

Subtitle A—Department of
Defense (Continued)

CHAPTER VII—DEPARTMENT OF THE AIR FORCE

SUBCHAPTER A—ADMINISTRATION

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SUBCHAPTER A—ADMINISTRATION

PARTS 800–806 [RESERVED]

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AUTHORITY: 10 U.S.C. 332 and 333.

SOURCE: 67 FR 13718, Mar. 26, 2002, unless otherwise noted.

§ 809a.0 Purpose.

This part prescribes the commanders' authority for enforcing order within or near Air Force installations under their jurisdiction and controlling entry to those installations. It provides guidance for use of military personnel in controlling civil disturbances and in supporting disaster relief operations. This part applies to installations in the United States, its territories and possessions, and will be used to the maximum extent possible in the overseas commands. Instructions issued by the appropriate overseas commander, status of forces agreements, and other international agreements provide more definitive guidance for the overseas commands. Nothing in this part should be construed as authorizing or requiring security forces units to collect and maintain information concerning persons or organizations having no affiliation with the Air Force other than a list of persons barred from the installation.

Subpart A—Installation Entry Policy

§ 809a.1 Random installation entry point checks.

The installation commander determines when, where, and how to implement random checks of vehicles or pedestrians. The commander conducts random checks to protect the security of the command or to protect government property.

§ 809a.2 Military responsibility and authority.

(a) Air Force installation commanders are responsible for protecting personnel and property under their jurisdiction and for maintaining order on installations, to ensure the uninterrupted and successful accomplishment of the Air Force mission.

(b) Each commander is authorized to grant or deny access to their installations, and to exclude or remove persons whose presence is unauthorized. In excluding or removing persons from the installation, the installation commander must not act in an arbitrary or capricious manner. Their action must be reasonable in relation to their responsibility to protect and to preserve order on the installation and to safeguard persons and property thereon. As far as practicable, they should prescribe by regulation the rules and conditions governing access to their installation.

§ 809a.3 Unauthorized entry.

Under Section 21 of the Internal Security Act of 1950 (50 U.S.C. 797), any directive issued by the commander of a military installation or facility, which includes the parameters for authorized entry to or exit from a military installation, is legally enforceable against all persons whether or not those persons are subject to the Uniformed Code of Military Justice (UCMJ). Military personnel who reenter an installation after having been properly ordered not to do so may be apprehended. Civilian violators may be detained and either escorted off the installation or turned

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over to proper civilian authorities. Civilian violators may be prosecuted under 18 U.S.C. 1382.

§ 809a.4 Use of Government facilities.

Commanders are prohibited from authorizing demonstrations for partisan political purposes. Demonstrations on any Air Force installation for other than political purposes may only occur with the prior approval of the installation commander. Demonstrations that could result in interference with, or prevention of, the orderly accomplishment of the mission of an installation

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or that present a clear danger to loyalty, discipline or morale of members of the Armed Forces will not be approved.

§ 809a.5 Barment procedures.

Under the authority of 50 U.S.C. 797, installation commanders may deny access to the installation through the use of a barment order. Barment orders should be in writing but may also be oral. Security forces maintain a list of personnel barred from the installation.

Subpart B [Reserved]

SUBCHAPTER B—SALES AND SERVICES

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811.8 Forms prescribed and availability of publications.

AUTHORITY: 10 U.S.C. 8013.

SOURCE: 65 FR 64619, Oct. 30, 2000, unless otherwise noted.

§811.1 Exceptions.

The regulations in this part do not apply to:

(a) Visual information (VI) materials made for the Air Force Office of Special Investigations for use in an investigation or a counterintelligence report. (See Air Force Instruction (AFI) 90-301, The Inspector General Complaints, which describes who may use these materials.)

(b) VI materials made during Air Force investigations of aircraft or missile mishaps according to AFI 91-204, Safety Investigations and Reports. (See AFI 90-301.)

§811.2 Release of visual information materials.

(a) Only the Secretary of the Air Force for Public Affairs (SAF/PA) clears and releases Air Force materials for use outside Department of Defense (DoD), according to AFI 35-205, Air Force Security and Policy Review Program.

(b) The Secretary of the Air Force for Legislative Liaison (SAF/LL) arranges the release of VI material through SAF/PA when a member of Congress asks for them for official use.

(c) The International Affairs Division (HQ USAF/CVAII) or, in some cases, the major command (MAJCOM) Foreign Disclosure Office, must authorize

release of classified and unclassified materials to foreign governments and international organizations or their representatives.

§811.3 Official requests for visual information productions or materials.

(a) Send official Air Force requests for productions or materials from the DoD Central Records Centers by letter or message. Include:

(1) Descriptions of the images needed, including media format, dates, etc.

(2) Visual information record identification number (VIRIN), production, or Research, development, test, and evaluation (RDT&E) identification numbers, if known.

(3) Intended use and purpose of the material.

(4) The date needed and a statement of why products are needed on a specific date.

(b) Send inquiries about motion picture or television materials to the Defense Visual Information Center (DVIC), 1363 Z Street, Building 2730, March ARB, CA 92518-2703.

(c) Send Air Force customer inquiries about still photographic materials to 11 CS/SCUA, Bolling AFB, Washington, DC 20332-0403 (the Air Force accessioning point).

(d) Send non-Air Force customers' inquiries about still photographic materials to the DVIC.

§811.4 Selling visual information materials.

(a) Air Force VI activities cannot sell materials.

(b) HQ AFCIC/ITSM may approve the loan of copies of original materials for federal government use.

(c) Send requests to buy:

(1) Completed, cleared, productions, to the National Archives and Records Administration, National Audiovisual Center, Information Office, 8700 Edgeworth Drive, Capitol Heights, MD 20722-3701.

(2) Nonproduction VI motion media to the DVIC. The center may sell other Air Force VI motion picture and television materials, such as historical and stock footage. When it sells VI motion

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media, the DVIC assesses charges, unless §811.5 exempts the requesting activity.

(3) VI still media to the DoD Still Media Records Center (SMRC), Attn: SSRC, Washington, DC 20374-1681. When SMRC sells VI still media, the SMRC assesses charges, unless §811.5 exempts the requesting activity.

§811.5 Customers exempt from fees.

Title III of the 1968 Intergovernmental Cooperation Act (42 U.S.C. 4201, 4231, and 4233) exempts some customers from paying for products and loans. This applies if the supplier has sufficient funds and if the exemption does not impair its mission. The requesting agency must certify that the materials are not commercially available. When requests for VI material do not meet exemption criteria, the requesting agency pays the fees. Exempted customers include:

(a) DoD and other government agencies asking for materials for official activities (see DoD Instruction 4000.19, Interservice, and Intergovernmental Support, August 9, 1995, and DoD Directive 5040.2, Visual Information (VI), December 7, 1987.

(b) Members of Congress asking for VI materials for official activities.

(c) VI records center materials or services furnished according to law or Executive Order.

(d) Federal, state, territorial, county, municipal governments, or their agencies, for activities contributing to an Air Force or DoD objective.

(e) Nonprofit organizations for public health, education, or welfare purposes.

(f) Armed Forces members with a casualty status, their next of kin, or authorized representative, if VI material requested relates to the member and does not compromise classified information or an accident investigation board's work.

(g) The general public, to help the Armed Forces recruiting program or enhance public understanding of the Armed Forces, when SAF/PA determines that VI materials or services promote the Air Force's best interest.

(h) Incidental or occasional requests for VI records center materials or services, including requests from residents of foreign countries, when fees would

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be inappropriate. AFI 16-101, International Affairs and Security Assistance Management, tells how a foreign government may obtain Air Force VI materials.

(i) Legitimate news organizations working on news productions, documentaries, or print products that inform the public on Air Force activities.

§811.6 Visual information product/material loans.

(a) You may request unclassified and classified copies of current Air Force productions and loans of DoD and other Federal productions from JVISDA, ATTN: ASQV-JVIA-T-AS, Bldg. 3, Bay 3, 11 Hap Arnold Blvd., Tobyhanna, PA 18466-5102.

(1) For unclassified products, use your organization's letterhead, identify subject title, PIN, format, and quantity.

(2) For classified products, use your organization's letterhead, identify subject title, personal identification number (PIN), format, and quantity. Also, indicate that either your organization commander or security officer, and MAJCOM VI manager approve the need.

(b) You may request other VI materials, such as, still images and motion media stock footage, from DVIC/OM-PA, 1363 Z Street, Building 2730, March ARB, CA 92518-2703.

§811.7 Collecting and controlling fees.

(a) The DoD records centers usually collect fees in advance. Exceptions are sales where you cannot determine actual cost until work is completed (for example, television and motion picture services with per minute or per footage charges).

(b) Customers pay fees, per AFR 177-108, Paying and Collecting Transactions at Base Level, with cash, treasury check, certified check, cashier's check, bank draft, or postal money order.

§811.8 Forms prescribed and availability of publications.

(a) AF Form 833, Visual Information Request, AF Form 1340, Visual Information Support Center Workload Report, DD Form 1995, Visual Information (VI) Production Request and Report,

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DD Form 2054-1, Visual Information (VI) Annual Report, and DD Form 2537, Visual Information Caption Sheet are prescribed by this part.

(b) Air Force publications and forms referenced in this part are available

from NTIS, 5285 Port Royal Road, Springfield, VA 22161 or online at <http://www.afpubs.hq.af.mil>. DoD publications are available at <http://www.defenselink.mil/pubs>.

SUBCHAPTER C—PUBLIC RELATIONS [RESERVED]

SUBCHAPTER D—CLAIMS AND LITIGATION

PART 842—ADMINISTRATIVE CLAIMS

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AUTHORITY: Sec. 8013, 100 Stat. 1053, as amended; 10 U.S.C. 8013, except as otherwise noted.

SOURCE: 55 FR 2809, Jan. 29, 1990, unless otherwise noted.

NOTE: Air Force Regulations are available on the e-Publishing Web site at <http://www.e-publishing.af.mil/> for downloading. This part is derived from Air Force Instruction 51–501, *Tort Claims*, and Air Force Instruction 51–502, *Personnel and Carrier Recovery Claims*.

[81 FR 83688, Nov. 22, 2016]

EDITORIAL NOTE: Nomenclature changes to part 842 appear at 81 FR 83688, Nov. 22, 2016.

§ 842.0 Scope.

This part establishes standard policies and procedures for all administrative claims resulting from Air Force activities and for which the Air Force has assigned responsibility.

[81 FR 83688, Nov. 22, 2016]

Subpart A—General Information

§ 842.1 Scope of this subpart.

This subpart explains terms used in this part. It states basic Air Force claims policy and identifies proper claimants.

§ 842.2 Definitions.

(a) *Authorized agent*. Any person or corporation, including a legal representative, empowered to act on a claimant's behalf.

(b) *Civilian personnel*. Civilian employees of the Air Force who are paid

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from appropriated or nonappropriated funds. They include prisoners of war, interned enemy aliens performing paid labor, and volunteer workers except for claims under the Military Personnel and Civilian Employees' Claims Act.

(c) *Claim*. Any signed written demand made on or by the Air Force for the payment of a sum certain. It does not include any obligations incurred in the regular procurement of services, supplies, equipment, or real estate. An oral demand made under Article 139, Uniform Code of Military Justice (UCMJ) is sufficient.

(d) *Claimant*. An individual, partnership, association, corporation, country, state, territory, or its political subdivisions, and the District of Columbia. The U.S. Government or any of its instrumentalities may be a claimant in admiralty, tort, carrier recovery and hospital recovery claims in favor of the United States.

(e) *Geographic area of claims responsibility*. The base Staff Judge Advocate's (SJA's) jurisdiction for claims. CONUS jurisdictional areas are designated by AFLOA/JACC on maps distributed to the field. HQ PACAF, HQ USAFE, and HQ 9AF SJAs designate these areas within their jurisdictions. DOD assigns areas of single service responsibility to each military department.

(f) *AFLOA/JACC*. Claims and Tort Litigation Division, 1500 West Perimeter Road, Suite 1700, Joint Base Andrews, MD 20762.

(g) *Owner*. A holder of a legal title or an equitable interest in certain property. Specific examples include:

(1) *For real property*. The mortgagor, and the mortgagee if that individual can maintain a cause of action in the local courts involving a tort to that specific property.

(2) *For personal property*. A bailee, lessee, mortgagee and a conditional vendee. A mortgagor, conditional vendor, title loan company or someone else other than the owner, who has the title for purposes of security are not owners.

(h) *HQ PACAF*. Headquarters, Pacific Air Forces, Hickam AFB, HI 96853-5001.

(i) *Personal injury*. The term "personal injury" includes both bodily injury and death.

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(j) *Property damage*. Damage to, loss of, or destruction of real or personal property.

(k) *Settle*. To consider and pay, or deny a claim in full or in part.

(1) *Single Base General Court-Martial Jurisdiction (GCM)*. For claims purposes, a base legal office serving the commander who exercises GCM authority over that base, or that base and other bases.

(m) *Subrogation*. The act of assuming the legal rights of another after paying a claim or debt, for example, an insurance company (subrogee) paying its insured's (subrogor's) claim, thereby assuming the insured's right of recovery.

(n) *HQ USAFE*. Headquarters, United States Air Forces in Europe, Ramstein Air Base, Germany, APO NY 09012-5001.

[55 FR 2809, Jan. 29, 1990, as amended at 56 FR 1574, Jan. 16, 1991; 81 FR 83688, Nov. 22, 2016]

§ 842.3 Claims authorities.

(a) *Appellate authority*. The individual authorized to review the final decision of a settlement authority upon appeal or reconsideration.

(b) *Settlement authority*. The individual or foreign claims commission authorized to settle a claim upon its initial presentation.

§ 842.4 Where to file a claim.

File a claim at the base legal office of the unit or installation at or nearest to where the accident or incident occurred. If the accident or incident occurred in a foreign country where no Air Force unit is located, file the claim with the Defense Attache (DATT) or Military Assistance Advisory Group (MAAG) personnel authorized to receive claims (DIAM 100-1 and AFR 400-45). In a foreign country where a claimant is unable to obtain adequate assistance in filing a claim, the claimant may contact the nearest Air Force SJA. The SJA then advises AFLOA/JACC through claims channels of action taken and states why the DATT or MAAG was unable to adequately assist the claimant.

[81 FR 83688, Nov. 22, 2016]

§ 842.5 Claims forms.

Any signed written demand on the Air Force for a sum certain is sufficient to file a claim. The claimant should use these forms when filing a claim:

(a) *Claim processed under the Military Personnel and Civilian Employees' Claims Act.* Use AF Form 180, Claim for Loss of or Damage to Personal Property Incident to Service, or DD Forms 1842, Claim for Personal Property Against the United States, and 1844, Schedule of Property and Claim Analysis Chart, to file the claim.

(b) *Claim processed under international agreements.* Use any form specified by the host country.

(c) *Any other type claim.* Use SF 95, Claim for Damage, Injury, or Death.

§ 842.6 Signature on the claim form.

The claimant or authorized agent signs the claim form in ink using the first name, middle initial, and last name.

(a) *Claim filed by an individual.* (1) A married woman signs her name, for example, Mary A. Doe, rather than Mrs. John Doe.

(2) An authorized agent signing for a claimant shows, after the signature, the title or capacity and attaches evidence of authority to present a claim on behalf of the claimant as agent, executor, administrator, parent, guardian, or other representative; for example, John Doe by Richard Roe, Attorney in Fact. A copy of a current and valid power of attorney, court order, or other legal document is sufficient evidence of the agent's authority.

(b) *Claim with joint interest.* Where a joint ownership or interest in real property exists, all joint owners must sign the claim form. This includes a husband and wife signing a claim if the claim is for property damage. However, only the military member or civilian employee signs the claim form for a claim under the Military Personnel and Civilian Employees' Claims Act.

(c) *Claim filed by a corporation.* (1) A corporate officer signing the form must show title or capacity and affix the corporate seal (if any) to the claim form.

(2) If the person signing the claim is other than the corporate officer they must:

(i) Attach to the claim form a certification by a proper corporate officer that the individual is an agent of the corporation duly authorized to file and settle the claim;

(ii) Affix to the claim form the corporate seal (if any) to the certification.

(d) *Claim filed by a partnership.* A partner must sign the form showing his or her title as partner and list the full name of the partnership.

§ 842.7 Who may file a claim.

(a) *Property damage.* The owner or owners of the property or their authorized agent may file a claim for property damage.

(b) *Personal injury or death.* (1) The injured person or authorized agent may file a claim for personal injury.

(2) The duly appointed guardian of a minor child or any other person legally entitled to do so under applicable local law may file a claim for a minor's personal injury.

(3) The executor or administrator of the decedent's estate or any other person legally entitled to do so under applicable local law may file a claim based on an individual's death.

(c) *Subrogation.* The subrogor (insured) and the subrogee (insurer) may file a claim jointly or individually. Pay a fully subrogated claim only to the subrogee. A joint claim must be asserted in the names of and signed by the real parties in interest. Make payment by sending a joint check to the subrogee, made payable to the subrogor and subrogee. If separate claims are filed, make payment by check issued to each claimant to the extent of each undisputed interest.

§ 842.8 Insured claimants.

Insured claimants must make a detailed disclosure of their insurance coverage by stating:

(a) Their name and address.

(b) Kind, amount, and dates of coverage of insurance.

(c) Insurance policy number.

(d) Whether a claim was presented to the insurer and, if so, in what amount.

(e) Whether the insurer paid or is expected to pay the claim.

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(f) The amount of any payment made or promised.

Subpart B—Claims Under Article 139, Uniform Code of Military Justice (UCMJ) (10 U.S.C. 939)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83688, Nov. 22, 2016, unless otherwise noted.

§ 842.9 Scope of this subpart.

It sets out the Air Force procedures for processing Article 139, UCMJ claims.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83688, Nov. 22, 2016]

§ 842.10 Definitions.

(a) *Appointing commander.* The commander exercising special court-martial jurisdiction over the offender.

(b) *Board of officers.* One to three commissioned officers appointed to investigate a complaint of willful property damage or wrongful taking by Air Force personnel.

(c) *Property.* Property is an item that is owned or possessed by an individual or business. Property includes a tangible item such as clothing, household furnishings, motor vehicles, real property, and currency. The term does not include intangible property or items having no independent monetary worth. Items that should not be considered as property for the purpose of this part include a stock, bond, check, check book, credit card, telephone service and cable television services.

(d) *Willful damage.* Damage or destruction caused intentionally, knowingly, and purposely, without justifiable excuse.

(e) *Wrongful taking.* Any unauthorized taking or withholding of property with intent to deprive the owner or person in lawful possession either temporarily or permanently.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83688, Nov. 22, 2016]

§ 842.11 Claims payable.

Claims for property willfully damaged or wrongfully taken by Air Force military personnel as a result of riotous, violent, or disorderly conduct. If a

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claim is payable under this part and also under another part, it may be paid under this part if authorized by AFLOA/JACC.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83688, Nov. 22, 2016]

§ 842.12 Claims not payable.

Claims that are not payable are:

(a) Claims resulting from simple negligence.

(b) Claims for personal injury or death.

(c) Claims resulting from acts or omissions of Air Force military personnel while acting within the scope of their duty.

(d) Claims of subrogees.

(e) Claims arising from private indebtedness.

(f) Claims for reimbursement for bad checks.

(g) Claims involving wrongful taking stemming from larceny, forgery or deceit, which are not accompanied by riotous or violent action.

(h) Claims against Air National Guard members unless they are performing duty under Title 10 U.S.C.

(i) Claims for indirect, consequential or remote damages.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83688, Nov. 22, 2016]

§ 842.13 Limiting provisions.

(a) A complaint must be submitted within 90 days of the date of the incident. The appointing commander may find good cause for the delay and accept a late claim. The appointing commander's determination of good cause is final and not reviewable.

(b) Assessment of damages in excess of \$5,000 against an offender's pay for a single incident requires AFLOA/JACC approval.

[81 FR 83688, Nov. 22, 2016]

§ 842.14 Filing a claim.

Claimant complains (orally or in writing) to the commander of a military organization or unit of the alleged offending member or members or to the commander of the nearest military installation. If the claim is made orally, the individual must assist the commander to reduce the complaint to writing within a reasonable time. The

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complainant need not request a sum certain in writing at the time the complaint is filed, but they must present such value and evidence before settlement is made.

[81 FR 83688, Nov. 22, 2016]

Subpart C—Personnel Claims (31 U.S.C. 3701, 3721)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83688, Nov. 22, 2016, unless otherwise noted.

§ 842.15 Scope of this subpart.

It explains how to settle and pay claims under the Military Personnel and Civilian Employees' Claims Act for incident to service loss and damage of personal property. These claims are paid according to this subpart even when another subpart may also apply.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83688, Nov. 22, 2016]

§ 842.16 Definitions.

(a) *Military installation.* A facility used to serve a military purpose and used or controlled by the Air Force or any other Department of Defense (DOD) element.

(b) *Personal property.* Tangible property an individual owns, including but not limited to household goods, unaccompanied baggage, privately owned vehicles (POV), and mobile homes.

(c) *Reconsideration.* The original or a higher settlement authority's review of a prior settlement action.

(d) *Unusual Occurrence.* Something not expected to happen in the normal course of events.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83688, Nov. 22, 2016]

§ 842.17 Delegations of authority.

(a) *Settlement authority.* The Secretary of the Air Force has delegated the authority to assign areas of responsibility and designate functional responsibility for claims under the Military Personnel and Civilian Employees' Claims Act to The Judge Advocate General (TJAG).

(b) *Reconsideration authority.* A settlement authority has the same authority specified in paragraph (a) of this sec-

tion. However, with the exception of TJAG, a settlement authority may not deny a claim on reconsideration that it, or its delegate, had previously denied.

(c) *Authority to reduce, withdraw and restore delegated settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

[81 FR 83688, Nov. 22, 2016]

§ 842.18 Filing a claim.

(a) *How and when to file a claim.* A claim is filed when a federal military agency receives from a claimant or duly authorized agent a properly completed AF Form 180, DD Form 1842 or other written and signed demand for a determinable sum of money.

(1) A claim is also filed when a federal military agency receives from a claimant or duly authorized agent an electronic submission, through a Department of Defense claims Web site, indicating that the claimant intends for the appropriate military branch to consider a digitally signed demand for a determinable sum of money.

(2) A claim is also filed when the Air Force receives from a claimant or duly authorized agent an electronic submission, through the Air Force claims Web site, a digitally signed demand for a determinable sum of money.

(b) *Amending a claim.* A claimant may amend a claim at any time prior to the expiration of the statute of limitations by submitting a signed amendment. The settlement authority adjudicates and settles or forwards the amended claim as appropriate.

(c) *Separate claims.* The claimant files a separate claim for each incident which caused a loss. For transportation claims, this means a separate claim for each shipment.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83688, Nov. 22, 2016]

§ 842.19 Partial payments.

Upon request of a claimant, a settlement authority may make a partial payment in advance of final settlement when a claimant experiences personal hardship due to extensive property damage or loss. Partial payments are made if a claim for only part of the loss

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is submitted and is readily provable, up to the amount of the settlement authority. (The claimant may later amend the claim for the remainder of the loss.) If the total payable amount of the claim exceeds the payment limits of the settlement authority, send it with recommendations to the proper settlement authority.

(a) If a claim for only part of the loss is submitted and is readily provable, pay it up to the amount of the settlement authority. (The claimant may later amend the claim for the remainder of the loss.) If the total payable amount of the claim exceeds the payment limits of the settlement authority, send it with recommendations through claims channels to the proper settlement authority.

(b) When the total claim is submitted and the amount payable exceeds the settlement authority, pay a partial payment within the limits of settlement authority and send the claim, with recommendations, through claims channels to the proper settlement authority.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83688, 83689, Nov. 22, 2016]

§ 842.20 Statute of limitations.

(a) The claimant must file the claim in writing within 2 years after it accrues. It accrues when the claimant discovered or reasonably should have discovered the full extent of the property damage or loss. For transportation losses, the claim usually accrues on the date of delivery.

(b) To compute the statutory period, the incident date is excluded and the day the claim was filed is included.

(c) Consider a claim filed after the statute has run if both of the following are present:

(1) The United States is at war or in an armed conflict when the claim accrues, or the United States enters a war or armed conflict after the claim accrues. Congress or the President establishes the beginning and end of war or armed conflict. A claimant may not file a claim more than 2 years after the war or armed conflict ends.

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(2) Good cause is shown. A claimant may not file a claim more than 2 years after the good cause ceases to exist.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83688, Nov. 22, 2016]

§ 842.21 Who may file a claim.

A claim may be filed by:

- (a) A proper claimant.
- (b) An authorized agent or legal representative of a proper claimant.
- (c) A survivor of a deceased proper claimant in this order:
 - (1) Spouse.
 - (2) Children.
 - (3) Father or mother.
 - (4) Brothers or sisters.

[81 FR 83689, Nov. 22, 2016]

§ 842.22 Who are proper claimants.

Proper claimants are:

- (a) Active duty Air Force military personnel.
- (b) Civilian employees of the Air Force who are paid from appropriated funds.
- (c) DOD school teachers and school administrative personnel who are provided logistic and administrative support by an Air Force installation commander.
- (d) Air Force Reserve (AFRES) and Air National Guard (ANG) personnel when performing active duty, full-time National Guard duty, or inactive duty training, ANG technicians under 32 U.S.C. 709.
- (e) Retired or separated Air Force military personnel who suffer damage or loss resulting from the last storage or movement of personal property, or for claims accruing before retirement or separation.
- (f) AFROTC cadets while on active duty for summer training.
- (g) United States Air Force Academy cadets.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83688, Nov. 22, 2016]

§ 842.23 Who are not proper claimants.

The following individuals are not proper claimants:

- (a) Subrogees and assignees of proper claimants, including insurance companies.
- (b) Conditional vendors and lienholders.

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(c) Non-Air Force personnel, including American Red Cross personnel, United Services Organization (USO) performers, employees of government contractors, and Civil Air Patrol (CAP) members.

(d) AFROTC cadets who are not on active duty for summer training.

(e) Active duty military personnel and civilian employees of a military service other than the Air Force.

(f) DOD employees who are not assigned to the Air Force.

(g) Army and Air Force Exchange Service (AAFES) employees and other employees whose salaries are paid from nonappropriated funds (see subpart O).

(h) Military personnel of foreign governments.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83688, Nov. 22, 2016]

§ 842.24 General provisions.

Payable claims must be for:

(a) Personal property which is reasonable or useful under the circumstances of military service.

(b) Loss, damage, destruction, confiscation, or forced abandonment which is incident to service.

(c) Losses that are not collectible from any other source, including insurance and carriers.

(d) Property that is owned by the claimants, or their immediate families, or borrowed for their use, or in which the claimants or their immediate families has an enforceable ownership interest.

(e) Losses occurring without the claimants' negligence.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83688, 83689, Nov. 22, 2016]

§ 842.25 Claims payable.

Claims may be payable for loss of or damage to tangible personal property when the damage occurs incident to service. For loss of or damage to property to be incident to service, it must occur at a place and time that is connected to the service of an active duty military member or employment of a civilian employee.

(a) *Authorized location.* Claims are only payable when the claimed property is located in an authorized location. There must be some connection

between the claimant's service and the location of the claimed property. Duty locations where personal property is used, stored or held because of official duties are authorized places. Other authorized places may include:

(1) Any location on a military installation not otherwise excluded.

(2) Any office, building, recreation area, or real estate the Air Force or any other DoD element uses or controls.

(3) Any place a military member is required or ordered to be pursuant to their duties and while performing those duties.

(4) Assigned Government housing or quarters in the United States or provided in kind. The Military Personnel and Civilian Employees' Claims Act specifically prohibits payment for loss of or damage to property in quarters within the U.S. unless the housing or quarters are assigned or otherwise provided in kind. Base housing that has not been privatized is generally considered assigned or provided in kind wherever it is located.

(i) Privatized housing or quarters within the United States subject to the Military Housing Privatization Initiative located within the fence line of a military installation or on federal land in which the DoD has an interest is considered assigned or otherwise provided in kind for the purposes of the Military Personnel and Civilian Employees' Claims Act.

(ii) [Reserved]

(5) Housing or quarters outside the United States. Outside the US, authorized off-base quarters, as well as assigned quarters, including quarters in U.S. territories and possessions, are authorized places. The residence of a civilian employee is not an authorized location if the employee is a local inhabitant.

(6) Temporary duty (TDY) quarters and locations en route to the TDY destination. Significant deviations from the direct travel route are not authorized locations.

(7) Permanent change of station (PCS) temporary quarters and locations enroute to the PCS destination. Significant deviations from the direct travel route are not authorized locations.

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(8) Entitlement and benefit locations. For these locations to be authorized, the claimant must be using them for the intended purpose and the property must be reasonably linked to that purpose.

(9) Locations where personal property shipped or stored at government expense are found. Government facilities where property is stored at the claimant's expense or for their convenience without an entitlement are not authorized places.

(b) *Payable causes of loss incident to service.* Because the Personnel Claims Act (PCA) is not a substitute for private insurance, loss or damage at quarters or other authorized locations may only be paid if caused by:

- (1) An unusual occurrence;
- (2) Theft, vandalism or other malfeasance;
- (3) Hostile action;
- (4) A carrier, contractor, warehouseman or other transportation service provider storing or moving goods or privately owned vehicles at government expense;
- (5) An agent of the US; or
- (6) A permanent seizure of a witness' property by the Air Force.

(c) *Privately owned vehicles (POV).* Pay for damage to or loss of POVs caused by government negligence under subpart F or K. Pay under this subpart for damage or loss incident to:

- (1) Theft of POVs or their contents, or vandalism to parked POVs:
 - (i) Anywhere on a military installation.
 - (ii) At offbase quarters overseas.
 - (iii) At other authorized places.
- (2) Government shipment:
 - (i) To or from oversea areas incident to PCS.
 - (ii) On a space available reimbursable basis.
 - (iii) As a replacement vehicle under the provisions of the Joint Travel Regulations (JTR).
- (3) Authorized use for government duty other than PCS moves. The owner must have specific advance permission of the appropriate supervisor or official. Adequate proof of the permission and of nonavailability of official transportation must be provided prior to paying such claims. Claims arising while the claimant is deviating from

the principal route or purpose of the trip should not be paid, but claims occurring after the claimant returns to the route or purpose should be paid. Travel between quarters and place of duty, including parking, is not authorized use for government duty.

(4) Paint spray, smokestack emission, and other similar operations by the Air Force on a military installation caused by a contractor's negligence. (Process the claim under subpart F or K, if government negligence causes such losses.) If a contractor's operation caused the damage:

(i) Refer the claim first to the contractor for settlement.

(ii) Settle the claim under this subpart if the contractor does not pay it or excessively delays payment, and assert a claim against the contractor.

(d) *Damage to mobile or manufactured homes and contents in shipment.* Pay such claims if there is no evidence of structural or mechanical failure for which the manufacturer is responsible.

(e) *Borrowed property.* Pay for loss or damage to property claimants borrow for their use. Either the borrower or lender, if proper claimants, may file a claim. Do not pay for property borrowed to accommodate the lender, i.e., such as to avoid weight or baggage restrictions in travel.

(f) *Marine or aircraft incident.* Pay claims of crewmembers and passengers who are in duty or leave status at the time of the incident. Payable items include jettisoned baggage, clothing worn at the time of an incident, and reasonable amounts of money, jewelry, and other personal items.

(g) *Combat losses.* Pay for personal property losses, whether or not the United States was involved, due to:

- (1) Enemy action.
- (2) Action to prevent capture and confiscation.
- (3) Combat activities.

(h) *Civil activity losses.* Pay for losses resulting from a claimant's acts to:

- (1) Quell a civil disturbance.
- (2) Assist during a public disaster.
- (3) Save human life.
- (4) Save government property.

(i) *Confiscated property.* Pay for losses when:

- (1) A foreign government unjustly confiscates property.

(2) An unjust change or application of foreign law forces surrender or abandonment of property.

(j) *Clothing and accessories worn on the person.* Pay claims for damage to eyeglasses, hearing aids, and dentures the government did not supply, when the damage results from actions beyond the normal risks associated with daily living and working. Claimants assume the risk of normal wear and tear, and their negligence bars payment of the claim.

(k) *Money losses.* Pay claims for loss of money when the losses are due to theft from quarters, other authorized places, or from the person, if the claimant was required to be in the area and could not avoid the theft by due care. As a general rule, \$200.00 is reasonable to have in quarters, and \$100.00 is reasonable to have on the person unless:

(1) The money was in a bona fide coin collection.

(2) The claimant can justify possession of the money for a PCS move, extended TDY, vacation, extensive shopping trip, or similar circumstances. The claimant must show a good reason why the money had not been deposited in a bank or converted into travelers checks or a money order.

(3) Local commercial facilities are not available or because U.S. personnel do not generally use such facilities.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83688, 83689, Nov. 22, 2016]

§ 842.26 Claims not payable.

A claim is not payable if:

(a) It is not incident to the claimant's service.

(b) The loss or damage is caused in whole or in part by the negligence or wrongful act of the claimant, the claimant's spouse, agent, or employee.

(c) It is a subrogation or assigned claim.

(d) The loss is recovered or recoverable from an insurer or other source unless the settlement authority determines there is good cause for not claiming against the insurer.

(e) It is intangible property including bank books, promissory notes, stock certificates, bonds, baggage checks, insurance policies, checks, money orders, travelers checks and credit cards.

(f) It is government property, including issued clothing items carried on an individual issue supply account. (Clothing not carried on an individual issue supply account which is stolen or clothing lost or damaged in transit may be considered as a payable item when claimed.)

(g) It is enemy property.

(h) It is a loss within the United States at offbase quarters the government did not provide.

(i) It is damage to real property.

(j) It is an appraisal fee, unless the settlement authority requires one to adjudicate the claim.

(k) It is property acquired or shipped for persons other than the claimant or the claimant's immediate family; however, a claim for property acquired for bona fide gifts may be paid.

(l) It is an article held for sale, resale, or used primarily in a private business.

(m) It is an item acquired, possessed, shipped, or stored in violation of any U.S. Armed Force directive or regulation.

(n) It is an item fraudulently claimed.

(o) It is for charges for labor performed by the owner or immediate family member.

(p) It is for financial loss due to changed or cancelled orders.

(q) It is for expenses of enroute repair of a mobile or manufactured home.

(r) It is a loss of use of personal property.

(s) It is an attorney or agent fee.

(t) It is the cost of preparing a claim, other than estimate fees.

(u) It is an inconvenience expense.

(v) It is a loss of, or damage to POV driven during PCS.

(w) It is a personal property insurance premium.

(x) It is a claim for a thesis or other similar papers, except for the cost of materials.

(y) It is damage to, or loss of a rental vehicle which TDY or PCS orders authorized.

(z) It is a cost to relocate a telephone or mobile or manufactured home due to a government ordered quarters move.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83688, 83689, Nov. 22, 2016]

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§ 842.27 Reconsideration of a claim.

A claimant may request reconsideration of an initial settlement or denial of a claim. The claimant sends the request in writing, to the settlement authority within a reasonable time following the initial settlement or denial. Sixty days is considered a reasonable time, but the settlement authority may waive the time limit for good cause.

(a) The original settlement authority reviews the reconsideration request. The settlement authority sends the entire claim file with recommendations and supporting rationale to the next higher settlement authority if all relief the claimant requests is not granted.

(b) The decision of the higher settlement authority is the final administrative action on the claim.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83688, Nov. 22, 2016]

§ 842.28 Right of subrogation, indemnity, and contribution.

The Air Force becomes subrogated to the rights of the claimant upon settling a claim. The Air Force has the rights of contribution and indemnity permitted by the law of the situs or under contract. The Air Force does not seek contribution or indemnity from U.S. military personnel or civilian employees whose conduct in scope of employment gave rise to government liability.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83688, Nov. 22, 2016]

§ 842.29 Depreciation and maximum allowances.

The military services have jointly established the "Allowance List-Depreciation Guide" to determine values for most items and to limit payment for some categories of items.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83688, Nov. 22, 2016]

Subpart D—Military Claims Act (10 U.S.C. 2733)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83690, Nov. 22, 2016, unless otherwise noted.

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§ 842.30 Scope of this subpart.

This subpart establishes policies and procedures for all administrative claims under the Military Claims Act for which the Air Force has assigned responsibility.

[81 FR 83690, Nov. 22, 2016]

§ 842.31 Definitions.

(a) *Appeal*. A request by the claimant or claimant's authorized agent to re-evaluate the final decision. A request for reconsideration and an appeal are the same for the purposes of this subpart.

(b) *Final denial*. A letter mailed from the settlement authority to the claimant or authorized agent advising the claimant that the Air Force denies the claim. Final denial letters mailed from within the United States shall be sent by U.S. Mail, certified mail, return receipt requested.

(c) *Noncombat activity*. Activity, other than combat, war or armed conflict, that is particularly military in character and has little parallel in the civilian community.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83690, Nov. 22, 2016]

§ 842.32 Delegations of authority.

(a) *Settlement authority*. (1) The Secretary of the Air Force has authority to:

(i) Settle claims for \$100,000 or less.
(ii) Settle claims for more than \$100,000, paying the first \$100,000 and reporting the excess to the General Accounting Office for payment.

(iii) Deny a claim in any amount.
(2) The Judge Advocate General has delegated authority to settle claims for \$100,000 or less and deny claims in any amount.

(3) The following individuals have delegated authority to settle claims for \$25,000 or less and to deny claims in any amount:

(i) The Deputy Judge Advocate General.

(ii) The Director, Civil Law and Litigation.

(iii) The Chief, Associate Chief and Branch Chiefs, Claims and Tort Litigation Division.

(4) SJAs of the Air Force component commander of the U.S. geographic

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combatant commands for claims arising within their respective combatant command areas of responsibility have delegated authority to settle claims payable or deny claims filed for \$25,000 or less.

(5) SJAs of GCMs in PACAF and USAFE have delegated authority to settle claims payable, or deny claims filed for \$15,000 or less.

(b) *Redelegation of authority.* The Chief, Claims and Tort Litigation Division may redelegate his or her authority to Staff Judge Advocates. A settlement authority may redelegate his or her authority for claims not exceeding \$25,000, to a subordinate judge advocate or civilian attorney in writing. The Chief, AFLOA/JACC may redelegate up to \$25,000, in writing, to paralegals assigned to AFLOA/JACC and, upon request, may authorize installation Staff Judge Advocates to redelegate their settlement authority to paralegals under their supervision.

(c) *Appellate authority.* Upon appeal, a settlement authority has the same authority specified above. However, no appellate authority below the Office of the Secretary of the Air Force may deny an appeal of a claim it had previously denied.

(d) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

(e) *Settlement negotiations.* A settlement authority may settle a claim in any sum within its delegated settlement authority, regardless of the amount claimed. Send uncompromised claims in excess of the delegated authority to the level with settlement authority. Unsuccessful negotiations at one level do not bind higher authority.

(f) *Special exceptions.* Do not settle or deny claims for the following reasons without AFLOA/JACC approval:

(1) Legal malpractice.

(2) On the job personal injury or death of an employee of a government contractor or subcontractor.

(3) Assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution committed by an investigative or law enforcement officer.

(4) On-base animal bite cases.

(5) Personal injury from asbestos or radon.

(6) Claims based upon an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation.

(7) Claims based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government.

(8) Claims not payable because payment is not in the best interests of the United States, is contrary to public policy, or is otherwise contrary to the basic intent of the MCA.

(9) Claims presented by a national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country.

(10) Medical malpractice.

[55 FR 2809, Jan. 29, 1990, as amended at 56 FR 1574, Jan. 16, 1991. Redesignated and amended at 81 FR 83690, Nov. 22, 2016]

§ 842.33 Filing a claim.

(a) *Elements of a proper claim.* A claim is must be filed on a Standard Form 95 or other written document. It must be signed by the Claimant or authorized agent, be for money damages in a sum certain, and lay out a basic statement as to the nature of the claim that will allow the Air Force to investigate the allegations contained therein.

(b) *Amending a claim.* A claimant may amend a claim at any time prior to final action. To amend a claim, the claimant or his or her authorized agent must submit a written, signed demand.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83690, Nov. 22, 2016]

§ 842.34 Advance payments.

Subpart P of this part sets forth procedures for advance payments.

[81 FR 83690, Nov. 22, 2016]

§ 842.35 Statute of limitations.

(a) A claim must be filed in writing within 2 years after it accrues. It is deemed to be filed upon receipt by The Judge Advocate General, AFLOA/JACC, or a Staff Judge Advocate of the Air Force. A claim accrues when the

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claimant discovers or reasonably should have discovered the existence of the act that resulted in the claimed loss. The same rules governing accrual pursuant to the Federal Tort Claims Act should be applied with respect to the Military Claims Act. Upon receipt of a claim that properly belongs with another military department, the claim is promptly transferred to that department.

(b) The statutory time period excludes the day of the incident and includes the day the claim was filed.

(c) A claim filed after the statute of limitations has run is considered if the U.S. is at war or in an armed conflict when the claim accrues or if the U.S. enters a war or armed conflict after the claim accrues, and if good causes shows how the war or armed conflict prevented the claimant from diligently filing the claim within the statute of limitations. But in no case will a claim be considered if filed more than two years after the war or armed conflict ends.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83690, Nov. 22, 2016]

§ 842.36 Who may file a claim.

(a) Owners of the property or their authorized agents may file claims for property damage.

(b) Injured persons or their duly authorized agents may file claims for personal injury.

(c) Duly appointed guardians of minor children or any other persons legally entitled to do so under applicable local law may file claims for minors' personal injuries.

(d) Executors or administrators of a decedent's estate or another person legally entitled to do so under applicable local law, may file claims based on:

(1) An individual's death.

(2) A cause of action surviving an individual's death.

(e) Insurers with subrogation rights may file claims for losses paid in full by them. The parties may file claims jointly or individually, to the extent of each party's interest, for losses partially paid by insurers with subrogation rights.

(f) Authorized agents signing claims show their title or legal capacity and

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present evidence of authority to present the claims.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83690, Nov. 22, 2016]

§ 842.37 Who are proper claimants.

(a) Citizens and inhabitants of the United States. U.S. inhabitants includes dependents of the U.S. military personnel and federal civilian employees temporarily outside the U.S. for purposes of U.S. Government service.

(b) U.S. military personnel and civilian employees. Note: These personnel are not proper claimants for claims for personal injury or death that occurred incident to their service.

(c) Foreign military personnel when the damage or injury occurs in the U.S. Do not pay for claims under the Military Claims Act (MCA) for personal injury or death of a foreign military personnel that occurred incident to their service.

(d) States, state agencies, counties, or municipalities, or their political subdivisions.

(e) Subrogees of proper claimants to the extent they have paid for the claim in question.

[81 FR 83690, Nov. 22, 2016]

§ 842.38 Who are not proper claimants.

(a) Governments of foreign nations, their agencies, political subdivisions, or municipalities.

(b) Agencies and nonappropriated fund instrumentalities (NAFIs) of the U.S. Government.

(c) Subrogees of § 842.42(a) and (b).

(d) Inhabitants of foreign countries.

[81 FR 83690, Nov. 22, 2016]

§ 842.39 Claims payable.

(a) Claims arising from negligent or wrongful acts or omissions committed by United States military or civilian personnel while acting in the scope of their employment, subject to the exceptions listed in this subpart.

(b) Claims arising from noncombat activities of the United States, whether or not such injuries of damages arose out of the negligent or wrongful acts or omissions by United States military or civilian employees acting within the scope of their employment.

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(c) Claims for property damage of U.S. military personnel under conditions listed in paragraphs (a) and (b) of this section, where the damage occurred on a military installation and is not payable under the Military Personnel and Civilian Employees' Claims Act.

[55 FR 2809, Jan. 29, 1990, as amended at 55 FR 32076, Aug. 7, 1990. Redesignated and amended at 81 FR 83690, Nov. 22, 2016]

§ 842.40 Claims not payable.

(a) Claims covered by the Federal Tort Claims Act (FTCA), Foreign Claims Act (FCA), International Agreements Claims Act (IACA), 10 U.S.C. 2734a and 2734b, Air Force Admiralty Claims Act (AFACA), 10 U.S.C. 9801-9804, 9806, National Guard Claims Act (NGCA), 32 U.S.C. 715, or covered under the Military Personnel and Civilian Employees' Claims Act (MPCECA), 31 U.S.C. 3701, 3721.

(1) MCA claims arising from noncombat activities in the U.S. are not covered by the FTCA because more elements are needed to state an FTCA claim than are needed to state a claim under the MCA for noncombat activities. All FTCA claims are based on elements of traditional tort liability (*i.e.*, duty, breach, causation, and damages); that is, they are fault based. Noncombat activity claims under the MCA are based solely on causation and damages. Because MCA claims for noncombat activities are not fault based, they are not covered by the FTCA.

(2) Claims for incident-to-service damage to vehicles caused by the negligence of a member or employee of the armed forces acting in the scope of employment are paid under the MCA, instead of the Military Personnel and Civilian Employees' Claims Act.

(b) Arises with respect to the assessment or collection of any customs duty, or the detention of any goods or merchandise by any U.S. officer of customs or excise, or any other U.S. law enforcement officer. Note: This includes loss or damage to property detained by members of the Security Forces or Office of Special Investigation (OSI).

(c) Is cognizable under U.S. admiralty and maritime law, to include:

(1) The Suits in Admiralty Act, 46 U.S.C. 30901 and following.

(2) The Death on the High Seas Act, 46 U.S.C. 30301 and following.

(3) The Public Vessels Act, 46 U.S.C. 31101 and following.

(4) Exception: Claims arising from noncombat activities may be paid under the MCA, even if they are also cognizable under paragraphs (c)(1) through (3) of this section.

(d) Arises out of assault, battery, false imprisonment, false arrest, malicious prosecution, or abuse of process. Exception: Unless such actions were committed by an investigative or law enforcement officer of the U.S. who is empowered by law to conduct searches, seize evidence, or make arrests for violations of federal law.

(e) Arises out of libel, slander, misrepresentation, or deceit.

(f) Arises out of an interference with contract rights.

(g) Arises out of the combat activities of U.S. military forces.

(h) Is for the personal injury or death of a member of the Armed Forces of the U.S. incident to the member's service.

(i) Is for the personal injury or death of any person for workplace injuries covered by the Federal Employees' Compensation Act, 5 U.S.C. 8101, and following.

(j) Is for the personal injury or death of any employee of the US, including nonappropriated fund employees, for workplace injuries covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901, and following.

(k) Is for a taking of property, *e.g.*, by technical trespass or over flight of aircraft.

(l) Is for patent or copyright infringement.

(m) Results wholly from the negligent or wrongful act of the claimant.

(n) Is for the reimbursement of medical, hospital, or burial expenses furnished at the expense of the US, either directly or through contractual payments.

(o) Arises from contractual transactions, express or implied (including rental agreements, sales agreements, leases, and easements), that:

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(1) Are payable or enforceable under oral or written contracts; or

(2) Arise out of an irregular procurement or implied contract.

(p) Is for the personal injury or death of military or civilian personnel of a foreign government incident to their service.

(q) Is based on an act or omission of an employee of the government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation is valid. Do not deny claims solely on this exception without the prior approval of USAF/JACC. Claims under the noncombat activities provision of this subpart may be paid even if this paragraph (q) applies. Is based on the exercise or performance of, or the failure to exercise or perform, a discretionary function or duty on the part of a federal agency or a Federal Government employee, whether or not the discretion involved is abused. Do not deny claims solely on this exception without the prior approval of USAF/JACC. Exception: Claims under the noncombat activities provision may be paid even if this paragraph (q) applies.

(r) Is not in the best interests of the US, is contrary to public policy, or is otherwise contrary to the basic intent of the MCA. Examples include, but are not limited to, when a claimant's criminal conduct or failure to comply with a nonpunitive regulation is a proximate cause of the loss. Prior approval must be obtained from USAF/JACC before denying claims solely on this exception.

(s) Arises out of an act or omission of any employee of the government in administering the provisions of the Trading With the Enemy Act, 50 U.S.C. app. 1-44.

(t) Is for damages caused by the imposition or establishment of a quarantine by the U.S.

(u) Arises from the fiscal operations of the Department of the Treasury or from the regulation of the monetary system.

(v) Arises from the activities of the Tennessee Valley Authority.

(w) Arises from the activities of a federal land bank, a federal intermediate credit bank, or a bank for cooperatives.

(x) Is for the personal injury or death of any government contractor employee for whom benefits are available under any worker's compensation law, or under any contract or agreement providing employee benefits through insurance, local law, or custom when the U.S. pays insurance either directly or as part of the consideration under the contract. Only USAF/JACC may act on these claims.

(y) Is for damage, injury or death from or by flood or flood waters at any place.

(z) Is for damage to property or other losses of a state, commonwealth, territory, or the District of Columbia caused by Air National Guard personnel engaged in training or duty under 32 U.S.C. 316, 502, 503, 504, or 505 who are assigned to a unit maintained by that state, commonwealth, territory, or the District of Columbia.

(aa) Is for damage to property or for any death or personal injury arising out of activities of any federal agency or employee of the government in carrying out the provisions of the Disaster Relief Act of 1974 (42 U.S.C. 5121, *et seq.*), as amended.

(bb) Arises from activities that present a political question.

(cc) Arises from private, as distinguished from government, transactions.

(dd) Is based solely on compassionate grounds.

(ee) Is for rent, damage, or other expenses or payments involving the regular acquisition, use, possession, or disposition of real property or interests therein by and for the U.S.

(ff) Is presented by a national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the U.S., or any country allied with such enemy country unless the appropriate settlement authority determines that the claimant is, and at the time of the incident was, friendly to the U.S. A prisoner of war or an interned enemy alien is not excluded as to a claim for damage, loss, or destruction of personal property in the custody of the U.S. otherwise payable. Forward claims considered not payable under this paragraph (ff), with recommendations for disposition, to USAF/JACC.

(gg) Arises out of the loss, mis-carriage, or negligent transmission of letters or postal matter by the U.S. Postal Service or its agents or employees.

(hh) Is for damage to or loss of bailed property when the bailor specifically assumes such risk.

(ii) Is for property damage, personal injury, or death occurring in a foreign country to an inhabitant of a foreign country.

(jj) Is for interest incurred prior to the payment of a claim.

(kk) Arises out of matters which are in litigation against the U.S.

(ll) Is for attorney fees or costs in connection with pursuing an administrative or judicial remedy against the U.S. or any of its agencies.

(mm) Is for bail, interest or inconvenience expenses incurred in connection with the preparation and presentation of the claim.

(nn) Is for a failure to use a duty of care to keep premises owned or under the control of the U.S. safe for use for any recreational purpose, or for a failure by the U.S. to give any warning of hazardous conditions on such premises to persons entering for a recreational purpose unless there is a willful or malicious failure to guard or warn against a dangerous condition, or unless consideration was paid to the U.S. (including a nonappropriated fund instrumentality) to use the premises.

[81 FR 83691, Nov. 22, 2016]

§ 842.41 Applicable law.

This section provides the existing law governing liability, measurement of liability and the effects of settlement upon awards.

(a) *Federal preemption.* Many of the exclusions in this subpart are based upon the wording of 28 U.S.C. 2680 or other federal statutes or court decisions interpreting the Federal Tort Claims Act. Federal case law interpreting the same exclusions under the Federal Tort Claims Act is applied to the Military Claims Act. Where state law differs with federal law, federal law prevails.

(b) *Extent of liability.* Where the claim arises is important in determining the extent of liability.

(1) *Applicable law.* When a claim arises in the United States, its territories or possessions, the same law as if the claim was cognizable under the FTCA will be applied.

(2) *Claims in foreign countries.* In claims arising in a foreign country, where the claim is for personal injury, death, or damage to or loss of real or personal property caused by an act or omission alleged to be negligent, wrongful, or otherwise involving fault of military personnel or civilian officers or employees of the United States acting within the scope of their employment, liability or the United States is determined according to federal case law interpreting the FTCA. Where the FTCA requires application of the law of the place where the act or omission occurred, settlement authorities will use the rules set forth in the currently adopted edition of the *Restatement of the Law*, published by the American Law Institute, to evaluate the liability of the Air Force, subject to the following rules:

(i) Foreign rules and regulations governing the operation of motor vehicles (rules of the road) are applied to the extent those rules are not specifically superseded or preempted by United States military traffic regulations.

(ii) Absolute or strict liability will not apply for claims not arising from noncombat activities.

(iii) Hedonic damages are not payable.

(iv) The collateral source doctrine does not apply.

(v) Joint and several liability does not apply. Payment will be made only upon the portion of loss, damage, injury or death attributable to the Armed Forces of the United States.

(vi) Future economic loss will be discounted to present value after deducting for federal income taxes and, in cases of wrongful death, personal consumption.

(c) *Claims not payable.* Do not approve payment for:

(i) Punitive damages.

(ii) Cost of medical or hospital services furnished at the expense of the United States.

(iii) Cost of burial expenses paid by the United States.

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(d) *Settlement by insurer or joint tortfeasor.* When settlement is made by an insurer or joint tortfeasor and an additional award is warranted, an award may be made if both of the following are present:

(1) The United States is not protected by the release executed by the claimant.

(2) The total amount received from such source is first deducted.

[81 FR 83692, Nov. 22, 2016]

§ 842.42 Appeal of final denials.

(a) A claimant may appeal the final denial of the claim. The claimant sends the request, in writing, to the settlement authority that issued the denial letter within 60 days of the date the denial letter was mailed. The settlement authority may waive the 60 day time limit for good cause.

(b) Upon receipt of the appeal, the original settlement authority reviews the appeal.

(c) Where the settlement authority does not reach a final agreement on an appealed claim, he or she sends the entire claim file to the next higher settlement authority, who is the appellate authority for that claim. Any higher settlement authority may act upon an appeal.

(d) The decision of the appellate authority is the final administrative action on the claim.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83690, 83692, Nov. 22, 2016]

§ 842.43 Right of subrogation, indemnity, and contribution.

The Air Force becomes subrogated to the rights of the claimant upon settling a claim. The Air Force has the rights of contribution and indemnity permitted by the law of the situs, or under contract. Do not seek contribution or indemnity from U.S. military personnel or civilian employees whose conduct gave rise to government liability.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83690, Nov. 22, 2016]

§ 842.44 Attorney fees.

In the settlement of any claim pursuant to 10 U.S.C. 2733 and this subpart, attorney fees will not exceed 20 percent

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of any award provided that when a claim involves payment of an award over \$1,000,000, attorney fees on that part of the award exceeding \$1,000,000 may be determined by the Secretary of the Air Force. For the purposes of this paragraph, an award is deemed to be the cost to the United States of any trust or structured settlement, and not its future value.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83690, Nov. 22, 2016]

Subpart E—Foreign Claims (10 U.S.C. 2734)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83692, Nov. 22, 2016, unless otherwise noted.

§ 842.45 Scope of this subpart.

This subpart tells how to settle and pay claims against the United States presented by inhabitants of foreign countries for property damage, personal injury, or death caused by military and civilian members of the U.S. Armed Forces in foreign countries.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83692, Nov. 22, 2016]

§ 842.46 Definitions.

(a) *Foreign country.* A national state other than the United States, including any place under jurisdiction of the United States in a foreign country.

(b) *Inhabitant of a foreign country.* A person, corporation, or other business association whose usual place of abode is in a foreign country. The term “inhabitant” has a broader meaning than such terms as “citizen” or “national”, but does not include persons who are merely temporarily present in a foreign country. It does not require foreign citizenship or domicile.

(c) *Appointing authority.* An Air Force official authorized to appoint members to foreign claims commissions (FCC).

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83692, Nov. 22, 2016]

§ 842.47 Delegations of authority.

(a) *Settlement authority.* (1) The Secretary of the Air Force has the authority to:

(i) Settle claims for payment of \$100,000 or less.

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(ii) Settle claims for more than \$100,000, pay the first \$100,000, and report the excess to the Department of the Treasury for payment.

(iii) Deny claims in any amount.

(2) The Judge Advocate General, Deputy Judge Advocate General, Director of Civil Law, and the Chief, Deputy Chief and Branch Chiefs, Claims and Tort Litigation Staff are FCCs and have delegated authority to:

(i) Settle claims for payment of \$100,000 or less.

(ii) Deny claims in any amount.

(3) The SJAs of the Air Force component commander of the U.S. geographic combatant commands are FCC for claims arising in their respective combatant command Areas of Responsibility (AORs) and may deny claims of \$50,000 or less and will pay claims filed in any amount when payment is for \$50,000 or less.

(b) *Redelegating settlement authority.* A settlement authority appointed as a FCC in paragraph (a) of this section may appoint one or more subordinate judge advocates or civilian attorneys to act as FCC, and redelegate all or part of that settlement authority to such persons.

(c) *Settlement negotiations.* A settlement authority may settle a claim in any sum within its settlement authority, regardless of the amount claimed. Send uncompromised claims in excess of the delegated authority through claims channels to the level with settlement authority. Unsuccessful negotiations at one level do not bind higher authority.

(d) *Special exceptions.* Do not settle claims for medical malpractice without HQ USAF/JACC approval.

[81 FR 83692, Nov. 22, 2016]

§ 842.48 Filing a claim.

(a) *How and when filed.* A claim is filed when the Air Force receives from a claimant or authorized agent a properly completed SF 95 or other signed and written demand for money damages in a sum certain. A claim may be presented orally only if oral claims are the custom in the country where the incident occurred and the claimant is functionally illiterate. In any case where an oral claim is made, claims personnel must promptly reduce the

claim to writing with all particulars carefully noted. A claim belonging to another agency is promptly transferred to the appropriate agency.

(b) *Amending a claim.* A claimant may amend a claim at any time prior to final action. An amendment must be in writing and signed by the claimant or authorized agent.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83692, 83693, Nov. 22, 2016]

§ 842.49 Advance payments.

Subpart P of this part outlines procedures for advance payments.

[81 FR 83693, Nov. 22, 2016]

§ 842.50 Statute of limitations.

(a) A claim must be presented to the Air Force within 2 years after it accrues. It accrues when the claimant discovers or reasonably should have discovered the existence of the act that resulted in the claimed loss or injury.

(b) In computing the statutory time period, the day of the incident is excluded and the day the claim was filed is included.

(c) War or armed conflict does not toll the statute of limitations.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83692, 83693, Nov. 22, 2016]

§ 842.51 Who may file a claim.

(a) Owners of the property or their authorized agents for property damage.

(b) Injured persons or other authorized agents for personal injury.

(c) Executors or administrators of a decedent's estate, or any other person legally entitled to do so under applicable local law, for an individual's death.

(d) Authorized agents (including the claimant's attorney) must show their title or legal capacity and present evidence of authority to present the claim.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83692, Nov. 22, 2016]

§ 842.52 Who are proper claimants.

Claimants include inhabitants of a foreign country who are:

(a) Foreign nationals. In a wrongful death case, if the decedent is an inhabitant of a foreign country, even though

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his or her survivors are U.S. inhabitants, the FCA will apply.

(b) U.S. nationals residing abroad, unless the claim arises from a benefit, privilege or service provided to them by the U.S. Government, or they reside in the foreign country primarily because they are employed directly by the United States, or sponsored by or accompanying such a person, or employed by a U.S. civilian contractor in furtherance of a contract with the U.S. Government, or sponsored by or accompanying such a person.

(c) U.S. corporations with a place of business in the country in which the claim arose.

(d) Foreign governments and their political subdivisions, including a municipal and prefectural government.

(e) Foreign companies and business entities.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83692, 83693, Nov. 22, 2016]

§ 842.53 Who are not proper claimants.

Persons who are not proper claimants include:

(a) Insurers and other subrogees.

(b) Persons determined to be U.S. inhabitants. U.S. inhabitants include dependents of U.S. military personnel and U.S. Government civilian employees.

(c) Foreign military personnel suffering personal injury, or death arising incident to service or pursuant to combined and/or joint military operations. Such operations include, but are not limited to, military exercises and United Nations, NATO, and other regional peacekeeping and humanitarian missions.

(d) Civilian employees of the United States, including local inhabitants, injured in the scope of their employment.

(e) National governments and their political subdivisions engaging in war or armed conflict with the United States or its allies. This includes factions that have not necessarily been recognized by the international community as a legitimate nation state.

(f) A national or nationally controlled corporation of a country engaging in war or armed conflict with the United States or its allies, unless the FCC or local military commander de-

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termines the claimant is friendly with the United States.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83692, 83693, Nov. 22, 2016]

§ 842.54 Payment criteria.

The following criteria is considered before determining liability.

(a) The incident causing the damage or injury must arise in a foreign country and be caused by noncombatant activities of the U.S. Armed Forces or by the negligent or wrongful acts of civilian employees or military members of the Armed Forces.

(1) It is a prerequisite to U.S. responsibility if the employee causing the damage or injury is a local inhabitant, a prisoner of war, or an interned enemy alien. These persons are “employees” within the meaning of the Foreign Claims Act (FCA) only when in the service of the United States. Ordinarily, a slight deviation as to time or place does not constitute a departure from the scope of employment. The purpose of the activity and whether it furthers the general interest of the United States is considered. If the claim arose from the operation or use of a U.S. Armed Forces vehicle or other equipment by such a person, pay it provided local law imposes liability on the owner of the vehicle or other equipment in the circumstances involved.

(2) It is immaterial when the claim arises from the acts or omissions of any U.S. Armed Forces member or employee not listed in § 842.64(c)(1). The Act imposes responsibility on the United States when it places a U.S. citizen or non-US citizen employee in a position to cause the injury or damage. If the cause is a criminal act clearly outside the scope of employment, ordinarily pay the claim and consider disciplinary action against the offender.

(b) Scope of employment is considered in the following situations.

(1) It is a prerequisite to U.S. responsibility if the employee causing the damage or injury is a local inhabitant, a prisoner of war, or an interned enemy alien. These persons are “employees” within the meaning of the Foreign Claims Act (FCA) only when in the service of the United States. Ordinarily, a slight deviation as to time or place does not constitute a departure

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from the scope of employment. The purpose of the activity and whether it furthers the general interest of the United States is considered. If the claim arose from the operation or use of a U.S. Armed Forces vehicle or other equipment by such a person, pay it provided local law imposes liability on the owner of the vehicle or other equipment in the circumstances involved.

(2) It is immaterial when the claim arises from the acts or omissions of any U.S. Armed Forces member or employee not listed in § 842.64(c)(1) of this part. The Act imposes responsibility on the United States when it places a U.S. citizen or non-US citizen employee in a position to cause the injury or damage. If the cause is a criminal act clearly outside the scope of employment, ordinarily pay the claim and consider disciplinary action against the offender.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83692, 83693, Nov. 22, 2016]

§ 842.55 Claims not payable.

A claim is not payable when it:

(a) Is waived under an applicable international agreement, or pursuant to an applicable international agreement, a receiving state should adjudicate and pay the claim. However, if a foreign government subject to such an international agreement disputes its legal responsibilities under the agreement, and the claimant has no other means of compensation, USAF/JACC may authorize payment.

(b) Is purely contractual in nature.

(c) Is for attorney fees, punitive damages, a judgment or interest on a judgment, bail, or court costs. FCC should consider providing early notice to claimants that attorney fees are not payable as an item of damage under the FCA.

(d) Accrues from a private contractual relationship between U.S. personnel and third parties about property leases, public utilities, hiring of domestic servants, and debts of any description. This claim is sent for action to the commander of the person concerned (see 32 CFR part 818).

(e) Is based solely on compassionate grounds.

NOTE: A Solatium payment is paid from O&M funds as an investigative expense.

(f) Is a paternity claim.

(g) Is for patent or copyright infringement.

(h) Results wholly from the negligent or wrongful act of the claimant or agent.

(i) Is for rent, damage, or other payments involving regular acquisition, possession, and disposition of real property by or for the Air Force.

(j) Is filed by a Communist country or its inhabitants, unless authorized by AFLOA/JACC.

(k) Is for real property taken by a continuing trespass.

(l) Is for personal injury or death of a person covered by:

(1) The Federal Employees' Compensation Act (5 U.S.C. 8101, *et seq.*).

(2) The Longshore and Harbor Workers' Compensation Act (33 U.S.C. 901, *et seq.*).

(3) A U.S. contract or agreement providing employee benefits through insurance, local law, or custom, where the United States pays for them either directly or as part of the consideration under the contract. (See 42 U.S.C. 1651 and 42 U.S.C. 1701.) The Judge Advocate General or Chief, Claims and Tort Litigation Staff, AFLOA/JACC, may authorize an award where local benefits are not adequate. Local benefits are deducted from any award.

(m) Results from an action by an enemy, or directly or indirectly from an act of the U.S. Armed Forces in combat, except that a claim may be allowed if it arises from an accident or malfunction incident to the operation of an aircraft of the U.S. Armed Forces, including its airborne ordnance, indirectly related to combat, and occurring while preparing for or going to, or returning from a combat mission.

(n) Is based on negligence of a concessionaire or other independent contractor.

(o) Arises out of personal activities of family members, guests, servants, or activities of the pets of members and employees of the U.S. Armed Forces.

(p) Is the subject of litigation against the United States or its employees. This restriction does not apply to joint criminal/civil proceedings in a foreign

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court. Claims settlement may be authorized by AFL/OA/JACC in appropriate cases on request.

(q) Is covered under U.S. admiralty or maritime laws, unless authorized by The Judge Advocate General or Chief, Claims and Tort Litigation Staff.

(s) Is not in the best interest of the United States, is contrary to public policy, or otherwise contrary to the basic intent of the FCA. Claims considered not payable on this basis will be forwarded to USAF/JACC for final decision.

(t) Is presented by a national, or a corporation controlled by a national, of a country at war or engaged in armed conflict with the United States, or any country allied with such enemy country unless the settlement authority determines the claimant is, and at the time of the incident was, friendly to the United States. Exception: A prisoner of war or interned enemy alien is not excluded from filing a claim for damage, loss, or destruction of personal property within the U.S. Armed Forces' custody if the claim is otherwise payable.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83692, 83693, Nov. 22, 2016]

§ 842.56 Applicable law.

This section provides guidance to determine the applicable law for assessment of liability.

(a) In adjudicating FCA claims, settlement authorities will follow the law, customs, and standards of the country where the claim arose, except:

(1) Causation is determined based upon general principles of U.S. tort law found in federal case law and standard legal publications.

(2) Joint and several liability does not apply. Payment is based solely on the portion of loss, damage, injury or death attributable to the U.S. Armed Forces.

(3) If lost income or lost profits is recoverable under the law where the claim arose, they shall be limited to net lost income or net lost profits, taking into account appropriate deductions for taxes, regular business expenditures, and in the case of wrongful death, personal consumption during the loss period.

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(b) Settlement authorities will not deduct compensation from collateral sources except for:

(1) Direct payments by a member or civilian employee of the U.S. Armed Forces for damages (not solatia).

(2) Any payments recovered or recoverable from an insurance policy when premiums were paid, directly or indirectly, by the United States, or a member or civilian employee of the U.S. Armed Forces; or when the member or employee has the benefit of the insurance (such as when a U.S. member or employee borrows a vehicle of a local national, and the vehicle carries insurance for the benefit of any driver with permission to drive the vehicle).

[81 FR 83694, Nov. 22, 2016]

§ 842.57 Reconsideration of final denials.

This section provides the procedures used to reconsider a final denial.

(a) An FCC has the inherent authority to reconsider a final decision. The mere fact that a request for reconsideration is received does not obligate the settlement authority to reopen the claim.

(b) The FCC does not mention a reconsideration right in the original denial letter.

(c) A settlement authority must reconsider the final action when there is:

(1) New and material evidence concerning the claim; or

(2) Obvious errors in the original decision.

(d) The FCC must document in the claim file the reason for reconsideration.

(e) A FCC above the original settlement authority may direct a claim be forwarded to a higher FCC for reconsideration.

[81 FR 83694, Nov. 22, 2016]

§ 842.58 Right of subrogation, indemnity, and contribution.

The Air Force has all the rights of subrogation, indemnity and contribution, as local law permits. However, settlement authorities will not seek contribution or indemnity from U.S. military members or civilian employees whose conduct gave rise to U.S. Government liability, or whenever it

would be harmful to international relations.

[81 FR 83694, Nov. 22, 2016]

Subpart F—International Agreement Claims (10 U.S.C. 2734a and 2734b)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83694, Nov. 22, 2016, unless otherwise noted.

§ 842.59 Scope of this subpart.

This subpart governs Air Force actions in investigating, processing, and settling claims under the International Agreement Claims Act.

[81 FR 83694, Nov. 22, 2016]

§ 842.60 Definitions.

The following are general definitions. See the relevant international agreement for the specific meaning of a term to use with a specific claim.

(a) *Civilian component.* Civilian personnel accompanying and employed by an international agreement contracting force. Local employees, contractor employees, or members of the American Red Cross are not a part of the civilian component unless specifically included in the agreement.

(b) *Contracting party.* A nation signing the governing agreement.

(c) *Force.* Personnel belonging to the land, sea, or air armed services of one contracting party when in the territory of another contracting party in connection with their official duties.

(d) *Legally responsible.* A term of art providing for settlement of claims under cost sharing international agreements in accordance with the law of the receiving state. Often, employees who are local inhabitants, not part of the civilian component of the force, could cause the sending state to be legally responsible under a respondeat superior theory.

(e) *Receiving state.* The country where the force or civilian component of another contracting party is temporarily located. It is often thought of as the “host nation.”

(f) *Sending state.* The country sending the force or civilian component to the receiving State. In cases where U.S.

personnel are stationed in a foreign country, the U.S. is the sending state.

(g) *Third parties.* A term of art used in International Agreements. Parties other than members of the force and civilian component of the sending or receiving States. Dependents, tourists, and other noninhabitants of a foreign country are third parties (and therefore can generally make a claim under a SOFA) unless the international agreement, or an understanding between the countries involved, specifically excludes them.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83694, Nov. 22, 2016]

§ 842.61 Delegations of authority.

(a) *Overseas settlement authority.* Staff Judge Advocates of the Air Force component commands of the U.S. geographic combatant commands will, within their combatant command AORs, fulfill U.S. obligations concerning claims abroad subject to 10 U.S.C. 2734a for which the Air Force has settlement authority. Consistent with 10 U.S.C. 2734a and the international agreement, they may reimburse or pay the pro rata share of a claim as agreed, or if inconsistent with the IACA or the international agreement, they may object to a bill presented.

(b) *Settlement authority.* The Secretary of the Air Force, The Judge Advocate General, the Deputy Judge Advocate General, The Director of Civil Law and Chief of the Claims and Tort Litigation Division may also exercise settlement authority under 10 U.S.C. 2734a.

(c) *Redelegation of authority.* A settlement authority may redelegate his or her authority to a subordinate judge advocate or civilian attorney in writing.

(d) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

[81 FR 83694, Nov. 22, 2016]

§ 842.62 Filing a claim.

(a) *Claims arising in a foreign country.*
 (1) If a third party claimant tries to file an international agreement claim

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with Air Force, direct that person to the appropriate receiving State office.

(2) If the Air Force receives a claim, send it to the U.S. sending State office for delivery to the receiving State.

(b) *Claims arising in the United States.* The claimant files tort claims arising from the act or omission of military or civilian personnel of another contracting party at any U.S. military installation. The Staff Judge Advocate for the installation where such military or civilian personnel is assigned or attached will promptly notify the Foreign Claims Branch of USAF/JACC as well as the Commander, U.S. Army Claims Service. If the claimant files said claim at an installation other than the location where said military or civilian personnel is assigned, the Staff Judge Advocate for that installation will promptly forward the claim to the appropriate installation Staff Judge Advocate.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83694, 83695, Nov. 22, 2016]

Subpart G—Use of Government Property Claims (10 U.S.C. 2737)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83695, Nov. 22, 2016, unless otherwise noted.

§ 842.63 Scope of this subpart.

This subpart explains how to settle and pay claims against the United States, for property damage, personal injury, or death incident to the use of a government vehicle or any other government property on a government installation which are not payable under any other statute.

[81 FR 83695, Nov. 22, 2016]

§ 842.64 Definitions.

(a) *Government installation.* A United States Government facility having fixed boundaries and owned or controlled by the government.

(b) *Vehicle.* Every mechanical device used as a means of transportation on land.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83695, Nov. 22, 2016]

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§ 842.65 Delegations of authority.

(a) *Settlement authority.* The following individuals have delegated authority to settle claims for \$1,000 or less and deny them in any amount.

(1) The Judge Advocate General.

(2) The Deputy Judge Advocate General.

(3) Director of Civil Law.

(4) Chief, Deputy Chief and Branch Chiefs, Claims and Tort Litigation staff.

(5) SJA of the Air Force component commands of the U.S. geographic combatant commands.

(6) SJAs of single base GCMs and GCMs in PACAF and USAFE.

(7) The SJA of each Air Force base, station and fixed installation.

(8) Any other judge advocate designated by The Judge Advocate General.

(b) *Redelegation of authority.* A settlement authority may redelegate it to a subordinate judge advocate or civilian attorney in writing.

(c) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83695, Nov. 22, 2016]

§ 842.66 Filing a claim.

(a) *How and when filed.* A claim has been filed when a federal agency receives from a claimant or the claimant's duly authorized agent written notification of an incident of property damage, personal injury or death accompanied by a demand for money damages in a sum certain. A claim incorrectly presented to the Air Force will be promptly transferred to the appropriate Federal agency.

(b) *Amending a claim.* A claimant may amend a claim at any time prior to final Air Force action. Amendments will be submitted in writing and signed by the claimant or the claimant's duly authorized agent.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83695, Nov. 22, 2016]

§ 842.67 Statute of limitations.

(a) A claim must be presented in writing within 2 years after it accrues.

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It accrues at the time the claimant discovers, or in the exercise of reasonable care should have discovered, the existence of the act causing property damage, personal injury or death for which the claim is filed.

(b) In computing time to determine whether the period of limitation has expired, exclude the incident date and include the date the claim was filed.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83695, Nov. 22, 2016]

§ 842.68 Claims payable.

When all of the following are present, payment of a claim in the amount of \$1,000 or less is authorized if it:

(a) Is for property damage, personal injury, or death. Payment for a personal injury or death claim is limited to costs of reasonable medical, hospital, and burial expenses actually incurred and not otherwise furnished or paid by the United States.

(b) Was caused by a military member or civilian employee of the Air Force, whether acting within or outside the scope of employment.

(c) Arose from the use of a government vehicle at any place or from the use of other government property on a government installation.

(d) Is not payable under any other provision of law except Article 139, UCMJ.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83695, Nov. 22, 2016]

§ 842.69 Claims not payable.

A claim is not payable if it is:

(a) Payable under any other provision of the law.

(b) Caused wholly or partly by a negligent or wrongful act of the claimant, the claimant's agent, or employee.

(c) A subrogated claim.

(d) Recoverable from other sources such as an insurance policy, or recovered from action under Article 139, UCMJ.

(e) For pain and suffering or other general damages.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83695, Nov. 22, 2016]

§ 842.70 Reconsideration of final denial.

(a) The statute does not provide for appeals. The original settlement authority may, however, reconsider any decision. There is no set format for a reconsideration but it should be submitted in writing within 60 days of the original decision.

(b) The settlement authority may either grant all or any portion of the requested relief without referral to any other office, or forward the entire file with the reasons for the action and recommendations to the next higher claims settlement authority for independent review and final action.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83695, Nov. 22, 2016]

§ 842.71 Settlement agreement.

Do not pay a claim unless the claimant accepts the amount offered in full satisfaction of the claim and signs a settlement agreement to that effect, in which the claimant agrees to release any and all claims against the United States, its employees and agents arising from the incident in question. Use the settlement agreement approved for use by the Department of Justice for the settlement of FTCA claims, tailored to this claim.

[81 FR 83695, Nov. 22, 2016]

Subpart H—Admiralty Claims (10 U.S.C. 9801–9804, 9806; 46 U.S.C. 740)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83695, Nov. 22, 2016, unless otherwise noted.

§ 842.72 Scope of this subpart.

It sets forth the procedure for administrative settlement of admiralty and maritime claims in favor of and against the United States.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83695, Nov. 22, 2016]

§ 842.73 Definitions.

(a) *Admiralty contracts.* A contract covering maritime services or a maritime transaction such as vessel procurement and space for commercial ocean transportation of DOD cargo,

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mail, and personnel is an admiralty contract.

(b) *General average*. General average is the admiralty rule that when someone's property is thrown overboard to save a ship, the ship owner and all owners of the cargo must share the loss.

(c) *Maritime torts*. A maritime tort is one committed in navigable waters or on land or in the air where a substantial element of the damage, personal injury, or death occurred in navigable waters. The activity causing the tortious act must bear some significant relationship to traditional maritime activity.

(d) *Vessel*. Every description of watercraft used or usable as a means of transportation on water is a vessel. (1 U.S.C. 3)

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83695, Nov. 22, 2016]

§ 842.74 Delegations of authority.

(a) The following officials have the authority to settle a claim against the Air Force in the amounts provided:

(1) The Secretary of the Air Force has the authority to:

(i) Settle or deny a claim in any amount. Settlements for payment of more than \$500,000 are certified to Congress for payment.

(ii) [Reserved]

(2) The following individuals have delegated authority to settle claims for \$100,000 or less:

(i) The Judge Advocate General.

(ii) The Deputy Judge Advocate General.

(iii) The Director of Civil Law.

(iv) The Chief and Deputy Chief, Claims and Tort Litigation staff.

(b) Delegation of settlement authority on claims in favor of the United States.

(1) The Secretary of the Air Force has the authority to settle claims for damage to property under the jurisdiction of the Air Force in an amount not to exceed \$500,000, and to settle claims for salvage services performed by the Air Force in any amount.

(2) AFLOA/JACC refers all claims for damage to property under the jurisdiction of the Air Force for more than \$500,000 to the Department of Justice.

(3) The following individuals have delegated authority to settle claims for

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\$100,000 or less and deny them in any amount:

(i) The Judge Advocate General.

(ii) The Deputy Judge Advocate General.

(iii) The Director of Civil Law.

(iv) The Chief and Deputy Chief, Claims and Tort Litigation Division.

[55 FR 2809, Jan. 29, 1990, as amended at 55 FR 32077, Aug. 7, 1990; 56 FR 1574, Jan. 16, 1991. Redesignated and amended at 81 FR 83695, Nov. 22, 2016]

§ 842.75 Reconsidering claims against the United States.

This section provides the policy and procedures to reconsider any maritime claim made against the United States.

(a) The settlement authority may reconsider any claim previously disapproved in whole or in part when either:

(1) The claimant submits new evidence in support of the claim.

(2) There were errors or irregularities in the submission or settlement of the claim.

(b) There is no right of appeal to higher authority under this subpart.

(c) There is no time limit for submitting a request for reconsideration, but it is within the discretion of the settlement authority to decline to reconsider a claim based on the amount of time passed since the claim was originally denied.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83695, Nov. 22, 2016]

Subpart I—Claims Under the Federal Tort Claims Act (28 U.S.C. 1346(b), 2402, 2671, 2672, 2674–2680)

SOURCE: 81 FR 83695, Nov. 22, 2016, unless otherwise noted.

§ 842.76 Scope of this subpart.

This subpart, promulgated under the authority of 28 CFR 14.11, governs claims against the United States for property damage, personal injury, or death, from the negligent or wrongful acts or omission of Air Force military or civilian personnel while acting within the scope of their employment.

§ 842.77 Delegations of authority.

(a) *Settlement authority.* The following individuals are delegated the full authority of the Secretary of the Air Force to settle and deny claims:

- (1) The Judge Advocate General.
- (2) The Deputy Judge Advocate General.
- (3) The Director of Civil Law.
- (4) The Division Chief of Claims and Tort Litigation.
- (5) The Division Chief of Environmental Law and Litigation.

(b) *Redelegation of authority.* A settlement authority may be redelegated, in writing, to a subordinate judge advocate or civilian attorney. The Chief, AFLOA/JACC may redelegate up to \$25,000, in writing, to paralegals assigned to AFLOA/JACC and, upon request, may authorize installation Staff Judge Advocates to redelegate their settlement authority to paralegals under their supervision.

(c) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

(d) *Settlement negotiations.* A settlement authority may settle a claim filed in any amount for a sum within the delegated authority. Unsettled claims in excess of the delegated authority will be sent to the next highest level with settlement authority. Unsuccessful negotiations at one level do not bind higher authority.

§ 842.78 Settlement agreements.

The claimant must sign a settlement agreement and general release before any payment is made.

§ 842.79 Administrative claim; when presented.

When the Air Force is the proper agency to receive a claim pursuant to 28 CFR 14.2(b), for purposes of the provisions of 28 U.S.C. 2401(b), 2672 and 2675, a claim shall be deemed to have been presented when it is received by:

- (a) The office of the Staff Judge Advocate of the Air Force installation nearest the location of the incident; or
- (b) The Claims and Tort Litigation Division, 1500 West Perimeter Road, Suite 1700, Joint Base Andrews, MD 20762.

Subpart J—Property Damage Tort Claims in Favor of the United States (31 U.S.C. 3701, 3711–3719)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83696, Nov. 22, 2016, unless otherwise noted.

§ 842.80 Scope of this subpart.

This subpart describes how to assert, administer, and collect claims for damage to or loss or destruction of government property and lost wages of Air Force servicemembers through negligent or wrongful acts. It does not cover admiralty, hospital recovery, or nonappropriated fund claims.

[81 FR 83696, Nov. 22, 2016]

§ 842.81 Delegations of authority.

(a) *Settlement authority.* (1) The following individuals have delegated authority to settle, compromise, suspend, or terminate action on claims asserted for \$100,000 or less and to accept full payment on any claim:

- (i) The Judge Advocate General.
- (ii) The Deputy Judge Advocate General.
- (iii) The Director of Civil Law.
- (iv) Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

(2) Installation staff judge advocates have authority to assert claims in any amount, accept full payment on any claim and to compromise, suspend or terminate action on claims asserted for \$25,000 or less.

(b) *Redelegation of authority.* A settlement authority may redelegate it to a subordinate judge advocate or civilian attorney, in writing.

(c) *Authority to reduce, withdraw, or restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83696, Nov. 22, 2016]

§ 842.82 Assertable claims.

A claim may be asserted in writing for loss of or damage to government property, against a tort-feasor when:

- (a) Damage results from negligence and the claim is for:

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(1) More than \$100.
(2) Less than \$100 but collection is practicable and economical.

(b) The claim is based on a contract and the contracting officer does not intend to assert a claim under the contract. The contracting officer's intention not to assert a claim should be recorded in a memorandum for the record and placed in the claim file.

(c) The claim is for property damage arising from the same incident as a hospital recovery claim.

(d) The Tort-feasor or his insurer presents a claim against the government arising from the same incident. (Both claims should be processed together.)

(e) The claim is assertable as a counterclaim under an international agreement. (The claim should be processed under subpart G of this part).

(f) The claim is based on product liability. AFLOA/JACC approval must be obtained before asserting the claim.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83696, Nov. 22, 2016]

§ 842.83 Non-assertable claims.

A claim is not assertable under this subpart when it is for:

(a) Reimbursement for military or civilian employees for their negligence claims paid by the United States.

(b) Loss or damage to government property:

(1) Caused by a nonappropriated fund employee acting in the scope of employment.

(2) Caused by a person who has accountability and responsibility for the damaged property under the Report of Survey system.

(c) Loss or damage to non-appropriated fund property assertable under other provisions.

(d) Loss or damage caused by an employee of an instrumentality of the government in the absence of statutory authority to reimburse.

(e) Monies recovered against a foreign government or any of its political subdivisions. (AFLOA/JACC may authorize this claim as an exception to the rule).

(f) Loss or damage caused by an employee of another federal agency while

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the employee was acting in the scope of his employment.

[55 FR 2809, Jan. 29, 1990, as amended at 55 FR 32077, Aug. 7, 1990. Redesignated and amended at 81 FR 83696, Nov. 22, 2016]

§ 842.84 Asserting the claim.

The base SJA asserts the claim against the tort-feasor by mailing, certified mail, return receipt requested, the original and one copy of a "Notice of Claim" that includes the following:

(a) Reference to the statutory right to collect.

(b) A demand for payment or restoration.

(c) A description of damage.

(d) The date and place of incident.

(e) The name, phone number, and office address of claims personnel to contact.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83696, Nov. 22, 2016]

§ 842.85 Referring a claim to the U.S. Attorney or the Department of Justice.

If collection efforts are unsuccessful, AFLOA/JACC may refer a claim to the appropriate U.S. Attorney's Office or the Department of Justice for initiation of a lawsuit.

[81 FR 83696, Nov. 22, 2016]

§ 842.86 Statute of limitations.

The government must file suit within 3 years after the cause of action accrues. It accrues when a responsible U.S. official knew or reasonably should have known the material facts that resulted in the claimed loss.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83696, Nov. 22, 2016]

§ 842.87 Compromise, termination, and suspension of collection.

This section establishes the guidelines for compromise, termination, or suspension of a claim.

(a) Compromise of a claim is allowable when:

(1) The tort-feasor is unable to pay the full amount within a reasonable time. (A sworn statement showing the debtor's assets and liabilities, income, expenses, and insurance coverage should be obtained and included in the claim file).

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(2) The Government is unable to collect a claim in full within a reasonable time even though the enforced collection proceedings are used for collection.

(3) The cost to collect does not justify enforced collection of the full amount.

(4) The government may have difficulty proving its case in court for the full amount claimed.

(b) Compromise is not allowable when there may be fraud, misrepresentation, or violation of antitrust laws. The Department of Justice must authorize compromise of such claims.

(c) Termination of collection is allowable when:

(1) The government is unable to collect the debt after exhausting all collection methods.

(2) The government is unable to locate the tort-feasor.

(3) The cost to collect will exceed recovery.

(4) The claim is legally without merit.

(5) The evidence does not substantiate the claim.

(d) Suspension of collection is allowable when:

(1) The government is unable to locate tort-feasor.

(2) The tort-feasor is presently unable to pay but:

(i) The statute of limitations is tolled or is running anew.

(ii) Future collection may be possible.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83696, Nov. 22, 2016]

Subpart K—Claims Under the National Guard Claims Act (32 U.S.C. 715)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83696, Nov. 22, 2016, unless otherwise noted.

§ 842.88 Scope of this subpart.

This subpart establishes policies and procedures for all administrative claims under the National Guard Claims Act for which the Air Force has assigned responsibility. Unless otherwise outlined in this subpart, follow procedures as outlined in subpart E of

this part for claims arising out of non-combat activities.

[81 FR 83696, Nov. 22, 2016]

§ 842.89 Definitions.

(a) *Air National Guard (ANG)*. The federally recognized Air National Guard of each state, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, and Guam.

(b) *ANG member*. An ANG member is one who is performing duty under 32 U.S.C., section 316, 502, 503, 504, or 505 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.

(c) *ANG duty status*—(1) *Active federal service*. ANG members may serve on active Federal duty under 10 U.S.C. to augment the active Air Force under certain circumstances or for certain types of duty or training (*e.g.*, overseas training exercises and ANG alert duty). Duty under 10 U.S.C. does not fall under this subpart.

(2) *Federally funded duty*. ANG members perform specified federally funded duty or training under 32 U.S.C. such as weekend drills, annual training, field exercises, range firing, military schooling, full time unit support, or recruiting duties. Duty under 32 U.S.C. falls under this subpart for noncombat activities.

(3) *State duty*. State duty is duty not authorized by federal law but required by the governor of the state and paid for from state funds. Such duty includes civil emergencies (natural or other disasters), civil disturbances (riots and strikes), and transportation requirements for official state functions, public health, or safety. State duty does not fall under this subpart.

(d) *ANG technicians*. An ANG technician is a Federal employee employed under 32 U.S.C. 709. Tort claims arising out of his or her activity are settled under the Federal Tort Claims Act (FTCA).

[81 FR 83696, Nov. 22, 2016]

§ 842.90 Delegations of authority.

(a) *Settlement authority*. (1) The Secretary of the Air Force has authority to:

(i) Settle a claim for \$100,000 or less.

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(ii) Settle a claim for more than \$100,000, paying the first \$100,000 and reporting the excess to the General Accounting Office for payment.

(iii) Deny a claim in any amount.

(2) The Judge Advocate General has delegated authority to settle a claim for \$100,000 or less, and deny a claim in any amount.

(3) The following individuals have delegated authority to settle a claim for \$25,000 or less, and deny a claim in any amount:

(i) The Deputy Judge Advocate General.

(ii) The Director of Civil Law.

(iii) The Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

(4) The SJAs of the Air Force component commander of the U.S. geographic combatant commands for claims arising within their respective combatant command areas of responsibility have delegated authority to settle claims payable or to deny claims filed for \$25,000 or less.

(5) SJAs of GCMs in PACAF and USAFE have delegated authority to settle claims payable, and deny claims filed, for \$15,000 or less.

(b) *Redelegation of authority.* A settlement authority may redelegate up to \$25,000 of settlement authority to a subordinate judge advocate or civilian attorney. This redelegation must be in writing and can be for all claims or limited to a single claim. The Chief, AFLOA/JACC may redelegate up to \$25,000, in writing, to paralegals assigned to AFLOA/JACC and, upon request, may authorize installation Staff Judge Advocates to redelegate their settlement authority to paralegals under their supervision.

(c) *Appellate authority.* Upon appeal a settlement authority has the same authority to settle a claim as that specified above. However, no appellate authority below the Office of the Secretary of the Air Force may deny an appeal of a claim it previously denied.

(d) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated settlement authority.

(e) *Settlement negotiations.* A settlement authority may settle a claim

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filed in any amount for a sum within the delegated settlement authority regardless of the amount claimed. Unsettled claims in excess of the delegated settlement authority are sent to the individual with higher settlement authority. Unsuccessful negotiations at one level do not bind higher authority.

(f) *Special exceptions.* No authority below the level of AFLOA/JACC may settle claims for:

(1) On the job personal injury or death of an employee of a government contractor or subcontractor.

(2) Assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution committed by an investigative or law enforcement officer.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83696, Nov. 22, 2016]

§ 842.91 Filing a claim.

(a) *Elements of a proper claim.* A claim is must be filed on a Standard Form 95 or other written document. It must be signed by the Claimant or authorized agent, be for money damages in a sum certain, and lay out a basic statement as to the nature of the claim that will allow the Air Force to investigate the allegations contained therein.

(b) *Amending a claim.* A claimant may amend a claim at any time prior to final action. To amend a claim the claimant or his or her authorized agent must submit a written, signed demand.

[81 FR 83697, Nov. 22, 2016]

§ 842.92 Advance payments.

Subpart P of this part sets forth procedures for such payments.

[81 FR 83697, Nov. 22, 2016]

§ 842.93 Statute of limitations.

(a) A claim must be filed in writing within 2 years after it accrues. It is deemed to be filed upon receipt by The Judge Advocate General, USAF/JACC, or a Staff Judge Advocate of the Air Force. A claim accrues when the claimant discovers or reasonably should have discovered the existence of the act that resulted in the claimed loss. The same rules governing accrual pursuant to the Federal Tort Claims Act should be applied with respect to the

National Guard Claims Act. Upon receipt of a claim that properly belongs with another military department, the claim is promptly transferred to that department.

(b) The statutory time period excludes the day of the incident and includes the day the claim was filed.

(c) A claim filed after the statute of limitations has run is considered if the U.S. is at war or in an armed conflict when the claim accrues or if the U.S. enters a war or armed conflict after the claim accrues, and if good causes shows how the war or armed conflict prevented the claimant from diligently filing the claim within the statute of limitations. But in no case will a claim be considered if filed more than two years after the war or armed conflict ends.

[81 FR 83697, Nov. 22, 2016]

§ 842.94 Who may file a claim.

The following individuals may file a claim under this subpart.

(a) Owners of the property or their authorized agents may file claims for property damage.

(b) Injured persons or their duly authorized agents may file claims for personal injury.

(c) Duly appointed guardians of minor children or any other person legally entitled to do so under applicable local law may file claims for minors' personal injuries.

(d) Executors or administrators of a decedent's estate or another person legally entitled to do so under applicable local law, may file claims based on:

(1) An individual's death.

(2) A cause of action surviving an individual's death.

(e) Insurers with subrogation rights may file claims for losses paid in full by them. The parties may file claims jointly or individually, to the extent of each party's interest, for losses partially paid by insurers with subrogation rights.

(f) Authorized agents signing claims show their title or legal capacity and present evidence of authority to present the claims.

[81 FR 83697, Nov. 22, 2016]

§ 842.95 Who are proper claimants.

(a) Citizens and inhabitants of the United States. U.S. inhabitants includes dependents of the U.S. military personnel and federal civilian employees temporarily outside the U.S. for purposes of U.S. Government service.

(b) U.S. military personnel and civilian employees. Note: These personnel are not proper claimants for claims for personal injury or death that occurred incident to their service.

(c) Foreign military personnel when the damage or injury occurs in the U.S. Do not pay for claims under the MCA for personal injury or death of a foreign military personnel that occurred incident to their service.

(d) States, state agencies, counties, or municipalities, or their political subdivisions.

(e) Subrogees of proper claimants to the extent they have paid for the claim in question.

[81 FR 83697, Nov. 22, 2016]

§ 842.96 Who are not proper claimants.

(a) Governments of foreign nations, their agencies, political subdivisions, or municipalities.

(b) Agencies and nonappropriated fund instrumentalities of the U.S. Government including the District of Columbia government.

(c) Inhabitants of foreign countries.

(d) The state, territory and its political subdivisions whose Air National Guard member caused the loss.

(e) Subrogees of the claimants in paragraphs (a) through (d) of this section.

[81 FR 83697, Nov. 22, 2016]

§ 842.97 Claims payable.

Claims arising from noncombat activities of the United States when caused by ANG members performing duty under 32 U.S.C. and acting within the scope of their employment, whether or not such injuries or damages arose out of their negligent or wrongful acts or omissions.

[81 FR 83697, Nov. 22, 2016]

§ 842.98 Claims not payable.

The following are not payable:

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(a) Claims covered by the FTCA, FCA, IACA, 10 U.S.C. 2734a and 2734b, Air Force Admiralty Claims Act (AFACA), 10 U.S.C. 9801-9804, 9806, MCA, 10 U.S.C. 2733, or covered under the Military Personnel and Civilian Employees' Claims Act (MPCECA), 31 U.S.C. 3701, 3721.

(b) NGCA claims arising from non-combat activities in the U.S. are not covered by the FTCA because more elements are needed to state an FTCA claim than are needed to state a claim under the NGCA for noncombat activities. All FTCA claims are based on elements of traditional tort liability (*i.e.*, duty, breach, causation, and damages); that is, they are fault based. Noncombat activity claims under the NGCA are based solely on causation and damages. Because NGCA claims for non-combat activities are not fault based, they are not covered by the FTCA.

(c) See subpart E of this part for other claims not payable.

(d) Claims for damage to or loss of bailed property when the bailor specifically assumed such risk.

(e) Claims for personal injury or death of a person covered by:

(1) The Federal Employees' Compensation Act.

(2) The Longshore and Harbor Workers' Compensation Act.

(3) A United States contract or agreement providing employee benefits through insurance, local law, or custom and the United States pays for such benefits either directly or as a part of the consideration under the contract.

(f) Claims for property damage, personal injury or death occurring in a foreign country to an inhabitant of that country.

(g) Claims caused by the negligent or wrongful acts or omissions of members of the District of Columbia ANG.

(h) Claims arising from a private rather than a government transaction.

(i) Claims for patent or copyright infringement.

(j) Claims for damage, use, or other expenses involving the regular acquisition, possession, and disposition of real property by or for the ANG.

(k) Claims for the taking of private real property by a continuing trespass

or by a technical trespass such as overflights of aircraft.

(l) Claims for loss of rental fee for personal property.

(m) Claims in litigation against the United States.

(n) Claims for a maritime occurrence covered under U.S. admiralty laws.

(o) Claims for:

(1) Any tax or customs duty.

(2) The detention of any goods or merchandise by any officer of customs, excise, or law enforcement officer.

(p) Claims from an act or omission of any employee of the Government while administering the provisions of the Trading With the Enemy Act.

(q) Claims for damages caused by the United States' imposition or establishment of a quarantine.

(r) Claims for libel, slander, misrepresentation, deceit or interference with contract rights.

(s) Claims that result wholly from the negligent or wrongful act of the claimant or the claimant's agent.

(t) Claims for reimbursement of medical, hospital, or burial expenses furnished at the expense of the United States, any state, the District of Columbia, or Puerto Rico.

(u) Claims for damage from floods or flood waters.

(v) Claims for damages caused by the fiscal operations of the Treasury or by regulation of the monetary system.

(w) Claims caused by the negligent or wrongful acts or omissions of ANG members acting within the scope of their employment, while performing duty under 32 U.S.C., on or after 29 December 1981.

(x) Claims caused by the negligent or wrongful acts or omissions of ANG technicians employed under 32 U.S.C. 709.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83696, 83697, Nov. 22, 2016]

§ 842.99 Applicable law.

(a) *Federal preemption.* Many of the exclusions in this subpart are based upon the wording of 28 U.S.C. 2680 or other federal statutes or court decisions interpreting the Federal Tort Claims Act. Federal case law interpreting the same exclusions under the Federal Tort Claims Act is applied to the National Guard Claims Act. Where

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state law differs with federal law, federal law prevails.

(b) *Extent of liability.* Where the claim arises is important in determining the extent of liability.

(1) *Applicable law.* When a claim arises in the United States, its territories or possessions, the same law as if the claim was cognizable under the FTCA will be applied.

(2) *Claims in foreign countries.* In claims arising in a foreign country, where the claim is for personal injury, death, or damage to or loss of real or personal property caused by an act or omission alleged to be negligent, wrongful, or otherwise involving fault of military personnel or civilian officers or employees of the United States acting within the scope of their employment, liability or the United States is determined according to federal case law interpreting the FTCA. Where the FTCA requires application of the law of the place where the act or omission occurred, settlement authorities will use the rules set forth in the currently adopted edition of the *Restatement of the Law*, published by the American Law Institute, to evaluate the liability of the Air Force, subject to the following rules:

(i) Absolute or strict liability will not apply for claims not arising from noncombat activities.

(ii) Hedonic damages are not payable.

(iii) The collateral source doctrine will not apply.

(iv) Joint and several liability does not apply. Payment will be made only upon the portion of loss, damage, injury or death attributable to the Armed Forces of the United States.

(v) Future economic loss will be discounted to present value after deducting for federal income taxes and, in cases of wrongful death, personal consumption.

(c) *Claims not payable.* Do not approve payment for:

(1) Punitive damages.

(2) Cost of medical or hospital services furnished at U.S. expense.

(3) Cost of burial expenses paid by the United States.

(d) *Settlement by insurer or joint tortfeasor.* When settlement is made by an insurer or joint tortfeasor and an additional award is warranted, an

award may be made if both of the following are present:

(1) The United States is not protected by the release executed by the claimant.

(2) The total amount received from such source is first deducted.

[81 FR 83698, Nov. 22, 2016]

§ 842.100 Appeal of final denials.

This section explains the steps to take when a denial is appealed.

(a) A claimant may appeal the final denial of the claim. The claimant sends the request, in writing, to the settlement authority that issued the denial letter within 60 days of the date the denial letter was mailed. The settlement authority may waive the 60 day time limit for good cause.

(b) Upon receipt of the appeal, the original settlement authority reviews the appeal.

(c) Where the settlement authority does not reach a final agreement on an appealed claim, he or she sends the entire claim file to the next higher settlement authority, who is the appellate authority for that claim. Any higher settlement authority may act upon an appeal.

(d) The decision of the appellate authority is the final administrative action on the claim.

[81 FR 83698, Nov. 22, 2016]

§ 842.101 Government's right of subrogation, indemnity, and contribution.

The Air Force becomes subrogated to the rights of the claimant upon settling a claim. The Air Force has the rights of contribution and indemnity permitted by the law of the situs or under contract. Do not seek contribution or indemnity from ANG members whose conduct gave rise to Government liability.

[81 FR 83698, Nov. 22, 2016]

§ 842.102 Attorney fees.

In the settlement of any claim pursuant to 32 U.S.C. 715 and this subpart, attorney fees will not exceed 20 percent of any award provided that when a claim involves payment of an award over \$1,000,000, attorney fees on that part of the award exceeding \$1,000,000

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may be determined by the Secretary of the Air Force. For the purposes of this section, an award is deemed to be the cost to the United States at the time of purchase of a structured settlement, and not its future value.

[81 FR 83698, Nov. 22, 2016]

Subpart L—Hospital Recovery Claims (42 U.S.C. 2651–2653)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83698, Nov. 22, 2016, unless otherwise noted.

§ 842.103 Scope of this subpart.

This subpart explains how the United States asserts and settles claims for costs of medical care, against third parties under the Federal Medical Care Recovery Act (FMCRA) (10 U.S.C. 1095) and various other laws.

[81 FR 83698, Nov. 22, 2016]

§ 842.104 Definitions.

This section defines terms which are used within this subpart.

(a) *Medical Cost Reimbursement Program Regional Field Offices.* The Chief of the Medical Cost Reimbursement Program (MCRP) Branch determines and assigns geographic responsibility for all regional field offices. Each field office is responsible for investigating all potential claims and asserting claims within their jurisdiction for the cost of medical care provided by either a Medical Treatment Facility or at a civilian facility through Tricare.

(b) *Compromise.* A mutually binding agreement where payment is made and accepted in an amount less than the full amount of the claim.

(c) *Injured party.* The person who received medical care for injury or disease as a result of the incident on which the claim is based. The injured party may be represented by a guardian, personal representative, estate, or survivor.

(d) *Medical care.* Includes medical and dental treatment, prostheses, and medical appliances the U.S. furnished or reimbursed other sources for providing.

(e) *Reasonable value of medical care.* Either:

(1) An amount determined by reference to rates set by the Director of

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the Office of Management and Budget for the value of necessary medical care in U.S. medical facilities.

(2) The actual cost of necessary care from other sources which was reimbursed by the United States.

(f) *Third party.* An individual, partnership, business, corporation (including insurance carriers), which is indebted to the United States for medical care provided to an injured party. (In some cases, a state or foreign government can be the third party.)

(g) *Waiver.* The voluntary relinquishment by the United States of the right to collect for medical care provided to an injured party.

(h) *Accrued pay.* The total of all pay accrued to the account of an active duty member during a period when the member is unable to perform military duties. It does not include allowances.

(i) *Future care.* Medical care reasonably expected to be provided or paid for in the future treatment of an injured party as determined during the investigative process.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83698, Nov. 22, 2016]

§ 842.105 Delegations of authority.

(a) *Settlement authority.* The following individuals have delegated authority to settle, compromise, or waive MCRP claims for \$300,000 or less and to accept full payment on any claim:

(1) The Judge Advocate General.

(2) The Deputy Judge Advocate General.

(3) The Director of Civil Law.

(4) Chief, Claims and Tort Litigation Staff and the Chief, MCRP.

(b) *Redelegation of authority.* The individuals described in paragraph (a) of this section may re-delegate a portion or all of their authority to subordinates, subject to the following limitations:

(1) SJAs, when given Medical Cost Reimbursement (MCR) claims jurisdiction, are granted authority to waive, compromise, or settle claims in amounts of \$25,000 or less. This authority may be re-delegated in writing with authority to re-delegate to subordinates.

(2) SJAs of numbered Air Forces, when given MCR claims jurisdiction,

are granted authority to waive, compromise, or settle claims in amounts of \$40,000 or less. This authority may be re-delegated in writing with authority to re-delegate to subordinates.

(3) SJAs of single base GCMs, the SJAs of GCMs in PACAF and USAFE, and the SJAs of each Air Force base, station, or fixed installation have delegated authority to compromise or waive claims for \$15,000 or less and to accept full payment on any claim.

(c) *Authority to assert a claim.* Each settlement authority has authority to assert a claim in any amount for the reasonable value of medical care.

(d) *Authority to reduce, withdraw, and restore settlement authority.* Any superior settlement authority may reduce, withdraw, or restore delegated authority.

(e) *Settlement negotiations.* A settlement authority may settle a claim filed for an amount within the delegated settlement authority. Claims in excess of the delegated authority must be approved by the next higher settlement authority. Unsuccessful negotiations at one level do not bind higher authority.

NOTE TO PARAGRAPH (e): Telephonic approvals, in the discretion of the higher settlement authority, are authorized.

(f) *Special exceptions.* Only the Department of Justice (DOJ) may approve claims involving:

(1) Compromise or waiver of a claim for more than \$300,000.

(2) Settlement previously referred to DOJ.

(3) Settlement where a third party files suit against the U.S. or the injured party arising out of the same incident.

[81 FR 83698, Nov. 22, 2016]

§ 842.106 Assertable claims.

A claim should be asserted when the Air Force has furnished or will furnish medical care in military health care facilities or when the Air Force is responsible for reimbursement to a private care provider and either of the following conditions are met:

(a) Third party liability in tort exists for causing an injury or disease.

(b) Local or foreign law permits the United States to recover or the United

States is a third party beneficiary under uninsured motorist coverage, medical pay insurance coverage, worker's compensation, no-fault statutes, or other statutes.

A claim should only be asserted if the base SJA determines it merits assertion. Claims for \$150 or less need not be asserted; they should be asserted only if the base SJA or designee determines the collection will not exceed the cost to collect, the third party offers payment and demands a release from the United States before paying damages to the injured party, or the United States asserts a property damage claim under subpart L arising out of the same incident.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83698, Nov. 22, 2016]

§ 842.107 Nonassertable claims.

The following are considered nonassertable claims and should not be asserted:

(a) *Claims against any department, agency, or instrumentality of the United States.* "Agency or instrumentality" includes any self-insured non-appropriated fund activity whether revenue producing, welfare, or sundry. The term does not include private associations.

(b) *Claims for care furnished a veteran by the Department of Veterans Affairs (VA) for service connected disability.* However, claims may be asserted for the reasonable value of medical care an Air Force member receives prior to his or her discharge and transfer to the VA facility or when the Air Force has reimbursed the VA facility for the care.

(c) *Claims for care furnished a merchant seaman under 42 U.S.C. 249.* A claim against the seaman's employer should not be filed.

(d) *Government contractors.* In claims in which the United States must reimburse the contractor for a claim according to the terms of the contract, settlement authorities investigate the circumstances surrounding the incident to determine if assertion is appropriate. If the U.S. is not required to reimburse the contractor, the MCR authority may assert a claim against the contractor.

(e) *Foreign governments.* Settlement authorities investigate any claims that

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might be made against foreign governments, their political subdivisions, armed forces members or civilian employees.

(f) *U.S. personnel.* Claims are not asserted against members of the uniformed services; employees of the US, its agencies or instrumentalities; or an individual who is a dependent of a service member or employee at the time of assertion unless they have insurance to pay the claim, they were required by law or regulation to have insurance which would have covered the Air Force, or their actions, which necessitated the medical treatment provided at government expense, constituted willful misconduct or gross negligence.

[81 FR 83699, Nov. 22, 2016]

§ 842.108 Asserting the claim.

When asserting the claim, the base SJA will:

(a) MCR personnel assert a claim against a tortfeasor or other third party using a formal letter on Air Force stationery. The assertion is made against all potential payers, including insurers. The demand letter should state the legal basis for recovery and sufficiently describe the facts and circumstances surrounding the incident giving rise to medical care. Applicable bases of recovery include U.S. status as a third-party beneficiary under various types of insurance policies, workers' compensation laws, no-fault laws, or other Federal statutes, including Coordination of Benefits (COB) or FMCRA.

(b) The MCR authority must promptly notify the injured parties or their legal representatives, in writing, that the United States will attempt to recover from the third parties the reasonable value of medical care furnished or to be furnished and that they:

- (1) Should seek advice from a legal assistance officer or civilian counsel.
- (2) Must cooperate in the prosecution of all actions of the United States against third parties.
- (3) Must furnish a complete statement regarding the facts and circumstances surrounding the incident which caused the injury.
- (4) Must not execute a release or settle any claim which exists as a result

of the injury without prior notice to the MCR authority.

(c) Mail all copies of the SF 96, or claim notice on Air Force letterhead:

(1) By certified mail with return receipt requested in all claims in which the amount claimed is \$5,000.00 or more or in which there is a substantial likelihood that the final amount claimed will be \$5,000.00 or more.

(2) By regular or certified mail with return receipt requested at the SJA's discretion in cases in which the final amount claimed is less than \$5,000.00, unless there is no response to the initial notice of claim within a reasonable period of time and a second notice of claim is required to be mailed. All second notices of claim and copies will be mailed by certified mail, return receipt requested.

(d) Notify the injured parties promptly in writing that the United States will attempt to recover from the third parties the reasonable value of medical care furnished or to be furnished and that they:

(1) Should seek advice from a legal assistance officer or civilian counsel and furnish the civilian counsel's name to the claims officer.

(2) Must cooperate in the prosecution of all actions of the United States against third parties.

(3) Must furnish a complete statement regarding the facts and circumstances surrounding the incident which caused the injury.

(4) Must not execute a release or settle any claim which exists as a result of the injury without prior notice to the SJA.

(5) Should read the enclosed Privacy Act statement.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83698, 83699, Nov. 22, 2016]

§ 842.109 Referring a claim to the U.S. Attorney.

(a) All cases that require forwarding to the DoJ must be routed through the Chief, MCRP. The MCR authority ensures that personnel review all claims for possible referral not later than two years after the date of the incident for tort based cases.

(b) The United States or the injured party on behalf of the United States must file suit within 3 years after an

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action accrues. This is usually 3 years after the initial treatment is provided in a federal medical facility or after the initial payment is made by Tricare, whichever is first.

[81 FR 83699, Nov. 22, 2016]

§ 842.110 Statute of limitations.

The United States or the injured party on behalf of the United States must file suit within 3 years after an action accrues. This is usually 3 years after the initial treatment is provided in a federal medical facility or after the initial payment is made by CHAMPUS, whichever is first.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83698, Nov. 22, 2016]

§ 842.111 Recovery rates in government facilities.

The FEDERAL REGISTER contains the rates set by the Office of Management and Budget, of which judges take judicial notice. Apply the rates in effect at the time of care to claims.

[81 FR 83699, Nov. 22, 2016]

§ 842.112 Waiver and compromise of United States interest.

Waivers and compromises of government claims can be made. This section lists the basic guidance for each action. (See this subpart for claims involving waiver and compromise of amounts in excess of settlement authorities' delegated amounts.)

(a) *Convenience of the Government.* When compromising or waiving a claim for convenience of the Government, settlement authorities should consider the following factors:

- (1) Risks of litigation.
- (2) Questionable liability of the third party.
- (3) Costs of litigation.
- (4) Insurance (Uninsured or Underinsured Motorist and Medical Payment Coverage) or other assets of the tortfeasor available to satisfy a judgment for the entire claim.
- (5) Potential counterclaim against the U.S.
- (6) Jury verdict expectancy amount.
- (7) Amount of settlement with proposed distribution.
- (8) Cost of any future care.
- (9) Tortfeasor cannot be located.

(10) Tortfeasor is judgment proof.

(11) Tortfeasor has refused to pay and the case is too weak for litigation.

(b) *Hardship on the injured party.* When compromising or waiving a claim to avoid undue hardship on the injured party, settlement authorities should consider the following factors:

(1) Permanent disability or disfigurement of the injured party.

(2) Decreased earning power of the injured party.

(3) Out of pocket losses to the injured party.

(4) Financial status of the injured party.

(5) Pension rights of the injured party.

(6) Other government benefits available to the injured party.

(7) An offer of settlement from a third party which includes virtually all of the third party's assets, although the amount is considerably less than the calculation of the injured party's damages.

(8) Whether the injured party received excessive treatment.

(9) Amount of settlement with proposed distribution, including reductions in fees or damages by other parties, medical providers, or attorneys in order to reduce the hardship on the injured party.

(c) *Compromise or waiver.* A compromise or waiver can be made upon written request from the injured party or the injured party's legal representative.

[81 FR 83699, Nov. 22, 2016]

§ 842.113 Reconsideration of a waiver for undue hardship.

A settlement authority may reconsider its previous action on a request for waiver or compromise whether requested or not. Reconsideration is normally on the basis of new evidence or discovery of errors in the waiver submission or settlement, but can be based upon a re-evaluation of the claim by the settlement authority.

[81 FR 83700, Nov. 22, 2016]

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Subpart M—Nonappropriated Fund Claims

SOURCE: 81 FR 83700, Nov. 22, 2016, unless otherwise noted.

§ 842.114 Scope of this subpart.

This subpart describes how to settle claims for and against the United States for property damage, personal injury, or death arising out of the operation of nonappropriated fund instrumentalities (NAFIs). Unless stated below, such claims will follow procedures outlined in other subparts of this part for the substantive law applicable to the particular claim. For example, a NAFI claim adjudicated under the Federal Tort Claims Act will follow procedures in this subpart as well as subpart K of this part.

[81 FR 83700, Nov. 22, 2016]

§ 842.115 Definitions.

(a) *Army and Air Force Exchange Service (AAFES)*. The Army and Air Force Exchange Service is a joint command of the Army and Air Force, under the jurisdiction of the Chiefs of Staff of the Army and Air Force, which provides exchange and motion picture services to authorized patrons.

(b) *Morale, welfare, and recreation (MWR) activities*. Air Force MWR activities are activities operated directly or by contract which provide programs to promote morale and well-being of the Air Force's military and civilian personnel and their dependents. They may be funded wholly with appropriated funds, primarily with non-appropriated funds (NAF), or with a combination of appropriated funds and NAFs.

(c) *Nonappropriated funds*. Non-appropriated funds are funds generated by Department of Defense military and civilian personnel and their dependents and used to augment funds appropriated by the Congress to provide a comprehensive morale-building, welfare, religious, educational, and recreational program, designed to improve the well-being of military and civilian personnel and their dependents.

(d) *Nonappropriated funds instrumentality*. A nonappropriated fund instrumentality is a Federal Government in-

strumentality established to generate and administer nonappropriated funds for programs and services contributing to the mental and physical well-being of personnel.

[81 FR 83700, Nov. 22, 2016]

§ 842.116 Payment of claims against NAFIs.

Substantiated claims against NAFIs must not be paid solely from appropriated funds. Claims are sent for payment as set out in this subpart. Do not delay paying a claimant because doubt exists whether to use appropriated funds or NAFs. Pay the claim initially from appropriated funds and decide the correct funding source later.

[81 FR 83700, Nov. 22, 2016]

§ 842.117 Claims by customers, members, participants, or authorized users.

(a) *Customer complaints*. Do not adjudicate claims complaints or claims for property loss or damage under this subpart that the local NAFI activity can satisfactorily resolve.

(b) *Claims generated by concessionaires*. Most concessionaires must have commercial insurance. Any unresolved claims or complaints against concessionaires or their insurers are sent to the appropriate contracting officers.

[81 FR 83700, Nov. 22, 2016]

Subpart N—Civil Air Patrol Claims (5 U.S.C. 8101(1)(B), 8102(a), 8116(c), 8141; 10 U.S.C. 9441, 9442; 36 U.S.C. 201–208)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83700, Nov. 22, 2016, unless otherwise noted.

§ 842.118 Scope of this subpart.

(a) This subpart explains how to process certain administrative claims:

(1) Against the United States for property damage, personal injury, or death, arising out of Air Force assigned noncombat missions performed by the Civil Air Patrol (CAP), as well as certain other Air Force authorized missions performed by the CAP in support of the Federal Government.

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(2) In favor of the United States for damage to U.S. Government property caused by CAP members or third parties.

(b) Unless stated in this subpart, such claims will follow procedures outlined in other subparts of this part for the substantive law applicable to the particular claim. For example, a CAP claim adjudicated under the Military Claims Act will follow procedures in this subpart as well as subpart E of this part.

[81 FR 83700, Nov. 22, 2016]

§ 842.119 Definitions.

(a) *Civil Air Patrol (CAP)*. A federally chartered, non-profit corporation which was designated by Congress in 1948 as a volunteer civilian auxiliary of the Air Force.

(b) *Air Force noncombat mission*. Although not defined in any statute, an Air Force noncombat mission is any mission for which the Air Force is tasked, by statute, regulation, or higher authority, which does not involve actual combat, combat operations or combat training. The Air Force, in lieu of using Air Force resources, can use the services of the Civil Air Patrol to fulfill these type missions. When performing an Air Force noncombat mission, the Civil Air Patrol is deemed to be an instrumentality of the United States. In order for a mission to be a noncombat mission of the Air Force under this part, it must either:

(1) Have a special Air Force mission order assigned, and, the Air Force must exercise operational control over the mission.

(2) Involve a peacetime mission the Air Force is tasked to perform by higher authority which requires the expenditure of Air Force resources to accomplish, and the Air Force specifically approves the mission as a noncombat mission, and assigns the mission to the Civil Air Patrol to perform.

(c) *CAP members*. CAP members are private citizens who volunteer their time, services, and resources to accomplish CAP objectives and purposes. The two primary categories of members are:

(1) *Cadets*. Youths, 13 years (or having satisfactorily completed the sixth grade) through 17 years of age, who

meet such prerequisites as the CAP corporation may establish from time to time. Cadet status may be retained until age 21.

(2) *Seniors*. Adults, 18 years of age or older (there is no maximum age), who meet such prerequisites as the CAP corporation may establish from time to time, and who have not retained cadet status.

(d) *Liaison officers*. Active duty Air Force officers assigned to liaison duty at the national, regional, and wing (state) levels of CAP.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83700, Nov. 22, 2016]

§ 842.120 Improper claimants.

CAP members, 18 years of age or older, whose personal injury or death claim is subject to the Federal Employees' Compensation Act, are improper claimants. FECA is their exclusive remedy.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83700, 83701, Nov. 22, 2016]

§ 842.121 Claims payable.

A claim is payable if all of the following are present:

(a) It is for property damage, personal injury, or death.

(b) It is proximately caused by a CAP member.

(c) It arises from an Air Force noncombat mission performed by the CAP, or arises from an authorized mission performed by the CAP for which specific coverage under this subpart is granted by AFLOA/JACC.

(d) It is otherwise payable because it meets the provisions of an appropriate subpart of this part.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83700, 83701, Nov. 22, 2016]

§ 842.122 Claims not payable.

A claim is not payable if it:

(a) Is for use or depreciation of privately owned property, operated by CAP or its members on an Air Force noncombat mission, or other specified Air Force authorized mission.

(b) Is for personal services or expenses incurred by CAP or its members while engaged in an Air Force noncombat mission, or other specified Air Force authorized mission.

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(c) Arises out of a CAP incident based solely on government ownership of property on loan to CAP.

(d) Arises from a CAP activity not performed as a noncombat mission of the Air Force or as a specified Air Force authorized mission. These claims are sent to HQ CAP-USAF/JA for referral to CAP's private insurer, with a copy of the transmittal letter to AFLOA/JACC.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83700, 83701, Nov. 22, 2016]

Subpart O—Advance Payments (10 U.S.C. 2736)

SOURCE: 55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83701, Nov. 22, 2016, unless otherwise noted.

§ 842.123 Scope of this subpart.

This subpart tells how to make an advance payment before a claim is filed or finalized under the Military Claims, Foreign Claims and National Guard Claims Acts.

[81 FR 83701, Nov. 22, 2016]

§ 842.124 Delegation of authority.

(a) The Secretary of the Air Force has authority to make an advance payment of \$100,000 or less.

(b) The Judge Advocate General has delegated authority to make an advance payment of \$100,000 or less.

(c) The following individuals have delegated authority to make an advance payment of \$25,000 or less:

(1) The Deputy Judge Advocate General.

(2) The Director of Civil Law.

(3) The Chief, Deputy Chief, and Branch Chiefs, Claims and Tort Litigation Staff.

(4) SJAs of the Air Force component commander of the U.S. geographic combatant commands for claims arising within their respective combatant command areas of responsibility.

(d) This authority may be redelegated either orally or in writing. Oral redelegations should be confirmed in writing as soon as practical.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83701, Nov. 22, 2016]

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§ 842.125 Who may request.

A proper claimant or authorized agent may request an advance payment.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83701, Nov. 22, 2016]

§ 842.126 When authorized.

Make advance payments only where all of the following exist:

(a) The potential claimant could file a valid claim for property damage or personal injury under the Military Claims, Foreign Claims, or National Guard Claims Acts.

(b) The potential claimant has an immediate need amounting to a hardship for food, shelter, medical or burial expenses, or other necessities. In the case of a commercial enterprise, severe financial loss or bankruptcy will result if the Air Force does not make an advance payment.

(c) Other resources for such needs are not reasonably available.

(d) The potential claim equals or exceeds the amount of the advance payment.

(e) The recipient signs as advance payment agreement.

[55 FR 2809, Jan. 29, 1990. Redesignated and amended at 81 FR 83701, Nov. 22, 2016]

§ 842.127 When not authorized.

Do not make an advance payment if the claim is payable under the:

(a) Federal Tort Claims Act.

(b) International Agreement Claims Act.

(c) Military Personnel and Civilian Employees' Claims Act. (Separate regulations issued under the Act provide for partial payments.)

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83701, Nov. 22, 2016]

§ 842.128 Separate advance payment claims.

Every person suffering injury or property loss may submit a separate request for an advance payment. For example, where the Air Force destroys a house containing a family of four,

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each family member may submit a separate request for and receive an advance payment of \$100,000 or less.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83701, Nov. 22, 2016]

§ 842.129 Liability for repayment.

The claimant is liable for repayment. Deduct the advance payment from any award or judgment given to a claimant. Reimbursement from the claimant will be sought if the claimant does not file a claim or lawsuit.

[55 FR 2809, Jan. 29, 1990. Redesignated at 81 FR 83701, Nov. 22, 2016]

PART 845—COUNSEL FEES AND OTHER EXPENSES IN FOREIGN TRIBUNALS

Sec.

845.1 Purpose.

845.2 Statutory authority.

845.3 Responsibility.

845.4 Criteria for the provision of counsel and payment of expenses in criminal cases.

845.5 Provision of bail in criminal cases.

845.6 Criteria for the provision of counsel and payment of expenses in civil cases.

845.7 Procedures for hiring counsel and obligating funds.

845.8 Payment of counsel fees and other expenses.

845.9 Appropriated funds chargeable.

845.10 Reimbursement.

845.11 Correspondence.

AUTHORITY: Sec. 8012, 70A Stat. 488, sec. 1037, 72 Stat. 1445; 10 U.S.C. 8012, 1037.

SOURCE: 44 FR 75633, Dec. 21, 1979, unless otherwise noted.

NOTE: This part is derived from chapter 2 of Air Force Regulation 110-12, December 1, 1978.

Part 806 of this chapter states the basic policies and instructions governing the disclosure of records and tells members of the public what they must do to inspect or obtain copies of the material referenced herein.

§ 845.1 Purpose.

This part establishes criteria and assigns responsibility for the provision of counsel, for the provision of bail, and for the payment of court costs and other necessary and reasonable expenses incident to representation in civil and criminal proceedings, including appellate proceedings, before foreign courts and foreign administrative

agencies, which involve members of the Armed Forces, civilian personnel and dependents. Payment of fines is not authorized hereunder.

§ 845.2 Statutory authority.

10 U.S.C. 1037 provides authority for employment of counsel, and payment of counsel fees, court costs, bail, and other expenses incident to representation of persons subject to the Uniform Code of Military Justice before foreign tribunals. For personnel not subject to the Uniform Code of Military Justice, funds for similar expenses may be made available in cases of exceptional interest to the service concerned, upon prior application through the Judge Advocate General of the service concerned, to the appropriate service secretary.

§ 845.3 Responsibility.

(a) Requests for provision of counsel, provision of bail, or payment of expenses will ordinarily be made by the defendant or accused through appropriate channels to the officer exercising general court-martial jurisdiction over him. This officer shall determine whether the request meets the criteria prescribed herein and, based upon such determination, shall take final action approving or disapproving the request. Within their geographical areas of responsibility, major commands in the interest of obtaining prompt and effective legal service may appoint as approval authority, instead of the officer exercising general court-martial jurisdiction, any subordinate officer having responsibility in a particular country for personnel subject to foreign criminal jurisdiction.

(b) Notwithstanding the criteria prescribed below, an officer exercising approved authority may, in his discretion, deny a request for the provision of counsel, provision of bail or payment of expenses, where the otherwise eligible requestor is in an absent without leave or deserter status at the time of the request, or otherwise is not then subject to United States military control, and there is no reasonable basis for the belief that the requestor will return to United States military control at the conclusion of the proceedings of service of an adjudged sentence, if any.

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§ 845.4 Criteria for the provision of counsel and payment of expenses in criminal cases.

Requests for the provision of counsel and payment of expenses in criminal cases may be approved in pretrial, trial, appellate and posttrial proceedings in any one of the following criminal cases:

(a) Where the act complained of occurred in the performance of official duty; or

(b) Where the sentence which is normally imposed includes confinement, whether or not such sentence is suspended; or

(c) Where capital punishment might be imposed; or

(d) Where an appeal is made from any proceeding in which there appears to have been a denial of the substantial rights of the accused; or

(e) Where conviction of the offense alleged could later form the basis for administrative discharge proceedings for misconduct as a result of civil court disposition; or

(f) Where the case, although not within the criteria established in paragraphs (a), (b), (c), (d), or (e) of this section, is considered to have significant impact upon the relations of US forces with the host country or is considered to involve any other particular US interest.

§ 845.5 Provision of bail in criminal cases.

Funds for the posting of bail or bond to secure the release of personnel from confinement by foreign authorities before, during, or after trial may be furnished in all criminal cases. Safeguards should be imposed to assure that at the conclusion of the proceedings or on the appearance of the defendant in court, the bail or bond will be refunded to the military authorities. Bail will be provided only to guarantee the presence of the defendant and will not be provided to guarantee the payment of fines or civil damages. Local US military authorities are expected to provide bail, in any case, only after other reasonable efforts have been made to secure release of pretrial custody to the US.

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§ 845.6 Criteria for the provision of counsel and payment of expenses in civil cases.

Requests for provision of counsel and payment of expenses in civil cases may be granted in trial and appellate proceedings in either of the following civil cases:

(a) Where the act complained of occurred in the performance of official duty; or

(b) Where the case is considered to have a significant impact upon the relations of US forces with the host country or is considered to involve any other particular US interest. No funds shall be provided under this part in cases where the United States of America is in legal effect the defendant, without prior authorization of the Judge Advocate General.

§ 845.7 Procedures for hiring counsel and obligating funds.

(a) The selection of individual trial or appellate counsel will be made by the defendant. Such counsel shall represent the individual defendant and not the US Government. Selection shall be made from approved lists of attorneys who are qualified, competent and experienced in trial practice, and admitted for full practice, on their own account, before the courts of the foreign country involved. Normally, these lists will be coordinated with the local court or bar association, if any, and the appropriate US Diplomatic or Consular Mission and should include only those attorneys who are known or reputed, to comply with local attorney fee schedules or guides approved or suggested by local bar associations and should not exceed amounts paid under similar circumstances by nationals of the country where the trial is held. No fee may include any amount in payment for services other than those incident to representation before judicial and administrative agencies of the foreign country in the particular case for which the contract is made, and in no event may any contract include fees for representation in habeas corpus or related proceedings before tribunals of the United States. When appropriate and reasonable in the case, the payment of expenses, in addition to counsel fees, may include court costs, bail costs, charges

for obtaining copies of records, printing and filing fees, interpreter fees, witness fees, and other necessary and reasonable expenses. Expenses will not include the payment of fines or civil damages, directly or indirectly.

(b) Whenever possible, the officer responsible under § 845.3 (or his designee), acting on behalf of the United States of America, shall enter into a written contract with the selected counsel. The contract will cover counsel fees, and, when appropriate, may cover other costs arising in defense of the case only in the court of first instance and will not include fees for representation on appeal. If the case is appealed to higher tribunals, supplemental agreements shall be executed for each appeal. A copy of the contractual agreement shall serve as the obligating document.

(c) If, for example, because of unusual circumstances or local customs, it is not practicable to enter into a written contract as in paragraph (b) of this section, action will be taken to record the agreement reached between the officer responsible under § 845.3 (or his designee) and the selected counsel. This requirement may be met by a letter of commission or letter of understanding, executed between the officer responsible under § 845.3 (or his designee) and the selected counsel, or by a written request for legal services expressly or impliedly accepted by the selected counsel. Any such document shall contain, if possible, an agreed estimate of counsel fees and reasonable expenses and a statement that both fees and expenses will conform to those paid by local nationals under similar circumstances and will not exceed local fee schedules, if any. If this document does not include an agreed estimate of counsel fees and other reasonable expenses, an estimate will be provided by the contracting officer. A copy of the document, together with the estimate, will be furnished the accounting component and will serve as the commitment document for the reservation of funds.

(d) The provision of counsel and payment of expenses under this part is not subject to the provisions of the Defense Acquisition Regulation (subchapter A, chapter I of this title). However, the contract clauses set forth in part 5,

section VII, Defense Acquisition Regulation, may be used as a guide in contracting.

(e) Because of the desirability of timely procedural action, it is suggested that there be designated, from among the judge advocates on the staffs of officers responsible under § 845.3, contracting officers with contracting authority limited to agreements described in this section. The effect of this designation would be to combine within one office the duties of contracting officer and judge advocate.

(f) Nothing in this part shall be construed as prohibiting the selection of qualified local counsel employed by the United States Government, if the serviceman freely selects such counsel.

§ 845.8 Payment of counsel fees and other expenses.

Payment of bills submitted by the selected counsel and other costs shall be made in accordance with the general provision of AFM 177-102 (Commercial Transactions at Base Level), relating to payment of contractual obligations and pertinent disbursing regulations. All payments under these procedures will be in local currency. Acceptance of services procured under these procedures shall be certified to by the officer responsible under § 845.3 (or his designee). Payments of bail may be made when authorized by such officers. Such authorization shall be in the form of a directing letter or message citing 10 U.S.C. 1037.

§ 845.9 Appropriated funds chargeable.

Authorized expenses incurred incident to implementation of the policies set forth in this part, including transportation and per diem expenses of trial observers, interpreters, and local counsel employees, shall be paid from appropriated funds of the service to which the defendant belongs. Payments shall be made from the appropriation current at time of payment, unless obligations for authorized costs have previously been established. Refunds shall be processed as appropriation refund. Such funds are chargeable to the base for operation and maintenance purposes (O&M or R&D, as applicable).

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§ 845.10 Reimbursement.

No reimbursement will ordinarily be required from individuals with respect to payments made in their behalf under this part. However, prior to the posting of bail on behalf of a defendant, a signed agreement shall be secured from him wherein he agrees to remit the amount of such bail or permit the application of so much of his pay as may be necessary to reimburse the Government in the event that he willfully causes forfeiture of bail. In the event of such forfeiture, bail provided under this part shall be recovered from the defendant in accordance with that

agreement. The agreement should include a statement that it does not prejudice the defendant's right to appeal to the Comptroller General of the United States and the courts after such payment or deduction has been made, if he considers the amount erroneous.

§ 845.11 Correspondence.

Judge advocates who advise officers responsible under § 845.3 are authorized to correspond directly with each other and with the Judge Advocate General of the service concerned for advice with regard to payment of counsel fees and other expenses.

SUBCHAPTER E—SECURITY [RESERVED]

SUBCHAPTER F—AIRCRAFT

PART 855—CIVIL AIRCRAFT USE OF UNITED STATES AIR FORCE AIRFIELDS

Subpart A—General Provisions

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TABLE 1 TO PART 855—PURPOSE OF USE/ VERIFICATION/APPROVAL AUTHORITY/FEEES

TABLE 2 TO PART 855—AIRCRAFT LIABILITY COVERAGE REQUIREMENTS

TABLE 3 TO PART 855—LANDING FEES

TABLE 4 TO PART 855—PARKING AND STORAGE FEES

ATTACHMENT 1 TO PART 855—GLOSSARY OF REFERENCES, ABBREVIATIONS, ACRONYMS, AND TERMS

ATTACHMENT 2 TO PART 855—WEATHER ALTERNATE LIST

ATTACHMENT 3 TO PART 855—LANDING PERMIT APPLICATION INSTRUCTIONS

ATTACHMENT 4 TO PART 855—SAMPLE JOINT-USE AGREEMENT

ATTACHMENT 5 TO PART 855—SAMPLE TEMPORARY AGREEMENT

AUTHORITY: 49 U.S.C. 44502 and 47103.

SOURCE: 60 FR 37349, July 20, 1995, unless otherwise noted.

Subpart A—General Provisions

§ 855.1 Policy.

The Air Force establishes and uses its airfields to support the scope and level of operations necessary to carry out missions worldwide. The Congress funds airfields in response to Air Force requirements, but also specifies that civil aviation access is a national priority to be accommodated when it does not jeopardize an installation's military utility. The Air Force engages in dialogue with the civil aviation community and the Federal Aviation Administration to ensure mutual understanding of long-term needs for the national air transportation system and programmed military force structure requirements. To implement the national policy and to respond to requests for access, the Air Force must have policies that balance such requests with military needs. Civil aircraft access to Air Force airfields on foreign territory requires host nation approval.

(a) The Air Force will manage two programs that are generally used to grant civil aircraft access to its airfields: civil aircraft landing permits and joint-use agreements. Other arrangements for access will be negotiated as required for specific purposes.

(1) Normally, landing permits will be issued only for civil aircraft operating in support of official Government business. Other types of use may be authorized if justified by exceptional circumstances. Access will be granted on an equitable basis.

(2) The Air Force will consider only proposals for joint use that do not compromise operations, security, readiness, safety, environment, and quality of life. Further, only proposals submitted by authorized local Government representatives eligible to sponsor a public airport will be given the comprehensive evaluation required to conclude a joint-use agreement.

(3) Any aircraft operator with an inflight emergency may land at any Air Force airfield without prior authorization. An inflight emergency is

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defined as a situation that makes continued flight hazardous.

(b) Air Force requirements will take precedence on Air Force airfields over all civil aircraft operations, whether they were previously authorized or not.

(c) Civil aircraft use of Air Force airfields in the United States will be subject to Federal laws and regulations. Civil aircraft use of Air Force airfields in foreign countries will be subject to US Federal laws and regulations that have extraterritorial effect and to applicable international agreements with the country in which the Air Force installation is located.

§ 855.2 Responsibilities.

(a) As the program manager for joint use, the Civil Aviation Branch, Bases and Units Division, Directorate of Operations (HQ USAF/XOBC), ensures that all impacts have been considered and addressed before forwarding a joint-use proposal or agreement to the Deputy Assistant Secretary for Installations (SAF/MII), who holds decision authority. All decisions are subject to the environmental impact analysis process as directed by the Environmental Planning Division, Directorate of Environment (HQ USAF/CEVP), and the Deputy Assistant Secretary for Environment, Safety, and Occupational Health (SAF/MIQ). The Air Force Real Estate Agency (AFREA/MI) handles the leases for Air Force-owned land or facilities that may be included in an agreement for joint use.

(b) HQ USAF/XOBC determines the level of decision authority for landing permits. It delegates decision authority for certain types of use to major commands and installation commanders.

(c) HQ USAF/XOBC makes the decisions on all requests for exceptions or waivers to this part and related Air Force instructions. The decision process includes consultation with other affected functional area managers when required. Potential impacts on current and future Air Force policies and operations strongly influence such decisions.

(d) Major commands, direct reporting units, and field operating agencies may issue supplements to establish com-

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mand-unique procedures permitted by and consistent with this part.

§ 855.3 Applicability.

This part applies to all regular United States Air Force (USAF), Air National Guard (ANG), and United States Air Force Reserve (USAFR) installations with airfields. This part also applies to civil aircraft use of Air Force ramps at civil airports hosting USAF, ANG, and USAFR units.

Subpart B—Civil Aircraft Landing Permits

§ 855.4 Scope.

Air Force airfields are available for use by civil aircraft so far as such use does not interfere with military operations or jeopardize the military utility of the installation. Access will be granted on an equitable basis. Air Force requirements take precedence over authorized civil aircraft use. This part carries the force of US law, and exceptions are not authorized without prior approval from the Civil Aviation Branch, Bases and Units Division, Directorate of Operations, (HQ USAF/XOBC), 1480 Air Force Pentagon, Washington DC 20330-1480. Proposed exceptions or waivers are evaluated as to current and future impact on Air Force policy and operations.

§ 855.5 Responsibilities and authorities.

(a) The Air Force:

(1) Determines whether civil aircraft use of Air Force airfields is compatible with current and planned military activities.

(2) Normally authorizes civil aircraft use of Air Force airfields only in support of official Government business. If exceptional circumstances warrant, use for other purposes may be authorized.

(3) Acts as clearing authority for civil aircraft use of Air Force airfields, subject to the laws and regulations of the US, or to applicable international agreements (e.g., status of forces agreements) with the country in which the Air Force installation is located.

(4) Reserves the right to suspend any operation that is inconsistent with national defense interests or deemed not in the best interests of the Air Force.

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(5) Will terminate authority to use an Air Force airfield if the:

(i) User's liability insurance is canceled.

(ii) User lands for other than the approved purpose of use or is otherwise in violation of this part or clearances and directives hereunder.

(6) Will not authorize use of Air Force airfields:

(i) In competition with civil airports by providing services or facilities that are already available in the private sector.

NOTE: Use to conduct business with or for the US Government is not considered as competition with civil airports.

(ii) Solely for the convenience of passengers or aircraft operator.

(iii) Solely for transient aircraft servicing.

(iv) By civil aircraft that do not meet US Department of Transportation operating and airworthiness standards.

(v) That selectively promotes, benefits, or favors a specific commercial venture unless equitable consideration is available to all potential users in like circumstances.

(vi) For unsolicited proposals in procuring Government business or contracts.

(vii) Solely for customs-handling purposes.

(viii) When the air traffic control tower and base operations are closed or when a runway is restricted from use by all aircraft.

NOTE: Requests for waiver of this provision must address liability responsibility, emergency response, and security.

(7) Will not authorize civil aircraft use of Air Force ramps located on civil airfields.

NOTE: This section does not apply to use of aero club facilities located on Air Force land at civil airports, or civil aircraft chartered by US military departments and authorized use of terminal facilities and ground handling services on the Air Force ramp. Only the DD Form 2400, Civil Aircraft Certificate of Insurance, and DD Form 2402, Civil Aircraft Hold Harmless Agreement, are required for use of Air Force ramps on civil airfields.

(b) Civil aircraft operators must:

(1) Have an approved DD Form 2401, Civil Aircraft Landing Permit, before operating at Air Force airfields, except for emergency use and as indicated in paragraphs (d)(2) and (d)(2)(iii)(E) of this section, and , and § 855.13(b)(1)(ii).

(2) Ensure that pavement load-bearing capacity will support the aircraft to be operated at the Air Force airfield.

(3) Ensure that aircraft to be operated at Air Force airfields are equipped with an operating two-way radio capable of communicating with the air traffic control tower.

(4) Obtain final approval for landing from the installation commander or a designated representative (normally base operations) at least 24 hours prior to arrival.

(5) Not assume that the landing clearance granted by an air traffic control tower facility is a substitute for either the approved civil aircraft landing permit or approval from the installation commander or a designated representative (normally base operations).

(6) Obtain required diplomatic or overflight clearance before operating in foreign airspace.

(7) Pay applicable costs and fees.

(8) File a flight plan before departing the Air Force airfield.

(c) The installation commander or a designated representative:

(1) Exercises administrative and security control over both the aircraft and passengers while on the installation.

(2) May require civil users to delay, reschedule, or reroute aircraft arrivals or departures to preclude interference with military activities.

(3) Cooperates with customs, immigration, health, and other public authorities in connection with civil aircraft arrival and departure.

(d) Decision Authority: The authority to grant civil aircraft use of Air Force airfields is vested in:

(1) Directorate of Operations, Bases and Units Division, Civil Aviation Branch (HQ USAF/XOOBC). HQ USAF/XOOBC may act on any request for civil aircraft use of an Air Force airfield. Decision authority for the following will not be delegated below HQ USAF:

(i) Use of multiple Air Force airfields except as designated in paragraph (d)(2) of this section.

(ii) Those designated as 2 under Approval Authority in Table 1 to this part.

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(iii) Any unusual or unique purpose of use not specifically addressed in this part.

(2) Major Command, Field Operating Agency, Direct Reporting Unit, or Installation Commander. With the exception of those uses specifically delegated to another decision authority, major commands (MAJCOMs), field operating agencies (FOAs), direct reporting units (DRUs) and installation commanders or designated representatives have the authority to approve or disapprove civil aircraft landing permit applications (DD Forms 2400, Civil Aircraft Certificate of Insurance; 2401; Civil Aircraft Landing Permit, and 2402, Civil Aircraft Hold Harmless Agreement) at airfields for which they hold oversight responsibilities. Additionally, for expeditious handling of short notice requests, they may grant requests for one-time, official Government business flights that are in the best interest of the US Government and do not violate other provisions of this part. As a minimum, for one-time flights authorized under this section, the aircraft owner or operator must provide the decision authority with insurance verification and a completed DD Form 2402 before the aircraft operates into the Air Force airfield. Air Force authority to approve civil aircraft use of Air Force airfields on foreign soil may be limited. Commanders outside the US must be familiar with base rights agreements or other international agreements that may render inapplicable, in part or in whole, provisions of this part. Decision authority is delegated for specific purposes of use and or locations as follows:

(i) Commander, 611th Air Operations Group (AOG). The Commander, 611th AOG or a designated representative may approve commercial charters, on a case-by-case basis, at all Air Force airfields in Alaska, except Eielson and Elmendorf AFBs, if the purpose of the charter is to transport goods and or materials, such as an electric generator or construction materials for a community center, for the benefit of remote communities that do not have adequate civil airports.

(ii) Commander, Air Mobility Command (AMC). The Commander, AMC or a designated representative may ap-

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prove permits that grant landing rights at Air Force airfields worldwide in support of AMC contracts.

(iii) US Defense Attache Office (USDAO). The USDAO, acting on behalf of HQ USAF/XOOBC, may grant a request for one-time landing rights at an Air Force airfield provided:

(A) The request is for official Government business of either the US or the country to which the USDAO is accredited.

(B) The Air Force airfield is located within the country to which the USDAO is accredited.

(C) Approval will not violate any agreement with the host country.

(D) The installation commander concurs.

(E) The USDAO has a properly completed DD Form 2402 on file and has verified that the insurance coverage meets the requirements of Table 2 to this part, before the aircraft operates into the Air Force airfield.

§ 855.6 Aircraft exempt from the requirement for a civil aircraft landing permit.

(a) Any aircraft owned by:

(1) Any other US Government agency.

(2) US Air Force aero clubs established as prescribed in AFI 34-117, Air Force Aero Club Program, and AFMAN 3-132, Air Force Aero Club Operations¹.

NOTE: This includes aircraft owned by individuals but leased by an Air Force aero club.

(3) Aero clubs of other US military services.

NOTE: This includes aircraft owned by individuals but leased by Army or Navy aero clubs.

(4) A US State, County, Municipality, or other political subdivision, when operating to support official business at any level of Government.

(b) Any civil aircraft under:

(1) Lease or contractual agreement for exclusive US Government use on a long-term basis and operated on official business by or for a US Government agency; for example, the Federal

¹Copies of the publications are available, at cost, from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

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Aviation Administration (FAA), Department of the Interior, or Department of Energy.

NOTE: The Government must hold liability responsibility for all damages or injury associated with operation of the aircraft.

(2) Lease or contractual agreement to the Air Force for Air Force Civil Air Patrol (CAP) liaison purposes and operated by an Air Force CAP liaison officer on official Air Force business.

(3) CAP control for a specific mission directed by the Air Force.

(4) Coast Guard control for a specific mission directed by the Coast Guard.

NOTE: For identification purposes, the aircraft will be marked with a sticker near the port side door identifying it as a Coast Guard Auxiliary aircraft. The pilot will always be in uniform and normally have a copy of a Coast Guard Auxiliary Patrol Order. If the aircraft is operating under "verbal orders of the commander," the pilot can provide the telephone number of the cognizant Coast Guard commander.

(5) Contractual agreement to any US, State, or local Government agency in support of operations involving safety of life or property as a result of a disaster.

(6) Government furnished property or bailment contract for use by a contractor, provided the Federal, State, or local Government has retained liability responsibilities.

(7) Civil aircraft transporting critically ill or injured individuals or transplant organs to or from an Air Force installation.

(8) Historic aircraft being delivered for Air Force museum exhibits under the provisions of AFI 84-103, Museum System.²

§ 855.7 Conditions for use of Air Force airfields.

The Air Force authorizes use of its airfields for a specific purpose by a named individual or company. The authorization cannot be transferred to a second or third party and does not extend to use for other purposes. An approved landing permit does not obligate the Air Force to provide supplies, equipment, or facilities other than the landing, taxiing, and parking areas. The aircraft crew and passengers are only authorized activities at the instal-

lation directly related to the purpose for which use is granted. All users are expected to submit their application (DD Forms 2400, 2401, and 2402) at least 30 days before intended use and, except for use as a weather alternate, CRAF alternate, or emergency landing site, must contact the appropriate installation commander or a designated representative for final landing approval at least 24 hours before arrival. Failure to comply with either time limit may result in denied landing rights.

§ 855.8 Application procedures.

To allow time for processing, the application (DD Forms 2400, 2401, and 2402) and a self-addressed, stamped envelope should be submitted at least 30 days before the date of the first intended landing. The verification required for each purpose of use must be included with the application. The name of the user must be the same on all forms. Original, hand scribed signatures, not facsimile elements, are required on all forms. Landing Permit Application Instructions are at attachment 3 to this part. The user is responsible for reviewing this part and accurately completing the forms before submitting them to the approving authority.

§ 855.9 Permit renewal.

When a landing permit expires, DD Forms 2401 and 2400 must be resubmitted for continued use of Air Force airfields.

NOTE: Corporations must resubmit the DD Form 2402 every five years.

§ 855.10 Purpose of use.

The purposes of use normally associated with civil aircraft operations at Air Force airfields are listed in Table 1. Requests for use for purposes other than those listed will be considered and may be approved if warranted by unique circumstances. A separate DD Form 2401 is required for each purpose of use. (Users can have multiple DD Forms 2401 that are covered by a single DD Form 2400 and DD Form 2402.)

§ 855.11 Insurance requirements.

Applicants must provide proof of third-party liability insurance on a DD Form 2400, with the amounts stated in

²See footnote 1 to § 855.6.

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US dollars. The policy number, effective date, and expiration date are required. The statement "until canceled" may be used in lieu of a specific expiration date. The geographic coverage must include the area where the Air Force airfield of proposed use is located. If several aircraft or aircraft types are included under the same policy, a statement such as "all aircraft owned," "all aircraft owned and or operated," "all non-owned aircraft," or "all aircraft operated," may be used in lieu of aircraft registration numbers. To meet the insurance requirements, either split limit coverage for bodily injury (individuals outside the aircraft), property damage, and passengers, or a single limit coverage is required. The coverage will be at the expense of the user with an insurance company acceptable to the Air Force. Coverage must be current during the period the Air Force airfield will be used. The liability required is computed on the basis of aircraft maximum gross takeoff weight (MGTOW) and passenger or cargo configuration. Minimum coverage will not be less than the amount indicated in Table 2 to this part.

(a) Any insurance presented as a single limit of liability or a combination of primary and excess coverage will be an amount equal to or greater than the each accident minimums indicated in Table 2 to this part for bodily injury (individuals outside the aircraft), property damage, and passengers.

(b) The policy will specifically provide that:

(1) The insurer waives any right of subrogation it may have against the US by reason of any payment made under the policy for injury, death, or property damage that might arise, out of or in connection with the insured's use of any Air Force airfield.

(2) The insurance afforded by the policy applies to the liability assumed by the insured under DD Form 2402.

(3) If the insurer or the insured cancels or reduces the amount of insurance afforded under the listed policy before the expiration date indicated on DD Form 2400, the insurer will send written notice of policy cancellation or coverage reduction to the Air Force approving authority at least 30 days be-

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fore the effective date of the cancellation or reduction. The policy must state that any cancellation or reduction will not be effective until at least 30 days after such notice is sent.

§ 855.12 Processing a permit application.

Upon receipt of an application (DD Forms 2400, 2401, and 2402) for use of an Air Force airfield, the decision authority:

(a) Determines the availability of the airfield and its capability to accommodate the purpose of use requested.

(b) Determines the validity of the request and ensures all entries on DD Forms 2400, 2401, and 2402 are in conformance with this part.

(c) Approves DD Form 2401 (with conditions or limitations noted) by completing all items in Section II—For Use by Approving Authority as follows:

(1) Period of Use (Block 7): The "From" date will be either the first day of approved use or the first day of insurance coverage. The "From" date cannot precede the first day of insurance coverage shown on the DD Form 2400. The "Thru" date is determined by the insurance expiration date and the purpose of use. For example, the period of use for participants in an Air Force open house will be determined by both insurance coverage and open house dates. The permit would be issued only for the duration of the open house but must not precede or exceed the dates of insurance coverage. Many insurance policies terminate at noon on the expiration date. Therefore, if the insurance expiration is used to determine the permit expiration date, the landing permit will expire one day before the insurance expiration date shown on the DD Form 2400. If the insurance expiration date either exceeds 2 years or is indefinite (for example, "until canceled"), the landing permit will expire 2 years from the issue date or first day of coverage.

(2) Frequency of Use (Block 8) is normally "as required" but may be more specific, such as "one time."

(3) Identification Number (Block 9): Installation commanders or a designated representative assign a permit number comprised of the last three letters of the installation's International

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Civil Aviation Organization identifier code, the last two digits of the calendar year, a number sequentially assigned, and the letter suffix that indicates the purpose of use (Table 1); for example, ADW 95-01C. MAJCOMs, FOAs, DRUs, and USDAOs use a three position organization abbreviation; such as AMC 95-02K.

(4) DD Form 2400 (Dated and Filed) (Block 11a): This block should contain the date from block 1 (Date Issued) on the DD Form 2400 and the identification of the unit or base where the form was approved; i.e., 30 March 1995, HQ USAF/XOBC.

(5) DD Form 2402 (Dated and Filed) (Block 11b): This block should contain the date from block 4 (Date Signed) on the DD Form 2402 and the identification of the unit or base where the form was approved; i.e., 30 March 1995, HQ USAF/XOBC.

(6) SA-ALC/SFR, 1014 Andrews Road, Building 1621, Kelly AFB TX 78241-5603 publishes the list of companies authorized to purchase Air Force fuel on credit. Block 12 should be marked "yes" only if the permit holder's name appears on the SA-ALC list.

(7) Landing Fees, Block 13, should be marked as indicated in Table 1 to this part.

(8) Permit Amendments: New entries or revisions to an approved DD Form 2401 may be made only by or with the consent of the approving authority.

(d) Provides the applicant with written disapproval if:

(1) Use will interfere with operations, security, or safety.

(2) Adequate civil facilities are collocated.

(3) Purpose of use is not official Government business and adequate civil facilities are available in the proximity of the requested Air Force airfield.

(4) Use will constitute competition with civil airports or air carriers.

(5) Applicant has not fully complied with this part.

(e) Distributes the approved DD Form 2401 before the first intended landing, when possible, as follows:

(1) Retains original.

(2) Returns two copies to the user.

(3) Provides a copy to HQ USAF/XOBC.

NOTE: HQ USAF/XOBC will provide a computer report of current landing permits to the MAJCOMs, FOAs, DRUs, and installations.

§ 855.13 Civil fly-ins.

(a) Civil aircraft operators may be invited to a specified Air Force airfield for:

(1) A base open house to perform or provide a static display.

(2) A flying safety seminar.

(b) Civil fly-in procedures:

(1) The installation commander or a designated representative:

(i) Requests approval from the MAJCOM, FOA, or DRU with an information copy to HQ USAF/XOBC/XOOO and SAF/PAC.

(ii) Ensures that DD Form 2402 is completed by each user.

NOTE: DD Forms 2400 and 2401 are not required for fly-in participants if flying activity consists of a single landing and takeoff with no spectators other than flightline or other personnel required to support the aircraft operations.

(2) The MAJCOM, FOA, or DRU ensures HQ USAF/XOBC/XOOO and SAF/PAC are advised of the approval or disapproval for the fly-in.

(3) Aerial performance by civil aircraft at an Air Force open house requires MAJCOM or FOA approval and an approved landing permit as specified in AFI 35-201, Community Relations³. Regardless of the aircraft's historic military significance, DD Forms 2400, 2401, and 2402 must be submitted and approved before the performance. The permit can be approved at MAJCOM, FOA, DRU, or installation level. Use will be authorized only for the period of the event. Fly-in procedures do not apply to aircraft transporting passengers (revenue or non-revenue) for the purpose of attending the open house or demonstration flights associated with marketing a product.

§ 855.14 Unauthorized landings.

(a) *Unauthorized landing procedures.* The installation commander or a designated representative will identify an unauthorized landing as either an emergency landing, an inadvertent landing, or an intentional landing. An

³See footnote 1 to § 855.6.

unauthorized landing may be designated as inadvertent or intentional whether or not the operator has knowledge of the provisions of this part, and whether or not the operator filed a flight plan identifying the installation as a destination. Aircraft must depart the installation as soon as practical. On all unauthorized landings, the installation commander or a designated representative:

(1) Informs the operator of subpart B procedures and the requirement for notifying the Federal Aviation Administration (FAA) as specified in section 6 of the FAA Airman's Information Manual.

(2) Notifies the Federal Aviation Flight Standards District Office (FSDO) by telephone or telefax, followed by written notification using FAA Form 8020-9, 8020-11, or 8020-17, as appropriate. A copy of the written notification must be provided to HQ USAF/XOBC.

(3) Ensures the operator completes a DD Form 2402, and collects applicable charges. (In some instances, it may be necessary to arrange to bill the user for the appropriate charges.) DD Form 2402 need not be completed for commercial carriers if it is known that the form is already on file at HQ USAF/XOBC.

(4) In a foreign country, notifies the local US Defense Attache Office (USDAO) by telephone or telefax and, where applicable, the appropriate USDAO in the country of aircraft registry, followed by written notification with an information copy to HQ USAF/XOBC and the civil aviation authority of the country or countries concerned.

(b) *Emergency landings.* Any aircraft operator who experiences an inflight emergency may land at any Air Force airfield without prior authorization (approved DD Form 2401 and 24 hours prior notice). An inflight emergency is defined as a situation that makes continued flight hazardous.

(1) The Air Force will use any method or means to clear an aircraft or wreckage from the runway to preclude interference with essential military operations after coordinating with the FSDO and National Transportation Safety Board. Removal efforts will

minimize damage to the aircraft or wreckage; however, military or other operational factors may be overriding.

(2) An operator making an emergency landing:

(i) Is not charged a landing fee.

(ii) Pays all costs for labor, material, parts, use of equipment and tools, and so forth, to include, but not limited to:

(A) Spreading foam on the runway.

(B) Damage to runway, lighting, and navigation aids.

(C) Rescue, crash, and fire control services.

(D) Movement and storage of aircraft.

(E) Performance of minor maintenance.

(F) Fuel or oil (AFM 67-1, vol 1, part three, chapter 1, Air Force Stock Fund and DPSC Assigned Item Procedures⁴).

(c) *Inadvertent unauthorized landings.*

(1) The installation commander or a designated representative may determine a landing to be inadvertent if the aircraft operator:

(i) Landed due to flight disorientation.

(ii) Mistook the Air Force airfield for a civil airport.

(2) Normal landing fees must be charged and an unauthorized landing fee may be assessed to compensate the Government for the added time, effort, and risk involved in the inadvertent landing. Only the unauthorized landing fee may be waived by the installation commander or a designated representative if, after interviewing the pilot-in-command and appropriate Government personnel, it is determined that flying safety was not significantly impaired. The pilot-in-command may appeal the imposition of an unauthorized landing fee for an inadvertent landing to the MAJCOM, FOA, or DRU whose decision will be final. A subsequent inadvertent landing will be processed as an intentional unauthorized landing.

(d) *Intentional unauthorized landings.*

(1) The installation commander may categorize an unauthorized landing as intentional when there is unequivocal evidence that the pilot deliberately:

(i) Landed without an approved DD Form 2401 on board the aircraft.

⁴See footnote 1 to § 855.6.

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(ii) Landed for a purpose not approved on the DD Form 2401.

(iii) Operated an aircraft not of a model or registration number on the approved DD Form 2401.

(iv) Did not request or obtain the required final approval from the installation commander or a designated representative at least 24 hours before aircraft arrival.

(v) Did not obtain landing clearance from the air traffic control tower.

(vi) Landed with an expired DD Form 2401.

(vii) Obtained landing authorization through fraudulent methods, or

(viii) Landed after having been denied a request to land from any Air Force authority, including the control tower.

(2) Normal landing fees and an unauthorized landing fee must be charged. Intentional unauthorized landings increase reporting, processing, and staffing costs; therefore, the unauthorized landing fee for paragraph (d)(1)(i) through (d)(1)(vi) of this section will be increased by 100 percent. The unauthorized landing fee will be increased 200 percent for paragraph (d)(1)(vii) and (d)(1)(viii) of this section.

(3) Intentional unauthorized landings may be prosecuted as a criminal trespass, especially if a debarment letter has been issued. Repeated intentional unauthorized landings prejudice the user's FAA operating authority and jeopardize future use of Air Force airfields.

§ 855.15 Detaining an aircraft.

(a) An installation commander in the United States, its territories, or its possessions may choose to detain an aircraft for an intentional unauthorized landing until:

(1) The unauthorized landing has been reported to the FAA, HQ USAF/XOOBC, and the appropriate US Attorney.

(2) All applicable charges have been paid.

(b) If the installation commander wishes to release the aircraft before the investigation is completed, he or she must obtain bond, promissory note, or other security for payment of the highest charge that may be assessed.

(c) The pilot and passengers will not be detained longer than is necessary for identification, although they may be permitted to remain in a lounge or other waiting area on the base at their request for such period as the installation commander may determine (normally not to exceed close of business hours at the home office of the entity owning the aircraft, if the operator does not own the aircraft). No person, solely due to an intentional unauthorized landing, will be detained involuntarily after identification is complete without coordination from the appropriate US Attorney, the MAJCOM, FOA, or DRU, and HQ USAF/XOOBC.

§ 855.16 Parking and storage.

The time that an aircraft spends on an installation is at the discretion of the installation commander or a designated representative but should be linked to the purpose of use authorized. Parking and storage may be permitted on a nonexclusive, temporary, or intermittent basis, when compatible with military requirements. At those locations where there are Air Force aero clubs, parking and storage privileges may be permitted in the area designated for aero club use without regard for the purpose of use authorized, if consistent with aero club policies. Any such permission may be revoked upon notice, based on military needs and the installation commander's discretion.

§ 855.17 Fees for landing, parking, and storage.

(a) Landing, parking, and storage fees (Tables 3 and 4 to this part) are determined by aircraft maximum gross takeoff weight (MGTOW). All fees are normally due and collectible at the time of use of the Air Force airfield. DD Form 1131, Cash Collection Voucher, is used to deposit the fees with the base accounting and finance officer. In some instances, it may be necessary to bill the user for charges incurred.

(b) Landing fees are not charged when the aircraft is operating in support of official Government business or for any purpose, the cost of which is subject to reimbursement by the US Government. Parking and Storage Fees (Table 4 to this part) are charged if an

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aircraft must remain beyond the period necessary to conduct official Government business and for all non-official Government business operations.

§ 855.18 Aviation fuel and oil purchases.

When a user qualifies under the provisions of AFM 67-1, vol. 1, part three, chapter 1, Air Force Stock Fund and DPSC Assigned Item Procedures,⁵ purchase of Air Force fuel and oil may be made on a cash or credit basis. An application for credit authority can be filed by submitting an Authorized Credit Letter to SA-ALC/SFRL, 1014 Andrews Road, Building 1621, Kelly AFB TX 78241-5603.

§ 855.19 Supply and service charges.

Supplies and services furnished to a user will be charged for as prescribed in AFM 67-1, volume 1, part one, chapter 10, section N, Basic Air Force Supply Procedures, and AFR 177-102, paragraph 28.24, Commercial Transactions at Base Level.⁶ A personal check with appropriate identification, cashier's check, money order, or cash are acceptable means of payment. Charges for handling foreign military sales cargo are prescribed in AFR 170-3, Financial Management and Accounting for Security Assistance and International Programs.⁷

Subpart C—Agreements for Civil Aircraft Use of Air Force Airfields

§ 855.20 Joint-use agreements.

An agreement between the Air Force and a local Government agency is required before a community can establish a public airport on an Air Force airfield.

(a) Joint use of an Air Force airfield will be considered only if there will be no cost to the Air Force and no compromise of mission capability, security, readiness, safety, or quality of life. Further, only proposals submitted by authorized representatives of local Government agencies eligible to sponsor a public airport will be given the comprehensive evaluation required to

⁵ See footnote 1 to § 855.6.

⁶ See footnote 1 to § 855.6.

⁷ See footnote 1 to § 855.6.

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conclude a joint use agreement. All reviewing levels will consider and evaluate such requests on an individual basis.

(b) Generally, the Air Force is willing to consider joint use at an airfield if it does not have pilot training, nuclear storage, or a primary mission that requires a high level of security. Civil operations must begin within 5 years of the effective date of an agreement. Operational considerations will be based on the premise that military aircraft will receive priority handling (except in emergencies), if traffic must be adjusted or resequenced. The Air Force normally will not consider personnel increases solely to support civil operations but, if accommodated, all costs must be fully reimbursed by the joint-use sponsor. The Air Force will not provide personnel to install, operate, maintain, alter, or relocate navigation equipment or aircraft arresting systems for the sole use of civil aviation. Changes in equipment or systems to support the civil operations must be funded by the joint-use sponsor. The Air Force must approve siting, design, and construction of the civil facilities.

§ 855.21 Procedures for sponsor.

To initiate consideration for joint use of an Air Force airfield, a formal proposal must be submitted to the installation commander by a local Government agency eligible to sponsor a public airport. The proposal must include:

- (a) Type of operation.
- (b) Type and number of aircraft to be located on or operating at the airfield.
- (c) An estimate of the number of annual operations for the first 5 years.

§ 855.22 Air Force procedures.

(a) Upon receipt of a joint-use proposal, the installation commander, without precommitment or comment, will send the documents to the Air Force Representative (AFREP) at the Federal Aviation Administration (FAA) Regional Office within the geographical area where the installation is located. AFI 13-201, Air Force Airspace Management,⁸ lists the AFREPs and

⁸ See footnote 1 to § 855.6.

their addresses. The installation commander must provide an information copy of the proposal to HQ USAF/XOOBC, 1480 Air Force Pentagon, Washington DC 20330-1480.

(b) The AFREP provides comments to the installation commander on airspace, air traffic control, and other related areas, and informs local FAA personnel of the proposal for joint use.

(c) The installation, the numbered Air Force, and the major command (MAJCOM) will then evaluate the proposal. The MAJCOM will send the comments and recommendations from all reviewing officials to HQ USAF/XOOBC.

(d) Factors considered in evaluating joint use include, but are not limited to:

(1) Impact on current and programmed military activities at the installation.

(2) Compatibility of proposed civil aviation operations with present and planned military operations.

(3) Compatibility of communications systems.

(4) Instrument capability of crew and aircraft.

(5) Runway and taxiway configuration. (Installations with single runways normally will not be considered for joint use.)

(6) Security. The possibility for sabotage, terrorism, and vandalism increases with joint use; therefore, joint use will not be considered:

(i) If military and civil aircraft would be collocated in hangars or on ramps.

(ii) If access to the civil aviation facilities would require routine transit through the base.

(7) Fire, crash, and rescue requirements.

(8) Availability of public airports to accommodate the current and future air transportation needs of the community through construction or expansion.

(9) Availability of land for civil airport complex.

NOTE: The majority of land required for a terminal and other support facilities must be located outside the installation perimeter or at a site that will allow maximum separation of military and civil activities. If the community does not already own the needed land, it must be acquired at no expense to the Air Force. The Air Force may make real

property that is not presently needed, but not excess, available by lease under 10 U.S.C 2667. An application for lease of Air Force real property must be processed through the chain of command to the Air Force Real Estate Agency, 172 Luke Avenue, Suite 104, Building 5683, Bolling AFB DC 20332-5113, as prescribed in AFI 32-9003, Granting Temporary Use of Air Force Real Property⁹. All real property outleases require payment of fair market consideration and normally are processed through the Corps of Engineers. The General Services Administration must be contacted regarding availability of excess or surplus Federal real property and an application submitted through FAA for an airport use public benefit transfer under 49 U.S.C. §47151-47153.

(10) Sponsor's resources to pay a proportionate share of costs for runway operation and maintenance and other jointly used facilities or otherwise provide compensation that is of direct benefit to the Government.

(e) When the Air Force determines that joint use may be compatible with its defense mission, the environmental impact analysis process must be completed before a final decision can be made. The Air Force will act as lead agency for the preparation of the environmental analysis (32 CFR part 989, Environmental Impact Analysis Process). The local Government agency representatives, working in coordination with Air Force personnel at the installation and other concerned local or Federal officials, must identify the proposed action, develop conceptual alternatives, and provide planning, socioeconomic, and environmental information as specified by the appropriate MAJCOM and HQ USAF/CEVP. The information must be complete and accurate in order to serve as a basis for the preparation of the Air Force environmental documents. All costs associated with the environmental studies required to complete the environmental impact analysis process must be paid by the joint use sponsor. Information on environmental analysis requirements is available from HQ USAF/CEVP, 1260 Air Force Pentagon, Washington DC 20330-1260.

(f) HQ USAF/XOOBC can begin negotiating a joint-use agreement after the environmental impact analysis process is completed. The agreement must be

⁹See footnote 1 to §855.6.

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concluded on behalf of the Air Force by SAF/MII as the approval authority for use of Air Force real property for periods exceeding 5 years. The joint-use agreement will state the extent to which the provisions of subpart B of this part, Civil Aircraft Landing Permits, apply to civil aircraft operations.

(1) Joint-use agreements are tailored to accommodate the needs of the community and minimize the impact on the defense mission. Although each agreement is unique, attachment 4 to this part provides basic terms that are frequently included in such agreements.

(2) Agreements for joint use at Air Force airfields on foreign soil are subject to the requirements of AFI 51–701, Negotiating, Concluding, Reporting, and Maintaining International Agreements¹⁰.

(g) HQ USAF/XOOBC and SAF/MII approval is required to amend existing joint use agreements. The evaluation and decision processes followed in concluding an initial joint-use proposal

must be used to amend existing joint-use agreements.

§ 855.23 Other agreements.

(a) Temporary use of Air Force runways occasionally is needed for extended periods when a local civil airport is unavailable or to accommodate special events or projects. Such use requires agreement between the Air Force and the local airport authority or other equivalent responsible entity.

(b) The local proponent and Air Force personnel should draft and submit an agreement to the MAJCOM Director for Operations, or equivalent level, for review and comment. The agreement must address all responsibilities for handling aircraft, cargo, and passengers, and hold the Air Force harmless of all liabilities. The agreement will not exceed 3 years. Although each agreement will be unique, attachment 5 of this part provides one example. The draft agreement, with all comments and recommendations, must be sent to HQ USAF/XOOBC for final approval.

TABLE 1 TO PART 855—PURPOSE OF USE/VERIFICATION/APPROVAL AUTHORITY/FEEES

Purpose of use	Verification	Approval* authority	Fees
Contractor or subcontractor (A). A US or foreign contractor or subcontractor, operating corporate, personal, or leased aircraft in conjunction with fulfilling the terms of a government contract. Note: Potential contractors may not land at Air Force airfields to pursue or present an unsolicited proposal for procurement of government business. One time authorization can be provided when an authorized US Government representative verifies that the potential contractor has been specifically invited for a sales presentation or to discuss their product.	Current Government contract numbers; the Air Force airfields required for each contract; a brief description of the work to be performed; and the name, telephone number, and address of the government contracting officer must be provided on the DD Form 2401 or a continuation sheet.	1	No.
Demonstration (B). Aircraft, aircraft with components installed, or aircraft transporting components or equipment operating to demonstrate or display a product to US Government representatives who have procurement authority or certification responsibilities. (Authority granted under this paragraph does not include aerobatic demonstrations.)	Demonstration or display must be a contractual requirement or presented at the request of an authorized US Government representative. The name, address, and telephone number of the requesting government representative or contracting officer and contract number must be included on the DD Form 2401.	1	No.
Aerial performance (BB). Aircraft performing aerobatics and or fly-bys at Air Force airfields.	Approval of MAJCOM, FOA, or DRU and FAA as specified in AFI 35–201, <i>Community Relations</i> .	1	No.

¹⁰ See footnote 1 to § 855.6.

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Purpose of use	Verification	Approval* authority	Fees
Active duty US military and other US uniformed service members with military identification cards (includes members of the US Public Health Service, Coast Guard, and National Oceanic and Atmospheric Administration) (C). Service members, operating their own aircraft, leased aircraft, or other available aircraft for official duty travel (temporary duty, permanent change of station, etc.) or for private, non revenue flights.	Social security number in block 1 on DD Form 2401.	1	No.
Reserve Forces (D). Members of the US Reserve Forces (including Reserve Officer Training Corps and National Guard) operating their own aircraft, leased aircraft, or other available aircraft to fulfill their official duty commitment at the installation where their unit is assigned and other installations for temporary duty assignments.	Endorsement from member's commander that validates military status and requirement for use of Air Force airfields listed on the DD Form 2401. The endorsement may be included on the DD Form 2401 or provided separately by letter. When appropriate, travel orders must be on board the aircraft.	1	No.
Dependents of active duty US military personnel, other US uniformed service personnel, (CC), or US Reserve Forces personnel (DD). Dependents operating their own aircraft, leased aircraft, or other available aircraft in conjunction with activities related to entitlements as a dependent of a uniformed service member.	Identification card (DD Form 1173) number or social security number, identification card expiration date, and a letter of endorsement from sponsor.	1	No.
US Government civil service employees (E). Civilian employees of the US Government operating their own aircraft, leased aircraft, or other available aircraft for official Government business travel.	Supervisor's endorsement in block 4 of the DD Form 2401. Individual must have a copy of current travel orders or other official travel certification available for verification if requested by an airfield manager or a designated representative.	1	No.
Retired US military members and other retired US uniformed service members with a military identification card authorizing use of the commissary, base exchange, and or military medical facilities (G). Retired Service members, operating their own aircraft, leased aircraft, or other available aircraft in conjunction with activities related to retirement entitlements authorized by law or regulation.	Copy of retirement orders on file with the approving authority.	1	No.
Dependents of retired US military personnel and other retired US uniformed service personnel (GG). Dependents of retired Service members operating their own aircraft, leased aircraft, or other available aircraft in conjunction with activities related to entitlements authorized by law or regulation as a dependent of a retired Service member.	Identification card (DD Form 1173) number or social security number, identification card expiration date, sponsor's retirement orders, and letter of endorsement from sponsor.	1	No.
Civil Air Patrol (CAP) (H). CAP members operating personal or CAP aircraft for official CAP activities.	Endorsement of the application by HQ CAP-USAF/XOO, 105 South Hansell Street, Maxwell AFB AL 36112-6332.	1	No.
Aero club members (I). Individuals operating their own aircraft at the Air Force airfield where they hold active aero club membership.	Membership validation by the aero club manager on the DD Form 2401.	6	No.
Weather alternate (J). An Air Force airfield identified on a scheduled air carrier's flight plan as an alternate airport as prescribed by Federal Aviation Regulations (FARs) or equivalent foreign Government regulations. The airfield can only be used if weather conditions develop while the aircraft is in flight that preclude landing at the original destination. Aircraft may not be dispatched from the point of departure to an Air Force airfield designated as an approved weather alternate.	List of the destination civil airports for which the alternate will be used and certification of scheduled air carrier status, such as the US Department of Transportation Fitness Certificate.	1	Yes

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Purpose of use	Verification	Approval* authority	Fees
<p><i>Note: Scheduled air carriers are defined at Attachment 1. Only those airfields identified on the list at Attachment 2 are available for use as weather alternates. Airfields cannot be used as alternates for non-scheduled operations. Passengers and cargo may not be offloaded, except with the approval of the installation commander when there is no other reasonable alternative. Boarding new passengers and or loading new cargo is not authorized.</i></p>			
<p>Air Mobility Command (AMC) contractor charter (K). An air carrier transporting passengers or cargo under the terms of an AMC contract. (Landing permits for this purpose are processed by HQ AMC/DOKA, 402 Scott Drive, Unit 3A1, Scott AFB IL 62225-5302.).</p>	<p>International flights must have an AMC Form 8, Civil Aircraft Certificate, on board the aircraft. Domestic flights must have either a <i>Certificate of QUICK-TRANS</i> (Navy), a <i>Certificate of Courier Service Operations</i> (AMC), or a <i>Certificate of Intra-Alaska Operations</i> (AMC) on board the aircraft.</p>	3	No.
<p>CRAF alternate (KK). An Air Force airfield used as an alternate airport by air carriers that have contracted to provide aircraft for the Civil Reserve Air Fleet (CRAF).</p>	<p>Participant in the CRAF program and authorized by contract.</p>	2	Yes.
<p>US Government contract or charter operator (L). An air carrier transporting passengers or cargo for a US Government department or agency other than US military departments.</p>	<p>The chartering agency and name, address, and telephone number of the Government official procuring the transportation must be listed in block 4 of the DD Form 2401. An official government document, such as an SF 1169, <i>US government Transportation Request</i>, must be on board the aircraft to substantiate that the flight is operating for a US Government department or agency.</p>	1	No.
<p>Contractor or subcontractor charter (M). Aircraft chartered by a US or foreign contractor or subcontractor to transport personnel or cargo in support of a current government contract.</p>	<p>The contractor or subcontractor must provide written validation to the decision authority that the charter operator will be operating on their behalf in fulfilling the terms of a government contract, to include current government contract numbers and contract titles or brief description of the work to be performed; the Air Force airfields required for use, and the name, telephone number, and address of the government contracting officer.</p>	1	No.
<p>DOD charter (N). Aircraft transporting passengers or cargo within the United States for the military departments to accommodate transportation requirements that do not exceed 90 days.</p>	<p>Military Air Transportation Agreement (MATA) approved by the Military Transportation Management Command (MTMC) (this includes survey and approval by HQ AMC/DOB, 402 Scott Drive, Suite 132, Scott AFB IL 62225-5363). An SF 1169 or SF 1103, <i>US Government Bill of Lading</i>, must be on board the aircraft to validate the operation is for the military departments as specified in AFJI 24-211, <i>Defense Traffic Management Regulation</i>. (Passenger charters arranged by the MTMC are assigned a commercial air movement (CAM) or civil air freight movement number each time a trip is awarded. Installations will normally be notified by message at least 24 hours before a pending CAM.)</p>	1	No.
<p>Media (F). Aircraft transporting representatives of the media for the purpose of gathering information about a US Government operation or event. (Except for the White House Press Corps, use will be considered on a case-by-case basis. For example, authorization is warranted if other forms of transportation preclude meeting a production deadline or such use is in the best interest of the US Government. DD Forms 2400 and 2402 should be on file with HQ USAF/XOOBC to ensure prompt telephone approval for validated requests.)</p>	<p>Except for White House Press Corps charters, concurrence of the installation commander, base operations officer, and public affairs officer.</p>	2	Note 1.
<p>Commercial aircraft certification testing required by the FARs that only involves use of normal flight facilities (P).</p>	<p>Application must cite the applicable FAR, describe the test, and include the name and telephone number of the FAA certification officer.</p>	2	Yes.

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Purpose of use	Verification	Approval* authority	Fees
Commercial development testing at Air Force flight test facilities (Q) as described in AFI 99-101, <i>Development Test & Evaluation</i> .	Statement of Capability Number or Cooperative Research and Development Agreement Number, and name and telephone number of the Air Force official who approved support of the test project.	1	Yes.
Commercial charter operations (R). Aircraft transporting passengers or cargo for hire for other than US military departments. <i>Note: Federal Aviation Administration (FAA) certification is required for airfields used by carriers certified under FAR, part 121 (passenger aircraft that exceed 30 passenger seats). HQ USAF/XOOBC will request that FAA issue an airport operating certificate under FAR, part 139, as necessary. Exceptions to the requirement for certification are Air Force airfields used for:</i> <i>a. Emergencies.</i> <i>b. Weather alternates.</i> <i>c. Air taxi operations under FAR, part 135. Note: This is currently under review. Anticipate a change that will eliminate the air taxi exemption.</i> <i>d. Air carrier operations in support of contract flights exclusively for the US military departments.</i>	Unavailability of: a. a suitable civil airport, b. aircraft that could operate into the local civil airport, or c. other modes of transportation that would reasonably satisfy the transportation requirement.	5	Yes.
Commercial air crew training flights (S). Aircraft operated by commercial air carrier crews for the purpose of maintaining required proficiency.	Memorandum of Understanding approved by HQ USAF/XOOBC that establishes conditions and responsibilities in conducting the training flights.	2	Yes.
Private, non revenue producing flights (T). Aircraft operating for a variety of reasons, such as transporting individuals to meet with Government representatives or participate in Government sponsored ceremonies and similar events. At specified locations, the purpose of use may be to gain access to collocated private sector facilities as authorized by lease, agreement, or contract.	The verification will vary with the purpose for use. For example, when use is requested in conjunction with events such as meetings or ceremonies, the applicant must provide the name and telephone number of the Government project officer.	4	Note 2.
Provisional airfield (U). An Air Force airfield used by civil aircraft when the local civil airport is temporarily unavailable, or by a commercial air carrier operating at a specific remote location to provide commercial air transportation for local military members under the provisions of a lease or other legal instrument.	Memorandum of Understanding, Letter of Agreement, or lease that establishes responsibilities and conditions for use.	2	Yes.
Foreign government charter (V). Aircraft chartered by a foreign government to transport passengers or cargo.	Application must include name and telephone number of the foreign government representative responsible for handling the charter arrangements.	2	Note 3.
Flights transporting foreign military sales (FMS) material (W). (Hazardous, oversized, or classified cargo only.)	FMS case number, requisition numbers, delivery term code and information as specified below: a. Description of cargo (nomenclature and or proper shipping name). The description of hazardous cargo must include the Department of Transportation exemption number, hazard class, number of pieces, and net explosive weight. b. Name, address, and telephone number of individual at Air Force base that is coordinating cargo handling and or other required terminal services.	2	Note 3.

Purpose of use	Verification	Approval* authority	Fees
Certified flight record attempts (X). Aircraft operating to establish a new aviation record.	c. Cargo to be loaded or off loaded must be equipped with sufficient cargo pallets and or tiedown materials to facilitate handling. Compatible 463L pallets and nets will be exchanged on a one-for-one basis for serviceable units. Nonstandard pallets and nets cannot be exchanged; however, they will be used to buildup cargo loads after arrival of the aircraft. Aircraft arriving without sufficient cargo loading and tiedown devices must be floor loaded and the aircraft crew will be responsible for purchasing the necessary ropes, chains, and so forth. d. US Government FMS case management agency to which costs for services rendered are chargeable. e. Name, address, and telephone number of freight forwarder. f. Name, address, and telephone number of shipper.		
Political candidates (Y). (For security reasons only) Aircraft either owned or chartered explicitly for a Presidential or Vice Presidential candidate, including not more than one accompanying overflow aircraft for the candidate's staff and press corps. Candidate must be a Presidential or Vice Presidential candidate who is being furnished protection by the US Secret Service. Aircraft clearance is predicated on the Presidential or Vice Presidential candidate being aboard one of the aircraft (either on arrival or departure). Normal landing fees will be charged. To avoid conflict with US statutes and Air Force operational requirements, and to accommodate expeditious handling of aircraft and passengers, the installation commander will: a. Provide minimum official welcoming party. b. Not provide special facilities. c. Not permit political rallies or speeches on the installation. d. Not provide official transportation to unauthorized personnel, such as the press or local populace.	Documentation that will validate National Aeronautic Association or Federation Aeronautique Internationale sanction of the record attempt. The Secret Service must confirm that use has been requested in support of its security responsibilities.	2	Yes.
Aircraft either owned or personally chartered for transportation of the President, Vice President, a past President of the United States, the head of any US Federal department or agency, or a member of the Congress (Z).	Use by other than the President or Vice President must be for official government business. All requests will be coordinated with the Office of Legislative Liaison (SAF/LL) as prescribed in AFI 90-401, <i>Air Force Relations with Congress</i> .	2	No.

* Approving Authority:
 1 = Can be approved at all levels.
 2 = HQ USAF/XOBC.
 3 = HQ AMC/DOKA.
 4 = Except as specifically delegated in paragraphs 2.4.2 and 2.4.2.3, must be approved by HQ USAF/XOBC.
 5 = Except as specifically delegated in paragraph 2.4.2.1, must be approved by HQ USAF/XOBC.
 6 = Policy concerning private aircraft use of aero club facilities varies from base to base, primarily due to space limitations and military mission requirements. Therefore, applications for use of aero club facilities must be processed at base level.
 Note 1: Landing fees are charged for White House Press Corps flights. Landing fees are not charged if the Air Force has invited media coverage of specific events.
 Note 2: Landing fees are charged if flight is not operating in support of official Government business.
 Note 3: Landing fees are charged unless US Government charters have reciprocal privileges in the foreign country.

TABLE 2 TO PART 855—AIRCRAFT LIABILITY COVERAGE REQUIREMENTS

Aircraft maximum gross takeoff weight (MGTOW)	Coverage for	Bodily injury	Property damage	Passenger
12,500 Pounds and Under	Each Person Each Accident	\$100,000 300,000	..... 100,000	\$100,000. 100,000 multiplied by the number of passenger seats.
More than 12,500 Pounds	Each Person	100,000	.....	100,000.

Aircraft maximum gross takeoff weight (MGTOW)	Coverage for	Bodily injury	Property damage	Passenger
	Each Accident	1,000,000	1,000,000	100,000 multiplied by 75% multiplied by the number of passenger seats.

TABLE 3 TO PART 855—LANDING FEES

Aircraft Maximum Gross Takeoff Weight (MGTOW)	Normal fee	Unauthorized fee	Intentional fee	Minimum fee	United States, Territories, and Possessions	Overseas
Up to and including 12,500 lbs. 12,501 to 40,000 lbs Over 40,000 lbs	\$1.50 per 1,000 lbs MGTOW or fraction thereof.	.....	.....	\$20.00	X	
	\$1.70 per 1,000 lbs MGTOW or fraction thereof.	.....	.....	25.00		X
	.....	\$100.00	.....	.....	X	X
	.....	300.00	.....	.....	X	X
	.....	600.00	.....	.....	X	X
	.....	.....	Increase unauthorized fee by 100% or 200%.	.....	X	X

TABLE 4 TO PART 855—PARKING AND STORAGE FEES

Fee per aircraft for each 24-hour period or less	Minimum fee	Charge begins	Ramp	Hangar
\$1.00 per 100,000 lbs MGTOW or fraction thereof	\$20.00	6 hours after landing	X	
\$2.00 per 100,000 lbs MGTOW or fraction thereof	20.00	Immediately		X

ATTACHMENT 1 TO PART 855—GLOSSARY OF REFERENCES, ABBREVIATIONS, ACRONYMS, AND TERMS

Section A—References

- AFPD 10-10, Civil Aircraft Use of United States Air Force Airfields
- AFI 10-1001, Civil Aircraft Landing Permits
- AFI 13-201, Air Force Airspace Management
- AFI 32-7061(32 CFR part 989), Environmental Impact Analysis Process
- AFI 32-9003, Granting Temporary Use of Air Force Real Property
- AFI 34-117, Air Force Aero Club Program
- AFI 35-201, Community Relations
- AFI 51-701, Negotiating, Concluding, Reporting, and Maintaining International Agreements
- AFI 84-103, Museum System
- AFI 90-401, Air Force Relations with Congress
- AFI 99-101, Development Test and Evaluation
- AFJI 24-211, Defense Traffic Management Regulation
- AFM
- 67-1, vol 1, part 1, Basic Air Force Supply Procedures
- AFM 67-1, vol 1, part 3, Air Force Stock Fund and DPSC Assigned Item Procedures

- AFMAN 3-132, Air Force Aero Club Operations
- AFR 170-3, Financial Management and Accounting for Security Assistance and International Programs
- AFR 177-102, Commercial Transactions at Base Level
- FAR, part 121, Certification and Operation: Domestic, Flag, and Supplemental Air Carriers and Commercial Operations of Large Aircraft
- FAR, part 135, Air Taxi Operators and Commercial Operators of Small Aircraft
- FAR, part 139, Certification and Operations: Land Airports Serving Certain Air Carriers

Section B—Abbreviations and Acronyms

Abbreviations and acronyms	Definitions
AFI	Air Force Instruction.
AFJI	Air Force Joint Instruction.
AFM	Air Force Manual.
AFMAN	Air Force Manual.
AFPD	Air Force Policy Directive.
AFR	Air Force Regulation.
AFREP	Air Force Representative.
AMC	Air Mobility Command.
AOG	Air Operations Group.
CAM	Commercial Air Movement.
CAP	Civil Air Patrol.
CRAF	Civil Reserve Air Fleet.
DPSC	Defense Personnel Support Center.

Abbreviations and acronyms	Definitions
DRU	Direct Reporting Unit.
FAA	Federal Aviation Administration.
FAR	Federal Aviation Regulation.
FMS	Foreign Military Sales.
FOA	Field Operating Agency.
FSDO	Flight Standards District Office.
HQ AMC/DOKA	Headquarters Air Mobility Command, Contract Airlift, Directorate of Operations and Transportation.
HQ USAF/CEVP	Headquarters United States Air Force, Environmental Planning Division, Directorate of Environment.
HQ USAF/XOOBC	Headquarters United States Air Force, Civil Aviation, Bases and Units Division, Directorate of Operations.
HQ USAF/XOOO	Headquarters United States Air Force, Operations Group, Directorate of Operations.
MAJCOM	Major Command.
MATA	Military Air Transportation Agreement.
MGTOW	Maximum Gross Takeoff Weight.
MTMC	Military Traffic Management Command.
SAF/LL	Secretary of the Air Force, Office of Legislative Liaison.
SAF/MI	Secretary of the Air Force, Deputy Assistant Secretary of the Air Force (Installations).
SAF/PAC	Secretary of the Air Force, Office of Public Affairs, Directorate for Community Relations.
US	United States.
USDAO	United States Defense Attache Office.

Section C—Terms

Aircraft. Any contrivance now known or hereafter invented, used, or designated for navigation or flight in navigable airspace as defined in the Federal Aviation Act.

Airfield. An area prepared for the accommodation (including any buildings, installations, and equipment), landing, and take-off of aircraft.

Authorized Credit Letter. A letter of agreement that qualified operators must file with the Air Force to purchase Air Force aviation fuel and oil on a credit basis under the provisions of AFM 67-1, vol 1, part three, chapter 1, Air Force Stock Fund and DPSC Assigned Item Procedures.

Civil Aircraft. Any United States or foreign-registered aircraft owned by non-Governmental entities, and foreign Government-owned aircraft that are operated for commercial purposes.

Civil Aviation. All civil aircraft of any national registry, including:

Commercial Aviation. Civil aircraft that transport passengers or cargo for hire.

General Aviation. Civil aircraft that do not transport passengers or cargo for hire.

Civil Reserve Air Fleet (CRAF). US registered aircraft, certificated under FAR part 121, obligated by contract to provide aircraft and crews to the Department of Defense during contingencies or war.

DD Form 2400, Civil Aircraft Certificate of Insurance. A certificate that shows the amount

of third-party liability insurance carried by the user and assures the United States Government of advance notice if changes in coverage occur.

DD Form 2401, Civil Aircraft Landing Permit. A license which, when validated by an Air Force approving authority, authorizes the civil aircraft owner or operator to use Air Force airfields.

DD Form 2402, Civil Aircraft Hold Harmless Agreement. An agreement, completed by the user, which releases the United States Government from all liabilities incurred in connection with civil aircraft use of Air Force airfields.

Government Aircraft. Aircraft owned, operated, or controlled for exclusive, long-term use by any department or agency of either the United States or a foreign Government; and aircraft owned by any United States State, County, Municipality or other political subdivision; or any aircraft for which a Government has the liability responsibility. In the context of this instruction, it includes foreign registered aircraft, which are normally commercially operated, that have been wholly chartered for use by foreign Government heads of State for official State visits.

Government Furnished or Bailed Aircraft. US Government-owned aircraft provided to a Government contractor for use in conjunction with a specific contractual requirement.

Installation Commander. The individual with ultimate responsibility for operating the airfield and for base operations (normally a wing or group commander), as determined by the MAJCOM.

Joint-Use Agreement. An agreement between the Air Force and a local Government agency that establishes a public airport on an Air Force airfield.

Loaned Aircraft. US Government-owned aircraft made available for use by another US Government agency. This does not include aircraft leased or loaned to non-Governmental entities. Such aircraft will be considered as civil aircraft for purposes of this instruction.

Military Aircraft. Aircraft used exclusively in the military services of the US or a foreign Government and bearing appropriate military and national markings or carrying appropriate identification.

Official Government Business. Activities that support or serve the needs of US Federal agencies located at or in the immediate vicinity of an Air Force installation, including nonappropriated fund entities. For elected or appointed Federal, State, and local officeholders, official business is activity performed in fulfilling duties as a public official.

Other Agreement. An agreement between the Air Force and a local Government agency for temporary use of an Air Force runway

when a local civil airport is unavailable, or to accommodate a special event or project.

Scheduled Air Carrier. An air carrier that holds a scheduled air carrier certificate and provides scheduled service year round between two or more points.

Unauthorized Landing. A landing at an Air Force airfield by a civil aircraft without prior authority (approved DD Form 2401 and 24 hours prior notice).

User. The person, corporation, or other responsible entity operating civil aircraft at Air Force airfields.

ATTACHMENT 2 TO PART 855—WEATHER
ALTERNATE LIST

- ALTUS AFB OK
- ANDERSEN AFB GUAM
- CANNON AFB NM
- DOBBINS AFB GA
- DYESS AFB TX
- EARECKSON AFS AK *
- EGLIN AFB FL
- EIELSON AFB AK
- ELLSWORTH AFB SD
- ELMENDORF AFB AK
- FAIRCHILD AFB WA
- GRAND FORKS AFB ND
- HILL AFB UT
- HOWARD AFB PA
- KADENA AB OKINAWA
- KELLY AFB TX
- KUNSAN AB KOREA
- LANGLEY AFB VA
- LAUGHLIN AFB TX
- MALMSTROM AFB MT
- McCHORD AFB WA
- McCONNELL AFB KS
- MINOT AFB ND
- MT HOME AFB ID
- NELLIS AFB NV
- OFFUTT AFB NE
- OSAN AB KOREA
- PLANT 42, PALMDALE CA
- TRAVIS AFB CA
- TYNDALL AFB FL
- YOKOTA AB JAPAN

ATTACHMENT 3 TO PART 855—LANDING
PERMIT APPLICATION INSTRUCTIONS

A3.1. DD Form 2400, Civil Aircraft Certificate of Insurance: The insurance company or its authorized agent must complete and sign the DD Form 2400. Corrections to the form made using a different typewriter, pen, or whiteout must be initialed by the signatory. **THE FORM CANNOT BE COMPLETED BY THE AIRCRAFT OWNER OR OPERATOR.** Upon expiration, the DD Form 2400 must be resubmitted along with DD Form 2401 for continued use of Air Force airfields. The DD

Form 2400 may be submitted to the decision authority by either the user or insurer.

(Approved by the Office of Management and Budget under control number 0701-0050)

A3.1.1. Block 1, Date Issued. The date the DD Form 2400 is completed by the signatory.

A3.1.2. Block 2a and 2b, Insurer Name, Address. The name and address of the insurance company.

A3.1.3. Block 3a and 3b. Insured Name, Address. The name and address of the aircraft owner and or operator. (The name of the user must be the same on all the forms.)

A3.1.4. Block 4a, Policy Number(s). The policy number must be provided. Binder numbers or other assigned numbers will not be accepted in lieu of the policy number.

A3.1.5. Block 4b, Effective Date. The first day of current insurance coverage.

A3.1.6. Block 4c, Expiration Date. The last day of current insurance coverage. The DD Form 2400 is valid until one day before the insurance expiration date. A DD Form 2400 with the statement "until canceled," in lieu of a specific expiration date, is valid for two years from the issue date.

A3.1.7. Block 5, Aircraft Liability Coverage. The amount of split limit coverage. All boxes in block 5 must be completed to specify the coverage for: each person (top line, left to right) outside the aircraft (bodily injury) and each passenger; and the total coverage per accident (second line, left to right) for: persons outside the aircraft (bodily injury), property damage, and passengers. **IF BLOCK 5 IS USED, BLOCK 6 SHOULD NOT BE USED.** All coverages must be stated in US dollars. **ALL SEATS THAT CAN BE USED FOR PASSENGERS MUST BE INSURED.** See Table 2 for required minimum coverage.

A3.1.8. Block 6, Single Limit. The maximum amount of coverage per accident. **IF BLOCK 6 IS USED, BLOCK 5 SHOULD NOT BE USED.** The minimum coverage required for a combined single limit is determined by adding the minimums specified in the "each accident" line of Table 2. All coverages must be stated in US dollars. **ALL SEATS THAT CAN BE USED FOR PASSENGERS MUST BE INSURED.**

A3.1.9. Block 7, Excess Liability. The amount of coverage which exceeds primary coverage. All coverages must be stated in US dollars.

A3.1.10. Block 8, Provisions of Amendments or Endorsements of Listed Policy(ies). Any modification of this block by the insurer or insured invalidates the DD Form 2400.

A3.1.11. Block 9a, Typed Name of Insurer's Authorized Representative. Individual must be an employee of the insurance company, an agent of the insurance company, or an employee of an insurance broker.

A3.1.12. Block 9b, Signature. The form must be signed in blue ink so that hand

* Formerly Shemya AFB.

scribed, original signatures are easy to identify. Signature stamps or any type of facsimile signature cannot be accepted.

A3.1.13. Block 9c, Title. Self-explanatory.

A3.1.14. Block 9d, Telephone Number. Self-explanatory.

A3.1.15. THE REVERSE OF THE FORM MAY BE USED IF ADDITIONAL SPACE IS REQUIRED.

A3.2. DD Form 2401, Civil Aircraft Landing Permit. A separate DD Form 2401 must be submitted for each purpose of use (Table 1).

(Approved by the Office of Management and Budget under control number 0701-0050)

A3.2.1. Block 1a. The name of the owner or operator. (The name of the user must be the same on all the forms.)

A3.2.2. Block 1b. This block should only be completed if the applicant is a subsidiary, division, etc. of another company.

A3.2.3. Block 1c. Business or home address, whichever is applicable, of applicant.

A3.2.4. Block 2. List the airfields where the aircraft will be operating. The statement "Any US Air Force Installation Worldwide" is acceptable for users performing AMC and White House Press Corps charters. "All Air Force airfields in the CONUS" is acceptable, if warranted by official Government business, for all users.

A3.2.5. Block 3. Self-explanatory. (Users will not necessarily be denied landing rights if pilots are not instrument rated and current.)

A3.2.6. Block 4. Provide a brief explanation of purpose for use. The purposes normally associated with use of Air Force airfields are listed in Table 1. If use for other purposes is requested, it may be approved if warranted by unique circumstances. (The verification specified for each purpose of use must be included with the application.)

A3.2.7. Block 5. EXCEPT AS NOTED FOR BLOCK 5C, ALL ITEMS MUST BE COMPLETED.

A3.2.8. Block 5a and Block 5b. Self-explanatory.

A3.2.9. Block 5c. If the DD Form 2400, Certificate of Insurance, indicates coverage for "any aircraft of the listed model owned and or operated," the same statement can be used in block 5c in lieu of specific registration numbers.

A3.2.10. Block 5d. The capacity provided must reflect only the number of crew required to operate the aircraft. The remaining seats are considered passenger seats.

A3.2.11. Block 5e. Self-explanatory.

A3.2.12. Block 5d. A two-way radio is required. Landing rights will not necessarily be denied for lack of strobe lights, a transponder, or IFR capabilities.

A3.2.13. Block 6a. Self-explanatory.

A3.2.14. Block 6b. If the applicant is an individual, this block should not be completed.

A3.2.15. Block 6c. This block should contain a daytime telephone number.

A3.2.16. Block 6d. The form must be signed in blue ink so that hand scribed, original signatures are easy to identify. Signature stamps or any type of facsimile signature cannot be accepted.

A3.2.17. Block 6e. Self-explanatory.

A3.2.18. THE REVERSE OF THE FORM MAY BE USED IF ADDITIONAL SPACE IS REQUIRED.

BLOCKS 7A THROUGH 14C ARE NOT COMPLETED BY THE APPLICANT.

A3.2.19. Blocks 7a and 7b. The expiration date of a permit is determined by the insurance expiration date or the purpose of use. For example, the dates of an air show will determine the expiration date of a permit approved for participation in the air show. If the insurance expiration is used to determine the permit expiration date, the landing permit will expire one day before the insurance expiration date shown on the DD Form 2400, or 2 years from the date the permit is issued when the insurance expiration date either exceeds 2 years or is indefinite (for example, "until canceled").

A3.2.20. APPROVED PERMITS CANNOT BE CHANGED WITHOUT THE CONSENT OF THE APPROVING AUTHORITY.

A3.2.21. DD FORMS 2400 AND 2401 MUST BE RESUBMITTED TO RENEW A LANDING PERMIT. (Corporations must resubmit the DD Form 2402 every five years.)

A3.3. DD Form 2402, Civil Aircraft Hold Harmless Agreement. A form submitted and accepted by an approving authority for an individual remains valid and need not be resubmitted to the same approving authority, unless canceled for cause. Forms submitted by companies, organizations, associations, etc. must be resubmitted at least every five years.

(Approved by the Office of Management and Budget under control number 0701-0050)

A3.3.1. Block 2a(1). This block should contain the user's name if the applicant is a company. If the hold harmless agreement is intended to cover other entities of a parent company, their names must also be included in this block.

A3.3.2. Block 2a(2). This block should contain the user's address if the applicant is a company.

A3.3.3. Block 2b(1). This block should contain the name of the individual applying for a landing permit or the name of a corporate officer that is authorized to legally bind the corporation from litigation against the Air Force.

A3.3.4. Block 2b(2). This block should contain the address of the individual applying for a landing permit. A company address is only required if it is different from the address in block 2a(2).

A3.3.5. Block 2b(3). The form must be signed in blue ink so that hand scribed, original signatures are easy to identify. Signature stamps or any type of facsimile signature cannot be accepted.

A3.3.6. Block 2b(4). This block should only be completed when the applicant is a company, organization, association, etc.

A3.3.7. Block 3a(1). If the applicant is a company, organization, association, etc, the form must be completed and signed by the corporate secretary or a second corporate officer (other than the officer executing DD Form 2402) to certify the signature of the first officer. As necessary, the US Air Force also may require that the form be authenticated by an appropriately designated third official.

A3.3.8. Block 3a(2). The form must be signed in blue ink so that hand scribed, original signatures are easy to identify. Signature stamps or any type of facsimile signature cannot be accepted.

A3.3.9. Block 3a(3). Self-explanatory.

A3.3.10. Block 4. Self-explanatory.

ATTACHMENT 4 TO PART 855—SAMPLE
JOINT-USE AGREEMENT

*Joint-Use Agreement Between an Airport
Sponsor and the United States Air Force*

This Joint Use Agreement is made and entered into this _____ day of _____ 19____, by and between the Secretary of the Air Force, for and on behalf of the United States of America ("Air Force") and an airport sponsor ("Sponsor") a public body eligible to sponsor a public airport.

WHEREAS, the Air Force owns and operates the runways and associated flight facilities (collectively "flying facilities") located at Warbucks Air Force Base, USA ("WAFB"); and

WHEREAS, Sponsor desires to use the flying facilities at WAFB to permit operations by general aviation aircraft and commercial air carriers (scheduled and nonscheduled) jointly with military aircraft; and

WHEREAS, the Air Force considers that this Agreement will be in the public interest, and is agreeable to joint use of the flying facilities at WAFB; and

WHEREAS, this Agreement neither addresses nor commits any Air Force real property or other facilities that may be required for exclusive use by Sponsor to support either present or future civil aviation operations and activities in connection with joint use; and

WHEREAS, the real property and other facilities needed to support civil aviation operations are either already available to or will be diligently pursued by Sponsor;

NOW, THEREFORE, it is agreed:

1. Joint Use

a. The Air Force hereby authorizes Sponsor to permit aircraft equipped with two-way radios capable of communicating with the WAFB Control Tower to use the flying facilities at WAFB, subject to the terms and conditions set forth in this Agreement and those Federal Aviation Regulations (FAR) applicable to civil aircraft operations. Civil aircraft operations are limited to 20,000 per calendar year. An operation is a landing or a takeoff. Civil aircraft using the flying facilities of WAFB on official Government business as provided in Air Force Instruction (AFI) 10-1001, Civil Aircraft Landing Permits, are not subject to this Agreement.

b. Aircraft using the flying facilities of WAFB under the authority granted to Sponsor by this Agreement shall be entitled to use those for landings, takeoffs, and movement of aircraft and will normally park only in the area made available to Sponsor and designated by them for that purpose.

c. Government aircraft taking off and landing at WAFB will have priority over all civil aircraft at all times.

d. All ground and air movements of civil aircraft using the flying facilities of WAFB under this Agreement, and movements of all other vehicles across Air Force taxiways, will be controlled by the WAFB Control Tower. Civil aircraft activity will coincide with the WAFB Control Tower hours of operation. Any additional hours of the WAFB Control Tower or other essential airfield management, or operational requirements beyond those needed by the Air Force, shall be arranged and funded (or reimbursed) by Sponsor. These charges, if any, shall be in addition to the annual charge in paragraph 2 and payable not less frequently than quarterly.

e. No civil aircraft may use the flying facilities for training.

f. Air Force-owned airfield pavements made available for use under this Agreement shall be for use on an "as is, where is" basis. The Air Force will be responsible for snow removal only as required for Government mission accomplishment.

g. Dust or any other erosion or nuisance that is created by, or arises out of, activities or operations by civil aircraft authorized use of the flying facilities under this Agreement will be corrected by Sponsor at no expense to the Air Force, using standard engineering methods and procedures.

h. All phases of planning and construction of new runways and primary taxiways on Sponsor property must be coordinated with the WAFB Base Civil Engineer. Those intended to be jointly used by Air Force aircraft will be designed to support the type of military aircraft assigned to or commonly transient through WAFB.

i. Coordination with the WAFB Base Civil Engineer is required for planning and construction of new structures or exterior alteration of existing structures that are owned or leased by Sponsor.

j. Sponsor shall comply with the procedural and substantive requirements established by the Air Force, and Federal, State, interstate, and local laws, for the flying facilities of WAFB and any runway and flight facilities on Sponsor property with respect to the control of air and water pollution; noise; hazardous and solid waste management and disposal; and hazardous materials management.

k. Sponsor shall implement civil aircraft noise mitigation plans and controls at no expense to and as directed by the Air Force, pursuant to the requirements of the WAFB Air Installation Compatible Use Zone (AICUZ) study; the FAA part 150 study; and environmental impact statements and environmental assessments, including supplements, applicable to aircraft operations at WAFB.

l. Sponsor shall comply, at no expense to the Air Force, with all applicable FAA security measures and procedures as described in the Airport Security Program for WAFB.

m. Sponsor shall not post any notices or erect any billboards or signs, nor authorize the posting of any notices or the erection of any billboards or signs at the airfield of any nature whatsoever, other than identification signs attached to buildings, without prior written approval from the WAFB Base Civil Engineer.

n. Sponsor shall neither transfer nor assign this Agreement without the prior written consent of the Air Force.

2. Payment

a. For the purpose of reimbursing the Air Force for Sponsor's share of the cost of maintaining and operating the flying facilities of WAFB as provided in this Agreement, Sponsor shall pay, with respect to civil aircraft authorized to use those facilities under this Agreement, the sum of (specify sum) annually. Payment shall be made quarterly, in equal installments.

b. All payments due pursuant to this Agreement shall be payable to the order of the Treasurer of the United States of America, and shall be made to the Accounting and Finance Officer, WAFB, within thirty (30) days after each quarter. Quarters are deemed to end on December 31, March 31, June 30, and September 30. Payment shall be made promptly when due, without any deduction or setoff. Interest at the rate prescribed by the Secretary of the Treasury of the United States shall be due and payable on any payment required to be made under this Agreement that is not paid within ten (10) days after the date on which such payment is due

and end on the day payment is received by the Air Force.

3. Services

Sponsor shall be responsible for providing services, maintenance, and emergency repairs for civil aircraft authorized to use the flying facilities of WAFB under this Agreement at no cost to the Air Force. If Air Force assistance is required to repair an aircraft, Sponsor shall reimburse the Air Force for all expenses of such services. Any required reimbursement shall be paid not less frequently than quarterly. These charges are in addition to the annual charge specified in paragraph 2.

4. Fire Protection and Crash Rescue

a. The Air Force maintains the level of fire fighting, crash, and rescue capability required to support the military mission at WAFB. The Air Force agrees to respond to fire, crash, and rescue emergencies involving civil aircraft outside the hangars or other structures within the limits of its existing capabilities, equipment, and available personnel, only at the request of Sponsor, and subject to subparagraphs b, c, and d below. Air Force fire fighting, crash, and rescue equipment and personnel shall not be routinely located in the airfield movement area during nonemergency landings by civil aircraft.

b. Sponsor shall be responsible for installing, operating, and maintaining, at no cost to the Air Force, the equipment and safety devices required for all aspects of handling and support for aircraft on the ground as specified in the FARs and National Fire Protection Association procedures and standards.

c. Sponsor agrees to release, acquit, and forever discharge the Air Force, its officers, agents, and employees from all liability arising out of or connected with the use of or failure to supply in individual cases, Air Force fire fighting and or crash and rescue equipment or personnel for fire control and crash and rescue activities pursuant to this Agreement. Sponsor further agrees to indemnify, defend, and hold harmless the Air Force, its officers, agents, and employees against any and all claims, of whatever description, arising out of or connected with such use of, or failure to supply Air Force fire fighting and or crash and rescue equipment or personnel.

d. Sponsor will reimburse the Air Force for expenses incurred by the Air Force for fire fighting and or crash and rescue materials expended in connection with providing such service to civil aircraft. The Air Force may, at its option, with concurrence of the National Transportation Safety Board, remove crashed civil aircraft from Air Force-owned

pavements or property and shall follow existing Air Force directives and or instructions in recovering the cost of such removal.

e. Failure to comply with the above conditions upon reasonable notice to cure or termination of this Agreement under the provisions of paragraph 7 may result in termination of fire protection and crash and rescue response by the Air Force.

f. The Air Force commitment to assist Sponsor with fire protection shall continue only so long as a fire fighting and crash and rescue organization is authorized for military operations at WAFB. The Air Force shall have no obligation to maintain or provide a fire fighting, and crash and rescue organization or fire fighting and crash and rescue equipment; or to provide any increase in fire fighting and crash and rescue equipment or personnel; or to conduct training or inspections for purposes of assisting Sponsor with fire protection.

5. Liability and Insurance

a. Sponsor will assume all risk of loss and or damage to property or injury to or death of persons by reason of civil aviation use of the flying facilities of WAFB under this Agreement, including, but not limited to, risks connected with the provision of services or goods by the Air Force to Sponsor or to any user under this Agreement. Sponsor further agrees to indemnify and hold harmless the Air Force against, and to defend at Sponsor expense, all claims for loss, damage, injury, or death sustained by any individual or corporation or other entity and arising out of the use of the flying facilities of WAFB and or the provision of services or goods by the Air Force to Sponsor or to any user, whether the claims be based in whole, or in part, on the negligence or fault of the Air Force or its contractors or any of their officers, agents, and employees, or based on any concept of strict or absolute liability, or otherwise.

b. Sponsor will carry a policy of liability and indemnity insurance satisfactory to the Air Force, naming the United States of America as an additional insured party, to protect the Government against any of the aforesaid losses and or liability, in the sum of not less than (specify sum) bodily injury and property damage combined for any one accident. Sponsor shall provide the Air Force with a certificate of insurance evidencing such coverage. A new certificate must be provided on the occasion of policy renewal or change in coverage. All policies shall provide that: (1) No cancellation, reduction in amount, or material change in coverage thereof shall be effective until at least thirty (30) days after receipt of notice of such cancellation, reduction, or change by the installation commander at WAFB, (2) any losses shall be payable notwithstanding any act or failure to act or negligence of Sponsor or the

Air Force or any other person, and (3) the insurer shall have no right of subrogation against the United States.

6. Term of Agreement

This Agreement shall become effective immediately and shall remain in force and effect for a term of 25 years, unless otherwise renegotiated or terminated under the provisions of paragraph 7, but in no event shall the Agreement survive the termination or expiration of Sponsor's right to use, by license, lease, or transfer of ownership, of the land areas used in connection with joint use of the flying facilities of WAFB.

7. Renegotiation and Termination

a. If significant change in circumstances or conditions relevant to this Agreement should occur, the Air Force and Sponsor may enter into negotiations to revise the provisions of this Agreement, including financial and insurance provisions, upon sixty (60) days written notice to the other party. Any such revision or modification of this Agreement shall require the written mutual agreement and signatures of both parties. Unless such agreement is reached, the existing agreement shall continue in full force and effect, subject to termination or suspension under this section.

b. Notwithstanding any other provision of this Agreement, the Air Force may terminate this Agreement: (1) At any time by the Secretary of the Air Force, giving ninety (90) days written notice to Sponsor, provided that the Secretary of the Air Force determines, in writing, that paramount military necessity requires that joint use be terminated, or (2) at any time during any national emergency, present or future, declared by the President or the Congress of the United States, or (3) in the event that Sponsor ceases operation of the civil activities at WAFB for a period of one (1) year, or (4) in the event Sponsor violates any of the terms and conditions of this Agreement and continues and persists therein for thirty (30) days after written notification to cure such violation. In addition to the above rights, the Air Force may at any time suspend this agreement if violations of its terms and conditions by Sponsor create a significant danger to safety, public health, or the environment at WAFB.

c. The failure of either the Air Force or Sponsor to insist, in any one or more instances, upon the strict performance of any of the terms, conditions, or provisions of this Agreement shall not be construed as a waiver or relinquishment of the right to the future performance of any such terms, conditions, or provisions. No provision of this Agreement shall be deemed to have been waived by either party unless such waiver be in writing signed by such party.

8. Notices

a. No notice, order, direction, determination, requirement, consent, or approval under this Agreement shall be of any effect unless it is in writing and addressed as provided herein.

b. Written communication to Sponsor shall be delivered or mailed to Sponsor addressed: The Sponsor, 9000 Airport Blvd, USA.

c. Written communication to the Air Force shall be delivered or mailed to the Air Force addressed: Commander, WAFB, USA.

9. Other Agreements not Affected

This Agreement does not affect the WAFB-Sponsor Fire Mutual Aid Agreement.

IN WITNESS WHEREOF, the respective duly authorized representatives of the parties hereto have executed this Agreement on the date set forth below opposite their respective signatures.

UNITED STATES AIR FORCE

Date: _____

By: _____

Deputy Assistant Secretary of the Air Force (Installations)

Date: _____

By: _____

Sponsor Representative

ATTACHMENT 5 TO PART 855—SAMPLE TEMPORARY AGREEMENT

Letter of Agreement for Temporary Civil Aircraft Operations at Warbucks AFB, USA

This letter of agreement establishes policies, responsibilities, and procedures for commercial air carrier operations at Warbucks AFB, USA, (WAFB) for the period (date) through (date) Military requirements will take precedence over civil aircraft operations. Should a conflict arise between air carrier and Air Force operational procedures, Air Force procedures will apply.

Authorized Users

The following air carriers are authorized use, provided they have a civil aircraft landing permit approved at HQ USAF/XOOBC for such use:

- Flyaway Airlines
Recreation Airlines
Economy Airlines
PacAir Transport

Schedules

The Bunker International Airport (BIA) manager or air carrier station managers will ensure that the WAFB Airfield Manager is provided current airline schedules during the approved period of use. Every effort will be made to avoid disruption of the air carriers' schedules; however, it is understood that the installation commander will suspend or

change flight plans when required to preclude interference with military activities or operations.

Passenger and Luggage Handling

The BIA terminal will be used for passenger loading and unloading. Security checks will be performed at the terminal before loading passengers on buses. Luggage on arriving aircraft will be directly offloaded onto vehicles and delivered to the BIA terminal. Each arriving and departing bus or vehicle caravan will be accompanied by a credentialed representative of the airline or BIA to ensure its integrity enroute. Buses or vehicles transporting passengers to board an aircraft will not depart WAFB until the passengers are airborne. Unless an emergency exists, arriving passengers will not deplane until the buses are available for transportation to the BIA terminal. All checked luggage will be picked up at BIA and delivered directly to the departing aircraft. Buses will proceed directly to the aircraft at WAFB alert ramp. Luggage on arriving aircraft will be directly offloaded onto a vehicle parked on the WAFB alert ramp. WAFB will be notified, in advance, if a local funeral home requires access for pickup or delivery of deceased persons.

AIRCRAFT HANDLING AND GROUND SUPPORT EQUIPMENT

Air Force-owned fuel will not be provided. The air carriers will provide their own ground support equipment. Refueling equipment from BIA will be prepositioned at WAFB on the alert ramp. The Air Force shall not be responsible for any damage or loss to such equipment, and BIA expressly assumes all risks of any such loss or damage and agrees to indemnify and hold the United States harmless against any such damage or loss. No routine aircraft maintenance will be accomplished at WAFB. Emergency repairs and or maintenance are only authorized to avoid extended parking and storage of civil aircraft at WAFB.

CUSTOMS AND SECURITY

The installation commander will exercise administrative and security control over both the aircraft and passengers on WAFB. Customs officials will be transported to and from the base by air carrier representatives. The installation commander will cooperate with customer, health, and other public officials to expedite arrival and departure of the aircraft. Air carrier representatives will notify the WAFB Airfield Manager, in advance, of armed security or law enforcement officers arriving or departing on a flight. BIA officials and air carrier representatives must provide the WAFB Airfield Manager a list of employees, contractors, and vehicles requiring flightline access. Temporary passes will

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be issued to authorized individuals and vehicles.

FIRE, CRASH, AND RESCUE SERVICES

BIA will provide technical information and training for WAFB Fire Department personnel prior to (date) . Fire, Crash, and Rescue Services will be provided in an emergency, but fire trucks will not routinely park on the flightline for aircraft arrivals and departures. BIA will reimburse WAFB for all such services.

LIABILITY AND INDEMNIFICATION

The Air Force shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the use of WAFB by BIA under this Agreement, or for damages to the property of BIA or injuries to the person of BIA's officers, agents, servants, employees, or invitees. BIA agrees to assume all risks of loss or damage to property and injury or death to persons by reason of or incident to the use of WAFB under this Agreement and expressly waives any and all claims against the United States for any such loss, damage, personal injury, or death caused by or occurring as a consequence of such use. BIA further agrees to indemnify, save, and hold the United States, its officers, agents, and employees harmless from and against all claims, demands, or actions, liabilities, judgments, costs, and attorneys fees, arising out of, claimed on account of, or in any manner predicated upon personal injury, death or property damage resulting from, related to, caused by, or arising out of the use of WAFB under this Agreement.

FEEES

Landing and parking fees will be charged in accordance with to AFI 10-1001, Civil Aircraft Landing Permits. Charges will be made in accordance with the appropriate Air Force Instructions for any services or supplies required from WAFB. The WAFB Airfield Manager will be responsible for consolidating all charges which will be billed to BIA not later than (date) by the Accounting and Finance Office.

IN WITNESS WHEREOF, the respective duly authorized representatives of the parties hereto have executed this Agreement on the date set forth below opposite their respective signatures.

BIA Representative (Name and Title)
DATE

WAFB Representative (Name and Title)
DATE

PART 861—DEPARTMENT OF DEFENSE COMMERCIAL AIR TRANSPORTATION QUALITY AND SAFETY REVIEW PROGRAM

- Sec.
861.1 References.
861.2 Purpose.
861.3 Definitions.
861.4 DOD air transportation quality and safety requirements.
861.5 DOD Commercial Airlift Review Board procedures.
861.6 DOD review of foreign air carriers.
861.7 Disclosure of voluntarily provided safety-related information.

AUTHORITY: 10 U.S.C. 2640, 8013.

SOURCE: 67 FR 65698, Oct. 28, 2002, unless otherwise noted.

§ 861.1 References.

The following references apply to this part:

- (a) 10 U.S.C. 2640, Charter Air Transportation of Members of the Armed Forces.
(b) Department of Defense Directive 4500.53, Department of Defense Commercial Air Transportation Quality and Safety Review Program.

§ 861.2 Purpose.

Department of Defense Directive 4500.53, Department of Defense Commercial Air Transportation Quality and Safety Review Program, charges the Commander-in-Chief (CINC), United States Transportation Command (USTRANSCOM), with ensuring the establishment of safety requirements and criteria for evaluating civil air carriers and operators (hereinafter collectively referred to as "air carriers") providing air transportation and operational support services to the Department of Defense (DOD). It also charges the CINC with ensuring the establishment of a Commercial Airlift Review Board (CARB) and providing policy guidance and direction for its operation. This part establishes DOD quality and safety criteria for air carriers providing or seeking to provide air transportation and, at the discretion of the CARB or higher authority, operational support services to the DOD. This part also includes the operating procedures of the CARB. The CARB has the authority to suspend air carriers from DOD use or

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take other actions when issues of air carrier quality and air safety arise.

§ 861.3 Definitions.

(a) *Air carrier*. Individuals or entities that operate commercial fixed and rotary wing aircraft in accordance with the Federal Aviation Regulations (14 CFR Chapter I) or equivalent regulations issued by a country's Civil Aviation Authority (CAA) and which provide air transportation or operational support services. Commercial air carriers under contract with, or operating on behalf of the DOD shall have a FAA or CAA certificate.

(b) *Air transportation services*. The transport of DOD personnel or cargo by fixed or rotary wing commercial aircraft, where such services are acquired primarily for the transportation of DOD personnel and cargo, through donation or any form of contract, tender, blanket ordering agreement, Government charge card, Government or commercial transportation request (TR), bill of lading, or similar instruments. Air transportation services also include medical evacuation services, paratrooper drops, and charter airlift and group travel arranged by the Military Service Academies, foreign military sales, nonappropriated fund instrumentalities by other DOD and non-DOD activities for DOD personnel. All air carriers providing air transportation services to DOD must have a FAA or CAA certificate. The policy contained in this Directive shall not apply to individually procured, discretionary air travel, such as that associated with military leave or pass.

(c) *Civil Aviation Authority (CAA)*. The CAA refers to the organization within a country that has the authority and responsibility to regulate civil aviation. The term CAA is used throughout this part since these requirements are applicable to both U.S. and foreign carriers doing business with DOD. The term CAA thus includes the U.S. Federal Aviation Administration (FAA).

(d) *Code sharing*. Code sharing is a marketing arrangement in which an air carrier places its designator code on a flight operated by another air carrier and sells tickets for that flight.

(e) *DOD approval*. DOD approval in the context of this part refers to the

process by which air carriers seeking to provide passenger or cargo airlift services (hereinafter referred to as air transportation services) to the DOD must be screened and evaluated by the DOD Air Carrier Survey and Analysis Office or other entity authorized by the CARB, and approved for DOD use by the CARB. Once initial approval is obtained, a DOD approved air carrier must remain in an approved status to be eligible for DOD business. Although not generally required, the CARB or higher authority may, on a case-by-case basis, require DOD approval of air carriers providing operational support services to DOD.

(f) *DOD air carrier safety and quality review process*. Includes four possible levels of review with increasing authority. The responsibilities of each are described in more detail in the reference in § 861.1 (b). These levels consist of the:

(1) DOD Air Carrier Survey and Analysis Office;

(2) DOD Commercial Airlift Review Board (CARB);

(3) Commander-in-Chief, U.S. Transportation Command, or USCINCTrans; and

(4) Secretary of Defense. (NOTE: A DOD-level body, the Commercial Airlift Review Authority, or CARA, provides advice and recommendations to the Secretary of Defense.)

(g) *Federal Aviation Administration (FAA) International Safety Assessment (IASA) program and categories*. The FAA IASA program assesses the ability of a foreign country's CAA to adhere to international standards established by the United Nation's technical agency for aviation, the International Civil Aviation Organization (ICAO). The FAA has established ratings for the status of countries as follows:

(1) *Category 1—Does comply with ICAO standards*. A country's CAA has been found to license and oversee air carriers in accordance with ICAO aviation safety standards.

(2) *Category 2—Does not comply with ICAO standards*. A country's CAA does not meet ICAO standards for aviation oversight. Operations to the U.S. by a carrier from a Category 2 country are limited to those in effect at the time a country is classified as Category 2 and

are subjected to heightened FAA surveillance. Expansion or changes in services to the U.S. are not permitted while a country is in Category 2 status unless the carrier arranges to have new services conducted by an air carrier from a Category 1 country. Category 2 countries that do not have operations to the U.S. at the time of the FAA assessment are not permitted to commence such operations unless it arranges to have its flights conducted by an air carrier from a Category 1 country.

(3) *Non-rated.* A country's CAA is labeled "non-rated" if it has not been assessed by the FAA.

(h) *GSA City Pair Program.* A program managed by the General Services Administration in which U.S. air carriers compete for annual contracts awarding U.S. Government business for specific domestic and international scheduled service city pair routes.

(i) *Group travel.* Twenty-one or more passengers on orders from the same organization traveling on the same date to the same destination to attend the same function.

(j) *Letter of Warning.* A notice to a DOD approved air carrier of a failure to satisfy safety or airworthiness requirements which, if not remedied, may result in temporary nonuse or suspension of the air carrier by the DOD. Issuance of a *Letter of Warning* is not a prerequisite to a suspension or other action by the CARB or higher DOD authority.

(k) *On-site Capability Survey.* The most comprehensive evaluation performed by DOD's Air Carrier Survey and Analysis Office. Successful completion of this evaluation is required of most air carriers before they may be approved to provide air transportation services to DOD. Once approved, air carriers are subject to periodic On-site Capability Surveys, as specified at Enclosure 3 in the reference in §861.1(b).

(l) *Operational support services.* Missions performed by air carriers that use fixed or rotary-winged aircraft to provide services other than air transportation services as defined in paragraph (b) of this section. Examples include, but are not limited to, range instrumentation and services, target-towing, sling loads, and electronic counter-

measures target flights. Air carriers providing only operational support services do not require advance DOD approval and are not subject to the initial or periodic on-site survey requirements under this part, unless directed by the CARB or higher authority. All air carriers providing operational support services to DOD must have a FAA or CAA certificate and are required to maintain applicable FAA or CAA standards absent deviation authority obtained pursuant to 14 CFR 119.55 or similar CAA rules.

(m) *Performance assessments.* Reviews conducted by U.S. air carriers when evaluating foreign air carriers with which they have code share arrangements, using performance-based factors. Such assessments include reviewing a variety of air carrier data including history, safety, scope/size, financial condition, equipment, flight operations and airworthiness issues.

(n) *Performance evaluations.* Reviews conducted by DOD as directed in the references in §861.1(a) and (b). These evaluations include a review of air carrier flight operations, maintenance departments, safety programs and other air carrier areas as necessary. Performance evaluations are not conducted on-site, but rely on information collected primarily from the FAA and the National Transportation Safety Board (NTSB).

(o) *Preflight safety inspection.* A visual safety inspection of the interior and exterior of an air carrier's aircraft performed by DOD personnel in accordance with the references in §861.1(a) and (b).

(p) *Suspension.* The exclusion of an air carrier from providing services to the DOD. The period of suspension will normally:

(1) Remain in effect until the air carrier furnishes satisfactory evidence that the conditions causing the suspension have been remedied and has been reinstated by the CARB, or;

(2) Be for a fixed period of time as determined at the discretion of the CARB.

(q) *Temporary nonuse.* The immediate exclusion of a DOD approved air carrier from providing services to the DOD pending a decision on suspension. Normally, temporary nonuse will be for a

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period of 30 days or less. However, by mutual agreement of the CARB and the air carrier involved, a suspension hearing or decision may be delayed and the air carrier continued in a temporary nonuse status for an extended period of time.

(r) *Voluntarily provided safety-related information.* Information which consists of nonfactual safety-related data, reports, statements, and other information provided to DOD by an air carrier at any point in the evaluation process described in this Part. It does not include factual safety-related information, such as statistics, maintenance reports, training records, flight planning information, and the like.

§ 861.4 DOD air transportation quality and safety requirements.

(a) *General.* The DOD, as a customer of air transportation and operational support services, expects air carriers used by DOD to employ programs and business practices that not only ensure good service but also enhance the safety, operational, and maintenance standards established by applicable Civil Aviation Authority (CAA) regulations. Accordingly, and as required by the references in § 861.1 (a) and (b), the DOD has established a set of quality and safety criteria and requirements that reflect the type programs and practices DOD seeks from air carriers providing services to DOD. Air carriers must meet and maintain these requirements in order to be eligible for DOD business. Air carriers providing air transportation services to DOD either directly by contract or agreement, or indirectly through the General Services Administration (GSA) City Pair Program or some other arrangement, must be approved by DOD prior to providing such services and remain in an approved status throughout the contract, agreement, or arrangement performance period. This approval entails successful completion of initial and recurring on-site surveys as well as periodic performance evaluations in accordance with the reference in § 861.1(b). The quality and safety criteria and requirements set forth in this part complement rather than replace the CAA criteria applicable to air carriers. Air carriers normally remain

fully subject to applicable CAA regulations (CARs) while performing business for the DOD, even when the aircraft involved is used exclusively for DOD missions. The inspection and oversight criteria set forth in this part do not, as a general rule, apply to air carriers providing only operational support services to DOD. However, in the event concerns relating to the safety of such a carrier arise, the CARB or higher authority may, on a case-by-case basis, direct an appropriate level of oversight under the authority of this part.

(b) *Applicability.* (1) The evaluation, quality and safety criteria and requirements set forth in this part apply to air carriers providing or seeking to provide air transportation services to DOD.

(2) Foreign air carriers performing portions of GSA City Pair routes awarded to U.S. air carriers under a code-sharing arrangement, as well as foreign air carriers providing individually-ticketed passenger service to DOD personnel traveling on official business, may be subject to limited oversight and review pursuant to § 861.6.

(3) The inspection and oversight requirements, as well as the quality and safety criteria of this part may, on a case-by-case basis and at the discretion of the CARB or higher authority, be applied to air carriers seeking to provide or providing operational support services as defined in § 861.3(1).

(4) The inspection and oversight requirements of this part do not apply to aircraft engaged in medical transport services if procured under emergency conditions to save life, limb or eyesight. Likewise, the inspection and oversight requirements of this part are not applicable when DOD is not involved in the procurement of the medical transportation services. For example, when specific medical treatment is obtained on an individual basis by or for DOD personnel with medical transportation provided, as needed, at the direction of the non-DOD medical care giver. This includes situations where DOD, through TRICARE or otherwise, pays for such transportation as part of the costs of medical services provided.

(c) *Scope and nature of the evaluation program—*(1) *Evaluation requirement.*

The provision of air transportation services under a contract or agreement with or on behalf of DOD, requires the successful completion of an initial on-site survey and approval by the CARB under this part in order to be eligible for DOD business. In addition, U.S. air carriers awarded contracts under the GSA City Pair Program, including those that perform part of the contract under a code-sharing arrangement with the U.S. air carrier awarded the contract, must successfully complete an initial on-site survey and be approved by the CARB for DOD use under this part prior to beginning performance of the GSA contract. Once approved by DOD, air carriers providing air transportation services are subject to recurring on-site surveys and performance evaluations and assessments throughout the duration of the relevant contract or agreement. The frequency and scope of these surveys and performance reviews will be in accordance with Enclosure 3 of the reference in § 861.1(b).

(2) *Office of primary responsibility.* Evaluations are performed by the DOD Air Carrier Survey and Analysis Office located at Scott Air Force Base, Illinois. The mailing address of this office is HQ AMC/DOB, 402 Scott Drive Unit 3A1, Scott AFB IL 62225-5302. The website address is <https://public.scott.af.mil/hqamc/dob/index.htm>.

(3) *Items considered in the evaluation process.* The specifics of the applicable DOD contract or agreement (if any), the applicable CAA regulations, and the experienced judgment of DOD personnel will be used to evaluate an air carrier's capability to perform services for DOD. The survey may also include, with the air carrier's coordination, observation of cockpit crew performance, as well as ramp inspections of selected company aircraft. In the case of air carriers seeking to provide air transportation services, after satisfactory completion of the initial survey and approval by the CARB as a DOD air carrier, follow-up surveys will be conducted on a recurring basis and when otherwise required to validate adherence to DOD quality and safety requirements. DOD personnel will also assess these quality and safety requirements when conducting periodic air carrier performance evaluations. The

size of an air carrier, along with the type and scope of operations will be considered during the on-site survey. For example, while an air taxi operator may not have a formal flight control function, such as a 24-hour dispatch organization, that same air taxi operator is expected to demonstrate some type of effective flight following capability. On the other hand, a major air carrier is expected to have a formal flight control or dispatch function. Both, however, will be evaluated based on the effectiveness and quality of whatever flight following function they do maintain. In the case of air carriers seeking to provide operational support services, the type, scope and frequency of evaluation, if any, performed by DOD or other entity will be as directed by the CARB or higher authority.

(d) *Status of aircraft performing services for DOD.* All air carriers providing air transportation or operational support services to the DOD shall have FAA or CAA air carrier or commercial operator certificates and shall remain under FAA and/or CAA regulatory and safety oversight during performance of the DOD mission. Aircraft performing services for or on behalf of DOD shall be on the air carrier's operating certificate, and remain on that certificate while performing the DOD mission. The installation of any special equipment needed to perform services for DOD shall be FAA or CAA approved or an appropriate FAA or CAA waiver obtained.

(e) *Evaluation requirements.* The air carrier requirements stated in this part provide the criteria against which would-be DOD and GSA City Pair Program air carrier contractors, as well as air carriers providing services on behalf of DOD, may be subjectively evaluated by DOD. These requirements are neither all-inclusive nor inflexible in nature. They are not replacements for the certification criteria and other regulations established by the CAA. Rather, these requirements complement CAA certification criteria and regulations and describe the enhanced level of service required by DOD. The relative weight accorded these requirements in a given case, as well as the determination of whether an air carrier meets or exceeds them, is a matter

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within the sole discretion of the DOD Air Carrier Survey and Analysis Office and the CARB, subject to the statutory minimums provided in the reference in § 861.1(a).

(1) *Quality and safety requirements—prior experience.* U.S. and foreign air carriers applying for DOD approval in order to conduct air transportation services for or on behalf of DOD under a contract or agreement with DOD, the GSA City Pair Program, or by some other arrangement are required to possess 12 months of continuous service equivalent to the service sought by DOD. In applying this requirement, the following guidance will be used by DOD authorities:

(i) “12 months” refers to the 12 calendar months immediately preceding the request for DOD approval.

(ii) “Continuous” service means the carrier must have performed revenue-generating services of the nature for which DOD approval is sought, as an FAA part 121, 125, 127, or 135 (14 CFR 121, 125, 127, or 135) air carrier (or foreign CAA equivalent if appropriate) on a recurring, substantially uninterrupted basis. The services must have occurred with such frequency and regularity as to clearly demonstrate the carrier’s ability to perform and support sustained, safe, reliable, and regular services of the type DOD is seeking. Weekly flight activity is normally considered continuous, while sporadic or seasonal operations (if such operations are the only operations conducted by the carrier) may not suffice to establish a carrier’s ability to perform and support services in the sustained, safe, reliable, and regular manner required by DOD. The ability of a carrier to perform services of the type sought by DOD may be called into question if there have been lengthy periods of time during the qualifying period in which the carrier has not operated such services. Consequently, any cessation, or nonperformance of the type of service for which approval is sought may, if it exceeds 30 days in length during the qualifying period and depending on the underlying factual circumstances, necessitate “restarting” the 12-month continuous service period needed to obtain DOD approval.

(iii) “Equivalent to the services sought by DOD” means service offered to qualify for DOD approval must be substantially equivalent to the type of service sought by DOD. The prior experience must be equivalent in difficulty and complexity with regard to the distances flown, weather systems encountered, international and national procedures, the same or similar aircraft, schedule demands, aircrew experience, number of passengers handled, frequency of operations, and management required. There is not a set formula for determining whether a particular type of service qualifies. The performance of cargo services is not considered to be “substantially equivalent” to the performance of passenger services, and may not be used to meet the 12 continuous months requirement for passenger services. However, when a carrier already providing cargo services to DOD applies to carry passengers, the CARB may consider the carrier’s cargo performance and experience in assessing whether a carrier is qualified to carry passengers on a specific type or category of aircraft, over certain routes or stage lengths, or under differing air traffic control, weather, or other conditions. The following examples are illustrative and not intended to reflect or predict CARB action in any given case:

Example 1: Coyote Air has operated commercial passenger commuter operations in the U.S. for a number of years flying a variety of twin-engine turboprop aircraft. They have also been a DOD-approved cargo carrier, providing international cargo services using DC-10 freighter aircraft. Coyote Air purchases a passenger version DC-10, and seeks DOD approval to provide international passenger service for DOD. The CARB may decide that although Coyote Air has provided passenger services for 12 continuous months, those services are not substantially equivalent to those being sought by DOD. While the carrier may have considerable operational experience with the DC-10, its commuter passenger operations are not substantially equivalent to the service now proposed—international passenger services on large jet aircraft.

Example 2: Acme Air has been a DOD-approved cargo carrier for several years, operating domestic and international missions with MD-11 freighter aircraft. At the same time, Acme has been performing commercial international passenger services with B-757

aircraft. Acme Air purchases a MD-11 passenger aircraft and applies to perform passenger services for DOD using the MD-11. Assuming Acme has performed B-757 passenger service for 12 continuous months immediately preceding its application, the CARB may consider these passenger services substantially equivalent to those proposed since both involve the operation of large multi-engine aircraft in an international environment. The CARB may also consider Acme's operational history with its MD-11 freighter aircraft in determining whether the carrier is competent to provide MD-11 passenger service in the same environment.

(iv) Once approved by DOD, an air carrier's failure to maintain continuous operations of the type for which approval has been granted may, at the discretion of the CARB, be grounds for nonuse or suspension under this part, rendering the carrier ineligible for DOD business during the nonuse or suspension period. Any cessation or non-performance of the type of service for which approval has been obtained may, if it exceeds 30 days in length and depending on the circumstances, provide the basis for the CARB to take appropriate action.

(2) *Quality and safety requirements—air carrier management.* Management has clearly defined safety as the number one company priority, and safety is never sacrificed to satisfy passenger concern, convenience, or cost. Policies, procedures, and goals that enhance the CAA's minimum operations and maintenance standards have been established and implemented. A cooperative response to CAA inspections, critiques, or comments is demonstrated. Proper support infrastructure, including facilities, equipment, parts, and qualified personnel, is provided at the certificate holder's primary facility and en route stations. Personnel with aviation credentials and experience fill key management positions. An internal quality audit program or other method capable of identifying in-house deficiencies and measuring the company's compliance with their stated policies and standards has been implemented. Audit results are analyzed in order to determine the cause, not just the symptom, of any deficiency. The result of sound fiscal policy is evident throughout the company. Foreign code-sharing air carrier partners are audited at least every

two years using DOD-approved criteria and any findings resolved. Comprehensive disaster response plans and, where applicable, family support plans, must be in place and exercised on a regular basis.

(3) *Quality and safety requirements—operations—(i) Flight safety.* Established policies that promote flight safety. These policies are infused among all aircrew and operational personnel who translate the policies into practice. New or revised safety-related data are promptly disseminated to affected personnel who understand that deviation from any established safety policy is unacceptable. An audit system that detects unsafe practices is in place and a feedback structure informs management of safety policy results including possible safety problems. Management ensures that corrective actions resolve every unsafe condition.

(ii) *Flight operations.* Established flight operations policies and procedures are up-to-date, reflect the current scope of operations, and are clearly defined to aviation department employees. These adhered-to procedures are further supported by a flow of current, management-generated safety and operational communications. Managers are in touch with mission requirements, supervise crew selection, and ensure the risk associated with all flight operations is reduced to the lowest acceptable level. Flight crews are free from undue management pressure and are comfortable with exercising their professional judgment during flight activities, even if such actions do not support the flight schedule. Effective lines of communication permit feedback from line crews to operations managers. Personnel records are maintained and reflect such data as experience, qualifications, and medical status.

(iii) *Flight crew hiring.* Established procedures ensure that applicants are carefully screened, including a review of the individual's health and suitability to perform flight crew duties. Consideration is given to the applicant's total aviation background, appropriate experience, and the individual's potential to perform safely. Freedom from alcohol abuse and illegal drugs is required. If new-hire cockpit

crewmembers do not meet industry standards for experience and qualification, then increased training and management attention to properly qualify these personnel are required.

(iv) *Aircrew training.* Training, including recurrent training, which develops and refines skills designed to eliminate mishaps and improve safety, is essential to a quality operation. Crew coordination training that facilitates full cockpit crews training and full crew interaction using standardized procedures and including the principles of Crew Resource Management (CRM) is required. Programs involving the use of simulators or other devices that can provide realistic training scenarios are desired. Captain and First Officer training objectives cultivate similar levels of proficiency. Appropriate emergency procedures training (e.g., evacuation procedures) is provided to flight deck and flight attendant personnel as a total crew whenever possible; such training focuses on cockpit and cabin crews functioning as a coordinated team during emergencies. Crew training—be it pilot, engineer, or flight attendant—is appropriate to the level of risk and circumstances anticipated for the trainee. Training programs have the flexibility to incorporate and resolve recurring problem areas associated with day-to-day flight operations. Aeromedical crews must also be trained in handling the specific needs of the categories of patients normally accepted for transportation on the equipment to be used. Trainers are highly skilled in both subject matter and training techniques. Training received is documented, and that documentation is maintained in a current status.

(v) *Captain upgrade training.* A selection and training process that considers proven experience, decision making, crew resource management, and response to unusual situations, including stress and pressure, is required. Also important is emphasis on captain responsibility and authority.

(vi) *Aircrew scheduling.* A closely monitored system that evaluates operational risks, experience levels of crewmembers, and ensures the proper pairing of aircrews on all flights is required. New captains are scheduled

with highly experienced first officers, and new or low-time first officers are scheduled with experienced captains. Except for aircraft new to the company, captains and first officers assigned to DOD charter passenger missions possess at least 250 hours combined experience in the type aircraft being operated. The scheduling system involves an established flight duty time program for aircrews, including flight attendants, carefully managed so as to ensure proper crew rest and considers quality-of-life factors. Attention is given to the stress on aircrews during strikes, mergers, or periods of labor-management difficulties.

(vii) *In-flight performance.* Aircrews, including flight attendants and flight medical personnel, are fit for flight duties and trained to handle normal, abnormal, and emergency situations. They demonstrate crew discipline and a knowledge of aviation rules; use company-developed standardized procedures; adhere to checklists; and emphasize safety, including security considerations, throughout all preflight, in-flight, and postflight operations. Qualified company personnel evaluate aircrews and analyze results; known performance deficiencies are eliminated. Evaluations ensure aircrews demonstrate aircraft proficiency in accordance with company established standards. Flight crews are able to determine an aircraft's maintenance condition prior to flight and use standardized methods to accurately report aircraft deficiencies to the maintenance activity.

(viii) *Operational control/support.* Effective mission control includes communications with aircrews and the capability to respond to irregularities or difficulties. Clear written procedures for mission preparation and flight following aircraft and aircrews are provided. There is access to weather, flight planning, and aircraft maintenance data. There are personnel available who are knowledgeable in aircraft performance and mission requirements and that can correctly respond to emergency situations. There is close interface between operations and maintenance, ensuring a mutual awareness of aircraft operational and maintenance status. Procedures to notify

DOD in case of an accident or serious incident have been established. Flight crews involved in such accidents or incidents report the situation to company personnel who, in turn, have procedures to evaluate the flight crew's capability to continue the mission. Aircraft involved in accidents or incidents are inspected in accordance with Civil Aviation Regulations and a determination made as to whether or not the aircraft is safe for continued operations.

(ix) *DOD charter procedures.* Detailed procedures addressing military charter requirements are expected. The level of risk associated with DOD charter missions does not exceed the risks inherent in the carrier's non-DOD daily flight operations. Complete route planning and airport analyses are accomplished, and actual passenger and cargo weights are used in computing aircraft weight and balance.

(4) *Quality and safety requirements—maintenance.* Maintenance supervisors ensure all personnel understand that in spite of scheduling pressure, peer pressure, supervisory pressure, or other factors, the airplane must be airworthy prior to flight. Passenger and employee safety is a paramount management concern. Quality, completeness, and integrity of work are trademarks of the maintenance manager and maintenance department. Nonconformance to established maintenance practices is not tolerated. Management ensures that contracted maintenance, including repair and overhaul facilities, is performed by maintenance organizations acceptable to the CAA.

(i) *Maintenance personnel.* Air carriers are expected to hire and train the number of employees required to safely maintain the company aircraft and support the scope of the maintenance operations both at home station (the company's primary facility) and at en route locations. These personnel ensure that all maintenance tasks, including required inspections and airworthiness directives, are performed; that maintenance actions are properly documented; and that the discrepancies identified between inspections are corrected. Mechanics are fit for duty, properly certificated, the company verifies certification, and these per-

sonnel possess the knowledge and the necessary aircraft-specific experience to accomplish the maintenance tasks. Noncertified and inexperienced personnel received proper supervision. Freedom from alcohol abuse and illegal drugs is required.

(ii) *Quality assurance.* A system that continuously analyzes the performance and effectiveness of maintenance activities and maintenance inspection programs is required. This system evaluates such functions as reliability reports, audits, component tear-down reports, inspection procedures and results, tool calibration program, real-time aircraft maintenance actions, warranty programs, and other maintenance functions. The extent of this program is directly related to the air carrier's size and scope of operation. The cause of any recurring discrepancy or negative trend is researched and eliminated. Action is taken to prevent recurrence of these discrepancies and preventive actions are monitored to ensure effectiveness. The results of preventive actions are provided to appropriate maintenance technicians.

(iii) *Maintenance inspection activity.* A process to ensure required aircraft inspections are completed and the results properly documented is required. Also required is a system to evaluate contract vendors, suppliers, and their products. Inspection personnel are identified, trained (initial and recurrent), and provided guidance regarding inspector responsibility and authority. The inspection activity is normally a separate entity within the maintenance department.

(iv) *Maintenance training.* Training is conducted commensurate with the size and type of maintenance function being performed. Continuing education and progressive experience are provided for all maintenance personnel. Orientation, familiarization, on-the-job, and appropriate recurrent training for all full and part-time personnel are expected. The use of such training aids as mockups, simulators, and computer-based training enhances maintenance training efforts and is desired. Training documentation is required; it is current, complete, well maintained, and

correctly identifies any special authorization such as inspection and airworthiness release. Trainers are fully qualified in the subject manner.

(v) *Maintenance control.* A method to control maintenance activities and track aircraft status is required. Qualified personnel monitor maintenance preplanning, ensure completion of maintenance actions, and track deferred discrepancies. Deferred maintenance actions are identified to supervisory personnel and corrected in accordance with the criteria provided by the manufacturer or regulatory agency. Constant and effective communications between maintenance and flight operations ensure an exchange of critical information.

(vi) *Aircraft maintenance program.* Aircraft are properly certified and maintained in a manner that ensures they are airworthy and safe. The program includes the use of manufacturer's and CAA information, as well as company policies and procedures. Airworthiness directives are complied with in the prescribed time frame, and service bulletins are evaluated for applicable action. Approved reliability programs are proactive, providing management with visibly on the effectiveness of the maintenance program; attention is given to initial component and older aircraft inspection intervals and to deferred maintenance actions. Special tools and equipment are calibrated.

(vii) *Maintenance records.* Maintenance actions are well documented and provide a complete record of maintenance accomplished and, for repetitive actions, maintenance required. Such records as aircraft log books and maintenance documentation are legible, dated, clean, readily identifiable, and maintained in an orderly fashion. Inspection compliance, airworthiness release, and maintenance release records, etc., are completed and signed by approved personnel.

(viii) *Aircraft appearance.* Aircraft exteriors, including all visible surfaces and components, are clean and well maintained. Interiors are also clean and orderly. Required safety equipment and systems are available and operable.

(ix) *Fueling and servicing.* Aircraft fuel is free from contamination, and company fuel facilities (farms) are in-

spected and results documented. Procedures and instructions pertaining to servicing, handling, and storing fuel and oil meet established safety standards. Procedures for monitoring and verifying vendor servicing practices are included in this program.

(x) *Maintenance manuals.* Company policy manuals and manufacturer's maintenance manuals are current, available, clear, complete, and adhered to by maintenance personnel. These manuals provide maintenance personnel with standardized procedures for maintaining company aircraft. Management policies, lines of authority, and company maintenance procedures are documented in company manuals and kept in a current status.

(xi) *Maintenance facilities.* Well maintained, clean maintenance facilities, adequate for the level of aircraft repair authorized in the company's CAA certificate are expected. Safety equipment is available in hangars, shops, etc., and is serviceable. Shipping, receiving, and stores areas are likewise clean and orderly. Parts are correctly packaged, tagged, segregated, and shelf life properly monitored.

(5) *Quality and safety requirements—security.* Company personnel receive training in security responsibilities and practice applicable procedures during ground and in-flight operations. Compliance with provisions of the appropriate standard security program, established by the Transportation Security Administration or foreign equivalent, is required for all DOD missions.

(6) *Quality and safety requirements—specific equipment requirements.* Air carriers satisfy DOD equipment and other requirements as specified in DOD agreements.

(7) *Quality and safety requirements—oversight of commuter or foreign air carriers in code-sharing agreements.* Air carriers awarded a route under the Passenger Standing Route Order (PSRO) program, the GSA City Pair Program, or other DOD program, that includes performance of a portion of the route by a commuter or foreign air carrier with which it has a code-sharing arrangement, must have a formal procedure in place to periodically review and assess the code-sharing air carrier's safety, operations, and maintenance

programs. The extent of such reviews and assessments must be consistent with, and related to, the code-sharing air carrier's safety history. These procedures must also provide for actual inspections of the foreign code-sharing air carrier if the above reviews and assessments indicate questionable safety practices.

(8) *Quality and safety requirements—aeromedical transport requirements.* (i) The degree of oversight is as determined by the CARB or higher authority. When an inspection is conducted, DOD medical personnel may also participate to assess the ability to provide the patient care and any specialty care required by DOD. The CARB's review will be limited solely to issues related to flight safety.

(ii) Portable Electronic Devices (PEDs) used in the provision of medical services or treatment on board aircraft are tested for non-interference with aircraft systems and the results documented to show compliance with 14 CFR 91.21 or other applicable CAA regulations. If there are no CAA regulations, actual use/inflight testing of the same or similar model PED prior to use with DOD patients is the minimum requirement.

§861.5 DOD Commercial Airlift Review Board procedures.

(a) This section establishes procedures to be used by the DOD when, in accordance with references in §861.1(a) and (b):

(1) An air carrier is subject to review or other action by the DOD Commercial Airlift Review Board, or CARB;

(2) A warning, suspension, temporary nonuse, or reinstatement action is considered or taken against a carrier by the CARB; or

(3) An issue involving an air carrier is referred by the CARB to higher authority for appropriate action.

(b) These procedures apply to air carriers seeking to provide or already providing air transportation services to DOD. It also applies to U.S. or foreign air carriers providing operational support services to DOD which, on a case-by-case basis and at the discretion of the CARB or higher authority, require some level of oversight by DOD.

(c) An air carrier's sole remedy in the case of a suspension decision by the CARB is the appellate process under this part.

(d) Quality and safety issues relating to air carriers used, or proposing to be used, by DOD, per reference (b) must be referred to the CARB for appropriate disposition.

(e) *CARB responsibilities.* As detailed in the reference in §861.1(b), the CARB provides a multifunctional review of the efforts of the DOD Air Carrier Survey and Analysis Office and is the first level decision authority in DOD on quality and safety issues relating to air carriers. Responsibilities include, but are not limited to: the review and approval or disapproval of air carriers seeking initial approval to provide air transportation service to DOD; the review and approval or disapproval of air carriers in the program that do not meet DOD quality and safety requirements; the review and approval or disapproval of air carriers in the program seeking to provide a class of service different from that which they are currently approved; taking action to suspend, reinstate, or place into temporary nonuse or extended temporary nonuse, DOD approved carriers; taking action, on an as needed basis, to review, suspend, reinstate, or place into temporary nonuse or extended temporary nonuse, an air carrier providing operational support services to DOD; and, referring with recommendations, issues requiring resolution or other action by higher authority.

(f) *CARB administrative procedures—(1) Membership.* The CARB will consist of four voting members appointed by USCINCTRANS from USTRANSCOM and its component commands. These members and their alternates will be general officers or their civilian equivalent, with experience in the operations, maintenance, transportation, or air safety fields. A Chairman and alternate will be designated. Nonvoting CARB members will be appointed as necessary by USCINCTRANS. A nonvoting recorder will also be appointed.

(2) *Decisions.* Decisions of the CARB will be taken by a majority vote of the voting members present, with a minimum of three voting members (or their alternates) required to constitute

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a quorum. In the event of a tie, the Chair of the CARB will decide the issue.

(3) *Meetings of the CARB.* The CARB may meet either in person or by some electronic means. It will be convened by either USCINCTRANS or the Chair of the CARB. The meeting date, time, and site of the CARB will be determined at the time of the decision to convene the CARB. Minutes of CARB meetings will be taken by the recorder, summarized, and preserved with all other records relating to the CARB meeting. The recorder will ensure the air carrier and appropriate DOD and federal agencies are notified of the CARB's decision(s) and reasons therefore. In the event of a fatal accident, the CARB shall convene as soon as possible but not later than 72 hours after notification by the Chair.

(g) *CARB operating procedures—(1) Placing an air carrier into temporary nonuse.* (i) In case of a fatal aircraft accident or for other good cause, two or more voting members of the CARB may jointly make an immediate determination whether to place the air carrier involved into a temporary nonuse status pending suspension proceedings. Prior notice to the air carrier is not required.

(ii) The carrier shall be promptly notified of the temporary nonuse determination and the basis therefore.

(iii) Temporary nonuse status terminates automatically if suspension proceedings are not commenced, as set out in paragraph (g)(2) of this section, within 30 days of inception unless the CARB and air carrier mutually agree to extend the temporary nonuse status.

(2) *Suspension of an air carrier.* (i) On a recommendation of the DOD Air Carrier Survey and Analysis Office or any individual voting member of the CARB, the CARB shall consider whether or not to suspend a DOD approved air carrier.

(ii) If the CARB determines that suspension may be appropriate, it shall notify the air carrier that suspension action is under consideration and of the basis for such consideration. The air carrier will be offered a hearing within 15 days of the date of the notice, or other such period as granted by the CARB, at which the air carrier may be

present and may offer evidence. The hearings shall be as informal as practicable, consistent with administrative due process. Formal rules of evidence do not apply.

(iii) The types of evidence which may be considered includes, but is not limited to:

(A) Information and analysis provided by the DOD Air Carrier Survey and Analysis Office.

(B) Information submitted by the air carrier.

(C) Information relating to action that may have been taken by the air carrier to:

(1) Correct the specific deficiencies that led the CARB to consider suspension; and

(2) Preclude recurring similar deficiencies.

(D) Other matters the CARB deems relevant.

(iv) The CARB's decisions on the reception or exclusion of evidence shall be final.

(v) Air carriers shall have the burden of proving their suitability to safely perform DOD air transportation and/or operational support services by clear and convincing evidence.

(vi) After the conclusion of such hearing, or if no hearing is requested and attended by the air carrier within the time specified by the CARB, the CARB shall consider the matter and make a final decision whether or not to suspend the air carrier or to impose such lesser sanctions as appropriate. The air carrier will be notified of the CARB's decision.

(3) *Reinstatement.* (i) The CARB may consider reinstating a suspended carrier on either CARB motion or carrier motion, unless such carrier has become ineligible in the interim.

(ii) The carrier has the burden of proving by clear and convincing evidence that reinstatement is warranted. The air carrier must satisfy the CARB that the deficiencies, which led to suspension, have been corrected and that action has been implemented to preclude the recurrence of similar deficiencies.

(iii) Air carrier evidence in support of reinstatement will be provided in a timely manner to the CARB for its review. The CARB may independently

corroborate the carrier-provided evidence and may, at its option, convene a hearing and request the participation of the air carrier.

(4) *Appeal of CARB decisions.* (i) An air carrier placed in suspension by the CARB may administratively appeal this action to USCINCTRANS. An appeal, if any, must be filed in writing, with the DOD Air Carrier Survey and Analysis Office, and postmarked within 15 workdays of receipt of notice of the CARB's suspension decision. In the sole discretion of USCINCTRANS, and for good cause shown, the suspension may be stayed pending action on the appeal.

(ii) Air carriers shall not be entitled to a de novo hearing or personal presentation before the appellate authority.

(iii) The decision of the appellate authority is final and is not subject to further administrative review or appeal.

(5) *Referral of issues to higher authorities.* The approval or disapproval of an air carrier for use by DOD, the placing of approved carriers into temporary nonuse status, and the suspension and reinstatement of approved carriers, are all decisions which must be made by the CARB. Other matters may be referred by the CARB to USCINCTRANS for appropriate action, with or without recommendations by the CARB. The CARB will forward for decision, through USCINCTRANS to the Under Secretary of Defense (Acquisition, Technology and Logistics) (USD(AT&L)), all air carrier use/non-use recommendations involving foreign air carriers other than those providing charter transportation or operational support service to the Department of Defense.

§861.6 DOD review of foreign air carriers.

Foreign air carriers providing or seeking to provide services to DOD shall be subject to review and, if appropriate, approval by DOD. Application of the criteria and requirements of this part and the degree of oversight to be exercised by DOD, if any, over a foreign air carrier depends upon the type of services performed and, in some instances, by the quality of oversight exercised by the foreign air carrier's

CAA. The scope and frequency of the review of any given foreign air carrier under this part will be at the discretion of the CARB or higher authority.

(a) *Foreign air carriers seeking to provide or providing air transportation services under a contract or Military Air Transportation Agreement with DOD, or pursuant to another arrangement entered into by, or on behalf of, DOD.* Foreign air carriers seeking to provide or providing air transportation services under a contract or Military Air Transportation Agreement with DOD, must meet all requirements of §861.4, and be approved by the CARB in accordance with §861.5. This includes foreign air carriers seeking to provide, or providing, airlift services to DOD personnel pursuant to an arrangement entered into by another federal agency, state agency, foreign government, international organization, or other entity or person on behalf of, or for the benefit of, DOD, regardless of whether DOD pays for the airlift services provided. For purposes of establishing the degree of oversight and review to be conducted under the DOD Commercial Air Transportation Quality and Safety Review Program, such foreign air carriers are considered the same as U.S. carriers. In addition, they must have an operating certificate issued by the appropriate CAA using regulations which are the substantial equivalent of those found in the U.S. FARs, and must maintain such certification throughout the term of the contract or agreement. The CAA responsible for exercising oversight of the foreign air carrier must meet ICAO standards as determined by ICAO, or the FAA under the FAA's International Aviation Safety Assessment Program.

(b) *Foreign air carriers providing passenger services under the GSA City Pair Program.* Foreign air carriers performing any portion of a route awarded to a U.S. air carrier under the GSA City Pair Program pursuant to a code-sharing agreement with that U.S. air carrier, are generally not subject to DOD survey and approval under §§861.4 and 861.5. However, DOD will periodically review the performance of such foreign carriers. This review may consist of recurring performance evaluations, periodic examination of the U.S.

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code-sharing carrier's operational reviews and assessments of the foreign carrier and, where appropriate and agreed to by the air carriers concerned and DOD, on-site surveys of the foreign air carrier. Such carriers must also meet the 12 months prior experience requirement of § 861.4(e)(1). The CARB or higher authority may prescribe additional review requirements. Should circumstances warrant, use of these air carriers by DOD passengers on official business may be restricted or prohibited as necessary to assure the highest levels of passenger safety.

(c) *Other foreign air carriers carrying individually ticketed DOD passengers on official business.* Foreign air carriers carrying individually ticketed DOD passengers on official business are not subject to DOD survey and approval under §§ 861.4 and 861.5. However, the DOD Air Carrier Survey and Analysis Division may periodically review the performance of such carriers. Reviews may include voluntary on-site surveys as directed by the CARB or higher authority. In the event questions relating to the safety and continued use of the carrier arise, the matter may be referred to the CARB for appropriate action.

(d) *Foreign air carriers from countries in which the CAA is not in compliance with ICAO standards.* Unless otherwise authorized, use by DOD personnel on official business of foreign air carriers from countries in which the CAA is not in compliance with ICAO standards is prohibited except for the last leg into and the first leg out of the U.S. on such carriers. This includes foreign air carriers performing any portion of a route awarded to a U.S. air carrier under the GSA City Pair Program pursuant to a code-sharing agreement with that U.S. air carrier.

(e) *On-site surveys.* The scope of the on-site survey of a foreign air carrier will be at the discretion of the CARB. In the event a foreign air carrier denies a request made under this part to conduct an on-site survey, the CARB will consider all available information and make a use/nonuse recommendation to DOD. If placed in nonuse status by

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DOD, such air carriers will not be used unless, in accordance with the reference in § 861.1 (b), in the judgment of the appropriate Combatant Commander, no acceptable alternative to using the carrier exists and the travel is mission essential.

(f) *Foreign carriers providing operational support services to DOD.* Such carriers are subject to DOD oversight, on a case-by-case basis, to the extent directed by the CARB or higher authority.

§ 861.7 Disclosure of voluntarily provided safety-related information.

(a) *General.* In accordance with paragraph (h) of the reference in § 861.1 (a), DOD may withhold from public disclosure safety-related information voluntarily provided to DOD by an air carrier for the purposes of this part if DOD determines that—

(1) The disclosure of the information would, in the future, inhibit an air carrier from voluntarily providing such information to DOD or another Federal agency for the purposes of this part or for other air safety purposes; and

(2) The receipt of such information generally enhances the fulfillment of responsibilities under this part or other air safety responsibilities involving DOD or another Federal agency.

(b) *Processing requests for disclosure of voluntarily provided safety-related information.* Requests for public disclosure will be administratively processed in accordance with 32 CFR part 806, Air Force Freedom of Information Act Program.

(c) *Disclosure of voluntarily provided safety-related information to other agencies.* The Department of Defense may, at its discretion, disclose voluntarily provided safety-related information submitted under this part by an air carrier, to other agencies with safety responsibilities. The DOD will provide such information to another agency only upon receipt of adequate assurances that it will protect the information from public disclosure, and that it will not release such information unless specifically authorized.

SUBCHAPTER G—ORGANIZATION AND MISSION—GENERAL

PART 865—PERSONNEL REVIEW BOARDS

Subpart A—Air Force Board for Correction of Military Records

Subpart A—Air Force Board for Correction of Military Records

SOURCE: 75 FR 596132, Sept. 28, 2010, unless otherwise noted.

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§ 865.0 Purpose.

This subpart sets up procedures for correction of military records to remedy error or injustice. It tells how to apply for correction of military records and how the Air Force Board for Correction of Military Records (AFBCMR, or the Board) considers applications. It defines the Board's authority to act on applications. It directs collecting and maintaining information subject to the Privacy Act of 1974 authorized by 10 U.S.C. 1034 and 1552. System of Records notice F035 SAFCB A, Military Records Processed by the Air Force Correction Board, applies.

§ 865.1 Setup of the Board.

The AFBCMR operates within the Office of the Secretary of the Air Force according to 10 U.S.C. 1552. The Board consists of civilians in the executive part of the Department of the Air Force who are appointed and serve at the pleasure of the Secretary of the Air Force. Three members constitute a quorum of the Board.

§ 865.2 Board responsibilities.

(a) *Considering applications.* The Board considers all individual applications properly brought before it. In appropriate cases, it directs correction of military records to remove an error or injustice, or recommends such correction.

(b) *Recommending action.* When an applicant alleges reprisal under the Military Whistleblowers Protection Act, 10 U.S.C. 1034, the Board may recommend to the Secretary of the Air Force that disciplinary or administrative action be taken against those responsible for the reprisal.

(c) *Deciding cases.* The Board normally decides cases on the evidence of the record. It is not an investigative body. However, the Board may, in its discretion, hold a hearing or call for

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additional evidence or opinions in any case.

§ 865.3 Application procedures.

(a) Who may apply:

(1) In most cases, the applicant is a member or former member of the Air Force, since the request is personal to the applicant and relates to his or her military records.

(2) An applicant with a proper interest may request correction of another person's military records when that person is incapable of acting on his or her own behalf, is missing, or is deceased. Depending on the circumstances, a child, spouse, civilian employee or former civilian employee, former spouse, parent or other close relative, an heir, or a legal representative (such as a guardian or executor) of the member or former member may be able to show a proper interest. Applicants will send proof of proper interest with the application when requesting correction of another person's military records. An application may be returned when proper interest has not been shown.

(3) A member, former member, employee or former employee, dependent, and current or former spouse may apply to correct a document or other record of any other military matter that affects them (This does not include records pertaining to civilian employment matters). Applicants will send proof of the effect of the document or record upon them with the application when requesting a correction under this provision.

(b) *Getting forms.* Applicants may get a DD Form 149, "Application for Correction of Military Record Under the Provisions of Title 10 U.S.C. 1552," and Air Force Pamphlet 36-2607, "Applicants' Guide to the Air Force Board for Correction of Military Records (AFBCMR)," from:

(1) Any Air Force Military Personnel Flight (MPF) or publications distribution office.

(2) Most veterans' service organizations.

(3) The Air Force Review Boards Office, SAF/MRBR, 550 C Street West, Suite 40, Randolph AFB TX 78150-4742.

(4) The AFBCMR, 1535 Command Drive, EE Wing 3rd Floor, Andrews AFB MD 20762-7002.

(5) Thru the Internet at <http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0149.pdf> (DD Form 149) and <http://www.e-publishing.af.mil/shared/media/epubs/AFPAM36-2607.pdf> (Air Force Pamphlet 36-2607).

(c) *Preparation.* Before applying, applicants should:

(1) Review Air Force Pamphlet 36-2607.

(2) Discuss their concerns with MPF, finance office, or other appropriate officials. Errors can often be corrected administratively without resort to the Board.

(3) Exhaust other available administrative remedies (otherwise the Board may return the request without considering it).

(d) *Submitting the application.* Applicants should complete all applicable sections of the DD Form 149, including at least:

(1) The name under which the member served.

(2) The member's social security number or Air Force service number.

(3) The applicant's current mailing address.

(4) The specific records correction being requested.

(5) Proof of proper interest if requesting correction of another person's records.

(6) The applicant's original signature.

(e) Applicants should mail the original signed DD Form 149 and any supporting documents to the Air Force address on the back of the form.

(f) *Meeting time limits.* Ordinarily, applicants must file an application within 3 years after the error or injustice was discovered, or, with due diligence, should have been discovered. In accordance with federal law, time on active duty is not included in the 3 year period. An application filed later is untimely and may be denied by the Board on that basis.

(1) The Board may excuse untimely filing in the interest of justice.

(2) If the application is filed late, applicants should explain why it would be in the interest of justice for the Board to waive the time limits.

(g) *Stay of other proceedings.* Applying to the AFBCMR does not stay other proceedings.

(h) *Counsel representation.* Applicants may be represented by counsel, at their own expense.

(1) The term “counsel” includes members in good standing of the bar of any state, accredited representatives of veterans’ organizations recognized under by the Secretary of Veterans Affairs pursuant to 38 U.S.C. 5902(a)(1), and other persons determined by the Executive Director of the Board to be competent to represent the interests of the applicant.

(2) See DoDD 7050.06, *Military Whistleblower Protection*¹ and AFI 90-301, *Inspector General Complaints Resolution*, for special provisions for counsel in cases processed under 10 U.S.C. 1034.

(i) *Page limitations on briefs.* Briefs in support of applications:

(1) May not exceed 25 double-spaced typewritten pages.

(2) Must be typed on one side of a page only with not more than 12 characters per inch.

(3) Must be assembled in a manner that permits easy reproduction.

(4) Responses to advisory opinions must not exceed 10 double-spaced typewritten pages and meet the other requirements for briefs.

(5) These limitations do not apply to supporting documentary evidence.

(6) In complex cases and upon request, the Executive Director of the Board may waive these limitations.

(j) *Withdrawing applications.* Applicants may withdraw an application at any time before the Board’s decision. Withdrawal does not stay the 3-year time limit.

(k) *Authority to reject applications.* The Executive Director may return an application without action, if, after consultation with legal counsel, he or she determines that the application is clearly frivolous, or the remedy that is requested is beyond the authority of the Board. This authority may not be delegated.

¹Available via the Internet at <http://www.dtic.mil/whs/directives/corres/pdf/705006p.pdf>.

§ 865.4 Board actions.

(a) *Board information sources.* The applicant has the burden of providing sufficient evidence of material error or injustice. However, the Board:

(1) May get additional information and advisory opinions on an application from any Air Force organization or official.

(2) May ask the applicant to furnish additional information regarding matters before the Board.

(b) Applicants will be given an opportunity to review and comment on advisory opinions and additional information obtained by the Board. They will also be provided with a copy of correspondence to or from the Air Force Review Boards Agency with an entity outside the Air Force Review Boards Agency in accordance with the provisions of 10 U.S.C. 1556.

(c) *Consideration by the Board.* A panel consisting of at least three board members considers each application. One panel member serves as its chair. The panel’s actions and decisions constitute the actions and decisions of the Board.

(d) The panel may decide the case in executive session or authorize a hearing. When a hearing is authorized, the procedures in §865.4(f), of this part, apply.

(e) *Board deliberations.* Normally only members of the Board and Board staff will be present during deliberations. The panel chair may permit observers for training purposes or otherwise in furtherance of the functions of the Board.

(f) *Board hearings.* The Board in its sole discretion determines whether to grant a hearing. Applicants do not have a right to a hearing before the Board.

(1) The Executive Director will notify the applicant or counsel, if any, of the time and place of the hearing. Written notice will be mailed 30 days in advance of the hearing unless the notice period is waived by the applicant. The applicant will respond not later than 15 days before the hearing date, accepting or declining the offer of a hearing and, if accepting, provide information pertaining to counsel and witnesses. The Board will decide the case in executive

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session if the applicant declines the hearing or fails to appear.

(2) When granted a hearing, the applicant may appear before the Board with or without counsel and may present witnesses. It is the applicant's responsibility to notify witnesses, arrange for their attendance at the hearing, and pay any associated costs.

(3) The panel chair conducts the hearing, maintains order, and ensures the applicant receives a full and fair opportunity to be heard. Formal rules of evidence do not apply, but the panel observes reasonable bounds of competency, relevancy, and materiality. Witnesses other than the applicant will not be present except when testifying. Witnesses will testify under oath or affirmation. A recorder will record the proceedings verbatim. The chair will normally limit hearings to 2 hours but may allow more time if necessary to ensure a full and fair hearing.

(4) Additional provisions apply to cases processed under 10 U.S.C. 1034. See DoDD 7050.06, *Military Whistleblower Protection*², and AFI 90-301, *Inspector General Complaints Resolution*.

(g) The Board will not deny or recommend denial of an application on the sole ground that the issue already has been decided by the Secretary of the Air Force or the President of the United States in another proceeding.

(h) *Board decisions.* The panel's majority vote constitutes the action of the Board. The Board will make determinations on the following issues in writing:

(1) Whether the provisions of the Military Whistleblowers Protection Act apply to the application. This determination is needed only when the applicant invokes the protection of the Act, or when the question of its applicability is otherwise raised by the evidence.

(2) Whether the application was timely filed and, if not, whether the applicant has demonstrated that it would be in the interest of justice to excuse the untimely filing. When the Board determines that an application is not timely, and does not excuse its untimeli-

ness, the application will be denied on that basis.

(3) Whether the applicant has exhausted all available and effective administrative remedies. If the applicant has not, the application will be denied on that basis.

(4) Whether the applicant has demonstrated the existence of a material error or injustice that can be remedied effectively through correction of the applicant's military record and, if so, what corrections are needed to provide full and effective relief.

(5) In Military Whistleblowers Protection Act cases only, whether to recommend to the Secretary of the Air Force that disciplinary or administrative action be taken against any Air Force official whom the Board finds to have committed an act of reprisal against the applicant. Any determination on this issue will not be made a part of the Board's record of proceedings and will not be given to the applicant, but will be provided directly to the Secretary of the Air Force under separate cover (Sec 865.2b, of this part).

(i) *Record of proceedings.* The Board staff will prepare a record of proceedings following deliberations which will include:

(1) The name and vote of each Board member.

(2) The application.

(3) Briefs and written arguments.

(4) Documentary evidence.

(5) A hearing transcript if a hearing was held.

(6) Advisory opinions and the applicant's related comments.

(7) The findings, conclusions, and recommendations of the Board.

(8) Minority reports, if any.

(9) Other information necessary to show a true and complete history of the proceedings.

(j) *Minority reports.* A dissenting panel member may prepare a minority report which may address any aspect of the case.

(k) *Separate communications.* The Board may send comments or recommendations to the Secretary of the Air Force as to administrative or disciplinary action against individuals found to have committed acts of reprisal prohibited by the Military Whistleblowers Protection Act and on other

²Copies may be obtained via the Internet at <http://www.dtic.mil/whs/directives/corres/pdf/705006p.pdf>.

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matters arising from an application not directly related to the requested correction of military records. Such comments and recommendations will be separately communicated and will not be included in the record of proceedings or given to the applicant or counsel.

(1) *Final action by the Board.* The Board acts for the Secretary of the Air Force and its decision is final when it:

(1) Denies any application (except under 10 U.S.C. 1034).

(2) Grants any application in whole or part when the relief was recommended by the official preparing the advisory opinion, was unanimously agreed to by the panel, and does not affect an appointment or promotion requiring confirmation by the Senate, and does not affect a matter for which the Secretary of the Air Force or his or her delegee has withheld decision authority or required notification before final decision.

(3) The Board sends the record of proceedings on all other applications to the Secretary of the Air Force or his or her designee for final decision.

(m) The Board may identify DoD or Air Force policies, instructions, guidance or practices that are leading to, or likely to lead to unsound business decisions, unfair results, waste of government funds or public criticism. The Board will forward such observations directly to the appropriate offices of the Secretariat and/or Air Staff for review and evaluation. Such observations will not be included in the record of proceedings.

§ 865.5 Decision of the Secretary of the Air Force.

(a) The Secretary may direct such action as he or she deems appropriate on each case, including returning the case to the Board for further consideration. Cases returned to the Board for further reconsideration will be accompanied by a brief statement of the reasons for such action. If the Secretary does not accept the Board's recommendation, the Secretary's decision will be in writing and will include a brief statement of the grounds for his/her final decision.

(b) *Decisions in cases under the Military Whistleblowers Protection Act.* The

Secretary will issue decisions on such cases within 180 days after receipt of the case and will, unless the full relief requested is granted, inform applicants of their right to request review of the decision by the Secretary of Defense (SecDef). Applicants will also be informed:

(1) Of the name and address of the official to whom the request for review must be submitted.

(2) That the request for review must be submitted within 90 days after receipt of the decision by the Secretary of the Air Force.

(3) That the request for review must be in writing and include the applicant's name, address, and telephone number; a copy of the application to the AFBCMR and the final decision of the Secretary of the Air Force; and a statement of the specific reasons the applicant is not satisfied with the decision of the Secretary of the Air Force.

(4) That the request must be based on the Board record; requests for review based on factual allegations or evidence not previously presented to the Board will not be considered under this paragraph but may be the basis for reconsideration by the Board under § 865.6.

(c) In cases under § 865.5(b) of this part which involve additional issues not cognizable under that paragraph, the additional issues may be considered separately by the Board under § 865.3 and § 865.4 of this part. The special time limit in § 865.5 (b) does not apply to the decision concerning these additional issues.

(d) *Decisions in high profile or sensitive cases.* Prior to taking final action on a BCMR application that has generated, or is likely to generate, significant public or Congressional interest, the Secretarial designee will provide the case record of proceedings through Secretarial channels to OSAF so that the Secretary can determine whether to decide the case personally or take other action the Secretary deems appropriate.

§ 865.6 Reconsideration of applications.

(a) The Board may reconsider an application if the applicant submits newly discovered relevant evidence

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that was not reasonably available when the application was previously considered. The Executive Director or Team Chiefs will screen each request for reconsideration to determine whether it contains new evidence. New arguments about, or analysis of, evidence already considered, and additional statements which are cumulative to those already in the record of proceedings will not be considered new evidence.

(b) If the request contains new evidence, the Executive Director or his/her designee will refer it to a panel of the Board for a decision. The Board will decide the relevance and weight of any new evidence, whether it was reasonably available to the applicant when the application was previously considered, and whether it was submitted in a timely manner. The Board may deny reconsideration if the request does not meet the criteria for reconsideration. Otherwise the Board will reconsider the application and decide the case either on timeliness or merit as appropriate.

(c) If the request does not contain new evidence, the Executive Director or his/her designee will return it to the applicant without referral to the Board.

§ 856.7 Action after final decision.

(a) *Action by the Executive Director.* The Executive Director or his/her designee will inform the applicant or counsel, if any, of the final decision on the application. If any requested relief was denied, the Executive Director will advise the applicant of reconsideration procedures and, for cases processed under the Military Whistleblowers Protection Act, review by the SecDef. The Executive Director will send decisions requiring corrective action to the Chief of Staff, U.S. Air Force, for necessary action.

(b) *Settlement of claims.* The Air Force is authorized, under 10 U.S.C. 1552, to pay claims for amounts due to applicants as a result of correction of military records.

(1) The Executive Director will furnish the Defense Finance and Accounting Service (DFAS) with AFBCMR decisions potentially affecting monetary entitlement or benefits. DFAS will

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treat such decisions as claims for payment by or on behalf of the applicant.

(2) DFAS settles claims on the basis of the corrected military record. Computation of the amount due, if any, is a function of DFAS. Applicants may be required to furnish additional information to DFAS to establish their status as proper parties to the claim and to aid in deciding amounts due.

(3) Earnings received from civilian employment during any period for which active duty pay and allowances are payable will be deducted from the settlement. Amounts found due will be offset by the amount of any existing indebtedness to the government in compliance with the Debt Collection Act of 1982 or successor statutes.

(c) *Public access to decisions.* After deletion of personal information, AFBCMR decisions will be made available for review and copying at an electronic public reading room.

§ 865.8 Miscellaneous provisions.

(a) At the request of the Board, all Air Force activities and officials will furnish the Board with:

(1) All available military records pertinent to an application.

(2) An advisory opinion concerning an application. The advisory opinion will include an analysis of the facts of the case and of the applicant's contentions, a statement of whether or not the requested relief can be done administratively, and a recommendation on the timeliness and merit of the request. Regardless of the recommendation, the advisory opinion will include instructions on specific corrective action to be taken if the Board grants the application.

(b) *Access to records.* Applicants will have access to all records considered by the Board, except those classified or privileged. To the extent practicable, applicants will be provided unclassified or nonprivileged summaries or extracts of such records considered by the Board.

(c) *Payment of expenses.* The Air Force has no authority to pay expenses of any kind incurred by or on behalf of an applicant in connection with a correction of military records under 10 U.S.C. 1034 or 1552.

(d) *Form adopted:* DD Form 149.

Subpart B—Air Force Discharge Review Board

AUTHORITY: Sec. 8012, 70A Stat. 488; sec. 1553, 72 Stat. 1267, 10 U.S.C. 8012, 1553.

SOURCE: 48 FR 37384, Aug. 18, 1983, unless otherwise noted.

§ 865.100 Purpose.

This subpart establishes policies for the review of discharges and dismissals under 32 CFR part 70, "Discharge Review Boards Procedures and Standards," 47 FR 37770, August 26, 1982. 1982, and explains the jurisdiction, authority, and actions of the Air Force Discharge Review Board. It applies to all Air Force activities. This subpart is affected by the Privacy Act of 1974. The system of records cited in this subpart is authorized by 10 U.S.C. 1553 and 8012. Each data gathering form or format which is required by this subpart contains a Privacy Act Statement, either incorporated in the body of the document or in a separate statement accompanying each such document.

§ 865.101 References.

- (a) Title 10 U.S.C., section 1553.
- (b) Title 38 U.S.C., sections 101 and 3103, as amended by Pub. L. 95-126, October 8, 1977.
- (c) DOD Directive 5000.19, "Policies for the Management and Control of Information Requirements," March 12, 1976.
- (d) DOD Directive 5000.11, "Data Elements and Data Codes Standardization Program," December 7, 1964.
- (e) DOD Directive 5000.12-M "DOD Manual for Standard Data Elements," December 1981.
- (f) DOD Directive 1332.14, "Enlisted Administrative Separations," January 28, 1982.
- (g) DOD Directive 5400.7, "DOD Freedom of Information Act Program," March 24, 1980; title 5 U.S.C., section 552.
- (h) DOD Directive 5400.11, "Department of Defense Privacy Program," June 9, 1982; title 5 U.S.C., section 552a.
- (i) Title 10 U.S.C., chapter 47, Uniform Code of Military Justice.
- (j) Wood v. Secretary of Defense, Civ. No. 77-0684 (D.D.C.) (Order, December 3, 1981).

(k) Urban Law Institute of Antioch College, Inc. v. Secretary of Defense, Civ. No. 76-0530, (D.D.C.) (Stipulation of Dismissal, January 31, 1977) (Order and Settlement Agreement, July 30, 1982).

(l) Air Force Regulation 35-41, Vol III, Separation Procedures for USAFR Members, dated October 30, 1975.

(m) Air Force Regulation 36-2, Officer Personnel, Administrative Discharge Procedures, August 2, 1976.

(n) Air Force Regulation 36-3, Officer Personnel, Administrative Discharge Procedures, August 2, 1976.

(o) Air Force Regulation 36-12, Officer Personnel, Administrative Separation of Commissioned Officers and Warrant Officers, July 15, 1977.

(p) Air Force Regulation 39-10, Separation Upon Expiration of Term of Service, for Convenience of Government, Minority, Dependency and Hardship, January 3, 1977.

(q) Air Force Manual 39-12, Separation for Unsuitability, Misconduct, Resignation, or Request for Discharge for the Good of the Service and Procedures for the Rehabilitation Program, September 1, 1966.

(r) Air National Guard Regulation 39-10, Enlisted Personnel-Separation, December 30, 1971.

§ 865.102 Statutory authority.

The Air Force Discharge Review Board (DRB) was established within the Department of the Air Force under section 301 of the Serviceman's Readjustment Act of 1944, as amended (now 10 U.S.C. 1553) and further amended by Pub. L. 95-126 dated October 8, 1977.

§ 865.103 Definition of terms.

(a) *Applicant*. A former member of the Armed Forces who has been dismissed or discharged 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

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member. When the term “applicant” is used in this subpart, 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 former member.

(b) *Complainant.* A former member of the Armed Forces (or the former member’s counsel) who submits a complaint in accordance with §865.121 of this subpart 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 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 subpart 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.

(e) *Discharge review.* The process by which the reason for separation, the procedures followed in accomplishing separation, and characterization of service are evaluated. This includes determinations made under the provisions of title 38 U.S.C. 3103(e)(2).

(f) *Discharge Review Board (DRB).* An administrative board constituted by the Secretary of the Air Force and

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vested with discretionary authority to review discharges and dismissals under the provisions of title 10 U.S.C. 1553.

(g) *Regional Discharge Review Board.* A DRB that conducts discharge reviews in a location outside the National Capital Region (NCR).

(h) *DRB President.* The senior line officer of any DRB convened for the purpose of conducting discharge reviews.

(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) *Record review.* A review of the application, available service records, and additional documents (if any) submitted by the applicant.

(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) *Director, Air Force Personnel Council.* The person designated by the Secretary of the Air Force who is responsible for the supervision of the Discharge Review function.

§ 865.104 Secretarial responsibilities.

The Secretary of the Air Force is responsible for the overall operation of the Discharge Review program within the Department of the Air Force. The following delegation of authority have been made:

(a) To the Office of the Assistant Secretary of the Air Force (Manpower, Reserve Affairs and Installations) to act for the Secretary of the Air Force in all discharge review actions subject to review by the Secretary as specified in §865.113 of this subpart.

(b) To the Director, Air Force Personnel Council, for operation of all phases of the discharge review function and authority to take action in the name of the Secretary of the Air Force in all discharge review actions except those specified in §865.113 of this subpart.

§ 865.105 Jurisdiction and authority.

The DRB has jurisdiction and authority in cases of former military personnel who, at the time of their separation from the Service, were members of the US Army Aviation components (Aviation Section, Signal Corps; Air Service; Air Corps; or Air Forces) prior to September 17, 1947, or the US Air Force. The DRB does not have jurisdiction and authority concerning personnel of other armed services who at the time of their separation, were assigned to duty with the Army Air Forces or the US Air Force.

(a) The DRB's review is based on the former member's available military records, issues submitted by the former member, or his counsel and on any other evidence that is presented to the DRB. The DRB determines whether the type of discharge or dismissal the former member received is equitable and proper; if not, the DRB instructs the USAF Manpower and Personnel Center (AFMPC) to change the discharge reason or to issue a new character of discharge according to the DRB's findings.

(b) The DRB is not authorized to revoke any discharge, to reinstate any person who has been separated from the military service, or to recall any person to active duty.

(c) The DRB, on its own motion, may review a case that appears likely to result in a decision favorable to the former military member, without the member's knowledge or presence. In this case, if the decision is:

(1) Favorable, the DRB directs AFMPC to notify the former member accordingly at the member's last known address.

(2) Unfavorable, the DRB returns the case to the files without any record of formal action; the DRB then reconsiders the case without prejudice in accordance with normal procedures.

§ 865.106 Application for review.

(a) *General.* Applications shall be submitted to the Air Force DRB on DD Form 293, Application for Review of Discharge or Dismissal from the Armed Forces of the United States (OMB Approval No. 0704-0004) 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.

(b) *Timing.* A motion or request for review must be made within 15 years after the date of discharge or dismissal.

(c) *Applicant's responsibilities.* An applicant may request a change in the character of or reason for discharge (or both).

(1) *Character of discharge.* DD Form 293 provides an applicant an opportunity to request a specific change in character of discharge (for example, General Discharge to Honorable Discharge; Under Other Than Honorable Conditions 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 an honorable discharge to Entry Level Separation. A request for review from an applicant who does not have an Honorable Discharge will be treated as a request for a change to an Honorable Discharge unless the applicant requests a specific change to another character of discharge.

(2) *Reason for discharge.* 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 will presume that the request for review does not involve a request for change in the reason for discharge. Under its responsibility to examine the propriety and equity of an applicant's discharge, the DRB will change the reason for discharge if such a change is warranted.

(3) The applicant must ensure that issues submitted to the DRB are consistent with the request for change in discharge set forth in "Board Action Requested" of the DD Form 293. If an ambiguity is created by a difference between an applicant's issue and the requested action, the DRB will respond

to the issue in the context of the action requested in "Board Action Requested." In the case of a Personal Appearance hearing, the DRB will attempt to resolve the ambiguity.

(d) If the member is deceased or mentally incompetent, the spouse, next-of-kin, or legal representative may, as agent for the member, submit the application for the review along with proof of the member's death or mental incompetency.

(e) Applicants forward their requests for review to the USAF Manpower and Personnel Center-mailing address: AFMPC/MPCDOA1, Randolph AFB TX 78150. AFMPC will obtain all available military records of the former members from the National Personnel Records Center.

(f) *Withdrawal of application.* An applicant shall be permitted to withdraw an application without prejudice at any time before the scheduled review.

(g) *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 and should be submitted in accordance with the guidelines of this subpart for submission of issues.

(1) *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.

(2) *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.

(3) *Use of DD Form 293.* DD Form 293 provides applicants with a standard format for submitting issues to the DRB, and its use:

(i) 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;

(ii) Assists the DRB in focusing on those matters considered to be important by an applicant;

(iii) 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 §865.112, and those matters submitted simply as background or supporting materials;

(iv) Provides the applicant with greater rights in the event that the applicant later submits a complaint under §865.121 of this subpart concerning the decisional document.

(v) Reduces the potential for disagreement as to the content of an applicant's issue.

(4) *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 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 in accordance with §§865.111 and 865.112 of this subpart.

(5) *Effective date of the new DD Form 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 application will be returned with a copy of the revised DD Form 293 for reaccomplishment. The DRB will only respond to the issues submitted on the new form in accordance with 32 CFR part 70, 47 FR 37770, August 26, 1982 and this subpart.

(h) *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.

(i) *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 §865.120 of this subpart. The applicant is encouraged to review those standards before submitting any issue upon which the applicant believes a change in discharge should be based. The applicant is also encouraged, but not required, to identify an issue as pertaining to the propriety or the equity of the discharge. This will assist the DRB in assessing the relationship of the issue to propriety or equity under §865.112(d) of this subpart.

(j) *Citation of matter from decisions.* The primary function of the DRB involves the exercise of discretion on a case-by-case basis. Applicants are not required to cite prior decisions as the basis for a change in discharge. If the applicant wishes to bring the 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.

(1) The issue must be set forth or expressly incorporated in the "Applicant's Issue" portion of DD Form 293.

(2) 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.

(3) To insure timely consideration of principles cited from unpublished opinions (including decisions maintained by the Armed Forces Discharge Review Board/Correction Board Reading

Room), the applicant must provide the DRB with copies of such decisions or of the relevant portion of treatise, manual, or similar source in which the principles were discussed. At the applicant's request, such materials will be returned.

(4) If the applicant fails to comply with the requirements above, the decisional document shall note the defect, and shall respond to the issue without regard to the citation.

(k) *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 all materials and information is made.

(1) *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 this part. 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.

(2) *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. This provision does not:

(i) Limit by DRB's authority to question an applicant as to the meaning of such matter;

(ii) Preclude the DRB from developing decisional issues based upon such questions;

(iii) Prevent the applicant from amending or withdrawing such matter any time before the DRB closes the review process for deliberation; or

(iv) Prevent 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.

(3) *Additional Issues Identified During a Hearing.* The following additional

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procedure shall be used during a hearing in order to promote the DRB's understanding of an applicant's presentation. If before closing the hearing for deliberation, the DRB believes that an applicant has presented an issue not listed on DD Form 293, the FRB 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.

(1) *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 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:

(1) Such absence must have been included as part of the basis for the applicant's discharge under other than honorable conditions.

(2) Such absence is computed without regard to the applicant's normal or adjusted expiration of term of service.

§ 865.107 DRB composition and meeting location.

(a) The DRB consists of five members, with the senior line officer acting as the presiding officer. The presiding officer convenes, recesses and adjourns the Board.

(b) In addition to holding hearings in Washington, DC, the DRB, as a convenience to applicants, periodically conducts hearings at selected locations throughout the Continental United States. Reviews are conducted at locations central to those areas with the greatest number of applicants. A continuing review and appraisal is conducted to ensure the selected hearing locations are responsive to a majority of applicants. Administrative details and responsibilities for Regional Boards are outlined in § 865.124.

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§ 865.108 Availability of records and documents.

(a) Before applying for discharge review, potential applicants or their designated representatives may, and are encouraged to obtain copies of their military personnel records by submitting a General Services Administration Standard Form 180, Request Pertaining to Military Records, to the National Personnel Records Center (NPRC) 9700 Page Boulevard, St. Louis, Mo 63132; thus avoiding any lengthy delays in the processing of the application (DD Form 293) and the scheduling of reviews.

(1) Once the application for discharge review (DD Form 293) is submitted, an applicant's military records are forwarded to the DRB where they cannot be reproduced. Submission of a request for an applicant's military records, including a request under the Freedom of Information Act or Privacy Act 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 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.

(2) Applicants and their designated representatives also may examine their military personnel records at the site of their scheduled review before the hearing. The DRB shall notify applicants and their designated representatives of the dates the records are available for examination in their standard scheduling information.

(b) 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.

(c) 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.

(d) The 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.

(1) In any case heard on the 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 (i) of the right to examine such documents or to be provided with copies of documents upon request; (ii) of the date by which such request must be received; and (iii) of the opportunity to respond within a reasonable period of time to be set by the DRB.

(2) 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 reference to source of information and other matters, the disclosure of which, in the opinion of the classifying authority, would be detrimental to the national security interest of the United States. Should preparation of such summary be deemed impracticable by the classifying authority, information

from the classified source shall not be considered by the DRB in its review of the case.

(e) Current Air Force numbered publications may be obtained from the Chief, Central Base Administration at any major Air Force installation or by writing:

HQ USAF/DASJL, Washington, DC 20330

or

DA Military Review Boards Agency, Attention: SPBA (Reading Room), Room 1E520, Washington, DC 20310

§ 865.109 Procedures for hearings.

(a) The applicant is entitled, by law, to appear in person at his or her request before the DRB in open session and to be represented by counsel of his or her own selection. The applicant also may present such witnesses as he or she may desire.

(b) There are two types of reviews. They are:

(1) *Record Review*. A review of the application, available service records, and additional documents (if any) submitted by the applicant.

(2) *Hearing*. A personal appearance before the DRB by the applicant with or without counsel, or by the counsel only.

(c) The Government does not compensate or pay the expenses of the applicant, applicant's witnesses, or counsel.

(d) A summary of the available military records of the applicant is prepared for use by the DRB in the review process. A copy of the summary is available to the applicant and/or his or her counsel, upon request.

(e) When an applicant has requested a personal appearance and/or representation by counsel on the DD Form 293, the DRB sends written notice of the hearing time and place to the applicant and designated counsel. Evidence of such notification will be placed in the applicant's record.

(f) Personal appearance hearings shall be conducted with recognition of the rights of the individual to privacy. Accordingly, presence at hearings of individuals other than those whose presence is required will be limited to persons authorized by the presiding officer and/or expressly requested by the

applicant, subject to reasonable limitations based upon available space.

(g) 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. Applicants and witnesses may present evidence to the DRB panel either in person or by affidavit or through counsel. If an applicant or witness testifies under oath or affirmation, he or she is subject to questioning by Board members.

(h) 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.

(i) *Failure to appear at a hearing or respond to scheduling notice.* (1) Except as otherwise authorized by the Secretary of the Air Force, further opportunity for a personal appearance hearing shall not be made available in the following circumstances to an applicant who has requested a hearing.

(i) When the applicant and/or a designated counsel or representative has been sent a letter containing the date and location of a proposed hearing and fails to make a timely response; or

(ii) When the applicant and/or a designated representative, 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 postponement or withdrawal.

(2) In such cases, the applicant shall be deemed to have waived his/her 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.

(j) *Continuance and postponements.* (1) A continuance of a discharge review hearing may be authorized by the presiding officer of the Board concerned, provided that such continuance is of a reasonable duration and is essential to achieving a full and fair hearing.

Where 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.

(2) 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.

(k) *Reconsideration.* A discharge review shall not be subject to reconsideration except:

(1) Where the only previous consideration of the case was on the motion of the DRB;

(2) When the original discharge review did not involve a personal appearance hearing and a personal appearance is now desired, and the provisions of § 865.109(j) do not apply;

(3) Where changes in discharge policy are announced subsequent to an earlier review of an applicant's discharge, and the new policy is made expressly retroactive;

(4) Where 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 an applicant in such proceeding;

(5) Where an individual is to be represented by a counsel/representative, and was not so represented in any previous consideration of the case.

(6) Where the case was not previously considered under the uniform standards published pursuant to Pub. L. 95-126 and application is made for such consideration within 15 years after the date of discharge; or

(7) On the basis of presentation of new, substantial, relevant evidence not available to the applicant at the time of the original review. The decision as to 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.

§ 865.110 Decision process.

(a) The DRB 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 this regulation.

(b) The presiding officer is responsible for the conduct of the discharge review. The presiding officer shall convene, recess, and adjourn the DRB as appropriate, and shall maintain an atmosphere of dignity and decorum at all times.

(c) Each board member shall act under oath or affirmation requiring careful, objective consideration of the application. They shall consider all relevant material and competent information presented to them by the applicant. In addition, they shall consider all available military records, together with such other records as may be in the files and relevant to the issues before the DRB.

(d) The DRB shall identify and address issues after a review of the following material obtained and presented in accordance with this subpart and 32 CFR part 70: available official military records, documentary evidence submitted by or on behalf of the applicant, presentation of testimony by or on behalf of the applicant, oral or written arguments presented by or on behalf of the applicant, and any other relevant evidence.

(e) Application of Standards:

(1) When the DRB determines that an applicant's discharge was improper, the DRB will determine which reason for discharge should have been assigned based upon the facts and circumstances properly before the discharge authority in view of the regulations governing reasons for discharge at the time the applicant was discharged.

(2) When the board determines that an applicant's discharge was inequitable, any change will be based on the evaluation of the applicant's overall

record of service and relevant regulations.

(f) Voting shall be conducted in closed session, a majority of the five members' votes constituting the DRB's decision.

(g) Details of closed session deliberations of a DRB are privileged information and shall not be divulged.

(h) A formal minority opinion may be submitted in instances of disagreement between members of a board. The opinion must cite findings, conclusions and reasons which are the basis for the opinion. The complete case with the majority and minority recommendations will be submitted to the Director, Air Force Personnel Council.

(i) The DRB may request advisory opinions from staff offices of the Air Force. These opinions are advisory in nature and are not binding on the DRB in its decision making process.

§ 865.111 Response to items submitted as issues by the applicant.

(a) 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 section as if it had been set forth separately by the applicant.

(b) 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.

(c) This section does not preclude 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.

(d) An item submitted as an issue by an applicant in accordance with this regulation shall be addressed as a decisional issue under § 865.112 of this subpart in the following circumstances:

(1) 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

(2) When the DRB does not provide the applicant with the full change in discharge requested, and the decision is

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based in whole or in part on the DRB's disagreement with the merits of an issue submitted by the applicant.

(e) 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 even if that basis is not addressed as an issue by the applicant. No further response is required to other issues submitted by the applicant.

(f) 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 unless one of the following responses is applicable:

(1) *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.

(2) *Citations without principles and facts.* The DRB may state that any issue, which consists of a citation of a previous 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 § 865.106(g)(1) of this part.

(3) *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 § 865.110(d) of this subpart.

(4) *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 § 865.110(d), 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

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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 § 865.112 of this subpart with respect to decisional issues, or it will reject the applicant's position on the basis of § 865.111(f)(1) or § 865.111(f)(2). 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.

§ 865.112 Decisional issues.

(a) 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.

(b) *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.

(c) *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.

(d) *Relationship of an Issue to Propriety or Equity.* (1) If an applicant identifies an issue as pertaining to both propriety and equity, the DRB will consider it under both standards.

(2) 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 § 865.112(d)(4), the DRB is not required to consider such an issue under the equity standards.

(3) 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 § 865.112(e) or § 865.112(f).

(4) 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 § 865.120 of this subpart. 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 § 865.112(h) or § 865.112(i).

(5) 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.

(e) *Change of discharge: Issues of propriety.* If a change in the discharge is warranted under the propriety standards the decisional document shall state that conclusion and list the errors or 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.

(f) *Denial of the full change requested: Issues of propriety.* 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. The decisional document shall list reasons for its conclusion on each issue of propriety under the following guidance:

(1) If a reason is based in whole or in part upon a part, 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.

(2) 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 Air Force 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.

(i) 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.

(ii) 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 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.

(3) 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 § 842.112(f) (1) and (2).

(i) 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).

(ii) 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.

(iii) 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.

(iv) 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.

(v) 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, 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 the Air Force, 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 as such.

(vi) When an applicant's issue contains a general allegation that a certain course of action violated his or her constitutional rights, 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 to 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.

(g) *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.

(h) *Change of discharge: Issues of equity.* If the DRB concludes that a change in the discharge is warranted under equity standards 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.

(i) *Denial of the full change requested: Issues of equity.* 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. The DRB shall list reasons for its conclusions on each issue of equity in accordance with the following:

(1) If a reason is based in whole or in part upon a part, 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.

(2) 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 Air Force 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.

(i) 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.

(ii) 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 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.

(3) 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 § 865.112(i) (1) and (2):

(i) 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).

(ii) 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.

(iii) 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 issues.

(iv) 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.

(v) 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, the DRB shall explain why the applicant's position did not provide a sufficient basis for the change in the discharge requested by the applicant.

(4) 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 factors are expressly raised as an issue by the applicant.

(5) 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.

§ 865.113 Recommendations by the Director of the Personnel Council and Secretarial Review Authority.

(a) The Director of the Personnel Council may forward cases for consideration by the Secretarial Reviewing Authority (SRA) under rules established by the Secretary of the Air Force.

(b) The following categories of discharge review requests are subject to

the review of the Secretary of the Air Force or the Secretary's designee.

(1) Cases in which a minority of the DRB panel requests their submitted opinions be forwarded for consideration (refer to § 865.110(h)).

(2) Cases when required in order to provide information to the Secretary on specific aspects of the discharge review function which are of interest to the Secretary.

(3) Any case which the Director, Air Force Personnel Council believes is of significant interest to the Secretary.

(c) The Secretarial Reviewing Authority is the Secretary of the Air Force or the official to whom he has delegated this authority. The SRA may review the types of cases described above before issuance of the final notification of a decision. Those cases forwarded for review by the SRA shall be considered under the standards set forth in § 865.121 and DOD Directive 1332.28.

(d) There is no requirement that the Director of the Personnel Council submit a recommendation when a case is forwarded to the SRA. If a recommendation is submitted, however, it should be in accordance with the guidelines described below.

(e) Format for Recommendation. If a recommendation is provided, it shall contain the Director's views whether there should be a change in the character of or reason for discharge (or both). If the Director recommends such a change, the particular change to be made shall be specified. The recommendation shall set forth the Director's position on decisional issues submitted by the applicant in accordance with the following:

(1) Adoption of the DRB's Decisional document. The recommendation may state that the Director has adopted the decisional document prepared by the majority. The Director shall ensure that the decisional document meets the requirements of this regulation.

(2) Adoption of the Specific Statements From the Majority. If the Director adopts the views of the majority only in part, the recommendation shall cite the specific matter adopted from the majority. If the Director modifies a statement submitted by the majority,

the recommendation shall set forth the modification.

(3) Response to Issues Not Included in Matter Adopted From the Majority. The recommendation shall set forth the following if not adopted in whole or in part from the majority:

(i) The issues on which the Director's recommendation is based. Each such decisional issue shall be addressed by the Director in accordance with § 865.112 of this subpart.

(ii) The Director's response to items submitted as issues by the applicant under § 865.111 of this subpart.

(iii) 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 Director's recommendation. Each issue shall be addressed in accordance with § 865.112 of this subpart.

(f) Copies of the proposed decisional document on 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) shall be provided to the applicant and counsel or representative, if any. The document will include the Director's recommendation to the SRA, if any. Classified information shall be summarized.

(g) The applicant shall be provided with a reasonable period of time, but not less than 25 days, to submit a rebuttal to the SRA. 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 Director on decisional issues and other clear and specific issues that were submitted by the applicant. The rebuttal shall be based solely on matters in the record when the DRB closed the case for deliberation or in the Director's recommendation.

(h) *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 or representative, 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 Director of the issues raised by the majority or the applicant.

(i) *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.

(1) *The SRA's Decision.* The addendum shall set forth the SRA's decision whether there will be a change in the character of or reason for discharge (or both); if the SRA concludes that a change is warranted, the particular change to be made shall be specified. If the SRA adopts the decision recommended by the DRB or the Director, the decisional document shall contain a reference to the matter adopted.

(2) *Discussion of Issues.* In support of the SRA's decision, the addendum shall set forth the SRA's position on decisional issues, items submitted by an applicant and issues raised by the DRB and the Director. The addendum will state that:

(i) The SRA has adopted the Director's recommendation.

(ii) The SRA has adopted the proposed decisional document prepared by the DRB.

(iii) If the SRA adopts the views of the DRB or the Director only in part, the addendum shall cite the specific statements adopted. If the SRA modifies a statement submitted by the DRB or the Director, the addendum shall set forth the modification.

(3) *Response to Issues Not Included in Master Adopted From the DRB or the Director.* The addendum shall set forth the following if not adopted in whole or in part from the DRB or the Director:

(i) A list of the issues on which the SRA's decision is based. Each such decisional issue shall be addressed by the SRA. This includes reasons for rejecting the conclusion of the DRB or the Director 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.

(ii) The SRA's response to items submitted as issues by the applicant will be in accordance with §865.111 of this subpart.

(4) *Response to Rebuttal.* (i) If the SRA grants the full change in discharge requested by the applicant (or a more favorable change), that fact shall be noted, the decisional document shall be addressed accordingly, and no further response to the rebuttal is required.

(ii) If the SRA does not grant the full change in discharge requested by the applicant (or a more favorable change), the addendum shall list each issue in rebuttal submitted by an applicant and shall set forth the response of the SRA under the following:

(A) If the SRA rejects an issue in rebuttal, the SRA may respond in accordance with the principles in §865.112 of this subpart.

(B) If the matter adopted by the SRA provides a basis for the SRA's rejection of the rebuttal material, the SRA may note that fact and cite the specific matter adopted that responds to the issue in rebuttal.

(C) If the matter submitted by the applicant does not meet the requirements for rebuttal material in paragraph (g) of this section, that fact shall be noted.

(j) *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.

§ 865.114 Decisional document.

(a) A decisional document shall be prepared for each review conducted by the DRB.

(b) At a minimum, the decisional document shall contain:

(1) The date, character of, and reason for discharge or dismissal certificate issued to the applicant upon separation from the military service, including the specific regulatory authority under which the discharge or dismissal certificate was issued.

(2) The circumstances and character of the applicant's service as extracted from military records and information provided by other government authority or the applicant, such as, but not limited to:

(i) Date of enlistment (YYMMDD).

(ii) Period of enlistment.

(iii) Age at enlistment.

(iv) Length of service.

(v) Periods of unauthorized absence.

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(vi) Conduct and efficiency ratings (numerical or narrative).

(vii) Highest rank achieved.

(viii) Awards and decorations.

(ix) Educational level.

(x) Aptitude test scores.

(xi) Incidents of punishment pursuant to Article 15, Uniform Code of Military Justice (including nature and date of offense or punishment).

(xii) Conviction by court-martial.

(xiii) Prior military service and type of discharge received.

(3) 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.

(4) A statement whether the applicant testified, and a list of the type of witnesses, if any, who testified on behalf of the applicant.

(5) A notation whether the application pertained to the character of discharge, the reason for discharge, or both.

(6) The DRB's conclusions on the following:

(i) Whether the character of or the reason for discharge should be changed.

(ii) The specific changes to be made, if any.

(7) 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 § 865.106(g)(4). 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.

(8) The response to items submitted as issues by the applicant under the guidance in § 865.111.

(9) A list of decisional issues and a discussion of such issues under the guidance of § 865.112.

(10) Minority views, if any, when authorized under the rules of the Secretary of the Air Force.

(11) The recommendation of the Director when required by § 865.113.

(12) Any addendum of the SRA when required by § 865.113.

(13) 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 the opinions incorporated by reference shall be appended to the decision and included in the record of proceedings.

(14) A record of the DRB member's names and votes.

(15) Index entries for each decisional issue under appropriate categories listed in the Subject/Category listing.

(16) An authentication of the document by an appropriate official.

§ 865.115 Issuance of decisions following discharge review.

(a) 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 in accordance with § 865.121 of this subpart and of the right to appeal to the Board for the Correction of Military Records. Final notification of decisions shall be issued to the applicant with a copy to the counsel or representative, if any.

(b) 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 the decision, together with a copy of the decisional document.

(c) Notification of HQ AFMPC/MPCDOA1 shall be for the purpose of appropriate action and inclusion of review matter in the military records. Such notification shall bear appropriate certification of completeness and accuracy.

(d) Actions on review by Secretarial Reviewing Authority, when occurring, shall be provided to the applicant and counsel or representative in the same manner as the notification of the review decision.

§ 865.116 Records of DRB proceeding.

(a) When the proceedings in any review have been concluded, a record thereof will be prepared. Records may include written records, electromagnetic records, or a combination thereof.

(b) At a minimum, the record will include the following:

(1) The application for review (DD Form 293).

(2) A record of the testimony in verbatim, summarized, or recorded form at the option of the DRB.

(3) Documentary evidence or copies thereof considered by the DRB other than the military record.

(4) Brief/arguments submitted by or on behalf of the applicant.

(5) Advisory opinions considered by the DRB, if any.

(6) The findings, conclusions, and reasons developed by the DRB.

(7) Notification of the DRB's decision to the cognizant custodian of the applicant's records, or reference to the notification document.

(8) Minority reports, if any.

(9) A copy of the decisional document.

§ 865.117 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 record of the applicant and returned to the custody of the National Personnel Records Center (NPRC), St. Louis, Missouri. If a portion of the original record cannot be stored with the service record, the service record shall contain a notation as to the place where the record is stored.

§ 865.118 Availability of Discharge Review Board documents for public inspection and copying.

(a) A copy of the decisional document prepared in accordance with § 865.114 of this subpart, shall be made available for public inspection and copying promptly after a notice of final decision is sent to the applicant.

(b) To the extent required 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. 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.

(c) The 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 in accordance with § 865.121 of this subpart.

(d) Any other privileged or classified material contained in or appended to any documents required to be furnished the applicant and counsel/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/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.

(e) DRB documents made available for public inspection and copying shall be located in the Armed Forces Discharge Review/Correction Boards Reading Room. The documents shall be indexed in usable and concise form so as to enable the public and those who represent applicants before the DRB 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 and/or reasons for which the DRB or the Secretary of the Air Force granted or denied relief.

(1) The reading file index shall include, in addition to any other items determined by the DRB, the case number, the date, character of, reason for, and authority for the discharge. It shall further include the decisions of the DRB and reviewing authority, if any, and the issues addressed in the statement of findings, conclusions and reasons.

(2) The index shall be maintained at selected permanent locations throughout the United States. This ensures reasonable availability to applicants at least 30 days before a regional board review. The index shall also be made

available at sites selected for regional Boards for such periods as the DRB is present and in operation. An applicant who has requested a regional board review shall be advised in the notice of scheduled hearings.

(3) The Armed Forces Discharge Review/Correction Board Reading Room shall publish indexes quarterly for the DRB. The DRB shall be responsible for timely submission to the Reading Room of individual case information required for update of indexes. These indexes shall be available for public inspection or purchase (or both) at the Reading Room. This information will be provided to applicants in the notice of acceptance of the application.

(4) Correspondence relating to matters under the cognizance of the Reading Room (including request for purchase of indexes) shall be addressed to:

DA Military Review Board Agency, Attention: SFBA (Reading Room), Room 1E520, The Pentagon, Washington DC 20310

§ 865.119 Privacy Act information.

Information protected under the Privacy Act is involved in discharge review functions. The provisions of 32 CFR part 286a will be observed throughout the processing of a request for review of discharge or dismissal.

§ 865.120 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 which aid in determining whether the standards are met shall be historically consistent with criteria for determining honorable service. No factors shall be established which require automatic change or denial of a change in a discharge. Neither the DRB nor the Secretary of the Air Force shall be bound by any methodology of weighing of the factors in reaching a determination. In each case, the DRB or Secretary of the Air Force shall give full, fair, and impartial consideration to all applicable factors prior to reaching a decision. An applicant may not receive a less favorable discharge than that issued at the time of separation. This does not preclude correction of clerical errors.

(b) *Propriety.* A discharge shall be deemed to be proper unless in the course of discharge review, it is determined that:

(1) There exists an error of fact, law, procedures, or discretion associated with the discharge at the time of issuance; and that the rights of the applicant were prejudiced thereby (such error shall constitute prejudicial error, if there is substantial doubt that the discharge would have remained the same if the error had not been made); or

(2) A change in policy by the Air Force made expressly retroactive to the type of discharge under consideration, requires a change in the discharge.

(c) 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.

(d) 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 blind the DRB in its review of subsequent cases because no two cases present the same issues of equity.

(e) 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:

(1) An Under 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;

(2) 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.

(f) The following applies to applicants who received less than fully honorable administrative discharges (between June 21, 1971 and March 2, 1982) because evidence developed by or as a direct result of compulsory urinalysis testing was introduced in the discharge proceedings. Applicants who believe they are members of the above category will so indicate this by writing "CATEGORY W" in block 7 of their DD Form 293. AFMPC/MPCDOA1 will expedite processing these applications to the designated "CATEGORY W" reviewer. For class members the designated reviewer shall either recharacterize the discharge to honorable without any additional proceedings or complete a review to determine whether proper ground exists for the issuance of a less than honorable discharge. If the applicant is determined not to be a class member, the application is returned to normal review procedure channels. If new administrative proceedings are initiated, the former service member must be notified of:

(1) The basis of separation other than drug abuse or use or possession of drugs based upon compelled urinalysis that was specified in the commander's report and upon which the Air Force now seeks to base a less than honorable discharge.

(2) The full complement of procedural protections that are required by current regulations.

(3) Name, address and telephone number of an Area Defense Counsel with whom the former service member has a right to consult, and

(4) The right to participate in the new proceedings to be conducted at the Air Force base nearest the former service member's current address, or to

elect to maintain his or her present character of discharge.

(g) *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 an applicant 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 Air Force; or

(3) In the course of a discharge review, it is determined that a change is warranted based upon consideration of the applicant's military 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) Record 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.

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(I) Length of service during the period which is the subject of the discharge review.

(J) Prior military service and type of discharge received or outstanding post-service conduct to the extent that such matters provide a basis for a more thorough understanding of the performance of the applicant during the period of service which is the subject of the discharge review.

(K) Convictions by court-martial.

(L) Record of non-judicial punishment.

(M) Convictions by civil authorities while a member of the Air Force, reflected in the discharge proceedings or otherwise noted in military records.

(N) Record of periods of unauthorized absence.

(O) Records relating to a discharge in lieu 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 to whether the individual met normal military standards of acceptability for military service and similar indicators of an individual's ability to serve satisfactorily, as well as ability to adjust to the military service.

(B) *Family/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 Actions*. This includes actions by individuals in authority which constitute a clear abuse of such authority and which, 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.

§ 865.121 Complaints concerning decisional documents and index entries.

Former members of the Air Force or their counsel or representative may submit complaints with respect to the decisional document issued in the former member's case.

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(a) All complaints should be processed in accordance with 32 CFR part 70 and should be forwarded to:

Assistant Secretary of Defense, Manpower, Reserve Affairs and Logistics, The Pentagon, Washington, DC 20331

(b) The Air Force Discharge Review Board will respond to all complaints in accordance with 32 CFR part 70.

§ 865.122 Summary of statistics for Discharge Review Board.

The Air Force Discharge Review Board shall prepare and provide to the Deputy Assistant Secretary of Defense (Military Personnel and Force Management) DASD(MP&FM), Office of the ASD(MRA&L), a semiannual report of discharge review actions in accordance with § 865.125.

§ 865.123 Approval of exceptions to directive.

Only the Secretary of the Air Force may authorize or approve a waiver of, or exception to, any part of this subpart.

§ 865.124 Procedures for regional hearings.

Composition of the board for these hearings consists of three members from Washington with augmentation by two members from nearby local Air Force resources. The nearest Air Force installation or Air Force Reserve Unit is tasked to provide two officers to serve as members of the DRB. Active duty members will serve on the board as an additional duty. Reserve members will be on a temporary tour of active duty (TTAD) for the duration of the hearings. Detailed information must be provided to the individuals selected to serve before each hearing date. The administrative staff in Washington processes all cases for regional hearings, establishes hearing dates, and returns the records to the Manpower and Personnel Center at Randolph AFB, Texas, when the case is finalized.

§ 865.125 Report requirement.

Semi-annual reports will be submitted by the 20th day of April and October for the preceding 6-month reporting period (1 October through 31 March

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and 1 April through 30 September). The reporting period will be inclusive from the first through the last days of each reporting period. The report will contain four parts:

(a) Part 1—Regular Cases are all those that are not included in part 2 below.

(b) Part 2—Other cases include the following:

(1) Reconsideration of President Ford's memorandum of 19 January 1977.

(2) Special Discharge Review Program cases.

(3) Statutes of Limitation Cases—those heard under Pub. L. 95-126 by waiver of 10 U.S.C. 1553.

(c) Part 3—Total—combine parts 1 and 2.

(d) Part 4—Cases outstanding include all those eligible cases in which a DD Form 293 has been received but has not been heard by the Discharge Review Board as the reporting date for this report. Reports will be prepared by the Air Force Discharge Review Board and submitted to the Army Discharge Review Board (executive agent for DRB matters).

§ 865.126 Sample report format.

SUMMARY OF STATISTICS FOR AIR FORCE DISCHARGE REVIEW BOARD

RCS: DD-M(SA) 1489

[FY _____]

[_____]

	Record review		Hearing		Total	
	Applied	Number approved	Applied	Number approved	Applied	Number approved
.....
.....

Part 1 Regular Cases.
Part 2 Other.
Part 3 Total.
Part 4 Cases Outstanding.

NOTE: Identify numbers separately for regional DRB hearings. Use of additional footnotes to clarify or amplify the statistic being reported is encouraged.

SUBCHAPTER H [RESERVED]

SUBCHAPTER I—MILITARY PERSONNEL

PARTS 888–888g [RESERVED]

SUBCHAPTER J—CIVILIAN PERSONNEL [RESERVED]

SUBCHAPTER K—MILITARY TRAINING AND SCHOOLS

PART 901—APPOINTMENT TO THE UNITED STATES AIR FORCE ACADEMY

Sec.
901.0 Purpose.

Subpart A—Appointment Policies and Requirements

- 901.1 General policy.
- 901.2 Appointments and nominations.
- 901.3 Categories of nominations for appointment.
- 901.4 Basic eligibility requirements.
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- 901.6 Candidate fitness test requirement.

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- 901.7 Precandidate evaluation.
- 901.8 Congressional and U.S. Possessions categories.
- 901.9 Vice-Presidential category.
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- 901.11 Children of deceased or disabled veterans and children of military or civilian personnel in a missing status category.
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- 901.14 Regular airmen category.
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- 901.16 Superintendent category.
- 901.17 Foreign students category.
- 901.18 Appointment vacancy selection.
- 901.19 Qualified alternate selection.
- 901.20 Notice of nomination.
- 901.21 Notification of selection or nonselection.
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- 901.23 Filling Presidential and airmen nominating categories.
- 901.24 Supply of forms.
- 901.25 Obligation of cadet appointment.
- 901.26 Cadet's oath of allegiance.
- 901.27 Charging of appointees.
- 901.28 OMB approval of information collection requirements.

AUTHORITY: 10 U.S.C., Chapter 903, and 10 U.S.C. 8012, except as otherwise noted.

SOURCE: 51 FR 23221, June 26, 1986, unless otherwise noted.

NOTE: This part is derived from Air Force Regulation 53-10, October 22, 1985.

Part 806 of this chapter states the basic policies and instructions governing the dis-

closure of records and tells members of the public what they must do to inspect or obtain copies of the material referenced herein.

§ 901.0 Purpose.

This part tells civilian and enlisted personnel (including Air Force Reserve and National Guard) the methods of applying and the requirements and procedures for appointing young men and women to the United States Air Force Academy.

NOTE: This part is affected by the Privacy Act of 1974. The systems of records prescribed in this part are authorized by 10 U.S.C., chapter 903; and 10 U.S.C. 8012. Each form that is subject to the provisions of part 806b.5 of this chapter, and is required by this part, contains a Privacy Act Statement either incorporated in the body of the document or in a separate statement accompanying each such document.

Subpart A—Appointment Policies and Requirements

§ 901.1 General policy.

Appointments as U.S. Air Force Academy cadets are offered to those candidates having the strongest potential to become successful career officers. Offers of appointment are made according to the law and guidance provided by HQ USAF to most effectively accomplish the Academy's mission. All candidates are appointed as cadets under the authority of the President; however, an appointment is conditional until the candidate is admitted.

§ 901.2 Appointments and nominations.

Appointments and nominations are based on statutory authority contained in 10 U.S.C., chapter 903. Specific authorities may nominate eligible applicants for appointment vacancies at the Academy. Each applicant must obtain a nomination to receive an appointment. Applicants may apply for a nomination in each category in which they are eligible.

§ 901.3 Categories of nominations for appointment.

All appointees must have a nomination in at least one of the following categories:

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(a) Congressional and U.S. Possessions categories include the following nominating authorities:

(1) U.S. Senators and Representatives.

(2) Delegates in Congress from the District of Columbia, Guam, Virgin Islands, and American Samoa.

(3) Resident Commissioner of Puerto Rico.

(4) Governor of Puerto Rico.

(5) Administrator of the Panama Canal Commission.

(b) Vice-Presidential category.

(c) Presidential competitive category.

(d) Children of deceased or disabled veterans and children of military or civilian personnel in missing status competitive category.

(e) Honor military and honor Naval schools, Air Force Reserve Officers' Training Corps (AFROTC), and Air Force Junior Reserve Officers' Training Corps (AFJROTC) competitive category.

(f) Children of Medal of Honor recipients category.

(g) Air Force enlisted regular competitive category.

(h) Air Force enlisted reserve competitive category.

(i) Superintendent competitive category.

(j) Foreign students competitive category (40 foreign persons designated to receive instruction under 10 U.S.C. 9344).

§ 901.4 Basic eligibility requirements.

Each applicant must meet the following eligibility requirements:

(a) *Age*. Applicants must be at least 17, and not have passed their 22nd birthday on July 1 of the year of entry into the Academy.

(b) *Citizenship*. Except for students sponsored by foreign governments under 10 U.S.C. 9344, applicants must be citizens or nationals of the United States. All incoming cadets must verify citizenship status before admission:

(1) For American-born citizens, certified birth certificate presented to the Director of Admissions (USAF/RRS), U.S. Air Force Academy, Colorado Springs CO 80840-5651 before administration of oath of appointment.

(2) Foreign cadets must present certified copies of certificates of arrival and nationalization or citizenship to USAFA/RRS before administration of oath of appointment.

NOTE: Facsimiles, copies, photographs or otherwise of birth certificate or certificate of citizenship will not be accepted unless properly certified by the raised seal of the issuing authority.

(c) *Domicile*. If nominated by an authority designated in the Congressional and U.S. Possessions categories, the applicant must be domiciled within the constituency of such authority.

(d) *Exemplary standards*. Applicants must be of highest moral character, personal conduct, and integrity. The Academy requires applicants to explain or clarify any of the circumstances below. For any military applicant or nominee whose official records indicate questionable background, commanders furnish the applicable information to USAFA/RRS.

(1) Applicant is or has been a conscientious objector. In this case, an affidavit is required stating that such beliefs and principles have been abandoned so far as they pertain to willingness to bear arms and give full and unqualified military service to the United States.

(2) Any facts that indicate the applicant's appointment may not be consistent with the interests of national security.

(3) Conviction by court-martial of other than a "minor offense" (MCM, 1984, part V, paragraph 1e, page V-1) or conviction of a felony in a civilian court.

(4) Elimination from any officer training program or any preparatory school of the Army, Navy, or Air Force Academies for military inaptitude, indifference, or undesirable traits of character. This includes any person who resigned in lieu of impending charges or who was eliminated by official action.

(5) Habitual alcohol misuse or drug abuse which exceeds the standards of AFR 30-2 is disqualifying.

(6) Any behavior, activity, or association showing the applicant's conduct is incompatible with exemplary standards of personal conduct, moral character, and integrity.

(e) *Marital status.* Applicant must be unmarried. (Any cadet who marries is disenrolled from the Academy.)

(f) *Dependents.* Applicant must not have a legal obligation to support a child, children, or any other person.

NOTE: For the purpose of this regulation, children are defined as the natural children of a parent and adopted children whose adoption proceedings were initiated before their 15th birthday.

(g) *Medical requirements for admission.* Before being admitted to the academy, candidates must take a medical examination and meet the medical standards outlined in AFRs 160-13 and 160-43. All candidates must meet the medical standards specified by the Secretary of the Air Force. Waivers may be granted by the Air Force Academy Command Surgeon. As specified by HQ USAF, most of the candidates admitted to the Academy must meet the eligibility standards for flying training.

§ 901.5 Academic examination requirements.

Before being offered an appointment, candidates must take either the College Board Admission Testing Program (ATP) or the American College Testing Program (ACT) test.

(a) *ATP.* A candidate who elects to use the ATP tests must take the Scholastic Aptitude Tests (SAT). The candidate is encouraged but not required to take achievement tests of English Composition and Level 1 (Standard) Mathematics or Level II (Intensive) Mathematics. (Level 1 recommended for candidates without advanced high school mathematics.)

(b) *ACT.* Candidates who elect to use the ACT tests must take the complete battery of tests: English, mathematics, social studies, and natural sciences.

§ 901.6 Candidate fitness test requirement.

Before being offered an appointment, candidates must take a Candidate Fitness Test (CFT) which consists of exercises designed to measure muscular strength, coordination, and aerobic power. Waivers to the CFT requirement may be granted by the Air Force Academy Director of Athletics if a candidate's participation in high school athletics conflicts with test administration dates and the candidate clearly

demonstrates an acceptable level of physical fitness.

Subpart B—Nomination Procedures and Requirements

§ 901.7 Precandidate evaluation.

The Air Force Academy conducts a precandidate evaluation program as an initial step in the admissions process and as an aid to Members of Congress in screening their applicants for nomination.

(a) Applicants normally are sent a precandidate packet, including USAFA Form 149, Precandidate Questionnaire, with a request for the applicant to provide academic, athletic, leadership, and medical information.

(b) The Academy evaluates the precandidate information and provides an analysis to appropriate congressional offices. Such information gives the nominating authorities an indication of the applicant's potential to qualify for admission and the applicant's self-reported medical status; it does not, however, reflect the applicant's final admission status. It is intended only to aid in selecting the best-qualified applicants for nomination.

(c) Applicants whose evaluation indicates they are fully qualified will be notified and advised to seek a nomination. Individuals whose evaluations reflect areas needing improvement are informed and encouraged to submit additional test scores or information in an effort to meet the qualifying levels.

§ 901.8 Congressional and U.S. Possessions categories.

Individuals who meet the basic eligibility requirements of § 901.4 may apply for a nomination according to their domicile (permanent legal residence).

(a) U.S. Senators, U.S. Representatives, the District of Columbia Delegate to the House of Representatives, and the Resident Commissioner of Puerto Rico are each authorized a quota of five cadets attending the Academy at any one time. If a vacancy occurs in their quota, each may nominate ten candidates to fill each vacancy.

(b) Delegates in Congress from Guam and from the Virgin Islands are each

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authorized a quota of two cadets attending the Academy at any one time. If a vacancy occurs in their quota, each may make ten nominations. Eligible residents may apply for a nomination directly to their Delegate.

(c) The Governor of Puerto Rico, the Delegate from American Samoa, and the Panama Canal Commission Administrator may each have one cadet attending the Academy and each may nominate ten candidates to fill their vacancy.

(1) Applicants domiciled in and natives of Puerto Rico may apply to the Governor of Puerto Rico in addition to the Resident Commissioner.

(2) Applicants domiciled in American Samoa may apply to their Delegate.

(3) Children of civilian personnel of the U.S. Government residing in the Republic of Panama who are citizens of the United States may apply to the Panama Canal Commission Administrator.

(d) Nominating authorities in these categories normally submit their nominations by January 31 for the class entering the following summer.

(1) These nominating authorities may nominate only if a vacancy occurs from their authorized quota of cadets attending the Academy. Vacancies normally occur from graduation or separation of cadets from the Academy. Failure of a member of a graduating class to complete the Academy program with his class does not delay the admission of his or her successor. HQ USAF/DPPA maintains the master records of cadets nominated and appointed, determines vacancies in each nominating authority's quota, and validates nominations submitted by each nominating authority.

(2) These nominating authorities forward their nominations on DD Form 1870, Nomination for Appointment to the U.S. Military Academy, Naval Academy, or Air Force Academy, for each Air Force Academy nominee through HQ USAF/DPPA, Washington, DC 20330-5060, to USAFA/RRS, USAF Academy, Colorado Springs, CO 80840-5651.

§901.9 Vice-Presidential category.

The Vice President of the United States nominates from the United

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States at large, and is authorized a quota of five cadets attending the Academy at any one time. For each vacancy occurring in the quota, ten individuals may be nominated to fill the vacancy. Requests for a nomination are submitted directly to the Vice President no later than October 31. Any individual who meets the basic eligibility requirements of §901.4 may apply to the Vice President for a nomination. The Vice President forwards nominations on DD Form 1870 for each Air Force Academy nominee through HQ USAF/DPPA, Washington, DC 20330-5060, to USAFA/RRS, USAF Academy, Colorado Springs, CO 80840-5651.

§901.10 Presidential category.

Appointments to fill vacancies from this category are made from candidates in order of merit. One hundred appointments are authorized each year.

(a) The child of a Regular or Reserve member of the Armed Forces of the United States is eligible for nomination if:

(1) The parent is on active duty and has completed 8 years of continuous active duty service (other than for training) by July 1 of the year that the candidate would enter the U.S. Air Force Academy; or

(2) The parent was retired with pay or was granted retired or retainer pay (children of reservists retired and receiving pay pursuant to 10 U.S.C., chapter 67, are ineligible); or

(3) The parent died after retiring with pay or died after being granted retired or retainer pay (children of such reservists who were retired and receiving pay pursuant to 10 U.S.C., chapter 67, are ineligible); and

(4) The applicant does not meet the eligibility requirements for the Children of Deceased or Disabled Veterans (CODDV) nomination category. (By law, a person eligible for appointment consideration under the DOCCV category is not a candidate in the Presidential category.)

(b) An eligible individual applies to USAFA/RRS, U.S. Air Force Academy, Colorado Springs, CO 80840-5651. A suggested letter format is included in the precandidate packet. The nominating period opens on May 1 and closes January 31. Applicants do not write directly

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to the President of the United States, since the applications are processed by the Air Force Academy.

NOTE: For the purpose of this category, children are defined as the natural children of a parent and adopted children whose adoption proceedings were initiated before their 15th birthday.

§ 901.11 Children of deceased or disabled veterans and children of military or civilian personnel in a missing status category.

Appointments to fill vacancies from this competitive category are made from candidates in order of merit. Appointments authorized in this category are limited to 65 cadets at the Academy at any one time.

(a) The child of a deceased or disabled member of the Armed Forces of the United States is eligible for nomination if:

(1) The parent was killed in action or died of wounds or injuries received or diseases contracted while in active service or of preexisting injury or disease aggravated by active service; or

(2) The parent has a permanent service-connected disability rated at not less than 100 percent resulting from wounds or injuries received or diseases contracted while in active service, or of preexisting injury or disease aggravated by active service.

(b) The child of a parent who is in "missing status" is eligible if the parent is a member of the Armed Services or a civilian employee in active government service who is officially carried or determined to be absent in a status of missing; missing in action; interned in a foreign country; captured, beleaguered, or besieged by a hostile force; or detained in a foreign country against the person's will.

(c) To request a nomination in this category, an individual submits an application to USAFA/RRS between May 1 and January 31. A suggested letter format is included in the precandidate packet.

NOTE: For the purpose of this category, children are defined as the natural children of a parent and adopted children whose adoption proceedings were initiated before the 15th birthday.

§ 901.12 Honor military and honor Naval schools—AFROTC and AFJROTC category.

Appointments to fill vacancies from this competitive category are made from candidates in order of merit. Twenty appointments are authorized each year.

(a) Honor military and honor Naval schools:

(1) Five honor graduates, or prospective honor graduates, from each designated honor military and honor naval school may be nominated to fill the vacancies allocated to this category. School authorities must certify that each nominee is a prospective honor graduate or an honor graduate, and meets the basic eligibility requirements.

(2) School authorities submit nominees directly to the Academy (USAFA/RRS) using specific nomination forms. Such nominations are submitted no later than January 31 of the entry year. Nominations are not limited to honor graduates of the current year. An individual eligible for nomination in this category applies to the administrative authority of the school involved.

(b) AFROTC and AFJROTC:

(1) Five students from each college or university AFROTC detachment may be nominated to compete for the vacancies allocated in this category.

(i) Students must apply for nomination to the Professor of Aerospace Studies (PAS) who must certify that the applicants meet the basic eligibility requirements and have or will have satisfactorily completed at least 1 year of scholastic work at the time the class for which they are applying enters the Academy.

(ii) The PAS uses the forms provided by the Academy to recommend for nomination the five best-qualified applicants to the president of the educational institution in which the AFROTC detachment is established.

(iii) Nominations from the president of the institution are submitted directly to the Academy (USAFA/RRS) by January 31 of the entry year.

(2) Five students from each high school AFJROTC detachment may be nominated to compete for the vacancies allocated to this category.

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(i) Students must apply for nomination to the Aerospace Science Instructor, who must certify that the applicants meet the basic eligibility requirements and have or will have successfully completed the prescribed AFJROTC program by the end of the school year.

(ii) The Aerospace Science Instructor uses the nomination forms provided by the Academy to recommend for nomination the five best-qualified applicants to the principal of the high school in which the AFJROTC detachment is established.

(iii) Nominations from the principal of the high school are submitted directly to the Academy by January 31 of the entry year.

§ 901.13 Children of Medal of Honor recipients category.

(a) The child of any Medal of Honor recipient who served in any branch of the Armed Forces may apply for nomination. If applicants meet the eligibility criteria and qualify on the entrance examinations, they are admitted to the Academy. Appointments from this category are not limited.

(b) The applicant applies directly to the Academy requesting a nomination in this category. The nominating period opens on May 1 and closes January 31. A suggested letter format is included in the precandidate packet.

NOTE: For the purpose of this category, children are defined as the natural children of a parent and adopted children whose adoption proceedings were initiated before their 15th birthday.

§ 901.14 Regular airmen category.

Appointments to fill vacancies from this competitive category are made from candidates in order of merit. A total of 85 appointments are authorized from this category each year. Applications must be submitted no later than January 31 of the entry year.

(a) Any enlisted member of the Regular component of the Air Force may apply for nomination. Selectees must be in active duty enlisted status when appointed as cadets.

(b) Regular category applicants must arrange to have their high school transcripts submitted to USAFA/RRS. They must also complete AF Form 1786, "Application for Appointment to

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the United States Air Force Academy Under Quota Allotted to Enlisted Members of the Regular and Reserve Components of the Air Force," and submit it to their organization commander who:

(1) Determines if the applicant meets the basic eligibility requirements shown in § 901.4 of this part. If disqualified, the application is returned and the applicant is informed of the reason.

(2) Advises the Consolidated Base Personnel Office (CBPO) to hold any reassignment action of the airman pending selection for an appointment. The CBPO places the airman in assignment availability code (AAC) 05 and coordinates on AF Form 1786. Applicants not selected are reassigned on Academy notification to the CBPO. Applicants to technical school follow-on training (if there is any) or PCS to their end assignment also are reassigned. The initial application package from the technical training center CBPO to USAFA/RRS includes the following information on all pipe-line students: name, SSN, AFSC, course graduation date, follow-on training, and end assignment.

(3) Completes an indorsement and forwards AF Form 1786 through the CBPO to USAFA/RRS, USAF Academy, Colorado Springs CO 80840-5651. The commander's indorsement must include a comprehensive statement of the applicant's character, ability, and motivation to become a career officer. Statements in the application regarding component, length of service, and date of birth must be verified from official records.

§ 901.15 Reserve airmen category.

Appointments to fill vacancies from this competitive category are made from candidates in order of merit. A total of 85 appointments are authorized from this category each year. Applications must be submitted no later than January 31 of the entry year.

(a) Any enlisted member of the Air Force Reserve or the Air National Guard of the United States (ANGUS) may apply for nomination.

(b) A Reserve commissioned officer who satisfactorily completes 1 year of

service in an active Reserve assignment by July 1 of the year in which admission is sought may apply for vacancies in this category. (Reserve commissioned officer on extended active duty (EAD) may apply for vacancies in the Regular competitive category.) If selected, such candidates must have commissioned officer status terminated and be in the enlisted Air Force Reserve before appointment as Air Force Academy cadets. Cadets in this category who are separated from the Air Force Academy without prejudice and under honorable conditions may apply for reappointment as Reserve commissioned officers.

(c) Reserve category applicants must arrange to have their high school transcripts submitted to USAFA/RRS, complete AF Form 1786, and submit it to their organization commander. The organization commander processes the application as outlined in §901.14(b). A Reserve applicant is not placed on active duty to be processed for nomination or appointment to the Air Force Academy.

(d) Reserve airmen on EAD as a result of an honor suspension from the Air Force Academy Cadet Wing must reapply for admission under the procedures specified in §901.14(b). Additionally, the AF Form 1786 which they submit must be endorsed by their wing commander, as well as their squadron commander, and must make specific recommendations about their potential to conform to Cadet Honor Code standards.

§901.16 Superintendent category.

Fifty eligible applicants who have not secured a nomination to the Academy from any other nominating authority may be nominated by the Superintendent. Highly qualified applicants are selected for nomination from the nationwide precandidate program by the Academy. Appointments from this category are made in order of merit from the nationwide pool of qualified alternates to fill the class.

§901.17 Foreign students category.

(a) The Academy is authorized to provide instruction to as many as 40 foreign persons at any one time. Foreign citizens must apply to the govern-

ment of their own country. Coordination with the U.S. Embassy is necessary to ensure all admission and appointment requirements are met. HQ USAF/DPPA effects necessary consultation before nomination invitations are forwarded to each country.

(b) The application must contain complete particulars about the applicant's background and must be submitted as early as possible. Nominations from this category must be received by the Academy by December 31 before their desired summer admission. Applicants in these categories must meet the eligibility and admissions requirements established for all Academy candidates, except the requirement to be a U.S. citizen, and they must be able to read, write, and speak English proficiently.

§901.18 Appointment vacancy selection.

To fill a vacancy in the Vice-Presidential quota or in the quota of a nominating authority in the congressional and U.S. Possessions categories, selections for appointment offers are made according to the following nomination methods.

(a) *The principal numbered-alternate method.* The nominating authority indicates his or her personal preference by designating a principal nominee and listing nine numbered alternate nominees in order of preference, and the appointment is offered to the first fully qualified nominee.

(b) *The principal competitive-alternate method.* The nominating authority designates his or her principal nominee and names up to nine other nominees who are evaluated by the Academy and ranked behind the principal nominee in order of merit. If the principal nominee is fully qualified, that individual is offered the appointment; otherwise, the fully qualified nominee ranked the highest by the Academy is offered the appointment.

(c) *The competitive method.* At the request of the nominating authority, the Academy evaluates the records of all the nominees and ranks them in order of merit. The fully qualified nominee ranked the highest by the Academy is offered the appointment.

§ 901.19 Qualified alternate selection.

Fully qualified candidates not offered appointments in their nominating category are placed in a nationwide pool of qualified alternates. To bring the Cadet Wing up to full strength, additional appointments are selected from this pool in order of merit. The first 150 additional appointments are of individuals having nominations from Members of Congress. Thereafter, three of every four additional appointments are of individuals having nominations from the Vice President, Members of Congress, Delegates to Congress (from the District of Columbia, Virgin Islands, and Guam), Governor of Puerto Rico, Resident Commissioner of Puerto Rico, or Administrator of Panama Canal Commission.

§ 901.20 Notice of nomination.

The Director of Admissions (USAFA/RRS) acknowledges receipt of all applicants' nominations. If not previously received, USAFA/RRS forwards a precandidate questionnaire for completion. If the precandidate questionnaire indicates the potential to qualify for admission to the Academy or the Preparatory School, USAFA/RRS sends the individual a candidate kit which includes: USAFA Form 146, AFA Candidate Personal Data Record; USAFA Form 147, AFA Candidate Activities Record; and USAFA Form 148, AFA Request for Secondary School Transcript; AF Form 2030, Drug Abuse Certificate; and complete processing instructions.

§ 901.21 Notification of selection or nonselection.

(a) Notification of candidates selected for appointment are furnished by USAFA/RRS to HQ USAF/DPPA. HQ USAF/DPPA notifies Members of Congress and the Vice President of offers of appointment. After HQ USAF/DPPA notifies the nominating sources and advises USAFA/RRS that notification has been completed, USAFA/RRS notifies each appointee (civilian, Regular or Reserve service member) by letter, enclosing an acceptance or declination statement form. On receipt of an acceptance statement for each unconditional offer of appointment, USAFA/RRS forwards the completed candidate file to Cadet Examinations and Records

(USAFA/RR). Conditional offers of appointment that have been accepted are held by USAFA/RRS until the conditional factor is resolved—medical status cleared, satisfactory preparatory school or college transcript received, proof of citizenship provided, etc. HQ USAF/DPPA is notified of removal of conditional status from offer of appointment in order to notify nominating sources as stated above. USAFA/RR completes admissions in-processing by:

(1) Forwarding an appointment kit which includes detailed reporting instructions to each appointee.

(2) Issuing invitation to travel orders.

(3) Notifying the Directorate of Cadet Personnel (USAFA/DPYC) of Regular airmen appointees. Regular airmen in technical school completes all phases of training, if time permits, before reporting to the Academy. On graduation, the airmen remain at the technical school in casual status (unless otherwise directed by HQ AFMPC/MPCRAC1) until earliest reporting date for the Academy.

(b) The Department of Defense Medical Examination Review Board (DODMERB) notifies applicants of their medical status. USAFA/RRS informs HQ USAF/DPPA of changes in medical status of candidates offered conditional appointments.

(c) USAFA/RRS notifies each unsuccessful candidate by May 1. For active duty Air Force personnel, the servicing CBPO also is notified and cancels the airman's Assignment Availability Code 05.

§ 901.22 Notification of change of address or station assignment.

The applicant or nominee is personally responsible for notifying USAFA/RRS, USAF Academy, Colorado Springs, CO 80840-5651, of every change of address or station assignment. Notifications from military personnel must include complete name, grade, SSN, and new organization or unit to which assigned.

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§ 901.23 Filling Presidential and air- men nominating categories.

If any of the annual quotas of cadets authorized in the Regular airman, Reserve airman, or Presidential nomination categories are not filled, then candidates from the other two categories may fill the vacancies on a best-qualified basis.

§ 901.24 Supply of forms.

USAFA Forms 146, 147, 148 and 149 are stocked and issued by USAFA/RRS, USAF Academy, Colorado Springs, CO 80840-5651. DD Form 1870 is stocked and issued by the Air Force Academy Activities Group, HQ USAF/DPPA, Washington, DC 20330-5060.

§ 901.25 Obligation of cadet appointment.

(a) A cadet who enters the Air Force Academy directly from civilian status and takes an oath of allegiance as a cadet normally assumes a military service obligation of not less than 6 years nor more than 8 years under 10 U.S.C. 651.

(b) A cadet who enters the Air Force Academy from the Regular or Reserve component of the Air Force and fails to complete the Academy course of instruction reverts to enlisted status to complete any prior service obligation under 10 U.S.C. 516.

(c) If they are minors, cadets are required to sign an agreement with the parent's or guardian's consent that they will fulfill the following obligations:

(1) Complete the Academy course of instruction unless disenrolled from the Academy by competent authority.

(2) Accept an appointment and on graduation serve as a commissioned officer in a Regular component of one of the armed services for 5 years.

(3) Serve as a commissioned officer in the Reserve component until the 8th anniversary if authorized to resign from the Regular component before the 8th anniversary of their graduation.

(4) Be subject to the separation policies in AFR 53-3 and, perhaps, be required to serve on active duty in enlisted status if disenrolled from the Academy before graduation.

(5) Reimburse the U.S. Air Force under regulations prescribed by the

Secretary of the Air Force for the costs of Academy education if the recipient, voluntarily or because of misconduct, fails to complete the period of active duty incurred.

§ 901.26 Cadet's oath of allegiance.

On admission, each appointee (except foreign cadets) will be required to take the following oath of allegiance:

I (name), having been appointed an Air Force cadet in the United States Air Force, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office of which I am about to enter. So Help Me God.

If an appointee refuses to take and subscribe to the oath, the appointment is terminated.

§ 901.27 Charging of appointees.

Appointment of candidates is according to § 901.18. Selecting of the charged cadets from the nominees for each vacancy is accomplished as follows:

(a) *Principal nominee, numbered-alternate method.* Principal, if meeting the admission criteria, is appointed and charged. Otherwise the 1st alternate, if meeting the admission criteria, is appointed and charged or the next succeeding numbered alternate who meets the admission criteria is appointed and charged. In instances where a candidate received two principal nominations from two Congressional sources, the principal normally is charged to the Member of Congress submitting the principal nomination first.

(b) *Principal nominee, competitive-alternate method.* Principal, if meeting the admission criteria, is appointed and charged. All alternates are ranked according to merit. If the principal does not meet admission criteria, the highest ranking alternate is appointed and charged.

(c) *Competitive nominee method.* The group of competitive nominees are evaluated, ranked according to merit, and the highest-ranked nominee, if meeting the admission criteria, is appointed and charged.

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(d) *Multiple Congressional nominations.* For candidates receiving numerous nominations, normally the candidate is charged to the congressional source. If the candidate is nominated by several congressional sources, the candidate normally is charged to the slate of the congressional member where the candidate ranks the highest, unless the candidate is the principal nominee or a numbered alternate.

(e) *Other sources of nomination.* All other candidates not nominated by congressional, Vice-Presidential, or U.S. Possessions who are appointed are charged to that nominating source (Presidential, AFJROTC, AFROTC, CODDV, Medal of Honor, etc.).

(f) *Qualified alternates.* To bring the Cadet Wing up to strength, the qualified alternate appointed according to §901.19 is charged to the Secretary of the Air Force as a qualified alternate. Those candidates having congressional, Vice-Presidential, or U.S. Possessions nominations appear as a qualified alternate for that nominating source.

(g) *Multiple congressional and other sources of nominations.* For appointees

who have multiple nominations, USAFA/RRS determines the appointment category to which they are assigned. Normally a cadet with both congressional and non-congressional nominations is assigned to a congressional authority. Designation of “charged” cadets (those filling a Vice-Presidential, congressional, or U.S. Possessions quota) also is accomplished by USAFA/RRS according to §901.18. USAFA/RRS notifies HQ USAF/DPPA of these assignments which are audited and verified by HQ USAF/DPPA. The Vice Presidential and nominating authorities in Congress and U.S. Possessions are notified of their charged appointees and other nominees who win appointments by HQ USAF/DPPA.

§ 901.28 OMB approval of information collection requirements.

The information collection requirements in this part 901 have been approved by the Office of Management and Budget under control numbers 0701-0026, 0701-0063, 0701-0064, 0701-0066 and 0701-0087.

SUBCHAPTERS L-M [RESERVED]

SUBCHAPTER N—TERRITORIAL AND INSULAR REGULATIONS

PART 935—WAKE ISLAND CODE

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935.165 Floating objects.

AUTHORITY: Sec. 48, Pub. L. 86-624, 74 Stat. 424; E.O. 11048, Sept. 1, 1962, 27 FR 8851, 3 CFR, 1959-1963 Comp., p. 632; agreement between the Department of Interior and Department of the Air Force, dated 19 June 1972, 37 FR 12255; and Secretary of the Air Force Order 111.1, dated 26 April 1999.

SOURCE: 67 FR 16999, Apr. 9, 2002, unless otherwise noted.

Subpart A—General

§ 935.1 Applicability.

(a) The local civil and criminal laws of Wake Island consist of this part and applicable provisions of the laws of the United States.

(b) For the purposes of this part, Wake Island includes Wake, Peale, and Wilkes Islands, and the appurtenant reefs, shoals, shores, bays, lagoons, keys, territorial waters, and superadjacent airspace of them.

§ 935.2 Purpose.

The purpose of this part is to provide—

(a) For the civil administration of Wake Island;

(b) Civil laws for Wake Island not otherwise provided for;

(c) Criminal laws for Wake Island not otherwise provided for; and

(d) A judicial system for Wake Island not otherwise provided for.

§ 935.3 Definitions.

In this part—

(a) *General Counsel* means the General Counsel of the Air Force or his successor in office.

(b) *Commander* means the Commander, Wake Island.

(c) *Commander, Wake Island* means the Commander of Pacific Air Forces or such subordinate commissioned officer of the Air Force to whom he may delegate his authority under this part.

(d) *He* or *his* includes both the masculine and feminine genders, unless the context implies otherwise.

(e) *Judge* includes Judges of the Wake Island Court and Court of Appeals.

§ 935.4 Effective date.

This part was originally applicable at 0000 June 25, 1972. Amendments to this part apply April 10, 2002.

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Subpart B—Civil Administration Authority

§ 935.10 Designation and delegation of authority.

(a) The civil administration authority at Wake Island is vested in the Secretary of the Air Force. That authority has been delegated to the General Counsel of the Air Force with authority to redelegate all or any part of his functions, powers, and duties under this part to such officers and employees of the Air Force as he may designate, but excluding redelegation of the power to promulgate, amend, or repeal this part, or any part thereof. Such redelegation must be in writing and must be in accordance with any applicable Secretary of the Air Force Orders. Such redelegation may be further redelegated subject to such restrictions as the delegating authority may impose. A redelegation may also be made to a commissioned officer serving in another United States military service who exercises military command, but such redelegation must explicitly and specifically list the powers redelegated and shall not include the power or authority to issue permits, licenses, or other outgrants unless individually approved by the Air Force official who made the redelegation. The Commander is the agent of the Secretary, his delegate and designee when carrying out any function, power, or duty assigned under this part.

(b) The authority of the General Counsel to appoint Judges shall not be delegated.

(c) Judges and officers of the court may not redelegate their powers or authorities except as specifically noted in this part.

§ 935.11 Permits.

(a) Permits in effect on the dates specified in § 935.4 continue in effect until revoked or rescinded by the Commander. Permits issued by the Commander shall conform to the requirements of Air Force Instruction 32-9003 (Available from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.). No permit or registration shall be issued under other authority that is inconsistent with this part. The Commander

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may issue island permits or registration for—

(1) Businesses, including any trade, profession, calling, or occupation, and any establishment where food or beverages are prepared, offered, or sold for human consumption.

(2) Self-propelled motor vehicles, except aircraft, including attached trailers.

(3) Vehicle operators.

(4) Boats.

(5) Food handlers.

(6) Drugs, narcotics, and poisons.

(7) Construction.

(8) Burials.

(b) To the extent it is not inconsistent with this part, any permit or registration issued pursuant to Air Force directives or instructions as applicable to Wake Island shall constitute a permit or registration under this section, and no other permit or registration shall be required.

§ 935.12 Functions, powers, and duties.

The Commander may—

(a) Appoint Peace Officers;

(b) Direct the abatement of any public nuisance upon failure of any person to comply with a notice of removal;

(c) Direct sanitation and fire prevention inspections;

(d) Establish records of vital statistics;

(e) Direct the registration and inspections of motor vehicles, boats, and aircraft;

(f) Impose quarantines;

(g) Direct the impoundment and destruction of unsanitary food, fish, or beverages;

(h) Direct the evacuation of any person from a hazardous area;

(i) Commission notaries public;

(j) Establish and maintain a facility for the restraint or confinement of persons and provide for their care;

(k) Direct the removal of any person from Wake Island and prohibit his future presence on the island;

(l) Issue traffic regulations that are not inconsistent with this part, and post traffic signs;

(m) Prohibit the posting, distribution, or public display of advertisements, signs, circulars, petitions, or similar materials, soliciting, picketing, or parading in any public place or area

if he determines it would interfere with public business or endanger the health and safety of persons and property on Wake Island;

(n) Perform or direct any other acts, not inconsistent with this part or applicable laws and regulations, if he considers it necessary for protection of the health or safety of persons and property on Wake Island; and

(o) Issue any order or notice necessary to implement this section. Any order or notice issued pursuant to Air Force directives and instructions as applicable to Wake Island shall constitute an order or notice issued pursuant to this section.

§ 935.13 Revocation or suspension of permits and registrations.

(a) The Commander may revoke or suspend any island permit or registration for cause, with or without notice.

(b) The holder of any revoked or suspended permit or registration may demand a personal hearing before the Commander within 30 days after the effective date of the revocation or suspension.

(c) If a hearing is demanded, it shall be granted by the Commander within 30 days of the date of demand. The applicant may appear in person and present such documentary evidence as is pertinent. The Commander shall render a decision, in writing, setting forth his reasons, within 30 days thereafter.

(d) If a hearing is not granted within 30 days, a written decision is not rendered within 30 days after a hearing, or the applicant desires to appeal a decision, he may, within 30 days after the latest of any of the foregoing dates appeal in writing to the General Counsel, whose decision shall be final.

§ 935.14 Autopsies.

The medical officer on Wake Island, or any other qualified person under his supervision, may perform autopsies upon authorization of the Commander or a Judge of the Wake Island Court.

§ 935.15 Notaries public.

(a) To the extent he considers there to be a need for such services, the Commander may commission one or more residents of Wake Island as notaries

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public. The Commander of Pacific Air Forces may not redelegate this authority.

(b) A person applying for commission as a notary public must be a citizen of the United States and shall file an application, together with evidence of good character and a proposed seal in such form as the Commander requires, with a fee of \$50 which shall be deposited in the Treasury as a miscellaneous receipt.

(c) Upon determining there to be a need for such a service and after such investigation as he considers necessary, the Commander may commission an applicant as a notary public. Commissions shall expire 3 years after the date thereof, and may be renewed upon application upon payment of a fee of \$25.

(d) Judges and the Clerk of the Wake Island Court and the Island Attorney shall have the general powers of a notary public.

§ 935.16 Emergency authority.

During the imminence and duration of any emergency declared by him, the Commander may perform or direct any acts necessary to protect life and property.

Subpart C—Civil Law

§ 935.20 Applicable law.

Civil acts and deeds taking place on Wake Island shall be determined and adjudicated as provided in this part; and otherwise, as provided in the Act of June 15, 1950 (64 Stat. 217) (48 U.S.C. 644a), according to the laws of the United States relating to such an act or deed taking place on the high seas on board a merchant vessel or other vessel belonging to the United States.

§ 935.21 Civil rights, powers, and duties.

In any case in which the civil rights, powers, and duties of any person on Wake Island are not otherwise prescribed by the laws of the United States or this part, the civil rights, powers, and duties as they obtain under the laws of the State of Hawaii will apply to persons on Wake Island.

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Subpart D—Criminal Law

§ 935.30 General.

In addition to any act made criminal in this part, any act committed on Wake Island that would be criminal if committed on board a merchant vessel or other vessel belonging to the United States is a criminal offense and shall be adjudged and punished according to the laws applicable on board those vessels on the high seas.

Subpart E—Petty Offenses

§ 935.40 Criminal offenses.

No person may on Wake Island—

(a) Sell or give an alcoholic beverage manufactured for consumption (including beer, ale, or wine) to any person who is not at least 21 years of age;

(b) Procure for, engage in, aid or abet in, or solicit for prostitution;

(c) Use any building, structure, vehicle, or public lands for the purpose of lewdness, assignation, or prostitution;

(d) Possess or display (publicly or privately) any pornographic literature, film, device, or any matter containing obscene language, that tends to corrupt morals;

(e) Make any obscene or indecent exposure of his person;

(f) Commit any disorderly, obscene, or indecent act;

(g) Commit any act of voyeurism (Peeping Tom);

(h) Enter upon any assigned residential quarters or areas immediately adjacent thereto, without permission of the assigned occupant;

(i) Discard or place any paper, debris, refuse, garbage, litter, bottle, can, human or animal waste, trash, or junk in any public place, except into a receptacle or place designated or used for that purpose;

(j) Commit any act of nuisance;

(k) With intent to provoke a breach of the peace or under such circumstances that a breach of the peace may be occasioned thereby, act in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to any other person;

(l) Be drunk in any public place;

(m) Use any profane or vulgar language in a public place;

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(n) Loiter or roam about Wake Island, without any lawful purpose, at late and unusual hours of the night;

(o) Lodge or sleep in any place without the consent of the person in legal possession of that place;

(p) Grossly waste any potable water;

(q) Being a male, knowingly enter any area, building, or quarters reserved for women, except in accordance with established visiting procedures;

(r) Smoke or ignite any fire in any designated and posted "No Smoking" area, or in the immediate proximity of any aircraft or fueling pit;

(s) Enter any airplane parking area or ramp, unless he is on duty therein, is a passenger under appropriate supervision, or is authorized by the Commander to enter that place;

(t) Interfere or tamper with any aircraft or servicing equipment or facility, or put in motion the engine of any aircraft without the permission of its operator;

(u) Post, distribute, or publicly display advertisements, signs, circulars, petitions, or similar materials, or solicit, picket, or parade in any public place or area where prohibited by the Commander pursuant to § 935.12;

(v) Import onto or keep on Wake Island any plant or animal not indigenous to the island, other than military working dogs or a guide dog for the blind or visually-impaired accompanying its owner; or

(w) Import or bring onto or possess while on Wake Island any firearm, whether operated by air, gas, spring, or otherwise, or explosive device, including fireworks, unless owned by the United States.

Subpart F—Penalties

§ 935.50 Petty offenses.

Whoever is found guilty of a violation of any provision of subpart E of this part is subject to a fine of not more than \$500 or imprisonment of not more than 6 months, or both.

§ 935.51 Motor vehicle violations.

Whoever is found guilty of a violation of subpart N of this part is subject to a fine of not more than \$100, imprisonment of not more than 30 days, or suspension or revocation of his motor

vehicle operator's permit, or any combination or all of these punishments.

§ 935.52 Violations of Subpart O or P of this part.

(a) Whoever is found guilty of a violation of subpart O or P of this part is subject to a fine of not more than \$100, or imprisonment of not more than 30 days, or both.

(b) The penalties prescribed in paragraph (a) of this section are in addition to and do not take the place of any criminal penalty otherwise applicable and currently provided by the laws of the United States.

§ 935.53 Contempt.

A Judge may, in any civil or criminal case or proceeding, punish any person for disobedience of any order of the Court, or for any contempt committed in the presence of the Court, by a fine of not more than \$100, or imprisonment of not more than 30 days, or both.

Subpart G—Judiciary

§ 935.60 Wake Island Judicial Authority.

(a) The judicial authority under this part is vested in the Wake Island Court and the Wake Island Court of Appeals.

(b) The Wake Island Court and the Wake Island Court of Appeals shall each have a seal approved by the General Counsel.

(c) Judges and Clerks of the Courts may administer oaths.

§ 935.61 Wake Island Court.

(a) The trial judicial authority for Wake Island is vested in the Wake Island Court.

(b) The Wake Island Court consists of one or more Judges, appointed by the General Counsel as needed. The term of a Judge shall be for one year, but he may be re-appointed. When the Wake Island Court consists of more than one Judge, the General Counsel shall designate one of the Judges as the Chief Judge who will assign matters to Judges, determine when the Court will sit individually or en banc, and prescribe rules of the Court not otherwise provided for in this Code. If there is only one Judge appointed, that Judge shall be the Chief Judge.

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(c) Sessions of the Court are held on Wake Island or Hawaii at times and places designated by the Chief Judge.

§ 935.62 Island Attorney.

There is an Island Attorney, appointed by the General Counsel as needed. The Island Attorney shall serve at the pleasure of the General Counsel. The Island Attorney represents the United States in the Wake Island Court and in the Wake Island Court of Appeals.

§ 935.63 Public Defender.

There is a Public Defender, appointed by the General Counsel as needed. The Public Defender shall serve at the pleasure of the General Counsel. The Public Defender represents any person charged with an offense under this part who requests representation and who is not able to afford his own legal representation.

§ 935.64 Clerk of the Court.

There is a Clerk of the Court, who is appointed by the Chief Judge. The Clerk shall serve at the pleasure of the Chief Judge. The Clerk maintains a public docket containing such information as the Chief Judge may prescribe, administers oaths, and performs such other duties as the Court may direct. The Clerk is an officer of the Court.

§ 935.65 Jurisdiction.

(a) The Wake Island Court has jurisdiction over all offenses under this part and all actions of a civil nature, cognizable at law or in equity, where the amount in issue is not more than \$1,000, exclusive of interests and costs, but not including changes of name or domestic relations matters.

(b) The United States is not subject to suit in the Court.

(c) The United States may intervene in any matter in which the Island Attorney determines it has an interest.

§ 935.66 Court of Appeals.

(a) The appellate judicial authority for Wake Island is vested in the Wake Island Court of Appeals.

(b) The Wake Island Court of Appeals consists of a Chief Judge and two Associate Judges, appointed by the General Counsel as needed. The term of a judge

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shall be for one year, but he may be re-appointed. The Chief Judge assigns matters to Judges, determines whether the Court sits individually or en banc, and prescribes rules of the Court not otherwise provided for in this part.

(c) Sessions of the Court of Appeals are held in the National Capital Region at times and places designated by the Chief Judge. The Court may also hold sessions at Wake Island or in Hawaii.

(d) A quorum of the Court of Appeals will consist of one Judge when sitting individually and three Judges when sitting en banc.

(e) The address of the Court of Appeals is—Wake Island Court of Appeals, SAF/GC, Room 4E856, 1740 Air Force Pentagon, Washington, DC 20330-1740.

§ 935.67 Clerk of the Court of Appeals.

There is a Clerk of the Court of Appeals, who is appointed by the Chief Judge. The Clerk serves at the pleasure of the Chief Judge. The Clerk maintains a public docket containing such information as the Chief Judge may prescribe, administers oaths, and performs such other duties as the Court directs. The Clerk is an officer of the Court.

§ 935.68 Jurisdiction of the Court of Appeals.

The Court of Appeals has jurisdiction over all appeals from the Wake Island Court.

§ 935.69 Qualifications and admission to practice.

(a) No person may be appointed a Judge, Island Attorney, or Public Defender under this part who is not a member of the bar of a State, Commonwealth, or Territory of the United States or of the District of Columbia.

(b) Any person, other than an officer or employee of the Department of the Air Force, appointed as a Judge, Island Attorney, Public Defender, or to any other office under this part shall, prior to entering upon the duties of that office, take an oath, prescribed by the General Counsel, to preserve, protect, and defend the Constitution of the United States. Such oath may be administered by any officer or employee of the Department of the Air Force.

(c) Civilian officers and employees of the Department of the Air Force may be appointed as a Judge, Island Attorney, Public Defender, or Clerk, as an additional duty and to serve without additional compensation. Officers and employees of the Department of the Air Force, both civilian and military, who serve in positions designated as providing legal services to the Department and who are admitted to practice law in an active status before the highest court of a State, Commonwealth, or territory of the United States, or of the District of Columbia, and are in good standing therewith, are admitted to the Bar of the Wake Island Court and the Wake Island Court of Appeals.

(d) No person may practice law before the Wake Island Court or the Wake Island Court of Appeals who is not admitted to Bar of those courts. Any person admitted to practice law in an active status before the highest court of a State, Commonwealth, or territory of the United States, or of the District of Columbia, and in good standing therewith, may be admitted to the Bar of the Wake Island Court and the Wake Island Court of Appeals. Upon request of the applicant, the Court, on its own motion, may grant admission. A grant of admission by either court constitutes admission to practice before both courts.

Subpart H—Statute of Limitations

§ 935.70 Limitation of actions.

(a) No civil action may be filed more than 1 year after the cause of action arose.

(b) No person is liable to be tried under this part for any offense if the offense was committed more than 1 year before the date the information or citation is filed with the Clerk of the Wake Island Court.

Subpart I—Subpoenas, Wake Island Court

§ 935.80 Subpoenas.

(a) A Judge or the Clerk of the Court shall issue subpoenas for the attendance of witnesses. The subpoena must include the name of the Court and the title, if any, of the proceeding; and

shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The Clerk may issue a subpoena for a party requesting it, setting forth the name of the witness subpoenaed.

(b) A Judge or the Clerk may also issue a subpoena commanding the person to whom it is directed to produce the books, papers, documents, or other objects designated therein. The Court may direct that books, papers, documents, or other objects designated in the subpoena be produced before the Court at a time before the trial or before the time when they are to be offered into evidence. It may, upon their production, allow the books, papers, documents, or objects or portions thereof to be inspected by the parties and their representatives.

(c) Any peace officer or any other person who is not a party and who is at least 18 years of age may serve a subpoena. Service of a subpoena shall be made by delivering a copy thereof to the person named.

(d) The Clerk of the Court shall assess and collect a witness fee of \$40 for each subpoena requested by any party other than the United States, which shall be tendered to the witness as his witness fee together with service of the subpoena. Witnesses subpoenaed by the Island Attorney shall be entitled to a fee of \$40 upon presentment of a proper claim therefor on the United States. No duly summoned witness may refuse, decline, or fail to appear or disobey a subpoena on the ground that the witness fee was not tendered or received.

(e) Upon a showing that the evidence is necessary to meet the ends of justice and that the defendant is indigent, the Public Defender may request the Court to direct the Island Attorney to obtain the issuance of a subpoena on behalf of a defendant in a criminal case. Witnesses so called on behalf of the defendant shall be entitled to the same witness fees as witnesses requested by the Island Attorney.

(f) Subpoenas may be credited only to persons or things on Wake Island.

(g) No person who is being held on Wake Island because of immigration status shall be entitled to a witness

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fee, but shall nevertheless be subject to subpoena like any other person.

Subpart J—Civil Actions

§ 935.90 General.

(a) The Federal Rules of Civil Procedure (28 U.S.C.) apply to civil actions in the Court to the extent the presiding Judge considers them applicable under the circumstances.

(b) There is one form of action called the "Civil Action."

(c) Except as otherwise provided for in this part, there is no trial by jury.

(d) A civil action begins with the filing of a complaint with the Court. The form of the complaint is as follows except as it may be modified to conform as appropriate to the particular action:

IN THE WAKE ISLAND COURT
[Civil Action No. _____]

(Plaintiff) vs. _____,
(Defendant)

Complaint

_____ plaintiff alleges that the defendant is indebted to plaintiff in the sum of \$ _____ that plaintiff has demanded payment of said sum; that defendant has refused to pay; that defendant resides at _____ on Wake Island; that plaintiff resides at _____.

§ 935.91 Summons.

Upon the filing of a complaint, a Judge or Clerk of the Court shall issue a summons in the following form and deliver it for service to a peace officer or other person specifically designated by the Court to serve it:

IN THE WAKE ISLAND COURT
[Civil Action No. _____]

(Plaintiff), vs. _____
(Defendant)

Summons

To the above-named defendant:
You are hereby directed to appear and answer the attached cause at _____ on _____ day of _____ 20____, at _____ -M. and to have with you all books, papers, and witnesses needed by you to establish any defense you have to said claim.

You are further notified that in case you do not appear, judgment will be given against you, for the amount of said claim, together with cost of this suit and the service of this order.

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Dated: _____, 20 _____. (Clerk, Wake Island Court) _____

§ 935.92 Service of complaint.

(a) A peace officer or other person designated by the Court to make service shall serve the summons and a copy of the complaint at Wake Island upon the defendant personally, or by leaving them at his usual place of abode with any adult residing or employed there.

(b) In the case of a corporation, partnership, joint stock company, trading association, or other unincorporated association, service may be made at Wake Island by delivering a copy of the summons and complaint to any of its officers, a managing or general agent, or any other agent authorized by appointment or by law to receive service.

§ 935.93 Delivery of summons to plaintiff.

The Clerk of the Court shall promptly provide a copy of the summons to the plaintiff, together with notice that if the plaintiff fails to appear at the Court at the time set for the trial, the case will be dismissed. The trial shall be set at a date that will allow each party at least 7 days, after the pleadings are closed, to prepare.

§ 935.94 Answer.

(a) The defendant may, at his election, file an answer to the complaint.

(b) The defendant may file a counterclaim, setoff, or any reasonable affirmative defense.

(c) If the defendant elects to file a counterclaim, setoff, or affirmative defense, the Court shall promptly send a copy of it to the plaintiff.

§ 935.95 Proceedings; record; judgment.

(a) The presiding Judge is responsible for the making of an appropriate record of each civil action.

(b) All persons shall give their testimony under oath or affirmation. The Chief Judge shall prescribe the oath and affirmation that may be administered by any Judge or the Clerk of the Court.

(c) Each party may present witnesses and other forms of evidence. In addition, the presiding Judge may informally investigate any controversy, in

or out of the Court, if the evidence obtained as a result is adequately disclosed to all parties. Witnesses, books, papers, documents, or other objects may be subpoenaed as provided for in § 935.80 for criminal cases.

(d) The Court may issue its judgment in writing or orally from the bench. However, if an appeal is taken from the judgment, the presiding Judge shall, within 10 days after it is filed, file a memorandum of decision as a part of the record. The Judge shall place in the memorandum findings of fact, conclusions of law, and any comments that he considers will be helpful to a thorough understanding and just determination of the case on appeal.

§ 935.96 Execution of judgment.

(a) If, after 60 days after the date of entry of judgment (or such other period as the Court may prescribe), the judgment debtor has not satisfied the judgment, the judgment creditor may apply to the Court for grant of execution on the property of the judgment debtor.

(b) Upon a writ issued by the Court, any peace officer may levy execution on any property of the judgment debtor except—

(1) His wearing apparel up to a total of \$300 in value;

(2) His beds, bedding, household furniture and furnishings, stove, and cooking utensils, up to a total of \$300 in value; and

(3) Mechanics tools and implements of the debtor's trade up to a total of \$200 in value.

(c) Within 60 days after levy of execution, a peace officer shall sell the seized property at public sale and shall pay the proceeds to the Clerk of the Court. The Clerk shall apply the proceeds as follows:

(1) First, to the reasonable costs of execution and sale and court costs.

(2) Second, to the judgment.

(3) Third, the residue (if any) to the debtor.

(d) In any case in which property has been seized under a writ of execution, but not yet sold, the property seized shall be released upon payment of the judgment, court costs, and the costs of execution.

§ 935.97 Garnishment.

(a) If a judgment debtor fails to satisfy a judgment in full within 60 days after the entry of judgment (or such other period as the Court may prescribe), the Court may, upon the application of the judgment creditor issue a writ of garnishment directed to any person having money or property in his possession belonging to the judgment debtor or owing money to the judgment debtor. The following are exempt from judgment:

(1) Ninety percent of so much of the gross wages as does not exceed \$200 due to the judgment debtor from his employer.

(2) Eighty percent of so much of the gross wages as exceeds \$200 but does not exceed \$500 due to the judgment debtor from his employer.

(3) Fifty percent of so much of the gross wages as exceeds \$500 due to the judgment debtor from his employer.

(b) The writ of garnishment shall be served on the judgment debtor and the garnishee and shall direct the garnishee to pay or deliver from the money or property owing to the judgment debtor such money or property as the Court may prescribe.

(c) The garnished amount shall be paid to the Clerk of the Court, who shall apply it as follows:

(1) First, to satisfy the costs of garnishment and court costs.

(2) Second, to satisfy the judgment.

(3) Third, the residue (if any) to the judgment debtor.

(d) Funds of the debtor held by the United States are not subject to garnishment.

Subpart K—Criminal Actions

§ 935.100 Bail.

(a) A person who is arrested on Wake Island for any violation of this part is entitled to be released on bail in an amount set by a Judge or Clerk of the Court, which may not exceed the maximum fine for the offense charged. If the defendant fails to appear for arraignment, trial or sentence, or otherwise breaches any condition of bail, the Court may direct a forfeiture of the whole or part of the bail and may on motion after notice to the surety or

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sureties, if any, enter a judgment for the amount of the forfeiture.

(b) The Chief Judge of the Wake Island Court may prescribe a schedule of bail for any offense under this part which the defendant may elect to post and forfeit without trial, in which case the Court shall enter a verdict of guilty and direct forfeiture of the bail.

(c) Bail will be deposited in cash with the Clerk of the Court.

§935.101 Seizure of property.

Any property seized in connection with an alleged offense (unless the property is perishable) is retained pending trial in accordance with the orders of the Court. The property must be produced in Court, if practicable. At the termination of the trial, the Court shall restore the property or the funds resulting from the sale of the property to the owner, or make such other proper order as may be required and incorporate its order in the record of the case. Any item used in the commission of the offense, may, upon order of the Court, be forfeited to the United States. All contraband, which includes any item that is illegal for the owner to possess, shall be forfeited to the United States; such forfeiture shall not relieve the owner from whom the item was taken from any costs or liability for the proper disposal of such item.

§935.102 Information.

(a) Any offense may be prosecuted by a written information signed by the Island Attorney. However, if the offense is one for which issue of a citation is authorized by this part and a citation for the offense has been issued, the citation serves as an information.

(b) A copy of the information shall be delivered to the accused, or his counsel, as soon as practicable after it is filed.

(c) Each count of an information may charge one offense only and must be particularized sufficiently to identify the place, the time, and the subject matter of the alleged offense. It shall refer to the provision of law under which the offense is charged, but any error in this reference or its omission may be corrected by leave of Court at any time before sentence and is not grounds for reversal of a conviction if

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the error or omission did not mislead the accused to his prejudice.

§935.103 Motions and pleas.

(a) Upon motion of the accused at any time after filing of the information or copy of citation, the Court may order the prosecutor to allow the accused to inspect and copy or photograph designated books, papers, documents, or tangible objects obtained from or belonging to the accused, or obtained from others by seizure or process, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable.

(b) When the Court is satisfied that it has jurisdiction to try the accused as charged, it shall require the accused to identify himself and state whether or not he has counsel. If he has no counsel, but desires counsel, the Court shall give him a reasonable opportunity to procure counsel.

(c) When both sides are ready for arraignment, or when the Court determines that both sides have had adequate opportunities to prepare for arraignment, the Court shall read the charges to the accused, explain them (if necessary), and, after the reading or stating of each charge in Court, ask the accused whether he pleads "guilty" or "not guilty". The Court shall enter in the record of the case the plea made to each charge.

(d) The accused may plead "guilty" to any or all of the charges against him, except that the Court may in its discretion refuse to accept a plea of guilty, and may not accept a plea without first determining that the plea is made voluntarily with understanding of the nature of the charge.

(e) The accused may plead "not guilty" to any or all of the charges against him. The Court shall enter a plea of not guilty if the answer of the accused to any charge is such that it does not clearly amount to a plea of guilty or not guilty.

(f) The accused may, at any stage of the trial, with the consent of the Court, change a plea of not guilty to one of guilty. The Court shall then proceed as if the accused had originally pleaded guilty.

§ 935.104 Sentence after a plea of guilty.

If the Court accepts a plea of guilty to any charge or charges, it shall make a finding of guilty on that charge. Before imposing sentence, the Court shall hear such statements for the prosecution and defense, if any, as it requires to enable it to determine the sentence to be imposed. The accused or his counsel may make any reasonable statement he wishes in mitigation or of previous good character. The prosecution may introduce evidence in aggravation, or of bad character if the accused has introduced evidence of good character. The Court shall then impose any lawful sentence that it considers proper.

§ 935.105 Trial.

(a) If the accused pleads not guilty, he is entitled to a trial on the charges in accordance with procedures prescribed in the Rules of Criminal Procedure for the U.S. District Courts (18 U.S.C.), except as otherwise provided for in this part, to the extent the Court considers practicable and necessary to the ends of justice. There is no trial by jury.

(b) All persons shall give their testimony under oath or affirmation. The Chief Judge shall prescribe the oath and affirmation that may be administered by any Judge or the Clerk of the Court.

(c) Upon completion of the trial, the Court shall enter a judgment consisting of a finding or findings and sentence or sentences, or discharge of the accused.

(d) The Court may suspend any sentence imposed, may order the revocation of any Island automobile permit in motor vehicle cases, and may place the accused on probation. It may delay sentencing pending the receipt of any presentencing report ordered by it.

Subpart L—Appeals and New Trials**§ 935.110 Appeals.**

(a) Any party to an action may, within 15 days after judgment, appeal an interlocutory order, issue of law, or judgment, except that an acquittal may not

be appealed, by filing a notice of appeal with the Clerk of the Wake Island Court and serving a copy on the opposing party. Judgment is stayed while the appeal is pending.

(b) Upon receiving a notice of appeal with proof of service on the opposing party, the Clerk shall forward the record of the action to the Wake Island Court of Appeals.

(c) The appellant shall serve on the opposing party and file a memorandum setting forth his grounds of appeal with the Wake Island Court of Appeals within 15 days after the date of the judgment. The appellee may serve and file a reply memorandum within 15 days thereafter. An appeal and the reply shall be deemed to be filed when deposited in the U.S. mail with proper postage affixed, addressed to the Clerk, Wake Island Court of Appeals, at his address in Washington, DC. The period for filing an appeal may be waived by the Court of Appeals when the interests of justice so require.

(d) The Court of Appeals may proceed to judgment on the record, or, if the Court considers that the interests of justice so require, grant a hearing.

(e) The decision of the Court of Appeals shall be in writing and based on the record prepared by the Wake Island Court, on the proceedings before the Court of Appeals, if any be had, and on any memoranda that are filed. If the Court of Appeals considers the record incomplete, the case may be remanded to the Wake Island Court for further proceedings.

(f) The decision of the Court of Appeals is final.

§ 935.111 New trial.

A Judge of the Wake Island Court may order a new trial as required in the interest of justice, or vacate any judgment and enter a new one, on motion made within a reasonable time after discovery by the moving party of matters constituting the grounds upon which the motion for new trial or vacation of judgment is made.

Subpart M—Peace Officers**§ 935.120 Authority.**

Peace officers—

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- (a) Have the authority of a sheriff at common law;
- (b) May serve any process on Wake Island that is allowed to be served under a Federal or State law; the officer serving the process shall execute any required affidavit of service;
- (c) May conduct sanitation or fire prevention inspections;
- (d) May inspect motor vehicles, boats, and aircraft;
- (e) May confiscate property used in the commission of a crime;
- (f) May deputize any member of the Air Force serving on active duty or civilian employee of the Department of the Air Force to serve as a peace officer;
- (g) May investigate accidents and suspected crimes;
- (h) May direct vehicular or pedestrian traffic;
- (i) May remove and impound abandoned or unlawfully parked vehicles, boats, or aircraft, or vehicles, boats, or aircraft interfering with fire control apparatus or ambulances;
- (j) May take possession of property lost, abandoned, or of unknown ownership;
- (k) May enforce quarantines;
- (l) May impound and destroy food, fish, or beverages found unsanitary;
- (m) May be armed;
- (n) May exercise custody over persons in arrest or confinement;
- (o) May issue citations for violations of this part; and
- (p) May make arrests, as provided for in § 935.122.

§ 935.121 Qualifications of peace officers.

Any person appointed as a peace officer must be a citizen of the United States and have attained the age of 18 years. The following persons, while on Wake Island on official business, shall be deemed peace officers: special agents of the Air Force Office of Special Investigations, members of the Air Force Security Forces, agents of the Federal Bureau of Investigation, United States marshals and their deputies, officers and agents of the United States Secret Service, agents of the United States Bureau of Alcohol, Tobacco, and Firearms, agents of the United States Customs Service, and

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agents of the United States Immigration and Naturalization Service.

§ 935.122 Arrests.

- (a) Any person may make an arrest on Wake Island, without a warrant, for any crime (including a petty offense) that is committed in his presence.
- (b) Any peace officer may, without a warrant, arrest any person on Wake Island who violates any provision of this part or commits a crime that is not a violation of this part, in his presence, or that he reasonably believes that person to have committed.
- (c) In making an arrest, a peace officer must display a warrant, if he has one, or otherwise clearly advise the person arrested of the violation alleged, and thereafter require him to submit and be taken before the appropriate official on Wake Island.
- (d) In making an arrest, a peace officer may use only the degree of force needed to effect submission, and may remove any weapon in the possession of the person arrested.
- (e) A peace officer may, whenever necessary to enter any building, vehicle, or aircraft to execute a warrant of arrest, force an entry after verbal warning.
- (f) A peace officer may force an entry into any building, vehicle, or aircraft whenever—
 - (1) It appears necessary to prevent serious injury to persons or damage to property and time does not permit the obtaining of a warrant;
 - (2) To effect an arrest when in hot pursuit; or
 - (3) To prevent the commission of a crime which he reasonably believes is being committed or is about to be committed.

§ 935.123 Warrants.

Any Judge may issue or direct the Clerk to issue a warrant for arrest if, upon complaint, it appears that there is probable cause to believe an offense has been committed and that the person named in the warrant has committed it. If a Judge is not available, the warrant may be issued by the Clerk and executed, but any such warrant shall be thereafter approved or quashed by the first available Judge. The issuing officer shall—

- (a) Place the name of the person charged with the offense in the warrant, or if his name is not known, any name or description by which he can be identified with reasonable certainty;
- (b) Describe in the warrant the offense charged;
- (c) Place in the warrant a command that the person charged with the offense be arrested and brought before the Wake Island Court;
- (d) Sign the warrant; and
- (e) Issue the warrant to a peace officer for execution.

§ 935.124 Release from custody.

The Chief Judge may authorize the Clerk to issue pro forma orders of the Court discharging any person from custody, with or without bail, pending trial, whenever further restraint is not required for protection of persons or property on Wake Island. Persons not so discharged shall be brought before a Judge or U.S. Magistrate as soon as a Judge or Magistrate is available. Judges may discharge defendants from custody, with or without bail or upon recognizance, or continue custody pending trial as the interests of justice and public safety require.

§ 935.125 Citation in place of arrest.

In any case in which a peace officer may make an arrest without a warrant, he may issue and serve a citation if he considers that the public interest does not require an arrest. The citation must briefly describe the offense charged and direct the accused to appear before the Wake Island Court at a designated time and place.

Subpart N—Motor Vehicle Code

§ 935.130 Applicability.

This subpart applies to self-propelled motor vehicles (except aircraft), including attached trailers.

§ 935.131 Right-hand side of the road.

Each person driving a motor vehicle on Wake Island shall drive on the right-hand side of the road, except where necessary to pass or on streets where a sign declaring one-way traffic is posted.

§ 935.132 Speed limits.

Each person operating a motor vehicle on Wake Island shall operate it at a speed—

- (a) That is reasonable, safe, and proper, considering time of day, road and weather conditions, the kind of motor vehicle, and the proximity to persons or buildings, or both; and
- (b) That does not exceed 40 miles an hour or such lesser speed limit as may be posted.

§ 935.133 Right-of-way.

(a) A pedestrian has the right-of-way over vehicular traffic when in the vicinity of a building, school, or residential area.

(b) In any case in which two motor vehicles have arrived at an uncontrolled intersection at the same time, the vehicle on the right has the right-of-way.

(c) If the driver of a motor vehicle enters an intersection with the intent of making a left turn, he shall yield the right-of-way to any other motor vehicle that has previously entered the intersection or is within hazardous proximity.

(d) When being overtaken by another motor vehicle, the driver of the slower vehicle shall move it to the right to allow safe passing.

(e) The driver of a motor vehicle shall yield the right-of-way to emergency vehicles on an emergency run.

§ 935.134 Arm signals.

(a) Any person operating a motor vehicle and making a turn or coming to a stop shall signal the turn or stop in accordance with this section.

(b) A signal for a turn or stop is made by fully extending the left arm as follows:

- (1) Left turn—extend left arm horizontally.
- (2) Right turn—extend left arm upward.
- (3) Stop or decrease speed—extend left arm downward.

(c) A signal light or other device may be used in place of an arm signal prescribed in paragraph (b) of this section if it is visible and intelligible.

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§ 935.135 Turns.

(a) Each person making a right turn in a motor vehicle shall make the approach and turn as close as practicable to the right-hand curb or road edge.

(b) Each person making a left turn in a motor vehicle shall make the approach and turn immediately to the right of the center of the road, except that on multi-lane roads of one-way traffic flow he may make the turn only from the left lane.

(c) No person may make a U-turn in a motor vehicle if he cannot be seen by the driver of any approaching vehicle within a distance of 500 feet.

(d) No person may place a vehicle in motion from a stopped position, or change from or merge into a lane of traffic, until he can safely make that movement.

§ 935.136 General operating rules.

No person may, while on Wake Island—

(a) Operate a motor vehicle in a careless or reckless manner;

(b) Operate or occupy a motor vehicle while he is under the influence of a drug or intoxicant;

(c) Consume an alcoholic beverage (including beer, ale, or wine) while he is in a motor vehicle;

(d) Operate a motor vehicle that is overloaded or is carrying more passengers than it was designed to carry;

(e) Ride on the running board, step, or outside of the body of a moving motor vehicle;

(f) Ride a moving motor vehicle with his arm or leg protruding, except when using the left arm to signal a turn;

(g) Operate a motor vehicle in a speed contest or drag race;

(h) Park a motor vehicle for a period longer than the posted time limit;

(i) Stop, park, or operate a motor vehicle in a manner that impedes or blocks traffic;

(j) Park a motor vehicle in an unposted area, except adjacent to the right-hand curb or edge of the road;

(k) Park a motor vehicle in a reserved or restricted parking area that is not assigned to him;

(l) Sound the horn of a motor vehicle, except as a warning signal;

(m) Operate a tracked or clefted vehicle in a manner that damages a paved or compacted surface;

(n) Operate any motor vehicle contrary to a posted traffic sign;

(o) Operate a motor vehicle as to follow any other vehicle closer than is safe under the circumstances;

(p) Operate a motor vehicle off of established roads, or in a cross-country manner, except when necessary in conducting business;

(q) Operate a motor vehicle at night or when raining on the traveled part of a street or road, without using operating headlights; or

(r) Operate a motor vehicle without each passenger wearing a safety belt; this shall not apply to military combat vehicles designed and fabricated without safety belts.

§ 935.137 Operating requirements.

Each person operating a motor vehicle on Wake Island shall—

(a) Turn off the highbeam headlights of his vehicle when approaching an oncoming vehicle at night; and

(b) Comply with any special traffic instructions given by an authorized person.

§ 935.138 Motor bus operation.

Each person operating a motor bus on Wake Island shall—

(a) Keep its doors closed while the bus is moving with passengers on board; and

(b) Refuse to allow any person to board or alight the bus while it is moving.

§ 935.139 Motor vehicle operator qualifications.

(a) No person may operate a privately owned motor vehicle on Wake Island unless he has an island operator's permit.

(b) The Commander may issue an operator's permit to any person who is at least 18 years of age and satisfactorily demonstrates safe-driving knowledge, ability, and physical fitness.

(c) No person may operate, on Wake Island, a motor vehicle owned by the United States unless he holds a current operator's permit issued by the United States.

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(d) Each person operating a motor vehicle on Wake Island shall present his operator's permit to any peace officer, for inspection, upon request.

§ 935.140 Motor vehicle maintenance and equipment.

(a) Each person who has custody of a motor vehicle on Wake Island shall present that vehicle for periodic safety inspection, as required by the Commander.

(b) No person may operate a motor vehicle on Wake Island unless it is in a condition that the Commander considers to be safe and operable.

(c) No person may operate a motor vehicle on Wake Island unless it is equipped with an adequate and properly functioning—

- (1) Horn;
- (2) Wiper, for any windshield;
- (3) Rear vision mirror;
- (4) Headlights and taillights;
- (5) Brakes;
- (6) Muffler;
- (7) Spark or ignition noise suppressors; and
- (8) Safety belts.

(d) No person may operate a motor vehicle on Wake Island if that vehicle is equipped with a straight exhaust or muffler cutoff.

Subpart O—Registration and Island Permits

§ 935.150 Registration.

(a) Each person who has custody of any of the following on Wake Island shall register it with the Commander.

- (1) A privately owned motor vehicle.
- (2) A privately owned boat.
- (3) An indigenous animal, military working dog, or guide dog for the blind or visually-impaired accompanying its owner.
- (4) A narcotic or dangerous drug or any poison.

(b) Each person who obtains custody of an article described in paragraph (a) (4) of this section shall register it immediately upon obtaining custody. Each person who obtains custody of any other article described in paragraph (a) of this section shall register it within 10 days after obtaining custody.

§ 935.151 Island permit for boat and vehicle.

(a) No person may use a privately owned motor vehicle or boat on Wake Island unless he has an island permit for it.

(b) The operator of a motor vehicle shall display its registration number on the vehicle in a place and manner prescribed by the Commander.

§ 935.152 Activities for which permit is required.

No person may engage in any of the following on Wake Island unless he has an island permit:

(a) Any business, commercial, or recreational activity conducted for profit, including a trade, profession, calling, or occupation, or an establishment where food or beverage is prepared, offered, or sold for human consumption (except for personal or family use).

(b) The practice of any medical profession, including dentistry, surgery, osteopathy, and chiropractic.

(c) The erection of any structure or sign, including a major alteration or enlargement of an existing structure.

(d) The burial of any human or animal remains, except that fish and bait scrap may be buried at beaches where fishing is permitted, without obtaining a permit.

(e) Keeping or maintaining an indigenous animal.

(f) Importing, storing, generating, or disposing of hazardous materials.

(g) Importing of solid wastes and importing, storing, generating, treating, or disposing of hazardous wastes, as they are defined in the Solid Waste Disposal Act, as amended, 42 U.S.C. 6901 *et seq.*, and its implementing regulations (40 CFR chapter I).

Subpart P—Public Safety

§ 935.160 Emergency requirements and restrictions.

In the event of any fire, crash, search and rescue, natural disaster, national peril, radiological hazard, or other calamitous emergency—

(a) No person may impede or hamper any officer or employee of the United States or any other person who has emergency authority;

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(b) No unauthorized persons may congregate at the scene of the emergency; and

(c) Each person present shall promptly obey the instructions, signals, or alarms of any peace officer, fire or crash crew, or other authorized person, and any orders of the Commander.

§ 935.161 Fire hazards.

(a) Each person engaged in a business or other activity on Wake Island shall, at his expense, provide and maintain (in an accessible location) fire extinguishers of the type, capacity, and quantity satisfactory for protecting life and property in the areas under that person's control.

(b) To minimize fire hazards, no person may store any waste or flammable fluids or materials except in a manner and at a place prescribed by the Commander.

§ 935.162 Use of special areas.

The Commander may regulate the use of designated or posted areas on Wake Island, as follows:

(a) Restricted areas—which no person may enter without permission.

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(b) Prohibited activities areas—in which no person may engage in any activity that is specifically prohibited.

(c) Special purpose areas—in which no person may engage in any activity other than that for which the area is reserved.

§ 935.163 Unexploded ordnance material.

Any person who discovers any unexploded ordnance material on Wake Island shall refrain from tampering with it and shall immediately report its site to the Commander.

§ 935.164 Boat operations.

The operator of each boat used at Wake Island shall conform to the limitations on its operations as the Commander may prescribe in the public interest.

§ 935.165 Floating objects.

No person may anchor, moor, or beach any boat, barge, or other floating object on Wake Island in any location or manner other than as prescribed by the Commander.

**SUBCHAPTER O—SPECIAL INVESTIGATION [RESERVED]
SUBCHAPTERS P–S [RESERVED]**

SUBCHAPTER T—ENVIRONMENTAL PROTECTION

PART 989—ENVIRONMENTAL IMPACT ANALYSIS PROCESS (EIAP)

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 - 989.33 Environmental justice.
 - 989.34 Special and emergency procedures.
 - 989.35 Reporting requirements.
 - 989.36 Waivers.
 - 989.37 Procedures for analysis abroad.
 - 989.38 Requirements for analysis abroad.
- APPENDIX A TO PART 989—GLOSSARY OF REFERENCES, ABBREVIATIONS, ACRONYMS, AND TERMS
- APPENDIX B TO PART 989—CATEGORICAL EXCLUSIONS
- APPENDIX C TO PART 989—PROCEDURES FOR HOLDING PUBLIC HEARINGS ON DRAFT ENVIRONMENTAL IMPACT STATEMENTS (EIS)

AUTHORITY: 10 U.S.C. 8013.

SOURCE: 64 FR 38129, July 15, 1999, unless otherwise noted.

§ 989.1 Purpose.

(a) This part implements the Air Force Environmental Impact Analysis

Process (EIAP) and provides procedures for environmental impact analysis both within the United States and abroad. Because the authority for, and rules governing, each aspect of the EIAP differ depending on whether the action takes place in the United States or outside the United States, this part provides largely separate procedures for each type of action. Consequently, the main body of this part deals primarily with environmental impact analysis under the authority of the National Environmental Policy Act of 1969 (NEPA) (Public Law 91-190, 42 United States Code (U.S.C.) Sections 4321 through 4347), while the primary procedures for environmental impact analysis of actions outside the United States in accordance with Executive Order (E.O.) 12114, Environmental Effects Abroad of Major Federal Actions, are contained in §§ 989.37 and 989.38.

(b) The procedures in this part are essential to achieve and maintain compliance with NEPA and the Council on Environmental Quality (CEQ) Regulations for Implementing the Procedural Provisions of the NEPA (40 CFR Parts 1500 through 1508, referred to as the “CEQ Regulations”). Further requirements are contained in Department of Defense Directive (DoDD) 4715.1, Environmental Security, Department of Defense Instruction (DoDI) 4715.9, Environmental Planning and Analysis, DoDD 5000.1, Defense Acquisition, and Department of Defense Regulation 5000.2-R, Mandatory Procedures for Major Defense Acquisition Programs and Major Automated Information System Acquisition Programs.¹ To comply with NEPA and complete the EIAP, the CEQ Regulations and this part must be used together.

(c) Air Force activities abroad will comply with this part, E. O. 12114, and 32 CFR part 187 (DoDD 6050.7, Environmental Effects Abroad of Major Department of Defense Actions, March 31,

¹Copies of the publications are available, at cost, from the National Technical Information Service, U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

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1979). To comply with E.O. 12114 and complete the EIAP, the Executive Order, 32 CFR part 187, and this part must be used together.

(d) Appendix A is a glossary of references, abbreviations, acronyms, and terms. Refer to 40 CFR 1508 for definitions of other terminology used in this part.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001]

§ 989.2 Concept.

(a) This part provides a framework on how to comply with NEPA and E.O. 12114 according to Air Force Policy Directive (AFPD) 32-70². The Air Force specific procedures and requirements in this part are intended to be used by Air Force decision-makers to fully comply with NEPA and the EIAP.

(b) Major commands (MAJCOM) provide additional implementing guidance in their supplemental publications to this part. MAJCOM supplements must identify the specific offices that have implementation responsibility and include any guidance needed to comply with this part. All references to MAJCOMs in this part include the Air National Guard Readiness Center (ANGRC) and other agencies designated as "MAJCOM equivalent" by HQ USAF.

§ 989.3 Responsibilities.

(a) *Office of the Secretary of the Air Force:*

(1) The Deputy Assistant Secretary of the Air Force for Installations (SAF/IEI).

(i) Develops environmental planning policy and provides oversight of the EIAP program.

(ii) Determines the level of environmental analysis required for especially important, visible, or controversial Air Force proposals and approves selected Environmental Assessments (EAs) and all Environmental Impact Statements (EISs) prepared for Air Force actions, whether classified or unclassified, except as specified in paragraph (c)(3) of this section.

(iii) Is the liaison on environmental matters with Federal agencies and na-

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tional level public interest organizations.

(iv) Ensures appropriate offices in the Office of the Secretary of Defense are kept informed on EIAP matters of Defense-wide interest.

(2) The General Counsel (SAF/GC). Provides final legal advice to SAF/IE, HQ USAF, and HQ USAF Environment, Safety and Occupational Health Committee (ESOHC) on EIAP issues.

(3) *Office of Legislative Liaison (SAF/LL):*

(i) Assists with narrowing and defining key issues by arranging consultations with congressional delegations on potentially sensitive actions.

(ii) Distributes draft and final EISs to congressional delegations.

(iii) Reviews and provides the Office of the Secretary of Defense (OSD) with analyses of the Air Force position on proposed and enrolled legislation and executive department testimony dealing with EIAP issues.

(4) *Office of Public Affairs (SAF/PA):*

(i) Reviews and clears environmental documents in accordance with Air Force Instruction (AFI) 35-101, Public Affairs Policies and Procedures³ prior to public release.

(ii) Assists the environmental planning function and the Air Force Legal Services Agency, Trial Judiciary Division (AFLOA/JAJT), in planning and conducting public scoping meetings and hearings.

(iii) Ensures that public affairs aspects of all EIAP actions are conducted in accordance with this part and AFI 35-101.⁴

(iv) The National Guard Bureau, Office of Public Affairs (NGB-PA), will assume the responsibilities of SAF/PA for the EIAP involving the National Guard Bureau, Air Directorate.

(b) Headquarters U.S. Air Force (HQ USAF). The Civil Engineer (HQ USAF/ILE) is responsible for execution of the EIAP program. The National Guard Bureau Air Directorate (NGB-CF) oversees the EIAP for Air National Guard actions.

(c) MAJCOMs, the Air National Guard, Field Operating Agencies (FOAs), and Single Manager Programs.

³See footnote 1 to § 989.1.

⁴See footnote 1 to § 989.1.

²See footnote 1 to § 989.1.

These organizations establish procedures that comply with this part wherever they are the host unit for preparing and using required environmental documentation in making decisions about proposed actions and programs within their commands or areas of responsibility.

(1) Air Force Center for Engineering and the Environment (AFCEE). The AFCEE Technical Directorate, Built Infrastructure Division (AFCEE/TDB) is available to provide technical assistance and has the capability to provide contract support to the proponent, EPF, and MAJCOMs in developing EIAP documents.

(2) Air Force Regional Environmental Offices (REOs). REOs review non-Air Force environmental documents that may have an impact on the Air Force. Requests for review of such documents should be directed to the proper REO (Atlanta, Dallas, or San Francisco) along with any relevant comments. The REO:

(i) Notifies the proponent, after receipt, that the REO is the single point of contact for the Air Force review of the document.

(ii) Requests comments from potentially affected installations, MAJCOMs, the ANG, and HQ USAF, as appropriate.

(iii) Consolidates comments into the Air Force official response and submits the final response to the proponent.

(iv) Provides to HQ USAF/A7CI and the appropriate MAJCOMs and installations a copy of the final response and a complete set of all review comments.

(3) Single Manager Acquisition Programs (system-related NEPA). The proponent Single Manager (i.e., System Program Director, Materiel Group Managers, and Product Group Managers) for all programs, regardless of acquisition category, shall comply with DoD Regulation 5000.2-R. SAF/AQR, as the Air Force Acquisition Executive Office, is the final approval authority for all system-related NEPA documents. SAF/AQR is responsible for accomplishing appropriate Headquarters EPC/ESOHC review. The Single Manager will obtain appropriate Product Center EPC approval prior to forwarding necessary EIAP documents (i.e., Notices of Intent (NOIs) and pre-

liminary draft and final EAs and EISs) to SAF/AQR. The Single Manager will allow for concurrent review of EIAP documents by HQ AFMC/CEV and the Operational Command (HQ ACC, HQ AMC, HQ AFSPC, etc.) The Single Manager is responsible for budgeting and funding EIAP efforts, including EIAP for research, development, testing, and evaluation activities.

(4) *Key Air Force environmental participants*. The EIAP must be approached as an integrated team effort including key participants within the Air Force and also involving outside federal agencies, state, Tribal, and local governments, interested outside parties, citizens groups, and the general public. Key Air Force participants may include the following functional areas, as well as others:

Proponent
Civil Engineers/Environmental Planning Function
Staff Judge Advocate
Public Affairs
Medical Service (Bioenvironmental Engineer)
Safety Office
Range and Airspace Managers
Bases and Units
Plans and Programs
Logistics
Personnel
Legislative Liaison

(d) *Proponent*. Each office, unit, single manager, or activity at any level that initiates Air Force actions is responsible for:

(1) Complying with the EIAP and shall ensure integration of the EIAP during the initial planning stages of proposed actions so that planning and decisions reflect environmental values, delays are avoided later in the process, and potential conflicts are precluded.

(2) Notifying the EPF of a pending action and completing Section I of AF Form 813, Request for Environmental Impact Analysis. Prepare the Description of Proposed Action and Alternatives (DOPAA) through an interdisciplinary team approach including the EPF and other key Air Force participants.

(3) Identifying key decision points and coordinating with the EPF on EIAP phasing to ensure that environmental documents are available to the

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decision-maker before the final decision is made and ensuring that, until the EIAP is complete, resources are not committed prejudicing the selection of alternatives nor actions taken having an adverse environmental impact or limiting the choice of reasonable alternatives.

(4) Determining, with the EPF, as early as possible whether to prepare an EIS. The proponent and the EPF will conduct an early internal scoping process as part of the EIAP process. The internal scoping process should involve key Air Force environmental participants (see § 989.3(c)(4)) and other Air Force offices as needed and conclude with preparation of a DOPAA. For complex or detailed EAs or EISs, an outside facilitator trained in EIAP may be used to focus and guide the discussion. Department of the Air Force personnel, rather than contractors, should generally be used to prepare the DOPAA.

(5) Presenting the DOPAA to the EPC for review and comment.

(6) Coordinating with the EPF, Public Affairs, and Staff Judge Advocate prior to organizing public or inter-agency meetings which deal with EIAP elements of a proposed action and involving persons or agencies outside the Air Force.

(7) Subsequent to the decision to prepare an EIS, assisting the EPF and Public Affairs Office in preparing a draft NOI to prepare an EIS. All NOIs must be forwarded through the MAJCOM EPF to HQ USAF/A7CI for review and publication in the FEDERAL REGISTER. Publication in the FEDERAL REGISTER is accomplished in accordance with AFI 37-120, FEDERAL REGISTER.⁵ (See § 989.17.)

(8) Ensuring that proposed actions are implemented as described in the final EIAP decision documents.

(e) *Environmental Planning Function (EPF)*. At every level of command, the EPF is one of the key Air Force participants responsible for the EIAP. The EPF can be the environmental flight within a civil engineer squadron, a separate environmental management office at an installation, the CEV at MAJCOMs, or an equivalent environ-

mental function located with a program office. The EPF:

(1) Supports the EIAP by bringing key participants in at the beginning of a proposed action and involving them throughout the EIAP. Key participants play an important role in defining and focusing key issues at the initial stage.

(2) At the request of the proponent, prepares environmental documents using an interdisciplinary approach, or obtains technical assistance through Air Force channels or contract support. Assists the proponent in obtaining review of environmental documents.

(3) Assists the proponent in preparing a DOPAA and actively supports the proponent during all phases of the EIAP.

(4) Evaluates proposed actions and completes Sections II and III of AF Form 813, subsequent to submission by the proponent and determines whether a Categorical Exclusion (CATEX) applies. The responsible EPF member signs the AF Form 813 certification.

(5) Identifies and documents, with technical advice from the Bioenvironmental Engineer and other staff members, environmental quality standards that relate to the action under evaluation.

(6) Supports the proponent in preparing environmental documents, or obtains technical assistance through Air Force channels or contract support and adopts the documents as official Air Force papers when completed and approved.

(7) Ensures the EIAP is conducted on base-level and MAJCOM-level plans, including contingency plans for the training, movement, and operations of Air Force personnel and equipment.

(8) Prepares the NOI to prepare an EIS with assistance from the proponent and the Public Affairs Office.

(9) Prepares applicable portions of the Certificate of Compliance for each military construction project according to AFI 32-1021, Planning and Programming of Facility Construction Projects.⁶

(10) Submits one hard copy and one electronic copy of the final EA/Finding of No Significant Impact (FONSI) and

⁵See footnote 1 to § 989.1.

⁶See footnote 1 to § 989.1.

EIS/Record of Decision (ROD) to the Defense Technical Information Center.

(f) *Environment, Safety, and Occupational Health Council (ESOHC)*. The ESOHC provides senior leadership involvement and direction at all levels of command in accordance with AFI 90-801, Environment, Safety, and Occupational Health Councils, 25 March 2005.

(g) *Staff Judge Advocate (SJA)*. The Staff Judge Advocate:

(1) Advises the proponent, EPF, and EPC on CATEX determinations and the legal sufficiency of environmental documents.

(2) Advises the EPF during the scoping process of issues that should be addressed in EISs and on procedures for the conduct of public hearings.

(3) Coordinates the appointment of the independent hearing officer with AFLOA/JAJT and provides support for the hearing officer in cases of public hearings on the draft EIS. The proponent pays administrative and Temporary Duty (TDY) costs. The hearing officer presides at hearings and makes final decisions regarding hearing procedures.

(4) Promptly refers all matters causing or likely to cause substantial public controversy or litigation through channels to AFLOA/JACE (or NGB-JA).

(h) *Public Affairs Officer*. This officer:

(1) Advises the EPF, the EPC, and the proponent on public affairs activities on proposed actions and reviews environmental documents for public involvement issues.

(2) Advises the EPF of issues and competing interests that should be addressed in the EIS or EA.

(3) Assists in preparation of and attends public meetings or media sessions on environmental issues.

(4) Prepares, coordinates, and distributes news releases and other public information materials related to the proposal and associated EIAP documents.

(5) Notifies the media (television, radio, newspaper) and purchases advertisements when newspapers will not run notices free of charge. The EPF will fund the required advertisements.

(6) Determines and ensures Security Review requirements are met for all information proposed for public release.

(7) For more comprehensive instructions about public affairs activities in

environmental matters, see AFI 35-101.⁸

(i) *Medical Service*. The Medical Service, represented by the Bioenvironmental Engineer, provides technical assistance to EPFs in the areas of environmental health standards, environmental effects, and environmental monitoring capabilities. The Air Force Armstrong Laboratory, Occupational and Environmental Health Directorate, provides additional technical support.

(j) *Safety Office*. The Safety Office provides technical review and assistance to EPFs to ensure consideration of safety standards and requirements.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001; 72 FR 37106, July 9, 2007; 79 FR 35286, June 20, 2014]

§ 989.4 Initial considerations.

Air Force personnel will:

(a) Consider and document environmental effects of proposed Air Force actions through AF Forms 813, EAs, FONSIIs, EISs, RODs, and documents prepared according to E.O. 12114.

(b) Evaluate proposed actions for possible CATEX from environmental impact analysis (appendix B).

(c) Make environmental documents, comments, and responses, including those of other federal agencies, state, Tribal, and local governments, and the public, part of the record available for review and use at all levels of decision-making.

(d) Review the specific alternatives analyzed in the EIAP when evaluating the proposal prior to decisionmaking.

(e) Ensure that alternatives to be considered by the decisionmaker are both reasonable and within the range of alternatives analyzed in the environmental documents.

(f) Pursue the objective of furthering foreign policy and national security interests while at the same time considering important environmental factors.

(g) Consider the environmental effects of actions that affect the global commons.

(h) Determine whether any foreign government should be informed of the

⁸See footnote 1 to § 989.1.

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availability of environmental documents. Formal arrangements with foreign governments concerning environmental matters and communications with foreign governments concerning environmental agreements will be coordinated with the Department of State by the Deputy Assistant Secretary of the Air Force for Installations (SAF/IEI) through the Deputy Under Secretary of Defense (Installations & Environment). This coordination requirement does not apply to informal working-level communications and arrangements.

[64 FR 38129, July 15, 1999, as amended at 72 FR 37106, July 9, 2007; 79 FR 35286, June 20, 2014]

§ 989.5 Organizational relationships.

(a) The host EPF manages the EIAP using an interdisciplinary team approach. This is especially important for tenant-proposed actions, because the host command is responsible for the EIAP for actions related to the host command's installations.

(b) The host command prepares environmental documents internally or directs the host base to prepare the environmental documents. Environmental document preparation may be by contract (requiring the tenant to fund the EIAP), by the tenant unit, or by the host. Regardless of the preparation method, the host command will ensure the required environmental analysis is accomplished before a decision is made on the proposal and an action is undertaken. Support agreements should provide specific procedures to ensure host oversight of tenant compliance, tenant funding or reimbursement of host EIAP costs, and tenant compliance with the EIAP regardless of the tenant not being an Air Force organization.

(c) For aircraft beddown and unit realignment actions, program elements are identified in the Program Objective Memorandum. Subsequent Program Change Requests must include AF Form 813.

(d) To ensure timely initiation of the EIAP, SAF/AQ forwards information copies of all Mission Need Statements and System Operational Requirements Documents to SAF/IEI, HQ USAF/A7CI (or NGB/A7CV), the Air Force Medical Operations Agency, Aerospace Medi-

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cine Office (AFMOA/SG), and the affected MAJCOM EPFs.

(e) The MAJCOM of the scheduling unit managing affected airspace is responsible for preparing and approving environmental analyses.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001; 72 FR 37106, July 9, 2007; 79 FR 35286, June 20, 2014]

§ 989.6 Budgeting and funding.

Contract EIAP efforts are proponent MAJCOM responsibilities. Each year, the EPF programs for anticipated out-year EIAP workloads based on inputs from command proponents. If proponent offices exceed the budget in a given year or identify unforeseen requirements, the proponent offices must provide the remaining funding.

§ 989.7 Requests from Non-Air Force agencies or entities.

(a) Non-Air Force agencies or entities may request the Air Force to undertake an action, such as issuing a permit or outleasing Air Force property, that may primarily benefit the requester or an agency other than the Air Force. The EPF and other Air Force staff elements must identify such requests and coordinate with the proponent of the non-Air Force proposal, as well as with concerned state, Tribal, and local governments.

(b) Air Force decisions on such proposals must take into consideration the potential environmental impacts of the applicant's proposed activity (as described in an Air Force environmental document), insofar as the proposed action involves Air Force property or programs, or requires Air Force approval.

(c) The Air Force may require the requester to prepare, at the requester's expense, an analysis of environmental impacts (40 CFR 1506.5), or the requester may be required to pay for an EA or EIS to be prepared by a contractor selected and supervised by the Air Force. The EPF may permit requesters to submit draft EAs for their proposed actions, except for actions described in § 989.16(a) and (b), or for actions the EPF has reason to believe will ultimately require an EIS. For EISs, the EPF has the responsibility to prepare the environmental document,

although responsibility for funding remains with the requester. The fact that the requester has prepared environmental documents at its own expense does not commit the Air Force to allow or undertake the proposed action or its alternatives. The requester is not entitled to any preference over other potential parties with whom the Air Force might contract or make similar arrangements.

(d) In no event is the requester who prepares or funds an environmental analysis entitled to reimbursement from the Air Force. When requesters prepare environmental documents outside the Air Force, the Air Force must independently evaluate and approve the scope and content of the environmental analyses before using the analyses to fulfill EIAP requirements. Any outside environmental analysis must evaluate reasonable alternatives as defined in § 989.8.

§ 989.8 Analysis of alternatives.

(a) The Air Force must analyze reasonable alternatives to the proposed action and the “no action” alternative in all EAs and EISs, as fully as the proposed action alternative.

(b) “Reasonable” alternatives are those that meet the underlying purpose and need for the proposed action and that would cause a reasonable person to inquire further before choosing a particular course of action. Reasonable alternatives are not limited to those directly within the power of the Air Force to implement. They may involve another government agency or military service to assist in the project or even to become the lead agency. The Air Force must also consider reasonable alternatives raised during the scoping process (see § 989.18) or suggested by others, as well as combinations of alternatives. The Air Force need not analyze highly speculative alternatives, such as those requiring a major, unlikely change in law or governmental policy. If the Air Force identifies a large number of reasonable alternatives, it may limit alternatives selected for detailed environmental analysis to a reasonable range or to a reasonable number of examples covering the full spectrum of alternatives.

(c) The Air Force may expressly eliminate alternatives from detailed analysis, based on reasonable selection standards (for example, operational, technical, or environmental standards suitable to a particular project). In consultation with the EPF, the appropriate Air Force organization may develop written selection standards to firmly establish what is a “reasonable” alternative for a particular project, but they must not so narrowly define these standards that they unnecessarily limit consideration to the proposal initially favored by proponents. This discussion of reasonable alternatives applies equally to EAs and EISs.

(d) Except in those rare instances where excused by law, the Air Force must always consider and assess the environmental impacts of the “no action” alternative. “No action” may mean either that current management practice will not change or that the proposed action will not take place. If no action would result in other predictable actions, those actions should be discussed within the no action alternative section. The discussion of the no action alternative and the other alternatives should be comparable in detail to that of the proposed action.

§ 989.9 Cooperation and adoption.

(a) *Lead and cooperating agency (40 CFR 1501.5 and 1501.6).* When the Air Force is a cooperating agency in the preparation of an EIS, the Air Force reviews and approves principal environmental documents within the EIAP as if they were prepared by the Air Force. The Air Force executes a ROD for its program decisions that are based on an EIS for which the Air Force is a cooperating agency. The Air Force may also be a lead or cooperating agency on an EA using similar procedures, but the MAJCOM EPC retains approval authority unless otherwise directed by HQ USAF. Before invoking provisions of 40 CFR 1501.5(e), the lowest authority level possible resolves disputes concerning which agency is the lead agency.

(b) *Adoption of EA or EIS.* The Air Force, even though not a cooperating agency, may adopt an EA or EIS prepared by another entity where the proposed action is substantially the same

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as the action described in the EA or EIS. In this case, the EA or EIS must be recirculated as a final EA or EIS but the Air Force must independently review the EA or EIS and determine that it is current and that it satisfies the requirements of this part. The Air Force then prepares its own FONSI or ROD, as the case may be. In the situation where the proposed action is not substantially the same as that described in the EA or the EIS, the Air Force may adopt the EA or EIS, or a portion thereof, by circulating the EA or EIS as a draft and then preparing the final EA or EIS.

§ 989.10 Tiering.

The Air Force should use tiered (40 CFR 1502.20) environmental documents, and environmental documents prepared by other agencies, to eliminate repetitive discussions of the same issues and to focus on the issues relating to specific actions. If the Air Force adopts another Federal agency's environmental document, subsequent Air Force environmental documents may also be tiered.

§ 989.11 Combining EIAP with other documentation.

(a) The EPF combines environmental analysis with other related documentation when practicable (40 CFR 1506.4) following the procedures prescribed by the CEQ regulations and this part.

(b) The EPF must integrate comprehensive planning (AFI 32-7062, Air Force Comprehensive Planning⁹) with the requirements of the EIAP. Prior to making a decision to proceed, the EPF must analyze the environmental impacts that could result from implementation of a proposal identified in the comprehensive plan.

§ 989.12 AF Form 813, Request for Environmental Impact Analysis.

The Air Force uses AF Form 813 to document the need for environmental analysis or for certain CATEX determinations for proposed actions. The form helps narrow and focus the issues to potential environmental impacts. AF Form 813 must be retained with the

⁹See footnote 1 to § 989.1.

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EA or EIS to record the focusing of environmental issues.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001]

§ 989.13 Categorical exclusion.

(a) CATEXs define those categories of actions that do not individually or cumulatively have potential for significant effect on the environment and do not, therefore, require further environmental analysis in an EA or an EIS. The list of Air Force-approved CATEXs is in appendix B. Supplements to this part may not add CATEXs or expand the scope of the CATEXs in appendix B.

(b) Characteristics of categories of actions that usually do not require either an EIS or an EA (in the absence of extraordinary circumstances) include:

- (1) Minimal adverse effect on environmental quality.
- (2) No significant change to existing environmental conditions.
- (3) No significant cumulative environmental impact.
- (4) Socioeconomic effects only.
- (5) Similarity to actions previously assessed and found to have no significant environmental impacts.

(c) CATEXs apply to actions in the United States and abroad. General exemptions specific to actions abroad are in 32 CFR part 187. The EPF or other decision-maker forwards requests for additional exemption determinations for actions abroad to HQ USAF/A7CI with a justification letter.

(d) Normally, any decision-making level may determine the applicability of a CATEX and need not formally record the determination on AF Form 813 or elsewhere, except as noted in the CATEX list.

(e) Application of a CATEX to an action does not eliminate the need to meet air conformity requirements (see § 989.30).

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001; 72 FR 37106, July 9, 2007]

§ 989.14 Environmental assessment.

(a) When a proposed action is one not usually requiring an EIS but is not categorically excluded, the EPF supports the proponent in preparing an EA (40

CFR 1508.9). Every EA must lead to either a FONSI, a decision to prepare an EIS, or no action on the proposal.

(b) Whenever a proposed action usually requires an EIS, the EPF responsible for the EIAP may prepare an EA to definitively determine if an EIS is required based on the analysis of environmental impacts. Alternatively, the EPF may choose to bypass the EA and proceed with preparation of an EIS.

(c) An EA is a written analysis that:

(1) Provides analysis sufficient to determine whether to prepare an EIS or a FONSI.

(2) Aids the Air Force in complying with the NEPA when no EIS is required.

(d) The length of an EA should be as short and concise as possible, while matching the magnitude of the proposal. An EA briefly discusses the need for the proposed action, reasonable alternatives to the proposed action, the affected environment, the environmental impacts of the proposed action and alternatives (including the "no action" alternative), and a listing of agencies and persons consulted during preparation. The EA should not contain long descriptions or lengthy, detailed data. Rather, incorporate by reference background data to support the concise discussion of the proposal and relevant issues.

(e) The format for the EA may be the same as the EIS. The alternatives section of an EA and an EIS are similar and should follow the alternatives analysis guidance outlined in § 989.8.

(f) The EPF should design the EA to facilitate rapidly transforming the document into an EIS if the environmental analysis reveals a significant impact.

(g) As a finding contained in the draft FONSI, a Finding of No Practicable Alternative (FONPA) must be submitted (five hard copies and an electronic version) to the MAJCOM EPF when the alternative selected could be located in wetlands or floodplains, and must discuss why no other practicable alternative exists to avoid impacts. See AFI 32-7064, Integrated Natural Resources Management.

(h) EAs and accompanying FONSI that require the Air Force to make Clean Air Act General Conformity De-

terminations shall be submitted (five hard copies and an electronic version) through the MAJCOM EPF to HQ USAF/A7CI for SAF/IEE coordination. SAF/IEE signs all General Conformity Determinations; SAF/IEI will sign the companion FONSI after coordination with SAF/IEE, when requested by the MAJCOM (see § 989.30).

(i) In cases potentially involving a high degree of controversy or Air Force-wide concern, the MAJCOM, after consultation with HQ USAF/A7CI, may request HQ USAF ESOHC review and approval of an EA, or HQ USAF may direct the MAJCOM to forward an EA (five hard copies and an electronic version) for HQ USAF ESOHC review and approval.

(j) As a minimum, the following EAs require MAJCOM approval because they involve topics of special importance or interest. Unless directed otherwise by HQ USAF/A7CI, the installation EPF must forward the following types of EAs to the MAJCOM EPF, along with an unsigned draft FONSI: (MAJCOMs can require other EAs to receive MAJCOM approval in addition to those types specified here.)

(1) All EAs on non-Air Force proposals that require an Air Force decision, such as use of Air Force property for highways, space ports, and joint-use proposals.

(2) EAs where mitigation to insignificance is accomplished in lieu of initiating an EIS (§ 989.22(c)).

(k) A few examples of actions that normally require preparation of an EA (except as indicated in the CATEX list) include:

(1) Public land withdrawals of less than 5,000 acres.

(2) Minor mission realignments and aircraft beddowns.

(3) New building construction on base within developed areas.

(4) Minor modifications to Military Operating Areas (MOAs), air-to-ground weapons ranges, and military training routes.

(l) The Air Force will involve other federal agencies, state, Tribal, and local governments, and the public in the preparation of EAs (40 CFR 1501.4(b) and 1506.6). The extent of involvement usually coincides with the

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magnitude and complexity of the proposed action and its potential environmental effect on the area. For proposed actions described in § 989.15(e)(2), use either the scoping process described in § 989.18 or the public notice process in § 989.24.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001; 72 FR 37106, July 9, 2007; 79 FR 35286, June 20, 2014]

§ 989.15 Finding of no significant impact.

(a) The FONSI (40 CFR 1508.13) briefly describes why an action would not have a significant effect on the environment and thus will not be the subject of an EIS. The FONSI must summarize the EA or, preferably, have it attached and incorporated by reference, and must note any other environmental documents related to the action.

(b) If the EA is not incorporated by reference, the FONSI must include:

- (1) Name of the action.
- (2) Brief description of the action (including alternatives considered and the chosen alternative).
- (3) Brief discussion of anticipated environmental effects.
- (4) Conclusions leading to the FONSI.
- (5) All mitigation actions that will be adopted with implementation of the proposal (see § 989.22).

(c) Keep FONSI as brief as possible. Only rarely should FONSI exceed two typewritten pages. Stand-alone FONSI without an attached EA may be longer.

(d) For actions of regional or local interest, disseminate the FONSI according to § 989.24. The MAJCOM and NGB are responsible for release of FONSI to regional offices of Federal agencies, the state single point of contact (SPOC), and state agencies concurrent with local release by the installations.

(e) The EPF must make the EA and unsigned FONSI available to the affected public and provide the EA and unsigned FONSI to organizations and individuals requesting them and to whomever the proponent or the EPF has reason to believe is interested in the action, unless disclosure is precluded for security classification reasons. Draft EAs and unsigned draft FONSI will be clearly identified as drafts and distributed via cover letter which will explain their purpose and

need. The EPF provides a copy of the documents without cost to organizations and individuals requesting them. The FONSI transmittal date (date of letter of transmittal) to the state SPOC or other equivalent agency is the official notification date.

(1) Before the FONSI is signed and the action is implemented, the EPF should allow sufficient time to receive comments from the public. The time period will reflect the magnitude of the proposed action and its potential for controversy. The greater the magnitude of the proposed action or its potential for controversy, the longer the time that must be allowed for public review. Mandatory review periods for certain defined actions are contained in § 989.15(e)(2). These are not all inclusive but merely specific examples. In every case where an EA and FONSI are prepared, the proponent and EPF must determine how much time will be allowed for public review. In all cases, other than classified actions, a public review period should be the norm unless clearly unnecessary due to the lack of potential controversy.

(2) In the following circumstances, the EA and unsigned FONSI are made available for public review for at least 30 days before FONSI approval and implementing the action (40 CFR 1501.4(e)(2)):

(i) When the proposed action is, or is closely similar to, one that usually requires preparation of an EIS (see § 989.16).

(ii) If it is an unusual case, a new kind of action, or a precedent-setting case in terms of its potential environmental impacts.

(iii) If the proposed action would be located in a floodplain or wetland.

(iv) If the action is mitigated to insignificance in the FONSI, in lieu of an EIS (§ 989.22(c)).

(v) If the proposed action is a change to airspace use or designation.

(vi) If the proposed action would have a disproportionately high and adverse environmental effect on minority populations and low-income populations.

(f) As a general rule, the same organizational level that prepares the EA also reviews and recommends the FONSI for approval by the EPC. MAJCOMs may decide the level of EA

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approval and FONSI signature, except as provided in § 989.14(g), (h), (i), and (j).

§ 989.16 Environmental impact statement.

(a) Certain classes of environmental impacts normally require preparation of an EIS (40 CFR 1501.4). These include, but are not limited to:

(1) Potential for significant degradation of the environment.

(2) Potential for significant threat or hazard to public health or safety.

(3) Substantial environmental controversy concerning the significance or nature of the environmental impact of a proposed action.

(b) Certain other actions normally, but not always, require an EIS. These include, but are not limited to:

(1) Public land withdrawals of over 5,000 acres (Engle Act, 43 U.S.C. 155 through 158).

(2) Establishment of new air-to-ground weapons ranges.

(3) Site selection of new airfields.

(4) Site selection of major installations.

(5) Development of major new weapons systems (at decision points that involve demonstration, validation, production, deployment, and area or site selection for deployment).

(6) Establishing or expanding supersonic training areas over land below 30,000 feet MSL (mean sea level).

(7) Disposal and reuse of closing installations.

§ 989.17 Notice of intent.

The EPF must furnish, through the MAJCOM, to HQ USAF/A7CI the NOI (40 CFR 1508.22) describing the proposed action for congressional notification and publication in the FEDERAL REGISTER. The EPF, through the host base public affairs office, will also provide the approved NOI to newspapers and other media in the area potentially affected by the proposed action. The EPF must provide copies of the notice to the SPOC and must also distribute it to requesting agencies, organizations, and individuals. Along with the draft NOI, the EPF must also forward the completed DOPAA, through the

MAJCOM, to HQ USAF for information.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001; 72 FR 37106, July 9, 2007]

§ 989.18 Scoping.

(a) After publication of the NOI for an EIS, the EPF must initiate the public scoping process (40 CFR 1501.7) to determine the scope of issues to be addressed and to help identify significant environmental issues to be analyzed in depth. Methods of scoping range from soliciting written comments to conducting public scoping meetings (see 40 CFR 1501.7 and 1506.6(e)). The scoping process is an iterative, pro-active process of communicating with individual citizens, neighborhood, community, and local leaders, public interest groups, congressional delegations, state, Tribal, and local governments, and federal agencies. The scoping process must start prior to official public scoping meetings and continue through to preparation of the draft EIS. The purpose of this process is to de-emphasize insignificant issues and focus the scope of the environmental analysis on significant issues (40 CFR 1500.4(g)). Additionally, scoping allows early and more meaningful participation by the public. The result of scoping is that the proponent and EPF determine the range of actions, alternatives, and impacts to be considered in the EIS (40 CFR 1508.25). The EPF must send scripts for scoping meetings to HQ USAF/A7CI (or ANGRC/CEV) no later than 30 days before the first scoping meeting. Scoping meeting plans are similar in content to public hearing plans (see appendix C). Public scoping meetings should generally be held at locations not on the installation.

(b) Where it is anticipated the proposed action and its alternatives will have disproportionately high and adverse human health or environmental effects on minority populations or low-income populations, special efforts

shall be made to reach these populations. This might include special informational meetings or notices in minority and low-income areas concerning the regular scoping process.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001; 66 FR 26793, May 15, 2001; 72 FR 37106, July 9, 2007]

§ 989.19 Draft EIS.

(a) *Preliminary draft.* The EPF supports the proponent in preparation of a preliminary draft EIS (PDEIS) (40 CFR 1502.9) based on the scope of issues decided on during the scoping process. The format of the EIS must be in accordance with the format recommended in the CEQ regulations (40 CFR 1502.10 and 1502.11). The CEQ regulations indicate that EISs normally contain fewer than 150 pages (300 pages for proposals of unusual complexity). The EPF provides a sufficient number of copies of the PDEIS to HQ USAF/A7CI for HQ USAF ESOHC security and policy review in each member's area of responsibility and to AFCEE/TDB for technical review.

(b) *Review of draft EIS.* After the HQ USAF ESOHC review, the EPF assists the appropriate Air Force organization in making any necessary revisions to the PDEIS and forwards it to HQ USAF/A7CI as a draft EIS to ensure completion of all security and policy reviews and to certify releasability. Once the draft EIS is approved, HQ USAF/A7CI notifies the EPF to print sufficient copies of the draft EIS for distribution to congressional delegations and interested agencies at least 7 calendar days prior to publication of the Notice of Availability (NOA) in the FEDERAL REGISTER. After congressional distribution, the EPF sends the draft EIS to all others on the distribution list. HQ USAF/A7CI then files the document with the U.S. Environmental Protection Agency (USEPA) and provides a copy to the Deputy Under Secretary of Defense for Environmental Security.

(c) *Public review of draft EIS (40 CFR 1502.19 and 1506.6):* (1) The public comment period for the draft EIS is at least 45 days starting from the publication date of the NOA of the draft EIS in the FEDERAL REGISTER. USEPA publishes in the FEDERAL REGISTER NOAs

of EISs filed during the preceding week. This public comment period may be extended by the EPF. If the draft EIS is unusually long, the EPF may distribute a summary to the public with an attached list of locations (such as public libraries) where the entire draft EIS may be reviewed. The EPF must distribute the full draft EIS to certain entities, for example, agencies with jurisdiction by law or agencies with special expertise in evaluating the environmental impacts, and anyone else requesting the entire draft EIS (40 CFR 1502.19 and 1506.6).

(2) The EPF sponsors public hearings on the draft EIS according to the procedures in appendix C to this part. Hearings take place no sooner than 15 days after the FEDERAL REGISTER publication of the NOA and at least 15 days before the end of the comment period. Scheduling hearings toward the end of the comment period is encouraged to allow the public to obtain and more thoroughly review the draft EIS. The EPF must provide hearing scripts to HQ USAF/A7CI (or ANGR/CEV) no later than 30 days prior to the first public hearing. Public hearings should generally be held at off-base locations. Submit requests to deviate from procedures in appendix C to this part to HQ USAF/A7CI for SAF/IEI approval.

(3) Where analyses indicate that a proposed action will potentially have disproportionately high and adverse human health or environmental effects on minority populations or low-income populations, the EPF should make special efforts to ensure that these potentially impacted populations are brought into the review process.

(d) *Response to comments (40 CFR 1503.4).* The EPF must incorporate in the Final EIS its responses to comments on the Draft EIS by modifying the text and referring in the appendix to where the comment is addressed or providing a written explanation in the comments section, or both. The EPF may group comments of a similar nature together to allow a common response and may also respond to individuals separately.

(e) *Seeking additional comments.* The EPF may, at any time during the EIS process, seek additional public comments, such as when there has been a

significant change in circumstances, development of significant new information of a relevant nature, or where there is substantial environmental controversy concerning the proposed action. Significant new information leading to public controversy regarding the scope after the scoping process is such a changed circumstance. An additional public comment period may also be necessary after the publication of the draft EIS due to public controversy or changes made as the result of previous public comments. Such periods when additional public comments are sought shall last for at least 30 days.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001; 72 FR 37106, July 9, 2007; 79 FR 35286, June 20, 2014]

§ 989.20 Final EIS.

(a) If changes in the draft EIS are minor or limited to factual corrections and responses to comments, the proponent and EPF may, with the prior approval of HQ USAF/A7CI and SAF/IEI, prepare a document containing only comments on the Draft EIS, Air Force responses, and errata sheets of changes staffed to the HQ USAF ESOHC for coordination. However, the EPF must submit the Draft EIS and all of the above documents, with a new cover sheet indicating that it is a final EIS (40 CFR 1503.4(c)), to HQ USAF/A7CI for filing with the EPA (40 CFR 1506.9). If more extensive modifications are required, the EPF must prepare a preliminary final EIS incorporating these modifications for coordination within the Air Force. Regardless of which procedure is followed, the final EIS must be processed in the same way as the draft EIS, including receipt of copies of the EIS by SAF/LLP, except that the public need not be invited to comment during the 30-day post-filing waiting period. The Final EIS should be furnished to every person, organization, or agency that made substantive comments on the Draft EIS or requested a copy. Although the EPF is not required to respond to public comments received during this period, comments received must be considered in determining final decisions such as identifying the preferred alternative, appropriate mitigations, or if a supplemental analysis is required.

(b) The EPF processes all necessary supplements to EISs (40 CFR 1502.9) in the same way as the original Draft and Final EIS, except that a new scoping process is not required.

(c) If major steps to advance the proposal have not occurred within 5 years from the date of the Final EIS approval, reevaluation of the documentation should be accomplished to ensure its continued validity.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001; 72 FR 37106, July 9, 2007; 79 FR 35287, June 20, 2014]

§ 989.21 Record of decision (ROD).

(a) The proponent and the EPF prepare a draft ROD, formally staff it through the MAJCOM EPC, to HQ USAF/A7CI for verification of adequacy, and forwards it to either SAF/IEI or SAF/AQR, as the case may be, for approval and designation of the signator. A ROD (40 CFR 1505.2) is a concise public document stating what an agency's decision is on a specific action. The ROD may be integrated into any other document required to implement the agency's decision. A decision on a course of action may not be made until the later of the following dates:

(1) 90 days after publication of the DEIS; or

(2) 30 days after publication of the NOA of the Final EIS in the FEDERAL REGISTER.

(b) The Air Force must announce the ROD to the affected public as specified in § 989.24, except for classified portions. The ROD should be concise and should explain the conclusion, the reason for the selection, and the alternatives considered. The ROD must identify the course of action, whether it is the proposed action or an alternative, that is considered environmentally preferable regardless of whether it is the alternative selected for implementation. The ROD should summarize all the major factors the agency weighed in making its decision, including essential considerations of national policy.

(c) The ROD must state whether the selected alternative employs all practicable means to avoid, minimize, or

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mitigate environmental impacts and, if not, explain why not.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001; 72 FR 37106, July 9, 2007; 79 FR 35287, June 20, 2014]

§ 989.22 Mitigation.

(a) When preparing EIAP documents, indicate clearly whether mitigation measures (40 CFR 1508.20) must be implemented for the alternative selected. If using Best Management Practices (BMPs), identify the specific BMPs being used and include those BMPs in the mitigation plan. Discuss mitigation measures in terms of “will” and “would” when such measures have already been incorporated into the proposal. Use terms like “may” and “could” when proposing or suggesting mitigation measures. Both the public and the Air Force community need to know what commitments are being considered and selected, and who will be responsible for implementing, funding, and monitoring the mitigation measures.

(b) The proponent funds and implements mitigation measures in the mitigation plan that is approved by the decision-maker. Where possible and appropriate because of amount, the proponent should include the cost of mitigation as a line item in the budget for a proposed project. The proponent must ensure compliance with mitigation requirements, monitoring their effectiveness, and must keep the EPF informed of the mitigation status. The EPF reports its status, through the MAJCOM, to HQ USAF/A7CI when requested. Upon request, the EPF must also provide the results of relevant mitigation monitoring to the public.

(c) The proponent may “mitigate to insignificance” potentially significant environmental impacts found during preparation of an EA, in lieu of preparing an EIS. The FONSI for the EA must include these mitigation measures. Such mitigations are legally binding and must be carried out as the proponent implements the project. If, for any reason, the project proponent later abandons or revises in environmentally adverse ways the mitigation commitments made in the FONSI, the proponent must prepare a supplemental EIAP document before con-

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tinuing the project. If potentially significant environmental impacts would result from any project revisions, the proponent must prepare an EIS.

(d) For each FONSI or ROD containing mitigation measures, the proponent prepares a plan specifically identifying each mitigation, discussing how the proponent will execute the mitigations, identifying who will fund and implement the mitigations, and stating when the proponent will complete the mitigation. The mitigation plan will be forwarded, through the MAJCOM EPF to HQ USAF/A7CI for review within 90 days from the date of signature of the FONSI or ROD.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16868, Mar. 28, 2001; 72 FR 37106, July 9, 2007]

§ 989.23 Contractor prepared documents.

All Air Force EIAP documents belong to and are the responsibility of the Air Force. EIAP correspondence and documents distributed outside of the Air Force should generally be signed out by Air Force personnel and documents should reflect on the cover sheet they are an Air Force document. Contractor preparation information should be contained within the document's list of preparers.

§ 989.24 Public notification.

(a) Except as provided in § 989.26, public notification is required for various aspects of the EIAP.

(b) Activities that require public notification include:

- (1) An EA and FONSI.
- (2) An EIS NOI.
- (3) Public scoping meetings.
- (4) Availability of the draft EIS.
- (5) Public hearings on the draft EIS (which should be included in the NOA for the draft EIS).
- (6) Availability of the final EIS.
- (7) The ROD for an EIS.

(c) For actions of local concern, the list of possible notification methods in 40 CFR 1506.6(b)(3) is only illustrative. The EPF may use other equally effective means of notification as a substitute for any of the methods listed. Because many Air Force actions are of limited interest to persons or organizations outside the Air Force, the EPF

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may limit local notification to the SPOC, local government representatives, and local news media. For all actions covered under § 989.15(e)(2), and for all EIS notices, the public affairs office must purchase with EPF funds an advertisement in a prominent section of the local newspaper(s) of general circulation (not “legal” newspapers or “legal section” of general newspapers).

(d) For the purpose of EIAP, the EPF begins the time period of local notification when it sends written notification to the state SPOC or other equivalent agency (date of letter of notification).

§ 989.25 Base closure and realignment.

Base closure or realignment may entail special requirements for environmental analysis. The permanent base closure and realignment law, 10 U.S.C. 2687, requires a report to the Congress when an installation where at least 300 DoD civilian personnel are authorized to be employed is closed, or when a realignment reduces such an installation by at least 50 percent or 1,000 of such personnel, whichever is less. In addition, other base closure laws may be in effect during particular periods. Such nonpermanent closure laws frequently contain provisions limiting the extent of environmental analysis required for actions taken under them. Such provisions may also add requirements for studies not necessarily required by NEPA.

§ 989.26 Classified actions (40 CFR 1507.3(c)).

(a) Classification of an action for national defense or foreign policy purposes does not relieve the requirement of complying with NEPA. In classified matters, the Air Force must prepare and make available normal NEPA environmental analysis documents to aid in the decision-making process; however, Air Force staff must prepare, safeguard, and disseminate these documents according to established procedures for protecting classified documents. If an EIAP document must be classified, the Air Force may modify or eliminate associated requirements for public notice (including publication in the FEDERAL REGISTER) or public involvement in the EIAP. However, the

Air Force should obtain comments on classified proposed actions or classified aspects of generally unclassified actions, from public agencies having jurisdiction by law or special expertise, to the extent that such review and comment is consistent with security requirements. Where feasible, the EPF may need to help appropriate personnel from those agencies obtain necessary security clearances to gain access to documents so they can comment on scoping or review the documents.

(b) Where the proposed action is classified and unavailable to the public, the Air Force may keep the entire NEPA process classified and protected under the applicable procedures for the classification level pertinent to the particular information. At times (for example, during weapons system development and base closures and realignments), certain but not all aspects of NEPA documents may later be declassified. In those cases, the EPF should organize the EIAP documents, to the extent practicable, in a way that keeps the most sensitive classified information (which is not expected to be released at any early date) in a separate annex that can remain classified; the rest of the EIAP documents, when declassified, will then be comprehensible as a unit and suitable for release to the public. Thus, the documents will reflect, as much as possible, the nature of the action and its environmental impacts, as well as Air Force compliance with NEPA requirements.

(c) Where the proposed action is not classified, but certain aspects of it need to be protected by security classification, the EPF should tailor the EIAP for a proposed action to permit as normal a level of public involvement as possible, but also fully protect the classified part of the action and environmental analysis. In some instances, the EPF can do this by keeping the classified sections of the EIAP documents in a separate, classified annex.

(d) For § 989.26(b) actions, an NOI or NOA will not be published in the FEDERAL REGISTER until the proposed action is declassified. For § 989.26(c) actions, the FEDERAL REGISTER will run an unclassified NOA which will advise

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the public that at some time in the future the Air Force may or will publicly release a declassified document.

(e) The EPF similarly protects classified aspects of FONISs, RODs, or other environmental documents that are part of the EIAP for a proposed action, such as by preparing separate classified annexes to unclassified documents, as necessary.

(f) Whenever a proponent believes that EIAP documents should be kept classified, the EPF must make a report of the matter to SAF/IEI, including proposed modifications of the normal EIAP to protect classified information. The EPF may make such submissions at whatever level of security classification is needed to provide a comprehensive understanding of the issues. SAF/IEI, with support from SAF/GC and other staff elements as necessary, makes final decisions on EIAP procedures for classified actions.

[64 FR 38129, July 15, 1999, as amended at 72 FR 37106, July 9, 2007; 79 FR 35287, June 20, 2014]

§ 989.27 Occupational safety and health.

Assess direct and indirect impacts of proposed actions on the safety and health of Air Force employees and others at a work site. The EIAP document does not need to specify compliance procedures. However, the EIAP documents should discuss impacts that require a change in work practices to achieve an adequate level of health and safety.

§ 989.28 Airspace and range proposals.

(a) *EIAP Review.* Airspace and range proposals require review by HQ USAF/XOO prior to public announcement and preparation of the DOPAA. Unless directed otherwise, the airspace proponent will forward the DOPAA as an attachment to the proposal sent to HQ USAF/XOO.

(b) *Federal Aviation Administration.* The DoD and the Federal Aviation Administration (FAA) have entered into a Memorandum of Understanding (MOU) that outlines various airspace responsibilities. For purposes of compliance with NEPA, the DoD is the “lead agency” for all proposals initiated by DoD, with the FAA acting as the “cooper-

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ating agency.” Where airspace proposals initiated by the FAA affect military use, the roles are reversed. The proponent’s action officers (civil engineering and local airspace management) must ensure that the FAA is fully integrated into the airspace proposal and related EIAP from the very beginning and that the action officers review the FAA’s responsibilities as a cooperating agency. The proponent’s airspace manager develops the preliminary airspace proposal per appropriate FAA handbooks and the FAA-DoD MOU. The preliminary airspace proposal is the basis for initial dialogue between DoD and the FAA on the proposed action. A close working relationship between DoD and the FAA, through the FAA regional Air Force representative, greatly facilitates the airspace proposal process and helps resolve many NEPA issues during the EIAP.

§ 989.29 Force structure and unit move proposals.

Unless directed otherwise, the MAJCOM plans and programs proponent will forward a copy of all EAs for force structure and unit moves to HQ USAF/A7CI for information only at the preliminary draft and preliminary final stages.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16869, Mar. 28, 2001; 72 FR 37106, July 9, 2007]

§ 989.30 Air quality.

Section 176(c) of the Clean Air Act Amendments of 1990, 42 U.S.C. 7506(c), establishes a conformity requirement for Federal agencies which has been implemented by regulation, 40 CFR 93, subpart B. All EIAP documents must address applicable conformity requirements and the status of compliance. Conformity applicability analyses and determinations are developed in parallel with EIAP documents, but are separate and distinct requirements and should be documented separately. To increase the utility of a conformity determination in performing the EIAP, the conformity determination should be completed prior to the completion of the EIAP so as to allow incorporation of the information from the conformity determination into the EIAP.

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See AFI 32-7040, Air Quality Compliance.¹⁰

§ 989.31 Pollution prevention.

The Pollution Prevention Act of 1990, 42 U.S.C. 13101(b), established a national policy to prevent or reduce pollution at the source, whenever feasible. Pollution prevention approaches should be applied to all pollution-generating activities. The environmental document should analyze potential pollution that may result from the proposed action and alternatives and must discuss potential pollution prevention measures when such measures are feasible for incorporation into the proposal or alternatives. Where pollution cannot be prevented, the environmental analysis and proposed mitigation measures should include, wherever possible, recycling, energy recovery, treatment, and environmentally safe disposal actions (see AFI 32-7080, Pollution Prevention Program¹¹).

§ 989.32 Noise.

Aircraft noise data files used for analysis during EIAP will be submitted to HQ AFCEE for review and validation prior to public release, and upon completion of the EIAP for database entry. Utilize the current NOISEMAP computer program for air installations and the Assessment System for Aircraft Noise for military training routes and military operating areas. Guidance on standardized Air Force noise data development and analysis procedures is available from HQ AFCEE/TDB. Develop EIAP land use analysis relating to aircraft noise impacts originating from air installations following procedures in AFI 32-7063, Air Installation Compatible Use Zone (AICUZ) Program. Draft EIAP aircraft noise/land use analysis associated with air installations will be coordinated with the MAJCOM AICUZ program manager.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16869, Mar. 28, 2001; 72 FR 37106, July 9, 2007]

§ 989.33 Environmental justice.

During the preparation of environmental analyses under this instruction,

¹⁰ See footnote 1 to § 989.1.

¹¹ See footnote 1 to § 989.1.

the EPF should ensure compliance with the provisions of E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations, and Executive Memorandum of February 11, 1994, regarding E.O. 12898.

§ 989.34 Special and emergency procedures.

(a) *Special procedures.* During the EIAP, unique situations may arise that require EIAP strategies different than those set forth in this part. These situations may warrant modification of the procedures in this part. EPFs should only consider procedural deviations when the resulting process would benefit the Air Force and still comply with NEPA and CEQ regulations. EPFs must forward all requests for procedural deviations to HQ USAF/A7CI (or ANGRC/CEV) for review and approval by SAF/IEI.

(b) *Emergency procedures (40 CFR 1506.11).* Emergency situations do not exempt the Air Force from complying with NEPA, but do allow emergency response while completing the EIAP. Certain emergency situations may make it necessary to take immediate action having significant environmental impact, without observing all the provisions of the CEQ regulations or this part. If possible, promptly notify HQ USAF/A7CI, for SAF/IEI coordination and CEQ consultation. The immediate notification requirement does not apply where emergency action must be taken without delay. Coordination in this instance must take place as soon as practicable.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16869, Mar. 28, 2001; 72 FR 37106, July 9, 2007; 79 FR 35287, June 20, 2014]

§ 989.35 Reporting requirements.

(a) EAs, EISs, and mitigation measures will be tracked at bases and MAJCOMs through an appropriate environmental management system.

(b) Proponents, EPFs, and public affairs offices may utilize the World Wide Web, in addition to more traditional means, to notify the public of availability of EAs and EISs. When possible, allow distribution of documents electronically. Public review comments

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should be required in writing, rather than by electronic mail.

(c) All documentation will be disposed of according to AFMAN 37-139, Records Disposition Schedule.¹²

[64 FR 38129, July 15, 1999; 66 FR 16869, Mar. 28, 2001]

§ 989.36 Waivers.

In order to deal with unusual circumstances and to allow growth in the EIAP process, SAF/IEI may grant waivers to those procedures contained in this part not required by NEPA or the CEQ Regulations. Such waivers shall not be used to limit compliance with NEPA or the CEQ Regulations but only to substitute other, more suitable procedures relative to the context of the particular action. Such waivers may also be granted on occasion to allow experimentation in procedures in order to allow growth in the EIAP. This authority may not be delegated.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16869, Mar. 28, 2001; 72 FR 37107, July 9, 2007; 79 FR 35287, June 20, 2014]

§ 989.37 Procedures for analysis abroad.

Procedures for analysis of environmental actions abroad are contained in 32 CFR part 187. That directive provides comprehensive policies, definitions, and procedures for implementing E.O. 12114. For analysis of Air Force actions abroad, 32 CFR part 187 will be followed.

§ 989.38 Requirements for analysis abroad.

(a) The EPF will generally perform the same functions for analysis of actions abroad that it performs in the United States. In addition to the requirements of 32 CFR part 187, the following Air Force specific rules apply:

(b) For EAs dealing with global commons (geographic areas beyond the jurisdiction of the United States or any foreign nation), HQ USAF/A7CI will review actions that are above the MAJCOM approval authority. In this instance, approval authority refers to the same approval authority that would apply to an EA in the United

¹² See footnote 1 to § 989.1.

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States. The EPF documents a decision not to do an EIS.

(c) For EISs dealing with the global commons, the EPF provides sufficient copies to HQ USAF/A7CI for the HQ USAF ESOHC review and AFCEE/TDB technical review. After ESOHC review, the EPF makes a recommendation as to whether the proposed draft EIS will be released as a draft EIS.

(d) For environmental studies and environmental reviews, forward, when appropriate, environmental studies and reviews to HQ USAF/A7CI for coordination among appropriate federal agencies. HQ USAF/A7CI makes environmental studies and reviews available to the Department of State and other interested federal agencies, and, on request, to the United States public, in accordance with 32 CFR part 187. HQ USAF/A7CI also may inform interested foreign governments or furnish copies of studies, in accordance with 32 CFR part 187.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16869, Mar. 28, 2001; 72 FR 37107, July 9, 2007]

APPENDIX A TO PART 989—GLOSSARY OF REFERENCES, ABBREVIATIONS, ACRONYMS, AND TERMS

References

Legislative

- 10 U.S.C. 2687, *Base Closures and Realignments*
- 42 U.S.C. 4321-4347, *National Environmental Policy Act of 1969*
- 42 U.S.C. 7506(c), *Clean Air Act Amendments of 1990*
- 42 U.S.C. 13101(b), *Pollution Prevention Act of 1990*
- 43 U.S.C. 155-158, *Engle Act*

Executive Orders

- Executive Order 11988, *Floodplain Management*, May 24, 1977
- Executive Order 11990, *Protection of Wetlands*, May 24, 1977
- Executive Order 12088, *Federal Compliance with Pollution Control Standards*.
- Executive Order 12114, *Environmental Effects Abroad of Major Federal Actions*, January 4, 1979
- Executive Order 12372, *Intergovernmental Review of Federal Programs*, July 14, 1982
- Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*, February 11, 1994

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U.S. Government Agency Publications

Council on Environmental Quality Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 40 CFR parts 1500–1508
 Department of Defense Directive DoDD 4715.1E, *Environment, Safety, and Occupational Health*
 Department of Defense Directive (DoDD) 6050.7, *Environmental Effects Abroad of Major Department of Defense Actions*, March 31, 1979 (32 CFR part 187)
 Department of Defense Instruction (DoDI) 4715.9, *Environmental Planning and Analysis*
 Department of Defense Directive DoDD 5000.1, *The Defense Acquisition System*
 Department of Defense Regulation 5000.2-R, *Mandatory Procedures for Major Defense Acquisition Programs and Major Automated Information System Acquisition Programs*

Air Force Publications

AFPD 32–70, *Environmental Quality*
 AFI 32–1021, *Planning and Programming of Facility Construction Projects*
 AFI 32–7002, *Environmental Information Management System*
 AFI 32–7005, *Environmental Protection Committees*
 AFI 32–7040, *Air Quality Compliance*
 AFI 32–7062, *Air Force Comprehensive Planning*
 AFI 32–7063, *Air Installation Compatible Use Zone Program*
 AFI 32–7064, *Integrated Natural Resources Management*
 AFI 32–7080, *Pollution Prevention Program*
 AFI 35–101, *Public Affairs Policies and Procedures*
 AFMAN 37–139, *Records Disposition Schedule*

Abbreviations and Acronyms

Abbreviation or Acronym	Definition
AFCEE	Air Force Center for Engineering and the Environment
AFCEE/TDB	AFCEE Technical Directorate, Built Infrastructure Division (AFCEE/TDB)
AFI	Air Force Instruction
AFLOA/JACE	Air Force Legal Services Agency/Environmental Law and Litigation Division
AFLOA/JAJT	Air Force Legal Services Agency/Trial Judiciary Division
AFMAN	Air Force Manual
AFMOA/SG	Air Force Medical Operations Agency/Aerospace Medicine Office
AFPD	Air Force Policy Directive
AFRES	Air Force Reserve
ANG	Air National Guard
ANGRC	Air National Guard Readiness Center
BMP	Best Management Practice
CATEX	Categorical Exclusion
CEQ	Council on Environmental Quality
CFR	Code of Federal Regulations
DoD	Department of Defense
DoDD	Department of Defense Directive
DoDI	Department of Defense Instruction
DOPAA	Description of Proposed Action and Alternatives
EA	Environmental Assessment
EIAP	Environmental Impact Analysis Process
EIS	Environmental Impact Statement
E.O.	Executive Order
EPA	Environmental Protection Agency
EPC	Environmental Protection Committee
EPF	Environmental Planning Function
ESOHC	Environmental Safety and Occupational Health Committee
FAA	Federal Aviation Administration
FEIS	Final Environmental Impact Statement
FOA	Field Operating Agency
FONPA	Finding of No Practicable Alternative
FONSI	Finding of No Significant Impact
GSA	General Services Administration
HQ AFMC	Headquarters, Air Force Materiel Command
HQ USAF	Headquarters, United States Air Force
HQ USAF/A7C	The Air Force Civil Engineer
MAJCOM	Major Command
MGM	Materiel Group Manager
MOA	Military Operating Area
MOU	Memorandum of Understanding
MSL	Mean Sea Level
NEPA	National Environmental Policy Act of 1969
NGB-CF	National Guard Bureau Air Directorate
NGB-JA	National Guard Bureau Office of the Staff Judge Advocate
NGB-PA	National Guard Bureau Office of Public Affairs
NOA	Notice of Availability
NOI	Notice of Intent
OSD	Office of the Secretary of Defense
OSHA	Occupational Safety and Health Administration
PDEIS	Preliminary Draft Environmental Impact Statement

Abbreviation or Acronym	Definition
PGM	Product Group Manager
REO	Air Force Regional Environmental Office
ROD	Record of Decision
SAF/AQR	Deputy Assistant Secretary of the Air Force (Science, Technology, and Engineering)
SAF/GC	Air Force General Counsel
SAF/LL	Air Force Office of Legislative Liaison
SAF/IE	Assistant Secretary of the Air Force for Installations, Environment & Logistics
SAF/IEE	Deputy Assistant Secretary of the Air Force for Environment, Safety and Occupational Health (ESOH)
SAF/IEI	Deputy Assistant Secretary of the Air Force for Installations.
SAF/PA	Air Force Office of Public Affairs
SJA	Staff Judge Advocate
SM	Single Manager
SPD	Single Program Director
SPOC	Single Point of Contact
TDY	Temporary Duty
U.S.C.	United States Code

Terms

NOTE: All definitions in the CEQ Regulations, 40 CFR part 1508, apply to this part. In addition, the following definitions apply:

Best Management Practices (BMPs)—Under the EIAP, BMPs should be applied in furtherance of 32 CFR 989.22, Mitigations or to fulfill permit requirements (see also E.O. 12088, “Federal Compliance with Pollution Control Standards).

Description of Proposed Action and Alternatives (DOPAA)—An Air Force document that is the framework for assessing the environmental impact of a proposal. It describes the purpose and need for the action, the alternatives to be considered, and the rationale used to arrive at the proposed action. The DOPAA often unfolds as writing progresses. The DOPAA can change during the internal scoping and public scoping process, especially as ideas and issues become clearer, and as new information makes changes necessary.

Environmental Impact Analysis Process (EIAP)—The Air Force program that implements the requirements of NEPA and requirements for analysis of environmental effects abroad under E.O. 12114.

Finding of No Practicable Alternative (FONPA)—Finding contained in a FONSI or ROD, according to Executive Orders 11988 and 11990, that explains why there are no practicable alternatives to an action affecting a wetland or floodplain, based on appropriate EIAP analysis or other documentation.

Interdisciplinary—An approach to environmental analysis involving more than one discipline or branch of learning.

Pollution Prevention—“Source reduction,” as defined under the Pollution Prevention Act, and other practices that reduce or eliminate pollutants through increased efficiency in the use of raw materials, energy, water, or other resources, or in the protection of natural resources by conservation.

Proponent—Any office, unit, or activity that proposes to initiate an action.

Scoping—A process for proposing alternatives to be addressed and for identifying the significant issues related to a proposed action. Scoping includes affirmative efforts to communicate with other federal agencies, state, Tribal, and local governments, and the public.

Single Manager—Any one of the Air Force designated weapon system program managers, that include System Program Directors (SPDs), Product Group Managers (PGMs), and Materiel Group Managers (MGMs).

United States—All states, commonwealths, the District of Columbia, 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 American Samoa, Guam, Johnston Atoll, Kingman Reef, Midway Island, Navassa Island, Palmyra Island, the Virgin Islands, and Wake Island.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16869, Mar. 28, 2001; 72 FR 37107, July 9, 2007; 79 FR 35287, June 20, 2014]

APPENDIX B TO PART 989—CATEGORICAL EXCLUSIONS

A2.1. Proponent/EPF Responsibility

Although a proposed action may qualify for a categorical exclusion from the requirements for environmental impact analysis under NEPA, this exclusion does not relieve the EPF or the proponent of responsibility for complying with all other environmental requirements related to the proposal, including requirements for permits, and state regulatory agency review of plans.

A2.2. Additional Analysis

Circumstances may arise in which usually categorically excluded actions may have a

significant environmental impact and, therefore, may generate a requirement for further environmental analysis. Examples of situations where such unique circumstances may be present include:

A2.2.1. Actions of greater scope or size than generally experienced for a particular category of action.

A2.2.2. Potential for degradation (even though slight) of already marginal or poor environmental conditions.

A2.2.3. Initiating a degrading influence, activity, or effect in areas not already significantly modified from their natural condition.

A2.2.4. Use of unproved technology.

A2.2.5. Use of hazardous or toxic substances that may come in contact with the surrounding environment.

A2.2.6. Presence of threatened or endangered species, archaeological remains, historical sites, or other protected resources.

A2.2.7. Proposals adversely affecting areas of critical environmental concern, such as prime or unique agricultural lands, wetlands, coastal zones, wilderness areas, floodplains, or wild and scenic river areas.

A2.2.8. Proposals with disproportionately high and adverse human health or environmental effects on minority populations or low-income populations.

A2.3. CATEX List

Actions that are categorically excluded in the absence of unique circumstances are:

A2.3.1. Routine procurement of goods and services.

A2.3.2. Routine Commissary and Exchange operations.

A2.3.3. Routine recreational and welfare activities.

A2.3.4. Normal personnel, fiscal or budgeting, and administrative activities and decisions including those involving military and civilian personnel (for example, recruiting, processing, paying, and records keeping).

A2.3.5. Preparing, revising, or adopting regulations, instructions, directives, or guidance documents that do not, themselves, result in an action being taken.

A2.3.6. Preparing, revising, or adopting regulations, instructions, directives, or guidance documents that implement (without substantial change) the regulations, instructions, directives, or guidance documents from higher headquarters or other Federal agencies with superior subject matter jurisdiction.

A2.3.7. Continuation or resumption of pre-existing actions, where there is no substantial change in existing conditions or existing land uses and where the actions were originally evaluated in accordance with applicable law and regulations, and surrounding circumstances have not changed.

A2.3.8. Performing interior and exterior construction within the 5-foot line of a build-

ing without changing the land use of the existing building.

A2.3.9. Repairing and replacing real property installed equipment.

A2.3.10. Routine facility maintenance and repair that does not involve disturbing significant quantities of hazardous materials such as asbestos and lead-based paint.

A2.3.11. Actions similar to other actions which have been determined to have an insignificant impact in a similar setting as established in an EIS or an EA resulting in a FONSI. The EPF must document application of this CATEX on AF Form 813, specifically identifying the previous Air Force approved environmental document which provides the basis for this determination.

A2.3.12. Installing, operating, modifying, and routinely repairing and replacing utility and communications systems, data processing cable, and similar electronic equipment that use existing rights of way, easements, distribution systems, or facilities.

A2.3.13. Installing or modifying airfield operational equipment (such as runway visual range equipment, visual glide path systems, and remote transmitter or receiver facilities) on airfield property and usually accessible only to maintenance personnel.

A2.3.14. Installing on previously developed land, equipment that does not substantially alter land use (i.e., land use of more than one acre). This includes outgrants to private lessees for similar construction. The EPF must document application of this CATEX on AF Form 813.

A2.3.15. Laying-away or mothballing a production facility or adopting a reduced maintenance level at a closing installation when (1) agreement on any required historic preservation effort has been reached with the state historic preservation officer and the Advisory Council on Historic Preservation, and (2) no degradation in the environmental restoration program will occur.

A2.3.16. Acquiring land and ingranths (50 acres or less) for activities otherwise subject to CATEX. The EPF must document application of this CATEX on AF Form 813.

A2.3.17. Transferring land, facilities, and personal property for which the General Services Administration (GSA) is the action agency. Such transfers are excluded only if there is no change in land use and GSA complies with its NEPA requirements.

A2.3.18. Transferring administrative control of real property within the Air Force or to another military department or to another Federal agency, not including GSA, including returning public domain lands to the Department of the Interior.

A2.3.19. Granting easements, leases, licenses, rights of entry, and permits to use Air Force controlled property for activities that, if conducted by the Air Force, could be categorically excluded in accordance with

this Appendix. The EPF must document application of this CATEX on AF Form 813.

A2.3.20. Converting in-house services to contract services.

A2.3.21. Routine personnel decreases and increases, including work force conversion to either on-base contractor operation or to military operation from contractor operation (excluding base closure and realignment actions which are subject to congressional reporting under 10 U.S.C. 2687).

A2.3.22. Routine, temporary movement of personnel, including deployments of personnel on a TDY basis where existing facilities are used.

A2.3.23. Personnel reductions resulting from workload adjustments, reduced personnel funding levels, skill imbalances, or other similar causes.

A2.3.24. Study efforts that involve no commitment of resources other than personnel and funding allocations.

A2.3.25. The analysis and assessment of the natural environment without altering it (inspections, audits, surveys, investigations). This CATEX includes the granting of any permits necessary for such surveys, provided that the technology or procedure involved is well understood and there are no adverse environmental impacts anticipated from it. The EPF must document application of this CATEX on AF Form 813.

A2.3.26. Undertaking specific investigatory activities to support remedial action activities for purposes of cleanup of Environmental Restoration Account (ERA)—Air Force and Resource Conservation and Recovery Act (RCRA) corrective action sites. These activities include soil borings and sampling, installation, and operation of test or monitoring wells. This CATEX applies to studies that assist in determining final cleanup actions when they are conducted in accordance with legal agreements, administrative orders, or work plans previously agreed to by EPA or state regulators.

A2.3.27. Normal or routine basic and applied scientific research confined to the laboratory and in compliance with all applicable safety, environmental, and natural resource conservation laws.

A2.3.28. Routine transporting of hazardous materials and wastes in accordance with applicable Federal, state, interstate, and local laws.

A2.3.29. Emergency handling and transporting of small quantities of chemical surety material or suspected chemical surety material, whether or not classified as hazardous or toxic waste, from a discovery site to a permitted storage, treatment, or disposal facility.

A2.3.30. Immediate responses to the release or discharge of oil or hazardous materials in accordance with an approved Spill Prevention and Response Plan or Spill Contingency Plan or that are otherwise consistent with

the requirements of the National Contingency Plan.

A2.3.31. Relocating a small number of aircraft to an installation with similar aircraft that does not result in a significant increase of total flying hours or the total number of aircraft operations, a change in flight tracks, or an increase in permanent personnel or logistics support requirements at the receiving installation. Repetitive use of this CATEX at an installation requires further analysis to determine there are no cumulative impacts. The EPF must document application of this CATEX on AF Form 813.

A2.3.32. Temporary (for less than 30 days) increases in air operations up to 50 percent of the typical installation aircraft operation rate or increases of 50 operations a day, whichever is greater. Repetitive use of this CATEX at an installation requires further analysis to determine there are no cumulative impacts.

A2.3.33. Flying activities that comply with the Federal aviation regulations, that are dispersed over a wide area and that do not frequently (more than once a day) pass near the same ground points. This CATEX does not cover regular activity on established routes or within special use airspace.

A2.3.34. Supersonic flying operations over land and above 30,000 feet MSL, or over water and above 10,000 feet MSL and more than 15 nautical miles from land.

A2.3.35. Formal requests to the FAA, or host-nation equivalent agency, to establish or modify special use airspace (for example, restricted areas, warning areas, military operating areas) and military training routes for subsonic operations that have a base altitude of 3,000 feet above ground level or higher. The EPF must document application of this CATEX on AF Form 813, which must accompany the request to the FAA.

A2.3.36. Adopting airfield approach, departure, and en route procedures that are less than 3,000 feet above ground level, and that also do not route air traffic over noise-sensitive areas, including residential neighborhoods or cultural, historical, and outdoor recreational areas. The EPF may categorically exclude such air traffic patterns at or greater than 3,000 feet above ground level regardless of underlying land use.

A2.3.37. Participating in "air shows" and fly-overs by Air Force aircraft at non-Air Force public events after obtaining FAA coordination and approval.

A2.3.38. Conducting Air Force "open houses" and similar events, including air shows, golf tournaments, home shows, and the like, where crowds gather at an Air

Force installation, so long as crowd and traffic control, etc., have not in the past presented significant safety or environmental impacts.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16869, Mar. 28, 2001]

EDITORIAL NOTE: At 72 FR 37107, July 9, 2007, appendix B to part 989 was amended by revising "AFLSA/JAJT" to read "AFLOA/JAJT" in A3.1.1 and A3.1.2. However, the amendment could not be made because appendix B did not contain such sections.

APPENDIX C TO PART 989—PROCEDURES FOR HOLDING PUBLIC HEARINGS ON DRAFT ENVIRONMENTAL IMPACT STATEMENTS (EIS)

A.3.1. General Information

A3.1.1. The Office of the Judge Advocate General, through the Air Force Legal Services Agency/Trial Judiciary Division (AFLSA/JAJT) and its field organization, is responsible for conducting public hearings and assuring verbatim transcripts are accomplished.

A3.1.2. The EPF, with proponent, AFLSA/JAJT, and Public Affairs support, establishes the date and location, arranges for hiring the court reporter, funds temporary duty costs for the hearing officer, makes logistical arrangements (for example, publishing notices, arranging for press coverage, obtaining tables and chairs, etc.).

A3.1.3. The procedures outlined below have proven themselves through many prior applications. However, there may be rare instances when circumstances warrant conducting public hearings under a different format, e.g., public/town meeting, information booths, third party moderator, etc. In these cases, forward a request with justification to deviate from these procedures to HQ USAF/A7CI for SAF/IEE approval.

A3.2. Notice of Hearing (40 CFR 1506.6)

A3.2.1. Public Affairs officers:

A3.2.1.1. Announce public hearings and assemble a mailing list of individuals to be invited.

A3.2.1.2. Distribute announcements of a hearing to all interested individuals and agencies, including the print and electronic media.

A3.2.1.3. Place a newspaper display advertisement announcing the time and place of the hearing as well as other pertinent particulars.

A3.2.1.4. Distribute the notice in a timely manner so it will reach recipients or be published at least 15 days before the hearing date. Distribute notices fewer than 15 days before the hearing date when you have substantial justification and if the justification

for a shortened notice period appears in the notice.

A3.2.1.5. Develop and distribute news release.

A3.2.2. If an action has effects of national concern, publish notices in the FEDERAL REGISTER and mail notices to national organizations that have an interest in the matter.

A3.2.2.1. Because of the longer lead time required by the FEDERAL REGISTER, send out notices for publication in the FEDERAL REGISTER to arrive at HQ USAF/A7CI no later than 30 days before the hearing date.

A3.2.3. The notice should include:

A3.2.3.1. Date, time, place, and subject of the hearing.

A3.2.3.2. A description of the general format of the hearing.

A3.2.3.3. The name, address, and telephone number of the Air Force point of contact.

A3.2.3.4. A suggestion that speakers submit (in writing or by return call) their intention to participate, with an indication of which environmental impact (or impacts) they wish to address.

A3.2.3.5. Any limitation on the length of oral statements.

A3.2.3.6. A suggestion that speakers submit statements of considerable length in writing.

A3.2.3.7. A summary of the proposed action.

A3.2.3.8. The location where the draft EIS and any appendices are available for examination.

A.3.3. Availability of the Draft EIS to the Public

The EPF makes copies of the Draft EIS available to the public at an Air Force installation and other reasonably accessible place in the vicinity of the proposed action and public hearing (e.g., public library).

A3.4. Place of the Hearing

The EPF arranges to hold the hearing at a time and place and in an area readily accessible to military and civilian organizations and individuals interested in the proposed action. Generally, the EPF should arrange to hold the hearing in an off-base civilian facility, which is more accessible to the public.

A3.5. Hearing Officer

A3.5.1. The AFLOA/JAJT selects a hearing officer to preside over hearings. The hearing officer does not need to have personal knowledge of the project, other than familiarity with the Draft EIS. In no event should the hearing officer be a judge advocate from the proponent or subordinate command, be assigned to the same installation with which the hearing is concerned, or have participated personally in the development of the project, or have rendered legal advice or assistance with respect to it (or be expected to

do so in the future). The principal qualification of the hearing officer should be the ability to conduct a hearing as an impartial participant.

A3.5.2. The primary duties of the hearing officer are to make sure that the hearing is orderly, is recorded, and that interested parties have a reasonable opportunity to speak. The presiding officer should direct the speakers' attention to the purpose of the hearing, which is to consider the environmental impacts of the proposed project. Speakers should have a time limit to ensure maximum public input to the decision-maker.

A3.6. Record of the Hearing

The EIS preparation team must make sure a verbatim transcribed record of the hearing is prepared, including all stated positions, all questions, and all responses. The EIS preparation team should append all written submissions that parties provide to the hearing officer during the hearing to the record as attachments. The EIS preparation team should also append a list of persons who spoke at the hearing and submitted written comments and a list of the organizations or interests they represent with addresses. The EIS preparation team must make sure a verbatim transcript of the hearing is provided to the EPF for inclusion as an appendix to the Final EIS. The officer should also ensure that all persons who request a copy of the transcript get a copy when it is completed. Copying charges are determined according to 40 CFR 1506.6(f).

A3.7. Hearing Format

Use the format outlined below as a general guideline for conducting a hearing. Hearing officers should tailor the format to meet the hearing objectives. These objectives provide information to the public, record opinions of interested persons on environmental impacts of the proposed action, and set out alternatives for improving the EIS and for later consideration.

A3.7.1. Record of Attendees. The hearing officer should make a list of all persons who wish to speak at the hearing to help the hearing officer in calling on these individuals, to ensure an accurate transcript of the hearing, and to enable the officer to send a copy of the Final EIS (40 CFR 1502.19) to any person, organization, or agency that provided substantive comments at the hearing. The hearing officer should assign assistants to the entrance of the hearing room to provide cards on which individuals can voluntarily write their names, addresses, telephone numbers, organizations they represent, and titles; whether they desire to make a statement at the hearing; and what environmental area(s) they wish to address. The hearing officer can then use the cards to

call on individuals who desire to make statements. However, the hearing officer will not deny entry to the hearing or the right to speak to people who decline to submit this information on cards.

A3.7.2. Introductory Remarks. The hearing officer should first introduce himself or herself and the EIS preparation team. Then the hearing officer should make a brief statement on the purpose of the hearing and give the general ground rules on how it will be conducted. This is the proper time to welcome any dignitaries who are present. The hearing officer should explain that he or she does not make any recommendation or decision on whether the proposed project should be continued, modified, or abandoned or how the EIS should be prepared.

A3.7.3. Explanation of the Proposed Action. The Air Force EIS preparation team representative should next explain the proposed action, the alternatives, the potential environmental consequences, and the EIAP.

A3.7.4. Questions by Attendees. After the EIS team representative explains the proposed action, alternatives, and consequences, the hearing officer should give attendees a chance to ask questions to clarify points they may not have understood. The EIS preparation team may have to reply in writing, at a later date, to some of the questions. While the Air Force EIS preparation team should be as responsive as possible in answering questions about the proposal, they should not become involved in debate with questioners over the merits of the proposed action. Cross-examination of speakers, either those of the Air Force or the public, is not the purpose of an informal hearing. If necessary, the hearing officer may limit questioning or conduct portions of the hearing to ensure proper lines of inquiry. However, the hearing officer should include all questions in the hearing record.

A3.7.5. Statement of Attendees. The hearing officer must give the persons attending the hearing a chance to present oral or written statements. The hearing officer should be sure the recorder has the name and address of each person who submits an oral or written statement. The officer should also permit the attendees to submit written statements within a reasonable time, usually two weeks, following the hearing. The officer should allot a reasonable length of time at the hearing for receiving oral statements. The officer may waive any announced time limit at his or her discretion. The hearing officer may allow those who have not previously indicated a desire to speak to identify themselves and be recognized only after those who have previously indicated their intentions to speak have spoken.

A3.7.6. Ending or Extending a Hearing. The hearing officer has the power to end the hearing if the hearing becomes disorderly, if the speakers become repetitive, or for other

good cause. In any such case, the hearing officer must make a statement for the record on the reasons for terminating the hearing. The hearing officer may also extend the hearing beyond the originally announced date and time. The officer should announce the extension to a later date or time during the hearing and prior to the hearing if possible.

A3.8. Adjourning the Hearing

After all persons have had a chance to speak, when the hearing has culled a representative view of public opinion, or when the time set for the hearing and any reasonable extension of time has ended, the hearing officer adjourns the hearing. In certain circumstances (for example, if the hearing officer believes it is likely that some participants will introduce new and relevant information), the hearing officer may justify scheduling an additional, separate hearing session. If the hearing officer makes the decision to hold another hearing while presiding over the original hearing he or she

should announce that another public hearing will be scheduled or is under consideration. The officer gives notice of a decision to continue these hearings in essentially the same way he or she announced the original hearing, time permitting. The Public Affairs officer provides the required public notices and directs notices to interested parties in coordination with the hearing officer. Because of lead-time constraints, SAF/IEE may waive FEDERAL REGISTER notice requirements or advertisements in local publications. At the conclusion of the hearing, the hearing officer should inform the attendees of the deadline (usually 2 weeks) to submit additional written remarks in the hearing record. The officer should also notify attendees of the deadline for the commenting period of the Draft EIS.

[64 FR 38129, July 15, 1999, as amended at 66 FR 16869, Mar. 28, 2001, as amended at 66 FR 31177, June 11, 2001; 72 FR 37107, July 9, 2007]

PARTS 900–999 [RESERVED]