and receiving digitally signed and encrypted email.

(iv) Must be a CAC holder.

(v) Shall complete the training provided by DMDC for the TASM role.

(3) *TA*. TAs shall be sponsors for eligible populations within TASS and will utilize TASS to register data for the DD Form 1172–2, re-verify CAC holder affiliation, and revoke CACs in accordance with this part and the DMDC ''Contractor Verification System TASS (CVS) TASM/TA and Applicant User Guides, Version 3.03'' (available at *https://www.dmdc.osd.mil /appj/cvs/login*). Sponsoring an applicant is a multi-step process which includes establishing the individual's eligibility in accordance with paragraph (a) of §161.7 of this subpart and verifying that the individual has the necessary background investigation completed to be issued a CAC in accordance with paragraph (c) of *§161.7* of this subpart. A TASS TA:

(i) Must be a U.S. citizen.

(ii) Must be a uniformed services member, a DoD civilian employee working for the sponsoring organization, or a non DoD Federal agency employee approved by DHRA.

(iii) Must be capable of sending and receiving digitally signed and encrypted email.

(iv) Must be a CAC holder.

(v) Shall complete the training provided by DMDC for the TA role.

(vi) Shall manage no more than 100 active contractors at any given time within TASS. Exceptions to this limit can be authorized by the DoD Component concerned to address specific contract requirements that substantiate a need for a larger contractor-to-TA ratio. The DoD Component SPOC shall document any authorized exceptions to the 100-contractors limit and shall, at a minimum, conduct annual audits on the oversight functions of these specific TAs.

(vii) Shall coordinate with their contracting personnel when establishing the contractor's initial and continued affiliation with DoD and need for CACs in accordance with agency or Component-level procedures.

(viii) Shall coordinate with their contracting, human resources, or personnel security organizations to confirm that the appropriate background check has been completed for CAC applicants.

(ix) Shall re-verify a CAC holder's need for a CAC every 6 months (180 days) within TASS.

(x) Shall revoke the CAC within the TASS upon termination of employment or completion of affiliation with the DoD.

(xi) Shall ensure that the CAC is retrieved upon the CAC holder's termination of employment or completion of affiliation with the DoD.

(e) *RAPIDS*. RAPIDS must be operated in accordance with DMDC, ''Real-time Automated Personnel Identification System (RAPIDS) User Guide.'' RAPIDS shall be supported by:

(1) *SSM*. The SSM shall manage the daily operations at a RAPIDS site to include managing users, cardstock, and consumables. The SPO shall assign a primary and secondary SSM to each site to ensure the site continues to function in the absence of one of the SSMs. The SSM shall perform all responsibilities of a RAPIDS user (VO), as well as all SSM responsibilities. The SSM shall:

(i) Be a U.S. citizen.

(ii) Be a uniformed services member, civilian employee working for the sponsoring organization, or a DoD contractor.

(iii) Be a CAC holder.

(iv) Complete the training provided by DMDC for the SSM and VO roles.

(v) Be responsible for supporting RAPIDS functions delineated in DMDC, ''Real-time Automated Personnel Identification System (RAPIDS) User Guide.''

(vi) Must have a favorably adjudicated NACI.

(2) *VO*. The VO shall complete identity and eligibility verification and card issuance functions in accordance with this part. The VO:

(i) Must be a U.S. citizen.

(ii) Must be a uniformed services member, civilian employee working for the sponsoring organization, or a DoD contractor.

(iii) Must be a CAC holder.

(iv) Shall complete the training provided by DMDC for the VO role.

(v) Be responsible for supporting RAPIDS functions delineated in DMDC, ''Real-time Automated Personnel Identification System (RAPIDS) User Guide.''

(f) *CPR*. Organizations that utilize CPR shall adhere to the guidelines in this section on user roles:

(1) *CPR project officer*. The CPR project officer (CPO) shall be appointed by the Service or Agency as the focal point for day-to-day CPR management and operation. The CPO:

(i) Must be a U.S. citizen.

(ii) Must be a uniformed services member, civilian employee working for the sponsoring organization, or a DoD contractor.

(iii) Must be a CAC holder.

(iv) Must establish sites with CPR capability, oversee CPR TASM registration, and ensure other required field support in accordance with DMDC and Service- or agency-level guidelines.

(2) *CPR TASM*. The CPR TASM manages the CPR trusted agent (CTA) operations. The CPR TASM:

(i) Must be a U.S. citizen.

(ii) Must be a uniformed services member, civilian employee working for the sponsoring organization, or a DoD contractor.

(iii) Must be a CAC holder.

(iv) Shall complete the required training and manage CTA operations in accordance with DMDC and Service- or agency-level guidelines.

(3) *CTA*. The CTA's primary role is to provide PIN reset. The CTA:

(i) Must be a U.S. citizen.

(ii) Must be a uniformed services member, civilian employee working for the sponsoring organization, or a DoD contractor.

(iii) Must be a CAC holder.

(iv) Shall complete the required training and conduct CPR operations in accordance with DMDC and Service- or agency-level guidelines.

Subpart C—DoD Identification (ID) Cards: Benefits for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals

SOURCE: 81 FR 74879, Oct. 27, 2016, unless otherwise noted.

§ 161.9 DoD benefits.

The benefits population is defined by roles. There are roles that have a direct affiliation with the DoD, such as an active duty Service member, or those that have an association to someone who is affiliated, such as the spouse of an active duty member. This section reflects benefit eligibility established by law and associated DoD policy, and addresses the roles that receive benefits. These benefits can include civilian health care, direct care at an MTF, commissary, exchange, and MWR, which are conveyed on the authorized CAC or uniformed services ID card. Sections 161.10 through 161.22 identify the categories of eligible persons and their authorized benefits as they would be recorded in the Defense Eligibility Enrollment Reporting System (DEERS).

(a) Sections 161.10 through 161.22 reflect the eligibility of persons for the benefits administered by the uniformed services in accordance with 10 U.S.C. chapter 55 and DoD Instruction 1330.17, ''Armed Services Commissary Operations'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/133017p.pdf*); DoD Instruction 1330.21, ''Armed Services Exchange Regulations'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/133021p.pdf*); and DoD Instruction 1015.10.

(1) Additional benefits may be authorized by DoD Instruction 1330.17, DoD Instruction 1330.21, and DoD Instruction 1015.10, but are not printed on the DoD ID card; access to benefits may be facilitated in another manner in accordance with DoD Instruction 1330.17, DoD Instruction 1330.21, and DoD Instruction 1015.10.

(2) Installation commanders may never authorize benefits beyond those allowed by DoD Instruction 1330.17, DoD Instruction 1330.21, and DoD Instruction 1015.10, but they may deny privileges indicated when base support facilities cannot handle the burden imposed as authorized by DoD Instruction 1330.17, DoD Instruction 1330.21, and DoD Instruction 1015.10.

(b) A sponsor's begin date for benefit eligibility is based on the date the sponsor begins their affiliation with the Department.

(c) A dependent's begin date for benefit eligibility is based on the date the dependent becomes associated as an eligible dependent to an eligible sponsor.

(d) Guidance on benefit eligibility begin dates and ID card expiration dates based on benefits will be maintained at *http://www.cac.mil*.

(e) Refer to the figure 1 to this subpart for abbreviations for the tables in this subpart.

FIGURE 1 TO SUBPART C OF PART 161—BENEFITS TABLE ABBREVIATIONS

CHC	civilian health care.
DC	direct care at MTFs.
C	commissary privileges.
MWR	MWR privileges.
E	exchange privileges.

§ 161.10 Benefits for active duty members of the uniformed services.

This section describes the benefits for active duty uniformed services members and their eligible dependents administered by the uniformed services in accordance with 10 U.S.C. chapter 55. Descriptions of benefits for National Guard and Reserve members and their eligible dependents are contained in §161.11. Descriptions of benefits for surviving dependents of active duty uniformed services members are contained in §161.17.

(a) *Active duty service members.* Active duty uniformed services members are eligible for benefits administered by the uniformed services as shown in Table 1 to this subpart.

TABLE 1 TO SUBPART C OF PART 161—BENEFITS FOR ACTIVE DUTY MEMBERS, NOT INCLUDING NATIONAL GUARD OR RESERVE MEMBERS

	CHC	DC	C	MWR	E
Member (Self)	No	Yes	Yes	Yes	Yes.

(b) *Dependents of active duty members.* Dependents of active duty members are eligible for benefits as shown in Table 2 to this subpart. Benefits for the eligible dependents of National Guard or Reserve members, non-regular Service retirees not yet age 60, or members entitled to retired pay or who are in receipt of retired pay for non-regular service, and non-regular Service retirees who are not in receipt of retired pay are identified in §§161.11 through 161.14.

TABLE 2 TO SUBPART C OF PART 161—BENEFITS FOR DEPENDENTS OF ACTIVE DUTY MEMBERS

	CHC	DC	C	MWR	E
Spouse	Yes	Yes	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	Yes	Yes	1	1	1.
Ward	3	3	3	3	3.
Pre-adoptive Child	4	4	4	4	4.
Foster Child	No	No	1	1	1
Children, Unmarried, 21 Years and Over.	5	5	6	6	6.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	2	2	2	2.

Notes:

1. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.

2. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.

3. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:

a. Is dependent on the member for over 50 percent support.

b. Resides with the member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary or Director may, by regulation, prescribe.

4. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member by a placement agency (recognized by the Secretary of Defense) or by another organization authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member.

5. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary and is dependent on the member for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a member and is dependent on the member for over 50 percent of the child's support.

6. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary and is dependent on the member for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the member for over 50 percent of the child's support.

§ 161.11 Benefits For National Guard and Reserve members of the uniformed services.

This section describes the benefits for National Guard and Reserve members of the uniformed services and their eligible dependents. Benefits for members of the Retired Reserve and their eligible dependents are described in § 161.13. Benefits for surviving dependents of deceased National Guard and Reserve members are described in § 161.17.

(a) *National Guard and Reserve members.* National Guard and Reserve members are eligible for benefits based on being ordered to periods of active duty or full-time National Guard duty or active status in the SelRes, including Ready Reserve and Standby Reserve and participation in the Reserve Officer Training Corps.

TABLE 3 TO SUBPART C OF PART 161—BENEFITS FOR NATIONAL GUARD AND RESERVE MEMBERS NOT ON ACTIVE DUTY GREATER THAN 30 DAYS

	CHC	DC	C	MWR	E
Member (Self)	No	No	Yes	Yes	Yes.

TABLE 4 TO SUBPART C OF PART 161—BENEFITS FOR NATIONAL GUARD AND RESERVE MEMBERS ON ACTIVE DUTY FOR PERIODS GREATER THAN 30 DAYS

	CHC	DC	C	MWR	E
Member (Self)	No	Yes	Yes	Yes	Yes.

Notes:
1. This includes reported periods of early identification of Service members in support of a contingency operation in accordance with DoD Instruction 7730.54, ''Reserve Components Common Personnel Data System (RCCPDS)'' (available at *http://www.dtic.mil/ whs/directives/corres/ pdf/773054p.pdf*).

(b) *Dependents of National Guard or Reserve members.* Dependents of National Guard or Reserve members are eligible for benefits as shown in Table 5 to this subpart.

TABLE 5 TO SUBPART C OF PART 161—BENEFITS FOR DEPENDENTS OF NATIONAL GUARD OR RESERVE MEMBERS

	CHC	DC	C	MWR	E
Spouse	1	1	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1	1	2	2	2.
Ward	1, 4	1, 4	4	4	4.
Pre-adoptive Child	1, 5	1, 5	5	5	5.
Foster Child	No	No	2	2	2.
Children, Unmarried, 21 Years and Over.	1, 6	1, 6	7	7	7.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	1, 3	3	3	3.

Notes:
1. Yes, if the sponsor is on active duty greater than 30 days. When the order to active duty period is greater than 30 days the eligibility for CHC and DC for eligible dependents begins on the first day of the active duty period.
2. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.

3. Yes, if dependent on an authorized sponsor for over 50 percent support of the parent's support and residing in the sponsor's household.
4. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
a. Is dependent on the member for over 50 percent support.
b. Resides with the member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
5. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member.
6. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the member for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a member and is dependent on the member for over 50 percent of the child's support.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the member for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the member for over 50 percent of the child's support.

§ 161.12 Benefits for former uniformed services members.

This section describes the benefits for former uniformed services members and their eligible dependents. Former members are eligible to receive retired pay, at age 60, for non-regular service in accordance with 10 U.S.C. chapter 1223, but have been discharged from their respective Service or agency and maintain no military affiliation.

(a) *Former members and their eligible dependents.* Former members and their dependents are eligible for benefits as shown in Table 6 to this subpart.

TABLE 6 TO SUBPART C OF PART 161—BENEFITS FOR FORMER MEMBERS AND DEPENDENTS

	CHC	DC	C	MWR	E
Former Member (Self)	1	1	Yes	Yes	Yes.
Lawful Spouse	1	2	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1	2	3	3	3.
Ward	1, 5	2, 5	5	5	5.
Pre-adoptive Child	1, 6	2, 6	6	6	6.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over.	1, 7	2, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	2, 4	4	4	4.

Notes:
1. Yes, if the former member is age 60 or over and in receipt of retired pay for non-regular service; and is:
a. Not entitled to Medicare Part A hospital insurance through the SSA, or
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84, ''National Defense Authorization Act for Fiscal Year 2010.''
2. Yes, if former member is age 60 or over and in receipt of retired pay for non-regular service.
3. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
a. Is dependent on the member for over 50 percent support.
b. Resides with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.

6. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member or former member.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the former member for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a member or former member, and is dependent on the member or former member for over 50 percent of the child's support.
8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the former member for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the former member for over 50 percent of the child's support.

(b) [Reserved]

§ 161.13 Benefits for retired members of the uniformed services.

This section describes the benefits for retired uniformed service members entitled to retired pay and their eligible dependents. Retired uniformed service members are entitled to retired pay and eligible for benefits administered by the uniformed services in accordance with 10 U.S.C., DoD Instruction 1330.17, DoD Instruction 1330.21, DoD Instruction 1015.10, and TRICARE Policy Manual 6010.57–M (available at *http://www.tricare.mil/ contracting/ healthcare/t3manuals/ change2/tp08/ c8s9_1.pdf*). This includes voluntary, temporary, and permanent disability retired list (PDRL) retirees. Benefits for former members and their eligible dependents are described in § 161.12.

(a) *Retired members.* Benefits for voluntary retired members and PDRL retirees are shown in Table 7 to this subpart. Benefits for temporary disability retired list (TDRL) retirees are shown in Table 8 to this subpart.

TABLE 7 TO SUBPART C OF PART 161—BENEFITS FOR VOLUNTARY RETIRED MEMBERS AND PDRL MEMBERS

	CHC	DC	C	MWR	E
Member (Self)	1	Yes	Yes	Yes	Yes.

Notes:
1. Yes, if:
a. Not entitled to Medicare Part A hospital insurance through the SSA or
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.

TABLE 8 TO SUBPART C OF PART 161—BENEFITS FOR TDRL MEMBERS

	CHC	DC	C	MWR	E
Member (Self)	1, 2	Yes	Yes	Yes	Yes.

Notes:
1. If not removed sooner, retention of the service member on the TDRL shall not exceed a period of 5 years. The uniformed service member must be returned to active duty, separated with or without severance pay, or retired as PDRL in accordance with 10 U.S.C. 1210.
2. Yes, if:
a. Not entitled to Medicare Part A hospital insurance through the SSA or
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.

(b) *Retired Reserve.* Benefits for members of the Retired Reserve who have attained 20 creditable years of service, have not reached the age of 60, and are not in receipt of retired pay are shown in Table 9 to this subpart. When a Retired Reserve member is ordered to active duty greater than 30 days, their benefits will reflect what is shown in Table 10 to this subpart. When a Retired Reserve member is in receipt of retired pay under age 60 (non-regular Service retirement), or upon reaching age 60, their benefits will reflect what is shown in Table 11 to this subpart.

TABLE 9 TO SUBPART C OF PART 161—BENEFITS FOR RETIRED RESERVE MEMBERS

	CHC	DC	C	MWR	E
Member (Self)	No	No	Yes	Yes	Yes.

TABLE 10 TO SUBPART C OF PART 161—BENEFITS FOR RETIRED RESERVE MEMBERS ORDERED TO ACTIVE DUTY GREATER THAN 30 DAYS

	CHC	DC	C	MWR	E
Member (Self)	No	Yes	Yes	Yes	Yes.

TABLE 11 TO SUBPART C OF PART 161—BENEFITS FOR NON-REGULAR SERVICE RETIREMENT FOR QUALIFYING READY RESERVE MEMBERS

	CHC	DC	C	MWR	E
Member (Self)	1	1	Yes	Yes	Yes.

Notes:
1. Yes, if age 60 or over, and:
a. Applied for or in receipt of retired pay in accordance with 10 U.S.C. 1074. If in receipt of retired pay in accordance with the provisions of 10 U.S.C. 12731, after the date of the enactment of section 647 of Public Law 110–181, "National Defense Authorization Act for Fiscal Year 2008," the member must be age 60 to qualify for CHC and DC.
b. Not entitled to Medicare Part A hospital insurance through the SSA, or
c. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.

(c) *Dependents*. Dependents of retired uniformed services members entitled to retired pay, including TDRL and PDRL, non-regular Service retirees not yet age 60 not in receipt of retired pay; non-regular Service retirees entitled to retired pay in accordance with the provisions of 10 U.S.C. 12731 after the date of the enactment of section 647 of Public Law 110–181; and non-regular Service retirees, age 60 or over, in receipt of retired pay for non-regular service in accordance with 10 U.S.C. chapter 1223, are eligible for benefits as shown in Table 12 to this subpart.

TABLE 12 TO SUBPART C OF PART 161—BENEFITS FOR DEPENDENTS OF RETIRED UNIFORMED SERVICES MEMBERS

	CHC	DC	C	MWR	E
Lawful Spouse	1	2	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1	2	3	3	3.
Ward	1, 5	2, 5	5	5	5.
Pre-adoptive Child	1, 6	2, 6	6	6	6.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over.	1, 7	2, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	2, 4	4	4	4.

Notes:
1. Yes, if the sponsor is:

a. Retired (as shown in Tables 7 and 8 to this subpart) and the dependent is not entitled to Medicare Part A hospital insurance through the SSA; or if entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84;
b. A National Guard or Reserve member on a period of active duty in excess of 30 days (as shown in Table 10 to this subpart). When the ordered to active duty period is greater than 30 days the eligibility for CHC and DC for the eligible dependents begins on the first day of the active duty period; or
c. A medically eligible non-regular Service Reserve Retiree, age 60 or over, as shown in Table 11 of this subpart.
2. Yes, if the sponsor is:
a. Retired (as shown in Tables 7 and 8 to this subpart);
b. A National Guard or Reserve member on a period of active duty in excess of 30 days (as shown in Table 10 to this subpart). When the ordered to active duty period is greater than 30 days the eligibility for CHC and DC for the eligible dependents begins on the first day of the active duty period; or
c. A medically eligible non-regular Service Reserve Retiree, age 60 or over, as seen in Table 11 to this subpart.
3. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
a. Is dependent on the member for over 50 percent support.
b. Resides with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
6. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member or former member.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the former member for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a member or former member, and is dependent on the member or former member for over 50 percent of the child's support.
8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the retired member for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the retired member for over 50 percent of child's support.

§ 161.14 Benefits for MOH recipients.

This section describes the benefits for MOH recipients and their dependents who are authorized pursuant to section 706 of Public Law 106–398, ''National Defense Authorization Act for Fiscal Year 2001'' and who are not otherwise entitled to military medical and dental care. Section 706 of Public Law 106–398 authorized MOH recipients not otherwise entitled to military medical and dental care and their dependents to be given care in the same manner that such care is provided to former uniformed service members who are entitled to military retired pay and the dependents of those former members. Eligibility for the benefits described in Table 13 to this subpart begins on the date of award of the MOH but no earlier than October 30, 2000.

TABLE 13 TO SUBPART C OF PART 161—BENEFITS FOR MOH RECIPIENTS AND DEPENDENTS

	CHC	DC	C	MWR	E
Self	1	2	Yes	Yes	Yes.
Lawful Spouse	1	2	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years: Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.					
Ward	1, 5	2, 5	5	5	5.
Pre-adoptive Child	1, 6	2, 6	6	6	6.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over.	1, 7	2, 7	8	8	8.

TABLE 13 TO SUBPART C OF PART 161—BENEFITS FOR MOH RECIPIENTS AND DEPENDENTS—Continued

	CHC	DC	C	MWR	E
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	2, 4	4	4	4.

Notes:
1. Yes, if the sponsor is a MOH recipient and is not otherwise entitled to medical care as of or after October 30, 2000 pursuant to section 706 of Public Law 106–398 and:
a. Is not entitled to Medicare Part A hospital insurance through the SSA or
b. Is entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
2. Yes, if the sponsor is a MOH recipient and is not otherwise entitled to medical care as of or after October 30, 2000 pursuant to section 706 of Public Law 106–398.
3. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
a. Is dependent on the member for over 50 percent support.
b. Resides with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
6. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member or former member.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the former member for over 50 percent of the child's support or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a member or former member, and is dependent on the member or former member for over 50 percent of the child's support.
8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the MOH recipient for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the MOH recipient for over 50 percent of the child's support.

§ 161.15 Benefits for Disabled American Veterans (DAV).

This section describes the benefits for DAVs rated as 100 percent disabled or incapable of pursuing substantially gainful employment by the VA and their eligible dependents. Neither DAVs nor their eligible dependents receive CHC or DC benefits from the DoD based on their affiliation. Honorably discharged veterans rated by the VA as 100 percent disabled or incapable of pursuing substantially gainful employment from a service-connected injury or disease, and their dependents, are eligible for benefits as shown in Table 14 to this subpart.

TABLE 14 TO SUBPART C OF PART 161—BENEFITS FOR 100 PERCENT DAVS AND DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	No	Yes	Yes	Yes.
Lawful Spouse	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	No	No	1	1	1.
Ward	No	No	3	3	3.
Pre-adoptive Child	No	No	4	4	4.
Foster Child	No	No	1	1	1.

TABLE 14 TO SUBPART C OF PART 161—BENEFITS FOR 100 PERCENT DAVS AND DEPENDENTS—Continued

	CHC	DC	C	MWR	E
Children, Unmarried, 21 Years and Over.	No	No	5	5	5.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption.	No	No	2	2	2.

Notes:
1. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.
2. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.
3. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
a. Is dependent on the member for over 50 percent support.
b. Resides with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
4. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member or former member.
5. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the authorized sponsor for over 50 percent of the child's support or
b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the authorized sponsor for over 50 percent of the child's support.

§ 161.16 Benefits for transitional health care members and dependents.

This section shows the benefits for THC members and their eligible dependents. THC (formerly the TAMP) was instituted in section 502 of Public Law 101–510, ''Department of Defense Appropriations Bill Fiscal Year 1991'' effective October 1, 1990. Section 706 of Public Law 108–375, ''National Defense Authorization Act of for Fiscal Year 2005'' made the THC program permanent and made the medical eligibility 180 days for all eligible uniformed services members. Section 651 of Public Law 110–181 extended 2 years' commissary and exchange benefits to THC members. Section 734 of Public Law 110–417, ''National Defense Authorization Act for Fiscal Year 2009'' extended THC benefits to uniformed service members separating from active duty who agree to become members of the SelRes of the Ready Reserve of a reserve component. Uniformed service members separated as uncharacterized entry-level separations do not qualify for THC.

TABLE 15 TO SUBPART C OF PART 161—BENEFITS FOR THC MEMBERS AND DEPENDENTS

	CHC	DC	C	MWR	E
THC Member (Self)	1	1	2, 3	2, 3	2, 3.
Lawful Spouse	1	1	2, 3	2, 3	2, 3.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1	1	2, 3, 4	2, 3, 4	2, 3. 4.
Ward	1, 6	1, 6	2, 3, 6	2, 3, 6	2, 3, 6.
Pre-adoptive Child	1, 7	1, 7	2, 3, 7	2, 3, 7	2, 3, 7.
Foster Child	No	No	2, 3, 4	2, 3, 4	2, 3, 4.

TABLE 15 TO SUBPART C OF PART 161—BENEFITS FOR THC MEMBERS AND DEPENDENTS—Continued

	CHC	DC	C	MWR	E
Children, Unmarried, 21 Years and Over.	1, 8	1, 8	9	9	9.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption.	No	1, 5	2, 3, 5	2, 3, 5	2, 3, 5.

Notes:
1. Yes, medical entitlement for 180 days beginning on the date after the member separated from the qualifying active duty period. There is no exception based on entitlement to Medicare Part A. The THC eligible sponsor and eligible dependents receive the medical benefits as if they were active duty eligible dependents.
2. No, if the member:
a. Separated on or after January 1, 2001 but before October 1, 2007
b. Separated in accordance with 10 U.S.C. 1145(a)(2)(F).
c. Separated from active duty to join the SelRes or the Ready Reserve of a Reserve Component.
3. Yes, if the member was separated during the period beginning on October 1, 1990, through December 31, 2001, or after October 1, 2007. Entitlement shall be for 2 years, beginning on the date the member separated.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support.
5. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household.
6. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and:
a. Is dependent on the member for over 50 percent support.
b. Resides with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.
7. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member or former member.
8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the authorized sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a member or former member, and is dependent on the authorized sponsor for over 50 percent of the child's support.
9. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the authorized sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity and is dependent on the authorized sponsor for over 50 percent of the child's support.

§ 161.17 Benefits for surviving dependents.

This section describes the benefits for surviving dependents of active duty deceased uniformed services members, deceased National Guard and Reserve service members, deceased MOH recipients, and deceased 100 percent DAV. Surviving children who are adopted by a non-military member after the death of the sponsor remain eligible for all benefits as shown in this section.

(a) *Surviving dependents of active duty deceased members.* Surviving dependents of members who died while on active duty under orders that specified a period of more than 30 days or members who died while in a retired with pay status are eligible for benefits as shown in Table 16 to this subpart.

TABLE 16 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF ACTIVE DUTY DECEASED MEMBERS

	CHC	DC	C	MWR	E
Widow or widower:					
Unremarried	1	Yes	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.
Children, Unmarried, or Under 21 Years (Including Orphans):					

TABLE 16 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF ACTIVE DUTY DECEASED MEMBERS—Continued

	CHC	DC	C	MWR	E
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1	Yes	2	2	2.
Ward	1, 4	1, 4	4	4	4.
Pre-adoptive Child	1, 5	1, 5	5	5	5.
Foster Child	No	No	2	2	2.
Children, Unmarried, 21 Years and Over.	1, 6	6	7	7	7.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	3	3	3	3.

Notes:

1. Yes, if the sponsor died on active duty (for dependents of National Guard or Reserve members or Retired Reserve members the period of active duty must be in excess of 30 days in order to qualify for the benefits in this table) and:

a. If claims are filed less than 3 years from the date of death, there is no Medicare exception for the widow. After 3 years from the date of death, the widow is eligible if,

(1) Not entitled to Medicare Part A hospital insurance through the SSA.

(2) Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.

b. Yes, for children regardless of the number of years from the date of death or entitlement to Medicare they are entitled.

2. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support at the time of the sponsor's death.

3. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household at the time of the sponsor's death.

4. Yes, if, for determinations of dependency made on or after July 1, 1994, and prior to the death of the member, the child had been placed in the legal custody of the member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and was at the time of the sponsor's death:

a. Dependent on the member for over 50 percent support.

b. Residing with the member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.

5. Yes, if, for determinations of dependency made on or after October 5, 1994, and prior to the death of the member, the child had been placed in the home of the member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the member.

6. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is or was at the time of the member's death dependent on the member for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a member or former member and is or was at the time of the member's death dependent on the member for over 50 percent of the child's support.

7. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

b. Is incapable of self-support because of a mental or physical incapacity and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

(b) *Surviving dependents of deceased National Guard and Reserve members not on an active duty period greater than 30 days.* The surviving dependents of National Guard and Reserve Service members are eligible for the benefits shown in Table 17 to this subpart if:

(1) The National Guard or Reserve member died from an injury or illness incurred or aggravated while on active duty for a period of 30 days or less, on active duty for training, or on inactive duty training, or while traveling to or from the place at which the member was to perform, or performed, such active duty, active duty for training, or inactive duty training pursuant to 10 U.S.C. 1076 and 1086(c)(2) and if death occurred on or after October 1, 1985; or

(2) The National Guard or Reserve member died from an injury, illness, or disease incurred or aggravated while performing, or while traveling to or from performing active duty for a period of 30 days or less, or active duty for training, or inactive duty training,

or while performing service on funeral honors in accordance with 10 U.S.C. 1074a and if death occurred on or after November 15, 1986.

TABLE 17 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF DECEASED NATIONAL GUARD AND RESERVE MEMBERS NOT ON ACTIVE DUTY FOR A PERIOD GREATER THAN 30 DAYS

	CHC	DC	C	MWR	E
Widow or Widower:					
Unremarried	1, 2	2	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years (Including Orphans):					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1, 2	2	3	3	3.
Ward	1, 2, 5	2, 5	5	5	5.
Pre-adoptive Child	1, 2, 6	2, 6	6	6	6.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over.	1, 2, 7	2, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	2, 4	4	4	4.

Notes:

1. Yes, if:

a. Not entitled to Medicare Part A hospital insurance through the SSA.

b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.

2. Yes, only if death occurred on or after 1 October 1985 in accordance with the provisions of 10 U.S.C. 1076, or on or after November 15, 1986 in accordance with the provisions of 10 U.S.C. 1074a.

3. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support at the time of the sponsor's death.

4. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household at the time of the sponsor's death.

5. Yes, if, for determinations of dependency made on or after July 1, 1994, and prior to the death of the member, the child had been placed in the legal custody of the member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months and was at the time of the sponsor's death:

a. Dependent on the member for over 50 percent support.

b. Residing with the member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.

6. Yes, if, for determinations of dependency made on or after October 5, 1994, and prior to the death of the member, the child had been placed in the home of the member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption.

7. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is or was at the time of the member's death dependent on the member for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a member and is or was at the time of the member's or former member's death dependent on the member for over 50 percent of the child's support.

8. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

b. Is incapable of self-support because of a mental or physical incapacity and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

(c) *Surviving dependents of deceased National Guard and Reserve members in receipt of their notice of eligibility (NOE), Retired Reserve members not yet age 60, and former members not in receipt of retired pay.* The surviving dependents of National Guard and Reserve members who have died before the age of 60 are eligible for the benefits shown in Table

18 to this subpart if the deceased sponsor was:

(1) A Reserve member who had earned 20 qualifying years for retirement and received their NOE for retired pay at age 60, but had not transferred to the Retired Reserve.

(2) A Retired Reserve member eligible for pay at age 60, not yet age 60.

(3) A former member who had met time-in-service requirements.

TABLE 18 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF NATIONAL GUARD AND RESERVE MEMBERS WHO HAVE DIED BEFORE AGE 60

	CHC	DC	C	MWR	E
Widow or Widower:					
Unremarried	1, 2	1	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years (Including Orphans):					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged.	1, 2	1	3	3	3.
Ward	1, 2, 5	1, 5	5	5	5.
Pre-adoptive Child	1, 2, 6	1, 6	6	6	6.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over.	1, 2, 7	1, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	1, 4	4	4	4.

Notes:

1. Yes, on or after the date the member would have become age 60.

2. Yes, if:

a. Not entitled to Medicare Part A hospital insurance through the SSA or

b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.

3. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support at the time of the sponsor's death.

4. Yes, if dependent on an authorized sponsor for over 50 percent of the parent's support and residing in the sponsor's household at the time of the sponsor's death.

5. Yes, if, for determinations of dependency made on or after July 1, 1994, and prior to the death of the member, the child had been placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and was at the time of the sponsor's death:

a. Dependent on the member for over 50 percent support.

b. Residing with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.

6. Yes, if, for determinations of dependency made on or after October 5, 1994, and prior to the death of the member, the child had been placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption.

7. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at 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 dependent on the former member for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a member or former member and is, or was at the time of the member's or former member's death, dependent on the member or former member for over 50 percent of the child's support.

8. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

b. Is incapable of self-support because of a mental or physical incapacity and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

(d) *Surviving dependents of deceased National Guard and Reserve members whose death is unrelated to the member's service.* The surviving dependents of National Guard and Reserve members are eligible for the benefits shown in Table 19 to this subpart if:

(1) The member's death was unrelated to the member's service.

(2) The member was not on active duty, active duty for training, or on inactive duty training, or while traveling to or from the place at which the member was to perform, or performed, such active duty, active duty for training, or inactive duty training.

(3) The member was not eligible for retired pay.

TABLE 19 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF NATIONAL GUARD AND RESERVE MEMBERS WHOSE DEATH WAS UNRELATED TO THE MEMBER'S SERVICE

	CHC	DC	C	MWR	E
Widow or Widower:					
Unremarried	No	No	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years (Including Orphans):					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged, foster child.	No	No	1	1	1.
Ward	No	No	2	2	2.
Pre-adoptive Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over.	No	No	4	4	4.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	No	5	5	5.

Notes:

1. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support at the time of the sponsor's death.

2. Yes, if, for determinations of dependency made on or after July 1, 1994, and prior to the death of the member, the child had been placed in the legal custody of the member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months and was at the time of the sponsor's death:

a. Dependent on the member for over 50 percent support.

b. Residing with the member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.

3. Yes, if, for determinations of dependency made on or after October 5, 1994, and prior to the death of the member, the child had been placed in the home of the member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption.

4. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

b. Is incapable of self-support because of a mental or physical incapacity and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

5. Yes, if dependent on that sponsor for over 50 percent of the child's support and residing in the sponsor's household at the time of the sponsor's death.

(e) *Surviving dependents of deceased uniformed services retirees or deceased MOH recipients.* The surviving dependents of deceased uniformed services retirees or deceased MOH recipients are eligible for the benefits shown in Table 20 to this subpart.

TABLE 20 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF DECEASED UNIFORMED SERVICES RETIREES AND DECEASED MOH RECIPIENTS

	CHC	DC	C	MWR	E
Widow or Widower:					
Unremarried	1, 2	2, 4	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of member, illegitimate child of spouse.	1, 2	2, 4	4	3	3.
Ward	1, 2, 6	2, 3, 6	6	6	6.
Pre-adoptive Child	1, 2, 7	2, 3, 7	7	7	7.
Foster Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over.	1, 2, 8	2, 8	9	9	9.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption.	No	No	5	5	5.

Notes:

1. Yes, if the:

a. Deceased uniformed service member was a retired uniformed service member entitled to retired pay, including TDRL or PDRL, or a non-regular Service retiree, age 60 or over, in receipt of retired pay, and if the person is:

(1) Not entitled to Medicare Part A hospital insurance through the SSA; or,

(2) Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.

b. Deceased MOH recipient was not otherwise entitled to medical care as of, or after October 30, 2000 in accordance with section 706 of Public Law 106–398 and if the person is:

(1) Not entitled to Medicare Part A hospital insurance through the SSA; or,

(2) Entitled to Medicare Part A, hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.

2. No, if the deceased uniformed service member was a non-regular Service Retiree in accordance with the provision of 10 U.S.C. 12731 after the enactment of Public Law 110–181, sections 647 and 1106. The eligible surviving dependents will become eligible for CHC and DC on the anniversary of the 60th birthday of the deceased uniformed service member. Eligibility for CHC also requires that the person is:

a. Not entitled to Medicare Part A hospital insurance through the SSA; or,

b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.

3. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support at the time of the sponsor's death.

4. Yes, if the deceased was a retired uniformed services member entitled to retired pay, including TDRL or PDRL, or a non-regular Service retiree, age 60 or over, in receipt of retired pay, or a deceased MOH recipient not otherwise entitled to medical care as of or after, October 30, 2000, or a deceased non-regular Service retiree entitled in accordance with the provisions of 10 U.S.C. 12731 after the enactment of Public Law 110–181, sections 647 and 1106 on the anniversary of the 60th birthday of the deceased uniformed Service member.

5. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household at the time of the sponsor's death.

6. Yes, if, for determinations of dependency made on or after July 1, 1994, and prior to the death of the member, the child had been placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and was at the time of the sponsor's death:

a. Dependent on the member for over 50 percent support.

b. Residing with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.

7. Yes, if, for determinations of dependency made on or after October 5, 1994, and prior to the death of the member, the child had been placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption.

8. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at 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 dependent on the former member for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a member or former member and is or was at the time of the member's or former member's death dependent on the member or former member for over 50 percent of the child's support.

9. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

b. Is incapable of self-support because of a mental or physical incapacity and is, or was at the time of the member's death, dependent on the member for over 50 percent of the child's support.

(f) *Surviving dependents of 100 percent DAVs.* Surviving dependents of honorably discharged veterans rated as 100

percent disabled or incapable of pursuing substantially gainful employment by the VA from a service-connected injury or disease at the time of the veteran's death are eligible for benefits as shown in Table 21 to this subpart.

TABLE 21 TO SUBPART C OF PART 161—BENEFITS FOR SURVIVING DEPENDENTS OF 100 PERCENT DAVS

	CHC	DC	C	MWR	E
Widow or Widower (DoD Beneficiary):					
Unremarried	No	No	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, or illegitimate child of male member whose paternity has been judicially determined or voluntarily acknowledged, foster child.	No	No	1	1	1.
Ward	No	No	2	2	2.
Pre-adoptive Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over.	No	No	4	4	4.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption.	No	No	5	5	5.

Notes:

1. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support at the time of the sponsor's death.

2. Yes, if, for determination of dependency made on or after July 1, 1994, was placed in the legal custody of the member or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months; and was at the time of the sponsor's death:

a. Dependent on the member for over 50 percent support.

b. Residing with the member or former member unless separated by the necessity of uniformed service or to receive institutional care as a result of a disability or incapacitation or under such other circumstances as the administering Secretary may, by regulation, prescribe.

3. Yes, if, for determinations of dependency made on or after July 1, 1994, and prior to the death of the member, the child had been placed in the home of the member or former member by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption.

4. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at 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, dependent on the former member for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a member or former member and is, or was at the time of the member's or former member's death, dependent on the member or former member for over 50 percent of the child's support.

5. Yes, if dependent on that sponsor for over 50 percent of the parent's support and residing in the sponsor's household at the time of the sponsor's death.

§ 161.18 Benefits for abused dependents.

(a) Abused dependents of active duty uniformed services members entitled to retired pay based on 20 or more years of service who, on or after October, 23, 1992, while a member, have their eligibility to receive retired pay terminated as a result of misconduct involving the abuse of the spouse or dependent child pursuant to 10 U.S.C. 1408(h), are eligible for benefits as shown in Table 22 to this subpart. For the purposes of these benefits the eligible spouse or child may not reside in the household of the sponsor. See § 161.19 for additional information on abused dependents under the 10/20/10 former spouse rule.

TABLE 22 TO SUBPART C OF PART 161—BENEFITS FOR ABUSED DEPENDENTS OF RETIREMENT ELIGIBLE UNIFORMED SERVICES MEMBERS

	CHC	DC	C	MWR	E
Lawful Spouse	1, 2, 6	2, 6	Yes	Yes	Yes.
Children, Unmarried, Under 18 Years:					
Legitimate, adopted, stepchild, pre-adoptive.	1, 3	3	4	4	4.
Children, Unmarried, 18 Years and Over:					
(If entitled above)	1, 4, 5	4, 5	7	7	7.

Notes:
1. Yes, if:
a. Not entitled to Medicare Part A hospital insurance through the SSA.
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
2. Yes, if a court order provides for an annuity for the spouse.
3. Yes, if a member of the household where the abuse occurred.
4. Yes, if dependent on an authorized sponsor for over 50 percent of child's support at the time the abuse occurred.
5. Yes, if the child:
a. Is older than 18 years old and is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 18, or occurred before the age of 23 while a full-time student.
6. The spouse must have been married to the uniformed service member for at least 10 years, the uniformed service member must have completed 20 creditable years for retired pay, and they must have been married at least 10 years during the 20 years of creditable service (see § 161.19). The uniformed services shall prescribe specific procedures to verify the eligibility of an applicant.
7. Yes, if the child:
a. Is older than 18 years old but has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and was dependent on the sponsor for over 50 percent the child's support at the time the abuse occurred; or
b. Is incapable of self-support because of a mental or physical incapacity and was dependent on the sponsor for over 50 percent of the child's support at the time the abuse occurred.

(b) Dependents of active duty uniformed service members (who have served for a continuous period greater than 30 days) not entitled to retired pay who have received a dishonorable or bad-conduct discharge, dismissal from a uniformed service as a result of a court martial conviction for an offense involving physical or emotional abuse of the spouse or child, or was administratively discharged as a result of such an offense, separated on or after November 30, 1993, are eligible for transitional privileges in accordance with DoD Instruction 1342.24, ''Transitional Compensation for Abused Dependents'' (available at: *http://www.dtic.mil/ whs/directives/corres/ pdf/134224p.pdf*). For the purposes of these benefits the eligible spouse or child may not reside in the household of the sponsor. A maximum of up to 36 months of medical benefits can be granted by the uniformed services to the transitional compensation dependent.

TABLE 23 TO SUBPART C OF PART 161—BENEFITS FOR ABUSED DEPENDENTS OF NON-RETIREMENT ELIGIBLE UNIFORMED SERVICES MEMBERS

	CHC	DC	C	MWR	E
Lawful Spouse	1, 2	2	4	4	4.
Children, Unmarried, Under 18 Years:					
Legitimate, adopted, and stepchild.	1, 2	2	4	4	4.
Children, Unmarried, 18 Years and Over (If entitled above).	1, 2, 3	2, 3	4	4	4.

Notes:
1. Yes, if:
a. Not entitled to Medicare Part A hospital insurance through the SSA.
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
2. Yes, if

a. Residing with the member at the time of the dependent-abuse offense and not residing with the member while receiving transitional compensation for abused dependents.
b. Married to and residing with the member at the time of the dependent-abuse offense and while receiving transitional compensation for abused dependents.
3. Yes, if:
a. 18 years of age or older and incapable of self-support because of a mental or physical incapacity that existed before the age of 18 and who is (or was when a punitive or other adverse action was carried out on the member) dependent on the member for over one-half of the child's support; or
b. 18 years of age or older, but less than 23 years of age, is enrolled in a full-time course of study in an institution of higher learning approved by the Secretary of Defense and who is (or was when a punitive or other adverse action was carried out on the member) dependent on the member for over one-half of the child's support.
4. Yes, if receiving transitional compensation.

§ 161.19 Benefits for former spouses.

(a) *20/20/20 former spouses.* Unremarried former spouses of a uniformed services member or retired member, married to the member or retired member for a period of at least 20 years, during which period the member or retired member performed at least 20 years of service that is creditable in determining the member's or retired member's eligibility for retired or retainer pay, or equivalent pay pursuant to 10 U.S.C. 1408 and 1072(2)(F), and the period of the marriage and the service overlapped by at least 20 years are eligible for benefits as shown in Tables 24 and 25 to this subpart. The benefit eligibility period begins on qualifying date of divorce from the uniformed services member.

(1) *20/20/20 former spouses of an active duty, regular retired, or a non-regular retired sponsor at age 60.* 20/20/20 former spouses of an active duty, regular retired, or a non-regular retired sponsor at age 60 are eligible for benefits as shown in Table 24 to this subpart.

TABLE 24 TO SUBPART C OF PART 161—BENEFITS FOR 20/20/20 FORMER SPOUSES OF ACTIVE DUTY, REGULAR RETIRED, AND NON-REGULAR RETIRED MEMBERS AT AGE 60

	CHC	DC	C	MWR	E
Former Spouse:					
Unremarried	1, 2	1	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.

Notes:
1. Yes, if the former spouse certifies in writing that the former spouse has no medical coverage under an employer-sponsored health plan.
2. Yes, if:
a. Not entitled to Medicare Part A hospital insurance through the SSA.
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance with the exception of those individuals who qualify in accordance with section 706 of Public Law 111–84.

(2) *20/20/20 former spouses of a National Guard, Reserve member, or Retired Reserve member under age 60.* (i) In the case of former spouses of National Guard, Reserve, or Retired Reserve members or former members who are entitled to retired pay at age 60, but have not yet reached age 60, the former spouse is only entitled to commissary, MWR, and exchange benefits as shown in Table 25 to this subpart. When the Retired Reserve member or former member attains or would have attained, age 60, the former spouse will be entitled to benefits as shown in Table 24 to this subpart.

(ii) In the case of former spouses of National Guard members or Reserve members ordered to active duty, or Retired Reserve members under age 60 recalled to active duty, they continue to receive benefits as shown in Table 25 to this subpart if the orders are for a period of 30 days or less. If the National Guard member, Reserve member, or recalled Retired Reserve member is on active duty orders in excess of 30 days, the former spouse will receive benefits as shown in Table 24 to this subpart.

TABLE 25 TO SUBPART C OF PART 161—BENEFITS FOR 20/20/20 FORMER SPOUSES FOR RETIRED RESERVE UNDER AGE 60

	CHC	DC	C	MWR	E
Former Spouse:					
Unremarried	No	No	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	No	No	Yes	Yes	Yes.

(b) *20/20/15 former spouses.* Unremarried former spouses described in paragraph (a)(1) of this section, with the period of overlap of marriage and the member's creditable service at least 15 years, but less than 20 years, are not eligible for the commissary, MWR, or exchange benefits.

(1) *20/20/15 former spouses of an active duty, regular retired, or a non-regular retired sponsor at age 60.* 20/20/15 former spouses of an active duty, regular retired, or a non-regular retired sponsor at age 60 are eligible for benefits as shown in Table 26 to this subpart.

TABLE 26 TO SUBPART C OF PART 161—BENEFITS FOR 20/20/15 FORMER SPOUSES OF ACTIVE DUTY, REGULAR RETIRED, AND NON-REGULAR RETIRED AT AGE 60

	CHC	DC	C	MWR	E
Former Spouse:					
Unremarried	1, 2, 3	1, 3	No	No	No.
Remarried	No	No	No	No	No.
Unmarried	No	No	No	No	No.

Notes:
1. Yes, if former spouse certifies in writing that the former spouse has no medical coverage under an employer-sponsored health plan.
2. Yes, if:
a. Not entitled to Medicare Part A hospital insurance through the SSA; or
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
3. Yes, if the:
a. Final decree of divorce, dissolution, or annulment of the marriage was before April 1, 1985; or
b. Marriage ended on, or after, September 29, 1988, entitlements shall exist for 1 year, beginning on the date of the divorce, dissolution, or annulment pursuant to 10 U.S.C. 1076 and 1072(2)(H).

(2) *20/20/15 former spouses of a Retired Reserve member under age 60.* (i) In the case of former spouses of Retired Reserve members or former members who are entitled to retired pay at age 60, but have not yet reached age 60, the former spouse has no entitlement prior to the Retired Reserve member or former member reaching age 60. The benefit eligible period is 1 year from the date of divorce. If any period of eligibility extends beyond the Retired Reserve or former member's 60th birthday then the former spouse will receive benefits as shown in Table 26 to this subpart for that period.

(ii) In the case of former spouses of Reserve members or Retired Reserve members under age 60 recalled to active duty on orders for a period of 30 days or less they are not entitled to any benefits as shown in Table 27 to this subpart. If the Reserve member or recalled Retired Reserve member is on active duty orders in excess of 30 days, the former spouse will receive benefits as shown in Table 26 to this subpart if they are within 1 year from the date of divorce from the uniformed service member.

TABLE 27 TO SUBPART C OF PART 161—BENEFITS FOR 20/20/15 FORMER SPOUSES OF A RETIRED RESERVE MEMBER UNDER AGE 60

	CHC	DC	C	MWR	E
Former Spouse:					
Unremarried	No	No	No	No	No.
Remarried	No	No	No	No	No.

TABLE 27 TO SUBPART C OF PART 161—BENEFITS FOR 20/20/15 FORMER SPOUSES OF A RETIRED RESERVE MEMBER UNDER AGE 60—Continued

	CHC	DC	C	MWR	E
Unmarried	No	No	No	No	No.

(c) *10/20/10 former spouses.* Unremarried former spouses of a member or retired member, married to the member or retired member for a period of at least 10 years to a member or retired member who performed at least 20 years of service that is creditable in determining the member's or retired member's eligibility for retired or retainer pay, when the period of overlap of marriage and the member's creditable service was at least 10 years and the former spouse is in receipt of an annuity as a result of the member being separated from the service due to misconduct involving dependent abuse pursuant to 10 U.S.C. 1408(h), are eligible for benefits as shown in Table 28 to this subpart.

TABLE 28 TO SUBPART C OF PART 161—BENEFITS FOR 10/20/10 FORMER SPOUSES

	CHC	DC	C	MWR	E
Former Spouse:					
Unremarried	1, 2	1, 2	Yes	Yes	Yes.
Remarried	No	No	No	No	No.
Unmarried	1, 2	1, 2	Yes	Yes	Yes.

Notes:
1. Yes, if:
a. Not entitled to Medicare Part A hospital insurance through the SSA.
b. Entitled to Medicare Part A hospital insurance and enrolled in Medicare Part B medical insurance or qualified as an exception in accordance with section 706 of Public Law 111–84.
2. The spouse must have been married to the uniformed service member for at least 10 years, the uniformed service member must have completed 20 creditable years for retired pay, and they must have been married at least 10 years during the 20 years of creditable service (see § 161.18, paragraph (a)(1)). The uniformed services shall prescribe specific procedures to verify the eligibility of an applicant.

§ 161.20 Benefits for civilian personnel.

Civilian personnel may be eligible for certain benefits described in this section based on their affiliation with DoD, Service-specific guidelines, or other authorizing conditions. The definition of ''civilian personnel'' (e.g., civilian employee, DoD contractor, Red Cross employee) is specific to each benefit set described.

(a) Civilian personnel in the United States may be issued a DoD ID card as a condition of employment or assignment in accordance with subpart B of this part. Civilian personnel in the United States are eligible for benefits as shown in Table 29 to this subpart.

TABLE 29 TO SUBPART C OF PART 161—BENEFITS FOR CIVILIAN PERSONNEL IN THE UNITED STATES

	CHC	DC	C	MWR	E
Self:					
DoD Civilian Employees, IPA Personnel.	No	No	No	1	No.
Non-DoD Civilian Employees.	No	No	No	2	No.
DoD Contractors	No	No	No	2	No.

Notes:
1. Yes, but benefit is not printed on the DoD ID card and will be facilitated in accordance with DoD Instruction 1015.10.
2. Yes, if working full-time on the installation in accordance with DoD Instruction 1015.10. Benefit is not printed on the DoD ID card and will be facilitated in accordance with DoD Instruction 1015.10.

(b) Civilian personnel residing on a military installation in the United States are eligible for benefits as shown in Table 30 to this subpart.

TABLE 30 TO SUBPART C OF PART 161—BENEFITS FOR CIVILIAN PERSONNEL WHEN RESIDING ON A MILITARY INSTALLATION IN THE UNITED STATES

	CHC	DC	C	MWR	E
Self:					
DoD Civilian Employees, IPA Personnel.	No	No	No	1	2.

Notes:
1. Yes, but benefit is not printed on the DoD ID card and will be facilitated in accordance with DoD Instruction 1015.10.
2. Yes, but subject to purchase restrictions, in accordance with DoD Instruction 1330.21. Benefit is not printed on the DoD ID card and will be facilitated in accordance with DoD Instruction 1330.21.

(c) DoD civilian personnel stationed or employed outside the United States and outside U.S. Territories and Possessions, and their accompanying dependents, when residing in the same household, are eligible for benefits as shown in Table 31 to this subpart.

TABLE 31 TO SUBPART C OF PART 161—BENEFITS FOR DOD CIVILIAN PERSONNEL STATIONED OUTSIDE THE UNITED STATES AND OUTSIDE U.S. TERRITORIES AND POSSESSIONS AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self:					
DoD Civilian Employee, IPA Personnel.	No	1	Yes	Yes	Yes.
DoD Contractor	No	1	2	Yes	3.
Lawful Spouse	No	1	4	Yes	4.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, Illegitimate child of employee, or Illegitimate child of spouse.	No	1, 5	5	5	5.
Ward	No	1, 6	6	6	6.
Pre-adoptive	No	1, 7	7	7	7.
Foster Child	No	No	5	5	5.
Children, Unmarried, 21 Years and Over.	No	1, 8	9	9	9.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption.	No	1, 5	1, 5	5	5.

Notes:
1. Yes, on a space-available, fully reimbursable basis. Medical care at uniformed services facilities shall be rendered in accordance with Service instructions. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.
2. Yes, if a U.S. citizen and on a fully-reimbursable basis in accordance with DoD Instruction 1330.17 (not a local hire).
3. Yes, if a U.S. citizen assigned overseas (not a local hire).
4. Yes, if a dependent of an authorized sponsor and residing in the sponsor's household.
5. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support and residing in the sponsor's household.
6. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
7. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor.
8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor and is, dependent on the sponsor for over 50 percent of the child's support.
9. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

(d) Non-DoD Government agency civilian personnel stationed or employed outside the United States and outside U.S. territories and possessions, and their dependents, when residing in the same household, are eligible for benefits as shown in Table 32 to this subpart.

TABLE 32 TO SUBPART C OF PART 161—BENEFITS FOR NON-DOD GOVERNMENT AGENCIES CIVILIAN PERSONNEL STATIONED OR EMPLOYED OUTSIDE THE UNITED STATES AND OUTSIDE U.S. TERRITORIES AND POSSESSIONS AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self:					
Non-DoD Civilian Personnel.	No	1	2	Yes	2.
Lawful Spouse	No	1	3	Yes	3.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, Illegitimate child of employee, or Illegitimate child of spouse.	No	1, 4	4	4	4.
Ward	No	1, 5	5	5	5.
Pre-adoptive	No	1, 6	6	6	6.
Foster Child	No	No	4	4	4.
Children, Unmarried, 21 Years and Over.	No	1, 7	8	8	8.
Parent, Parent-in-Law, Stepparent, Parent-by-Adoption.	No	1, 4	4	4	4.

Notes:

1. Yes, on a space-available, fully reimbursable basis. Medical care at uniformed services facilities shall be rendered in accordance with Service instructions. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.
2. Yes, excluding local hires in accordance with DoD Instruction 1330.17 and DoD Instruction 1330.21.
3. Yes, if a dependent of an authorized sponsor and residing in the sponsor's household.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the dependent's support, and residing in the sponsor's household.
6. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor and is, dependent on the member or former member for over 50 percent of the child's support.
8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

(e) Civilian personnel stationed or employed in U.S. Territories and Possessions and their dependents, when residing in the same household, are eligible for benefits as shown in Table 33 to this subpart.

TABLE 33 TO SUBPART C OF PART 161—BENEFITS FOR CIVILIAN PERSONNEL STATIONED OR EMPLOYED IN U.S. TERRITORIES AND POSSESSIONS AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self:					
DoD Civilian employee, IPA personnel.	No	1	2	Yes	2.
Non-DoD Civilian employee; DoD contractor.	No	1	No	3	No.

TABLE 33 TO SUBPART C OF PART 161—BENEFITS FOR CIVILIAN PERSONNEL STATIONED OR EMPLOYED IN U.S. TERRITORIES AND POSSESSIONS AND ACCOMPANYING DEPENDENTS—Continued

	CHC	DC	C	MWR	E
Lawful Spouse	No	1	4	4	4.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, Illegitimate child of employee or illegitimate child of spouse.	No	1, 5	5	5	5.
Ward	No	1, 6	6	6	6.
Pre-adoptive	No	1, 7	7	7	7.
Foster Child	No	No	5	5	5.
Children, Unmarried, 21 Years and Over.	No	1, 8	9	9	9.
Parent, Parent -in-Law, Stepparent, Parent-by-Adoption.	No	1, 5	No	5	5.

Notes:
1. Yes, on a space-available, fully reimbursable basis only if residing in a household on a military installation. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.
2. Yes, excluding local hires in accordance with DoD Instruction 1330.17 and DoD Instruction 1330.21.
3. Yes, if working full-time on the installation in accordance with DoD Instruction 1015.10. Benefit will not be printed on the DoD ID card and will be facilitated in accordance with DoD Instruction 1015.10.
4. Yes, if a dependent of an authorized sponsor and residing in the sponsor's household.
5. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.
6. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
7. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor.
8. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
9. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

(f) DoD OCONUS hires are foreign nationals in host countries who are employed by U.S. forces, consistent with any agreement with the host country as defined in Volume 1231 of DoD Instruction 1400.25. They are entered into DEERS for the purposes of issuing a CAC and are eligible for benefits as shown in Table 34 to this subpart.

TABLE 34 TO SUBPART C OF PART 161—BENEFITS FOR DOD OCONUS HIRES

	CHC	DC	C	MWR	E
Self	No	No	No	1	No.

Note:
1. Yes, for appropriated fund and NAF foreign national employees assigned and working directly for DoD installations overseas, if not prohibited by Status of Forces Agreements, other international agreements, or local laws, and the installation commander determines it is in the best interest of the command. Annual recertification of the employee authorization is required in accordance with DoD Instruction 1015.10. Benefit is not printed on the DoD ID card and will be facilitated in accordance with DoD Instruction 1015.10.

(g) Full-time paid personnel of the Red Cross assigned to duty with the uniformed services in the United States and residing on a military installation and their accompanying dependents, when residing in the same household are eligible for benefits as shown in Table 35 to this subpart.

TABLE 35 TO SUBPART C OF PART 161—BENEFITS FOR FULL-TIME PAID PERSONNEL OF THE RED CROSS ASSIGNED TO DUTY WITH THE UNIFORMED SERVICES IN THE UNITED STATES AND RESIDING ON A MILITARY INSTALLATION AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	No	No	Yes	1.
Lawful Spouse	No	No	No	Yes	1, 2.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of employee, illegitimate child of spouse, or foster child.	No	No	No	3	1, 3.
Ward	No	No	No	4	1, 4.
Pre-adoptive	No	No	No	5	1, 5.
Children, Unmarried, 21 Years and Over.	No	No	No	6	1, 6.
Parent, Parent-in-Law, Stepparent, Parent-by-Adoption.	No	No	No	3	1, 3.

Notes:
1. Yes, but subject to purchase restrictions in accordance with DoDI 1330.21.
2. Yes, if a dependent of an authorized sponsor, and residing in the sponsor's household.
3. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.
4. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
5. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor.
6. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.

(h) Full-time paid personnel of the Red Cross assigned to duty with the uniformed services outside the United States and their accompanying dependents, when residing in the same household, are eligible for benefits as shown in Table 36 to this subpart.

TABLE 36 TO SUBPART C OF PART 161—BENEFITS FOR FULL-TIME PAID PERSONNEL OF THE RED CROSS ASSIGNED TO DUTY WITH THE UNIFORMED SERVICES OUTSIDE THE UNITED STATES AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	1	2	Yes	2.
Lawful Spouse	No	1	3	Yes	3.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of employee or illegitimate child of spouse.	No	1, 4	4	4	4.
Ward	No	No	5	5	5.
Foster Child	No	No	4	4	4.
Children, Unmarried, 21 Years and Over.	No	1, 6	7	7	7.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption.	No	1, 4	4	4	4.

Notes:

1. Yes, on a space-available basis at rates specified in uniformed services instructions. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.
2. Yes, if U.S. citizen assigned overseas (not a local hire).
3. Yes, if a dependent of an authorized sponsor and residing in the sponsor's household.
4. Yes, if a dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
6. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

(i) Full-time paid personnel of the United Service Organizations (USO) serving outside the United States and their accompanying dependents when residing in the same household are eligible for benefits as shown in Table 37 to this subpart.

TABLE 37 TO SUBPART C OF PART 161—BENEFITS FOR FULL-TIME PAID PERSONNEL OF THE USO AND ACCOMPANYING DEPENDENTS SERVING OUTSIDE THE UNITED STATES

	CHC	DC	C	MWR	E
Self	No	1	2	Yes	2.
Lawful Spouse	No	1	3	Yes	3.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of employee, or illegitimate child of spouse.	No	1, 4	4	4	4.
Ward	No	No	5	5	5.
Foster child	No	No	4	4	4.
Children, Unmarried, 21 Years and Over.	No	1, 5	7	7	7.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption.	No	1, 4	4	4	4.

Notes:

1. Yes, on a space-available, fully reimbursable basis. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.
2. Yes, if U.S. citizens assigned overseas (not a local hire).
3. Yes, if a dependent of an authorized sponsor and residing in the sponsor's household.
4. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
6. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the member sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

(j) Full-time paid personnel of the USS serving outside the United States and outside U.S. territories and possessions, and their accompanying dependents, when residing in the same household, are eligible for benefits as shown in Table 38 to this subpart.

TABLE 38 TO SUBPART C OF PART 161—BENEFITS FOR FULL-TIME PAID PERSONNEL OF THE USS SERVING OUTSIDE THE UNITED STATES AND OUTSIDE U.S. TERRITORIES AND POSSESSIONS AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	1	No	Yes	No.
Lawful Spouse	No	1	No	Yes	No.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of employee, or illegitimate child of spouse.	No	1, 2	No	2	No.
Ward	No	No	No	3	No.
Foster Child	No	No	No	2	No.
Children, Unmarried, 21 Years and Over.	No	1, 4	No	5	No.
Parent, Parent-in-Law, Stepparent, or Parent-by-Adoption.	No	1, 2	No	2	No.

Notes:
1. Yes, on a space-available, fully reimbursable basis. Additional guidelines are contained in DoD Instruction 1100.22 and Volume 1231 of DoD Instruction 1400.25.
2. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support and residing in the sponsor's household.
3. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
4. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
5. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

(k) MSC civil service Marine personnel deployed on MSC-owned and operated vessels outside the United States and outside U.S. territories and possessions are eligible for benefits as shown in Table 39 to this subpart.

TABLE 39 TO SUBPART C OF PART 161—BENEFITS FOR MSC PERSONNEL DEPLOYED ON MSC-OWNED AND OPERATED VESSELS OUTSIDE THE UNITED STATES AND OUTSIDE U.S. TERRITORIES AND POSSESSIONS

	CHC	DC	C	MWR	E
Self	No	1	No	Yes	No.

Note:
1. Yes, on a space-available, fully reimbursable basis.

(l) Ship's officers and members of the crews of NOAA vessels are eligible for benefits in accordance with 33 U.S.C. 3074 as shown in Table 40 to this subpart. Ship's officers are not commissioned officers, but civilian employees of NOAA.

TABLE 40 TO SUBPART C OF PART 161—BENEFITS FOR SHIP'S OFFICERS AND MEMBERS OF THE CREWS OF NOAA VESSELS

[NOAA Wage Mariner Employees]

	CHC	DC	C	MWR	E
Self	No	No	Yes	Yes	Yes.
Lawful Spouse	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, Illegitimate child of employee, Illegitimate child of spouse, or Foster Child.	No	No	1	1	1.
Ward	No	No	2	2	2.
Pre-adoptive	No	No	3	3	3.
Children, Unmarried, 21 Years and Over.	No	No	4	4	4.
Parent, Parent-in-Law, Stepparent, Parent-by-Adoption.	No	No	1	1	1.

Notes:

1. Yes, if dependent on an authorized sponsor for over 50 percent of the individual's support and residing in the sponsor's household.

2. Yes if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.

3. Yes if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor.

4. Yes, if the child:

a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or

b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

(m) Officers and crews of vessels, lighthouse keepers, and depot keepers of the former Lighthouse Service are eligible for benefits as shown in Table 41 to this subpart.

TABLE 41 TO SUBPART C OF PART 161—BENEFITS FOR OFFICERS AND CREWS OF VESSELS, LIGHTHOUSE KEEPERS, AND DEPOT KEEPERS OF THE FORMER LIGHTHOUSE SERVICE

	CHC	DC	C	MWR	E
Self	No	No	Yes	Yes	Yes.

(n) Presidential appointees who have been confirmed by the Senate (PASs) are eligible for benefits as shown in Table 42 to this subpart.

TABLE 42 TO SUBPART C OF PART 161—BENEFITS FOR PRESIDENTIAL APPOINTEES

	CHC	DC	C	MWR	E
Self PAS	No	1	2	Yes	2.

Notes:

1. Designation for PASs and other designated civilian officials within the DoD and the Military Departments. This is a specific reimbursable care value at the interagency rate outside the National Capital Region.

2. Yes, if residing in quarters on DoD military installations.

(o) Contract surgeons overseas during the period of their contract are eligible for benefits as shown in Table 43 to this subpart.

TABLE 43 TO SUBPART C OF PART 161—BENEFITS FOR CONTRACT SURGEONS OVERSEAS

	CHC	DC	C	MWR	E
Self	No	No	No	1	1.

Note:
1. Only during the period of their contract with the Surgeon General.

(p) State employees of the National Guard may be identified in DEERS for the purpose of issuing a CAC to access DoD networks. There are no benefits assigned and no dependent benefits are extended as shown in Table 44 to this subpart.

TABLE 44 TO SUBPART C OF PART 161—BENEFITS FOR STATE GUARD EMPLOYEES

	CHC	DC	C	MWR	E
Self	No	No	No	No	No.

§ 161.21 Benefits for retired civilian personnel.

(a) *Retired DoD civilian employees.* Retired appropriated and non-appropriated fund employees of the DoD are eligible for benefits as shown in Table 45 to this subpart. The Under Secretary of Defense for Personnel and Readiness Memorandum, ''Department of Defense Civilian Retiree Identification Cards,'' authorized the issuance of a DoD ID card to this population.

TABLE 45 TO SUBPART C OF PART 161—BENEFITS FOR RETIRED DOD CIVILIAN EMPLOYEES

	CHC	DC	C	MWR	E
Self	No	No	No	1	No.

Note:
1. Yes, but benefit is not printed on the DoD ID card and will be facilitated in accordance with DoD Instruction 1015.10.

(b) *Retired NOAA Wage Mariner employees and their eligible dependents.* Retired NOAA Wage Mariners (including retired ship's noncommissioned officers and members of the crews of NOAA vessels and its predecessors), and their dependents are eligible for benefits in accordance with 33 U.S.C. 3074 as shown in Table 46 to this subpart. Surviving dependents of deceased retired NOAA wage mariners remain eligible for benefits in accordance with governing policies as shown in Table 46 to this subpart.

TABLE 46 TO SUBPART C OF PART 161—BENEFITS FOR RETIRED NOAA WAGE MARINER EMPLOYEES AND THEIR ELIGIBLE DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	No	Yes	Yes	Yes.
Lawful Spouse	No	No	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of record of female member, illegitimate child of male member, whose paternity has been judicially determined, or foster child.	No	No	1	1	1.
Ward	No	No	2	2	2.

TABLE 46 TO SUBPART C OF PART 161—BENEFITS FOR RETIRED NOAA WAGE MARINER EMPLOYEES AND THEIR ELIGIBLE DEPENDENTS—Continued

	CHC	DC	C	MWR	E
Pre-adoptive Child	No	No	3	3	3.
Children, Unmarried, 21 Years and Over.	No	No	4	4	4.

Notes:
1. Yes, if dependent on an authorized sponsor for over 50 percent of the child's support and residing in the sponsor's household.
2. Yes, if, for determinations of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor or former member as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
3. Yes, if, for determinations of dependency made on or after October 5, 1994, placed in the home of the sponsor by a placement agency (recognized by the Secretary of Defense) or by another source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption by the sponsor.
4. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity, and is dependent on the sponsor for over 50 percent of the child's support.

§ 161.22 Benefits for foreign affiliates.

(a) *Sponsored NATO and PFP personnel in the United States.* Active duty officer and enlisted personnel of NATO and PFP countries serving in the United States under the sponsorship or invitation of the DoD or a Military Service and their accompanying dependents living in the sponsor's U.S. household are eligible for benefits as shown in Table 47 to this subpart.

TABLE 47 TO SUBPART C OF PART 161—BENEFITS FOR SPONSORED NATO AND PFP PERSONNEL AND ACCOMPANYING DEPENDENTS IN THE UNITED STATES

	CHC	DC	C	MWR	E
Self	No	1	2	2	2.
Lawful Spouse	3	1	4	4	4.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of member, or illegitimate child of spouse.	3, 4	1, 4	4	4	4.
Ward	No	No	5	5	5.
Children, Unmarried, 21 Years and Over.	3, 6	1, 6	7	7	7.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	No	4	4	4.

Notes:
1. Yes, for outpatient care no charge and for inpatient care at full reimbursable rate.
2. Yes, if:
a. Under orders issued by a U.S. Military Service; or
b. Assigned military attaché duties in the United States and designated on reciprocal agreements with the Department of State.
3. Yes, for outpatient care only.
4. Yes, if residing in the household of the authorized sponsor in the United States.
5. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if residing in the authorized sponsor's household.
6. Yes, if residing in the household of the authorized sponsor in the United States and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
7. Yes, if the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical, and is dependent on the sponsor for over 50 percent of the child's support.

(b) *Sponsored non-NATO personnel in the United States.* Active duty officer and enlisted personnel of non-NATO countries serving in the United States under DoD or Service sponsorship or invitation and their dependents, living in the non-NATO personnel's U.S. household, are eligible for benefits as shown in Table 48 to this subpart.

TABLE 48 TO SUBPART C OF PART 161—BENEFITS FOR SPONSORED NON-NATO PERSONNEL AND ACCOMPANYING DEPENDENTS IN THE UNITED STATES

	CHC	DC	C	MWR	E
Self	No	1	2	2	2.
Lawful Spouse	No	1	3	3	3.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of member, or illegitimate child of spouse.	No	1, 4	3	3	3.
Ward	No	No	4	4	4.
Children, Unmarried, 21 Years and Over.	No	1, 5	6	6	6.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	No	3	3	3.

Notes:
1. Yes, for outpatient care only on a reimbursable basis.
2. Yes, if under orders issued by a U.S. Military Service.
3. Yes, if residing in the household of the authorized sponsor in the United States.
4. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if residing in the authorized sponsor's household.
5. Yes, if residing in the household of the authorized sponsor in the United States and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
6. Yes, if residing in the household of the authorized sponsor in the United States and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical, and is dependent on the sponsor for over 50 percent of the child's support.

(c) *Non-sponsored NATO personnel in the United States.* Active duty officer and enlisted personnel of NATO countries who, in connection with their official NATO duties, are stationed in the United States but are not under DoD or Service sponsorship and their accompanying dependents living in the non-sponsored NATO personnel's U.S. household are eligible for benefits as shown in Table 49 to this subpart.

TABLE 49 TO SUBPART C OF PART 161—BENEFITS FOR NON-SPONSORED NATO AND PFP PERSONNEL IN THE UNITED STATES AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	1	No	No	No.
Lawful Spouse	2	1	No	No	No.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of member, or illegitimate child of spouse.	2, 3	1, 3	No	No	No.
Ward	No	No	No	No	No.
Children, Unmarried, 21 Years and Over.	2, 3, 4	1, 3, 4	No	No	No.

TABLE 49 TO SUBPART C OF PART 161—BENEFITS FOR NON-SPONSORED NATO AND PFP PERSONNEL IN THE UNITED STATES AND ACCOMPANYING DEPENDENTS—Continued

	CHC	DC	C	MWR	E
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	No	No	No	No.

Notes:
1. Yes, for outpatient care no charge and for inpatient care at full reimbursable rate.
2. Yes, for outpatient care only.
3. Yes, if residing in the household of the authorized sponsor in the United States.
4. Yes, if residing in the household of the authorized sponsor in the United States and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.

(d) *NATO and non-NATO personnel outside the United States.* Active duty officer and enlisted personnel of NATO and non-NATO countries serving outside the United States and outside their own country under DoD or Service sponsorship or invitation and their accompanying dependents living with the sponsor are eligible for benefits as shown in Table 50 to this subpart. These benefits may be extended to this category of personnel not under DoD or Service sponsorship or invitation when it is determined by the major overseas commander that the granting of such privileges is in the best interests of the United States and such personnel are connected with, or their activities are related to, the performance of functions of the Service establishment.

TABLE 50 TO SUBPART C OF PART 161—BENEFITS FOR NATO, PFP, AND NON-NATO PERSONNEL OUTSIDE THE UNITED STATES AND ACCOMPANYING DEPENDENTS

	CHC	DC	C	MWR	E
Self	No	1	Yes	Yes	Yes.
Lawful Spouse	No	1	Yes	Yes	Yes.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of member, or illegitimate child of spouse.	No	1, 2	2	2	2.
Ward	No	No	3	3	3.
Children, Unmarried, 21 Years and Over.	No	1, 4	5	5	5.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	No	2	2	2.

Notes:
1. Yes, for outpatient care only on a reimbursable basis.
2. Yes, if residing in the household of the authorized sponsor and dependent on over 50 percent support.
3. Yes, if, for determination of dependency made on or after July 1, 1994, placed in the legal custody of the sponsor as a result of a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months, and if dependent on the sponsor for over 50 percent of the child's support, and residing in the sponsor's household.
4. Yes, if residing in the household of the authorized sponsor and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.
5. Yes, if residing in the household of the authorized sponsor in the United States and the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical, and is dependent on the sponsor for over 50 percent of the child's support.

(e) *Korean Augmentation to the U.S. Army (KATUSA).* Military service is mandatory for all Republic of Korea (ROK) male citizens. Those male citizens who speak English often become KATUSA serving with the U.S. Army forces in the ROK. This arrangement is provided for in the status of forces agreement between the United States and ROK. The KATUSAs are identified in DEERS for the purpose of issuing CACs for access to the U.S. installations in the ROK. No other benefits are provided as shown in Table 51 to this subpart.

TABLE 51 TO SUBPART C OF PART 161—BENEFITS FOR KATUSA

	CHC	DC	C	MWR	E
Self	No	No	No	No	No.

(f) *Foreign national civilians.* Civilian employees of a foreign government who are assigned a support role with the DoD or Military Services or attending school at one of the DoD or uniformed services advanced schools may be identified in DEERS for the purpose of issuing a CAC. The foreign national civilian must be sponsored by the DoD or a Military Service regardless of whether the foreign national civilian is from a NATO, PFP, or non-NATO country. There are no benefits assigned and no dependent benefits are extended as shown in Table 52 to this subpart.

TABLE 52 TO SUBPART C OF PART 161—BENEFITS FOR FOREIGN NATIONAL CIVILIANS

	CHC	DC	C	MWR	E
Self	No	No	No	No	No.

(g) *Foreign national contractors.* Contractor personnel, contracted to a foreign government, who are assigned a support role with the DoD or Military Services or as a representative of a foreign government at one of the DoD or uniformed services advanced schools may be identified in DEERS for the purpose of issuing a CAC for physical and logical access requirements. The foreign national contractor must be sponsored by the DoD or a Military Service regardless of whether the foreign national civilian is from a NATO, PFP, or a non-NATO country. There are no benefits assigned and no dependent benefits are extended as shown in Table 53 to this subpart.

TABLE 53 TO SUBPART C OF PART 161—BENEFITS FOR FOREIGN NATIONAL CONTRACTORS

	CHC	DC	C	MWR	E
Self	No	No	No	No	No.

(h) *Personnel subject to a Reciprocal Health Care Agreement (RHCA) in the United States.* For countries that have bilateral RHCAs with the DoD, RHCAs provide that a limited number of foreign force members and their dependents in the United States may be provided inpatient medical care at MTFs on a space-available basis without cost (except for a subsistence charge, if it applies). Provision of such care is contingent on comparable care being made available to a comparable number of U.S. military personnel and their dependents in the foreign country. Benefits are provided as shown in Table 54 to this subpart.

TABLE 54 TO SUBPART C OF PART 161—BENEFITS FOR FOREIGN FORCE MEMBERS AND ELIGIBLE DEPENDENTS RESIDING IN THE UNITED STATES WHO ARE COVERED BY AN RHCA

	CHC	DC	C	MWR	E
Self	No	1	No	No	No.
Lawful Spouse	No	1	No	No	No.
Children, Unmarried, Under 21 Years:					
Legitimate, adopted, stepchild, illegitimate child of member, or illegitimate child of spouse.	No	1, 2	No	No	No.
Ward	No	No	No	No	No.
Children, Unmarried, 21 Years and Over.	No	1, 2, 3	No	No	No.
Parent, Parent-in-Law, Stepparent, or Parent by Adoption.	No	No	No	No	No.

Notes:
1. As determined by the appropriate RHCA.
2. Yes, if residing in the household of the authorized sponsor in the United States.
3. Yes, if residing in the household of the authorized sponsor in the United States, the child:
a. Has not attained the age of 23, is enrolled in a full-time course of study at an institution of higher learning approved by the administering Secretary, and is dependent on the sponsor for over 50 percent of the child's support; or
b. Is incapable of self-support because of a mental or physical incapacity that existed before age 21, or occurred before the age of 23 while a full-time student, while a dependent of a sponsor, and is dependent on the sponsor for over 50 percent of the child's support.

Subpart D—DoD Identification (ID) Cards: Eligibility Documentation Required for Defense Enrollment Eligibility Reporting System (DEERS) Enrollment, Record Management, and ID Card Issuance

SOURCE: 81 FR 74904, Oct. 27, 2016, unless otherwise noted.

§ 161.23 Procedures.

(a) *Eligibility documentation*—(1) *Basic requirements.* (i) ID card applicants must provide documentation as initial verification of eligibility for benefits or as proof of relationship to the sponsor. The sponsor is the prime beneficiary who derives eligibility based on individual status rather than dependence upon or relationship to another person, in accordance with §161.7(a). When possible, DEERS records will be established and updated by authoritative data feeds.

(ii) An individual's DEERS record is established through the in-person presentation of identity documentation and, in some cases, eligibility documentation. Documentation verifying an ID card applicant's identity is always required in accordance with §161.7(d)(1). Eligibility documentation may also be required to update a DEERS record to reflect a change in benefits or status.

(A) Identity and eligibility documentation is reviewed for authenticity by a RAPIDS verifying official (VO) and incorporated into the individual's DEERS record as necessary.

(B) The sponsor or DoD beneficiary must provide documentation to establish or terminate the relationship to a dependent within 30 days of the change.

(C) The VO ensures that the DD Form 1172–2 is signed by the sponsor.

(*1*) If the sponsor refuses to sign or is physically unable to sign the application, the VO verifies that the dependency between the sponsor and dependent exists and includes reasons why the sponsor is not able to or will not sign the application on the DD Form 1172–2. The VO then signs in the sponsor signature block and in the verifier's block.

(*2*) If the sponsor is deceased, the DoD beneficiary signs on the beneficiary's own behalf or on behalf of the surviving dependent.

(D) A VO may request additional documentation if there is any question of the authenticity of those presented.

(iii) Eligible individuals presenting eligibility documentation not listed in this subpart must have the responsible

uniformed service Judge Advocate General or local Staff Judge Advocate (SJA) review and verify the documentation. A written Judge Advocate General or SJA opinion may need to be submitted at ID card issuance, verifying the documentation's use for DEERS enrollment.

(2) *Documentation standards*—(i) *Certified documentation*. All documentation must be an original or certified document.

(ii) *Foreign documentation*. Additional requirements are applied toward the verification of foreign eligibility documentation submitted to support enrollment of a dependent, including:

(A) A full English language translation, which the translator has certified as complete and accurate, and the translator's certification of competency to translate from the foreign language into English, in accordance with 8 CFR 103.2(b)(3). Translation must be provided by a translator other than the individual presenting the document.

(B) A written Judge Advocate General or local SJA opinion confirming use of the eligibility documentation, if the uniformed service member is stationed overseas.

(C) Documentation that attests to the genuineness of the signature and seal, or the position of the foreign official who executed, issued, or certified the foreign documentation being presented to substantiate the dependency relationship to the sponsor.

(*1*) An accompanying original *apostille* (*i.e.*, certification) from a higher-level authority in the foreign country of issuance, for eligibility documents from countries that have adopted the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents, October 5, 1961 (copies may be obtained from the Internet at *https://www.hcch.net/en/ instruments/conventions/ full-text/?cid=41*). Sponsors should contact their SJA for information on how to obtain an *apostille* from a member nation; or

(*2*) An accompanying original certificate of authentication by a U.S. Consular Officer in the foreign country of issuance, for eligibility documents from all other foreign nations. Sponsors should contact their SJA for information on how to request issuance of certificate(s) of authentication from a U.S. Consular official.

(b) *Documentation for dependents*—(1) *Overview*. This paragraph (b) describes eligibility documentation required for eligible dependents of qualifying sponsors, including current, former, and retired uniformed service members, civilian employees, and other eligible individuals in accordance with subpart C of this part. Dependents who are eligible for benefits in accordance with subpart C of this part must provide eligibility documentation that establishes the dependent's relationship to the sponsor and verifies eligibility, as shown in Tables 1 through 12 to this subpart.

(i) The uniformed services restrict cross-servicing for verification of the DD Form 1172–2 and eligibility documentation to the responsible uniformed service for certain categories of dependents, in accordance with §161.7(e)(1).

(ii) Service-specific requirements and processes are addressed in Air Force Instruction 36–3026, ''Identification Cards for Members of the Uniformed Services, Their Eligible Family Members, and Other Eligible Personnel'' (available at: *http://static.e-publishing.af.mil/ production/1/af_a1/ publication/afi36-3026v1_ip/ afi_36-3026_ip.pdf*).

(2) *Spouse*. A sponsor's spouse must have eligibility verified by documentation shown in Table 1 to this subpart.

TABLE 1 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A SPOUSE

Status	Eligibility documentation
Spouse	Marriage certificate.
Common Law Spouse	SJA opinion (Note 1) and Common law marriage certificate (Note 2) or Court order (Note 3).

Notes:
1. A written SJA opinion that a common law marriage is recognized in the relevant State or U.S. jurisdiction.
2. A common law marriage certificate certified by the State.
3. An order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) that establishes a common law marriage.

(3) *Child, unmarried, under the age of 21.* A sponsor's dependent child, who is unmarried and under the age of 21, must have eligibility verified as shown in Tables 2 through 7 to this subpart. A child under the age of 21, who marries and subsequently divorces, may present a divorce decree and have eligibility reinstated, if the other requirements for a dependent child are met.

(i) *Legitimate child.* A sponsor's legitimate child must have eligibility verified by documentation shown in Table 2 to this subpart.

TABLE 2 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A LEGITIMATE CHILD

Status	Eligibility documentation
Legitimate Child	Birth certificate (Note 1).
Legitimate Child Conceived Posthumously.	Birth certificate (Note 1) and Director, DoDHRA memorandum (Note 2).

Notes:
1. A certificate of live birth or an FS–240, ''Consular Report of Birth Abroad,'' may be used in lieu of a birth certificate.
2. A memorandum signed by the Director, DoDHRA, establishing the eligibility for a child conceived of artificial insemination after the sponsor's death. The deceased sponsor's responsible uniformed service project office must submit all eligibility determination requests to DoDHRA, including documentation that:
a. Verifies the sponsor's intent to start a family, usually provided by the lab or clinic that assisted the couple with the in vitro process.
b. Provides the date of the sponsor's death.
c. Provides the date of birth or expected date of birth of the child.

(ii) *Pre-adoptive or adopted child.* A sponsor's pre-adoptive or adopted child must have eligibility verified by documentation shown in Table 3 to this subpart.

TABLE 3 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A PRE-ADOPTIVE OR ADOPTED CHILD

Status	Eligibility documentation
Pre-Adoptive Child	Birth certificate (Note 1) and Placement agreement (Note 2) or Court order (Note 2) or Document authorized by State or local law (Notes 2, 3).
Adopted Child	Birth certificate (Note 1) and Adoption decree (Note 4) or Court order (Note 4).

Notes:
1. A certificate of live birth or an FS–240 may be used in lieu of a birth certificate. When a placement agreement or an order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) establishes the child's date of birth, it may also be used in lieu of a birth certificate.
2. The placement agreement, order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession), or other appropriate document from any other source authorized by State or local law to provide adoption placement must include the intent to adopt.
3. An appropriate document from any other source authorized by State or local law with written approval from the responsible uniformed service Judge Advocate General or local SJA.
4. An order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) that establishes legal adoption of the child by the sponsor.

(iii) *Stepchild.* A sponsor's stepchild must have eligibility verified by documentation shown in Table 4 to this subpart.

TABLE 4 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A STEPCHILD

Status	Eligibility documentation
Stepchild	Birth certificate (Note 1) and Sponsor's marriage certificate (Note 2).

Note:
1. A certificate of live birth or an FS–240 may be used in lieu of a birth certificate. When a placement agreement or an order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) establishes the child's date of birth, it may also be used in lieu of a birth certificate.
2. A marriage certificate that establishes the relationship between the child's parent and the sponsor.

(iv) *Illegitimate child of record.* A male sponsor's illegitimate child of record must have eligibility verified by documentation shown in Table 5 to this subpart.

TABLE 5 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A MALE SPONSOR'S ILLEGITIMATE CHILD OF RECORD

Status	Eligibility documentation
Illegitimate child of record whose paternity has been judicially determined.	Birth certificate (Note 1) and Court document (Note 2) or Consent order of paternity (Note 3).
Illegitimate child of record whose paternity has not been judicially determined.	Birth certificate (Note 1) and SJA opinion (Note 4) or Voluntary acknowledgment of paternity (Note 5).

Notes:
1. A certificate of live birth or an FS–240 may be used in lieu of a birth certificate. When a placement agreement or an order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) establishes the child's date of birth, it may also be used in lieu of a birth certificate.
2. An order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) that establishes paternity.
3. A consent order of paternity, recognized by a court of competent jurisdiction in the United States (or U.S. territory or possession). An affidavit of paternity, recognized by a court of competent jurisdiction in the United States (or U.S. territory or possession), may be used in lieu of a consent order of paternity.
4. A written SJA opinion, if the member is stationed in a foreign country.
5. A voluntary acknowledgement of paternity signed by both parents and filed with the State.

(v) *Ward.* A sponsor's ward must have eligibility verified by documentation shown in Table 6 to this subpart. The sponsor must certify on the DD Form 1172–2 that the sponsor is providing more than 50 percent of the dependent's support and that the ward resides in the sponsor's household in order to issue an ID card.

TABLE 6 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A WARD

Status	Eligibility documentation
Ward	Birth certificate (Note 1) and Financial dependency determination (Note 2) and Placement agreement (Note 3) or Court document (Note 3).

Notes:
1. A certificate of live birth or an FS–240 may be used in lieu of a birth certificate. When a placement agreement or an order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) establishes the child's date of birth, it may also be used in lieu of a birth certificate.
2. A financial dependency determination from the responsible service's Defense Finance and Accounting Services (DFAS), or the service equivalent pay office, acknowledging that the sponsor is providing more than 50 percent of the dependent's support, or was at the time of the sponsor's death.
3. A placement agreement or an order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) that establishes legal custody of the child by the sponsor for no less than 12 consecutive months.

(vi) *Foster child.* A sponsor's foster child must have eligibility verified by documentation shown in Table 7 to this subpart.

TABLE 7 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A FOSTER CHILD

Status	Eligibility documentation
Foster Child	Birth certificate (Note 1) and Placement agreement (Note 2) or Court document (Note 2).

Notes:
1. A certificate of live birth or an FS–240 may be used in lieu of a birth certificate. When a placement agreement or an order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) establishes the child's date of birth, it may also be used in lieu of a birth certificate.
2. A placement agreement or an order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) that establishes the child's relationship to the sponsor.

(4) *Child, unmarried, over the age of 21.* A sponsor's dependent child, who is unmarried and over the age of 21, must have eligibility verified as shown in Tables 8 and 9 to this subpart.

(i) *Full-time student.* A sponsor's child who is between the ages of 21 and 23 and enrolled as a full-time student at an institution of higher learning must have eligibility verified by documentation shown in Table 8 to this subpart.

TABLE 8 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A FULL-TIME STUDENT

Status	Eligibility documentation
Full-Time Student	Dependent documentation (Note 1) and Letter from school registrar (Note 2) and Sponsor's certification of 50 percent support (Note 3).

Notes:
1. Eligible dependents, as identified in subpart C of this part, must establish their relationship to the sponsor as specified in Tables 2 through 7 in this subpart, if the relationship has not previously been established.
2. A letter from the school registrar that establishes the child as a full-time student.
3. Sponsor's certification on the DD Form 1172–2 that he or she is providing more than 50 percent of the dependent's support.

(ii) *Incapacitated child.* A sponsor must follow the Service-specific process for initial determination of an incapacitated dependent child. The incapacitated dependent child must have eligibility verified by documentation shown in Table 9 to this subpart.

TABLE 9 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR AN INCAPACITATED CHILD

Status	Eligibility documentation
Incapacitated Child	Dependent documentation (Note 1) and Medical sufficiency statement (Note 2) and Financial dependency determination (Note 3).

Notes:
1. Eligible dependents, as identified in subpart C of this part, must establish their relationship to the sponsor as specified in Tables 2 through 7 of this subpart, if the relationship has not previously been established.
2. A medical sufficiency statement issued by a physician in support of the military treatment facility or authorized TRICARE service provider, stating incapacitation, and dated within 90 days of application, as required by the sponsoring component. If applicable, the physician's statement must reflect that the incapacitation occurred after the 21st birthday but before the 23rd birthday, while the dependent was a full-time student.
3. A financial dependency determination from the responsible Service's DFAS, or the Service equivalent pay office, acknowledging that the sponsor is providing more than 50 percent of the dependent's support, or was at the time of the sponsor's death.

(5) *Parent.* A sponsor's dependent parent, parent-in-law, stepparent, or parent-by-adoption, must have eligibility verified by documentation shown in Table 10 to this subpart.

TABLE 10 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A PARENT

Status	Eligibility documentation
Parent	Financial dependency determination (Note 1) and Birth certificate (Notes 2) and Marriage certificate (Note 3) or Adoption decree (Note 4).

Notes:
1. A financial dependency determination from the responsible Service's DFAS, or the Service equivalent pay office, acknowledging that the sponsor is providing more than 50 percent of the dependent's support, or was at the time of the sponsor's death.
2. A birth certificate establishing parental relationship to the sponsor, or the sponsor's spouse.
3. A marriage certificate establishing a relationship to the sponsor's parent, or the sponsor's spouse's parent.
4. An adoption decree establishing legal adoption of the sponsor, or the sponsor's spouse, by the parent, or parent-in-law.

(c) *Documentation for surviving dependents.* This paragraph (c) describes eligibility documentation required for surviving dependents of deceased uniformed service members who are eligible for benefits in accordance with subpart C of this part. Surviving dependents must have eligibility verified by documentation shown in Table 11 to this subpart. For ID card issuance, the unremarried widow or widower must certify on the DD Form 1172–2 that the widow or widower has not remarried.

TABLE 11 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A SURVIVING DEPENDENT

Status	Eligibility documentation
Widow or Widower:	
Unremarried	Marriage certificate to sponsor (Note 1) and Death certificate of sponsor.

TABLE 11 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A SURVIVING DEPENDENT—Continued

Status	Eligibility documentation
Unmarried	Marriage certificate to sponsor (Note 1) and Death certificate of sponsor and Marriage certificate from subsequent marriage (Note 1) and Divorce decree from subsequent marriage (Note 2) or Death certificate from subsequent marriage.
Dependent	Dependent documentation (Note 3).

Notes:
1. A common law marriage certificate, a court order, or a written SJA opinion that a common law marriage is recognized by the relevant State or U.S. jurisdiction is also accepted.
2. A dissolution decree or annulment decree is also accepted.
3. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(d) *Documentation for abused dependents*—(1) *Overview*. This paragraph (d) describes eligibility documentation required for abused dependents of uniformed service members who are eligible for benefits in accordance with subpart C of this part.

(i) For the purposes of this paragraph (d), dependent children are limited to the sponsor's legitimate children, adopted children, and stepchildren, in accordance with 10 U.S.C. 1408(h). Their eligibility ends at age 18 unless otherwise eligible as full-time students (aged 18–23) or based on an incapacitation that existed before age 18 or occurred between the ages of 18 and 23 while a full-time student.

(ii) Abused dependents are required to provide documentation that verifies eligibility as shown in Tables 12 and 13 to this subpart to the responsible uniformed service project office.

(2) *Abused dependent of a retirement-eligible service member*. An abused dependent of a retirement eligible service member must have eligibility verified by documentation shown in Table 12 to this subpart.

TABLE 12 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR AN ABUSED DEPENDENT OF A RETIREMENT-ELIGIBLE SERVICE MEMBER

Status	Eligibility documentation
Dependent	DD Form 2698 ''Application for Transitional Compensation'' (Note 1) and Letter from DFAS (Note 2) and Dependent documentation (Note 3).

Notes:
1. DD Form 2698, approved by the responsible uniformed service.
2. A letter from DFAS, approving request to receive a portion of retired pay, or other approval from the service equivalent pay office.
3. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor as specified in Tables 1 through 4 of this subpart, if the relationship has not previously been established.

(3) *Abused dependent of a non-retirement-eligible service member*. An abused dependent of a non-retirement-eligible Service member must have eligibility verified by documentation shown in Table 13 to this subpart.

TABLE 13 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR AN ABUSED DEPENDENT OF A NON-RETIREMENT ELIGIBLE SERVICE MEMBER

Status	Eligibility documentation
Dependent	DD Form 2698 (Note 1) and Dependent documentation (Note 2).

Notes:
1. DD Form 2698, approved by the responsible uniformed service.
2. Eligible dependents, as identified in subpart C of this part, must establish their relationship to the sponsor as specified in Tables 1 through 4 of this subpart, if the relationship has not previously been established.

(e) *Documentation for former spouses*. This paragraph (e) describes eligibility documentation required for 20/20/20, 20/20/15, and 10/20/10 former spouses of current, former, and retired uniformed service members, who are eligible for

benefits in accordance with subpart C of this part. For ID card issuance, the unremarried former spouse must certify on the DD Form 1172–2 that the former spouse has not remarried. 10/20/10 former spouses, also known as abused former spouses of retirement-eligible Service members who are eligible under 10 U.S.C. 4108(h), should refer to paragraphs (d)(1) and (2) of this section for more information. Eligible former spouses, as identified in subpart C of this part, must have eligibility verified by documentation shown in Table 14 to this subpart.

TABLE 14 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A FORMER SPOUSE

Status	Eligibility documentation
Former Spouse:	
Unremarried	Marriage certificate to sponsor (Note 1) and Divorce decree from sponsor (Note 2) and Statement of service (Note 3).
Unmarried	Marriage certificate to sponsor (Note 1) and Divorce decree from sponsor (Note 2) and Statement of service (Note 3) and Marriage certificate from subsequent marriage (Note 1) and Divorce decree from subsequent marriage (Note 2) or Death certificate from subsequent marriage.

Notes:
1. A common law marriage certificate, a court order, or a written SJA opinion that a common law marriage is recognized in the relevant State or U.S. jurisdiction, is also accepted.
2. A dissolution decree or annulment decree is also accepted.
3. Statement of service that establishes the uniformed service member's service. A complete set of DD Form 214, ''Certificate of Release or Discharge from Active Duty,'' or dates of inclusive service for servicing personnel may be used in lieu of the statement of service.

(f) *Documentation for uniformed service members*—(1) *Overview*. This paragraph (f) describes eligibility documentation required for current, former, and retired uniformed service members, Medal of Honor (MOH) recipients, 100 percent disabled American veterans (DAVs), and their eligible dependents, in accordance with subpart C of this part.

(i) MOH recipients must have their DEERS records updated manually, as indicated in this paragraph.

(ii) Current, former, and retired members identified in this paragraph (f) should have eligibility updated in DEERS by an authoritative feed; however, under certain circumstances described in paragraphs (f)(2) and (3) of this section, a Service member may have eligibility verified by documentation shown in Tables 15 through 21 to this subpart.

(iii) All other uniformed service members should have their DEERS records updated by authoritative data feeds.

(2) *Active duty member*. An active duty member should have eligibility updated in DEERS by an authoritative feed; however, under certain circumstances described in the notes of the table, an active duty member may have eligibility verified by documentation shown in Table 15 to this subpart.

TABLE 15 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR AN ACTIVE DUTY MEMBER AND DEPENDENTS

Status	Eligibility documentation
Active Duty Member	Military orders (Note 1).
Dependent	Dependent documentation (Note 2).

Notes:
1. Military orders may be used at the service project officer level when DEERS verification is not available.
2. Eligible dependents, as identified in subpart C of this part, must establish their relationship to the sponsor, as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(3) *National Guard and Reserve member*. A National Guard or Reserve member who is activated to active duty should have eligibility updated in DEERS by an authoritative feed; however, under certain circumstances described in the notes of the table, a National Guard or Reserve member may

have eligibility verified by documentation shown in Table 16 to this subpart.

TABLE 16 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A NATIONAL GUARD OR RESERVE MEMBER AND DEPENDENTS

Status	Eligibility documentation
National Guard or Reserve Member.	Military orders (Note 1).
Dependent	Dependent documentation (Note 2).

Notes:
1. Military orders may be used at the service project officer level when DEERS verification is not available.
2. Eligible dependents, as identified in subpart C of this part, must establish their relationship to the sponsor, as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(4) *Retired reserve member*. A retired reserve member should have eligibility updated in DEERS by an authoritative feed; however, a retired reserve member may also have eligibility verified by documentation shown in Table 17 to this subpart.

TABLE 17 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A RETIRED RESERVE MEMBER AND DEPENDENTS

Status	Eligibility documentation
Retired Reserve Member	Notice of eligibility (Note 1) or Retired pay orders (Note 2) or DD Form 214 (Note 3).
Retired Reserve Member ordered to active duty.	DD Form 214 (Note 3) or Military order (Note 4) or Commissioning oath (Note 4) or Enlistment contract (Note 4).
Dependent	Dependent documentation (Note 5).

Notes:
1. Notice of eligibility from the Service's designated Reserve Personnel Center establishing the uniformed service member's eligibility for retired pay at age 60.
2. Retired pay orders, establishing the uniformed service member's eligibility for retired pay at age 60.
3. A DD Form 214 that establishes the uniformed service member's service can be used when DEERS verification is not available. A statement of service or dates of inclusive service for servicing personnel may be used in lieu of the DD Form 214.
4. Documentation establishing the uniformed service member being ordered to active duty for greater than 30 days.
5. Eligible dependents, as identified in subpart C of this part, must establish their relationship to the sponsor as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(5) *Retired member*. A retired member should have eligibility updated in DEERS by an authoritative feed; however, a retired member may also have eligibility verified by documentation shown in Table 18 to this subpart. Retired members include voluntary retired members, permanent disability retired list members, and temporary disability retired list members.

TABLE 18 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A RETIRED MEMBER AND DEPENDENTS

Status	Eligibility documentation
Retired Member	Retirement orders or Correction of military record (Note 1) or DD Form 214 (Note 2).
Dependent	Dependent documentation (Note 3).

Notes:
1. A correction of military record can be used at the service project officer level when DEERS verification is not available.
2. A DD Form 214 that establishes the uniformed service member's service can be used when DEERS verification is not available. A statement of service or dates of inclusive service for servicing personnel may be used in lieu of the DD Form 214.
3. Eligible dependents, as identified in subpart C of this part, must establish their relationship to the sponsor, as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(6) *Transitional Health Care (THC) member*. A THC member should have eligibility updated in DEERS by an authoritative feed; however, a THC member may also have eligibility verified by documentation shown in Table 19 to this subpart to correct an ineligible condition.

TABLE 19 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A THC MEMBER AND DEPENDENTS

Status	Eligibility documentation
THC Member	DD Form 214 (Note 1).
Dependent	Dependent documentation (Note 2).

Notes:
1. DD Form 214, reflecting the appropriate separation program designator code for Transition Assistance (TA)-180 eligibility. Separation orders, reflecting the appropriate separation program designator code for TA–180 eligibility may be used in lieu of the DD Form 214.
2. Eligible dependents, as identified in subpart C of this part, must establish their relationship to the sponsor, as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(7) *MOH recipient*. A MOH recipient should have eligibility verified by documentation shown in Table 20 to this subpart. DoDHRA will update all MOH DEERS records.

TABLE 20 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A MOH RECIPIENT AND DEPENDENTS

Status	Eligibility documentation
MOH Recipient	Confirmation of MOH status (Note 1).
Dependent	Dependent documentation (Note 2).

Notes:
1. Confirmation of MOH status by DoDHRA.
2. Eligible dependents, as identified in subpart C of this part, must establish their relationship to the sponsor, as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(8) *100 percent DAV*. An honorably discharged veteran who has been rated as 100 percent disabled or incapable of pursuing substantially gainful employment by the Department of Veterans Affairs (VA) should have eligibility verified by documentation shown in Table 21 to this subpart.

TABLE 21 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR A 100 PERCENT DAV AND DEPENDENTS

Status	Eligibility documentation
100 Percent DAV	VA rating determination letter (Note 1) and DD Form 214 (Note 2).
Dependent	Dependent documentation (Note 3).

Notes:
1. VA rating determination letter that establishes eligibility as 100 percent disabled or incapable of pursuing substantially gainful employment.
2. A DD Form 214 that characterizes the uniformed service member's discharge as honorable.
3. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor, as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(g) *Documentation for civilian personnel*—(1) *Overview*. This paragraph (g) describes eligibility documentation required for civilian personnel, and their dependents, when they are eligible for benefits in accordance with subpart C of this part. Civilian personnel, as the sponsors, and their dependents, qualify for different benefits based on the sponsor's status in accordance with subpart C of this part. The definition of ''civilian personnel'' (e.g., civilian employee, DoD contractor, Red Cross employee) is specific to each eligibility set described. Civilian employees include both appropriated fund and nonappropriated fund employees, in accordance with subpart B of this part.

(2) *Civilian personnel*—(i) *Civilian personnel residing on a military installation in the United States*. Civilian personnel residing on a military installation in the United States, and accompanying dependents, must have eligibility verified by documentation shown in Table 22 to this subpart.

TABLE 22 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR CIVILIAN PERSONNEL RESIDING ON A MILITARY INSTALLATION IN THE UNITED STATES AND ACCOMPANYING DEPENDENTS

Status	Eligibility documentation
Civilian: DoD civilian employee, DoD contractor, Intergovernmental Personnel Act personnel, non-DoD government agency civilian employee under DoD sponsorship.	Travel authorization (Note 1).
Dependent	Travel authorization (Note 2) and Dependent documentation (Note 3).

Notes:
1. A travel authorization produced by the sponsoring DoD Component authorizing the sponsor to reside on a military installation.
2. A travel authorization produced by the sponsoring DoD Component authorizing eligible dependents to accompany the sponsor.
3. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor, as specified in Tables 1 through 12 of this subpart, if the relationship has not previously been established.

(ii) *Civilian personnel outside the United States.* Civilian personnel stationed outside the United States, and accompanying dependents, must have eligibility verified by documentation shown in Table 23 to this subpart.

TABLE 23 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR CIVILIAN PERSONNEL STATIONED OUTSIDE THE UNITED STATES AND ACCOMPANYING DEPENDENTS

Status	Eligibility documentation
Civilian: DoD civilian employee, DoD contractor, Intergovernmental Personnel Act personnel, non-DoD government agency civilian employee under DoD sponsorship, DoD contractor authorized to accompany the Armed Forces (CAAF).	Travel authorization (Note 1) and SPOT LOA (Note 2, 3).
Dependent	Dependent documentation (Note 4) and Travel authorization (Note 5) or SPOT LOA (Note 5).

Notes:
1. A travel authorization produced by the sponsoring DoD Component, indicating an assignment outside the United States.
2. A SPOT LOA that designates the contractor as CAAF, if a CAAF in accordance with DoD Instruction 3020.41, ''Operational Contract Support (OCS)'' (available at: *http://www.dtic.mil/ whs/directives/corres/ pdf/302041p.pdf*).
3. A SPOT LOA, if applicable in accordance with Combatant Command guidance.
4. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.
5. A travel authorization produced by the sponsoring DoD Component or SPOT LOA authorizing eligible dependents to accompany the sponsor.

(3) *Red Cross personnel.* Uniformed and non-uniformed full-time paid personnel of the Red Cross assigned to duty with the uniformed services and either residing on a military installation in the United States, or stationed outside the United States, and accompanying dependents, must have eligibility verified by documentation shown in Table 24 to this subpart.

TABLE 24 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR FULL-TIME PAID PERSONNEL OF THE RED CROSS AND ACCOMPANYING DEPENDENTS

Status	Eligibility documentation
Red Cross Employee	Travel authorization (Note 1).
Dependent	Travel authorization (Note 2) and Dependent documentation (Note 3).

Notes:
1. A travel authorization produced by the sponsoring DoD Component authorizing the sponsor to reside on a military installation in the United States, or indicating an assignment outside the United States.
2. A travel authorization produced by the sponsoring DoD Component authorizing eligible dependents to accompany the sponsor.
3. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor, as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(4) *United Service Organizations (USO) personnel.* USO area executives, center directors, and assistant directors serving outside the United States and outside U.S. territories and possessions and accompanying dependents, must

have eligibility verified by documentation shown in Table 25 to this subpart.

TABLE 25 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR USO AREA EXECUTIVES, CENTER DIRECTORS, AND ASSISTANT DIRECTORS AND ACCOMPANYING DEPENDENTS

Status	Eligibility documentation
USO Employee	Travel authorization (Note 1).
Dependent	Travel authorization (Note 2) and Dependent documentation (Note 3).

Notes:
1. A travel authorization produced by the sponsoring DoD Component.
2. A travel authorization produced by the sponsoring DoD Component authorizing eligible dependents to accompany the sponsor.
3. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor, as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(5) *United Seaman's Service (USS) personnel.* USS personnel serving outside the United States and outside U.S. territories and possessions, and accompanying dependents, must have eligibility verified by documentation shown in Table 26 to this subpart.

TABLE 26 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR USS PERSONNEL AND ACCOMPANYING DEPENDENTS

Status	Eligibility documentation
USS Employee (Self)	Travel authorization (Note 1).
Dependent	Travel authorization (Note 2) and Dependent documentation (Note 3).

Notes:
1. A travel authorization produced by the sponsoring DoD Component.
2. A travel authorization produced by the sponsoring DoD Component authorizing eligible dependents to accompany the sponsor.
3. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor, as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(6) *Military Sealift Command (MSC) personnel.* MSC personnel on MSC-owned and operated vessels outside the United States and outside U.S. territories and possessions, and accompanying dependents, must have eligibility verified by documentation shown in Table 27 to this subpart.

TABLE 27 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR MSC PERSONNEL DEPLOYED ON MSC-OWNED AND OPERATED VESSELS AND ACCOMPANYING DEPENDENTS

Status	Eligibility documentation
MSC Employee	Travel authorization (Note 1).
Dependent	Travel authorization (Note 2) and Dependent documentation (Note 3).

Notes:
1. A travel authorization produced by the sponsoring DoD Component.
2. A travel authorization produced by the sponsoring DoD Component authorizing eligible dependents to accompany the sponsor.
3. Eligible dependents, as identified in subpart C of this part, are required to establish their relationship to the sponsor, as specified in Tables 1 through 10 of this subpart, if the relationship has not previously been established.

(h) *Documentation for foreign affiliates.* This paragraph (h) describes eligibility documentation required for foreign affiliates, including foreign national military, civilian, and contractor personnel, and their dependents, when they are eligible for benefits in accordance with subpart C of this part. A foreign affiliate serving in the United States or outside the United States under the sponsorship or invitation of the DoD or a Military Service, and accompanying dependents, or a foreign affiliate serving in the United States in connection with their official duties but who are not under the sponsorship or invitation of the DoD or a Military Service, and accompanying dependents,

must have eligibility verified by documentation shown in Table 28 to this subpart.

TABLE 28 TO SUBPART D OF PART 161—ELIGIBILITY DOCUMENTATION REQUIRED FOR SPONSORED FOREIGN AFFILIATES IN THE UNITED STATES AND ACCOMPANYING DEPENDENTS

Status	Eligibility documentation
Foreign Affiliate	ITO (Note 1) or Foreign Visit Request (Note 1).
Dependent	ITO (Note 2) or Foreign Visit Request (Note 2).

Notes:
1. An ITO, Foreign Visit Request, or other document establishing the foreign affiliate's sponsorship to travel to the United States.
2. An ITO, Foreign Visit Request, or letter produced by the sponsoring DoD Component authorizing eligible dependents to accompany the sponsor.

(i) *Documentation required to terminate eligibility in DEERS*—(1) *Overview*. This paragraph (i) describes documentation required to terminate eligibility in DEERS. When terminating eligibility in DEERS, documentation is required in accordance with Tables 29 through 31 to this subpart.

(2) *Spouse*. A sponsor's spouse, former spouse, or surviving widow or widower, who does not qualify as a DoD beneficiary and no longer meets the eligibility requirements identified in subpart C of this part, must have eligibility terminated in DEERS by documentation shown in Table 29 to this subpart.

TABLE 29 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO TERMINATE ELIGIBILITY OF A SPOUSE IN DEERS

Status	Eligibility documentation
Spouse	Divorce decree (Note 1) or Death certificate.
Former Spouse	Marriage certificate from subsequent marriage (Note 2).
Widow/Widower	Marriage certificate from subsequent marriage (Note 2).

Notes:
1. A dissolution decree or annulment decree is also accepted.
2. A common law marriage certificate, a court order, or a written SJA opinion that a common law marriage is recognized in the relevant State or U.S. jurisdiction, is also accepted.

(3) *Child*. A sponsor's child, who no longer meets the eligibility requirements identified in subpart C of this part, must have eligibility terminated in DEERS by documentation shown in Table 30 to this subpart.

TABLE 30 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO TERMINATE ELIGIBILITY OF A CHILD IN DEERS

Status	Eligibility documentation
Child, Under Age 21:	
Legitimate, Adopted, Pre-Adoptive, Illegitimate Child.	Marriage certificate (Note 1) or Adoption decree (Note 2) or Court order (Note 3) or Death certificate (Note 4).
Stepchild	Marriage certificate (Note 1) or Adoption decree (Note 2) or Court order (Note 3) or Death certificate (Note 4) or Divorce decree (Notes 5, 6).
Ward, Foster Child	Marriage certificate (Note 1) or Adoption decree (Note 2) or Court order (Note 3) or Death certificate (Note 4) or Dependency certification (Note 7).
Child, Over Age 21:	
Full-Time Student	Marriage certificate (Note 1) or Death certificate (Note 4) or Change in financial status (Note 7) or Letter from school registrar (Note 8).
Temporary or Permanent Incapacitated Child.	Marriage certificate (Note 1) or Death certificate (Note 4) or Change in financial status (Note 7) or Medical sufficiency statement (Note 9).

Notes:
1. A marriage certificate, if the child marries.
2. An adoption decree, if the child is adopted and the relationship to the sponsor is severed. This does not apply to surviving children adopted by a non-military member after the death of the sponsor in accordance with 32 CFR 199.3(f)(3).

3. An order or appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession), affirming either the voluntary relinquishment or involuntary termination of parental rights and placing the child into custody of another guardian, or emancipating the child. In cases of involuntary termination, the Service project office should consult with the local SJA and confirm that the sponsor was properly notified of the involuntary termination proceedings and was given the opportunity to defend the sponsor's rights.
4. A death certificate, if the child dies.
5. A final divorce decree, if the sponsor and the child's parent divorce in accordance with 32 CFR 199.3(f)(3).
6. A dissolution decree or annulment decree is also accepted.
7. Sponsor certification on the DD Form 1172–2 that the sponsor is not providing more than 50 percent or that the child does not resides in the household.
8. A letter from the school registrar that establishes the child is no longer a full-time student.
9. A medical sufficiency statement issued by a physician in support of the military treatment facility or authorized TRICARE service provider, establishing the end of an incapacitation.

(4) *Parent*. A sponsor's parent, including a parent-in-law, stepparent, or parent-by-adoption, who no longer meets the eligibility requirements, as identified in subpart C of this part, must have eligibility terminated in DEERS by documentation shown in Table 31 to this subpart.

TABLE 31 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO TERMINATE ELIGIBILITY OF A PARENT IN DEERS

Status	Eligibility documentation
Parent	Change in financial status (Note 1) or Divorce decree (Note 2) or Marriage certificate (Note 3) or Death certificate (Note 4) or.

Notes:
1. The sponsor, or the dependent parent, verifies that the sponsor is not providing more than 50 percent financial support for the parent.
2. The relationship between the sponsor and the parent-in-law is terminated as a result of a divorce. A dissolution decree or annulment decree is also accepted.
3. The parent marries.
4. The parent dies.

(j) *Documentation required to set data display restrictions in DEERS*. This paragraph (j) describes documentation required to request data display restrictions in DEERS. In certain circumstances, data display restrictions may be applied in DEERS to mask data elements from being viewed by affiliated family members by documentation shown in Table 32 to this subpart. Reasons and circumstances for restricting data may include, but are not limited to, personal preference and cases of abuse. Restricted data may include, but is not limited to, contact information such as an address, phone number, or email address.

TABLE 32 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO SET DATA DISPLAY RESTRICTIONS

Status	Documentation
Sponsor or Dependent	DEERS Support Office request (Note 1) or Project Office request (Note 2) or Protective order (Note 3) or Health Insurance Portability and Accountability Act request (Note 4).

Notes:
1. A request to the DEERS Support Office asking for contact information to be restricted.
2. A request to the Service DEERS/RAPIDS Project Office asking for the contact information to be restricted.
3. An order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) that establishes a protective order.
4. A request to restrict health information.

(k) *Documentation required to change a gender marker in DEERS*. This paragraph (k) describes documentation required to request a change to a retiree's, a dependent's, or a contractor's gender marker in DEERS. Requests to change a gender marker require submission of documentation listed in Table 33 to this subpart that reflects the applicant's gender identity. All requests by retirees, dependents, and contractors to change gender markers must be submitted by the sponsor's responsible uniformed service project office or sponsoring agency to DoDHRA.

(1) For changes to a retiree's gender marker, after DoDHRA confirms the

change in DEERS, the uniformed service project office must follow existing Service procedures to send an update to DFAS, or the Service equivalent pay office, to allow DFAS, or the Service equivalent pay office, to update its system with the retiree's gender identity.

(2) A military Service member should refer to DoD Instruction 1300.28, ''In-Service Transition For Transgender Service Members'' (available at: *http://www.dtic.mil/ whs/directives/corres/ pdf/ 130028p.pdf*) and the Secretary of Defense Memorandum of June 30, 2016, Directive Type Memorandum (DTM) 16–005, ''Military Service of Transgender Service Members'' (available at: *http://www.dtic.mil/ whs/directives/corres/ pdf/ DTM-16-005.pdf*) for DoD policy concerning changing their gender in DEERS.

(3) Government civilian employees should consult their servicing human resources or civilian personnel office for guidance concerning changing their gender markers in DEERS.

(4) If a name change is required in conjunction with a change of gender marker, see paragraph (m) of this section.

(5) To change a gender marker in DEERS to correct an administrative error, see paragraph (n) of this section.

TABLE 33 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO CHANGE A GENDER MARKER IN DEERS

Status	Documentation
Retiree, Dependent, or Contractor (Note 4).	Re-issued or amended birth certificate (Note 1) or U.S. Passport (Note 1) or Court order (Note 2) or Doctor's letter with justification (Note 3).

Notes:
1. Document must reflect the individual's gender identity.
2. An order or other appropriate document from a court of competent jurisdiction in the United States (or U.S. territory or possession) reflecting the individual's gender identity.
3. If unable to submit a re-issued or an amended birth certificate reflecting the individual's gender identity, a U.S. passport reflecting the individual's gender identity, or a certified true copy of a court order reflecting the individual's gender identity, a retiree, dependent or contractor may submit a letter from a doctor certifying that the sponsor or dependent has had the appropriate clinical treatment for gender transition. If a doctor's letter is being submitted in lieu of the other official documents identified in this table, the individual submitting the request shall attach to the doctor's letter a written statement that the other official documents cannot be submitted. Information that must be included in the doctor's letter follows:
a. Physician's full name.
b. Physician's medical license or certificate number.
c. Issuing state or other jurisdiction of medical license/certificate.
d. Physician's office address and telephone number.
e. Language stating that the physician is the sponsor's or dependent's attending physician and that the physician has a doctor/patient relationship with the sponsor or dependent.
f. Language stating the sponsor or dependent has had the appropriate clinical treatment for gender transition to the individual's gender identity. Specific treatment information is not required.
g. Language stating ''I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.''
4. Includes other ID card eligible populations managed by the Trusted Associate Sponsorship System for which DEERS is the authoritative source.

(l) *Documentation required to change a Social Security Number (SSN) in DEERS.* This paragraph (l) describes documentation required to change an SSN in DEERS. An individual's SSN should be changed in DEERS with documentation shown in Table 34 to this subpart.

(1) To change an SSN in a DEERS record that was established by an authoritative feed (e.g., uniformed service member records, DoD civilian personnel records), the sponsor will need to consult the personnel office that established the authoritative feed.

(2) To change an SSN in a DEERS record that was manually established (e.g., dependent records), the sponsor will need to go to a RAPIDS site for assistance.

TABLE 34 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO CHANGE AN SSN IN DEERS

Status	Documentation
Sponsor	Social security cards (Note 1) and Social Security Administration letter (Note 2).
Dependent	Social security cards (Note 1) and Social Security Administration letter (Note 2).

Notes:
1. Social security cards issued by the Social Security Administration, establishing the old and new SSNs.

2. A letter from the Social Security Administration, explaining that a new SSN has been issued and stating that the individual will no longer use the old SSN.

(m) *Documentation required to change a name in DEERS.* This paragraph (m) describes documentation required to change a name in DEERS. Name changes based on a marriage, divorce, or death, are made at the time of enrollment or ID card issuance. An individual's name should be changed in DEERS with documentation shown in Table 35 to this subpart.

(1) To change a name in a DEERS record that was established by an authoritative feed (e.g., uniformed service member records, DoD civilian personnel records), the sponsor will need to first consult the personnel office that established the authoritative feed. If an immediate change is required, the sponsor may visit a RAPIDS site with the applicable documentation identified in Table 35 to this subpart.

(2) To change a name in a DEERS record that was manually established (e.g., dependent records), the sponsor will need to visit a RAPIDS site with the applicable documentation identified in Table 35 to this subpart.

TABLE 35 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO CHANGE A NAME IN DEERS

Status	Documentation
Sponsor	Court order or Marriage certificate (Note 1) or Divorce decree (Note 2) or Death decree (Note 3) or Social security cards (Note 4).
Spouse	Court order or Marriage certificate (Note 1) or Divorce decree (Note 2) or Death certificate (Note 3) or Social security cards (Note 4).
Child	Court order or Social security cards (Note 4).

Notes:
1. A marriage certificate to change an individual's last name to match the spouse's last name or to hyphenate the last name.
2. A divorce decree to establish the individual's last name as the individual's last name before being married. A dissolution decree or annulment decree is also accepted. Additional documentation confirming name before being married may be required.
3. A death certificate to establish the individual's last name as the individual's last name before being married. Additional documentation confirming name before being married may be required.
4. Social security cards issued by the Social Security Administration, establishing the individual's old full name and new full name.

(n) *Documentation required to correct an administrative error in DEERS*—(1) *Overview.* This paragraph (n) describes documentation required to correct administrative errors in DEERS.

(i) To correct an administrative error in a DEERS record that was established and updated by authoritative feed, the sponsor should consult the personnel office that owns the authoritative feed.

(ii) To correct an administrative error in a DEERS record that was established and updated manually, the sponsor, on behalf of a dependent, should seek the support of the uniformed service's DEERS Support Office Field Support personnel with documentation shown in Tables 36 through 38 of this subpart.

(2) *Name or date of birth.* An individual's name or date of birth, when incorrectly entered in DEERS, should be corrected with the documentation shown in Table 36 to this subpart.

TABLE 36 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO MODIFY A NAME OR DATE OF BIRTH IN DEERS TO CORRECT AN ADMINISTRATIVE ERROR

Status	Documentation
Sponsor or Dependent	U.S. Citizenship and Immigration Services Form I–9, ''Instructions for Employment Eligibility Verification,'' Documentation (Note).

Note: Documentation from the U.S. Citizenship and Immigration Services Form I–9, Lists of Acceptable Documents), that establishes name or date of birth.

(3) *Gender.* An individual's gender marker, when incorrectly entered in DEERS, should be corrected with the

documentation shown in Table 37 to this subpart.

TABLE 37 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO MODIFY A GENDER MARKER IN DEERS TO CORRECT AN ADMINISTRATIVE ERROR

Status	Documentation
Sponsor or Dependent	Birth certificate and Form I–9 Documentation (Note).

Note: Documentation from the U.S. Citizenship and Immigration Services Form I–9 (Lists of Acceptable Documents) that establishes gender.

(4) *SSN*. An individual's SSN, when incorrectly entered in DEERS, should be corrected with the documentation shown in Table 38 to this subpart.

TABLE 38 TO SUBPART D OF PART 161—DOCUMENTATION REQUIRED TO MODIFY AN SSN IN DEERS TO CORRECT AN ADMINISTRATIVE ERROR

Status	Documentation
Sponsor or Dependent	Documentation establishing SSN (Note).

Note: Government-issued documentation establishing SSN, including but not limited to, social security card, Department of the Treasury Internal Revenue Service Form W–2, ''Wage and Tax Statement,'' and Form SSA–1099, ''Social Security Benefit Statement.''

SUBCHAPTER G—DEFENSE CONTRACTING

PART 168a—NATIONAL DEFENSE SCIENCE AND ENGINEERING GRADUATE FELLOWSHIPS

Sec.
168a.1 Purpose.
168a.2 Applicability.
168a.3 Definition.
168a.4 Policy and procedures.
168a.5 Responsibilities.

AUTHORITY: 10 U.S.C. 2191.

SOURCE: 55 FR 29844, July 23, 1990, unless otherwise noted.

§ 168a.1 Purpose.

This part:

(a) Establishes guidelines for the award of National Defense Science and Engineering Graduate (NDSEG) Fellowships, as required by 10 U.S.C. 2191.

(b) Authorizes, in accordance with 10 U.S.C. 2191 and consistent with DoD 5025.1, the publication of a regulation which will be codified at 32 CFR part 168b.

§ 168a.2 Applicability.

This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, and the Defense Agencies (hereafter referred to collectively as ''DoD Components'').

§ 168a.3 Definition.

Sponsoring Agency. A DoD Component or an activity that is designated to award NDSEG fellowships under § 168a.5(a).

§ 168a.4 Policy and procedures.

(a) Sponsoring Agencies, in awarding NDSEG fellowships, shall award:

(1) Solely to U.S. citizens and nationals who agree to pursue graduate degrees in science, engineering, or other fields of study that are designated, in accordance with § 168a.5(b)(2), to be of priority interest to the Department of Defense.

(2) Through a nationwide competition in which all appropriate actions have been taken to encourage applications from members of groups (including minorities, women, and disabled persons) that historically have been underrepresented in science and engineering.

(3) Without regard to the geographic region in which the applicant lives or the geographic region in which the applicant intends to pursue an advanced degree.

(b) The criteria for award of NDSEG fellowships shall be:

(1) The applicant's academic ability relative to other persons applying in the applicant's proposed field of study.

(2) The priority of the applicant's proposed field of study to the Department of Defense.

§ 168a.5 Responsibilities.

(a) The Deputy Director, Defense Research and Engineering (Research and Advanced Technology) [DDDR&E(R&AT)], shall:

(1) Administer this part and issue DoD guidance, as needed, for NDSEG fellowships.

(2) Designate those DoD Components that will award NDSEG fellowships, consistent with relevant statutory authority.

(3) Issue a regulation in accordance with 10 U.S.C. 2191 and DoD 5025.1–M.

(b) The Heads of Sponsoring Agencies, or their designees, in coordination with a representative of the Deputy Director, Defense Research and Engineering (Research and Advanced Technology) [DDDR&E(R&AT)], shall:

(1) Oversee the nationwide competition to select NDSEG fellowship recipients.

(2) Determine those science, engineering and other fields of priority interest to the Department of Defense in which NDSEG fellowships are to be awarded.

(3) Prepare a regulation, in accordance with 10 U.S.C. 2191, that prescribes.

(i) Procedures for selecting NDSEG fellows.

(ii) The basis for determining the amounts of NDSEG fellowships.

(iii) The maximum NDSEG fellowship amount that may be awarded to an individual during an academic year.

PART 169—COMMERCIAL ACTIVITIES PROGRAM

Sec.
169.1 Purpose.
169.2 Applicability and Scope.
169.3 Definitions.
169.4 Policy.
169.5 Responsibilities.

AUTHORITY: 5 U.S.C. 301 and 552 and Pub. L. 93–400.

SOURCE: 54 FR 13373, Apr. 3, 1989, unless otherwise noted.

§ 169.1 Purpose.

This document:

(a) Revises 32 CFR part 169.

(b) Updates DoD policies and assigns responsibilities for commercial activities (CAs) as required by E.O. 12615, Pub. L. 100–180, sec. 1111, and OMB Circular A–76.

§ 169.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense (OSD), the Military Departments, and the Defense Agencies (hereafter referred to collectively as ''DoD Components'').

(b) Encompasses DoD policy for CAs in the United States, its territories and possessions, the District of Columbia, and the Commonwealth of Puerto Rico.

(c) Is not mandatory for CAs staffed solely with DoD civilian personnel paid by nonappropriated funds, such as military exchanges. However, this part is mandatory for CAs when they are staffed partially with DoD civilian personnel paid by or reimbursed from appropriated funds, such as libraries, open messes, and other morale, welfare, and recreation (MWR) activities. When related installation support functions are being cost-compared under a single solicitation, a DoD Component may decide that it is practical to include activities staffed solely with DoD civilian personnel paid by nonappropriated funds.

(d) Does not apply to DoD governmental functions as defined §169.3.

(e) Does not apply when contrary to law, Executive orders, or any treaty or international agreement.

(f) Does not apply in times of a declared war or military mobilization.

(g) Does not provide authority to enter into contracts.

(h) Does not apply to the conduct of research and development, except for severable in-house CAs that support research and development, such as those listed in enclosure 3 of DoD Instruction 4100.33[1] (32 CFR part 169a).

(i) Does not justify conversion to contract solely to avoid personnel ceilings or salary limitations.

(j) Does not authorize contracts that establish an employer-employee relationship between the Department of Defense and contractor employees, as described in FAR 37.104.

§ 169.3 Definitions.

Commercial Activity Review. The process of evaluating CAs for the purpose of determining whether or not a cost comparison will be conducted.

Commercial Source. A business or other non-Federal activity located in the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico that provides a commercial product or service.

Conversion to Contract. The changeover of a CA from performance by DoD personnel to performance under contract by a commercial source.

Conversion to In-House. The changeover of a CA from performance under contract to performance by DoD personnel.

Core Logistics. Those functions identified as core logistics activities pursuant to section 307 of Pub. L 98–525 and section 1231 of Pub. L. 99–145, codified at section 2464, title 10 that are necessary to maintain a logistics capability (including personnel, equipment, and facilities) to ensure a ready and controlled source of technical competence and resources necessary to ensure effective and timely response to a mobilization, national defense contingency situation, and other emergency requirements.

Cost Comparison. The process of developing an estimate of the cost of performance of a CA by DoD employees

[1] Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, ATTN: Code 1053, 5801 Tabor Avenue, Philadelphia, PA 19120.

and comparing it, in accordance with the requirements in DoD Instruction 4100.33 to the cost of performance by contract.

Direct-Conversion. Conversion to contract performance of an in-house commercial activity based on a simplified cost comparsion or the conversion of an in-house commercial activity performed exclusively by military personnel.

Displaced DoD Employee. Any DoD employee affected by conversion to contract operation (including such actions as job elimination, or grade reduction). It includes both employees in the function converted to contract and employees outside the function who are affected adversely by conversion through reassignment or the exercise of bumping or retreat rights.

DoD Commercial Activity (CA). An activity that provides a product or service obtainable (or obtained) from a commercial source. A DoD CA may be the mission of an organization or a function within the organization. It must be type of work that is separable from other functions or activities so that it is suitable for performance by contract. A representative list of the functions performed by such activities is provided in enclosure 3 of DoD Instruction 4100.33. A DoD CA falls into one of two categories:

(a) Contract CA. A DoD CA managed by a DoD Component, but operated with contractor personnel.

(b) In-House CA. A DoD CA operated by a DoD Component with DoD personnel.

DoD Employee. Civilian personnel of the Department of Defense.

DoD Governmental Function. A function that is related so intimately to the public interest as to mandate performance by DoD personnel. These functions include those that require either the exercise of discretion in applying Government authority or the use of value judgment in making the decision for the Department of Defense. Services or products in support of Governmental functions, such as those listed in enclosure 3 of DoD Instruction 4100.33, are CAs and are subject to this part and its implementing Instructions. Governmental functions normally fall into two categories:

(a) *Act of Governing.* The discretionary exercise of Governmental authority. Examples include criminal investigations, prosecutions, and other judicial functions; management of Government programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment in a combat, combat support, or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers, and other natural resources; management of natural resources on Federal Property; direction of intelligence and counterintelligence operations; and regulation of industry and commerce, including food and drugs.

(b) *Monetary Transactions and Entitlements.* Refers to such actions as tax collection and revenue disbursements; control of treasury accounts and the money supply, and the administration of public trusts.

DoD Personnel. Military and civilian personnel of the Department of Defense.

Expansion. The modernization, replacement, upgrading, or enlargement of a DoD CA involving a cost increase exceeding either 30 percent of the total capital investment or 30 percent of the annual personnel and material costs. A consolidation of two or more CAs is not an expansion, unless the proposed total capital investment or annual personnel and material costs of the consolidation exceeds the total of the individual CAs by 30 percent or more.

Installation. An installation is the grouping of facilities, collocated in the same vicinity, that supports particular functions. Activities collocated and supported by an installation are considered to be tenants.

Installation Commander. The commanding officer or head of an installation or a tenant activity, who has budget and supervisory control over resources and personnel.

New Requirement. A recently established need for a commercial product or service. A new requirement does not include interim in-house operation of

essential services pending reacquisition of the services prompted by such action as the termination of an existing contract operation.

Preferential Procurement Programs. Preferential procurement programs include mandatory source programs such as Federal Prison Industries (FPI) and the workshops administered by the Committee for Purchase from the Blind and Other Severely Handicapped under Pub. L. 92–98. Small, minority, and disadvantaged businesses; and labor surplus area set-asides and awards made under Pub. L. 85–536, section 8(a) and Pub. L. 95–507 are included under preferential procurement programs.

Right of First Refusal of Employment. Contractors provide Government employees, displaced as a result of the conversion to contract performance, the right of first refusal for employment openings under the contract in positions for which they are qualified, if that employment is consistent with post-Government employment conflict of interest standards.

§ 169.4 Policy.

(a) *Ensure DoD Mission Accomplishment.* When complying with this part and its implementing Instruction, DoD Components shall consider the overall DoD mission and the defense objective of maintaining readiness and sustainability to ensure a capability for mobilizing the defense and support structure.

(b) *Achieve Economy and Quality through Competition.* Encourage competition with the objective of enhancing quality, economy, and performance. When performance by a commercial source is permissible, a comparsion of the cost of contracting and the cost of in-house performance shall be performed to determine who shall provide the best value for the Government, considering price and other factors included in the solicitation. The restriction of a solicitation to a preferential procurement program does not negate the requirement to perform a cost comparison. Performance history will be considered in the source selection process, and high quality performance should be rewarded.

(c) *Retain Governmental Functions In-House.* Certain functions that are inherently governmental in nature, and intimately related to the public interest, mandate performance by DoD personnel only. These functions are not in competition with commercial sources; therefore, these functions shall be performed by DoD personnel.

(d) *Rely on the Commercial Sector.* DoD Components shall rely on commercially available sources to provide commercial products and services except when required for national defense, when no satisfactory commercial source is available, or when in the best interest of direct patient care. DoD Components shall not consider an in-house new requirement, an expansion of an in-house requirement, conversion to in-house, or otherwise carry on any CAs to provide commercial products or services if the products or services can be procured more economically from commercial sources.

(e) *Delegate Decision Authority and Responsibility.* DoD Components shall delegate decision authority and responsibility to lower organization levels, giving more authority to the doers, and linking responsibility with that authority. This shall facilitate the work that installation commanders must perform without limiting their freedom to do their jobs. When possible, the installation commanders should have the freedom to make intelligent use of their resources, while preserving the essential wartime capabilities of U.S. support organizations in accordance with DoD Directive 4001.1.[2]

(f) *Share Resources Saved.* When possible, make available to the installation commander a share of any resources saved or earned so that the commander can improve operations or working and living conditions on the installation.

(g) *Provide Placement Assistance.* Provide a variety of placement assistance to employees whose Federal jobs are eliminated through CA competitions.

[54 FR 13373, Apr. 3, 1989; 54 FR 21726, May 19, 1989]

[2] See footnote 1 to § 169.2(h)

§ 169.5 Responsibilities.

(a) The *Assistant Secretary of Defense (Production and Logistics)* (ASD (P&L)), or designee, shall:

(1) Formulate and develop policy consistent with this part for the DoD CA program.

(2) Issue Instructions to implement the policies of this part.

(3) Maintain an inventory of in-house DoD CAs and the Commercial Activities Management Information System (CAMIS).

(4) Establish criteria for determining whether a CA is required to be retained in-house for national defense.

(5) Approve or disapprove core logistics waiver requests.

(b) The *Comptroller of the Department of Defense* (C, DoD) shall provide inflation factors and/or price indices and policy guidance to the DoD Components on procedures and systems for obtaining cost data for use in preparing the in-house cost estimate.

(c) The *Heads of DoD Components* shall:

(1) Comply with this part and DoD Instruction 4100.33.

(2) Designate an official at the Military Service Assistant Secretary level, or equivalent, to implement this part.

(3) Establish an office as a central point of contact for implementing this part.

(4) Encourage and facilitate CA competitions.

(5) Delegate, as much as practicable, broad authority to installation commanders to decide how best to use the CA program to accomplish the mission. Minimally, as prescribed by P.L. 100–180, section 1111 and E.O. 12615, installation commanders shall have the authority and responsibility to carry out the following:

(i) Prepare an inventory each fiscal year of commercial activities carried out by Government personnel on the military installation in accordance with DoD Instruction 4100.33.

(ii) Decide which commercial activities shall be reviewed under the procedures and requirements of E.O. 12615, OMB Circular A–76, and DoD Instruction 4100.33. This authority shall not be applied retroactively. Cost comparisons and direct conversions initiated, as of December 4, 1987, shall be continued.

(iii) Conduct a cost comparison of those commercial activities selected for conversion to contractor performance under OMB Circular A–76.

(iv) To the maximum extent practicable, assist in finding suitable employment for any DoD employee displaced because of a contract entered into with a contractor for performance of a commercial activity on the military installation.

(6) Develop specific national defense guidance consistent with DoD Instruction 4100.33.

(7) Establish administrative appeal procedures consistent with DoD Instruction 4100.33.

(8) Ensure that contracts resulting from cost comparisons conducted under this part are solicited and awarded in accordance with the FAR and the DFARS.

(9) Ensure that all notification and reporting requirements established in DoD Instruction 4100.33 are satisfied.

(10) Ensure that the Freedom of Information Act Program is complied with in responding to requests for disclosure of contractor-supplied information obtained in the course of procurement.

(11) Ensure that high standards of objectivity and consistency are maintained in compiling and maintaining the CA inventory and conducting the reviews and cost comparisons.

(12) Provide, when requested, assistance to installation commanders to ensure effective CA program implementation and technical competence in management and implementation of the CA program.

(13) Ensure that maximum efforts are exerted to assist displaced DoD employees in finding suitable employment, to include, as appropriate:

(i) Providing priority placement assistance for other Federal jobs.

(ii) Training and relocation when these shall contribute directly to placement.

(iii) Providing outplacement assistance for employment in other sectors of the economy with particular attention to assisting eligible employees to exercise their right of first refusal with the successful contractor.

(14) Maintain the technical competence necessary to ensure effective and efficient management of the CA program.

(15) Ensure, once the cost comparison is initiated, that the milestones are met, and completion of the cost comparison is without unreasonable delay.

PART 169a—COMMERCIAL ACTIVITIES PROGRAM PROCEDURES

Subpart A—General

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APPENDIX A TO PART 169a—CODES AND DEFINITIONS OF FUNCTIONAL AREAS

APPENDIX B TO PART 169a—COMMERCIAL ACTIVITIES INVENTORY REPORT AND FIVE-YEAR REVIEW SCHEDULE

APPENDIX C TO PART 169a—SIMPLIFIED COST COMPARISONS FOR DIRECT CONVERSION OF CAS

APPENDIX D TO PART 169a—COMMERCIAL ACTIVITIES MANAGEMENT INFORMATION SYSTEM (CAMIS)

AUTHORITY: 5 U.S.C. 301 and 552.

SOURCE: 50 FR 40805, Oct. 7, 1985, unless otherwise noted.

Subpart A—General

§ 169a.1 Purpose.

This part:

(a) Reissues DoD Instruction 4100.33[1] to update policy, procedures, and responsibilities required by DoD Directive 4100.15[2] and OMB Circular A–76[3] for use by the Department of Defense (DoD) to determine whether needed commercial activities (CAs) should be accomplished by DoD personnel or by contract with a commercial source.

(b) Cancels DoD 4100.33–H,[4] ''DoD In-House vs. Contract Commercial and Industrial Activities Cost Comparison Handbook.''

§ 169a.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Defense Agencies and DoD Field Activities (hereafter referred to collectively as the ''DoD Components'').

(b) Contains DoD procedures for CAs in the United States, its territories and possessions, the District of Columbia, and the Commonwealth of Puerto Rico.

(c) Is not mandatory for CAs staffed solely with DoD civilian personnel paid by nonappropriated funds, such as military exchanges. However, this part is mandatory for CAs when they are staffed partially with DoD civilian personnel paid by or reimbursed from appropriated funds, such as libraries, open messes, and other morale, welfare, and recreation (MWR) activities. When related installation support functions are being cost-compared under a single solicitation, a DoD Component may decide that it is practical to include activities staffed solely with DoD civilian personnel paid by nonappropriated funds.

(d) Does not apply to DoD governmental functions are defined in §169a.3.

(e) Does not apply when contrary to law, Executive orders, or any treaty or international agreement.

(f) Does not apply in times of a declared war or military mobilization.

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

[2] See footnote 1 to §169a.1(a).

[3] Copies may be obtained if needed, from the Office of Management and Budget, Executive Office Building, Washington, DC 20503.

[4] See footnote 1 to §169a.1(a).

(g) Does not provide authority to enter into contracts.

(h) Does not apply to the conduct of research and development, except for severable in-house CAs that support research and development, such as those listed in appendix A to this part.

(i) Does not justify conversion to contract solely to avoid personnel ceilings or salary limitations.

(j) Doe not authorize contracts that establish employer-employee relations between the Department of Defense and contractor employees as described in the Federal Acquisition Regulation (FAR), 48 CFR 37.104.

(k) Does not establish and shall not be construed to create any substantive or procedural basis for anyone to challenge any DoD action or inaction on the basis that such action or inaction was not in accordance with this part except as specifically set forth in §169a.15(d).

[57 FR 29207, July 1, 1992]

§169a.3 Definitions.

Commercial activity review. The process of evaluating CAs for the purpose of determining whether or not a cost comparison will be conducted.

Commercial source. A business or other non-Federal activity located in the United States, its territories and possessions, the District of Columbia, or the Commonwealth of Puerto Rico that provides a commercial product or service.

Conversion to contract. The changeover of a CA from performance by DoD personnel to performance under contract by a commercial source.

Conversion to in-house. The changeover of a CA from performance under contract by a commercial source to performance by DoD personnel.

Cost comparison. The process of developing an estimate of the cost of performance of a CA by DoD employees and comparing it, in accordance with the requirements in this part, to the cost to the Government for contract performance of the CA.

Directly affected parties. DoD employees and their representative organizations and bidders or offerers on the solicitation.

Displaced DoD employee. Any DoD employee affected by conversion to contract operation (including such actions as job elimination, grade reduction, or reduction in rank). It includes both employees in the function converted to contract and to employees outside the function who are affected adversely by conversion through reassignment or the exercise of bumping or retreat rights.

DoD Commercial Activity (CA). An activity that provides a product or service obtainable (or obtained) from a commercial source. A DoD CA is not a Governmental function. A DoD CA may be an organization or part of another organization. It must be a type of work that is separable from other functions or activities so that it is suitable for performance by contract. A representative list of the functions performed by such activities is provided in Enclosure 1. A DoD CA falls into one of two categories:

(a) *In-house CA*. A DoD CA operated by a DoD Component with DoD personnel.

(b) *Contract CA*. A DoD CA managed by a DoD Component operated with contractor personnel.

DoD Employee. Refers to only civilian personnel of the Department of Defense.

DoD governmental function. A function that is related so intimately to the public interest as to mandate performance by DoD personnel. These functions require either the exercise of discretion in applying Government authority or the use of value judgement in making the decision for the Department of Defense.

Services or products in support of Governmental functions such as those listed in enclosure 3 of DoD Instruction 4100.33 are normally subject to this part and its implementing instructions. Governmental functions normally fall into two categories:

(a) The act of governing; that is, the discretionary exercise of Governmental authority. Examples include criminal investigations, prosecutions, and other judicial functions; management of Governmental programs requiring value judgments, as in direction of the national defense; management and direction of the Armed Services; activities performed exclusively by military personnel who are subject to deployment

in a combat, combat support, or combat service support role; conduct of foreign relations; selection of program priorities; direction of Federal employees; regulation of the use of space, oceans, navigable rivers, and other natural resources; direction of intelligence and counterintelligence operations; and regulation of industry and commerce, including food and drugs.

(b) Monetary transactions and entitlements, such as tax collection and revenue disbursements; control of the money supply treasury accounts; and the administration of public trusts.

DoD personnel. Refers to both military and civilian personnel of the Department of Defense.

Expansion. The modernization, replacement, upgrading, or enlargement of a DoD CA involving a cost increase exceeding either 30 percent of the total capital investment or 30 percent of the annual personnel and material costs. A consolidation of two or more CAs is not an expansion unless the proposed total capital investment or annual personnel and material costs of the consolidation exceeds the total of the individual CAs by 30 percent or more.

New requirement. A recently established need for a commercial product or service. A new requirement does not include interim in-house operation of essential services pending reacquisition of the services prompted by such action as the termination of an existing contract operation.

Preferential procurement programs. Mandatory source programs such as Federal Prison Industries (FPI) and the workshops administered by the Committee for Purchase from the Blind and Other Severely Handicapped under the Javits-Wagner-O'Day Act. Also included are small, minority and disadvantaged businesses, and labor surplus area set-asides and awards made under 15 U.S.C. section 637.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29207, July 1, 1992]

§ 169a.4 Policy.

(a) *Ensure DoD mission accomplishment*. The implementation of this part shall consider the overall DoD mission and the defense objective of maintaining readiness and sustainability to ensure a capability for mobilizing the defense and support structure.

(b) *Retain governmental functions in-house*. Certain functions that are inherently governmental in nature, and intimately related to the public interest, mandate performance by DoD personnel only. These functions are not in competition with commercial sources; therefore, these functions shall be performed by DoD personnel.

(c) *Rely on the commercial sector*. DoD Components shall rely on commercially available sources to provide commercial products and services, except when required for national defense, when no satisfactory commercial source is available, or when in the best interest of direct patient care. DoD Components shall not consider an in-house new requirement, an expansion of an in-house requirement, conversion to in-house, or otherwise carry on any CAs to provide commercial products or services if the products or services can be procured more economically from commercial sources.

(d) *Achieve economy and enhance productivity*. Encourage competition with the objective of enhancing quality, economy, and performance.

When performance by a commercial source is permissible, a comparison of the cost of contracting and the cost of in-house performance shall be performed to determine who shall provide the best value for the Government, considering price and other factors included in the solicitation. If the installation commander has reason to believe that it may not be cost effective to make an award under mandatory source programs, section 8(a) of the Small Business Act or any other noncompetitive preferential procurement program, a cost comparison, or any other cost analysis, although not required by OMB Circular A–76, may be performed. Performance history will be considered in the source selection process, and high quality performance should be rewarded.

(e) *Delegate decision authority and responsibility*. DoD Components shall delegate decision authority and responsibility to lower organization levels, giving more authority to the doers, and linking responsibility with that authority. This shall facilitate the work

that installation commanders must perform without limiting their freedom to do their jobs. When possible, the installation commanders should have the freedom to make intelligent use of their resources, while preserving the essential wartime capabilities of U.S. support organizations in accordance with DoD Directive 4001.15.[5]

(f) *Share resources saved.* When possible, make available to the installation commander a share of any resources saved or earned so that the commander can improve operations or working and living conditions on the installation.

(g) *Provide Placement Assistance.* Provide a variety of placement assistance to employees whose Federal jobs are eliminated through CA competitions.

(h) *Permit interim-in-house operation.* A DoD in-house CA may be established on a temporary basis if a contractor defaults. Action shall be taken to resolicit bids or proposals in accordance with this part.

[57 FR 29207, July 1, 1992]

Subpart B—Procedures

§ 169a.8 Inventory and review schedule (Report Control Symbol DD-P&L(A)).

(a) Information in each DoD Component's inventory shall be used to assess DoD implementation of OMB Circular A–76 and for other purposes. Each Component's inventory shall be updated at least annually to reflect changes to their review schedule and the results of reviews, cost comparisons, and direct conversions. Updated inventories for all DoD Components except National Security Agency/Central Security Service (NSA/CSS) and the Defense Intelligence Agency (DIA) Shall be submitted to the Assistant Secretary of Defense Production and Logistics) (ASD(P&L)) within 90 days after the end of each fiscal year. Inventory data pertaining to NSA/CSS and DIA shall be held at the specific Agency concerned for subsequent review by properly cleared personnel. Appendix A to this part provides the codes and explanations for functional areas and Appendix B to this part provides procedures for submitting the inventory.

(b) DoD component's review schedules should be coordinated with the DoD Component's Efficiency Review Program and the Defense Regional Interservice Support (DRIS) Program to preclude duplication of efforts and to make use of information already available.

(c) Review of CAs that provide interservice support shall be scheduled by the supplying DoD Component. Subsequent cost comparisons, when appropriate, shall be executed by the same DoD Component. All affected DoD Components shall be notified of the intent to perform a review.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29208, July 1, 1992]

§ 169a.9 Reviews: Existing in-house commercial activities.

(a) DoD components shall conduct reviews of in-house CAs in accordance with their established review schedules. Existing in-house CAs, once reviewed shall be retained in-house without a cost comparison only when certain conditions are satisfied. (Detailed documentation will be maintained to support the decision to continue in-house performance). These conditions are as follows:

(1) *National Defense.* In most cases, application of this criteria shall be made considering the wartime and peacetime duties of the specific positions involved rather than in terms of broad functions.

(i) A CA, staffed with military personnel who are assigned to the activity, may be retained in-house for national defense reason when the following apply.

(A) The CA is essential for training or experience in required military skills;

(B) The CA is needed to provide appropriate work assignments for a rotation base for overseas or sea-to-shore assignments; or

(C) The CA is necessary to provide career progression to needed military skill levels.

(ii) *Core logistics activities.* The core logistics capability reported to Congress, March 29, 1984, under the provisions of 10 U.S.C. 2646 is comprised of

[5] See footnote 1 to § 169a.1(a).

the facilities, equipment, and management personnel at the activities listed in the report. The work at those activities may be performed by either government or contractor personnel, whichever is more cost effective. Core logistics activities reported to Congress under the provisions of 10 U.S.C. 2646, shall be retained in-house unless the Secretary of Defense grants a waiver as provided for in 10 U.S.C. 2464. Requests for waivers shall be submitted to the ASD (P&L). DoD Components may propose to the ASD (P&L) additional core logistics capability for inclusion in the list of core logistics activities. Core logistics activities reported to Congress as additions to the original list shall be retained in-house unless subsequently waived by the Secretary of Defense.

(iii) If the DoD Component has a larger number of similar CAs with a small number of essential military personnel in each CA, action shall be taken, when appropriate, to consolidate the military positions consistent with military requirements so that economical performance by either DoD civilian employees or by contract can be explored for accomplishing a portion of the work.

(iv) The DoD Components may propose to the ASD (P&L) other criteria for exempting CAs for national defense reasons.

(2) *No satisfactory commercial source available.* A DoD commercial activity may be performed by DoD personnel when it can be demonstrated that:

(i) There is no satisfactory commercial source capable of providing the product or service that is needed. Before concluding that there is no satisfactory commercial source available, the DoD Component shall make all reasonable efforts to identify available sources.

(A) DoD Components' efforts to find satisfactory commercial sources shall be carried out in accordance with the FAR and Defense FAR Supplement (DFAS) including review of bidders lists and inventories of contractors, consideration of preferential procurement programs, and requests for help from Government agencies such as the Small Business Administration.

(B) Where the availability of commercial sources is uncertain, the DoD Component will place up to three notices of the requirement in the *Commerce Business Daily* (CBD) over a 90-day period. (Notices will be in the format specified in FAR, 48 CFR part 5 and part 7, subpart 7.3) When a bona fide urgent requirement occurs, the publication period in the CBD may be reduced to two notices, 15 days apart. Specifications and requirements in the notice will not be unduly restrictive and will not exceed those required of Government personnel or operations.

(ii) Use of a commercial source would cause an unacceptable delay or disruption of an essential program. In-house operation of a commercial activity on the basis that use of a commercial source would cause an unacceptable delay or disrupt an essential DoD program requires a specific documented explanation.

(A) The delay or disruption must be specific as to cost, time, and performance measures.

(B) The disruption must be shown to be a lasting or unacceptable nature. Temporary disruption caused by conversion to contract is not sufficient support for the use of this criteria.

(C) The fact that a DoD commercial activity involves a classified program, or is part of a DoD Component's basic mission, or that there is the possibility of a strike by contract employees is not adequate reason for Government performance of that activity. Further, urgency alone is not an adequate reason to continue Government operation of a commercial activity. It must be shown that commercial sources are not able, and the Government is able, to provide the product or service when needed.

(D) Use of an exemption due to an unacceptable delay or disruption of an essential program shall be approved by the DoD Component's central point of contact office. This authority may be redelegated.

(3) *Patient Care.* Commercial activities at DoD hospitals may be performed by DoD personnel when it is determined by the head of the DoD Component or his designee, in consultation with the DoD Component's chief medical director, that performance by DoD

personnel would be in the best interest of direct patient care.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29208, July 1, 1992]

§ 169a.10 Contracts.

When contract cost becomes unreasonable or performance becomes unsatisfactory, the requirement must be resolicited. If the DoD Component competes in the resolicitation, then a cost comparison of a contracted CA shall be performed in accordance with part III of the Supplement to OMB Circular A–76 (Office of Federal Procurement Policy pamphlet No. 4)[6], part II of the Supplement to OMB Circular A–76 (Management Study Guide)[7], part IV of the Supplement to OMB Circular A–76 (Cost Comparison Handbook)[8], if in-house performance is feasible. When contracted CAs are justified for conversion to in-house performance, the contract will be allowed to expire (options will not be exercised) once in-house capability is established.

[57 FR 29208, July 1, 1992]

§ 169a.11 Expansions.

In cases where expansion of an in-house commercial activity is anticipated, a review of the entire commercial activity, including the proposed expansion, shall be conducted to determine if performance by DoD personnel is authorized for national defense reasons, because no commercial source is available, or because it is in the best interest of direct patient care. If performance by DoD personnel is not justified under these criteria, a cost comparison of the entire activity shall be performed. Government facilities and equipment normally will not be expanded to accommodate expansions if adequate and cost effective contractor facilities and equipment are available.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29208, July 1, 1992]

§ 169a.12 New requirements.

(a) In cases where a new requirement for a commercial product or service is anticipated, a review shall be conducted to determine if performance by DoD personnel is authorized for national defense reasons, because no commercial source is available, or because it is in the best interest of direct patient care. If performance by DoD personnel is not justified under these criteria, then the new requirement normally shall be performed by contract.

(b) If there is reason to believe that commercial prices may be unreasonable, a preliminary cost analysis shall be conducted to determine whether it is likely that the work can be performed in-house at a cost that is less than anticipated for contract performance. If in-house performance appears to be more economical, a cost comparison shall be scheduled. The appropriate conversion differentials will be added to the preliminary in-house cost before it is determined that in-house performance is likely to be more economical.

(c) Government facilities and equipment normally will not be expanded to accommodate new requirements if adequate and cost-effective contractor facilities are available. The requirement for Government ownership of facilities does not obviate the possibility of contract operation. If justification for in-house operation is dependent on relative cost, the cost comparison may be delayed to accommodate the lead time necessary for acquiring the facilities.

(d) Approval or disapproval of in-house performance of new requirements involving a capital investment of $500,000 or more will not be redelegated below the level of DAS or equivalent.

(e) Approval to budget for a major capital investment associated with a new requirement will not constitute OSD approval to perform the new requirement with DoD personnel. Government performance shall be determined in accordance with this part.

§ 169a.13 CAs involving forty-five or fewer DoD civilian employees.

(a) When adequately justified under the criteria required in Appendix C to this part, CAs involving 11 to 45 DoD civilian employees may be competed based on simplified cost comparison procedures and 10 or fewer DoD civilian employees may be directly converted

[6] See footnote 3 to § 169a.1(a).
[7] See footnote 3 to § 169a.1(a).
[8] See footnote 3 to § 169a.1(a).

to contract without the use of a simplified cost comparison. Such conversion shall be approved by the DoD Component's central point of contact office having the responsibility for implementation of this part. Part IV of the Supplement to OMB Circular A–76 and Appendix C to this part shall be utilized to define the specific elements of costs to be estimated in the simplified cost comparison.

(b) In no case shall any CA involving more than forty-five employees be modified, reorganized, divided, or in any way changed for the purpose of circumventing the requirement to perform a full cost comparison.

(c) The decision to perform a simplified cost comparison on a CA involving military personnel and 11 to 45 DoD Civilian employees reflects a management decision that the work need not be performed in-house. Therefore, all direct military personnel costs will be estimated in the simplified cost comparison (see Appendix C to this part) on the basis of civilian performance.

(d) A most efficient and cost-effective organization analysis certification is required for studies involving 11 to 45 DoD civilian employees (see Appendix C to this part).

[57 FR 29208, July 1, 1992]

§ 169a.14 Military personnel commercial activity.

Commercial activities performed exclusively by military personnel not subject to deployment in a combat, combat support, or combat service support role may be converted to contract without a cost comparison, when adequate competition is available and reasonable prices can be obtained from qualified commercial sources.

§ 169a.15 Special considerations.

(a) Signals Intelligence, Telecommunications (SIGINT) and Automated Information System (AIS) security.

(1) Before making a determination that an activity involving SIGINT as prescribed in Executive Order 12333, and AIS, security should be subjected to a cost comparison, the DoD Component shall specifically identify the risk to national security and complete a risk assessment to determine if the use of commercial resources poses a potential threat to national security. Information copies of the risk assessment and a decision memorandum containing data on the acceptable and/or unacceptable risk will be maintained within the requesting DoD Component's contracting office.

(2) The National Security Agency (NSA) considers the polygraph program an effective means to enhance security protection for special access type information. The risk to national security is of an acceptable level if contractor personnel assigned to the maintenance and operation of SIGINT, Computer Security (COMPUSEC) and Communications Security (COMSEC) equipment agree to an aperiodic counter-intelligence scope polygraph examination. The following clause should be included in every potential contract involving SIGINT, Telecommunications, and AIS systems:

Contract personnel engaged in operation or maintaining SIGINT, COMSEC or COMPUSEC equipment or having access to classified documents or key material must consent to an aperiodic counter-intelligence scope polygraph examination administered by the Government. Contract personnel who refuse to take the polygraph examination shall not be considered for selection.

(b) *National intelligence.* Before making a determination that an activity involving the collection/processing/production/dissemination of national intelligence as prescribed in Executive Order 12333 should be subjected to a cost comparison, the DoD Component must specifically identify the risk to national intelligence of using commercial sources. Except as noted in paragraph (a) of this section, the DoD Component shall provide its assessment of the risk to national intelligence of using commercial sources to the Director, DIA, who shall make the determination if the risk to national intelligence is unacceptable. DIA shall consult with other organizations as deemed necessary and shall provide the decision to the DoD Component. (Detailed documentation shall be maintained to support the decision).

(c) *Accountable Officer.* (1) The functions and responsibilities of the Accountable Officer are defined by DoD 7200.10–M.[9] Those functions of the Accountable Officer that involve the exercise of substantive discretionary authority in determining the Government's requirements and controlling Government assets cannot be performed by a contractor and must be retained in-house. The responsibilities of the Accountable Officer as an individual and the position of the Accountable Officer are not contractable.

(2) Contractors can perform functions in support of the Accountable Officer and functions where they are performing in accordance with criteria defined by the Government. For instance, contractors can process requisitions, maintain stock control records, perform storage and warehousing, and make local procurements of items specified as deliverables in the contract.

(3) The responsibility for administrative fund control must be retained inhouse. The contractor can process all required paperwork up to funds obligation which must be done by the Government employee designated as responsible for funds control. The contractor can also process such documents as reports of survey and adjustments to stockage levels, but approval must rest with the Accountable Officer. In all cases, the administrative control of funds must be retained by the Government since contractors or their employees cannot be held responsible for violations of the United States Code.

(d) *Cost Comparison Process.* If performance of a commercial activity by DoD personnel cannot be justified under national defense, non-availability of commercial source, or patient care criteria, than a full cost comparison shall be conducted in accordance with part II of the Supplement to OMB Circular No. A–76, part III of the Supplement to OMB Circular No. A–76, and part IV of the Supplement to OMB Circular A–76, to determine if performance by DoD employees is justified on the basis of lower cost (unless the criteria of §169a. and §169a. are met). The conclusion that a commercial activity will be cost compared reflects a management decision that the work need not be accomplished by military personnel. Therefore, all direct personnel costs shall be estimated on the basis of civilian performance. Funds shall be budgeted to cover either the cost of the appropriate in-house operation required to accomplish the work or the estimated cost of the contract. Neither funds nor manpower authorizations shall be removed from the activity's budget in anticipation of the outcome of a study.

(1) *Notification*—(i) *Congressional notification.* DoD Components shall notify Congress of the intention to do a cost comparison involving 46 or more DoD civilian personnel. DoD Components shall annotate the notification when a cost comparison is planned at an activity listed in the report to Congress on core logistics (see section 169a.9(a)(1)(ii)). The DoD Component shall notify the ADS(P&L) of any such intent at least 5 working days before the Congressional notification. The cost comparison process begins on the date of Congressional notification.

(ii) *DoD employee notification.* DoD Components shall, in accordance with 10 U.S.C. 2467(b), at least monthly during the development and preparation of the performance work statement (PWS) and management study, consult with DoD civilian employees who will be affected by the cost comparison and consider the views of such employees on the development and preparation of the PWS and management study. DoD Components may consult with such employees more frequently and on other matters relating to the cost comparison. In the case of DoD employees represented by a labor organization accorded exclusive recognition under 5 U.S.C. 7111, consultation with representatives of the labor organization satisfies the consultation requirement. Consultation with nonunion DoD civilian employees may be through such means as group meetings. Alternatively, DoD civilian employees may be invited to designate one or more representatives to speak for them. Other methods may be implemented if adequate notice is provided to the nonunion DOD civilian employees and the

[9] See footnote 1 to §169a.1(a).

right to be represented during the consultations is ensured.

(iii) *Local notification*. It is suggested that upon starting the cost comparison process, the installation make an announcement of the cost comparison, including a brief explanation of the cost-comparison process to the employees of the activity and the community. The installations' labor relations specialist also should be apprised to ensure appropriate notification to employees and their representatives in accordance with applicable collective bargaining agreements. Local Interservice Support Coordinators (ISCs) and the Chair of the appropriate Joint Interservice Regional Support Group (JIRSG) also should be notified of a pending cost comparison.

(2) *Performance Work Statement (PWS)*. (i) The PWS and its Quality Assurance Plan shall be prepared in accordance with part II of the Supplement to OMB Circular No. A–76 5 for full cost comparison, simplified cost comparisons, and direct conversions of DoD personnel commercial activities. The PWS shall include reasonable performance standards that can be used to ensure a comparable level of performance for both Government and contractor and a common basis for evaluation. Employees and/or their bargaining unit representatives should be encouraged to participate in preparing or reviewing the PWS.

(ii) Each DoD Component shall:

(A) Prepare PWSs that are based on accurate and timely historical or projected workload data and that provide measurable and verifiable performance standards.

(B) Monitor the development and use of prototype PWSs.

(C) Review and initiate action to correct disagreements on PWS discrepancies.

(D) Approve prototype PWSs for Component-wide use.

(E) Coordinate these efforts with the other DoD Components to avoid duplication and to provide mutual assistance.

(iii) Guidance on Government Property:

(A) For the purposes of this instruction, Government property is defined in accordance with the 48 CFR part 45.

(B) The decision to offer or not to offer Government property to a contractor shall be determined by a cost-benefit analysis justifying that the decision is in the government's best interest. The determination on Government property must be supported by current, accurate, complete information and be readily available for the independent reviewing activity. The design of this analysis shall not give a decided advantage or disadvantage to either in-house or contract competitors. The management of Government property offered to the contractor shall also be in compliance with 48 CFR part 45.

(iv) If a commercial activity provides critical or sensitive services, the PWS shall include sufficient data for the in-house organization and commercial sources to prepare a plan for expansion in emergency situations.

(v) DoD Components that provide interservice support to other DoD Components or Federal agencies through interservice support agreements or other arrangements shall ensure that the PWS includes this work load and is coordinated with all affected Dod Components and Federal Agencies.

(vi) If there is a requirement for the commercial source to have access to classified information in order to provide the product or service, the commercial source shall be processed for a facility security clearance under the Defense Industrial Security Program in accordance with DoD Directive 5220.22[10] and DoD Regulation 5220.22–R.[11] However, if no *bona fide* requirement for access to classified information exists, no action shall be taken to obtain security clearance for the commercial source.

(vii) Employees of commercial sources who do not require access to classified information for work performance, but require entry into restricted areas of the installation, may be authorized unescorted entry only when the provisions of DoD Regulation 5200.2–R[12] apply.

(3) *Management Study*. A management study shall be performed to analyze

[10] See footnote 1 to §169a.1(a).
[11] See footnote 1 to §169a.1(a).
[12] See footnote 1 to §169a.1(a).

completely the method of operation necessary to establish the most efficient and cost-effective in-house organization (MEO) needed to accomplish the requirements in the PWS. The MEO must reflect only approved resources for which the commercial activity has been authorized. As a part of the management study, installations should determine if specific requirements can be met through an Inter/Intraservice Support Agreement (ISA) with other activities or Government Agencies which have excess capacity or capability.

(i) The commercial activity management study is mandatory. Part III of the Supplement to OMB Circular No. A–76 provides guidance on how to conduct the management study. The study shall identify essential functions to be performed, determine performance factors, organization structure, staffing, and operating procedures for the most efficient and cost effective in-house performance of the commercial activity. The MEO becomes the basis of the Government estimate for the cost comparison with potential contractors. In this context, ''efficient'' (or cost-effective) means that the required level of workload (output, as described in the performance work statement) is accomplished with as little resource consumption (input) as possible without degradation in the required quality level of products or services.

(ii) DoD Components have formal programs and training for the performance of management studies, and those programs are appropriate for teaching how to conduct commercial activity management studies. Part III of the Supplement to OMB Circular No. A–76 does not purport to replace the DoD Component's own management techniques, but merely to establish the basic criteria and the interrelationship between the management study and the PWS.

(iii) If a commercial activity provides critical or sensitive services, the management study shall include a plan for expansion in emergency situations.

(iv) Early in the management study, management will solicit the views of the employees in the commercial activity under review, and/or their representatives for their recommendations as to the MEO or ways to improve the method of operation.

(v) The management study will be the basis on which the DoD Component certifies that the Government cost estimate is based on the most efficient and cost effective organization practicable.

(vi) Implementation of the MEO shall be initiated no later than 1 month after cancellation of the soliciation and completed within 6 months. DoD Components shall take action, within 1 month, to schedule and conduct a subsequent cost comparison when the MEO is not initiated and completed as prescribed above. Subsequent cost comparisons may be delayed by the DoD Component's central point of contact office, when situations outside the control of the DoD Component prevent timely or full implementation of the MEO. This authority may not be redelegated.

(vii) DoD Components shall establish procedures to ensure that the in-house operation, as specified in the MEO, is capable of performing in accordance with the requirements of the PWS. The procedures also shall ensure that the resources (facilities, equipment, and personnel) specified in the MEO are available to the in-house operation and that in-house performance remains within the requirements and resources specified in the PWS and MEO for the period of the cost comparison, unless documentation to support changes in workload/scope is available.

(viii) A management study is not required for simplified cost comparisons however, a MEO analysis and certification is required.

(4) *Cost Comparisons*. Cost comparisons shall include all significant costs of both Government and contract performance. Common costs; that is, costs that would be the same for either in-house or contract operation, need not be computed, but the basis of those common costs must be identified and included in the cost comparison documentation. Part IV of the Supplement to OMB Circular A–76 (Cost Comparison Handbook) provides the basic guidance for conducting full cost comparisons. Appendix D provides guidance for

conducting simplified cost comparisons. The supplemental guidance contained below is intended to establish uniformity and to ensure all factors are considered when making cost comparisons. Deviation from the guidance contained in part IV of the Supplement to OMB Circular A–76, will not be allowed, except as provided in the following subparagraphs.

(i) *In-house Cost Estimate.* (A) The in-house cost estimate shall be based on the most efficient and cost-effective in-house organization needed to accomplish the requirements in the PWS.

(B) Heads of DoD Components or their designees shall certify that the in-house cost estimate is based on the most efficient and cost-effective operation practicable. Such certification shall be made before the bid opening or the date for receipt of initial proposals.

(C) The ASD(P&L) shall provide inflation factors for adjusting costs for the first and subsequent performance periods. These factors shall be the only acceptable factors for use in cost comparisons. Inflation factors for outyear (second and subsequent) performance periods will not be applied to portions of the in-house estimate that are comparable with those portions of the contract estimate subject to economic price adjustment clauses.

(D) Military positions in the organization under cost comparison shall be converted to civilian positions for costing purposes. Civilian grades and series shall be based on the work described in the PWS and the MEO, determined by the management study rather than on the current organization structure.

(E) DoD Components shall not use the DLA Wholesale Stock Fund Rate and/or the DLA Direct Delivery rate for supplies and materials as reflected in paragraph 3.a. (1) and (2) of part IV of the Supplement to OMB Circular No. A–76. The current standard and pricing formula includes full cost under the Defense Business Operations Fund (DBOF). No further mark-up is required.

(F) DoD Components shall assume for the purpose of depreciation computations that residual value is equal to the disposal values listed in Appendix C of part IV of the Supplemental to OMB Circular No. 76 (Cost Comparison Handbook) if more precise figures are not available from the official accounting records or other knowledgeable authority. Therefore, the basis for depreciation shall be the original cost plus the cost of capital improvements (if any) less the residual value. The original cost plus the cost of capital improvements less the residual value shall be divided by the useful life (as projected for the commercial activity cost comparison) to determine the annual depreciation.

(G) Purchased services which augment the current in-house work effort and that are included in the PWS should be included in line 3 (other specifically attributable costs). When these purchased services are long-term and contain labor costs subject to economic price adjustment clauses, then the applicable labor portion will not be escalated by outyear inflation factors. In addition, purchased services shall be offset for potential Federal income tax revenue by applying the appropriate rate in Appendix D of part IV of the Supplement to OMB Circular A–76 (Cost Comparison Handbook) to total cost of purchased services.

(H) Overhead costs shall be computed only when such costs will not continue in the event of contract performance. This includes the cost of any position (full time, part time, or intermittent) that is dedicated to providing support to the activity(ies) under cost comparison regardless of the support organization's location. Military positions provided overhead support shall be costed using current military composite standard rates that include PCS costs multiplied by the appropriate support factor.

(ii) *Cost of Contract Performance.* (A) The contract cost estimate shall be based on firm bids or negotiated proposals solicited in accordance with the FAR and the DoD FAR Supplement (DFARS) for full cost comparisons. Existing contract prices (such as those from GSA Supply Schedules) will not be used in a cost comparison. For simplified cost comparisons, the guidance in Appendix C of this part applies.

(B) Standby costs are costs incurred for the upkeep of property in standby status. Such costs neither add to the value of the property nor prolong its

life, but keep it in efficient operating condition or available for use. When an in-house activity is terminated in favor of contract performance and an agency elects to hold Government equipment and facilities on standby solely to maintain performance capability, this is a management decision, and such standby costs will not be charged to the cost of contracting.

(C) A specific waiver is required to use contract administration factors that exceed the limits established in Table 3–1 of part IV of the Supplement to OMB Circular No. A–76 (Cost Comparison Handbook). The reason for the deviation from the limits, the supporting alternative computation, and documentation supporting the alternative method, shall be provided to the DoD Component's central point of contact office for advance approval on a case-by-case basis. The authority may not be redelegated. ASD(A&L) shall be notified within 30 days of any such decisions.

(D) The following guidance pertains to one-time conversion costs:

(*1*) *Material Related Costs.* The cost factors below shall be used, if more precise costs are not known, to estimate the cost associated with disposal/transfer of excess government material which result from a conversion to contract performance:

	Percentage of current replacement cost
Packing, crating , and handling (PCH)	3.5
Transportation	3.75

(*2*) *Labor-Related Costs.* If unique circumstances prevail when a strict application of the 2 percent factor for computation of severance pay results in a substantial overstatement or understatement of this cost, an alternative methodology may be employed. The reason for the deviation from this standard, the alternative computation, and documentation supporting the alternative method shall be provided to the appropriate DoD Component's central point of contact office for advance approval on a case-by-case basis. This authority may not be redelegated.

(*3*) *Other Transition Costs.* Normally, government personnel assistance after the contract start date (to assist in transition from in-house performance to contract performance) should not be necessary. When transition assistance will not be made available, this condition should be stated clearly in the solicitation so that contractors will be informed that they will be expected to meet full performance requirements from the first date of the contract. Also, when circumstances require full performance on the contract start date, the solicitation shall state that time will be made available for contractor indoctrination prior to the start date of the contract. The inclusion of personnel transition costs in a cost comparison requires advance approval of the DoD Component's central point of contact office. This authority may not be redelegated.

(E) *Gain or Loss on Disposal/Transfer of Assets.* If more precise costs are not available from the Defense Reutilization and Marketing Office or appropriate authority, then:

(*1*) The same factors for PCH and transportation costs as prescribed in §169a.12E(ii)(D)(*1*) for the costs associated with disposal/transfer of materials may be used.

(*2*) The estimated disposal value may be calculated from the net book value as derived from the table in Appendix C of part IV of the Supplement to OMB Circular No. A–76 (Cost Comparison Handbook), minus the disposal/transfer costs. This figure shall be entered as a gain or loss on line 11 or line 13 of the cost comparison form as appropriate.

NOTE: If a cost-benefit analysis, as prescribed in §169a.12(B)(iii), indicates that the retention of Government-owned facilities, equipment, or real property for use elsewhere in the Government is cost advantageous to the Government, then the cost comparison form shall reflect a gain to the Government and therefore a decrease to the cost of contracting on line 11 or line 13 of the cost comparison form as appropriate.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29209, July 1, 1992]

§ 169a.16 Independent review.

(a) The estimates of in-house and contracting costs that can be computed before the cost comparison shall be reviewed by a qualified activity, independent of the Task Group preparing the cost comparison. This review shall

be completed far enough in advance of the bid or initial proposal opening date to allow the DoD Component to correct any discrepancies found before sealing the in-house cost estimate.

(b) The independent review shall substantiate the currency, reasonableness, accuracy, and completeness of the inhouse estimate. The review shall ensure that the in-house cost estimate is based on the same required services, performance standards, and workload contained in the solicitation. The reviewer shall scrutinize and attest to the adequacy and authenticity of the supporting documentation. Supporting documentation shall be sufficient to require no additional interpretation.

(c) The purpose of the independent review is to ensure costs have been estimated and supported in accordance with provisions of this Instruction. If no (or only minor) discrepancies are noted during this review, the reviewer indicates the minor discrepancies, signs, dates, and returns the CCF to the preparer. If significant discrepancies are noted during the review, the discrepancies shall be reported to the preparer for recommended correction and resubmission.

(d) The independent review is not required for simplified cost comparisons.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29210, July 1, 1992]

§ 169a.17 Solicitation considerations.

(a) Every effort must be made to avoid postponement or cancellation of CA solicitations even if there are significant changes, omissions, or defects in the Government's in-house cost estimate. Such corrections shall be made before the expiration of bids or proposals and may require the extensions of bids or proposals. When there is no alternative, contracting officers must clearly document the reason(s).

(b) Bidders or offerers shall be informed that an in-house cost estimate is being developed and that a contract may or may not result.

(c) Bids or proposals shall be on at least a 3-year multi-year basis (when appropriate) or shall include prepriced renewal options to cover 2 fiscal years after the initial period.

(d) All contracts awarded as a result of a conversion (whether or not a cost comparison was performed) shall comply with all requirements of the FAR and DFARS.

(e) Solicitations shall be restricted for preferential procurement when the requirements applicable to such programs (such as, small business setasides or other required sources of supplies and services) are met, in accordance with the FAR.

(f) Solicitations will not be restricted for preferential procurement unless the contracting officer determines that there is a reasonable expectation that the commercial prices will be fair and reasonable, in accordance with the FAR.

(g) Contract defaults may result in temporary performance by Government personnel or other suitable means; such as, an interim contract source. Personnel detailed to such a temporary assignment should be clearly informed that they will return to their permanent assignment when a new contract is awarded. If the default occurs within the first year of contract performance, the following procedures apply:

(1) If the Government was the next lowest bidder/offerer, and in-house performance is still feasible, the function may be returned to in-house performance. If in-house performance is no longer feasible, the contracting officer shall obtain the requirement by contract in accordance with the requirements of the FAR, 48 CFR part 49. A return to in-house performance under the above criteria shall be approved by the DoD Component's central point of contact office. This authority may not be redelegated.

(2) If the contract wage rates are no longer valid or if the contracting officer, after a review of the availability of the next lowest responsible and responsive bidders/offerers, determines that resolicitation is appropriate, the Government may submit a bid for comparison with other bids/offers from the private sector. Submission of a Government bid requires a determination by the DoD Component that performance by DoD employees is still feasible and that a likelihood exists that such performance may be more economical than performance by contract. In such cost comparisons, the conversion differentials will not be applied to the

costs of either in-house or contract performance.

(h) If contract default occurs during the second or subsequent year of contract performance, the procedures of §169a.8(b)(2)(i) of this part apply.

(1) *Grouping of Commercial Activities.* (i) The installation commander shall determine carefully which CAs should be grouped in a single solicitation. The installation commander should keep in mind that the grouping of commercial activities can influence the amount of competition (number of commercial firms that will bid or submit proposals) and the eventual cost to the Government.

(ii) [Reserved]

(2) The installation commander shall consider the adverse impacts that the grouping of commercial activities into a single solicitation may have on small and small disadvantaged business concerns. Commercial activities being performed wholly by small or small disadvantaged businesses will not be incorporated into a cost comparison unless consolidation is necessary to meet mission requirements. Actions must be taken to ensure that such contractors are not displaced merely to accomplish consolidation. Similarly, care must be taken so that nonincumbent small and small disadvantaged business contractors are not handicapped or prejudiced unduly from competing effectively at the prime contractor level.

(3) In developing solicitations for commercial activities, the procurement plan should reflect an analysis of the advantages and disadvantages to the Government that might result from making more than one award. The decision to group commercial activities should reflect an analysis of all relevant factors including the following:

(A) The effect on competition.

(B) The duplicative management functions and costs to be eliminated through grouping.

(C) The economies of administering multifunction vs. single function contracts, including cost risks associated with the pricing structure of each.

(D) The feasibility of separating unrelated functional tasks or groupings.

(E) The effect grouping will have on the performance of the functions.

(4) When the solicitation package includes totally independent functions which are clearly divisible, severable, limited in number, and not price interrelated, they shall be solicited on the basis of an ''any or all'' bid or offer. commercial bidders or offerors shall be permitted to submit bids or offers on one or any combination of the functions being solicited. These bids or offers shall be evaluated to determine the lowest aggregate contract cost to the Government. This lowest aggregate contract cost then will be compared to the in-house cost estimate based on the MEO for performance of the functions in the single solicitation. The procedures in part IV of the Supplement to OMB Circular No. A–76 (Cost Comparison Handbook) apply.

(5) There are instances when this approach to contracting for CAs may not apply; such as, situations when physical limitations of site (where the activities are to be performed) preclude allowing more than one contractor to perform, when the function cannot be divided for purposes of performance accountability, or for other national security considerations. However, if an ''all or none'' solicitation is issued, the decision to do so must include a cost analysis to reflect that the ''all or none'' solicitation is less costly to the Government or an analysis indicating it is otherwise in the best interest of the Government, all factors considered.

(6) It is recognized that in some cases, decisions will result in the elimination of prime contracting opportunities for small business. In such cases special measures shall be taken. At a minimum, small and small disadvantaged business concerns shall be given preferential consideration by all competing prime contractors in the award of subcontracts. For negotiated procurements the degree to which this is accomplished will be a weighted factor in the evaluation and source selection process leading to contract award.

(7) The contract files shall be documented fully to demonstrate compliance with these procedures.

(i) If no bids or proposals, or no responsive or responsible bids or proposals are received in response to a solicitation, the in-house cost estimate

shall remain unopened. The contracting officer shall examine the solicitation to ascertain why no responses were received. Depending on the results of this review, the contracting officer shall consider restructuring the requirement, if feasible and reissue it under restricted or unrestricted solicitation procedures, as appropriate.

(j) Continuation of an in-house CA for lack of a satisfactory commercial source will not be based upon lack of response to a restricted solicitation.

(k) The guidance of subparagraph E.3.f. applies to sumplified cost comparisons and direct conversions of military personnel CAs.

(l) To ensure that bonds and/or insurance requirements are being used in the best interest of the Government, as a general rule, requirements (for other than construction related services) above the levels established in the FAR and DFARS should not be included in acquisitions.

[50 FR 40805, Oct. 7, 1985, as amended at 56 FR 27901, June 18, 1991; 57 FR 29210, July 1, 1992]

§ 169a.18 Administrative appeal procedures.

(a) *Appeals of Cost Comparison Decisions.* (1) Each DoD Component shall establish an administrative appeals procedure to resolve questions from directly affected parties relating to determinations resulting from cost comparisons performed in compliance with this part. The appeal procedure will not apply to questions concerning the following:

(i) Award to one contractor in preference to another;

(ii) DoD management decisions.

(2) The appeals procedure is to provide an administrative safeguard to ensure that DoD Component decisions are fair, equitable, and in accordance with procedures in this part. The procedure does not authorize an appeal outside the DoD Component or a judicial review.

(3) The appeals procedure shall be independent and objective and provide for a decision on the appeal within 30 calendar days of receipt of the appeal. The decision shall be made by an impartial official at a level organizationally higher than the official who approved the cost comparison decision. The appeal decision shall be final, unless the DoD Component procedures provide for further discretionary review within the DoD Component.

(4) All detailed documentation supporting the initial cost comparison decision shall be made available to directly affected parties upon request when the initial decision is announced. The detailed documentation shall include, at a minimum, the following: the in-house cost estimate with detailed supporting documentation (see §169a.5(c)(ii) of this part), the completed CCF, name of the tentative winning contractor (if the decision is to contract), or the price of the bidder whose bid or proposal would have been most advantageous to the Government (if the decision is to perform in-house). If the documentation is not available when the initial decision is announced, the time alloted for submission of appeals shall be extended the number of days equal to the delay.

(5) To be considered eligible for review under the DoD Component appeals procedures, appeals shall:

(i) Be received by the DoD Component in writing within 15 working days after the date the supporting documentation is made available to directly affected parties.

(ii) Address specific line items on the CCF and the rationale for questioning those items.

(iii) Demonstrate that the result of the appeal may change the decision.

(b) *Appeals of Simplified Cost Comparisons and Direct Conversions.* (1) Directly affected parties may appeal decision to convert to contract based on a simplified cost comparison involving 11–45 DoD civilian employees or a direct conversion involving 10 or fewer DoD civilian employees. The appeal must address reasons why fair and reasonable prices will not be obtainable.

(2) Each DoD Component shall establish an administrative appeal procedure that is independent and objective; Installation Commanders must make available, upon request, the documentation supporting the decision to directly convert activities; appeals of direct conversions must be filed within 30 calendar days after the decision is announced in the Commerce Business

Daily and/or FEDERAL REGISTER, and the supporting documentation is made available; an impartial official one level organizationally higher than the official who approved the direct conversion decision shall hear the appeal; officials shall provide an appeal decision within 30 calendar days of receipt of the appeal.

(c) Since the appeal procedure is intended to protect the rights of all directly affected parties, the DoD Component's procedures, as well as the decision upon appeal, will not be subject to negotiation, arbitration, or agreement.

(d) DoD Components shall include administrative appeal procedures as part of their implementing documents.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29210, July 1, 1992]

§ 169a.19 Study limits.

No DoD funds shall be available to perform any cost study pursuant to the provisions of OMB Circular A–76 if the study being performed exceeds a period of 24 months after initiation of such study with respect to a single function activity or 48 months after initiation of such study for a multi-function activity.

[60 FR 67328, Dec. 29, 1995]

Subpart C—Reporting Requirements

§ 169a.21 Reporting requirements.

(a) *Inventory and Review Schedule (Report Control Symbol DD-A&T(A) 1540).* See § 169a.8(a) of this part.

(b) *Commercial Activities Management Information System (CAMIS) (Report Control Symbol DD-A&T(Q) 1542).* (1) The purpose of CAMIS is to maintain an accurate DoD data base of commercial activities that undergo an OMB Circular A–76 cost comparison and CAs that are converted directly to contract without a cost comparison. The CAMIS is used to provide information to the Congress, Office of Management Budget (OMB), General Accounting Office (GAO), OSD, and others. The CAMIS is divided into two parts. Part I contains data on CAs that undergo cost comparison. Part II contains data on commercial activities converted to contract without a full cost comparison.

(2) The CAMIS report shall be submitted in accordance with the procedures in Appendix C.

(c) Congressional Data Reports on CA (Report Control Symbol DD-A&T(A&AR) 1949) and Reports on savings on Costs from Increased Use of DoD Civilian Personnel (Report Control Symbol DD-A&T(AR) 1950). To insure consistent application of the requirements stated in 10 U.S.C. 2461 and 2463, the following guidance is provided:

(1) The geographic scope of section 10 U.S.C. 2461 applies to the United States, its territories and possessions, the District of Columbia, and the Commonwealth of Puerto Rico.

(2) Section 10 U.S.C. 2461 applies to proposed conversions of DoD CAs that on October 1, 1980, were being performed by more than forty-five DoD civilian employees. 10 U.S.C. 2463 applies to conversions from contract to in-house involving 50 or more contractor employees.

(3) DoD Components must not proceed with a CA study until notification to Congress, as required by 10 U.S.C. 2461. DoD Components shall notify the ASD(ES) of any such intent at least 5 working days before congressional notification.

(4) DoD Components shall annotate announcements to Congress when a cost comparison is planned at an activity listed in the report to Congress on Core Logistics (see § 169a.8(b)(1)(i)(2) of this part).

(5) The DoD Components shall notify Congress, at least 5 working days before sending the detailed summary report required by 10 U.S.C. 2461 to Congress. The detailed summary of the cost shall include: the amount of the offer accepted for the performance of the activity by the private contractor; the costs and expenditures that the Government will incur because of the contract; the estimated cost of performance of the activity by the most efficient Government organization; a statement indicating the life of the contract; and certifications that the entire cost comparison is available, and that the Government calculation for the cost of performance of such

function by DoD employees is based on an estimate of the most efficient and cost-effective organization for performance of such function by DoD employees.

(6) The potential economic effect on the employees affected, the local community, and the Federal Government of contracting for performance of the function shall be included in the report to accompany the above certifications, if more than 75 total employees (including military and civilian, both permanent and temporary) are potentially affected. It is suggested that the Army Corps of Engineers' model (or equivalent) be used to generate this information. The potential impact on affected employees shall be included in the report, regardless of the number of employees involved. Also include in the report a statement that the decision was made to convert to contractor performance, the projected date of contract award, the projected contract start date, and the effect of contracting the function on the military mission of that function.

(7) By December 15th of each year, each DoD Component shall submit to the ASD(P&L) the data required by 10 U.S.C. 2461(c). In describing the extent to which CA functions were performed by DoD contractors during the preceding fiscal year, include the estimated number of work years for the in-house operation as well as for contract operation (including percentages) by major OSD functional areas in Appendix A to this part; such as, Social Services, Health Services, Installation Services, etc. For the estimate of the percentage of CA functions that will be performed in-house and those that will be performed by contract during the fiscal year during which the report is submitted, include the estimated work years for in-house CAs as well as for contracted CAs and the rationale for significant changes when compared to the previous year's data. Also, include the number of studies you expect to complete in the next fiscal year showing total civilian and military FTEs.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29210, July 1, 1992; 60 FR 67329, Dec. 29, 1995]

§ 169a.22 Responsibilities.

The responsibilities for implementing the policies and procedures of the DoD CA Program are prescribed in DoD Directive 4100.15 (32 CFR part 169) and appropriate paragraphs of this part.

[57 FR 29210, July 1, 1992]

APPENDIX A TO PART 169a—CODES AND DEFINITIONS OF FUNCTIONAL AREAS

This list of functional codes and their definitions does not restrict the applicability or scope of the commercial activity Program within DoD. Section B. of DoD Directive 4100.15 defines the applicability and scope of the program. The commercial activity program still applies to CAs not defined in this listing. These codes and definitions are a guide to assist reporting. As new functions are identified, codes will be added or existing definitions will be expanded.

Social Services

G001 Care of Remains of Deceased Personnel and/or Funeral Services. Includes CAs that provide mortuary services, including transportation from aerial port of embarkation (APOE) to mortuary of human remains received from overseas mortuaries, inpection, restoration, provision of uniform and insignia, dressing, flag, placement in casket, and preparation for onward shipment.

G008 Commissary Store Operation. Includes CAs that provide all ordering, receipt, storage, stockage, and retailing for commissaries. Excludes procurement of goods for issue or resale.

G008A: Shelf Stocking.
G008B: Check Out.
G008C: Meat Processing.
G008D: Produce Processing.
G008E: Storage and Issue.
G008F: Other.
G008G: Troop Subsistance Issue Point.

G009 Clothing Sales Store Operation. Includes commercial activities that provide ordering, receipt, storage, stockage, and retailing of clothing. Stores operated by the Army and Air Force Exchange Services, Navy Exchange Services, and Marine Corps Exchange Services are excluded.

G010 Recreational Library Services. Includes operation of libraries maintained primarily for off-duty use by military personnel and their dependents.

G011 Other Morale, Welfare, and Recreation Services. Operation of commercial activities maintained primarily for the off-duty use of

military personnel and their dependents, including both appropriated and partially nonappropriated fund activities. The operation of clubs and messes, and morale support activities are included in code G011. Examples of activities performing G011 functions are arts and crafts, entertainment, sports and athletics, swimming, bowling, marina and boating, stables, youth activities, centers, and golf. DoD Directive 1015.1[1] contains amplification of the categories reflected below. (NOTE: commercial activities procedures are not mandatory for functions staffed solely by civilian personnel paid by nonappropriated funds.)

G011A: All Category II Nonappropriated Fund Instrumentalities (NAFIs), except Package Beverage Branch.

G011B: Package Beverage Branch.

G011C: All Category IIIa NAFIs.

G011D: All Category IIIb1, except Libraries.

G011E: Category IIIb2 Arts and Crafts.

G011F: Category IIIb2 Music & Theatre.

G011G: Category IIIb2 Outdoor Recreation.

G011H: Category IIIb2 Youth Activities.

G011I: Category IIIb2 Child Development Service.

G011J: Category IIIb2 Sports—Competitive.

G011K: All Category IIIb3 except Armed Forces Recreation Center (AFRC) Golf Bowling, and membership associations converted from Category VI.

G011L: Category IIIb3 AFRC.

G011M: Category IIIb3 Golf.

G011N: Category IIIb3 Bowling.

G011O: Category IIIb3 membership associations converted from Category VI.

G011P: Category III Information Tour and Travel (ITT).

G011Q: All Category IV.

G011R: All Category V.

G011S: All Category VI, except those converted to Category IIIb3.

G011T: All Category VII.

G011U: All Category VIII, except billeting and hotels.

G011V: Category VIII Billeting.

G011W: Category VIII Hotels.

G012 Community Services. DoD Directive 1015.1 contains further amplification of the categories.

G012A: Information and Referral.

G012B: Relocation Assistance.

G012C: Exceptionl Family Member.

G012D: Family Advocacy (Domestic Violence).

G012E: Foster Care.

G012F: Family Member Employment.

G012G: Installation Volunteer Coordination.

G012H: Outreach.

G012I: Volunteer Management.

G012J: Office Management.

G012K: Consumer Affairs/Financial Assistance.

G012L: General and Emergency Family Assistance.

G900 Chaplain Activities and Support Services. Includes commercial activities that provide non-military unique support services that supplement the command religious program such as non-pastoral counseling, organists, choir directors, and directions of religious education. The command religious program, which includes chaplains and enlisted support personnel, is a Governmental function and is excluded from this category.

G901 Berthing BOQ/BEQ. Includes commercial activities that provide temporary or permanent accommodations for officer or enlisted personnel. Management of the facility, room service, and daily cleaning are included.

G904 Family Services. Includes commercial activities that perform various social services for families, such as family counseling, financial counseling and planning, the operation of an abuse center, child care center, or family aid center.

G999 Other Social Services. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

Health Services

H101 Hospital Care. Includes commercial activities that provide outpatient and inpatient care and consultative evaluation in the medical specialties, including pediatrics and psychiatry; the coordination of health care delivery relative to the examination, diagnosis, treatment, and disposition of medical inpatients.

H102 Surgical Care. Includes commercial activities that provide outpatient and inpatient care and consultative evaluation in the surgical specialties, including obstetrics, gynecology, ophthalmology and otorhinolaryngology; the coordination of health care delivery relative to the examination, treatment, diagnosis, and disposition of surgical patients.

H105 Nutritional Care. Includes commercial activities that provide hospital food services for inpatients and outpatients, dietetic treatment, counseling of patients, and nutritional education.

H106 Pathology Services. Includes commercial activities involved in the operation of laboratories providing comprehensive clinical and anatomical pathology services; DoD military blood program and blood bank activities; and area reference laboratories.

H107 Radiology Services. Includes commercial activities that provide diagnostic and therapeutic radiologic service to inpatients and outpatients, including the processing, examining, interpreting, and storage and retrieval of radiographs, fluorographs, and radiotherapy.

[1] See footnote 1 to §169.1(a).

H108 Pharmacy Services. Includes commercial activities that produce, preserve, store, compound, manufacture, package, control, assay, dispense, and distribute medications (including intravenous solutions) for inpatients and outpatients.

H109 Physical Therapy. Includes commercial activities that provide care and treatment to patients whose ability to function is impaired or threatened by disease or injury; primarily serve patients whose actual impairment is related to neuromusculoskeletal, pulmonary, and cardiovascular systems; evaluate the function and impairment of these systems, and select and apply therapeutic procedures to maintain, improve, or restore these functions.

H110 Materiel Services. Includes commercial activities that provide or arrange for the supplies, equipment, and certain services necessary to support the mission of the medical facility; responsibilities include procurement, inventory control, receipt, storage, quality assurance, issue, turn-in, disposition, property accounting, and reporting actions for designated medical and nonmedical supplies and equipment.

H111 Orthopedic Services. Includes commercial activities that construct orthopedic appliances such as braces, casts, splints, supports, and shoes from impressions, forms, molds, and other specifications.

H112 Ambulance Service. Includes commercial activities that provide transportation for personnel who are injured, sick, or otherwise require medical treatment, including standby duty in support of military activities and ambulance bus services.

H113 Dental Care. Includes commercial activities that provide oral examinations, patient education, diagnosis, treatment, and care including all phases of restorative dentistry, oral surgery, prosthodontics, oral pathology, periodontics, orthodontics, endodontics, oral hygiene, preventive dentistry, and radiodontics.

H114 Dental Laboratories. Includes commercial activities that operate dental prosthetic laboratories required to support the provision of comprehensive dental care; services may include preparing casts and models, repairing dentures, fabricating transitional, temporary, or orthodontic appliances, and finishing dentures.

H115 Clinics and Dispensaries. Includes commercial activities that operate freestanding clinics and dispensaries that provide health care services. Operations are relatively independent of a medical treatment facility and are separable for in-house or contract performance. Health clinics, occupational health clinics, and occupational health nursing offices.

H116 Veterinary Services. Includes commercial activities that provide a complete wholesomeness and quality assurance food inspection program, including sanitation, inspection of food received, surveillance inspections, and laboratory examination and analysis; a complete zoonosis control program; complete medical care for Government-owned animals; veterinary medical support for biomedical research and development; support to other Federal agencies when requested and authorized; assistance in a comprehensive preventive medicine program; and determination of fitness of all foods that may have been contaminated by chemical, bacteriological, or radioactive materials.

H117 Medical Records Transcription. Includes commercial activities that transcribe, file, and maintain medical records.

H118 Nursing Services. Includes commercial activities that provide care and treatment for inpatients and outpatients not required to be performed by a doctor.

H119 Preventive Medicine. Includes commercial activities that operate wellness or holistic clinics (preventive medicine), information centers, and research laboratories.

H120 Occupational Health. Includes commercial activities that develop, monitor, and inspect installation safety conditions.

H121 Drug Rehabilitation. Includes commercial activities that operate alcohol treatment facilities, urine testing for drug content, and drug/alcohol counseling centers.

H999 Other Health Services. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

Intermediate, Direct, or General Repair and Maintenance of Equipment

Definition. Maintenance authorized and performed by designated maintenance commercial activities in support of using activities. Normally, it is limited to replacement and overhaul of unserviceable parts, subassemblies, or assemblies. It includes (1) intermediate/direct/general maintenance performed by fixed activities that are not designed for deployment to combat areas and that provide direct support of organizations performing or designed to perform combat missions from bases in the United States, and (2) any testing conducted to check the repair procedure. Commercial activities engaged in intermediate/direct/general maintenance and/or repair of equipment are to be grouped according to the equipment predominantly handled, as follows:

J501 Aircraft. Aircraft and associated equipment. Includes armament, electronic and communications equipment, engines, and any other equipment that is an integral part of an aircraft.

J502 Aircraft Engines. Aircraft engines that are not repaired while an integral part of the aircraft.

J503 Missiles. Missile systems and associated equipment. Includes mechanical, electronics, and communication equipment that is an integral part of missile systems.

J504 Vessels. All vessels, including armament, electronics, communications and any other equipment that is an integral part of the vessel.

J505 Combat Vehicles. Tanks, armored personnel carriers, self-propelled artillery, and other combat vehicles. Includes armament, fire control, electronic, and communications equipment that is an integral part of a combat vehicle.

J506 Noncombat Vehicles. Automotive equipment, such as tactical, support, and administrative vehicles. Includes electronic and communications equipment that is an integral part of the noncombat vehicle.

J507 Electronic and Communications Equipment. Stationary, mobile, portable, and other electronic and communications equipment. Excludes electronic and communications equipment that is an integral part of another weapon/support system. Maintenance of Automatic Data Processing Equipment (ADPE) not an integral part of a communications system shall be reported under functional code W825; maintenance of tactical ADPE shall be reported under function code J999.

J510 Railway Equipment. Locomotives of any type or gauge, including steam, compressed air, straight electric, storage battery, diesel electric, gasoline, electric, diesel mechanical locomotives, railway cars, and cabooses. Includes electrical equipment for locomotives and cars, motors, generators, wiring supplies for railway tracks for both propulsion and signal circuits, and on-board communications and control equipment.

J511 Special Equipment. Construction equipment, weight lifting, power, and materiel handling equipment (MHE).

J512 Armament. Small arms, artillery and guns, nuclear munitions, chemical, biological, and radiological (CBR) items, conventional ammunition, and all other ordnance items. Excludes armament that is an integral part of another weapon or support system.

J513 Dining Facility Equipment. Dining facility kitchen appliances and equipment.

J514 Medical and Dental Equipment. Medical and dental equipment.

J515 Containers, Textiles, Tents, and Tarpaulins. Containers, tents, tarpaulins, other textiles, and organizational clothing.

J516 Metal Containers. Container Express (CONEX) containers, gasoline containers, and other metal containers.

J517 Training Devices and Audiovisual Equipment. Training devices and audiovisual equipment. Excludes maintenance of locally fabricated devices and functions reported under codes T807 and T900.

J519 Industrial Plant Equipment. That part of plant equipment with an acquisition cost of $3,000 or more, used to cut, abrade, grind, shape, form, join, test, measure, heat, or otherwise alter the physical, electrical, or chemical properties of materiels, components, or end items entailed in manufacturing, maintenance, supply processing, assembly, or research and development operations.

J520 Test, Measurement, and Diagnostic Equipment. Test, measurement, and diagnostic equipment (TMDE) that has resident in it a programmable computer. Included is equipment referred to as automated test equipment (ATE).

J521 Other Test, Measurement, and Diagnostic Equipment. Test, measurement, and diagnostic equipment not classified as ATE or that does not contain a resident programmable computer. Includes such items as electronic meters, armament circuit testers, and other specialized testers.

J522 Aeronautical Support Equipment. Aeronautical support equipment excluding TMDE (and ATE). Includes such items as ground electrical power carts, aircraft tow tractors, ground air conditioners, engine stands, and trailers. Excludes aeronautical equipment reported under J501.

J999 Other Intermediate, Direct, or General Repair and Maintenance of Equipment. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

Depot Repair, Maintenance, Modification, Conversion, or Overhaul of Equipment

Definition. The maintenance performed on materiel that requires major overhaul or a complete rebuild of parts, assemblies, subassemblies, and end items, including the manufacture of parts, modifications, testing, and reclamation, as required. Depot maintenance serves to support lower categories of maintenance. Depot maintenance provides stocks of serviceable equipment by using more extensive facilities for repair than are available in lower level maintenance activities. (See DoD Instruction 4151.15[2] for further amplification of the category definitions reflected below.) Depot or indirect maintenance functions are identified by the type of equipment maintained or repaired.

K531 Aircraft. Aircraft and associated equipment. Includes armament, electronics and communications equipment, engines, and any other equipment that is an integral part of an aircraft. Aeronautical support equipment not reported separately under code K548.

[2] See footnote 1 to §169a.1(a).

K532 Aircraft Engines. Aircraft engines that are not repaired while an integral part of the aircraft.

K533 Missiles. Missile systems and associated equipment. Includes mechanical, electronic, and communications equipment that is an integral part of missile systems.

K534 Vessels. All vessels, including armament, electronics, and communications equipment, and any other equipment that is an integral part of a vessel.

K535 Combat Vehicles. Tanks, armored personnel carriers, self-propelled artillery, and other combat vehicles. Includes armament, fire control, electronics, and communications equipment that is an integral part of a combat vehicle.

K536 Noncombat Vehicles. Automotive equipment, such as tactical support and administrative vehicles. Includes electronic and communications equipment that is an integral part of the vehicle.

K537 Electronic and Communications Equipment. Stationary, mobile, portable, and other electronics and communications equipment. Excludes electronic and communications equipment that is an integral part of another weapon/support system. Maintenance of ADPE, not an integral part of a communications system, is reported under functional code W825.

K538 Railway Equipment. Locomotives of any type or gauge, including steam, compressed air, straight electric, storage battery, diesel electric, gasoline, electric, diesel mechanical locomotives, railway cars, and cabooses. Includes electrical equipments for locomotives and cars, motors, generators, wiring supplies for railway tracks for both propulsion and signal circuits, and on-board communication and control equipment.

K539 Special Equipment. Construction equipment, weight lifting, power, and materiel-handling equipment.

K540 Armament. Small arms; artillery and guns; nuclear munitions, CBR items; conventional ammunition; and all other ordnance items. Excludes armament that is an integral part of another weapon or support system.

K541 Industrial Plant Equipment. That part of plant equipment with an acquisition cost of $3,000 or more, used to cut, abrade, grind, shape, form, join, test, measure, heat, or otherwise alter the physical, electrical, or chemical properties of materials, components, or end items entailed in manufacturing, maintenance, supply, processing, assembly, or research and development operations.

K542 Dining Facility Equipment. Dining facility kitchen appliances and equipment. This includes field feeding equipment.

K543 Medical and Dental Equipment. Medical and dental equipment.

K544 Containers, Textiles, Tents and Tarpaulins. Containers, tents, tarpaulins, and other textiles.

K545 Metal Containers. CONEX containers, gasoline containers, and other metal containers.

K546 Test Measurement and Diagnostic Equipment. Test measurement and diagnostic equipment (TMDE) that has resident in it a programmable computer. Included is equipment referred to as automated test equipment (ATE).

K547 Other Test Measurement and Diagnostic Equipment. Test measurement and diagnostic equipment not classfied as ATE or that does not contain a resident programmable computer. Includes such items as electronic meters, armament circuit testers, and other specialized testers.

K548 Aeronautical Support Equipment. Aeronautical support equipment excluding TMDE (and ATE). Includes such items as ground electrical power carts, aircraft tow tractors, ground air conditioners, engine stands, and trailers. Excludes aeronautical support equipment reported under code K531.

K999 Other Depot Repair, Maintenance, Modification, Conversion, or Overhaul of Equipment. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

Base Maintenance/Multifunction Contracts

P100 Base Maintenance/Multifunction Contracts. Includes all umbrella-type contracts where the contractor performs more than one function at one or more installations. (Identify specific functions as nonadd entries.)

Research, Development, Test, and Evaluation (RDT&E) Support

R660 RDT&E Support. Includes all effort not reported elsewhere directed toward support of installation or operations required for research, development, test, and evaluation use. Included are maintenance support of laboratories, operation and maintenance of test ranges, and maintenance of test aircraft and ships.

Installation Services

S700 Natural Resource Services. Includes those commercial activities that provide products or services that implement natural resource management plans in the areas of fish, game, wildlife, forestry, watershed areas or ground water table, erosion control, and mineral deposit management. Natural resources planning and management is a governmental function and will not be reported.

S701 Advertising and Public Relations Services. Includes commercial activities responsible for advertising and public relations in support of public affairs offices, installation newspapers and publications, and information offices.

S702 Financial and Payroll Services. Includes commercial activities that prepare payroll, print checks, escrow, or change payroll accounts for personnel. Includes other services normally associated with banking operations.

S703 Debt Collection. Includes commercial activities that monitor, record, and collect debts incurred by overdrafts, bad checks, or delinquent accounts.

S706 Installation Bus Services. Includes commercial activities that operate local, intrapost, and interpost scheduled bus services. Includes scheduled movement of personnel over regular routes by administrative motor vehicles to include taxi and dependent school bus services.

S706A Scheduled Bus Services.
S706B Unscheduled Bus Services
S706C Dependent School Bus Services.
S706D Other Bus Services.

S708 Laundry and Dry Cleaning Services. Including commercial activities that operate and maintain laundry and dry cleaning facilities.

S709 Custodial Services. Includes commercial activities that provide janitorial and housekeeping services to maintain safe and sanitary conditions and preserve property.

S710 Pest Management. Includes commercial activities that provide control measures directed against fungi, insects, rodents, and other pests.

S712 Refuse Collection and Disposal Services. Includes commercial activities that operate incinerators, sanitary fills, and regulated dumps, and perform all other approved refuse collection and disposal services.

S713 Food Services. Includes commercial activities engaged in the operation and administration of food preparation and serving facilities. Excludes operation of central bakeries, pastry kitchens, and central meat processing facilities that produce a product and are reported under functional area X934. Excludes hospital food service operations (under code H105).

S713A: Food Preparation and Administration.
S713B: Mess Attendants and Housekeeping Services.

S714 Furniture. Includes commercial activities that repair and refurbish furniture.

S715 Office Equipment. Includes commercial activities that maintain and repair typewriters, calculators, and adding machines.

S716 Motor Vehicle Operation. Includes commercial activities that operate local administrative motor transportation services. Excludes installation bus services reported in functional area S706.

S716A: Taxi Service.
S716B: Bus Service (unless in S706).
S716C: Motor Pool Operations.
S716D: Crane Operation (includes rigging, excludes those listed in T800G).
S716E: Heavy Truck Operation.
S716F: Construction Equipment Operation.
S716I: Driver/Operator Licensing & Test.
S716J: Other Vehicle Operations (Light Truck/Auto).
S716K: Fuel Truck Operations.
S716M: Tow Truck Operations.

S717 Motor Vehicle Maintenance. Includes commercial activities that perform maintenance on automotive equipment, such as support and administrative vehicles. Includes electronic and communications equipment that are an integral part of the vehicle.

S717A: Upholstery Maintenance and Repair.
S717B: Glass Replacement and Window Repair.
S717C: Body Repair and Painting.
S717D: Accessory Overhaul.
S717E: General Repairs/Minor Maintenance.
S717F: Battery Maintenance and Repair.
S717G: Tire Maintenance and Repair.
S717H: Major Component Overhaul.
S717I: Material Handling Equipment Maintenance.
S717J: Crane Maintenance.
S717K: Construction Equipment Maintenance.
S717L: Frame and Wheel Alignment.
S717M: Other Motor Vehicle Maintenance.

S718 Fire Prevention and Protection. Includes commercial activities that operate and maintain fire protection and preventive services. Includes routine maintenance and repair of fire equipment and the installation of fire prevention equipment.

S718A: Fire Protection Engineering.
S718B: Fire Station Administration.
S718C: Fire Prevention.
S718D: Fire Station Operations.
S718E: Crash and Rescue.
S718F: Structural Fire Suppression.
S718G: Fire & Crash/Rescue Equipment Major Maintenance.
S718H: Other Fire Prevention and Protection.

S719: Military Clothing. Includes commercial activities that order, receive, store, issue, and alter military clothing and repair military shoes. Excludes repair of organizational clothing reported under code J515.

S724: Guard Service. Includes commercial activities engaged in physical security operations that provide for installation security and intransit protection of military property from loss or damage.

S724A: Ingress and egress control. Regulation of persons, material, and vehicles entering or exiting a designated area to provide

protection of the installation and Government property.

S724B: Physical security patrols and posts. Mobile and static physical security guard activities that provide protection of installation or Government property.

S724C: Conventional arms, ammunition, and explosives (CAAE) security. Dedicated security guards for CAAE.

S724D: Animal control. Patrolling for, capture of, and response to complaints about uncontrolled, dangerous, and disabled animals on military installations.

S724E: Visitor information services. Providing information to installation resident and visitors about street, agency, unit, and activity locations.

S724F: Vehicle impoundment. Removal, accountability, security, and processing of vehicles impounded on military installations.

S724G: Registration functions. Administration, filing, processing, and retrieval information about privately owned items that must be registered on military installations.

S724S: Other guard service.

S725 Electrical Plants and Systems. Includes commercial activities that operate, maintain, and repair Government-owned electrical plants and systems.

S726 Heating Plants and Systems. Includes commercial activities that operate, maintain, and repair Government-owned heating plants and systems over 750,000 British Thermal Unit (BTU) capacity. Codes Z991 or Z992 will be used for systems under 750,000 BTU capacity, as applicable.

S727 Water Plants and Systems. Includes commercial activities that operate, maintain, and repair Government-owned water plants and systems.

S728 Sewage and Waste Plants and Systems. Includes commercial activities that operate, maintain, and repair Government-owned sewage and waste plants and systems.

S729 Air Conditioning and Refrigeration Plants. Includes commercial activities that operate, maintain, and repair Government-owned air conditioning and refrigeration plants over 5-ton capacity. Codes Z991 or Z992 shall be used for plants under 5-ton capacity as applicable.

S730 Other Services or Utilities. Includes commercial activities that operate, maintain, and repair other Government-owned services or utilities.

S731 Base Supply Operations. Includes commercial activities that operate centralized installation supply functions providing supplies and equipment to all assigned or attached units. Performs all basic supply functions to determine requirements for all requisition, receipt, storage, issuance, and accountability for materiel.

S732 Warehousing and Distribution of Publications. Includes commercial activities that receive, store, and distribute publications and blank forms.

S740 Installation Transportation Office. Includes technical, clerical, and administrative commercial activities that support traffic management services related to the procurement of freight and passenger service from commercial ''for hire'' transportation companies. Excludes restricted functions that must be performed by Government employees such as the review, approval, and signing of documents related to the obligation of funds; selection of mode or carrier; evaluation of carrier performance; and carrier suspension. Excludes installation transportation functions described under codes S706, S716, S717, T810, T811, T812, and T814.

S740A: Installation Transportation Management and Administration.

S740B: Materiel Movements.

S740C: Personnel Movements.

S740D: Personal Property Activities.

S740E: Quality Control and Inspection.

S740F: Unit Movements.

S750 Museum Operations.

S760 Contractor-Operated Parts Stores and Contractor-Operated Civil Engineering Supply Stores.

S999 Other Installation Services. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

Other Nonmanufacturing Operations

T800 Ocean Terminal Operations. Includes commercial activities that operate terminals transferring cargo between overland and sealift transportation. Includes handling of Government cargo through commercial water terminals.

T800A: Pier Operations. Includes commercial activities that provide stevedore and shipwright carpentry operations supporting the loading, stowage, and discharge of cargo and containers on and off ships, and supervision of operations at commercial piers and military ocean terminals.

T800B: Cargo Handling Equipment. Includes commercial activities that operate and maintain barge derricks, gantries, cranes, forklifts, and other materiel handling equipment used to handle cargo within the terminal area.

T800C: Port Cargo Operations. Includes commercial activities that load and unload railcars and trucks, pack, repack, crate, warehouse, and store cargo moving through the terminal, and stuff and unstuff containers.

T800D: Vehicle Preparation. Includes commercial activites that prepare Government and privately owned vehicles (POVs) for ocean shipment, inspection, stowage in containers, transportation to pier, processing, and issue of import vehicles to owners.

T800E: Lumber Operations. Includes commercial activities that segregate reclaimable lumber from dunnage removed from ships,

railcars, and trucks; remove nails; even lengths; inspect; and return the lumber to inventory for reuse. Includes receipt, storage, and issue of new lumber.

T800F: Materiel Handling Equipment (MHE) Operations. Includes commercial activities that deliver MHE to user agencies, perform onsite fueling, and operate special purpose and heavy capacity equipment.

T800G: Crane Operations. Includes commercial activities that operate and perform first-echelon maintenance of barge derricks, gantries, and truck-mounted cranes in support of vessels and terminal cargo activities.

T800H: Breakbulk Cargo Operations. Includes commercial activities that provide stevedoring, shipwright carpentry, stevedore transportation, and the loading and unloading of noncontainerized cargo.

T800I: Other Ocean Terminal Operations.

T801 Storage and Warehousing. Includes commercial activities that receive materiel into depots and other storage and warehousing facilities, provide care for supplies, and issue and ship materiel. Excludes installation supply in support of unit and tenet activities described in S731.

T801A: Receipt. Includes commercial activities that receive supplies and related documents and information. This includes materiel handling and related actions, such as materials segregation and checking, and tallying incident to receipt.

T801B: Packing and Crating of Household Goods. Includes commercial activities performing packing and crating operations described in T801H, incident to the movement or storage of household goods.

T801C: Shipping. Includes commercial activities that deliver stocks withdrawn from storage to shipping. Includes onloading and offloading of stocks from transportation carriers, blocking, bracing, dunnage, checking, tallying, and materiel handling in central shipping area and related documentation and information operations.

T801D: Care, Rewarehousing, and Support of Materiel. Includes commercial activities that provide for actions that must be taken to protect stocks in storage, including physical handling, temperature control, assembly placement and preventive maintenance of storage aids, and realigning stock configuration; provide for movement of stocks from one storage location to another and related checking, tallying, and handling; and provide for any work being performed within general storage support that cannot be identified clearly as one of the subfunctions described above.

T801E: Preservation and Packaging. Includes commercial activities that preserve, represerve, and pack materiel to be placed in storage or to be shipped. Excludes application of final (exterior) shipping containers.

T801F: Unit and Set Assembly and Disassembly. Includes commercial activities that gather or bring together items of various nomenclature (parts, components, and basic issue items) and group, assemble, or restore them to or with an item of another nomenclature (such as parent end item or assemblage) to permit shipment under a single document. This also includes blocking, bracing, and packing preparations within the inner shipping container; physical handling and loading; and reverse operation of assembling such units.

T801G: Special Processing of Non Stock Fund-Owned Materiel. Includes commercial activities performing special processing actions described below that must be performed on Inventory Control Point (ICP)-controlled, nonstock fund-owned materiel by technically qualified depot maintenance personnel, using regular or special maintenance tools or equipment. Includes disassembly or reassembly or reserviceable ICP-controlled materiel being readied for movement, inhouse storage, or out-of-house location such as a port to a commercial or DoD-operated maintenance or storage facility, property disposal or demilitarization activity, including blocking, bracing, cushioning, and packing.

T801H: Packing and Crating. Includes commercial activities that place supplies in their final, exterior containers ready for shipment. Includes the nailing, strapping, sealing, stapling, masking, marking, and weighing of the exterior container. Also, includes all physical handling, unloading, and loading of materiel, within the packing and shipping area; checking and tallying material in and out; all operations incident to packing, repacking, or recrating for shipment, including on-line fabrication of tailored boxes, crates, bit inserts, blocking, bracing and cushioning shrouding, overpacking, containerization, and the packing of materiel in transportation containers. Excludes packing of household goods and personnel effects reported under code T801B.

T801I: Other Storage and Warehousing.

T802 Cataloging. Includes commercial activity that prepare supply catalogs and furnish cataloging data on all items of supply for distribution to all echelons worldwide. Includes catalog files, preparation, and revision of all item identifications for all logistics functions; compilation of Federal catalog sections and allied publication; development of Federal item identification guides, and procurement identification descriptions. Includes printing and publication of Federal supply catalogs and related allied publications.

T803 Acceptance Testing. Includes commercial activities that inspect and test supplies and materiel to ensure that products meet minimum requirements of applicable specifications, standards, and similar technical criteria; laboratories and other facilities

with inspection and test capabilities; and activities engaged in production acceptance testing of ammunition, aircraft armament, mobility material, and other military equipment.

T803A: Inspection and Testing of Oil and Fuel.

T803B: Other Acceptance Testing.

T804 Architect-Engineering Services. Includes commercial activities that provide Architect/Engineer (A/E) services. Excludes Engineering Technical Services (ETS) reported in functional area T813, and those required under 40 U.S.C. 541–554.

T805 Operation of Bulk Liquid Storage. Includes commercial activities that operate bulk petroleum storage facilities. Includes operation of off-vessel discharging and loading facilities, fixed and portable bulk storage facilities, pipelines, pumps, and other related equipment within or between storage facilities or extended to using agencies (excludes aircraft fueling services); handling of drums within bulk fuel activities. Excludes aircraft fueling services reported under code T814.

T806 Printing and Reproduction. Includes commercial activities that print, duplicate, and copy. Excludes user-operated office copying equipment.

T807 Audiovisual and Visual Information Services. Includes commercial activities that provide base audiovisual (AV) and visual information (VI) support, production, depositories, technical documentation, and broadcasting.

T807A: Base VI Support. Includes commercial activities that provide production activities that provide general support to all installation, base, facility or site, organizations or activities. Typically, they supply motion picture, still photography, television, and audio recording for nonproduction documentary purposes, their laboratory support, graphic arts, VI libraries, and presentation services.

T807B: AV Production. Includes commercial activities that provide a self-contained, complete presentation, developed according to a plan or script, combining sound with motion media (film, tape or disc) for the purpose of conveying information to, or communicating with, an audience. (An AV production is distinguished from a VI production by the absence of combined sound and motion media in the latter.)

T807C: VI Depositories. Includes commercial activities that are especially designed and constructed for the low-cost and efficient storage and furnishing of reference service on semicurrent records pending their ultimate disposition. Includes records centers.

T807D: VI Technical Documentation. Includes commercial activities that provide a technical documentation (TECDOC) which is a continuous visual recording (with or without sound as an integral documentation component) of an actual event made for purposes of evaluation. Typically, TECDOC contributes to the study of human or mechanical factors, procedures and processes in the context of medicine, science logistics, research, development, test and evaluation, intelligence, investigations and armament delivery.

T807E: Electronic Media Transmission. Includes commercial activities that transmit and receive audio and video signals for closed circuit local and long distance multistation networking and broadcast operations.

T807F: VI Documentation. Includes commercial activities that provide motion media (film or tape) still photography and audio recording of technical and nontechnical events, as they occur, usually not controlled by the recording crew. VI documentation (VIDOC) encompasses Operational Documentation (OPDOC) and TECDOC. OPDOC is VI (photographic or electronic) recording of activities, or multiple perspectives of the same activity, to convey information about people, places and things.

T807G: AV Central Library (Inventory Control Point). Includes commercial activities that receive, store, issue, and maintain AV products at the central library level. May or may not include records center operations for AV products.

T807K: AV or VI Design Service. Includes commercial activities that provide professional consultation services involving the selection, design, and development of AV or VI equipment or facilities.

T808 Mapping and Charting. Includes commercial activities that design, compile, print, and disseminate cartographic and geodetic products.

T809 Administrative Telephone Service. Includes commercial activities that operate and maintain the common-user, administrative telephone systems at DoD installations and activities. Includes telephone operator services; range communications; emergency action consoles; and the cable distribution portion of a fire alarm, intrusion detection, emergency monitoring and control data, and similar systems that require use of a telephone system.

T810 Air Transportation Services. Includes commercial activities that operate and maintain nontactical aircraft that are assigned to commands and installations and used for administrative movement of personnel and supplies.

T811 Water Transportation Services. Includes commercial activities that operate and maintain nontactical watercraft that are assigned to commands and installations and are used for administrative movement of personnel and supplies.

T811A: Water Transportation Services (except tug operations).

T811B: Tug Operations.

T812 Rail Transportation Services. Includes commercial activities that operate and maintain nontactical rail equipment assigned to commands and installation and used for administrative movement of personnel and supplies.

T813 Engineering and Technical Services. Includes commercial activities that advise, instruct, and train DoD personnel in the installation, operation, and maintenance of DoD weapons, equipment, and systems.

These services include transmitting the technical skill capability to DoD personnel in order for them to install, maintain, and operate such equipment and keep it in a high state of military readiness.

T813A: Contractor Plant Services. Includes commercial manufacturers of military equipment contracted to provide technical and engineering services to DoD personnel. Qualified employees of the manufacturer furnish these services in the manufacturer plants and facilities. Through this program, the special skills, knowledge, experience, and technical data of the manufacturer are provided for use in training, training aid programs, and other essential services directly related to the development of the technical capability required to install, operate, maintain, supply, and store such equipment.

T813B: Contract Field Services (CFS). Includes commercial activities that provide services of qualified contractor personnel who provide onsite technical and engineering services to DoD personnel.

T813C: In-house Engineering and Technical Services. Includes commercial activities that provide technical and engineering services described in codes T813A and T813B above that are provided by Government employees.

T813D: Other Engineering and Technical Services.

T814 Fueling Service (Aircraft). Includes commercial activities that distribute aviation petroleum/oil/lubricant products. Includes operation of trucks and hydrants.

T815 Scrap Metal Operation. Includes commercial activities that bale or shear metal scrap and melt or sweat aluminum scrap.

T816 Telecommunication Centers. Includes commercial activities that operate and maintain telecommunication centers, nontactical radios, automatic message distribution systems, technical control facilities, and other systems integral to the communication center. Includes operations and maintenance of air traffic control equipment and facilities.

T817 Other Communications and Electronics Systems. Includes commercial activities that operate and maintain communications and electronics systems not included in T809 and T816.

T818 Systems Engineering and Installation of Communications Systems. Includes commercial activities that provide engineering and installation services, including design and drafting services associated with functions specified in T809, T816, and T817.

T819 Preparation and Disposal of Excess and Surplus Property. Includes commercial activities that accept, classify, and dispose of surplus Government property, including scrap metal.

T820 Administrative Support Services. Includes commercial activities that provide centralized administrative support services not included specifically in another functional category. These activities render services to multiple activities throughout an organization or to multiple organizations; such as, a steno or typing pool rather than a secretary assigned to an individual. Typical activities included are word processing centers, reference and technical libraries, microfilming, messenger service, translation services, publication distribution centers, etc.

T820A: Word Processing Centers.

T820B: Reference and Technical Libraries.

T820C: Microfilming.

T820D: Internal Mail and Messenger Services.

T820E: Translation Services.

T820F: Publication Distribution Centers.

T820G: Field Printing and Publication. Includes those activities that print or reproduce official publications, regulations, and orders. Includes management and operation of the printing facility.

T820H: Compliance Auditing.

T820I: Court Reporting.

T821 Special Studies and Analyses. Includes commercial activities that perform research, collect data, conduct time-motion studies, or pursue some other planned methodology in order to analyze a specific issue, system, device, boat, plane, or vehicle for management. Such activities may be temporary or permanent in nature.

T821A: Cost Benefit Analyses.

T821B: Statistical Analyses.

T821C: Scientific Data Studies.

T821D: Regulatory Studies.

T821E: Defense, Education, Energy Studies.

T821F: Legal/Litigation Studies.

T821G: Management Studies.

T900 Training Devices and Simulators. Includes commercial activities that provide training aids, devices, simulator design, fabrication, issue, operation, maintenance, support, and services.

T900A: Training Aids, Devices, and Simulator Support. Includes commercial activities that design, fabricate, stock, store, issue, receive, and account for and maintain training aids, devices, and simulators (does not include audiovisual production and associated services or audiovisual support).

T900B: Training Device and Simulator Operation. Includes commercial activities that operate and maintain training device and simulator systems.

T999 Other Nonmanufacturing Operations.

Education and Training

Includes commercial activities that conduct courses of instruction attended by civilian or military personnel of the Department of Defense. Terminology of categories and subcategories primarily for military personnel (marked by an asterisk) follows the definitions of the statutory *Military Manpower Training Report* submitted annually to the Congress. This series includes only the conduct of courses of instruction; it does not include education and training support functions (that is, Base Operations Functions in the S series and Nonmanufacturing Operations in the T series). A course is any separately identified instructional entity or unit appearing in a formal school or course catalog.

*U100 Recruit Training.** The instruction of recruits.

*U200 Officer Acquisition Training.** Programs concerned with officer acquisition training.

*U300 Specialized Skill Training.** Includes Army One-Station Unit Training, Naval Apprenticeship Training, and health care training.

*U400 Flight Training.** Includes flight familiarization training.

*U500 Professional Development Education**

*U510 Professional Military Education.** Generally, the conduct of instruction at basic, intermediate, and senior Military Service schools and colleges and enlisted leadership training does not satisfy the requirements of the definition of a DoD CA and is excluded from the provision of this Instruction.

*U520 Graduate Education, Fully Funded, Full-Time**

*U530 Other Full-Time Education Programs**

*U540 Off-Duty (Voluntary) and On-Duty Education Programs.** Includes the conduct of Basic Skills Education Program (BSEP), English as a Second Language (ESL), skill development courses, graduate, undergraduate, vocational/technical, and high school completion programs for personnel without a diploma.

U600 Civilian Education and Training. Includes the conduct of courses intended primarily for civilian personnel.

U700 Dependent Education. Includes the conduct of elementary and secondary school courses of instruction for the dependents of DoD overseas personnel.

U800 Training Development and Support (not reported elsewhere)

U999 Other Training. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

Automatic Data Processing

W824 Data Processing Services. Includes commercial activities that provide ADP processing services by using Government-owned or -leased ADP equipment; or participating in Government-wide ADP sharing program; or procuring of time-sharing processing services (machine time) from commercial sources. Includes all types of data processing services performed by general purpose ADP and peripheral equipment.

W824A: Operation of ADP Equipment.

W824B: Production Control and Customer Services.

W824C: ADP Magnetic Media Library.

W824D: Data Transcription/Data Entry Services.

W824E: Transmission and Teleprocessing Equipment Services.

W824F: Acceptance Testing and Recovery Systems.

W824G: Punch Card Processing Services.

W824H: Other ADP Operations and Support.

W825 Maintenance of ADP Equipment. Includes commercial activities that maintain and repair all Government-owned ADP equipment and peripheral equipment.

W826 Systems Design, Development, and Programing Services. Includes commercial activities that provide software services associated with nontactical ADP operation.

W826A: Development and Maintenance of Applications Software.

W826B: Development and Maintenance of Systems Software.

W827 Software Services for Tactical Computers and Automated Test Equipment. Includes commercial activities that provide software services associated with tactical computers and TMDE and ATE hardware.

W999 Other Automatic Data Processing. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

Products Manufactured and Fabricated In-House

Commercial activities that manufacture and/or fabricate products in-house are grouped according to the products predominantly handled as follows:

X931 Ordnance Equipment. Ammunition and related products.

X932 Products Made from Fabric or Similar Materials. Including the assembly and manufacture of clothing, accessories, and canvas products.

X933 Container Products and Related Items. Including the design, engineering, and manufacture of wooden boxes, crates, and other containers; includes the fabrication of fiberboard boxes, and assembly of paperboard boxes with metal straps. Excludes on-line fabrication of boxes and crates reported in functional area T801.

X934 Food and Bakery Products. Including the operation of central meat processing

plants, pastry kitchens, and bakery facilities. Excludes food services reported in functional areas S713 and H105.

X935 Liquid, Gaseous, and Chemical Products. Including the providing of liquid oxygen and liquid nitrogen.

X936 Rope, Cordage, and Twine Products; Chains and Metal Cable Products

X937 Logging and Lumber Products. Logging and sawmill operations.

X938 Communications and Electronic Products.

X939 Construction Products. The operation of quarries and pits, including crushing, mixing, and concrete and asphalt batching plants.

X940 Rubber and Plastic Products.

X941 Optical and Related Products.

X942 Sheet Metal Products.

X943 Foundry Products.

X944 Machined Parts.

X999 Other Products Manufactured and Fabricated In-House. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

Maintenance, Repair, Alteration, and Minor Construction of Real Property.

Z991 Buildings and Structures—Family Housing. Includes commercial activities that are engaged in exterior and interior painting and glazing; roofing, interior plumbing; interior electric; interior heating equipment, including heat sources under 750,000 BTU capacity; installed food service and related equipment, air conditioning and refrigeration under a 5-ton capacity; elevators; and other equipment affixed as part of the building and not included in other activities. Includes fencing, flagpoles, and other miscellaneous structures associated with family housing.

Z991A: Rehabilitation—Tenant Change.

Z991B: Roofing.

Z991C: Glazing.

Z991D: Tiling.

Z991E: Exterior Painting.

Z991F: Interior Painting

Z991G: Flooring.

Z991H: Screens, Blinds, etc.

Z991I: Appliance Repair.

Z991J: Electrical Repair. Includes elevators, escalators, and moving walks.

Z991K: Plumbing.

Z991L: Heating Maintenance.

Z991M: Air Conditioning Maintenance.

Z991N: Emergency/Service Work.

Z991T: Other Work.

Z992 Buildings and Structures (Other Than Family Housing). Includes commercial activities that are engaged in exterior and interior painting and glazing; roofing, interior plumbing; interior electric; interior heating equipment, including heat sources under 750,000 BTU capacity; installed foor service and related equipment; air conditioning and refrigeration under a 5-ton capacity; elevators; and other equipment affixed as part of the building and not reported under other functional codes. Includes fencing, flagpoles, guard and watchtowers, grease racks, unattached loading ramps, training facilities other than buildings, monuments, grandstands and bleachers, elevated garbage racks, and other miscellaneous structures.

Z992A: Rehabilitation—Tenant Change.

Z992B: Roofing.

Z992C: Glazing.

Z992D: Tiling.

Z992E: Exterior Painting.

Z992F: Interior Painting.

Z992G: Flooring.

Z992H: Screens, Blinds, etc.

Z992I: Appliance Repair.

Z992J: Electrical Repair. Includes elevators, escalators, and moving walkways.

Z992K: Plumbing.

Z992L: Heating Maintenance.

Z992M: Air Conditioning Maintenance.

Z992N: Emergency/Service Work.

Z992T: Other Work.

Z993 Grounds and Surfaced Areas. Commercial activities that maintain, repair, and alter grounds and surfaced areas defined in codes Z993A, B, and C, below.

Z993A: Grounds (Improved). Includes improved grounds, including lawns, drill fields, parade grounds, athletic and recreational facilities, cemeteries, other ground areas, landscape and windbreak plants, and accessory drainage systems.

Z993B: Grounds (Other than Improved). Small arms ranges, antenna fields, drop zones, and firebreaks. Also grounds such as wildlife conservation areas, maneuver areas, artillery ranges, safety and security zones, desert, swamps, and similar areas.

Z993C: Surfaced Areas. Includes airfield pavement, roads, walks, parking and open storage areas, traffic signs and markings, storm sewers, culverts, ditches, and bridges. Includes sweeping and snow removal from streets and airfields.

Z997 Railroad Facilities. Includes commercial activities that maintain, repair, and alter narrow and standard gauge two-rail tracks, including spurs, sidings, yard, turnouts, frogs, switches, ties, ballast, and roadbeds, with accessories and appurtenances, drainage facilities, and trestles.

Z998 Waterways and Waterfront Facilities. Includes commercial activities that maintain, repair, and alter approaches, turning basin, berth areas and maintenance dredging, wharves, piers, docks, ferry racks, transfer bridges, quays, bulkheads, marine railway dolphins, mooring, buoys, seawalls, breakwaters, causeways, jetties, revetments, etc. Excludes waterways maintained by the Army Corps of Engineers (COE) rivers and harbors programs. Also excludes buildings,

grounds, railroads, and surfaced areas located on waterfront facilities.

Z999 Other Maintenance, Repair, Alteration, and Minor Construction of Real Property. This code will only be used for unusual circumstances and will not be used to report organizations or work that can be accommodated under a specifically defined code.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29210, July 1, 1992]

APPENDIX B TO PART 169a—COMMERCIAL ACTIVITIES INVENTORY REPORT AND FIVE-YEAR REVIEW SCHEDULE

A. General Instructions

1. Forward your inventory report before January 1 to the Director, Installations Management, 400 Army Navy Drive, Room 206, Arlington, VA 22202–2884. Use Report Control Symbol ''DD-A&T(A) 1540'' as your authority to collect this data.

2. Transmit by use of floppy diskette. Data files must be in American Standard Code Information Interchange text file format on a MicroSoft-Disk Operating System formatted 3.5 inch floppy diskette. Provide submissions in the Defense Utility Energy Reporting System format as specified below.

3. *Data Format: In-House DoD Commercial Activities*

Data element	Tape positions	Field	Type data [1]
Designator	1	A	A
Installation		A1	
—State, territory, or possession.	2–3	A1a	N
—Place	4–9	A1b	A/N
+ Function	10–14	A2	A/N
In-house civilian workload.	15–20	A3	N
Military workload	21–26	A4	N
+ Reason for in-house operation.	49	A8	A
+ Most recent year in-house operation approved.	50–51	A9	N
+ Year DoD CA scheduled for next review.	52–53	A10	N
Installation name	76–132	A11	A

[1] A = Alpha; N = Numeric. A and A/N data shall be left justified space filled, N data shall be right justified and zero filled. + Items marked with a cross (+) have been registered in the DoD Data Element Dictionary.

4. When definite coding instructions are not provided, reference must be made to DoD 5000.12–M.[1] Failure to follow the coding instructions contained in this document, or those published in DoD 5000.12–M makes the DoD Component responsible for noncompliance of required concessions in data base communication.

[1] See Footnote 1 to §169a.1(a).

B. Entry Instructions

Field	Instruction
A	Enter an A to designate that the data to follow on this record pertains to a particular DoD CA.
A1a	Enter the two-position numeric code for State (Data element reference ST-GA) or U.S. territory or possession, as shown in attachment 1 to Appendix B of this part.
A1b	Enter the unique alpha-numeric code established by the DoD Component for military installation, named populated place, or related entity where the CA workload was performed during the fiscal year covered by this submission. A separate look-up listing or file should be provided showing each unique place code and its corresponding place name.
A2	Enter the function code from Appendix A to this part that best describes the type of CA workload principally performed by the CA covered by this submission. Left justify.
A3	Enter total (full- and part-time) in-house civilian workyear equivalents applied to the performance of the function during fiscal year. Round off to the nearest whole workyear equivalent. (If amount is equal to or greater than .5, round up. If amount is less than .5, round down. Amounts between zero and 0.9 should be entered as one). Right justify. Zero fill.
A4	Enter total military workyear equivalents applied to the performance of the function in the fiscal year. Round off to the nearest whole workyear equivalent. (Amounts between zero and one should be entered as one). Right justify. Zero fill.
A8	Enter the reason for in-house operation of the CA, as shown in attachment 2 to Appendix B of this part.
A9	Enter the last two digits of the most recent fiscal year corresponding to the reason for in-house operation of the CA, as stated in Field A8.
A10	Enter the last two digits of the fiscal year the function is scheduled for study or next review. (Data element reference YE-NA.)
A11	Enter the named populated place, or related entity, where the CA workload was performed.

ATTACHMENT 1 TO APPENDIX B TO PART 169a—CODES FOR DENOTING STATES, TERRITORIES, AND POSSESSIONS OF THE UNITED STATES.

a. Numeric State Codes (Data element reference ST-GA)

Code

01 Alabama
02 Alaska
04 Arizona
05 Arkansas
06 California
08 Colorado
09 Connecticut
10 Delaware
11 District of Columbia
12 Florida
13 Georgia
15 Hawaii
16 Idaho
17 Illinois
18 Indiana
19 Iowa

20 Kansas
21 Kentucky
22 Louisiana
23 Maine
24 Maryland
25 Massachusetts
26 Michigan
27 Minnesota
28 Mississippi
29 Missouri
30 Montana
31 Nebraska
32 Nevada
33 New Hampshire
34 New Jersey
35 New Mexico
36 New York
37 North Carolina
38 North Dakota
39 Ohio
40 Oklahoma
41 Oregon
42 Pennsylvania
44 Rhode Island
45 South Carolina
46 South Dakota
47 Tennessee
48 Texas
49 Utah
50 Vermont
51 Virginia
53 Washington
54 West Virginia
55 Wisconsin
56 Wyoming

b. Numeric Codes for Territories and Possessions (FIPS 55–2)

60 American Samoa
66 Guam
69 Northern Marianna Islands
71 Midway Islands
72 Puerto Rico
75 Trust Territory of the Pacific Islands
76 Navassa Islands
78 Virgin Islands
79 Wake Island
81 Baker Island
86 Jarvis Island
89 Kingman Reef
95 Palmyra Atoll

ATTACHMENT 2 TO APPENDIX B TO PART 169a—CODES FOR DENOTING COMPELLING REASONS FOR IN-HOUSE OPERATIONS OF PLANNED CHANGES IN METHOD OR PERFORMANCE

1. PERFORMANCE (for entry in field A8)

Code	Explanation
A	Indicates that the DoD CA has been retained in-house for national defense reasons in accordance with paragraph E.2.a(1) of DoD Instruction 4100.33, other than CAs reported under code "C" of this attachment.
C	Indicates that the DoD CA is retained in-house because the CA is essential for training or experience in required military skills, or the CA is needed to provide appropriate work assignments for a rotation base for overseas or sea-to-shore assignments, or the CA is necessary to provide career progression to a needed military skill level in accordance with paragraph E.2.a(1)(a) of DoD Instruction 4100.33.
D	Indicates procurement of a product or service from a commercial source would cause an unacceptable delay or disruption of an essential DoD program.
E	Indicates that there is no satisfactory commercial source capable of providing the product or service needed.
F	Indicates that a cost comparison has been conducted and that the Government is providing the product or service at a lower total cost as a result of a cost comparison.
G	Indicates that the CA is being performed by DoD personnel now, but decision to continue in-house or convert to contract is pending results of a scheduled cost comparison.
H	Indicates that the CA is being performed by DoD employees now, but will be converted to contract because of cost comparison results.
J	Indicates that the CA is being performed by DoD hospital and, in the best interest of direct patient care, is being retained in-house.
K	Indicates that the CA is being performed by DoD employees now, but a decision has been made to convert to contract for reasons other than cost.
N	Indicates that the CA is performed by DoD employees now, but a review is in progress pending a decision. (i.e., base closure, realignment, or consolidation).
X	Indicates that the Installation commander is not scheduling this CA for cost study under the provisions of congressional authority.
Y	Indicates that the CA is retained in-house because the cost study exceeded the time limit prescribed by law.
Z	Indicates that the CA is retained in-house for reasons not included above. (i.e., a law, Executive order, treaty, or international agreement).

2. USE OF OTHER CODES. Other codes may be assigned as designated by the ODASD (I).

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29210, July 1, 1992; 60 FR 67329, Dec. 29, 1995]

APPENDIX C TO PART 169a—SIMPLIFIED COST COMPARISON AND DIRECT CONVERSION OF CAS

A. This appendix provides guidance on procedures to be followed in order to convert a commercial activity employing 45 or fewer DoD civilian employees to contract performance without a full cost comparison. DoD Components may directly convert functions with 10 or fewer civilian employees without conducting a simplified cost comparison. Simplified cost comparisons may only be conducted on activities with 45 or fewer DoD civilian employees.

B. Direct conversions with 10 or fewer DoD civilian employees must meet the following criteria:

1. The activity is currently performed by 10 or fewer civilian employees.

2. The direct conversion makes sense from a management or performance standpoint.

3. The direct conversion is cost effective.

4. The installation commander should attempt to place or retrain displaced DoD civilian employees by

a. Placing or retraining employees in available permanent vacant positions, or

b. Assigning displaced employees to valid temporary or over-hire positions in similar activities for gainful employment until permanent vacancies are available. The type of employee appointment (e.g., career, career-conditional, etc., or change from competitive to excepted service or vice versa) must not change, or

c. Where no vacancies exist or are projected, offer employees retraining opportunities under the Job Training Partnership Act or similar retraining programs for transitioning into the private sector.

5. The function to be directly converted does not include any DoD civilian positions that were as a result of DoD Component streamlining plans and/or were removed with buyout offers that satisfied Section 5 of the Federal Workforce Restructuring Act requirements.

C. The following provides general guidance for completion of a simplified cost comparison:

1. Estimated contractor costs should be based on either the past history of similar contracts at other installations or on the contracting officer's best estimate of what would constitute a fair and reasonable price.

2. For activities small in total size (45 or fewer civilian and military personnel):

a. Estimated in-house cost generally should not include overhead costs, as it is unlikely that they would be a factor for a small activity.

b. Similarly, estimated contractor costs generally should not include contract administration, on-time conversion costs, or other contract price add-ons associated with full cost comparisons.

3. For activities large in total size (including those with a mix of civilian and military personnel) all cost elements should be considered for both in-house and contractor estimated costs.

4. In either case, large or small, the 10 percent conversion differential contained in part IV of the Supplement to OMB Circular No. A–76 should be applied.

5. Part IV of the Supplement to OMB Circular No. A–76 shall be utilized to define the specific elements of cost to be estimated.

6. Clearance for CA simplified cost comparison decisions are required for Agencies without their own Legislative Affairs (LA) and Public Affairs (PA) offices. Those Agencies shall submit their draft decision brief to the Deputy Assistant Secretary of Defense (Installations) room 3E813, the Pentagon, Washington, DC 20301 for release to Congress.

7. Provide CA simplified cost comparison approvals containing a certification of the MEO analysis, a copy of the approval to convert, a copy of the cost comparison, with back-up data, before conversion to the following:

a. Committee on Appropriations of the House of Representatives and the Senate (11–45 civilian employees only).

b. Copies of the following:

(1) Assistant Secretary of Defense (LA), room 3D918, the Pentagon, Washington, DC 20301.

(2) Assistant Secretary of Defense (PA), room 2E757, the Pentagon, Washington, DC 20301.

(3) Office of Economic Adjustment, room 4C767, the Pentagon, Washington, DC 20301.

(4) Deputy Assistant Secretary of Defense, (Installations), room 3E813, the Pentagon, Washington, DC 20301. (exception—no copies required from Agencies that do not have legislative and public affairs offices).

8. Most Efficient and Cost-Effective Analysis for Contractor Performance of an Activity (Report Control Symbol DD-A&T(AR) 1951. The installation commander must certify that the estimated in-house cost for activities involving 11 to 45 DoD civilian employees are based on a completed most efficient and cost effective organization analysis. Certification of this MEO analysis, as required by Public Law 103–139, shall be provided to the Committee on Appropriations of the House of Representatives and the Senate before conversion to contract performance.

[57 FR 29212, July 1, 1992, as amended at 60 FR 67329, Dec. 29, 1995]

APPENDIX D TO PART 169a—COMMERCIAL ACTIVITIES MANAGEMENT INFORMATION SYSTEM (CAMIS)

Each DoD Component shall create and manage their CAMIS data base. The CAMIS data base shall have a comprehensive edit check on all input data in the computerized system. All data errors in the CAMIS data base shall be corrected as they are found by the established edit check program. The data elements described in this appendix represents the DoD minimum requirements.

On approval of a full cost comparison, a simplified cost comparison, or a direct conversion CA, the DoD Component shall create the initial entry using the data elements in part I for full cost comparisons and data elements in part II for all other conversions. Within 30 days of the end of each quarter the

DoD Component shall submit a floppy diskette. Data files must be in American Standard Code Information Interchange text file format on a MicroSoft-Disk Operating System formatted 3.5 inch floppy diskette. Provide submissions in the Defense Utility Energy Reporting System format. The data shall be submitted in the Director, Installations Management (D,IM), 400 Army Navy Drive, Room 206, Arlington, VA 22202–2884 at least 60 days prior to the end of the quarter. The D,IM shall use the automated data to update the CAMIS. If the DoD Component is unable to provide data in an automated format, the D,IM shall provide quarterly printouts of cost comparison records (CCR) and conversion and/or comparison records (DCSCCR) that may be annotated and returned within 30 days of the end of each quarter to the D,IM. The D,IM then shall use the annotated printouts to update the CAMIS.

PART I—COST COMPARISON

The record for each cost comparison is divided into six sections. Each of these sections contains information provided by the DoD Components. The first five sections are arranged in a sequence of milestone events occurring during a cost comparison. Each section is completed immediately following the completion of the milestone event. These events are as follows:

1. Cost comparison is approved by DoD Component.
2. Solicitation is issued.
3. In-house and contractor costs are compared.
4. Contract is awarded/solicitation is canceled.
5. Contract starts.

The events are used as milestones because upon their completion some elements of significant information concerning the cost comparison become known.

A sixth section is utilized for CCRs that result in award of a contract. This section contains data elements on contract cost and information on subsequent contract actions during the second and third year of contract operation.

The data elements that comprise these six sections are defined in this enclosure.

PART II—DIRECT CONVERSIONS AND SIMPLIFIED COST COMPARISONS

The record for each direct conversion and simplified cost comparison is divided into six sections. Each of the first five sections is completed immediately following the completion of the following events:

1. DoD Component approves CA action.
2. The solicitation is issued.
3. In-house and contractor costs are compared.
4. Contract is awarded or solicitation is canceled.
5. Contract starts.

A sixth section is utilized for tracking historical data after the direct conversion or simplified cost comparison is completed. This section contains data elements on contracts and cost information during the second and third performance period. The data elements that comprise the six sections in part II, of this Appendix, are defined in the CAMIS Entry and Update Instruction, Part II—Direct Conversions and Simplified Cost Comparisons.

CAMIS ENTRY AND UPDATE INSTRUCTIONS

PART I—COST COMPARISONS

The bracketed number preceding each definition in sections one through five is the DoD data element number. All date fields should be in the format MMDDYY (such as, June 30, 1983 = 063083).

Section One

Event: DoD Component Approves Conducting a Cost Comparison

All entries in this section of CCR shall be submitted by DoD Components on the first quarter update after approving the start of a cost comparison.

These entries shall be used to establish the CCR and to identify the geographical, organizational, political, and functional attributes of the activity (or activities) undergoing cost comparison as well as to provide an initial estimate of the manpower associated with the activity (or activities). The initial estimate of the manpower in this section of the CCR will be in all cases those manpower figures identified in the correspondence approving the start of the cost comparison.

DoD Components shall enter the following data elements to establish a CCR:

[1] Cost Comparison Number. The number assigned by the DoD Component to uniquely identify a specific cost comparison. The first character of the cost comparison number must be a letter designating DoD Component as noted in data element [3], below. The cost comparison number may vary in length from five to ten characters, of which the second and subsequent may be alpha or numeric and assigned under any system desired by the DoD Component.

[2] Announcement and/or approval date. Date Congress is notified when required by 10 U.S.C. 2461, of this part or date DoD Component approves studies being performed by 45 or fewer DoD civilian employees.

[3] DOD Component Code. Use the following codes to identify the Military Service or Defense Agency conducting the cost comparison:

A—Department of the Army

B—Defense Mapping Agency
C—Strategic Defense Initiatives Organization
D—Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) [3D1]
E—Defense Advanced Research Projects Agency
F—Department of the Air Force
G—National Security Agency/Central Security Service
H—Defense Nuclear Agency
J—Joint Chiefs of Staff (including the Joint Staff, Unified and Specified Commands, and Joint Service Schools)
K—Defense Information Systems Agency (DISA)
L—Defense Intelligence Agency
M—United States Marine Corps
N—United States Navy
R—Defense Contract Audit Agency
S—Defense Logistics Agency
T—Defense Security Assistance Agency
V—Defense Investigative Service
W—Uniform Services University of the Health Sciences
X—Inspector General, Department of Defense
Y—On Site Inspection Agency (OSIA)
2—Defense Finance & Accounting Service (DFAS)
3—Defense Commissary Agency (DeCA)
4—Defense Technical Information Center (DTIC)
5—U.S. Army Corps of Engineers (USACE) Civil Works

[4] Command code. The code established by the DoD Component headquarters to identify the command responsible for operating the commercial activity undergoing cost comparison.

[5] Installation code. The code established by the DoD Component headquarters to identify the installation where the CA(s) under cost comparison is and/or are located physically. Two or more codes (for cost comparison packages encompassing more than one installation) should be separated by commas.

[6] State code. A two-position numeric code for the State (Data element reference ST-GA.) or U.S. Territory (FIPS 55–2), as shown in attachment 1 to appendix B to this part, where element [5] is located. Two or more codes shall be separated by commas.

[7] Congressional District (CD). Number of the congressional district(s) where [5] is located. If representatives are elected ''at large,'' enter ''01'' in this data element; for a delegate or resident commissioner (such as, District of Columbia or Puerto Rico) enter ''98.'' If the installation is located in two or more CDs, all CDs should be entered and separated by commas.

[8] [Reserved]

[9] Title of Cost Comparison. The title that describes the commercial activity(s) under cost comparision (for instance, ''Facilities Engineering Package,'' ''Installation Bus Service,'' or ''Motor Pool''). Use a clear title, not acronyms of function codes in this data element.

[10] DOD Functional Area Code(s). The four of five alpha/numeric character designators listed in Appendix A of this part that describe the type of CA undergoing cost comparison. There would be one code for a single CA or possible several codes for a large cost comparison package. A series of codes shall be separated by commas.

[11] Prior Operation Code. A single alpha character that identifies the mode of operation for the activity at the time the cost comparison is started. Despite the outcome of the cost comparison, this code does not change. The coding as as follows:

I—In-house
C—Contract
N—New requirement
E—Expansion

[12] Cost Comparison Status Code. A single alpha character that identifies the current status of the cost comparison. Enter one of the following codes:

P—In progress
C—Complete
X—Canceled. The CCR shall be excluded from future updates.
Z—Consolidated. The cost comparison has been consolidated with one or more other cost comparisons into a single cost comparison package. The CCR for the cost comparison that has been consolidated shall be excluded from future updates. (See data element [15].)
B—Broken out. The cost comparison package has been broken into two or more separate cost comparisons. The previous CCR shall be excluded from future updates. (See data element [15].)

[13] Announcement—personnel estimate civilian, and [14] announcement—personnel estimate military. The number of civilian and military personnel allocated to the CAs undergoing cost comparison when the cost comparison is approved by the DoD Component or announced to Congress. This number in all cases shall be those personnel figures identified in the correspondence announcing the start of a cost comparison and will include authorized positions, temporaries, and borrowed labor. The number is used to give a preliminary estimate of the size of the activity.

[15] Revised and/or original cost comparison number. When a consolidation occurs, create a new CCR containing the attributes of the consolidated cost comparison. In the CCR of each cost comparison being consolidated, enter the cost comparison number of the new CCR in this data element and code ''Z'' in data element [12] of this attachment. In the new CCR, this data element should be blank and data element [12] of this attachment should denote the current status of the

cost comparison. Once the consolidation has occurred, only the new CCR requires future updates. When a single cost comparison is being broken into multiple cost comparisons, create a new CCR for each cost comparison broken out from the original cost comparison. Each new CCR shall contain its own unique set of attributes; in data element [15] of this attachment enter the cost comparison number of the original cost comparison from which each was derived, and in data element [12] of this attachment enter the current status of each cost comparison. For the original cost comparison, data element [15] of this attachment, should be blank and data element [12] of this attachment should have a code ''B'' entry. Only the derivative record entries require future updates. When a consolidation or a breakout occurs, an explanatory remark shall be entered in data element [57] of this attachment (such as, ''part of SW region cost comparison,'' or, ''separated into three cost comparisons'').

Section Two

Event: The Solicitation is Issued

The entries in this section of the CCR provide information on the personnel authorized to perform the workload in the PWS, the number of workyears used to accomplish the workload in the PWS, and the type and kind of solicitation.

The DoD Component shall enter the following data elements at the first quarterly update subsequent to the issuance of the solicitation:

[17] [Reserved]

[18] Solicitation-Type Code. A one-character alpha designator that identifies the type of solicitation used to obtain contract bids or offers. Use either the CBD as the source document or information received from the contracting officer for this entry. Solicitations under section 8(a) of the Small Business Act are negotiated. Enter one of the following codes:

S—Sealed Bid
N—Negotiated

[19] Solicitation Kind Code. A one-character (or two-character, if ''W'' suffix is used) alpha designator indicating whether the competition for the contract has been limited to a specific class of bidders or offerors. Use either the CBD as the source document or information received from the contracting officer to enter one of the following codes:

A—Restrict to small business
B—Small Business Administration 8(a) Set Aside
C—Javits-Wagner-O'Day Act (JWOD)
D—Other mandatory sources
U—Unrestricted
W—(optional suffix) Unrestricted after initial restriction

[20] Current Authorized Civilians and [21] Current Authorized Military. The number of civilian and military authorizations allocated on the DoD Component's manpower documents to perform the work described in the PWS. This number refines the initial authorization estimate (section one, data elements [13] and [14]).

[22] Baseline Annual Workyears Civilian and [23] Baseline Annual Workyears Military. The number of annual workyears it has taken to perform the work described by the PWS before the DoD Component conducts the MEO study of the in-house organizations; do not include contract monitor requirements. Military workyears include assigned, borrowed, diverted, and detailed personnel.

An annual workyear is the use of 2,087 hours (including authorized leave and paid time off for training). For example, when full-time employees whose work is completely within the PWS are concerned, ''one workyear'' normally is comparable to ''one employee'' or two part-time employees, each working 1,043 hours in a fiscal year. Also include in this total the workyears for full-time employees who do not work on a full-time basis on the work described by the PWS. For example, some portion of the workload is performed by persons from another work center who are used on an ''as needed'' basis. Their total hours performing this workload is 4,172 hours. This would be reflected as two workyears. Less than one-half year of effort should be rounded down, and one-half year or more should be rounded up.

These workyear figures shall be the baseline for determining the manpower savings identified by the management study.

Section Three

Event: The In-House and the Contractor Costs of Operation are Compared

The entries in this section provide information on the date of the cost comparison (initial decision), the preliminary results, the number of bids or offers received, and the costing method used in the cost comparison.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the date of the comparison of in-house and contractor costs (date of initial decision):

[24] Scheduled Initial Decision Date. Date the initial decision is scheduled at the start of a cost comparison.

[24A] Actual Initial Decision Date. Date the initial decision is announced. The initial decision is based on the apparent low bid or offer and is subject to preaward surveys and resolution of all appeals and protests. In a sealed bid procurement, the initial decision is announced at bid opening. In a negotiated procurement, the initial decision is announced when the cost comparison is made

between the in-house estimate and the proposal of the selected offeror.

[25] Cost Comparison Preliminary Results Code. A one-character alpha designator indicating the results of the cost comparison as announced by the contracting officer at the time the bids or offers are compared. The entries are limited to two possibilities:

I—In-house
C—Contract

[26]–[27] [Reserved]

Section Four

Event: The Contracting Officer Either Awards the Contract or Commercial Activity Cancels the Solicitation

The entries in this section identify the final result, information on the contract, the in-house bid, and costing information from the cost comparison record.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the date the contracting officer either awards a contract or cancels the solicitation:

[28] Contract Award/Solicitation Commercial Activity Cancellation Date. For conversions to contract, this is the date a contract was awarded in a sealed bid solicitation or the date the contractor was authorized to proceed on a conditional award contract in a negotiated solicitation. For retentions in-house, this is the date the solicitation was canceled (when the contracting officer publishes an amendment to the solicitation canceling it).

[29] Cost Comparison Final Result Code. A one-character alpha designator identifying the final result of the comparison between in-house and contractor costs; the contracting officer either awards the contract or cancels the solicitation. Enter one of the following codes:

I—In-house
C—Contract

[30] Decision Rationale Code. A one-character alpha designator that identifies the rationale for awarding a contract or canceling the solicitation. The work shall be performed in-house or by contractor, based on cost, or the work shall be performed in-house because no satisfactory commercial source was available (no bids or offers were received or the preaward survey resulted in the determination that no commercial sources were responsive or responsible). Enter one of the following codes:

C—Cost
N—No satisfactory commercial source
O—Other

[31] [Reserved]

[31a] Prime Contractor Size. Enter one of the following

S—Small or small/disadvantaged business
L—Large business

[32] MEO Workyears. The number of annual workyears it takes to perform the work described in the PWS after the MEO study has been conducted. Do not include the minimum cost differential (line 14 in CCF or line 16 in the ENCR CCF) in the computation of any of these data elements.

For data elements [33] through [36], enter all data after all adjustments required by appeals board decisions. Do not include the minimum cost differential (line 31 old CCF or line 14 new CCF or line 16 new ENRC form) in the computation of any of these data elements. If a valid cost comparison was not conducted (that is, all bidders or offerors disqualified, no bids or offers received, etc.) do not complete data elements [33] through [36]. Explain lack of valid cost data in data element [57], DOD Component Comments.

[33] First Performance Period. Expressed in months, the length of time covered by the contract. Do not include any option periods.

[34] Cost Comparison Period. Expressed in months, the total period of operation covered by the cost comparison; this is the period used as the basis for data elements [35] and [36], below.

[35] Total in-house Cost ($000). Enter the total cost of in-house performance in thousands of dollars, rounded to the nearest thousand. This is the total of line 6 of the new CCF or line 8 of the ENCR CCF. An entry is required although the activity remains in-house due to absence of a satisfactory commercial source.

[36] Total Contract Cost ($000). Enter the total cost of contract performance in thousands of dollars, rounded to the nearest thousand. This is the total of line 13 of the CCF or line 15 of the ENCR CCF.

[37] Scheduled Contract or MEO Start Date. Date the contract and/or MEO was scheduled to start at the beginning of a cost comparison.

Section Five

Event: The Contract/MEO Starts

The entries in this section identify the contract or MEO start date and the personnel actions taken as a result of the cost comparison.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the start of the contract:

[38] Contract/MEO Start Date. The actual date the contractor began operation of the contract or the Government implements the MEO.

[39] Permanent Employees Reassigned to Equivalent Positions. The number of permanent employees who were reassigned to positions of equivalent grade as of the contract start date.

[40] Permanent Employee Changed To Lower Positions. The number of permanent employees who were reassigned to lower grade positions as of the contract start date.

[41] Employees Taking Early Retirement. The number of employees who took early retirement as of the contract start date.

[42] Employees Taking Normal Retirement. The number of employees who took normal retirement as of the contract start date.

[43] Permanent Employees Separated. The number of permanent employees who were separated from Federal employment as of the contract start date.

[44] Temporary Employees Separated. The number of temporary employees who were separated from Federal employment as of the contract start date.

[45] Employees Entitled to Severance Pay. The estimated number of employees entitled to severance pay on their separation from Federal employment as of the contract start date.

[46] Total Amount of Severance Entitlements ($000). The total estimated amount of severance to be paid to all employees, in thousands of dollars, rounded to the nearest thousand, as of the contract start date.

[47] Number Of Employees Hired by The Contractor. The number of estimated DoD civilian employees (full-time or otherwise) that will be hired by the contractors, or their subcontractors, at the contract start date.

Administrative Appeal

[48] Filed. Were administrative appeals filed?
N—No
Y—Yes

[49] Source. Who filed the appeal?
B—Both
C—Contractor
I—In-house

[50] Result. Were the appeals finally upheld? (If both appealed, explain result in data element [57], of this section).
N—No
P—Still in progress
Y—Yes

GAO Protest

[51] Filed. Was a protest filed with GAO?
N—No
Y—Yes

[52] Source. Who filed the protest?
B—Both
C—Contractor
I—In-house

[53] Result. Was the protest finally upheld? (Explain result in data element [57], below).
N—No
P—Still in progress
Y—Yes

Arbitration

[54] Requested. Was there a request for arbitration?
N—No
Y—Yes

[55] Result. Was the case found arbitrable? (Explain result in data element [57], below).
N—No
P—Still in progress
Y—Yes

General Information

+ [56] Total Staff-Hours Expended. Enter the estimated number of staff-hours expended by the installation for the cost comparison. Include direct and indirect hours expended from the time of PWS until a final decision is made.

+ [56a] Estimated Cost Of Conducting The Cost Comparison. Enter the estimated cost of the total staff-hours identified in data element [56] of this section non-labor (travel, reproduction costs, etc.) associated with the cost comparision.

+ Data elements [56] and [56A] will only be completed by DoD Components that are participating in the pilot test of these data elements.

[57] DoD Component Comments. Enter comments, as required, to explain situations that affect the conduct of the cost comparision. Where appropriate, precede each comment with the CAMIS data element being referenced.

[58] Effective Date. ''As of'' date of the most current update for the cost comparison. This data element will be completed by the DMDC.

[59] (Leave blank, for DoD computer program use).

Section Six

Event: Quarter Following Contract and/or Option Renewal

The entries in this section identify original costs, savings, information on subsequent performance periods and miscellaneous contract data. The DoD Component shall enter the following data elements in the first quarterly update annually.

[60] Original Cost of Function(s) ($000). The estimated total cost of functions before to development of an MEO in thousands of dollars, rounded to the nearest thousand for the base year and option years. (Begin entry when study began for data element [2] after 1 October 1989).

[60A] Estimated Dollar Savings ($000). The DoD Component's estimated savings from the cost comparison for the base year plus option years, in thousands of dollars, rounded to the nearest thousand, for either in-house or contract performance. Documentation will be available at the DoD Component level. (Begin entry after 1 October 1989).

[61] Contract Or In-House Bid First Performance Period ($000). For studies resulting in continued in-house performance, enter the total in-house cost (Line 6 from the CCF) for the first performance period. For studies resulting in conversion to contract performance, enter the contract price (Line 7 from the CCF) for the first performance period. Figures shall be shown in thousands of dollars, rounded to the nearest thousand.

[61A] Actual Contract or In-House Costs First Performance Period ($000). Enter the actual first performance period contract cost including all change orders (Plus changes in the scope of work) or actual in-house performance cost including changes in the scope of work, in thousands of dollars, rounded to the nearest thousand. No entry is required for actual in-house performance during the second and third performance periods.

[61B] Adjusted Contract Costs First Performance Period ($000). Enter an adjusted first performance period contract cost that includes actual DoL wage increases and costs for omissions and/or errors in the original PWS, but exclude new requirement costs and their associated wage increases, in thousands of dollars, rounded to the nearest thousand. (Begin entry after 1 October 1989).

[61C] Adjusted In-House Costs First Performance Period ($000). Enter the total first performance period in-house cost of the MEO, including civil service pay increases, but excluding increases associated with new mission requirements not included in the original scope of work of the function. Show costs in thousands of dollars, rounded to the nearest thousand. Entry is required even if the function went to contract. (Begin entry after 1 October 1989).

[62] Contract Or In-House Bid Second Performance Period ($000). For studies resulting in continued in-house performance, enter the total in-house cost (Line 6 from the CCF) for the second performance period. For studies resulting in conversion to contract performance, enter the contract price (Line 7 from the CCF) for the second performance period. Figures shall be shown in thousands of dollars, rounded to the nearest thousand.

[62A] Actual Contract Costs Second Performance Period ($000). Enter the actual second performance period contract cost including all change orders (Plus changes in the scope of work), in thousands of dollars, rounded to the nearest thousand. No entry is required when the function remained in-house.

[62B] Adjusted Contract Costs Second Performance Period ($000). Enter an adjusted second performance period contract cost that includes actual DoL wage increases and costs for omissions and/or errors in the original PWS, but exclude new requirement costs and their associated wage increases, in thousands of dollars, rounded to the nearest thousand. (Begin entry after 1 October 1989).

[62] Adjusted In-House Costs Second Performance Period ($000). Enter the total second performance period in-house cost of the MEO, including civil service pay increases, but excluding increases associated with new mission requirements not included in the original scope of work of the function. Show costs in thousands of dollars, rounded to the nearest thousand. Entry is required even if the function went to contract. (Begin entry after 1 October 1989).

[63] Contract Or In-house Bid Third Performance Period ($000). For studies resulting in continued in-house performance, enter the total in-house cost (Line 6 from the CCF) for the third performance period. For studies resulting in conversion to contract performance, enter the contract price (Line 7 from the CCF) for the third performance period. Figures shall be shown in thousands of dollars, rounded to the nearest thousand.

[63A] Actual Contract Costs Third Performance Period ($000). Enter the actual third performance period contract cost including all change orders (Plus changes in the scope of work), in thousands of dollars, rounded to the nearest thousand. No entry is required when the function remained in-house.

[63B] Adjusted Contract Costs Third Performance Period ($000). Enter an adjusted third performance period contract cost that includes actual DoL wage increases and costs for omissions and/or errors in the original PWS, but exclude new requirement costs and their associated wage increases, in thousands of dollars, rounded to the nearest thousand (Begin entry after 1 October 1989).

[63C] Adjusted In-House Costs Third Performance Period ($000). Enter the total third performance period in-house cost of the MEO, including civil service pay increases, but excluding increases associated with new mission requirements not included in the original scope of work of the function. Show costs in thousands of dollars, rounded to the nearest thousand. Entry is required even if the function went to contract (Begin entry after 1 October 1989).

[64] Contractor Change. Enter one of the following alpha designators to indicate whether the contract for the second or third performance period has changed from the original contractor.

N—No, the contractor has not changed.

Y—Yes, the contractor has changed.

Data elements [65] through [66] of this section are not required if the answer to [64] of this section is no (N).

[65] New Contractor Size (If data element [66] of this section contains the alpha designator ''I'' or ''R,'' no entry is required).

L—New contractor is large business.

S—New contractor is small and/or small disadvantaged business.

[66] Reason For Change. DoD Components shall enter one of the following designators

listed in this section, followed by the last two digits of the fiscal year which the change occurred.

C—Contract workload consolidated with other existing contract workload.

D—New contractor takes over because original contractor defaults.

I—Returned in-house because original contractor defaults within 12 months of start date and in-house bid is the next lowest.

N—New contractor replaced original contractor because Government opted not to renew contract in option years.

R—Returned in-house temporarily pending resolicitation due to contract default, etc.

U—Contract workload consolidated into a larger (umbrella) cost comparison.

X—Other-function either returned in-house or eliminated because of base closure, realignment, budget reduction or other change in requirements.

[67] Contract Administration Staffing. The actual number of contract administration personnel hired to administer the contract.

CAMIS ENTRY AND UPDATE INSTRUCTION

PART II—DIRECT CONVERSIONS AND SIMPLIFIED COST COMPARISONS

The bracketed number preceding each definition in sections One through six of this section, is the DoD data element number. All date fields should be in the format YYMMDD (Data element reference DA-FA).

Section One

Event: DoD Component Approves the CA Action

All entries in this section of the DCSCCR record shall be submitted by DoD Components on the first quarter update after approving the start of a cost comparison. These entries shall be used to establish the DCSCCR and to identify the geographical, organizational, political, and functional attributes of the activity (or activities) undergoing conversion and/or comparison as well as to provide an initial estimate of the manpower associated with the activity (or activities). The initial estimate of the personnel in this section of the DCSCCR will be, in all cases, those personnel figures identified in the correspondence approving the start of the conversion and/or comparison. DoD Components shall enter the following data elements to establish a DCSCCR:

[1] Direct Conversion/Simplified Cost Comparison Number. The number assigned by the DoD Component to uniquely identify a specific conversion and/or comparison. The first character of the conversion and/or comparison number must be a letter designating the DoD Component as noted in data element [3] of this section. The conversion and/or comparison number may vary in length from five to ten characters, of which the second and subsequent may be alpha or numeric and assigned under any system desired by the DoD Component.

[2] Approval Date. The date has simplified cost comparison or direct conversion was approved.

[3] DoD Component Code. Use the following codes to identify the Military Service or Defense Agency and/or Field Activity conducting the cost comparison:

A—Department of the Army

B—Defense Mapping Agency (DMA)

D—Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) [3D1]

D—Washington Headquarters Service (WHS) [3D2]

F—Department of the Air Force

G—National Security Agency/Central Security Service (NSA/CSS)

H—Defense Nuclear Agency (DNA)

J—Joint Chiefs of Staff (JCS) (including the Joint Staff, Unified and Specified Commands, and Joint Service Schools)

K—Defense Information Systems Agency (DISA)

L—Defense Intelligence Agency (DIA)

M—United States Marine Corps (USMC)

N—United States Navy (USN)

R—Defense Contract Audit Agency (DCAA)

S—Defense Logistics Agency (DLA)

T—Defense Security Assistance Agency (DSAA)

V—Defense Investigative Service (DIS)

W—Uniformed Services University of the Health Sciences (USUHS)

Y—On Site Inspection Agency (OSIA)

2—Defense Finance & Accounting Service (DFAS)

3—Defense Commissary Agency (DeCA)

4—Defense Technical Information Center (DTIC)

5—U.S. Army Corps of Engineers (USACE) Civil Works

[4] Command code. The code established by the DoD Component headquarters to identify the command responsible for operating the commercial activity undergoing cost comparison.

[5] Installation code. The code established by the DoD Component headquarters to identify the installation where the CA(s) under cost comparison is and/or are located physically. Two or more codes (for cost comparison packages encompassing more than one installation) should be separated by commas.

[6] State Code. A two-position numeric code for the State (Data element reference ST-GA.) or U.S. Territory (FIPS 55–2), as shown in attachment 1 to appendix B of this part, where element [5] is located. Two or more codes shall be separated by commas.

[7] Congressional District (CD). Number of the CDs where [5] of this section, is located. If representatives are elected ''at large,''

enter ''01'' in this data element; for a delegate or resident commissioner (i.e., District of Columbia or Puerto Rico) enter ''98.'' If the installation is located in two or more CDs, all CDs should be entered and separated by commas.

[8] (Leave blank)

[9] Title of Conversion and/or Comparison. The title that describes the CA(s) under conversion/comparison (for instance, ''Facilities Engineering Package'', ''Installation Bus Service,'' or ''Motor Pool''). Use a clear title, not acronyms or function codes in this data element.

[10] DoD Functional Area Code(s). The four- or five-alpha and/or numeric character designators listed in appendix A of this part that describes the type of CA undergoing conversion and/or comparison. This would be one code for a single CA or possibly several codes for a large cost comparison package. A series of codes shall be separated by commas.

[11] Prior Operation Code. A single alpha character that identifies the mode of operation for the activity at the time the conversion and/or comparison is started. Despite the outcome of the conversion and/or comparison, this code does not change. The coding is as follows:

C—Contract
E—Expansion
I—In-house
N—New requirement

[12] Conversion and/or Comparison Status Code. A single alpha character that identifies the current status of the conversion and/or comparison. Enter one of the following codes:

B—Broken out. The cost comparison package has been broken into two or more separate cost comparisons. The previous DCSCCR shall be excluded from future updates. (See data element [15] of this section.)
C—Complete
P—In progress
X—Canceled. The DCSCCR shall be excluded from future updates.
Z—Consolidated. The cost comparison has been consolidated with one or more other cost comparisons into a single cost comparison package. The DCSCCR for the cost comparison that has been consolidated shall be excluded from future updates. (See data element [15] of this section.)

[13] Announcement—personnel estimate civilian, and [14] announcement—personnel estimate military. The number of civilian and military personnel allocated to the CAs undergoing conversion and/or comparison at the time the start of the conversion and/or comparison is approved. This number is all cases shall be those personnel figures identified when the conversion and/or comparison was approved and will include authorized positions, temporaries, and borrowed labor. The number is used to give a preliminary estimate of the size of the activity.

[15] Revised and/or original cost comparison number. When a consolidation occurs, create a new DCSCCR containing the attributes of the consolidated conversion and/or comparison. In the DCSCCR of each conversion and/or comparison being consolidated, enter the conversion and/or comparison number of the new DCSCCR in this data element and code ''Z'' in data element [12] of this section. In the new DCSCCR, this data element should be blank and data element [12] of this section should denote the current status of the conversion and/or comparison. Once the consolidation has occurred, only the new DCSCCR requires future updates.

When a single conversion and/or comparison is being broken into multiple conversion and/or comparisons, create a new DCSCCR for each conversion and/or comparison broken out from the original conversion and/or comparison. Each new DCSCCR shall contain its own unique set of attributes; in data element [15] of this section enter the conversion and/or comparison number of the original conversion and/or comparison from which each was derived, and in data element [12] of this section enter the current status of each conversion and/or comparison. For the original conversion and/or comparison, data element [15] of this section should be blank and data element [12] of this section should have a code ''B'' entry. Only the derivative record entries require future updates.

When a consolidation or a breakout occurs, an explanatory remark shall be entered in data element [56] of this section (such as, ''part of SW region cost comparison,'' or, ''separated into three cost comparisons'').

[16] (Leave blank)

Section Two

Event: The Solicitation is Issued

The entries in this section of the DCSCCR provide information on the personnel authorized to perform the workload in the PWS, the number of workyears used to accomplish the workload in the PWS, and the type and kind of solicitation.

The DoD Component shall enter the following data elements at the first quarterly update subsequent to the issuance of the solicitation:

[17] (Leave blank)

[18] Solicitation-Type code. A one-character alpha designator that identifies the type of solicitation used to obtain contract bids or offers. Use either the CBD as the source document or information received from the contracting officer for this entry. Solicitations under section 8(a) of ''The Small Business Act'' are negotiated. Enter one of the following codes:

N—Negotiated
S—Sealed Bid

[19] Solicitation-Kind code. A one-character (or two-character, if ''W'' suffix is

used) alpha designator indicating whether the competition for the contract has been limited to a specific class of bidders or offerors. Use either the CBD as the source document or information received from the contracting officer to enter one of the following codes:

A—Restrict to small business
B—Small Business Administration 8(a) Set Aside
C—''Javits-Wagner-O'Day Act'' (JWOD)
D—Other mandatory sources
U—Unrestricted
W—(Optional suffix) Unrestricted after initial restriction

[20] Current Authorized Civilians, and [21] Current Authorized Military. The number of civilian and military authorizations allocated on the DoD Component's manpower documents to perform the work described in the PWS. This number refines the initial authorization estimate (section one, data elements [13] and [14] of this section).

[22] Baseline Annual Workyears Civilian, and [23] Baseline Annual Workyears Military. The number of annual workyears it has taken to perform the work described by the PWS before the DoD Component conducts the MEO analysis of the in-house organization. Do not include contract monitor requirements. Military workyears include assigned, borrowed, diverted, and detailed personnel. Less than one-half a year of effort should be rounded down, and one-half a year or more should be rounded up. These workyear figures shall be the baseline for determining the personnel savings identified by the most efficient organization analysis.

Section Three

Event: The In-House And The Contractor Costs Of Operations Are Compared

The entries in this section provide information on the date of the conversion and/or comparison (initial decision), the preliminary results, the number of bids or offers received, and the costing method used in the conversion and/or comparison.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the date of the comparison of in-house and contractor costs (date of initial decision):

[24] Scheduled Initial Decision Date. Date the initial decision is scheduled at the start of a conversion and/or comparison

[24A] Actual Initial Decision Date. Date the initial decision is announced. The initial decision is based on the apparent low bid or offer and is subject to preaward surveys and resolution of all appeals and protests. In a sealed bid procurement, the initial decision is announced at bid opening. In a negotiated procurement, the initial decision is announced when the cost comparison is made between the in-house estimate and the proposal of the selected offeror. In a conversion, the initial decision is announced when the in-house cost estimate is evaluated against proposed contractor proposals.

[25] Cost Comparison Preliminary Results Code. A one-character alpha designator indicating the results of the cost comparison as announced by the contracting officer at the time of the comparison (No entry required for a direct conversion). The entries are limited to two possibilities:

C—Contract
I—In-house

[26] (Leave blank)
[27] (Leave blank)

Section Four

Event: The Contracting Officer Either Awards The Contract or Cancels The Solicitation

The entries in this section identify the final result, information on the contract, the in-house bid, and costing information from the direct conversion and/or simplified cost comparison fact sheet.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the date the contracting officer either awards a contract or cancels the solicitation:

[28] Contract Award or Solicitation Cancellation Date. For conversions to contract, this is the date a contract was awarded in a sealed bid solicitation or the date the contractor was authorized to proceed on a conditional award contract in a negotiated solicitation. For retentions in-house, this is the date the solicitation was canceled (when the contracting officer publishes an amendment to cancel the solicitation).

[29] Cost Comparison Final Result Code. A one-character alpha designator identifying the final result of the comparison between in-house and contractor costs; the contracting officer either awards the contract or cancels the solicitation. Enter one of the following codes:

C—Contract
I—In-house

[30] Decision Rationale Code. A one-character alpha designator that identifies the rationale for awarding a contract or canceling the solicitation. The work shall be performed in-house or by contractor based on cost, for other than cost, or the work shall be performed in-house because no satisfactory commercial source was available (no bids or offers were received or the pre-award survey resulted in the determination that no commercial sources were responsive or responsible). Enter one of the following codes:

C—Cost
N—No satisfactory commercial source
O—Other

[31] (Leave blank)

[31A] Prime Contractor Size. Enter one of the following:

L—Large business
S—Small or small and/or disadvantaged business

[32] MEO Workyears. The number of annual workyears it takes to perform the work described in the PWS after the MEO analysis has been conducted. This entry will be equal to the number of annual workyears in the in-house bid (No entry required for a direct conversion).

For data elements [33] through [36] of this section enter all data after all adjustments required by appeal board decisions. Do not include minimum cost differential in the computation of any of these data elements. If a valid conversion and/or comparison was not conducted (i.e., all bidders or offerors disqualified, no bids or offers received, etc.) do not complete data elements [33], [34] and [36] of this section. Explain lack of valid cost data in data element [56], ''DoD Component Comments'' of this section.

[33] First Performance Period. Expressed in months, the length of time covered by the contract. Do not include any option periods.

[34] Conversion and/or Comparison Period. Expressed in months, the total period of operation covered by the conversion or cost comparison; this is the period used as the basis for data elements [35] and [36] of this section.

[35] Total In-House Cost ($000). Enter the total estimated cost of in-house performance for the base year plus option years, in thousands of dollars, rounded to the nearest thousand. An entry is required although the activity remains in-house due to absence of a satisfactory commercial source (No entry required for a direct conversion).

[36] Total Contract Cost ($000). Enter the total estimated cost of contract performance for the base year plus option years, in thousands of dollars, rounded to the nearest thousand.

[37] Scheduled Contract or MEO Start Date. Date the contract and/or MEO was scheduled to start at the beginning of a conversion and/or comparison.

Section Five

Event: The Contract MEO Starts.

The entries in this section identify the contract or MEO start date and the personnel actions taken as a result of the conversion and/or comparison.

The DoD Component shall enter the following data elements in the first quarterly update subsequent to the start of the contract:

[38] Contract and/or MEO Start Date. The actual date the contractor began operation of the contract or the Government implements the MEO.

[39] Permanent Employees Reassigned to Equivalent Positions. The number of permanent employees who were reassigned to positions of equivalent grade as of the contract start date.

[40] Permanent Employees Changed to Lower Positions. The number of permanent employees who were reassigned to lower grade positions as of the contract start date.

[41] Employees Taking Early Retirement. The number of employees who took early retirement as of the contract start date.

[42] Employees Taking Normal Retirement. The number of employees who took normal retirement as of the contract start date.

[43] Permanent Employees Separated. The number of permanent employees who were separated from Federal employment as of the contract start date.

[44] Temporary Employees Separated. The number of temporary employees who were separated from Federal employment as of the contract start date.

[45] Employees Entitled to Severance Pay. The estimated number of employees entitled to severance pay on their separation from Federal employment as of the contract start date.

[46] Total Amount of Severance Entitlements ($000). The total estimated amount of severance to be paid to all employees, in thousands of dollars, rounded to the nearest thousand, as of the contract start date.

[47] Number of Employees Hired by the Contractor. The number of estimated DoD civilian employees (full-time or otherwise) that will be hired by the contractors, or their subcontractors, at the contract start date.

Administrative Appeal

[48] Filed. Were administrative appeals filed?

N—No
Y—Yes

[49] Source. Who filed the appeal?

B—Both
C—Contractor
I—In-House

[50] Result. Were the appeals finally upheld? (if both appealed, explain result in data element [56] of this section).

N—No
P—Still in Progress
Y—Yes

GAO Protest

[51] Filed. Was a protest filed with GAO?

N—No
Y—Yes

[52] Source. Who filed the protest?

B—Both
C—Contractor
I—In-House

[53] Result. Was the protest finally upheld? (explain result in data element [56], of this section).

N—No
P—Still in Progress
Y—Yes

Arbitration

[54] Requested. Was there a request for arbitration?

N—No
Y—Yes

[55] Result. Was the case found arbitrable? (explain result in data element [56], of this section).

N—No
P—Still in Progress
Y—Yes

General Information

[56] DoD Component Comments. Enter comments, as required, to explain situations that affect the conduct of the conversion and/or comparison. Where appropriate, precede each comment with the CAMIS data element being referenced.

[57] Effective Date. ''As of'' date of the most current update for the conversion and/or comparison. This data element will be completed by the DMDC.

[58] (Leave blank, for DoD computer program use).

Section Six

Event: Quarter Following Contract and/or Option Renewal

The entries in this section identify information on subsequent performance periods and miscellaneous contract data. The DoD Component shall enter the following data elements in the first quarterly update annually:

[59] Actual Contract Cost First Performance Period ($000). Enter the actual contractor cost for the first performance period, in thousands of dollars, rounded to the nearest thousand.

[60] Actual Contract Cost Second Performance Period ($000). Enter the actual contractor cost for the second performance period, in thousands of dollars, rounded to the nearest thousand.

[61] Actual Contract Cost Third Performance Period ($000). Enter the actual contractor cost for the third performance period, in thousands of dollars, rounded to the nearest thousand.

[62] Contractor Change. Enter one of the following alpha designators to indicate whether the contractor for the second or third performance period has changed from the original contractor.

N—No, the contractor has not changed
Y—Yes, the contractor has changed

Data elements [63] through [64] of this section are not required if the answer to [62] of this section is no (N).

[63] New Contractor Size. (If data element [64] of this section contains the alpha designator ''I'' or ''R,'' no entry is required)

L—New contractor is large business
S—New contractor is small and/or small disadvantaged business.

[64] Reason For Change. DoD Components shall enter one of the following designators listed in the following, followed by the last two digits of the FY in which the change occurred.

C—Contract workload consolidated with other existing contract workload.
D—New contractor takes over because original contractor defaults.
I—Returned in-house because of original contractor defaults; etc., within 6 months of start date and in-house bid is the next lowest.
N—New contractor replaced original contractor because Government opted not to renew contract in option years.
R—Returned in-house temporarily pending resolicitation due to contract default, etc.
U—Contract workload consolidated with other existing contract workload.
X—Other-Function either returned in-house or eliminated because of base closure, realignment, budget reduction or other change in requirements.

[65] Contract Administration Staffing. The actual number of contract administration personnel hired to administer the contract.

[50 FR 40805, Oct. 7, 1985, as amended at 57 FR 29212, July 1, 1992; 60 FR 67329, Dec. 29, 1995]

PART 173—COMPETITIVE INFORMATION CERTIFICATE AND PROFIT REDUCTION CLAUSE

Sec.
173.1 Scope.
173.2 Competitive Information Certification.
173.3 Profit reduction clause.
APPENDIX TO PART 173—LIST OF CONTRACTORS FOR WHOM CERTIFICATION IS REQUIRED

AUTHORITY: 10 U.S.C. 2202.

SOURCE: 53 FR 42948, Oct. 25, 1988, unless otherwise noted.

§ 173.1 Scope.

(a) The purpose of the Competitive Information Certificate is to provide the Contracting Officer sufficient information and assurance to support award of a contract in those circumstances where certification is required.

(b) Although a Competitive Information Certificate provides reasonable assurance to the Government, the possibility remains that even a diligent internal review by the contractor may fail to identify illegal or improper actions. The purpose of the Profit Reduction Clause is to ensure effective protection of the Government's interest in making contract awards when a Competitive Information Certification is required. The Profit Reduction Clause is required in all competitively awarded new contracts over $100,000 when a Competitive Information Certificate is required prior to award.

§ 173.2 Competitive Information Certification.

(a) The Competitive Information Certificate is required prior to award of all competitively awarded new contracts of a value exceeding $100,000 to contractors subject to the requirement.

(1) Corporate activities required to provide the Certificate are corporations or corporate divisions which have been the subject of search warrants, or as to which other official information indicates such certification should be required, and their subsidiaries and affiliates. A list of contractors from whom certification is required is maintained and published as required under authority of the Department of Defense Procurement Task Force.

(2) The requirement to provide the Certificate may be further limited to certain divisions or subsidiaries, contracts or programs upon the basis of official information, furnished by the contractor or otherwise, sufficient to establish to the satisfaction of the Department of Defense that the investigation is so limited. Such information may include copies of search warrants, subpoenas and affidavits from corporate officials concerning the scope and conduct of the investigation. The sufficiency of such information is solely within the discretion of the Department of Defense.

(3) Contractors from whom certification in certain instances is required will be relieved of the certification requirement when the Department of Defense determines that information developed in the ''Ill Wind'' investigation has been resolved in such a manner that certification is no longer required to protect the interests of the Government.

(4) A Certificate will not be required prior to the exercise of options or noncompetitive award of contracts. This does not limit in any manner the Government's ability to inquire into, or require information concerning, the circumstances surrounding an underlying competitive award.

(b) With respect to information disclosed under paragraph (1) of the Certificate, the offeror must attach to the Certificate a written statement detailing what information was obtained, and how, when, and from whom it was obtained. This information shall be evaluated at the levels prescribed by the contracting component to determine whether award of the contract should be made to the offeror. If during this review it is determined that the offeror may have obtained an unfair competitive advantage from the information and that there is no other reason for denying award to the offeror, the reviewing authority shall consider whether action may be taken to neutralize the potential unfair competitive advantage. Any decision to deny award to an offeror based upon information disclosed in the Certificate shall be reviewed and approved by the Service Acquisition Executive.

(c) This certificate and any accompanying statements required, must be executed by the offeror's corporate president or his designee at no more than one level below the president's level.

(d) If a contractor from whom certification is required is uncertain as to whether competitive information otherwise required to be disclosed was generally available to offerors, the uncertainty should be resolved by disclosure.

(e) Contracting Officers may continue to accept Certificates of Business Ethics and Integrity complying with the Interim rule in lieu of Competitive Information Certificates.

(f) The Competitive Information Certificate shall be in the following form:

Competitive Information Certificate

(1) (Name of the offeror) certifies, to the best of its knowledge and belief, that

(i) With the exception of any information described in an attachment to this certificate, and any information the offeror reasonably believes was made generally available to prospective offerors, the offeror has not knowingly obtained, directly or indirectly from the Government, any written information or oral extract or account thereof relating to this solicitation which was

(A) Submitted to the Government by offerors or potential offerors in response to the Government's solicitation for bid or proposal;

(B) Marked by an offeror or potential offeror to indicate the information was submitted to the Government subject to an assertion of privilege against disclosure;

(C) Marked or otherwise identified by the Government pursuant to law or regulation as classified, source selection sensitive, or for official use only; or

(D) The disclosure of which to the offeror or potential offeror by a Government employee would, under the circumstances, otherwise violate law or regulation.

(ii) The offeror named above

(A) Determined the prices in its offer independently, without, for the purpose of restricting competition, any consultation, communications, or agreement, directly or indirectly, with any other offeror or competitor relating to (*1*) those prices, (*2*) the intention to submit an offer, or (*3*), the methods or factors used to calculate the prices offered;

(B) Has not knowingly disclosed the prices in its offer, directly or indirectly, to any other offeror or competitor before bid opening (in the case of a sealed bid solicitation) or contract award (in the case of a negotiated solicitation) unless otherwise required by law;

(C) Has not attempted to induce any other concern to submit or not to submit an offer for the purpose of restricting competition.

(iii) The offeror has attached an accurate description of the internal review forming the basis for the certifications provided herein.

Corporate President or Designee.

§ 173.3 Profit reduction clause.

The following profit reduction clause is required in all competitively awarded new contracts over $100,000 when a Competitive Information Certificate is required prior to award.

Profit Reduction for Illegal or Improper Activity

(a) The government, at its election, may reduce the contract price by the amount of any anticipated profit determined as set forth in paragraph (b) of this section; if

(1) A person or business entity is convicted for violating 18 U.S.C. 201–224 (bribery, graft, and conflicts of interest), 18 U.S.C. 371 (conspiracy), 18 U.S.C. 641 (theft of public money, property, or records), 18 U.S.C. 1001 (false statements), 18 U.S.C. 1341 (fraud), 18 U.S.C. 1343 (fraud by wire) for any act in connection with or related to the obtaining of this contract; or

(2) The Secretary of Defense, or his designee, determines that the Competitive Information Certificate submitted by the offeror in connection with award of this contract

(i) Was materially false at the time it was filed, or

(ii) Notwithstanding the offeror's best knowledge and belief, was materially incomplete or inaccurate.

Prior to making such a determination, the Secretary or his designee, shall provide to the contractor a written statement of the action being considered and the basis therefor. The contractor shall have not less than 30 calendar days after receipt to submit in person, in writing, or through a representative, information and argument in opposition to the proposed reduction. The Secretary or his designee may, upon good cause shown, determine to reduce the contract price by less than the amount of any profit determined under paragraph (b) of this section.

(b) The amount of anticipated profits referred to in §173.3(a) shall be:

(1) In the case of a cost-plus-fixed-fee contract, the amount of the fee specified in the contract at the time of award;

(2) In the case of fixed-price-incentive-profit or cost-plus-incentive-fee contract, the amount of the target

profit or fee specified in the contract at the time of award; or

(3) In the case of a firm-fixed-price contract, the amount of anticipated profit determined by the contracting officer, after notice to the contractor and opportunity to comment, from records or documents in existence prior to the date of the award of the contract.

(c) The rights and remedies of the government provided in this cluase shall not be exclusive and are in addition to any other rights and remedies provided by law or under this contract.

APPENDIX TO PART 173—LIST OF CONTRACTORS FOR WHOM CERTIFICATION IS REQUIRED

Armtec, Incorporated, 410 Highway 19 South, Palatka, FL 32077

Cubic Corporation, 9333 Balboa Avenue, San Diego, CA 92123 as to contracts originating in the following division:

Cubic Defense Systems, Incorporated, San Diego, CA

Executive Resource Associates, 2011 Crystal Drive, suite 813, Arlington, VA 22202

Hazeltine Corporation, 500 Commack Road, Commack, NY 11725 and all divisions and subsidiaries as follows:

Hazeltine Corporation, Electro-Acoustic Division, 115 Bay State Drive, Braintree, MA 02184

Hazeltine Corporation, Government Systems & Products Division, Cuba Hill Road, Greenlawn, NY 11740

Hazeltine Research, Incorporated, 188 Industrial Drive, Elmhurst, IL 60126

Kane Paper Corporation, 2365 Milburn Avenue, Baldwin, NY 11510

Litton Data Systems, Incorporated, 8000 Woodley Ave., Van Nuys, CA 91408

Loral Defense Systems Akron, 1210 Massillon Rd., Akron, OH 44315

McDonnel Douglas Corporation, Banshee Rd., P.O. Box 516, St. Louis, MO 63166 as to contracts originating in the following division:

McDonnell Aircraft Company, St. Louis, MO

Northrop Corporation, Ventura Division, 1515 Rancho Conejo Boulevard, Newbury Park, CA 91320

Teledyne Electronics, 649 Lawrence Drive, Newbury Park, CA 91320

Unisys Corporation, One Unisys Place, Detroit, MI 48232, as to contracts originating in the following divisions or subsidiaries:

Unisys Corporation, Defense Systems Division, 3333 Pilot Knob Road, Eagan, MN

Unisys Corporation, Defense Systems Division, Neil Armstrong Boulevard, Eagan, MN

Unisys Shipboard & Ground Systems Group, Marquis Avenue, Great Neck, NY 11020

United Technologies Corporation, UT Bldg., Hartford, CT 06101 as to contracts originating in the following divisions or subsidiaries:

Norden Systems, Incorporated

Pratt & Whitney

Varian Associates, Incorporated, 611 Hansen Way, Palo Alto, CA as to contracts originating in the following division:

*Continental Electronics Manufacturing Company, Dallas, TX

Whittaker Corporation (Lee Telecommunications Corporation (LTC), Route 1, Farmington, AR 72730)

Zubier Enterprises, 6201 Pine Street, Harrisburg, PA.

*Firm suspended as of July 6, 1988.

SUBCHAPTER H—CLOSURES AND REALIGNMENT

PART 174—REVITALIZING BASE CLOSURE COMMUNITIES AND ADDRESSING IMPACTS OF REALIGNMENT

Subpart A—General

Sec.
174.1 Purpose.
174.2 Applicability.
174.3 Definitions.

Subpart B—Policy

174.4 Policy.
174.5 Responsibilities.

Subpart C—Working with Communities and States

174.6 LRA and the redevelopment plan.

Subpart D—Real Property

174.7 Retention for DoD Component use and transfers to other Federal agencies.
174.8 Screening for properties covered by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, cross-reference.
174.9 Economic development conveyances.
174.10 [Reserved]
174.11 Leasing of real property to non-Federal entities.
174.12 Leasing of transferred real property by Federal agencies.

Subpart E—Personal Property

174.13 Personal property.

Subpart F—Maintenance and Repair

174.14 Maintenance and repair.

Subpart G—Environmental Matters

174.15 Indemnification under Section 330 of the National Defense Authorization Act for Fiscal Year 1993.
174.16 Real property containing explosive or chemical agent hazards.
174.17 NEPA.
174.18 Historic preservation.

AUTHORITY: 10 U.S.C. 113 and 10 U.S.C. 2687 *note*.

SOURCE: 71 FR 9919, Feb. 28, 2006, unless otherwise noted.

Subpart A—General

§ 174.1 Purpose.

This part:

(a) Establishes policy, assigns responsibilities, and implements base closure laws and associated provisions of law relating to the closure and the realignment of installations. It does not address the process for selecting installations for closure or realignment.

(b) Authorizes the publication of DoD 4165.66–M, ''Base Redevelopment and Realignment Manual,'' in accordance with DoD 5025.1–M[1], ''DoD Directive System Procedures,'' March 2003.

§ 174.2 Applicability.

This part applies to:

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

(b) Installations in the United States selected for closure or realignment under a base closure law.

(c) Federal agencies and non-Federal entities that seek to obtain real or personal property on installations selected for closure or realignment.

§ 174.3 Definitions.

(a) *Base closure law*. This term has the same meaning as provided in 10 U.S.C. § 101(a)(17)(B) and (C).

(b) *Closure*. An action that ceases or relocates all current missions of an installation and eliminates or relocates all current personnel positions (military, civilian, and contractor), except for personnel required for caretaking, conducting any ongoing environmental cleanup, or property disposal. Retention of a small enclave, not associated

[1] Copies may be obtained at *http://www.dtic.mil/ whs/directives/corres /publ.html*.

with the main mission of the base, is still a closure.

(c) *Consultation.* Explaining and discussing an issue, considering objections, modifications, and alternatives; but without a requirement to reach agreement.

(d) *Date of approval.* This term has the same meaning as provided in section 2910(8) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510.

(e) *Excess property.* This term has the same meaning as provided in 40 U.S.C. § 102(3).

(f) *Installation.* This term has the same meaning as provided in the definition for ''military installation'' in section 2910(4) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510.

(g) *Local Redevelopment Authority* (LRA). This term has the same meaning as provided in the definition for ''redevelopment authority'' in section 2910(9) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510.

(h) *Military Department.* This term has the same meaning as provided in 10 U.S.C. 101(a)(8).

(i) *National Environmental Policy Act (NEPA).* The National Environmental Policy Act of 1969, Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*, as amended.

(j) *Realignment.* This term has the same meaning as provided in section 2910(5) of the Defense Base Closure and Realignment Act of 1990, Pub. L. 101–510.

(k) *Secretary concerned.* This term has the same meaning as provided in 10 U.S.C. 101(a)(9)(A), (B), and (C).

(l) *Surplus property.* This term has the same meaning as provided in 40 U.S.C. 102(10).

(m) *Transition coordinator.* This term has the same meaning as used in section 2915 of the National Defense Authorization Act for Fiscal Year 1994, Public Law 103–160.

Subpart B—Policy

§ 174.4 Policy.

It is DoD policy to:

(a) Act expeditiously whether closing or realigning. Relocating activities from installations designated for closure will, when feasible, be accelerated to facilitate the transfer of real property for community reuse. In the case of realignments, the Department will pursue aggressive planning and scheduling of related facility improvements at the receiving location.

(b) Fully utilize all appropriate means to transfer property. Federal law provides the Department with an array of legal authorities, including public benefit transfers, economic development conveyances at cost and no cost, negotiated sales to state or local government, conservation conveyances, and public sales, by which to transfer property on closed or realigned installations. Recognizing that the variety of types of facilities available for civilian reuse and the unique circumstances of the surrounding communities does not lend itself to a single universal solution, the Department will use this array of authorities in a way that considers individual circumstances.

(c) Rely on and leverage market forces. Community redevelopment plans and military conveyance plans should be integrated to the extent practical and should take account of any anticipated demand for surplus military land and facilities.

(d) Collaborate effectively. Experience suggests that collaboration is the linchpin to successful installation redevelopment. Only by collaborating with the local community can the Department close and transfer property in a timely manner and provide a foundation for solid economic redevelopment.

(e) Speak with one voice. The Department of Defense, acting through the DoD Components, will provide clear and timely information and will encourage affected communities to do the same.

(f) Work with communities to address growth. The Department will work with the surrounding community so that the public and private sectors can provide the services and facilities needed to accommodate new personnel and their families. The Department recognizes that installation commanders and local officials, as appropriate (*e.g.*, State, county, and tribal), need to integrate and coordinate elements of their

local and regional growth planning so that appropriate off-base facilities and services are available for arriving personnel and their families.

§ 174.5 Responsibilities.

(a) The Under Secretary of Defense for Acquisition, Technology, and Logistics shall issue DoD Instructions as necessary to further implement applicable public laws affecting installation closure and realignment implementation and shall monitor compliance with this part. All authorities and responsibilities of the Secretary of Defense—

(1) Vested in the Secretary of Defense by a base closure law, but excluding those provisions relating to the process for selecting installations for closure or realignment;

(2) Delegated from the Administrator of General Services relating to base closure and realignment matters;

(3) Vested in the Secretary of Defense by any other provision relating to base closure and realignment in a national defense authorization act, a Department of Defense appropriations act, or a military construction appropriations act, but excluding section 330 of the National Defense Authorization Act for Fiscal Year 1993; or

(4) Vested in the Secretary of Defense by Executive Order or regulation and relating to base closure and realignment, are hereby delegated to the Under Secretary of Defense for Acquisition, Technology, and Logistics.

(b) The authorities and responsibilities of the Secretary of Defense delegated to the Under Secretary of Defense for Acquisition, Technology, and Logistics under paragraph (a) of this section are hereby re-delegated to the Deputy Under Secretary of Defense (Installations and Environment).

(c) The Heads of the DoD Components shall ensure compliance with this part and any implementing guidance.

(d) Subject to the delegations in paragraphs (a) and (b) of this section, the Secretaries concerned shall exercise those authorities and responsibilities specified in subparts C through G of this part.

(e) The cost of recording deeds and other transfer documents is the responsibility of the transferee.

Subpart C—Working with Communities and States

§ 174.6 LRA and the redevelopment plan.

(a) The LRA should have broad-based membership, including, but not limited to, representatives from those jurisdictions with zoning authority over the property. Generally, there will be one recognized LRA per installation.

(b) The LRA should focus primarily on developing a comprehensive redevelopment plan based upon local needs. The plan should recommend land uses based upon an exploration of feasible reuse alternatives. If applicable, the plan should consider notices of interest received under a base closure law. This section shall not be construed to require a plan that is enforceable under state and local land use laws, nor is it intended to create any exemption from such laws.

(c)(1) The Secretary concerned will develop a disposal plan and, to the extent practicable, complete the appropriate environmental documentation no later than 12 months after receipt of the redevelopment plan. The redevelopment plan will be used as part of the proposed Federal action in conducting environmental analyses required under NEPA.

(2) In the event there is no LRA recognized by DoD or if a redevelopment plan is not received from the LRA within 9 months from the date referred to in section 2905(b)(7)(F)(iv) of Pub. L. 101–510, (unless an extension of time has been granted by the Deputy Under Secretary of Defense (Installations and Environment)), the Secretary concerned shall, after required consultation with the governor and heads of local governments, proceed with the disposal of property under applicable property disposal and environmental laws and regulations.

Subpart D—Real Property

§ 174.7 Retention for DoD Component use and transfer to other Federal agencies.

(a) To speed the economic recovery of communities affected by closures and

realignments, the Department of Defense will identify DoD and Federal interests in real property at closing and realigning installations as quickly as possible. The Secretary concerned shall identify such interests. The Secretary concerned will keep the LRA informed of these interests. This section establishes a uniform process, with specified timelines, for identifying real property that is available for use by DoD Components (which for purposes of this section includes the United States Coast Guard) or is excess to the needs of the Department of Defense and available for use by other Federal agencies, and for the disposal of surplus property for various purposes.

(b) The Secretary concerned should consider LRA input, if provided, in making determinations on the retention of property (location and size of cantonment area).

(c) Within one week of the date of approval of the closure or realignment, the Secretary concerned shall issue a notice of availability to the DoD Components and other Federal agencies covering closing and realigning installation buildings and property available for transfer to the DoD Components and other Federal agencies. The notice of availability should describe the property and buildings available for transfer. Withdrawn public domain lands which the Secretary of the Interior has determined are suitable for return to the jurisdiction of the Department of the Interior (DoI) will not be included in the notice of availability.

(d) To obtain consideration of a requirement for such available buildings and property, a DoD Component or Federal agency is required to provide a written, firm expression of interest for buildings and property within 30 days of the date of the notice of availability. An expression of interest must explain the intended use and the corresponding requirement for the buildings and property.

(e)(1) Within 60 days of the date of the notice of availability, the DoD Component or Federal agency expressing interest in buildings or property must submit an application for transfer of such property to a Military Department or Federal agency. In the case of a DoD Component that would normally, under the circumstances, obtain its real property needs from the Military Department disposing of the real property, the application should indicate the property would not transfer to another Military Department but should be retained by the current Military Department for the use of the DoD Component. To the extent a different Military Department provides real property support for the requesting DoD Component, the application must indicate the concurrence of the supporting Military Department.

(2) Within 90 days of the notice of availability, the Federal Aviation Administration (FAA) should survey the air traffic control and air navigation equipment at the installation to determine what is needed to support the air traffic control, surveillance, and communications functions supported by the Military Department, and to identify the facilities needed to support the National Airspace System. FAA requests for property to manage the National Airspace System will not be governed by paragraph (h) of this section. Instead, the FAA shall work directly with the Military Department to prepare an agreement to assume custody of the property necessary for control of the airspace being relinquished by the Military Department.

(f) The Secretary concerned will keep the LRA informed of the progress in identifying interests. At the same time, the LRA is encouraged to contact Federal agencies which sponsor public benefit conveyances for information and technical assistance. The Secretary concerned will provide to the LRA points of contact at the Federal agencies.

(g) DoD Components and Federal agencies are encouraged to discuss their plans and needs with the LRA, if an LRA exists. If an LRA does not exist, the consultation should be pursued with the governor or the heads of the local governments in whose jurisdiction the property is located. DoD Components and Federal agencies are encouraged to notify the Secretary concerned of the results of this consultation. The Secretary concerned, the Transition Coordinator, and the DoD Office of Economic Adjustment Project Manager are available to help

facilitate communication between the DoD Components and Federal agencies, and the LRA, governor, and heads of local governments.

(h) An application for property from a DoD Component or Federal agency must contain the following information:

(1) A completed GSA Form 1334, *Request for Transfer* (for requests from DoD Components, a DD Form 1354 will be used). This must be signed by the head of the Component or agency requesting the property. If the authority to acquire property has been delegated, a copy of the delegation must accompany the form;

(2) A statement from the head of the requesting Component or agency that the request does not establish a new program (*i.e.*, one that has never been reflected in a previous budget submission or Congressional action);

(3) A statement that the requesting Component or agency has reviewed its real property holdings and cannot satisfy its requirement with existing property. This review must include all property under the requester's accountability, including permits to other Federal agencies and outleases to other organizations;

(4) A statement that the requested property would provide greater long-term economic benefits for the program than acquisition of a new facility or other property;

(5) A statement that the program for which the property is requested has long-term viability;

(6) A statement that considerations of design, layout, geographic location, age, state of repair, and expected maintenance costs of the requested property clearly demonstrate that the transfer will prove more economical over a sustained period of time than acquiring a new facility;

(7) A statement that the size of the property requested is consistent with the actual requirement;

(8) A statement that fair market value reimbursement to the Military Department will be made at the later of January of 2008, or at the time of transfer, unless this obligation is waived by the Office of Management and Budget and the Secretary concerned, or a public law specifically provides for a non-reimbursable transfer (this requirement does not apply to requests from DoD Components);

(9) A statement that the requesting DoD Component or Federal agency agrees to accept the care and custody costs for the property on the date the property is available for transfer, as determined by the Secretary concerned; and

(10) A statement that the requesting agency agrees to accept transfer of the property in its existing condition, unless this obligation is waived by the Secretary concerned.

(i) The Secretary concerned will make a decision on an application from a DoD Component or Federal agency based upon the following factors:

(1) The requirement must be valid and appropriate;

(2) The proposed use is consistent with the highest and best use of the property;

(3) The proposed transfer will not have an adverse impact on the transfer of any remaining portion of the installation;

(4) The proposed transfer will not establish a new program or substantially increase the level of a Component's or agency's existing programs;

(5) The application offers fair market value for the property, unless waived;

(6) The proposed transfer addresses applicable environmental responsibilities to the satisfaction of the Secretary concerned; and

(7) The proposed transfer is in the best interest of the Government.

(j) When there is more than one acceptable application for the same building or property, the Secretary concerned shall consider, in the following order—

(1) The need to perform the national defense missions of the Department of Defense and the Coast Guard;

(2) The need to support the homeland defense mission; and

(3) The LRA's comments as well as other factors in the determination of highest and best use.

(k) If the Federal agency does not meet its commitment under paragraph (h)(8) of this section to provide the required reimbursement, and the requested property has not yet been

transferred to the agency, the requested property will be declared surplus and disposed of in accordance with the provisions of this part.

(l) Closing or realigning installations may contain ''public domain lands'' which have been withdrawn by the Secretary of the Interior from operation of the public land laws and reserved for use by the Department of Defense. Lands deemed suitable for return to the public domain are not real property governed by title 40, United States Code, and are not governed by the property management and disposal provisions of a base closure law. Public domain lands are under the jurisdiction of the Secretary of the Interior and administered by the Bureau of Land Management (BLM) unless the Secretary of the Interior has withdrawn the lands and reserved them for another Federal agency's use.

(1) The Secretary concerned will provide the BLM with information about which, if any, public domain lands will be affected by the installation's closure or realignment.

(2) The BLM will review the information to determine if any installations contain withdrawn public domain lands. The BLM will review its land records to identify any withdrawn public domain lands at the closing installations. Any records discrepancies between the BLM and Military Departments should be resolved. The BLM will notify the Secretary concerned as to the final agreed upon withdrawn and reserved public domain lands at an installation.

(3) Upon agreement as to what withdrawn and reserved public domain lands are affected at closing installations, the BLM will initiate a screening of DoI agencies to determine if these lands are suitable for programs of the Secretary of the Interior.

(4) The Secretary concerned will transmit a Notice of Intent to Relinquish (see 43 CFR Part 2370) to the BLM as soon as it is known that there is no DoD Component interest in reusing the public domain lands. The BLM will complete the suitability determination screening process within 30 days of receipt of the Secretary's Notice of Intent to Relinquish. If a DoD Component is approved to reuse the public domain lands, the BLM will be notified and BLM will determine if the current authority for military use of these lands needs to be modified or amended.

(5) If BLM determines the land is suitable for return, it shall notify the Secretary concerned that the intent of the Secretary of the Interior is to accept the relinquishment of the land by the Secretary concerned.

(6) If BLM determines the land is not suitable for return to the DoI, the land should be disposed of pursuant to base closure law.

(m) The Secretary concerned should make a surplus determination within six (6) months of the date of approval of closure or realignment, and shall inform the LRA of the determination. If requested by the LRA, the Secretary may postpone the surplus determination for a period of no more than six (6) additional months after the date of approval if the Secretary determines that such postponement is in the best interests of the communities affected by the closure or realignment.

(1) In unusual circumstances, extensions beyond six months can be granted by the Deputy Under Secretary of Defense (Installations and Environment).

(2) Extensions of the surplus determination should be limited to the portions of the installation where there is an outstanding interest, and every effort should be made to make decisions on as much of the installation as possible, within the specified timeframes.

(n) Once the surplus determination has been made, the Secretary concerned shall follow the procedures in part 176 of this title.

(o) Following the surplus determination, but prior to the disposal of property, the Secretary concerned may, at the Secretary's discretion, withdraw the surplus determination and evaluate a Federal agency's late request for excess property.

(1) Transfers under this paragraph shall be limited to special cases, as determined by the Secretary concerned.

(2) Requests shall be made to the Secretary concerned, as specified under paragraphs (h) and (i) of this section, and the Secretary shall notify the LRA of such late request.

(3) Comments received from the LRA and the time and effort invested by the LRA in the planning process should be considered when the Secretary concerned is reviewing a late request.

§ 174.8 Screening for properties covered by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994, cross-reference.

The Departments of Defense and Housing and Urban Development have promulgated regulations to address state and local screening and approval of redevelopment plans for installations covered by the Base Closure Community Redevelopment and Homeless Assistance Act of 1994 (Pub. L. 103–421). The Department of Defense regulations can be found at part 176 of this title. The Department of Housing and Urban Development regulations can be found at 24 CFR part 586.

§ 174.9 Economic development conveyances.

(a) The Secretary concerned may transfer real property and personal property to the LRA for purposes of job generation on the former installation. Such a transfer is an Economic Development Conveyance (EDC).

(b) An LRA is the only entity eligible to receive property under an EDC.

(c) The Secretary concerned shall use the completed application, along with other relevant information, to decide whether to enter into an EDC with an LRA. An LRA may submit an EDC application only after it adopts a redevelopment plan. The Secretary concerned shall establish a reasonable time period for submission of an EDC application after consultation with the LRA.

(d) The application shall include:

(1) A copy of the adopted redevelopment plan.

(2) A project narrative including the following:

(i) A general description of the property requested.

(ii) A description of the intended uses.

(iii) A description of the economic impact of closure or realignment on the local community.

(iv) A description of the economic condition of the community and the prospects for redevelopment of the property.

(v) A statement of how the EDC is consistent with the overall redevelopment plan.

(3) A description of how the EDC will contribute to short- and long-term job generation on the installation, including the projected number and type of new jobs it will assist in generating.

(4) A business/operational plan for development of the EDC parcel, including at least the following elements:

(i) A development timetable, phasing schedule, and cash flow analysis.

(ii) A market and financial feasibility analysis describing the economic viability of the project, including an estimate of net proceeds over the planned life of the redevelopment project, but in no event for less than fifteen years after the initial transfer of property, and the proposed consideration or payment to the Department of Defense. The proposed consideration should describe the methodology for payment and include draft documents or instruments proposed to secure such payment.

(iii) A cost estimate and justification for infrastructure and other investments needed for redevelopment of the EDC parcel.

(iv) A proposed local investment and financing plan for the development.

(5) A statement describing why an EDC will more effectively enable achievement of the job generation objectives of the redevelopment plan regarding the parcel requested for conveyance than other federal real property disposal authorities.

(6) Evidence of the LRA's legal authority to acquire and dispose of the property.

(7) Evidence that:

(i) The LRA has authority to perform the actions required of it, pursuant to the terms of the EDC, and

(ii) That the officers submitting the application and making the representations contained therein on behalf of the LRA have the authority to do so.

(8) A commitment from the LRA that the proceeds from any sale or lease of the EDC parcel (or any portion thereof) received by the LRA during at least the first seven years after the date of the initial transfer of property, except

proceeds that are used to pay consideration to the Secretary concerned under paragraph (h) of this section, shall be used to support economic redevelopment of, or related to, the installation. In the case of phased transfers, the Secretary concerned shall require that this commitment apply during at least the first seven years after the date of the last transfer of property to the LRA. For the purposes of calculating this reinvestment period, a lease in furtherance of conveyance shall constitute a transfer. The use of proceeds to pay for, or offset the costs of, public investment on or related to the installation for any of the following purposes shall be considered a use to support the economic redevelopment of, or related to, the installation—

(i) Road construction;

(ii) Transportation management facilities;

(iii) Storm and sanitary sewer construction;

(iv) Police and fire protection facilities and other public facilities;

(v) Utility construction;

(vi) Building rehabilitation;

(vii) Historic property preservation;

(viii) Pollution prevention equipment or facilities;

(vix) Demolition;

(x) Disposal of hazardous materials and hazardous waste generated by demolition;

(xi) Landscaping, grading, and other site or public improvements; and

(xii) Planning for or the marketing of the development and reuse of the installation.

(9) A commitment from the LRA to execute the agreement for transfer of the property and accept control of the property within a reasonable time, as determined by the Secretary concerned after consultation with the LRA, after the date of the property disposal record of decision. The determination of reasonable time should take account of the ability of the Secretary concerned to provide the deed covenants, or covenant deferral, provided for under section 120(h)(3) and (4) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (42 U.S.C. 9620(h)(3) and (4)).

(e) The Secretary concerned shall review the application and, to the extent practicable, provide a preliminary determination within 30 days of receipt as to whether the Military Department can accept the application for negotiation of terms and conditions, subject to the following findings:

(1) The LRA submitting the application has been duly recognized by the DoD Office of Economic Adjustment;

(2) The application is complete. With respect to the elements of the application specified in paragraph (d)(6) and (d)(7)(i) of this section, the Secretary concerned may accept the application for negotiation of terms and conditions without this element, provided the Secretary concerned is satisfied that the LRA has a reasonable plan in place to provide the element prior to transfer of the property; and

(3) The proposed EDC will more effectively enable achievement of the job generation objectives of the redevelopment plan regarding the parcel requested than the application of other federal real property disposal authorities.

(f) Upon acceptance of an EDC application, the Secretary concerned shall determine if the proposed terms and conditions are fair and reasonable. The Secretary concerned may propose and negotiate any alternative terms or conditions that the Secretary considers necessary. The following factors shall be considered, as appropriate, in evaluating the terms and conditions of the proposed transfer, including price, time of payment, and other relevant methods of compensation to the Federal government:

(1) Local economic conditions and adverse impact of closure or realignment on the region and potential for economic recovery through an EDC.

(2) Extent of short- and long-term job generation.

(3) Consistency with the entire redevelopment plan.

(4) Financial feasibility of the development and proposed consideration, including financial and market analysis and the need and extent of proposed infrastructure and other investments.

(5) Extent of state and local investment, level of risk incurred, and the LRA's ability to implement the redevelopment plan. Higher risk assumed and investment made by the LRA

should be recognized with more favorable terms and conditions, to encourage local investment to support job generation.

(6) Current local and regional real estate market conditions, including market demand for the property.

(7) Incorporation of other Federal agency interests and concerns, including the applicability of other Federal surplus property disposal authorities.

(8) Economic benefit to the Federal Government, including protection and maintenance cost savings, environmental clean-up savings, and anticipated consideration from the transfer.

(9) Compliance with applicable Federal, state, interstate, and local laws and regulations.

(g) The Secretary concerned shall negotiate the terms and conditions of each transaction with the LRA. The Secretary concerned shall have the discretion and flexibility to enter into agreements that specify the form of payment and the schedule.

(h)(1) The Secretary concerned may accept, as consideration, any combination of the following:

(i) Cash, including a share of the revenues that the local redevelopment authority receives from third-party buyers or lessees from sales and leases of the conveyed property (*i.e.*, a share of the revenues generated from the redevelopment project);

(ii) Goods and services;

(iii) Real property and improvements; and

(iv) Such other consideration as the Secretary considers appropriate.

(2) The consideration may be accepted over time.

(3) All cash consideration for property at a military installation where the date of approval of closure or realignment is before January 1, 2005, shall be deposited in the account established under Section 2906(a) of the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Pub. L. 101–510; 10 U.S.C. 2687 note). All cash consideration for property at a military installation where the date of approval of closure or realignment is after January 1, 2005, shall be deposited in the account established under Section 2906A(a) of the Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Pub. L. 101–510; 10 U.S.C. 2687 note).

(4) The Secretary concerned may use in-kind consideration received from an LRA at any location under control of the Secretary concerned.

(i) The LRA and the Secretary concerned may agree on a schedule for sale of parcels and payment participation.

(j) Additional provisions shall be incorporated in the conveyance documents to protect the Department's interest in obtaining the agreed upon consideration, which may include such items as predetermined release prices, accounting standards, or other appropriate clauses designed to ensure payment and protect against fraudulent transactions. Every agreement for an EDC shall contain provisions allowing the Secretary concerned to recoup from the LRA such portion of the proceeds from a sale or lease by the LRA as the Secretary concerned determines appropriate if the LRA does not use the proceeds to support economic redevelopment of or related to the installation during the period specified in paragraph (d)(8) of this section. The Secretary concerned and an LRA may enter into a mutually agreed participation agreement which may include input by the Secretary concerned on the LRA's disposal of EDC parcels.

(k) The Secretary concerned should take account of property value but is not required to formally determine the estimated fair market value of the property for any EDC. The consideration negotiated should be based on a business plan and development proforma that assumes the uses in the redevelopment plan. The Secretary concerned may determine the nature and extent of any additional information needed for purposes of an informed negotiation. This may include, but is not limited to, an economic and market analysis, construction estimates, a real estate pro forrma analysis, or an appraisal. To the extent not prohibited by law, information used should be shared with the LRA.

(l) After evaluating the application based upon the criteria specified in

paragraph (f) of this section, and negotiating terms and conditions, the Secretary concerned shall present the proposed EDC to the Deputy Under Secretary of Defense (Installations and Environment) for formal coordination before announcing approval of the application.

[76 FR 70880, Nov. 16, 2011]

§ 174.10 [Reserved]

§ 174.11 Leasing of real property to non-Federal entities.

(a) Leasing of real property to non-Federal entities prior to the final disposition of closing and realigning installations may facilitate state and local economic adjustment efforts and encourage economic redevelopment, but the Secretary concerned will always concentrate on the final disposition of real and personal property.

(b) In addition to leasing property at fair market value, to assist local redevelopment efforts the Secretary concerned may also lease real and personal property, pending final disposition, for less than fair market value if the Secretary determines that:

(1) A public interest will be served as a result of the lease; and,

(2) The fair market value of the lease is unobtainable or not compatible with such public benefit.

(c) Pending final disposition of an installation, the Secretary concerned may grant interim leases which are short-term leases that make no commitment for future use or ultimate disposal. When granting an interim lease, the Secretary will generally lease to the LRA but can lease property directly to other entities. If the interim lease (after complying with NEPA) is entered into prior to completion of the final disposal decisions, the term may be for up to five years, including options to renew, and may contain restrictions on use. Leasing should not delay the final disposal of the property. After completion of the final disposal decisions, the term of the lease may be longer than five years.

(d) If the property is leased for less than fair market value to the LRA and the interim lease permits the property to be subleased, the interim lease shall provide that rents from the subleases will be applied by the lessee to the protection, maintenance, repair, improvement, and costs related to the property at the installation consistent with 10 U.S.C. 2667.

§ 174.12 Leasing of transferred real property by Federal agencies.

(a) The Secretary concerned may transfer real property that is still needed by a Federal agency (which for purposes of this section includes DoD Components) to an LRA provided the LRA agrees to lease the property to the Federal agency in accordance with all statutory and regulatory guidance.

(b) The decision whether to transfer property pursuant to such a leasing arrangement rests with the Secretary concerned. However, a Secretary shall only transfer property subject to such a leasing arrangement if the Federal agency that needs the property agrees to the leasing arrangement.

(c) If the subject property cannot be transferred pursuant to such a leasing arrangement (*e.g.*, the relevant Federal agency prefers ownership, the LRA and the Federal agency cannot agree on terms of the lease, or the Secretary concerned determines that such a lease would not be in the Federal interest), such property shall remain in Federal ownership unless and until the Secretary concerned determines that it is surplus.

(d) If a building or structure is proposed for transfer pursuant to this section, that which is leased by the Federal agency may be all or a portion of that building or structure.

(e) Transfers pursuant to this section must be to an LRA.

(f) Either existing Federal tenants or Federal agencies desiring to locate onto the property after operational closure may make use of such a leasing arrangement. The Secretary concerned may not enter into such a leasing arrangement unless:

(1) In the case of a Defense Agency, the Secretary concerned is acting in an Executive Agent capacity on behalf of the Agency that certifies that such a leasing arrangement is in the interest of that Agency; or,

(2) In the case of a Military Department, the Secretary concerned certifies that such a leasing arrangement

is in the best interest of the Military Department and that use of the property by the Military Department is consistent with the obligation to close or realign the installation in accordance with the recommendations of the Defense Base Closure and Realignment Commission.

(g) Property eligible for such a leasing arrangement is not surplus because it is still needed by the Federal Government. Even though the LRA would not otherwise have to include such property in its redevelopment plan, it should include the property in its redevelopment plan anyway to take into account the planned Federal use of such property.

(h) The terms of the LRA's lease to the Federal Government should afford the Federal agency rights as close to those associated with ownership of the property as is practicable. The requirements of the General Services Administration (GSA) Federal Acquisition Regulation (48 CFR part 570) are not applicable to the lease, but provisions in that regulation may be used to the extent they are consistent with this part. The terms of the lease are negotiable subject to the following:

(1) The lease shall be for a term of no more than 50 years, but may provide for options for renewal or extension of the term at the request of the Federal Government. The lease term should be based on the needs of the Federal agency.

(2) The lease, or any renewals or extensions thereof, shall not require rental payments.

(3) Notwithstanding paragraph (h)(2) of this section, if the lease involves a substantial portion of the installation, the Secretary concerned may obtain facility services for the leased property and common area maintenance from the LRA or the LRA's assignee as a provision of the lease.

(A) Such services and common area maintenance shall be provided at a rate no higher than the rate charged to non-Federal tenants of the transferred property.

(B) Such services and common area maintenance shall not include—

(*i*) Municipal services that a State or local government is required by law to provide to all landowners in its jurisdiction without direct charge, including police protection; or

(*ii*) Firefighting or security-guard functions.

(C) The Federal agency may be responsible for services such as janitorial, grounds keeping, utilities, capital maintenance, and other services normally provided by a landlord. Acquisition of such services by the Federal agency is to be accomplished through the use of Federal Acquisition Regulation procedures or otherwise in accordance with applicable statutory and regulatory requirements.

(4) The lease shall include a provision prohibiting the LRA from transferring fee title to another entity during the term of the lease, other than one of the political jurisdictions that comprise the LRA, without the written consent of the Federal agency occupying the leased property.

(5)(i) The lease shall include an option specifying that if the Federal agency no longer needs the property before the expiration of the term of the lease, the remainder of the lease term may be satisfied by the same or another Federal agency that needs property for a similar use. (''Similar use'' is a use that is comparable to or essentially the same as the use under the original lease, as determined by the Secretary concerned.)

(ii)(B) If the tenant is a DoD Component, before notifying GSA of the availability of the leasehold, it shall determine whether any other DoD Component has a requirement for the leasehold; in doing so, it shall consult with the LRA. If another DoD Component has a requirement for the leasehold, that DoD Component shall be allowed to assume the leasehold for the remainder of its term. If no DoD Component has a requirement for the leasehold, the tenant shall notify GSA in accordance with paragraph (h)(5)(ii)(A) of this section.

(A) The Federal tenant shall notify the GSA of the availability of the leasehold. GSA will then decide whether to exercise this option after consulting with the LRA or other property owner. The GSA shall have 60 days from the date of notification in which to identify a Federal agency to serve out the term of the lease and to notify

the LRA or other property owner of the new tenant. If the GSA does not notify the LRA or other property owner of a new tenant within such 60 days, the leasehold shall terminate on a date agreed to by the Federal tenant and the LRA or other property owner.

(B) If the GSA decides not to exercise this option after consulting with the LRA or other property owner, the leasehold shall terminate on a date agreed to by the Federal tenant and the LRA or other property owner.

(6) The terms of the lease shall provide that the Federal agency may repair and improve the property at its expense after consultation with the LRA.

(i) Property subject to such a leasing arrangement shall be conveyed in accordance with the existing EDC procedures. The LRA shall submit the following in addition to the application requirements outlined in §174.9(e) of this part:

(1) A description of the parcel or parcels the LRA proposes to have transferred to it and then to lease to a Federal agency;

(2) A written statement signed by an authorized representative of the Federal agency that it agrees to accept the lease of the property; and,

(3) A statement explaining why such a leasing arrangement is necessary for the long-term economic redevelopment of the installation property.

(j) The exact amount of consideration, or the formula to be used to determine that consideration, as well as the schedule for payment of consideration must be agreed upon in writing before transfer pursuant to this section.

Subpart E—Personal Property

§174.13 Personal property.

(a) This section outlines procedures to allow transfer of personal property to the LRA for the effective implementation of a redevelopment plan. Personal property does not include fixtures.

(b) The Secretary concerned, supported by DoD Components with personal property on the installation, will take an inventory of the personal property, including its condition, within 6 months after the date of approval of closure or realignment. This inventory will be limited to the personal property located on the real property to be disposed of by the Military Department. The inventory will be taken in consultation with LRA officials. If there is no LRA, the Secretary concerned shall consult with the local government in whose jurisdiction the installation is wholly located, or a local government agency or a State government agency designated for that purpose by the Governor of the State. Based on these consultations, the installation commander will determine the items or category of items that have the potential to enhance the reuse of the real property.

(c) Except for property subject to the exemptions in paragraph (e) of this section, personal property with potential to enhance the reuse of the real property shall remain at an installation being closed or realigned until the earlier of:

(1) One week after the Secretary concerned receives the redevelopment plan;

(2) The date notified by the LRA that there will be no redevelopment plan;

(3) 24 months after the date of approval of the closure or realignment of the installation; or

(4) 90 days before the date of the closure or realignment of the installation.

(d) National Guard property under the control of the United States Property and Fiscal Officer is subject to inventory and may be made available for redevelopment planning purposes.

(e) Personal property may be removed upon approval of the installation commander or higher authority, as prescribed by the Secretary concerned, after the inventory required in paragraph (b) of this section has been sent to the LRA, when:

(1) The property is required for the operation of a unit, function, component, weapon, or weapons system at another installation;

(2) The property is uniquely military in character and is likely to have no civilian use (other than use for its material content or as a source of commonly used components). This property consists of classified items; nuclear, biological, and chemical items; weapons and munitions; museum property or

items of significant historic value that are maintained or displayed on loan; and similar military items;

(3) The property is not required for the reutilization or redevelopment of the installation (as jointly determined by the Secretary concerned and the LRA);

(4) The property is stored at the installation for purposes of distribution (including spare parts or stock items) or redistribution and sale (DoD excess/surplus personal property). This property includes materials or parts used in a manufacturing or repair function but does not include maintenance spares for equipment to be left in place;

(5) The property meets known requirements of an authorized program of a DoD Component or another Federal agency that would have to purchase similar items, and is the subject of a written request by the head of the DoD Component or other Federal agency. If the authority to acquire personal property has been delegated, a copy of the delegation must accompany the request. (For purposes of this paragraph, ''purchase'' means the DoD Component or Federal agency intends to obligate funds in the current quarter or next six fiscal quarters.) The DoD Component or Federal agency must pay packing, crating, handling, and transportation charges associated with such transfers of personal property;

(6) The property belongs to a nonappropriated fund instrumentality (NAFI) of the Department of Defense; separate arrangements for communities to purchase such property are possible and may be negotiated with the Secretary concerned;

(7) The property is not owned by the Department of Defense, *i.e.*, it is owned by a Federal agency outside the Department of Defense or by non-Federal persons or entities such as a State, a private corporation, or an individual; or,

(8) The property is needed elsewhere in the national security interest of the United States as determined by the Secretary concerned. This authority may not be re-delegated below the level of an Assistant Secretary. In exercising this authority, the Secretary may transfer the property to any DoD Component or other Federal agency.

(f) Personal property not subject to the exemptions in paragraph (e) of this section may be conveyed to the LRA as part of an EDC for the real property if the Secretary concerned makes a finding that the personal property is necessary for the effective implementation of the redevelopment plan.

(g) Personal property may also be conveyed separately to the LRA under an EDC for personal property. This type of EDC can be made if the Secretary concerned determines that the transfer is necessary for the effective implementation of a redevelopment plan with respect to the installation. Such determination shall be based on the LRA's timely application for the property, which should be submitted to the Secretary upon completion of the redevelopment plan. The application must include the LRA's agreement to accept the personal property after a reasonable period and will otherwise comply with the requirements of §§174.9 and 174.10 of this part. The transfer will be subject to reasonable limitations and conditions on use.

(h) Personal property that is not needed by a DoD Component or a tenant Federal agency or conveyed to an LRA (or a state or local jurisdiction in lieu of an LRA), or conveyed as related personal property together with the real property, will be transferred to the Defense Reutilization and Marketing Office for disposal in accordance with applicable regulations.

(i) Useful personal property not needed by the Federal Government and not qualifying for transfer to the LRA under an EDC may be donated to the community or LRA through the appropriate State Agency for Surplus Property (SASP) under 41 CFR part 102–37 surplus program guidelines. Personal property donated under this procedure must meet the usage and control requirements of the applicable SASP.

Subpart F—Maintenance and Repair

§ 174.14 Maintenance and repair.

(a) Facilities and equipment located on installations being closed are often important to the eventual reuse of the installation. This section provides maintenance procedures to preserve

and protect those facilities and items of equipment needed for reuse in an economical manner that facilitates installation redevelopment.

(b) In order to ensure quick reuse, the Secretary concerned, in consultation with the LRA, will establish initial levels of maintenance and repair needed to aid redevelopment and to protect the property for the time periods set forth in paragraph (c) of this section. Where agreement between the Secretary and the LRA cannot be reached, the Secretary will determine the required levels of maintenance and repair and its duration. In no case will these initial levels of maintenance:

(1) Exceed the standard of maintenance and repair in effect on the date of approval of closure or realignment;

(2) Be less than maintenance and repair required to be consistent with Federal Government standards for excess and surplus properties as provided in the Federal Management Regulations of the GSA, 41 CFR part 102;

(3) Be less than the minimum levels required to support the use of such facilities or equipment for nonmilitary purposes; or,

(4) Require any property improvements, including construction, alteration, or demolition, except when the demolition is required for health, safety, or environmental purposes, or is economically justified in lieu of continued maintenance expenditures.

(c) Unless the Secretary concerned determines that it is in the national security interest of the United States, the levels of maintenance and repair specified in paragraph (b) of this section shall not be changed until the earlier of:

(1) One week after the Secretary concerned receives the redevelopment plan;

(2) The date notified by the LRA that there will be no redevelopment plan;

(3) 24 months after the date of approval of the closure or realignment of the installation; or

(4) 90 days before the date of the closure or realignment of the installation.

(d) The Secretary concerned may extend the time period for the initial levels of maintenance and repair for property still under the Secretary's control for an additional period, if the Secretary determines that the LRA is actively implementing its redevelopment plan, and such levels of maintenance are justified.

(e) Once the time period for the initial or extended levels of maintenance and repair expires, the Secretary concerned will reduce the levels of maintenance and repair to levels consistent with Federal Government standards for excess and surplus properties as provided in the Federal Management Regulations of the GSA, except in the case of facilities still being used to perform a DoD mission.

Subpart G—Environmental Matters

§ 174.15 Indemnification under Section 330 of the National Defense Authorization Act for Fiscal Year 1993.

Section 330 of the National Defense Authorization Act for Fiscal Year 1993, Pub. L. 102–484, as amended, provides for indemnification of transferees of closing Department of Defense properties under circumstances specified in that statute. The authority to implement this provision of law has been delegated by the Secretary of Defense to the General Counsel of the Department of Defense; therefore, this provision of law shall only be referred to or recited in any deed, sales agreement, bill of sale, lease, license, easement, right-of-way, or transfer document for real or personal property after obtaining the written concurrence of the Deputy General Counsel (Environment and Installations), Office of the General Counsel, Department of Defense.

§ 174.16 Real property containing explosive or chemical agent hazards.

The DoD Component controlling real property known to contain or suspected of containing explosive or chemical agent hazards from past DoD military munitions-related or chemical warfare-related activities shall, prior to transfer of the property out of Department of Defense control, obtain the DoD Explosives Safety Board's approval of measures planned to ensure protectiveness from such hazards, in accordance with DoD Directive 6055.9E, *Explosives Safety Management and the DoD Explosives Safety Board.*

§ 174.17 NEPA.

At installations subject to this part, NEPA analysis shall comply with the promulgated NEPA regulations of the Military Department exercising real property accountability for the installation, including any requirements relating to responsibility for funding the analysis. See 32 CFR parts 651 (for the Army), 775 (for the Navy), and 989 (for the Air Force). Nothing in this section shall be interpreted as releasing a Military Department from complying with its own NEPA regulation.

§ 174.18 Historic preservation.

(a) The transfer, lease, or sale of National Register-eligible historic property to a non-Federal entity at installations subject to this part may constitute an ''adverse effect'' under the regulations implementing the National Historic Preservation Act (36 CFR 800.5(a)(2)(vii)). One way of resolving this adverse effect is to restrict the use that may be made of the property subsequent to its transfer out of Federal ownership or control through the imposition of legally enforceable restrictions or conditions. The Secretary concerned may include such restrictions or conditions (typically a real property interest in the form of a restrictive covenant or preservation easement) in any deed or lease conveying an interest in historic property to a non-Federal entity. Before doing so, the Secretary should first consider whether the historic character of the property can be protected effectively through planning and zoning actions undertaken by units of State or local government; if so, working with such units of State or local government to protect the property through these means is preferable to encumbering the property with such a covenant or easement.

(b) Before including such a covenant or easement in a deed or lease, the Secretary concerned shall consider—

(1) Whether the jurisdiction that encompasses the property authorizes such a covenant or easement; and

(2) Whether the Secretary can give or assign to a third party the responsibility for monitoring and enforcing such a covenant or easement.

PART 175—INDEMNIFICATION OR DEFENSE, OR PROVIDING NOTICE TO THE DEPARTMENT OF DEFENSE, RELATING TO A THIRD–PARTY ENVIRONMENTAL CLAIM

Sec.

175.1 Purpose.
175.2 Applicability.
175.3 Definitions.
175.4 Responsibilities.
175.5 Notice to DoD relating to a third-party claim.
175.6 Filing a request for indemnification or defense.

AUTHORITY: 10 U.S.C. 113, 5 U.S.C. 301, section 330 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102–484, October 23, 1992, 106 Stat. 2371, as amended, and section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. 106–398, October 30, 2000, 1014 Stat. 1654A–350, as amended.

SOURCE: 83 FR 34475, July 20, 2018, unless otherwise noted.

§ 175.1 Purpose.

This part describes the process for filing a request for indemnification or defense, or providing proper notice to DoD, of a third-party claim pursuant to section 330 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102–484, October 23, 1992, 106 Stat. 2371, as amended (hereafter ''section 330''), or section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law 106–398, October 30, 2000, 1014 Stat. 1654A–350, as amended (hereafter ''section 1502(e)''). This process identifies the minimum information that a request for indemnification or defense or notice to DoD of a third-party claim for indemnification must include, where that information must be sent, how to make such a request or provide such a notice, the time limits that apply to such a request or notice, and other requirements.

§ 175.2 Applicability.

(a) This part applies to—

(1) The Office of the General Counsel of the Department of Defense and the Military Departments.

(2) Any person or entity making a request for indemnification or defense, or providing notice to DoD, of a third-

party claim pursuant to section 330 or section 1502(e).

(b) In the case of a property that is subject to an earlier agreement containing different notification requirements, the requirement for notice to the Deputy General Counsel in sections 175.5 and 175.6 are in addition to those notification requirements.

(c) Nothing in this part alters the provisions of §174.15 of this title.

§ 175.3 Definitions.

Commercial delivery service. Federal Express or United Parcel Service, or other similar service that provides for delivery of packages directly from the sender to the recipient for a fee, but excluding the United States Postal Service (USPS).

Deputy General Counsel. The Deputy General Counsel (Environment, Energy, and Installations), Department of Defense.

Received. Actual physical receipt by the intended recipient.

Request. Any request for indemnification or defense made to the Department of Defense (DoD) by a requester pursuant to section 330 or section 1502(e).

Requester. A person or entity making a request pursuant to section 330 or section 1502(e). When the requester is acting by way of subrogation, the requester is subject to the same requirements and limitations as though it were the subrogor.

Section 330. Section 330 of the National Defense Authorization Act for Fiscal Year 1993, Public Law 102–484, October 23, 1992, 106 Stat. 2371, as amended.

Section 1502(e). Section 1502(e) of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Public Law 106–398, October 30, 2000, 114 Stat. 1654A–350. (This provision applies only to certain portions of the former Naval Ammunition Support Detachment on the island of Vieques, Puerto Rico.)

Third-party claim. A claim from a person or entity (other than the requester) to a requester resulting from a suit, claim, demand or action, liability, judgment, cost or other fee, demanding, seeking, or otherwise requiring that the requester pay an amount, take an action, or incur a liability for alleged personal injury or property damage and such payment, action, or liability is eligible for indemnification or defense pursuant to section 330 or section 1502(e). A third-party claim may consist of a notice, letter, order, compliance advisory, compliance agreement, or similar direction from a governmental regulatory authority exercising its authority to regulate the release or threatened release of any hazardous substance, pollutant or contaminant, or petroleum or petroleum derivative if the notice, letter, order, compliance advisory, compliance agreement, or similar notification imposes, directs, or demands requirements for environmental actions or asserts damages related thereto that are eligible for indemnification or defense pursuant to section 330 or section 1502(e).

§ 175.4 Responsibilities.

(a) The General Counsel of the Department of Defense has been delegated the authorities and responsibilities of the Secretary of Defense under section 330 and section 1502(e), with certain limitations as to re-delegation.

(b) The General Counsel has re-delegated the authority and responsibility to adjudicate requests for indemnification or defense and to process notices to DoD of a third-party claim under section 330 and section 1502(e) to the Deputy General Counsel or, when the position of Deputy General Counsel is vacant, the acting Deputy General Counsel. The authority to acknowledge receipt of a request has been delegated to an Associate General Counsel under the Deputy General Counsel.

§ 175.5 Notice to DoD relating to a third-party claim.

(a) *Where to file a notice to DoD of a third-party claim.* (1) Notice to DoD of receipt of a third-party claim, or intent to enter into, agree to, settle, or solicit such a claim, must be received by the Deputy General Counsel at the following address: Deputy General Counsel, Environment, Energy, and Installations, 1600 Defense Pentagon, Room 3B747, Washington, DC 20301–1600, (703–693–4895) or (703–692–2287).

(2) Delivering or otherwise filing a notice of a third-party claim with any other office or location will not constitute proper notice for purposes of this part. Requesters should be aware that all delivery services, and particularly that of the USPS, to the Pentagon can be significantly delayed for security purposes and they should plan accordingly in order to meet any required filing deadlines under this part; use of a commercial delivery service may reduce the delay.

(b) *Individual notices.* A notice to DoD of a third-party claim must be filed separately for each person or entity that is filing the notice. Notices may not be filed jointly for a group, a class, or for multiple persons or entities.

(c) *Means of filing a notice of a third-party claim.* A notice of a third-party claim must be submitted in writing by mail through the USPS or by a commercial delivery service. While the Deputy General Counsel will affirmatively acknowledge receipt of a notice of a third-party claim, it is recommended that a requester, whether using the USPS or a commercial delivery service, mail its notice by registered or certified mail, return receipt requested, or equivalent proof of delivery.

(d) *Information to be included in a notice to DoD of a third-party claim.* A notice to DoD of a third-party claim must include, at a minimum, the following information:

(1) A complete copy of the third-party claim, or, if not presented in writing, a complete summary of the claim, with the names of officers, employees, or agents with knowledge of any information that may be relevant to the claim or any potential defenses. The third-party claim may consist of a summons and complaint or, in the case of a third-party claim from a governmental regulatory authority, a notice, letter, order, compliance advisory, compliance agreement, or similar notification.

(2) A complete copy of all pertinent records, including any deed, sales agreement, bill of sale, lease, license, easement, right-of-way, or transfer document for the facility for which the third-party claim is made.

(3) If the requester is not the first transferee from DoD, a complete copy of all intervening deeds, sales agreements, bills of sale, leases, licenses, easements, rights-of-way, or other transfer documents between the original transfer from DoD and the transfer to the current owner. If the requester is a lender who has made a loan to a person or entity who owns, controls, or leases the facility for which the request for indemnification is made that is secured by said facility, complete copies of all promissory notes, mortgages, deeds of trust, assignments, or other documents evidencing such a loan by the requester.

(4) A complete copy of any insurance policies related to such facility.

(5) If the notice to DoD of a third-party claim is being made by a representative, agent, or attorney in fact or at law, proof of authority to make the notice on behalf of the requester.

(6) Evidence or proof of any claim, loss, or damage alleged to be suffered by the third-party claimant which the requester asserts is covered by section 330 or by section 1502(e).

(7) In the case where a requester intends to enter into, agree to, settle, or solicit a third-party claim, a description or copy of the proposed claim, settlement, or solicitation, as the case may be.

(8) To the extent that any environmental response action has been taken, the documentation supporting such response action and its costs included in the request for indemnification.

(9) To the extent that any environmental response action has been taken, a statement as to whether the remedial action is consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (part 300 of title 42, Code of Federal Regulations) or other applicable regulatory requirements.

(10) A complete copy of any claims made by the requester to any other entity related to the conditions on the property which are the subject of the claim, and any responses or defenses thereto or made to any third-party claims, including correspondence, litigation filings, consultant reports, and other information supporting a claim or defense.

(e) *Entry, inspection, and samples.* The requester must provide DoD a right of entry at reasonable times to any facility, establishment, place, or property under the requester's control which is the subject of or associated with the requester's notice of third-party claim and must allow DoD to inspect or obtain samples from that facility, establishment, place, or property.

(f) *Additional information.* The Deputy General Counsel will advise a requester in writing of any additional information that must be provided to defend against a claim. Failure to provide the additional information in a timely manner may result in denial of a request for indemnification or defense for lack of information to adjudicate the claim.

(g) *When to file a notice to DoD of a third-party claim.* (1) A requester must, within 15 days of receiving a third-party claim, file with DoD a notice of such claim in accordance with this part. Failure to timely file such a notice, if it in any way compromises the ability of DoD to defend against such a claim pursuant to section 330(c) or section 1502(e)(3), will result in denial of any subsequent request for indemnification or defense resulting from such a claim. Requesters who take action in compliance with any such third-party claim, or any part of such claim, without first providing DoD with a notice of such claim in accordance with this section do so at their own risk.

(2) A requester must, at least 30 days prior to the earlier of entering into, agreeing to, settling, or soliciting a third-party claim, file a notice to DoD of such intent in accordance with this part. Failure to file such a notice will compromise the ability of DoD to defend against such a claim pursuant to section 330(c) or section 1502(e)(3) and will result in denial of any subsequent request for indemnification or defense resulting from such a claim.

(3) A requester may, if it believes more immediate notice to DoD is desirable or less than all the information required by paragraph (d) of this section is immediately available, contact the Deputy General Counsel using the phone numbers in paragraph (a)(1) of this section. Any such contact does not constitute compliance with the requirements of paragraph (g)(1) or (2) of this section unless and until the Deputy General Counsel subsequently provides written confirmation that the notice constitutes such compliance. Such written confirmation may be provided by electronic means.

(h) *No implication from DoD action.* Any actions taken by DoD related to defending a claim do not constitute a decision by DoD that the requester is entitled to indemnification or defense.

(i) *Notice also constituting a request for indemnification or defense.* Notice of receipt of a third-party claim may also constitute a request for indemnification or defense if that notice complies with all applicable requirements for a request for indemnification or defense.

§ 175.6 Filing a request for indemnification or defense.

(a) *Where to file a request for indemnification or defense.* (1) In order to notify DoD in accordance with section 330(b)(1) or section 1502(e)(2)(A), a request for indemnification or defense pursuant to section 330 or section 1502(e) must be received by the Deputy General Counsel at the following address: Deputy General Counsel, Environment, Energy, and Installations, 1600 Defense Pentagon, Room 3B747, Washington, DC 20301–1600, (703–693–4895) or (703–692–2287).

(2) Delivering or otherwise filing a request for indemnification or defense with any other office or location will not constitute proper notice of a request for purposes of section 330(b)(1) or section 1502(e)(2)(A). Requesters should be aware that all delivery services, and particularly that of the USPS, to the Pentagon can be significantly delayed for security purposes and they should plan accordingly in order to meet any required filing deadlines under this part; use of a commercial delivery service may reduce the delay.

(b) *When to file a request for indemnification or defense.* A request for indemnification must be received by the Deputy General Counsel within two years after the claim giving rise to the request accrues. A request for defense must be received by the Deputy General Counsel in sufficient time to allow

the United States to provide the requested defense.

(c) *Means of filing a request for indemnification or defense.* A request for indemnification or defense must be submitted in writing by mail through the USPS or by a commercial delivery service. While the Deputy General Counsel will affirmatively acknowledge receipt of a request for indemnification or defense, it is recommended that a requester, whether using the USPS or a commercial delivery service, mail its request by registered or certified mail, return receipt requested, or equivalent proof of delivery.

(d) *Individual requests.* A request for indemnification or defense must be filed separately for each person or entity that is making the request. Requests may not be filed jointly for a group, a class, or for multiple persons or entities.

(e) *Information to be included in a request for indemnification or defense.* A request for indemnification or defense must include, at a minimum, the following information:

(1) A complete copy of the third-party claim, or, if not presented in writing, a complete summary of the claim, with the names of officers, employees, or agents with knowledge of any information that may be relevant to the claim or any potential defenses.

(2) A complete copy of all pertinent records, including any deed, sales agreement, bill of sale, lease, license, easement, right-of-way, or transfer document for the facility for which the request for indemnification or defense is made.

(3) If the requester is not the first transferee from DoD, a complete copy of all intervening deeds, sales agreements, bills of sale, leases, licenses, easements, rights-of-way, or other transfer documents between the original transfer from DoD and the transfer to the current owner. If the requester is a lender who has made a loan to a person or entity who owns, controls, or leases the facility for which the request for indemnification is made that is secured by said facility, complete copies of all promissory notes, mortgages, deeds of trust, assignments, or other documents evidencing such a loan by the requester.

(4) A complete copy of any insurance policies related to such facility.

(5) If the request for indemnification or defense is being made by a representative, agent, or attorney in fact or at law, proof of authority to make the request on behalf of the requester.

(6) Evidence or proof of any claim, loss, or damage covered by section 330 or by section 1502(e).

(7) In the case of a request for defense, a copy of the documents, such as a summons and complaint, or enforcement order, representing the matter against which the United States is being asked to defend.

(8) To the extent that any environmental response action has been taken, the documentation supporting such response action and its costs included in the request for indemnification.

(9) To the extent that any environmental response action has been taken, a statement as to whether the remedial action is consistent with the National Oil and Hazardous Substances Pollution Contingency Plan (part 300 of title 42, Code of Federal Regulations) or other applicable regulatory requirements.

(10) A complete copy of any claims made by the requester to any other entity related to the conditions on the property which are the subject of the claim, and any responses or defenses thereto or made to any third-party claims, including correspondence, litigation filings, consultant reports, and other information supporting a claim or defense.

(f) *Entry, inspection, and samples.* The requester must provide DoD a right of entry at reasonable times to any facility, establishment, place, or property under the requester's control which is the subject of or associated with the requester's request for indemnification or defense and must allow DoD to inspect or obtain samples from that facility, establishment, place, or property.

(g) *Additional information.* The Deputy General Counsel will advise a requester in writing of any additional information that must be provided to adjudicate the request for indemnification or defense. Failure to provide the additional information in a timely manner may result in denial of the request for indemnification or defense.

(h) *Adjudication.* The Deputy General Counsel will adjudicate a request for indemnification or defense and provide the requester with DoD's determination of the validity of the request. Such determination will be in writing and sent to the requester by certified or registered mail.

(i) *Reconsideration.* Any such determination will provide that the requester may ask for reconsideration of the determination. Such reconsideration shall be limited to an assertion by the requester of substantial new evidence or errors in calculation. The requester may seek such reconsideration by filing a request to that effect. A request for reconsideration must be received by the Deputy General Counsel within 30 days after receipt of the determination by the requester. Such a request must be sent to the same address as provided for in paragraph (a)(1) of this section and provide the substantial new evidence or identify the errors in calculation. Such reconsideration will not extend to determinations concerning the law, except as it may have been applied to the facts. A request for reconsideration will be acted on within 30 days from the time it is received. If a request for reconsideration is made, the six month period referred to in section 330(b)(1) and section 1502(e)(2)(A) will commence from the date the requester receives DoD's denial of the request for reconsideration.

(j) *Finality of adjudication.* An adjudication of a request for indemnification constitutes final administrative disposition of such a request, except in the case of a request for reconsideration under paragraph (i) of this section, in which case a denial of the request for reconsideration constitutes final administrative disposition of the request.

PART 176—REVITALIZING BASE CLOSURE COMMUNITIES AND COMMUNITY ASSISTANCE—COMMUNITY REDEVELOPMENT AND HOMELESS ASSISTANCE

Sec.

176.1 Purpose.
176.5 Definitions.
176.10 Applicability.
176.15 Waivers and extensions of deadlines.
176.20 Overview of the process.
176.25 HUD's negotiations and consultations with the LRA.
176.30 LRA application.
176.35 HUD's review of the application.
176.40 Adverse determinations.
176.45 Disposal of buildings and property.

AUTHORITY: 10 U.S.C. 2687 note.

SOURCE: 62 FR 35346, July 1, 1997, unless otherwise noted.

§ 176.1 Purpose.

This part implements the Base Closure Community Redevelopment and Homeless Assistance Act, as amended (10 U.S.C. 2687 note), which instituted a new community-based process for addressing the needs of the homeless at base closure and realignment sites. In this process, Local Redevelopment Authorities (LRAs) identify interest from homeless providers in installation property and develop a redevelopment plan for the installation that balances the economic redevelopment and other development needs of the communities in the vicinity of the installation with the needs of the homeless in those communities. The Department of Housing and Urban Development (HUD) reviews the LRA's plan to see that an appropriate balance is achieved. This part also implements the process for identifying interest from State and local entities for property under a public benefit transfer. The LRA is responsible for concurrently identifying interest from homeless providers and State and local entities interested in property under a public benefit transfer.

§ 176.5 Definitions.

As used in this part:

CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. 9601 *et seq.*).

Communities in the vicinity of the installation. The communities that constitute the political jurisdictions (other than the State in which the installation is located) that comprise the LRA for the installation. If no LRA is formed at the local level, and the State is serving in that capacity, the communities in the vicinity of the installation are deemed to be those political jurisdiction(s) (other than the State) in which the installation is located.

Continuum of care system.

(1) A comprehensive homeless assistance system that includes:

(i) A system of outreach and assessment for determining the needs and condition of an individual or family who is homeless, or whether assistance is necessary to prevent an individual or family from becoming homeless;

(ii) Emergency shelters with appropriate supportive services to help ensure that homeless individuals and families receive adequate emergency shelter and referral to necessary service providers or housing finders;

(iii) Transitional housing with appropriate supportive services to help those homeless individuals and families who are not prepared to make the transition to independent living;

(iv) Housing with or without supportive services that has no established limitation on the amount of time of residence to help meet long-term needs of homeless individuals and families; and,

(v) Any other activity that clearly meets an identified need of the homeless and fills a gap in the continuum of care.

(2) Supportive services are services that enable homeless persons and families to move through the continuum of care toward independent living. These services include, but are not limited to, case management, housing counseling, job training and placement, primary health care, mental health services, substance abuse treatment, child care, transportation, emergency food and clothing family violence services, education services, moving services, assistance in obtaining entitlements, and referral to veterans services and legal services.

Consolidated Plan. The plan prepared in accordance with the requirements of 24 CFR part 91.

Day. One calendar day including weekends and holidays.

DoD. Department of Defense.

HHS. Department of Health and Human Services.

Homeless person.

(1) An individual or family who lacks a fixed, regular, and adequate nighttime residence; and

(2) An individual or family who has a primary nighttime residence that is:

(i) A supervised publicly or privately operated shelter designed to provide temporary living accommodations (including welfare hotels, congregate shelters and transitional housing for the mentally ill);

(ii) An institution that provides a temporary residence for individuals intended to be institutionalized; or,

(iii) A public or private place not designed for, or ordinarily used as, a regular sleeping accommodation for human beings.

(3) This term does not include any individual imprisoned or otherwise detained under an Act of the Congress or a State law.

HUD. Department of Housing and Urban Development.

Installation. A base, camp, post, station, yard, center, homeport facility for any ship or other activity under the jurisdiction of DoD, including any leased facility, that is approved for closure or realignment under the Base Closure and Realignment Act of 1988 (Pub. L. 100–526). as amended, or the Defense Base Closure and Realignment Act of 1990 (Pub. L. 101–510), as amended (both at 10 U.S.C. 2687, note).

Local redevelopment authority (LRA). Any authority or instrumentality established by State or local government and recognized by the Secretary of Defense, through the Office of Economic Adjustment, as the entity responsible for developing the redevelopment plan with respect to the installation or for directing implementation of the plan.

NEPA. National Environmental Policy Act of 1969 (42 U.S.C. 4320).

OEA. Office of Economic Adjustment, Department of Defense.

Private nonprofit organization. An organization, no part of the net earnings of which inures to the benefit of any member, founder, contributor, or individual; that has a voluntary board; that has an accounting system or has designated an entity that will maintain a functioning accounting system for the organization in accordance with generally accepted accounting procedures; and that practices nondiscrimination in the provision of assistance.

Public benefit transfer. The transfer of surplus military property for a specified public purpose at up to a 100-percent discount in accordance with 40 U.S.C. 471 *et seq.* or 49 U.S.C. 47151–47153.

Redevelopment plan. A plan that is agreed by the LRA with respect to the installation and provides for the reuse or redevelopment of the real property and personal property of the installation that is available for such reuse and redevelopment as a result of the closure of the installation.

Representative(s) of the homeless. A State or local government agency or private nonprofit organization, including a homeless assistance planning board, that provides or proposes to provide services to the homeless.

Substantially equivalent. Property that is functionally suitable to substitute for property referred to in an approved Title V application. For example, if the representative of the homeless had an approved Title V application for a building that would accommodate 100 homeless persons in an emergency shelter, the replacement facility would also have to accommodate 100 at a comparable cost for renovation.

Substantially equivalent funding. Sufficient funding to acquire a substantially equivalent facility.

Surplus property. Any excess property not required for the needs and the discharge of the responsibilities of all Federal Agencies. Authority to make this determination, after screening with all Federal Agencies, rests with the Military Departments.

Title V. Title V of the Steward B. McKinney Homeless Assistance Act of 1987 (42 U.S.C. 11411) as amended by the National Defense Authorization Act for Fiscal Year 1994 (Pub. L. 103–160).

Urban county. A county within a metropolitan area as defined at 24 CFR 570.3.

§ 176.10 Applicability.

(a) *General*. This part applies to all installations that are approved for closure/realignment by the President and Congress under Pub. L. 101–510 after October 25, 1994.

(b) *Request for inclusion under this process*. This part also applies to installations that were approved for closure/realignment under either Public Law 100–526 or Public Law 101–510 prior to October 25, 1994 and for which an LRA submitted a request for inclusion under this part to DoD by December 24, 1994. A list of such requests was published in the FEDERAL REGISTER on May 30, 1995 (60 FR 28089).

(1) For installations with Title V applications pending but not approved before October 25, 1994, the LRA shall consider and specifically address any application for use of buildings and property to assist the homeless that were received by HHS prior to October 25, 1994, and were spending with the Secretary of HHS on that date. These pending requests shall be addressed in the LRA's homeless assistance submission.

(2) For installations with Title V applications approved before October 25, 1994 where there is an approved Title V application, but property has not been assigned or otherwise disposed of by the Military Department, the LRA must ensure that its homeless assistance submission provides the Title V applicant with:

(i) The property requested;

(ii) Properties, on or off the installation, that are substantially equivalent to those requested;

(iii) Sufficient funding to acquire such substantially equivalent properties;

(iv) Services and activities that meet the needs identified in the application; or,

(v) A combination of the properties, funding, and services and activities described in §176.10(b)(2)(i)–(iv) of this part.

(c) *Revised Title V process*. All other installations approved for closure or realignment under either Public Law 100–526 or Public Law 101–510 prior to October 25, 1994, for which there was no request for consideration under this part, are covered by the process stipulated under Title V. Buildings or property that were transferred or leased for homeless use under Title V prior to October 25, 1994, may not be reconsidered under this part.

§ 176.15 Waivers and extensions of deadlines.

(a) After consultation with the LRA and HUD, and upon a finding that it is in the interest of the communities affected by the closure/realignment of the installation, DoD, through the Director of the Office of Economic Adjustment, may extend or postpone any deadline contained in this part.

(b) Upon completion of a determination and finding of good cause, and except for deadlines and actions required on the part of DoD, HUD may waive any provision of §§176.20 through 176.45 of this part in any particular case, subject only to statutory limitations.

§ 176.20 Overview of the process.

(a) *Recognition of the LRA.* As soon as practicable after the list of installations recommended for closure or realignment is approved, DoD, through OEA, will recognize an LRA for the installation. Upon recognition, OEA shall publish the name, address, and point of contact for the LRA in the FEDERAL REGISTER and in a newspaper of general circulation in the communities in the vicinity of the installation.

(b) *Responsibilities of the Military Department.* The Military Department shall make installation properties available to other DoD components and Federal agencies in accordance with the procedures set out at 32 CFR part 174. The Military Department will keep the LRA informed of other Federal interest in the property during this process. Upon completion of this process the Military Department will notify HUD and either the LRA or the Chief Executive Officer of the State, as appropriate, and publish a list of surplus property on the installation that will be available for reuse in the FEDERAL REGISTER and a newspaper of general circulation in the communities in the vicinity of the installation.

(c) *Responsibilities of the LRA.* The LRA should begin to conduct outreach efforts with respect to the installation as soon as is practicable after the date of approval of closure/realignment of the installation. The local reuse planning process must begin no later than the date of the Military Department's FEDERAL REGISTER publication of available property described at §176.20(b). For those installations that began the process described in this part prior to August 17, 1995, HUD will, on a case-by-case basis, determine whether the statutory requirements have been fulfilled and whether any additional requirements listed in this part should be required. Upon the FEDERAL REGISTER publication described in §176.20(b), the LRA shall:

(1) Publish, within 30 days, in a newspaper of general circulation in the communities in the vicinity of the installation, the time period during which the LRA will receive notices of interest from State and local governments, representatives of the homeless, and other interested parties. This publication shall include the name, address, telephone number and the point of contact for the LRA who can provide information on the prescribed form and contents of the notices of interest. The LRA shall notify DoD of the deadline specified for receipt of notices of interest. LRAs are strongly encouraged to make this publication as soon as possible within the permissible 30 day period in order to expedite the closure process.

(i) In addition, the LRA has the option to conduct an informal solicitation of notices of interest from public and non-profit entities interested in obtaining property via a public benefit transfer other than a homeless assistance conveyance under either 40 U.S.C. 471 *et. seq.* or 49 U.S.C. 47151–47153. As part of such a solicitation, the LRA may wish to request that interested entities submit a description of the proposed use to the LRA and the sponsoring Federal agency.

(ii) For all installations selected for closure or realignment prior to 1995 that elected to proceed under Public Law 103–421, the LRA shall accept notices of interest for not less than 30 days.

(iii) For installations selected for closure or realignment in 1995 or thereafter, notices of interest shall be accepted for a minimum of 90 days and not more than 180 days after the LRA's publication under §176.20(c)(1).

(2) Prescribe the form and contents of notices of interest.

(i) The LRA may not release to the public any information regarding the

capacity of the representative of the homeless to carry out its program, a description of the organization, or its financial plan for implementing the program, without the consent of the representative of the homeless concerned, unless such release is authorized under Federal law and under the law of the State and communities in which the installation concerned is located. The identity of the representative of the homeless may be disclosed.

(ii) The notices of interest from representatives of the homeless must include:

(A) A description of the homeless assistance program proposed, including the purposes to which the property or facility will be put, which may include uses such as supportive services, job and skills training, employment programs, shelters, transitional housing or housing with no established limitation on the amount of time of residence, food and clothing banks, treatment facilities, or any other activity which clearly meets an identified need of the homeless and fills a gap in the continuum of care;

(B) A description of the need for the program;

(C) A description of the extent to which the program is or will be coordinated with other homeless assistance programs in the communities in the vicinity of the installation;

(D) Information about the physical requirements necessary to carry out the program including a description of the buildings and property at the installation that are necessary to carry out the program;

(E) A description of the financial plan, the organization, and the organizational capacity of the representative of the homeless to carry out the program; and,

(F) An assessment of the time required to start carrying out the program.

(iii) The notices of interest from entities other than representatives of the homeless should specify the name of the entity and specific interest in property or facilities along with a description of the planned use.

(3) In addition to the notice required under §176.20(c)(1), undertake outreach efforts to representatives of the homeless by contacting local government officials and other persons or entities that may be interested in assisting the homeless within the vicinity of the installation.

(i) The LRA may invite persons and organizations identified on the HUD list of representatives of the homeless and any other representatives of the homeless with which the LRA is familiar, operating in the vicinity of the installation, to the workshop described in §176.20(c)(3)(ii).

(ii) The LRA, in coordination with the Military Department and HUD, shall conduct at least one workshop where representatives of the homeless have an opportunity to:

(A) Learn about the closure/realignment and disposal process;

(B) Tour the buildings and properties available either on or off the installation;

(C) Learn about the LRA's process and schedule for receiving notices of interest as guided by §176.20(c)(2); and,

(D) Learn about any known land use constraints affecting the available property and buildings.

(iii) The LRA should meet with representatives of the homeless that express interest in discussing possible uses for these properties to alleviate gaps in the continuum of care.

(4) Consider various properties in response to the notices of interest. The LRA may consider property that is located off the installation.

(5) Develop an application, including the redevelopment plan and homeless assistance submission, explaining how the LRA proposes to address the needs of the homeless. This application shall consider the notices of interest received from State and local governments, representatives of the homeless, and other interested parties. This shall include, but not be limited to, entities eligible for public benefit transfers under either 40 U.S.C. 471 *et. seq.*, or 49 U.S.C. 47151–47153; representatives of the homeless; commercial, industrial, and residential development interests; and other interests. From the deadline date for receipt of notices of interest described at §176.20(c)(1), the LRA shall have 270 days to complete and submit the LRA application to the appropriate

Military Department and HUD. The application requirements are described at § 176.30.

(6) Make the draft application available to the public for review and comment periodically during the process of developing the application. The LRA must conduct at least one public hearing on the application prior to its submission to HUD and the appropriate Military Department. A summary of the public comments received during the process of developing the application shall be included in the application when it is submitted.

(d) *Public benefit transfer screening.* The LRA should, while conducting its outreach efforts, work with the Federal agencies that sponsor public benefit transfers under either 40 U.S.C. 471 *et. seq.* or 49 U.S.C. 47151–47153. Those agencies can provide a list of parties in the vicinity of the installation that might be interested in and eligible for public benefit transfers. The LRA should make a reasonable effort to inform such parties of the availability of the property and incorporate their interests within the planning process. Actual recipients of property are to be determined by sponsoring Federal agency. The Military Departments shall notify sponsoring Federal agencies about property that is available based on the community redevelopment plan and keep the LRA apprised of any expressions of interest. Such expressions of interest are not required to be incorporated into the redevelopment plan, but must be considered.

[62 FR 35346, July 1, 1997, as amended at 71 FR 9927, Feb. 28, 2006]

§ 176.25 HUD's negotiations and consultations with the LRA.

HUD may negotiate and consult with the LRA before and during the course of preparation of the LRA's application and during HUD's review thereof with a view toward avoiding any preliminary determination that the application does not meet any requirement of this part. LRAs are encouraged to contact HUD for a list of persons and organizations that are representatives of the homeless operating in the vicinity of the installation.

§ 176.30 LRA application.

(a) *Redevelopment plan.* A copy of the redevelopment plan shall be part of the application.

(b) *Homeless assistance submission.* This component of the application shall include the following:

(1) Information about homelessness in the communities in the vicinity of the installation.

(i) A list of all the political jurisdictions which comprise the LRA.

(ii) A description of the unmet need in the continuum of care system within each political jurisdiction, which should include information about any gaps that exist in the continuum of care for particular homeless subpopulations. The source for this information shall depend upon the size and nature of the political jurisdictions(s) that comprise the LRA. LRAs representing:

(A) Political jurisdictions that are required to submit a Consolidated Plan shall include a copy of their Homeless and Special Needs Population Table (Table 1), Priority Homeless Needs Assessment Table (Table 2), and narrative description thereof from that Consolidated Plan, including the inventory of facilities and services that assist the homeless in the jurisdiction.

(B) Political jurisdictions that are part of an urban county that is required to submit a Consolidated Plan shall include a copy of their Homeless and Special Needs Population Table (Table 1), Priority Homeless Needs Assessment Table (Table 2), and narrative description thereof from that Consolidated Plan, including the inventory of facilities and services that assist the homeless in the jurisdiction. In addition, the LRA shall explain what portion of the homeless population and subpopulations described in the Consolidated Plan are attributable to the political jurisdiction it represents.

(C) A political jurisdiction not described by § 176.30(b)(1)(ii)(A) or § 176.30(b)(1)(ii)(B) shall submit a narrative description of what it perceives to be the homeless population within the jurisdiction and a brief inventory of the facilities and services that assist homeless persons and families within the jurisdiction. LRAs that represent these jurisdictions are not required to

conduct surveys of the homeless population.

(2) Notices of interest proposing assistance to homeless persons and/or families.

(i) A description of the proposed activities to be carried out on or off the installation and a discussion of how these activities meet a portion or all of the needs of the homeless by addressing the gaps in the continuum of care. The activities need not be limited to expressions of interest in property, but may also include discussions of how economic redevelopment may benefit the homeless;

(ii) A copy of each notice of interest from representatives of the homeless for use of buildings and property and a description of the manner in which the LRA's application addresses the need expressed in each notice of interest. If the LRA determines that a particular notice of interest should not be awarded property, an explanation of why the LRA determined not to support that notice of interest, the reasons for which may include the impact of the program contained in the notice of interest on the community as described in §176.30(b)(2)(iii); and,

(iii) A description of the impact that the implemented redevelopment plan will have on the community. This shall include information on how the LRA's redevelopment plan might impact the character of existing neighborhoods adjacent to the properties proposed to be used to assist the homeless and should discuss alternative plans. Impact on schools, social services, transportation, infrastructure, and concentration of minorities and/or low income persons shall also be discussed.

(3) Legally binding agreements for buildings, property, funding, and/or services.

(i) A copy of the legally binding agreements that the LRA proposes to enter into with the representative(s) of the homeless selected by the LRA to implement homeless programs that fill gaps in the existing continuum of care. The legally binding agreements shall provide for a process for negotiating alternative arrangements in the event that an environmental analysis conducted under §176.45(b) indicates that any property identified for transfer in the agreement is not suitable for the intended purpose. Where the balance determined in accordance with §176.30(b)(4) provides for the use of installation property as a homeless assistance facility, legally binding agreements must provide for the reversion or transfer, either to the LRA or to another entity or entities, of the buildings and property in the event they cease to be used for the homeless. In cases where the balance proposed by the LRA does not include the use of buildings or property on the installation, the legally binding agreements need not be tied to the use of specific real property and need not include a reverter clause. Legally binding agreements shall be accompanied by a legal opinion of the chief legal advisor of the LRA or political jurisdiction or jurisdictions which will be executing the legally binding agreements that the legally binding agreements, when executed, will constitute legal, valid, binding, and enforceable obligations on the parties thereto;

(ii) A description of how buildings, property, funding, and/or services either on or off the installation will be used to fill some of the gaps in the current continuum of care system and an explanation of the suitability of the buildings and property for that use; and,

(iii) Information on the availability of general services such as transportation, police, and fire protection, and a discussion of infrastructure such as water, sewer, and electricity in the vicinity of the proposed homeless activity at the installation.

(4) An assessment of the balance with economic and other development needs.

(i) An assessment of the manner in which the application balances the expressed needs of the homeless and the needs of the communities comprising the LRA for economic redevelopment and other development; and

(ii) An explanation of how the LRA's application is consistent with the appropriate Consolidated Plan(s) or any other existing housing, social service, community, economic, or other development plans adopted by the jurisdictions in the vicinity of the installation.

(5) A description of the outreach undertaken by the LRA. The LRA shall explain how the outreach requirements described at §176.20(c)(1) and §176.20(c)(3) have been fulfilled. This explanation shall include a list of the representatives of the homeless the LRA contacted during the outreach process.

(c) *Public comments.* The LRA application shall include the materials described at §176.20(c)(6). These materials shall be prefaced with an overview of the citizen participation process observed in preparing the application.

§176.35 HUD's review of the application.

(a) *Timing.* HUD shall complete a review of each application no later than 60 days after its receipt of a completed application.

(b) *Standards of review.* The purpose of the review is to determine whether the application is complete and, with respect to the expressed interest and requests of representatives of the homeless, whether the application:

(1) *Need.* Takes into consideration the size and nature of the homeless population in the communities in the vicinity of the installation, the availability of existing services in such communities to meet the needs of the homeless in such communities, and the suitability of the buildings and property covered by the application for use and needs of the homeless in such communities. HUD will take into consideration the size and nature of the installation in reviewing the needs of the homeless population in the communities in the vicinity of the installation.

(2) Impact of notices of interest. Takes into consideration any economic impact of the homeless assistance under the plan on the communities in the vicinity of the installation, including:

(i) Whether the plan is feasible in light of demands that would be placed on available social services, police and fire protection, and infrastructure in the community; and,

(ii) Whether the selected notices of interest are consistent with the Consolidated Plan(s) of any other existing housing, social service, community economic, or other development plans adopted by the political jurisdictions in the vicinity of the installation.

(3) Legally binding agreements. Specifies the manner in which the buildings, property, funding, and/or services on or off the installation will be made available for homeless assistance purposes. HUD will review each legally binding agreement to verify that:

(i) They include all the documents legally required to complete the transactions necessary to realize the homeless use(s) described in the application;

(ii) They include all appropriate terms and conditions;

(iii) They address the full range of contingencies including those described at §176.30(b)(3)(i);

(iv) They stipulate that the buildings, property, funding, and/or services will be made available to the representatives of the homeless in a timely fashion; and,

(v) They are accompanied by a legal opinion of the chief legal advisor of the LRA or political jurisdiction or jurisdictions which will be executing the legally binding agreements that the legally binding agreements will, when executed, constitute legal, valid, binding, and enforceable obligations on the parties thereto.

(4) *Balance.* Balances in an appropriate manner a portion or all of the needs of the communities in the vicinity or the installation for economic redevelopment and other development with the needs of the homeless in such communities.

(5) *Outreach.* Was developed in consultation with representatives of the homeless and the homeless assistance planning boards, if any, in the communities in the vicinity of the installation and whether the outreach requirements described at §176.20(c)(1) and §176.20(c)(3) have been fulfilled by the LRA.

(c) *Notice of determination.* (1) HUD shall, no later than the 60th day after its receipt of the application, unless such deadline is extended pursuant to §176.15(a), send written notification

both to DoD and the LRA of its preliminary determination that the application meets or fails to meet the requirements of §176.35(b). If the application fails to meet the requirements, HUD will send the LRA:

(i) A summary of the deficiencies in the application;

(ii) An explanation of the determination; and,

(iii) A statement of how the LRA must address the determinations.

(2) In the event that no application is submitted and no extension is requested as of the deadline specified in §176.20(c)(5), and the State does not accept within 30 days a DoD written request to become recognized as the LRA, the absence of such application will trigger an adverse determination by HUD effective on the date of the lapsed deadline. Under these conditions, HUD will follow the process described at §176.40.

(d) *Opportunity to cure.* (1) The LRA shall have 90 days from its receipt of the notice of preliminary determination under §176.35(c)(1) within which to submit to HUD and DoD a revised application which addresses the determinations listed in the notice. Failure to submit a revised application shall result in a final determination, effective 90 days from the LRA's receipt of the preliminary determination, that the redevelopment plan fails to meet the requirements of §176.35(b).

(2) HUD shall, within 30 days of its receipt of the LRA's resubmission send written notification of its final determination of whether the application meets the requirements of §176.35(b) to both DOD and the LRA.

§176.40 Adverse determinations.

(a) *Review and consultation.* If the resubmission fails to meet the requirements of §176.35(b) or if no resubmission is received, HUD will review the original application, including the notices of interest submitted by representatives of the homeless. In addition, in such instances or when no original application has been submitted, HUD:

(1) Shall consult with the representatives of the homeless, if any, for purposes of evaluation the continuing interest of such representatives in the use of buildings or property at the installation to assist the homeless;

(2) May consult with the applicable Military Department regarding the suitability of the buildings and property at the installation for use to assist the homeless; and,

(3) May consult with representatives of the homeless and other parties as necessary.

(b) *Notice of decision.* (1) Within 90 days of receipt of an LRA's revised application which HUD determines does not meet the requirements of §176.35(b), HUD shall, based upon its reviews and consultations under §176.40(a):

(i) Notify DoD and the LRA of the buildings and property at the installation that HUD determines are suitable for use to assist the homeless, and;

(ii) Notify DoD and the LRA of the extent to which the revised redevelopment plan meets the criteria set forth in §176.35(b).

(2) In the event that an LRA does not submit a revised redevelopment plan under §176.35(d), HUD shall, based upon its reviews and consultations under §176.40(a), notify DoD and the LRA of the buildings and property at the installation that HUD determines are suitable for use to assist the homeless, either

(i) Within 190 days after HUD sends its notice of preliminary adverse determination under §176.35(c)(1), if an LRA has not submitted a revised redevelopment plan; or

(ii) Within 390 days after the Military Department's FEDERAL REGISTER publication of available property under §176.20(b), if no redevelopment plan has been received and no extension has been approved.

§176.45 Disposal of buildings and property.

(a) *Puglic benefit transfer screening.* Not later than the LRA's submission of its redevelopment plan to DoD and HUD, the Military Development will conduct an official public benefit transfer screening in accordance with the Federal Property Management Regulations (41 CFR 101–47.303–2) based upon the uses identified in the redevelopment plan. Federal sponsoring agencies shall notify eligible applicants

that any request for property must be consistent with the uses identified in the redevelopment plan. At the request of the LRA, the Military Department may conduct the official State and local public benefit screening at any time after the publication of available property described at §176.20(b).

(b) *Environmental analysis.* Prior to disposal of any real property, the Military Department shall, consistent with NEPA and section 2905 of the Defense Base Closure and Realignment Act of 1990, as amended (10 U.S.C. 2687 note), complete an environmental impact analysis of all reasonable disposal alternatives. The Military Department shall consult with the LRA throughout the environmental impact analysis process to ensure both that the LRA is provided the most current environmental information available concerning the installation, and that the Military Department receives the most current information available concerning the LRA's redevelopment plans for the installation.

(c) *Disposal.* Upon receipt of a notice of approval of an application from HUD under §176.35(c)(1) or §176.35(d)(2), DoD shall dispose of buildings and property in accordance with the record of decision or other decision document prepared under §176.45(b). Disposal of buildings and property to be used as homeless assistance facilities shall be to either the LRA or directly to the representative(s) of the homeless and shall be without consideration. Upon receipt of a notice from HUD under §176.40(b), DoD will dispose of the buildings and property at the installation in consultation with HUD and the LRA.

(d) *LRA's responsibility.* The LRA shall be responsible for the implementation of and compliance with legally binding agreements under the application.

(e) *Reversions to the LRA.* If a building or property reverts to the LRA under a legally binding agreement under the application, the LRA shall take appropriate actions to secure, to the maximum extent practicable, the utilization of the building or property by other homeless representatives to assist the homeless. An LRA may not be required to utilize the building or property to assist the homeless.

PART 179—MUNITIONS RESPONSE SITE PRIORITIZATION PROTOCOL (MRSPP)

Sec.

179.1 Purpose.
179.2 Applicability and scope.
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APPENDIX A TO PART 179—TABLES OF THE MUNITIONS RESPONSE SITE PRIORITIZATION PROTOCOL (MRSPP).

AUTHORITY: 10 U.S.C. 2710 *et seq.*

SOURCE: 70 FR 58028, Oct. 5, 2005, unless otherwise noted.

§ 179.1 Purpose.

The Department of Defense (the Department) is adopting this Munitions Response Site Prioritization Protocol (MRSPP) (hereinafter referred to as the ''rule'') under the authority of 10 U.S.C. 2710(b). Provisions of 10 U.S.C. 2710(b) require that the Department assign to each defense site in the inventory required by 10 U.S.C. 2710(a) a relative priority for response activities based on the overall conditions at each location and taking into consideration various factors related to safety and environmental hazards.

§ 179.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense, the Military Departments, the Defense Agencies and the Department Field Activities, and any other Department organizational entity or instrumentality established to perform a government function (hereafter referred to collectively as the ''Components'').

(b) The rule in this part shall be applied at all locations:

(1) That are, or were, owned by, leased to, or otherwise possessed or used by the Department, and

(2) That are known to, or suspected of, containing unexploded ordnance (UXO), discarded military munitions (DMM), or munitions constituents (MC), and

(3) That are included in the inventory established pursuant to 10 U.S.C. 2710(a).

(c) The rule in this part shall not be applied at the locations not included in the inventory required under 10 U.S.C. 2710(a). The locations not included in the inventory are:

(1) Locations that are not, or were not, owned by, leased to, or otherwise possessed or used by the Department,

(2) Locations neither known to contain, or suspected of containing, UXO, DMM, or MC,

(3) Locations outside the United States,

(4) Locations where the presence of military munitions results from combat operations,

(5) Currently operating military munitions storage and manufacturing facilities,

(6) Locations that are used for, or were permitted for, the treatment or disposal of military munitions, and

(7) Operational ranges.

§ 179.3 Definitions.

This part includes definitions for many terms that clarify its scope and applicability. Many of the terms relevant to this part are already defined, either in 10 U.S.C. 101, 10 U.S.C. 2710(e), or the Code of Federal Regulations. Where this is the case, the statutory and regulatory definitions are repeated here strictly for ease of reference. Citations to the U.S. Code or the Code of Federal Regulations are provided with the definition, as applicable. Unless used elsewhere in the U.S. Code or the Code of Federal Regulations, these terms are defined only for purposes of this part.

Barrier means a natural obstacle or obstacles (*e.g.*, difficult terrain, dense vegetation, deep or fast-moving water), a man-made obstacle or obstacles (*e.g.*, fencing), and combinations of natural and man-made obstacles.

Chemical agent (CA) means a chemical compound (to include experimental compounds) that, through its chemical properties produces lethal or other damaging effects on human beings, is intended for use in military operations to kill, seriously injure, or incapacitate persons through its physiological effects. Excluded are research, development, testing and evaluation (RDTE) solutions; riot control agents; chemical defoliants and herbicides; smoke and other obscuration materials; flame and incendiary materials; and industrial chemicals. (This definition is based on the definition of ''chemical agent and munition'' in 50 U.S.C. 1521(j)(1).)

Chemical Agent (CA) Hazard is a condition where danger exists because CA is present in a concentration high enough to present potential unacceptable effects (*e.g.*, death, injury, damage) to people, operational capability, or the environment.

Chemical Warfare Materiel (CWM) means generally configured as a munition containing a chemical compound that is intended to kill, seriously injure, or incapacitate a person through its physiological effects. CWM includes V- and G-series nerve agents or H-series (mustard) and L-series (lewisite) blister agents in other-than-munition configurations; and certain industrial chemicals (*e.g.*, hydrogen cyanide (AC), cyanogen chloride (CK), or carbonyl dichloride (called phosgene or CG)) configured as a military munition. Due to their hazards, prevalence, and military-unique application, chemical agent identification sets (CAIS) are also considered CWM. CWM does not include riot control devices; chemical defoliants and herbicides; industrial chemicals (*e.g.*, AC, CK, or CG) not configured as a munition; smoke and other obscuration-producing items; flame and incendiary-producing items; or soil, water, debris, or other media contaminated with low concentrations of chemical agents where no CA hazards exist. For the purposes of this Protocol, CWM encompasses four subcategories of specific materials:

(1) *CWM, explosively configured* are all munitions that contain a CA fill and any explosive component. Examples are M55 rockets with CA, the M23 VX mine, and the M360 105-mm GB artillery cartridge.

(2) *CWM, nonexplosively configured* are all munitions that contain a CA fill, but that do not contain any explosive components. Examples are any chemical munition that does not contain explosive components and VX or mustard agent spray canisters.

(3) *CWM, bulk container* are all non-munitions-configured containers of CA (e.g., a ton container) and CAIS K941, toxic gas set M–1 and K942, toxic gas set M–2/E11.

(4) *CAIS* are military training aids containing small quantities of various CA and other chemicals. All forms of CAIS are scored the same in this rule, except CAIS K941, toxic gas set M–1; and CAIS K942, toxic gas set M–2/E11, which are considered forms of CWM, bulk container, due to the relatively large quantities of agent contained in those types of sets.

Components means the Office of the Secretary of Defense, the Military Departments, the Defense Agencies, the Department Field Activities, and any other Department organizational entity or instrumentality established to perform a government function.

Defense site means locations that are or were owned by, leased to, or otherwise possessed or used by the Department. The term does not include any operational range, operating storage or manufacturing facility, or facility that is used for or was permitted for the treatment or disposal of military munitions. (10 U.S.C. 2710(e)(1))

Discarded military munitions (DMM) means military munitions that have been abandoned without proper disposal or removed from storage in a military magazine or other storage area for the purpose of disposal. The term does not include UXO, military munitions that are being held for future use or planned disposal, or military munitions that have been properly disposed of consistent with applicable environmental laws and regulations. (10 U.S.C. 2710(e)(2))

Explosive hazard means a condition where danger exists because explosives are present that may react (*e.g.*, detonate, deflagrate) in a mishap with potential unacceptable effects (*e.g.*, death, injury, damage) to people, property, operational capability, or the environment.

Military munitions means all ammunition products and components produced for or used by the armed forces for national defense and security, including ammunition products or components under the control of the Department of Defense, the Coast Guard, the Department of Energy, and the National Guard. The term includes confined gaseous, liquid, and solid propellants; explosives, pyrotechnics, chemical and riot control agents, smokes, and incendiaries, including bulk explosives and chemical warfare agents; chemical munitions, rockets, guided and ballistic missiles, bombs, warheads, mortar rounds, artillery ammunition, small arms ammunition, grenades, mines, torpedoes, depth charges, cluster munitions and dispensers, and demolition charges; and devices and components of any item thereof. The term does not include wholly inert items, improvised explosive devices, and nuclear weapons, nuclear devices, and nuclear components, other than nonnuclear components of nuclear devices that are managed under the nuclear weapons program of the Department of Energy after all required sanitization operations under the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*) have been completed. (10 U.S.C. 101(e)(4))

Military range means designated land and water areas set aside, managed, and used to research, develop, test, and evaluate military munitions, other ordnance, or weapon systems, or to train military personnel in their use and handling. Ranges include firing lines and positions, maneuver areas, firing lanes, test pads, detonation pads, impact areas, and buffer zones with restricted access and exclusionary areas. (40 CFR 266.201)

Munitions and explosives of concern distinguishes specific categories of military munitions that may pose unique explosives safety risks, such as UXO, as defined in 10 U.S.C. 101(e)(5); discarded military munitions, as defined in 10 U.S.C. 2710(e)(2); or munitions constituents (*e.g.*, TNT, RDX), as defined in 10 U.S.C. 2710(e)(3), present in high enough concentrations to pose an explosive hazard.

Munitions constituents means any materials originating from UXO, discarded military munitions, or other military munitions, including explosive and nonexplosive materials, and emission, degradation, or breakdown elements of such ordnance or munitions. (10 U.S.C. 2710(e)(3))

Munitions response means response actions, including investigation, removal actions, and remedial actions, to address the explosives safety, human health, or environmental risks presented by UXO, discarded military munitions (DMM), or munitions constituents (MC), or to support a determination that no removal or remedial action is required.

Munitions response area (MRA) means any area on a defense site that is known or suspected to contain UXO, DMM, or MC. Examples are former ranges and munitions burial areas. An MRA comprises one or more munitions response sites.

Munitions response site (MRS) means a discrete location within an MRA that is known to require a munitions response.

Operational range means a range that is under the jurisdiction, custody, or control of the Secretary of Defense and that is used for range activities, or although not currently being used for range activities, that is still considered by the Secretary to be a range and has not been put to a new use that is incompatible with range activities. (10 U.S.C. 101(e)(3))

Range means a designated land or water area that is set aside, managed, and used for range activities of the Department of Defense. The term includes firing lines and positions, maneuver areas, firing lanes, test pads, detonation pads, impact areas, electronic scoring sites, buffer zones with restricted access, and exclusionary areas. The term also includes airspace areas designated for military use in accordance with regulations and procedures prescribed by the Administrator of the Federal Aviation Administration. (10 U.S.C. 101(e)(1)(A) and (B))

Range activities means research, development, testing, and evaluation of military munitions, other ordnance, and weapons systems; and the training of members of the armed forces in the use and handling of military munitions, other ordnance, and weapons systems. (10 U.S.C. 101(3)(2))

Unexploded ordnance (UXO) means military munitions that:

(1) Have been primed, fuzed, armed, or otherwise prepared for action;

(2) Have been fired, dropped, launched, projected, or placed in such a manner as to constitute a hazard to operations, installations, personnel, or material; and

(3) Remain unexploded, whether by malfunction, design, or any other cause. (10 U.S.C. 101(e)(5))

United States means, in a geographic sense, the states, territories, and possessions and associated navigable waters, contiguous zones, and ocean waters of which the natural resources are under the exclusive management authority of the United States. (10 U.S.C. 2710(e)(10))

§ 179.4 Policy.

(a) In assigning a relative priority for response activities, the Department generally considers those MRSs posing the greatest hazard as being the highest priority for action. The priority assigned should be based on the overall conditions at each MRS, taking into consideration various factors relating to safety and environmental hazard potential.

(b) In addition to the priority assigned to an MRS, other considerations (*e.g.*, availability of specific equipment, intended reuse, stakeholder interest) can affect the sequence in which munitions response actions at a specific MRS are funded.

(c) It is Department policy to ensure that U.S. EPA, other federal agencies (as appropriate or required), state regulatory agencies, tribal governments, local restoration advisory boards or technical review committees, and local stakeholders are offered opportunities to participate in the application of the rule in this part and making sequencing recommendations.

§ 179.5 Responsibilities.

Each Component shall:

(a) Apply the rule in this part to each MRS under its administrative control when sufficient data are available to populate all the data elements within any or all of the three hazard evaluation modules that comprise the rule. Upon further delineation and characterization of an MRA into more than one MRS, Components shall reapply the rule to all MRSs within the MRA.

In such cases where data are not sufficient to populate one or two of the hazard evaluation modules (*e.g.*, there are no constituent sampling data for the Health Hazard Evaluation [HHE] module), Components will assign a priority based on the hazard evaluation modules evaluated and reapply the rule once sufficient data are available to apply the remaining hazard evaluation modules.

(b) Ensure that the total acreage of each MRA is evaluated using this rule (i.e., ensure the all MRSs within the MRA are evaluated).

(c) Ensure that EPA, other federal agencies (as appropriate or required), state regulatory agencies, tribal governments, local restoration advisory boards or technical review committees, local community stakeholders, and the current landowner (if the land is outside Department control) are offered opportunities as early as possible and throughout the process to participate in the application of the rule and making sequencing recommendations.

(1) To ensure EPA, other federal agency, state regulatory agencies, tribal governments, and local government officials are aware of the opportunity to participate in the application of the rule, the Component organization responsible for implementing a munitions response at the MRS shall notify the heads of these organizations (or their designated point of contact), as appropriate, seeking their involvement prior to beginning prioritization. Records of the notification will be placed in the Administrative Record and Information Repository for the MRS.

(2) Prior to beginning prioritization, the Component organization responsible for implementing a munitions response at the MRS shall publish an announcement in local community publications requesting information pertinent to prioritization or sequencing decisions to ensure the local community is aware of the opportunity to participate in the application of the rule.

(d) Establish a quality assurance panel of Component personnel to review, initially, all MRS prioritization decisions. Once the Department determines that its Components are applying the rule in a consistent manner and the rule's application leads to decisions that are representative of site conditions, the Department may establish a sampling-based approach for its Components to use for such reviews. This panel reviewing the priority assigned to an MRS shall not include any participant involved in applying the rule to that MRS. If the panel recommends a change that results in a different priority, the Component shall report, in the inventory data submitted to the Office of the Deputy Under Secretary of Defense (Installations & Environment) (ODUSD[I&E]), the rationale for this change. The Component shall also provide this rationale to the appropriate regulatory agencies and involved stakeholders for comment before finalizing the change.

(e) Following the panel review, submit the results of applying the rule along with the other inventory data that 10 U.S.C. 2710(c) requires be made publicly available, to the ODUSD(I&E). The ODUSD(I&E) shall publish this information in the report on environmental restoration activities for that fiscal year. If sequencing decisions result in action at an MRS with a lower MRS priority ahead of an MRS with a higher MRS priority, the Component shall provide specific justification to the ODUSD(I&E).

(f) Document in a Management Action Plan (MAP) or its equivalent all aspects of the munitions responses required at all MRSs for which that MAP is applicable. Department guidance requires that MAP be developed and maintained at an installation (or Formerly Used Defense Site [FUDS] property) level and address each site at that installation or FUDS. For the FUDS program, a statewide MAP may also be developed.

(g) Develop sequencing decisions at installations and FUDS with input from appropriate regulators and stakeholders (*e.g.*, community members of an installation's restoration advisory board or technical review committee), and document this development in the MAP. Final sequencing may be impacted by Component program management considerations. If the sequencing of any MRS is changed from the sequencing reflected in the current MAP,

the Component shall provide information to the appropriate regulators and stakeholders documenting the reasons for the sequencing change, and shall request their review and comment on that decision.

(h) Ensure that information provided by regulators and stakeholders that may influence the priority assigned to an MRS or sequencing decision concerning an MRS is included in the Administrative Record and the Information Repository.

(i) Review each MRS priority at least annually and update the priority as necessary to reflect new information. Reapplication of the rule is required under any of the following circumstances:

(1) Upon completion of a response action that changes site conditions in a manner that could affect the evaluation under this rule.

(2) To update or validate a previous evaluation at an MRS when new information is available.

(3) To update or validate the priority assigned where that priority has been previously assigned based on evaluation of only one or two of the three hazard evaluation modules.

(4) Upon further delineation and characterization of an MRA into MRSs.

(5) To categorize any MRS previously classified as ''evaluation pending.''

§ 179.6 Procedures.

The rule in this part comprises the following three hazard evaluation modules.

(a) Explosive Hazard Evaluation (EHE) module.

(1) The EHE module provides a single, consistent, Department-wide approach for the evaluation of explosive hazards. This module is used when there is a known or suspected presence of an explosive hazard. The EHE module is composed of three factors, each of which has two to four data elements that are intended to assess the specific conditions at an MRS. These factors are:

(i) *Explosive hazard*, which has the data elements *Munitions Type* and *Source of Hazard* and constitutes 40 percent of the EHE module score. (See appendix A to this part, tables 1 and 2.)

(ii) *Accessibility*, which has the data elements *Location of Munitions*, *Ease of Access*, and *Status of Property* and constitutes 40 percent of the EHE module score. (See appendix A, tables 3, 4, and 5.)

(iii) Receptors, which has the data elements *Population Density*, *Population Near Hazard*, *Types of Activities/Structures*, and *Ecological and/or Cultural Resources* and constitutes 20 percent of the EHE module score. (See appendix A, tables 6, 7, 8, and 9.)

(2) Based on MRS-specific information, each data element is assigned a numeric score, and the sum of these score is the EHE module score. The EHE module score results in an MRS being placed into one of the following ratings. (See appendix A, table 10.)

(i) *EHE Rating A (Highest)* is assigned to MRSs with an EHE module score from 92 to 100.

(ii) *EHE Rating B* is assigned to MRSs with an EHE module score from 82 to 91.

(iii) *EHE Rating C* is assigned to MRSs with an EHE module score from 71 to 81.

(iv) *EHE Rating D* is assigned to MRSs with an EHE module score from 60 to 70.

(v) *EHE Rating E* is assigned to MRSs with an EHE module score from 48 to 59.

(vi) *EHE Rating F* is assigned to MRSs with an EHE module score from 38 to 47.

(vii) *EHE Rating G (Lowest)* is assigned to MRSs with an EHE module score less than 38.

(3) There are also three other possible outcomes for the EHE module:

(i) *Evaluation pending*. This category is used when there are known or suspected UXO or DMM, but sufficient information is not available to populate the nine data elements of the EHE module.

(ii) *No longer required*. This category is reserved for MRSs that no longer require an assigned priority because the Department has conducted a response, all objectives set out in the decision document for the MRS have been achieved, and no further action, except for long-term management and recurring reviews, is required.

(iii) *No known or suspected explosive hazard*. This category is reserved for MRSs that do not require evaluation under the EHE module.

(4) The EHE module rating shall be considered with the CHE and HHE module ratings to determine the MRS priority.

(5) MRSs lacking information for determining an EHE module rating shall be programmed for additional study and evaluated as soon as sufficient data are available. Until an EHE module rating is assessed, MRSs shall be rated as ''evaluation pending'' for the EHE module.

(b) Chemical Warfare Materiel Hazard Evaluation (CHE) module. (1) The CHE module provides an evaluation of the chemical hazards associated with the physiological effects of CWM. The CHE module is used only when CWM are known or suspected of being present at an MRS. Like the EHE module, the CHE module has three factors, each of which has two to four data elements that are intended to assess the conditions at an MRS.

(i) *CWM hazard*, which has the data elements *CWM Configuration* and *Sources of CWM* and constitutes 40 percent of the CHE score. (See appendix A to this part, tables 11 and 12.)

(ii) *Accessibility*, which focuses on the potential for receptors to encounter the CWM known or suspected to be present on an MRS. This factor consists of three data elements, *Location of CWM*, *Ease of Access*, and *Status of Property*, and constitutes 40 percent of the CHE score. (See appendix A, tables 13, 14, and 15.)

(iii) *Receptor*, which focuses on the human and ecological populations that may be impacted by the presence of CWM. It has the data elements *Population Density*, *Population Near Hazard*, *Types of Activities/Structures*, and *Ecological and/or Cultural Resources* and constitutes 20 percent of the CHE score. (See appendix A, tables 16, 17, 18, and 19.)

(2) Similar to the EHE module, each data element is assigned a numeric score, and the sum of these scores (*i.e.*, the CHE module score) is used to determine the CHE rating. The CHE module score results in an MRS being placed into one of the following ratings. (See appendix A, table 20.)

(i) *CHE Rating A (Highest)* is assigned to MRSs with a CHE score from 92 to 100.

(ii) *CHE Rating B* is assigned to MRSs with a CHE score from 82 to 91.

(iii) *CHE Rating C* is assigned to MRSs with a CHE score from 71 to 81.

(iv) *CHE Rating D* is assigned to MRSs with a CHE score from 60 to 70.

(v) *CHE Rating E* is assigned to MRSs with a CHE score from 48 to 59.

(vi) *CHE Rating F* is assigned to MRSs with a CHE score from 38 to 47.

(vii) *CHE Rating G (Lowest)* is assigned to MRSs with a CHE score less than 38.

(3) There are also three other potential outcomes for the CHE module:

(i) *Evaluation pending*. This category is used when there are known or suspected CWM, but sufficient information is not available to populate the nine data elements of the CHE module.

(ii) *No longer required*. This category is reserved for MRSs that no longer require an assigned priority because the Department has conducted a response, all objectives set out in the decision document for the MRS have been achieved, and no further action, except for long-term management and recurring reviews, is required.

(iii) *No known or suspected CWM hazard*. This category is reserved for MRSs that do not require evaluation under the CHE module.

(4) The CHE rating shall be considered with the EHE module and HHE module ratings to determine the MRS priority.

(5) MRSs lacking information for assessing a CHE module rating shall be programmed for additional study and evaluated as soon as sufficient data are available. Until a CHE module rating is assigned, the MRS shall be rated as ''evaluation pending'' for the CHE module.

(c) Health Hazard Evaluation (HHE) module.

(1) The HHE provides a consistent Department-wide approach for evaluating the relative risk to human health and the environment posed by MC. The HHE builds on the RRSE framework that is used in the Installation Restoration Program (IRP) and has been

modified to address the unique requirements of MRSs. The HHE module shall be used for evaluating the potential hazards posed by MC and other chemical contaminants. The HHE module is intended to evaluate MC at sites. Any incidental nonmunitions-related contaminants may be addressed incidental to a munitions response under the MMRP.

(2) The module has three factors:

(i) Contamination Hazard Factor (CHF), which indicates MC, and any nonmunitions-related incidental contaminants present; this factor contributes a level of High (H), Middle (M), or Low (L) based on Significant, Moderate, or Minimal contaminants present, respectively. (See appendix A to this part, table 21.)

(ii) Receptor Factor (RF), which indicates the receptors; this factor contributes a level of H, M, or L based on Identified, Potential, or Limited receptors, respectively. (See appendix A, table 21.)

(iii) Migration Pathway Factor (MPF), which indicates environmental migration pathways, and contributes a level of H, M, or L based on Evident, Potential or Confined pathways, respectively. (See appendix A, table 21.)

(3) The H, M, and L levels for the CHF, RF, and MPF are combined in a matrix to obtain composite three-letter combination levels that integrate considerations of all three factors. (See appendix A, table 22.)

(4) The three-letter combination levels are organized by frequency, and the resulting frequencies result in seven HHE ratings. (See appendix A, table 23.)

(i) HHE Rating A (Highest) is assigned to MRSs with an HHE combination level of high for all three factors.

(ii) HHE Rating B is assigned to MRSs with a combination level of high for CHF and RF and medium for MPF (HHM).

(iii) HHE Rating C is assigned to MRSs with a combination level of high for the CHF and RF and low for MPF (HHL), or high for CHF and medium for the RF and MPF (HMM).

(iv) HHE Rating D is assigned to MRSs with a combination level of high for the CHF, medium for the RF, and low for the MPF (HML), or medium for all three factors (MMM).

(v) HHE Rating E is assigned to MRSs with a combination level of high for the CHF and low for the RF and MPF (HLL), or medium for the CHF and RF and low for the MPF (MML).

(vi) HHE Rating F is assigned to MRSs with a combination level of medium for the CHF and low for the RF and MPF (MLL).

(vii) HHE Rating G (Lowest) is assigned to MRSs with a combination level of low for all three factors (LLL).

(5) The HHE three-letter combinations are replaced by the seven HHE ratings. (See appendix A, table 24.)

(6) There are also three other potential outcomes for the HHE module:

(i) *Evaluation pending.* This category is used when there are known or suspected MC, and any incidental nonmunitions-related contaminants present, but sufficient information is not available to determine the HHE module rating.

(ii) *No longer required.* This category is reserved for MRSs that no longer require an assigned MRS priority because the Department has conducted a response, all objectives set out in the decision document for the MRS have been achieved, and no further action, except for long-term management and recurring reviews, is required.

(iii) *No known or suspected munitions constituent hazard.* This rating is reserved for MRSs that do not require evaluation under the HHE module.

(7) The HHE module rating shall be considered with the EHE and CHE module ratings to determine the MRS priority.

(8) MRSs lacking information sufficient for assessing an HHE module rating shall be programmed for additional study and evaluated as soon as sufficient data are available. Until an HHR module rating is assigned, the MRS shall be classified as ''evaluation pending'' for the HHE module.

(d) *Determining the MRS priority.* (1) An MRS priority is determined based on integrating the ratings from the EHE, CHE, and HHE modules. Until all three hazard evaluation modules have been evaluated, the MRS priority shall be based on the results of the modules completed.

(2) Each MRS is assigned to one of eight MRS priorities based on the ratings of the three hazard evaluation modules, where Priority 1 indicates the highest potential hazard and Priority 8 the lowest potential hazard. Under the rule in this part, only MRSs with CWM can be assigned to Priority 1 and no MRS with CWM can be assigned to Priority 8. (See appendix A to this part, table 25.)

(3) An ''evaluation pending'' rating is used to indicate that an MRS requires further evaluation. This designation is only used when none of the three modules has a numerical rating (*i.e.*, 1 through 8) and at least one module is rated ''evaluation pending.'' The Department shall develop program metrics focused on reducing the number of MRSs with a status of ''evaluating pending'' for any of the three modules. (See appendix A, table 25.)

(4) A ''no longer required'' rating is used to indicate that an MRS no longer requires prioritization. The MRS will receive this rating when none of the three modules has a numerical (*i.e.*, 1 through 8) or an ''evaluation pending'' designation, and at least one of the modules is rated ''no longer required.''

(5) A rating of ''no known or suspected hazard'' is used to indicate that an MRS has no known or expected hazard. This designation is used only when the hazard evaluation modules are rated as ''no known or suspected explosive hazard,'' ''no known or suspected CWM hazard,'' and ''no known or suspected MC hazard.'' (See appendix A, table 25.)

§ 179.7 Sequencing.

(a) *Sequencing considerations.* The sequencing of MRSs for action shall be based primarily on the MRS priority determined through applying the rule in this part. Generally, an MRS that presents a greater relative risk to human health, safety, or the environment will be addressed before an MRS that presents a lesser relative risk. Other factors, however, may warrant consideration when determining the sequencing for specific MRSs. In evaluating other factors in sequencing decisions, the Department will consider a broad range of issues. These other, or risk-plus factors, do not influence or change the MRS priority, but may influence the sequencing for action. Examples of factors that the Department may consider are:

(1) Concerns expressed by regulators or stakeholders.

(2) Cultural and social factors.

(3) Economic factors, including economic considerations pertaining to environmental justice issues, economies of scale, evaluation of total life cycle costs, and estimated valuations of long-term liabilities.

(4) Findings of health, safety, or ecological risk assessments or evaluations based on MRS-specific data.

(5) Reasonably anticipated future land use, especially when planning response actions, conducting evaluations of response alternatives, or establishing specific response action objectives.

(6) A community's reuse requirements at Base Realignment and Closure (BRAC) installations.

(7) Specialized considerations of tribal trust lands (held in trust by the United States for the benefit of any tribe or individual). The United States holds the legal title to the land and the tribe holds the beneficial interest.

(8) Implementation and execution considerations (*e.g.*, funding availability; the availability of the necessary equipment and people to implement a particular action; examination of alternatives to responses that entail significant capital investments, a lengthy period of operation, or costly maintenance; alternatives to removal or treatment of contamination when existing technology cannot achieve established standards [*e.g.*, maximum contaminant levels]).

(9) Mission-driven requirements.

(10) The availability of appropriate technology (*e.g.*, technology to detect, discriminate, recover, and destroy UXO).

(11) Implementing standing commitments, including those in formal agreements with regulatory agencies, requirements for continuation of remedial action operations until response objectives are met, other long-term management activities, and program administration.

(12) Established program goals and initiatives.

(13) Short-term and long-term ecological effects and environmental impacts in general, including injuries to natural resources.

(b) *Procedures and documentation for sequencing decisions.* (1) Each installation or FUDS is required to develop and maintain a Management Action Plan (MAP) or its equivalent. Sequencing decisions, which will be documented in the MAP at military installations and FUDS, shall be developed with input from appropriate regulators and stakeholders (*e.g.*, community members of an installation's restoration advisory board or technical review committee). If the sequencing of an MRS is changed from the sequencing reflected in the current MAP, information documenting the reasons for the sequencing change will be provided for inclusion in the MAP. Notice of the change in the sequencing shall be provided to those regulators and stakeholders that provided input to the sequencing process.

(2) In addition to the information on prioritization, the Components shall ensure that information provided by regulators and stakeholders that may influence the sequencing of an MRS is included in the Administrative Record and the Information Repository.

(3) Components shall report the results of sequencing to ODUSD(I&E) (or successor organizations). ODUSD(I&E) shall compile the sequencing results reported by each Component and publish the sequencing in the report on environmental restoration activities for that fiscal year. If sequencing decisions result in action at an MRS with a lower MRS priority ahead of an MRS with a higher priority, specific justification shall be provided to the ODUSD(I&E).

APPENDIX A TO PART 179—TABLES OF THE MUNITIONS RESPONSE SITE PRIORITIZATION PROTOCOL

The tables in this Appendix are solely for use in implementing 32 CFR part 179.

Table 1
Classifications Within the EHE Module *Munitions Type* Data Element

Classification	Description	Score
Sensitive	• All UXO that are considered likely to function upon any interaction with exposed persons (e.g., submunitions, 40mm high-explosive [HE] grenades, white phosphorus [WP] munitions, high-explosive antitank [HEAT] munitions, and practice munitions with sensitive fuzes, but excluding all other practice munitions). • All hand grenades containing energetic filler. • Bulk primary explosives, or mixtures of these with environmental media, such that the mixture poses an explosive hazard.	30
High explosive (used or damaged)	• All UXO containing a high-explosive filler (e.g., RDX, Composition B), that are not considered "sensitive." • All DMM containing a high-explosive filler that have: - Been damaged by burning or detonation - Deteriorated to the point of instability.	25
Pyrotechnic (used or damaged)	• All UXO containing pyrotechnic fillers other than white phosphorous (e.g., flares, signals, simulators, smoke grenades). • All DMM containing pyrotechnic fillers other than white phosphorous (e.g., flares, signals, simulators, smoke grenades) that have: - Been damaged by burning or detonation - Deteriorated to the point of instability.	20
High explosive (unused)	• All DMM containing a high explosive filler that: - Have not been damaged by burning or detonation - Are not deteriorated to the point of instability.	15
Propellant	• All UXO containing mostly single-, double-, or triple-based propellant, or composite propellants (e.g., rocket motor). • All DMM containing mostly single-, double-, or triple-based propellant, or composite propellants (e.g., rocket motor) that are: - Damaged by burning or detonation - Deteriorated to the point of instability.	15
Bulk secondary high explosives, pyrotechnics, or propellant	• All DMM containing mostly single-, double-, or triple-based propellant, or composite propellants (e.g., rocket motor), that are deteriorated. • Bulk secondary high explosives, pyrotechnic compositions, or propellant (not contained in a munition), or mixtures of these with environmental media such that the mixture poses an explosive hazard.	10

Table 1
Classifications Within the EHE Module *Munitions Type* Data Element

Classification	Description	Score
Pyrotechnic (not used or damaged)	• All DMM containing a pyrotechnic fillers (i.e., red phosphorous), other than white phosphorous filler, that: – Have not been damaged by burning or detonation – Are not deteriorated to the point of instability.	10
Practice	• All UXO that are practice munitions that are not associated with a sensitive fuze. • All DMM that are practice munitions that are not associated with a sensitive fuze and that have not: – Been damaged by burning or detonation – Deteriorated to the point of instability.	5
Riot control	• All UXO or DMM containing a riot control agent filler (e.g., tear gas).	3
Small arms	• All used munitions or DMM that are categorized as small arms ammunition. [Physical evidence or historical evidence that no other types of munitions (e.g., grenades, subcaliber training rockets, demolition charges) were used or are present on the MRS is required for selection of this category.]	2
Evidence of no munitions	• Following investigation of the MRS, there is physical evidence that there are no UXO or DMM present, or there is historical evidence indicating that no UXO or DMM are present.	0

Notes:

- *Former* (as in "former military range") means the MRS is a location that was (1) closed by a formal decision made by the Component with administrative control over the location, or (2) put to a use incompatible with the presence of UXO, DMM, or MC.
- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.
- *Practice munitions* means munitions that contain an inert filler (e.g., wax, sand, concrete), a spotting charge (i.e., a small charge of red phosphorus, photoflash powder, or black powder used to indicate the point of impact), and a fuze.
- The term *small arms ammunition* means ammunition, without projectiles that contain explosives (other than tracers), that is .50 caliber or smaller, or for shotguns.

Table 2
Classifications Within the EHE Module *Source of Hazard* Data Element

Classification	Description	Score
Former range	• The MRS is a former military range where munitions (including practice munitions with sensitive fuzes) have been used. Such areas include impact or target areas, associated buffer and safety zones, firing points, and live-fire maneuver areas.	10
Former munitions treatment (i.e., OB/OD) unit	• The MRS is a location where UXO or DMM (e.g., munitions, bulk explosives, bulk pyrotechnic, or bulk propellants) were burned or detonated for the purpose of treatment prior to disposal.	8
Former practice munitions range	• The MRS is a former military range on which only practice munitions without sensitive fuzes were used.	6
Former maneuver area	• The MRS is a former maneuver area where no munitions other than flares, simulators, smokes, and blanks were used. There must be evidence that no other munitions were used at the location to place an MRS into this category.	5
Former burial pit or other disposal area	• The MRS is a location where DMM were buried or disposed of (e.g., disposed of into a water body) without prior thermal treatment.	5
Former industrial operating facilities	• The MRS is a location that is a former munitions maintenance, manufacturing, or demilitarization facility.	4
Former firing points	• The MRS is a firing point, where the firing point is delineated as an MRS separate from the rest of a former military range.	4
Former missile or air defense artillery emplacements	• The MRS is a former missile defense or air defense artillery (ADA) emplacement not associated with a military range.	2
Former storage or transfer points	• The MRS is a location where munitions were stored or handled for transfer between different modes of transportation (e.g., rail to truck, truck to weapon system).	2
Former small arms range	• The MRS is a former military range where only small arms ammunition was used. [There must be evidence that no other types of munitions (e.g., grenades) were used or are present to place an MRS into this category.]	1
Evidence of no munitions	• Following investigation of the MRS, there is physical evidence that no UXO or DMM are present, or there is historical evidence indicating that no UXO or DMM are present.	0

Notes:

- *Former* (as in "former military range") means the MRS is a location that was (1) closed by a formal decision made by the Component with administrative control over the location, or (2) put to a use incompatible with the presence of UXO, DMM, or MC.
- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.
- *Practice munitions* means munitions that contain an inert filler (e.g., wax, sand, concrete), a spotting charge (i.e., a small charge of red phosphorus, photoflash powder, or black powder used to indicate the point of impact), and a fuze.
- The term *small arms ammunition* means ammunition, without projectiles that contain explosives (other than tracers), that is .50 caliber or below, or for shotguns.

Table 3
Classifications Within the EHE Module *Information on the Location of Munitions* Data Element

Classification	Description	Score
Confirmed surface	• Physical evidence indicates that there are UXO or DMM on the surface of the MRS. • Historical evidence (e.g., a confirmed incident report or accident report) indicates there are UXO or DMM on the surface of the MRS.	25
Confirmed subsurface, active	• Physical evidence indicates the presence of UXO or DMM in the subsurface of the MRS, and the geological conditions at the MRS are likely to cause UXO or DMM to be exposed, in the future, by naturally occurring phenomena (e.g., drought, flooding, erosion, frost, heat heave, tidal action), or intrusive activities (e.g., plowing, construction, dredging) at the MRS are likely to expose UXO or DMM. • Historical evidence indicates that UXO or DMM are located in the subsurface of the MRS and the geological conditions at the MRS are likely to cause UXO or DMM to be exposed, in the future, by naturally occurring phenomena (e.g., drought, flooding, erosion, frost, heat heave, tidal action), or intrusive activities (e.g., plowing, construction, dredging) at the MRS are likely to expose UXO or DMM.	20
Confirmed subsurface, stable	• Physical evidence indicates the presence of UXO or DMM in the subsurface of the MRS and the geological conditions at the MRS are not likely to cause UXO or DMM to be exposed, in the future, by naturally occurring phenomena, or intrusive activities at the MRS are not likely to cause UXO or DMM to be exposed. • Historical evidence indicates that UXO or DMM are located in the subsurface of the MRS and the geological conditions at the MRS are not likely to cause UXO or DMM to be exposed, in the future, by naturally occurring phenomena, or intrusive activities at the MRS are not likely to cause UXO or DMM to be exposed.	15
Suspected (physical evidence)	• There is physical evidence (e.g., munitions debris, such as fragments, penetrators, projectiles, shell casings, links, fins), other than the documented presence of UXO or DMM, indicating that UXO or DMM may be present at the MRS.	10
Suspected (historical evidence)	• There is historical evidence indicating that UXO or DMM may be present at the MRS.	5
Subsurface, physical constraint	• There is physical or historical evidence indicating that UXO or DMM may be present in the subsurface, but there is a physical constraint (e.g., pavement, water depth over 120 feet) preventing direct access to the UXO or DMM.	2

Table 3
Classifications Within the EHE Module *Information on the Location of Munitions* Data Element

Classification	Description	Score
Small arms (regardless of location)	• The presence of small arms ammunition is confirmed or suspected, regardless of other factors such as geological stability. [There must be evidence that no other types of munitions (e.g., grenades) were used or are present at the MRS to place an MRS into this category.]	1
Evidence of no munitions	• Following investigation of the MRS, there is physical evidence that there are no UXO or DMM present, or there is historical evidence indicating that no UXO or DMM are present.	0

Notes:

- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.
- *In the subsurface* means the munition (i.e., a DMM or UXO) is (1) entirely beneath the ground surface, or (2) fully submerged in a water body.
- *On the surface* means the munition (i.e., a DMM or UXO) is (1) entirely or partially exposed above the ground surface (i.e., above the soil layer), or (2) entirely or partially exposed above the surface of a water body (e.g., as a result of tidal activity).
- The term *small arms ammunition* means ammunition, without projectiles that contain explosives (other than tracers), that is .50 caliber or smaller, or for shotguns.

Table 4
Classifications Within the EHE Module *Ease of Access* Data Element

Classification	Description	Score
No barrier	• There is no barrier preventing access to any part of the MRS (i.e., all parts of the MRS are accessible).	10
Barrier to MRS access is incomplete	• There is a barrier preventing access to parts of the MRS, but not the entire MRS.	8
Barrier to MRS access is complete, but not monitored	• There is a barrier preventing access to all parts of the MRS, but there is no surveillance (e.g., by a guard) to ensure that the barrier is effectively preventing access to all parts of the MRS.	5
Barrier to MRS access is complete and monitored	• There is a barrier preventing access to all parts of the MRS, and there is active, continual surveillance (e.g., by a guard, video monitoring) to ensure that the barrier is effectively preventing access to all parts of the MRS.	0

Notes:

• *Barrier* means a natural obstacle or obstacles (e.g., difficult terrain, dense vegetation, deep or fast-moving water), a man-made obstacle or obstacles (e.g., fencing), or a combination of natural and man-made obstacles.

Table 5
Classifications Within the EHE *Status of Property* Data Element

Classification	Description	Score
Non-DoD control	• The MRS is at a location that is no longer owned by, leased to, or otherwise possessed or used by the Department. Examples are privately owned land or water bodies; land or water bodies owned or controlled by state, tribal, or local governments; and land or water bodies managed by other federal agencies.	5
Scheduled for transfer from DoD control	• The MRS is on land or is a water body that is owned, leased, or otherwise possessed by the Department, and the Department plans to transfer that land or water body to the control of another entity (e.g., a state, tribal, or local government; a private party; another federal agency) within 3 years from the date the rule is applied.	3
DoD control	• The MRS is on land or is a water body that is owned, leased, or otherwise possessed by the Department. With respect to property that is leased or otherwise possessed, the Department must control access to the MRS 24 hours per day, every day of the calendar year.	0

Table 6
Classifications Within the EHE Module *Population Density* Data Element

Classification	Definition	Score
> 500 persons per square mile	• There are more than 500 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data.	5
100 to 500 persons per square mile	• There are 100 to 500 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data.	3
< 100 persons per square mile	• There are fewer than 100 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data.	1

Notes:

- If an MRS is in more than one county, the Component will use the largest population value among those counties. If the MRS is within or borders a city or town, the population density for that city or town, instead of the county population density, is used.

Table 7
Classifications Within the EHE Module *Population Near Hazard* Data Element

Classification	Description	Score
26 or more structures	• There are 26 or more inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	5
16 to 25	• There are 16 to 25 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	4
11 to 15	• There are 11 to 15 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	3
6 to 10	• There are 6 to 10 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	2
1 to 5	• There are 1 to 5 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	1
0	• There are no inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	0

Notes:

- The term *inhabited structures* means permanent or temporary structures, other than military munitions-related structures, that are routinely occupied by one or more persons for any portion of a day.

Table 8
Classifications Within the EHE Module *Types of Activities/Structures* Data Element

Classification	Description	Score
Residential, educational, commercial, or subsistence	• Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with any of the following purposes: residential, educational, child care, critical assets (e.g., hospitals, fire and rescue, police stations, dams), hotels, commercial, shopping centers, playgrounds, community gathering areas, religious sites, or sites used for subsistence hunting, fishing, and gathering.	5
Parks and recreational areas	• Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with parks, nature preserves, or other recreational uses.	4
Agricultural, forestry	• Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with agriculture or forestry.	3
Industrial or warehousing	• Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with industrial activities or warehousing.	2
No known or recurring activities	• There are no known or recurring activities occurring up to two miles from the MRS's boundary or within the MRS's boundary.	1

Notes:

- The term *inhabited structures* means permanent or temporary structures, other than Department-related structures, that are routinely occupied by one or more persons for any portion of a day.

Table 9
Classifications Within the EHE Module *Ecological and/or Cultural Resources* Data Element

Classification	Description	Score
Ecological and cultural resources present	• There are both ecological and cultural resources present on the MRS.	5
Ecological resources present	• There are ecological resources present on the MRS.	3
Cultural resources present	• There are cultural resources present on the MRS.	3
No ecological or cultural resources present	• There are no ecological resources or cultural resources present on the MRS.	0

Notes:

- *Ecological resources* means that (1) a threatened or endangered species (designated under the Endangered Species Act [ESA]) is present on the MRS; or (2) the MRS is designated under the ESA as critical habitat for a threatened or endangered species; or (3) there are identified sensitive ecosystems such as wetlands or breeding grounds present on the MRS.
- *Cultural resources* means there are recognized cultural, traditional, spiritual, religious, or historical features (e.g., structures, artifacts, symbolism) on the MRS. Requirements for determining if a particular feature is a cultural resource are found in *the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, Archeological Resources Protection Act, Executive Order 13007*, and *the American Indian Religious Freedom Act*. As examples: American Indians or Alaska Natives deem an MRS to be of religious significance; there are areas used by American Indians or Alaska Natives for subsistence activities (e.g., hunting, fishing).

Table 10
Determining the EHE Rating from the EHE Module Score

Overall EHE Module Score	EHE Rating
The MRS has an overall EHE module score from 92 to 100.	EHE Rating A
The MRS has an overall EHE module score from 82 to 91.	EHE Rating B
The MRS has an overall EHE module score from 71 to 81.	EHE Rating C
The MRS has an overall EHE module score from 60 to 70.	EHE Rating D
The MRS has an overall EHE module score from 48 to 59.	EHE Rating E
The MRS has an overall EHE module score from 38 to 47.	EHE Rating F
The MRS has an overall EHE module score less than 38.	EHE Rating G
Alternative Module Ratings	Evaluation Pending
	No Longer Required
	No Known or Suspected Explosive Hazard

Table 11
Classifications Within the CHE Module *CWM Configuration* Data Element

Classification	Description	Score
CWM, explosive configuration, either UXO or damaged DMM	The CWM known or suspected of being present at the MRS is: • Explosively configured CWM that are UXO (i.e., CWM/UXO). • Explosively configured CWM that are DMM (i.e., CWM/DMM) that have been damaged.	30
CWM mixed with UXO	• The CWM known or suspected of being present at the MRS are explosively configured CWM/DMM that have not been damaged, or nonexplosively configured CWM/DMM, or CWM not configured as a munition, that are commingled with conventional munitions that are UXO.	25
CWM, explosive configuration that are DMM (undamaged)	• The CWM known or suspected of being present at the MRS are explosively configured CWM/DMM that have not been damaged.	20
CWM, not explosively configured or CWM, bulk container	The CWM known or suspected of being present at the MRS is: • Nonexplosively configured CWM/DMM. • Bulk CWM/DMM (e.g., ton container).	15
CAIS K941 and CAIS K942	• The CWM/DMM known or suspected of being present at the MRS is CAIS K941-toxic gas set M-1 or CAIS K942-toxic gas set M-2/E11.	12
CAIS (chemical agent identification sets)	• Only CAIS, other than CAIS K941 and K942, are known or suspected of being present at the MRS.	10
Evidence of no CWM	• Following investigation, the physical evidence indicates that CWM are not present at the MRS, or the historical evidence indicates that CWM are not present at the MRS.	0

Notes:

- The term *CWM/UXO* means CWM that are UXO.
- The notation *CWM/DMM* means CWM that are DMM, to include CAIS K941, toxic gas set M-1; and K942, toxic gas set M-2/E11.
- The term CAIS/DMM means CAIS, other than CAIS K941 and K942.
- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.

Table 12
Classifications Within the CHE Module *Sources of CWM* Data Element

Classification	Description	Score
Live-fire involving CWM	• The MRS is a former military range that supported live-fire of explosively configured CWM and the CWM/UXO are known or suspected of being present on the surface or in the subsurface. • The MRS is a former military range that supported live-fire with conventional munitions, and CWM/DMM are on the surface or in the subsurface commingled with conventional munitions that are UXO.	10
Damaged CWM/DMM surface or subsurface	• There are damaged CWM/DMM on the surface or in the subsurface at the MRS.	10
Undamaged CWM/DMM surface	• There are undamaged CWM/DMM on the surface at the MRS.	10
CAIS/DMM surface	• There are CAIS/DMM on the surface.	10
Undamaged CWM/DMM, subsurface	• There are undamaged CWM/DMM in the subsurface at the MRS.	5
CAIS/DMM subsurface	• There are CAIS/DMM in the subsurface at the MRS.	5
Former CA or CWM Production Facilities	• The MRS is a facility that formerly engaged in production of CA or CWM, and CWM/DMM is suspected of being present on the surface or in the subsurface.	3
Former Research, Development, Testing, and Evaluation (RDT&E) facility using CWM	• The MRS is at a facility that formerly was involved in non-live-fire RDT&E activities (including static testing) involving CWM, and there are CWM/DMM suspected of being present on the surface or in the subsurface.	3
Former Training Facility using CWM or CAIS	• The MRS is a location that formerly was involved in training activities involving CWM and/or CAIS (e.g., training in recognition of CWA, decontamination training) and CWM/DMM or CAIS/DMM are suspected of being present on the surface or in the subsurface.	2
Former Storage or Transfer points of CWM	• The MRS is a former storage facility or transfer point (e.g., intermodal transfer) for CWM.	1
Evidence of no CWM	• Following investigation, the physical evidence indicates that CWM are not present at the MRS, or the historical evidence indicates that CWM are not present at the MRS.	0

Notes:

- The term *CWM /UXO* means CWM that are UXO.
- The notation *CWM/DMM* means CWM that are DMM, to include CAIS K941, toxic gas set M-1; and K942, toxic gas set M-2/E11.
- The term CAIS/DMM means CAIS, other than CAIS K941 and K942.
- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.
- *In the subsurface* means the CWM (i.e., a DMM or UXO) is (1) entirely beneath the ground surface, or (2) fully submerged in a water body.
- *On the surface* means the CWM (i.e., a DMM or UXO) is (1) entirely or partially exposed above the ground surface (i.e., above the soil layer), or (2) entirely or partially exposed above the surface of a water body (e.g., as a result of tidal activity).

Table 13
Classifications Within the CHE Module *Information on the Location of CWM* Data Element

Classification	Description	Score
Confirmed surface	• Physical evidence indicates that there are CWM on the surface of the MRS. • Historical evidence (e.g., a confirmed incident report or accident report) indicates there are CWM on the surface of the MRS.	25
Confirmed subsurface, active	• Physical evidence indicates the presence of CWM in the subsurface of the MRS and the geological conditions at the MRS are likely to cause CWM to be exposed, in the future, by naturally occurring phenomena (e.g., drought, flooding, erosion, frost, heat heave, tidal action), or intrusive activities (e.g., plowing, construction, dredging) at the MRS are likely to expose CWM. • Historical evidence indicates that CWM are located in the subsurface of the MRS and the geological conditions at the MRS are likely to cause CWM to be exposed, in the future, by naturally occurring phenomena (e.g., drought, flooding, erosion, frost, heat heave, tidal action), or intrusive activities (e.g., plowing, construction, dredging) at the MRS are likely to expose CWM.	20
Confirmed subsurface, stable	• Physical evidence indicates the presence of CWM in the subsurface of the MRS and the geological conditions at the MRS are not likely to cause CWM to be exposed, in the future, by naturally occurring phenomena, or intrusive activities at the MRS are not likely to cause CWM to be exposed. • Historical evidence indicates that CWM are located in the subsurface of the MRS and the geological conditions at the MRS are not likely to cause CWM to be exposed, in the future, by naturally occurring phenomena, or intrusive activities at the MRS are not likely to cause CWM to be exposed.	15
Suspected (physical evidence)	• There is physical evidence, other than the documented presence of CWM, indicating that CWM may be present at the MRS.	10
Suspected (historical evidence)	• There is historical evidence indicating that CWM may be present at the MRS.	5
Subsurface, physical constraint	• There is physical or historical evidence indicating that CWM may be present in the subsurface, but there is a physical constraint (e.g., pavement, water depth over 120 feet) preventing direct access to the CWM.	2

Table 13
Classifications Within the CHE Module *Information on the Location of CWM* Data Element

Classification	Description	Score
Evidence of no CWM	• Following investigation of the MRS, there is physical evidence that there is no CWM present or there is historical evidence indicating that no CWM are present.	0

Notes:

- *Historical evidence* means the investigation: (1) found written documents or records, (2) documented interviews of persons with knowledge of site conditions, or (3) found and verified other forms of information.
- *Physical evidence* means: (1) recorded observations from on-site investigations, such as finding intact UXO or DMM, or munitions debris (e.g., fragments, penetrators, projectiles, shell casings, links, fins); (2) the results of field or laboratory sampling and analysis procedures; or (3) the results of geophysical investigations.
- *In the subsurface* means the CWM (i.e., a DMM or UXO) is (1) entirely beneath the ground surface, or (2) fully submerged in a water body.
- *On the surface* means the CWM (i.e., a DMM or UXO) is (1) entirely or partially exposed above the ground surface (i.e., above the soil layer), or (2) entirely or partially exposed above the surface of a water body (e.g., as a result of tidal activity).

Table 14
Classifications Within the CHE Module *Ease of Access* Data Element

Classification	Description	Score
No barrier	• There is no barrier preventing access to any part of the MRS (i.e., all parts of the MRS are accessible).	10
Barrier to MRS access is incomplete	• There is a barrier preventing access to parts of the MRS, but not the entire MRS.	8
Barrier to MRS access is complete, but not monitored	• There is a barrier preventing access to all parts of the MRS, but there is no surveillance (e.g., by a guard) to ensure that the barrier is effectively preventing access to all parts of the MRS.	5
Barrier to MRS access is complete and monitored	• There is a barrier preventing access to all parts of the MRS, and there is active continual surveillance (e.g., by a guard, video monitoring) to ensure that the barrier is effectively preventing access to all parts of the MRS.	0

Notes:

- *Barrier* means a natural obstacle or obstacles (e.g., difficult terrain, dense vegetation, deep or fast moving water), a man-made obstacle or obstacles (e.g., fencing), or a combination of natural and man-made obstacles.

Table 15
Classifications Within the CHE Module *Status of Property* Data Element

Classification	Description	Score
Non-DoD control	• The MRS is at a location that is no longer owned by, leased to, or otherwise possessed or used by the Department. Examples are privately owned land or water bodies; land or water bodies owned or controlled by state, tribal, or local governments; and land or water bodies managed by other federal agencies.	5
Scheduled for transfer from DoD control	• The MRS is on land or is a water body that is owned, leased, or otherwise possessed by the Department, and the Department plans to transfer that land or water body to control of another entity (e.g., a state, tribal, or local government; a private party; another federal agency) within 3 years from the date the rule is applied.	3
DoD control	• The MRS is on land or is a water body that is owned, leased, or otherwise possessed by the Department. With respect to property that is leased or otherwise possessed, the Department controls access to the property 24 hours per day, every day of the calendar year.	0

Table 16
Classifications Within the CHE Module *Population Density* Data Element

Classification	Definition	Score
> 500 persons per square mile	• There are more than 500 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data.	5
100 to 500 persons per square mile	• There are 100 to 500 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data.	3
< 100 persons per square mile	• There are fewer than 100 persons per square mile in the county in which the MRS is located, based on U.S. Census Bureau data.	1

Notes:

• If an MRS is in more than one county, the Component will use the largest population value among those counties. If the MRS is within or borders a city or town, the population density for that city or town, instead of the county population density, is used.

Table 17
Classifications Within the CHE Module *Population Near Hazard* Data Element

Classification	Description	Score
26 or more structures	• There are 26 or more inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	5
16 to 25	• There are 16 to 25 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	4
11 to 15	• There are 11 to 15 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	3
6 to 10	• There are 6 to 10 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	2
1 to 5	• There are 1 to 5 inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	1
0	• There are no inhabited structures located up to 2 miles from the boundary of the MRS, within the boundary of the MRS, or both.	0

Notes:

• The term *inhabited structures* means permanent or temporary structures, other than military munitions-related structures, that are routinely occupied by one or more persons for any portion of a day.

Table 18
Classifications Within the CHE Module *Types of Activities/Structures* Data Element

Classification	Description	Score
Residential, educational, commercial, or subsistence	• Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with any of the following purposes: residential, educational, child care, critical assets (e.g., hospitals, fire and rescue, police stations, dams), hotels, commercial, shopping centers, playgrounds, community gathering areas, religious sites, or sites used for subsistence hunting, fishing, and gathering.	5
Parks and recreational areas	• Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with parks, nature preserves, or other recreational uses.	4
Agricultural, forestry	• Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary or within the MRS's boundary, that are associated with agriculture or forestry.	3
Industrial or warehousing	• Activities are conducted, or inhabited structures are located up to two miles from the MRS's boundary, or within the MRS's boundary, that are associated with industrial activities or warehousing.	2
No known or recurring activities	• There are no known or recurring activities occurring up to two miles from the MRS's boundary or within the MRS's boundary.	1

Notes:

- The term *inhabited structures* means permanent or temporary structures, other than Department-related structures, that are routinely occupied by one or more persons for any portion of a day.

Table 19
Classifications Within the CHE Module *Ecological and/or Cultural Resources* Data Element

Classification	Description	Score
Ecological and cultural resources present	• There are both ecological and cultural resources present on the MRS.	5
Ecological resources present	• There are ecological resources present on the MRS.	3
Cultural resources present	• There are cultural resources present on the MRS.	3
No ecological or cultural resources present	• There are no ecological resources or cultural resources present on the MRS.	0

Notes:

- *Ecological resources* means that: (1) a threatened or endangered species (designated under the Endangered Species Act [ESA]) is present on the MRS; or (2) the MRS is designated under the ESA as critical habitat for a threatened or endangered species; or (3) there are identified sensitive ecosystems such as wetlands or breeding grounds present on the MRS.
- *Cultural resources* means there are recognized cultural, spiritual, traditional, religious, or historical features (e.g., structures, artifacts, symbolism) on the MRS. Requirements for determining if a particular feature is a cultural resource are found in *the National Historic Preservation Act, Native American Graves Protection and Repatriation Act, Archeological Resources Protection Act, Executive Order 13007*, and *the American Indian Religious Freedom Act*. As examples: American Indians or Alaska Natives deem an MRS to be of spiritual significance; there are areas that are used by American Indians or Alaska Natives for subsistence activities (e.g., hunting, fishing).

Table 20
Determining the CHE Rating from the CHE Module Score

Overall CHE Module Score	CHE Rating
The MRS has an overall CHE module score from 92 to 100.	CHE Rating A
The MRS has an overall CHE module score from 82 to 91.	CHE Rating B
The MRS has an overall CHE module score from 71 to 81.	CHE Rating C
The MRS has an overall CHE module score from 60 to 70.	CHE Rating D
The MRS has an overall CHE module score from 48 to 59.	CHE Rating E
The MRS has an overall CHE module score from 38 to 47.	CHE Rating F
The MRS has an overall CHE module score less than 38.	CHE Rating G
Alternative Module Ratings	Evaluation Pending
	No Longer Required
	No Known or Suspected CWM Hazard

Table 21
HHE Factor Levels

Contaminant Hazard Factor		Receptor Factor		Migration Pathway Factor	
Significant	High (H)	Identified	High (H)	Evident	High (H)
Moderate	Middle (M)	Potential	Middle (M)	Potential	Middle (M)
Minimal	Low (L)	Limited	Low (L)	Confined	Low (L)

Table 22
HHE Three-letter Combination Levels

Contaminant Hazard Factor	Receptor Factor	Migration Pathway		
		Evident	Potential	Confined
Significant	Identified	HHH	HHM	HHL
	Potential	HHM	HMM	HML
	Limited	HHL	HML	HLL
Moderate	Identified	HHM	HMM	HML
	Potential	HMM	MMM	MML
	Limited	HML	MML	MLL
Minimal	Identified	HHL	HML	HLL
	Potential	HML	MML	MLL
	Limited	HLL	MLL	LLL

Table 23
HHE Module Ratings

Combination	Rating
HHH	A
HHM	B
HHL	C
HMM	
HML	D
MMM	
HLL	E
MML	
MLL	F
LLL	G
Alternative Module Ratings	Evaluation Pending
	No Longer Required
	No Known or Suspected MC Hazard

Table 24 HHE Module Rating				
Contaminant Hazard Factor	Receptor Factor	Migration Pathway		
		Evident	Potential	Confined
Significant	Identified	A	B	C
	Potential	B	C	D
	Limited	C	D	E
Moderate	Identified	B	C	D
	Potential	C	D	E
	Limited	D	E	F
Minimal	Identified	C	D	E
	Potential	D	E	F
	Limited	E	F	G

Table 25 MRS Priority Based on Highest Hazard Evaluation Module Rating					
EHE Module Rating	Priority	CHE Module Rating	Priority	HHE Module Rating	Priority
Hazard Evaluation A (Highest)	2	Hazard Evaluation A (Highest)	1	Hazard Evaluation A (Highest)	2
Hazard Evaluation B	3	Hazard Evaluation B	2	Hazard Evaluation B	3
Hazard Evaluation C	4	Hazard Evaluation C	3	Hazard Evaluation C	4
Hazard Evaluation D	5	Hazard Evaluation D	4	Hazard Evaluation D	5
Hazard Evaluation E	6	Hazard Evaluation E	5	Hazard Evaluation E	6
Hazard Evaluation F	7	Hazard Evaluation F	6	Hazard Evaluation F	7
Hazard Evaluation G (Lowest)	8	Hazard Evaluation G (Lowest)	7	Hazard Evaluation G (Lowest) Low	8
Evaluation Pending		Evaluation Pending		Evaluation Pending	
No Longer Required		No Longer Required		No Longer Required	
No Known or Suspected Explosive Hazard		No Known or Suspected CWM Hazard		No Known or Suspected MC Hazard	

SUBCHAPTERS I–K [RESERVED]

SUBCHAPTER L—ENVIRONMENT

PART 187—ENVIRONMENTAL EFFECTS ABROAD OF MAJOR DEPARTMENT OF DEFENSE ACTIONS

Sec.
187.1 Purpose.
187.2 Applicability.
187.3 Definitions.
187.4 Policy.
187.5 Responsibilities.
187.6 Information requirements.

ENCLOSURE 1 TO PART 187—REQUIREMENTS FOR ENVIRONMENTAL CONSIDERATIONS—GLOBAL COMMONS

ENCLOSURE 2 TO PART 187—REQUIREMENTS FOR ENVIRONMENTAL CONSIDERATIONS—FOREIGN NATIONS AND PROTECTED GLOBAL RESOURCES

AUTHORITY: Title 10 U.S.C. 131.

SOURCE: 44 FR 21786, Apr. 14, 1979, unless otherwise noted. Redesignated at 56 FR 64481, Dec. 10, 1991.

§ 187.1 Purpose.

Executive Order 12114 provides the exclusive and complete requirement for taking account of considerations with respect to actions that do significant harm to the environment of places *outside* the United States. This part provides policy and procedures to enable Department of Defense (DoD) officials to be informed and take account of environmental considerations when authorizing or approving certain major Federal actions that do significant harm to the environment of places outside the United States. Its sole objective is to establish internal procedures to achieve this purpose, and nothing in it shall be construed to create a cause of action. Guidance for taking account of considerations with respect to the environment of places *within* the United States is set out in 32 CFR part 188 (under rev.) That guidance is grounded on legal and policy requirements different from those applicable to this part.

[44 FR 21786, Apr. 14, 1979. Redesignated and amended at 56 FR 64481, Dec. 10, 1991]

§ 187.2 Applicability.

The provisions of this part apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Defense Agencies (hereafter referred to as ''DoD components'').

§ 187.3 Definitions.

(a) *Environment* means the natural and physical environment, and it excludes social, economic, and other environments. Social and economic effects do not give rise to any requirements under this part.

(b) *Federal Action* means an action that is implemented or funded directly by the United States Government. It does not include actions in which the United States participates in an advisory, information-gathering, representational, or diplomatic capacity but does not implement or fund the action; actions taken by a foreign government or in a foreign country in which the United States is a beneficiary of the action, but does not implement or fund the action; or actions in which foreign governments use funds derived indirectly from United States funding.

(c) *Foreign Nation* means any geographic area (land, water, and airspace) that is under the jurisdiction of one or more foreign governments; any area under military occupation by the United States alone or jointly with any other foreign government; and any area that is the responsibility of an international organization of governments. ''Foreign nation'' includes contiguous zones and fisheries zones of foreign nations. ''Foreign government'' in this context includes governments regardless of whether recognized by the United States, political factions, and organizations that exercise governmental power outside the United States.

(d) *Global Commons* are geographical areas that are outside the jurisdiction of any nation, and include the oceans outside territorial limits and Antarctica. Global commons do not include contiguous zones and fisheries zones of foreign nations.

(e) *Major Action* means an action of considerable importance involving substantial expenditures of time, money,

and resources, that affects the environment on a large geographic scale or has substantial environmental effects on a more limited geographical area, and that is substantially different or a significant departure from other actions, previously analyzed with respect to environmental considerations and approved, with which the action under consideration may be associated. Deployment of ships, aircraft, or other mobile military equipment is not a major action for purposes of this part.

(f) *United States* means all States, territories, and possessions of the United States; and all waters and airspace subject to the territorial jurisdiction of the United States. The territories and possessions of the United States include the Virgin Islands, American Samoa, Wake Island, Midway Island, Guam, Palmyra Island, Johnston Atoll, Navassa Island, and Kingman Reef.

§ 187.4 Policy.

(a) Executive Order 12114 is based on the authority vested in the President by the Constitution and the laws of the United States. The objective of the Order is to further foreign policy and national security interests while at the same time taking into consideration important environmental concerns.

(b) The Department of Defense acts with care in the global commons because the stewardship of these areas is shared by all the nations of the world. The Department of Defense will take account of environmental considerations when it acts in the global commons in accordance with procedures set out in Enclosure 1 and its attachment.

(c) The Department of Defense also acts with care within the jurisdiction of a foreign nation. Treaty obligations and the sovereignty of other nations must be respected, and restraint must be exercised in applying United States laws within foreign nations unless Congress has expressly provided otherwise. The Department of Defense will take account of environmental considerations in accordance with Enclosure 2 and its attachments when it acts in a foreign nation.

(d) Foreign policy considerations require coordination with the Department of State on communications with foreign governments concerning environmental agreements and other formal arrangements with foreign governments concerning environmental matters under this part.

Informal working-level communications and arrangements are not included in this coordination requirement. Consultation with the Department of State also is required in connection with the utilization of additional exemptions from this part as specified in paragraph C.3.b. of Enclosure 2. Coordination and consultation with the Department of State will be through the Assistant Secretary of Defense (International Security Affairs).

(e) Executive Order 12114, implemented by this part prescribes the exclusive and complete procedural measures and other actions to be taken by the Department of Defense to further the purpose of the National Environmental Policy Act with respect to the environment outside the United States.

§ 187.5 Responsibilities.

(a) The *Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics)* shall:

(1) Serve as the responsible Department of Defense official for policy matters under Executive Order 12114 and this part;

(2) Modify or supplement any of the enclosures to this part in a manner consistent with the policies set forth in this part;

(3) Maintain liaison with the Council on Environmental Quality with respect to environmental documents;

(4) Participate in determining whether a recommendation should be made to the President that a natural or ecological resource of global importance be designated for protection; and

(5) Consult with the Assistant Secretary of Defense (International Security Affairs) on significant or sensitive actions or decisions affecting relations with another nation.

(b) The *Assistant Secretary of Defense (International Security Affairs)* shall:

(1) Maintain liaison and conduct consultations with the Department of State as required under this part; and

(2) Serve as the responsible official, in consultation with the Assistant Secretary of Defense (Manpower, Reserve

Affairs, and Logistics), for monitoring the continuing cooperation and the exchange of information with other nations concerning the environment.

(c) The *General Counsel, DoD,* shall provide advice and assistance concerning the requirements of Executive Order 12114 and this part.

(d) The *Secretaries of the Military Departments, Directors of the Defense Agencies,* and *Commanders of the Unified and Specified Commands,* for operations under their jurisdiction, shall:

(1) Prepare and consider environmental documents when required by this directive for proposed actions within their respective DoD component (this reporting requirement has been assigned Report Control Symbol DD-M(AR) 1327 (§ 187.6));

(2) Insure that regulations and other major policy issuances are reviewed for consistency with Executive Order 12114 and this part;

(3) Designate a single point-of-contact for matters pertaining to this part; and

(4) Consult with the Assistant Secretary of Defense (International Security Affairs) on significant or sensitive actions or decisions affecting relations with another nation.

[44 FR 21786, Apr. 14, 1979. Redesignated and amended at 56 FR 64481, Dec. 10, 1991]

§ 187.6 Information requirements.

The documents to be prepared under § 187.5(d) and Enclosures 1 and 2, ''Requirements for Environmental Considerations—Global Commons,'' and ''Requirements for Environmental Considerations—Foreign Nations and Protected Global Resources,'' respectively, are assigned Report Control Symbol DD-M(AR) 1327.

[44 FR 21786, Apr. 14, 1979. Redesignated and amended at 56 FR 64481, Dec. 10, 1991]

ENCLOSURE 1 TO PART 187—REQUIREMENTS FOR ENVIRONMENTAL CONSIDERATIONS—GLOBAL COMMONS

A. *General.* This enclosure implements the requirements of Executive Order 12114 with respect to major Department of Defense actions that do significant harm to the environment of the global commons. The focus is not the place of the action, but the location of the environment with respect to which there is significant harm. The actions prescribed by this enclosure are the exclusive and complete requirement for taking account of environmental considerations with respect to Department of Defense activities that affect the global commons.

B. *Actions included.* The requirements of this enclosure apply only to major Federal actions that do significant harm to the environment of the global commons.

C. *Environmental Document Requirements*—1. *General.* When an action is determined to be a major Federal action that significantly harms the environment of the global commons, an environmental impact statement, as described below, will be prepared to enable the responsible decision-making official to be informed of pertinent environmental considerations. The statement may be a specific statement for the particular action, a generic statement covering the entire class of similar actions, or a program statement.

2. *Limitations on Actions.* Until the requirements of this enclosure have been met with respect to actions involving the global commons, no action concerning the proposal may be taken that does significant harm to the environment or limits the choice of reasonable alternatives.

3. *Emergencies.* Where emergency circumstances make it necessary to take an action that does significant harm to the environment without meeting the requirements of this enclosure, the DoD component concerned shall consult with the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics). This includes actions that must be taken to promote the national defense or security and that cannot be delayed, and actions necessary for the protection of life or property.

4. *Combining Documents.* Environmental documents may be combined with other agency documents to reduce duplication. If an environmental impact statement for a particular action already exists, regardless of what Federal agency prepared it, no new statement is required by this part.

5. *Collective Statements.* Consideration should be given to the use of generic and program statements. Generic statements may include actions with relevant similarities such as common timing, environmental effects, alternatives, methods of implementation, or subject matter.

6. *Tiering.* Consideration should be given to tiering of environmental impact statements to eliminate repetitive discussions of the same issue and to focus the issues. Tiering refers to the coverage of general matters in broader environmental impact statements, with succeeding narrower statements or environmental analyses that incorporate by reference the general discussion and concentrate only on the issues specific to the statement subsequently prepared.

7. *Lead Agency*. When one or more other Federal agencies are involved with the Department of Defense in an action or program, a lead agency may be designated to supervise the preparation of the environmental impact statement. In appropriate cases, more than one agency may act as joint lead agencies. The following factors should be considered in making the lead agency designation:

a. The magnitude of agency involvement;

b. Which agency or agencies have project approval and disapproval authority;

c. The expert capabilities concerning the environmental effects of the action;

d. The duration of agency involvement; and

e. The sequence of agency involvement.

8. *Categorical Exclusions*. The Department of Defense may provide categorical exclusions for actions that normally do not, individually or cumulatively, do significant harm to the environment. If an action is covered by a categorical exclusion no environmental assessment or environmental impact statement is required. Categorical exclusions will be established by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) and will be identified in Attachment 1 to this enclosure, to be entitled, ''Categorical Exclusions—Global commons. ''DoD components identifying recurring actions that have been determined, after analysis, not to do significant harm to the environment should submit recommendations for cateorical exclusions and accompanying justification to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

9. *Environmental Assessments*. The purpose of an environmental assessment is to assist DoD components in determining whether an environmental impact statement is required for a particular action. The assessment should be brief and concise but should include sufficient information on which a determination can be made whether the proposed action is major and Federal, and whether it significantly harms the environment of the global commons. As a minimum, the assessment should include consideration of the need for the proposed action and the environmental effect of the proposed action. The environmental assessment will be made available to the public in the United States upon request, but there is no requirement that it be distributed for public comment.

D. *Environmental Impact Statements*. 1. *General*. Environmental impact statements will be concise and no longer than necessary to permit an informed consideration of the environmental effects of the proposed action on the global commons and the reasonable alternatives. If an action requiring an environmental impact statement also has effects on the environment of a foreign nation or on a resource designated as one of global importance, the statement need not consider or be prepared with respect to these effects. The procedures for considering these effects are set out in Enclosure 2, of this part.

2. *Draft Statement*. Environmental impact statements will be prepared in two stages and may be supplemented. The first, or draft statement, should be sufficiently complete to permit meaningful analysis and comment. The draft statement will be made available to the public, in the United States, for comment. The Department of State, the council on environmental Quality, and other interested Federal agencies will be informed of the availability of the draft statement and will be afforded an opportunity to comment. Contacts with foreign governments are discussed in §187.4(d) and subsection D.11. of this enclosure.

3. *Final statement*. Final statements will consider, either individually or collectively, substantive comments received on the draft statement. The final statement will be made available to the public in the United States.

4. *Supplemental statement*. Supplements to the draft or final statement should be used when substantial changes to the proposed action are made relative to the environment of the global commons or when significant new information or circumstances, relevant to environmental concerns, bears on the proposed action or its environmental effects on the global commons. Supplemental statements will be circulated for comment as in subsection 2. of this enclosure unless alternative procedures are approved by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

5. *Statement content*. The statement will include: A section on consideration of the purpose of and need for the proposed action; a section on the environmental consequences of the proposed action and reasonable alternatives; a section that provides a succinct description of the environment of the global commons affected by the proposed action and reasonable alternatives; and a section that analyzes, in comparative form, the environmental effects on the global commons of the proposed action and reasonable alternatives.

6. *Incomplete Information*. The statement should indicate when relevant information is missing due to unavailability or scientific uncertainty.

7. *Hearings*. Public hearings are not required. consideration should be given in appropriate cases to holding or sponsoring public hearings. Factors in this consideration include: Foreign relations sensitivities; whether the hearings would be an infringement or create the appearance of infringement on the sovereign responsibilities of another government; requirements of domestic and foreign governmental confidentiality; requirements of national security; whether meaningful information could be obtained through hearings; time considerations; and

requirements for commercial confidentiality. There is no requirement that all factors listed in this section be considered when one or more factors indicate that public hearings would not produce a substantial net benefit to those responsible for authorizing or approving the proposed action.

8. *Decision.* Relevant environmental documents developed in accordance with this enclosure will accompany the proposal for action through the review process to enable officials responsible for authorizing or approving the proposed action to be informed and to take account of environmental considerations. One means of making an appropriate record with respect to this requirement is for the decision-maker to sign and date a copy of the environmental impact statement indicating that it has been considered in the decision-making process. Other means of making an appropriate record are also acceptable.

9. *Timing.* No decision on the proposed action may be made until the later of 90 days after the draft statement has been made available and notice thereof published in the FEDERAL REGISTER, or 30 days after the final statement has been made available and notice thereof published in the FEDERAL REGISTER. The 90-day period and the 30-day period may run concurrently. Not less than 45 days may be allowed for public comment. The Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) may, upon a showing of probable important adverse effect on national security or foreign policy, reduce the 30-day, 45-day, and 90-day periods.

10. *Classified Information.* Environmental assessments and impact statements that address classified proposals will be safeguarded and classified information will be restricted from public dissemination in accordance with Department of Defense procedures (32 CFR part 159) established for such information under Executive Order 12065. The requirements of that Executive Order take precedence over any requirement of disclosure in this part. Only unclassified portions of environmental documents may be disseminated to the public.

11. *Foreign Governments.* Consideration will be given to whether any foreign government should be informed of the availability of environmental documents. Communications with foreign governments concerning environmental agreements and other formal arrangements with foreign governments concerning environmental matters under this part will be coordinated with the Department of State. Informal, working-level communications and arrangements are not included in this coordination requirement. Coordination with the Department of State will be through the Assistant Secretary of Defense (International Security Affairs).

[44 FR 21786, Apr. 14, 1979. Redesignated and amended at 56 FR 64481, Dec. 10, 1991]

ENCLOSURE 2 TO PART 187—REQUIREMENTS FOR ENVIRONMENTAL CONSIDERATIONS—FOREIGN NATIONS AND PROTECTED GLOBAL RESOURCES

A. *General.* This enclosure implements the requirements of Executive Order 12114 to provide for procedural and other actions to be taken to enable officials to be informed of pertinent environmental considerations when authorizing or approving certain major Department of Defense actions that do significant harm to the environment of a foreign nation or to a protected global resource.

B. *Actions included.* 1. The requirements of this enclosure apply only to the following actions:

a. Major Federal actions that significantly harm the environment of a foreign nation that is not involved in the action. The involvement of the foreign nation may be directly by participation with the United States in the action, or it may be in conjunction with another participating nation. The focus of this category is on the geographical location of the environmental harm and not on the location of the action.

b. Major Federal actions that are determined to do significant harm to the environment of a foreign nation because they provide to that nation: (1) A product, or involve a physical project that produces a principal product, emission, or effluent, that is prohibited or strictly regulated by Federal law in the United States because its toxic effects on the environment create a serious public health risk; or (2) a physical project that is prohibited or strictly regulated in the United States by Federal law to protect the environment against radioactive substances. Included in the category of ''prohibited or strictly regulated'' are the following: asbestos, vinyl chloride, acrylonitrile, isocyanates, polychlorinated biphenyls, mercury, beryllium, arsenic, cadmium, and benzene.

c. Major Federal actions outside the United States that significantly harm natural or ecological resources of global importance designated for protection by the President or, in the case of such a resource protected by international agreement binding on the United States, designated for protection by the Secretary of State. Such determinations by the President or the Secretary of State to be listed in Attachment 1 to this enclosure, entitled, ''Protected Global Resources''.

2. The actions prescribed by this enclosure are the exclusive and complete requirement

for taking account of environmental considerations with respect to Federal actions that do significant harm to the environment of foreign nations and protected global resources as described in subsection B.1., of this enclosure. No action is required under this enclosure with respect to Federal actions that affect only the environment of a participating or otherwise involved foreign nation and that do not involve providing products or physical projects producing principal products, emissions, or effluents that are prohibited or strictly regulated by Federal law in the United States, or resources of global importance that have been designated for protection.

C. *Environmental Document Requirements.*

1. *General.* a. There are two types of environmental documents officials shall use in taking account of environmental considerations for actions covered by this enclosure:

(1) Environmental studies—bilateral or multilateral environmental studies, relevant or related to the proposed action, by the United States and one or more foreign nations or by an international body or organization in which the United States is a member or participant; and

(2) Environmental reviews—concise reviews of the environmental issues involved that are prepared unilaterally by the United States.

b. This section identifies the procedures for the preparation of environmental studies or reviews when required by this enclosure and the exceptions from the requirement to prepare environmental studies or reviews. If an environmental document already exists for a particular action, regardless of what Federal agency prepared it, no new document is required by this enclosure.

2. *Lead Agency.* When one or more other Federal agencies are involved with the Department of Defense in an action or program, a lead agency may be designated to supervise the preparation of environmental documentation. In appropriate cases, more than one agency may act as joint lead agencies. The following factors should be considered in making the lead agency designation:

a. The magnitude of agency involvement;

b. Which agency or agencies have project approval and disapproval authority;

c. The expert capabilities concerning the environmental effects of the action;

d. The duration of agency involvement; and

e. The sequence of agency involvement.

3. *Exemptions.* There are general exemptions from the requirements of this enclosure provided by Executive Order 12114, and the Secretary of Defense has the authority to approve additional exemptions.

a. *General Exemptions.* The following actions are exempt from the procedural and other requirements of this enclosure under general exemptions established for all agencies by Executive Order 12114:

(1) Actions that the DoD component concerned determines do not do significant harm to the environment outside the United States or to a designated resource of global importance.

(2) Actions taken by the President. These include: Signing bills into law; signing treaties and other international agreements; the promulgation of Executive Orders; Presidential proclamations; and the issuance of Presidental decisions, instructions, and memoranda. This includes actions taken within the Department of Defense to prepare or assist in preparing recommendations, advice, or information for the President in connection with one of these actions by the President. It does not include actions taken within the Department of Defense to implement or carry out these instruments and issuances after they are promulgated by the President.

(3) Actions taken by or pursuant to the direction of the President or a cabinet officer in the course of armed conflict. The term ''armed conflict'' refers to: hostilities for which Congress has declared war or enacted a specific authorization for the use of armed forces; hostilities or situations for which a report is prescribed by section 4(a)(1) of the War Powers Resolution, 50 U.S.C.A. 1543(a)(1) (Supp. 1978); and other actions by the armed forces that involve defensive use or introduction of weapons in situations where hostilities occur or are expected. This exemption applies as long as the armed conflict continues.

(4) Actions taken by or pursuant to the direction of the President or a cabinet officer when the national security or national interest is involved. The determination that the national security or national interest is involved in actions by the Department of Defense must be made in writing by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

(5) The activities of the intelligence components utilized by the Secretary of Defense under Executive Order 12036, 43 FR 3674 (1978). These components include the Defense Intelligence Agency, the National Security Agency, the offices for the collection of specialized intelligence through reconnaissance programs, the Army Office of the Assistant Chief of Staff for Intelligence, the Office of Naval Intelligence, and the Air Force Office of the Assistant Chief of Staff for Intelligence.

(6) The decisions and actions of the Office of the Assistant Secretary of Defense (International Security Affairs), the Defense Security Assistance Agency, and the other responsible offices within DoD components with respect to arms transfers to foreign nations. The term ''arms transfers'' includes the grant, loan, lease, exchange, or sale of

defense articles or defense services to foreign governments or international organizations, and the extension or guarantee of credit in connection with these transactions.

(7) Votes and other actions in international conferences and organizations. This includes all decisions and actions of the United States with respect to representation of its interests at international organizations, and at multilateral conferences, negotiations, and meetings.

(8) Disaster and emergency relief actions.

(9) Actions involving export licenses, export permits, or export approvals, other than those relating to nuclear activities. This includes: Advice provided by DoD components to the Department of State with respect to the issuance of munitions export licenses under section 38 of the Arms Export Control Act, 22 U.S.C. 2778 (1976); advice provided by DoD components to the Department of Commerce with respect to the granting of export licenses under the Export Administration Act of 1969, 50 U.S.C. App. 2401–2413 (1970 & Supp. V 1975); and direct exports by the Department of Defense of defense articles and services to foreign governments and international organizations that are exempt from munitions export licenses under section 38 of the Arms Export Control Act, 22 U.S.C. 2778 (1976). The term ''export approvals'' does not mean or include direct loans to finance exports.

(10) Actions relating to nuclear activities and nuclear material, except actions providing to a foreign nation a nuclear production or utilization facility, as defined in the Atomic Energy Act of 1954, as amended, or a nuclear waste management facility.

b. *Additional Exemptions.* The Department of Defense is authorized under Executive Order 12114 to establish additional exemptions that apply only to the Department's operations. There are two types of additional exemptions: Case-by-case and class.

(1) *Case-by-Case Exemptions.* Exemptions other than those specified above may be required because emergencies, national security considerations, exceptional foreign policy requirements, or other special circumstances preclude or are inconsistent with the preparation of environmental documentation and the taking of other actions prescribed by this enclosure. The following procedures apply for approving these exemptions:

(a) *Emergencies.* This category includes actions that must be taken to promote the national defense or security and that cannot be delayed, and actions necessary for the protection of life or property. The heads of the DoD components are authorized to approve emergency exemptions on a case-by-case basis. The Department of Defense is required to consult as soon as feasible with the Department of State and the Council on Environmental Quality with respect to emergency exemptions. The requirement to consult as soon as feasible is not a requirement of prior consultation. A report of the emergency action will be made by the DoD component head to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), who, with the Assistant Secretary of Defense (International Security Affairs), shall undertake the necessary consultations.

(b) *Other Circumstances.* National security considerations, exceptional foreign policy requirements, and other special circumstances not identified in paragraph C.3.a. of this enclosure, may preclude or be inconsistent with the preparation of environmental documentation. In these circumstances, the head of the DoD component concerned is authorized to exempt a particular action from the environmental documentation requirements of this enclosure after obtaining the prior approval of the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), who, with the Assistant Secretary of Defense (International Security Affairs), shall consult, before approving the exemption, with the Department of State and the Council on Environmental Quality. The requirement for prior consultation is not a requirement for prior approval.

(2) *Class Exemptions.* Circumstances may exist where a class exemption for a group of related actions is more appropriate than a specific exemption. Class exemptions may be established by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), who, with the Assistant Secretary of Defense (International Security Affairs), shall consult, before approving the exemption, with the Department of State and the Council on Environmental Quality. The requirement for prior consultation is not a requirement for prior approval. Requests for class exemptions will be submitted by the head of the DoD component concerned to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) after coordination with other interested DoD components. Notice of the establishment of a class exemption will be issued as Attachment 2 to this enclosure to be entitled, ''Class Exemptions—Foreign Nations and Protected Global Resources.''

4. *Categorical Exclusions.* The Department of Defense is authorized by Executive Order 12114 to provide for categorical exclusions. A categorical exclusion is a category of actions that normally do not, individually or cumulatively, do significant harm to the environment. If an action is covered by a categorical exclusion, no environmental document is required. Categorical exclusions will be established by the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics), and will be identified in Attachment 3 to this enclosure to be entitled, ''Categorical Exclusions—Foreign Nations and Protected Global

Resources.'' DoD components identifying recurring actions that have been determined, after analysis, not to do significant harm to the environment should submit requests for categorical exclusions and accompanying justification to the Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics).

D. *Environmental studies.* 1. *General.* Environmental studies are one of two alternative types of documents to be used for actions described by section B. of this enclosure.

a. An environmental study is an analysis of the likely environmental consequences of the action that is to be considered by DoD components in the decision-making process. It includes a review of the affected environment, significant actions taken to avoid environmental harm or otherwise to better the environment, and significant environmental considerations and actions by the other participating nations, bodies, or organizations.

b. An environmental study is a cooperative action and not a unilateral action undertaken by the United States. It may be bilateral or multilateral, and it is prepared by the United States in conjunction with one or more foreign nations, or by an international body or organization in which the United States is a member or participant. The environmental study, because it is prepared as a cooperative undertaking, may be best suited for use with respect to actions that provide strictly regulated or prohibited products or projects to a foreign nation (B.1.b.) and actions that affect a protected global resource (B.1.c.).

2. *Department of State Coordination.* Communications with foreign governments concerning environmental studies and other formal arrangements with foreign governments concerning environmental matters under this directive will be coordinated with the Department of State. Informal, working-level communications and arrangements are not included in this coordination requirement. Coordination with the Department of State will be through the Assistant Secretary of Defense (International Security Affairs).

3. *Whether to Prepare an Environmental Study.* The judgment whether the action is one that would do significant harm to one of the environments covered by this enclosure normally will be made in consultation with concerned foreign governments or organizations. If a negative decision is made, the file will be documented with a record of that decision and the decision-makers who participated. If a decision is made to prepare a study then, except as provided by this enclosure, no action concerning the proposal may be taken that would do significant harm to the environment until the study has been completed and the results considered.

4. *Content of the Study.* The document is a study of the environmental aspects of the proposed action to be considered in the decision-making process. The precise content of each study must be flexible because of such considerations as the sensitivity of obtaining information from foreign governments, the availability of useful and understandable information, and other factors identified under ''Limitations,'' (subsection D.6., of this enclosure). The study should, however, include consideration of the following:

a. A general review of the affected environment;

b. The predicted effect of the action on the environment;

c. Significant known actions taken by governmental entities with respect to the proposed action to protect or improve the environment; and

d. If no actions are being taken to protect or enhance the environment, whether the decision not to do so was made by the affected foreign government or international organization.

5. *Distribution of the Study.* Except as provided under ''Limitations,'' (subsection D.6., of this enclosure), and except where classified information is involved, environmental studies will be made available to the Department of State, the Council on Environmental Quality, other interested Federal agencies, and, on request, to the public in the United States. Interested foreign governments also may be informed of the studies, subject to the ''Limitations'' (subsection D.6., of this enclosure) and controls on classified information, and furnished copies of the documents. No distribution is required prior to the preparation of the final version of the study or prior to taking the action that caused the study to be prepared.

6. *Limitations.* The requirements with respect to the preparation, content, and distribution of environmental studies in the international context must remain flexible. The specific procedures must be determined on a case-by-case basis and may be modified where necessary to:

a. Enable the component to act promptly. Considerations such as national security and foreign government involvement may require prompt action that must take precedence in the environmental review process;

b. Avoid adverse impacts on relations between the United States and foreign governments and international organizations;

c. Avoid infringement or the appearance of infringement on the sovereign responsibilities of another government. The collection of information and the preparation and distribution of environmental documentation for actions in which another nation is involved, or with respect to the environment and resources of another nation, unless done with proper regard to the sovereign authority of that nation, may be viewed by that nation as an interference in its internal affairs

and its responsibility to evaluate requirements with respect to the environment;

d. Ensure consideration of:

(1) Requirements of governmental confidentiality. This refers to the need to protect sensitive foreign affairs information and information received from another government with the understanding that it will be protected from disclosure regardless of its classification;

(2) National security requirements. This refers to the protection of classified information and other national security interests;

(3) Availability of meaningful information. Information on the environment of foreign nations may be unavailable, incomplete, or not susceptible to meaningful evaluation, particularly where the affected foreign nation is not a participant in the analysis. This may reduce or change substantially the normal content of the environmental study;

(4) The extent of the participation of the DoD component concerned and its ability to affect the decision made. The utility of the environmental analysis and the need for an in-depth review diminishes as DoD's role and control over the decision lessens; and

(5) International commercial, commercial confidentiality, competitive, and export promotion factors. This refers to the requirement to protect domestic and foreign trade secrets and confidential business information from disclosure. Export promotion factors includes the concept of not unnecessarily hindering United States exports.

7. *Classified Information.* Classified information will be safeguarded from disclosure in accordance with the Department of Defense procedures (32 CFR 159) established for such information under Executive Order 12065. The requirements of that Executive Order take precedence over any requirement of disclosure in this directive.

E. *Environmental Reviews.* 1. *General.* Environmental reviews are the second of the two alternative types of documents to be used for actions covered by section B. of this enclosure.

a. An environmental review is a survey of the important environmental issues involved. It includes identification of these issues, and a review of what if any consideration has been or can be given to the environmental aspects by the United States and by any foreign government involved in taking the action.

b. An environmental review is prepared by the DoD component concerned either unilaterally or in conjunction with another Federal agency. While an environmental review may be used for any of the actions identified by section B., it may be uniquely suitable, because it is prepared unilaterally by the United States, to actions that affect the environment of a nation not involved in the undertaking (B.1.a.).

2. *Department of State Coordination.* Communications with foreign governments concerning environmental agreements and other formal arrangements with foreign governments concerning environmental matters under this enclosure will be coordinated with the Department of State. Informal working-level communications and arrangements are not included in this coordination requirement. Coordination with the Department of State will be through the Assistant Secretary of Defense (International Security Affairs).

3. *Whether to Prepare an Environmental Review.* Sufficient information will be gathered, to the extent it is reasonably available, to permit an informed judgment as to whether the proposed action would do significant harm to the environments covered by this enclosure. If a negative decision is made, a record will be made of that decision and its basis. If a decision is made to prepare a review, then, except as provided by this enclosure, no action concerning the proposal may be taken that would do significant environmental harm until the review has been completed.

4. *Content of the Review.* An environmental review is a survey of the important environmental issues associated with the proposed action that is to be considered by the DoD component concerned in the decision-making process. It does not include all possible environmental issues and it does not include the detailed evaluation required in an environmental impact statement under Enclosure 1 of this part. There is no foreign government or international organization participation in its preparation, and the content therefore may be circumscribed because of the availability of information and because of foreign relations sensitivities. Other factors affecting the content are identified under ''Limitations,'' (subsection E.6., of this enclosure). To the extent reasonably practical the review should include consideration of the following:

a. A statement of the action to be taken including its timetable, physical features, general operating plan, and other similar broad-guage descriptive factors;

b. Identification of the important environmental issues involved;

c. The aspects of the actions taken or to be taken by the DoD component that ameliorate or minimize the impact on the environment; and

d. The actions known to have been taken or to be planned by the government of any participating and affected foreign nations that will affect environmental considerations.

5. *Distribution.* Except as provided under ''Limitations,'' (subsection E.6., of this enclosure), and except where classified information is involved, environmental reviews will be made available to the Department of

State, the Council on Environmental Quality, other interested Federal agencies, and, on request, to the public in the United States. Interested foreign governments also may be informed of the reviews and, subject to the ''Limitations'' (subsection E.6., of this enclosure) and controls on classified information, will be furnished copies of the documents on request. This provision for document distribution is not a requirement that distribution be made prior to taking the action that is the subject of the review.

6. *Limitations*. The requirements with respect to the preparation, content, and distribution of environmental reviews in the international context must remain flexible. The specific procedures must be determined on a case-by-case basis and may be modified where necessary to:

a. Enable the component to act promptly. Considerations such as national security and foreign government involvement may require prompt action that must take precedence in the environmental review process;

b. Avoid adverse impacts on relations between the United States and foreign governments and international organizations;

c. Avoid infringement or the appearance of infringement on the sovereign responsibilities of another government. The collection of information and the preparation and distribution of environmental documentation for actions in which another nation is involved or with respect to the environment and resources of another nation, unless done with proper regard to the sovereign authority of that nation, may be viewed by that nation as an interference in its internal affairs and its prerogative to evaluate requirements with respect to the environment; and

d. Ensure consideration of:

(1) Requirements of governmental confidentiality. This refers to the need to protect sensitive foreign affairs information and information received from another government with the understanding that it will be protected from disclosure regardless of its classification;

(2) National security requirements. This refers to the protection of classified information;

(3) Availability of meaningful information. Information on the environment of foreign nations may be unavailable, incomplete, or not susceptable to meaningful evaluation, and this may reduce or change substantially the normal content of the environmental review;

(4) The extent of the participation of the DoD component concerned and its ability to affect the decision made. The utility of the environmental analysis and the need for an in-depth review diminishes as the role of the Department of Defense and control over the decision lessens; and

(5) International commercial, commercial confidentiality, competitive, and export promotion factors. This refers to the requirements to protect domestic and foreign trade secrets and confidential business information from disclosure. Export promotion factors includes the concept of not unnecessarily hindering United States exports.

7. *Classified Information*. Classified information will be safeguarded from disclosure in accordance with the DoD procedures (32 CFR 159) established for such information under Executive Order 12065. The requirements of that Executive Order take precedence over any requirement of disclosure in this part.

PART 188—DOD ENVIRONMENTAL LABORATORY ACCREDITATION PROGRAM (ELAP)

Sec.

188.1 Purpose.
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SOURCE: 81 FR 80998, Nov. 17, 2016, unless otherwise noted.

§ 188.1 Purpose.

This part implements policy, assigns responsibilities, and provides procedures to be used by DoD personnel for the operation and management of the DoD ELAP.

§ 188.2 Applicability.

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

§ 188.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purposes of this part.

Accreditation. Third-party attestation conveying formal demonstration of a laboratory's competence to carry out specific tasks.

Accreditation body (AB). Authoritative organization that performs accreditation.

Assessment. Process undertaken by an AB to evaluate the competence of a laboratory, based on requirements contained in the DoD Quality Systems Manual for Environmental Laboratories (QSM), for a defined scope of accreditation.

Change. A reissuance of the DoD QSM containing minor changes to requirements or clarifications of existing requirements necessary to ensure consistent implementation.

Complaint. Defined in International Organization for Standardization/International Electrotechnical Commission (ISO/IEC) 17025:2005, ''General Requirements for the Competence of Testing and Calibration Laboratories'' (available for purchase at *http://www.iso.org/iso/store.htm*).

Contractor project chemist. Defined in Under Secretary of Defense for Acquisition, Technology, and Logistics Memorandum, ''Acquisitions Involving Environmental Sampling or Testing Services'' (available at *http://www.acq.osd.mil/dpap/dars/dfars/changenotice/2008/20080303/223.7.pdf*).

Corrective action response. Description, prepared by the laboratory, of specific actions to be taken to correct a deficiency and prevent its reoccurrence.

Deficiency. An unauthorized deviation from requirements.

Definitive data. Defined in DoD Instruction 4715.15, ''Environmental Quality Systems'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/471515p.pdf*).

Environmental Data Quality Workgroup (EDQW) component principal. A voting member of the DoD EDQW.

Errata sheet. A document prepared by the EDQW and issued by the EDQW chair, defining minor ''pen and ink'' changes that apply to the most recently issued version of the DoD QSM. Errata will be corrected in the next change or revision of the DoD QSM.

Government chemist. Defined in USD(AT&L) Memorandum, ''Acquisitions Involving Environmental Sampling or Testing Services.''

Government oversight. The set of activities performed by or on behalf of the DoD EDQW to provide assurance that ABs and assessors are providing thorough, consistent, objective, and impartial assessments within the specified scopes of accreditation and to identify opportunities for continual improvement of the DoD QSM and DoD ELAP.

International Laboratory Accreditation Cooperation (ILAC) mutual recognition arrangement (MRA). An arrangement through which ABs are evaluated and accepted by their peers for conformance to ILAC rules and procedures. To be accepted into the ILAC MRA, the AB must become a signatory to its requirements; specifically, it must commit to maintain conformance with the current version of Deputy Secretary of Defense Memorandum, ''Ensuring Quality of Information Disseminated to the Public by the Department of Defense'') and ensure that the laboratories it accredits comply with ISO/IEC 17025:2005.

ILAC MRA peer evaluation. The process through which ABs are assessed by other ABs and receive or maintain acceptance into the ILAC MRA.

Project-specific laboratory approval. The set of activities undertaken by the DoD EDQW to assess whether a laboratory is competent to perform specific tests, in the case where no DoD-ELAP accredited laboratory is able to perform the required tests.

Quality system. Defined in ISO/IEC 17025:2005.

Recognition. The acceptance of an AB by the EDQW based on its demonstrated commitment to maintain signatory status in the ILAC MRA and accept the DoD ELAP conditions and criteria for recognition.

Revision. A reissuance of the DoD QSM containing significant changes in requirements or scope. A significant change is one that could reasonably be expected to affect a laboratory's ability to comply with the requirement (*i.e.,* the laboratory is likely to have to make a change in its quality system or technical procedures in order to maintain compliance).

Scope of accreditation. Specific laboratory services, stated in terms of test method, matrix, and analyte, for which accreditation is sought or has been granted.

§ 188.4 Policy.

It is DoD policy, in accordance with DoD Instruction 4715.15, to implement the DoD ELAP for the collection of definitive data in support of the Defense Environmental Restoration Program (DERP) at all DoD operations, activities, and installations, including government-owned, contractor-operated facilities and formerly used defense sites.

§ 188.5 Responsibilities.

(a) *Secretaries of the Military Departments and Director, Defense Logistics Agency (DLA).* The Director, DLA, is under the authority, direction, and control of the USD(AT&L), through the Assistant Secretary of Defense for Logistics and Materiel Readiness. The Secretaries of the Military Departments and Director, DLA:

(1) Provide resources to support project-specific government oversight for the collection of definitive data in support of the DERP.

(2) Provide resources to support project-specific laboratory approvals, if required.

(b) *Secretary of the Navy.* In addition to the responsibilities in paragraph (a) of this section, the Secretary of the Navy plans, programs, and budgets for DoD EDQW activities necessary to support government oversight of the DoD ELAP.

§ 188.6 Procedures.

(a) *DoD ELAP Overview*—(1) *Introduction.* (i) DoD ELAP provides a unified DoD program through which commercial environmental laboratories can voluntarily demonstrate competency and document conformance to the international standard established in ISO/IEC 17025:2005 as implemented by the Deputy Under Secretary of Defense for Environmental Security Memorandum, ''DoD Quality Systems Manual for Environmental Laboratories'' (available at *http://www.denix.osd.mil/edqw/ upload/QSM-V4-2-Final-102510.pdf*) (referred to in this part as the ''DoD Quality Systems Manual for Environmental Laboratories (QSM)''). The DoD QSM provides minimum quality systems requirements, based on ISO/IEC 17025:2005, for environmental laboratories performing testing for DoD.

(ii) DoD ELAP was developed in compliance with 15 U.S.C. 3701 (also known as the ''National Technology Transfer and Advancement Act''). Support and guidance was provided by the National Institute of Standards and Technology, following procedures used to establish similar programs for other areas of testing. The DoD ELAP supports implementation of section 515 of Public Law 106–554, ''Treasury and General Government Appropriations Act, 2001'' and Office of Management and Budget Guidance, ''Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies'' (67 FR 8452) as implemented by Deputy Secretary of Defense Memorandum, ''Ensuring Quality of Information Disseminated to the Public by the Department of Defense.''

(iii) Using third party ABs operating in accordance with the international standard ISO/IEC 17011:2004(E), ''Conformity Assessment—General Requirements for Accreditation Bodies Accrediting Conformity Assessment Bodies'' (available for purchase at *http://www.iso.org/iso/store.htm*), the DoD ELAP:

(A) Promotes interoperability among the DoD Components.

(B) Promotes fair and open competition among commercial laboratories.

(C) Streamlines the process for identifying and procuring competent providers of environmental laboratory services.

(D) Promotes the collection of data of known and documented quality.

(2) *Authority.* Operation of the DoD ELAP is authorized by DoD Instruction 4715.15.

(3) *Program requirements.* (i) Pursuant to DoD Instruction 4715.15, laboratories seeking to perform testing in support of the DERP must be accredited in accordance with DoD ELAP.

(ii) The DoD ELAP applies to:

(A) Environmental programs at DoD operations, activities, and installations, including government-owned, contractor-operated facilities and formerly used defense sites.

(B) Permanent, temporary, and mobile laboratories regardless of their

size, volume of business, or field of accreditation that generate definitive data.

(iii) Participation in the program is voluntary and open to all laboratories that operate under a quality system conforming to ISO/IEC 17025:2005 and Deputy Under Secretary of Defense for Environmental Security Memorandum, ''DoD Quality Systems Manual for Environmental Laboratories.'' Laboratories may seek accreditation for any method they perform in accordance with documented procedures, including non-standard methods. Laboratories are free to select any participating AB for accreditation services.

(iv) To participate in DoD ELAP, ABs must be U.S.-based signatories to the ILAC MRA and must operate in accordance with ISO/IEC 17011:2004(E).

(4) *Program oversight.* In accordance with Assistant Deputy Under Secretary of Defense for Installations and Environment Memorandum, ''DoD Environmental Data Quality Workgroup Charter'' (available at *http://www.denix.osd.mil/edqw/upload/USA004743-10-Signed-Memo-to-DASs-DLA-DoD-Envir-Data-Quality-Workgroup-Charter-1Oct10-1.pdf*), the DoD EDQW:

(i) Provides coordinated responses to legislative and regulatory initiatives.

(ii) Responds to requests for DoD Component information.

(iii) Develops and recommends department-wide policy related to sampling, testing, and quality assurance for environmental programs.

(iv) Implements and provides oversight for the DoD ELAP.

(v) Includes technical experts from the Military Services and DLA as well as an EDQW component principal (voting) member from each of the Military Services.

(vi) Specifies the EDQW Navy principal, Director of Naval Sea Systems Command (NAVSEASYSCOM) 04XQ(LABS), serve as EDQW chair.

(b) *Maintaining the DoD QSM*—(1) *General.* The DoD EDQW will maintain and improve the DoD QSM to ensure that:

(i) The DoD QSM remains current in accordance with ISO/IEC 17025:2005.

(ii) Minimum essential requirements are met.

(iii) Requirements are clear, concise, and auditable.

(iv) The DoD QSM will efficiently and effectively support the DoD ELAP.

(2) *Procedures*—(i) *Annual review.* At a minimum, the DoD EDQW will perform an annual review of the DoD QSM, based on feedback received from participants in DoD ELAP (*e.g.,* DoD Components, commercial laboratories, and ABs). The review will also address any revisions to ISO/IEC 17025:2005.

(ii) *Ongoing review.* As received, the DoD EDQW will respond to questions submitted through the Defense Environmental Network Information Exchange (DENIX) concerning the interpretation of DoD QSM requirements. DoD EDQW participants will forward all questions through their EDQW component principal to the DoD EDQW chair.

(iii) *Issuances.* The DoD EDQW chair will prepare DoD QSM updates:

(A) *Correspondence.* The DoD EDQW chair, in consultation with the EDQW component principals, will prepare correspondence (email or memorandum) providing responses to all written requests for clarification and interpretation of the DoD QSM. Depending on the significance of the issue, as determined by the EDQW chair, the response may also result in a posting to the frequently asked question (FAQ) section of the appropriate Web sites.

(B) *Errata sheets.* Minor corrections to the DoD QSM, such as typographical errors, may be made by the issuance of an errata sheet defining ''pen and ink'' changes that apply to the current version of the DoD QSM. Following concurrence by all EDQW component principals, errata sheets will be issued as needed by the DoD EDQW chair. Errata will be corrected in the next change or revision to the DoD QSM.

(C) *Changes.* Changes to the DoD QSM will be issued as necessary to reflect minor changes to requirements or clarifications of existing requirements that are necessary to ensure consistent implementation. Following concurrence by the EDQW component principals, changes will be issued by the DoD EDQW chair in the form of a complete DoD QSM.

(*1*) The first change to DoD QSM Version 4 will be numbered Version 4.1,

the second change will be Version 4.2, etc.

(*2*) Changes to the DoD QSM will be posted on DENIX in place of the previous version or change of the DoD QSM.

(D) *Revisions*. A revision will be issued if one or more of the proposed changes could reasonably be expected to affect a laboratory's ability to comply with the requirement (*i.e.*, the laboratory is likely to have to make a change in its quality system or technical procedures).

(*1*) Once EDQW component principals have reached consensus on the proposed revision, the DoD EDQW chair will forward the proposed revision to all participating DoD ELAP-accredited laboratories and ABs for review.

(*2*) The DoD EDQW will review and respond to comments received from the DoD ELAP-accredited laboratories and ABs within the designated comment period.

(*3*) Following concurrence by the EDQW component principals, revisions will be issued by the DoD EDQW chair in the form of a complete DoD QSM.

(*4*) A revision of Version 4 will be issued as Version 5, a revision of Version 5 will be issued as Version 6, etc.

(*5*) The final revised version of the DoD QSM will be posted on DENIX in place of the previous version including any DoD QSM updates.

(3) *Continual improvement*. The DoD EDQW will meet with the ABs on an annual basis to review lessons learned and identify additional opportunities for continual improvement of the DoD ELAP and the DoD QSM.

(4) *Data and records management*. Through NAVSEASYSCOM, the DoD EDQW will maintain all DoD QSM updates in accordance with Secretary of the Navy Manual M–5210.1, ''Department of the Navy Records Management Program: Records Management Manual'' (available at *http://doni.daps.dla.mil/ SECNAV%20Manuals1/ 5210.1.pdf*).

(c) *Recognizing ABs*—(1) *General*. (i) The DoD EDQW will:

(A) Use the procedures in this paragraph to evaluate and recognize third-party ABs in support of the DoD ELAP.

(B) Develop and maintain the application for recognition, the conditions and criteria for recognition and related forms, and review submitted AB applications for completeness and compliance with DoD ELAP requirements.

(ii) The DoD EDQW chair, following consultation with and concurrence by the EDQW component principals, grants or revokes AB recognition in accordance with this paragraph.

(2) *Limitations*. Candidate ABs must be U.S.-based signatories in good standing to the ILAC MRA. ABs must maintain ILAC recognition to maintain DoD ELAP recognition. Because the EDQW continually monitors AB performance, no pre-defined limits are placed on the duration of recognition; however, the EDQW may revoke recognition at any time, for cause, in accordance with paragraph (c)(3)(vii) of this section.

(3) *Procedures*. (i) Upon receipt of an application for recognition, the DoD EDQW will review the application package for completeness. A complete application package must include:

(A) Application for recognition.

(B) Signed acceptance of the conditions and criteria for DoD ELAP recognition.

(C) Electronic copy of the AB's quality systems documentation.

(D) Copy of the most recent ILAC MRA peer evaluation documentation.

(ii) If necessary to complete the review, the DoD EDQW will request additional documentation from the applicant.

(iii) The EDQW component principals will review the application package for compliance with requirements. Prior to granting recognition, the EDQW component principals must unanimously concur that all application requirements have been met.

(iv) Once the EDQW component principals have completed review of the application package, the DoD EDQW chair will notify the AB, either granting recognition or citing specific reasons for not doing so (*i.e.*, indicating which areas of the application package are deficient).

(v) Once recognition has been granted, the DoD EDQW chair will post the name and contact information of the AB on DENIX.

(vi) With unanimous concurrence, the EDQW component principals may revoke recognition if the AB:

(A) Violates any of the conditions or criteria for recognition.

(B) Fails to operate in accordance with its documented quality system.

(vii) Should it become necessary to revoke an AB's recognition, the DoD EDQW chair will notify the AB stating specific reasons for the revocation and remove the AB's name from the list of DoD ELAP-recognized ABs.

(viii) If recognition is revoked, the AB must immediately cease to perform all DoD ELAP assessments.

(ix) ABs who have been denied recognition, or ABs whose recognition has been revoked, may appeal that decision.

(A) Within 15 calendar days of its receipt of a notice denying or revoking recognition, the AB must submit to the DoD EDQW chair a written statement with supporting documentation contesting the denial or revocation.

(B) The submission must demonstrate that:

(*1*) Clear, factual errors were made by the DoD EDQW during the review of the AB's application for recognition; or

(*2*) The decision to revoke recognition was based on clear, factual errors, and that the AB would have been determined to meet all requirements for recognition if those errors had been corrected.

(x) The DoD EDQW will have up to 30 calendar days to review the appeal and provide written notice to the AB either accepting the appeal and granting, or restoring, recognition, or explaining the basis for denying the appeal.

(4) *Continual improvement.* The DoD EDQW will meet with ABs on an annual basis to review lessons learned and identify additional opportunities for continual improvement of the DoD ELAP. On a 5-year cycle, at minimum, the DoD EDQW will evaluate whether the process for evaluating and recognizing ABs is continuing to meet DoD needs.

(5) *Data and records management.* Through NAVSEASYSCOM, the DoD EDQW, will maintain copies of all application packages and associated documentation in accordance with Secretary of the Navy Manual M–5210.1.

(d) *Performing government oversight—*(1) *General.* DoD personnel will use the procedures in this paragraph to perform and document government oversight of the DoD ELAP. Government oversight will include monitoring the performance of AB assessors during laboratory assessments, reviewing laboratory assessment reports, observing ILAC MRA peer evaluations, and evaluating AB Web sites for content on accredited laboratories.

(2) *Limitations.* (i) DoD personnel performing oversight must observe, but must not participate in, laboratory assessments or ILAC MRA peer evaluations. Specifically, DoD personnel must not:

(A) Offer specific advice to the laboratory regarding the development or implementation of quality systems or technical procedures;

(B) Offer specific advice or direction to assessors or peer evaluators regarding accreditation processes, assessment procedures, or documentation of findings; or

(C) Impede assessors, peer reviewers, or laboratory personnel in any way during the performance of their work, including technical procedures, document reviews, observations, interviews, and meetings.

(ii) If, during the course of an assessment, questions by laboratory personnel or assessors are directed to DoD personnel, personnel must limit responses to specific text from the DoD QSM or published FAQs. DoD personnel must not render opinions regarding interpretation of the DoD QSM. If there are questions about the DoD QSM that require interpretation, DoD personnel must advise the assessor to contact the AB who may, if necessary, contact the DoD EDQW chair for a coordinated response.

(iii) If DoD personnel observe any evidence of inappropriate practices on the part of assessors or laboratory personnel during the course of the assessment, they must record the observations and notify the DoD EDQW chair immediately (inappropriate practices are identified in the DoD QSM). DoD personnel must not call either the laboratory's or the assessor's attention to the specific practice in question.

(3) *Personnel qualifications.* DoD personnel or contractors performing oversight must:

(i) Meet the government chemist or contractor project chemist requirements contained in the USD(AT&L) Memorandum, ''Acquisitions Involving Environmental Sampling or Testing Services.''

(ii) Have a working knowledge of the DoD QSM requirements and be familiar with environmental test methods and instrumentation.

(iii) Obey all laboratory instructions regarding health and safety precautions while in the laboratory.

(4) *Procedures.* (i) The DoD EDQW will maintain an up-to-date calendar of scheduled assessments and peer evaluations based on input from the ABs, peer evaluators, and assigned oversight personnel.

(ii) Once an assessment or peer review has been scheduled, the EDQW component principals will determine if DoD oversight of the activity will be performed. The goal will be to observe a representative number of activities for each AB.

(iii) The EDQW component principals will provide the DoD EDQW chair the names of personnel from their respective DoD Components who will participate in the oversight.

(iv) The DoD EDQW chair will provide the AB with contact information for the oversight personnel.

(v) If two or more DoD personnel are scheduled to monitor the assessment, the DoD EDQW chair will designate a lead that will be responsible for compiling an oversight report.

(vi) The lead for the oversight activity will request a copy of the assessment plan from the AB's lead assessor and distribute it to other oversight personnel.

(vii) The lead will review the assessment plan to determine the scope of accreditation and ensure that oversight personnel are assigned to monitor a cross-section of the assessment.

(viii) Persons performing oversight will review previous oversight reports, if available, for the particular AB and assessors performing the assessment.

(ix) Observing all health and safety protective measures, oversight personnel must accompany the assessor(s) as they witness procedures and conduct interviews, taking care not to interfere with the assessment.

(5) *Reporting.* Within 15 calendar days of the onsite assessment, the lead for the oversight activity will complete an oversight report and forward the completed report through the appropriate EDQW component principal to the DoD EDQW chair.

(i) The DoD EDQW chair will provide copies of the report to the EDQW component principals for review.

(ii) After review by the EDQW component principals, the DoD EDQW chair will provide a summary of the oversight report to the AB performing the assessment.

(6) *Handling disputes.* Laboratories must follow the AB's dispute resolution process for all disputes concerning the assessment or accreditation of the laboratory, including disagreements involving an interpretation of the DoD QSM arising during the accreditation process.

(i) In the event the laboratory and the AB are unable to resolve a disagreement concerning the interpretation of the DoD QSM, either the laboratory or the AB may request the DoD EDQW provide an interpretation of the DoD QSM. The DoD EDQW chair will provide a written response to the laboratory and the AB providing the DoD authoritative interpretation of the DoD QSM. No review of this interpretation will be available to the laboratory or the AB.

(ii) The DoD EDQW will not consider or take a position on requests by either a laboratory or an AB on a dispute concerning accreditation of the laboratory.

(7) *Continual improvement.* The DoD EDQW will:

(i) Review the ABs' assessment reports and the DoD oversight reports to evaluate the thoroughness, consistency, objectivity, and impartiality of the DoD ELAP assessments.

(ii) Compare assessment reports across laboratories, ABs, and assessors.

(iii) Compare DoD ELAP findings to findings from previous assessments.

(iv) Identify opportunities for continual improvement of the DoD ELAP.

(v) Meet with ABs on an annual basis to review lessons learned and identify

additional opportunities for continual improvement of the DoD ELAP.

(8) *Data and records management.* Through NAVSEASYSCOM, the DoD EDQW will maintain copies of all oversight reports in accordance with Secretary of the Navy Manual M–5210.1.

(e) *Conducting project-specific laboratory approvals*—(1) *General.* The DoD EDQW will use the procedures in this paragraph to conduct project-specific laboratory approvals for specific tests in the rare instances when DoD is unable to identify a DoD ELAP-accredited laboratory capable of providing the required services. This will ensure that competent laboratories are used to support DoD environmental projects. Examples of these rare instances include:

(i) The required method, matrix, or analyte is not included in the scope of accreditation for any existing DoD ELAP-accredited laboratories.

(ii) The required method, matrix, and analyte combination is included in the scope of accreditation for an existing accredited laboratory; however, the laboratory is unable to meet one or more of the project-specific measurement performance criteria.

(2) *Limitations.* (i) Project-specific laboratory approvals are not to be used as substitutes for the required DoD ELAP-accreditation.

(ii) The DoD EDQW will not perform project-specific laboratory approvals in cases where one or more DoD ELAP-accredited laboratories capable of meeting project-specific requirements are available.

(iii) The project-specific laboratory approval is a one-time approval, the specific terms of which will be outlined in the approval notice issued by the DoD EDQW.

(3) *Personnel qualifications.* DoD personnel and contractors assessing laboratories for the purpose of performing project-specific laboratory approvals must meet the government chemist or contractor project chemist requirements contained in USD(AT&L) Memorandum, ''Acquisitions Involving Environmental Sampling or Testing Services.'' Personnel must have a working knowledge of the DoD QSM requirements and be familiar with required environmental test methods and instrumentation.

(4) *Procedures.* (i) If a project-specific laboratory approval is requested, the DoD EDQW will request and review a copy of the project's quality assurance project plan (QAPP).

(ii) If, after review of the QAPP, the DoD EDQW determines that an existing DoD ELAP-accredited laboratory is available to provide the required services, the laboratory contact information will be provided to the project manager requesting assistance.

(iii) If, after review of the QAPP, the DoD EDQW determines that no existing DoD ELAP-accredited laboratory is available to provide the required services, the DoD EDQW will:

(A) Work with the project team to determine whether the use of alternative procedures by an existing DoD ELAP-accredited laboratory is feasible;

(B) Determine if the required services can be added to the scope of accreditation of an existing DoD ELAP-accredited laboratory; or

(C) Work with the project team to identify a candidate laboratory for project-specific laboratory approval.

(iv) If a project-specific approval is needed, the DoD EDQW will:

(A) Determine the type of assessment required (on-site, document review, etc.).

(B) Determine if additional funding is required to support the assessment. If additional funding is required, the DoD EDQW will provide a cost estimate and work with the project manager to establish funding.

(v) If the DoD EDQW determines that a project-specific laboratory approval is warranted and resources (including funding and technical expertise) are available to support the assessment, the DoD EDQW chair will coordinate with the EDQW component principals to appoint an assessment team with appropriate technical backgrounds.

(vi) The DoD EDQW chair will designate an assessment team leader. The assessment team leader will:

(A) Request the documentation needed to perform the assessment.

(B) Assign responsibilities for individual members of the assessment team, if appropriate.

(C) Coordinate the document reviews.

(D) Lead the assessment team in the performance of the on-site assessment, if required.

(E) Provide a report to the DoD EDQW chair. The report will identify whether:

(*1*) The laboratory is capable of meeting all project-specific requirements.

(*2*) Documentation procedures are in place to provide data that are scientifically valid, defensible, and reproducible.

(*3*) Any deficiencies must be corrected prior to granting the project-specific laboratory approval.

(vii) The DoD EDQW chair, with concurrence by the EDQW component principals, will issue a report to the project manager and laboratory detailing the results of the assessment and any deficiencies that must be corrected prior to granting a project-specific laboratory approval.

(viii) Upon receipt of the laboratory's corrective action response, if required, the assessment team will:

(A) Review the laboratory's corrective action response for resolving the deficiencies.

(B) Provide the EDQW component principals with a final report describing the resolution of findings and containing recommendations on whether to grant the project-specific laboratory approval.

(ix) The DoD EDQW chair, with concurrence by the EDQW component principals, will prepare a report for the DoD project manager describing the results of the assessment and the status and terms of the project-specific laboratory approval. Information about project-specific laboratory approvals will not be posted on Web sites listing DoD ELAP-accredited laboratories.

(5) *Continual improvement.* The EDQW component principals will review project-specific laboratory assessment reports to evaluate the thoroughness, consistency, objectivity, and impartiality of project-specific assessments and make recommendations for continual improvement of the DoD QSM and the DoD ELAP.

(6) *Data and records management.* Through NAVSEASYSCOM, the DoD EDQW will maintain copies of all laboratory records and project-specific assessment reports in accordance with Secretary of the Navy Manual M–5210.1.

(f) *Handling complaints*—(1) *General.* The DoD EDQW will use the procedures in this paragraph to handle complaints concerning the processes established in the DoD ELAP or the DoD QSM. The DoD EDQW will document and resolve complaints promptly through the appropriate channels, consistently and objectively, and identify and implement any necessary corrective action arising from complaints. Complaints generally fall into one of four categories:

(i) Complaints by any party against an accredited laboratory.

(ii) Complaints by any party against an AB.

(iii) Complaints by any party concerning any assessor acting on behalf of the AB.

(iv) Complaints by any party against the DoD ELAP itself.

(2) *Limitations.* The procedures in this paragraph:

(i) Do not address appeals by laboratories regarding accreditation decisions by ABs. Appeals to decisions made by ABs regarding the accreditation status of any laboratory must be filed directly with the AB in accordance with agreements in place between the laboratory and the AB.

(ii) Are not designed to handle allegations of unethical or illegal actions as described in paragraph (d)(2)(iii) of this section.

(iii) Do not address complaints involving contractual requirements between a laboratory and its client. All contracting issues must be resolved with the contracting officer.

(3) *Procedures.* (i) All complaints must be filed in writing to the EDQW chair. All complaints must provide the basis for the complaint (*i.e.*, the specific process or requirement in the DoD ELAP or the DoD QSM that has not been satisfied or is believed to need changing) and supporting documentation, including descriptions of attempts to resolve the complaint by the laboratory or the AB.

(ii) Upon receipt of the complaint, the DoD EDQW chair will assign a unique identifier to the complaint, send a notice of acknowledgement to the complainant, and forward a copy of

the complaint to the EDQW component principals.

(iii) In consultation with the EDQW component principals, the DoD EDQW chair will make a preliminary determination of the validity of the complaint. Following preliminary review, the actions available to the DoD EDQW chair include:

(A) If the DoD EDQW chair determines the complaint should be handled directly between the complainant and the subject of the complaint, the DoD EDQW will refer the complaint to the laboratory, or AB, as appropriate. The DoD EDQW will notify the complainant of the referral, but will take no further action with respect to investigation of the complaint. The subject of the complaint will be expected to respond to the complainant in accordance with their established procedures and timelines. A copy of the response will be provided to the DoD EDQW.

(B) If insufficient information has been provided to determine whether the complaint has merit, the DoD EDQW will return the complaint to the complainant with a request for additional supporting documentation.

(C) If the complaint appears to have merit and the parties to the complaint have been unable to resolve it, the DoD EDQW will investigate the complaint and recommend actions for its resolution.

(D) If available information does not support the complaint, the DoD EDQW may reject the complaint.

(E) If the complaint alleges inappropriate laboratory practices or other misconduct, the DoD EDQW chair will consult legal counsel to determine the recommended course of action.

(iv) In all cases, the DoD EDQW will notify the complainant and any other entity involved in the complaint and explain the response of the EDQW to the complaint.

(4) *Continual improvement.* The DoD EDQW will look into root causes and trends in complaints to help identify actions that should be taken by the DoD EDQW, or any parties involved with DoD ELAP, to prevent recurrence of problems that led to the complaints.

(5) *Data and records management.* Through NAVSEASYSCOM, the DoD EDQW will maintain copies of all complaint documentation in accordance with Secretary of the Navy Manual M–5210.1.

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FINDING AIDS

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List of CFR Sections Affected

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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.govinfo.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.govinfo.gov*.

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64 Removed 72524
66 Regulation at 80 FR 16270 confirmed 64062
66.3 Amended 64062
66.5 (a) revised; (c) removed; (d) redesignated as new (c) 64063
66.6 (b)(2)(ii), (3)(ii), (8)(iii), (vi)(A) and (9)(ii) amended 64063
66.7 (a) introductory text, (3) and (b)(1) amended 64063
88.3 Amended; eff. 9-1-16 41808
88.5 (a) introductory text, (c) introductory text, (e) introductory text, (f) introductory text, (j) introductory text and (5) revised; eff. 9-1-16 41808
89 Added 92659
103 Authority citation revised 66187
103.1 (a)(6), (17) and (20) removed; (a)(7) through (16), (18) and (19) redesignated as new (a)(6) through (17); new (a)(14) revised; new (a)(17) amended; new (a)(18) through (23) added; interim 66187
103.2 (b) and (d) introductory text amended; (c) revised; (f) redesignated as (g); new (f) added; interim 66187
103.3 Amended; interim 66187

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103.4 (i), (j), (k) introductory text, (1), (2) introductory text, (i), (ii) and (v) amended; (n) added; interim 66188
103.5 (f)(17), (18), (19), (g), (h) and (i) redesignated as (f)(18), (19), (20), (h), (i) and (j); (a)(1), (6)(i), (iii), (f)(6), (16), new (i)(2) and (5) amended; (a)(6) introductory text, (f)(5) and (12) revised; (a)(6)(vi), new (f)(17), new (g) and (i)(12) added; interim 66188
104 Revised 10494
105 Authority citation revised 66426
105.1 (d) amended; (e) and (f) revised; interim 66427
105.2 Revised; interim 66428
105.3 Amended; interim 66428
105.4 Revised; interim 66430
105.5 Revised; interim 66432
105.7 (a)(16), (b)(1)(iii), (iv) and (v) redesignated as (a)(20), (b)(1)(iv), (v) and (vi); new (a)(16) through (19), (21), (22) and new (b)(1)(iii) added; (a)(7) and (b)(2)(ii) revised; (a)(8), (10), (12), (13), (14), (15) introductory text, (i), (ii), (b)(1)(ii), new (vi), (2)(iv) and (3)(iii) amended; interim 66437

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105.8 (a) introductory text, (5)(i), (ii), (c) introductory text, (1), (e)(2)(iv), (v), (3) and (f) amended; footnote 6 redesignated as footnote 5; (a)(1), (2) introductory text, (i), (iii), (iv), (v), (3)(ii), (iii), (4), (6) introductory text, (ii), (7), (b), (d), (e)(2) introductory text, (ii), (iii), (4) and (5) revised; (a)(8) and (g) added; footnote 7 removed; interim 66438

105.9 Revised; interim 66441

105.10 (a)(2), (7)(ii)(A), (iii), (8)(i)(A), (B), (C), (v), (vi), (xxii)(B), (xxv) and (b)(1)(i) revised; (a)(8)(ii)(A), (xiii), (xv), (xx), (b)(1)(iii) and (iv) amended; (a)(8)(ix)(B) removed; (a)(8)(ix)(A) redesignated as new (a)(8)(ix)(B); new (a)(8)(ix)(A), (xxii)(C) and (xxvi) added; interim 66447

105.11 (a)(2) through (11) and (b) through (e) redesignated as (a)(5) through (8), (10) through (15) and (c) through (f); new (a)(2), (3), (4), (9), (16), new (b) and (f)(3) added; (a)(1), new (5), new (11) introductory text, (i), (ii), new (12) introductory text, (i), (ii), new (14)(ii) introductory text, new (15) amended; new (a)(8), new (13), new (e)(2) and new (f)(2)(i) and (ii) revised; interim 66448

105.12 (a), (c), (e) introductory text, (f) introductory text, (2) introductory text, (ii)(B)(*1*), (*2*) and (iii) revised; (d), (f)(2)(i) introductory text, (A) and (ii) introductory text amended; interim 66449

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105.13 (a)(1) through (6), (b)(2)(ii) through (vii), (8) and (7) redesignated as (a)(2) through (7), (b)(2)(iii) through (viii), (10) and new (8); new (b)(10)(ii) removed; new (b)(10)(iii), (iv) and (v) further redesignated as (b)(10)(A), (B) and new (iii); new (a)(1), new (b)(2)(ii), new (7) and (9) added; new (a)(2), (3), (b)(3)(i), (ii) and (6) amended; new (a)(4), new (b)(2)(iii), new (10) introductory text and new (iii) revised; interim 66450

105.14 Revised; interim 66451

105.15 (a)(1) and (b) revised; interim 66459

105.16 (a) introductory text, (b) introductory text, (1), (2), (3) and (d) amended; (a)(4) revised; (a)(6) and (7) added; interim 66459

105.17 Introductory text, (a) introductory text, (1), (b) introductory text, (1)(i), (ii), (2) introductory text, (ii), (c)(4) and (e) introductory text amended; footnote 13 redesignated as footnote 10; interim 66459

105.18 Revised; interim 66460

161 Authority citation revised 74875

161.1 (a) amended; (d) added; interim 74875

161.3 Amended; interim 74875

161.4 (a), (c) and (e) amended; interim 74877

161.5 (a)(3), (4), (7), (d), (h), (8) and (i) amended; (d)(7), (8), (h)(12), (13), (i)(3) and (4) added; interim 74878

161.6 (a), (3), (c), (1)(iii), (iv), (v), (3)(i) and (ii) amended; interim 74878

161.7 (c) introductory text, (1), (d)(1)(ii), (4), (e)(2)(i)(A) and Appendices 1 and 2 amended; (c)(2), (3) introductory text, (d)(1) introductory text and (e)(2)(ii) revised; (e)(2)(i) heading added; interim 74878

161.9—161.22 (Subpart C) Revised; interim 74879

161.23 (Subpart D) Added; interim 74904

188 Added 80998

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9 Removed 57825
10 Removed 57825
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45 Removed 58562
154 Removed 1192

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65 Removed 26840
80 Removed 37433
81 Removed 15065
149 Removed 27704
175 Added 34475
182 Removed 14589
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48 Removed 7810
54 Removed 12933
75 Added 3690
77 Removed 8809
78 Removed 55057
88 Removed 48274
96 Removed 38552
100 Removed 968
101 Removed 969
110 Removed 6676
111 Added 49459
117 Removed 47880
151 Revised 18384
162 Removed 4711
165 Removed 42808
171 Removed 27202

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21.320 (d) removed 51240
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21.505 Amended 51240
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21.515 Revised 51240
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21.540 (b) and (c) revised 51241
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21.565 Footnote 6 redesignated as footnote 2; section amended 51241
21 Appendix A revised 51241
22.100 Revised 51242
22.220 (a)(2) and (b) amended 51242
22.310 (b)(1)(iii) amended 51242
22.315 (a)(3) amended 51242
22.325 Removed 51242
22.405 (b) amended 51242
22.420 (b)(1), (c)(1) introductory text and (ii) revised 51242
22.505 Revised 51242
22.510 (b) revised 51242
22.520 (d)(2), (e)(5) introductory text, (i), and (iii)(A) amended; (e)(1) revised 51243
22.605 Footnote 9 redesignated as footnote 6; introductory text, (a), (b), and new footnote 6 revised 51243
22.610 Removed 51243
22.700 Amended 51243
22.710 Introductory text footnote 10 redesignated as footnote 7 and revised; (a)(1), (2), (b) introductory text, (2), and (3) amended; (a)(1) footnote 11 and (2) footnote 12 removed; (a)(4) footnotes 13 and 14 redesignated as footnotes 8 and 9; new footnote 9 revised 51243
22.715 (a)(1), (3) introductory text, (iii), and (4) amended 51243
22.805 Introductory text and (a) revised 51244

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22.810 (c)(3)(i) footnote 15 redesignated as footnote 10; (b)(1), (2), and new (c)(3)(i) footnote 10 revised; (c)(1) removed; (c)(3)(iii) amended 51244
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22 Appendices B and C removed 51244
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34.41 Introductory text amended 51245
34 Appendix A amended 51245
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45.11 Correction: second (g)(5), (6), and (7) redesignated as (g)(6) through (8); eff. 7-19-21; interim 33885
68 Authority citation revised 27976
68.6 (d)(2) removed; (d)(3) through (6) redesignated as new (d)(2) through (5) 27976