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# CODE OF FEDERAL REGULATIONS

# Title 32
## National Defense

Parts 191 to 399

Revised as of July 1, 2022

Containing a codification of documents
of general applicability and future effect

As of July 1, 2022

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*Cite this Code:* CFR

*To cite the regulations in this volume use title, part and section number. Thus,* 32 CFR 191.1 *refers to title 32, part 191, section 1.*

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

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OLIVER A. POTTS,
*Director*,
*Office of the Federal Register*
*July 1, 2022*

# THIS TITLE

Title 32—NATIONAL DEFENSE is composed of six volumes. The parts in these volumes are arranged in the following order: Parts 1–190, parts 191–399, parts 400–629, parts 630–699, parts 700–799, and part 800 to end. The contents of these volumes represent all current regulations codified under this title of the CFR as of July 1, 2022.

The current regulations issued by the Office of the Secretary of Defense appear in the volumes containing parts 1–190 and parts 191–399; those issued by the Department of the Army appear in the volumes containing parts 400–629 and parts 630–699; those issued by the Department of the Navy appear in the volume containing parts 700–799, and those issued by the Department of the Air Force, Defense Logistics Agency, Selective Service System, Office of the Director of National Intelligence, National Counterintelligence Center, Central Intelligence Agency, Information Security Oversight Office (National Archives and Records Administration), National Security Council, Office of Science and Technology Policy, Office for Micronesian Status Negotiations, and Office of the Vice President of the United States appear in the volume containing part 800 to end.

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

# Title 32—National Defense

(This volume contains parts 191 to 399)

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*Part*

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# Subtitle A—Department of Defense (Continued)

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# SUBCHAPTER M—MISCELLANEOUS

## PART 191—THE DOD CIVILIAN EQUAL EMPLOYMENT OPPORTUNITY (EEO) PROGRAM

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191.3 Definitions.
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191.6 Procedures.
191.7 Civilian EEO program staff.
191.8 Defense equal opportunity council and EEO boards.
191.9 Information requirements.
191.10 Effective date.

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

SOURCE: 53 FR 30990, Aug. 17, 1988, unless otherwise noted.

### § 191.1 Purpose.

This part:

(a) Implements the DoD Humans Goals Charter; 29 U.S.C. 791, 792, 793, and 795; guidance from the Equal Employment Opportunity Commission (EEOC); guidance from the Office of Personnel Management (OPM); Executive Order 11830; General Services Administration Order ADM 5420.71A; Executive Orders 11141; 11246 Part II, 11375, and 12086; Office of Management and Budget (OMB) Circular No. A–11; 42 U.S.C. 2000E–16; Executive Order 11478; 38 U.S.C. 2014; 29 U.S.C. 631(b) and 633a; 5 U.S.C. chapters 43 and 72; Secretary of Defense Policy on Sexual Harassment, July 17, 1981; Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics) Multiple Addressee Memorandum, August 16, 1981; and 29 U.S.C. 206(d) by establishing the Civilian Equal Employment Opportunity (EEO) Program, to include affirmative action programs, consistent with guidance from the Equal Employment Opportunity Commission (EEOC), Office of Personnel Management (OPM), and the DoD Human Goals Charter.

(b) Consolidates in a single document provisions of Secretary of Defense Multiple Addressee Memorandum, June 23, 1981; DoD Directive 1100.11, DoD Directive 1450.1, DoD Directive 5120.46, and DoD Directive 1100.15, therefore cancelling each document.

(c) Authorizes, as an integral part of the Civilian EEO Program, the establishment of Special Emphasis Programs (SEPs) entitled the Federal Women's Program (FWP), the Hispanic Employment Program (HEP), and the Program for People with Disabilities (PPD), the Asian/Pacific Islander Employment Program (AEP), the American Indian/Alaskan Native Employment Program (AIEP), and the Black Employment Program (BEP).

(d) Establishes the Defense Equal Opportunity Council (DEOC), the Civilian EEO Review Board, the SEP Boards.

(e) Authorizes the issuance of DoD Instructions and Manuals to implement this part and guidance from standard-setting agencies such as EEOC and OPM, consistent with DoD 5025.1–M.

[53 FR 30990, Aug. 17, 1988, as amended at 56 FR 10170, Mar. 11, 1991; 57 FR 35755, Aug. 11, 1992]

### § 191.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense (OSD) and activities supported administratively by OSD, the Military Departments, the Organization of the Joint Chiefs of Staff (as an element of the OSD for the purposes of this program), the Unified and Specified Commands, the Defense Agencies, the Army and Air Force Exchange Service, the National Guard Bureau, the Uniformed Services University of the Health Sciences, the Office of Civilian Health and Medical Programs of the Uniformed Services, and the DoD Dependents Schools (hereafter referred to collectively as ''DoD Components'').

(b) Applies worldwide to all civilian employees and applicants for civilian employment within the Department of Defense in appropriated and non-appropriated fund positions.

(c) Does not apply to military personnel, for whom equal opportunity is covered by DoD Directive 1350.2[1].

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

(d) Covers Federal employment issues under section 504 of the Rehabilitation Act of 1973, as amended, even though DoD Directive 1020.1[2] implements section 504 with respect to programs conducted and assisted by the Department of Defense. The standards established under section 501 of the Rehabilitation Act of 1973, as amended, (29 U.S.C. 791, 792, 793, and 795), are to be applied under section 504 of the Act with respect to civilian employees and applicants for civilian employment in Federal Agencies.

[53 FR 30990, Aug. 17, 1988, as amended at 56 FR 10170, Mar. 11, 1991]

### § 191.3 Definitions.

*Affirmative action*. A tool to achieve equal employment opportunity. A program of self-analysis, problem identification, data collection, policy statements, reporting systems, and elimination of discriminatory policies and practices, past and present.

*Age*. A prohibited basis discrimination. For purposes of this Directive, persons protected under age discrimination provisions are those 40 years of age or older, except when a maximum age requirement has been established by statute or the OPM. Aliens employed outside the limits of the United States are not covered by this definition.

*Discrimination*. Illegal treatment of a person or group based on race, color, national origin, religion, sex, age, or disability.

*Equal Employment Opportunity (EEO)*. The right of all persons to work and advance on the basis of merit, ability, and potential, free from social, personal, or institutional barriers of prejudice and discrimination.

*Minorities*. All persons classified as black (not of Hispanic origin), Hispanic, Asian or Pacific Islander, and American Indian or Alaskan Native.

*National origin*. A prohibited basis for discrimination. An individual's place of origin or his or her ancestor's place of origin or the possession of physical, cultural, or linguistic characteristics of a national origin group.

*People with disabilities*. People who have physical or mental impairments that substantially limits one or more major life activities, has a record of such impairment, or is regarded as having such an impairment. For purposes of this part, such term does not include any individual who is an alcoholic or drug abuser and whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question, or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or to the safety of others. As used in this paragraph:

(a) *Physical or mental impairment*. Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological; musculoskeletal and special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(b) *Major life activities*. Functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(c) *Has a record of such impairment*. Has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(d) *Is regarded as having an impairment*. Has:

(1) A physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation;

(2) A physical or mental impairment that substantially limits major life activities only as a result of the attitude of others toward such impairment; or

(3) None of the impairments defined above but is treated by an employer as having an impairment.

*Race*. A prohibited basis for discrimination. For purposes of this part, all persons are classified as black (not of Hispanic origin), Hispanic, Asian or Pacific Islander, American Indian or Alaskan Native, and White, as follows:

[2] See footnote 1 to § 191.2(c).

(a) *Black (not of Hispanic origin)*. A person having origins in any of the black racial groups of Africa.

(b) *Hispanic origin*. A person of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish culture or origin regardless of race.

(c) *Asian or Pacific Islander*. A person having origin in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands. This area includes, for example, China, India, Japan, Korea, the Philippine Islands, and Samoa.

(d) *American Indian or Alaskan Native*. A person having origins in any of the original peoples of North America, and who maintains cultural identification through tribal affiliation or community recognition.

(e) *White*. A person having origins in any of the original peoples of Europe, North Africa, or the Middle East.

*Religion*. Traditional systems of religious belief and moral or ethical beliefs as to what is right and wrong that are sincerely held with the strength of traditional religious views. The phrase ''religious practice'' as used in this part includes both religious observances and practices. DoD Components are expected to accommodate an employee's religious practices unless doing so causes undue hardship on the conduct of the Component's business.

*Sexual Harassment*. A form of sex discrimination that involves unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(a) Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of a person's job, pay, or career; or

(b) Submission to or rejection of such conduct by a person is used as a basis for career or employment decisions affecting that person, or

(c) Such conduct interferes with an individual's performance or creates an intimidating, hostile, or offensive environment.

Any person in a supervisory or command position who uses or condones implicit or explicit sexual behavior to control, influence, or affect the career, pay, or job of a military member of civilian employee is engaging in sexual harassment. Similarly, any military member of civilian employee who makes deliberate or repeated unwelcomed verbal comments, gestures, or physical contact of a sexual nature is also engaging in sexual harassment.

*Special Emphasis Program (SEPs)*. Programs established as integral parts of the overall EEO program to enhance the employment, training, and advancement of a particular minority group, women, or people with disabilities.

*Standard-setting agencies*. Non-DoD Federal Agencies authorized to establish Federal Government-wide EEO policy or program requirements. The term includes the EEOC; OPM: DoL, Office of Federal Contract Compliance Programs (OFCCP); and OMB.

[53 FR 30990, Aug. 17, 1988, as amended at 54 FR 15752, Apr. 19, 1989; 57 FR 35755, Aug. 11, 1992]

### § 191.4 Policy.

It is DoD Policy to:

(a) Recognize equal opportunity programs, including affirmative action programs, as essential elements of readiness that are vital to the accomplishment of the DoD national security mission. Equal employment opportunity is the objective of affirmative action programs.

(b) Develop and implement affirmative action programs to achieve the objective of a civilian work force in which the representation of minorities, women, and people with disabilities at all grade levels, in every occupational series, and in every major organization element is commensurate with the representation specified in EEOC and OPM guidance. Such programs, which shall be designed to identify, recruit, and select qualified personnel, shall be coordinated with the cognizant legal offices.

(c) Ensure that Civilian EEO Program activities for minorities, women, and people with disabilities are integrated fully into the civilian personnel management system.

(d) Assess progress in DoD Component programs in accordance with the affirmative action goals of the Department of Defense.

(e) Prohibit discrimination based on race, color, religion, sex, national origin, mental or physical disability, or age.

(f) Eliminate barriers and practices that impede equal employment opportunity for all employees and applicants for employment, including sexual harassment in the work force and at work sites and architectural, transportation, and other barriers affecting people with disabilities.

[53 FR 30990, Aug. 17, 1988, as amended at 54 FR 15752, Apr. 19, 1989; 57 FR 35756, Aug. 11, 1992]

### § 191.5 Responsibilities.

(a) The *Assistant Secretary of Defense (Force Management and Personnel* (ASD(FM&P)), or designee, shall:

(1) Represent the Secretary of Defense in all matters related to the DoD Civilian EEO Program, consistent with DoD Directive 5124.2[3]

(2) Establish and chair the DEOC.

(3) Establish a Civilian EEO Review Board.

(4) Develop policy and provide program oversight for the Civilian EEO Program.

(5) Ensure full implementation of this part, monitor progress of affirmative action program elements, and advise the Secretary of Defense on matters relating to the Civilian EEO Program.

(6) Ensure that realistic goals that provide for significant continuing increases in the percentages of minorities, women, and people with disabilities in entry, middle, and higher grade positions in all organizations and occupations are set and accomplished until the overall DoD objective is met and sustained.

(7) Prepare a new DoD Human Goals Charter each time a new Secretary of Defense is appointed.

(8) Ensure fair, impartial, and timely investigation and resolution of complaints of discrimination in employment, including complaints of sexual harassment.

(9) Establish DoD SEPs for the FWP, HEP, HIP, AEP, AIEP, and BEP.

(10) Establish DoD Special Emphasis Program Boards to assist with implementation of SEPs under this part.

(11) Establish DoD Civilian EEO Award Programs to provide for the annual issuance of Secretary of Defense Certificates of Merit to DoD Components and individuals for outstanding achievement in the major areas covered by this part, and to review all awards and management training programs within the Department of Defense to ensure that minorities, women, and people with disabilities receive full and fair consideration consistent with their qualifications and the applicable program criteria.

(12) Issue implementing instructions and other documents, as required, to achieve the goals of the DoD Civilian EEO Program and to provide policy direction and overall guidance to the DoD Components.

(13) Represent the Department of Defense on programmatic EEO matters with EEOC, OPM, the Department of Justice, other Federal Agencies, and Congress.

(14) Represent the Department of Defense on the Interagency Committee on Handicapped Employees under E.O. 11830, as amended, and the Council on Accessible Technology under General Services Administration Order ADM 5420.71A.

(15) Represent the Department of Defense at meetings and conferences of non-Federal organizations concerned with EEO programs, and coordinate DoD support of such organizations' activities with the Assistant Secretary of Defense (Public Affairs) and with DoD General Counsel in accordance with DoD Directive 5410.18[4], DoD Instruction 5410.19[5], DoD Directive 5500.2[6], and DoD Directive 5500.7[7].

(16) Serve as the DoD liaison with the Office of Federal Contract Compliance Programs (OFCCP), Department of Labor (DoL), for the purpose of providing contract information, forwarding complaints of discrimination filed against DoD contractors, and implementing administrative sanctions imposed against DoD contractors for

[3] See footnote 1 to § 191.2(c).

[4] See footnote 1 to § 191.2(c).

[5] See footnote 1 to § 191.2(c).

[6] See footnote 1 to § 191.2(c).

[7] See footnote 1 to § 191.2(c).

violations of E.O. 11141; E.O. 11246; as amended by E.O. 11375, E.O. 12088; and DoL implementing regulations.

(17) Ensure that the DoD FAR Supplement contains appropriate contract provisions for EEO for Government contractors and subcontractors under Executive Orders 11141, 11246 Part II, 11375, and 12086; Section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; Section 503 of the Rehabilitation Act of 1973, as amended; and DoL implementing regulations.

(b) The *Heads of DoD Components*, or their designees, shall:

(1) Ensure that all EEO policies are disseminated widely and that they are understood and implemented at all levels within their Components.

(2) Ensure that their Components comply with EEOC and OPM guidance and this part and that minorities, women, and people with disabilities receive full and fair consideration for civilian employment in all grade levels, occupations, and major organizations, with special emphasis on mid-level and higher grades and executive-level jobs, including the Senior Executive Service (SES) and SES candidate pools.

(3) Treat equal opportunity and affirmative action programs as essential elements of readiness that are vital to accomplishment of the national security mission.

(4) Designate a Director of Civilian Equal Opportunity and allocate sufficient staff and other resources to ensure a viable EEO program under this Directive. This includes assignment of staff to be responsible for EEO and affirmative action programs generally and SEP Managers for the SEPs established under this part at the Component level.

(5) Establish DoD SEPs, for the FWP, HEP, PPD, AEP, AIEP, and BEP at Headquarters level and at all field activities levels unless exemptions are granted to field activities. Authority to grant exceptions to field activities of DoD Components is delegated to the Component Heads who, in turn, may redelegate this authority.

(6) Require that EEO be included in critical elements in the performance appraisals of all supervisors, managers, and other Component personnel, military and civilian, with EEO responsibilities.

(7) Ensure fair, impartial, and timely investigation and resolution of complaints of discrimination in employment, including complaints of sexual harassment.

(8) Set realistic Component goals and motivate subordinate managers and supervisors to set and meet their own goals until overall DoD and Component goals are met and sustained.

(9) Evaluate employment policies, practices, and patterns within their respective Components and identify and correct and institutional barriers that restrict opportunities for recruitment, employment, advancement, awards, or training for minorities, women, and people with disabilities and ensure that EEO officers and civilian personnel officers provide leadership in eliminating these barriers.

(10) Ensure that installations and activities establish focused external recruitment programs to produce employment applications from minorities, women, and people with disabilities who are qualified to compete effectively with internal DoD candidates for employment at all levels and in all occupations.

(11) Establish a continuing EEO educational program (including training in the prevention of sexual harassment) for civilian and military personnel who supervise civilian employees.

(12) Establish EEO Awards Programs to recognize individuals and organizational units for outstanding achievement in one or all of the major EEO areas covered by this part.

(13) Review all award and management training programs to ensure that minorities, women, and people with disabilities are considered, consistent with their qualifications and program criteria.

(14) At military installations having a civilian work force and military units, ensure that the Civilian EEO Program is managed by and conducted for civilian personnel only and that the Military Equal Opportunity Program is managed by and conducted for military personnel only. Any exceptions to this

policy must be authorized by the Component head.

[53 FR 30990, Aug. 17, 1988, as amended at 56 FR 10170, Mar. 11, 1991; 57 FR 35756, Aug. 11, 1992]

### § 191.6 Procedures.

(a) Officials designated in this Directive shall allocate resources necessary to develop methods and procedures to ensure that all elements of this part are fully implemented and are in compliance with the spirit and intent of the DoD Human Goals Charter, laws, executive orders, regulatory requirements, and other Directive and Instructions governing the Civilian EEO Program within the Department of Defense.

(b) Heads of DoD Components, in accordance with EEOC and OPM guidance and subject to oversight by and supplemental guidance from the ASD(FM&P), or designee shall:

(1) Develop procedures for and implement an affirmative action program for minorities and women, consistent with section 717 of the Civil Rights Act of 1964, as amended; E.O. 11478; guidance from EEOC; and guidance from OPM.

(2) Develop procedures for and implement an affirmative action program for people with disabilities consistent with section 501 of Rehabilitation Act of 1973, as amended, and guidance from EEOC.

(3) Develop procedures for and implement an affirmative action program for disabled veterans, consistent with DoD Directive 1341.6.[8] This program shall be consistent with the program established in paragraph (b)(2) of this section and coordinated with the Component's PPD manager.

(4) Develop procedures for and implement systems for investigation and resolution of complaints of employment discrimination under section 717 of the Civil Rights Act of 1964, as amended; sections 501, 503, and 504 of the Rehabilitation Act of 1973, as amended and DoD Directive 1020.1; section 402 of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended; the Age Discrimination in Employment Act of 1967, as amended; guidance from EEOC; and applicable case law.

(5) Develop procedures for and implement a Federal Equal Opportunity Recruitment Program for minorities and women and a comparable special recruitment program for people with disabilities in accordance with the Civil Service Reform Act of 1978; EEOC instruction concerning affirmative action programs for people with disabilities; guidance from OPM; external recruitment programs to obtain employment applications from minorities, women, and people with disabilities who are competitive with internal DoD candidates for employment at all levels.

(6) Develop procedures for and implement all SEPs established under this part at the Component level. These SEPs shall be integral parts of the Civilian EEO Program and shall be conducted in accordance with the provisions of this part and applicable EEOC and OPM guidance.

(7) Develop procedures for and implement a program to eliminate sexual harassment in Component work places, consistent with DoD Policy on Sexual Harassment memorandums, and to ensure compliance with the Equal Pay Act.

(8) Develop procedures for and implement a program of employment preference for spouses of military personnel, in accordance with DoD Instruction 1404.12.[9]

(9) Develop procedures for and implement a selective placement program for people with disabilities in accordance with guidance from OPM. This program shall be consistent with the program established in paragraph (b)(2) of this section, and coordinated with the Component's PPD manager.

(10) Develop procedures for and implement staffing initiatives, training and development programs, and upward mobility programs designed to increase the representation of qualified minorities, women, and people with disabilities on certificates of eligibility and accompanying lists of individuals eligible for special appointments that are provided to selecting officials at all levels within the Component. These

[8] See footnote 1 to § 191.2(c).

[9] See footnote 1 to § 191.2(c).

programs should include SES candidate programs and shall be targeted in career field in which there is underrepresentation and a likelihood of vacancies (e.g., science and engineering positions).

(11) Develop procedures for and implement a program to evaluate all supervisors and managers with EEO responsibilities on their contributions to and support of the Component's EEO program. Specifically, Component SES and General Manager personnel, when appropriate, shall have their EEO responsibilities defined as a critical element in their performance appraisals in accordance with the Civil Service Reform Act of 1978.

(12) Develop procedures for an implement a program to participate in and conduct ceremonies, where appropriate, at all levels of the Component to observe nationally proclaimed or other specially-designated community activities that particularly affect minorities, women, and people with disabilities and that support the Civilian EEO Program. Military and civilian personnel should both participate whenever possible. Example of special observances include Dr. Martin Luther King Jr.'s Birthday, Black History Month, National Women's History Week, Women's Equality Day, Hispanic Heritage Week, National Disability Employment Awareness Month, and the Decade of Disabled Persons.

(13) Develop procedures for and implement a program to revise documents and change practices and policies that discriminate against civilian personnel on the basis of race, color, sex, religion, national origin, mental or physical disability, or age.

(14) Develop procedures for and implement and affirmative action program for the continued Federal employment of minorities, women, and people with disabilities who have lost their jobs in DoD Components because of contracting decisions made under OMB Circular No. A–76. (Under OMB Circular Federal employees have, in general, the right of first refusal of employment under these contracts.)

(15) Develop procedures for and implement a program for computer support of employees with disabilities consistent with DoD participation in activities of the Council on Accessible Technology in accordance with General Services Administration Order ADM 5420.71A.

[53 FR 30990, Aug. 17, 1988, as amended at 54 FR 15752, Apr. 19, 1989; 57 FR 35756, Aug. 11, 1992]

### § 191.7 Civilian EEO program staff.

(a) EEO Managers, including SEP Managers and other staff who are responsible for EEO and affirmative action programs, shall function at a level that is sufficiently responsible with the assigned organization to enable them to communicate effectively the goals and objectives of the program and to enable them to obtain the understanding, support, and commitment of managers and other officials at all levels within the organization.

(b) It shall be the responsibility of EEO Managers, SEP Managers, and other program staff to develop, coordinate, implement, and recommend to managers, other officials, and covered groups the policy, guidance, information, and activities necessary to attain the goals of the SEPs and the overall DoD Civilian EEO Program.

### § 191.8 Defense equal opportunity council and EEO boards.

(a) The DEOC shall be chaired by the ASD (FM&P) and shall coordinate policy for and review civilian and military equal opportunity programs, monitor progress of program elements, and advise the secretary of Defense on pertinent matters. One of the mandates of the DEOC shall be to pursue an aggressive course of action to increase the numbers of minorities, women, and people with disabilities in management and executive positions at grades 13 and above, including the SES and, at the request of the Secretary of Defense, Schedule C, and other noncareer executive positions in the SES and on the Executive Schedule. Members of the DEOC shall include the assistant Secretary of Defense (Reserve Affairs), Director of Administration and Management, and the Assistant Secretaries with responsibility for personnel policy and reserve affairs in the Military Departments.

(b) The Civilian EEO Review Board shall be chaired by the ASD(FM&P), or

designee. The Board shall support the DEOC and shall be made up of designated EEO and personnel representatives from the DoD Components and such other individuals as may be necessary to carry out the work of the DEOC and implement this part. The Board shall work with career management officials, other key management officials, and union representatives in developing policies, programs, and objectives.

(c) The DoD SEP Boards shall be chaired by the DoD SEP Managers. These Boards shall be comprised of designated SEP Managers from the DoD Components and such other individuals as may be necessary to advise and assist in EEO activities and policy development in the Department of Defense. The Boards shall work with career management officials, other key management officials, and union representatives in developing policies, programs, and objectives.

(d) The DEOC, Civilian EEO Review Board, and each SEP Board established at the DoD level shall have a Charter that describes its organization, management, functions, and operating procedures, consistent with DoD Directive 5105.18.[10]

(e) Civilian EEO Review Boards and SEP Boards may be established at Component, command, and installation levels as well as the DoD level to assist in program activities.

(f) Members of covered groups should be represented on Civilian EEO Review Boards, SEP Boards, and subcommittees at all levels; and consideration should be given to participation by military personnel and by Federal employees who are union representatives.

[53 FR 30990, Aug. 17, 1988, as amended at 54 FR 15752, Apr. 19, 1989; 57 FR 35756, Aug. 11, 1992]

### § 191.9 Information requirements.

(a) The ASD(FM&P) shall:

(1) Submit an annual report to the Secretary of Defense on the status of the DoD EEO program. This report shall be developed from existing documents, such as affirmative action plan accomplishment reports, civil rights budget reports, semiannual discrimination complaint reports, and Federal Equal Opportunity Recruitment Program reports, plus statistical data obtained from the Defense Manpower Data Center and reports of visits to DoD installations.

(2) Submit consolidated DoD annual reports on discrimination complaints to the EEOC in accordance with EEOC guidance. This reporting requirement is assigned Interagency Report Control Number 0288-EEO-NA.

(b) Heads of DoD Components shall:

(1) Submit annual reports on discrimination complaints to the ASD(FM&P), or designee, in accordance with guidance from the EEOC. This reporting requirement is assigned Interagency Report Control Number 0288-EEO-NA.

(2) Submit copies of affirmative action program plan, affirmative action program plan updates, and affirmative action plan accomplishment reports for minorities, women, and people with disabilities to the ASD(FM&P), or designee, in addition to copies of annual reports for the Federal Equal Opportunity Recruitment Program.

(3) Ensure that designated officials submit information for an annual report on computer support of employees with disabilities and for reports on individual computer accommodations for employees with disabilities. These reporting requirements are assigned RCS DD-FM&P (A) 1731 and RCS DD-FM&P (AR) 1732.

[53 FR 30990, Aug. 17, 1988, as amended at 54 FR 15752, Apr. 19, 1989; 57 FR 35756, Aug. 11, 1992]

### § 191.10 Effective date.

This part is effective May 21, 1987.

## PART 192—EQUAL OPPORTUNITY IN OFF-BASE HOUSING

Sec.

192.1 Purpose.
192.2 Applicability.
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[10] See footnote 1 to § 191.2(c).

AUTHORITY: 42 U.S.C. 3601 *et seq.*

SOURCE: 55 FR 6248, Feb. 22, 1990, unless otherwise noted. Redesignated at 56 FR 32964, July 18, 1991.

### § 192.1 Purpose.

This part:

(a) Revises 32 CFR part 192.

(b) Revises the references, policies, and procedures covering off-base housing and fair housing enforcement.

(c) Outlines discrimination complaint inquiries or investigative procedures and hearing requirements.

(d) Deletes the requirement for each Military Department to submit a semiannual housing discrimination report to the Assistant Secretary of Defense (Force Management and Personnel) (ASD(FM&P)).

(e) Requires each Military Service to report to the ASD(FM&P) any housing discrimination cases and their results in their Annual Military Equal Opportunity Assessment Report to the ASD(FM&P).

(f) Requires each Military Department to maintain all completed or resolved housing discrimination cases.

(g) Emphasizes liaison with other Government (local, State, or Federal) agencies.

[55 FR 6248, Feb. 22, 1990. Redesignated and amended at 56 FR 32964, July 18, 1991]

### § 192.2 Applicability.

This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Joint Chiefs of Staff (JCS), the Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense (IG, DoD), the Uniformed Services University of the Health Sciences (USUHS), the Defense Agencies, and DoD Field Activities (hereafter referred to collectively as ''DoD Components''). The term ''Military Services,'' as used herein, refers to the Army, Navy, Air Force, and Marine Corps. DoD civilian employees (as defined in § 192.3) will be offered the same services that members of the Armed Forces receive.

[55 FR 6248, Feb. 22, 1990. Redesignated and amended at 56 FR 32964, July 18, 1991]

### § 192.3 Definitions.

*Agent*. Real estate agency, manager, landlord, or owner of a housing facility doing business with DoD personnel or a housing referral service (HRS).

*Area outside the United States*. Foreign countries where DoD personnel reside.

*Commander*. The military or civilian head of any installation, organization, or agency of the Department of Defense who is assigned responsibility for the off-base housing program.

*Commuting area*. That area which is within a 1 hour commute by a privately-owned vehicle during rush hour and no farther than 30 miles from the installation, or within other limits to satisfy mission requirements.

*Complainant*. A member of the Armed Forces (or authorized dependent designated by the member) or a civilian employee of the Department of Defense (or authorized dependent designated by the civilian employee) who submits a complaint of discrimination under this part.

*Discrimination*. An act, policy, or procedure that arbitrarily denies equal treatment in housing because of race, color, religion, sex, national origin, age, handicap, or familial status to an individual or group of individuals.

*DoD personnel*. (1) Members of the Armed Forces (and their dependents) authorized to live off-base.

(2) DoD civilian employees (and their dependents) who are transferred from one place of residence to another because of job requirements or recruited for job opportunities away from their current place of residence in the United States, and all DoD U.S. citizen appropriated fund and nonappropriated fund civilian employees and their dependents outside the United States.

*Familial Status*. One or more individuals (who have not attained the age of 18 years) being domiciled with a parent or another person having legal custody of such an individual or individuals; or the designee of such parent or other person having such custody, with the written permission of such parent or other person.

*Listed facility*. A suitable housing facility (not on restrictive sanction) listed with the HRS as available for occupancy by DoD personnel.

*Minorities.* All persons classified as black (not of Hispanic origin), Hispanic, Asian or Pacific Islander, or American Indian or Alaskan native.

*Relief for the complainant.* Action taken by a commander for the benefit of a complainant.

*Restrictive sanctions.* Actions taken by a commander to prevent military personnel from moving to, or entering into a rental, lease, or purchase arrangement with, a housing facility, when its agent has been found to have discriminated against DoD personnel. Restrictive sanctions are effective against the agent and the facility.

*Survey.* The procedure by which the HRS identifies housing resources to ascertain the availability of housing facilities for occupancy by DoD personnel.

*Verifiers.* Volunteers used by the commander during the course of a housing discrimination investigation to determine if, in fact, housing discrimination is being practiced by an agent, as alleged. Verifiers are not required to be prospective tenants.

**§ 192.4 Policy.**

It is DoD policy that under DoD Directive 1350.2[1] the Department of Defense is fully committed to the goal of obtaining equal treatment for all DoD personnel. Specific guidance on off-base housing and fair housing enforcement is as follows:

(a) *National Housing Policy.* Federal law prohibits discrimination in housing in the United States against any person because of race, color, religion, sex, age, national origin, handicap, or familial status.

(1) Title VIII of P.L. 90–284 contains the following:

(i) The fair housing provisions.

(ii) Outlines the responsibilities of the Secretary of Housing and Urban Development (HUD) with regard to Public Law 90–284.

(iii) Requires all Executive Departments and Agencies to administer housing and urban development programs and activities under their jurisdiction in a manner that shall reflect ''affirmatively'' the furthering of title VIII.

(2) Title IX of Public Law 90–284 makes it a crime to intimidate willfully or interfere with any person by force or threat because of that person's activities in support of fair housing.

(3) Title 42 U.S.C. 1982 prohibits discrimination in housing in the United States. This statute protects DoD personnel.

(4) Public Law 100–430 amends title VIII of Public Law 90–284 by revising the procedures for the enforcement of fair housing requirements and adding protected classes of individuals.

(5) Title VIII of Public Law 90–284, as amended by Public Law 100–430, does not limit the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Additionally, provisions of such title VIII regarding familial status do not apply with respect to housing intended for, and solely occupied by, persons 62 years of age or older or intended and operated for occupancy, but at least one person 55 years of age or older. For guidance regarding housing occupied by those 55 years of age or older, use the statutory provision at section 805 b(2)(c), 102 Stat. 1623, of Public Law 100–430.

(b) *DoD Fair Housing Policy.* The Department of Defense intends that Federal fair housing law shall be supported and that DoD personnel shall have equal opportunity for available housing regardless of race, color, religion, sex, age, national origin, handicap, or familial status.

(1) That policy includes the objective of eliminating discrimination against DoD personnel in off-base housing. That objective is not achieved simply by finding a place to live in a particular part of town or in a particular facility for a specific person.

(2) The intent is achieved when a person meeting the ordinary standards of character and financial responsibility is able to obtain off-base housing equally as any other person anywhere in the area surrounding a military installation, without suffering discrimination based on race, color, religion,

[1] Copies of all DoD issuances listed in this part may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22161.

sex, age, national origin, handicap or familial status.

(i) The accomplishment of this objective shall not be hampered by requiring the submission of a formal complaint of discrimination. A suspected discriminatory act, with or without the filing of a formal complaint, is a valid basis for investigation and, if discrimination is substantiated, imposition of restrictive sanctions.

(ii) On substantiation that an agent practiced discrimination, restrictive sanctions shall be imposed for a minimum of 180 days.

(iii) The fact that Public Law 90–284, 42 U.S.C. 1982, and Public Law 100–430 may or may not provide a remedy in a given case of discrimination affecting DoD personnel does not relieve a commander of the responsibility to ensure equal treatment and equal opportunity for such personnel or to impose restrictive sanctions against the agent and/or facility, when appropriate.

(iv) Military installations shall develop information programs to apprise Service members of the DoD policy and program for equal opportunity in off-base housing. Commanders should use local community resources, such as civil rights organizations, religious and service groups, and local information media, in support of their programs.

[55 FR 6248, Feb. 22, 1990. Redesignated and amended at 56 FR 32964, July 18, 1991]

### § 192.5 Responsibilities.

The *Secretaries of the Military Departments* shall:

(a) Ensure nondiscrimination in referring DoD personnel to off-base housing facilities.

(b) Continue efforts (as described in DoD 4165.63–M[2] to identify and solicit nondiscriminatory assurances for housing facilities within the commuting area, which are considered to be suitable for occupancy by Service members.

(c) Ensure that an office and staff required by DoD 4165.63–M are available in conjunction with the cognizant staff judge advocate or other legal authority to advise Service members on the following:

(1) The procedures in this part.

(2) The application of Public Law 90–284, 42 U.S.C. 1982, and Public Law 100–430 in specific situations.

(3) The rights of individuals to pursue remedies through civilian channels, without recourse and in addition to the procedures prescribed in this part, including the right to:

(i) Make a complaint directly to the Department of HUD and/or to the Department of Justice (DoJ) in the United States.

(ii) Bring a private civil action in any court of competent jurisdiction.

(d) Periodically review off-base housing procedures and policies to ensure effectiveness and compliance with this part. (Appendix A to this part is a checklist to help commanders with this review.)

(e) Cooperate with other Government Agencies investigating housing discrimination complaints filed by Service members.

(f) Ensure that each Military Service reports any housing discrimination cases and their results in the Annual Military Equal Opportunity Assessment Report required by DoD Instruction 1350.3.

[55 FR 6248, Feb. 22, 1990. Redesignated and amended at 56 FR 32964, July 18, 1991]

### § 192.6 Procedures.

(a) Appendix B to this part contains the detailed procedures for assisting Service members, investigating housing complaints, and reporting requirements for housing discrimination complaints.

(b) The complaint and investigative report required in section B., appendix B to this part is exempt from formal approval and licensing under DoD 7750.5–M.[3]

[55 FR 6248, Feb. 22, 1990. Redesignated and amended at 56 FR 32965, July 18, 1991]

## APPENDIX A TO PART 192—CHECKLIST FOR COMMANDERS

A. Are all assigned personnel informed of the Equal Opportunity in Off-Base Housing Program requirements before obtaining housing off base?

B. Is there an effective information program ensuring equal opportunity in off-base housing information program?

[2] See footnote 1 to § 192.4.

[3] See footnote 1 to § 192.4.

C. Are community resources being used to support the equal opportunity in off-base housing information program?

D. Are housing discrimination complaints being processed within the required time?

E. Are complainants being informed in writing of the results of housing discrimination inquiry and/or investigating actions?

F. Are housing surveys being conducted periodically to obtain new listings?

G. Are restrictive sanctions being imposed immediately for a minimum of 180 days on agents found to be practicing discrimination?

H. Are the services of command representatives provided to assist applicants in their search for housing?

I. Are HHS personnel and equal opportunity personnel aware of and sensitive to housing problems encountered by DoD personnel?

J. Are equal opportunity in off-base housing reports being submitted accurately and on time?

## APPENDIX B TO PART 192—PROCEDURES AND REPORTS

### *A. Off-Base Housing Procedures*

DoD personnel seeking off-base housing shall be processed as follows:

1. Seen by an HRS when available (optional for DoD civilian personnel).

2. Provided assistance in seeking temporary and permanent off-base housing, as follows:

a. Counseling on the equal opportunity in off-base housing program with particular emphasis placed on reporting any indication of discrimination against DoD personnel in their search for housing.

b. Counseling and personal assistance shall include the following services:

(1) Offering to check by telephone the availability of selected listings. A record shall be made and retained for future reference of the date, time, and nature of any conversation confirming the availability of a facility. The race, color, religion, sex, national origin, handicap, or familial status of the applicant shall not be divulged. Caution must be exercised to ensure that a pattern of ''confirmation only for minorities'' does not develop.

(2) Offering the services of a command representative (such as a unit sponsor or other designated person, when available) to accompany and assist the applicant in the search for housing.

(3) Explaining various discriminatory methods that may be employed by agents. For instance, an agent may arbitrarily refuse to accept or consider the applicant as a tenant, falsely indicate the unit sought has been rented to another applicant, or refuse to make the unit available under the same terms and conditions as are ordinarily applied to applicants for the facilities. In such instances the following shall apply:

(a) The agent shall be queried on the reasons why the unit is not available. After all reasonable steps have been taken to ascertain whether any valid nondiscriminatory reason can be shown for the agent's rejection of the applicant, and if there appears to be no such reason, a reasonable effort shall be made to persuade the agent to make the unit available to the applicant.

(b) The incident shall be reported immediately by the command representative and the applicant to the HRS for appropriate command action.

### *B. Complaint Procedures—United States*

Commanders shall ensure that all DoD personnel are informed of the scope and provisions of the DoD Equal Opportunity in Off-Base Housing Program and advised to report immediately to the HRS (when available) any form of discrimination encountered when seeking housing within a Civilian Community. Incidents should be reported to base agencies or command representatives when an HRS is not available (i.e., equal opportunity officer, unit commander, supervisor). A verbal or written statement of discriminatory policy by an agent is considered to be an act or incident of discrimination, and the investigative procedures outlined in this appendix shall be followed.

1. *Inquiry into Complaint.* Complaints of off-base housing discrimination must receive prompt attention. An inquiry into the complaint shall begin within 3 working days after receipt of the complaint. The inquiry may be informal, but must be detailed sufficiently to determine if discrimination occurred. Upon receipt of a discrimination complaint, the HRS (if there is no HRS, a command designated representative) shall take the following action:

a. Immediately notify the commander.

b. Promptly interview the complainant to determine the details and circumstances of the alleged discriminatory act.

c. Immediately telephone or visit the facility and/or agent concerned, if the complaint is received shortly after the time of the alleged act and it concerns the change in availability of a vacancy (i.e., ''just rented,'' etc.). Attempt to determine if a vacancy exists without making reference to the complaint received. Request the commander to authorize the use of verifiers, as necessary. (See this appendix, subsection B.2.)

d. Advise the complainant of the provisions and procedures in this Instruction and of the right to pursue further actions through HUD, DoJ, and local or State agencies. Coordinate efforts with the Office of Judge Advocate or other cognizant legal counsel to determine

to what extent legal assistance can be provided to the complainant. Assist the complainant in completing seven signed, dated, and notarized copies of HUD Form 903, ''Housing Discrimination Complaint.'' The fact that a complainant might report an act of alleged discriminatory treatment, but declines completing a HUD Form 903, does not relieve the command of responsibility for making further inquiry and taking such subsequent actions, as may be appropriate.

e. Document the complainant's action for future reference and inform the commander of the results of the HRS preliminary inquiry and actions taken. The commander shall take action to assist the complainant in obtaining suitable housing. If, due to previous discriminatory practices in the community, suitable housing cannot be obtained by the complainant in a reasonable amount of time, the complainant and the commander may use this fact to justify a request for priority in obtaining military housing or for humanitarian reassignment. Reassignment action is a last resort and must be justified fully through command personnel channels.

2. *Use of Verifiers*. Verifiers are authorized to determine if a vacancy exists and whether or not rental or such practices are discriminatory. Verifiers shall not be used only for determining sincerity or normal practices of an agent about whom the HRS has not received a housing discrimination complaint.

a. When selecting and using verifiers, the following applies:

(1) Verification of the vacancy shall be made expediently after alleged act of discrimination.

(2) Verifiers may be volunteers. (The equal opportunity office is a possible source for identifying individuals to be used as verifiers.)

(3) The purpose of verification is to isolate the attribute of race, color, religion, sex, national origin, age, handicap, or familial status that is the suspected basis for the alleged discrimination against the complainant. Except for those attributes that are considered to be the source of the discrimination complaint, the verifier should possess attributes that are similar to the complainant. If two verifiers are used, one may possess similar attributes to the complainant. Ideally, two verifiers should be used.

b. Instructions provided to the verifiers by HRS personnel should include the following:

(1) Explanation of the equal opportunity in off-base housing and off-base housing referral programs.

(2) Verifiers are to obtain information only on agent and/or facility operating policies, practices, and procedures for subsequent determination of complaint validity.

(3) Verifiers are not to make a verbal or written contract for the housing unit, pay any money, or say they want the housing unit.

(4) Verifiers shall be knowledgeable concerning family composition, pets, and housing requirements of the complainant; they shall ask for identical housing requirements.

(5) The following information shall be obtained by the verifier, if possible:

(a) *Concerning the Facility*. What is available? Does it meet the requirements of the complainant? Amount of rent or cost of facility? Deposit required? Is an application required? What is the time between filing an application and permission to move in? Are there minority families and/or singles in the facility? Make a note of the presence or absence of a vacancy sign, and any other information deemed appropriate.

(b) *Concerning the Prospective Tenants/Purchasers*. If possible, ascertain criteria and qualifications that must be met (credit rating, salary, marital status, deposit, written application, etc.) and obtain a complete description of all procedures for becoming a tenant/purchaser including all steps from initial inquiry to moving in. Does the agent's subjective impression of the applicant appear to play any part in the decision to rent the unit?

(6) The verifier's statement shall be completed immediately after the verification visit, if possible. It shall be accurate, objective, and factual. Include the following in the statement:

(a) Date, time of visit, persons contacted, positions of persons contacted. Include any other pertinent information obtained during visit; i.e., length of time employed at facility, in addition to the information in this appendix, subparagraph B.2.b.(5), above.

(b) When reconstructing a conversation, write in the first person and try to use direct quotes. Do not use pronouns such as ''he,'' ''she,'' or ''they.'' Clearly identify who said what to whom.

(c) Sign and date statement. Give full name, address, telephone number (duty or home), race, color, religion, sex, national origin, age, handicap or familial status, as relevant to the complaint.

3. *Complaint Process*. If the basic facts of the HRS preliminary inquiry appear to substantiate the complaint, the commander shall ensure that the following actions begin within 3 working days of receipt of the inquiry report:

a. *Informal Hearing*. Give written notice to the agent explaining the nature of the complaint and the agent's right to request an informal hearing with the commander. The notification shall state specifically the nature of the discrimination complaint and the right of the agent to appear personally at the hearing, to be represented by an attorney, to present evidence, and to call witnesses. The notification also shall state that the agent has 5 days after receipt of the written notice to request a hearing. If no request

is received within 5 days, the lack of response shall be considered as a waiver of the right to such hearing. The written notification either shall be delivered to the agent personally by a representative of the commander, or shall be sent to the agent by certified mail with return receipt requested.

(1) *Composition of an Informal Hearing*. The informal hearing shall be conducted by the commander or designee at a convenient location. The agent, agent's attorney, the complainant, the complainant's attorney, the equal opportunity officer, the HRS, the Staff Judge Advocate or other cognizant legal counsel, or other designated persons may attend.

(2) *Record of Hearing*. A summary of the hearing shall be made a part of the complaint file.

b. *Legal Review*. A legal review shall be accomplished following the inquiry and informal hearing (if applicable) and before the commander's final decision that the inquiry supports or fails to support the complaint. The summary and other pertinent documents shall be reviewed for content and completeness. A statement that such a review was conducted and signed by the Staff Judge Advocate or other cognizant legal counsel performing the review shall be made a part of the case file. That statement shall include:

(1) Any necessary explanatory remarks, including comments on the facts and evidence presented.

(2) Information known about pending complaints brought by other parties on the same facility and/or agent.

(3) Comments on the civil rights laws relevant to the particular case.

4. *Commander's Decision*. The responsibility for imposition of restrictive sanctions rests with the commander and cannot be delegated. The commander's decision shall be based on a full and impartial review of all facts and the policies and requirements as stated in this part. The commander's options include the following:

a. If the commander determines that more information is required, or for any reason further inquiry is deemed necessary, an officer shall be appointed from sources other than the HRS to conduct a formal inquiry or investigation, as the situation warrants. The officer, if not an attorney, shall be afforded the advice and assistance of a Staff Judge Advocate or other cognizant legal counsel.

b. If, in the commander's judgment, the inquiry or investigation fails to support the complaint the case shall be considered closed and the commander shall:

(1) Inform the complainant in writing of all actions taken and advise the complainant of rights to pursue further actions to include the following:

(a) The right to submit a complaint to the HUD and the DoJ.

(b) The right to bring a private civil action in a State or Federal court of competent jurisdiction.

(c) The availability of legal assistance from their local Staff Judge Advocate or other cognizant legal counsel in pursuing civil redress.

(2) Summarize in the report file the practices giving rise to the complaint, the actions and results of the inquiry or investigation, and if discriminatory practices were found, written assurances from the agent on future facility and/or agent practices. The following statement, completed by the complainant, shall be included, as part of the case file: ''I am (am not) satisfied with the efforts taken by the commander on my behalf to achieve satisfactory resolution of my off-base housing discrimination complaint.'' If the complainant indicates a lack of satisfaction, the reasons must be included in the case file.

(3) Inform the agent of the results of the inquiry by command correspondence if an informal hearing was held. Such correspondence should reiterate DoD policy and requirements for equal opportunity in off-base housing.

(4) Forward unsubstantiated complaint reports and HUD Form 903 to the HUD and the DoJ if requested by the complainant.

(5) Retain a copy of the report file for 2 years for future reference.

c. If the inquiry or investigation supports the complainant's charge of discrimination and the discriminatory act is determined by the commander to conflict with DoD policy, the commander shall:

(1) Impose restrictive sanctions against the agent and/or facility for a minimum of 180 days. Sanctions shall remain in effect until the requirements in this appendix, subparagraphs B.6.a.(1) or B.6.a.(2), below, are met. Restrictive sanctions shall be imposed when a suspected discriminatory act, despite the absence of a formal complaint, is investigated and found valid. The fact that a validated discrimination complaint and/or incident has been or is scheduled to be forwarded to another Agency (the HUD, the DoJ, etc.) is not cause for withholding sanction action pending the outcome of that Agency's further review or investigation. When imposing a restrictive sanction, the commander shall:

(a) Remove the facility listing(s) from HRO files.

(b) Impose restrictive sanctions against all facilities owned or operated by the agent concerned.

(c) Place the facility on the restrictive sanction list maintained by the HRS. The restrictive sanction list shall be prepared on official letterhead stationery, signed by the commander, and include the authority for and conditions of the restrictive sanctions.

(d) Inform the agent concerned by command correspondence that:

(1) Restrictive sanctions have been imposed.

(2) The reasons, nature, and minimum duration of the restrictions.

(3) The action required for the removal of sanctions at the conclusion of the minimum period.

The notification of restrictive sanctions shall be sent by certified mail, return receipt requested or delivered to the agent personally by a command representative.

(e) Provide all DoD personnel reporting to the HRS with a copy of the restrictive sanction list, and advise members of the Armed Forces that they may not rent, lease, purchase, or reside in any of the listed facilities. Obtain a signed acknowledgment of receipt of the restrictive sanction list from the HRS using a DD Form 1746, ''Application for Assignment to Housing.''

(f) Advise other military installations of the restrictive sanction action taken when the sanctioned facility is located within the commuting area of their military installations.

(2) Inform the complainant in writing of all actions taken and advise the complainant that his or her case will receive continuing action to include, if the complainant requests, forwarding the case file to the HUD and/or the DoJ for action.

(3) Before forwarding the report to the respective Military Department, prepare a memorandum outlining the following:

(a) The base efforts made to obtain housing relief for the complainant.

(b) The impact of restrictive sanctions on the off-base housing program and DoD personnel and their dependents.

(c) Any other considerations deemed relevant.

(4) Include a statement completed by the complainant for the case file. (See this appendix, subparagraph B.4.b.(3), above.)

(5) If the act of discrimination falls within existing regulations, forward a copy of the complaint and investigation report directly to the HUD within 180 days after the occurrence of the alleged discriminating act, using HUD Form 903. The original report shall be sent to the appropriate HUD Regional Office or the U.S. Department of Housing and Urban Development Office of Fair Housing and Equal Opportunity, 451 7th Street SW., Washington, DC 20410. A copy of the complaint and investigation report shall be forwarded to the Civil Rights Division, Department of Justice, Washington, DC 20530.

(6) When more than one complaint alleging discrimination in the same facility or by the same agent has been received, consolidate the complaints for the inquiry, legal review, and commander's memorandum.

d. When a commander receives a complaint alleging further discrimination in a facility or by an agent after a completed case file has been closed, the commander shall forward the summary of the facts on the subsequent complaint, outlined in this enclosure, subparagraph B.4.c.(6), above. Include brief comments indicating the extent to which the new complaint affects the previous action.

5. *Followup Actions.* After forwarding the report and all required attachments to the HUD and the DoJ, the commander shall take the following actions:

a. Cooperate with the HUD, the DoJ, and the local and State agency representatives during their investigation and processing of the case, should those entities seek assistance.

b. Periodically determine the status of the case by maintaining liaison with the HUD office concerned. Contact shall be maintained until such time as the case is resolved by the HUD.

c. Ensure that the complainant is kept informed directly by the HUD and/or the DoJ.

d. Ensure that DoD personnel comply with the restrictive sanctions imposed on the facility and/or the agent. Housing personnel will comply with the following:

(1) Military personnel moving into or changing their place of residence in the commuting area of a military installation or activity may not enter into a rental, purchase, or lease arrangement with an agent or a facility that is under restrictive sanction.

(2) Implement procedures for ensuring that DoD personnel seeking housing are made aware of, and are counselled on, current restrictive sanctions.

(3) Sanctions are not applicable to the DoD personnel who may be residing in a facility when the sanction is imposed or to the extension or renewal of a rental or lease agreement originally entered into before the imposition of the sanction. Relocation of a military tenant within a restricted facility is prohibited without the written approval of the commander.

(4) If it is determined that a member of the Armed Forces has intentionally taken residency in a restricted facility contrary to instructions received by Housing Referral personnel, the commander shall take appropriate disciplinary action against that number.

(5) Periodically publish a current listing of restricted facilities in the base bulletin (or other appropriate means of internal distribution). Minimally, such publication shall occur when there has been an addition or deletion to the list.

6. *Removal of Restrictive Sanction*

a. A facility and/or agent may be removed from restrictive sanction only if one of the following actions is taken:

(1) The restrictive sanction may be removed before completion of the 180 day restrictive period if an approved waiver request is obtained from the senior installation commander concerned, or designee. Consideration shall be given to lifting an imposed sanction only in exceptional circumstances and in conjunction with a written assurance of nondiscrimination from the agent concerned.

(2) After completion of 180 days on restrictive sanction, if the agent provides written assurance of future nondiscrimination to the HRS.

b. The commander shall inform the HRS, the equal opportunity office, and the agent in writing of the removal from restrictive sanction.

7. *''Privacy Act'' and ''Freedom of Information Act'' Inquiries.* Requests for information from reports of housing discrimination shall be processed in accordance with 32 CFR parts 285 and 286a.

*C. Compliant Procedures—Outside the United States*

Commanders of installations or activities outside the United States shall ensure that all DoD personnel, on reporting to the HRS, are clearly informed of the scope and provisions of the DoD Equal Opportunity in Off-Base Housing Program and advised to report immediately to the HRS any form of discrimination encountered as a tenant, prospective tenant, or purchaser. Incidents reported to base agencies or representatives other than the HRS (i.e., equal opportunity officer, unit commander, supervisor) shall be brought to the immediate attention of the HRS for appropriate action. On receiving a complaint of discrimination, the commander and HRS shall:

1. Consult with the Staff Judge Advocate or other cognizant legal counsel to determine if the laws of the country concerned (or any subdivision thereof) prohibit any of the actions outlined in this appendix, section B., above.

2. Take actions outlined in this appendix, section B, above, except that a HUD Form 903 shall not be completed because reports of cases arising outside the United States are not forwarded to the HUD or the DoJ. Complainants should understand that the fair housing provisions of the P.L. 90–284, ''Civil Rights Act,'' Title 42, United States, 1982, and Public Law 100–430, ''Fair Housing Amendments Act of 1988,'' September 13, 1988, are not applicable in areas outside the United States.

3. Determine, with legal advice, whether redress for the discriminatory act should be sought from authorities in the host country. Redress shall be based on the laws of the country (or subdivision thereof) concerned.

*D. Reporting Requirements*

1. A copy of each complaint and investigative report that substantiates a housing discrimination shall be submitted to the appropriate Military Department (manpower and reserve affairs and/or the equal opportunity office) not later than 45 days from the date the case is completed. Under normal circumstances, the commander of the installation concerned shall complete the required investigation and processing complaints within 45 days from the date that a housing complaint is filed by a complainant.

2. A copy of complaint and investigative reports that do not substantiate allegations of housing discrimination shall be kept on file at the installation level for a 24-month period beginning from the date the case was completed.

# PART 193—HIGHWAYS FOR NATIONAL DEFENSE

Sec.
193.1 Purpose and scope.
193.2 Applicability.
193.3 Policy.
193.4 Authorities and responsibilities.

AUTHORITY: 5 U.S.C. 301.

SOURCE: 33 FR 13016, Sept. 14, 1968, unless otherwise noted.

## § 193.1 Purpose and scope.

This part sets forth policy, responsibilities, and authority in matters pertaining to Department of Defense highway needs and, when appropriate, to the highway needs of other Federal agencies, during peacetime and emergencies in the United States and its territories and possessions.

## § 193.2 Applicability.

The provisions of this part apply to all components of the Department of Defense.

## § 193.3 Policy.

In order to insure that the national defense is served by adequate, safe and efficient highway transportation, it shall be the policy of the DoD to (a) integrate the highway needs of the national defense into the civil highway programs of the various State and Federal agencies, and (b) cooperate with those agencies in matters pertaining to the use of public highways and in planning their development and construction.

**§ 193.4 Authorities and responsibilities.**

(a) The Secretary of the Army, as the Single Manager for Military Traffic, Land Transportation, and Common-User Ocean Terminals (see DoD Directive 5160.53, Single Manager Assignment for Military Traffic, Land Transportation, and Common-User Ocean Terminals, March 24, 1967 (32 FR 5295)), is hereby designated as the Executive Agent for the Department of Defense (hereinafter referred to as the Executive Agent), in matters pertaining to public highways to serve the national defense in meeting both peacetime and mobilization highway transportation needs in the United States, its territories and possessions; and highway needs of other Federal agencies, when appropriate. The Executive Agent, or his designee, under the policy guidance of the Assistant Secretary of Defense (Installations and Logistics), will:

(1) Coordinate the defense transportation interest in public highways, including the implementation of subsection (h), section 210 of Title 23 U.S. Code, and integrate foreseen DoD highway needs and operational requirements into the highway programs of the United States, its territories and possessions.

(2) Review and analyze DoD access road needs, and, when appropriate, those of other Federal agencies from the standpoint of approved transportation engineering practices, statutory provisions, and policies and procedures of the Bureau of Public Roads, Department of Transportation.

(3) Represent the DoD in matters pertaining to highways to serve the national defense in liaison with the Bureau of Public Roads, the American Association of State Highway Officials, and other appropriate Government and non-Government agencies.

(4) Certify on behalf of the Secretary of Defense to the appropriate Government agency, the public highway needs of the DoD and, when appropriate, the needs of other Federal agencies, as being important to the national defense. (See section 210, Title 23, U.S. Code.)

(5) Advise and assist the Assistant Secretary of Defense (Comptroller) in matters pertaining to the (i) preparation and justification of budget requirements for defense access road needs, and (ii) transfer of funds appropriated for this purpose to the Bureau of Public Roads.

(6) Develop and maintain an efficient relationship between the design of military vehicles and State and Federal standards for the design of public highways to ensure the effective and efficient utilization of such highways by military vehicles.

(7) Provide highway traffic engineering services to DoD components, when requested.

(8) Insure effective cooperation between the Department of Defense and state highway authorities in matters pertaining to special defense utilization of public highways.

(b) The other DoD Components will:

(1) Maintain official liaison with the Executive Agent in matters pertaining to the provision of public highways to serve the national defense and the access road needs of new or expanded DoD installations and activities.

(2) Furnish the Executive Agent with information and data on current and potential access-road and highway-system needs on request.

(c) The Secretaries of the Military Departments, or their designees, are authorized to act for the Secretary of Defense under the provisions of subsection (h) of section 210, Title 23, U.S. Code, in determining, in connection with the funding of contracts for the construction of classified military installations and facilities for ballistic missiles, that construction estimates and the bids of contractors did not include allowances for repairing road damages.

(d) The Secretaries of the Military Departments and the Directors of DoD Agencies will program, budget, and finance for the responsibilities assigned by this part and their access road requirements (see Pub. L. 90–180, Military Construction Appropriation Act, fiscal year 1968, and successor statutes) in accordance with applicable program and financial guidelines and procedures.

## PART 194 [RESERVED]

# PART 195—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS OF THE DEPARTMENT OF DEFENSE—EFFECTUATION OF TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Sec.
195.1 Purpose.
195.2 Definitions.
195.3 Application.
195.4 Policy.
195.5 Responsibilities.
195.6 Assurances required.
195.7 Compliance information.
195.8 Conduct of investigations.
195.9 Procedure for effecting compliance.
195.10 Hearings.
195.11 Decisions and notices.
195.12 Judicial review.
195.13 Effect on other issuances.
195.14 Implementation.
APPENDIX A TO PART 195—PROGRAMS TO WHICH THIS PART APPLIES

AUTHORITY: Sec. 602, 78 Stat. 252; 42 U.S.C. 2000d–1; and the laws referred to in appendix A.

SOURCE: 29 FR 19291, Dec. 31, 1964, unless otherwise noted. Redesignated at 56 FR 32965, July 18, 1991.

## § 195.1 Purpose.

The purpose of this part is to effectuate the provisions of Title VI of the Civil Rights Act of 1964 (referred to in this part as the ''Act'') to the end that no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity receiving Federal financial assistance from any component of the Department of Defense.

## § 195.2 Definitions.

(a) *Component* means the Office of the Secretary of Defense, a military department or a Defense agency.

(b) *Responsible Department official* means the Secretary of Defense or other official of the Department of Defense or component thereof who by law or by delegation has the principal responsibility within the Department or component for the administration of the law extending such assistance.

(c) The term *United States* means the States of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and the territories and possessions of the United States, and the term ''State'' means any one of the foregoing.

(d) The term *Federal financial assistance* includes:

(1) Grants and loans of Federal funds,

(2) The grant or donation of Federal property and interests in property,

(3) The detail of Federal personnel,

(4) The sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and

(5) Any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

(e) The term *program* includes any program, project, or activity for the provision of services, financial aid, or other benefits to individuals, or for the provision of facilities for furnishing services, financial aid or other benefits to individuals. The services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any services, financial aid, or other benefits provided with the aid of Federal financial assistance or with the aid of any non-Federal funds, property, or other resources required to be expended or made available for the program to meet matching requirements or other conditions which must be met in order to receive the Federal financial assistance, and to include any services, financial aid, or other benefits provided in or through a facility provided with the aid of Federal financial assistance or such non-Federal resources.

(f) The term *facility* includes all or any portion of structures, equipment, or other real or personal property or interests therein, and the provision of facilities includes the construction, expansion, renovation, remodeling, alteration or acquisition of facilities.

(g) The term *recipient* means any State, political subdivision of any State, or instrumentality of any State or political subdivision, any public or private agency, institution, or organization, or other entity, or any individual, in any State, to whom Federal financial assistance is extended, directly or through another recipient, for any program, including any successor, assign, or transferee thereof, but such term does not include any ultimate beneficiary under any such program.

(h) The term *primary recipient* means any recipient which is authorized or required to extend Federal financial assistance to another recipient for the purpose of carrying out a program.

(i) The term *applicant* means one who submits an application, request, or plan required to be approved by a responsible Department official, or by a primary recipient, as a condition to eligibility for Federal financial assistance, and the term ''application'' means such an application, request or plan.

### § 195.3 Application.

This part applies to any program for which Federal financial assistance is authorized under a law administered by any component of the Department of Defense, including the federally assisted programs and activities listed in appendix A of this part. This directive applies to money paid, property transferred, or other Federal financial assistance extended under any such program after January 7, 1965 pursuant to an application approved prior to such date. This directive does not apply to: (a) Any Federal financial assistance by way of insurance guaranty contracts, (b) money paid, property transferred, or other assistance extended under any such program before January 7, 1965, (c) any assistance to any individual who is the ultimate beneficiary under any such program, or (d) any employment practice, under any such program, of any employer, employment agency, or labor organization, except as noted in § 195.4(b)(5) of this part. The fact that a program or activity is not listed in appendix A shall not mean, if title VI of the Act is otherwise applicable, that such program is not covered. Other programs under statutes now in force or hereinafter enacted may be added to this list by notice published in the FEDERAL REGISTER.

[29 FR 19291, Dec. 31, 1964, as amended at 38 FR 17959, July 5, 1973. Redesignated and amended at 56 FR 32965, July 18, 1991]

### § 195.4 Policy.

(a) *General.* No person in the United States shall, on the ground of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this (part) applies.

(b) *Specific discriminatory actions prohibited.* (1) A recipient under any program to which this part applies may not, directly or through contractual or other arrangements, on the ground of race, color, or national origin:

(i) Deny an individual any service, financial aid, or other benefit provided under the program;

(ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program;

(iii) In determining the site or location of facilities, a recipient may not make selections with the purpose of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this part applies, on the ground of race, color, or national origin; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of the Act or this part.

(iv) Subject an individual to segregation or separate treatment in any matter related to his receipt of any service, financial aid, or other benefit under the program;

(v) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program;

(vi) Treat an individual differently from others in determining whether he satisfies any admission, enrollment, quota, eligibility, membership or other requirement or condition which individuals must meet in order to be provided any service, financial aid, or

other benefit provided under the program;

(vii) Deny an individual an opportunity to participate in the program through the provision of services or otherwise or afford him an opportunity to do so which is different from that afforded others under the program;

(viii) Deny a person the opportunity to participate as a member of a planning or advisory body which is an integral part of the program.

(2) A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination because of their race, color, or national origin, or have the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin.

(3) As used in this section the services, financial aid, or other benefits provided under a program receiving Federal financial assistance shall be deemed to include any service, financial aid, or other benefit provided in or through a facility provided with the aid of Federal financial assistance.

(4)(i) In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination.

(ii) Even in the absence of such prior discrimination, a recipient in administering a program may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin.

(5) Where a primary objective of the Federal financial assistance is not to provide employment, but nevertheless discrimination on the grounds of race, color or national origin in the employment practices of the recipient or other persons subject to this Directive tends, on the grounds of race, color, or national origin of the intended beneficiaries, to exclude intended beneficiaries from participation in, to deny them benefits of, or to subject them to discrimination under any program to which this Directive applies, the recipient or other persons subject to this Directive are prohibited from (directly or through contractual or other arrangements) subjecting an individual to discrimination on the grounds of race, color, or national origin in its employment practices under such program (including recruitment or recruitment advertising; employment, layoff or termination; upgrading, demotion or transfer; rates of pay and/or other forms of compensation; and use of facilities), to the extent necessary to assure equality of opportunity to, and nondiscriminatory treatment of the beneficiaries. Any action taken by a component pursuant to this provision with respect to a state or local agency subject to Standards for a Merit System of Personnel Administration, 45 CFR part 70, shall be consistent with those standards and shall be coordinated with the U.S. Civil Service Commission.

(6) The enumeration of specific forms of prohibited discrimination in this section does not limit the generality of the prohibition in paragraph (a) of this section.

[29 FR 19291, Dec. 31, 1964, as amended at 38 FR 17959, July 5, 1973]

### § 195.5 Responsibilities.

(a) The Assistant Secretary of Defense (Manpower) shall be responsible for insuring that the policies of this part are effectuated throughout the Department of Defense. He may review from time to time as he deems necessary the implementation of these policies by the components of the Department of Defense.

(b) The Secretary of each Military Department is responsible for implementing this part with respect to programs and activities receiving financial assistance from his Military Department; and the Assistant Secretary of Defense (Manpower) is responsible for similarly implementing this part

with respect to all other components of the Department of Defense. Each may designate official(s) to fulfill this responsibility in accordance with § 195.2(b).

(c) The Assistant Secretary of Defense (Manpower) or, after consultation with the Assistant Secretary of Defense (Manpower), the Secretary of each Military Department or other responsible Department official designated by the Assistant Secretary of Defense (Manpower) may assign to officials of other departments or agencies of the Government, with the consent of such departments or agencies, responsibilities in connection with the effectuation of the purposes of Title VI of the Act and this part (other than responsibility for final decision as provided in § 195.11), including the achievement of effective coordination and maximum uniformity within the Department and within the Executive Branch of the Government in the application of Title VI and this part to similar programs and in similar situations.

[29 FR 19291, Dec. 31, 1964. Redesignated and amended at 56 FR 32965, July 18, 1991]

### § 195.6 Assurances required.

(a) *General.* (1)(i) Every application for Federal financial assistance to carry out a program to which this part applies, except a program to which paragraph (b) of this section applies, and every application for Federal financial assistance to provide a facility shall, as a condition to its approval and the extension of any Federal financial assistance pursuant to the application, contain or be accompanied by an assurance that the program will be conducted or the facility operated in compliance with all requirements imposed by or pursuant to this part.

(ii) In the case where the Federal financial assistance is to provide or is in the form of personal property, or real property or interest therein or structures thereon, the assurance shall obligate the recipient, or, in the case of a subsequent transfer, the transferee, for the period during which the property or structures are used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services and benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. In all other cases the assurance shall obligate the recipient for the period during which Federal financial assistance is extended pursuant to the application. In any case in which Federal financial assistance is extended without an application having been made, such extension shall be subject to the same assurances as if an application had been made. The responsible Department official shall specify the form of the foregoing assurances for each program, and the extent to which like assurances will be required of subguarantees, contractors and subcontractors, transferees, successors in interest, and other participants in the program. Any such assurance shall include provisions which give the United States a right to seek its judicial enforcement.

(2) In the case of real property, structures or improvements thereon, or interest therein, which was acquired through a program of Federal financial assistance, or in the case where Federal financial assistance is provided in the form of a transfer of real property or interest therein from the Federal Government, the instrument effecting or recording the transfer, shall contain a covenant running with the land assuring nondiscrimination for the period during which the real property is used for a purpose for which the Federal financial assistance is extended or for another purpose involving the provision of similar services or benefits, or for as long as the recipient retains ownership or possession of the property, whichever is longer. Where no transfer of property is involved, but property is improved under a program of Federal financial assistance, the recipient shall agree to include such a covenant in any subsequent transfer of such property. Where the property is obtained from the Federal Government, such covenant may also include a condition coupled with a right to be reserved by the Department to revert title to the property in the event of a breach of the covenant where, in the discretion of the responsible Department official, such a condition and right of reverter is appropriate to the program under which the real property

is obtained and to the nature of the grant and the grantee. In the event a transferee of real property proposes to mortgage or otherwise encumber the real property as security for financing construction of new, or improvement of existing facilities on such property for the purposes for which the property was transferred, the responsible Department official may agree, upon request of the transferee and if necessary to accomplish such financing, and upon such conditions as he deems appropriate, to forbear the exercise of such right to revert title for so long as the lien of such mortgage or other encumbrance remains effective. In programs receiving Federal financial assistance in the form, or for the acquisition of real property or an interest in real property, to the extent that rights to space on, over, or under any such property are included as part of the program receiving such assistance, the nondiscrimination requirements of this part shall extend to any facility located wholly or in part in such space.

(3) The assurance required in the case of a transfer of surplus personal property shall be inserted in a written agreement by and between the Department of Defense component concerned and the recipient.

(b) *Continuing State programs.* Every application by a State agency to carry out a program involving continuing Federal financial assistance to which this part applies shall as a condition to its approval and the extension of any Federal financial assistance pursuant to the application (1) contain or be accompanied by a statement that the program is (or, in the case of a new program, will be) conducted in compliance with all requirements imposed by or pursuant to this part, and (2) provide or be accompanied by provision for such methods of administration for the program as are found by the responsible Department official to give reasonable assurance that the applicant and all recipients of Federal financial assistance under such program will comply with all requirements imposed by or pursuant to this part. In cases of continuing State programs in which applications are not made, the extension of Federal financial assistance shall be subject to the same conditions under this subsection as if applications had been made.

(c) *Assurances from institutions.* (1) In the case of Federal financial assistance to an institution of higher education, the assurance required by this section shall extend to admission practices and to all other practices relating to the treatment of students.

(2) The assurance required with respect to an institution of higher education, or any other institution, insofar as the assurance relates to the institution's practices with respect to admission or other treatment of individuals as students of the institution or to the opportunity to participate in the provision of services or other benefits to such individuals, shall be applicable to the entire institution unless the applicant establishes, to the satisfaction of the responsible Department official, that the institution's practices in designated parts or programs of the institution will in no way affect its practices in the program of the institution for which Federal financial assistance is sought, or the beneficiaries of or participants in such program. If in any such case the assistance sought is for the construction of a facility or part of a facility, the assurance shall in any event extend to the entire facility and to facilities operated in connection therewith.

(d) *Elementary and secondary schools.* The requirement of paragraph (a), (b), or (c) of this section, with respect to any elementary or secondary school or school system shall be deemed to be satisfied if such school or school system (1) is subject to a final order of a court of the United States for the desegregation of such school or school system, and provides an assurance that it will comply with such order, including any future modification of such order, or (2) submits a plan for the desegregation of such school or school system which the responsible official of the Department of Health, Education, and Welfare determines is adequate to accomplish the purposes of the Act and this part, and provides reasonable assurance that it will carry out such plan; in any case of continuing Federal financial assistance the said Department officer may reserve the right to redetermine, after such period as may

be specified by him, the adequacy of the plan to accomplish the purpose of the Act or this part within the earliest practicable time. In any case in which a final order of a court of the United States for the desegregation of such school or school system is entered after submission of such a plan, such plan shall be revised to conform to such final order, including any future modification of said order.

[29 FR 19291, Dec. 31, 1964, as amended at 38 FR 17960, July 5, 1973]

### § 195.7 Compliance information.

(a) *Cooperation and assistance.* Each responsible Department official shall to the fullest extent practicable seek the cooperation of recipients in obtaining compliance with this part and shall provide assistance and guidance to recipients to help them comply voluntarily with this part.

(b) *Compliance reports.* Each recipient shall keep such records and submit to the responsible Department official timely, complete and accurate compliance reports at such times, and in such form and containing such information, as the responsible Department official may determine to be necessary to enable him to ascertain whether the recipient has complied or is complying with this part. In general, recipients should have available for the Department racial and ethnic data showing the extent to which members of minority groups are beneficiaries of federally assisted programs. In the case of any program under which a primary recipient extends Federal financial assistance to any other recipient, such other recipient shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to carry out its obligations imposed pursuant to this part.

(c) *Access to sources of information.* Each recipient shall permit access by the responsible Department official during normal business hours to such of its books, records, accounts, and other sources of information, and its facilities as may be pertinent to ascertain compliance with this part. Where any information required of a recipient is in the exclusive possession of any other institution or person and this institution or person shall fail or refuse to furnish this information, the recipient shall so certify in its report and shall set forth what efforts it has made to obtain the information.

(d) *Information to beneficiaries and participants.* Each recipient shall make available to participants, beneficiaries, and other interested persons such information regarding the provisions of this part and its applicability to the program under which the recipient receives Federal financial assistance, and make such information available to them in such manner, as the responsible Department official finds necessary to apprise such persons of the protections against discrimination assured them by the Act and this part.

[29 FR 19291, Dec. 31, 1964, as amended at 38 FR 17960, July 5, 1973]

### § 195.8 Conduct of investigations.

(a) *Periodic compliance reviews.* The responsible Department official or his designee(s) shall from time to time review the practices of recipients to determine whether they are complying with this part.

(b) *Complaints.* Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official a written complaint. A complaint must be filed not later than 180 days from the date of the alleged discrimination, unless the time for filing is extended by the responsible Department official.

(c) *Investigations.* The responsible Department official will make a prompt investigation whenever a compliance review, report, complaint, or any other information indicates a possible failure to comply with this part. The investigation should include, where appropriate, a review of the pertinent practices and policies of the recipient, the circumstances under which the possible noncompliance with this part occurred, and other factors relevant to a determination of whether the recipient has failed to comply with this part.

(d) *Resolution of matters.* (1) If an investigation pursuant to paragraph (c) of this section indicates a failure to comply with this part, the responsible Department official will so inform the

recipient and the matter will be resolved by informal means whenever possible. If it has been determined that the matter cannot be resolved by informal means, action will be taken as provided in § 195.9.

(2) If an investigation does not warrant action pursuant to paragraph (d)(1) of this section, the responsible Department official will so inform the recipient and the complainant, if any, in writing.

(e) *Intimidatory or retaliatory acts prohibited.* No recipient or other person shall intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by section 601 of the Act or this part, or because he has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. The identity of complainants shall not be disclosed except when necessary to carry out the purposes of this part including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

[29 FR 19291, Dec. 31, 1964, as amended at 38 FR 17960, July 5, 1974. Redesignated and amended at 56 FR 32965, July 18, 1991]

### § 195.9 Procedure for effecting compliance.

(a) *General.* If there appears to be a failure or threatened failure to comply with this part, and if the noncompliance or threatened noncompliance cannot be corrected by informal means, compliance with this part may be effected by the suspension or termination of or refusal to grant or to continue Federal financial assistance or by any other means authorized by law as determined by the responsible Department official. Such other means may include, but are not limited to (1) a reference to the Department of Justice with a recommendation that appropriate proceedings be brought to enforce any rights of the United States under any law of the United States (including other titles of the Act), or any assurance or other contractual undertaking, and (2) any applicable proceedings under State or local law.

(b) *Noncompliance with § 195.6.* If an applicant fails or refuses to furnish an assurance required under § 195.6 or otherwise fails or refuses to comply with a requirement imposed by or pursuant to that section Federal financial assistance may be refused in accordance with the procedures of paragraph (c) of this section. The component of the Department of Defense concerned shall not be required to provide assistance in such a case during the pendency of the administrative proceedings under such paragraph except that the component shall continue assistance during the pendency of such proceedings where such assistance is due and payable pursuant to an application therefor approved prior to the effective date of this part.

(c) *Termination of or refusal to grant or to continue Federal financial assistance.* Except as provided in paragraph (b) of this section no order suspending, terminating or refusing to grant or continue Federal financial assistance shall become effective until (1) the responsible Department official has advised the applicant or recipient of his failure to comply and has determined that compliance cannot be secured by voluntary means, (2) there has been an express finding, after opportunity for a hearing (as provided in § 195.10), of a failure by the applicant or recipient to comply with a requirement imposed by or pursuant to this part, (3) the action has been approved by the Secretary of Defense pursuant to § 195.11, and (4) the expiration of 30 days after the Secretary of Defense has filed with the committee of the House and the committee of the Senate having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds for such action. Any action to suspend or terminate or to refuse to grant or to continue Federal financial assistance shall be limited to the particular political entity, or part thereof, or other applicant or recipient as to whom such a finding has been made and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found.

(d) *Other means authorized by law.* No action to affect compliance by any other means authorized by law shall be taken until (1) the responsible Department official has determined that compliance cannot be secured by voluntary means, (2) the action has been approved

by the Assistant Secretary of Defense (Manpower), (3) the recipient or other person has been notified of its failure to comply and of the action to be taken to effect compliance, and (4) the expiration of at least 10 days from the mailing of such notice to the recipient or other person. During this period of at least 10 days additional efforts shall be made to persuade the recipient or other person to comply with this part and to take such corrective action as may be appropriate.

[29 FR 19291, Dec. 31, 1964. Redesignated and amended at 56 FR 32965, July 18, 1991]

**§ 195.10 Hearings.**

(a) *Opportunity for hearing*. Whenever an opportunity for a hearing is required by § 195.9, reasonable notice shall be given by registered or certified mail, return receipt requested, to the affected applicant or recipient. This notice shall advise the applicant or recipient of the action proposed to be taken, the specific provision under which the proposed action against it is to be taken, and the matters of fact or law asserted as the basis for this action, and either (1) fix a date not less than 20 days after the date of such notice within which the applicant or recipient may request of the responsible Department official that the matter be scheduled for hearing or (2) advise the applicant or recipient that the matter in question has been set down for hearing at a stated place and time. The time and place so fixed shall be reasonable and shall be subject to change for cause. The complainant, if any, shall be advised of the time and place of hearing. An applicant or recipient may waive a hearing and submit written information and argument. The failure of an applicant or recipient to request a hearing under this paragraph or to appear at a hearing for which a date has been set shall be deemed to be a waiver of the right to a hearing under section 602 of the Act and § 195.11(c) and consent to the making of a decision on the basis of such information as is available.

(b) *Time and place of hearing*. Hearings shall be held at the offices of the responsible component of the Department of Defense in Washington, D.C., at a time fixed by the responsible Department official unless he determines that the convenience of the applicant or recipient or of the component requires that another place be selected. Hearings shall be held before the responsible Department official or, at his discretion, before a hearing examiner designated by him.

(c) *Hearing examiner*. The examiner shall be a field grade officer or civilian employee above the grade of GS–12 (or the equivalent) who shall be a person admitted to practice law before a Federal court or the highest court of a State.

(d) *Right to counsel*. In all proceedings under this section, the applicant or recipient and the responsible component of the Department shall have the right to be represented by counsel.

(e) *Procedures*. (1) The recipient shall receive an open hearing at which he or his counsel may examine any witnesses present. Both the responsible Department official and the applicant or recipient shall be entitled to introduce all relevant evidence on the issues as stated in the notice for hearing or as determined by the officer conducting the hearing at the outset of or during the hearing.

(2) Technical rules of evidence shall not apply to hearings conducted pursuant to this part, but rules or principles designed to assure production of the most credible evidence available and to subject testimony to test by cross-examination shall be applied where reasonably necessary by the officer conducting the hearing. The hearing officer may exclude irrelevant, immaterial, or unduly repetitious evidence. All documents and other evidence offered or taken for record shall be open to examination by the parties and opportunity shall be given to refute facts and arguments advanced on either side of the issues. A transcript shall be made of the oral evidence except to the extent the substance thereof is stipulated for the record. All decisions shall be based upon the hearing record and written findings shall be made.

(f) *Consolidated or joint hearings*. In cases in which the same or related facts are asserted to constitute noncompliance with this part with respect to two or more programs to which this part applies, or noncompliance with

this part and the regulations of one or more other Federal departments or agencies issued under Title VI of the Act, the Assistant Secretary of Defense (Manpower), the Secretary of a Military Department, or other responsible Department official designated by the Assistant Secretary of Defense (Manpower) after consultation with the Assistant Secretary of Defense (Manpower) may, by agreement with such other departments or agencies where applicable, provide for the conduct of consolidated or joint hearings, and for the application to such hearings of appropriate procedures not inconsistent with this part. Final decisions in such cases, insofar as this part is concerned, shall be made in accordance with § 195.11.

[29 FR 19291, Dec. 31, 1964, as amended at 30 FR 133, Jan. 7, 1965. Redesignated and amended at 56 FR 32965, July 18, 1991]

### § 195.11 Decisions and notices.

(a) *Decision by person other than the responsible department official.* If the hearing is held by a hearing examiner such hearing examiner shall either make an initial decision, if so authorized, or certify the entire record including his recommended findings and proposed decision to the responsible Department official for a final decision, and a copy of such initial decision or certification shall be mailed to the applicant or recipient. Where the initial decision is made by the hearing examiner the applicant or recipient may within 30 days of the mailing of such notice of initial decision file with the responsible Department official his exceptions to the initial decision, with his reasons therefor. In the absence of exceptions, the responsible Department official may on his own motion within 45 days after the initial decision serve on the applicant or recipient a notice that he will review the decision. Upon the filing of such exceptions or of such notice of review the responsible Department official shall review the initial decision and issue his own decision thereon including the reasons therefor. In the absence of either exceptions or a notice of review the initial decision shall constitute the final decision of the responsible Department official.

(b) *Decisions on record or review by the responsible department official.* Whenever a record is certified to the responsible Department official for decision or he reviews the decision of a hearing examiner pursuant to paragraph (a) of this section or whenever the responsible Department official conducts the hearing, the applicant or recipient shall be given reasonable opportunity to file with him briefs or other written statements of its contentions, and a copy of the final decision of the responsible Department official shall be given in writing to the applicant or recipient and to the complainant, if any.

(c) *Decisions on record where a hearing is waived.* Whenever a hearing is waived pursuant to § 195.10(a), a decision shall be made by the responsible Department official on the record and a copy of such decision shall be given in writing to the applicant or recipient, and to the complainant, if any.

(d) *Rulings required.* Each decision of a hearing officer or responsible Department official shall set forth his ruling on each finding, conclusion, or exception presented, and shall identify the requirement or requirements imposed by or pursuant to this part with which it is found that the applicant or recipient has failed to comply.

(e) *Approval by the Secretary of Defense.* Any final decision of a responsible Department official which provides for the suspension or termination of, or the refusal to grant or continue Federal financial assistance, or the imposition of any other sanction available under this part or the Act, shall promptly be transmitted to the Secretary of Defense, who may approve such decision, may vacate it, or remit or mitigate any sanction imposed.

(f) *Contents of orders.* The final decision may provide for suspension or termination of, or refusal to grant or continue Federal financial assistance, in whole or in part, under the program involved, and may contain such terms, conditions, and other provisions as are consistent with and will effectuate the purposes of the Act and this part, including provisions designed to assure that no Federal financial assistance will thereafter be extended under such program to the applicant or recipient determined by such decision to be in

default in its performance of an assurance given by it pursuant to this part, or to have otherwise failed to comply with this part, unless and until it corrects its noncompliance and satisfies the responsible Department official that it will fully comply with this part.

(g) *Post-termination proceedings.* (1) An applicant or recipient adversely affected by an order issued under paragraph (f) of this section shall be restored to full eligibility to receive Federal financial assistance if it satisfies the terms and conditions of that order for such eligibility or if it brings itself into compliance with this part and provides reasonable assurance that it will fully comply with this part.

(2) Any applicant or recipient adversely affected by an order entered pursuant to paragraph (f) of this section may at any time request the responsible Department official to restore fully its eligibility to receive Federal financial assistance. Any such request shall be supported by information showing that the applicant or recipient has met the requirements of paragraph (g)(1) of this section. If the responsible Department official determines that those requirements have been satisfied, he shall restore such eligibility.

(3) If the responsible Department official denies any such request, the applicant or recipient may submit a request for a hearing in writing, specifying why it believes such official to have been in error. It shall thereupon be given an expeditious hearing, with a decision on the record, in accordance with rules of procedure issued by the responsible Department official. The applicant or recipient will be restored to such eligibility if it proves at such a hearing that it satisfied the requirements of paragraph (g)(1) of this section. While proceedings under this subsection are pending, the sanctions imposed by the order issued under paragraph (f) of this section shall remain in effect.

[29 FR 19291, Dec. 31, 1964, as amended at 38 FR 17960, July 5, 1973. Redesignated and amended at 56 FR 32965, July 18, 1991]

### § 195.12 Judicial review.

Action taken pursuant to section 602 of the Act is subject to judicial review as provided in section 603 of the Act.

### § 195.13 Effect on other issuances.

All issuances heretofore issued by any officer of the Department of Defense or its components which impose requirements designed to prohibit any discrimination against individuals on the ground of race, color, or national origin under any program to which this part applies, and which authorize the suspension or termination of or refusal to grant or to continue Federal financial assistance to any applicant for or recipient of such assistance under such program for failure to comply with such requirements, are hereby superseded to the extent that such discrimination is prohibited by this part, except that nothing in this part shall be deemed to relieve any person of any obligation assumed or imposed under any such superseded regulation, order, instruction, or like direction prior to the effective date of this part. Nothing in this part, however, shall be deemed to supersede any of the following (including future amendments thereof):

(a) Executive Orders 10925 and 11114 and issuances thereunder,

(b) The ''Standards for a Merit System of Personnel Administration,'' issued jointly by the Secretaries of Defense, of Health, Education, and Welfare, and of Labor, 28 FR 734, or

(c) Executive Order 11063 and issuances thereunder, or any other issuances, insofar as such Order or issuances prohibit discrimination on the ground of race, color, or national origin in any program or situation to which this part is inapplicable, or prohibit discrimination on any other ground.

### § 195.14 Implementation.

The Secretary of each Military Department shall submit regulations implementing this part to the Assistant Secretary of Defense (Manpower).

## APPENDIX A TO PART 195—PROGRAMS TO WHICH THIS PART APPLIES

1. The Army and Air National Guard (Title 32, United States Code).

2. Various programs involving loan or other disposition of surplus property (various general and specialized statutory provisions including: 40 United States Code 483, 484, 512; 49 United States Code 1101–1119; 10 United States Code 2541, 2542, 2543, 2572, 2662, 7308, 7541, 7542, 7545, 7546, 7547).

3. National Program for Promotion of Rifle Practice (10 United States Code 4307 and annual Department of Defense Appropriation Act).

4. National Defense Cadet Corps Program (10 United States Code 3540(b), 4651).

5. Office of Civil Defense assistance to programs of adult education in civil defense subjects (50 United States Code App. 2281 (e), (f)).

6. Office of Civil Defense radiological instruments grants (50 United States Code App. 2281(h)).

7. Office of Civil Defense program (with Public Health Service) for development of instructional materials on medical self-help (50 United States Code App. 2281 (e), (f)).

8. Office of Civil Defense university extension programs for civil defense instructor training (50 United States Code App. 2281 (e)).

9. Office of Civil Defense programs for survival supplies and equipment, survival training, emergency operating center construction, and personnel and administrative expenses (50 United States Code App. 2281(i), 2285).

10. Office of Civil Defense Shelter Provisioning Program (50 United States Code App. 2281(h)).

11. Office of Civil Defense assistance to students attending Office of Civil Defense schools (50 United States Code App. 2281(e)).

12. Office of Civil Defense loans of equipment or materials from OCD stockpiles for civil defense, including local disaster purposes (50 United States Code App. 2281).

13. Navy Science Cruiser Program (SecNav Instruction 5720.19A).

14. Civil Air Patrol (10 United States Code 9441).

15. Research grants made under the authority of Pub. L. 85–934 (42 United States Code 1892).

16. Contracts with nonprofit institutions of higher education or with nonprofit organizations whose primary purpose is the conduct of scientific research, wherein title to equipment purchased with funds under such contracts may be vested in such institutions or organizations under the authority of Pub. L. 85–934 (42 United States Code 1891).

17. Army Corps of Engineers participation in cooperative investigations and studies concerning erosion of shores of coastal and lake waters (33 United States Code 426).

18. Army Corps of Engineers assistance in the construction of works for the restoration and protection of shores and beaches (33 United States Code 426e–h).

19. Public park and recreational facilities at water resource development projects under the administrative jurisdiction of the Department of the Army (16 United States Code 460d and Federal Water Project Recreation Act, Pub. L. 89–72, 79 Stat. 218, July 9, 1965).

20. Payment to States of proceeds of lands acquired by the United States for flood control, navigation, and allied purposes (33 United States Code 701–c–3).

21. Grants of easements without consideration, or at a nominal or reduced consideration, on lands under the control of the Department of the Army at water resource development projects (33 United States Code 558c and 702d–1; 10 United States Code 2668 and 2669); 43 United States Code 961; 40 United States Code 319).

22. Army Corps of Engineers assistance in the construction of small boat harbor projects (33 United States Code 540 and 577, and 47 Stat. 42, Feb. 10, 1932).

23. Emergency bank protection works constructed by the Army Corps of Engineers for protection of highways, bridge approaches, and public works (33 United States Code 701r).

24. Assistance to States and local interests in the development of water supplies for municipal and industrial purposes in connection with Army Corps of Engineers reservoir projects (Water Supply Act of 1958, 43 United States Code 390b).

25. Army Corps of Engineers contracts for remedial works under authority of section 111 of Act of July 3, 1958 (33 United States Code 633).

[29 FR 19291, Dec. 31, 1964, as amended at 31 FR 6831, May 7, 1966]

# PART 196—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

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AUTHORITY: 20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688.

SOURCE: 65 FR 52865, 52885, Aug. 30, 2000, unless otherwise noted.

## Subpart A—Introduction

### § 196.100 Purpose and effective date.

The purpose of these Title IX regulations is to effectuate Title IX of the Education Amendments of 1972, as amended (except sections 904 and 906 of those Amendments) (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688), which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in these Title IX regulations. The effective date of these Title IX regulations shall be September 29, 2000.

### § 196.105 Definitions.

As used in these Title IX regulations, the term:

*Administratively separate unit* means a school, department, or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

*Admission* means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

*Applicant* means one who submits an application, request, or plan required to be approved by an official of the Federal agency that awards Federal financial assistance, or by a recipient, as a condition to becoming a recipient.

*Designated agency official* means Assistant Secretary of Defense (Force Management Policy).

*Educational institution* means a local educational agency (LEA) as defined by 20 U.S.C. 8801(18), a preschool, a private elementary or secondary school, or an applicant or recipient that is an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, or an institution of vocational education, as defined in this section.

*Federal financial assistance* means any of the following, when authorized or extended under a law administered by

the Federal agency that awards such assistance:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages, or other funds extended to any entity for payment to or on behalf of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement that has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

*Institution of graduate higher education* means an institution that:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences;

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

*Institution of professional education* means an institution (except any institution of undergraduate higher education) that offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary of Education.

*Institution of undergraduate higher education* means:

(1) An institution offering at least two but less than four years of college-level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body that certifies credentials or offers degrees, but that may or may not offer academic study.

*Institution of vocational education* means a school or institution (except an institution of professional or graduate or undergraduate higher education) that has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers full-time study.

*Recipient* means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and that operates an education program or activity that receives such assistance, including any subunit, successor, assignee, or transferee thereof.

*Student* means a person who has gained admission.

*Title IX* means Title IX of the Education Amendments of 1972, Public Law 92–318, 86 Stat. 235, 373 (codified as amended at 20 U.S.C. 1681–1688) (except sections 904 and 906 thereof), as amended by section 3 of Public Law 93–568, 88 Stat. 1855, by section 412 of the Education Amendments of 1976, Public Law 94–482, 90 Stat. 2234, and by Section 3 of

Public Law 100–259, 102 Stat. 28, 28–29 (20 U.S.C. 1681, 1682, 1683, 1685, 1686, 1687, 1688).

*Title IX regulations* means the provisions set forth at §§196.100 through 196.605.

*Transition plan* means a plan subject to the approval of the Secretary of Education pursuant to section 901(a)(2) of the Education Amendments of 1972, 20 U.S.C. 1681(a)(2), under which an educational institution operates in making the transition from being an educational institution that admits only students of one sex to being one that admits students of both sexes without discrimination.

**§196.110 Remedial and affirmative action and self-evaluation.**

(a) *Remedial action*. If the designated agency official finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the designated agency official deems necessary to overcome the effects of such discrimination.

(b) *Affirmative action*. In the absence of a finding of discrimination on the basis of sex in an education program or activity, a recipient may take affirmative action consistent with law to overcome the effects of conditions that resulted in limited participation therein by persons of a particular sex. Nothing in these Title IX regulations shall be interpreted to alter any affirmative action obligations that a recipient may have under Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12086, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264.

(c) *Self-evaluation*. Each recipient education institution shall, within one year of September 29, 2000:

(1) Evaluate, in terms of the requirements of these Title IX regulations, its current policies and practices and the effects thereof concerning admission of students, treatment of students, and employment of both academic and nonacademic personnel working in connection with the recipient's education program or activity;

(2) Modify any of these policies and practices that do not or may not meet the requirements of these Title IX regulations; and

(3) Take appropriate remedial steps to eliminate the effects of any discrimination that resulted or may have resulted from adherence to these policies and practices.

(d) *Availability of self-evaluation and related materials*. Recipients shall maintain on file for at least three years following completion of the evaluation required under paragraph (c) of this section, and shall provide to the designated agency official upon request, a description of any modifications made pursuant to paragraph (c)(2) of this section and of any remedial steps taken pursuant to paragraph (c)(3) of this section.

**§196.115 Assurance required.**

(a) *General*. Either at the application stage or the award stage, Federal agencies must ensure that applications for Federal financial assistance or awards of Federal financial assistance contain, be accompanied by, or be covered by a specifically identified assurance from the applicant or recipient, satisfactory to the designated agency official, that each education program or activity operated by the applicant or recipient and to which these Title IX regulations apply will be operated in compliance with these Title IX regulations. An assurance of compliance with these Title IX regulations shall not be satisfactory to the designated agency official if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with §196.110(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior to or subsequent to the submission to the designated agency official of such assurance.

(b) *Duration of obligation*. (1) In the case of Federal financial assistance extended to provide real property or structures thereon, such assurance shall obligate the recipient or, in the case of a subsequent transfer, the

transferee, for the period during which the real property or structures are used to provide an education program or activity.

(2) In the case of Federal financial assistance extended to provide personal property, such assurance shall obligate the recipient for the period during which it retains ownership or possession of the property.

(3) In all other cases such assurance shall obligate the recipient for the period during which Federal financial assistance is extended.

(c) *Form.* (1) The assurances required by paragraph (a) of this section, which may be included as part of a document that addresses other assurances or obligations, shall include that the applicant or recipient will comply with all applicable Federal statutes relating to nondiscrimination. These include but are not limited to: Title IX of the Education Amendments of 1972, as amended (20 U.S.C. 1681–1683, 1685–1688).

(2) The designated agency official will specify the extent to which such assurances will be required of the applicant's or recipient's subgrantees, contractors, subcontractors, transferees, or successors in interest.

### § 196.120 Transfers of property.

If a recipient sells or otherwise transfers property financed in whole or in part with Federal financial assistance to a transferee that operates any education program or activity, and the Federal share of the fair market value of the property is not upon such sale or transfer properly accounted for to the Federal Government, both the transferor and the transferee shall be deemed to be recipients, subject to the provisions of §§196.205 through 196.235(a).

### § 196.125 Effect of other requirements.

(a) *Effect of other Federal provisions.* The obligations imposed by these Title IX regulations are independent of, and do not alter, obligations not to discriminate on the basis of sex imposed by Executive Order 11246, 3 CFR, 1964–1965 Comp., p. 339; as amended by Executive Order 11375, 3 CFR, 1966–1970 Comp., p. 684; as amended by Executive Order 11478, 3 CFR, 1966–1970 Comp., p. 803; as amended by Executive Order 12087, 3 CFR, 1978 Comp., p. 230; as amended by Executive Order 12107, 3 CFR, 1978 Comp., p. 264; sections 704 and 855 of the Public Health Service Act (42 U.S.C. 295m, 298b-2); Title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e *et seq.*); the Equal Pay Act of 1963 (29 U.S.C. 206); and any other Act of Congress or Federal regulation.

(b) *Effect of State or local law or other requirements.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any State or local law or other requirement that would render any applicant or student ineligible, or limit the eligibility of any applicant or student, on the basis of sex, to practice any occupation or profession.

(c) *Effect of rules or regulations of private organizations.* The obligation to comply with these Title IX regulations is not obviated or alleviated by any rule or regulation of any organization, club, athletic or other league, or association that would render any applicant or student ineligible to participate or limit the eligibility or participation of any applicant or student, on the basis of sex, in any education program or activity operated by a recipient and that receives Federal financial assistance.

### § 196.130 Effect of employment opportunities.

The obligation to comply with these Title IX regulations is not obviated or alleviated because employment opportunities in any occupation or profession are or may be more limited for members of one sex than for members of the other sex.

### § 196.135 Designation of responsible employee and adoption of grievance procedures.

(a) *Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under these Title IX regulations, including any investigation of any complaint communicated to such recipient alleging its noncompliance with these Title IX regulations or alleging any actions that would be prohibited by these Title IX regulations.

The recipient shall notify all its students and employees of the name, office address, and telephone number of the employee or employees appointed pursuant to this paragraph.

(b) *Complaint procedure of recipient.* A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.

### § 196.140 Dissemination of policy.

(a) *Notification of policy.* (1) Each recipient shall implement specific and continuing steps to notify applicants for admission and employment, students and parents of elementary and secondary school students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, that it does not discriminate on the basis of sex in the educational programs or activities that it operates, and that it is required by Title IX and these Title IX regulations not to discriminate in such a manner. Such notification shall contain such information, and be made in such manner, as the designated agency official finds necessary to apprise such persons of the protections against discrimination assured them by Title IX and these Title IX regulations, but shall state at least that the requirement not to discriminate in education programs or activities extends to employment therein, and to admission thereto unless §§ 196.300 through 196.310 do not apply to the recipient, and that inquiries concerning the application of Title IX and these Title IX regulations to such recipient may be referred to the employee designated pursuant to § 196.135, or to the designated agency official.

(2) Each recipient shall make the initial notification required by paragraph (a)(1) of this section within 90 days of September 29, 2000 or of the date these Title IX regulations first apply to such recipient, whichever comes later, which notification shall include publication in:

(i) Newspapers and magazines operated by such recipient or by student, alumnae, or alumni groups for or in connection with such recipient; and

(ii) Memoranda or other written communications distributed to every student and employee of such recipient.

(b) *Publications.* (1) Each recipient shall prominently include a statement of the policy described in paragraph (a) of this section in each announcement, bulletin, catalog, or application form that it makes available to any person of a type, described in paragraph (a) of this section, or which is otherwise used in connection with the recruitment of students or employees.

(2) A recipient shall not use or distribute a publication of the type described in paragraph (b)(1) of this section that suggests, by text or illustration, that such recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by these Title IX regulations.

(c) *Distribution.* Each recipient shall distribute without discrimination on the basis of sex each publication described in paragraph (b)(1) of this section, and shall apprise each of its admission and employment recruitment representatives of the policy of nondiscrimination described in paragraph (a) of this section, and shall require such representatives to adhere to such policy.

## Subpart B—Coverage

### § 196.200 Application.

Except as provided in §§ 196.205 through 196.235(a), these Title IX regulations apply to every recipient and to each education program or activity operated by such recipient that receives Federal financial assistance.

### § 196.205 Educational institutions and other entities controlled by religious organizations.

(a) *Exemption.* These Title IX regulations do not apply to any operation of an educational institution or other entity that is controlled by a religious organization to the extent that application of these Title IX regulations would not be consistent with the religious tenets of such organization.

(b) *Exemption claims.* An educational institution or other entity that wishes

to claim the exemption set forth in paragraph (a) of this section shall do so by submitting in writing to the designated agency official a statement by the highest-ranking official of the institution, identifying the provisions of these Title IX regulations that conflict with a specific tenet of the religious organization.

### § 196.210 Military and merchant marine educational institutions.

These Title IX regulations do not apply to an educational institution whose primary purpose is the training of individuals for a military service of the United States or for the merchant marine.

### § 196.215 Membership practices of certain organizations.

(a) *Social fraternities and sororities.* These Title IX regulations do not apply to the membership practices of social fraternities and sororities that are exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), the active membership of which consists primarily of students in attendance at institutions of higher education.

(b) *YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls.* These Title IX regulations do not apply to the membership practices of the Young Men's Christian Association (YMCA), the Young Women's Christian Association (YWCA), the Girl Scouts, the Boy Scouts, and Camp Fire Girls.

(c) *Voluntary youth service organizations.* These Title IX regulations do not apply to the membership practices of a voluntary youth service organization that is exempt from taxation under section 501(a) of the Internal Revenue Code of 1954, 26 U.S.C. 501(a), and the membership of which has been traditionally limited to members of one sex and principally to persons of less than nineteen years of age.

### § 196.220 Admissions.

(a) Admissions to educational institutions prior to June 24, 1973, are not covered by these Title IX regulations.

(b) *Administratively separate units.* For the purposes only of this section, §§ 196.225 and 196.230, and §§ 196.300 through 196.310, each administratively separate unit shall be deemed to be an educational institution.

(c) *Application of §§ 196.300 through 196.310.* Except as provided in paragraphs (d) and (e) of this section, §§ 196.300 through 196.310 apply to each recipient. A recipient to which §§ 196.300 through 196.310 apply shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 196.300 through 196.310.

(d) *Educational institutions.* Except as provided in paragraph (e) of this section as to recipients that are educational institutions, §§ 196.300 through 196.310 apply only to institutions of vocational education, professional education, graduate higher education, and public institutions of undergraduate higher education.

(e) *Public institutions of undergraduate higher education.* §§ 196.300 through 196.310 do not apply to any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex.

### § 196.225 Educational institutions eligible to submit transition plans.

(a) *Application.* This section applies to each educational institution to which §§ 196.300 through 196.310 apply that:

(1) Admitted students of only one sex as regular students as of June 23, 1972; or

(2) Admitted students of only one sex as regular students as of June 23, 1965, but thereafter admitted, as regular students, students of the sex not admitted prior to June 23, 1965.

(b) *Provision for transition plans.* An educational institution to which this section applies shall not discriminate on the basis of sex in admission or recruitment in violation of §§ 196.300 through 196.310.

### § 196.230 Transition plans.

(a) *Submission of plans.* An institution to which § 196.225 applies and that is composed of more than one administratively separate unit may submit either a single transition plan applicable to all such units, or a separate transition plan applicable to each such unit.

(b) *Content of plans.* In order to be approved by the Secretary of Education, a transition plan shall:

(1) State the name, address, and Federal Interagency Committee on Education Code of the educational institution submitting such plan, the administratively separate units to which the plan is applicable, and the name, address, and telephone number of the person to whom questions concerning the plan may be addressed. The person who submits the plan shall be the chief administrator or president of the institution, or another individual legally authorized to bind the institution to all actions set forth in the plan.

(2) State whether the educational institution or administratively separate unit admits students of both sexes as regular students and, if so, when it began to do so.

(3) Identify and describe with respect to the educational institution or administratively separate unit any obstacles to admitting students without discrimination on the basis of sex.

(4) Describe in detail the steps necessary to eliminate as soon as practicable each obstacle so identified and indicate the schedule for taking these steps and the individual directly responsible for their implementation.

(5) Include estimates of the number of students, by sex, expected to apply for, be admitted to, and enter each class during the period covered by the plan.

(c) *Nondiscrimination.* No policy or practice of a recipient to which § 196.225 applies shall result in treatment of applicants to or students of such recipient in violation of §§ 196.300 through 196.310 unless such treatment is necessitated by an obstacle identified in paragraph (b)(3) of this section and a schedule for eliminating that obstacle has been provided as required by paragraph (b)(4) of this section.

(d) *Effects of past exclusion.* To overcome the effects of past exclusion of students on the basis of sex, each educational institution to which § 196.225 applies shall include in its transition plan, and shall implement, specific steps designed to encourage individuals of the previously excluded sex to apply for admission to such institution. Such steps shall include instituting recruitment programs that emphasize the institution's commitment to enrolling students of the sex previously excluded.

**§ 196.235 Statutory amendments.**

(a) This section, which applies to all provisions of these Title IX regulations, addresses statutory amendments to Title IX.

(b) These Title IX regulations shall not apply to or preclude:

(1) Any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference;

(2) Any program or activity of a secondary school or educational institution specifically for:

(i) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) The selection of students to attend any such conference;

(3) Father-son or mother-daughter activities at an educational institution or in an education program or activity, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided to students of the other sex;

(4) Any scholarship or other financial assistance awarded by an institution of higher education to an individual because such individual has received such award in a single-sex pageant based upon a combination of factors related to the individual's personal appearance, poise, and talent. The pageant, however, must comply with other nondiscrimination provisions of Federal law.

(c) *Program or activity* or *program* means:

(1) All of the operations of any entity described in paragraphs (c)(1)(i) through (iv) of this section, any part of which is extended Federal financial assistance:

(i)(A) A department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) The entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(ii)(A) A college, university, or other postsecondary institution, or a public system of higher education; or

(B) A local educational agency (as defined in section 8801 of title 20), system of vocational education, or other school system;

(iii)(A) An entire corporation, partnership, or other private organization, or an entire sole proprietorship—

(*1*) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(*2*) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(iv) Any other entity that is established by two or more of the entities described in paragraphs (c)(1)(i), (ii), or (iii) of this section.

(2)(i) *Program or activity* does not include any operation of an entity that is controlled by a religious organization if the application of 20 U.S.C. 1681 to such operation would not be consistent with the religious tenets of such organization.

(ii) For example, all of the operations of a college, university, or other postsecondary institution, including but not limited to traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities are part of a ''program or activity'' subject to these Title IX regulations if the college, university, or other institution receives Federal financial assistance.

(d)(1) Nothing in these Title IX regulations shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Medical procedures, benefits, services, and the use of facilities, necessary to save the life of a pregnant woman or to address complications related to an abortion are not subject to this section.

(2) Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion. Accordingly, subject to paragraph (d)(1) of this section, no person shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, employment, or other educational program or activity operated by a recipient that receives Federal financial assistance because such individual has sought or received, or is seeking, a legal abortion, or any benefit or service related to a legal abortion.

## Subpart C—Discrimination on the Basis of Sex in Admission and Recruitment Prohibited

### § 196.300 Admission.

(a) *General.* No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which §§ 196.300 through §§ 196.310 apply, except as provided in §§ 196.225 and §§ 196.230.

(b) *Specific prohibitions.* (1) In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 196.300 through 196.310 apply shall not:

(i) Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis, or otherwise;

(ii) Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or

(iii) Otherwise treat one individual differently from another on the basis of sex.

(2) A recipient shall not administer or operate any test or other criterion for admission that has a disproportionately adverse effect on persons on the

basis of sex unless the use of such test or criterion is shown to predict validly success in the education program or activity in question and alternative tests or criteria that do not have such a disproportionately adverse effect are shown to be unavailable.

(c) *Prohibitions relating to marital or parental status.* In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which §§ 196.300 through 196.310 apply:

(1) Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant that treats persons differently on the basis of sex;

(2) Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice that so discriminates or excludes;

(3) Subject to § 196.235(d), shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and

(4) Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is ''Miss'' or ''Mrs.'' A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

### § 196.305 Preference in admission.

A recipient to which §§ 196.300 through 196.310 apply shall not give preference to applicants for admission, on the basis of attendance at any educational institution or other school or entity that admits as students only or predominantly members of one sex, if the giving of such preference has the effect of discriminating on the basis of sex in violation of §§ 196.300 through 196.310.

### § 196.310 Recruitment.

(a) *Nondiscriminatory recruitment.* A recipient to which §§ 196.300 through 196.310 apply shall not discriminate on the basis of sex in the recruitment and admission of students. A recipient may be required to undertake additional recruitment efforts for one sex as remedial action pursuant to § 196.110(a), and may choose to undertake such efforts as affirmative action pursuant to § 196.110(b).

(b) *Recruitment at certain institutions.* A recipient to which §§ 196.300 through 196.310 apply shall not recruit primarily or exclusively at educational institutions, schools, or entities that admit as students only or predominantly members of one sex, if such actions have the effect of discriminating on the basis of sex in violation of §§ 196.300 through 196.310.

## Subpart D—Discrimination on the Basis of Sex in Education Programs or Activities Prohibited

### § 196.400 Education programs or activities.

(a) *General.* Except as provided elsewhere in these Title IX regulations, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient that receives Federal financial assistance. Sections 196.400 through 196.455 do not apply to actions of a recipient in connection with admission of its students to an education program or activity of a recipient to which §§ 196.300 through 196.310 do not apply, or an entity, not a recipient, to which §§ 196.300 through 196.310 would not apply if the entity were a recipient.

(b) *Specific prohibitions.* Except as provided in §§ 196.400 through 196.455, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person that discriminates on the basis of sex in providing any aid, benefit, or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) *Assistance administered by a recipient educational institution to study at a foreign institution.* A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, that are designed to provide opportunities to study abroad, and that are awarded to students who are already matriculating at or who are graduates of the recipient institution; *Provided*, that a recipient educational institution that administers or assists in the administration of such scholarships, fellowships, or other awards that are restricted to members of one sex provides, or otherwise makes available, reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) *Aids, benefits or services not provided by recipient.* (1) This paragraph (d) applies to any recipient that requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or that facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient:

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient that these Title IX regulations would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

**§ 196.405 Housing.**

(a) *Generally.* A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) *Housing provided by recipient.* (1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) *Other housing.* (1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than that provided by such recipient.

(2)(i) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(A) Proportionate in quantity; and

(B) Comparable in quality and cost to the student.

(ii) A recipient may render such assistance to any agency, organization,

or person that provides all or part of such housing to students of only one sex.

### § 196.410 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

### § 196.415 Access to course offerings.

(a) A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business, vocational, technical, home economics, music, and adult education courses.

(b)(1) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

(2) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(3) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(4) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards that do not have such effect.

(5) Portions of classes in elementary and secondary schools, or portions of education programs or activities, that deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(6) Recipients may make requirements based on vocal range or quality that may result in a chorus or choruses of one or predominantly one sex.

### § 196.420 Access to schools operated by LEAs.

A recipient that is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

### § 196.425 Counseling and use of appraisal and counseling materials.

(a) *Counseling.* A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) *Use of appraisal and counseling materials.* A recipient that uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials that permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in a substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) *Disproportion in classes.* Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

**§ 196.430 Financial assistance.**

(a) *General.* Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amounts or types of such assistance, limit eligibility for such assistance that is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities, or other services, assist any foundation, trust, agency, organization, or person that provides assistance to any of such recipient's students in a manner that discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance that treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) *Financial aid established by certain legal instruments.* (1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government that require that awards be made to members of a particular sex specified therein; *Provided,* that the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) *Athletic scholarships.* (1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) A recipient may provide separate athletic scholarships or grants-in-aid for members of each sex as part of separate athletic teams for members of each sex to the extent consistent with this paragraph (c) and § 196.450.

**§ 196.435 Employment assistance to students.**

(a) *Assistance by recipient in making available outside employment.* A recipient that assists any agency, organization, or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person that discriminates on the basis of sex in its employment practices.

(b) *Employment of students by recipients.* A recipient that employs any of its students shall not do so in a manner that violates §§ 196.500 through 196.550.

**§ 196.440 Health and insurance benefits and services.**

Subject to § 196.235(d), in providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner that would violate §§ 196.500 through 196.550 if it were provided to employees of the recipient.

This section shall not prohibit a recipient from providing any benefit or service that may be used by a different proportion of students of one sex than of the other, including family planning services. However, any recipient that provides full coverage health service shall provide gynecological care.

**§ 196.445 Marital or parental status.**

(a) *Status generally*. A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status that treats students differently on the basis of sex.

(b) *Pregnancy and related conditions*. (1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation as long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient that operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section, shall ensure that the separate portion is comparable to that offered to non-pregnant students.

(4) Subject to § 196.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan, or policy that such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient that does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence for as long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status that she held when the leave began.

**§ 196.450 Athletics.**

(a) *General*. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person, or otherwise be discriminated against in any interscholastic, intercollegiate, club, or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams*. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. For the purposes of these Title IX regulations, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity*. (1) A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the designated agency official will consider, among other factors:

(i) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(ii) The provision of equipment and supplies;

(iii) Scheduling of games and practice time;

(iv) Travel and per diem allowance;

(v) Opportunity to receive coaching and academic tutoring;

(vi) Assignment and compensation of coaches and tutors;

(vii) Provision of locker rooms, practice, and competitive facilities;

(viii) Provision of medical and training facilities and services;

(ix) Provision of housing and dining facilities and services;

(x) Publicity.

(2) For purposes of paragraph (c)(1) of this section, unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the designated agency official may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from September 29, 2000. A recipient that operates or sponsors interscholastic, intercollegiate, club, or intramural athletics at the secondary or postsecondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from September 29, 2000.

### § 196.455 Textbooks and curricular material.

Nothing in these Title IX regulations shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

## Subpart E—Discrimination on the Basis of Sex in Employment in Education Programs or Activities Prohibited

### § 196.500 Employment.

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient that receives Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way that could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by §§ 196.500 through 196.550, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity that admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of these Title IX regulations.

(b) *Application.* The provisions of §§ 196.500 through 196.550 apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications, and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

**§ 196.505 Employment criteria.**

A recipient shall not administer or operate any test or other criterion for any employment opportunity that has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

**§ 196.510 Recruitment.**

(a) *Nondiscriminatory recruitment and hiring.* A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have so discriminated in the past, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) *Recruitment patterns.* A recipient shall not recruit primarily or exclusively at entities that furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of §§ 196.500 through 196.550.

**§ 196.515 Compensation.**

A recipient shall not make or enforce any policy or practice that, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and that are performed under similar working conditions.

**§ 196.520 Job classification and structure.**

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements that classify persons on the basis of sex, unless sex is a bona fide occupational qualification for the positions in question as set forth in § 196.550.

**§ 196.525 Fringe benefits.**

(a) *''Fringe benefits'' defined.* For purposes of these Title IX regulations, *fringe benefits* means: Any medical, hospital, accident, life insurance, or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 196.515.

(b) *Prohibitions.* A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan that does not provide for equal periodic benefits for members of each sex and for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan that establishes different optional or compulsory retirement ages based on sex or that otherwise discriminates in benefits on the basis of sex.

### § 196.530 Marital or parental status.

(a) *General.* A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment that treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) *Pregnancy.* A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) *Pregnancy as a temporary disability.* Subject to § 196.235(d), a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, recovery therefrom, and any temporary disability resulting therefrom as any other temporary disability for all job-related purposes, including commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) *Pregnancy leave.* In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status that she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

### § 196.535 Effect of state or local law or other requirements.

(a) *Prohibitory requirements.* The obligation to comply with §§ 196.500 through 196.550 is not obviated or alleviated by the existence of any State or local law or other requirement that imposes prohibitions or limits upon employment of members of one sex that are not imposed upon members of the other sex.

(b) *Benefits.* A recipient that provides any compensation, service, or benefit to members of one sex pursuant to a State or local law or other requirement shall provide the same compensation, service, or benefit to members of the other sex.

### § 196.540 Advertising.

A recipient shall not in any advertising related to employment indicate preference, limitation, specification, or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job in question.

### § 196.545 Pre-employment inquiries.

(a) *Marital status.* A recipient shall not make pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is ''Miss'' or ''Mrs.''

(b) *Sex.* A recipient may make pre-employment inquiry as to the sex of an applicant for employment, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by these Title IX regulations.

### § 196.550 Sex as a bona fide occupational qualification.

A recipient may take action otherwise prohibited by §§ 196.500 through 196.550 provided it is shown that sex is a bona fide occupational qualification for that action, such that consideration of sex with regard to such action

is essential to successful operation of the employment function concerned. A recipient shall not take action pursuant to this section that is based upon alleged comparative employment characteristics or stereotyped characterizations of one or the other sex, or upon preference based on sex of the recipient, employees, students, or other persons, but nothing contained in this section shall prevent a recipient from considering an employee's sex in relation to employment in a locker room or toilet facility used only by members of one sex.

## Subpart F—Procedures

### § 196.600 Notice of covered programs.

Within 60 days of September 29, 2000, each Federal agency that awards Federal financial assistance shall publish in the FEDERAL REGISTER a notice of the programs covered by these Title IX regulations. Each such Federal agency shall periodically republish the notice of covered programs to reflect changes in covered programs. Copies of this notice also shall be made available upon request to the Federal agency's office that enforces Title IX.

### § 196.605 Enforcement procedures.

The investigative, compliance, and enforcement procedural provisions of Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d) (''Title VI'') are hereby adopted and applied to these Title IX regulations. These procedures may be found at 32 CFR 195.7 through 195.12.

[65 FR 52885, Aug. 30, 2000]

# PART 197—HISTORICAL RESEARCH IN THE FILES OF THE OFFICE OF THE SECRETARY OF DEFENSE (OSD)

Sec.

197.1 Purpose.
197.2 Applicability.
197.3 Definitions.
197.4 Policy.
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APPENDIX A TO PART 197—EXPLANATION OF FOIA EXEMPTIONS AND CLASSIFICATION CATEGORIES

AUTHORITY: 5 U.S.C. 301, Executive Order 13526, 5 U.S.C. 552b, and Pub. L. 102–138.

SOURCE: 80 FR 65935, Oct. 28, 2015, unless otherwise noted.

### § 197.1 Purpose.

This part, in accordance with the authority in DoD Directive 5110.4, implements policy and updates procedures for the programs that permit authorized personnel to perform historical research in records created by or in the custody of Office of the Secretary of Defense (OSD) consistent with Executive Order 13526; DoD Manual 5230.30, ''DoD Mandatory Declassification Review (MDR) Program'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/523030m.pdf*); 32 CFR part 286; 32 CFR part 310; DoD Manual 5200.01, ''DoD Information Security Program'' Volumes 1–4 (available at *http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf*, *http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf*, *http://www.dtic.mil/whs/directives/corres/pdf/520001_vol3.pdf*, and *http://www.dtic.mil/whs/directives/corres/pdf/520001_vol4.pdf*); 36 CFR 1230.10 and 36 CFR part 1236; DoD Directive 5230.09, ''Clearance of DoD Information for Public Release'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/523009p.pdf*); and 32 CFR 197.5.

### § 197.2 Applicability.

This part applies to:

(a) The Office of the Secretary of Defense (OSD), the Defense Agencies, and the DoD Field Activities in the National Capital Region that are serviced by Washington Headquarters Services (WHS) (referred to collectively in this part as the ''WHS-Serviced Components'').

(b) All historical researchers as defined in § 197.3.

(c) Cabinet Level Officials, Former Presidential Appointees (FPAs) to include their personnel, aides and researchers, seeking access to records containing information they originated, reviewed, signed, or received while serving in an official capacity.

### § 197.3 Definitions.

The following definitions apply to this part:

*Access*. The availability of or the permission to consult records, archives, or manuscripts. The ability and opportunity to obtain classified, unclassified, or administratively controlled information or records.

*Electronic records*. Records stored in a form that only a computer can process and satisfies the definition of a federal record, also referred to as machine-readable records or automatic data processing records (including email).

*Historical researchers or requestors*. A person approved to conduct research in OSD files for historical information to use in a DoD approved project (*e.g.*, agency historical office projects, books, articles, studies, or reports), regardless of the person's employment status. Excluded are Military personnel assigned to OSD; OSD employees, contractors, and students conducting research in response to academic requirements.

*Records (also referred to as federal records or official records)*. All books, papers, maps, photographs, machine-readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the U.S. Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the U.S. Government or because of the informational value of data in them.

**§ 197.4 Policy.**

It is OSD policy that:

(a) Pursuant to Executive Order 13526, anyone requesting access to classified material must possess the requisite security clearance.

(b) Members of the public seeking the declassification of DoD documents under the provisions of section 3.5 of Executive Order 13526 will contact the appropriate OSD Component as listed in DoD Manual 5230.30.

(c) Records and information requested by FPA and approved historical researchers will be accessed at a facility under the control of the National Archives and Records Administration (NARA), NARA's Archives II in College Park, Maryland, a Presidential library, or an appropriate U.S. military facility or a DoD activity in accordance with Vol 3 of DoD Manual 5200.01, ''DoD Information Security Program,'' February 24, 2012, as amended.

(d) Access to records and information will be limited to the specific records within the scope of the proposed research request over which OSD has authority and to any other records for which the written consent of other agencies with authority has been granted in accordance with Vol 3 of DoD Manual 5200.01, ''DoD Information Security Program,'' February 24, 2012, as amended.

(e) Access to unclassified OSD Component records and information will be permitted consistent with the restrictions of the exemptions of 5 U.S.C. 552(b) (also known and referred to in this part as the ''Freedom of Information Act'' (FOIA), 32 CFR part 286, § 197.5 of this part, and consistent with 32 CFR part 310. The procedures for access to classified information will be used if the requested unclassified information is contained in OSD files whose overall markings are classified.

(f) Except as otherwise provided in DoD Manual 5200.01 volume 3, no person may have access to classified information unless that person has been determined to be trustworthy and access is essential to the accomplishment of a lawful and authorized purpose.

(g) Persons outside the Executive Branch who are engaged in approved historical research projects may be granted access to classified information, consistent with the provisions of Executive Order 13526 and DoD Manual 5200.01 volume 1 provided that the OSD official with classification jurisdiction over that information grants access.

(h) Contractors working for Executive Branch agencies may be allowed access to classified OSD Component files provided the contractors meet all the required criteria for such access as an historical researcher including the appropriate level of personnel security clearance set forth in paragraphs (a) and (i) of this section. No copies of OSD records and information may be released directly to the contractors. The Washington Headquarters Services

Records and Declassification Division (WHS/RDD) will be responsible for ensuring that the contractor safeguards the documents and the information is only used for the project for which it was requested per section 4.1 of Executive Order 13526, ''Classified National Security Information,'' December 29, 2009.

(i) All DoD-employed requesters, to include DoD contractors, must have critical nuclear weapons design information (CNWDI) to access CNWDI information. All other non DoD and non-Executive Branch personnel must have a Department of Energy-issued ''Q'' clearance to access CNWDI information in accordance with DoD Manual 5220.22, ''National Industrial Security Program Operating Manual (NISPOM),'' February 28, 2006, as amended.

(j) The removal of federal records and information from OSD custody is not authorized; this includes copies and email according to 36 CFR 1230.10. Copies of records and information that are national security classified will remain under the control of the agency.

(k) Access for FPAs is limited to records they originated, reviewed, signed, or received while serving as Presidential appointees, unless there is another basis for providing access in accordance with Vol 3 of DoD Manual 5200.01, ''DoD Information Security Program,'' February 24, 2012, as amended.

(l) Authorization is required from all agencies whose classified information is, or is expected to be, in the requested files prior to granting approval for access. Separate authorizations for access to records and information maintained in OSD Component office files or at the federal records centers will not be required in accordance with Vol 3 of DoD Manual 5200.01, ''DoD Information Security Program,'' February 24, 2012, as amended.

### § 197.5 Responsibilities.

(a) The Director of Administration (DA), Office of the Deputy Chief Management Officer (ODCMO), or designee is the approval authority for access to DoD information in OSD Component files and in files at the National Archives, Presidential libraries, and other similar institutions in accordance with DoD Directive 5110.4 and DoD Manual 5230.30.

(b) *OSD Records Administrator*. Under the authority, direction, and control of the DA, ODCMO, the OSD Records Administrator:

(1) Exercises approval authority for research access to OSD and WHS Serviced Components records, information, and the Historical Research Program.

(2) Maintains records necessary to process and monitor each case.

(3) Obtains all required authorizations.

(4) Obtains, when warranted, the legal opinion of the General Counsel of the Department of Defense regarding the requested access.

(5) Coordinates, with the originator, on the public release review on documents selected by the researchers for use in unclassified projects in accordance with DoD Directive 5230.09 and DoD Instruction 5230.29, ''Security and Policy Review of DoD Information for Public Release'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/523029p.pdf*).

(6) Coordinates requests with the OSD Historian.

(7) Provides prospective researchers the procedures necessary for requesting access to OSD Component files.

(c) The WHS-serviced Components heads, when requested:

(1) Determine whether access is for a lawful and authorized government purpose or in the interest of national security.

(2) Determine whether the specific records requested are within the scope of the proposed historical research.

(3) Determine the location of the requested records.

(4) Provide a point of contact to the OSD Records Administrator.

### § 197.6 Procedures.

(a) *Procedures for historical researchers permanently assigned within the Executive Branch working on official projects.* (1) In accordance with § 197.5, the WHS-serviced Components heads, when requested, will:

(i) Make a written determination that the requested access is essential to the accomplishment of a lawful and authorized U.S. Government purpose,

stating whether the requested records can be made available. If disapproved, cite specific reasons.

(ii) Provide the location of the requested records, including accession and box numbers if the material has been retired to the Washington National Records Center (WNRC).

(iii) Provide a point of contact for liaison with the OSD Records Administrator if any requested records are located in OSD Component working files.

(2) The historical researcher or requestor will:

(i) Submit a request for access to OSD files to: OSD Records Administrator, WHS/Records and Declassification Division, 4800 Mark Center Drive, Suite 02F09–02, Alexandria, VA 22350–3100.

(ii) All requests must be signed by an appropriate official and must contain:

(A) The name(s) of the researcher(s) and any assistant(s), level of security clearance, and the federal agency, institute, or company to which the researcher is assigned.

(B) A statement on the purpose of the project, including whether the final product is to be classified or unclassified.

(C) An explicit description of the information being requested and, if known, the originating office, so that the identification and location of the information may be facilitated.

(D) Appropriate higher authorization of the request.

(E) Ensure researcher's security manager or personnel security office verifies his or her security clearances in writing to the OSD Records Administrator's Security Manager.

(iii) Maintain the file integrity of the records being reviewed, ensuring that no records are removed and that all folders are replaced in the correct box in their proper order.

(iv) Make copies of any documents pertinent to the project, ensuring that staples are carefully removed and that the documents are re-stapled before they are replaced in the folder.

(v) Submit the completed manuscript for review prior to public presentation or publication to:

WHS/Chief, Security Review Division, Office of Security Review, 1155 Defense Pentagon, Washington, DC 20301–1155.

(vi) If the requester is an official historian of a federal agency requiring access to DoD records at the National Archives facilities or a Presidential library, the requested must be addressed directly to the pertinent facility with an information copy sent to the OSD Records Administrator. The historian's security clearances must be verified to the National Archives or the Presidential library.

(3) The use of computers, laptops, computer tablets, personal digital assistants, recorders, or similar devices listed in § 197.6(f) is prohibited. Researchers will use letter-sized paper (approximately 8½ by 11 inches), writing on only one side of the page. Each page of notes must pertain to only one document.

(4) The following applies to all notes taken during research:

(i) All notes are considered classified at the level of the document from which they were taken.

(ii) Indicate at the top of each page of notes the document:

(A) Originator.

(B) Date.

(C) Subject (if the subject is classified, indicate the classification).

(D) Folder number or other identification.

(E) Accession number and box number in which the document was found.

(F) Security classification of the document.

(iii) Number each page of notes consecutively.

(iv) Leave the last 1½ inches on the bottom of each page of notes blank for use by the reviewing agencies.

(v) Ensure the notes are legible, in English, and in black ink.

(vi) All notes must be given to the staff at the end of each day. The facility staff will forward the notes to the OSD Records Administrator for an official review and release to the researcher.

(5) The OSD Records Administrator will:

(i) Process all requests from Executive Branch employees requesting access to OSD Component files for official projects.

(ii) Determine which OSD Component originated the requested records and, if

necessary, request an access determination from the OSD Component and the location of the requested records, including but not limited to electronic information systems, databases or accession number and box numbers if the hardcopy records have been retired offsite.

(iii) Request authorization for access from other OSD Component as necessary.

(A) Official historians employed by federal agencies may have access to the classified information of any other agency found in DoD files, as long as authorization for access has been obtained from these agencies.

(B) If the requester is not an official historian, authorization for access must be obtained from the Central Intelligence Agency (CIA), National Security Council (NSC), Department of State (DOS), and any other non-DoD agency whose classified information is expected to be found in the files to be accessed.

(iv) Make a written determination as to the researcher's trustworthiness based on the researcher having been issued a security clearance.

(v) Compile all information on the request for access to classified information, to include evidence of an appropriately issued personnel security clearance, and forward the information to the DA, ODCMO; OSD Component or designee, who will make the access determination.

(vi) Notify the researcher of the authorization and conditions for access to the requested records or of the denial of access and the reason(s).

(vii) Ensure that all conditions for access and release of information for use in the project are met.

(viii) Make all necessary arrangements for the researcher to visit the review location and review the requested records.

(ix) Provide all requested records and information under OSD control in electronic formats consistent with 36 CFR part 1236. For all other information, a staff member will be assigned to supervise the researcher's copying of pertinent documents at the assigned facility.

(x) If the records are maintained in the OSD Component's working files, arrange for the material to be converted to electronic format for the researchers to review.

(xi) Notify the National Archives, Presidential library, or military facility of the authorization and access conditions of all researchers approved to research OSD records held in those facilities.

(b) *Procedures for the DOS Foreign Relations of the United States (FRUS) series.* (1) The DOS historians will:

(i) Submit requests for access to OSD files. The request should list the names and security clearances for the historians doing the research and an explicit description, including the accession and box numbers, of the files being requested. Submit request to: OSD Records Administrator, WHS/Records and Declassification Division, 4800 Mark Center Dr, Suite 02F09–02, Alexandria, VA 22380–2100.

(ii) Submit to the OSD Records Administrator requests for access for members of the Advisory Committee on Historical Diplomatic Documentation to documents copied by the DOS historians for the series or the files reviewed to obtain the documents.

(iii) Request that the DOS Diplomatic Security staff verify all security clearances in writing to the OSD Records Administrator's Security Manager.

(iv) Give all document copies to the OSD Records Administrator staff member who is supervising the copying as they are made.

(v) Submit any OSD documents desired for use or pages of the manuscript containing OSD classified information for declassification review prior to publication to the Chief, Security Review Division at: WHS/Chief, Security Review Division, Office of Security Review, 1155 Defense Pentagon, Washington, DC 20301–1155.

(2) The OSD Records Administrator will:

(i) Determine the location of the records being requested by the DOS for the FRUS series according to Title IV of Public Law 102–138, ''The Foreign Relations of the United States Historical Series.''

(ii) Act as a liaison with the CIA, NSC, and any other non-OSD agency for access by DOS historians to records

and information and such non-DoD agency classified information expected to be interfiled with the requested OSD records.

(iii) Obtain written verification from the DOS Diplomatic Security staff of all security clearances, including ''Q'' clearances.

(iv) Make all necessary arrangements for the DOS historians to access, review, and copy documents selected for use in their research in accordance with procedures in accordance with § 197.6(a).

(v) Provide a staff member to supervise document copying in accordance with the guidance provided in § 197.6(d) of this part.

(vi) Compile a list of the documents that were copied by the DOS historians.

(vii) Scan and transfer copies to DOS in NARA an approved electronic format.

(viii) Submit to the respective agency a list of CIA and NSC documents copied and released to the DOS historians.

(ix) Process DOS Historian Office requests for members of the Advisory Committee on Historical Diplomatic Documentation with appropriate security clearances to have access to documents copied and used by the DOS historians to compile the FRUS series volumes or to the files that were reviewed to obtain the copied documents. Make all necessary arrangements for the Advisory Committee to review any documents that are at the WNRC.

(c) *Procedures for historical researchers not permanently assigned to the Executive Branch.* (1) The WHS-serviced Components heads, when required, will:

(i) Recommend to the DA, ODCMO, or his or her designee, approval or disapproval of requests to access OSD information. State whether access to, release, and clearance of the requested information is in the interest of national security and whether the information can be made available. If disapproval is recommended, specific reasons should be cited.

(ii) Provide the location of the requested information, including but not limited to the office, component, information system or accession and box numbers for any records that have been retired to the WNRC.

(iii) Provide a point of contact for liaison with the OSD Records Administrator if any requested records are located in OSD Component working files.

(2) The OSD Records Administrator will:

(i) Process all requests from non-Executive Branch researchers for access to OSD or WHS-serviced Components files. Certify via the WHS Security Officer that the requester has the appropriate clearances.

(ii) Determine which OSD Component originated the requested records and, as necessary, obtain written recommendations for the research to review the classified information.

(iii) Obtain prior authorization to review their classified information from the DOS, CIA, NSC, and any other agency whose classified information is expected to be interfiled with OSD records.

(iv) Obtain agreement from the researcher(s) and any assistant(s) that they will comply with conditions governing access to the classified information (see Figure to § 197.6).

Figure to § 197.6. Form Letter – Conditions Governing Access to Official Records for Historical Research Purposes

(LETTERHEAD STATIONERY)

Date:

OSD Records Administrator

WHS/Records and Declassification Division

4800 Mark Center Drive

Suite 02F09-02

Alexandria Va 22350-3100

To Whom It May Concern:

I understand that the information to which I have requested access for historical research purposes may include information concerning the national defense or foreign relations of the United States. Unauthorized disclosure could reasonably be expected to cause damage, serious damage, or exceptionally grave damage to the national security regardless of the classification of that information. If granted access, I therefore agree to the following conditions governing access to OSD files:

1. I will abide by any rules and restrictions issued in your letter of authorization, including those of other agencies whose information is interfiled with that of the OSD.

2. I agree to safeguard the classified information to which I gain possession or knowledge in a manner consistent with Part 4 of Executive Order 13526, "Classified National Security Information," and the applicable provisions of the DoD issuances concerning safeguarding classified information, including DoD Instruction 5200.01, "DoD Information Security Program and Protection of Sensitive Compartmented Information."

3. I agree not to reveal to any person or agency any information obtained as a result of this access except as authorized in the terms of your authorization letter or a follow-on letter. I further agree that I will not use the information for purposes other than those set forth in my request for access.

4. I agree to submit my research notes to determine if classified information is contained in them before their removal from the specific area assigned to me for research. I further agree to submit my manuscript for a security review before its publication or presentation. In each of these reviews, I agree to comply with any decision of the reviewing official in the interests of the security of the United States, including the retention or deletion of any classified parts of such notes and manuscript whenever the federal agency concerned deems such retention or deletion necessary.

5. I understand that failure to abide by the conditions in this statement constitutes sufficient cause for canceling my access to OSD information and for denying me any future access and may subject me to criminal provisions of federal law as referred to in paragraph 6.

6. I have been informed that provisions of Title 18 of the United States Code impose criminal penalties, under certain circumstances, for the unauthorized disclosure, loss, copying, or destruction of defense information.

7. Removal Subject to a Nondisclosure Agreement. Cabinet Level officials may remove copies of unclassified information and/or materials not previously released to the public or with clearly identified restrictions upon request of the departing official if he or she signs a non-disclosure agreement. The former official must agree not to release or publish the information, orally or in writings (paper or electronically), without the written approval of the DoD. Upon request by the Cabinet level official, the DoD will perform an official review of the information. The review may result in possible denial or redaction of the information. The Director of Administration and Management will serve as the appellate authority to any denials or redactions that may be contested.

Signature

THIS STATEMENT IS MADE TO THE UNITED STATES GOVERNMENT TO ENABLE IT TO EXERCISE ITS RESPONSIBILITY FOR THE PROTECTION OF INFORMATION AFFECTING THE NATIONAL SECURITY. I UNDERSTAND THAT ANY MATERIAL FALSE STATEMENT THAT I MAKE KNOWINGLY AND WILLFULLY SHALL SUBJECT ME TO THE PENALTIES OF TITLE 18, U.S. CODE, SECTION 1001.

(v) If the requester is an FPA, submit a memorandum after completion of the actions described in this part to WHS, Human Resources Directorate, Security Operations Division, requesting the issuance (including an interim) or reinstatement of an inactive security

clearance for the FPA and any assistant and a copy of any signed form letters. The Security Division will contact the researcher(s) and any assistant(s) to obtain the forms required to reinstate or initiate the personnel security investigation to obtain a security clearance. Upon completion of the adjudication process, notify the OSD Records Administrator in writing of the reinstatement, issuance, or denial of a security clearance.

(vi) Make a written determination as to the researcher's trustworthiness based on his or her having been issued a security clearance.

(vii) Compile all information on the request for access to classified information, to include either evidence of an appropriately issued or reinstated personnel security clearance. Forward the information to the DA, ODCMO or designee, who will make the final determination on the applicant's eligibility for access to classified OSD or WHS-serviced Component files. If the determination is favorable, the DA, ODCMO or designee will then execute an authorization for access, which will be valid for not more than 2 years.

(viii) Notify the researcher of the approval or disapproval of the request. If the request has been approved, the notification will identify the files authorized for review and specify that the authorization:

(A) Is approved for a predetermined time period.

(B) Is limited to the designated files.

(C) Does not include access to records and/or information of other federal agencies, unless such access has been specifically authorized by those agencies.

(ix) Make all necessary arrangements for the researcher to visit the WNRC and review any requested records that have been retired there, to include written authorization, conditions for the access, and a copy of the security clearance verification.

(x) If the requested records are at the WNRC, make all necessary arrangements for the scanning of documents.

(xi) If the requested records are maintained in OSD or WHS-serviced Component working files, make arrangements for the researcher to review the requested information and, if authorized, copy pertinent documents in the OSD or WHS-serviced Component's office. Provide the OSD Component with a copy of the written authorization and conditions under which the access is permitted.

(xii) Compile a list of all the documents requested by the researcher.

(xiii) Coordinate the official review on all notes taken and documents copied by the researcher.

(xiv) If the classified information to be reviewed is on file at the National Archives, a Presidential library, or other facility, notify the pertinent facility in writing of the authorization and conditions for access.

(3) The researcher will:

(i) Submit a request for access to OSD Component files to OSD Records Administrator, WHS/Records and Declassification Division, 4800 Mark Center Drive, Suite 02F09–02, Alexandria VA 22350–3100. The request must contain:

(A) As explicit a description as possible of the information being requested so that identification and location of the information may be facilitated.

(B) A statement as to how the information will be used, including whether the final project is to be classified or unclassified.

(C) A statement as to whether the researcher has a security clearance, including the level of clearance and the name of the issuing agency.

(D) The names of any persons who will be assisting the researcher with the project. If the assistants have security clearances, provide the level of clearance and the name of the issuing agency.

(E) A signed copy of their agreement (see Figure) to safeguard the information and to authorize a review of any notes and manuscript for a determination that they contain no classified information. Each project assistant must also sign a copy of the letter.

(F) The forms necessary to obtain a security clearance, if the requester is an FPA without an active security clearance. Each project assistant without an active security clearance will also need to complete these forms. If

the FPA or assistant have current security clearances, their personnel security office must provide verification in writing to the OSD Records Administrator's Security Manager.

(ii) Maintain the integrity of the files being reviewed, ensuring that no records are removed and that all folders are replaced in the correct box in their proper order.

(iii) If copies are authorized, give all copies to the custodian of the files at the end of each day. The custodian will forward the copies of the documents to the OSD Records Administrator for a declassification review and release to the requester.

(A) For records at the WNRC, if authorized, provide the requested information in an electronic format. Review will occur only in the presence of an OSD Records Administrator staff member.

(B) Ensure that all staples are carefully removed and that the documents are re-stapled before the documents are replaced in the folder.

(C) Submit all classified and unclassified notes made from the records to the custodian of the files at the end of each day of research. The custodian will transmit the notes to the OSD Records Administrator for an official review and release to the researcher at the completion of researcher's project.

(D) Submit the final manuscript to the OSD Records Administrator for forwarding to the Chief, Security Review Division, Office of Security Review, for a security review and public release clearance in accordance with DoD Directive 5230.09 and DoD 5220.22–M, ''National Industrial Security Program Operating Manual (NISPOM)'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/522022m.pdf*) prior to publication, presentation, or any other public use.

(d) *Procedures for document review for the FRUS series.* (1) When documents are being reviewed, a WHS/RDD staff member must be present at all times.

(2) The records maybe reviewed at a Presidential Library Archives II, College Park Maryland, WNRC, Suitland, Maryland, or an appropriate military facility. All requested information will remain under the control of the WHS/RDD staff until a public release review is completed, and then provided in electronic formats.

(3) If the requested records have been reviewed in accordance with the automatic declassification provisions of Executive Order 13526, any tabs removed during the research and copying must be replaced in accordance with DoD Manual 5200.01 volume 2.

(4) The number of boxes to be reviewed will determine which of the following procedures will apply. The WHS/RDD staff member will make that determination at the time the request is processed. When the historian completes the review of the boxes, he or she must contact the WHS/RDD to establish a final schedule for scanning the documents. To avoid a possible delay, a tentative schedule will be established at the time that the review schedule is set.

(i) For 24 boxes or fewer, review and scanning will take place simultaneously. Estimated time to complete scanning is 7 work days.

(ii) For 25 boxes or more, the historian will review the boxes and mark the documents that are to be scanned using WHS/RDD authorized reproduction tabs.

(iii) If the review occurs at facilities that OSD does not control ownership of the document, the documents must be given to the WHS/RDD staff member for transmittal for processing.

(5) WHS/RDD will notify the historian when the documents are ready to be picked up. All administrative procedures for classified material transfers will be followed in accordance with DoD Manual 5200.01 volume 1 and DoD 5220.22–M and appropriate receipt for unclassified information will be used.

(e) *Procedures for copying documents.* (1) The records will be reviewed and copied at a Presidential Library, Archives II, College Park Maryland, WNRC, Suitland, Maryland, or an appropriate U.S. military facility.

(2) If the requested records have been reviewed in accordance with the automatic declassification provisions of Executive Order 13526 any tabs removed during the research and copying must be replaced in accordance with DoD Manual 5200.01 volume 2.

(3) The researcher will mark the documents that he or she wants to copy

using WHS/RDD authorized reproduction tabs.

(4) Any notes taken during the review process must be given to the WHS/RDD staff member present for transmittal to the WHS/RDD.

(5) All reproduction charges are to the responsibility of the researcher.

(6) All documents requested will be copied to an approved electronic format by WHS/RDD staff after official review.

(i) The researcher will need to bring paper, staples, staple remover, and stapler.

(ii) When the researcher completes the review of the boxes, he or she must contact the WHS/RDD to establish a final schedule for scanning the requested documents.

(iii) When the documents are scanned, the WHS/RDD will notify the researcher.

(iv) All questions pertaining to the review, copying, or transmittal of OSD documents must be addressed to the WHS/RDD staff member.

(f) *General guidelines for researching DoD records*. DoD records and information are unique and often cannot be replaced should they be lost or damaged. In order to protect its collections and archives, the OSD Records Administrator has set rules that researchers must follow.

(1) Researchers will work in room assigned. Researchers are not allowed in restricted areas.

(2) Special care must be taken in handling all records. Records may not be leaned on, written on, folded, traced from, or handled in any way likely to damage them.

(3) Records should be kept in the same order in which they are presented.

(4) Items that may not be brought into these research areas include, but are not limited to:

(i) Briefcases.

(ii) Cases for equipment (laptop computers).

(iii) Computers. This includes laptops, tablet computers, personal digital assistants, smart phones, and other similar devices.

(iv) Cellular phones.

(v) Computer peripherals including handheld document scanners and digital or analog cameras.

(vi) Containers larger than 9.5″ × 6.25″ (*e.g.*, paper bags, boxes, backpacks, shopping bags, and sleeping bags).

(vii) Food, drinks (includes bottled water) and cigarettes, cigars, or pipes.

(viii) Handbags or purses larger than 9.5″ × 6.25″.

(ix) Luggage.

(x) Musical instruments and their cases.

(xi) Newspapers.

(xii) Outerwear (*e.g.*, raincoats and overcoats).

(xiii) Pets (exception for service animals, *i.e.*, any guide dog or signal dog that is trained to provide a service to a person with a disability).

(xiv) Scissors or other cutting implements.

(xv) Televisions and audio or video equipment.

(xvi) Umbrellas.

(5) Eating, drinking, or smoking is prohibited.

## APPENDIX A TO PART 197—EXPLANATION OF FOIA EXEMPTIONS AND CLASSIFICATION CATEGORIES

(a) *Explanation of FOIA Exemptions and Classification Categories*—(1) *Explanation of FOIA Exemptions*. Exemptions and their explanations are provided in the Table to Appendix A. See chapter III of 32 CFR part 286 for further information.

### TABLE TO APPENDIX A—EXPLANATION OF FOIA EXEMPTIONS

| Exemption | Explanation |
|---|---|
| (b)(1) | Applies to records and information currently and properly classified in the interest of national security. |
| (b)(2) | Applies to records related solely to the internal personnel rules and practices of an agency. |
| (b)(3) | Applies to records and information protected by another law that specifically exempts the information from public release. |
| (b)(4) | Applies to records and information on trade secrets and commercial or financial information obtained from a *private* source which would cause substantial competitive harm to the source if disclosed. |

TABLE TO APPENDIX A—EXPLANATION OF FOIA EXEMPTIONS—Continued

| Exemption | Explanation |
|---|---|
| (b)(5) | Applies to records and information of internal records that are deliberative in nature and are part of the decision making process that contain opinions and recommendations. |
| (b)(6) | Applies to records or information the release of which could reasonably be expected to constitute a clearly unwarranted invasion of the personal privacy of individuals. |
| (b)(7) | Applies to records or information compiled for law enforcement purposes that could: (a) Reasonably be expected to interfere with law enforcement proceedings; (b) deprive a person of a right to a fair trial or impartial adjudication; (c) reasonably be expected to constitute an unwarranted invasion of the personal privacy of others; (d) disclose the identity of a confidential source; (e) disclose investigative techniques and procedures; or (f) reasonably be expected to endanger the life or physical safety of any individual. |
| (b)(8) | Applies to records and information for the use of any agency responsible for the regulation or supervision of financial institutions. |
| (b)(9) | Applies to records and information containing geological and geophysical information (including maps) concerning wells. |

(2) *Classification Categories.* Information will not be considered for classification unless its unauthorized disclosure could reasonably be expected to cause identifiable or describable damage to the national security in accordance with section 1.2 of Executive Order 13526, and it pertains to one or more of the following:

(i) Military plans, weapons systems, or operations;

(ii) Foreign government information;

(iii) Intelligence activities (including covert action), intelligence sources or methods, or cryptology;

(iv) Foreign relations or foreign activities of the United States, including confidential sources;

(v) Scientific, technological, or economic matters relating to the national security;

(vi) U.S. Government programs for safeguarding nuclear materials or facilities;

(vii) Vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or

(viii) The development, production, or use of weapons of mass destruction.

(b) [Reserved]

# PART 199—CIVILIAN HEALTH AND MEDICAL PROGRAM OF THE UNIFORMED SERVICES (CHAMPUS)

Sec.
199.1 General provisions.
199.2 Definitions.
199.3 Eligibility.
199.4 Basic program benefits.
199.5 TRICARE Extended Care Health Option (ECHO).
199.6 TRICARE—authorized providers.
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199.8 Double coverage.
199.9 Administrative remedies for fraud, abuse, and conflict of interest.
199.10 Appeal and hearing procedures.
199.11 Overpayments recovery.
199.12 Third party recoveries.
199.13 TRICARE Dental Program.
199.14 Provider reimbursement methods.
199.15 Quality and utilization review peer review organization program.
199.16 Supplemental Health Care Program for active duty members.
199.17 TRICARE program.
199.18 [Reserved]
199.20 Continued Health Care Benefit Program (CHCBP).
199.21 TRICARE Pharmacy Benefits Program.
199.22 TRICARE Retiree Dental Program (TRDP).
199.23 Special Supplemental Food Program.
199.24 TRICARE Reserve Select.
199.25 TRICARE Retired Reserve.
199.26 TRICARE Young Adult.
APPENDIX A TO PART 199—ACRONYMS

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. chapter 55.

SOURCE: 51 FR 24008, July 1, 1986, unless otherwise noted.

## § 199.1 General provisions.

(a) *Purpose.* This part prescribes guidelines and policies for the administration of the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) for the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Commissioned Corps of the U.S. Public Health Service (USPHS) and the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA).

(b) *Applicability*—(1) *Geographic.* This part is applicable geographically within the 50 States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and the United States possessions and territories, and

in all foreign countries, unless specific exemptions are granted in writing by the Director, OCHAMPUS, or a designee.

(2) *Agency*. The provisions of this part apply throughout the Department of Defense (DoD), the Coast Guard, the Commissioned Corps of the USPHS, and the Commissioned Corps of the NOAA.

(c) *Authority and responsibility*—(1) *Legislative authority*—(i) *Joint regulations*. 10 U.S.C. chapter 55 authorizes the Secretary of Defense, the Secretary of Health and Human Services, and the Secretary of Transportation jointly to prescribe regulations for the administration of CHAMPUS.

(ii) *Administration*. 10 U.S.C. chapter 55 also authorizes the Secretary of Defense to administer CHAMPUS for the Army, Navy, Air Force, and Marine Corps under DoD jurisdiction, the Secretary of Transportation to administer CHAMPUS for the Coast Guard, when the Coast Guard is not operating as a service in the Navy, and the Secretary of Health and Human Services to administer CHAMPUS for the Commissioned Corps of the NOAA and the USPHS.

(2) *Organizational delegations and assignments*—(i) *Assistant Secretary of Defense (Health Affairs) (ASD(HA))*. The Secretary of Defense, by 32 CFR part 367, delegated authority to the ASD(HA) to provide policy guidance, management control and coordination as required for CHAMPUS, and to develop, issue, and maintain regulations with the coordination of the Military Departments and consistent with DoD 5025.1–M.[1] Additional implementing authority is contained in DoD Directive 5105.46.[2]

(ii) *Department of Health and Human Services*. The Secretary of Health and Human Services has delegated authority to the Assistant Secretary for Health, DHHS, to consult with the Secretary of Defense or a designee and to approve and issue joint regulations implementing 10 U.S.C. chapter 55. This delegation was effective April 19, 1976 (41 FR 18698, May 6, 1976).

(iii) *Department of Transportation*. The Secretary of Transportation has delegated authority to the Commandant, United States Coast Guard, to consult with the Secretary of Defense or a designee and to approve an issue joint regulations implementing 10 U.S.C., chapter 55.

(iv) *Office of CHAMPUS (OCHAMPUS)*. By DoD Directive 5105.46, OCHAMPUS was established as an OSD field activity under the policy guidance and direction of the ASD(HA). The Director, OCHAMPUS, is directed to execute the following responsibilities and functions:

(A) Supervise and administer the programs and missions to:

(*1*) Provide technical direction and guidance on organizational, administrative, and operational matters.

(*2*) Conduct studies and research activities in the health care area to assist in formulating policy required to guide OCHAMPUS in carrying out its programs.

(*3*) Enter into agreements through the Department of Defense with respect to the Military Departments or other U.S. Government entities, as required, for the effective performance of CHAMPUS.

(*4*) Supervise and administer OCHAMPUS financial management activities to include:

(*i*) Formulating budget estimates and justifications to be submitted to the Deputy Assistant Secretary of Defense (Administration) (DASD(A)) for inclusion in the overall budget for the Office of the Secretary of Defense.

(*ii*) Ensuring the establishment and maintenance of necessary accounting records and submission of required financial reports to the DASD(A).

(*iii*) Ensuring the effective execution of approved budgets.

(*5*) Contract for claims processing services, studies and research, supplies, equipment, an other services necessary to carry out the CHAMPUS programs.

(*6*) Monitor claims adjudication and processing contracts to ensure that CHAMPUS fiscal intermediaries are fulfilling their obligations.

[1] Copies may be obtained, if needed, from the National Technical Information Service (NTIS), U.S. Department of Commerce, 5285 Port Royal Road, Springfield, VA 22161.

[2] Copies may be obtained; if needed from the Naval Publications and Forms Center, 5801 Tabor Avenue, Code 301, Philadelphia, PA 19120.

(*7*) Convey appropriate CHAMPUS information to providers of care, practitioners, professional societies, health industry organizations, fiscal agents, hospital contractors, and others who have need of such information.

(*8*) Collect, maintain, and analyze program cost and utilization data appropriate for preparation of budgets, fiscal planning, and as otherwise needed to carry out CHAMPUS programs and missions.

(*9*) Arrange for the facilities logistical and administrative support to be provided by the Military Departments.

(*10*) Execute such other functions as appropriate to administer the programs and missions assigned.

(B) Direct and control of the office, activities, and functions of OCHAMPUS Europe (OCHAMPUSEUR).

NOTE: The Director, OCHAMPUS, may also establish similar offices for OCHAMPUS Southern Hemisphere (OCHAMPUSSO) and OCHAMPUS Pacific (OCHAMPUSPAC).

(C) Develop for issuance, subject to approval by the ASD(HA), such policies or regulations as required to administer and manage CHAMPUS effectively.

(v) *Evidence of eligibility*. The Department of Defense, through the Defense Enrollment Eligibility Reporting System (DEERS), is responsible for establishing and maintaining a listing of persons eligible to receive benefits under CHAMPUS. Identification cards or devices bearing information necessary for preliminary evidence of eligibility, subject to verification through the DEERS, shall be issued to eligible persons by the appropriate Uniformed Services (DoD 1341.1–M, ''Defense Enrollment Eligibility Reporting System (DEERS) Program Manual'').

(d) *Medical benefits program*. The CHAMPUS is a program of medical benefits provided by the U.S. Government under public law to specified categories of individuals who are qualified for these benefits by virtue of their relationship to one of the seven Uniformed Services. Although similar in structure in many of its aspects, CHAMPUS is not an insurance program in that it does not involve a contract guaranteeing the indemnification of an insured party against a specified loss in return for a premium paid. Further, CHAMPUS is not subject to those state regulatory bodies or agencies that control the insurance business generally.

(e) *Program funds*. The funds used by CHAMPUS are appropriated funds furnished by the Congress through the annual appropriation acts for the Department of Defense and the DHHS. These funds are further disbursed by agents of the government under contracts negotiated by the Director, OCHAMPUS, or a designee, under the provisions of the Federal Acquisition Regulation (FAR). These agents (referred to in this part as CHAMPUS fiscal intermediaries) receive claims against CHAMPUS and adjudicate the claims under this part and in accordance with administrative procedures and instructions prescribed in their contracts. The funds expended for CHAMPUS benefits are federal funds provided CHAMPUS fiscal intermediaries solely to pay CHAMPUS claims, and are not a part of or obtained from the CHAMPUS fiscal intermediary's funds related to other programs or insurance coverage. CHAMPUS fiscal intermediaries are reimbursed for the adjudication and payment of CHAMPUS claims at a rate (generally fixed-price) prescribed in their contracts.

(f) *Claims adjudication and processing*. The Director, OCHAMPUS, is responsible for making such arrangements as are necessary to adjudicate and process CHAMPUS claims worldwide.

(1) *The United States*—(i) *Contracting out*. The primary method of processing CHAMPUS claims in the United States is through competitively procured, fixed-price contracts. The Director, OCHAMPUS, or a designee, is responsible for negotiating, under the provisions of the FAR, contracts for the purpose of adjudicating and processing CHAMPUS claims (and related supporting activities).

(ii) *In-house*. The Director, OCHAMPUS, or a designee, is authorized to adjudicate and process certain CHAMPUS claims in-house at OCHAMPUS, when it is determined to be in the best interests of CHAMPUS subject to applicable considerations set forth in OMB Circular A–76. Such in-house claims processing may involve

special or unique claims, or all claims for a specific geographic area.

(2) *Outside the United States*—(i) *Special subsidiary office or contracting out.* For adjudicating and processing CHAMPUS claims for services or supplies provided outside the United States, the Director, OCHAMPUS, or a designee, has the option of either setting up a special subsidiary claims paying operation (such as OCHAMPUSEUR) or contracting out as described in paragraph (f)(1)(i) of this section. Such claims paying operations are reviewed periodically to determine whether current arrangements continue to be appropriate and the most effective.

(ii) *Support agreements.* In those situations outside the United States that demand special arrangements, the Director, OCHAMPUS, may enter into support agreements through the Department of Defense with any of the Military Departments or other government agency to process CHAMPUS claims in specific geographic locations. Such agreements may be negotiated for such period of time as the Director, OCHAMPUS, or designee, may determine to be necessary to meet identified special demands.

(g) *Recommendations for change to part.* The Director, OCHAMPUS, or a designee, shall establish procedures for receiving and processing recommendations for changes to this part from interested parties.

(h) *CHAMPUS, claims forms.* The Director, OCHAMPUS, or a designee, is responsible for the development and updating of all CHAMPUS claim forms and any other forms necessary in the administration of CHAMPUS.

(i) *The CHAMPUS handbook.* The Director, OCHAMPUS, or a designee, shall develop the CHAMPUS, Handbook. The CHAMPUS Handbook is a general program guide for the use of CHAMPUS beneficiaries and providers and shall be updated, as required.

(j) *Program integrity.* The Director, OCHAMPUS, or a designee, shall oversee all CHAMPUS personnel, fiscal intermediaries, providers, and beneficiaries to ensure compliance with this part. The Director, OCHAMPUS, or a designee, shall accomplish this by means of proper delegation of authority, separation of responsibilities, establishment of reports, performance evaluations, internal and external management and fiscal audits, personal or delegated reviews of CHAMPUS responsibilities, taking affidavits, exchange of information among state and Federal governmental agencies, insurers, providers and associations of providers, and such other means as may be appropriate. Compliance with law and this part shall include compliance with specific contracts and agreements, regardless of form, and general instructions, such as CHAMPUS policies, instructions, procedures, and criteria relating to CHAMPUS operation.

(k) *Role of CHAMPUS Health Benefits Advisor (HBA).* The CHAMPUS HBA is appointed (generally by the commander of a Uniformed Services medical treatment facility) to serve as an advisor to patients and staff in matters involving CHAMPUS. The CHAMPUS HBA may assist beneficiaries or sponsors in applying for CHAMPUS benefits, in the preparation of claims, and in their relations with OCHAMPUS and CHAMPUS fiscal intermediaries. However, the CHAMPUS HBA is not responsible for CHAMPUS policies and procedures and has no authority to make benefit determinations or obligate Government funds. Advice given to beneficiaries as to determination of benefits or level of payment is not binding on OCHAMPUS or CHAMPUS fiscal intermediaries.

(l) *Cooperation and exchange of information with other Federal programs.* The Director, OCHAMPUS, or a designee, shall disclose to appropriate officers or employees of the DHHS:

(1) *Investigation for fraud.* The name and address of any physician or other individual actively being investigated for possible fraud in connection with CHAMPUS, and the nature of such suspected fraud. An active investigation exists when there is significant evidence supporting an initial complaint but there is need for further investigation.

(2) *Unnecessary services.* The name and address of any provider of medical services, organization, or other person found, after consultation with an appropriate professional association or appropriate peer review body, to have

provided unnecessary services. Such information will be released only for the purpose of conducting an investigation or prosecution, or for the administration of titles XVIII and XIX of the Social Security Act, provided that the information will be released only to the agency's enforcement branch and that the agency will preserve the confidentiality of the information received and will not disclose such information for other than program purposes.

(m) *Disclosure of information to the public.* Records and information acquired in the administration of CHAMPUS are records of the Department of Defense and may be disclosed in accordance with DoD Directive 5400.7[3], DoD 5400.7–R[4], and DoD 5400.11–R[5] (codified in 32 CFR parts 286 and 286a), constituting the applicable DoD Directives and DoD Regulations implementing the Freedom of Information and the Privacy Acts.

(n) *Discretionary authority.* When it is determined to be in the best interest of CHAMPUS, the Director, OCHAMPUS, or a designee, is granted discretionary authority to waive any requirements of this part, except that any requirement specifically set forth in 10 U.S.C. chapter 55, or otherwise imposed by law, may not be waived. It is the intent that such discretionary authority be used only under very unusual and limited circumstances and not to deny any individual any right, benefit, or privilege provided to him or her by statute or this part. Any such exception granted by the Director, OCHAMPUS, or a designee, shall apply only to the individual circumstance or case involved and will in no way be construed to be precedent-setting.

(o) *Demonstration projects*—(1) *Authority.* The Director, OCHAMPUS may waive or alter any requirements of this regulation in connection with the conduct of a demonstration project required or authorized by law except for any requirement that may not be waived or altered pursuant to 10 U.S.C. chapter 55, or other applicable law.

(2) *Procedures.* At least 30 days prior to taking effect, OCHAMPUS shall publish a notice describing the demonstration project, the requirements of this regulation being waived or altered under paragraph (o)(1) of this section and the duration of the waiver or alteration. Consistent with the purpose and nature of demonstration projects, these notices are not covered by public comment practices under DoD Directive 5400.9 (32 CFR part 296) or DoD Instruction 6010.8.

(3) *Definition.* For purposes of this section, a ''demonstration project'' is a project of limited duration designed to test a different method for the finance, delivery or administration of health care activities for the uniformed services. Demonstration projects may be required or authorized by 10 U.S.C. 1092, any other statutory provision requiring or authorizing a demonstration project or any other provision of law that authorizes the activity involved in the demonstration project.''.

(p) *Military-Civilian Health Services Partnership Program.* The Secretary of Defense, or designee, may enter into an agreement (external or internal) providing for the sharing of resources between facilities of the uniformed services and facilities of a civilian health care provider or providers if the Secretary determines that such an agreement would result in the delivery of health care in a more effective, efficient or economical manner. This partnership allows CHAMPUS beneficiaries to receive inpatient and outpatient services through CHAMPUS from civilian personnel providing health care services in military treatment facilities and from uniformed service professional providers in civilian facilities. The policies and procedures by which partnership agreements may be executed are set forth in Department of Defense Instruction (DoDI) 6010.12, ''Military-Civilian Health Services Partnership Program.'' The Director, OCHAMPUS, or a designee, shall issue policies, instructions, procedures, guidelines, standards, or criteria as may be necessary to provide support for implementation of DoDI 6010.12, to promulgate and manage benefit and financial policy issues, and to develop a program evaluation process to ensure the Partnership Program accomplishes the purpose for which it was developed.

[3] See footnote 2 to §199.1(c)(2)(i)
[4] See footnote 1 to §199.1(c)(2)(i)
[5] See footnote 1 to §199.1(c)(2)(i)

(1) *Partnership agreements.* Military treatment facility commanders, based upon the authority provided by their representative Surgeons General of the military departments, are responsible for entering into individual partnership agreements only when they have determined specifically that use of the Partnership Program is more economical overall to the Government than referring the need for health care services to the civilian community under the normal operation of the CHAMPUS Program. All such agreements are subject to the review and approval of the Director, OCHAMPUS, or designee, and the appropriate Surgeon General.

(i) *External partnership agreements.* The external partnership agreement is an agreement between a military treatment facility Commander and a CHAMPUS-authorized institutional provider, enabling Uniformed Services health care personnel to provide otherwise covered medical care to CHAMPUS beneficiaries in a civilian facility. Authorized costs associated with the use of the facility will be financed through CHAMPUS under normal cost-sharing and reimbursement procedures currently applicable under the basic CHAMPUS. Savings will be realized under this type of agreement by using available military health care personnel to avoid the civilian professional provider charges which would otherwise be billed to CHAMPUS.

(ii) *Internal partnership agreements.* The internal partnership agreement is an agreement between a military treatment facility commander and a CHAMPUS-authorized civilian health care provider which enables the use of civilian health care personnel or other resources to provide medical care to CHAMPUS beneficiaries on the premises of a military treatment facility. These internal agreements may be established when a military treatment facility is unable to provide sufficient health care services for CHAMPUS beneficiaries due to shortages of personnel and other required resources. In addition to allowing the military treatment facility to achieve maximum use of available facility space, the internal agreement will result in savings to the Government by using civilian medical specialists to provide inpatient care in Government-owned facilities, thereby avoiding the civilian facility charges which would have otherwise been billed to CHAMPUS.

(2) *Beneficiary cost-sharing.* Beneficiary cost-sharing under the Partnership Program is outlined in § 199.4(f)(5) of this part.

(3) *Reimbursement.* Reimbursement under the Partnership Program is outlined in § 199.14(f) of this part.

(4) *Beneficiary eligibility and authorized providers.* Existing requirements of this Regulation remain in effect as concerns beneficiary eligibility and authorized providers.

(5) *Range of benefits.* Health care services provided CHAMPUS beneficiaries under the terms of the Partnership Program must be consistent with the CHAMPUS range of benefits outlined in this Regulation. The services rendered must be otherwise covered. Charges allowed for professional services provided under the Partnership Program may include costs of support personnel, equipment, and supplies when specifically outlined in the partnership agreement, However, all CHAMPUS coverage and provider requirements must be met.

(q) *Equality of benefits.* All claims submitted for benefits under CHAMPUS shall be adjudicated in a consistent, fair, and equitable manner, without regard to the rank of the sponsor.

(r) *TRICARE program.* Many rules and procedures established in sections of this part are subject to revision in areas where the TRICARE program is implemented. The TRICARE program is the means by which managed care activities designed to improve the delivery and financing of health care services in the Military Health Services System(MHSS) are carried out. Rules and procedures for the TRICARE program are set forth in § 199.17.

[51 FR 24008, July 1, 1986, as amended at 52 FR 38754, Oct. 19, 1987; 53 FR 27961, July 26, 1988; 55 FR 43338, Oct. 29, 1990; 60 FR 52094, Oct. 5, 1995]

### § 199.2 Definitions.

(a) *General.* In an effort to be as specific as possible as to the word and intent of CHAMPUS, the following definitions have been developed. While

many of the definitions are general and some assign meaning to relatively common terms within the health insurance environment, others are applicable only to CHAMPUS; however, they all appear in this part solely for the purpose of the Program. Except when otherwise specified, the definitions in this section apply generally throughout this part.

(b) *Specific definitions. Abortion.* Abortion means the intentional termination of a pregnancy by artificial means done for a purpose other than that of producing a live birth. A spontaneous, missed or threatened abortion or termination of an ectopic (tubal) pregnancy are not included within the term ''abortion'' as used herein.

*Absent treatment.* Services performed by Christian Science practitioners for a person when the person is physically present.

NOTE: Technically, ''Absent Treatment'' is an obsolete term. The current Christian Science terminology is ''treatment through prayer and spiritual means,'' which is employed by an authorized Christian Science practitioner either with the beneficiary being present or absent. However, to be considered for coverage under CHAMPUS, the beneficiary must be present physically when a Christian Science service is rendered, regardless of the terminology used.

*Abuse.* For the purposes of this part, abuse is defined as any practice that is inconsistent with accepted sound fiscal, business, or professional practice which results in a CHAMPUS claim, unnecessary cost, or CHAMPUS payment for services or supplies that are: (1) Not within the concepts of medically necessary and appropriate care, as defined in this part, or (2) that fail to meet professionally recognized standards for health care providers. The term ''abuse'' includes deception or misrepresentation by a provider, or any person or entity acting on behalf of a provider in relation to a CHAMPUS claim.

NOTE: Unless a specific action is deemed gross and flagrant, a pattern of inappropriate practice will normally be required to find that abuse has occurred. Also, any practice or action that constitutes fraud, as defined by this part, would also be abuse.

*Abused dependent.* An eligible spouse or child, who meets the criteria in § 199.3 of this part, of a former member who received a dishonorable or bad-conduct discharge or was dismissed from a Uniformed Service as a result of a court-martial conviction for an offense involving physical or emotional abuse or was administratively discharged as a result of such an offense, *or* of a member or former member who has had their entitlement to receive retired pay terminated because of misconduct involving physical or emotional abuse.

*Accidental injury.* Physical bodily injury resulting from an external force, blow or fall, or the ingestion of a foreign body or harmful substance, requiring immediate medical treatment. Accidental injury also includes animal and insect bites and sunstrokes. For the purpose of CHAMPUS, the breaking of a tooth or teeth does not constitute a physical bodily injury.

*Active duty.* Full-time duty in the Uniformed Services of the United States. It includes duty on the active list, full-time training duty, annual training duty, and attendance while in the active Military Service, at a school designated as a Service school by law or by the Secretary of the Military Department concerned.

*Active duty member.* A person on active duty in a Uniformed Service under a call or order that does not specify a period of 30 days or less.

*Activities of daily living.* Care that consists of providing food (including special diets), clothing, and shelter; personal hygiene services; observation and general monitoring; bowel training or management (unless abnormalities in bowel function are of a severity to result in a need for medical or surgical intervention in the absence of skilled services); safety precautions; general preventive procedures (such as turning to prevent bedsores); passive exercise; companionship; recreation; transportation; and such other elements of personal care that reasonably can be performed by an untrained adult with minimal instruction or supervision. Activities of daily living may also be referred to as ''essentials of daily living''.

*Acupuncture.* The practice of inserting needles into various body parts to pierce specific peripheral nerves for the

production of counter-irritation to relieve the discomfort of pain, induce surgical anesthesia, or for other treatment purposes.

NOTE: Acupuncture is not covered by CHAMPUS.

*Adequate Medical Documentation, Medical Treatment Records.* Adequate medical documentation contains sufficient information to justify the diagnosis, the treatment plan, and the services and supplies furnished. Under CHAMPUS, it is required that adequate and sufficient clinical records be kept by the health care provider(s) to substantiate that specific care was actually and appropriately furnished, was medically necessary and appropriate (as defined by this part), and to identify the individual(s) who provided the care. All procedures billed must be documented in the records. In determining whether medical records are adequate, the records will be reviewed under the generally acceptable standards such as the applicable Joint Commission on Accreditation of Healthcare Organizations (JCAHO) standards, the Peer Review Organization (PRO) standards (and the provider's state or local licensing requirements) and other requirements specified by this part. In general, the documentation requirements for a professional provider are not less in the outpatient setting than the inpatient setting.

*Adequate medical documentation, mental health records.* Adequate medical documentation provides the means for measuring the type, frequency, and duration of active treatment mechanisms employed and progress under the treatment plan. Under CHAMPUS, it is required that adequate and sufficient clinical records be kept by the provider to substantiate that specific care was actually and appropriately furnished, was medically or psychologically necessary (as defined by this part), and to identify the individual(s) who provided the care. Each service provided or billed must be documented in the records. In determining whether medical records are adequate, the records will be reviewed under the generally acceptable standards (*e.g.*, the standards of an accrediting organization approved by the Director, and the provider's state or local licensing requirements) and other requirements specified by this part. The psychiatric and psychological evaluations, physician orders, the treatment plan, integrated progress notes (and physician progress notes if separate from the integrated progress notes), and the discharge summary are the more critical elements of the mental health record. However, nursing and staff notes, no matter how complete, are not a substitute for the documentation of services by the individual professional provider who furnished treatment to the beneficiary. In general, the documentation requirements of a professional provider are not less in the outpatient setting than the inpatient setting. Furthermore, even though a hospital that provides psychiatric care may be accredited under The Joint Commission (TJC) manual for hospitals rather than the behavioral health standards manual, the critical elements of the mental health record listed above are required for CHAMPUS claims.

*Adjunctive dental care.* Dental care which is medically necessary in the treatment of an otherwise covered medical (not dental) condition, is an integral part of the treatment of such medical condition and is essential to the control of the primary medical condition; or, is required in preparation for or as the result of dental trauma which may be or is caused by medically necessary treatment of an injury or disease (iatrogenic).

*Admission.* The formal acceptance by a CHAMPUS authorized institutional provider of a CHAMPUS beneficiary for the purpose of diagnosis and treatment of illness, injury, pregnancy, or mental disorder.

*Adopted child.* A child taken into one's own family by legal process and treated as one's own child. In case of adoption, CHAMPUS eligibility begins as of 12:01 a.m. of the day of the final adoption decree.

NOTE: There is no CHAMPUS benefit entitlement during any interim waiting period.

*All-inclusive per diem rate.* The OCHAMPUS determined rate that encompasses the daily charge for inpatient care and, unless specifically excepted, all other treatment determined

necessary and rendered as part of the treatment plan established for a patient, and accepted by OCHAMPUS.

*Allowable charge*. The CHAMPUS-determined level of payment to physicians, other individual professional providers and other providers, based on one of the approved reimbursement methods set forth in § 199.14 of this part. Allowable charge also may be referred to as the CHAMPUS-determined reasonable charge.

*Allowable cost*. The CHAMPUS-determined level of payment to hospitals or other institutions, based on one of the approved reimbursement methods set fourth in § 199.14 of this part. Allowable cost may also be referred to as the CHAMPUS-determined reasonable cost.

*Ambulance*. A specially designed vehicle for transporting the sick or injured that contains a stretcher, linens, first aid supplies, oxygen equipment, and such lifesaving equipment required by state and local law, and that is staffed by personnel trained to provide first aid treatment.

*Ambulatory Payment Classifications* (APCs). Payment of services under the TRICARE OPPS is based on grouping outpatient procedures and services into ambulatory payment classification groups based on clinical and resource homogeneity, provider concentration, frequency of service and minimal opportunities for upcoding and code fragmentation. Nationally established rates for each APC are calculated by multiplying the APC's relative weight derived from median costs for procedures assigned to the APC group, scaled to the median cost of the APC group representing the most frequently provided services, by the conversion factor.

*Amount in dispute*. The amount of money, determined under this part, that CHAMPUS would pay for medical services and supplies involved in an adverse determination being appealed if the appeal were resolved in favor of the appealing party. See § 199.10 for additional information concerning the determination of ''amount in dispute'' under this part.

*Anesthesia services*. The administration of an anesthetic agent by injection or inhalation, the purpose and effect of which is to produce surgical anesthesia characterized by muscular relaxation, loss of sensation, or loss of consciousness when administered by or under the direction of a physician or dentist in connection with otherwise covered surgery or obstetrical care, or shock therapy. Anesthesia services do not include hypnosis or acupuncture.

*Appealable issue*. Disputed questions of fact which, if resolved in favor of the appealing party, would result in the authorization of CHAMPUS benefits, or approval as an authorized provider in accordance with this part. An appealable issue does not exist if no facts are in dispute, if no CHAMPUS benefits would be payable, or if there is no authorized provider, regardless of the resolution of any disputed facts. See § 199.10 for additional information concerning the determination of ''appealable issue'' under this part.

*Appealing party*. Any party to the initial determination who files an appeal of an adverse determination or requests a hearing under the provisions of this part.

*Appropriate medical care*. (i) Services performed in connection with the diagnosis or treatment of disease or injury, pregnancy, mental disorder, or well-baby care which are in keeping with the generally accepted norms for medical practice in the United States;

(ii) The authorized individual professional provider rendering the medical care is qualified to perform such medical services by reason of his or her training and education and is licensed or certified by the state where the service is rendered or appropriate national organization or otherwise meets CHAMPUS standards; and

(iii) The services are furnished economically. For purposes of this part, ''economically'' means that the services are furnished in the least expensive level of care or medical environment adequate to provide the required medical care regardless of whether or not that level of care is covered by CHAMPUS.

*Approved teaching programs*. For purposes of CHAMPUS, an approved teaching program is a program of graduate medical education which has been duly approved in its respective specialty or subspecialty by the Accreditation

Council for Graduate Medical Education of the American Medical Association, by the Committee on Hospitals of the Bureau of Professional Education of the American Osteopathic Association, by the Council on Dental Education of the American Dental Association, or by the Council on Podiatry Education of the American Podiatry Association.

*Assistant Secretary of Defense (Health Affairs).* An authority of the Assistant Secretary of Defense (Health Affairs) includes any person designated by the Assistant Secretary to exercise the authority involved.

*Assistive technology devices.* Equipment that generally does not treat an underlying injury, illness, disease or their symptoms. Assistive technology devices are authorized only under the Extended Care Health Option (ECHO). Assistive technology devices help an ECHO beneficiary overcome or remove a disability and are used to increase, maintain, or improve the functional capabilities of an individual. Assistive technology devices may include nonmedical devices but do not include any structural alterations (*e.g.*, permanent structure of wheelchair ramps or alterations to street curbs) service animals (*e.g.*, Seeing Eye dogs, hearing/handicapped assistance animals, etc.) or specialized equipment and devices whose primary purpose is to enable the individual to engage in sports or recreational events. Assistive technology devices are authorized only under coverage criteria determined by the Director, TRICARE Management Activity to assist in the reduction of the disabling effects of a qualifying condition for individuals eligible to receive benefits under the ECHO program, as provided in § 199.5.

*Attending physician.* The physician who has the primary responsibility for the medical diagnosis and treatment of the patient. A consultant or an assistant surgeon, for example, would not be an attending physician. Under very extraordinary circumstances, because of the presence of complex, serious, and multiple, but unrelated, medical conditions, a patient may have more than one attending physician concurrently rendering medical treatment during a single period of time. An attending physician also may be a teaching physician.

*Augmentative communication device (ACD).* A voice prosthesis as determined by the Secretary of Defense to be necessary because of significant conditions resulting from trauma, congenital anomalies, or disease. Also referred to as Speech Generating Device.

*Authorized provider.* A hospital or institutional provider, physician, or other individual professional provider, or other provider of services or supplies specifically authorized to provide benefits under CHAMPUS in § 199.6 of this part.

*Automobile liability insurance.* Automobile liability insurance means insurance against legal liability for health and medical expenses resulting from personal injuries arising from operation of a motor vehicle. Automobile liability insurance includes:

(1) Circumstances in which liability benefits are paid to an injured party only when the insured party's tortious acts are the cause of the injuries; and

(2) Uninsured and underinsured coverage, in which there is a third-party tortfeasor who caused the injuries (i.e., benefits are not paid on a no-fault basis), but the insured party is not the tortfeasor.

*Backup hospital.* A hospital which is otherwise eligible as a CHAMPUS institutional provider and which is fully capable of providing emergency care to a patient who develops complications beyond the scope of services of a given category of CHAMPUS-authorized freestanding institutional provider and which is accessible from the site of the CHAMPUS-authorized freestanding institutional provider within an average transport time acceptable for the types of medical emergencies usually associated with the type of care provided by the freestanding facility.

*Balance billing.* A provider seeking any payment, other than any payment relating to applicable deductible and cost sharing amounts, from a beneficiary for CHAMPUS covered services for any amount in excess of the applicable CHAMPUS allowable cost or charge.

*Bariatric Surgery.* Surgical procedures performed to treat co-morbid conditions associated with morbid obesity.

Bariatric surgery is based on two principles: (1) Divert food from the stomach to a lower part of the digestive tract where the normal mixing of digestive fluids and absorption of nutrients cannot occur (i.e., Malabsorptive surgical procedures); or (2) Restrict the size of the stomach and decrease intake (i.e., Restrictive surgical procedures).

*Basic program.* The primary medical benefits set forth in § 199.4, generally referred to as the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) as authorized under chapter 55 of title 10 United States Code, were made available to eligible beneficiaries under this part.

*Beneficiary.* An individual who has been determined to be eligible for CHAMPUS benefits, as set forth in § 199.3 of this part.

*Beneficiary liability.* The legal obligation of a beneficiary, his or her estate, or responsible family member to pay for the costs of medical care or treatment received. Specifically, for the purposes of services and supplies covered by CHAMPUS, beneficiary liability includes any annual deductible amount, cost-sharing amounts, or, when a provider does not submit a claim on a participating basis on behalf of the beneficiary, amounts above the CHAMPUS-determined allowable cost or charge. Beneficiary liability also includes any expenses for medical or related services and supplies not covered by CHAMPUS.

*Biotelemetry.* A diagnostic or monitoring procedure for the detection or measurement of human physiologic functions from a distance using a biotelemetry device to remotely monitor various vital signs of ambulatory patients. Biotelemetry may also be referred to as remote physiologic monitoring of physiologic parameters. See § 199.4.

*Birthing center.* A health care provider which meets the applicable requirements established by § 199.6(b) of this part.

*Birthing room.* A room and environment designed and equipped to provide care, to accommodate support persons, and within which a woman with a low-risk, normal, full-term pregnancy can labor, deliver and recover with her infant.

*Brace.* An orthopedic appliance or apparatus (an orthosis) used to support, align, or hold parts of the body in correct position. For the purposes of CHAMPUS, it does not include orthodontic or other dental appliances.

*CAHs.* A small facility that provides limited inpatient and outpatient hospital services primarily in rural areas and meets the applicable requirements established by § 199.6(b)(4)(xvi).

*Capped rate.* The maximum per diem or all-inclusive rate that CHAMPUS will allow for care.

*Case management.* Case management is a collaborative process which assesses, plans, implements, coordinates, monitors, and evaluates the options and services required to meet an individual's health needs, including mental health and substance use disorder needs, using communication and available resources to promote quality, cost effective outcomes.

*Case-mix index.* Case-mix index is a scale that measures the relative difference in resources intensity among different groups receiving home health services.

*Certified nurse-midwife.* An individual who meets the applicable requirements established by § 199.6(c) of this part.

*Certified psychiatric nurse specialist.* A licensed, registered nurse who meets the criteria in § 199.6(c)(3)(iii)(G).

*CHAMPUS DRG-Based Payment System.* A reimbursement system for hospitals which assigns prospectively-determined payment levels to each DRG based on the average cost of treating all CHAMPUS patients in a given DRG.

*CHAMPUS fiscal intermediary.* An organization with which the Director, OCHAMPUS, has entered into a contract for the adjudication and processing of CHAMPUS claims and the performance of related support activities.

*CHAMPUS Health Benefits Advisors (HBAs).* Those individuals located at Uniformed Services medical facilities (on occasion at other locations) and assigned the responsibility for providing CHAMPUS information, information concerning availability of care from the Uniformed Services direct medical care system, and generally assisting beneficiaries (or sponsors). The term

also includes ''Health Benefits Counselor'' and ''CHAMPUS Advisor.''

*Chemotherapy*. The administration of approved antineoplastic drugs for the treatment of malignancies (cancer) via perfusion, infusion, or parenteral methods of administration.

*Child*. An unmarried child of a member or former member, who meets the criteria (including age requirements) in § 199.3 of this part.

*Chiropractor*. A practitioner of chiropractic (also called chiropraxis); essentially a system of therapeutics based upon the claim that disease is caused by abnormal function of the nerve system. It attempts to restore normal function of the nerve system by manipulation and treatment of the structures of the human body, especially those of the spinal column.

NOTE: Services of chiropractors are not covered by CHAMPUS.

*Christian science nurse*. An individual who has been accredited as a Christian Science Nurse by the Department of Care of the First Church of Christ, Scientist, Boston, Massachusetts, and listed (or eligible to be listed) in the Christian Science Journal at the time the service is provided. The duties of Christian Science nurses are spiritual and are nonmedical and nontechnical nursing care performed under the direction of an accredited Christian Science practitioner. There exist two levels of Christian Science nurse accreditation:

(i) *Graduate Christian Science nurse*. This accreditation is granted by the Department of Care of the First Church of Christ, Scientist, Boston, Massachusetts, after completion of a 3-year course of instruction and study.

(ii) *Practical Christian Science nurse*. This accreditation is granted by the Department of Care of the First Church of Christ, Scientist, Boston, Massachusetts, after completion of a 1-year course of instruction and study.

*Christian Science practitioner*. An individual who has been accredited as a Christian Science Practitioner for the First Church, Scientist, Boston, Massachusetts, and listed (or eligible to be listed) in the Christian Science Journal at the time the service is provided. An individual who attains this accreditation has demonstrated results of his or her healing through faith and prayer rather than by medical treatment. Instruction is executed by an accredited Christian Science teacher and is continuous.

*Christian Science sanatorium*. A sanatorium either operated by the First Church of Christ, Scientist, or listed and certified by the First Church of Christ, Scientist, Boston, Massachusetts.

*Chronic medical condition*. A medical condition that is not curable, but which is under control through active medical treatment. Such chronic conditions may have periodic acute episodes and may require intermittent inpatient hospital care. However, a chronic medical condition can be controlled sufficiently to permit generally continuation of some activities of persons who are not ill (such as work and school).

*Chronic renal disease (CRD)*. The end stage of renal disease which requires a continuing course of dialysis or a kidney transplantation to ameliorate uremic symptoms and maintain life.

*Clinical psychologist*. A psychologist, certified or licensed at the independent practice level in his or her state, who meets the criteria in § 199.6(c)(3)(iii)(A).

*Clinical social worker*. An individual who is licensed or certified as a clinical social worker and meets the criteria listed in § 199.6.

*Clinically meaningful endpoints*. As used the definition of *reliable evidence* in this paragraph (b) and § 199.4(g)(15), the term clinically meaningful endpoints means objectively measurable outcomes of clinical interventions or other medical procedures, expressed in terms of survival, severity of illness or condition, extent of adverse side effects, diagnostic capability, or other effect on bodily functions directly associated with such results.

*Collateral visits*. Sessions with the patient's family or significant others for purposes of information gathering or implementing treatment goals.

*Combined daily charge*. A billing procedure by an inpatient facility that uses an inclusive flat rate covering all professional and ancillary charges without any itemization.

*Complications of pregnancy*. One of the following, when commencing or exacerbating during the term of the pregnancy:

(i) Caesarean delivery; hysterectomy.

(ii) Pregnancy terminating before expiration of 26 weeks, except a voluntary abortion.

(iii) False labor or threatened miscarriage.

(iv) Nephritis or pyelitis of pregnancy.

(v) Hyperemesis gravidarum.

(vi) Toxemia.

(vii) Aggravation of a heart condition or diabetes.

(viii) Premature rupture of membrane.

(ix) Ectopic pregnancy.

(x) Hemorrhage.

(xi) Other conditions as may be determined by the Director, OCHAMPUS, or a designee.

*Confinement*. That period of time from the day of admission to a hospital or other institutional provider, to the day of discharge, transfer, or separation from the facility, or death. Successive admissions also may qualify as one confinement provided not more than 60 days have elapsed between the successive admissions, except that successive admissions related to a single maternity episode shall be considered one confinement, regardless of the number of days between admissions.

*Conflict of interest*. Includes any situation where an active duty member (including a reserve member while on active duty) or civilian employee of the United States Government, through an official federal position, has the apparent or actual opportunity to exert, directly or indirectly, any influence on the referral of CHAMPUS beneficiaries to himself or herself or others with some potential for personal gain or appearance of impropriety. For purposes of this part, individuals under contract to a Uniformed Service may be involved in a conflict of interest situation through the contract position.

*Congenital anomaly*. A condition existing at or from birth that is a significant deviation from the common form or norm and is other than a common racial or ethnic feature. For purposes of CHAMPUS, congenital anomalies do not include anomalies relating to teeth (including malocclusion or missing tooth buds) or structures supporting the teeth, or to any form of hermaphroditism or sex gender confusion. Examples of congenital anomalies are harelip, birthmarks, webbed fingers or toes, or such other conditions that the Director, OCHAMPUS, or a designee, may determine to be congenital anomalies.

NOTE: Also refer to §199.4(e)(7) of this part.

*Consultation*. A deliberation with a specialist physician, dentist, or qualified mental health provider requested by the attending physician primarily responsible for the medical care of the patient, with respect to the diagnosis or treatment in any particular case. A consulting physician or dentist or qualified mental health provider may perform a limited examination of a given system or one requiring a complete diagnostic history and examination. To qualify as a consultation, a written report to the attending physician of the findings of the consultant is required.

NOTE: Staff consultations required by rules and regulations of the medical staff of a hospital or other institutional provider do not qualify as consultation.

*Consultation appointment*. An appointment for evaluation of medical symptoms resulting in a plan for management which may include elements of further evaluation, treatment and follow-up evaluation. Such an appointment does not include surgical intervention or other invasive diagnostic or therapeutic procedures beyond the level of very simply office procedures, or basic laboratory work but rather provides the beneficiary with an authoritative opinion.

*Consulting physician or dentist*. A physician or dentist, other than the attending physician, who performs a consultation.

*Conviction*. For purposes of this part, ''conviction'' or ''convicted'' means that (1) a judgment of conviction has been entered, or (2) there has been a finding of guilt by the trier of fact, or (3) a plea of guilty or a plea of *nolo contendere* has been accepted by a court of competent jurisdiction, regardless of whether an appeal is pending.

*Coordination of benefits.* The coordination, on a primary or secondary payer basis, of the payment of benefits between two or more health care coverages to avoid duplication of benefit payments.

*Corporate services provider.* A health care provider that meets the applicable requirements established by § 199.6(f).

*Cosmetic, reconstructive, or plastic surgery.* Surgery that can be expected primarily to improve the physical appearance of a beneficiary, or that is performed primarily for psychological purposes, or that restores form, but does not correct or improve materially a bodily function.

*Cost-share.* The amount of money for which the beneficiary (or sponsor) is responsible in connection with otherwise covered inpatient and outpatient services (other than the annual fiscal year deductible or disallowed amounts) as set forth in §§ 199.4(f) and 199.5(b) of this part. Cost-sharing may also be referred to as ''co-payment.''

*Custodial care.* The term ''custodial care'' means treatment or services, regardless of who recommends such treatment or services or where such treatment or services are provided, that:

(1) Can be rendered safely and reasonably by a person who is not medically skilled; or

(2) Is or are designed mainly to help the patient with the activities of daily living.

*Days.* Calendar days.

*Deceased member.* A person who, at the time of his or her death, was an active duty member of a Uniformed Service under a call or order that did not specify a period of 30 days or less.

*Deceased reservist.* A reservist in a Uniformed Service who incurs or aggravates an injury, illness, or disease, during, or on the way to or from, active duty training for a period of 30 days or less or inactive duty training and dies as a result of that specific injury, illness or disease.

*Deceased retiree.* A person who, at the time of his or her death, was entitled to retired or retainer pay or equivalent pay based on duty in a Uniformed Service. For purposes of this part, it also includes a person who died before attaining age 60 and at the time of his or her death would have been eligible for retired pay as a reservist but for the fact that he or she was not 60 years of age, and had elected to participate in the Survivor Benefit Plan established under 10 U.S.C. chapter 73.

*Deductible.* Payment by an individual beneficiary or family of a specific first dollar amount of the TRICARE allowable amount for otherwise covered outpatient services or supplies obtained in any program year. The dollar amount of deductible per individual or family is calculated as specified by law.

*Deductible certificate.* A statement issued to the beneficiary (or sponsor) by a TRICARE contractor certifying to deductible amounts satisfied by a beneficiary for any applicable program year.

*Defense Enrollment Eligibility Reporting System (DEERS).* An automated system maintained by the Department of Defense for the purpose of:

(1) Enrolling members, former members and their dependents, and

(2) Verifying members', former members' and their dependents' eligibility for health care benefits in the direct care facilities and for CHAMPUS.

*Dental care.* Services relating to the teeth and their supporting structures.

*Dentist.* Doctor of Dental Medicine (D.M.D.) or Doctor of Dental Surgery (D.D.S.) who is licensed to practice dentistry by an appropriate authority.

*Dependent.* Individuals whose relationship to the sponsor (including NATO members who are stationed in or passing through the United States on official business when authorized) leads to entitlement to benefits under this part. (See § 199.3 of this part for specific categories of dependents).

*Deserter or desertion status.* A service member is a deserter, or in a desertion status, when the Uniformed Service concerned has made an administrative determination to that effect, or the member's period of unauthorized absence has resulted in a court-martial conviction of desertion. Administrative declarations of desertion normally are made when a member has been an unauthorized absentee for over 30 days, but particular circumstances may result in an earlier declaration. Entitlement to CHAMPUS benefits ceases as of 12:01 a.m. on the day following the

day the desertion status is declared. Benefits are not to be authorized for treatment received during a period of unauthorized absence that results in a court-martial conviction for desertion. Dependent eligibility for benefits is reestablished when a deserter is returned to military control and continues, even though the member may be in confinement, until any discharge is executed. When a deserter status is later found to have been determined erroneously, the status of deserter is considered never to have existed, and the member's dependents will have been eligible continuously for benefits under CHAMPUS.

*Diagnosis-Related Groups (DRGs).* Diagnosis-related groups (DRGs) are a method of dividing hospital patients into clinically coherent groups based on the consumption of resources. Patients are assigned to the groups based on their principal diagnosis (the reason for admission, determined after study), secondary diagnoses, procedures performed, and the patient's age, sex, and discharge status.

*Diagnostic admission.* An admission to a hospital or other authorized institutional provider, or an extension of a stay in such a facility, primarily for the purpose of performing diagnostic tests, examinations, and procedures.

*Director.* The Director of the Defense Health Agency, Director, TRICARE Management Activity, or Director, Office of CHAMPUS. Any references to the Director, Office of CHAMPUS, or OCHAMPUS, or TRICARE Management Activity, shall mean the Director, Defense Health Agency (DHA). Any reference to Director shall also include any person designated by the Director to carry out a particular authority. In addition, any authority of the Director may be exercised by the Assistant Secretary of Defense (Health Affairs).

*Director, OCHAMPUS.* An authority of the Director, OCHAMPUS includes any person designated by the Director, OCHAMPUS to exercise the authority involved.

*Director, TRICARE Management Activity.* This term includes the Director, TRICARE Management Activity, the official sometimes referred to in this part as the Director, Office of CHAMPUS (or OCHAMPUS), or any designee of the Director, TRICARE Management Activity or the Assistant Secretary of Defense for Health Affairs who is designated for purposes of an action under this part.

*Doctor of Dental Medicine (D.M.D.).* A person who has received a degree in dentistry, that is, that department of the healing arts which is concerned with the teeth, oral cavity, and associated structures.

*Doctor of Medicine (M.D.).* A person who has graduated from a college of allopathic medicine and who is entitled legally to use the designation M.D.

*Doctor of Osteopathy (D.O.).* A practitioner of osteopathy, that is, a system of therapy based on the theory that the body is capable of making its own remedies against disease and other toxic conditions when it is in normal structural relationship and has favorable environmental conditions and adequate nutrition. It utilizes generally accepted physical, medicinal, and surgical methods of diagnosis and therapy, while placing chief emphasis on the importance of normal body mechanics and manipulative methods of detecting and correcting faulty structure.

*Domiciliary care.* The term ''domiciliary care'' means care provided to a patient in an institution or homelike environment because:

(1) Providing support for the activities of daily living in the home is not available or is unsuitable; or

(2) Members of the patient's family are unwilling to provide the care.

*Donor.* An individual who supplies living tissue or material to be used in another body, such as a person who furnishes a kidney for renal transplant.

*Double coverage.* When a CHAMPUS beneficiary also is enrolled in another insurance, medical service, or health plan that duplicates all or part of a beneficiary's CHAMPUS benefits.

*Double coverage plan.* The specific insurance, medical service, or health plan under which a CHAMPUS beneficiary has entitlement to medical benefits that duplicate CHAMPUS benefits in whole or in part. Double coverage plans do not include:

(i) Medicaid.

(ii) Coverage specifically designed to supplement CHAMPUS benefits.

(iii) Entitlement to receive care from the Uniformed Services medical facilities;

(iv) Entitlement to receive care from Veterans Administration medical care facilities; or

(v) Part C of the Individuals with Disabilities Education Act for services and items provided in accordance with Part C of the IDEA that are medically or psychologically necessary in accordance with the Individual Family Service Plan and that are otherwise allowable under the CHAMPUS Basic Program or the Extended Care Health Option (ECHO).

*Dual compensation.* Federal Law (5 U.S.C. 5536) prohibits active duty members or civilian employees of the United States Government from receiving additional compensation from the government above their normal pay and allowances. This prohibition applies to CHAMPUS cost-sharing of medical care provided by active duty members or civilian government employees to CHAMPUS beneficiaries.

*Duplicate equipment.* An item of durable equipment, durable medical equipment, or assistive technology items, as defined in this section that serves the same purpose that is served by an item of durable equipment, durable medical equipment, or assistive technology item previously cost-shared by TRICARE. For example, various models of stationary oxygen concentrators with no essential functional differences are considered duplicate equipment, whereas stationary and portable oxygen concentrators are not considered duplicates of each other because the latter is intended to provide the user with mobility not afforded by the former. Also, a manual wheelchair and electric wheelchair, both of which otherwise meet the definition of durable equipment or durable medical equipment, would not be considered duplicates of each other if each is found to provide an appropriate level of mobility. For the purpose of this Part, durable equipment, durable medical equipment, or assistive technology items that are essential in providing a fail-safe in-home life support system or that replace in-like-kind an item of equipment that is not serviceable due to normal wear, accidental damage, a change in the beneficiary's condition, or has been declared adulterated by the U.S. FDA, or is being or has been recalled by the manufacturer is not considered duplicate equipment.

*Durable equipment.* Equipment that—

(1) Is a medically necessary item, which can withstand repeated use;

(2) Is primarily and customarily used to serve a medical purpose; and

(3) Is generally not useful to an individual in the absence of an illness or injury. It includes durable medical equipment as defined in §199.2, wheelchairs, iron lungs, and hospital beds. It does not include equipment (including wheelchairs) used or designed primarily for use in sports or recreational activities.

*Durable medical equipment.* Durable equipment that is medically appropriate to—

(1) Improve, restore, or maintain the function of a malformed, diseased, or injured body part or can otherwise minimize or prevent the deterioration of the beneficiary's function or condition; or

(2) Maximize the beneficiary's function consistent with the beneficiary's physiological or medical needs.

*Economic interest.* (1) Any right, title, or share in the income, remuneration, payment, or profit of a CHAMPUS-authorized provider, or of an individual or entity eligible to be a CHAMPUS-authorized provider, resulting, directly or indirectly, from a referral relationship; or any direct or indirect ownership, right, title, or share, including a mortgage, deed of trust, note, or other obligation secured (in whole or in part) by one entity for another entity in a referral or accreditation relationship, which is equal to or exceeds 5 percent of the total property and assets of the other entity.

(2) A referral relationship exists when a CHAMPUS beneficiary is sent, directed, assigned or influenced to use a specific CHAMPUS-authorized provider, or a specific individual or entity eligible to be a CHAMPUS-authorized provider.

(3) An accreditation relationship exists when a CHAMPUS-authorized accreditation organization evaluates for

accreditation an entity that is an applicant for, or recipient of CHAMPUS-authorized provider status.

*Emergency inpatient admission*. An unscheduled, unexpected, medically necessary admission to a hospital or other authorized institutional provider for treatment of a medical condition meeting the definition of medical emergency and which is determined to require immediate inpatient treatment by the attending physician.

*Entity*. For purposes of §199.9(f)(1), ''entity'' includes a corporation, trust, partnership, sole proprietorship or other kind of business enterprise that is or may be eligible to receive reimbursement either directly or indirectly from CHAMPUS.

*Essential Access Community Hospital (EACH)*. A hospital that is designated by the Centers for Medicare and Medicaid Services (CMS) as an EACH and meets the applicable requirements established by §199.14(a)(7)(vi).

*Extended Care Health Option (ECHO)*. The TRICARE program of supplemental benefits for qualifying active duty family members as described in §199.5.

*External Partnership Agreement*. The External Partnership Agreement is an agreement between a military treatment facility commander and a CHAMPUS authorized institutional provider, enabling Uniformed Services health care personnel to provide otherwise covered medical care to CHAMPUS beneficiaries in a civilian facility under the Military-Civilian Health Services Partnership Program. Authorized costs associated with the use of the facility will be financed through CHAMPUS under normal cost-sharing and reimbursement procedures currently applicable under the basic CHAMPUS.

*External Resource Sharing Agreement*. A type External Partnership Agreement, established in the context of the TRICARE program by agreement of a military medical treatment facility commander and an authorized TRICARE contractor. External Resource Sharing Agreements may incorporate TRICARE features in lieu of standard CHAMPUS features that would apply to standard External Partnership Agreements.

*Extramedical individual providers of care*. Individuals who do counseling or nonmedical therapy and whose training and therapeutic concepts are outside the medical field, as specified in §199.6 of this part.

*Extraordinary physical or psychological condition*. A complex physical or psychological clinical condition of such severity which results in the beneficiary being homebound as defined in this section.

*Facility charge*. The term ''facility charge'' means the charge, either inpatient or outpatient, made by a hospital or other institutional provider to cover the overhead costs of providing the service. These costs would include building costs, *i.e.* depreciation and interest; staffing costs; drugs and supplies; and overhead costs, *i.e.*, utilities, housekeeping, maintenance, etc.

*Former member*. An individual who is eligible for, or entitled to, retired pay, at age 60, for non-Regular service in accordance with chapter 1223, title 10, United States Code but who has been discharged and who maintains no military affiliation. These former members, at age 60, and their eligible dependents are entitled to medical care, commissary, exchange, and MWR privileges. Under age 60, they and their eligible dependents are entitled to commissary, exchange, and MWR privileges only.

*Former spouse*. A former husband or wife of a Uniformed Service member or former member who meets the criteria as set forth in §199.3(b)(2)(ii) of this part.

*Fraud*. For purposes of this part, fraud is defined as (1) a deception or misrepresentation by a provider, beneficiary, sponsor, or any person acting on behalf of a provider, sponsor, or beneficiary with the knowledge (or who had reason to know or should have known) that the deception or misrepresentation could result in some unauthorized CHAMPUS benefit to self or some other person, or some unauthorized CHAMPUS payment, or (2) a claim that is false or fictitious, or includes or is supported by any written statement which asserts a material fact which is false or fictitious, or includes or is supported by any written statement that (a) omits a material fact and (b) is

false or fictitious as a result of such omission and (c) is a statement in which the person making, presenting, or submitting such statement has a duty to include such material fact. It is presumed that, if a deception or misrepresentation is established *and* a CHAMPUS claim is filed, the person responsible for the claim had the requisite knowledge. This presumption is rebuttable only by substantial evidence. It is further presumed that the provider of the services is responsible for the actions of all individuals who file a claim on behalf of the provider (for example, billing clerks); this presumption may only be rebutted by clear and convincing evidence.

*Freestanding*. Not ''institution-affiliated'' or ''institution-based.''

*Full-time course of higher education*. A complete, progressive series of studies to develop attributes such as knowledge, skill, mind, and character, by formal schooling at a college or university, and which meets the criteria set out in § 199.3 of this part. To qualify as full-time, the student must be carrying a course load of a minimum of 12 credit hours or equivalent each semester.

*General staff nursing service*. All nursing care (other than that provided by private duty nurses) including, but not limited to, general duty nursing, emergency room nursing, recovery room nursing, intensive nursing care, and group nursing arrangements performed by nursing personnel on the payroll of the hospital or other authorized institution.

*Good faith payments*. Those payments made to civilian sources of medical care who provided medical care to persons purporting to be eligible beneficiaries but who are determined later to be ineligible for CHAMPUS benefits. (The ineligible person usually possesses an erroneous or illegal identification card.) To be considered for good faith payments, the civilian source of care must have exercised reasonable precautions in identifying a person claiming to be an eligible beneficiary.

*Habilitation*. The provision of functional capacity, absent from birth due to congenital anomaly or developmental disorder, which facilitates performance of an activity in the manner, or within the range considered normal, for a human being.

*Handicap*. For the purposes of this part, the term ''handicap'' is synonymous with the term ''disability.''

*High-risk pregnancy*. A pregnancy is high-risk when the presence of a currently active or previously treated medical, anatomical, physiological illness or condition may create or increase the likelihood of a detrimental effect on the mother, fetus, or newborn and presents a reasonable possibility of the development of complications during labor or delivery.

*Homebound*. A beneficiary's condition is such that there exists a normal inability to leave home and, consequently, leaving home would require considerable and taxing effort. Any absence of an individual from the home attributable to the need to receive health care treatment—including regular absences for the purpose of participating in therapeutic, psychosocial, or medical treatment in an adult day-care program that is licensed or certified by a state, or accredited to furnish adult day-care services in the—state shall not disqualify an individual from being considered to be confined to his home. Any other absence of an individual from the home shall not disqualify an individual if the absence is infrequent or of relatively short duration. For purposes of the preceding sentence, any absence for the purpose of attending a religious service shall be deemed to be an absence of infrequent or short duration. Also, absences from the home for non-medical purposes, such as an occasional trip to the barber, a walk around the block or a drive, would not necessarily negate the beneficiary's homebound status if the absences are undertaken on an infrequent basis and are of relatively short duration. An exception is made to the above homebound definitional criteria for beneficiaries under the age of 18 and those receiving maternity care. The only homebound criteria for these special beneficiary categories is written certification from a physician attesting to the fact that leaving the home would place the beneficiary at medical risk. In addition to the above, absences, whether regular or infrequent,

from the beneficiary's primary residence for the purpose of attending an educational program in a public or private school that is licensed and/or certified by a state, shall not negate the beneficiary's homebound status.

*Home health discipline*. One of six home health disciplines covered under the home health benefit (skilled nursing services, home health aide services, physical therapy services, occupational therapy services, speech-language pathology services, and medical social services).

*Home health market basket index*. An index that reflects changes over time in the prices of an appropriate mix of goods and services included in home health services.

*Hospice care*. Hospice care is a program which provides an integrated set of services and supplies designed to care for the terminally ill. This type of care emphasizes palliative care and supportive services, such as pain control and home care, rather than cure-oriented services provided in institutions that are otherwise the primary focus under CHAMPUS. The benefit provides coverage for a humane and sensible approach to care during the last days of life for some terminally ill patients.

*Hospital, acute care (general and special)*. An institution that meets the criteria as set forth in §199.6(b)(4)(i) of this part.

*Hospital, psychiatric*. An institution that meets the criteria as set forth in §199.6(b)(4)(ii) of this part.

*Illegitimate child*. A child not recognized as a lawful offspring; that is, a child born of parents not married to each other.

*Immediate family*. The spouse, natural parent, child and sibling, adopted child and adoptive parent, stepparent, stepchild, grandparent, grandchild, stepbrother and stepsister, father-in-law, mother-in-law of the beneficiary, or provider, as appropriate. For purposes of this definition only, to determine who may render services to a beneficiary, the step-relationship continues to exist even if the marriage upon which the relationship is based terminates through divorce or death of one of the parents.

*Independent laboratory*. A freestanding laboratory approved for participation under Medicare and certified by the Health Care Financing Administration.

*Infirmaries*. Facilities operated by student health departments of colleges and universities to provide inpatient or outpatient care to enrolled students. When specifically approved by the Director, OCHAMPUS, or a designee, a boarding school infirmary also is included.

*Initial determination*. A formal written decision on a CHAMPUS claim, a request for benefit authorization, a request by a provider for approval as an authorized CHAMPUS provider, or a decision disqualifying or excluding a provider as an authorized provider under CHAMPUS. Rejection of a claim or a request for benefit or provider authorization for failure to comply with administrative requirements, including failure to submit reasonably requested information, is not an initial determination. Responses to general or specific inquiries regarding CHAMPUS benefits are not initial determinations.

*In-out surgery*. Surgery performed in the outpatient department of a hospital or other institutional provider, in a physician's office or the office of another individual professional provider, in a clinic, or in a ''freestanding'' ambulatory surgical center which does not involve a formal inpatient admission for a period of 24 hours or more.

*Inpatient*. A patient who has been admitted to a hospital or other authorized institution for bed occupancy for purposes of receiving necessary medical care, with the reasonable expectation that the patient will remain in the institution at least 24 hours, and with the registration and assignment of an inpatient number or designation. Institutional care in connection with in and out (ambulatory) surgery is not included within the meaning of inpatient whether or not an inpatient number or designation is made by the hospital or other institution. If the patient has been received at the hospital, but death occurs before the actual admission occurs, an inpatient admission exists as if the patient had lived and had been formally admitted.

*Inpatient Rehabilitation Facility (IRF).* A facility classified by CMS as an IRF and meets the applicable requirements established by §199.6(b)(4)(xx) (which includes the requirement to be a Medicare participating provider).

*Institution-affiliated.* Related to a CHAMPUS-authorized institutional provider through a shared governing body but operating under a separate and distinct license or accreditation.

*Institution-based.* Related to a CHAMPUS-authorized institutional provider through a shared governing body and operating under a common license and shared accreditation.

*Institutional provider.* A health care provider which meets the applicable requirements established by §199.6(b) of this part.

*Intensive care unit (ICU).* A special segregated unit of a hospital in which patients are concentrated by reason of serious illness, usually without regard to diagnosis. Special lifesaving techniques and equipment regularly and immediately are available within the unit, and patients are under continuous observation by a nursing staff specially trained and selected for the care of this type patient. The unit is maintained on a continuing rather than an intermittent or temporary basis. It is not a postoperative recovery room nor a postanesthesia room. In some large or highly specialized hospitals, the ICUs may be further refined for special purposes, such as for respiratory conditions, cardiac surgery, coronary care, burn care, or neurosurgery. For the purposes of CHAMPUS, these specialized units would be considered ICUs if they otherwise conformed to the definition of an ICU.

*Intensive outpatient program (IOP).* A treatment setting capable of providing an organized day or evening program that includes assessment, treatment, case management and rehabilitation for individuals not requiring 24-hour care for mental health disorders, to include substance use disorders, as appropriate for the individual patient. The program structure is regularly scheduled, individualized and shares monitoring and support with the patient's family and support system.

*Intern.* A graduate of a medical or dental school serving in a hospital in preparation to being licensed to practice medicine or dentistry.

*Internal Partnership Agreement.* The Internal Partnership Agreement is an agreement between a military treatment facility commander and a CHAMPUS-authorized civilian health care provider which enables the use of civilian health care personnel or other resources to provide medical care to CHAMPUS beneficiaries on the premises of a military treatment facility under the Military-Civilian Health Services Partnership Program. These internal agreements may be established when a military treatment facility is unable to provide sufficient health care services for CHAMPUS beneficiaries due to shortages of personnel and other required resources.

*Internal Resource Sharing Agreement.* A type of Internal Partnership Agreement, established in the context of the TRICARE program by agreement of a military medical treatment facility commander and authorized TRICARE contractor. Internal Resource Sharing Agreements may incorporate TRICARE features in lieu of standard CHAMPUS features that would apply to standard Internal Partnership Agreements.

*Item, Service, or Supply.* Includes (1) any item, device, medical supply, or service claimed to have been provided to a beneficiary (patient) and listed in an itemized claim for CHAMPUS payment or a request for payment, or (2) in the case of a claim based on costs, any entry or omission in a cost report, books of account, or other documents supporting the claim.

*Laboratory and pathological services.* Laboratory and pathological examinations (including machine diagnostic tests that produce hard-copy results) when necessary to, and rendered in connection with medical, obstetrical, or surgical diagnosis or treatment of an illness or injury, or in connection with well-baby care.

*Legitimized child.* A formerly illegitimate child who is considered legitimate by reason of qualifying actions recognized in law.

*Licensed practical nurse (L.P.N.).* A person who is prepared specially in the scientific basis of nursing; who is a

graduate of a school of practical nursing; whose qualifications have been examined by a state board of nursing; and who has been authorized legally to practice as an L.P.N. under the supervision of a physician.

*Licensed vocational nurse (L.V.N.)* A person who specifically is prepared in the scientific basis or nursing; who is a graduate of a school of vocational nursing; whose qualifications have been examined by a state board of nursing; and who has been authorized legally to practice as a L.V.N. under the supervision of a physician.

*Long Term Care Hospital (LTCH).* A hospital that is classified by the Centers for Medicare and Medicaid Services (CMS) as an LTCH and meets the applicable requirements established by §199.6(b)(4)(v) (which includes the requirement to be a Medicare participating provider).

*Low-risk pregnancy.* A pregnancy is low-risk when the basis for the ongoing clinical expectation of a normal uncomplicated birth, as defined by reasonable and generally accepted criteria of maternal and fetal health, is documented throughout a generally accepted course of prenatal care.

*Major life activity.* Breathing, cognition, hearing, seeing, and age appropriate ability essential to bathing, dressing, eating, grooming, speaking, stair use, toilet use, transferring, and walking.

*Marriage and family therapist, certified.* An extramedical individual provider who meets the requirements outlined in §199.6.

*Maternity care.* Care and treatment related to conception, delivery, and abortion, including prenatal and postnatal care (generally through the 6th post-delivery week), and also including treatment of the complications of pregnancy.

*Medicaid.* Those medical benefits authorized under Title XIX of the Social Security Act provided to welfare recipients and the medically indigent through programs administered by the various states.

*Medical.* The generally used term which pertains to the diagnosis and treatment of illness, injury, pregnancy, and mental disorders by trained and licensed or certified health professionals. For purposes of CHAMPUS, the term ''medical'' should be understood to include ''medical, psychological, surgical, and obstetrical,'' unless it is specifically stated that a more restrictive meaning is intended.

*Medical emergency.* The sudden and unexpected onset of a medical condition or the acute exacerbation of a chronic condition that is threatening to life, limb, or sight, and requires immediate medical treatment or which manifests painful symptomatology requiring immediate palliative efforts to alleviate suffering. Medical emergencies include heart attacks, cardiovascular accidents, poisoning, convulsions, kidney stones, and such other acute medical conditions as may be determined to be medical emergencies by the Director, OCHAMPUS, or a designee. In the case of a pregnancy, a medical emergency must involve a sudden and unexpected medical complication that puts the mother, the baby, or both, at risk. Pain would not, however, qualify a maternity case as an emergency, nor would incipient birth after the 34th week of gestation, unless an otherwise qualifying medical condition is present. Examples of medical emergencies related to pregnancy or delivery are hemorrhage, ruptured membrane with prolapsed cord, placenta previa, abruptio placenta, presence of shock or unconsciousness, suspected heart attack or stroke, or trauma (such as injuries received in an automobile accident).

*Medically or psychologically necessary preauthorization.* A pre (or prior) authorization for payment for medical/surgical or psychological services based upon criteria that are generally accepted by qualified professionals to be reasonable for diagnosis and treatment of an illness, injury, pregnancy, and mental disorder.

*Medical supplies and dressings (consumables).* Necessary medical or surgical supplies (exclusive of durable medical equipment) that do not withstand prolonged, repeated use and that are needed for the proper medical management of a condition for which benefits are otherwise authorized under CHAMPUS, on either an inpatient or

outpatient basis. Examples include disposable syringes for a diabetic, colostomy sets, irrigation sets, and ace bandages.

*Medically or psychologically necessary.* The frequency, extent, and types of medical services or supplies which represent appropriate medical care and that are generally accepted by qualified professionals to be reasonable and adequate for the diagnosis and treatment of illness, injury, pregnancy, and mental disorders or that are reasonable and adequate for well-baby care.

*Medicare.* These medical benefits authorized under Title XVIII of the Social Security Act provided to persons 65 or older, certain disabled persons, or persons with chronic renal disease, through a national program administered by the DHHS, Health Care Financing Administration, Medicare Bureau.

*Medication assisted treatment (MAT).* MAT for diagnosed opioid use disorder is a holistic modality for recovery and treatment that employs evidence-based therapy, including psychosocial treatments and psychopharmacology, and FDA-approved medications as indicated for the management of withdrawal symptoms and maintenance.

*Member.* An individual who is affiliated with a Service, either an active duty member, Reserve member, active duty retired member, or Retired Reserve member. Members in a retired status are not former members. Also referred to as the sponsor.

*Mental disorder, to include substance use disorder.* For purposes of the payment of CHAMPUS benefits, a mental disorder is a nervous or mental condition that involves a clinically significant behavioral or psychological syndrome or pattern that is associated with a painful symptom, such as distress, and that impairs a patient's ability to function in one or more major life activities. A substance use disorder is a mental condition that involves a maladaptive pattern of substance use leading to clinically significant impairment or distress; impaired control over substance use; social impairment; and risky use of a substance(s). Additionally, the mental disorder must be one of those conditions listed in the current edition of the Diagnostic and Statistical Manual of Mental Disorders. ''Conditions Not Attributable to a Mental Disorder,'' or V codes, are not considered diagnosable mental disorders. Co-occurring mental and substance use disorders are common and assessment should proceed as soon as it is possible to distinguish the substance related symptoms from other independent conditions.

*Mental health therapeutic absence.* A therapeutically planned absence from the inpatient setting. The patient is not discharged from the facility and may be away for periods of several hours to several days. The purpose of the therapeutic absence is to give the patient an opportunity to test his or her ability to function outside the inpatient setting before the actual discharge.

*Missing in action (MIA).* A battle casualty whose whereabouts and status are unknown, provided the absence appears to be involuntary and the service member is not known to be in a status of unauthorized absence.

NOTE: Claims for eligible CHAMPUS beneficiaries whose sponsor is classified as MIA are processed as dependents of an active duty service member.

*Morbid obesity.* A body mass index (BMI) equal to or greater than 40 kilograms per meter squared ($kg/m^2$), or a BMI equal to or greater than 35 $kg/m^2$ in conjunction with high-risk comorbidities, which is based on the guidelines established by the National Heart, Lung and Blood Institute on the Identification and Management of Patients with Obesity.

NOTE: Body mass index is equal to weight in kilograms divided by height in meters squared.

*Most-favored rate.* The lowest usual charge to any individual or third-party payer in effect on the date of the admission of a CHAMPUS beneficiary.

*Natural childbirth.* Childbirth without the use of chemical induction or augmentation of labor or surgical procedures other than episiotomy or perineal repair.

*Naturopath.* A person who practices naturopathy, that is, a drugless system of therapy making use of physical forces such as air, light, water, heat, and massage.

NOTE: Services of a naturopath are not covered by CHAMPUS.

*NAVCARE clinics*. Contractor owned, staffed, and operated primary clinics exclusively serving uniformed services beneficiaries pursuant to contracts awarded by a Military Department.

*No-fault insurance*. No-fault insurance means an insurance contract providing compensation for health and medical expenses relating to personal injury arising from the operation of a motor vehicle in which the compensation is not premised on whom may have been responsible for causing such injury. No-fault insurance includes personal injury protection and medical payments benefits in cases involving personal injuries resulting from operation of a motor vehicle.

*Nonavailability statement*. A certification by a commander (or a designee) of a Uniformed Services medical treatment facility, recorded on DEERS, generally for the reason that the needed medical care being requested by a non-TRICARE Prime enrolled beneficiary cannot be provided at the facility concerned because the necessary resources are not available in the time frame needed.

*Nonparticipating provider*. A hospital or other authorized institutional provider, a physician or other authorized individual professional provider, or other authorized provider that furnished medical services or supplies to a CHAMPUS beneficiary, but who did not agree on the CHAMPUS claim form to participate or to accept the CHAMPUS-determined allowable cost or charge as the total charge for the services. A nonparticipating provider looks to the beneficiary or sponsor for payment of his or her charge, not CHAMPUS. In such cases, CHAMPUS pays the beneficiary or sponsor, not the provider.

*North Atlantic Treaty Organization (NATO) member*. A military member of an armed force of a foreign NATO nation who is on active duty and who, in connection with official duties, is stationed in or passing through the United States. The foreign NATO nations are Belgium, Canada, Denmark, France, Federal Republic of Germany, Greece, Iceland, Italy, Luxembourg, the Netherlands, Norway, Portugal, Spain, Turkey, and the United Kingdom.

*Not-for-profit entity*. An organization or institution owned and operated by one or more nonprofit corporations or associations formed pursuant to applicable state laws, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

*Occupational therapist*. A person who is trained specially in the skills and techniques of occupational therapy (that is, the use of purposeful activity with individuals who are limited by physical injury of illness, psychosocial dysfunction, developmental or learning disabilities, poverty and cultural differences, or the aging process in order to maximize independence, prevent disability, and maintain health) and who is licensed to administer occupational therapy treatments prescribed by a physician.

*Off-label use of a drug or device*. A use other than an intended use for which the prescription drug, biologic or device is legally marketed under the Federal Food, Drug, and Cosmetic Act or the Public Health Services Act. This includes any use that is not included in the approved labeling for an approved drug, licensed biologic, approved device or combination product; any use that is not included in the cleared statement of intended use for a device that has been determined by the Food and Drug Administration (FDA) to be substantially equivalent to a legally marketed predicate device and cleared for marketing; and any use of a device for which a manufacturer or distributor would be required to seek pre-market review by the FDA in order to legally include that use in the device's labeling.

*Office-based opioid treatment*. TRICARE authorized providers acting within the scope of their licensure or certification to prescribe outpatient supplies of the medication to assist in withdrawal management (detoxification) and/or maintenance of opioid use disorder, as regulated by 42 CFR part 8, addressing office-based opioid treatment (OBOT).

*Official formularies*. A book of official standards for certain pharmaceuticals

and preparations that are not included in the *U.S. Pharmacopeia*.

*Opioid Treatment Program.* Opioid Treatment Programs (OTPs) are service settings for opioid treatment, either free standing or hospital based, that adhere to the Department of Health and Human Services' regulations at 42 CFR part 8 and use medications indicated and approved by the Food and Drug Administration. Treatment in OTPs provides a comprehensive, individually tailored program of medication therapy integrated with psychosocial and medical treatment and support services that address factors affecting each patient, as certified by the Center for Substance Abuse Treatment (CSAT) of the Department of Health and Human Services' Substance Abuse and Mental Health Services Administration. Treatment in OTPs can include management of withdrawal symptoms (detoxification) from opioids and medically supervised withdrawal from maintenance medications. Patients receiving care for substance use and co-occurring disorders care can be referred to, or otherwise concurrently enrolled in, OTPs.

*Optometrist (Doctor of Optometry).* A person trained and licensed to examine and test the eyes and to treat visual defects by prescribing and adapting corrective lenses and other optical aids, and by establishing programs of exercises.

*Oral surgeon (D.D.S. or D.M.D.).* A person who has received a degree in dentistry and who limits his or her practice to oral surgery, that is, that branch of the healing arts that deals with the diagnosis and the surgical correction and adjunctive treatment of diseases, injuries, and defects of the mouth, the jaws, and associated structures.

*Orthopedic shoes.* Shoes prescribed by an orthopedic surgeon to effect changes in foot or feet position and alignment and which are not an integral part of a brace.

*Other allied health professionals.* Individual professional providers other than physicians, dentists, or extramedical individual providers, as specified in § 199.6 of this part.

*Other special institutional providers.* Certain specialized medical treatment facilities, either inpatient or outpatient, other than those specifically defined, that provide courses of treatment prescribed by a doctor of medicine or osteopathy; when the patient is under the supervision of a doctor of medicine or osteopathy during the entire course of the inpatient admission or the outpatient treatment; when the type and level of care and services rendered by the institution are otherwise authorized in this part; when the facility meets all licensing or other certification requirements that are extant in the jurisdiction in which the facility is located geographically; which is accredited by the Joint Commission or other accrediting organization approved by the Director if an appropriate accreditation program for the given type of facility is available; and which is not a nursing home, intermediate facility, halfway house, home for the aged, or other institution of similar purpose.

*Outpatient.* A patient who has not been admitted to a hospital or other authorized institution as an inpatient.

*Ownership or control interest.* For purposes of § 199.9(f)(1), a ''person with an ownership or control interest'' is anyone who

(1) Has directly or indirectly a 5 percent or more ownership interest in the entity; or

(2) Is the owner of a whole or part interest in any mortgage, deed of trust, note, or other obligation secured (in whole or in part) by the entity or any of the property or assets thereof, which whole or part interest is equal to or exceeds 5 percent of the total property and assets of the entity; or

(3) Is an officer or director of the entity if the entity is organized as a corporation; or

(4) Is a partner in the entity if the entity is organized as a partnership.

*Partial hospitalization.* A treatment setting capable of providing an interdisciplinary program of medically monitored therapeutic services, to include management of withdrawal symptoms, as medically indicated. Services may include day, evening, night and weekend treatment programs

which employ an integrated, comprehensive and complementary schedule of recognized treatment approaches. Partial hospitalization is a time-limited, ambulatory, active treatment program that offers therapeutically intensive, coordinated, and structured clinical services within a stable therapeutic environment. Partial hospitalization is an appropriate setting for crisis stabilization, treatment of partially stabilized mental disorders, to include substance disorders, and a transition from an inpatient program when medically necessary.

*Participating provider*. A CHAMPUS-authorized provider that is required, or has agreed by entering into a CHAMPUS participation agreement or by act of indicating ''accept assignment'' on the claim form, to accept the CHAMPUS-allowable amount as the maximum total charge for a service or item rendered to a CHAMPUS beneficiary, whether the amount is paid for fully by CHAMPUS or requires cost-sharing by the CHAMPUS beneficiary.

*Part-time or intermittent home health aide and skilled nursing services*. Part-time or intermittent means skilled nursing and home health aide services furnished any number of days per week as long as they are furnished (combined) less than 8 hours each day and 28 or fewer hours each week (or, subject to review on a case-bay-case basis as to the need for care, less than 8 hours each day and 35 or fewer hours per week).

*Party to a hearing*. An appealing party or parties and CHAMPUS.

*Party to the initial determination*. Includes CHAMPUS and also refers to a CHAMPUS beneficiary and a participating provider of services whose interests have been adjudicated by the initial determination. In addition, a provider who has been denied approval as an authorized CHAMPUS provider is a party to that initial determination, as is a provider who is disqualified or excluded as an authorized provider under CHAMPUS, unless the provider is excluded based on a determination of abuse or fraudulent practices or procedures under another federal or federally funded program. See § 199.10 for additional information concerning parties not entitled to administrative review under the CHAMPUS appeals and hearing procedures.

*Pastoral counselor*. An extramedical individual provider who meets the requirements outlined in § 199.6.

*Pharmaceutical Agent*. Drugs, biological products, and medical devices under the regulatory authority of the Food and Drug Administration.

*Pharmacist*. A person who is trained specially in the scientific basis of pharmacology and who is licensed to prepare and sell or dispense drugs and compounds and to make up prescriptions ordered by a physician.

*Physical medicine services or physiatry services*. The treatment of disease or injury by physical means such as massage, hydrotherapy, or heat.

*Physical therapist*. A person who is trained specially in the skills and techniques of physical therapy (that is, the treatment of disease by physical agents and methods such as heat, massage, manipulation, therapeutic exercise, hydrotherapy, and various forms of energy such as electrotherapy and ultrasound), who has been authorized legally (that is, registered) to administer treatments prescribed by a physician and who is entitled legally to use the designation ''Registered Physical Therapist.'' A physical therapist also may be called a physiotherapist.

*Physician*. A person with a degree of Doctor of Medicine (M.D.) or Doctor of Osteopathy (D.O.) who is licensed to practice medicine by an appropriate authority.

*Physician in training*. Interns, residents, and fellows participating in approved postgraduate training programs and physicians who are not in approved programs but who are authorized to practice only in a hospital or other institutional provider setting, e.g., individuals with temporary or restricted licenses, or unlicensed graduates of foreign medical schools.

*Podiatrist (Doctor of Podiatry or Surgical Chiropody)*. A person who has received a degree in podiatry (formerly called chiropody), that is, that specialized field of the healing arts that deals with the study and care of the foot, including its anatomy, pathology, and medical and surgical treatment.

*Preauthorization*. A decision issued in writing, or electronically by the Director, TRICARE Management Activity, or a designee, that TRICARE benefits are payable for certain services that a beneficiary has not yet received. The term prior authorization is commonly substituted for preauthorization and has the same meaning.

*Prescription drugs and medicines*. Drugs and medicines which at the time of use were approved for commercial marketing by the U.S. Food and Drug Administration, and which, by law of the United States, require a physician's or dentist's prescription, except that it includes insulin for known diabetics whether or not a prescription is required. Drugs grandfathered by the Federal Food, Drug and Cosmetic Act of 1938 may be covered under CHAMPUS as if FDA approved. Prescription drugs and medicines may also be referred to as ''pharmaceutical agents''.

NOTE: The fact that the U.S. Food and Drug Administration has approved a drug for testing on humans would not qualify it within this definition.

*Preventive care*. Diagnostic and other medical procedures not related directly to a specific illness, injury, or definitive set of symptoms, or obstetrical care, but rather performed as periodic health screening, health assessment, or health maintenance.

*Primary caregiver*. An individual who renders to a beneficiary services to support the activities of daily living (as defined in § 199.2) and specific services essential to the safe management of the beneficiary's condition.

*Primary payer*. The plan or program whose medical benefits are payable first in a double coverage situation.

*PRIMUS clinics*. Contractor owned, staffed, and operated primary care clinics exclusively serving uniformed services beneficiaries pursuant to contracts awarded by a Military Department.

*Private room*. A room with one bed that is designated as a private room by the hospital or other authorized institutional provider.

*Profound hearing loss (adults)*. An ''adult'' (a spouse as defined in section 32 CFR 199.3(b) of this part of a member of the Uniformed Services on active duty for more than 30 days) with a hearing threshold of:

(1) 40 dB HL or greater in one or both ears when tested at 500, 1,000, 1,500, 2,000, 3,000, or 4,000Hz; or

(2) 26 dB HL or greater in one or both ears at any three or more of those frequencies; or

(3) A speech recognition score less than 94 percent.

*Profound hearing loss (children)*. A ''child'' (an unmarried child of an active duty member who otherwise meets the criteria (including age requirements) in 32 CFR 199.3 of this part) with a 26dB HL or greater hearing threshold level in one or both ears when tested in the frequency range at 500, 1,000, 2,000, 3,000 or 4,000 Hz.

*Program year*. The appropriate year (*e.g.*, calendar year, fiscal year, rolling 12-month period, etc.) specified in the administration of TRICARE programs for application of unique requirements or limitations (*e.g.*, enrollment fees, deductibles, catastrophic loss protection, etc.) on covered health care services obtained or provided during the designated time period.

*Progress notes*. Progress notes are an essential component of the medical record wherein health care personnel provide written evidence of ordered and supervised diagnostic tests, treatments, medical procedures, therapeutic behavior and outcomes. In the case of mental health care, progress notes must include: the date of the therapy session; length of the therapy session; a notation of the patient's signs and symptoms; the issues, pathology and specific behaviors addressed in the therapy session; a statement summarizing the therapeutic interventions attempted during the therapy session; descriptions of the response to treatment, the outcome of the treatment, and the response to significant others; and a statement summarizing the patient's degree of progress toward the treatment goals. Progress notes do not need to repeat all that was said during a therapy session but must document a patient contact and be sufficiently detailed to allow for both peer review and audits to substantiate the quality and quantity of care rendered.

*Prosthetic device (prosthesis)*. An artificial substitute for a missing body part.

*Prosthetic or Prosthetic device (prosthesis).* A prosthetic or prosthetic device (prosthesis) determined by the Secretary of Defense to be necessary because of significant conditions resulting from trauma, congenital anomalies, or diseases.

*Prosthetic supplies.* Supplies that are necessary for the effective use of a prosthetic or prosthetic device.

*Provider.* A hospital or other institutional provider, a physician, or other individual professional provider, or other provider of services or supplies as specified in § 199.6 of this part.

*Provider exclusion and suspension.* The terms ''exclusion'' and ''suspension'', when referring to a provider under CHAMPUS, both mean the denial of status as an authorized provider, resulting in items, services, or supplies furnished by the provider not being reimbursed, directly or indirectly, under CHAMPUS. The terms may be used interchangeably to refer to a provider who has been denied status as an authorized CHAMPUS provider based on (1) a criminal conviction or civil judgment involving fraud, (2) an administrative finding of fraud or abuse under CHAMPUS, (3) an administrative finding that the provider has been excluded or suspended by another agency of the Federal Government, a state, or a local licensing authority, (4) an administrative finding that the provider has knowingly participated in a conflict of interest situation, or (5) an administrative finding that it is in the best interests of the CHAMPUS or CHAMPUS beneficiaries to exclude or suspend the provider.

*Provider termination.* When a provider's status as an authorized CHAMPUS provider is ended, other than through exclusion or suspension, based on a finding that the provider does not meet the qualifications, as set forth in § 199.6 of this part, to be an authorized CHAMPUS provider.

*Psychiatric emergency.* A psychiatric inpatient admission is an emergency when, based on a psychiatric evaluation performed by a physician (or other qualified mental health care professional with hospital admission authority), the patient is at immediate risk of serious harm to self or others as a result of a mental disorder and requires immediate continuous skilled observation at the acute level of care.

*Public facility.* A public authority or entity legally constituted within a State (as defined in this section) to administer, control or perform a service function for public health, education or human services programs in a city, county, or township, special district, or other political subdivision, or such combination of political subdivisions or special districts or counties as are recognized as an administrative agency for a State's public health, education or human services programs, or any other public institution or agency having administrative control and direction of a publicly funded health, education or human services program.

*Public facility adequacy.* An available public facility shall be considered adequate when the Director, OCHAMPUS, or designee, determines that the quality, quantity, and frequency of an available service or item otherwise allowable as a CHAMPUS benefit is sufficient to meet the beneficiary's specific disability related need in a timely manner.

*Public facility availability.* A public facility shall be considered available when the public facility usually and customarily provides the requested service or item to individuals with the same or similar disability related need as the otherwise equally qualified CHAMPUS beneficiary.

*Qualified accreditation organization.* A not-for-profit corporation or a foundation that:

(1) Develops process standards and outcome standards for health care delivery programs, or knowledge standards and skill standards for health care professional certification testing, using experts both from within and outside of the health care program area or individual specialty to which the standards are to be applied;

(2) Creates measurable criteria that demonstrate compliance with each standard;

(3) Publishes the organization's standards, criteria and evaluation processes so that they are available to the general public;

(4) Performs on-site evaluations of health care delivery programs, or provides testing of individuals, to measure

the extent of compliance with each standard;

(5) Provides on-site evaluation or individual testing on a national or international basis;

(6) Provides to evaluated programs and tested individuals time-limited written certification of compliance with the organization's standards;

(7) Excludes certification of any program operated by an organization which has an economic interest, as defined in this section, in the accreditation organization or in which the accreditation organization has an economic interest;

(8) Publishes promptly the certification outcomes of each program evaluation or individual test so that it is available to the general public; and

(9) Has been found by the Director, OCHAMPUS, or designee, to apply standards, criteria, and certification processes which reinforce CHAMPUS provider authorization requirements and promote efficient delivery of CHAMPUS benefits.

*Qualified mental health provider*. Psychiatrists or other physicians; clinical psychologists, certified psychiatric nurse specialists, certified clinical social workers, certified marriage and family therapists, TRICARE certified mental health counselors, pastoral counselors under a physician's supervision, and supervised mental health counselors under a physician's supervision.

*Radiation therapy services*. The treatment of diseases by x-ray, radium, or radioactive isotopes when ordered by the attending physician.

*Rare diseases*. TRICARE/CHAMPUS defines a rare disease as any disease or condition that has a prevalence of less than 200,000 persons in the United States.

*Referral*. The act or an instance of referring a TRICARE beneficiary to another authorized provider to obtain necessary medical treatment. Generally, when a referral is required to qualify health care as a covered benefit, only a TRICARE-authorized physician may make such a referral unless this regulation specifically allows another category of TRICARE-authorized provider to make a referral as allowed within the scope of the provider's license. In addition to referrals which may be required for certain health care to be a covered TRICARE benefit, the TRICARE Prime program under § 199.17 generally requires Prime enrollees to obtain a referral for care through a primary care manager (PCM) or other authorized care coordinator to avoid paying higher deductible and cost-sharing for otherwise covered TRICARE benefits.

*Registered nurse*. A person who is prepared specially in the scientific basis of nursing, who is a graduate of a school of nursing, and who is registered for practice after examination by a state board of nurse examiners or similar regulatory authority, who holds a current, valid license, and who is entitled legally to use the designation R.N.

*Rehabilitation*. The reduction of an acquired loss of ability to perform an activity in the manner, or within the range considered normal, for a human being.

*Rehabilitative therapy*. Any rehabilitative therapy that is necessary to improve, restore, or maintain function, or to minimize or prevent deterioration of function, of a patient and prescribed by a physician.

*Reliable evidence*. (1) As used in § 199.4(g)(15), the term reliable evidence means only:

(i) Well controlled studies of clinically meaningful endpoints, published in refereed medical literature.

(ii) Published formal technology assessments.

(iii) The published reports of national professional medical associations.

(iv) Published national medical policy organization positions; and

(v) The published reports of national expert opinion organizations.

(2) The hierarchy of reliable evidence of proven medical effectiveness, established by (1) through (5) of this paragraph, is the order of the relative weight to be given to any particular source. With respect to clinical studies, only those reports and articles containing scientifically valid data and published in the refereed medical and scientific literature shall be considered as meeting the requirements of reliable evidence. Specifically not included in

the meaning of reliable evidence are reports, articles, or statements by providers or groups of providers containing only abstracts, anecdotal evidence or personal professional opinions. Also not included in the meaning of reliable evidence is the fact that a provider or a number of providers have elected to adopt a drug, device, or medical treatment or procedure as their personal treatment or procedure of choice or standard of practice.

*Representative*. Any person who has been appointed by a party to the initial determination as counsel or advisor and who is otherwise eligible to serve as the counsel or advisor of the party to the initial determination, particularly in connection with a hearing.

*Reservist*. A person who is under an active duty call or order to one of the Uniformed Services for a period of 30 days or less or is on inactive training.

*Resident (medical)*. A graduate physician or dentist who has an M.D. or D.O. degree, or D.D.S. or D.M.D. degree, respectively, is licensed to practice, and who choose to remain on the house staff of a hospital to get further training that will qualify him or her for a medical or dental specialty.

*Residential treatment center (RTC)*. A facility (or distinct part of a facility) which meets the criteria in §199.6(b)(4)(vii).

*Respite care*. Respite care is short-term care for a patient in order to provide rest and change for those who have been caring for the patient at home, usually the patient's family.

*Retired category*. Retirees and their family members who are beneficiaries covered by 10 U.S.C. 1086(c), other than Medicare-eligible beneficiaries as described in 10 U.S.C. 1086(d).

*Retiree*. For ease of reference in this part only, and except as otherwise specified in this part, the term means a member or former member of a Uniformed Service who is entitled to retired, retainer, or equivalent pay based on duty in a Uniformed Service.

*Routine eye examinations*. The services rendered in order to determine the refractive state of the eyes.

*Sanction*. For purpose of §199.9, ''sanction'' means a provider exclusion, suspension, or termination.

*Secondary payer*. The plan or program whose medical benefits are payable in double coverage situations only after the primary payer has adjudicated the claim.

*Semiprivate room*. A room containing at least two beds. If a room is designated publicly as a semiprivate accommodation by the hospital or other authorized institutional provider and contains multiple beds, it qualifies as a semiprivate room for the purposes of CHAMPUS.

*Serious physical disability*. Any physiological disorder or condition or anatomical loss affecting one or more body systems which has lasted, or with reasonable certainty is expected to last, for a minimum period of 12 contiguous months, and which precludes the person with the disorder, condition or anatomical loss from unaided performance of at least one Major Life Activity as defined in this section.

*Skilled nursing facility*. An institution (or a distinct part of an institution) that meets the criteria as set forth in §199.6(b)(4)(vi).

*Skilled nursing services*. Skilled nursing services includes application of professional nursing services and skills by an RN, LPN, or LVN, that are required to be performed under the general supervision/direction of a TRICARE-authorized physician to ensure the safety of the patient and achieve the medically desired result in accordance with accepted standards of practice.

*Sole community hospital* (SCH). A hospital that is designated by CMS as an SCH and meets the applicable requirements established by §199.6(b)(4)(xvii).

*Spectacles, eyeglasses, and lenses*. Lenses, including contact lenses, that help to correct faulty vision.

*Speech generating device (SGD)*. See Augmentative Communication Device.

*Sponsor*. A member or former member of a Uniformed Service upon whose status his or her dependents' eligibility for CHAMPUS is based. A sponsor also includes a person who, while a member of the Uniformed Services and after becoming eligible to be retired on the basis of years of service, has his or her eligibility to receive retired pay terminated as a result of misconduct involving abuse of a spouse or dependent

child. It also includes NATO members who are stationed in or passing through the United States on official business when authorized. It also includes individuals eligible for CHAMPUS under the Transitional Assistance Management Program.

*Spouse*. A lawful husband or wife, who meets the criteria in § 199.3 of this part, regardless of whether or not dependent upon the member or former member for his or her own support.

*State*. For purposes of this part, any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, and each territory and possession of the United States.

*State victims of crime compensation programs*. Benefits available to victims of crime under the Violent Crime Control and Law Enforcement Act.

*Student status*. A dependent of a member or former member of a Uniformed Service who has not passed his or her 23rd birthday, and is enrolled in a full-time course of study in an institution of higher learning.

*Substance use disorder rehabilitation facility (SUDRF)*. A facility or a distinct part of a facility that meets the criteria in § 199.6(b)(4)(xiv).

*Supervised mental health counselor*. An extramedical individual provider who meets the requirements outlined in § 199.6.

*Supplemental insurance plan*. A health insurance policy or other health benefit plan offered by a private entity to a CHAMPUS beneficiary, that primarily is designed, advertised, marketed, or otherwise held out as providing payment for expenses incurred for services and items that are not reimbursed under CHAMPUS due to program limitations, or beneficiary liabilities imposed by law. CHAMPUS recognizes two types of supplemental plans, general indemnity plans, and those offered through a direct service health maintenance organization (HMO).

(1) An indemnity supplemental insurance plan must meet all of the following criteria:

(i) It provides insurance coverage, regulated by state insurance agencies, which is available only to beneficiaries of CHAMPUS.

(ii) It is premium based and all premiums relate only to the CHAMPUS supplemental coverage.

(iii) Its benefits for all covered CHAMPUS beneficiaries are predominantly limited to non-covered services, to the deductible and cost-shared portions of the pre-determined allowable charges, and/or to amounts exceeding the allowable charges for covered services.

(iv) It provides insurance reimbursement by making payment directly to the CHAMPUS beneficiary or to the participating provider.

(v) It does not operate in a manner which results in lower deductibles or cost-shares than those imposed by law, or that waives the legally imposed deductibles or cost-shares.

(2) A supplemental insurance plan offered by a Health Maintenance Organization (HMO) must meet all of the following criteria:

(i) The HMO must be authorized and must operate under relevant provisions of state law.

(ii) The HMO supplemental plan must be premium based and all premiums must relate only to CHAMPUS supplemental coverage.

(iii) The HMO's benefits, above those which are directly reimbursed by CHAMPUS, must be limited predominantly to services not covered by CHAMPUS and CHAMPUS deductible and cost-share amounts.

(iv) The HMO must provide services directly to CHAMPUS beneficiaries through its affiliated providers who, in turn, are reimbursed by CHAMPUS.

(v) The HMO's premium structure must be designed so that no overall reduction in the amount of the beneficiary deductibles or cost-shares will result.

*Suppliers of portable X-ray services*. A supplier that meets the conditions of coverage of the Medicare program, set forth in the Medicare regulations (42 CFR 405.1411 through 405.1416 (as amended)) or the Medicaid program in the state in which the covered service is provided.

*Surgery*. Medically appropriate operative procedures, including related preoperative and postoperative care; reduction of fractures and dislocations; injections and needling procedures of

the joints; laser surgery of the eye; and those certain procedures listed in §199.4(c)(2)(i) of this part.

*Surgical assistant.* A physician (or dentist or podiatrist) who assists the operating surgeon in the performance of a covered surgical service when such assistance is certified as necessary by the attending surgeon, when the type of surgical procedure being performed is of such complexity and seriousness as to require a surgical assistant, and when interns, residents, or other house staff are not available to provide the surgical assistance services in the specialty area required.

*Suspension of claims processing.* The temporary suspension of processing (to protect the government's interests) of claims for care furnished by a specific provider (whether the claims are submitted by the provider or beneficiary) or claims submitted by or on behalf of a specific CHAMPUS beneficiary pending action by the Director, OCHAMPUS, or a designee, in a case of suspected fraud or abuse. The action may include the administrative remedies provided for in §199.9 or any other Department of Defense issuance (e.g. DoD issuances implementing the Program Fraud Civil Remedies Act), case development or investigation by OCHAMPUS, or referral to the Department of Defense-Inspector General or the Department of Justice for action within their cognizant jurisdictions.

*Teaching physician.* A teaching physician is any physician whose duties include providing medical training to physicians in training within a hospital or other institutional provider setting.

*Telephonic consultations:* A covered consultation service conducted via telephone call between TRICARE-authorized providers, including a verbal and written report to the patient's treating/requesting physician or other TRICARE-authorized provider.

*Telephonic office visits.* A covered service provided via a telephone call between a beneficiary who is an established patient and a TRICARE-authorized provider. See §199.4.

*Third-party billing agent.* Any entity that acts on behalf of a provider to prepare, submit and monitor claims, excluding those entities that act solely as a collection agency.

*Third-party payer.* Third-payer means an entity that provides an insurance, medical service, or health plan by contract or agreement, including an automobile liability insurance or no fault insurance carrier and a worker's compensation program or plan, and any other plan or program (e.g., homeowners insurance) that is designed to provide compensation or coverage for expenses incurred by a beneficiary for medical services or supplies. For purposes of the definition of ''third-party payer,'' an insurance, medical service, or health plan includes a preferred provider organization, an insurance plan described as Medicare supplemental insurance, and a personal injury protection plan or medical payments benefit plan for personal injuries resulting from the operation of a motor vehicle.

NOTE: TRICARE is secondary payer to all third-party payers. Under limited circumstances described in §199.8(c)(2) of this part, TRICARE payment may be authorized to be paid in advance of adjudication of the claim by certain third-party payers. TRICARE advance payments will not be made when a third-party provider is determined to be a primary medical insurer under §199.8(c)(3) of this part.''

*Timely filing.* The filing of CHAMPUS claims within the prescribed time limits as set forth in §199.7 of this part.

*Transitional Assistance Management Program (TAMP).* The program established under 10 U.S.C. §1145(a) and §199.3(e) of this part.

*Treatment plan.* A detailed description of the medical care being rendered or expected to be rendered a CHAMPUS beneficiary seeking approval for inpatient and other benefits for which preauthorization is required as set forth in §199.4(b). Medical care described in the plan must meet the requirements of medical and psychological necessity. A treatment plan must include, at a minimum, a diagnosis (either current International Statistical Classification of Diseases and Related Health Problems (ICD) or current Diagnostic and Statistical Manual of Mental Disorders (DSM)); detailed reports of prior treatment, medical history, family history, social history, and physical examination; diagnostic

test results; consultant's reports (if any); proposed treatment by type (such as surgical, medical, and psychiatric); a description of who is or will be providing treatment (by discipline or specialty); anticipated frequency, medications, and specific goals of treatment; type of inpatient facility required and why (including length of time the related inpatient stay will be required); and prognosis. If the treatment plan involves the transfer of a CHAMPUS patient from a hospital or another inpatient facility, medical records related to that inpatient stay also are required as a part of the treatment plan documentation.

*TRICARE certified mental health counselor*. An allied health professional who meets the requirements outlined in § 199.6.

*TRICARE Extra*. The preferred-provider option of the TRICARE program made available prior to January 1, 2018, under which TRICARE Standard beneficiaries may obtain discounts on cost sharing as a result of using TRICARE network providers.

*TRICARE for Life*. The Medicare wraparound coverage option of the TRICARE program made available to an eligible beneficiary by reason of 10 U.S.C. 1086(d).

*TRICARE Hospital Outpatient Prospective Payment System* (OPPS). OPPS is a hospital outpatient prospective payment system, based on nationally established APC payment amounts and standardized for geographic wage differences that includes operating and capital-related costs that are directly related and integral to performing a procedure or furnishing a service in a hospital outpatient department.

*TRICARE Prime*. The managed care option of the TRICARE program established under § 199.17.

*TRICARE program*. The program established under § 199.17.

*TRICARE Reserve Select*. The program established under 10 U.S.C. 1076d and § 199.24 of this Part.

*TRICARE Retired Reserve*. The program established under 10 U.S.C. 1076e and § 199.25.

*TRICARE Select*. The self-managed, preferred-provider network option under the TRICARE Program established by 10 U.S.C. 1075 and § 199.17 to replace TRICARE Extra and Standard after December 31, 2017.

*TRICARE Standard*. The TRICARE program made available prior to January 1, 2018, covering health benefits contracted for under the authority of 10 U.S.C. section 1079(a) or 1086(a) and subject to the same rates and conditions as apply to persons covered under those sections.

*TRICARE Young Adult*. The program authorized by and described in § 199.26 of this part.

*Uniform HMO benefit*. The health care benefit established by § 199.18.

*Uniformed Services*. The Army, Navy, Air Force, Marine Corps, Coast Guard, Commissioned Corps of the USPHS, and the Commissioned Corps of the NOAA.

*Veteran*. A person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable.

NOTE: Unless the veteran is eligible for ''retired pay,'' ''retirement pay,'' or ''retainer pay,'' which refers to payments of a continuing nature and are payable at fixed intervals from the government for military service neither the veteran nor his or her dependents are eligible for benefits under CHAMPUS.

*Waiver of benefit limits*. Extension of current benefit limitations under the Case Management Program, of medical care, services, and/or equipment, not otherwise a benefit under the TRICARE/CHAMPUS program.

*Well-child care*. A specific program of periodic health screening, developmental assessment, and routine immunization for dependents under six years of age.

*Widow or Widower*. A person who was a spouse at the time of death of a member or former member and who has not remarried.

*Worker's compensation benefits*. Medical benefits available under any worker's compensation law (including the Federal Employees Compensation Act), occupational disease law, employers liability law, or any other legislation of similar purpose, or under the maritime doctrine of maintenance, wages, and cure.

*X-ray services*. An x-ray examination from which an x-ray film or other

image is produced, ordered by the attending physician when necessary and rendered in connection with a medical or surgical diagnosis or treatment of an illness or injury, or in connection with maternity or well-baby care.

[51 FR 24008, July 1, 1986]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 199.2, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

### § 199.3 Eligibility.

(a) *General*. This section sets forth those persons who, by the provisions of 10 U.S.C. chapter 55, and the NATO Status of Forces Agreement, are eligible for CHAMPUS benefits. A determination that a person is eligible does not automatically entitle such a person to CHAMPUS payments. Before any CHAMPUS benefits may be extended, additional requirements, as set forth in other sections of this part, must be met. Additionally, the use of CHAMPUS may be denied if a Uniformed Service medical treatment facility capable of providing the needed care is available. CHAMPUS relies primarily on the Defense Enrollment Eligibility Reporting System (DEERS) for eligibility verification.

(b) *CHAMPUS eligibles*—(1) *Retiree*. A member or former member of a Uniformed Service who is entitled to retired, retainer, or equivalent pay based on duty in a Uniformed Service.

(2) *Dependent*. Individuals whose relationship to the sponsor leads to entitlement to benefits. CHAMPUS eligible dependents include the following:

(i) *Spouse*. A lawful husband or wife of a member or former member. The spouse of a deceased member or retiree must not be remarried. A former spouse also may qualify for benefits as a dependent spouse. A former spouse is a spouse who was married to a military member, or former member, but whose marriage has been terminated by a final decree of divorce, dissolution or annulment. To be eligible for CHAMPUS benefits, a former spouse must meet the criteria described in paragraphs (b)(2)(i)(A) through (b)(2)(i)(E) of this section *and* must qualify under the group defined in paragraph (b)(2)(i)(F)(*1*) or (b)(2)(i)(F)(*2*) of this section.

(A) Must be unremarried; and

(B) Must not be covered by an employer-sponsored health plan; and

(C) Must have been married to a member or former member who performed at least 20 years of service which can be credited in determining the member's or former member's eligibility for retired or retainer pay; and

(D) Must not be eligible for Part A of Title XVIII of the Social Security Act (Medicare) except as provided in paragraphs (b)(3), (f)(3)(vii), (f)(3)(viii), and (f)(3)(ix) of this section; and

(E) Must not be the dependent of a NATO member; *and*

(F) Must meet the requirements of paragraph (b)(2)(i)(F)(*1*) or (b)(2)(i)(F)(*2*) of this section:

(*1*) The former spouse must have been married to the same member or former member for at least 20 years, at least 20 of which were creditable in determining the member's or former member's eligibility for retired or retainer pay. Eligibility continues indefinitely unless affected by any of the conditions of paragraphs (b)(2)(i)(A) through (b)(2)(i)(E) of this section.

(*i*) If the date of the final decree of divorce, dissolution, or annulment was before February 1, 1983, the former spouse is eligible for CHAMPUS coverage of health care received on or after January 1, 1985.

(*ii*) If the date of the final decree of the divorce, dissolution, or annulment was on or after February 1, 1983, the former spouse is eligible for CHAMPUS coverage of health care which is received on or after the date of the divorce, dissolution, or annulment.

(*2*) The former spouse must have been married to the same member or former member for at least 20 years, and at least 15, but less than 20 of those married years were creditable in determining the member's or former member's eligibility for retired or retainer pay.

(*i*) If the date of the final decree of divorce, dissolution, or annulment is before April 1, 1985, the former spouse is eligible only for care received on or after January 1, 1985, or the date of the divorce, dissolution, or annulment,

whichever is later. Eligibility continues indefinitely unless affected by any of the conditions of paragraphs (b)(2)(i)(A) through (b)(2)(i)(E) of this section.

(*ii*) If the date of the final decree of divorce, dissolution or annulment is on or after April 1, 1985, but before September 29, 1988, the former spouse is eligible only for care received from the date of the decree of divorce, dissolution, or annulment until December 31, 1988, or for two years from the date of the divorce, dissolution, or annulment, whichever is later.

(*iii*) If the date of the final decree of divorce, dissolution, or annulment is on or after September 29, 1988, the former spouse is eligible only for care received within the 365 days (366 days in the case of a leap year) immediately following the date of the divorce, dissolution, or annulment.

(ii) *Child*. A dependent child is an unmarried child of a member or former member who has not reached his or her twenty-first (21st) birthday, except an incapacitated adopted child meeting the requirements of paragraph (b)(2)(ii)(H)(*2*) of this section, and who bears one of the following relationships to a member or former member of one of the Uniformed Services:

(A) A legitimate child; or

(B) An adopted child whose adoption has been legally completed on or before the child's twenty-first (21st) birthday; or

(C) A legitimate stepchild; or

(D) An illegitimate child of a *member or former member* whose paternity/maternity *has been* determined judicially, and the member or former member directed to support the child; or

(E) An illegitimate child of a *member or former member* whose paternity/maternity *has not been* determined judicially, who resides with or in the home provided by the member or former member, and is or continues to be dependent upon the member or former member for over one-half of his or her support, or who was so dependent on the former member at the time of the former member's death; or

(F) An illegitimate child of a *spouse of a member* who resides with or in a home provided by the member and is, and continues to be dependent upon the member for over one-half of his or her support; or

(G) An illegitimate child of a *spouse of a former member* who resides with or in a home provided by a former member or the former member's spouse at the time of death of the former member, and is, or continues to be, or was, dependent upon the former member for more than one-half of his or her support at the time of death; or

(H) An individual who falls into one of the following classes:

(*1*) *A student*. A child determined to be a member of one of the classes in paragraphs (b)(2)(ii)(A) through (b)(2)(ii)(G) of this section, who is not married, has passed his or her 21st birthday but has not passed his or her 23rd birthday, is dependent upon the member or former member for over 50 percent of his or her support or was dependent upon the member or former member for over 50 percent of his or her support on the date of the member's or former member's death, and is pursuing a full-time course of education in an institution of higher learning approved by the Secretary of Defense or the Department of Education (as appropriate) or by a state agency under 38 U.S.C. chapters 34 and 35.

NOTE: Courses of education offered by institutions listed in the ''Education Directory,'' ''Higher Education'' or ''Accredited Higher Institutions'' issued periodically by the Department of Education meet the criteria approved by the Administering Secretary or the Secretary of Education. For determination of approval of courses offered by a foreign institution, by an institution not listed in either of the above directories, or by an institution not approved by a state agency pursuant to 38 U.S.C. chapters 34 and 35, a statement may be obtained from the Department of Education, Washington, D.C. 20202.

(*2*) *An incapacitated child*. A child determined to be a member of one of the classes in paragraphs (b)(2)(ii)(A) through (b)(2)(ii)(G) of this section, who is not married and is incapable of self-support because of a mental or physical disability that:

(*i*) Existed before the child's twenty-first (21st) birthday; or

(*ii*) Occurred between the ages of 21 and 23 while the child was enrolled in a

full-time course of study in an institution of higher learning approved by the Administering Secretary or the Department of Education (see NOTE to paragraph (b)(2)(ii)(H)(*2*)(*iii*) of this section), and is or was at the time of the member's or former member's death dependent on the member or former member for over one-half of his or her support; and

(*iii*) The incapacity is continuous. (If the incapacity significantly improves or ceases at any time, CHAMPUS eligibility cannot be reinstated on the basis of the incapacity, unless the incapacity recurs and the beneficiary is under age 21, or is under age 23 and is enrolled as a full-time student under paragraph (b)(2)(ii)(H)(*2*)(*ii*) of this section. If the child was not incapacitated after that date, no CHAMPUS eligibility exists on the basis of the incapacity. However, incapacitated children who marry and who subsequently become unmarried through divorce, annulment, or death of spouse, may be reinstated as long as they still meet all other requirements).

NOTE: An institution of higher learning is a college, university, or similar institution, including a technical or business school, offering post-secondary level academic instruction that leads to an associate or higher degree, if the school is empowered by the appropriate State education authority under State law to grant an associate, or higher, degree. When there is no State law to authorize the granting of a degree, the school may be recognized as an institution of higher learning if it is accredited for degree programs by a recognized accrediting agency. The term also shall include a hospital offering educational programs at the post-secondary level regardless of whether the hospital grants a post-secondary degree. The term also shall include an educational institution that is not located in a State, that offers a course leading to a standard college degree, or the equivalent, and that is recognized as such by the Secretary of Education (or comparable official) of the country, or other jurisdiction, in which the institution is located (38 U.S.C. chapter 34, section 1661, and chapter 35, section 1701.

Courses of education offered by institutions listed in the ''Education Directory,'' ''Higher Education'' or ''Accredited Higher Institutions'' issued periodically by the Department of Education meet the criteria approved by the Administering Secretary or the Secretary of Education. For determination of approval of courses offered by a foreign institution, by an institution not listed in either of the above directories, or by an institution not approved by a state agency pursuant to chapters 34 and 35 of 38 U.S.C., a statement may be obtained from the Department of Education, Washington, D.C. 20202.

(*3*) *A child of a deceased reservist.* A child, who is determined to be a member of one of the classes in paragraphs (b)(2)(ii)(A) through (b)(2)(ii)(G) of this section, of a reservist in a Uniformed Service who incurs or aggravates an injury, illness, or disease, during, or on the way to or from, active duty training for a period of 30 days or less or inactive duty training, and the reservist dies as a result of that specific injury, illness or disease.

(*4*) *An unmarried person.* An unmarried person placed in the home of a member or former member prior to adoption. To be a dependent child, the unmarried person must not have reached the age of 21 (or otherwise meets the requirements of a student or incapacitated child set out in paragraphs (b)(2)(ii)(H)(*1*) or (b)(2)(ii)(H)(*2*) of this section) and has been placed in the home of the member or former member by a recognized placement agency or by any other source authorized by State or local law to provide adoption placement, in anticipation of legal adoption by the member or former member.

(iii) *Abused dependents*—(A) *Categories of abused dependents.* An abused dependent may be either a spouse or a child. Eligibility for either class of abused dependent results from being either:

(*1*) The spouse (including a former spouse) or child of a member who has received a dishonorable or bad-conduct discharge, or dismissal from a Uniformed Service as a result of a court-martial conviction for an offense involving physical or emotional abuse of the spouse or child, or was administratively discharged as a result of such an offense. Until October 17, 1998, Medical benefits are limited to care related to the physical or emotional abuse and for a period of 12 months following the member's separation from the Uniformed Service. On or after October 17, 1998, medical benefits can include all under the Basic Program and under the Extended Care Health Option for the period that the spouse or child is in receipt of transitional compensation under section 1059 of title 10 U.S.C.

(*2*) The spouse (including a former spouse) or child of a member or former member who while a member and as a result of misconduct involving abuse of the spouse or child has eligibility to receive retired pay on the basis of years of service terminated.

(B) *Requirements for categories of abused dependents*—(*1*) *Abused spouse*. As long as the spouse is receiving payments from the DoD Military Retirement Fund under court order, the spouse is eligible for health care under the same conditions as any spouse of a retired member. The abused spouse must:

(*i*) Under paragraph (b)(2)(iii)(A)(*1*) of this section, be a lawful husband or wife or a former spouse of the member; or

(*ii*) Under paragraph (b)(2)(iii)(A)(*2*) of this section, be a lawful husband or wife or a former spouse of the member or former member, and the spouse is receiving payments from the Department of Defense Military Retirement Fund under 10 U.S.C. 1408(h) pursuant to a court order; and

(*A*) Be a victim of the abuse; and

(*B*) Have been married to the member or former member at the time of the abuse; or

(*C*) Be the natural or adoptive parent of a dependent child of the member or former member who was the victim of the abuse.

(*2*) *Abused child*. The abused child must:

(*i*) Under paragraph (b)(2)(iii)(A)(*1*) of this section, be a dependent child of the member or former member.

(*ii*) Under paragraph (b)(2)(iii)(A)(*2*) of this section,

(*A*) Have been a member of the household where the abuse occurred; and

(*B*) Be an unmarried legitimate child, including an adopted child or stepchild of the member or former member; and

(*C*) Be under the age of 18; or

(*D*) Be incapable of self support because of a mental or physical incapacity that existed before becoming 18 years of age and be dependent on the member or former member for over one-half of his or her support; or

(*E*) If enrolled in a full-time course of study in an institution of higher learning recognized by the Secretary of Defense (for the purposed of 10 U.S.C. 1408(h)), be under 23 years of age and be dependent on the member or former member for over one-half of his or her support.

(*F*) The dependent child is eligible for health care, regardless of whether any court order exists, under the same conditions as any dependent of a retired member.

(*3*) *TAMP eligibles*. A former member, including his or her dependents, who is eligible under the provisions of the Transitional Assistance Management Program as described in paragraph (e) of this § 199.3.

(iv) An unmarried person who is placed in the legal custody of a member or former member by a court of competent jurisdiction in the United States (or possession of the United States) for a period of at least 12 consecutive months. The unmarried person shall be considered a dependent of the member or former member under this section provided he or she otherwise meets the following qualifications:

(A) Has not reached the age of 21 unless he or she otherwise meets the requirements of a student set out in paragraph (b)(2)(ii)(H)(*1*) of this section or the requirements for being incapacitated as set out in paragraph (b)(2)(ii)(H)(*2*) of this section and the incapacitation occurred while he or she was a dependent of the member or former member through court ordered legal custody;

(B) Is dependent on the member or former member for over one-half of the person's support;

(C) Resides with the member or former member unless separated by the necessity of military service or to receive institutional care as a result of disability or incapacitation or under such other authorized circumstances; and,

(D) Is not a dependent of a member or former member under any other provision of law or regulation.

(3) *Eligibility under TRICARE Senior Pharmacy Program*. Section 711 of the National Defense Authorization Act for Fiscal Year 2001 (Public Law 106–398, 114 Stat. 1654) established the TRICARE Senior Pharmacy Program effective April 1, 2001. To be eligible for this program, a person is required to be:

(i) Medicare eligible, who is:

(A) 65 years of age or older; and

(B) Entitled to Medicare Part A; and

(C) Enrolled in Medicare Part B, except for a person who attained age 65 prior to April 1, 2001, is not required to enroll in Part B; and

(ii) Otherwise qualified under one of the following categories:

(A) A retired uniformed service member who is entitled to retired or retainer pay, or equivalent pay including survivors who are annuitants; or

(B) A dependent of a member of the uniformed services described in one of the following:

(*1*) A member who is on active duty for a period of more than 30 days or died while on such duty; or

(*2*) A member who died from an injury, illness, or disease incurred or aggravated while the member was:

(*i*) On active duty under a call or order to active duty of 30 days or less, on active duty for training, or on inactive duty training; or

(*ii*) Traveling to or from the place at which the member was to perform or had performed such active duty, active duty for training, or inactive duty training.

NOTE TO PARAGRAPH (b)(3)(ii)(B): Dependent under Section 711 of the National Defense Authorization Act for Fiscal Year 2001 includes spouse, unremarried widow/widower, child, parent/parent-in-law, unremarried former spouse, and unmarried person in the legal custody of a member or former member, as those terms of dependency are defined and periods of eligibility are set forth in 10 U.S.C. 1072(2).

(4) *Medal of Honor recipients*. (i) A former member of the armed forces who is a Medal of Honor recipient and who is not otherwise entitled to medical and dental benefits has the same CHAMPUS eligibility as does a retiree.

(ii) *Immediate dependents*. CHAMPUS eligible dependents of a Medal of Honor Recipient are those identified in paragraphs (b)(2)(i) of this section (except for former spouses) and (b)(2)(ii) of this section (except for a child placed in legal custody of a Medal of Honor recipient under (b)(2)(ii)(H)(*4*) of this section).

(iii) *Effective date*. The CHAMPUS eligibility established by paragraphs (b)(4)(i) and (ii) of this section is applicable to health care services provided on or after October 30, 2000.

(5) *Reserve Component Members issued delayed-effective-date orders*—(i) *Member*. A member of a reserve component of the armed forces who is ordered to active duty for a period of more than 30 consecutive days in support of a contingency operation under a provision of law referred to in section 101(a)(13)(B) of Title 10, United States Code, that provides for active-duty service to begin on a date after the date of the issuance of the order.

(ii) *Dependents*. CHAMPUS eligible dependents under this paragraph (b)(5) are those identified in paragraphs (b)(2)(i) (except former spouses) and (b)(2)(ii) of this section.

(iii) *Effective date*. The eligibility established by paragraphs (b)(5)(i) and (ii) of this section shall begin on or after November 6, 2003, and shall be effective on the later of the date that is:

(A) The date of issuance of the order referred to in paragraph (b)(5)(i) of this section; or

(B) 180 days before the date on which the period of active duty is to begin.

(iv) *Termination date*. The eligibility established by paragraphs (b)(5)(i) and (ii) of this section ends upon entry of the member onto active duty (at which time CHAMPUS eligibility for the dependents of the member is established under paragraph (b)(2) of this section) or upon cancellation or amendment of the orders referred to in paragraph (b)(5)(i) of this section such that they no longer meet the requirements of that paragraph (b)(5)(i).

(c) *Beginning dates of eligibility*. (1) Beginning dates of eligibility depend on the class to which the individual belongs and the date the individual became a member of the class. Those who join after the class became eligible attain individual eligibility on the date they join.

(2) Beginning dates of eligibility for each class of spouse (*excluding spouses who are victims of abuse and eligible spouses of certain deceased reservists*) are as follows:

(i) A spouse of a member for:

(A) Medical benefits authorized by the Dependents' Medical Care Act of 1956, December 7, 1956;

(B) Outpatient medical benefits under the Basic Program, October 1, 1966;

(C) Inpatient medical benefits under the Basic Program *and* benefits under the Extended Care Health Option, January 1, 1967;

(ii) A spouse of a former member:

(A) For medical benefits under the Basic Program, January 1, 1967.

(B) Ineligible for benefits under the Extended Care Health Option.

(iii) A former spouse:

(A) For medical benefits under the Basic Program, dates of beginning eligibility are as indicated for each category of eligible former spouse identified within paragraph (b)(2)(i) of this section.

(B) Ineligible for benefits under the Extended Care Health Option.

(3) Beginning dates of eligibility for spouses who are victims of abuse (*excluding spouses who are victims of abuse of certain deceased reservists*) are as follows:

(i) An abused spouse meeting the requirements of paragraph (b)(2)(iii)(A)(*1*) of this section, including an eligible former spouse:

(A) For medical and dental care for problems associated with the physical or emotional abuse under the Basic Program for a period of up to one year (12 months) following the person's separation from the Uniformed Service, November 14, 1986.

(B) For all medical and dental benefits under the Basic Program for the period that the spouse is in receipt of transitional compensation under section 1059 of title 10 U.S.C., October 17, 1998.

(C) For medical and dental care for problems associated with the physical or emotional abuse under the Extended Care Health Option for a period up to one year (12 months) following the person's separation from the Uniformed Service, November 14, 1986.

(D) For all medical and dental benefits described in section 199.5 for the period that the spouse is in receipt of transitional compensation under section 1059 of title 10 U.S.C., October 17, 1998.

(ii) An abused spouse meeting the requirements of paragraphs (b)(2)(iii)(A)(*2*) of this section, including an eligible former spouse:

(A) For all benefits under the CHAMPUS Basic Program, October 23, 1992.

(B) Ineligible for benefits under the Extended Care Health Option.

(4) Beginning dates of eligibility for spouses of certain deceased reservists, *including spouses who are victims of abuse of certain deceased reservists*, are as follows:

(i) A spouse meeting the requirements of paragraph (b)(2)(i) of this section, including an eligible former spouse:

(A) For benefits under the Basic Program, November 14, 1986.

(B) Ineligible for benefits under the Extended Care Health Option.

(ii) An abused spouse of certain deceased reservists, meeting the requirements of paragraphs (b)(2)(iii) of this section, including an eligible former spouse, *for the limited benefits and period of eligibility* described in paragraphs (b)(2)(iii) of this section:

(A) For benefits under the Basic Program, November 14, 1986.

(B) For benefits under the Extended Care Health Option, November 14, 1986.

(iii) An abused spouse of certain deceased reservists, including an eligible former spouse, meeting the requirements of paragraphs (b)(2)(iii) of this section:

(A) For benefits under the Basic Program, October 23, 1992.

(B) Ineligible for benefits under the Extended Care Health Option.

(5) Beginning dates of eligibility for each class of dependent children, (*excluding dependent children of certain deceased reservists, abused children and incapacitated children whose incapacity occurred between the ages of 21 and 23 while enrolled in a full-time course of study in an institution of higher learning*), are as follows:

(i) Legitimate child, adopted child, or legitimate stepchild of a *member*, for:

(A) Medical benefits authorized by the Dependents' Medical Care Act of 1956, December 7, 1956;

(B) Outpatient medical benefits under the Basic Program, October 1, 1966;

(C) Inpatient medical benefits under the Basic Program *and* benefits under

the Extended Care Health Option, January 1, 1967;

(ii) Legitimate child, adopted child or legitimate stepchild of *former members*:

(A) For medical benefits under the Basic Program, January 1, 1967.

(B) Ineligible for benefits under the Extended Care Health Option.

(iii) Illegitimate child of a male or female *member or former member* whose paternity/maternity has been determined judicially and the member or former member has been directed to support the child, for:

(A) All benefits for which otherwise entitled, August 31, 1972.

(B) Extended Care Health Option benefits limited to dependent children of *members* only, August 31, 1972.

(iv) Illegitimate child of:

(A) A male member or former member whose paternity *has not been* determined judicially:

(B) A female member or former member who resides with, or in a home provided by the member or former member, or who was residing in a home provided by the member or former member at the time of the member's or former member's death, and who is or continues to be dependent on the member for over one-half of his or her support, or was so dependent on the member or former member at the time of death;

(C) A spouse of a member or former member who resides with or in a home provided by the member or former member, or the parent who is the spouse of the member or former member or was the spouse of a member or former member at the time of death, and who is and continues to be dependent upon the member or former member for over one-half of his or her support, or was so dependent on the member or former member at the time of death; for:

(*1*) All benefits for which otherwise eligible, January 1, 1969.

(*2*) Extended Care Health Option limited to dependent children of *members* only, January 1, 1969.

(6) Beginning dates of eligibility for children of certain deceased reservists who meet the requirements of paragraph (b)(2)(ii)(H)(*3*) of this section, *excluding incapacitated children* who meet the requirements of paragraph (b)(2)(ii)(H)(*2*) of this section, for:

(i) Benefits under the Basic program, November 14, 1986.

(ii) Not eligible for benefits under the Extended Care Health Option.

(7) Beginning dates of eligibility for children who are victims of abuse, *including incapacitated children* who meet the requirements of paragraph (b)(2)(ii)(H)(*2*) of this section are as follows:

(i) An abused child meeting the requirements of paragraph (b)(*2*)(iii)(A)(*1*) of this section:

(A) Medical and dental care for problems associated with the physical or emotional abuse under the Basic Program for a period of up to one year (12 months) following the person's separation from the Uniformed Service, November 14, 1986.

(B) For all medical and dental benefits under the Basic Program for the period that the child is in receipt of transitional compensation under section 1059 of title 10 U.S.C., October 17, 1998.

(C) Medical and dental care for problems associated with the physical or emotional abuse under the Extended Care Health Option for a period up to one year (12 months) following the person's separation from the Uniformed Service, November 14, 1986.

(D) For all medical and dental benefits described in section 199.5 for the period that the child is in receipt of transitional compensation under section 1059 of title 10 U.S.C., October 17, 1998.

(ii) An abused child meeting the requirements of paragraphs (b)(2)(iii)(A)(*2*) of this section:

(A) For all benefits under the CHAMPUS Basic Program, October 23, 1992.

(B) Ineligible for benefits under the Extended Care Health Option.

(8) Beginning dates of eligibility for incapacitated children who meet the requirements of paragraph (b)(2)(ii)(H)(*2*) of this section, whose incapacity occurred between the ages of 21 and 23 while enrolled in a full-time course of study in an institution of higher learning approved by the Administering Secretary or the Department of Education, and, are or were at

the time of the member's or former member's death, dependent on the member or former member for over one-half of their support, for:

(i) All benefits for which otherwise entitled, October 23, 1992.

(ii) Extended Care Health Option benefits limited to children of *members* only, October 23, 1992.

(9) Beginning dates of eligibility for a child who meets the requirements of paragraph (b)(2)(ii)(H)(*4*) and:

(i) Has been placed in custody by a court:

(A) All benefits for which entitled, July 1, 1994.

(B) Extended Care Health Option benefits limited to children of *members* only, July 1, 1994.

(ii) Has been placed in custody by a recognized adoption agency:

(A) All benefits for which entitled, October 5, 1994.

(B) Extended Care Health Option benefits limited to children of *members* only, October 5, 1994.

(iii) Has been placed in the home of a member by a placement agency or by any other source authorized by State or local law to provide adoption placement, in anticipation of the legal adoption of the member:

(A) All benefits for which entitled, January 6, 2006.

(B) Extended Care Health Option benefits limited to children of members only, January 6, 2006.

(10) Beginning dates of eligibility for a retiree for:

(i) Medical benefits under the Basic Program January 1, 1967.

(ii) Retirees and their dependents are not eligible for benefits under the Extended Care Health Option.

(d) *Dual eligibility*. Dual eligibility occurs when a person is entitled to benefits from two sources. For example, when an active duty member is also the dependent of another active duty member, a retiree, or a deceased active duty member or retiree, dual eligibility, that is, entitlement to direct care from the Uniformed Services medical care system and CHAMPUS is the result. Since the active duty status is primary, and it is the intent that all medical care be provided an active duty member through the Uniformed Services medical care system, CHAMPUS eligibility is terminated as of 12:01 a.m. on the day following the day the dual eligibility begins. However, any dependent children in a marriage of two active duty persons or of an active duty member and a retiree, are CHAMPUS eligible in the same manner as dependent children of a marriage involving only one CHAMPUS sponsor. Should a spouse or dependent who has dual eligibility leave active duty status, that person's CHAMPUS eligibility is reinstated as of 12:01 a.m. of the day active duty ends, if he or she otherwise is eligible as a dependent of a CHAMPUS sponsor.

NOTE: No CHAMPUS eligibility arises as the result of the marriage of two active duty members.

(e) *Eligibility under the Transitional Assistance Management Program (TAMP)*. (1) A member of the armed forces is eligible for transitional health care if the member is:

(i) A member who is involuntarily separated from active duty.

(ii) A member of a Reserve component who is separated from active duty to which called or ordered in support of a contingency operation if the active duty is active duty for a period of more than 30 consecutive days.

(iii) A member who is separated from active duty for which the member is involuntarily retained under 10 U.S.C. 12305 in support of a contingency operation; or

(iv) A member who is separated from active duty served pursuant to a voluntary agreement of the member to remain on active duty for a period of less than 1 year in support of a contingency operation.

(v) A member who receives a sole survivorship discharge (as defined in section 1174(i) of this title).

(vi) A member who is separated from Active Duty who agrees to become a member of the Selected Reserve of the Ready Reserve of a reserve component.

(2) A spouse (as described in paragraph (b)(2)(i) of this section except former spouses) and child (as described in paragraph (b)(2)(ii) of this section) of a member described in paragraph (e)(1) of this section is also eligible for TAMP benefits under TRICARE.

(3) TAMP benefits under TRICARE begin on the day after the member is

separated from active duty, and, if such separation occurred on or after November 6, 2003, end 180 days after such date. TRICARE benefits available to both the member and eligible family members are generally those available to family members of members of the uniformed services under this Part. However, during TAMP eligibility, a member of a Reserve Component as described in paragraph (e)(1)(ii) of this section, is entitled to dental care to which a member of the uniformed services on active duty for more than 30 days is entitled. Each branch of service will determine eligibility for its members and eligible family members and provide data to DEERS.

(f) *Changes in status which result in termination of CHAMPUS eligibility.* Changes in status which result in a loss of CHAMPUS eligibility as of 12:01 a.m. of the day following the day the event occurred, unless otherwise indicated, are as follows:

(1) *Changes in the status of a member.* (i) When an active duty member's period of active duty ends, excluding retirement or death.

(ii) When an active duty member is placed on desertion status (eligibility is reinstated when the active duty member is removed from desertion status and returned to military control).

NOTE: A member serving a sentence of confinement in conjunction with a sentence of punitive discharge is still considered on active duty until such time as the discharge is executed.

(2) *Changes in the status of a retiree.* (i) When a retiree ceases to be entitled to retired, retainer, or equivalent pay for any reason, the retiree's dependents lose their eligibility unless the dependent is otherwise eligible (e.g., some former spouses, some dependents who are victims of abuse and some incapacitated children as outlined in paragraph (b)(2)(ii)(H)(*2*) of this section).

(ii) A retiree also loses eligibility when no longer entitled to retired, retainer, or equivalent pay.

NOTE: A retiree who waives his or her retired, retainer or equivalent pay is still considered a retiree for the purposes of CHAMPUS eligibility.

(iii) Attainment of entitlement to hospital insurance benefits (Part A) under Medicare except as provided in paragraphs (b)(3), (f)(3)(vii), (f)(3)(viii) and (f)(3)(ix) of this section.

(3) *Changes in the status of a dependent.* (i) Divorce, except for certain classes of former spouses as provided in paragraph (b)(2)(i) of this section and the member or former member's *own* children (i.e., legitimate, adopted, and judicially determined illegitimate children).

NOTE: An unadopted stepchild loses eligibility as of 12:01 a.m. of the day following the day the divorce becomes final.

(ii) Annulment, except for certain classes of former spouse as provided in paragraph (b)(2)(i) of this section and the member or former member's *own* children (i.e., legitimate, adopted, and judicially determined illegitimate children).

NOTE: An unadopted stepchild loses eligibility as of 12:01 a.m. of the day following the day the annulment becomes final.

(iii) Adoption, except for adoptions occurring after the death of a member or former member.

(iv) Marriage of a child, except when the marriage is terminated by death, divorce, or annulment before the child is 21 or 23 if an incapacitated child as provided in paragraph (b)(2)(ii)(H)(*2*) of this section.

(v) Marriage of a widow or widower, except for the child of the widow or widower who was the stepchild of the deceased member or former member at the time of death. The stepchild continues CHAMPUS eligibility as other classes of dependent children.

(vi) Attainment of entitlement to hospital insurance benefits (Part A) under Medicare except as provided in paragraphs (b)(3), (f)(3)(vii), (f)(3)(viii), and (f)(3)(ix) of this section. (This also applies to individuals living outside the United States where Medicare benefits are not available.)

(vii) Attainment of age 65, except for dependents of active duty members, beneficiaries not entitled to part A of Medicare, beneficiaries entitled to Part A of Medicare who have enrolled in Part B of Medicare, and as provided in paragraph (b)(3) of this section. For those who do not retain CHAMPUS, CHAMPUS eligibility is lost at 12:01 a.m. on the first day of the month in

which the beneficiary becomes entitled to Medicare.

NOTE: If the person is not eligible for Part A of Medicare, he or she must file a Social Security Administration, ''Notice of Disallowance'' certifying to that fact with the Uniformed Service responsible for the issuance of his or her identification card so a new card showing CHAMPUS eligibility can be issued. Individuals entitled only to supplementary medical insurance (Part B) of Medicare, but not Part A, or Part A through the Premium HI provisions (provided for under the 1972 Amendments to the Social Security Act) retain eligibility under CHAMPUS (refer to §199.8 for additional information when a double coverage situation is involved).

(viii) End stage renal disease. All beneficiaries, except dependents of active duty members, lose their CHAMPUS eligibility when Medicare coverage becomes available to a person because of chronic renal disease unless the following conditions have been met. CHAMPUS eligibility will continue if:

(A) The individual is under 65 years old;

(B) The individual became eligible for Medicare under the provisions of 42 U.S.C. 426–1(a);

(C) The individual is enrolled in Part B of Medicare; and

(D) The individual has applied and qualified for continued CHAMPUS eligibility through the Defense Enrollment Eligibility Reporting System (DEERS).

(ix) Individuals with certain disabilities. Each case relating to Medicare eligibility resulting from being disabled requires individual investigation. All beneficiaries except dependents of active duty members lose their CHAMPUS eligibility when Medicare coverage becomes available to a disabled person unless the following conditions have been met. CHAMPUS eligibility will continue if:

(A) The individual is under 65 years old;

(B) The individual became eligible for Medicare under the provisions of 42 U.S.C. 426(b)(2);

(C) The individual is enrolled in Part B of Medicare except that in the case of a retroactive determination of entitlement to Medicare Part A hospital insurance benefits for a person under 65 years of age there is no requirement to enroll in Medicare Part B from the Medicare Part A entitlement date until the issuance of such retroactive determination; and

(D) The individual has applied and qualified for continued CHAMPUS eligibility through the Defense Enrollment Eligibility Reporting System (DEERS).

(x) Disabled students, that is children age 21 or 22, who are pursuing a full-time course of higher education and who, either during the school year or between semesters, suffer a disabling illness or injury with resultant inability to resume attendance at the institution remain eligible for CHAMPUS medical benefits for 6 months after the disability is removed or until the student passes his or her 23rd birthday, whichever occurs first. However, if recovery occurs before the 23rd birthday and there is resumption of a full-time course of higher education, CHAMPUS benefits can be continued until the 23rd birthday. The normal vacation periods during an established school year do not change the eligibility status of a dependent child 21 or 22 years old in a full time student status. Unless an incapacitating condition existed before, and at the time of, a dependent child's 21st birthday, a dependent child 21 or 22 years old in student status *does not* have eligibility and *may not* qualify for eligibility under the requirements related to mental or physical incapacity as described in paragraph (b)(2)(ii)(H)(*2*) of this section.

(g) *Reinstatement of CHAMPUS eligibility*. Circumstances which result in reinstatement of CHAMPUS eligibility are as follows:

(1) *End Stage renal disease*. Unless CHAMPUS eligibility has been continued under paragraph (f)(3)(viii) of the section, when Medicare eligibility ceases for end-stage renal disease patients, CHAMPUS eligibility resumes if the person is otherwise still eligible. He or she is required to take action to be reinstated as a CHAMPUS beneficiary and to obtain a new identification card.

(2) *Disability*. Some disabilities are permanent, others temporary. Each case must be reviewed individually. Unless CHAMPUS eligibility has been

continued under paragraph (f)(3)(ix) of this section, when disability ends and Medicare eligibility ceases, CHAMPUS eligibility resumes if the person is otherwise still eligible. Again, he or she is required to take action to obtain a new CHAMPUS identification card.

(3) *Enrollment in Medicare Part B.* For individuals whose CHAMPUS eligibility has terminated pursuant to paragraph (f)(2)(iii) or (f)(3)(vi) of this section due to beneficiary action to decline Part B of Medicare, CHAMPUS eligibility resumes, effective on the date Medicare Part B coverage begins, if the person subsequently enrolls in Medicare Part B and the person is otherwise still eligible.

(h) *Determination of eligibility status.* Determination of an individual's eligibility as a CHAMPUS beneficiary is the primary responsibility of the Uniformed Service in which the member or former member is, or was, a member, or in the case of dependents of a NATO military member, the Service that sponsors the NATO member. For the purpose of program integrity, the appropriate Uniformed Service shall, upon request of the Director, OCHAMPUS, review the eligibility of a specific person when there is reason to question the eligibility status. In such cases, a report on the results of the review and any action taken will be submitted to the Director, OCHAMPUS, or a designee.

(i) *Procedures for determination of eligibility.* Procedures for the determination of eligibility are prescribed within the Department of Defense Instruction 1000.13 available at local military facilities personnel offices.

(j) *CHAMPUS procedures for verification of eligibility.* (1) Eligibility for CHAMPUS benefits will be verified through the Defense Enrollment Eligibility Reporting System (DEERS) maintained by the Uniformed Services, except for abused dependents as set forth in paragraph (b)(2)(iii) of this section. It is the responsibility of the CHAMPUS beneficiary, or parent, or legal representative, when appropriate, to provide the necessary evidence required for entry into the DEERS file to establish CHAMPUS eligibility and to ensure that all changes in status that may affect eligibility be reported immediately to the appropriate Uniformed Service for action.

(2) Ineligibility for CHAMPUS benefits may be presumed in the absence of prescribed eligibility evidence in the DEERS file.

(3) The Director, OCHAMPUS, shall issue guidelines as necessary to implement the provisions of this section.

[64 FR 46135, Aug. 24, 1999, as amended at 66 FR 9654, Feb. 9, 2001; 66 FR 16400, Mar. 26, 2001; 66 FR 40606, Aug. 3, 2001; 67 FR 15725, Apr. 3, 2002; 68 FR 23032, Apr. 30, 2003; 68 FR 32361, May 30, 2003; 69 FR 51564, Aug. 20, 2004; 69 FR 60554, Oct. 12, 2004; 70 FR 12802, Mar. 16, 2005; 72 FR 2447, Jan. 19, 2007; 75 FR 50883, Aug. 18, 2010; 76 FR 81367, Dec. 28, 2011; 77 FR 38176, June 27, 2012; 80 FR 55254, Sept. 15, 2015]

## § 199.4 Basic program benefits.

(a) *General.* The CHAMPUS Basic Program is essentially a supplemental program to the Uniformed Services direct medical care system. The Basic Program is similar to private insurance programs, and is designed to provide financial assistance to CHAMPUS beneficiaries for certain prescribed medical care obtained from civilian sources.

(1)(i) *Scope of benefits.* Subject to all applicable definitions, conditions, limitations, or exclusions specified in this part, the CHAMPUS Basic Program will pay for medically or psychologically necessary services and supplies required in the diagnosis and treatment of illness or injury, including maternity care and well-baby care. Benefits include specified medical services and supplies provided to eligible beneficiaries from authorized civilian sources such as hospitals, other authorized institutional providers, physicians, other authorized individual professional providers, and professional ambulance service, prescription drugs, authorized medical supplies, and rental or purchase of durable medical equipment.

(ii) *Impact of TRICARE program.* The basic program benefits set forth in this section are applicable to the basic CHAMPUS program. In areas in which the TRICARE program is implemented, certain provisions of § 199.17 will apply instead of the provisions of this section. In those areas, the provisions of § 199.17 will take precedence over any

provisions of this section with which they conflict.

(2) *Persons eligible for Basic Program benefits.* Persons eligible to receive the Basic Program benefits are set forth in § 199.3 of this part. Any person determined to be an eligible CHAMPUS beneficiary is eligible for Basic Program benefits.

(3) *Authority to act for CHAMPUS.* The authority to make benefit determinations and authorize the disbursement of funds under CHAMPUS is restricted to the Director, OCHAMPUS; designated OCHAMPUS staff; Director, OCHAMPUSEUR; or CHAMPUS fiscal intermediaries. No other persons or agents (such as physicians, staff members of hospitals, or CHAMPUS health benefits advisors) have such authority.

(4) *Status of patient controlling for purposes of cost-sharing.* Benefits for covered services and supplies described in this section will be extended either on an inpatient or outpatient cost-sharing basis in accordance with the status of the patient at the time the covered services and supplies were provided, unless otherwise specifically designated (such as for ambulance service or maternity care). For cost-sharing provisions, refer to paragraph (f) of this section.

(5) *Right to information.* As a condition precedent to the provision of benefits hereunder, OCHAMPUS or its CHAMPUS fiscal intermediaries shall be entitled to receive information from a physician or hospital or other person, institution, or organization (including a local, state, or U.S. Government agency) providing services or supplies to the beneficiary for which claims or requests for approval for benefits are submitted. Such information and records may relate to the attendance, testing, monitoring, or examination or diagnosis of, or treatment rendered, or services and supplies furnished to a beneficiary, and shall be necessary for the accurate and efficient administration of CHAMPUS benefits. Before a determination will be made on a request for preauthorization or claim of benefits, a beneficiary or sponsor must provide particular additional information relevant to the requested determination, when necessary. The recipient of such information shall in every case hold such records confidential except when:

(i) Disclosure of such information is authorized specifically by the beneficiary;

(ii) Disclosure is necessary to permit authorized governmental officials to investigate and prosecute criminal actions, or

(iii) Disclosure is authorized or required specifically under the terms of the Privacy Act or Freedom of Information Act (refer to § 199.1(m) of this part).

For the purposes of determining the applicability of and implementing the provisions of §§ 199.8, 199.11, and 199.12, or any provision of similar purpose of any other medical benefits coverage or entitlement, OCHAMPUS or CHAMPUS fiscal intermediaries may release, without consent or notice to any beneficiary or sponsor, to any person, organization, government agency, provider, or other entity any information with respect to any beneficiary when such release constitutes a routine use published in the FEDERAL REGISTER in accordance with DoD 5400.11–R (Privacy Act (5 U.S.C. 552a)). Before a person's claim of benefits will be adjudicated, the person must furnish to CHAMPUS information that reasonably may be expected to be in his or her possession and that is necessary to make the benefit determination. Failure to provide the requested information may result in denial of the claim.

(6) *Physical examinations.* The Director, OCHAMPUS, or a designee, may require a beneficiary to submit to one or more medical (including psychiatric) examinations to determine the beneficiary's entitlement to benefits for which application has been made or for otherwise authorized medically necessary services and supplies required in the diagnosis or treatment of an illness or injury (including maternity and well-baby care). When a medical examination has been requested, CHAMPUS will withhold payment of any pending claims or preauthorization requests on that particular beneficiary. If the beneficiary refuses to agree to the requested medical examination, or unless prevented by a medical reason acceptable to OCHAMPUS, the examination is not

performed within 90 days of initial request, all pending claims for services and supplies will be denied. A denial of payments for services or supplies provided before (and related to) the request for a physical examination is not subject to reconsideration. The medical examination and required beneficiary travel related to performing the requested medical examination will be at the expense of CHAMPUS. The medical examination may be performed by a physician in a Uniformed Services medical facility or by an appropriate civilian physician, as determined and selected by the Director, OCHAMPUS, or a designee who is responsible for making such arrangements as are necessary, including necessary travel arrangements.

(7) *Claims filing deadline.* For all services provided on or after January 1, 1993, to be considered for benefits, all claims submitted for benefits must, except as provided in § 199.7, be filed with the appropriate CHAMPUS contractor no later than one year after the services are provided. Unless the requirement is waived, failure to file a claim within this deadline waives all rights to benefits for such services or supplies.

(8) *Double coverage and third party recoveries.* CHAMPUS claims involving double coverage or the possibility that the United States can recover all or a part of its expenses from a third party, are specifically subject to the provisions of § 199.8 or § 199.12 of this part as appropriate.

(9) *Nonavailability Statements within a 40-mile catchment area.* Unless required by action of the Assistant Secretary of Defense for Health Affairs (ASD(HA)) under this paragraph (a)(9), nonavailability statements are not required. If they are required by ASD(HA) action, in some geographic locations, CHAMPUS beneficiaries not enrolled in TRICARE Prime may be required to obtain a nonavailability statement from a military medical treatment facility in order to receive specifically identified health care services from a civilian provider. If the required care cannot be provided through the Uniformed Service facility, the hospital commander, or a designee, will issue a Nonavailability Statement (NAS) (DD Form 1251). Failure to secure such a statement may waive the beneficiary's rights to benefits under CHAMPUS/TRICARE.

(i) With the exception of maternity services, the ASD(HA) may require an NAS prior to TRICARE cost-sharing for additional services from civilian sources if such services are to be provided to a beneficiary who lives within a 40-mile catchment area of an MTF where such services are available and the ASD(HA):

(A) Demonstrates that significant costs would be avoided by performing specific procedures at the affected MTF or MTFs; or

(B) Determines that a specific procedure must be provided at the affected MTF or MTFs to ensure the proficiency levels of the practitioners at the MTF or MTFs; or

(C) Determines that the lack of NAS data would significantly interfere with TRICARE contract administration; and

(D) Provides notification of the ASD(HA)'s intent to require an NAS under this authority to covered beneficiaries who receive care at the MTF or MTFs that will be affected by the decision to require an NAS under this authority; and

(E) Provides at least 60-day notification to the Committees on Armed Services of the House of Representatives and the Senate of the ASD(HA)'s intent to require an NAS under this authority, the reason for the NAS requirement, and the date that an NAS will be required.

(ii) Rules in effect at the time civilian medical care is provided apply. The applicable rules and regulations regarding Nonavailability Statements in effect at the time the civilian care is rendered apply in determining whether a NAS is required.

(iii) The Director, TMA is responsible for issuing the procedural rules and regulations regarding Nonavailability Statements. Such rules and regulations should address:

(A) When and for what services a NAS is required. However, a NAS may not be required for services otherwise available at an MTF located within a 40-mile radius of the beneficiary's residence when another insurance plan or

program provides the beneficiary's primary coverage for the services. This requirement for an NAS does not apply to beneficiaries enrolled in TRICARE Prime, even when those beneficiaries use the point-of-service option under §199.17(n)(3) of this part; and

(B) When and how notifications will be made to a beneficiary who is not enrolled in TRICARE Prime as to whether or not he or she resides in a geographic area that requires obtaining a NAS; and

(C) What information relating to claims submissions, including the documentation, if any, that is required to document that a valid NAS was issued. However, when documentation of a NAS is required, then that documentation shall be valid for the adjudication of CHAMPUS claims for all related care otherwise authorized by this part which is received from a civilian source while the beneficiary resided within the Uniformed Service facility catchment area which issued the NAS.

(iv) In the case of any service subject to a NAS requirement under this paragraph (a)(9) and also subject to a preadmission (or other pre-service) authorization requirement under §199.4 or §199.15 of this part, the administrative processes for the NAS and pre-service authorization may be combined.

(10) [Reserved]

(11) Quality and Utilization Review Peer Review Organization program. All benefits under the CHAMPUS program are subject to review under the CHAMPUS Quality and Utilization Review Peer Review Organization program pursuant to Sec 199.15.

(12) [Reserved]

(13) *Implementing instructions*. The Director, OCHAMPUS shall issue policies, procedures, instructions, guidelines, standards and/or criteria to implement this section.

(14) *Confidentiality of substance use disorder treatment*. Release of any patient identifying information, including that required to adjudicate a claim, must comply with the provisions of section 543 of the Public Health Service Act, as amended, (42 U.S.C. 290dd-2), and implementing regulations at 42 CFR part 2, which governs the release of medical and other information from the records of patients undergoing treatment of substance use disorder. If the patient refuses to authorize the release of medical records which are, in the opinion of the Director, Defense Health Agency, or a designee, necessary to determine benefits on a claim for treatment of substance use disorder, the claim will be denied.

(b) *Institutional benefits*—(1) *General*. Services and supplies provided by an institutional provider authorized as set forth in §199.6 may be cost-shared only when such services or supplies: are otherwise authorized by this part; are medically necessary; are ordered, directed, prescribed, or delivered by an OCHAMPUS-authorized individual professional provider as set forth in §199.6 or by an employee of the authorized institutional provider who is otherwise eligible to be a CHAMPUS authorized individual professional provider; are delivered in accordance with generally accepted norms for clinical practice in the United States; meet established quality standards; and comply with applicable definitions, conditions, limitations, exceptions, or exclusions as otherwise set forth in this part.

(i) *Billing practices*. To be considered for benefits under §199.4(b), covered services and supplies must be provided and billed for by a hospital or other authorized institutional provider. Such billings must be fully itemized and sufficiently descriptive to permit CHAMPUS to determine whether benefits are authorized by this part. Depending on the individual circumstances, teaching physician services may be considered an institutional benefit in accordance with §199.4(b) or a professional benefit under §199.4(c). See paragraph (c)(3)(xiii) of this section for the CHAMPUS requirements regarding teaching physicians. In the case of continuous care, claims shall be submitted to the appropriate CHAMPUS fiscal intermediary at least every 30 days either by the beneficiary or sponsor or, on a participating basis, directly by the facility on behalf of the beneficiary (refer to §199.7).

(ii) *Successive inpatient admissions*. Successive inpatient admissions shall be deemed one inpatient confinement for the purpose of computing the active duty dependent's share of the inpatient institutional charges, provided not

more than 60 days have elapsed between the successive admissions, except that successive inpatient admissions related to a single maternity episode shall be considered one confinement, regardless of the number of days between admissions. For the purpose of applying benefits, successive admissions will be determined separately for maternity admissions and admissions related to an accidental injury (refer to § 199.4(f)).

(iii) *Related services and supplies.* Covered services and supplies must be rendered in connection with and related directly to a covered diagnosis or definitive set of symptoms requiring otherwise authorized medically necessary treatment.

(iv) *Inpatient, appropriate level required.* For purposes of inpatient care, the level of institutional care for which Basic Program benefits may be extended must be at the appropriate level required to provide the medically necessary treatment except for patients requiring skilled nursing facility care. For patients for whom skilled nursing facility care is adequate, but is not available in the general locality, benefits may be continued in the higher level care facility. General locality means an area that includes all the skilled nursing facilities within 50 miles of the higher level facility, unless the higher level facility can demonstrate that the skilled nursing facilities are inaccessible to its patients. The decision as to whether a skilled nursing facility is within the higher level facility's general locality, or the skilled nursing facility is inaccessible to the higher level facility's patients shall be a CHAMPUS contractor initial determination for the purposes of appeal under § 199.10 of this part. CHAMPUS institutional benefit payments shall be limited to the allowable cost that would have been incurred in the skilled nursing facility, as determined by the Director, OCHAMPUS, or a designee. If it is determined that the institutional care can be provided reasonably in the home setting, no CHAMPUS institutional benefits are payable.

(v) *General or special education not covered.* Services and supplies related to the provision of either regular or special education generally are not covered. Such exclusion applies whether a separate charge is made for education or whether it is included as a part of an overall combined daily charge of an institution. In the latter instance, that portion of the overall combined daily charge related to education must be determined, based on the allowable costs of the educational component, and deleted from the institution's charges before CHAMPUS benefits can be extended. The only exception is when appropriate education is not available from or not payable by the cognizant public entity. Each case must be referred to the Director, OCHAMPUS, or a designee, for review and a determination of the applicability of CHAMPUS benefits.

(vi) *Substance use disorder treatment exclusions.* (A) The programmed use of physical measures, such as electric shock, alcohol, or other drugs as negative reinforcement (aversion therapy) is not covered, even if recommended by a physician.

(B) *Domiciliary settings.* Domiciliary facilities generally referred to as halfway or quarterway houses are not authorized providers and charges for services provided by these facilities are not covered.

(2) *Covered hospital services and supplies*—(i) *Room and board.* Includes special diets, laundry services, and other general housekeeping support services (inpatient only).

(ii) *General staff nursing services.*

(iii) *ICU.* Includes specialized units, such as for respiratory conditions, cardiac surgery, coronary care, burn care, or neurosurgery (inpatient only).

(iv) *Operating room, recovery room.* Operating room and recovery room, including other special treatment rooms and equipment, and hyperbaric chamber.

(v) *Drugs and medicines.* Includes sera, biologicals, and pharmaceutical preparations (including insulin) that are listed in the official formularies of the institution or facility at the time of use. (To be considered as an inpatient supply, drugs and medicines must be consumed during the specific period the beneficiary is a registered inpatient. Drugs and medicines prescribed for use outside the hospital, even

though prescribed and obtained while still a registered inpatient, will be considered outpatient supplies and the provisions of paragraph (d) of this section will apply.)

(vi) *Durable medical equipment, medical supplies, and dressings.* Includes durable medical equipment, medical supplies essential to a surgical procedure (such as artificial heart valve and artificial ball and socket joint), sterile trays, casts, and orthopedic hardware. Use of durable medical equipment is restricted to an inpatient basis.

NOTE: If durable medical equipment is to be used on an outpatient basis or continued in outpatient status after use as an inpatient, benefits will be provided as set forth in paragraph (d) of this section and cost-sharing will be on an outpatient basis (refer to paragraph (a)(4) of this section).

(vii) *Diagnostic services.* Includes clinical laboratory examinations, x-ray examinations, pathological examinations, and machine tests that produce hard-copy results. Also includes CT scanning under certain limited conditions.

(viii) *Anesthesia.* Includes both the anesthetic agent and its administration.

(ix) *Blood.* Includes blood, plasma and its derivatives, including equipment and supplies, and its administration.

(x) *Radiation therapy.* Includes radioisotopes.

(xi) *Physical therapy.*

(xii) *Oxygen.* Includes equipment for its administration.

(xiii) *Intravenous injections.* Includes solution.

(xiv) *Shock therapy.*

(xv) *Chemotherapy.*

(xvi) *Renal and peritoneal dialysis.*

(xvii) *Psychological evaluation tests.* When required by the diagnosis.

(xviii) *Other medical services.* Includes such other medical services as may be authorized by the Director, OCHAMPUS, or a designee, provided they are related directly to the diagnosis or definitive set of symptoms and rendered by a member of the institution's medical or professional staff (either salaried or contractual) and billed for by the hospital.

(xix) *Medication assisted treatment.* Covered drugs and medicines for the treatment of substance use disorder include the substitution of a therapeutic drug, with addictive potential, for a drug addiction when medically or psychologically necessary and appropriate medical care for a beneficiary undergoing supervised treatment for a substance use disorder.

(xx) *Withdrawal management (detoxification).* For a beneficiary undergoing treatment for a substance use disorder, this includes management of a patient's withdrawal symptoms (detoxification).

(3) *Covered services and supplies provided by special medical treatment institutions or facilities, other than hospitals or RTCs*—(i) *Room and board.* Includes special diets, laundry services, and other general housekeeping support services (inpatient only).

(ii) *General staff nursing services.*

(iii) *Drugs and medicines.* Includes sera, biologicals, and pharmaceutical preparations (including insulin) that are listed in the official formularies of the institution or facility at the time of use. (To be considered as an inpatient supply, drugs and medicines must be consumed during the specific period the beneficiary is a registered inpatient. Drugs and medicines prescribed for use outside the authorized institutional provider, even though prescribed and obtained while still a registered inpatient, will be considered outpatient supplies and the provisions of paragraph (d) of this section will apply.).

(iv) *Durable medical equipment, medical supplies, and dressings.* Includes durable medical equipment, sterile trays, casts, orthopedic hardware and dressings. Use of durable medical equipment is restricted to an inpatient basis.

NOTE: If the durable medical equipment is to be used on an outpatient basis or continued in outpatient status after use as an inpatient, benefits will be provided as set forth in paragraph (d) of this section, and cost-sharing will be on an outpatient basis (refer to paragraph (a)(4) of this section).

(v) *Diagnostic services.* Includes clinical laboratory examinations, x-ray examinations, pathological examination, and machine tests that produce hard-copy results.

(vi) *Blood.* Includes blood, plasma and its derivatives, including equipment and supplies, and its administration.

(vii) *Physical therapy.*

(viii) *Oxygen*. Includes equipment for its administration.

(ix) *Intravenous injections*. Includes solution.

(x) *Shock therapy*.

(xi) *Chemotherapy*.

(xii) *Psychological evaluation tests*. When required by the diagnosis.

(xiii) *Renal and peritoneal dialysis*.

(xiv) *Skilled nursing facility (SNF) services*. Covered services in SNFs are the same as provided under Medicare under section 1861(h) and (i) of the Social Security Act (42 U.S.C. 1395x(h) and (i)) and 42 CFR part 409, subparts C and D, except that the Medicare limitation on the number of days of coverage under section 1812(a) and (b) of the Social Security Act (42 U.S.C. 1395d(a) and (b)) and 42 CFR 409.61(b) shall not be applicable under TRICARE. Skilled nursing facility care for each spell of illness shall continue to be provided for as long as medically necessary and appropriate. For a SNF admission to be covered under TRICARE, the beneficiary must have a qualifying hospital stay meaning an inpatient hospital stay of three consecutive days or more, not including the hospital leave day. (The three-day hospital stay requirement is waived for the duration of the President's national emergency for the coronavirus disease 2019 (COVID–19) outbreak.) The beneficiary must enter the SNF within 30 days of leaving the hospital, or within such time as it would be medically appropriate to begin an active course of treatment, where the individual's condition is such that SNF care would not be medically appropriate within 30 days after discharge from a hospital. The skilled services must be for a medical condition that was either treated during the qualifying three-day hospital stay, or started while the beneficiary was already receiving covered SNF care. Additionally, an individual shall be deemed not to have been discharged from a SNF, if within 30 days after discharge from a SNF, the individual is again admitted to a SNF. Adoption by TRICARE of most Medicare coverage standards does not include Medicare coinsurance amounts. Extended care services furnished to an inpatient of a SNF by such SNF (except as provided in paragraphs (b)(3)(xiv)(C), (b)(3)(xiv)(F), and (b)(3)(xiv)(G) of this section) include:

(A) Nursing care provided by or under the supervision of a registered professional nurse;

(B) Bed and board in connection with the furnishing of such nursing care;

(C) Physical or occupational therapy or speech-language pathology services furnished by the SNF or by others under arrangements with them by the facility;

(D) Medical social services;

(E) Such drugs, biological, supplies, appliances, and equipment, furnished for use in the SNF, as are ordinarily furnished for the care and treatment of inpatients;

(F) Medical services provided by an intern or resident-in-training of a hospital with which the facility has such an agreement in effect; and

(G) Such other services necessary to the health of the patients as are generally provided by SNFs, or by others under arrangements with them made by the facility.

(xv) *Other medical services*. Other medical services may be authorized by the Director, OCHAMPUS, or a designee, provided they are related directly to the diagnosis or definitive set of symptoms and rendered by a member of the institution's medical or professional staff (either salaried or contractual) and billed for by the authorized institutional provider of care.

(xvi) *Medication assisted treatment*. Covered drugs and medicines for the treatment of substance use disorder include the substitution of a therapeutic drug, with addictive potential, for a drug addiction when medically or psychologically necessary and appropriate medical care for a beneficiary undergoing supervised treatment for a substance use disorder.

(xvii) *Withdrawal management (detoxification)*. For a beneficiary undergoing treatment for a substance use disorder, this includes management of a patient's withdrawal symptoms (detoxification).

(4) *Services and supplies provided by RTCs*—(i) *Room and board*. Includes use of residential facilities such as food service (including special diets), laundry services, supervised reasonable recreational and social activity services,

and other general services as considered appropriate by the Director, OCHAMPUS, or a designee.

(ii) *Patient assessment.* Includes the assessment of each child or adolescent accepted by the RTC, including clinical consideration of each of his or her fundamental needs, that is, physical, psychological, chronological age, developmental level, family, educational, social, environmental, and recreational.

(iii) *Diagnostic services.* Includes clinical laboratory examinations, x-ray examinations, pathological examinations, and machine tests that produce hard-copy results.

(iv) *Psychological evaluation tests.*

(v) *Treatment of mental disorders.* Services and supplies that are medically or psychologically necessary to diagnose and treat the mental disorder for which the patient was admitted to the RTC. Covered services and requirements for qualifications of providers are as listed in paragraph (c)(3)(ix) of this section.

(vi) *Other necessary medical care.* Emergency medical services or other authorized medical care may be rendered by the RTC provided it is professionally capable of rendering such services and meets standards required by the Director, OCHAMPUS. It is intended, however, that CHAMPUS payments to an RTC should primarily cover those services and supplies directly related to the treatment of mental disorders that require residential care.

(vii) *Criteria for determining medical or psychological necessity.* In determining the medical or psychological necessity of services and supplies provided by RTCs, the evaluation conducted by the Director, OCHAMPUS (or designee) shall consider the appropriate level of care for the patient, the intensity of services required by the patient, and the availability of that care. In addition to the criteria set forth in this paragraph (b)(4) of this section, additional evaluation standards, consistent with such criteria, may be adopted by the Director, OCHAMPUS (or designee). RTC services and supplies shall not be considered medically or psychologically necessary unless, at a minimum, *all* the following criteria are clinically determined in the evaluation to be fully met:

(A) Patient has a diagnosable psychiatric disorder.

(B) Patient exhibits patterns of disruptive behavior with evidence of disturbances in family functioning or social relationships and persistent psychological and/or emotional disturbances.

(C) RTC services involve active clinical treatment under an individualized treatment plan that provides for:

(*1*) Specific level of care, and measurable goals/objectives relevant to each of the problems identified;

(*2*) Skilled interventions by qualified mental health professionals to assist the patient and/or family;

(*3*) Time frames for achieving proposed outcomes; and

(*4*) Evaluation of treatment progress to include timely reviews and updates as appropriate of the patient's treatment plan that reflects alterations in the treatment regimen, the measurable goals/objectives, and the level of care required for each of the patient's problems, and explanations of any failure to achieve the treatment goals/objectives.

(D) Unless therapeutically contraindicated, the family and/or guardian must actively participate in the continuing care of the patient either through direct involvement at the facility or geographically distant family therapy. (In the latter case, the treatment center must document that there has been collaboration with the family and/or guardian in all reviews.)

(5) *Extent of institutional benefits*—(i) *Inpatient room accommodations*—(A) *Semiprivate.* The allowable costs for room and board furnished an individual patient are payable for semiprivate accommodations in a hospital or other authorized institution, subject to appropriate cost-sharing provisions (refer to paragraph (f) of this section). A semiprivate accommodation is a room containing at least two beds. Therefore, if a room publicly is designated by the institution as a semiprivate accommodation and contains multiple beds, it qualifies as semiprivate for the purpose of CHAMPUS.

(B) *Private.* A room with one bed that is designated as a private room by the hospital or other authorized institutional provider. The allowable cost of a

private room accommodation is covered only under the following conditions:

(*1*) When its use is required medically and when the attending physician certifies that a private room is necessary medically for the proper care and treatment of a patient; or

(*2*) When a patient's medical condition requires isolation; or

(*3*) When a patient (in need of immediate inpatient care but not requiring a private room) is admitted to a hospital or other authorized institution that has semiprivate accommodations, but at the time of admission, such accommodations are occupied; or

(*4*) When a patient is admitted to an acute care hospital (general or special) without semiprivate rooms.

(C) *Duration of private room stay*. The allowable cost of private accommodations is covered under the circumstances described in paragraph (b)(5)(i)(B) of this section until the patient's condition no longer requires the private room for medical reasons or medical isolation; or, in the case of the patient not requiring a private room, when a semiprivate accommodation becomes available; or, in the case of an acute care hospital (general or special) which does not have semiprivate rooms, for the duration of an otherwise covered inpatient stay.

(D) *Hospital (except an acute care hospital, general or special) or other authorized institutional provider without semiprivate accommodations*. When a beneficiary is admitted to a hospital (except an acute care hospital, general or special) or other institution that has no semiprivate accommodations, for any inpatient day when the patient qualifies for use of a private room (as set forth in paragraphs (b)(5)(i)(B) (*1*) and (*2*) of this section) the allowable cost of private accommodations is covered. For any inpatient day in such a hospital or other authorized institution when the patient does not require medically the private room, the allowable cost of semiprivate accommodations is covered, such allowable costs to be determined by the Director, OCHAMPUS, or a designee.

(ii) *General staff nursing services*. General staff nursing services cover all nursing care (other than that provided by private duty nurses) including, but not limited to, general duty nursing, emergency room nursing, recovery room nursing, intensive nursing care, and group nursing arrangements. Only nursing services provided by nursing personnel on the payroll of the hospital or other authorized institution are eligible under paragraph (b) of this section. If a nurse who is not on the payroll of the hospital or other authorized institution is called in specifically to care for a single patient (individual nursing) or more than one patient (group nursing), whether the patient is billed for the nursing services directly or through the hospital or other institution, such services constitute private duty (special) nursing services and are not eligible for benefits under this paragraph (the provisions of paragraph (c)(2)(xv) of this section would apply).

(iii) *ICU*. An ICU is a special segregated unit of a hospital in which patients are concentrated, by reason of serious illness, usually without regard to diagnosis. Special lifesaving techniques and equipment are available regularly and immediately within the unit, and patients are under continuous observation by a nursing staff specially trained and selected for the care of this type of patient. The unit is maintained on a continuing, rather than an intermittent or temporary, basis. It is not a postoperative recovery room or a postanesthesia room. In some large or highly specialized hospitals, the ICUs may be refined further for special purposes, such as for respiratory conditions, cardiac surgery, coronary care, burn care, or neurosurgery. For purposes of CHAMPUS, these specialized units would be considered ICUs if they otherwise conformed to the definition of an ICU.

(iv) *Treatment rooms*. Standard treatment rooms include emergency rooms, operating rooms, recovery rooms, special treatment rooms, and hyperbaric chambers and all related necessary medical staff and equipment. To be recognized for purposes of CHAMPUS, treatment rooms must be so designated and maintained by the hospital or other authorized institutions on a continuing basis. A treatment room set up on an intermittent or temporary basis would not be so recognized.

(v) *Drugs and medicines.* Drugs and medicines are included as a supply of a hospital or other authorized institution only under the following conditions:

(A) They represent a cost to the facility rendering treatment;

(B) They are furnished to a patient receiving treatment, and are related directly to that treatment; and

(C) They are ordinarily furnished by the facility for the care and treatment of inpatients.

(vi) *Durable medical equipment, medical supplies, and dressings.* Durable medical equipment, medical supplies, and dressings are included as a supply of a hospital or other authorized institution only under the following conditions:

(A) If ordinarily furnished by the facility for the care and treatment of patients; and

(B) If specifically related to, and in connection with, the condition for which the patient is being treated; and

(C) If ordinarily furnished to a patient for use in the hospital or other authorized institution (except in the case of a temporary or disposable item); and

(D) Use of durable medical equipment is limited to those items provided while the patient is an inpatient. If such equipment is provided for use on an outpatient basis, the provisions of paragraph (d) of this section apply.

(vii) *Transitional use items.* Under certain circumstances, a temporary or disposable item may be provided for use beyond an inpatient stay, when such item is necessary medically to permit or facilitate the patient's departure from the hospital or other authorized institution, or which may be required until such time as the patient can obtain a continuing supply; or it would be unreasonable or impossible from a medical standpoint to discontinue the patient's use of the item at the time of termination of his or her stay as an inpatient.

(viii) *Anesthetics and oxygen.* Anesthetics and oxygen and their administration are considered a service or supply if furnished by the hospital or other authorized institution, or by others under arrangements made by the facility under which the billing for such services is made through the facility.

(6) *Inpatient mental health services.* Inpatient mental health services are those services furnished by institutional and professional providers for treatment of a nervous or mental disorder (as defined in §199.2) to a patient admitted to a CHAMPUS-authorized acute care general hospital; a psychiatric hospital; or, unless otherwise exempted, a special institutional provider.

(i) *Criteria for determining medical or psychological necessity.* In determining the medical or psychological necessity of acute inpatient mental health services, the evaluation conducted by the Director, OCHAMPUS (or designee) shall consider the appropriate level of care for the patient, the intensity of services required by the patient, and the availability of that care. The purpose of such acute inpatient care is to stabilize a life-threatening or severely disabling condition within the context of a brief, intensive model of inpatient care in order to permit management of the patient's condition at a less intensive level of care. Such care is appropriate only if the patient requires services of an intensity and nature that are generally recognized as being effectively and safely provided only in an acute inpatient hospital setting. In addition to the criteria set forth in this paragraph (b)(6) of this section, additional evaluation standards, consistent with such criteria, may be adopted by the Director, OCHAMPUS (or designee). Acute inpatient care shall not be considered necessary unless the patient needs to be observed and assessed on a 24-hour basis by skilled nursing staff, and/or requires continued intervention by a multidisciplinary treatment team; and in addition, at least one of the following criteria is determined to be met:

(A) Patient poses a serious risk of harm to self and/or others.

(B) Patient is in need of high dosage, intensive medication or somatic and/or psychological treatment, with potentially serious side effects.

(C) Patient has acute disturbances of mood, behavior, or thinking.

(ii) *Emergency admissions.* Admission to an acute inpatient hospital setting

may be on an emergency or on a nonemergency basis. In order for an admission to qualify as an emergency, the following criteria, in addition to those in paragraph (b)(6)(i) of this section, must be met:

(A) The patient must be at immediate risk of serious harm to self and or others based on a psychiatric evaluation performed by a physician (or other qualified mental health professional with hospital admission authority); and

(B) The patient requires immediate continuous skilled observation and treatment at the acute psychiatric level of care.

(iii)–(iv)[Reserved]

(7) *Emergency inpatient hospital services.* In the case of a medical emergency, benefits can be extended for medically necessary inpatient services and supplies provided to a beneficiary by a hospital, including hospitals that do not meet CHAMPUS standards or comply with the nondiscrimination requirements under title VI of the Civil Rights Act and other nondiscrimination laws applicable to recipients of federal financial assistance, or satisfy other conditions herein set forth. In a medical emergency, medically necessary inpatient services and supplies are those that are necessary to prevent the death or serious impairment of the health of the patient, and that, because of the threat to the life or health of the patient, necessitate, the use of the most accessible hospital available and equipped to furnish such services. Emergency services are covered when medically necessary for the active medical treatment of the acute phases of substance withdrawal (detoxification), for stabilization and for treatment of medical complications for substance use disorder. The availability of benefits depends upon the following three separate findings and continues only as long as the emergency exists, as determined by medical review. If the case qualified as an emergency at the time of admission to an unauthorized institutional provider and the emergency subsequently is determined no longer to exist, benefits will be extended up through the date of notice to the beneficiary and provider that CHAMPUS benefits no longer are payable in that hospital.

(i) *Existence of medical emergency.* A determination that a medical emergency existed with regard to the patient's condition;

(ii) *Immediate admission required.* A determination that the condition causing the medical emergency required immediate admission to a hospital to provide the emergency care; and

(iii) *Closest hospital utilized.* A determination that diagnosis or treatment was received at the most accessible (closest) hospital available and equipped to furnish the medically necessary care.

(8) *Residential treatment for substance use disorder*—(i) *In general.* Rehabilitative care, to include withdrawal management (detoxification), in an inpatient residential setting of an authorized hospital or substance use disorder rehabilitative facility, whether freestanding or hospital-based, is covered on a residential basis. The medical necessity for the management of withdrawal symptoms must be documented. Any withdrawal management (detoxification) services provided by the substance use disorder rehabilitation facility must be under general medical supervision.

(ii) *Criteria for determining medical or psychological necessity of residential treatment for substance use disorder.* Residential treatment for substance use disorder will be considered necessary only if all of the following conditions are present:

(A) The patient has been diagnosed with a substance use disorder.

(B) The patient is experiencing withdrawal symptoms or potential symptoms severe enough to require inpatient care and physician management, or who have less severe symptoms that require 24-hour inpatient monitoring or the patient's addiction-related symptoms, or concomitant physical and emotional/behavioral problems reflect persistent dysfunction in several major life areas.

(iii) *Services and supplies.* The following services and supplies are included in the per diem rate approved for an authorized residential treatment for substance use disorder.

(A) *Room and board.* Includes use of the residential treatment program facilities such as food service (including special diets), laundry services, supervised therapeutically constructed recreational and social activities, and other general services as considered appropriate by the Director, or a designee.

(B) *Patient assessment.* Includes the assessment of each individual accepted by the facility, and must, at a minimum, consist of a physical examination; psychiatric examination; psychological assessment; assessment of physiological, biological and cognitive processes; case management assessment; developmental assessment; family history and assessment; social history and assessment; educational or vocational history and assessment; environmental assessment; and recreational/activities assessment. Assessments conducted within 30 days prior to admission to a residential treatment program for substance use disorder (SUD) may be used if approved and deemed adequate to permit treatment planning by the residential treatment program for SUD.

(C) *Psychological testing.* Psychological testing is provided based on medical and psychological necessity.

(D) *Treatment services.* All services, supplies, equipment and space necessary to fulfill the requirements of each patient's individualized diagnosis and treatment plan. All mental health services must be provided by a TRICARE authorized individual professional provider of mental health services. [Exception: Residential treatment programs that employ individuals with master's or doctoral level degrees in a mental health discipline who do not meet the licensure, certification, and experience requirements for a qualified mental health provider but are actively working toward licensure or certification may provide services within the all-inclusive per diem rate, but such individuals must work under the clinical supervision of a fully qualified mental health provider employed by the facility.]

(iv) *Case management required.* The facility must provide case management that helps to assure arrangement of community based support services, referral of suspected child or elder abuse or domestic violence to the appropriate state agencies, and effective after care arrangements, at a minimum.

(v) *Professional mental health benefits.* Professional mental health benefits are billed separately from the residential treatment program per diem rate only when rendered by an attending, TRICARE authorized mental health professional who is not an employee of, or under contract with, the program for purposes of providing clinical patient care.

(vi) *Non-mental health related medical services.* Separate billing will be allowed for otherwise covered non-mental health related services.

(9) *Psychiatric and substance use disorder partial hospitalization services*—(i) *In general.* Partial hospitalization services are those services furnished by a TRICARE authorized partial hospitalization program and authorized mental health providers for the active treatment of a mental disorder. All services must follow a medical model and vest patient care under the general direction of a licensed TRICARE authorized physician employed by the partial hospitalization program to ensure medication and physical needs of all the patients are considered. The primary or attending provider must be a TRICARE authorized mental health provider (see paragraph (c)(3)(ix) of this section), operating within the scope of his/her license. These categories include physicians, clinical psychologists, certified psychiatric nurse specialists, clinical social workers, marriage and family counselors, TRICARE certified mental health counselors, pastoral counselors, and supervised mental health counselors. All categories practice independently except pastoral counselors and supervised mental health counselors who must practice under the supervision of TRICARE authorized physicians. Partial hospitalization services and interventions are provided at a high degree of intensity and restrictiveness of care, with medical supervision and medication management. Partial hospitalization services are covered as a basic program benefit only if they are provided in accordance with paragraph (b)(9) of this section. Such programs must enter into a participation agreement with

TRICARE; and be accredited and in substantial compliance with the specified standards of an accreditation organization approved by the Director.

(ii) *Criteria for determining medical or psychological necessity of psychiatric and SUD partial hospitalization services*. Partial hospitalization services will be considered necessary only if all of the following conditions are present:

(A) The patient is suffering significant impairment from a mental disorder (as defined in § 199.2) which interferes with age appropriate functioning or the patient is in need of rehabilitative services for the management of withdrawal symptoms from alcohol, sedative-hypnotics, opioids, or stimulants that require medically-monitored ambulatory detoxification, with direct access to medical services and clinically intensive programming of rehabilitative care based on individual treatment plans.

(B) The patient is unable to maintain himself or herself in the community, with appropriate support, at a sufficient level of functioning to permit an adequate course of therapy exclusively on an outpatient basis, to include outpatient treatment program, outpatient office visits, or intensive outpatient services (but is able, with appropriate support, to maintain a basic level of functioning to permit partial hospitalization services and presents no substantial imminent risk of harm to self or others). These patients require medical support; however, they do not require a 24-hour medical environment.

(C) The patient is in need of crisis stabilization, acute symptom reduction, treatment of partially stabilized mental health disorders, or services as a transition from an inpatient program.

(D) The admission into the partial hospitalization program is based on the development of an individualized diagnosis and treatment plan expected to be effective for that patient and permit treatment at a less intensive level.

(iii) *Services and supplies*. The following services and supplies are included in the per diem rate approved for an authorized partial hospitalization program:

(A) *Board*. Includes use of the partial hospital facilities such as food service, supervised therapeutically constructed recreational and social activities, and other general services as considered appropriate by the Director, or a designee.

(B) *Patient assessment*. Includes the assessment of each individual accepted by the facility, and must, at a minimum, consist of a physical examination; psychiatric examination; psychological assessment; assessment of physiological, biological and cognitive processes; case management assessment; developmental assessment; family history and assessment; social history and assessment; educational or vocational history and assessment; environmental assessment; and recreational/activities assessment. Assessments conducted within 30 days prior to admission to a partial program may be used if approved and deemed adequate to permit treatment planning by the partial hospital program.

(C) *Psychological testing. Treatment services*. All services, supplies, equipment and space necessary to fulfill the requirements of each patient's individualized diagnosis and treatment plan. All mental health services must be provided by a TRICARE authorized individual professional provider of mental health services. [Exception: partial hospitalization programs that employ individuals with master's or doctoral level degrees in a mental health discipline who do not meet the licensure, certification, and experience requirements for a qualified mental health provider but are actively working toward licensure or certification, may provide services within the all-inclusive per diem rate, but such individuals must work under the clinical supervision of a fully qualified mental health provider employed by the partial hospitalization program.]

(iv) *Case management required*. The facility must provide case management that helps to assure the patient appropriate living arrangements after treatment hours, transportation to and from the facility, arrangement of community based support services, referral of suspected child or elder abuse or domestic violence to the appropriate state agencies, and effective after care arrangements, at a minimum.

(v) *Educational services required.* Programs treating children and adolescents must ensure the provision of a state certified educational component which assures that patients do not fall behind in educational placement while receiving partial hospital treatment. CHAMPUS will not fund the cost of educational services separately from the per diem rate. The hours devoted to education do not count toward the therapeutic intensive outpatient program or full day program.

(vi) *Family therapy required.* The facility must ensure the provision of an active family therapy treatment component, which assures that each patient and family participate at least weekly in family therapy provided by the institution and rendered by a TRICARE authorized individual professional provider of mental health services. There is no acceptable substitute for family therapy. An exception to this requirement may be granted on a case-by-case basis by the Clinical Director, or designee, only if family therapy is clinically contraindicated.

(vii) *Professional mental health benefits.* Professional mental health benefits are billed separately from the partial hospitalization per diem rate only when rendered by an attending, TRICARE authorized mental health professional who is not an employee of, or under contract with, the partial hospitalization program for purposes of providing clinical patient care.

(viii) *Non-mental health related medical services.* Separate billing will be allowed for otherwise covered, non-mental health related medical services.

(10) *Intensive psychiatric and substance use disorder outpatient services*—(i) *In general.* Intensive outpatient services are those services furnished by a TRICARE authorized intensive outpatient program and qualified mental health provider(s) for the active treatment of a mental disorder, to include substance use disorder.

(ii) *Criteria for determining medical or psychological necessity of intensive outpatient services.* In determining the medical or psychological necessity of intensive outpatient services, the evaluation conducted by the Director, or designee, shall consider the appropriate level of care, based on the patient's clinical needs and characteristics matched to a service's structure and intensity. In addition to the criteria set for this paragraph (b)(10) of this section, additional evaluation standards, consistent with such criteria, may be adopted by the Director, or designee. Treatment in an intensive outpatient setting shall not be considered necessary unless the patient requires care that is more intensive than an outpatient treatment program or outpatient office visits and less intensive than inpatient psychiatric care or a partial hospital program. Intensive outpatient services will be considered necessary only if the following conditions are present:

(A) The patient is suffering significant impairment from a mental disorder, to include a substance use disorder (as defined in § 199.2), which interferes with age appropriate functioning. Patients receiving a higher intensity of treatment may be experiencing moderate to severe instability, exacerbation of severe/persistent disorder, or dangerousness with some risk of confinement. Patients receiving a lower intensity of treatment may be experiencing mild instability with limited dangerousness and low risk for confinement.

(B) The patient is unable to maintain himself or herself in the community, with appropriate support, at a sufficient level of functioning to permit an adequate course of therapy exclusively in an outpatient treatment program or an outpatient office basis (but is able, with appropriate support, to maintain a basic level of functioning to permit a level of intensive outpatient treatment and presents no substantial imminent risk of harm to self or others).

(C) The patient is in need of stabilization, symptom reduction, and prevention of relapse for chronic mental illness. The goal of maintenance of his or her functioning within the community cannot be met by outpatient office visits, but requires active treatment in a stable, staff-supported environment;

(D) The admission into the intensive outpatient program is based on the development of an individualized diagnosis and treatment plan expected to be effective for that patient and permit treatment at a less intensive level.

(iii) *Services and supplies*. The following services and supplies are included in the per diem rate approved for an authorized intensive outpatient program.

(A) *Patient assessment*. Includes the assessment of each individual accepted by the facility.

(B) *Treatment services*. All services, supplies, equipment, and space necessary to fulfill the requirements of each patient's individualized diagnosis and treatment plan. All mental health services must be provided by a TRICARE authorized individual qualified mental health provider. [Exception: Intensive outpatient programs that employ individuals with master's or doctoral level degrees in a mental health discipline who do not meet the licensure, certification, and experience requirements for a qualified mental health provider but are actively working toward licensure or certification, may provide services within the all-inclusive per diem rate but such individuals must work under the clinical supervision of a fully qualified mental health provider employed by the facility.]

(iv) *Case management*. When appropriate, and with the consent of the person served, the facility should coordinate the care, treatment, or services, including providing coordinated treatment with other services.

(v) *Professional mental health benefits*. Professional mental health benefits are billed separately from the intensive outpatient per diem rate only when rendered by an attending, TRICARE authorized qualified mental health provider who is not an employee of, or under contract with, the program for purposes of providing clinical patient care.

(vi) *Non-mental health related medical services*. Separate billing will be allowed for otherwise covered, non-mental health related medical services.

(11) *Opioid treatment programs*—(i) *In general*. Outpatient treatment and management of withdrawal symptoms for substance use disorder provided at a TRICARE authorized opioid treatment program are covered. If the patient is medically in need of management of withdrawal symptoms, but does not require the personnel or facilities of a general hospital setting, services for management of withdrawal symptoms are covered. The medical necessity for the management of withdrawal symptoms must be documented. Any services to manage withdrawal symptoms provided by the opioid treatment program must be under general medical supervision.

(ii) Criteria for determining medical or psychological necessity of an opioid treatment program are set forth in 42 CFR part 8.

(iii) *Services and supplies*. The following services and supplies are included in the reimbursement approved for an authorized opioid treatment program.

(A) *Patient assessment*. Includes the assessment of each individual accepted by the facility.

(B) *Treatment services*. All services, supplies, equipment, and space necessary to fulfill the requirements of each patient's individualized diagnosis and treatment plan. All mental health services must be provided by a TRICARE authorized individual professional provider of mental health services. [Exception: opioid treatment programs that employ individuals with degrees in a mental health discipline who do not meet the licensure, certification, and experience requirements for a qualified mental health provider but work under the clinical supervision of a fully qualified mental health provider employed by the facility.]

(iv) *Case management*. Care, treatment, or services should be coordinated among providers and between settings, independent of whether they are provided directly by the organization or by an organization or by an outside source, so that the individual's needs are addressed in a seamless, synchronized, and timely manner.

(c) *Professional services benefit*—(1) *General*. Benefits may be extended for those covered services described in paragraph (c) of this section that are provided in accordance with good medical practice and established standards of quality by physicians or other authorized individual professional providers, as set forth in § 199.6 of this part. Such benefits are subject to all applicable definitions, conditions, exceptions, limitations, or exclusions as

maybe otherwise set forth in this or other Sections of this part. Except as otherwise specifically authorized, to be considered for benefits under paragraph (c) of this section, the described services must be rendered by a physician, or prescribed, ordered, and referred medically by a physician to other authorized individual professional providers. Further, except under specifically defined circumstances, there should be an attending physician in any episode of care. (For example, certain services of a clinical psychologist are exempt from this requirement. For these exceptions, refer to § 199.6.)

(i) *Billing practices.* To be considered for benefits under paragraph (c) of this section, covered professional services must be performed personally by the physician or other authorized individual professional provider, who is other than a salaried or contractual staff member of a hospital or other authorized institution, and who ordinarily and customarily bills on a fee-for-service basis for professional services rendered. Such billings must be itemized fully and be sufficiently descriptive to permit CHAMPUS to determine whether benefits are authorized by this part. See paragraph (c)(3)(xiii) of this section for the requirements regarding the special circumstances for teaching physicians. For continuing professional care, claims should be submitted to the appropriate CHAMPUS fiscal intermediary at least every 30 days either by the beneficiary or sponsor, or directly by the physician or other authorized individual professional provider on behalf of a beneficiary (refer to § 199.7).

(ii) *Services must be related.* Covered professional services must be rendered in connection with and directly related to a covered diagnosis or definitive set of symptoms requiring medically necessary treatment.

(iii) *Telehealth services.* Health care services covered by TRICARE and provided through the use of telehealth modalities including telephone services for: telephonic office visits; telephonic consultations; electronic transmission of data or biotelemetry or remote physiologic monitoring services and supplies, are covered services to the same extent as if provided in person at the location of the patient if those services are medically necessary and appropriate for such modalities. The Director will establish special procedures for payment for such services. Additionally, where appropriate, in order to incentive the use of telehealth services, the Director may modify the otherwise applicable beneficiary cost-sharing requirements in paragraph (f) of this section which otherwise apply.

(2) *Covered services of physicians and other authorized profession providers.*

(i) *Surgery.* Surgery means operative procedures, including related preoperative and postoperative care; reduction of fractures and dislocations; injection and needling procedures of the joints; laser surgery of the eye; and the following procedures:

Bronchoscopy
Laryngoscopy
Thoracoscopy
Catheterization of the heart
Arteriograph thoracic lumbar
Esophagoscopy
Gastroscopy
Proctoscopy
Sigmoidoscopy
Peritoneoscopy
Cystoscopy
Colonscopy
Upper G.I. panendoscopy
Encephalograph
Myelography
Discography
Visualization of intracranial aneurysm by intracarotid injection of dye, with exposure of carotid artery, unilateral
Ventriculography
Insufflation of uterus and fallopian tubes for determination of tubal patency (Rubin's test of injection of radiopaque medium or for dilation)
Introduction of opaque media into the cranial arterial system, preliminary to cerebral arteriography, or into vertebral and subclavian systems
Intraspinal introduction of air preliminary to pneumoencephalography
Intraspinal introduction of opaque media preliminary to myelography
Intraventricular introduction of air preliminary to ventriculography

NOTE: The Director, OCHAMPUS, or a designee, shall determine such additional procedures that may fall within the intent of this definition of ''surgery.''

(ii) *Surgical assistance.*

(iii) *Inpatient medical services.*

(iv) *Outpatient medical services.*

(v) *Psychiatric services.*

(vi) *Consultation services.*

(vii) *Anesthesia services.*

(viii) *Radiation therapy services.*

(ix) *X-ray services.*

(x) *Laboratory and pathological services.*

(xi) *Physical medicine services or physiatry services.*

(xii) *Maternity care.*

(xiii) *Well-child care.*

(xiv) *Other medical care.* Other medical care includes, but is not limited to, hemodialysis, inhalation therapy, shock therapy, and chemotherapy. The Director, OCHAMPUS, or a designee, shall determine those additional medical services for which benefits may be extended under this paragraph.

NOTE: A separate professional charge for the oral administration of approved antineoplastic drugs is not covered.

(xv) [Reserved]

(xvi) *Routine eye examinations.* Coverage for routine eye examinations is limited to dependents of active duty members, to one examination per calendar year per person, and to services rendered on or after October 1, 1984, except as provided under paragraph (c)(3)(xi) of this section.

(3) *Extent of professional benefits—*

(i) *Multiple Surgery.* In cases of multiple surgical procedures performed during the same operative session, benefits shall be extended as follows:

(A) One hundred (100) percent of the CHAMPUS-determined allowable charge for the major surgical procedure (the procedure for which the greatest amount is payable under the applicable reimbursement method); and

(B) Fifty (50) percent of the CHAMPUS-determined allowable charge for each of the other surgical procedures;

(C) Except that:

(*1*) If the multiple surgical procedures include an incidental procedure, no benefits shall be allowed for the incidental procedure.

(*2*) If the multiple surgical procedures involve specific procedures identified by the Director, OCHAMPUS, benefits shall be limited as set forth in CHAMPUS instructions.

(ii) *Different types of inpatient care, concurrent.* If a beneficiary receives inpatient medical care during the same admission in which he or she also receives surgical care or maternity care, the beneficiary shall be entitled to the greater of the CHAMPUS-determined allowable charge for either the inpatient medical care or surgical or maternity care received, as the case may be, but not both; except that the provisions of this paragraph (c)(3)(ii) shall not apply if such inpatient medical care is for a diagnosed condition requiring inpatient medical care not related to the condition for which surgical care or maternity care is received, and is received from a physician other than the one rendering the surgical care or maternity care.

NOTE: This provision is not meant to imply that when extra time and special effort are required due to postsurgical or postdelivery complications, the attending physician may not request special consideration for a higher than usual charge.

(iii) *Need for surgical assistance.* Surgical assistance is payable only when the complexity of the procedure warrants a surgical assistant (other than the surgical nurse or other such operating room personnel), subject to utilization review. In order for benefits to be extended for surgical assistance service, the primary surgeon may be required to certify in writing to the nonavailability of a qualified intern, resident, or other house physician. When a claim is received for a surgical assistant involving the following circumstances, special review is required to ascertain whether the surgical assistance service meets the medical necessity and other requirements of paragraph (c) of this section.

(A) If the surgical assistance occurred in a hospital that has a residency program in a specialty appropriate to the surgery;

(B) If the surgery was performed by a team of surgeons;

(C) If there were multiple surgical assistants; or

(D) If the surgical assistant was a partner of or from the same group of practicing physicians as the attending surgeon.

(iv) *Aftercare following surgery.* Except for those diagnostic procedures classified as surgery in paragraph (c) of this

section, and injection and needling procedures involving the joints, the benefit payments made for surgery (regardless of the setting in which it is rendered) include normal aftercare, whether the aftercare is billed for by the physician or other authorized individual professional provider on a global, all-inclusive basis, or billed for separately.

(v) *Cast and sutures, removal.* The benefit payments made for the application of a cast or of sutures normally covers the postoperative care including the removal of the cast or sutures. When the application is made in one geographical location and the removal of the cast or sutures must be done in another geographical location, a separate benefit payment may be provided for the removal. The intent of this provision is to provide a separate benefit only when it is impracticable for the beneficiary to use the services of the provider that applied the cast originally. Benefits are not available for the services of a second provider if those services reasonably could have been rendered by the individual professional provider who applied the cast or sutures initially.

(vi) *Inpatient care, concurrent.* Concurrent inpatient care by more than one individual professional provider is covered if required because of the severity and complexity of the beneficiary's condition or because the beneficiary has multiple conditions that require treatment by providers of different specialties. Any claim for concurrent care must be reviewed before extending benefits in order to ascertain the condition of the beneficiary at the time the concurrent care was rendered. In the absence of such determination, benefits are payable only for inpatient care rendered by one attending physician or other authorized individual professional provider.

(vii) *Consultants who become the attending surgeon.* A consultation performed within 3 days of surgery by the attending physician is considered a preoperative examination. Preoperative examinations are an integral part of the surgery and a separate benefit is not payable for the consultation. If more than 3 days elapse between the consultation and surgery (performed by the same physician), benefits may be extended for the consultation, subject to review.

(viii) *Anesthesia administered by the attending physician.* A separate benefit is not payable for anesthesia administered by the attending physician (surgeon or obstetrician) or dentist, or by the surgical, obstetrical, or dental assistant.

(ix) *Treatment of mental disorders, to include substance use disorder.* In order to qualify for CHAMPUS mental health benefits, the patient must be diagnosed by a TRICARE authorized qualified mental health professional practicing within the scope of his or her license to be suffering from a mental disorder, as defined in § 199.2

(A) *Covered diagnostic and therapeutic services.* CHAMPUS benefits are payable for the following services when rendered in the diagnosis or treatment of a covered mental disorder by a TRICARE authorized qualified mental health provider practicing within the scope of his or her license. Qualified mental health providers are: Psychiatrists or other physicians; clinical psychologists, certified psychiatric nurse specialists, certified clinical social workers, certified marriage and family therapists, TRICARE certified mental health counselors, pastoral counselors under a physician's supervision, and supervised mental health counselors under a physician's supervision.

(*1*) *Individual psychotherapy, adult or child.* A covered individual psychotherapy session is no more than 60 minutes in length. An individual psychotherapy session of up to 120 minutes in length is payable for crisis intervention.

(*2*) *Group psychotherapy.* A covered group psychotherapy session is no more than 90 minutes in length.

(*3*) *Family or conjoint psychotherapy.* A covered family or conjoint psychotherapy session is no more than 90 minutes in length. A family or conjoint psychotherapy session of up to 180 minutes in length is payable for crisis intervention.

(*4*) *Psychoanalysis.* Psychoanalysis is covered when provided by a graduate or candidate of a psychoanalytic training institution recognized by the American Psychoanalytic Association and when

preauthorized by the Director, or a designee.

(*5*) *Psychological testing and assessment*. Psychological testing and assessment is covered when medically or psychologically necessary. Psychological testing and assessment performed as part of an assessment for academic placement are not covered.

(*6*) *Administration of psychotropic drugs*. When prescribed by an authorized provider qualified by licensure to prescribe drugs.

(*7*) *Electroconvulsive treatment*. When provided in accordance with guidelines issued by the Director.

(*8*) *Collateral visits*. Covered collateral visits are those that are medically or psychologically necessary for the treatment of the patient.

(*9*) *Medication assisted treatment*. Medication assisted treatment, combining pharmacotherapy and holistic care, to include provision in office-based opioid treatment by an authorized TRICARE provider, is covered. The practice of an individual physician in office-based treatment is regulated by the Department of Health and Human Services' 42 CFR 8.12,the Center for Substance Abuse Treatment (CSAT), and the Drug Enforcement Administration (DEA), along with individual state and local regulations.

(B) *Therapeutic settings*—(*1*) *Outpatient psychotherapy*. Outpatient psychotherapy generally is covered for individual, family, conjoint, collateral, and/or group sessions.

(*2*) *Inpatient psychotherapy*. Coverage of inpatient psychotherapy is based on medical or psychological necessity for the services identified in the patient's treatment plan.

(C) *Covered ancillary therapies*. Includes art, music, dance, occupational, and other ancillary therapies, when included by the attending provider in an approved inpatient, SUDRF, residential treatment, partial hospital, or intensive outpatient program treatment plan and under the clinical supervision of a qualified mental health professional. These ancillary therapies are not separately reimbursed professional services but are included within the institutional reimbursement.

(D) *Review of claims for treatment of mental disorder*. The Director shall establish and maintain procedures for review, including professional review, of the services provided for the treatment of mental disorders.

(x) *Physical and occupational therapy*. Assessment and treatment services of a CHAMPUS-authorized physical or occupational therapist may be cost-shared when:

(A) The services are prescribed and monitored by a physician, certified physician assistant, certified nurse practitioner or Doctor of Podiatric Medicine (Podiatrist) acting within the scope of their license.

(B) The purpose of the prescription is to reduce the disabling effects of an illness, injury, or neuromuscular disorder; and

(C) The prescribed treatment increases, stabilizes, or slows the deterioration of the beneficiary's ability to perform specified purposeful activity in the manner, or within the range considered normal, for a human being.

(xi) *Well-child care*. Benefits routinely are covered for well-child care from birth to under six years of age. These periodic health examinations are designed for prevention, early detection and treatment of disease and consist of screening procedures, immunizations and risk counseling.

(A) The following services are covered when required as a part of the specific well-child care program and when rendered by the attending pediatrician, family physician, certified nurse practitioner, or certified physician assistant.

(*1*) Newborn examination, heredity and metabolic screening, and newborn circumcision.

(*2*) Periodic health supervision visits, in accordance with American Academy of Pediatrics (AAP) guidelines, intended to promote the optimal health for infants and children to include the following services:

(*i*) History and physical examination and mental health assessment.

(*ii*) Vision, hearing, and dental screening.

(*iii*) Developmental appraisal to include body measurement.

(*iv*) Immunizations as recommenced by the Centers for Disease Control (CDC).

(*v*) Pediatric risk assessment for lead exposure and blood lead level test.

(*vi*) Tuberculosis screening.

(*vii*) Blood pressure screening.

(*viii*) Measurement of hemoglobin and hematocrit for anemia.

(*ix*) Urinalysis.

(*x*) Health guidance and counseling, including breastfeeding and nutrition counseling.

(B) Additional services or visits required because of specific findings or because the particular circumstances of the individual case are covered if medically necessary and otherwise authorized for benefits under CHAMPUS.

(C) The Deputy Assistant Secretary of Defense, Health Services Financing, will determine when such services are separately reimbursable apart from the health supervision visit.

(xii) [Reserved]

(xiii) *Physicians in a teaching setting.*

(A) *Teaching physicians.*

(*1*) *General.* The services of teaching physicians may be reimbursed on an allowable charge basis only when the teaching physician has established an attending physician relationship between the teaching physician and the patient or when the teaching physician provides distinct, identifiable, personal services (e.g., services rendered as a consultant, assistant surgeon, etc.). Attending physician services may include both direct patient care services or direct supervision of care provided by a physician in training. In order to be considered an attending physician, the teaching physician must:

(*i*) Review the patient's history and the record of examinations and tests in the institution, and make frequent reviews of the patient's progress; and

(*ii*) Personally examine the patient; and

(*iiii*) Confirm or revise the diagnosis and determine the course of treatment to be followed; and

(*iv*) Either perform the physician's services required by the patient or supervise the treatment so as to assure that appropriate services are provided by physicians in training and that the care meets a proper quality level; and

(*v*) Be present and ready to perform any service performed by an attending physician in a nonteaching setting when a major surgical procedure or a complex or dangerous medical procedure is performed; and

(*vi*) Be personally responsible for the patient's care, at least throughout the period of hospitalization.

(*2*) *Direct supervision by an attending physician of care provided by physicians in training.* Payment on the basis of allowable charges may be made for the professional services rendered to a beneficiary by his/her attending physician when the attending physician provides personal and identifiable direction to physicians in training who are participating in the care of the patient. It is not necessary that the attending physician be personally present for all services, but the attending physician must be on the provider's premises and available to provide immediate personal assistance and direction if needed.

(*3*) *Individual, personal services.* A teaching physician may be reimbursed on an allowable charge basis for any individual, identifiable service rendered to a CHAMPUS beneficiary, so long as the service is a covered service and is normally reimbursed separately, and so long as the patient records substantiate the service.

(*4*) *Who may bill.* The services of a teaching physician must be billed by the institutional provider when the physician is employed by the provider or a related entity or under a contract which provides for payment to the physician by the provider or a related entity. Where the teaching physician has no relationship with the provider (except for standard physician privileges to admit patients) and generally treats patients on a fee-for-service basis in the private sector, the teaching physician may submit claims under his/her own provider number.

(B) *Physicians in training.* Physicians in training in an approved teaching program are considered to be ''students'' and may not be reimbursed directly by CHAMPUS for services rendered to a beneficiary when their services are provided as part of their employment (either salaried or contractual) by a hospital or other institutional provider. Services of physicians in training may be reimbursed on an allowable charge basis only if:

(*1*) The physician in training is fully licensed to practice medicine by the

state in which the services are performed, and

(*2*) The services are rendered outside the scope and requirements of the approved training program to which the physician in training is assigned.

(d) *Other benefits*—(1) General. Benefits may be extended for the allowable charge of those other covered services and supplies described in paragraph (d) of this section, which are provided in accordance with good medical practice and established standards of quality by those other authorized providers described in § 199.6. Such benefits are subject to all applicable definitions, conditions, limitations, or exclusions as otherwise may be set forth in this or other chapters of this Regulation. To be considered for benefits under paragraph (d) of this section, the described services or supplies must be prescribed and ordered by a physician. Other authorized individual professional providers acting within their scope of licensure may also prescribe and order these services and supplies unless otherwise specified in paragraph (d) of this section.

(2) *Billing practices*. To be considered for benefits under paragraph (d) of this section, covered services and supplies must be provided and billed for by an authorized provider as set forth in § 199.6 of this part. Such billing must be itemized fully and described sufficiently, even when CHAMPUS payment is determined under the CHAMPUS DRG-based payment system, so that CHAMPUS can determine whether benefits are authorized by this part. Except for claims subject to the CHAMPUS DRG-based payment system, whenever continuing charges are involved, claims should be submitted to the appropriate CHAMPUS fiscal intermediary at least every 30 days (monthly) either by the beneficiary or sponsor or directly by the provider. For claims subject to the CHAMPUS DRG-based payment system, claims may be submitted only after the beneficiary has been discharged or transferred from the hospital.

(3) *Other covered services and supplies*—(i) *Blood*. If whole blood or plasma (or its derivatives) are provided and billed for by an authorized institution in connection with covered treatment, benefits are extended as set forth in paragraph (b) of this section. If blood is billed for directly to a beneficiary, benefits may be extended under paragraph (d) in the same manner as a medical supply.

(ii) *Durable equipment*—(A) Scope of benefit. (*1*) Durable equipment, which is for the specific use of the beneficiary and is ordered by an authorized individual professional provider listed in § 199.6(c)(3)(i), (ii) or (iii), acting within his or her scope of licensure shall be covered if the durable equipment meets the definition in § 199.2 and—

(*i*) Provides the medically appropriate level of performance and quality for the medical condition present and

(*ii*) Is not otherwise excluded by this part.

(*2*) Items that may be provided to a beneficiary as durable equipment include:

(*i*) Durable medical equipment as defined in § 199.2;

(*ii*) *Wheelchairs*. A wheelchair, which is medically appropriate to provide basic mobility, including reasonable additional costs for medically appropriate modifications to accommodate a particular physiological or medical need, may be covered as durable equipment. An electric wheelchair, or TRICARE approved alternative to an electric wheelchair (*e.g.*, scooter) may be provided in lieu of a manual wheelchair when it is medically indicated and appropriate to provide basic mobility. Luxury or deluxe wheelchairs, as described in paragraph (d)(3)(ii)(A)(*3*) of this section, include features beyond those required for basic mobility of a particular beneficiary are not authorized.

(*iii*) Iron lungs.

(*iv*) Hospital beds.

(*v*) Cardiorespiratory monitors under conditions specified in paragraph (d)(3)(ii)(B) of this section.

(*3*) Whether a prescribed item of durable equipment provides the medically appropriate level of performance and quality for the beneficiary's condition must be supported by adequate documentation. Luxury, deluxe, immaterial, or non- essential features, which increase the cost of the item relative to a similar item without those features, based on industry standards for a

particular item at the time the equipment is prescribed or replaced for a beneficiary, are not authorized. Only the ''base'' or ''basic'' model of equipment (or more cost- effective alternative equipment) shall be covered, unless customization of the equipment, or any accessory or item of supply for any durable medical equipment, is essential, as determined by the Director (or designee), for—

(*i*) Achieving therapeutic benefit for the patient;

(*ii*) Making the equipment serviceable; or

(*iii*) Otherwise assuring the proper functioning of the equipment.

(B) *Cardiorespiratory monitor exception*. (*1*) When prescribed by a physician who is otherwise eligible as a CHAMPUS individual professional provider, or who is on active duty with a United States Uniformed Service, an electronic cardiorespiratory monitor, including technical support necessary for the proper use of the monitor, may be cost-shared as durable medical equipment when supervised by the prescribing physician for in-home use by:

(*i*) An infant beneficiary who has had an apparent life-threatening event, as defined in guidelines issued by the Director, OCHAMPUS, or a designee, or

(*ii*) An infant beneficiary who is a subsequent or multiple birth biological sibling of a victim of sudden infant death syndrome (SIDS), or

(*iii*) An infant beneficiary whose birth weight was 1,500 grams or less, or

(*iv*) An infant beneficiary who is a pre-term infant with pathologic apnea, as defined in guidelines issued by the Director, OCHAMPUS, or a designee, or

(*v*) Any beneficiary who has a condition or suspected condition designated in guidelines issued by the Director, OCHAMPUS, or a designee, for which the in-home use of the cardiorespiratory monitor otherwise meets Basic Program requirements.

(*2*) The following types of services and items may be cost-shared when provided in conjunction with an otherwise authorized cardiorespiratory monitor:

(*i*) Trend-event recorder, including technical support necessary for the proper use of the recorder.

(*ii*) Analysis of recorded physiological data associated with monitor alarms.

(*iii*) Professional visits for services otherwise authorized by this part, and for family training on how to respond to an apparent life threatening event.

(*iv*) Diagnostic testing otherwise authorized by this part.

(C) *Exclusions*. Durable equipment, which is otherwise qualified as a benefit is excluded from coverage under the following circumstances:

(*1*) Durable equipment for a beneficiary who is a patient in a type of facility that ordinarily provides the same type of durable equipment item to its patients at no additional charge in the usual course of providing its services.

(*2*) Durable equipment, which is available to the beneficiary from a Uniformed Services Medical Treatment Facility.

(D) *Basis for reimbursement*. (*1*) Durable equipment may be provided on a rental or purchase basis. Coverage of durable equipment will be based on the price most advantageous to the government taking into consideration the anticipated duration of the medically necessary need for the equipment and current price information for the type of item. The cost analysis must include a comparison of the total price of the item as a monthly rental charge, a lease-purchase price, and a lump-sum purchase price and a provision for the time value of money at the rate determined by the U.S. Department of Treasury. If a beneficiary wishes to obtain an item of durable equipment with deluxe, luxury, immaterial or non-essential features, the beneficiary may agree to accept TRICARE coverage limited to the allowable amount that would have otherwise been authorized for a similar item without those features. In that case, the TRICARE coverage is based upon the allowable amount for the kind of durable equipment normally used to meet the intended purpose (*i.e.*, the standard item least costly). The provider shall not hold the beneficiary liable for deluxe, luxury, immaterial, or non- essential features that cannot be considered in determining the TRICARE allowable costs. However, the beneficiary shall be held liable if the provider has a specific

agreement in writing from the beneficiary (or his or her representative) accepting liability for the itemized difference in costs of the durable equipment with deluxe, luxury, or immaterial features and the TRICARE allowable costs for an otherwise authorized item without such features.

(*2*) In general, repairs of beneficiary owned durable equipment are covered when necessary to make the equipment serviceable and replacement of durable equipment is allowed when the durable equipment is not serviceable because of normal wear, accidental damage or when necessitated by a change in the beneficiary's condition. However, repairs of durable equipment damaged while using the equipment in a manner inconsistent with its common use, and replacement of lost or stolen rental durable equipment are excluded from coverage. In addition, repairs of deluxe, luxury, or immaterial features of durable equipment are excluded from coverage.

(iii) *Medical supplies and dressings (consumables)*—(A) *In general.* In general, medical supplies and dressings (consumables) are those that do not withstand prolonged, repeated use. Such items must be related directly to an appropriate and verified covered medical condition of the specific beneficiary for whom the item was purchased and obtained from a medical supply company, a pharmacy, or authorized institutional provider. Examples of covered medical supplies and dressings are disposable syringes for a known diabetic, colostomy sets, irrigation sets, and elastic bandages. An external surgical garment specifically designed for use follow a mastectomy is considered a medical supply item.

NOTE 1 TO PARAGRAPH (d)(3)(iii)(A): Generally, the allowable charge of a medical supply item will be under $100. Any item over this amount must be reviewed to determine whether it would qualify as a DME item. If it is, in fact, a medical supply item and does not represent an excessive charge, it can be considered for benefits under paragraph (d)(3)(iii) of this section.

(B) *Medically necessary food and medical equipment and supplies necessary to administer such food (other than durable medical equipment and supplies) when prescribed for dietary management of a covered disease or condition.* (*1*) Medically necessary food, including a low protein modified food product or an amino acid preparation product, may be covered when:

(*i*) Furnished pursuant to the prescription, order, or recommendation of a TRICARE authorized provider acting within the provider's scope of license/certificate of practice, for the dietary management of a covered disease or condition;

(*ii*) Is a specifically formulated and processed product (as opposed to a naturally occurring foodstuff used in its natural state) for the partial or exclusive feeding of an individual by means of oral intake or enteral feeding by tube;

(*iii*) Is intended for the dietary management of an individual who, because of therapeutic or chronic medical needs, has limited or impaired capacity to ingest, digest, absorb, or metabolize ordinary foodstuffs or certain nutrients, or who has other special medically determined nutrient requirements, the dietary management of which cannot be achieved by the modification of the normal diet alone;

(*iv*) Is intended to be used under medical supervision, which may include in a home setting; and

(*v*) Is intended only for an individual receiving active and ongoing medical supervision under which the individual requires medical care on a recurring basis for, among other things, instructions on the use of the food.

(*2*) Medically necessary food does not include:

(*i*) Food taken as part of an overall diet designed to reduce the risk of a disease or medical condition or as weight-loss products, even if the food is recommended by a physician or other health care professional;

(*ii*) Food marketed as gluten-free for the management of celiac disease or non-celiac gluten sensitivity;

(*iii*) Food marketed for the management of diabetes; or

(*iv*) Such other products as the Director, Defense Health Agency determines appropriate.

(*3*) Covered disease or condition under paragraph (d)(3)(iii)(B) of this section means:

(*i*) Inborn errors of metabolism;

(*ii*) Medical conditions of malabsorption;

(*iii*) Pathologies of the alimentary tract or the gastrointestinal tract;

(*iv*) A neurological or physiological condition; and

(*v*) Such other diseases or conditions the Director, Defense Health Agency determines appropriate.

(iv) *Oxygen*. Oxygen and equipment for its administration are covered. Benefits are limited to providing a tank unit at one location with oxygen limited to a 30-day supply at any one time. Repair and adjustment of CHAMPUS-purchased oxygen equipment also is covered.

(v) *Ambulance*. Civilian ambulance service is covered when medically necessary in connection with otherwise covered services and supplies and a covered medical condition. For the purpose of TRICARE payment, ambulance service is an outpatient service (including in connection with maternity care) with the exception of otherwise covered transfers between hospitals which are cost-shared on an inpatient basis. Ambulance transfers from a hospital based emergency room to another hospital more capable of providing the required care will also be cost-shared on an inpatient basis.

NOTE: The inpatient cost-sharing provisions for ambulance transfers only apply to otherwise covered transfers between hospitals, i.e., acute care, general, and special hospitals; psychiatric hospitals; and long-term hospitals.

(A) Ambulance service cannot be used instead of taxi service and is not payable when the patient's condition would have permitted use of regular private transportation; nor is it payable when transport or transfer of a patient is primarily for the purpose of having the patient nearer to home, family, friends, or personal physician. Except as described in paragraph (d)(3)(v)(C)(*1*) of this section transport must be to the closest appropriate facility by the least costly means.

(B) Vehicles such as medicabs or ambicabs function primarily as public passenger conveyances transporting patients to and from their medical appointments. No actual medical care is provided to the patients in transit. These types of vehicles do not qualify for benefits for the purpose of CHAMPUS payment.

(C) Except as described in paragraph (d)(3)(v)(C)(1)(*1*) of this section, ambulance services by other than land vehicles (such as a boat or airplane) may be considered only when the pickup point is inaccessible by a land vehicle, or when great distance or other obstacles are involved in transporting the patient to the nearest hospital with appropriate facilities and the patient's medical condition warrants speedy admission or is such that transfer by other means is contraindicated.

(*1*) Advanced life support air ambulance and certified advanced life support attendant are covered services for solid organ and stem cell transplant candidates.

(*2*) Advanced life support air ambulance and certified advanced life support attendant shall be reimbursed subject to standard reimbursement methodologies.

(vi) *Drugs and medicines*. Drugs and medicines that by United States law require a prescription are also referred to as ''legend drugs.'' Legend drugs are covered when prescribed by a physician or other authorized individual professional provider acting within the scope of the provider's license and ordered or prescribed in connection with an otherwise covered condition or treatment, and not otherwise excluded by TRICARE. This includes Rh immune globulin.

(A) Drugs administered by a physician or other authorized individual professional provider as an integral part of a procedure covered under paragraph (b) or (c) of this section (such as chemotherapy) are not covered under this subparagraph inasmuch as the benefit for the institutional services or the professional services in connection with the procedure itself also includes the drug used.

(B) CHAMPUS benefits may not be extended for drugs not approved by the U.S. Food and Drug Administration for commercial marketing. Drugs grandfathered by the Federal Food, Drug and Cosmetic Act of 1938 may be covered under CHAMPUS as if FDA approved.

(C) Over-the-counter (OTC) drugs (drugs that by United States law do not require a prescription), in general, are

not covered. However, insulin is covered for a known diabetic even in states that do not require a prescription for its purchase. In addition, OTC drugs used for smoking cessation are covered when all requirements under the TRICARE smoking cessation program are met as provided in paragraph (e)(30) of this section.

(D) Medically necessary vitamins used for the management of a covered disease or condition pursuant to a prescription, order, or recommendation of a TRICARE authorized provider acting within the provider's scope of license/certificate of practice. For purposes of this paragraph (d)(3)(vi)(D), the term ''covered disease or condition'' means:

(*1*) Inborn errors of metabolism;

(*2*) Medical conditions of malabsorption;

(*3*) Pathologies of the alimentary tract or the gastrointestinal tract;

(*4*) A neurological or physiological condition;

(*5*) Pregnancy in relation to prenatal vitamins, with the limitation the prenatal vitamins that require a prescription in the United States may be covered for prenatal care only;

(*6*) Such other disease or conditions the Director, Defense Health Agency determines appropriate.

(vii) Prosthetics, prosthetic devices, and prosthetic supplies, as determined by the Secretary of Defense to be necessary because of significant conditions resulting from trauma, congenital anomalies, or disease. Additionally, the following are covered:

(A) Any accessory or item of supply that is used in conjunction with the device for the purpose of achieving therapeutic benefit and proper functioning;

(B) Services necessary to train the recipient of the device in the use of the device;

(C) Repair of the device for normal wear and tear or damage;

(D) Replacement of the device if the device is lost or irreparably damaged or the cost of repair would exceed 60 percent of the cost of replacement.

(viii) *Orthopedic braces and appliances.* The purchase of leg braces (including attached shoes), arm braces, back braces, and neck braces is covered, orthopedic shoes, arch supports, shoe inserts, and other supportive devices for the feet, including special-ordered, custom-made built-up shoes or regular shoes subsequently built up, are not covered.

(ix) *Diabetes Self-Management Training (DSMT).* A training service or program that educates diabetic patients about the successful self-management of diabetes. It includes the following criteria: Education about self-monitoring of blood glucose, diet, and exercise; an insulin treatment plan developed specifically for the patient who is insulin-dependent; and motivates the patient to use the skills for self-management. The DSMT service or program must be accredited by the American Diabetes Association.

Coverage limitations on the provision of this benefit will be as determined by the Director, TRICARE Management Activity, or designee.

(e) *Special benefit information*—(1) *General.* There are certain circumstances, conditions, or limitations that impact the extension of benefits and that require special emphasis and explanation. This paragraph (e) sets forth those benefits and limitations recognized to be in this category. The benefits and limitations herein described also are subject to all applicable definitions, conditions, limitations, exceptions, and exclusions as set forth in this or other sections of this part, except as otherwise may be provided specifically in this paragraph (e).

(2) *Abortion.* The statute under which CHAMPUS operates prohibits payment for abortions with one single exception—where the life of the mother would be endangered if the fetus were carried to term. Covered abortion services are limited to medical services and supplies only. Physician certification is required attesting that the abortion was performed because the mother's life would be endangered if the fetus were carried to term. Abortions performed for suspected or confirmed fetal abnormality (e.g., anencephalic) or for mental health reasons (e.g., threatened suicide) do not fall within the exceptions permitted within the language of the statute and are not authorized for payment under CHAMPUS.

NOTE: Covered abortion services are limited to medical services or supplies only for the single circumstance outlined above and

do not include abortion counseling or referral fees. Payment is not allowed for any services involving preparation for, or normal followup to, a noncovered abortion. The Director, OCHAMPUS, or a designee, shall issue guidelines describing the policy on abortion.

(3) *Family planning*. The scope of the CHAMPUS family planning benefit is as follows:

(i) *Birth control (such as contraception)*—(A) *Benefits provided*. Benefits are available for services and supplies related to preventing conception, including the following:

(*1*) Surgical inserting, removal, or replacement of intrauterine devices.

(*2*) Measurement for, and purchase of, contraceptive diaphragms (and later remeasurement and replacement).

(*3*) Prescription contraceptives.

(*4*) Surgical sterilization (either male or female).

(B) *Exclusions*. The family planning benefit does not include the following:

(*1*) Prophylactics (condoms).

(*2*) Spermicidal foams, jellies, and sprays not requiring a prescription.

(*3*) Services and supplies related to noncoital reproductive technologies, including but not limited to artificial insemination (including any costs related to donors or semen banks), in-vitro fertilization and gamete intrafallopian transfer.

(*4*) Reversal of a surgical sterilization procedure (male or female).

(ii) *Genetic testing*. Genetic testing essentially is preventive rather than related to active medical treatment of an illness or injury. However, under the family planning benefit, genetic testing is covered when performed in certain high risk situations. For the purpose of CHAMPUS, genetic testing includes to detect developmental abnormalities as well as purely genetic defects.

(A) *Benefits provided*. Benefits may be extended for genetic testing performed on a pregnant beneficiary under the following prescribed circumstances. The tests must be appropriate to the specific risk situation and must meet one of the following criteria:

(*1*) The mother-to-be is 35 years old or older; or

(*2*) The mother- or father-to-be has had a previous child born with a congenital abnormality; or

(*3*) Either the mother- or father-to-be has a family history of congenital abnormalities; or

(*4*) The mother-to-be contracted rubella during the first trimester of the pregnancy; or

(*5*) Such other specific situations as may be determined by the Director, OCHAMPUS, or a designee, to fall within the intent of paragraph (e)(3)(ii) of this section.

(B) *Exclusions*. It is emphasized that routine or demand genetic testing is not covered. Further, genetic testing does not include the following:

(*1*) Tests performed to establish paternity of a child.

(*2*) Tests to determine the sex of an unborn child.

(4) [Reserved]

(5) *Transplants*. (i) *Organ transplants*. Basic Program benefits are available for otherwise covered services or supplies in connection with an organ transplant procedure, provided such transplant procedure is in accordance with accepted professional medical standards and is not considered unproven.

(A) *General*. (*1*) Benefits may be allowed for medically necessary services and supplies related to an organ transplant for:

(*i*) Evaluation of potential candidate's suitability for an organ transplant, whether or not the patient is ultimately accepted as a candidate for transplant.

(*ii*) Pre- and post-transplant inpatient hospital and outpatient services.

(*iii*) Pre- and post-operative services of the transplant team.

(*iv*) Blood and blood products.

(*v*) FDA approved immunosuppression drugs to include off-label uses when determined to be medically necessary for the treatment of the condition for which it is administered, according to accepted standards of medical practice.

(*vi*) Complications of the transplant procedure, including inpatient care, management of infection and rejection episodes.

(*vii*) Periodic evaluation and assessment of the successfully transplanted patient.

(*viii*) The donor acquisition team, including the costs of transportation to

the location of the donor organ and transportation of the team and the donated organ to the location of the transplant center.

(*ix*) The maintenance of the viability of the donor organ after all existing legal requirements for excision of the donor organ have been met.

(*2*) TRICARE benefits are payable for recipient costs when the recipient of the transplant is a CHAMPUS beneficiary, whether or not the donor is a CHAMPUS beneficiary.

(*3*) Donor costs are payable when:

(*i*) Both the donor and recipient are CHAMPUS beneficiaries.

(*ii*) The donor is a CHAMPUS beneficiary but the recipient is not.

(*iii*) The donor is the sponsor and the recipient is a CHAMPUS beneficiary. (In such an event, donor costs are paid as a part of the beneficiary and recipient costs.)

(*iv*) The donor is neither a CHAMPUS beneficiary nor a sponsor, if the recipient is a CHAMPUS beneficiary. (Again, in such an event, donor costs are paid as a part of the beneficiary and recipient costs.)

(*4*) If the donor is not a CHAMPUS beneficiary, TRICARE benefits for donor costs are limited to those directly related to the transplant procedure itself and do not include any medical care costs related to other treatment of the donor, including complications.

(*5*) TRICARE benefits will not be allowed for transportation of an organ donor.

(B) [Reserved]

(ii) *Stem cell transplants.* TRICARE benefits are payable for beneficiaries whose conditions are considered appropriate for stem cell transplant according to guidelines adopted by the Executive Director, TMA, or a designee.

(6) *Eyeglasses, spectacles, contact lenses, or other optical devices.* Eyeglasses, spectacles, contact lenses, or other optical devices are excluded under the Basic Program except under very limited and specific circumstances.

(i) *Exception to general exclusion.* Benefits for glasses and lenses may be extended only in connection with the following specified eye conditions and circumstances:

(A) Eyeglasses or lenses that perform the function of the human lens, lost as a result of intraocular surgery or ocular injury or congenital absence.

NOTE: Notwithstanding the general requirement for U.S. Food and Drug Administration approval of any surgical implant set forth in paragraph (d)(3)(vii) of this section, intraocular lenses are authorized under CHAMPUS if they are either approved for marketing by FDA or are subject to an investigational device exemption.

(B) ''Pinhole'' glasses prescribed for use after surgery for detached retina.

(C) Lenses prescribed as ''treatment'' instead of surgery for the following conditions:

(*1*) Contract lenses used for treatment of infantile glaucoma.

(*2*) Corneal or scleral lenses prescribed in connection with treatment of keratoconus.

(*3*) Scleral lenses prescribed to retain moisture when normal tearing is not present or is inadequate.

(*4*) Corneal or scleral lenses prescribed to reduce a corneal irregularity other than astigmatism.

(ii) *Limitations.* The specified benefits are limited further to one set of lenses related to one of the qualifying eye conditions set forth in paragraph (e)(6)(i) of this section. If there is a prescription change requiring a new set of lenses (but still related to the qualifying eye condition), benefits may be extended for a second set of lenses, subject to specific medical review.

(7) [Reserved]

(8) *Cosmetic, reconstructive, or plastic surgery.* For the purposes of CHAMPUS, cosmetic, reconstructive, or plastic surgery is surgery that can be expected primarily to improve physical appearance or that is performed primarily for psychological purposes or that restores form, but does not correct or improve materially a bodily function.

NOTE: If a surgical procedure primarily restores function, whether or not there is also a concomitant improvement in physical appearance, the surgical procedure does not fall within the provisions set forth in this paragraph (e)(8).

(i) *Limited benefits under CHAMPUS.* Benefits under the Basic Program generally are not available for cosmetic, reconstructive, or plastic surgery.

However, under certain limited circumstances, benefits for otherwise covered services and supplies may be provided in connection with cosmetic, reconstructive, or plastic surgery as follows:

(A) Correction of a congenital anomaly; or

(B) Restoration of body form following an accidental injury; or

(C) Revision of disfiguring and extensive scars resulting from neoplastic surgery.

(D) Reconstructive breast surgery following a medically necessary mastectomy performed for the treatment of carcinoma, severe fibrocystic disease, other nonmalignant tumors or traumatic injuries.

(E) Penile implants and testicular prostheses for conditions resulting from organic origins (i.e., trauma, radical surgery, disease process, for correction of congenital anomaly, etc.). Also, penile implants for organic impotency.

NOTE: Organic impotence is defined as that which can be reasonably expected to occur following certain diseases, surgical procedures, trauma, injury, or congenital malformation. Impotence does not become organic because of psychological or psychiatric reasons.

(F) Generally, benefits are limited to those cosmetic, reconstructive, or plastic surgery procedures performed no later than December 31 of the year following the year in which the related accidental injury or surgical trauma occurred, except for authorized postmastectomy breast reconstruction for which there is no time limitation between mastectomy and reconstruction. Also, special consideration for exception will be given to cases involving children who may require a growth period.

(ii) *General exclusions.* (A) For purposes of CHAMPUS, dental congenital anomalies such as absent tooth buds or malocclusion specifically are excluded.

(B) Cosmetic, reconstructive, or plastic surgery procedures performed primarily for psychological reasons or as a result of the aging process also are excluded.

(C) Procedures performed for elective correction of minor dermatological blemishes and marks or minor anatomical anomalies also are excluded.

(D) Any procedures related to sex gender changes, except as provided in paragraph (g)(29) of this section, are excluded.

(iii) *Noncovered surgery, all related services and supplies excluded.* When it is determined that a cosmetic, reconstructive, or plastic surgery procedure does not qualify for CHAMPUS benefits, all related services and supplies are excluded, including any institutional costs.

(iv) *Example of noncovered cosmetic, reconstructive, or plastic surgery procedures.* The following is a partial list of cosmetic, reconstructive, or plastic surgery procedures that do not qualify for benefits under CHAMPUS. This list is for example purposes only and is not to be construed as being all-inclusive.

(A) Any procedure performed for personal reasons to improve the appearance of an obvious feature or part of the body that would be considered by an average observer to be normal and acceptable for the patient's age or ethnic or racial background.

(B) Cosmetic, reconstructive, or plastic surgical procedures that are justified primarily on the basis of a psychological or psychiatric need.

(C) *Augmentation mammoplasties.* Augmentation mammoplasties, except for breast reconstruction following a covered mastectomy and those specifically authorized in paragraph (e)(8)(i) of this section.

(D) Face lifts and other procedures related to the aging process.

(E) *Reduction mammoplasties.* Reduction mammoplasties (unless there is medical documentation of intractable pain, not amenable to other forms of treatment, resulting from large, pendulous breasts or unless performed as an integral part of an authorized breast reconstruction procedure under paragraph (e)(8)(i) of this section, including reduction of the collateral breast for purposes of ensuring breast symmetry)

(F) Panniculectomy; body sculpture procedures.

(G) Repair of sagging eyelids (without demonstrated and medically documented significant impairment of vision).

(H) Rhinoplasties (without evidence of accidental injury occurring within the previous 6 months that resulted in significant obstruction of breathing).

(I) Chemical peeling for facial wrinkles.

(J) Dermabrasion of the face.

(K) Elective correction of minor dermatological blemishes and marks or minor anatomical anomalies.

(L) Revision of scars resulting from surgery or a disease process, except disfiguring and extensive scars resulting from neoplastic surgery.

(M) Removal of tattoos.

(N) Hair transplants.

(O) Electrolysis.

(P) [Reserved]

(Q)) Penile implant procedure for psychological impotency or as related to sex gender changes, as prohibited by section 1079 of title 10, United States Code.

(R) Insertion of prosthetic testicles as related to sex gender changes, as prohibited by section 1079 of title 10, United States Code.

(9) *Care related to non-covered initial surgery or treatment.* (i) Benefits are available for otherwise covered services and supplies required in the treatment of complications resulting from a non-covered incident of treatment (such as nonadjunctive dental care or cosmetic surgery) but only if the later complication represents a separate medical condition such as a systemic infection, cardiac arrest, and acute drug reaction. Benefits may not be extended for any later care or a procedure related to the complication that essentially is similar to the initial non-covered care. Examples of complications similar to the initial episode of care (and thus not covered) would be repair of facial scarring resulting from dermabrasion for acne.

(ii) Benefits are available for otherwise covered services and supplies required in the treatment of complications (unfortunate sequelae) and any necessary follow-on care resulting from a non-covered incident of treatment provided in an MTF, when the initial non-covered service has been authorized by the MTF Commander and the MTF is unable to provide the necessary treatment of the complications or required follow-on care, according to the guidelines adopted by the Director, DHA, or a designee.

(iii) Benefits are available for otherwise covered services and supplies required in the treatment of complications (unfortunate sequelae) and any necessary follow-on care resulting from a non-covered incident of treatment provided in the private sector pursuant to a properly granted waiver under §199.16(f). The Director, DHA, or designee, shall issue guidelines for implementing this provision.

(10) *Dental.* TRICARE/CHAMPUS does not include a dental benefit. However, in connection with dental treatment for patients with developmental, mental, or physical disabilities or for pediatric patients age 5 or under, only institutional and anesthesia services may be provided as a benefit. Under very limited circumstances, benefits are available for dental services and supplies when the dental services are adjunctive to otherwise covered medical treatment.

(i) *Adjunctive dental care: Limited.* Adjunctive dental care is limited to those services and supplies provided under the following conditions:

(A) Dental care which is medically necessary in the treatment of an otherwise covered medical (not dental) condition, is an integral part of the treatment of such medical condition and is essential to the control of the primary medical condition. The following is a list of conditions for which CHAMPUS benefits are payable under this provision:

(*1*) Intraoral abscesses which extend beyond the dental alveolus.

(*2*) Extraoral abscesses.

(*3*) Cellulitis and osteitis which is clearly exacerbating and directly affecting a medical condition currently under treatment.

(*4*) Removal of teeth and tooth fragments in order to treat and repair facial trauma resulting from an accidental injury.

(*5*) Myofacial Pain Dysfunction Syndrome.

(*6*) Total or complete ankyloglossia.

(*7*) Adjunctive dental and orthodontic support for cleft palate.

(*8*) The prosthetic replacement of either the maxilla or the mandible due to

the reduction of body tissues associated with traumatic injury (e.g., impact, gun shot wound), in addition to services related to treating neoplasms or iatrogenic dental trauma.

NOTE: The test of whether dental trauma is covered is whether the trauma is solely dental trauma. Dental trauma, in order to be covered, must be related to, and an integral part of medical trauma; or a result of medically necessary treatment of an injury or disease.

(B) Dental care required in preparation for medical treatment of a disease or disorder or required as the result of dental trauma caused by the medically necessary treatment of an injury or disease (iatrogenic).

(*1*) Necessary dental care including prophylaxis and extractions when performed in preparation for or as a result of in-line radiation therapy for oral or facial cancer.

(*2*) Treatment of gingival hyperplasia, with or without periodontal disease, as a direct result of prolonged therapy with Dilantin (diphenylhydantoin) or related compounds.

(C) Dental care is limited to the above and similar conditions specifically prescribed by the Director, OCHAMPUS, as meeting the requirements for coverage under the provisions of this section.

(ii) *General exclusions*. (A) Dental care which is routine, preventative, restorative, prosthodontic, periodontic or emergency does not qualify as adjunctive dental care for the purposes of CHAMPUS except when performed in preparation for or as a result of dental trauma caused by medically necessary treatment of an injury or disease.

(B) The adding or modifying of bridgework and dentures.

(C) Orthodontia, except when directly related to and an integral part of the medical or surgical correction of a cleft palate or when required in preparation for, or as a result of, trauma to the teeth and supporting structures caused by medically necessary treatment of an injury or disease.

(iii) *Preauthorization required*. In order to be covered, adjunctive dental care requires preauthorization from the Director, TRICARE Management Activity, or a designee, in accordance with paragraph (a)(12) of this section. When adjunctive dental care involves a medical (not dental) emergency (such as facial injuries resulting from an accident), the requirement for preauthorization is waived. Such waiver, however, is limited to the essential adjunctive dental care related to the medical condition requiring the immediate emergency treatment. A complete explanation, with supporting medical documentation, must be submitted with claims for emergency adjunctive dental care.

(iv) *Covered oral surgery*. Notwithstanding the above limitations on dental care, there are certain oral surgical procedures that are performed by both physicians and dentists, and that are essentially medical rather than dental care. For the purposes of CHAMPUS, the following procedures, whether performed by a physician or dentist, are considered to be in this category and benefits may be extended for otherwise covered services and supplies without preauthorization:

(A) Excision of tumors and cysts of the jaws, cheeks, lips, tongue, and roof and floor of the mouth, when such conditions require a pathological (histological) examination.

(B) Surgical procedures required to correct accidental injuries of the jaws, cheeks, lips, tongue, and roof and floor of the mouth.

(C) Treatment of oral or facial cancer.

(D) Treatment of fractures of facial bones.

(E) External (extra-oral) incision and drainage of cellulitis.

(F) Surgery of accessory sinuses, salivary glands, or ducts.

(G) Reduction of dislocations and the excision of the temporomandibular joints, when surgery is a necessary part of the reduction.

(H) Any oral surgical procedure that falls within the cosmetic, reconstructive, or plastic surgery definition is subject to the limitations and requirements set forth in paragraph (e)(8) of this section.

NOTE: Extraction of unerupted or partially erupted, malposed or impacted teeth, with or without the attached follicular or development tissues, is not a covered oral surgery procedure except when the care is indicated

in preparation for medical treatment of a disease or disorder or required as a result of dental trauma caused by the necessary medical treatment of an injury or illness. Surgical preparation of the mouth for dentures is not covered by CHAMPUS.

(v) *Inpatient hospital stay in connection with non-adjunctive, noncovered dental care.* Institutional benefits specified in paragraph (b) of this section may be extended for inpatient hospital stays related to noncovered, nonadjunctive dental care when such inpatient stay is medically necessary to safeguard the life of the patient from the effects of dentistry because of the existence of a specific and serious nondental organic impairment currently under active treatment. (Hemophilia is an example of a condition that could be considered a serious nondental impairment.) Preauthorization by the Director, OCHAMPUS, or a designee, is required for such inpatient stays to be covered in the same manner as required for adjunctive dental care described in paragraph (e)(10)(iii) of this section. Regardless of whether or not the preauthorization request for the hospital admission is approved and thus qualifies for institutional benefits, the professional service related to the nonadjunctive dental care is not covered.

(vi) *Anesthesia and institutional costs for dental care for children and certain other patients.* Institutional benefits specified in paragraph (b) of this section may be extended for hospital and in-out surgery settings related to noncovered, nonadjunctive dental care when such outpatient care or inpatient stay is in conjunction with dental treatment for patients with developmental, mental, or physical disabilities or for pediatric patients age 5 or under. For these patients, anesthesia services will be limited to the administration of general anesthesia only. Patients with developmental, mental, or physical disabilities are those patients with conditions that prohibit dental treatment in a safe and effective manner. Therefore, it is medically or psychologically necessary for these patients to require general anesthesia for dental treatment. Patients with physical disabilities include those patients having disabilities as defined in § 199.2 as a serious physical disability. Preauthorization by the Director, TRICARE Management Activity, or a designee, is required for such outpatient care or inpatient stays to be covered in the same manner as required for adjunctive dental care described in paragraph (e)(10)(iii) of this section. Regardless of whether or not the preauthorization request for outpatient care or hospital admission is approved and thus qualifies for institutional benefits, the professional service related to the nonadjunctive dental care is not covered, with the exception of coverage for anesthesia services.

(11) *Drug abuse.* Under the Basic Program, benefits may be extended for medically necessary prescription drugs required in the treatment of an illness or injury or in connection with maternity care (refer to paragraph (d) of this section). However, TRICARE benefits cannot be authorized to support or maintain an existing or potential drug abuse situation whether or not the drugs (under other circumstances) are eligible for benefit consideration and whether or not obtained by legal means. Drugs, including the substitution of a therapeutic drug with addictive potential for a drug of addiction, prescribed to beneficiaries undergoing medically supervised treatment for a substance use disorder as authorized under paragraphs (b) and (c) of this section are not considered to be in support of, or to maintain, an existing or potential drug abuse situation and are allowed. The Director may prescribe appropriate policies to implement this prescription drug benefit for those undergoing medically supervised treatment for a substance use disorder.

(i) *Limitations on who can prescribe drugs.* CHAMPUS benefits are not available for any drugs prescribed by a member of the beneficiary's family or by a nonfamily member residing in the same household with the beneficiary or sponsor.

(ii) [Reserved]

(iii) *Kinds of prescription drugs that are monitored carefully by CHAMPUS for possible abuse situations*—(A) *Narcotics.* Examples are Morphine and Demerol.

(B) *Nonnarcotic analgesics.* Examples are Talwin and Darvon.

(C) *Tranquilizers*. Examples are Valium, Librium, and Meprobamate.

(D) *Barbiturates*. Examples are Seconal and Nembuttal.

(E) *Nonbarbituate hypnotics*. Examples are Doriden and Chloral Hydrate.

(F) *Stimulants*. Examples are amphetamines.

(iv) *CHAMPUS fiscal intermediary responsibilities*. CHAMPUS fiscal intermediaries are responsible for implementing utilization control and quality assurance procedures designed to identify possible drug abuse situations. The CHAMPUS fiscal intermediary is directed to screen all drug claims for potential overutilization and irrational prescribing of drugs, and to subject any such cases to extensive review to establish the necessity for the drugs and their appropriateness on the basis of diagnosis or definitive symptoms.

(A) When a possible drug abuse situation is identified, all claims for drugs for that specific beneficiary or provider will be suspended pending the results of a review.

(B) If the review determines that a drug abuse situation does in fact exist, all drug claims held in suspense will be denied.

(C) If the record indicates previously paid drug benefits, the prior claims for that beneficiary or provider will be reopened and the circumstances involved reviewed to determine whether or not drug abuse also existed at the time the earlier claims were adjudicated. If drug abuse is later ascertained, benefit payments made previously will be considered to have been extended in error and the amounts so paid recouped.

(D) Inpatient stays primarily for the purpose of obtaining drugs and any other services and supplies related to drug abuse also are excluded.

(v) *Unethical or illegal provider practices related to drugs*. Any such investigation into a possible drug abuse that uncovers unethical or illegal drug dispensing practices on the part of an institution, a pharmacy, or physician will be referred to the professional or investigative agency having jurisdiction. CHAMPUS fiscal intermediaries are directed to withhold payment of all CHAMPUS claims for services and supplies rendered by a provider under active investigation for possible unethical or illegal drug dispensing activities.

(vi) *Detoxification*. The above monitoring and control of drug abuse situations shall in no way be construed to deny otherwise covered medical services and supplies related to drug detoxification (including newborn, addicted infants) when medical supervision is required.

(12) [Reserved]

(13) *Domiciliary care*. The statute under which CHAMPUS operates also specifically excludes domiciliary care (refer to § 199.2 of this part for the definition of ''Domiciliary Care'').

(i) *Examples of domiciliary care situations*. The following are examples of domiciliary care for which CHAMPUS benefits are not payable.

(A) *Home care is not available*. Institutionalization primarily because parents work, or extension of a hospital stay beyond what is medically necessary because the patient lives alone, are examples of domiciliary care provided because there is no other family member or other person available in the home.

(B) *Home care is not suitable*. Institutionalization of a child because a parent (or parents) is unable to provide a safe and nurturing environment due to a mental or substance use disorder, or because someone in the home has a contagious disease, are examples of why domiciliary care is being provided because the home setting is unsuitable.

(C) *Family unwilling to care for a person in the home*. A child who is difficult to manage may be placed in an institution, not because institutional care is medically necessary, but because the family does not want to handle him or her in the home. Such institutionalization would represent domiciliary care, that is, the family being unwilling to assume responsibility for the child.

(ii) *Benefits available in connection with a domiciliary care case*. Should the beneficiary receive otherwise covered medical services or supplies while also being in a domiciliary care situation, CHAMPUS benefits are payable for those medical services or supplies, or both, in the same manner as though the beneficiary resided in his or her own home. Such benefits would be cost-

shared as though rendered to an outpatient.

(iii) *General exclusion.* Domiciliary care is institutionalization essentially to provide a substitute home—not because it is medically necessary for the beneficiary to be in the institution (although there may be conditions present that have contributed to the fact that domiciliary care is being rendered). CHAMPUS benefits are not payable for any costs or charges related to the provision of domiciliary care. While a substitute home or assistance may be necessary for the beneficiary, domiciliary care does not represent the kind of care for which CHAMPUS benefits can be provided.

(14) *CT scanning*—(i) *Approved CT scan services.* Benefits may be extended for medically necessary CT scans of the head or other anatomical regions of the body when all of the following conditions are met:

(A) The patient is referred for the diagnostic procedure by a physician.

(B) The CT scan procedure is consistent with the preliminary diagnosis or symptoms.

(C) Other noninvasive and less costly means of diagnosis have been attempted or are not appropriate.

(D) The CT scan equipment is licensed or registered by the appropriate state agency responsible for licensing or registering medical equipment that emits ionizing radiation.

(E) The CT scan equipment is operated under the general supervision and direction of a physician.

(F) The results of the CT scan diagnostic procedure are interpreted by a physician.

(ii) *Review guidelines and criteria.* The Director, OCHAMPUS, or a designee, will issue specific guidelines and criteria for CHAMPUS coverage of medically necessary head and body part CT scans.

(15) *Morbid obesity.* The TRICARE morbid obesity benefit is limited to those bariatric surgical procedures for which the safety and efficacy has been proven comparable or superior to conventional therapies and is consistent with the generally accepted norms for medical practice in the United States medical community. (See the definition of *reliable evidence* in §199.2 of this part for the procedures used in determining if a medical treatment or procedure is unproven.)

(i) *Conditions for coverage.* (A) Payment for bariatric surgical procedures is determined by the requirements specified in paragraph (g)(15) of this section, and as defined in §199.2(b) of this part.

(B) Covered bariatric surgical procedures are payable only when the patient has completed growth (18 years of age or documentation of completion of bone growth) and has met one of the following selection criteria:

(*1*) The patient has a BMI that is equal to or exceeds 40 $kg/m^2$ and has previously been unsuccessful with medical treatment for obesity.

(*2*) The patient has a BMI of 35 to 39.9 $kg/m^2$, has at least one high-risk co-morbid condition associated with morbid obesity, and has previously been unsuccessful with medical treatment for obesity.

NOTE: The Director, TMA, shall issue guidelines for review of the specific high-risk co-morbid conditions, exacerbated or caused by obesity based on the Reliable Evidence Standard as defined in §199.2 of this part.

(ii) *Treatment of complications.* (A) Payment may be extended for repeat bariatric surgery when medically necessary to correct or treat complications from the initial covered bariatric surgery (a takedown). For instance, the surgeon in many cases will do a gastric bypass or gastroplasty to help the patient avoid regaining the weight that was lost. In this situation, payment is authorized even though the patient's condition technically may not meet the definition of morbid obesity because of the weight that was already lost following the initial surgery.

(B) Payment is authorized for otherwise covered medical services and supplies directly related to complications of obesity when such services and supplies are an integral and necessary part of the course of treatment that was aggravated by the obesity.

(iii) *Exclusions.* CHAMPUS payment may not be extended for weight control services, weight control/loss programs, dietary regimens and supplements, appetite suppressants and other medications; food or food supplements, exercise and exercise programs, or other

programs and equipment that are primarily intended to control weight or for the purpose of weight reduction, regardless of the existence of co-morbid conditions.

(16) *Maternity care.* (i) *Benefit.* The CHAMPUS Basic Program may share the cost of medically necessary services and supplies associated with maternity care which are not otherwise excluded by this part.

(ii) *Cost-share.* Maternity care cost-share shall be determined as follows:

(A) Inpatient cost-share formula applies to maternity care ending in childbirth in, or on the way to, a hospital inpatient childbirth unit, and for maternity care ending in a non-birth outcome not otherwise excluded by this part.

(B) Ambulatory surgery cost-share formula applies to maternity care ending in childbirth in, or on the way to, a birthing center to which the beneficiary is admitted and from which the beneficiary has received prenatal care, or a hospital-based outpatient birthing room.

(C) Outpatient cost-share formula applies to maternity care which terminates in a planned childbirth at home.

(D) Otherwise covered medical services and supplies directly related to ''Complications of pregnancy,'' as defined in § 199.2 of this part, will be cost-shared on the same basis as the related maternity care for a period not to exceed 42 days following termination of the pregnancy and thereafter cost-shared on the basis of the inpatient or outpatient status of the beneficiary when medically necessary services and supplies are received.

(17) *Biofeedback Therapy.* Biofeedback therapy is a technique by which a person is taught to exercise control over a physiologic process occurring within the body. By using modern biomedical instruments the patient learns how a specific physiologic system within his body operates and how to modify the performance of this particular system.

(i) *Benefits Provided.* CHAMPUS benefits are payable for services and supplies in connection with electrothermal, electromyograph and electrodermal biofeedback therapy when there is documentation that the patient has undergone an appropriate medical evaluation, that their present condition is not responding to or no longer responds to other forms of conventional treatment, and only when provided as treatment for the following conditions:

(A) Adjunctive treatment for Raynaud's Syndrome.

(B) Adjunctive treatment for muscle re-education of specific muscle groups or for treating pathological muscle abnormalities of spasticity, or incapacitating muscle spasm or weakness.

(ii) *Limitations.* Payable benefits include initial intake evaluation. Treatment following the initial intake evaluation is limited to a maximum of 20 inpatient and outpatient biofeedback treatments per calendar year.

(iii) *Exclusions.* Benefits are excluded for biofeedback therapy for the treatment of ordinary muscle tension states or for psychosomatic conditions. Benefits are also excluded for the rental or purchase of biofeedback equipment.

(iv) *Provider Requirements.* A provider of biofeedback therapy must be a CHAMPUS-authorized provider. (Refer to § 199.6, ''Authorized Providers). If biofeedback treatment is provided by other than a physician, the patient must be referred by a physician.

(v) *Implementation Guidelines.* The Director of OCHAMPUS shall issue guidelines as are necessary to implement the provision of this paragraph.

(18) *Cardiac rehabilitation.* Cardiac rehabilitation is the process by which individuals are restored to their optimal physical, medical, and psychological status, after a cardiac event. Cardiac rehabilitation is often divided into three phases. Phase I begins during inpatient hospitalization and is managed by the patient's personal physician. Phase II is a medically supervised outpatient program which begins following discharge. Phase III is a lifetime maintenance program emphasizing continuation of physical fitness with periodic followup. Each phase includes an exercise component, patient education, and risk factor modification. There may be considerable variation in program components, intensity, and duration.

(i) *Benefits Provided.* CHAMPUS benefits are available on an inpatient or

outpatient basis for services and supplies provided in connection with a cardiac rehabilitation program when ordered by a physician and provided as treatment for patients who have experienced the following cardiac events within the preceding twelve (12) months:

(A) Myocardial Infarction.

(B) Coronary Artery Bypass Graft.

(C) Coronary Angioplasty.

(D) Percutaneous Transluminal Coronary Angioplasty

(E) Chronic Stable Angina (see limitations below).

(F) Heart valve surgery.

(G) Heart or Heart-lung Transplantation.

(ii) *Limitations*. Payable benefits include separate allowance for the initial evaluation and testing. Outpatient treatment following the initial intake evaluation and testing is limited to a maximum of thirty-six (36) sessions per cardiac event, usually provided 3 sessions per week for twelve (12) weeks. Patients diagnosed with chronic stable angina are limited to one treatment episode (36 sessions) in a calendar year.

(iii) *Exclusions*. Phase III cardiac rehabilitation lifetime maintenance programs performed at home or in medically unsupervised settings are not covered.

(iv) *Providers*. A provider of cardiac rehabilitation services must be a TRICARE authorized hospital (see §199.6 (b)(4)(i)) or a freestanding cardiac rehabilitation facility that meets the requirements of §199.6 (f). All cardiac rehabilitation services must be ordered by a physician.

(v) *Payment*. Payment for outpatient treatment will be based on an all inclusive allowable charge per session. Inpatient treatment will be paid based upon the reimbursement system in place for the hospital where the services are rendered.

(vi) *Implementation Guidelines*. The Director of OCHAMPUS shall issue guidelines as are necessary to implement the provisions of this paragraph.

(19) *Hospice care*. Hospice care is a program which provides an integrated set of services and supplies designed to care for the terminally ill. This type of care emphasizes palliative care and supportive services, such as pain control and home care, rather than cure-oriented services provided in institutions that are otherwise the primary focus under CHAMPUS. The benefit provides coverage for a humane and sensible approach to care during the last days of life for some terminally ill patients.

(i) *Benefit coverage*. CHAMPUS beneficiaries who are terminally ill (that is, a life expectancy of six months or less if the disease runs its normal course) will be eligible for the following services and supplies in lieu of most other CHAMPUS benefits:

(A) Physician services.

(B) Nursing care provided by or under the supervision of a registered professional nurse.

(C) Medical social services provided by a social worker who has at least a bachelor's degree from a school accredited or approved by the Council on Social Work Education, and who is working under the direction of a physician. Medical social services include, but are not limited to the following:

(*1*) Assessment of social and emotional factors related to the beneficiary's illness, need for care, response to treatment, and adjustment to care.

(*2*) Assessment of the relationship of the beneficiary's medical and nursing requirements to the individual's home situation, financial resources, and availability of community resources.

(*3*) Appropriate action to obtain available community resources to assist in resolving the beneficiary's problem.

(*4*) Counseling services that are required by the beneficiary.

(D) Counseling services provided to the terminally ill individual and the family member or other persons caring for the individual at home. Counseling, including dietary counseling, may be provided both for the purpose of training the individual's family or other care-giver to provide care, and for the purpose of helping the individual and those caring for him or her to adjust to the individual's approaching death. Bereavement counseling, which consists of counseling services provided to the individual's family after the individual's death, is a required hospice service but it is not reimbursable.

(E) Home health aide services furnished by qualified aides and homemaker services. Home health aides may provide personal care services. Aides also may perform household services to maintain a safe and sanitary environment in areas of the home used by the patient. Examples of such services are changing the bed or light cleaning and laundering essential to the comfort and cleanliness of the patient. Aide services must be provided under the general supervision of a registered nurse. Homemaker services may include assistance in personal care, maintenance of a safe and healthy environment, and services to enable the individual to carry out the plan of care. Qualifications for home health aides can be found in 42 CFR 484.36.

(F) Medical appliances and supplies, including drugs and biologicals. Only drugs that are used primarily for the relief of pain and symptom control related to the individual's terminal illness are covered. Appliances may include covered durable medical equipment, as well as other self-help and personal comfort items related to the palliation or management of the patient's condition while he or she is under hospice care. Equipment is provided by the hospice for use in the beneficiary's home while he or she is under hospice care. Medical supplies include those that are part of the written plan of care. Medical appliances and supplies are included within the hospice all-inclusive rates.

(G) Physical therapy, occupational therapy and speech-language pathology services provided for purposes of symptom control or to enable the individual to maintain activities of daily living and basic functional skills.

(H) Short-term inpatient care provided in a Medicare participating hospice inpatient unit, or a Medicare participating hospital, skilled nursing facility (SNF) or, in the case of respite care, a Medicaid-certified nursing facility that additionally meets the special hospice standards regarding staffing and patient areas. Services provided in an inpatient setting must conform to the written plan of care. Inpatient care may be required for procedures necessary for pain control or acute or chronic symptom management. Inpatient care may also be furnished to provide respite for the individual's family or other persons caring for the individual at home. Respite care is the only type of inpatient care that may be provided in a Medicaid-certified nursing facility. The limitations on custodial care and personal comfort items applicable to other CHAMPUS services are not applicable to hospice care.

(ii) *Core services.* The hospice must ensure that substantially all core services are routinely provided directly by hospice employees; i.e., physician services, nursing care, medical social services, and counseling for individuals and care givers. Refer to paragraphs (e)(19)(i)(A), (e)(19)(i)(B), (e)(19)(i)(C), and (e)(19)(i)(D) of this section.

(iii) *Non-core services.* While non-core services (i.e., home health aide services, medical appliances and supplies, drugs and biologicals, physical therapy, occupational therapy, speech-language pathology and short-term inpatient care) may be provided under arrangements with other agencies or organizations, the hospice must maintain professional management of the patient at all times and in all settings. Refer to paragraphs (e)(19)(i)(E), (e)(19)(i)(F), (e)(19)(i)(G), and (e)(19)(i)(H) of this section.

(iv) *Availability of services.* The hospice must make nursing services, physician services, and drugs and biologicals routinely available on a 24-hour basis. All other covered services must be made available on a 24-hour basis to the extent necessary to meet the needs of individuals for care that is reasonable and necessary for the palliation and management of the terminal illness and related condition. These services must be provided in a manner consistent with accepted standards of practice.

(v) *Periods of care.* Hospice care is divided into distinct periods of care. The periods of care that may be elected by the terminally ill CHAMPUS beneficiary shall be as the Director, TRICARE determines to be appropriate, but shall not be less than those offered under Medicare's Hospice Program.

(vi) *Conditions for coverage.* The CHAMPUS beneficiary must meet the

following conditions/criteria in order to be eligible for the hospice benefits and services referenced in paragraph (e)(19)(i) of this section.

(A) There must be written certification in the medical record that the CHAMPUS beneficiary is terminally ill with a life expectancy of six months or less if the terminal illness runs its normal course.

(*1*) *Timing of certification*. The hospice must obtain written certification of terminal illness for each of the election periods described in paragraph (e)(19(vi)(B) of this section, even if a single election continues in effect for two, three or four periods.

(*i*) *Basic requirement*. Except as provided in paragraph (e)(19(vi)(A)(*1*)(*ii*) of this section the hospice must obtain the written certification no later than two calendar days after the period begins.

(*ii*) *Exception*. For the initial 90-day period, if the hospice cannot obtain the written certifications within two calendar days, it must obtain oral certifications within two calendar days, and written certifications no later than eight calendar days after the period begins.

(*2*) *Sources of certification*. Physician certification is required for both initial and subsequent election periods.

(*i*) For the initial 90-day period, the hospice must obtain written certification statements (and oral certification statements if required under paragraph (e)(19(vi)(A)(*i)(ii*) of this section) from:

(*A*) The individual's attending physician if the individual has an attending physician; and

(*B*) The medical director of the hospice or the physician member of the hospice interdisciplinary group.

(*ii*) For subsequent periods, the only requirement is certification by one of the physicians listed in paragraph (e)(19)(vi)(A)(*2)(i*)(*B*) of this section.

(B) The terminally ill beneficiary must elect to receive hospice care for each specified period of time; i.e., the two 90-day periods, a subsequent 30-day period, and a final period of unlimited duration. If the individual is found to be mentally incompetent, his or her representative may file the election statement. Representative means an individual who has been authorized under State law to terminate medical care or to elect or revoke the election of hospice care on behalf of a terminally ill individual who is found to be mentally incompetent.

(*1*) The episodes of care must be used consecutively; i.e., the two 90-day periods first, then the 30-day period, followed by the final period. The periods of care may be elected separately at different times.

(*2*) The initial election will continue through subsequent election periods without a break in care as long as the individual remains in the care of the hospice and does not revoke the election.

(*3*) The effective date of the election may begin on the first day of hospice care or any subsequent day of care, but the effective date cannot be made prior to the date that the election was made.

(*4*) The beneficiary or representative may revoke a hospice election at any time, but in doing so, the remaining days of that particular election period are forfeited and standard CHAMPUS coverage resumes. To revoke the hospice benefit, the beneficiary or representative must file a signed statement of revocation with the hospice. The statement must provide the date that the revocation is to be effective. An individual or representative may not designate an effective date earlier than the date that the revocation is made.

(*5*) If an election of hospice benefits has been revoked, the individual, or his or her representative may at any time file a hospice election for any period of time still available to the individual, in accordance with § 199.4(e)(19)(vi)(B).

(*6*) A CHAMPUS beneficiary may change, once in each election period, the designation of the particular hospice from which he or she elects to receive hospice care. To change the designation of hospice programs the individual or representative must file, with the hospice from which care has been received and with the newly designated hospice, a statement that includes the following information:

(*i*) The name of the hospice from which the individual has received care and the name of the hospice from which he or she plans to receive care.

(*ii*) The date the change is to be effective.

(*7*) Each hospice will design and print its own election statement to include the following information:

(*i*) Identification of the particular hospice that will provide care to the individual.

(*ii*) The individual's or representative's acknowledgment that he or she has been given a full understanding of the palliative rather than curative nature of hospice care, as it relates to the individual's terminal illness.

(*iii*) The individual's or representative's acknowledgment that he or she understands that certain other CHAMPUS services are waived by the election.

(*iv*) The effective date of the election.

(*v*) The signature of the individual or representative, and the date signed.

(*8*) The hospice must notify the CHAMPUS contractor of the initiation, change or revocation of any election.

(C) The beneficiary must waive all rights to other CHAMPUS payments for the duration of the election period for:

(*1*) Care provided by any hospice program other than the elected hospice unless provided under arrangements made by the elected hospice; and

(*2*) Other CHAMPUS basic program services/benefits related to the treatment of the terminal illness for which hospice care was elected, or to a related condition, or that are equivalent to hospice care, except for services provided by:

(*i*) The designated hospice;

(*ii*) Another hospice under arrangement made by the designated hospice; or

(*iii*) An attending physician who is not employed by or under contract with the hospice program.

(*3*) Basic CHAMPUS coverage will be reinstated upon revocation of the hospice election.

(D) A written plan of care must be established by a member of the basic interdisciplinary group assessing the patient's needs. This group must have at least one physician, one registered professional nurse, one social worker, and one pastoral or other counselor.

(*1*) In establishing the initial plan of care the member of the basic interdisciplinary group who assesses the patient's needs must meet or call at least one other group member before writing the initial plan of care.

(*2*) At least one of the persons involved in developing the initial plan must be a nurse or physician.

(*3*) The plan must be established on the same day as the assessment if the day of assessment is to be a covered day of hospice care.

(*4*) The other two members of the basic interdisciplinary group—the attending physician and the medical director or physician designee—must review the initial plan of care and provide their input to the process of establishing the plan of care within two calendar days following the day of assessment. A meeting of group members is not required within this 2-day period. Input may be provided by telephone.

(*5*) Hospice services must be consistent with the plan of care for coverage to be extended.

(*6*) The plan must be reviewed and updated, at intervals specified in the plan, by the attending physician, medical director or physician designee and interdisciplinary group. These reviews must be documented in the medical records.

(*7*) The hospice must designate a registered nurse to coordinate the implementation of the plan of care for each patient.

(*8*) The plan must include an assessment of the individual's needs and identification of the services, including the management of discomfort and symptom relief. It must state in detail the scope and frequency of services needed to meet the patient's and family's needs.

(E) Complete medical records and all supporting documentation must be submitted to the CHAMPUS contractor within 30 days of the date of its request. If records are not received within the designated time frame, authorization of the hospice benefit will be denied and any prior payments made will be recouped. A denial issued for this reason is not an initial determination under § 199.10, and is not appealable.

(vii) *Appeal rights under hospice benefit.* A beneficiary or provider is entitled to appeal rights for cases involving

a denial of benefits in accordance with the provisions of this part and § 199.10.

(20) [Reserved]

(21) *Home health services*. Home health services are covered when furnished by, or under arrangement with, a home health agency (HHA) that participates in the TRICARE program, and provides care on a visiting basis in the beneficiary's home. Covered HHA services are the same as those provided under Medicare under section 1861(m) of the Social Security Act (42 U.S.C. 1395x(m)) and 42 CFR part 409, subpart E.

(i) *Benefit coverage*. Coverage will be extended for the following home health services subject to the conditions of coverage prescribed in paragraph (e)(21)(ii) of this section:

(A) Part-time or intermittent skilled nursing care furnished by a registered nurse or a licensed practical (vocational) nurse under the supervision of a registered nurse;

(B) Physical therapy, speech-language pathology, and occupational therapy;

(C) Medical social services under the direction of a physician;

(D) Part-time or intermittent services of a home health aide who has successfully completed a state-established or other training program that meets the requirements of 42 CFR Part 484;

(E) Medical supplies, a covered osteoporosis drug (as defined in the Social Security Act 1861(kk), but excluding other drugs and biologicals) and durable medical equipment;

(F) Medical services provided by an interim or resident-in-training of a hospital, under an approved teaching program of the hospital in the case of an HHA that is affiliated or under common control of a hospital; and

(G) Services at hospitals, SNFs or rehabilitation centers when they involve equipment too cumbersome to bring to the home but not including transportation of the individual in connection with any such item or service.

(ii) *Conditions for Coverage*. The following conditions/criteria must be met in order to be eligible for the HHA benefits and services referenced in paragraph (e)(21)(i) of this section:

(A) The person for whom the services are provided is an eligible TRICARE beneficiary.

(B) The HHA that is providing the services to the beneficiary has in effect a valid agreement to participate in the TRICARE program.

(C) Physician certifies the need for home health services because the beneficiary is homebound.

(D) The services are provided under a plan of care established and approved by a physician.

(*1*) The plan of care must contain all pertinent diagnoses, including the patient's mental status, the types of services, supplies, and equipment required, the frequency of visits to be made, prognosis, rehabilitation potential, functional limitations, activities permitted, nutritional requirements, all medications and treatments, safety measures to protect against injury, instructions for timely discharge or referral, and any additional items the HHA or physician chooses to include.

(*2*) The orders on the plan of care must specify the type of services to be provided to the beneficiary, both with respect to the professional who will provide them and the nature of the individual services, as well as the frequency of the services.

(E) The beneficiary must need skilled nursing care on an intermittent basis or physical therapy or speech-language pathology services, or have continued need for occupational therapy after the need for skilled nursing care, physical therapy, or speech-language pathology services has ceased.

(F) The beneficiary must receive, and an HHA must provide, a patient-specific, comprehensive assessment that:

(*1*) Accurately reflects the patient's current health status and includes information that may be used to demonstrate the patient's progress toward achievement of desired outcomes;

(*2*) Identifies the beneficiary's continuing need for home care and meets the beneficiary's medical, nursing, rehabilitative, social, and discharge planning needs.

(*3*) Incorporates the use of the current version of the Outcome and Assessment Information Set (OASIS) items, using the language and groupings of the OASIS items, as specified by the Director, TRICARE Management Activity.

(G) TRICARE is the appropriate payer.

(H) The services for which payment is claimed are not otherwise excluded from payment.

(I) Any other conditions of coverage/participation that may be required under Medicare's HHA benefit; *i.e.*, coverage guidelines as prescribed under Sections 1861(o) and 1891 of the Social Security Act (42 U.S.C. 1395x(o) and 1395bbb), 42 CFR Part 409, Subpart E and 42 CFR Part 484.

(22) *Pulmonary rehabilitation.* TRICARE benefits are payable for beneficiaries whose conditions are considered appropriate for pulmonary rehabilitation according to guidelines adopted by the Executive Director, TMA, or a designee.

(23) A speech generating device (SGD) as defined in §199.2 of this part is covered as a voice prosthesis. The prosthesis provisions found in paragraph (d)(3)(vii) of this section apply.

(24) A hearing aid, but only for a dependent of a member of the uniformed services on active duty and only if the dependent has a profound hearing loss as defined in §199.2 of this part. Medically necessary and appropriate services and supplies, including hearing examinations, required in connection with this hearing aid benefit are covered.

(25) Rehabilitation therapy as defined in §199.2 of this part to improve, restore, or maintain function, or to minimize or prevent deterioration of function, of a patient when prescribed by a physician. The rehabilitation therapy must be medically necessary and appropriate medical care, rendered by an authorized provider, necessary to the establishment of a safe and effective maintenance program in connection with a specific medical condition, and must not be custodial care or otherwise excluded from coverage.

(26) *National Institutes of Health clinical trials.* By law, and pursuant to an agreement between the Department of Defense and the Department of Health and Human Services, the general prohibition against CHAMPUS cost-sharing of unproven drugs, devices, and medical treatments or procedures may be waived by the Secretary of Defense in connection with clinical trials sponsored or approved by the National Institutes of Health (NIH) or an NIH Institute or Center if it is determined that such a waiver will promote access by covered beneficiaries to promising new treatments and contribute to the development of such treatments. A waiver shall only be exercised as authorized under this paragraph.

(i) *Demonstration waiver.* A waiver may be granted through a demonstration project established in accordance with Sec. 199.1(o) of this part.

(ii) *Continuous waiver.* (A) *General.* As a result of a demonstration project under which a waiver has been granted in connection with a National Institutes of Health National Cancer Institute clinical trial, a determination may be made that it is in the best interest of the government and CHAMPUS beneficiaries to end the demonstration and continue to provide a waiver for CHAMPUS cost-sharing of the specific clinical trial. Only those specified clinical trials identified under paragraph (e)(26)(ii) of this section have been authorized a continuous waiver under CHAMPUS.

(B) *National Cancer Institute (NCI) sponsored cancer prevention, screening, and early detection clinical trials.* A continuous waiver under paragraph (e)(26) of this regulation has been granted for CHAMPUS cost-sharing for those CHAMPUS-eligible patients selected to participate in NCI sponsored Phase II and Phase III studies for the prevention and treatment of cancer. Additionally, Phase I studies may be approved on a case by case basis when the requirements below are met.

(*1*) TRICARE will cost-share all medical care and testing required to determine eligibility for an NCI-sponsored trial, including the evaluation for eligibility at the institution conducting the NCI-sponsored study. TRICARE will cost-share all medical care required as a result of participation in NCI-sponsored studies. This includes purchasing and administering all approved chemotherapy agents (except for NCI-funded investigational drugs), all inpatient and outpatient care, including diagnostic and laboratory services not otherwise reimbursed under an NCI grant program if the following conditions are met:

(*i*) The provider seeking treatment for a CHAMPUS-eligible patient in an NCI approved protocol has obtained pre-authorization for the proposed treatment before initial evaluation; and,

(*ii*) Such treatments are NCI sponsored Phase I, Phase II or Phase III protocols; and

(*iii*) The patient continues to meet entry criteria for said protocol; and,

(*iv*) The institutional and individual providers are CHAMPUS authorized providers; and,

(*v*) The requirements for Phase I protocols in paragraph (e)(26)(ii)(B)(*2*) of this section are met:

(*2*) Requirements for Phase I protocols are:

(*i*) Standard treatment has been or would be ineffective, does not exist, or there is no superior non-investigational treatment alternative; and,

(*ii*) The available clinical or preclinical data provide a reasonable expectation that the treatment will be at least as effective as the non-investigational alternative; and,

(*iii*) The facility and personnel providing the treatment are capable of doing so by virtue of their experience, training, and volume of patients treated to maintain expertise; and,

(*iv*) The referring physician has concluded that the enrollee's participation in such a trial would be appropriate based upon the satisfaction of paragraphs (e)(26)(ii)(B)(*2*)(*i*) through (*iii*) of this section.

(*3*) TRICARE will not provide reimbursement for care rendered in the National Institutes of Health Clinical Center or costs associated with non-treatment research activities associated with the clinical trials.

(*4*) Cost-shares and deductibles applicable to CHAMPUS will also apply under the NCI-sponsored clinical trials.

(*5*) The Director, TRICARE (or designee), shall issue procedures and guidelines establishing NCI-sponsorship of clinical trials and the administrative process by which individual patients apply for and receive cost-sharing under NCI-sponsored cancer clinical trials.

(iii) *Public Health Emergency Waiver*.

(A) *General*. During public health emergencies (*e.g.*, a national state of emergency declared by the President), TRICARE may cover cost-sharing for TRICARE-eligible patients who participate in Phase I, II, III, or IV trials that are sponsored by the NIH or an NIH Institute for the purposes of treatment or prevention of the pandemic or public health emergency.

(B) *National Institute of Allergy and Infectious Diseases (NIAID)-sponsored clinical trials for COVID–19*. For the duration of the President's national emergency regarding the COVID–19 outbreak, TRICARE will cover cost-sharing for those TRICARE-eligible patients selected to participate in NIAID-sponsored Phase I, II, III, and IV studies examining the treatment or prevention of COVID–19 and its associated sequelae (*e.g.*, cardiac and pulmonary issues). TRICARE will continue to cover cost-sharing for any eligible beneficiary enrolled in such a study until the conclusion of that study, even if the national emergency ends before the conclusion of the study.

(*1*) TRICARE will cost-share all medical care (including associated health complications) and testing required to determine eligibility for an NIAID-sponsored trial, including the evaluation for eligibility at the institution conducting the NIAID-sponsored study. TRICARE will cost-share all medical care required as a result of participation in NIAID-sponsored studies. This includes purchasing and administering all approved pharmaceutical agents (except for NIAID-funded investigational drugs), all inpatient and outpatient care, including diagnostic, laboratory, rehabilitation, and home health services not otherwise reimbursed under an NIAID grant program if the following conditions are met:

(*i*) Such treatments are NIAID-sponsored Phase I, Phase II, Phase III, or Phase IV protocols;

(*ii*) The patient continues to meet entry criteria for said protocol;

(*iii*) The institutional and individual providers are TRICARE-authorized providers; and

(*iv*) The requirements for Phase I protocols in paragraph (e)(26)(iii)(B)(*2*) of this section are met.

(*2*) Requirements for Phase I protocols are:

(*i*) Standard treatment has been or would be ineffective, does not exist, or there is no superior non-investigational treatment alternative;

(*ii*) The available clinical or preclinical data provide a reasonable expectation that the treatment will be at least as effective as the non-investigational alternative;

(*iii*) The facility and personnel providing the treatment are capable of doing so by virtue of their experience, training, and volume of patients treated to maintain expertise; and

(*iv*) The referring physician has concluded that the enrollee's participation in such a trial would be appropriate based upon the satisfaction of paragraphs (e)(26)(iii)(B)(*2*)(*i*) through (*iii*) of this section.

(*3*) TRICARE will not provide reimbursement for care rendered in the NIH Clinical Center or costs associated with non-treatment research activities associated with the clinical trials.

(*4*) Cost-shares and deductibles applicable to TRICARE will also apply under the NIAID-sponsored clinical trials.

(*5*) The Director, Defense Health Agency (or designee), shall issue procedures and guidelines establishing NIAID-sponsorship of clinical trials and the administrative process by which individual patients apply for and receive cost-sharing under NIAID-sponsored COVID–19 clinical trials.

(27) TRICARE will cost share forensic examinations following a sexual assault or domestic violence. The forensic examination includes a history of the event and a complete physical and collection of forensic evidence, and medical and psychological follow-up care. The examination for sexual assault also includes, but is not limited to, a test kit to retrieve forensic evidence, testing for pregnancy, testing for sexually transmitted disease and HIV, and medical services and supplies for prevention of sexually transmitted diseases, HIV, pregnancy, and counseling services.

(28) *Preventive care.* The following preventive services are covered:

(i) Cervical, breast, colon and prostate cancer screenings according to standards issued by the Director, TRICARE Management Activity, based on guidelines from the U.S. Department of Health and Human Services. The standards may establish a specific schedule that includes frequency, age specifications, and gender of the beneficiary, as appropriate.

(ii) Immunizations as recommended by the Centers for Disease Control and Prevention (CDC).

(iii) Well-child visits for children under 6 years of age as described in paragraph (c)(3)(xi) of this section.

(iv) Health promotion and disease prevention visits (which may include all of the services provided pursuant to §199.17(f)(2)) for beneficiaries 6 years of age or older may be provided in connection with immunizations and cancer screening examinations authorized by paragraphs (e)(28)(i) and (ii) of this section).

(v) Breastfeeding support, supplies (including breast pumps and associated equipment), and counseling.

(29) *Physical examinations.* In addition to the health promotion and disease prevention visits authorized in paragraph (e)(28)(iv) of this section, the following physical examinations are specifically authorized:

(i) Physical examinations for dependents of Active Duty military personnel who are traveling outside the United States. The examination must be required because of an Active Duty member's assignment and the travel is being performed under orders issued by a Uniformed Service. Any immunizations required for a dependent of an Active Duty member to travel outside of the United States is covered as a preventive service under paragraph (e)(28) of this section.

(ii) Physical examinations for beneficiaries ages 5–11 that are required for school enrollment and that are provided on or after October 30, 2000.

(iii) Other types of physical examinations not listed above are excluded including routine, annual, or employment-requested physical examinations and routine screening procedures that are not part of medically necessary care or treatment or otherwise specifically authorized by statute.

(30) *Smoking cessation program.* The TRICARE smoking cessation program is a behavioral modification program

to assist eligible beneficiaries who desire to quit smoking. The program consists of a pharmaceutical benefit; smoking cessation counseling; access to a toll-free quit line for non-medical assistance; and, access to print and internet web-based tobacco cessation materials.

(i) *Availability*. The TRICARE smoking cessation program is available to all TRICARE beneficiaries who reside in one of the 50 United States or the District of Columbia who are not eligible for Medicare benefits authorized under Title XVIII of the Social Security Act. In addition, pursuant to § 199.17, if authorized by the Assistant Secretary of Defense (Health Affairs), the TRICARE smoking cessation program may be implemented in whole or in part in areas outside the 50 states and the District of Columbia for active duty members and their dependents who are enrolled in TRICARE Prime (overseas Prime beneficiaries). In such cases, the Assistant Secretary of Defense (Health Affairs) may also authorize modifications to the TRICARE smoking cessation program rules and procedures as may be appropriate to the overseas area involved. Notice of the use of this authority, not otherwise mentioned in this paragraph (e)(30), shall be published in the FEDERAL REGISTER.

(ii) *Benefits*. There is no requirement for an eligible beneficiary to be diagnosed with a smoking related illness to access benefits under this program. The specific benefits available under the TRICARE smoking cessation program are:

(A) *Pharmaceutical agents*. Products available under this program are identified through the DoD Pharmacy and Therapeutics Committee, consistent with the DoD Uniform Formulary in § 199.21. Smoking cessation pharmaceutical agents, including FDA-approved over-the-counter (OTC) pharmaceutical agents, are available through the TRICARE Mail Order Pharmacy (TMOP) or the MTF at no cost to the beneficiary. Smoking cessation pharmaceuticals through the TRICARE program will not be available at any retail pharmacies. A prescription from a TRICARE-authorized provider is required to obtain any pharmaceutical agent used for smoking cessation, including OTC agents. For overseas Prime beneficiaries, pharmaceutical agents may be provided either in the MTF or through the TMOP where such facility or service is available.

(B) *Face-to-face smoking cessation counseling*. Both individual and group smoking cessation counseling are covered. The number and mix of face-to-face counseling sessions covered under this program shall be determined by the Director, TMA; however, shall not exceed the limits established in paragraph (e)(30)(iii) of this section. A TRICARE-authorized provider listed in § 199.6 must render all counseling sessions.

(C) *Toll-free quit line*. Access to a non-medical toll-free quit line 7 days a week, 24 hours a day will be available. The quit line will be staffed with smoking cessation counselors trained to assess a beneficiary's readiness to quit, identify barriers to quitting, and provide specific suggested actions and motivational counseling to enhance the chances of a successful quit attempt. When appropriate, quit line counselors will refer beneficiaries to a TRICARE-authorized provider for medical intervention. The quit line may, at the discretion of the Director, TMA, include the opportunity for the beneficiary to request individual follow-up contact initiated by quit line personnel; however, the beneficiary is not required to participate in the quit line initiated follow-up. Printed educational materials on the effects of tobacco use will be provided to the beneficiary upon request. This benefit may be made available to overseas Prime beneficiaries should the ASD(HA) exercise his authority to do so and provide appropriate notice in the FEDERAL REGISTER.

(D) *Web-based resources*. Downloadable educational materials on the effects of tobacco use will be available through the internet or other electronic media. This service may be made available to overseas Prime beneficiaries in all locations where web based resources are available. There shall be no requirement to create web based resources in any geographic area in order to make this service available.

(f) *Beneficiary or sponsor liability*—(1) *General*. As stated in the introductory

paragraph to this section, the Basic Program is essentially a supplemental program to the Uniformed Services direct medical care system. To encourage use of the Uniformed Services direct medical care system wherever its facilities are available and appropriate, the Basic Program benefits are designed so that it is to the financial advantage of a CHAMPUS beneficiary or sponsor to use the direct medical care system. When medical care is received from civilian sources, a CHAMPUS beneficiary is responsible for payment of certain deductible and cost-sharing amounts in connection with otherwise covered services and supplies. By statute, this joint financial responsibility between the beneficiary or sponsor and CHAMPUS is more favorable for dependents of members than for other classes of beneficiaries.

(2) *Dependents of members of the Uniformed Services*. CHAMPUS beneficiary or sponsor liability set forth for dependents of members is as follows:

(i) *Annual calendar year deductible for outpatient services and supplies*.

(A) For care rendered all eligible beneficiaries prior to April 1, 1991, or when the active duty sponsor's pay grade is E–4 or below, regardless of the date of care:

(*1*) *Individual Deductible:* Each beneficiary is liable for the first fifty dollars ($50.00) of the CHAMPUS-determined allowable amount on claims for care provided in the same calendar year.

(*2*) *Family Deductible:* The total deductible amount for all members of a family with the same sponsor during one calendar year shall not exceed one hundred dollars ($100.00).

(B) For care rendered on or after April 1, 1991, for all CHAMPUS beneficiaries except dependents of active duty sponsors in pay grades E–4 or below.

(*1*) *Individual Deductible:* Each beneficiary is liable for the first one hundred and fifty dollars ($150.00) of the CHAMPUS-determined allowable amount on claims for care provided in the same calendar year.

(*2*) *Family Deductible:* The total deductible amount for all members of a family with the same sponsor during one calendar year shall not exceed three hundred dollars ($300.00).

(C) CHAMPUS-*approved Ambulatory Surgical Centers or Birthing Centers*. No deductible shall be applied to allowable amounts for services or items rendered to active duty for authorized NATO dependents.

(D) *Allowable Amount does not exceed Deductible Amount*. If calendar year allowable amounts for two or more beneficiary members of a family total less than $100.00 ($300.00 if paragraph (f)(2)(i)(B)(*2*) of this section applies), but more of the beneficiary members submit a claim for over $50.00 ($150.00 if paragraph (f)(2)(i)(B)(*1*) of this section applies), neither the family nor the individual deductible will have been met and no CHAMPUS benefits are payable.

(E) For any family the outpatient deductible amounts will be applied sequentially as the CHAMPUS claims are processed.

(F) If the calendar year outpatient deductible under either paragraphs (f)(2)(i)(A) or (f)(2)(i)(B) of this section has been met by a beneficiary or a family through the submission of a claim or claims to a CHAMPUS fiscal intermediary in another geographic location from the location where a current claim is being submitted, the beneficiary or sponsor must obtain a deductible certificate from the CHAMPUS fiscal intermediary where the applicable beneficiary or family calendar year deductible was met. Such deductible certificate must be attached to the current claim being submitted for benefits. Failure to obtain a deductible certificate under such circumstances will result in a second beneficiary or family calendar year deductible being applied. However, this second deductible may be reimbursed once appropriate documentation, as described in paragraph (f)(2)(i)(F) of this section, is supplied to the CHAMPUS fiscal intermediary applying the second deductible.

(G) Notwithstanding the dates specified in paragraphs (f)(2)(i)(A) and (f)(B)(2)(i) of this section in the case of dependents of active duty members of rank E–5 or above with Persian Gulf Conflict service, dependents of service members who were killed in the Gulf, or who died subsequent to Gulf service,

and of members who retired prior to October 1, 1991, after having served in the Gulf War, the deductible shall be the amount specified in paragraph (f)(2)(i)(A) of this section for care rendered prior to October 1, 1991, and the amount specified in paragraph (f)(2)(i)(B) of this section for care rendered on or after October 1, 1991.

(H) The Director, TRICARE Management Activity, may waive the annual individual or family calendar year deductible for dependents of a Reserve Component member who is called or ordered to active duty for a period of more than 30 days or a National Guard member who is called or ordered to fulltime federal National Guard duty for a period of more than 30 days in support of a contingency operation (as defined in 10 U.S.C. 101(a)(13)). For purposes of this paragraph, a dependent is a lawful husband or wife of the member and a child is defined in paragraphs (b)(2)(ii)(A) through (F) and (b)(2)(ii)(H)(1), (2), and (4) of § 199.3.

(ii) *Inpatient cost-sharing.* Dependents of members of the Uniformed Services are responsible for the payment of the first $25 of the allowable institutional costs incurred with each covered inpatient admission to a hospital or other authorized institutional provider (refer to § 199.6, including inpatient admission to a residential treatment center, substance use disorder rehabilitation facility residential treatment program, or skilled nursing facility), or the amount the beneficiary or sponsor would have been charged had the inpatient care been provided in a Uniformed Service hospital, whichever is greater.

**Note:** The Secretary of Defense (after consulting with the Secretary of Health and Human Services and the Secretary of Transportation) prescribes the fair charges for inpatient hospital care provided through Uniformed Services medical facilities. This determination is made each calendar year.

(A) *Inpatient cost-sharing payable with each separate inpatient admission.* A separate cost-sharing amount (as described in paragraph (f)(2) of this section) is payable for each inpatient admission to a hospital or other authorized institution, regardless of the purpose of the admission (such as medical or surgical), regardless of the number of times the beneficiary is admitted, and regardless of whether or not the inpatient admissions are for the same or related conditions; except that successive inpatient admissions shall be deemed one inpatient confinement for the purpose of computing the inpatient cost-share payable, provided not more than 60 days have elapsed between the successive admissions. However, notwithstanding this provision, all admissions related to a single maternity episode shall be considered one confinement, regardless of the number of days between admissions (refer to paragraph (b) of this section).

(B) *Multiple family inpatient admissions.* A separate cost-sharing amount is payable for each inpatient admission, regardless of whether or not two or more beneficiary members of a family are admitted at the same time or from the same cause (such as an accident). A separate beneficiary inpatient cost-sharing amount must be applied for each separate admission on each beneficiary member of the family.

(C) *Newborn patient in his or her own right.* When a newborn infant remains as an inpatient in his or her own right (usually after the mother is discharged), the newborn child becomes the beneficiary and patient and the extended inpatient stay becomes a separate inpatient admission. In such a situation, a new, separate inpatient cost-sharing amount is applied. If a multiple birth is involved (such as twins or triplets) and two or more newborn infants become patients in their own right, a separate inpatient cost-sharing amount must be applied to the inpatient stay for each newborn child who has remained as an inpatient in his or her own right.

(iii) *Outpatient cost-sharing.* Dependents of members of the Uniformed Services are responsible for payment of 20 percent of the CHAMPUS-determined allowable cost or charge beyond the annual calendar year deductible amount (as described in paragraph (f)(2)(i) of this section) for otherwise covered services or supplies provided on an outpatient basis by authorized providers.

(iv) *Ambulatory surgery*. Notwithstanding the above provisions pertaining to outpatient cost-sharing, dependents of members of the Uniformed Services are responsible for payment of $25 for surgical care that is authorized and received while in an outpatient status and that has been designated in guidelines issued by the Director, OCHAMPUS, or a designee.

(v) [Reserved]

(vi) *Transitional Assistance Management Program (TAMP)*. Members of the Armed Forces (and their family members) who are eligible for TAMP under paragraph 199.3(e) of this Part are subject to the same beneficiary or sponsor liability as family members of members of the uniformed services described in this paragraph (f)(2).

(3) *Former members and dependents of former members*. CHAMPUS beneficiary liability set forth for former members and dependents of former members is as follows:

(i) *Annual calendar year deductible for outpatient services or supplies*. The annual calendar year deductible for otherwise covered outpatient services or supplies provided former members and dependents of former members is the same as the annual calendar year outpatient deductible applicable to dependents of active duty members of rank E–5 or above (refer to paragraph (f)(2)(i)(A) or (B) of this section).

(ii) *Inpatient cost-sharing*. Inpatient admissions to a hospital or other authorized institutional provider (refer to § 199.6, including inpatient admission to a residential treatment center, substance use disorder rehabilitation facility residential treatment program, or skilled nursing facility) shall be cost-shared on an inpatient basis. The cost-sharing for inpatient services subject to the TRICARE DRG-based payment system and the TRICARE per diem system shall be the lesser of the respective per diem copayment amount multiplied by the total number of days in the hospital (except for the day of discharge under the DRG payment system), or 25 percent of the hospital's billed charges. For other inpatient services, the cost-share shall be 25% of the CHAMPUS-determined allowable charges.

(iii) *Outpatient cost-sharing*. Former members and dependents of former members are responsible for payment of 25 percent of the CHAMPUS-determined allowable costs or charges beyond the annual calendar year deductible amount (as described in paragraph (f)(2)(i) of this section) for otherwise covered services or supplies provided on an outpatient basis by authorized providers.

(4) *Former spouses*. CHAMPUS beneficiary liability for former spouses eligible under the provisions set forth in § 199.3 of this part is as follows:

(i) *Annual calendar year deductible for outpatient services or supplies*. An eligible former spouse is responsible for the payment of the first $150.00 of the CHAMPUS-determined reasonable costs or charges for otherwise covered outpatient services or supplies provided in any one calendar year. (Except for services received prior to April 1, 1991, the deductible amount is $50.00). The former spouse cannot contribute to, nor benefit from, any family deductible of the member or former member to whom the former spouse was married or of any CHAMPUS-eligible children.

(ii) *Inpatient cost-sharing*. Eligible former spouses are responsible for payment of cost-sharing amounts the same as those required for former members and dependents of former members.

(iii) *Outpatient cost-sharing*. Eligible former spouses are responsible for payment of 25 percent of the CHAMPUS-determined reasonable costs or charges beyond the annual calendar year deductible amount for otherwise covered services or supplies provided on an outpatient basis by authorized providers.

(5) *Cost-Sharing under the Military-Civilian Health Services Partnership Program*. Cost-sharing is dependent upon the type of partnership program entered into, whether external or internal. (See paragraph (p) of § 199.1, for general requirements of the Military-Civilian Health Services Partnership Program.)

(i) *External Partnership Agreement*. Authorized costs associated with the use of the civilian facility will be financed through CHAMPUS under the

normal cost-sharing and reimbursement procedures applicable under CHAMPUS.

(ii) *Internal Partnership Agreement.* Beneficiary cost-sharing under internal agreements will be the same as charges prescribed for care in military treatment facilities.

(6)–(7) [Reserved]

(8) *Cost-sharing for services provided under special discount arrangements*—(i) *General rule.* With respect to services determined by the Director, OCHAMPUS (or designee) to be covered by § 199.14(e), the Director, OCHAMPUS (or designee) has authority to establish, as an exception to the cost-sharing amount normally required pursuant to this section, a different cost-share amount that appropriately reflects the application of the statutory cost-share to the discount arrangement.

(ii) *Specific applications.* The following are examples of applications of the general rule; they are not all inclusive.

(A) In the case of services provided by individual health care professionals and other noninstitutional providers, the cost-share shall be the usual percentage of the CHAMPUS allowable charge determined under § 199.14(e).

(B) In the case of services provided by institutional providers normally paid on the basis of a pre-set amount (such as DRG-based amount under § 199.14(a)(1) or per-diem amount under § 199.14(a)(2)), if the discount rate is lower than the pre-set rate, the cost-share amount that would apply for a beneficiary other than an active duty dependent pursuant to the normal pre-set rate would be reduced by the same percentage by which the pre-set rate was reduced in setting the discount rate.

(9) *Waiver of deductible amounts or cost-sharing not allowed*—(i) *General rule.* Because deductible amounts and cost sharing are statutorily mandated, except when specifically authorized by law (as determined by the Director, OCHAMPUS), a provider may not waive or forgive beneficiary liability for annual deductible amounts or inpatient or outpatient cost sharing, as set forth in this section.

(ii) *Exception for bad debts.* This general rule is not violated in cases in which a provider has made all reasonable attempts to effect collection, without success, and determines in accordance with generally accepted fiscal management standards that the beneficiary liability in a particular case is an uncollectible bad debt.

(iii) *Remedies for noncompliance.* Potential remedies for noncompliance with this requirement include:

(A) A claim for services regarding which the provider has waived the beneficiary's liability may be disallowed in full, or, alternatively, the amount payable for such a claim may be reduced by the amount of the beneficiary liability waived.

(B) Repeated noncompliance with this requirement is a basis for exclusion of a provider.

(10) *Catastrophic loss protection for basic program benefits.* Calendar year limits, or catastrophic caps, on the amounts beneficiaries are required to pay are established as follows:

(i) *Dependents of active duty members.* The maximum family liability is $1,000 for deductibles and cost-shares based on allowable charges for Basic Program services and supplies received in a calendar year.

(ii) *All other beneficiaries.* For all other categories of beneficiary families (including those eligible under CHAMPVA) the calendar year cap is $3,000.

(iii) *Payment after cap is met.* After a family has paid the maximum cost-share and deductible amounts (dependents of active duty members $1,000 and all others $3,000), for a calendar year, CHAMPUS will pay allowable amounts for remaining covered services through the end of that calendar year.

NOTE TO PARAGRAPH (f)(10): Under the Defense Authorization Act for Fiscal Year 2001, the cap for beneficiaries other than dependents of active duty members was reduced from $7,500 to $3,000 effective October 30, 2000. Prior to this, the Defense Authorization Act for Fiscal Year 1993 reduced this cap from $10,000 to $7,500 on October 1, 1992. The cap remains at $1,000 for dependents of active duty members.

(11) *Beneficiary or sponsor liability under the Pharmacy Benefits Program.* Beneficiary or sponsor liability under the Pharmacy Benefits Program is addressed in § 199.21.

(12) *Elimination of cost-sharing for certain preventive services.*

(i) Effective for dates of service on or after October 14, 2008, beneficiaries, subject to the limitation in paragraph (f)(12)(iii) of this section, shall not pay any cost-share for preventive services listed in paragraph (e)(28)(i) through (iv) of this section. The beneficiary shall not be required to pay any portion of the cost of these preventive services even if the beneficiary has not satisfied the deductible for that year.

(ii) Beneficiaries who paid a cost-share for preventive services listed in paragraph (e)(28)(i) through (iv) of this section on or after October 14, 2008, may request reimbursement until January 28, 2013 according to procedures established by the Director, TRICARE Management Activity.

(iii) This elimination of cost-sharing for preventive services does not apply to any beneficiary who is a Medicare-eligible beneficiary. For purposes of this section, the term ''Medicare-eligible'' beneficiary is defined in 10 U.S.C. 1111(b) and refers to a person eligible for Medicare Part A.

(iv) Appropriate copayments and deductibles will apply for all services not listed in paragraph (e)(28) of this section, whether considered preventive in nature or not.

(13) *Special transition rule for the last quarter of calendar year 2017.* In order to transition deductibles and catastrophic caps from a fiscal year basis to a calendar year basis, the deductible amount and the catastrophic cap amount specified in paragraph (f) of this section will be applicable to the 15-month period of October 1, 2016 through December 31, 2017.

(g) *Exclusions and limitations.* In addition to any definitions, requirements, conditions, or limitations enumerated and described in other sections of this part, the following specifically are excluded from the Basic Program:

(1) *Not medically or psychologically necessary.* Services and supplies that are not medically or psychologically necessary for the diagnosis or treatment of a covered illness (including mental disorder, to include substance use disorder) or injury, for the diagnosis and treatment of pregnancy or well-baby care except as provided in the following paragraph.

(2) *Unnecessary diagnostic tests.* X-ray, laboratory, and pathological services and machine diagnostic tests not related to a specific illness or injury or a definitive set of symptoms except for cancer screening mammography and cancer screening papanicolaou (PAP) tests provided under the terms and conditions contained in the guidelines adopted by the Director, OCHAMPUS.

(3) *Institutional level of care.* Services and supplies related to inpatient stays in hospitals or other authorized institutions above the appropriate level required to provide necessary medical care.

(4) *Diagnostic admission.* Services and supplies related to an inpatient admission primarily to perform diagnostic tests, examinations, and procedures that could have been and are performed routinely on an outpatient basis.

NOTE: If it is determined that the diagnostic x-ray, laboratory, and pathological services and machine tests performed during such admission were medically necessary and would have been covered if performed on an outpatient basis, CHAMPUS benefits may be extended for such diagnostic procedures only, but cost-sharing will be computed as if performed on an outpatient basis.

(5) *Unnecessary postpartum inpatient stay, mother or newborn.* Postpartum inpatient stay of a mother for purposes of staying with the newborn infant (usually primarily for the purpose of breast feeding the infant) when the infant (but not the mother) requires the extended stay; or continued inpatient stay of a newborn infant primarily for purposes of remaining with the mother when the mother (but not the newborn infant) requires extended postpartum inpatient stay.

(6) *Therapeutic absences.* Therapeutic absences from an inpatient facility, except when such absences are specifically included in a treatment plan approved by the Director, OCHAMPUS, or a designee. For cost-sharing provisions refer to § 199.14, paragraph (f)(3).

(7) *Custodial care.* Custodial care as defined in § 199.2.

(8) *Domiciliary care.* Domiciliary care as defined in § 199.2.

(9) *Rest or rest cures.* Inpatient stays primarily for rest or rest cures.

(10) *Amounts above allowable costs or charges.* Costs of services and supplies to the extent amounts billed are over the CHAMPUS determined allowable cost or charge, as provided for in § 199.14.

(11) *No legal obligation to pay, no charge would be made.* Services or supplies for which the beneficiary or sponsor has no legal obligation to pay; or for which no charge would be made if the beneficiary or sponsor was not eligible under CHAMPUS; or whenever CHAMPUS is a secondary payer for claims subject to the CHAMPUS DRG-based payment system, amounts, when combined with the primary payment, which would be in excess of charges (or the amount the provider is obligated to accept as payment in full, if it is less than the charges).

(12) *Furnished without charge.* Services or supplies furnished without charge.

(13) *Furnished by local, state, or Federal Government.* Services and supplies paid for, or eligible for payment, directly or indirectly by a local, state, or Federal Government, except as provided under CHAMPUS, or by government hospitals serving the general public, or medical care provided by a Uniformed Service medical care facility, or benefits provided under title XIX of the Social Security Act (Medicaid) (refer to § 199.8 of this part).

(14) *Study, grant, or research programs.* Services and supplies provided as a part of or under a scientific or medical study, grant, or research program.

(15) *Unproven drugs, devices, and medical treatments or procedures.* By law, CHAMPUS can only cost-share medically necessary supplies and services. Any drug, device, or medical treatment or procedure, the safety and efficacy of which have not been established, as described in this paragraph (g)(15), is unproved and cannot be cost-shared by CHAMPUS except as authorized under paragraph 199.4(e)(26) of this part.

(i) A drug, device, or medical treatment or procedure is unproven:

(A) If the drug or device cannot be lawfully marketed without the approval or clearance of the United States Food and Drug Administration (FDA) and approval or clearance for marketing has not been given at the time the drug or device is furnished to the patient.

NOTE TO PARAGRAPH (G)(15)(I)(A): Although the use of drugs and medicines not approved by the FDA for commercial marketing, that is for use by humans, (even though permitted for testing on humans) is excluded from coverage as unproven, drugs grandfathered by the Federal Food, Drug and Cosmetic Act of 1938 may be covered by CHAMPUS as if FDA approved.

Certain cancer drugs, designated as Group C drugs (approved and distributed by the National Cancer Institute) and Treatment Investigational New Drugs (INDs), are not covered under CHAMPUS because they are not approved for commercial marketing by the FDA. However, medical care related to the use of Group C drugs and Treatment INDs can be cost-shared under CHAMPUS when the patient's medical condition warrants their administration and the care is provided in accordance with generally accepted standards of medical practice. For the duration of the President's national emergency in response to the COVID–19 outbreak, TRICARE will cost-share investigational drugs provided for the treatment of COVID–19 under expanded access.

CHAMPUS will consider coverage of off-label uses of drugs and devices that meet the definition of Off-Label Use of a Drug or Device in § 199.2(b). Approval for reimbursement of off-label uses requires review for medical necessity and also requires demonstrations from medical literature, national organizations, or technology assessment bodies that the off-label use of the drug or device is safe, effective, and in accordance with nationally accepted standards of practice in the medical community.

(B) If a medical device (as defined by 21 U.S.C. 321(h)) with an Investigational Device Exemption (IDE) approved by the Food and Drug Administration is categorized by the FDA as experimental/investigational (FDA Category A).

NOTE: CHAMPUS will consider for coverage a device with an FDA-approved IDE categorized by the FDA as non-experimental/investigational (FDA Category B) for CHAMPUS beneficiaries participating in FDA approved clinical trials. Coverage of any such Category B device is dependent on its meeting all other requirements of the laws and rules governing CHAMPUS and upon the beneficiary involved meeting the FDA-approved IDE study protocols.

(C) Unless reliable evidence shows that any medical treatment or procedure has been the subject of well-controlled studies of clinically meaningful

endpoints, which have determined its maximum tolerated dose, its toxicity, its safety, and its efficacy as compared with standard means of treatment or diagnosis. (See the definition of *reliable evidence* in § 199.2 of this part for the procedures used in determining if a medical treatment or procedure is unproven.)

(D) If reliable evidence shows that the consensus among experts regarding the medical treatment or procedure is that further studies or clinical trials are necessary to determine its maximum tolerated doses, its toxicity, its safety, or its effectiveness as compared with the standard means of treatment or diagnosis (see the definition of reliable evidence in § 199.2 for the procedures used in determining if a medical treatment or procedure is unproven).

(ii) CHAMPUS benefits for rare diseases are reviewed on a case-by-case basis by the Director, Office of CHAMPUS, or a designee. In reviewing the case, the Director, or a designee, may consult with any or all of the following sources to determine if the proposed therapy is considered safe and effective:

(A) Trials published in refereed medical literature.

(B) Formal technology assessments.

(C) National medical policy organization positions.

(D) National professional associations.

(E) National expert opinion organizations.

(iii) *Care excluded*. This exclusion from benefits includes all services directly related to the unproven drug, device, or medical treatment or procedure. However, CHAMPUS may cover services or supplies when there is no logical or causal relationship between the unproven drug, device or medical treatment or procedure and the treatment at issue or where such a logical or causal relationship cannot be established with a sufficient degree of certainty. This CHAMPUS coverage is authorized in the following circumstances:

(A) Treatment that is not related to the unproven drug, device or medical treatment or procedure; e.g., medically necessary in the absence of the unproven treatment.

(B) Treatment which is necessary follow-up to the unproven drug, device or medical treatment or procedure but which might have been necessary in the absence of the unproven treatment.

(16) *Immediate family, household*. Services or supplies provided or prescribed by a member of the beneficiary's immediate family, or a person living in the beneficiary's or sponsor's household.

(17) *Double coverage*. Services and supplies that are (or are eligible to be) payable under another medical insurance or program, either private or governmental, such as coverage through employment or Medicare (refer to § 199.8 of this part).

(18) *Nonavailability Statement required*. Services and supplies provided under circumstances or in geographic locations requiring a Nonavailability Statement (DD Form 1251), when such a statement was not obtained.

(19) *Preauthorization required*. Services or supplies which require preauthorization if preauthorization was not obtained. Services and supplies which were not provided according to the terms of the preauthorization. The Director, OCHAMPUS, or a designee, may grant an exception to the requirement for preauthorization if the services otherwise would be payable except for the failure to obtain preauthorization.

(20) *Psychoanalysis or psychotherapy, part of education*. Psychoanalysis or psychotherapy provided to a beneficiary or any member of the immediate family that is credited towards earning a degree or furtherance of the education or training of a beneficiary or sponsor, regardless of diagnosis or symptoms that may be present.

(21) *Runaways*. Inpatient stays primarily to control or detain a runaway child, whether or not admission is to an authorized institution.

(22) *Services or supplies ordered by a court or other government agency*. Services or supplies, including inpatient stays, directed or agreed to by a court or other governmental agency. However, those services and supplies (including inpatient stays) that otherwise are medically or psychologically necessary for the diagnosis or treatment

of a covered condition and that otherwise meet all CHAMPUS requirements for coverage are not excluded.

(23) *Work-related (occupational) disease or injury*. Services and supplies required as a result of occupational disease or injury for which any benefits are payable under a worker's compensation or similar law, whether or not such benefits have been applied for or paid; except if benefits provided under such laws are exhausted.

(24) *Cosmetic, reconstructive, or plastic surgery*. Services and supplies in connection with cosmetic, reconstructive, or plastic surgery except as specifically provided in paragraph (e)(8) of this section.

(25) *Surgery, psychological reasons*. Surgery performed primarily for psychological reasons (such as psychogenic).

(26) *Electrolysis*.

(27) *Dental care*. Dental care or oral surgery, except as specifically provided in paragraph (e)(10) of this section.

(28) *Obesity, weight reduction*. Service and supplies related ''solely'' to obesity or weight reduction or weight control whether surgical or nonsurgical; wiring of the jaw or any procedure of similar purpose, regardless of the circumstances under which performed (except as provided in paragraph (e)(15) of this section).

(29) *Sex gender changes*. Services and supplies related to sex gender change, also referred to as sex reassignment surgery, as prohibited by section 1079 of title 10, United States Code. This exclusion does not apply to surgery and related medically necessary services performed to correct sex gender confusion/intersex conditions (that is, ambiguous genitalia) which has been documented to be present at birth.

(30) *Therapy or counseling for sexual dysfunctions or sexual inadequacies*. Sex therapy, sexual advice, sexual counseling, sex behavior modification, psychotherapy for mental disorders involving sexual deviations (i.e., transvestic fetishm), or other similar services, and any supplies provided in connection with therapy for sexual dysfunctions or inadequacies.

(31) *Corns, calluses, and toenails*. Removal of corns or calluses or trimming of toenails and other routine podiatry services, except those required as a result of a diagnosed systemic medical disease affecting the lower limbs, such as severe diabetes.

(32) *Dyslexia*.

(33) *Surgical sterilization, reversal*. Surgery to reverse surgical sterilization procedures.

(34) *Noncoital reproductive procedures including artifical insemination, in-vitro fertilization, gamete intrafallopian transfer and all other such reproductive technologies*. Services and supplies related to artificial insemination (including semen donors and semen banks), in-vitro fertilization, gamete intrafallopian transfer and all other noncoital reproductive technologies.

(35) *Nonprescription contraceptives*.

(36) *Tests to determine paternity or sex of a child*. Diagnostic tests to establish paternity of a child; or tests to determine sex of an unborn child.

(37) *Preventive care*. Except as stated in paragraph (e)(28) of this section, preventive care, such as routine, annual, or employment-requested physical examinations and routine screening procedures.

(38) *Chiropractors and naturopaths*. Services of chiropractors and naturopaths whether or not such services would be eligible for benefits if rendered by an authorized provider.

(39) *Counseling*. Educational, vocational, non-medical nutritional counseling, counseling for socioeconomic purposes, stress management, and/or lifestyle modification purposes, except the following are not excluded:

(i) Services provided by a certified marriage and family therapist, pastoral or mental health counselor in the treatment of a mental disorder as specifically provided in paragraph (c)(3)(ix) of this section and in § 199.6.

(ii) Diabetes self-management training (DSMT) as specifically provided in paragraph (d)(3)(ix) of this section.

(iii) Smoking cessation counseling and education as specifically provided in paragraph (e)(30) of this section.

(iv) Services provided by alcoholism rehabilitation counselors only when rendered in a CHAMPUS-authorized treatment setting and only when the cost of those services is included in the facility's CHAMPUS-determined allowable cost rate.

(v) Medical nutritional therapy (also referred to as medical nutritional counseling) required in the administration of the medically necessary foods, services and supplies authorized in paragraph (d)(3)(iii)(B) of this section, medically necessary vitamins authorized in paragraph (d)(3)(vi)(D) of this section, or when medically necessary for other authorized covered services.

(40) *Acupuncture*. Acupuncture, whether used as a therapeutic agent or as an anesthetic.

(41) *Hair transplants, wigs/hair pieces/cranial prosthesis*.

NOTE: In accordance with section 744 of the DoD Appropriation Act for 1981 (Pub. L. 96–527), CHAMPUS coverage for wigs or hairpieces is permitted effective December 15, 1980, under the conditions listed below. Continued availability of benefits will depend on the language of the annual DoD Appropriation Acts.

(i) *Benefits provided*. Benefits may be extended, in accordance with the CHAMPUS-determined allowable charge, for one wig or hairpiece per beneficiary (lifetime maximum) when the attending physician certifies that alopecia has resulted from treatment of a malignant disease and the beneficiary certifies that a wig or hairpiece has not been obtained previously through the U.S. Government (including the Veterans Administration).

(ii) *Exclusions*. The wig or hairpiece benefit does not include coverage for the following:

(A) Alopecia resulting from conditions other than treatment of malignant disease.

(B) Maintenance, wig or hairpiece supplies, or replacement of the wig or hairpiece.

(C) Hair transplants or any other surgical procedure involving the attachment of hair or a wig or hairpiece to the scalp.

(D) Any diagnostic or therapeutic method or supply intended to encourage hair regrowth.

(42) *Education or training*. Self-help, academic education or vocational training services and supplies, unless the provisions of §199.4, paragraph (b)(1)(v) relating to general or special education, apply.

(43) *Exercise/relaxation/comfort/sporting items or sporting devices*. Exercise equipment, to include items primarily and customarily designed for use in sports or recreational activities, spas, whirlpools, hot tubs, swimming pools health club memberships or other such charges or items.

(44) *Exercise*. General exercise programs, even if recommended by a physician and regardless of whether or not rendered by an authorized provider. In addition, passive exercises and range of motion exercises also are excluded, except when prescribed by a physician and rendered by a physical therapist concurrent to, and as an integral part of, a comprehensive program of physical therapy.

(45) [Reserved]

(46) *Vision care*. Eye exercises or visual training (orthoptics).

(47) *Eye and hearing examinations*. Eye and hearing examinations except as specifically provided in paragraphs (c)(2)(xvi), (c)(3)(xi), and (e)(24) of this section, or except when rendered in connection with medical or surgical treatment of a covered illness or injury.

(48) *Prosthetic devices*. Prostheses other than those determined by the Director, OCHAMPUS to be necessary because of significant conditions resulting from trauma, congenital anomalies, or disease. All dental prostheses are excluded, except for those specifically required in connection with otherwise covered orthodontia directly related to the surgical correction of a cleft palate anomaly.

(49) *Orthopedic shoes*. Orthopedic shoes, arch supports, shoe inserts, and other supportive devices for the feet, including special-ordered, custom-made built-up shoes, or regular shoes later built up.

(50) *Eyeglasses*. Eyeglasses, spectacles, contact lenses, or other optical devices, except as specifically provided under paragraph (e)(6) of this section.

(51) *Hearing aids*. Hearing aids or other auditory sensory enhancing devices, except those allowed in paragraph (e)(24) of this section.

(52) *Telephone services*. Services or advice rendered by telephone are excluded. Exceptions:

(i) Medically necessary and appropriate Telephonic office visits are covered as authorized in paragraph (c)(1)(iii) of this section.

(ii) A diagnostic or monitoring procedure which incorporates electronic transmission of data or remote detection and measurement of a condition, activity, or function (biotelemetry) is not excluded when:

(A) The procedure without electronic transmission of data or biotelemetry is otherwise an explicit or derived benefit of this section;

(B) The addition of electronic transmission of data or biotelemetry to the procedure is found by the Director, CHAMPUS, or designee, to be medically necessary and appropriate medical care which usually improves the efficiency of the management of a clinical condition in defined circumstances; and

(C) The each data transmission or biotelemetry devices incorporated into a procedure that is otherwise an explicit or derived benefit of this section, has been classified by the U.S. Food and Drug Administration, either separately or as a part of a system, for consistent use with the defined circumstances in paragraph (g)(52)(ii) of this section.

(53) *Air conditioners, humidifiers, dehumidifiers, and purifiers.*

(54) *Elevators or chair lifts.*

(55) *Alterations.* Alterations to living spaces or permanent features attached thereto, even when necessary to accommodate installation of covered durable medical equipment or to facilitate entrance or exit.

(56) *Clothing.* Items of clothing or shoes, even if required by virtue of an allergy (such as cotton fabric as against synthetic fabric and vegetable-dyed shoes).

(57) *Food, food substitutes.* Food, food substitutes, vitamins, or other nutritional supplements, including those related to prenatal care, except as authorized in paragraphs (d)(3)(iii)(B) and (d)(3)(vi)(D) of this section.

(58) *Enuretic.* Enuretic conditioning programs, but enuretic alarms may be cost-shared when determined to be medically necessary in the treatment of enuresis.

(59) *Duplicate equipment.* As defined in § 199.2, duplicate equipment is excluded.

(60) *Autopsy and postmortem.*

(61) *Camping.* All camping even though organized for a specific therapeutic purpose (such as diabetic camp or a camp for emotionally disturbed children), and even though offered as a part of an otherwise covered treatment plan or offered through a CHAMPUS-approved facility.

(62) *Housekeeper, companion.* Housekeeping, homemaker, or attendant services; sitter or companion.

(63) *Non-covered condition/treatment, unauthorized provider.* All services and supplies (including inpatient institutional costs) related to a non-covered condition or treatment, including any necessary follow-on care or the treatment of complications, are excluded from coverage except as provided under paragraph (e)(9) of this section. In addition, all services and supplies provided by an unauthorized provider are excluded.

(64) *Comfort or convenience.* Personal, comfort, or convenience items such as beauty and barber services, radio, television, and telephone.

(65) [Reserved]

(66) *Megavitamin psychiatric therapy, orthomolecular psychiatric therapy.*

(67) *Transportation.* All transportation except by ambulance, as specifically provided under paragraph (d), and except as authorized in paragraph (e)(5) of this section.

(68) *Travel.* All travel even though prescribed by a physician and even if its purpose is to obtain medical care, except as specified in paragraph (a)(6) of this section in connection with a CHAMPUS-required physical examination and as specified in § 199.17(n)(2)(vi).

(69) *Institutions.* Services and supplies provided by other than a hospital, unless the institution has been approved specifically by OCHAMPUS. Nursing homes, intermediate care facilities, halfway houses, homes for the aged, or institutions of similar purpose are excluded from consideration as approved facilities under the Basic Program.

NOTE: In order to be approved under CHAMPUS, an institution must, in addition to meeting CHAMPUS standards, provide a level of care for which CHAMPUS benefits are payable.

(70)–(71) [Reserved]

(72) [Reserved]

(73) *Economic interest in connection with mental health admissions.* Inpatient mental health services (including both acute care and RTC services) are excluded for care received when a patient is referred to a provider of such services by a physician (or other health care professional with authority to admit) who has an economic interest in the facility to which the patient is referred, unless a waiver is granted. Requests for waiver shall be considered under the same procedure and based on the same criteria as used for obtaining preadmission authorization (or continued stay authorization for emergency admissions), with the only additional requirement being that the economic interest be disclosed as part of the request. This exclusion does not apply to services under the Extended Care Health Option (ECHO) in § 199.5 or provided as partial hospital care. If a situation arises where a decision is made to exclude CHAMPUS payment solely on the basis of the provider's economic interest, the normal CHAMPUS appeals process will be available.

(74) *Not specifically listed.* Services and supplies not specifically listed as a benefit in this part. This exclusion is not intended to preclude extending benefits for those services or supplies specifically determined to be covered within the intent of this part by the Director, OCHAMPUS, or a designee, even though not otherwise listed.

NOTE: The fact that a physician may prescribe, order, recommend, or approve a service or supply does not, of itself, make it medically necessary or make the charge an allowable expense, even though it is not listed specifically as an exclusion.

(h) *Payment and liability for certain potentially excludable services under the Peer Review Organization program*—(1) *Applicability.* This subsection provides special rules that apply only to services retrospectively determined under the Peer Review organization (PRO) program (operated pursuant to § 199.15) to be potentially excludable (in whole or in part) from the basic program under paragraph (g) of this section. Services may be excluded by reason of being not medically necessary (paragraph (g)(1) of this section), at an inappropriate level (paragraph (g)(3) of this section), custodial care (paragraph (g)(7) of this section) or other reason relative to reasonableness, necessity or appropriateness (which services shall throughout the remainder of this subsection, be referred to as ''not medically necessary''). (Also throughout the remainder of the subsection, ''services'' includes items and ''provider'' includes supplier). This paragraph does not apply to coverage determinations made by OCHAMPUS or the fiscal intermediaries which are not based on medical necessity determinations made under the PRO program.

(2) *Payment for certain potentially excludable expenses.* Services determined under the PRO program to be potentially excludable by reason of the exclusions in paragraph (g) of this section for not medically necessary services will not be determined to be excludable if neither the beneficiary to whom the services were provided nor the provider (institutional or individual) who furnished the services knew, or could reasonably have been expected to know, that the services were subject to those exclusions. Payment may be made for such services as if the exclusions did not apply.

(3) *Liability for certain excludable services.* In any case in which items or services are determined excludable by the PRO program by reason of being not medically necessary and payment may not be made under paragraph (h)(2) of this section because the requirements of paragraph (h)(2) of this section are not met, the beneficiary may not be held liable (and shall be entitled to a full refund from the provider of the amount excluded and any cost share amount already paid) if:

(i) The beneficiary did not know and could not reasonably have been expected to know that the services were excludable by reason of being not medically necessary; and

(ii) The provider knew or could reasonably have been expected to know that the items or services were excludable by reason of being not medically necessary.

(4) *Criteria for determining that beneficiary knew or could reasonably have been expected to have known that services*

*were excludable.* A beneficiary who receives services excludable by reason of being not medically necessary will be found to have known that the services were excludable if the beneficiary has been given written notice that the services were excludable or that similar or comparable services provided on a previous occasion were excludable and that notice was given by the OCHAMPUS, CHAMPUS PRO or fiscal intermediary, a group or committee responsible for utilization review for the provider, or the provider who provided the services.

(5) *Criteria for determining that provider knew or could reasonably have been expected to have known that services were excludable.* An institutional or individual provider will be found to have known or been reasonably expected to have known that services were excludable under this subsection under any one of the following circumstances:

(i) The PRO or fiscal intermediary had informed the provider that the services provided were excludable or that similar or reasonably comparable services were excludable.

(ii) The utilization review group or committee for an institutional provider or the beneficiary's attending physician had informed the provider that the services provided were excludable.

(iii) The provider had informed the beneficiary that the services were excludable.

(iv) The provider had received written materials, including notices, manual issuances, bulletins, guides, directives or other materials, providing notification of PRO screening criteria specific to the condition of the beneficiary. Attending physicians who are members of the medical staff of an institutional provider will be found to have also received written materials provided to the institutional provider.

(v) The services that are at issue are the subject of what are generally considered acceptable standards of practice by the local medical community.

(vi) Preadmission authorization was available but not requested, or concurrent review requirements were not followed.

[51 FR 24008, July 1, 1986]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 199.4, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov.*

## § 199.5 TRICARE Extended Care Health Option (ECHO).

(a) *General.* (1) The TRICARE ECHO is essentially a supplemental program to the TRICARE Basic Program. It does not provide acute care nor benefits available through the TRICARE Basic Program.

(2) The purpose of the ECHO is to provide an additional financial resource for an integrated set of services and supplies designed to assist in the reduction of the disabling effects of the ECHO-eligible dependent's qualifying condition. Services include those necessary to maintain, minimize or prevent deterioration of function of an ECHO-eligible dependent.

(3) The Government's cost-share for ECHO or ECHO home health benefits during any program year is limited as stated in this section. In order to transition the program year from a fiscal year to a calendar year basis, the Government's annual cost-share limitation specified in paragraph (f) of this section shall be prorated for the last quarter of calendar year 2018 as authorized by 10 U.S.C. 1079(f)(2)(A).

(b) *Eligibility.* (1) The following categories of TRICARE/CHAMPUS beneficiaries with a qualifying condition are ECHO-eligible dependents:

(i) A spouse, child, or unmarried person (as described in § 199.3(b)(2)(i), (b)(2)(ii), or (b)(2)(iv)) of a member of the Uniformed Services on active duty for a period of more than 30 days.

(ii) An abused dependent as described in § 199.3(b)(2)(iii).

(iii) A spouse, child, or unmarried person (as described in § 199.3(b)(2)(i), (b)(2)(ii), or (b)(2)(iv)), of a member of the Uniformed Services who dies while on active duty for a period of more than 30 days and whose death occurs on or after October 7, 2001. In such case, an eligible surviving spouse remains eligible for benefits under the ECHO for a period of 3 years from the date the active duty sponsor dies. Any other eligible surviving dependent remains eligible for benefits under the ECHO for a period of three years from the date the

active duty sponsor dies or until the surviving eligible dependent:

(A) Attains 21 years of age, or

(B) Attains 23 years of age or ceases to pursue a full-time course of study prior to attaining 23 years of age, if, at 21 years of age, the eligible surviving dependent is enrolled in a full-time course of study in a secondary school or in a full-time course of study in an institution of higher education approved by Secretary of Defense and was, at the time of the sponsor's death, in fact dependent on the member for over one-half of such dependent's support.

(iv) A spouse, child, or unmarried person (as defined in paragraphs §199.3(b)(2)(i), (b)(2)(ii), or (b)(2)(iv)) of a deceased member of the Uniformed Services who, at the time of the member's death was receiving benefits under ECHO, and the member at the time of death was eligible for receipt of hostile-fire pay, or died as a result of a disease or injury incurred while eligible for such pay. In such a case, the surviving dependent remains eligible for benefits under ECHO through midnight of the dependent's twenty-first birthday.

(2) *Qualifying condition*. The following are qualifying conditions:

(i) *Mental retardation*. A diagnosis of moderate or severe mental retardation made in accordance with the criteria of the current edition of the ''Diagnostic and Statistical Manual of Mental Disorders'' published by the American Psychiatric Association.

(ii) *Serious physical disability*. A serious physical disability as defined in §199.2.

(iii) *Extraordinary physical or psychological condition*. An extraordinary physical or psychological condition as defined in §199.2.

(iv) *Infant/toddler*. Beneficiaries under the age of 3 years who are diagnosed with a neuromuscular developmental condition or other condition that is expected to precede a diagnosis of moderate or severe mental retardation or a serious physical disability, shall be deemed to have a qualifying condition for the ECHO. The Director, TRICARE Management Activity or designee shall establish criteria for ECHO eligibility in lieu of the requirements of paragraphs (b)(2)(i), (ii) or (iii) of this section.

(v) *Multiple disabilities*. The cumulative effect of multiple disabilities, as determined by the Director, TRICARE Management Activity or designee shall be used in lieu of the requirements of paragraphs (b)(2)(i), (ii) or (iii) of this section to determine a qualifying condition when the beneficiary has two or more disabilities involving separate body systems.

(3) *Loss of ECHO eligibility*. Eligibility for ECHO benefits ceases as of 12:01 a.m. of the day following the day that:

(i) The sponsor ceases to be an active duty member for any reason other than death; or

(ii) Eligibility based upon the abused dependent provisions of paragraph (b)(1)(ii) of this section expires; or

(iii) Eligibility based upon the deceased sponsor provisions of paragraphs (b)(1)(iii) or (iv) of this section expires; or

(iv) Eligibility based upon a beneficiary's participation in the Transitional Assistance Management Program ends; or

(v) The Director, TRICARE Management Activity or designee determines that the beneficiary no longer has a qualifying condition.

(c) *ECHO benefit*. Items and services that the Director, TRICARE Management Activity or designee has determined are capable of confirming, arresting, or reducing the severity of the disabling effects of a qualifying condition, includes, but are not limited to:

(1) Diagnostic procedures to establish a qualifying condition or to measure the extent of functional loss resulting from a qualifying condition.

(2) Medical, habilitative, rehabilitative services and supplies, durable equipment and assistive technology (AT) devices that assist in the reduction of the disabling effects of a qualifying condition. Benefits shall be provided in the beneficiary's home or another environment, as appropriate. An AT device may be covered only if it is recommended in a beneficiary's Individual Educational Program (IEP) or, if the beneficiary is not eligible for an IEP, the AT device is an item or educational learning device normally included in an IEP and is preauthorized

under ECHO as an integral component of the beneficiary's individual comprehensive health care services plan (including rehabilitation) as prescribed by a TRICARE authorized provider.

(i) An AT device may be covered under ECHO only if it is not otherwise covered by TRICARE as durable equipment, a prosthetic, augmentation communication device, or other benefits under § 199.4.

(ii) An AT device may include an educational learning device directly related to the beneficiary's qualifying condition when recommended by an IEP and not otherwise provided by State or local government programs. If an individual is not eligible for an IEP, an educational learning device normally included in the IEP may be authorized as if directly related to the beneficiary's qualifying condition and prescribed by a TRICARE authorized provider as part of the beneficiary's individual comprehensive health care services plan.

(iii) Electronic learning devices may include the hardware and software as appropriate. The Director, DHA, shall determine the types and (or) platforms of electronic devices and the replacement lifecycle of the hardware and its supporting software. All upgrades or replacements shall require a recommendation from the individual's IEP or the individual's comprehensive health care services plan.

(iv) Duplicative or redundant hardware platforms are not authorized.

NOTE TO PARAGRAPH (c)(2)(iv): When one or more electronic platforms such as a desktop computer, laptop, notebook or tablet can perform the same functions in relation to the teaching or educational objective directly related to the qualifying condition, it is the intent of this provision to allow only one electronic platform that may be chosen by the beneficiary. Duplicative or redundant platforms are not allowed; however, a second platform may be obtained, if the individual's IEP recommends one platform such as a computer for the majority of the learning objectives, but there exists another objective, which cannot be performed on that platform. In these limited circumstances, the beneficiary may submit a request with the above justification to the Director, TMA, who may authorize a second device.

(v) AT devices damaged through improper use of the device may not be replaced until the device would next be eligible for a lifecycle replacement.

(vi) AT devices do not include equipment or devices whose primary purpose is to assist the individual to engage in sports or recreational activities.

(3) Training that teaches the use of assistive technology devices or to acquire skills that are necessary for the management of the qualifying condition. Such training is also authorized for the beneficiary's immediate family. Vocational training, in the beneficiary's home or a facility providing such, is also allowed.

(4) Special education as provided by the Individuals with Disabilities Education Act and defined at 34 CFR 300.26 and that is specifically designed to accommodate the disabling effects of the qualifying condition.

(5) Institutional care within a state, as defined in § 199.2, in private nonprofit, public, and state institutions and facilities, when the severity of the qualifying condition requires protective custody or training in a residential environment. For the purpose of this section protective custody means residential care that is necessary when the severity of the qualifying condition is such that the safety and well-being of the beneficiary or those who come into contact with the beneficiary may be in jeopardy without such care.

(6) Transportation of an ECHO beneficiary receiving benefits under paragraph (c)(5), and a medical attendant when necessary to assure the beneficiary's safety, to or from a facility or institution to receive authorized ECHO services or items.

(7) *Respite care*. TRICARE beneficiaries enrolled in ECHO are eligible for a maximum of 16 hours of respite care per month. Respite care is defined in § 199.2. Respite care services will be provided by a TRICARE-authorized HHA and will be designed to provide health care services for the covered beneficiary. The benefit will not be cumulative, that is, any respite hours not used in one month will not be carried over or banked for use on another occasion.

(i) TRICARE-authorized home health agencies must provide and bill for all authorized ECHO respite care services through established TRICARE claims'

mechanisms. No special billing arrangements will be authorized in conjunction with coverage that may be provided by Medicaid or other federal, state, community or private programs.

(ii) For authorized ECHO respite care, TRICARE will reimburse the allowable charges or negotiated rates.

(iii) The Government's cost-share incurred for these services accrues to the program year benefit limit of $36,000.

(8) *Other services.* (i) *Assistive services.* Services of qualified personal assistants, such as an interpreter or translator for ECHO beneficiaries who are deaf or mute and readers for ECHO beneficiaries who are blind, when such services are necessary in order for the ECHO beneficiary to receive authorized ECHO benefits.

(ii) *Equipment adaptation.* The allowable equipment and an AT device purchase shall include such services and modifications to the equipment as necessary to make the equipment usable for a particular ECHO beneficiary.

(iii) *Equipment maintenance.* Reasonable repairs and maintenance of the beneficiary owned or rented DE or AT devices provided by this section shall be allowed while a beneficiary is registered in the ECHO Program. Repairs of DE and/or AT devices damaged while using the item in a manner inconsistent with its common use, and replacement of lost or stolen rental DE are not authorized coverage as an ECHO benefit. In addition, repairs and maintenance of deluxe, luxury, or immaterial features of DE or AT devices are not authorized coverage as an ECHO benefit.

(d) *ECHO Exclusions*—(1) *Basic Program.* Benefits allowed under the TRICARE Basic Program will not be provided through the ECHO.

(2) *Inpatient care.* Inpatient acute care for medical or surgical treatment of an acute illness, or of an acute exacerbation of the qualifying condition, is excluded.

(3) *Structural alterations.* Alterations to living space and permanent fixtures attached thereto, including alterations necessary to accommodate installation of equipment or AT devices to facilitate entrance or exit, are excluded.

(4) *Homemaker services.* Services that predominantly provide assistance with household chores are excluded.

(5) *Dental care or orthodontic treatment.* Both are excluded.

(6) *Deluxe travel or accommodations.* The difference between the price for travel or accommodations that provide services or features that exceed the requirements of the beneficiary's condition and the price for travel or accommodations without those services or features is excluded.

(7) *Equipment.* Purchase or rental of DE and AT devices otherwise allowed by this section is excluded when:

(i) The beneficiary is a patient in an institution or facility that ordinarily provides the same type of equipment or AT devices to its patients at no additional charge in the usual course of providing services; or

(ii) The item is available to the beneficiary from a Uniformed Services Medical Treatment Facility; or

(iii) The item has deluxe, luxury, immaterial or nonessential features that increase the cost to the Department relative to a similar item without those features; or

(iv) The item is a duplicate DE or an AT device, as defined in § 199.2.

(v) The item (or charge for access to such items through health club membership or other activities) is exercise equipment including an item primarily and customarily designed for use in sports or recreational activities, spa, whirlpool, hot tub, swimming pool, an electronic device used to locate or monitor the location of the beneficiary, or other similar items or charges.

(8) *Maintenance agreements.* Maintenance agreements for beneficiary owned or rented equipment or AT device are excluded.

(9) *No obligation to pay.* Services or items for which the beneficiary or sponsor has no legal obligation to pay are excluded.

(10) *Public facility or Federal government.* Services or items paid for, or eligible for payment, directly or indirectly by a public facility, as defined in § 199.2, or by the Federal government, other than the Department of Defense,

are excluded for training, rehabilitation, special education, assistive technology devices, institutional care in private nonprofit, public, and state institutions and facilities, and if appropriate, transportation to and from such institutions and facilities, except when such services or items are eligible for payment under a state plan for medical assistance under Title XIX of the Social Security Act (Medicaid). Rehabilitation and assistive technology services or supplies may be available under the TRICARE Basic Program.

(11) *Study, grant, or research programs.* Services and items provided as a part of a scientific clinical study, grant, or research program are excluded.

(12) *Unproven status.* Drugs, devices, medical treatments, diagnostic, and therapeutic procedures for which the safety and efficacy have not been established in accordance with § 199.4 are excluded.

(13) *Immediate family or household.* Services or items provided or prescribed by a member of the beneficiary's immediate family, or a person living in the beneficiary's or sponsor's household, are excluded.

(14) *Court or agency ordered care.* Services or items ordered by a court or other government agency, which are not otherwise an allowable ECHO benefit, are excluded.

(15) *Excursions.* Excursions are excluded regardless of whether or not they are part of a program offered by a TRICARE-authorized provider. The transportation benefit available under ECHO is specified elsewhere in this section.

(16) *Drugs and medicines.* Drugs and medicines that do not meet the requirements of § 199.4 or § 199.21 are excluded.

(17) *Therapeutic absences.* Therapeutic absences from an inpatient facility or from home for a homebound beneficiary are excluded.

(18) *Custodial care.* Custodial care, as defined in § 199.2 is not a stand-alone benefit. Services generally rendered as custodial care may be provided only as specifically set out in this section.

(19) *Domiciliary care.* Domiciliary care, as defined in § 199.2, is excluded.

(20) *Respite care.* Respite care for the purpose of covering primary caregiver (as defined in § 199.2) absences due to deployment, employment, seeking of employment or to pursue education is excluded. Authorized respite care covers only the ECHO beneficiary, not siblings or others who may reside in or be visiting in the beneficiary's residence.

(e) *ECHO Home Health Care (EHHC).* The EHHC benefit provides coverage of home health care services and respite care services specified in this section.

(1) *Home health care.* Covered ECHO home health care services are the same as, and provided under the same conditions as those services described in § 199.4(e)(21)(i), except that they are not limited to part-time or intermittent services. Custodial care services, as defined in § 199.2, may be provided to the extent such services are provided in conjunction with authorized ECHO home health care services, including the EHHC respite care benefit specified in this section. Beneficiaries who are authorized EHHC will receive all home health care services under EHHC and no portion will be provided under the Basic Program. TRICARE-authorized home health agencies are not required to use the Outcome and Assessment Information Set (OASIS) to assess beneficiaries who are authorized EHHC.

(2) *Respite care.* EHHC beneficiaries whose plan of care includes frequent interventions by the primary caregiver(s) are eligible for respite care services in lieu of the ECHO general respite care benefit. For the purpose of this section, the term ''frequent'' means ''more than two interventions during the eight-hour period per day that the primary caregiver would normally be sleeping.'' The services performed by the primary caregiver are those that can be performed safely and effectively by the average non-medical person without direct supervision of a health care provider after the primary caregiver has been trained by appropriate medical personnel. EHHC beneficiaries in this situation are eligible for a maximum of eight hours per day, 5 days per week, of respite care by a TRICARE-authorized home health agency. The home health agency will provide the health care interventions or services for the covered beneficiary so that the primary caregiver is relieved of the responsibility to provide

such interventions or services for the duration of that period of respite care. The home health agency will not provide baby-sitting or child care services for other members of the family. The benefit is not cumulative, that is, any respite care hours not used in a given day may not be carried over or banked for use on another occasion. Additionally, the eight-hour respite care periods will not be provided consecutively, that is, a respite care period on one calendar day will not be immediately followed by a respite care period the next calendar day. The Government's cost-share incurred for these services accrue to the maximum yearly ECHO Home Health Care benefit.

(3) *EHHC eligibility*. The EHHC is authorized for beneficiaries who meet all applicable ECHO eligibility requirements and who:

(i) Physically reside within the 50 United States, the District of Columbia, Puerto Rico, the Virgin Islands, or Guam; and

(ii) Are homebound, as defined in § 199.2; and

(iii) Require medically necessary skilled services that exceed the level of coverage provided under the Basic Program's home health care benefit; and/or

(iv) Require frequent interventions by the primary caregiver(s) such that respite care services are necessary to allow primary caregiver(s) the opportunity to rest; and

(v) Are case managed to include a reassessment at least every 90 days, and receive services as outlined in a written plan of care; and

(vi) Receive all home health care services from a TRICARE-authorized home health agency, as described in § 199.6(b)(4)(xv), in the beneficiary's primary residence.

(4) *EHHC plan of care*. A written plan of care is required prior to authorizing ECHO home health care. The plan must include the type, frequency, scope and duration of the care to be provided and support the professional level of provider. Reimbursement will not be authorized for a level of provider not identified in the plan of care.

(5) *EHHC exclusions*—(i) *General*. ECHO Home Health Care services and supplies are excluded from those who are being provided continuing coverage of home health care as participants of the former Individual Case Management Program for Persons with Extraordinary Conditions (ICMP-PEC) or previous case management demonstrations.

(ii) *Respite care*. Respite care for the purpose of covering primary caregiver absences due to deployment, employment, seeking of employment or to pursue education is excluded. Authorized respite care covers only the ECHO beneficiary, not siblings or others who may reside in or be visiting in the beneficiary's residence.

(f) *Cost-share liability*—(1) *No deductible*. ECHO benefits are not subject to a deductible amount.

(2) *Sponsor cost-share liability*. (i) Regardless of the number of family members receiving ECHO benefits or ECHO Home Health Care in a given month, the sponsor's cost-share is according to the following table:

TABLE 1—MONTHLY COST-SHARE BY MEMBER'S PAY GRADE

| | |
|---|---|
| E–1 through E–5 | $25 |
| E–6 | 30 |
| E–7 and O–1 | 35 |
| E–8 and O–2 | 40 |
| E–9, W–1, W–2 and O–3 | 45 |
| W–3, W–4 and O–4 | 50 |
| W–5 and O–5 | 65 |
| O–6 | 75 |
| O–7 | 100 |
| O–8 | 150 |
| O–9 | 200 |
| O–10 | 250 |

(ii) The Sponsor's cost-share shown in Table 1 in paragraph (f)(2)(i) of this section will be applied to the first allowed ECHO charges in any given month. The Government's share will be paid, up to the maximum amount specified in paragraph (f)(3) of this section, for allowed charges after the sponsor's cost-share has been applied.

(iii) The provisions of § 199.18(d)(1) and (e)(1) regarding elimination of copayments for active duty family members enrolled in TRICARE Prime do not eliminate, reduce, or otherwise affect the sponsor's cost-share shown in Table 1 in paragraph (f)(2)(i) of this section.

(iv) The sponsor's cost-share shown in Table 1 in paragraph (f)(2)(i) of this

section does not accrue to the Basic Program's Catastrophic Loss Protection under 10 U.S.C. 1079(b)(5) as shown at §§ 199.4(f)(10) and 199.18(f).

(3) *Government cost-share liability*—(i) *ECHO*. The total Government share of the cost of all ECHO benefits, except ECHO Home Health Care (EHHC) and EHHC respite care, provided in a given program year to a beneficiary, may not exceed $36,000 after application of the allowable payment methodology.

(ii) *ECHO home health care*. (A) The maximum annual program year Government cost-share per EHHC-eligible beneficiary for ECHO home health care, including EHHC respite care may not exceed the local wage-adjusted highest Medicare Resource Utilization Group (RUG-III) category cost for care in a TRICARE-authorized skilled nursing facility.

(B) When a beneficiary moves to a different locality within the 50 United States, the District of Columbia, Puerto Rico, the Virgin Islands, or Guam, the annual program year cap will be recalculated to reflect the maximum established under paragraph (f)(3)(ii)(A) of this section for the beneficiary's new location and will apply to the EHHC benefit for the remaining portion of that program year.

(g) *Benefit payment*—(1) *Transportation*. The allowable amount for transportation of an ECHO beneficiary is limited to the actual cost of the standard published fare plus any standard surcharge made to accommodate any person with a similar disability or to the actual cost of specialized medical transportation when non-specialized transport cannot accommodate the beneficiary's qualifying condition related needs, or when specialized transport is more economical than non-specialized transport. When transport is by private vehicle, the allowable amount is limited to the Federal government employee mileage reimbursement rate in effect on the date the transportation is provided.

(2) *Equipment*. (i) The TRICARE allowable amount for DE or AT devices shall be calculated in the same manner as DME allowable through section 199.4 of this title, and accrues to the program year benefit limit specified in paragraph (f)(3) of this section.

(ii) Cost-share. A cost-share, as provided by paragraph (f)(2) of this section, is required for each month in which equipment or an AT device is purchased under this section. However, in no month shall a sponsor be required to pay more than one cost-share regardless of the number of benefits the sponsor's dependents received under this section.

(3) *For-profit institutional care provider*. Institutional care provided by a for-profit entry may be allowed only when the care for a specific ECHO beneficiary:

(i) Is contracted for by a public facility as a part of a publicly funded long-term inpatient care program; and

(ii) Is provided based upon the ECHO beneficiary's being eligible for the publicly funded program which has contracted for the care; and

(iii) Is authorized by the public facility as a part of a publicly funded program; and

(iv) Would cause a cost-share liability in the absence of TRICARE eligibility; and

(v) Produces an ECHO beneficiary cost-share liability that does not exceed the maximum charge by the provider to the public facility for the contracted level of care.

(4) *ECHO home health care and EHHC respite care*. (i) TRICARE-authorized home health agencies must provide and bill for all authorized home health care services through established TRICARE claims' mechanisms. No special billing arrangements will be authorized in conjunction with coverage that may be provided by Medicaid or other federal, state, community or private programs.

(ii) For authorized ECHO home health care and respite care, TRICARE will reimburse the allowable charges or negotiated rates.

(iii) The maximum monthly Government reimbursement for EHHC, including EHHC respite care, will be based on the actual number of hours of EHHC services rendered in the month, but in no case will it exceed one-twelfth of the annual maximum Government cost-share as determined in this section and adjusted according to the actual number of days in the month the services were provided.

(h) *Other Requirements*—(1) *Applicable part*. All provisions of this part, except the provisions of §199.4 unless otherwise provided by this section or as directed by the Director, TRICARE Management Activity or designee, apply to the ECHO.

(2) *Registration*. Active duty sponsors must register potential ECHO-eligible beneficiaries through the Director, TRICARE Management Activity, or designee prior to receiving ECHO benefits. The Director, TRICARE Management Activity, or designee will determine ECHO eligibility and update the Defense Enrollment Eligibility Reporting System accordingly. Unless waived by the Director, TRICARE Management Activity or designee, sponsors must provide evidence of enrollment in the Exceptional Family Member Program provided by their branch of Service at the time they register their family member(s) for the ECHO.

(3) *Benefit authorization*. All ECHO benefits require authorization by the Director, TRICARE Management Activity or designee prior to receipt of such benefits.

(i) *Documentation*. The sponsor shall provide such documentation as the Director, TRICARE Management Activity or designee requires as a prerequisite to authorizing ECHO benefits. Such documentation shall describe how the requested benefit will contribute to confirming, arresting, or reducing the disabling effects of the qualifying condition, including maintenance of function or prevention of further deterioration of function, of the beneficiary.

(ii) *Format*. An authorization issued by the Director, TRICARE Management Activity or designee shall specify such description, dates, amounts, requirements, limitations or information as necessary for exact identification of approved benefits and efficient adjudication of resulting claims.

(iii) *Valid period*. An authorization for ECHO benefits shall be valid until such time as the Director, TRICARE Management Activity or designee determines that the authorized services are no longer appropriate or required or the beneficiary is no longer eligible under paragraph (b) of this section.

(iv) *Authorization waiver*. The Director, TRICARE Management Activity or designee may waive the requirement for a written authorization for rendered ECHO benefits that, except for the absence of the written authorization, would be allowable as an ECHO benefit.

(v) *Public facility use*. (A) An ECHO beneficiary residing within a state must demonstrate that a public facility is not available and adequate to meet the needs of their qualifying condition. Such requirements shall apply to beneficiaries who request authorization for training, rehabilitation, special education, assistive technology, and institutional care in private nonprofit, public, and state institutions and facilities, and if appropriate for beneficiaries receiving institutional care, transportation to and from such institutions and facilities. The maximum Government cost-share for services that require demonstration of public facility non-availability or inadequacy is limited to $36,000 per program year per beneficiary. State-administered plans for medical assistance under Title XIX of the Social Security Act (Medicaid) are not considered available and adequate facilities for the purpose of this section.

(B) The domicile of the beneficiary shall be the basis for the determination of public facility availability when the sponsor and beneficiary are separately domiciled due to the sponsor's move to a new permanent duty station or due to legal custody requirements.

(C) Written certification, in accordance with information requirements, formats, and procedures established by the director, TRICARE Management Activity or designee that requested ECHO services or items cannot be obtained from public facilities because the services or items are not available and adequate, is a prerequisite for ECHO benefit payment for training, rehabilitation, special education, assistive technology, and institutional care in private nonprofit, public, and state institutions and facilities, and if appropriate, transportation to and from such institutions and facilities.

(*1*) An administrator or designee of a public facility may make such certification for a beneficiary residing within the service area of that public facility.

(*2*) The Director, TRICARE Management Activity or designee may determine, on a case-by-case basis, that apparent public facility availability or adequacy for a requested type of service or item cannot be substantiated for a specific beneficiary's request for ECHO benefits and therefore is not available.

(*i*) A case-specific determination shall be based upon a written statement by the beneficiary (or sponsor or guardian acting on behalf of the beneficiary) which details the circumstances wherein a specific individual representing a specific public facility refused to provide a public facility use certification, and such other information as the Director, TRICARE Management Activity or designee determines to be material to the determination.

(*ii*) A case-specific determination of public facility availability by the Director, TRICARE Management Activity or designee is conclusive and is not appealable under § 199.10.

(4) Repair or maintenance of DE owned by the beneficiary or an AT device is exempt from the public facility-use certification requirements.

(5) The requirements of this paragraph (h)(3)(v)(A) notwithstanding, no public facility use certification is required for services and items that are provided under Part C of the Individuals with Disabilities Education Act in accordance with the Individualized Family Services Plan and that are otherwise allowable under the ECHO.

(i) *Implementing instructions.* The Director, TRICARE Management Activity or designee shall issue TRICARE policies, instructions, procedures, guidelines, standards, and criteria as may be necessary to implement the intent of this section.

(j) *Effective date.* All changes to this section are effective as of October 14, 2008, and claims for ECHO benefits provided on or after that date will be reprocessed retroactively to that date as necessary.

[69 FR 51564, Aug. 20, 2004, as amended at 71 FR 47092, Aug. 16, 2006; 72 FR 2447, Jan. 19, 2007; 75 FR 47711, Aug. 9, 2010; 79 FR 78713, Dec. 31, 2014; 81 FR 27329, May 6, 2016; 82 FR 45447, Sept. 29, 2017; 86 FR 36217, July 9, 2021]

## § 199.6 TRICARE—authorized providers.

(a) *General.* This section sets forth general policies and procedures that are the basis for the CHAMPUS cost-sharing of medical services and supplies provided by institutions, individuals, or other types of providers. Providers seeking payment from the Federal Government through programs such as CHAMPUS have a duty to familiarize themselves with, and comply with, the program requirements.

(1) *Listing of provider does not guarantee payment of benefits.* The fact that a type of provider is listed in this section is not to be construed to mean that CHAMPUS will automatically pay a claim for services or supplies provided by such a provider. The provider who actually furnishes the service(s) must, in fact, meet all licensing and other requirements established by this part to be an authorized provider; the provider must not be the subject of sanction under § 199.9; and, cost-sharing of the services must not otherwise be prohibited by this part. In addition, the patient must in fact be an eligible beneficiary and the services or supplies billed must be authorized and medically necessary, regardless of the standing of the provider.

(2) *Outside the United States or emergency situations within the United States.* Outside the United States or within the United States and Puerto Rico in emergency situations, the Director, OCHAMPUS, or a designee, after review of the facts, may provide payment to or on behalf of a beneficiary who receives otherwise covered services or supplies from a provider of service that does not meet the standards described in this part.

NOTE: Only the Secretary of Defense, the Secretary of Health and Human Services, or the Secretary of Transportation, or their designees, may authorize (in emergency situations) payment to civilian facilities in the United States that are not in compliance with title VI of the Civil Rights Act of 1964. For the purpose of the Civil Rights Act only, the United States includes the 50 states, the District of Columbia, Puerto Rico, Virgin Islands, American Samoa, Guam, Wake Island, Canal Zone, and the territories and possessions of the United States.

(3) *Dual compensation/Conflict of interest*. Title 5, United States Code, section 5536 prohibits medical personnel who are active duty Uniformed Service members or civilian employees of the Government from receiving additional Government compensation above their normal pay and allowances for medical care furnished. In addition, Uniformed Service members and civilian employees of the Government are generally prohibited by law and agency regulations and policies from participating in apparent or actual conflict of interest situations in which a potential for personal gain exists or in which there is an appearance of impropriety or incompatibility with the performance of their official duties or responsibilities. The Departments of Defense, Health and Human Services, and Transportation have a responsibility, when disbursing appropriated funds in the payment of CHAMPUS benefits, to ensure that the laws and regulations are not violated. Therefore, active duty Uniformed Service members (including a reserve member while on active duty and civilian employees of the United States Government shall not be authorized to be CHAMPUS providers. While individual employees of the Government may be able to demonstrate that the furnishing of care to CHAMPUS beneficiaries may not be incompatible with their official duties and responsibilities, the processing of millions of CHAMPUS claims each year does not enable Program administrators to efficiently review the status of the provider on each claim to ensure that no conflict of interest or dual compensation situation exists. The problem is further complicated given the numerous interagency agreements (for example, resource sharing arrangements between the Department of Defense and the Veterans Administration in the provision of health care) and other unique arrangements which exist at individual treatment facilities around the country. While an individual provider may be prevented from being an authorized CHAMPUS provider even though no conflict of interest or dual compensation situation exists, it is essential for CHAMPUS to have an easily administered, uniform rule which will ensure compliance with the existing laws and regulations. Therefore, a provider who is an active duty Uniformed Service member or civilian employee of the Government shall not be an authorized CHAMPUS provider. In addition, a provider shall certify on each CHAMPUS claim that he/she is not an active duty Uniformed Service member or civilian employee of the Government.

(4) [Reserved]

(5) *Utilization review and quality assurance*. Providers approved as authorized CHAMPUS providers have certain obligations to provide services and supplies under CHAMPUS which are (i) furnished at the appropriate level and only when and to the extent medically necessary under the criteria of this part; (ii) of a quality that meets professionally recognized standards of health care; and, (iii) supported by adequate medical documentation as may be reasonably required under this part by the Director, OCHAMPUS, or designee, to evidence the medical necessity and quality of services furnished, as well as the appropriateness of the level of care. Therefore, the authorization of CHAMPUS benefits is contingent upon the services and supplies furnished by any provider being subject to pre-payment or post-payment utilization and quality assurance review under professionally recognized standards, norms, and criteria, as well as any standards or criteria issued by the Director, OCHAMPUS, or a designee, pursuant to this part. (Refer to §§ 199.4, 199.5, and 199.7 of this part.)

(6) *Exclusion of beneficiary liability*. In connection with certain utilization review, quality assurance and preauthorization requirements of section 199.4 of this part, providers may not hold patients liable for payment for certain services for which CHAMPUS payment is disallowed. With respect to such services, providers may not seek payment from the patient or the patient's family. Any such effort to seek payment is a basis for termination of the provider's authorized status.

(7) *Provider required*. In order to be considered for benefits, all services and supplies shall be rendered by, prescribed by, or furnished at the direction of, or on the order of a CHAMPUS-

authorized provider practicing within the scope of his or her license.

(8) *Participating providers.* A CHAMPUS-authorized provider is a participating provider, as defined in § 199.2 under the following circumstances:

(i) *Mandatory participation.* (A) An institutional provider in § 199.6(b), in order to be an authorized provider under TRICARE, must be a participating provider for all claims.

(B) A SNF or a HHA, in order to be an authorized provider under TRICARE, must enter into a participation agreement with TRICARE for all claims.

(C) Corporate services providers authorized as CHAMPUS providers under the provisions of paragraph (f) of this section must enter into a participation agreement as provided by the Director, OCHAMPUS, or designee.

(ii) *Voluntary participation*—(A) *Total claims participation: The participating provider program.* A CHAMPUS-authorized provider that is not required to participate by this part may become a participating provider by entering into an agreement or memorandum of understanding (MOU) with the Director, OCHAMPUS, or designee, which includes, but is not limited to, the provisions of paragraph (a)(13) of this section. The Director, OCHAMPUS, or designee, may include in a participating provider agreement/MOU provisions that establish between CHAMPUS and a class, category, type, or specific provider, uniform procedures and conditions which encourage provider participation while improving beneficiary access to benefits and contributing to CHAMPUS efficiency. Such provisions shall be otherwise allowed by this part or by DoD Directive or DoD Instruction specifically pertaining to CHAMPUS claims participation. Participating provider program provisions may be incorporated into an agreement/MOU to establish a specific CHAMPUS-provider relationship, such as a preferred provider arrangement.

(B) *Claim-specific participation.* A CHAMPUS-authorized provider that is not required to participate and that has not entered into a participation agreement pursuant to paragraph (a)(8)(ii)(A) of this section may elect to be a participating provider on a claim-by-claim basis by indicating ''accept assignment'' on each claim form for which participation is elected.

(iii) *Claim-by-claim participation.* Individual providers that are not participating providers pursuant to paragraph (a)(8)(ii) of this section may elect to participate on a claim-by-claim basis. They may do so by signing the appropriate space on the claims form and submitting it to the appropriate TRICARE contractor on behalf of the beneficiary.

(9) *Limitation to authorized institutional provider designation.* Authorized institutional provider status granted to a specific institutional provider applicant does not extend to any institution-affiliated provider, as defined in § 199.2, of that specific applicant.

(10) *Authorized provider.* A hospital or institutional provider, physician, or other individual professional provider, or other provider of services or supplies specifically authorized in this chapter to provide benefits under CHAMPUS. In addition, to be an authorized CHAMPUS provider, any hospital which is a CHAMPUS participating provider under paragraph (a)(7) of this section, shall be a participating provider for all care, services, or supplies furnished to an active duty member of the uniformed services for which the active duty member is entitled under 10 U.S.C. 1074(c). As a participating provider for active duty members, the CHAMPUS authorized hospital shall provide such care, services, and supplies in accordance with the payment rules of § 199.16 of this part. The failure of any CHAMPUS participating hospital to be a participating provider for any active duty member subjects the hospital to termination of the hospital's status as a CHAMPUS authorized provider for failure to meet the qualifications established by this part.

(11) *Balance billing limits*—(i) *In general.* Individual providers including providers salaried or under contract by an institutional provider and other providers who are not participating providers may not balance bill a beneficiary an amount that exceeds the applicable balance billing limit. The balance billing limit shall be the same percentage as the Medicare limiting

charge percentage for nonparticipating practitioners and suppliers.

(ii) *Waiver*. The balance billing limit may be waived by the Director, OCHAMPUS on a case-by-case basis if requested by a CHAMPUS beneficiary. A decision by the Director, OCHAMPUS to waive or not waive the limit in any particular case is not subject to the appeal and hearing procedures of § 199.10.

(iii) *Compliance*. Failure to comply with the balance billing limit shall be considered abuse and/or fraud and grounds of exclusion or suspension of the provider under § 199.9.

(12) *Medical records*. CHAMPUS-authorized provider organizations and individuals providing clinical services shall maintain adequate clinical records to substantiate that specific care was actually furnished, was medically necessary, and appropriate, and identify(ies) the individual(s) who provided the care. This applies whether the care is inpatient or outpatient. The minimum requirements for medical record documentation are set forth by all of the following:

(i) The cognizant state licensing authority;

(ii) The Joint Commission on Accreditation of Healthcare Organizations, or the appropriate Qualified Accreditation Organization as defined in § 199.2;

(iii) Standards of practice established by national medical organizations; and

(iv) This part.

(13) *Participation agreements*. A participation agreement otherwise required by this part shall include, in part, all of the following provisions requiring that the provider shall:

(i) Not charge a beneficiary for the following:

(A) Services for which the provider is entitled to payment from CHAMPUS;

(B) Services for which the beneficiary would be entitled to have CHAMPUS payment made had the provider complied with certain procedural requirements.

(C) Services not medically necessary and appropriate for the clinical management of the presenting illness, injury, disorder or maternity;

(D) Services for which a beneficiary would be entitled to payment but for a reduction or denial in payment as a result of quality review; and

(E) Services rendered during a period in which the provider was not in compliance with one or more conditions of authorization;

(ii) Comply with the applicable provisions of this part and related CHAMPUS administrative policy;

(iii) Accept the CHAMPUS determined allowable payment combined with the cost-share, deductible, and other health insurance amounts payable by, or on behalf of, the beneficiary, as full payment for CHAMPUS allowed services;

(iv) Collect from the CHAMPUS beneficiary those amounts that the beneficiary has a liability to pay for the CHAMPUS deductible and cost-share;

(v) Permit access by the Director, OCHAMPUS, or designee, to the clinical record of any CHAMPUS beneficiary, to the financial and organizational records of the provider, and to reports of evaluations and inspections conducted by state, private agencies or organizations;

(vi) Provide the Director, OCHAMPUS, or designee, prompt written notification of the provider's employment of an individual who, at any time during the twelve months preceding such employment, was employed in a managerial, accounting, auditing, or similar capacity by an agency or organization which is responsible, directly or indirectly for decisions regarding Department of Defense payments to the provider;

(vii) Cooperate fully with a designated utilization and clinical quality management organization which has a contract with the Department of Defense for the geographic area in which the provider renders services;

(viii) Obtain written authorization before rendering designated services or items for which CHAMPUS cost-share may be expected;

(ix) Maintain clinical and other records related to individuals for whom CHAMPUS payment was made for services rendered by the provider, or otherwise under arrangement, for a period of 60 months from the date of service;

(x) Maintain contemporaneous clinical records that substantiate the clinical rationale for each course of treatment, periodic evaluation of the efficacy of treatment, and the outcome at completion or discontinuation of treatment;

(xi) Refer CHAMPUS beneficiaries only to providers with which the referring provider does not have an economic interest, as defined in § 199.2; and

(xii) Limit services furnished under arrangement to those for which receipt of payment by the CHAMPUS authorized provider discharges the payment liability of the beneficiary.

(14) *Implementing instructions*. The Director, OCHAMPUS, or a designee, shall issue CHAMPUS policies, instructions, procedures, and guidelines, as may be necessary to implement the intent of this section.

(15) *Exclusion*. Regardless of any provision in this section, a provider who is suspended, excluded, or terminated under § 199.9 of this part is specifically excluded as an authorized CHAMPUS provider.

(b) *Institutional providers*—(1) *General*. Institutional providers are those providers who bill for services in the name of an organizational entity (such as hospital and skilled nursing facility), rather than in the name of a person. The term ''institutional provider'' does not include professional corporations or associations qualifying as a domestic corporation under § 301.7701–5 of the Internal Revenue Service Regulations nor does it include other corporations that provide principally professional services. Institutional providers may provide medical services and supplies on either an inpatient or outpatient basis.

(i) *Preauthorization*. Preauthorization may be required by the Director, OCHAMPUS for any health care service for which payment is sought under CHAMPUS. (See §§ 199.4 and 199.15 for further information on preauthorization requirements.)

(ii) Billing practices.

(A) Each institutional billing, including those institutions subject to the CHAMPUS DRG-based reimbursement method or a CHAMPUS-determined all-inclusive rate reimbursement method, must be itemized fully and sufficiently descriptive for the CHAMPUS to make a determination of benefits.

(B) Institutional claims subject to the CHAMPUS DRG-based reimbursement method or a CHAMPUS-determined all-inclusive rate reimbursement method, may be submitted only after the beneficiary has been discharged or transferred from the institutional provider's facility or program.

(C) Institutional claims for Residential Treatment Centers and all other institutional providers, except those listed in (B) above, should be submitted to the appropriate CHAMPUS fiscal intermediary at least every 30 days.

(2) *Nondiscrimination policy*. Except as provided below, payment may not be made for inpatient or outpatient care provided and billed by an institutional provider found by the Federal Government to practice discrimination in the admission of patients to its services on the basis of race, color, or national origin. Reimbursement may not be made to a beneficiary who pays for care provided by such a facility and submits a claim for reimbursement. In the following circumstances, the Secretary of Defense, or a designee, may authorize payment for care obtained in an ineligible facility:

(i) *Emergency care*. Emergency inpatient or outpatient care.

(ii) *Care rendered before finding of a violation*. Care initiated before a finding of a violation and which continues after such violation when it is determined that a change in the treatment facility would be detrimental to the health of the patient, and the attending physician so certifies.

(iii) *Other facility not available*. Care provided in an ineligible facility because an eligible facility is not available within a reasonable distance.

(3) *Procedures for qualifying as a CHAMPUS-approved institutional provider*. General and special hospitals otherwise meeting the qualifications outlined in paragraphs (b)(4) (i), (ii), and (iii), of this section are not required to request CHAMPUS approval formally.

(i) *JCAH accreditation status*. Each CHAMPUS fiscal intermediary shall keep informed as to the current JCAH accreditation status of all hospitals and skilled nursing facilities in its

area; and the provider's status under Medicare, particularly with regard to compliance with title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d(1)). The Director, OCHAMPUS, or a designee, shall specifically approve all other authorized institutional providers providing services to CHAMPUS beneficiaries. At the discretion of the Director, OCHAMPUS, any facility that is certified and participating as a provider of services under title XVIII of the Social Security Act (Medicare), may be deemed to meet CHAMPUS requirements. The facility must be providing a type and level of service that is authorized by this part.

(ii) *Required to comply with criteria.* Facilities seeking CHAMPUS approval will be expected to comply with appropriate criteria set forth in paragraph (b)(4) of this section. They also are required to complete and submit CHAMPUS Form 200, ''Required Information, Facility Determination Instructions,'' and provide such additional information as may be requested by OCHAMPUS. An onsite evaluation, either scheduled or unscheduled, may be conducted at the discretion of the Director, OCHAMPUS, or a designee. The final determination regarding approval, reapproval, or disapproval of a facility will be provided in writing to the facility and the appropriate CHAMPUS fiscal intermediary.

(iii) *Notice of peer review rights.* All health care facilities subject to the DRG-based payment system shall provide CHAMPUS beneficiaries, upon admission, with information about peer review including their appeal rights. The notices shall be in a form specified by the Director, OCHAMPUS.

(iv) *Surveying of facilities.* The surveying of newly established institutional providers and the periodic resurveying of all authorized institutional providers is a continuing process conducted by OCHAMPUS.

(v) *Institutions not in compliance with CHAMPUS standards.* If a determination is made that an institution is not in compliance with one or more of the standards applicable to its specific category of institution, CHAMPUS shall take immediate steps to bring about compliance or terminate the approval as an authorized institution in accordance with §199.9(f)(2).

(vi) *Participation agreements required for some hospitals which are not Medicare-participating.* Notwithstanding the provisions of this paragraph (B)(3), a hospital which is subject to the CHAMPUS DRG-based payment system but which is not a Medicare-participating hospital must request and sign an agreement with OCHAMPUS. By signing the agreement, the hospital agrees to participate on all CHAMPUS inpatient claims and accept the requirements for a participating provider as contained in paragraph (a)(8) of §199.6. Failure to sign such an agreement shall disqualify such hospital as a CHAMPUS-approved institutional provider.

(4) *Categories of institutional providers.* The following categories of institutional providers may be reimbursed by CHAMPUS for services provided CHAMPUS beneficiaries subject to any and all definitions, conditions, limitation, and exclusions specified or enumerated in this part.

(i) *Hospitals, acute care, general and special.* An institution that provides inpatient services, that also may provide outpatient services (including clinical and ambulatory surgical services), and that:

(A) Is engaged primarily in providing to inpatients, by or under the supervision of physicians, diagnostic and therapeutic services for the medical or surgical diagnosis and treatment of illness, injury, or bodily malfunction (including maternity).

(B) Maintains clinical records on all inpatients (and outpatients if the facility operates an outpatient department or emergency room).

(C) Has bylaws in effect with respect to its operations and medical staff.

(D) Has a requirement that every patient be under the care of a physician.

(E) Provides 24-hour nursing service rendered or supervised by a registered professional nurse, and has a licensed practical nurse or registered professional nurse on duty at all times.

(F) Has in effect a hospital utilization review plan that is operational and functioning.

(G) In the case of an institution in a state in which state or applicable local

law provides for the licensing of hospitals, the hospital:

(*1*) Is licensed pursuant to such law, or

(*2*) Is approved by the agency of such state or locality responsible for licensing hospitals as meeting the standards established for such licensing.

(H) Has in effect an operating plan and budget.

(I) Is accredited by the JCAH or meets such other requirements as the Secretary of Health and Human Services, the Secretary of Transportation, or the Secretary of Defense finds necessary in the interest of the health and safety of patients who are admitted to and furnished services in the institution.

NOTE TO PARAGRAPH (B)(4)(I)(I): For the duration of Medicare's ''Hospitals Without Walls'' initiative for the coronavirus disease 2019 (COVID–19) outbreak, any entity that temporarily enrolls with Medicare as a hospital may be temporarily exempt from certain institutional requirements for acute care hospitals under TRICARE. To the extent practicable, the Director, Defense Health Agency (DHA), will adopt by administrative policy any process requirement related to Medicare's Hospitals Without Walls initiative.

(ii) *Organ transplant centers.* To obtain TRICARE approval as an organ transplant center, the center must be a Medicare approved transplant center or meet the criteria as established by the Executive Director, TMA, or a designee.

(iii) *Organ transplant consortia.* TRICARE shall approve individual pediatric organ transplant centers that meet the criteria established by the Executive Director, TMA, or a designee.

(iv) *Hospitals, psychiatric.* A psychiatric hospital is an institution which is engaged primarily in providing services to inpatients for the diagnosis and treatment of mental disorders.

(A) There are two major categories of psychiatric hospitals:

(*1*) The private psychiatric hospital category includes both proprietary and the not-for-profit nongovernmental institutions.

(*2*) The second category is those psychiatric hospitals that are controlled, financed, and operated by departments or agencies of the local, state, or Federal Government and always are operated on a not-for-profit basis.

(B) In order for the services of a psychiatric hospital to be covered, the hospital shall comply with the provisions outlined in paragraph (b)(4)(i) of this section. All psychiatric hospitals shall be accredited under an accrediting organization approved by the Director, in order for their services to be cost-shared under CHAMPUS. In the case of those psychiatric hospitals that are not accredited because they have not been in operation a sufficient period of time to be eligible to request an accreditation survey, the Director, or a designee, may grant temporary approval if the hospital is certified and participating under Title XVIII of the Social Security Act (Medicare, Part A). This temporary approval expires 12 months from the date on which the psychiatric hospital first becomes eligible to request an accreditation survey by an accrediting organization approved by the Director.

(C) Factors to be considered in determining whether CHAMPUS will cost-share care provided in a psychiatric hospital include, but are not limited to, the following considerations:

(*1*) Is the prognosis of the patient such that care provided will lead to resolution or remission of the mental illness to the degree that the patient is of no danger to others, can perform routine daily activities, and can be expected to function reasonably outside the inpatient setting?

(*2*) Can the services being provided be provided more economically in another facility or on an outpatient basis?

(*3*) Are the charges reasonable?

(*4*) Is the care primarily custodial or domiciliary? (Custodial or domiciliary care of the permanently mentally ill or retarded is not a benefit under the Basic Program.)

(D) Although psychiatric hospitals are accredited under an accrediting organization approved by Director, their medical records must be maintained in accordance with accrediting organization's current standards manual, along with the requirements set forth in § 199.7(b)(3). The hospital is responsible for assuring that patient services and

all treatment are accurately documented and completed in a timely manner.

(v) *Long Term Care Hospital (LTCH).* LTCHs must meet all the criteria for classification as an LTCH under 42 CFR part 412, subpart O, as well as all of the requirements of this part in order to be considered an authorized LTCH under the TRICARE program.

(A) In order for the services of LTCHs to be covered, the hospitals must comply with the provisions outlined in paragraph (b)(4)(i) of this section. In addition, in order for services provided by such hospitals to be covered by TRICARE, they must be primarily for the treatment of the presenting illness.

(B) Custodial or domiciliary care is not coverable under TRICARE, even if rendered in an otherwise authorized LTCH.

(C) The controlling factor in determining whether a beneficiary's stay in a LTCH is coverable by TRICARE is the level of professional care, supervision, and skilled nursing care that the beneficiary requires, in addition to the diagnosis, type of condition, or degree of functional limitations. The type and level of medical services required or rendered is controlling for purposes of extending TRICARE benefits; not the type of provider or condition of the beneficiary.

(vi) *Skilled nursing facility.* A skilled nursing facility is an institution (or a distinct part of an institution) that is engaged primarily in providing to inpatients medically necessary skilled nursing care, which is other than a nursing home or intermediate facility, and which:

(A) Has policies that are developed with the advice of (and with provisions for review on a periodic basis by) a group of professionals, including one or more physicians and one or more registered nurses, to govern the skilled nursing care and related medical services it provides.

(B) Has a physician, a registered nurse, or a medical staff responsible for the execution of such policies.

(C) Has a requirement that the medical care of each patient must be under the supervision of a physician, and provides for having a physician available to furnish necessary medical care in case of an emergency.

(D) Maintains clinical records on all patients.

(E) Provides 24-hour skilled nursing service that is sufficient to meet nursing needs in accordance with the policies developed as provided in paragraph (b)(4)(iv)(A) of this section, and has at least one registered professional nurse employed full-time.

(F) Provides appropriate methods and procedures for the dispensing and administering of drugs and biologicals.

(G) Has in effect a utilization review plan that is operational and functioning.

(H) In the case of an institution in a state in which state or applicable local law provides for the licensing of this type facility, the institution:

(*1*) Is licensed pursuant to such law, or

(*2*) Is approved by the agency of such state or locality responsible for licensing such institutions as meeting the standards established for such licensing.

(I) Has in effect an operating plan and budget.

(J) Meets such provisions of the most current edition of the Life Safety Code[8] as are applicable to nursing facilities; except that if the Secretary of Health and Human Services has waived, for such periods, as deemed appropriate, specific provisions of such code which, if rigidly applied, would result in unreasonable hardship upon a nursing facility.

(K) Is an authorized provider under the Medicare program, and meets the requirements of Title 18 of the social Security Act, sections 1819(a), (b), (c), and (d) (42 U.S.C. 1395i–3(a)–(d)).

NOTE: If a pediatric SNF is certified by Medicaid, it will be considered to meet the Medicare certification requirement in order to be an authorized provider under TRICARE.

(vii) *Residential treatment centers.* This paragraph (b)(4)(vii) establishes the definition of and eligibility standards and requirements for residential treatment centers (RTCs).

[8] Compiled and published by the National Fire Protection Association, Batterymarch Park, Quincy, Massachusetts 02269.

(A) *Organization and administration*—(*1*) *Definition*. A Residential Treatment Center (RTC) is a facility or a distinct part of a facility that provides to beneficiaries under 21 years of age a medically supervised, interdisciplinary program of mental health treatment. An RTC is appropriate for patients whose predominant symptom presentation is essentially stabilized, although not resolved, and who have persistent dysfunction in major life areas. Residential treatment may be complemented by family therapy and case management for community based resources. Discharge planning should support transitional care for the patient and family, to include resources available in the geographic area where the patient will be residing. The extent and pervasiveness of the patient's problems require a protected and highly structured therapeutic environment. Residential treatment is differentiated from:

(*i*) Acute psychiatric care, which requires medical treatment and 24-hour availability of a fullrange of diagnostic and therapeutic services to establish and implement an effective plan of care which will reverse life-threatening and/or severely incapacitating symptoms;

(*ii*) Partial hospitalization, which provides a less than 24-hour-per-day, seven-day-per-week treatment program for patients who continue to exhibit psychiatric problems but can function with support in some of the major life areas;

(*iii*) A group home, which is a professionally directed living arrangement with the availability of psychiatric consultation and treatment for patients with significant family dysfunction and/or chronic but stable psychiatric disturbances;

(*iv*) Therapeutic school, which is an educational program supplemented by psychological and psychiatric services;

(*v*) Facilities that treat patients with a primary diagnosis of substance use disorder; and

(*vi*) Facilities providing care for patients with a primary diagnosis of mental retardation or developmental disability.

(*2*) *Eligibility*. (*i*) In order to qualify as a TRICARE authorized provider, every RTC must meet the minimum basic standards set forth in paragraphs (b)(4)(vii)(A) through (C) of this section, and as well as such additional elaborative criteria and standards as the Director determines are necessary to implement the basic standards.

(*ii*) To qualify as a TRICARE authorized provider, the facility is required to be licensed and operate in substantial compliance with state and federal regulations.

(*iii*) The facility is currently accredited by an accrediting organization approved by the Director.

(*iv*) The facility has a written participation agreement with OCHAMPUS. The RTC is not a CHAMPUS-authorized provider and CHAMPUS benefits are not paid for services provided until the date upon which a participation agreement is signed by the Director.

(B) Participation agreement requirements. In addition to other requirements set forth in this paragraph (b)(4)(vii), for the services of an RTC to be authorized, the RTC shall have entered into a Participation Agreement with OCHAMPUS. The period of a participation agreement shall be specified in the agreement, and will generally be for not more than five years. In addition to review of a facility's application and supporting documentation, an on-site inspection by OCHAMPUS authorized personnel may be required prior to signing a Participation Agreement. Retroactive approval is not given. In addition, the Participation Agreement shall include provisions that the RTC shall, at a minimum:

(*1*) Render residential treatment center inpatient services to eligible CHAMPUS beneficiaries in need of such services, in accordance with the participation agreement and CHAMPUS regulation;

(*2*) Accept payment for its services based upon the methodology provided in §199.14(f) or such other method as determined by the Director;

(*3*) Accept the CHAMPUS all-inclusive per diem rate as payment in full and collect from the CHAMPUS beneficiary or the family of the CHAMPUS beneficiary only those amounts that represent the beneficiary's liability, as defined in §199.4, and charges for services and supplies that are not a benefit of CHAMPUS;

(*4*) Make all reasonable efforts acceptable to the Director, to collect those amounts, which represents the beneficiary's liability, as defined in § 199.4;

(*5*) Comply with the provisions of § 199.8, and submit claims first to all health insurance coverage to which the beneficiary is entitled that is primary to CHAMPUS;

(*6*) Submit claims for services provided to CHAMPUS beneficiaries at least every 30 days (except to the extent a delay is necessitated by efforts to first collect from other health insurance). If claims are not submitted at least every 30 days, the RTC agrees not to bill the beneficiary or the beneficiary's family for any amounts disallowed by CHAMPUS;

(*7*) Certify that:

(*i*) It is and will remain in compliance with the TRICARE standards and provisions of paragraph (b)(4)(vii) of this section establishing standards for Residential Treatment Centers; and

(*ii*) It will maintain compliance with the CHAMPUS Standards for Residential Treatment Centers Serving Children and Adolescents with Mental Disorders, as issued by the Director, except for any such standards regarding which the facility notifies the Director that it is not in compliance.

(*8*) Designate an individual who will act as liaison for CHAMPUS inquiries. The RTC shall inform OCHAMPUS in writing of the designated individual;

(*9*) Furnish OCHAMPUS, as requested by OCHAMPUS, with cost data certified by an independent accounting firm or other agency as authorized by the Director, OCHAMPUS;

(*10*) Comply with all requirements of this section applicable to institutional providers generally concerning accreditation requirements, preauthorization, concurrent care review, claims processing, beneficiary liability, double coverage, utilization and quality review, and other matters;

(*11*) Grant the Director, or designee, the right to conduct quality assurance audits or accounting audits with full access to patients and records (including records relating to patients who are not CHAMPUS beneficiaries) to determine the quality and cost-effectiveness of care rendered. The audits may be conducted on a scheduled or unscheduled (unannounced) basis. This right to audit/review includes, but is not limited to:

(*i*) Examination of fiscal and all other records of the RTC which would confirm compliance with the participation agreement and designation as a TRICARE authorized RTC;

(*ii*) Conducting such audits of RTC records including clinical, financial, and census records, as may be necessary to determine the nature of the services being provided, and the basis for charges and claims against the United States for services provided CHAMPUS beneficiaries;

(*iii*) Examining reports of evaluations and inspections conducted by federal, state and local government, and private agencies and organizations;

(*iv*) Conducting on-site inspections of the facilities of the RTC and interviewing employees, members of the staff, contractors, board members, volunteers, and patients, as required;

(*v*) Audits conducted by the United States Government Accountability Office.

(C) *Other requirements applicable to RTCs.* (*1*) Even though an RTC may qualify as a TRICARE authorized provider and may have entered into a participation agreement with CHAMPUS, payment by CHAMPUS for particular services provided is contingent upon the RTC also meeting all conditions set forth in § 199.4 especially all requirements of § 199.4(b)(4).

(*2*) The RTC shall provide inpatient services to CHAMPUS beneficiaries in the same manner it provides inpatient services to all other patients. The RTC may not discriminate against CHAMPUS beneficiaries in any manner, including admission practices, placement in special or separate wings or rooms, or provisions of special or limited treatment.

(*3*) The RTC shall assure that all certifications and information provided to the Director, incident to the process of obtaining and retaining authorized provider status is accurate and that it has no material errors or omissions. In the

case of any misrepresentations, whether by inaccurate information being provided or material facts withheld, authorized status will be denied or terminated, and the RTC will be ineligible for consideration for authorized provider status for a two year period.

(viii) *Christian Science sanatoriums.* The services obtained in Christian Science sanatoriums are covered by CHAMPUS as inpatient care. To qualify for coverage, the sanatorium either must be operated by, or be listed and certified by the First Church of Christ, Scientist.

(ix) *Infirmaries.* Infirmaries are facilities operated by student health departments of colleges and universities to provide inpatient or outpatient care to enrolled students. Charges for care provided by such facilities will not be cost-shared by CHAMPUS if the student would not be charged in the absence of CHAMPUS, or if student is covered by a mandatory student health insurance plan, in which enrollment is required as a part of the student's school registration and the charges by the college or university include a premium for the student health insurance coverage. CHAMPUS will cost-share only if enrollment in the student health program or health insurance plan is voluntary.

NOTE: An infirmary in a boarding school also may qualify under this provision, subject to review and approval by the Director, OCHAMPUS or a designee.

(x) *Other special institution providers.* (A) *General.* (*1*) Care provided by certain special institutional providers (on either an inpatient or outpatient basis), may be cost-shared by CHAMPUS under specified circumstances and only if the provider is specifically identified in paragraph (b)(4)(x) of this section.

(*i*) The course of treatment is prescribed by a doctor of medicine or osteopathy.

(*ii*) The patient is under the supervision of a physician during the entire course of the inpatient admission or the outpatient treatment.

(*iii*) The type and level of care and service rendered by the institution are otherwise authorized by this part.

(*iv*) The facility meets all licensing or other certification requirements that are extant in the jurisdiction in which the facility is located geographically.

(*v*) Is other than a nursing home, intermediate care facility, home for the aged, halfway house, or other similar institution.

(*vi*) Is accredited by the JCAH or other CHAMPUS-approved accreditation organization, if an appropriate accreditation program for the given type of facility is available. As future accreditation programs are developed to cover emerging specialized treatment programs, such accreditation will be a prerequisite to coverage by CHAMPUS for services provided by such facilities.

(*2*) To ensure that CHAMPUS beneficiaries are provided quality care at a reasonable cost when treated by a special institutional provider, the Director, OCHAMPUS may:

(*i*) Require prior approval of all admissions to special institutional providers.

(*ii*) Set appropriate standards for special institutional providers in addition to or in the absence of JCAHO accreditation.

(*iii*) Monitor facility operations and treatment programs on a continuing basis and conduct onsite inspections on a scheduled and unscheduled basis.

(*iv*) Negotiate agreements of participation.

(*v*) Terminate approval of a case when it is ascertained that a departure from the facts upon which the admission was based originally has occurred.

(*vi*) Declare a special institutional provider not eligible for CHAMPUS payment if that facility has been found to have engaged in fraudulent or deceptive practices.

(*3*) In general, the following disclaimers apply to treatment by special institutional providers:

(*i*) Just because one period or episode of treatment by a facility has been covered by CHAMPUS may not be construed to mean that later episodes of care by the same or similar facility will be covered automatically.

(*ii*) The fact that one case has been authorized for treatment by a specific facility or similar type of facility may not be construed to mean that similar cases or later periods of treatment will

be extended CHAMPUS benefits automatically.

(B) *Types of providers.* The following is a list of facilities that have been designated specifically as special institutional providers.

(*1*) *Free-standing ambulatory surgical centers.* Care provided by freestanding ambulatory surgical centers may be cost-shared by CHAMPUS under the following circumstances:

(*i*) The treatment is prescribed and supervised by a physician.

(*ii*) The type and level of care and services rendered by the center are otherwise authorized by this part.

(*iii*) The center meets all licensing or other certification requirements of the jurisdiction in which the facility is located.

(*iv*) The center is accredited by the JCAH, the Accreditation Association for Ambulatory Health Care, Inc. (AAAHC), or such other standards as authorized by the Director, OCHAMPUS.

(*v*) A childbirth procedure provided by a CHAMPUS-approved free-standing ambulatory surgical center shall not be cost-shared by the CHAMPUS unless the surgical center is also a CHAMPUS-approved birthing center institutional provider as established by the birthing center provider certification requirement of this Regulation.

(*2*) [Reserved]

(xi) *Birthing centers.* A birthing center is a freestanding or institution-affiliated outpatient maternity care program which principally provides a planned course of outpatient prenatal care and outpatient childbirth service limited to low-risk pregnancies; excludes care for high-risk pregnancies; limits childbirth to the use of natural childbirth procedures; and provides immediate newborn care.

(A) *Certification requirements.* A birthing center which meets the following criteria may be designated as an authorized CHAMPUS institutional provider:

(*1*) The predominant type of service and level of care rendered by the center is otherwise authorized by this part.

(*2*) The center is licensed to operate as a birthing center where such license is available, or is specifically licensed as a type of ambulatory health care facility where birthing center specific license is not available, and meets all applicable licensing or certification requirements that are extant in the state, county, municipality, or other political jurisdiction in which the center is located.

(*3*) The center is accredited by a nationally recognized accreditation organization whose standards and procedures have been determined to be acceptable by the Director, OCHAMPUS, or a designee.

(*4*) The center complies with the CHAMPUS birthing center standards set forth in this part.

(*5*) The center has entered into a participation agreement with OCHAMPUS in which the center agrees, in part, to:

(*i*) Participate in CHAMPUS and accept payment for maternity services based upon the reimbursement methodology for birthing centers;

(*ii*) Collect from the CHAMPUS beneficiary only those amounts that represent the beneficiary's liability under the participation agreement and the reimbursement methodology for birthing centers, and the amounts for services and supplies that are not a benefit of the CHAMPUS;

(*iii*) Permit access by the Director, OCHAMPUS, or a designee, to the clinical record of any CHAMPUS beneficiary, to the financial and organizational records of the center, and to reports of evaluations and inspections conducted by state or private agencies or organizations;

(*iv*) Submit claims first to all health benefit and insurance plans primary to the CHAMPUS to which the beneficiary is entitled and to comply with the double coverage provisions of this part;

(*v*) Notify CHAMPUS in writing within 7 days of the emergency transport of any CHAMPUS beneficiary from the center to an acute care hospital or of the death of any CHAMPUS beneficiary in the center.

(*6*) A birthing center shall not be a CHAMPUS-authorized institutional provider and CHAMPUS benefits shall not be paid for any service provided by a birthing center before the date the participation agreement is signed by the Director, OCHAMPUS, or a designee.

(B) *CHAMPUS birthing center standards.* (*1*) *Environment:* The center has a safe and sanitary environment, properly constructed, equipped, and maintained to protect health and safety and meets the applicable provisions of the ''Life Safety Code'' of the National Fire Protection Association.

(*2*) *Policies and procedures:* The center has written administrative, fiscal, personnel and clinical policies and procedures which collectively promote the provision of high-quality maternity care and childbirth services in an orderly, effective, and safe physical and organizational environment.

(*3*) *Informed consent:* Each CHAMPUS beneficiary admitted to the center will be informed in writing at the time of admission of the nature and scope of the center's program and of the possible risks associated with maternity care and childbirth in the center.

(*4*) *Beneficiary care:* Each woman admitted will be cared for by or under the direct supervision of a specific physician or a specific certified nurse-midwife who is otherwise eligible as a CHAMPUS individual professional provider.

(*5*) *Medical direction:* The center has written memoranda of understanding (MOU) for routine consultation and emergency care with an obstetrician-gynecologist who is certified or is eligible for certification by the American Board of Obstetrics and Gynecology or the American Osteopathic Board of Obstetrics and Gynecology and with a pediatrician who is certified or eligible for certification by the American Board of Pediatrics or by the American Osteopathic Board of Pediatrics, each of whom have admitting privileges to at least one backup hospital. In lieu of a required MOU, the center may employ a physician with the required qualifications. Each MOU must be renewed annually.

(*6*) *Admission and emergency care criteria and procedures.* The center has written clinical criteria and administrative procedures, which are reviewed and approved annually by a physician related to the center as required by paragraph (b)(4)(xi)(B)(*5*) above, for the exclusion of a woman with a high-risk pregnancy from center care and for management of maternal and neonatal emergencies.

(*7*) *Emergency treatment.* The center has a written memorandum of understanding (MOU) with at least one backup hospital which documents that the hospital will accept and treat any woman or newborn transferred from the center who is in need of emergency obstetrical or neonatal medical care. In lieu of this MOU with a hospital, a birthing center may have an MOU with a physician, who otherwise meets the requirements as a CHAMPUS individual professional provider, and who has admitting privileges to a backup hospital capable of providing care for critical maternal and neonatal patients as demonstrated by a letter from that hospital certifying the scope and expected duration of the admitting privileges granted by the hospital to the physician. The MOU must be reviewed annually.

(*8*) *Emergency medical transportation.* The center has a written memorandum of understanding (MOU) with at least one ambulance service which documents that the ambulance service is routinely staffed by qualified personnel who are capable of the management of critical maternal and neonatal patients during transport and which specifies the estimated transport time to each backup hospital with which the center has arranged for emergency treatment as required in paragraph (b)(4)(xi)(B)(*7*) above. Each MOU must be renewed annually.

(*9*) *Professional staff.* The center's professional staff is legally and professionally qualified for the performance of their professional responsibilities.

(*10*) *Medical records.* The center maintains full and complete written documentation of the services rendered to each woman admitted and each newborn delivered. A copy of the informed consent document required by paragraph (b)(4)(xi)(B)(*3*), above, which contains the original signature of the CHAMPUS beneficiary, signed and dated at the time of admission, must be maintained in the medical record of each CHAMPUS beneficiary admitted.

(*11*) *Quality assurance*. The center has an organized program for quality assurance which includes, but is not limited to, written procedures for regularly scheduled evaluation of each type of service provided, of each mother or newborn transferred to a hospital, and of each death within the facility.

(*12*) *Governance and administration*. The center has a governing body legally responsible for overall operation and maintenance of the center and a full-time employee who has authority and responsibility for the day-to-day operation of the center.

(xii) *Psychiatric and substance use disorder partial hospitalization programs*. This paragraph (b)(4)(xii) establishes the definition of and eligibility standards and requirements for psychiatric and substance use disorder partial hospitalization programs.

(A) *Organization and administration*—(*1*) *Definition*. Partial hospitalization is defined as a time-limited, ambulatory, active treatment program that offers therapeutically intensive, coordinated, and structured clinical services within a stable therapeutic milieu. Partial hospitalization programs serve patients who exhibit psychiatric symptoms, disturbances of conduct, and decompensating conditions affecting mental health. Partial hospitalization is appropriate for those whose psychiatric and addiction-related symptoms or concomitant physical and emotional/behavioral problems can be managed outside the hospital for defined periods of time with support in one or more of the major life areas. A partial hospitalization program for the treatment of substance use disorders is an addiction-focused service that provides active treatment to children and adolescents, or adults aged 18 and over.

(*2*) *Eligibility*. (*i*) To qualify as a TRICARE authorized provider, every partial hospitalization program must meet minimum basic standards set forth in paragraphs (b)(4)(xii)(A) through (D) of this section, as well as such additional elaborative criteria and standards as the Director determines are necessary to implement the basic standards. Each partial hospitalization program must be either a distinct part of an otherwise-authorized institutional provider or a free-standing program. Approval of a hospital by TRICARE is sufficient for its partial hospitalization program to be an authorized TRICARE provider. Such hospital-based partial hospitalization programs are not required to be separately authorized by TRICARE.

(*ii*) To be approved as a TRICARE authorized provider, the facility is required to be licensed and operate in substantial compliance with state and federal regulations.

(*iii*) The facility is required to be currently accredited by an accrediting organization approved by the Director. Each PHP authorized to treat substance use disorder must be accredited to provide the level of required treatment by an accreditation body approved by the Director.

(*iv*) The facility is required to have a written participation agreement with OCHAMPUS. The PHP is not a CHAMPUS-authorized provider and CHAMPUS benefits are not paid for services provided until the date upon which a participation agreement is signed by the Director.

(B) *Participation agreement requirements*. In addition to other requirements set forth in this paragraph (b)(4)(xii), in order for the services of a PHP to be authorized, the PHP shall have entered into a Participation Agreement with OCHAMPUS. A single consolidated participation agreement is acceptable for all units of the TRICARE authorized facility granted that all programs meet the requirements of this part. The period of a Participation Agreement shall be specified in the agreement, and will generally be for not more than five years. The PHP shall not be considered to be a CHAMPUS authorized provider and CHAMPUS payments shall not be made for services provided by the PHP until the date the participation agreement is signed by the Director. In addition to review of a facility's application and supporting documentation, an on-site inspection by OCHAMPUS authorized personnel may be required prior to signing a participation agreement. The Participation Agreement shall include at least the following requirements:

(*1*) Render partial hospitalization program services to eligible CHAMPUS beneficiaries in need of such services,

in accordance with the participation agreement and CHAMPUS regulation.

(*2*) Accept payment for its services based upon the methodology provided in § 199.14, or such other method as determined by the Director;

(*3*) Accept the CHAMPUS all-inclusive per diem rate as payment in full and collect from the CHAMPUS beneficiary or the family of the CHAMPUS beneficiary only those amounts that represent the beneficiary's liability, as defined in § 199.4, and charges for services and supplies that are not a benefit of CHAMPUS;

(*4*) Make all reasonable efforts acceptable to the Director to collect those amounts, which represent the beneficiary's liability, as defined in § 199.4;

(*5*) Comply with the provisions of § 199.8, and submit claims first to all health insurance coverage to which the beneficiary is entitled that is primary to CHAMPUS;

(*6*) Submit claims for services provided to CHAMPUS beneficiaries at least every 30 days (except to the extent a delay is necessitated by efforts to first collect from other health insurance). If claims are not submitted at least every 30 days, the PHP agrees not to bill the beneficiary or the beneficiary's family for any amounts disallowed by CHAMPUS;

(*7*) Certify that:

(*i*) It is and will remain in compliance with the TRICARE standards and provisions of paragraph (b)(4)(xii) of this section establishing standards for psychiatric and substance use disorder partial hospitalization programs; and

(*ii*) It will maintain compliance with the CHAMPUS Standards for Psychiatric Substance Use Disorder Partial Hospitalization Programs, as issued by the Director, except for any such standards regarding which the facility notifies the Director, or designee, that it is not in compliance.

(*8*) Designate an individual who will act as liaison for CHAMPUS inquiries. The PHP shall inform the Director, or designee, in writing of the designated individual;

(*9*) Furnish OCHAMPUS, as requested by OCHAMPUS, with cost data certified by an independent accounting firm or other agency as authorized by the Director;

(*10*) Comply with all requirements of this section applicable to institutional providers generally concerning accreditation requirements, preauthorization, concurrent care review, claims processing, beneficiary liability, double coverage, utilization and quality review, and other matters;

(*11*) Grant the Director, or designee, the right to conduct quality assurance audits or accounting audits with full access to patients and records (including records relating to patients who are not CHAMPUS beneficiaries) to determine the quality and cost-effectiveness of care rendered. The audits may be conducted on a scheduled or unscheduled (unannounced) basis. This right to audit/review includes, but is not limited to:

(*i*) Examination of fiscal and all other records of the PHP which would confirm compliance with the participation agreement and designation as a TRICARE authorized PHP provider;

(*ii*) Conducting such audits of PHP records including clinical, financial, and census records, as may be necessary to determine the nature of the services being provided, and the basis for charges and claims against the United States for services provided CHAMPUS beneficiaries;

(*iii*) Examining reports of evaluations and inspections conducted by federal, state and local government, and private agencies and organizations;

(*iv*) Conducting on-site inspections of the facilities of the PHP and interviewing employees, members of the staff, contractors, board members, volunteers, and patients, as required;

(*v*) Audits conducted by the United States General Account Office.

(C) *Other requirements applicable to PHPs.* (*1*) Even though a PHP may qualify as a TRICARE authorized provider and may have entered into a participation agreement with CHAMPUS, payment by CHAMPUS for particular services provided is contingent upon the PHP also meeting all conditions set forth in § 199.4.

(*2*) The PHP may not discriminate against CHAMPUS beneficiaries in any manner, including admission practices, placement in special or separate wings

or rooms, or provisions of special or limited treatment.

(*3*) The PHP shall assure that all certifications and information provided to the Director incident to the process of obtaining and retaining authorized provider status is accurate and that is has no material errors or omissions. In the case of any misrepresentations, whether by inaccurate information being provided or material facts withheld, authorized provider status will be denied or terminated, and the PHP will be ineligible for consideration for authorized provider status for a two year period.

(xiii) *Hospice programs*. Hospice programs must be Medicare approved and meet all Medicare conditions of participation (42 CFR part 418) in relation to CHAMPUS patients in order to receive payment under the CHAMPUS program. A hospice program may be found to be out of compliance with a particular Medicare condition of participation and still participate in the CHAMPUS as long as the hospice is allowed continued participation in Medicare while the condition of noncompliance is being corrected. The hospice program can be either a public agency or private organization (or a subdivision thereof) which:

(A) Is primarily engaged in providing the care and services described under §199.4(e)(19) and makes such services available on a 24-hour basis.

(B) Provides bereavement counseling for the immediate family or terminally ill individuals.

(C) Provides for such care and services in individuals' homes, on an outpatient basis, and on a short-term inpatient basis, directly or under arrangements made by the hospice program, except that the agency or organization must:

(*1*) Ensure that substantially all the core services are routinely provided directly by hospice employees.

(*2*) Maintain professional management responsibility for all services which are not directly furnished to the patient, regardless of the location or facility in which the services are rendered.

(*3*) Provide assurances that the aggregate number of days of inpatient care provided in any 12-month period does not exceed 20 percent of the aggregate number of days of hospice care during the same period.

(*4*) Have an interdisciplinary group composed of the following personnel who provide the care and services described under §199.4(e)(19) and who establish the policies governing the provision of such care/services:

(*i*) A physician;

(*ii*) A registered professional nurse;

(*iii*) A social worker; and

(*iv*) A pastoral or other counselor.

(*5*) Maintain central clinical records on all patients.

(*6*) Utilize volunteers.

(*7*) The hospice and all hospice employees must be licensed in accordance with applicable Federal, State and local laws and regulations.

(*8*) The hospice must enter into an agreement with CHAMPUS in order to be qualified to participate and to be eligible for payment under the program. In this agreement the hospice and CHAMPUS agree that the hospice will:

(*i*) Not charge the beneficiary or any other person for items or services for which the beneficiary is entitled to have payment made under the CHAMPUS hospice benefit.

(*ii*) Be allowed to charge the beneficiary for items or services requested by the beneficiary in addition to those that are covered under the CHAMPUS hospice benefit.

(*9*) Meet such other requirements as the Secretary of Defense may find necessary in the interest of the health and safety of the individuals who are provided care and services by such agency or organization.

(xiv) *Substance use disorder rehabilitation facilities*. This paragraph (b)(4)(xiv) establishes the definition of eligibility standards and requirements for residential substance use disorder rehabilitation facilities (SUDRF).

(A) *Organization and administration*—(*1*) *Definition*. A SUDRF is a residential or rehabilitation facility, or distinct part of a facility, that provides medically monitored, interdisciplinary addiction-focused treatment to beneficiaries who have psychoactive substance use disorders. Qualified health care professionals provide 24-hour,

seven-day-per-week, assessment, treatment, and evaluation. A SUDRF is appropriate for patients whose addiction-related symptoms, or concomitant physical and emotional/behavioral problems reflect persistent dysfunction in several major life areas. Residential or inpatient rehabilitation is differentiated from:

(*i*) Acute psychoactive substance use treatment and from treatment of acute biomedical/emotional/behavioral problems; which problems are either life-threatening and/or severely incapacitating and often occur within the context of a discrete episode of addiction-related biomedical or psychiatric dysfunction;

(*ii*) A partial hospitalization center, which serves patients who exhibit emotional/behavioral dysfunction but who can function in the community for defined periods of time with support in one or more of the major life areas;

(*iii*) A group home, sober-living environment, halfway house, or three-quarter way house;

(*iv*) Therapeutic schools, which are educational programs supplemented by addiction-focused services;

(*v*) Facilities that treat patients with primary psychiatric diagnoses other than psychoactive substance use or dependence; and

(*vi*) Facilities that care for patients with the primary diagnosis of mental retardation or developmental disability.

(*2*) *Eligibility*. (*i*) In order to become a TRICARE authorized provider, every SUDRF must meet minimum basic standards set forth in paragraphs (b)(4)(xiv)(A) through (C) of this section, as well as such additional elaborative criteria and standards as the Director determines are necessary to implement the basic standards.

(*ii*) To be approved as a TRICARE authorized provider, the SUDRF is required to be licensed and operate in substantial compliance with state and federal regulations.

(*iii*) The SUDRF is currently accredited by an accrediting organization approved by the Director. Each SUDRF must be accredited to provide the level of required treatment by an accreditation body approved by the Director.

(*iv*) The SUDRF has a written participation agreement with OCHAMPUS. The SUDRF is not considered a TRICARE authorized provider, and CHAMPUS benefits are not paid for services provided until the date upon which a participation agreement is signed by the Director.

(B) *Participation agreement requirements*. In addition to other requirements set forth in this paragraph (b)(4)(xiv), in order for the services of an inpatient rehabilitation center for the treatment of substance use disorders to be authorized, the center shall have entered into a Participation Agreement with OCHAMPUS. A single consolidated participation agreement is acceptable for all units of the TRICARE authorized facility. The period of a Participation Agreement shall be specified in the agreement, and will generally be for not more than five years. The SUDRF shall not be considered to be a CHAMPUS authorized provider and CHAMPUS payments shall not be made for services provided by the SUDRF until the date the participation agreement is signed by the Director. In addition to review of the SUDRF's application and supporting documentation, an on-site visit by OCHAMPUS representatives may be part of the authorization process. The Participation Agreement shall include at least the following requirements:

(*1*) Render applicable services to eligible CHAMPUS beneficiaries in need of such services, in accordance with the participation agreement and CHAMPUS regulation;

(*2*) Accept payment for its services based upon the methodology provided in § 199.14, or such other method as determined by the Director;

(*3*) Accept the CHAMPUS-determined rate as payment in full and collect from the CHAMPUS beneficiary or the family of the CHAMPUS beneficiary only those amounts that represent the beneficiary's liability, as defined in § 199.4, and charges for services and supplies that are not a benefit of CHAMPUS;

(*4*) Make all reasonable efforts acceptable to the Director to collect those amounts which represent the beneficiary's liability, as defined in § 199.4;

(*5*) Comply with the provisions of § 199.8, and submit claims first to all health insurance coverage to which the beneficiary is entitled that is primary to CHAMPUS;

(*6*) Furnish OCHAMPUS with cost data, as requested by OCHAMPUS, certified to by an independent accounting firm or other agency as authorized by the Director;

(*7*) Certify that:

(*i*) It is and will remain in compliance with the provisions of paragraph (b)(4)(xiv) of the section establishing standards for substance use disorder rehabilitation facilities; and

(*ii*) It has conducted a self-assessment of the facility's compliance with the CHAMPUS Standards for Substance Use Disorder Rehabilitation Facilities, as issued by the Director and notified the Director of any matter regarding which the facility is not in compliance with such standards; and

(*iii*) It will maintain compliance with the CHAMPUS Standards for Substance Use Disorder Rehabilitation Facilities, as issued by the Director, except for any such standards regarding which the facility notifies the Director that it is not in compliance.

(*8*) Designate an individual who will act as liaison for CHAMPUS inquiries. The SUDRF shall inform OCHAMPUS in writing of the designated individual;

(*9*) Furnish OCHAMPUS, as requested by OCHAMPUS, with cost data certified by an independent accounting firm or other agency as authorized by the Director;

(*10*) Comply with all requirements of this section applicable to institutional providers generally concerning accreditation requirements, preauthorization, concurrent care review, claims processing, beneficiary liability, double coverage, utilization and quality review, and other matters;

(*11*) Grant the Director, or designee, the right to conduct quality assurance audits or accounting audits with full access to patients and records (including records relating to patients who are not CHAMPUS beneficiaries) to determine the quality and cost effectiveness of carerendered. The audits may be conducted on a scheduled or unscheduled (unannounced) basis. This right to audit/review included, but is not limited to:

(*i*) Examination of fiscal and all other records of the center which would confirm compliance with the participation agreement and designation as an authorized TRICARE provider;

(*ii*) Conducting such audits of center records including clinical, financial, and census records, as may be necessary to determine the nature of the services being provided, and the basis for charges and claims against the United States for services provided CHAMPUS beneficiaries;

(*iii*) Examining reports of evaluations and inspection conducted by federal, state and local government, and private agencies and organizations;

(*iv*) Conducting on-site inspections of the facilities of the SUDRF and interviewing employees, members of the staff, contractors, board members, volunteers, and patients, as required.

(*v*) Audits conducted by the United States Government Accountability Office.

(C) Other requirements applicable to substance use disorder rehabilitation facilities.

(*1*) Even though a SUDRF may qualify as a TRICARE authorized provider and may have entered into a participation agreement with CHAMPUS, payment by CHAMPUS for particular services provided is contingent upon the SUDRF also meeting all conditions set forth in § 199.4.

(*2*) The center shall provide inpatient services to CHAMPUS beneficiaries in the same manner it provides services to all other patients. The center may not discriminate against CHAMPUS beneficiaries in any manner, including admission practices, placement in special or separate wings or rooms, or provisions of special or limited treatment.

(*3*) The substance use disorder facility shall assure that all certifications and information provided to the Director, incident to the process of obtaining and retaining authorized provider status, is accurate and that it has no material errors or omissions. In the case of any misrepresentations, whether by inaccurate information being provided or material facts withheld, authorized provider status will be denied or terminated, and the facility will be

ineligible for consideration for authorized provider status for a two year period.

(xv) *Home health agencies (HHAs).* HHAs must be Medicare approved and meet all Medicare conditions of participation under sections 1861(o) and 1891 of the Social Security Act (42 U.S.C. 1395x(o) and 1395bbb) and 42 CFR part 484 in relation to TRICARE beneficiaries in order to receive payment under the TRICARE program. An HHA may be found to be out of compliance with a particular Medicare condition of participation and still participate in the TRICARE program as long as the HHA is allowed continued participation in Medicare while the condition of noncompliance is being corrected. An HHA is a public or private organization, or a subdivision of such an agency or organization, that meets the following requirements:

(A) Engaged in providing skilled nursing services and other therapeutic services, such as physical therapy, speech-language pathology services, or occupational therapy, medical services, and home health aide services.

(*1*) Makes available part-time or intermittent skilled nursing services and at least one other therapeutic service on a visiting basis in place of residence used as a patient's home.

(*2*) Furnishes at least one of the qualifying services directly through agency employees, but may furnish the second qualifying service and additional services under arrangement with another HHA or organization.

(B) Policies established by a professional group associated with the agency or organization (including at least one physician and one registered nurse) to govern the services and provides for supervision of such services by a physician or a registered nurse.

(C) Maintains clinical records for all patients.

(D) Licensed in accordance with State and local law or is approved by the State or local licensing agency as meeting the licensing standards, where applicable.

(E) Enters into an agreement with TRICARE in order to participate and to be eligible for payment under the program. In this agreement the HHA and TRICARE agree that the HHA will:

(*1*) Not charge the beneficiary or any other person for items or services for which the beneficiary is entitled to have payment under the TRICARE HHA prospective payment system.

(*2*) Be allowed to charge the beneficiary for items or services requested by the beneficiary in addition to those that are covered under the TRICARE HHA prospective payment system.

(F) Abide by the following consolidated billing requirements:

(*1*) The HHA must submit all TRICARE claims for all home health services, excluding durable medical equipment (DME), while the beneficiary is under the home health plan without regard to whether or not the item or service was furnished by the HHA, by others under arrangement with the HHA, or under any other contracting or consulting arrangement.

(*2*) Separate payment will be made for DME items and services provided under the home health benefit which are under the DME fee schedule. DME is excluded from the consolidated billing requirements.

(*3*) Home health services included in consolidated billing are:

(*i*) Part-time or intermittent skilled nursing;

(*ii*) Part-time or intermittent home health aide services;

(*iii*) Physical therapy, occupational therapy and speech-language pathology;

(*iv*) Medical social services;

(*v*) Routine and non-routine medical supplies;

(*vi*) A covered osteoporosis drug (not paid under PPS rate) but excluding other drugs and biologicals;

(*vii*) Medical services provided by an intern or resident-in-training of a hospital, under an approved teaching program of the hospital in the case of an HHA that is affiliated or under common control of a hospital;

(*viii*) Services at hospitals, SNFs or rehabilitation centers when they involve equipment too cumbersome to bring home.

(G) Meet such other requirements as the Secretary of Health and Human Services and/or Secretary of Defense may find necessary in the interest of the health and safety of the individuals

who are provided care and services by such agency or organization.

(xvi) *Critical Access Hospitals (CAHs).* CAHs must meet all conditions of participation under 42 CFR 485.601 through 485.645 in relation to TRICARE beneficiaries in order to receive payment under the TRICARE program. If a CAH provides inpatient psychiatric services or inpatient rehabilitation services in a distinct part unit, the distinct part unit must meet the conditions of participation in 42 CFR 485.647, with the exception of being paid under the inpatient prospective payment system for psychiatric facilities as specified in 42 CFR 412.1(a)(2) or the inpatient prospective payment system for rehabilitation hospitals or rehabilitation units as specified in 42 CFR 412.1(a)(3). Upon implementation of TRICARE's IRF PPS in § 199.14(a)(10), if a CAH provides inpatient rehabilitation services in a distinct part unit, the distinct part unit shall be paid under TRICARE's IRF PPS.

(xvii) *Sole community hospitals (SCHs).* SCHs must meet all the criteria for classification as an SCH under 42 CFR 412.92, in order to be considered an SCH under the TRICARE program.

(xviii) *Intensive outpatient programs.* This paragraph (b)(4)(xviii) establishes standards and requirements for intensive outpatient treatment programs for psychiatric and substance use disorder.

(A) *Organization and administration*—(*1*) *Definition.* Intensive outpatient treatment (IOP) programs are defined in § 199.2. IOP services consist of a comprehensive and complimentary schedule of recognized treatment approaches that may include day, evening, night, and weekend services consisting of individual and group counseling or therapy, and family counseling or therapy as clinically indicated for children and adolescents, or adults aged 18 and over, and may include case management to link patients and their families with community based support systems.

(*2*) *Eligibility.* (*i*) In order to qualify as a TRICARE authorized provider, every intensive outpatient program must meet the minimum basic standards set forth in paragraphs (b)(4)(xviii)(A) through (C) of this section, as well as additional elaborative criteria and standards as the Director determines are necessary to implement the basic standards. Each intensive outpatient program must be either a distinct part of an otherwise-authorized institutional provider or a free-standing psychiatric or substance use disorder intensive outpatient program. Approval of a hospital by TRICARE is sufficient for its IOP to be an authorized TRICARE provider. Such hospital-based intensive outpatient programs are not required to be separately authorized by TRICARE.

(*ii*) To qualify as a TRICARE authorized provider, the IOP is required to be licensed and operate in substantial compliance with state and federal regulations.

(*iii*) The IOP is currently accredited by an accrediting organization approved by the Director. Each IOP authorized to treat substance use disorder must be accredited to provide the level of required treatment by an accreditation body approved by the Director.

(*iv*) The facility has a written participation agreement with TRICARE. The IOP is not considered a TRICARE authorized provider and TRICARE benefits are not paid for services provided until the date upon which a participation agreement is signed by the Director.

(B) *Participation agreement requirements.* In addition to other requirements set forth in paragraph (b)(4)(xii) of this section, in order for the services of an IOP to be authorized, the IOP shall have entered into a Participation Agreement with TRICARE. A single consolidated participation agreement is acceptable for all units of the TRICARE authorized facility granted that all programs meet the requirements of this part. The period of a Participation Agreement shall be specified in the agreement, and will generally be for not more than five years. In addition to review of a facility's application and supporting documentation, an on-site inspection by DHA authorized personnel may be required prior to signing a participation agreement. The Participation Agreement shall include at least the following requirements:

(*1*) Render intensive outpatient program services to eligible TRICARE beneficiaries in need of such services,

in accordance with the participation agreement and TRICARE regulation.

(*2*) Accept payment for its services based upon the methodology provided in § 199.14, or such other method as determined by the Director;

(*3*) Collect from the TRICARE beneficiary or the family of the TRICARE beneficiary only those amounts that represent the beneficiary's liability, as defined in § 199.4, and charges for services and supplies that are not a benefit of TRICARE;

(*4*) Make all reasonable efforts acceptable to the Director to collect those amounts, which represent the beneficiary's liability, as defined in § 199.4;

(*5*) Comply with the provisions of § 199.8, and submit claims first to all health insurance coverage to which the beneficiary is entitled that is primary to TRICARE;

(*6*) Submit claims for services provided to TRICARE beneficiaries at least every 30 days (except to the extent a delay is necessitated by efforts to first collect from other health insurance). If claims are not submitted at least every 30 days, the IOP agrees not to bill the beneficiary or the beneficiary's family for any amounts disallowed by TRICARE;

(*7*) Free-standing intensive outpatient programs shall certify that:

(*i*) It is and will remain in compliance with the provisions of paragraph (b)(4)(xii) of this section establishing standards for psychiatric and SUD IOPs;

(*ii*) It has conducted a self-assessment of the facility's compliance with the CHAMPUS Standards for Intensive Outpatient Programs, as issued by the Director, and notified the Director of any matter regarding which the facility is not in compliance with such standards; and

(*iii*) It will maintain compliance with the TRICARE standards for IOPs, as issued by the Director, except for any such standards regarding which the facility notifies the Director, or a designee that it is not in compliance.

(*8*) Designate an individual who will act as liaison for TRICARE inquiries. The IOP shall inform TRICARE, or a designee in writing of the designated individual;

(*9*) Furnish OCHAMPUS with cost data, as requested by OCHAMPUS, certified by an independent accounting firm or other agency as authorized by the Director.

(*10*) Comply with all requirements of this section applicable to institutional providers generally concerning accreditation requirements, preauthorization, concurrent care review, claims processing, beneficiary liability, double coverage, utilization and quality review, and other matters;

(*11*) Grant the Director, or designee, the right to conduct quality assurance audits or accounting audits with full access to patients and records (including records relating to patients who are not CHAMPUS beneficiaries) to determine the quality and cost effectiveness of care rendered. The audits may be conducted on a scheduled or unscheduled (unannounced) basis. This right to audit/review included, but is not limited to:

(*i*) Examination of fiscal and all other records of the center which would confirm compliance with the participation agreement and designation as an authorized TRICARE provider;

(*ii*) Conducting such audits of center records including clinical, financial, and census records, as may be necessary to determine the nature of the services being provided, and the basis for charges and claims against the United States for services provided CHAMPUS beneficiaries;

(*iii*) Examining reports of evaluations and inspection conducted by federal, state and local government, and private agencies and organizations;

(*iv*) Conducting on-site inspections of the facilities of the IOP and interviewing employees, members of the staff, contractors, board members, volunteers, and patients, as required.

(*v*) Audits conducted by the United States Government Accountability Office.

(C) *Other requirements applicable to Intensive Outpatient Programs (IOP).* (*1*) Even though an IOP may qualify as a TRICARE authorized provider and may have entered into a participation agreement with CHAMPUS, payment by CHAMPUS for particular services provided is contingent upon the IOP

also meeting all conditions set forth in § 199.4.

(*2*) The IOP may not discriminate against CHAMPUS beneficiaries in any manner, including admission practices, placement in special or separate wings or rooms, or provisions of special or limited treatment.

(*3*) The IOP shall assure that all certifications and information provided to the Director incident to the process of obtaining and retaining authorized provider status is accurate and that is has no material errors or omissions. In the case of any misrepresentations, whether by inaccurate information being provided or material facts withheld, authorized provider status will be denied or terminated, and the IOP will be ineligible for consideration for authorized provider status for a two year period.

(xix) *Opioid Treatment Programs (OTPs)*. This paragraph (b)(4)(xix) establishes standards and requirements for Opioid Treatment Programs.

(A) *Organization and administration*. (*1*) *Definition*. Opioid Treatment Programs (OTPs) are defined in § 199.2. Opioid Treatment Programs (OTPs) are organized, ambulatory, addiction treatment services for patients with an opioid use disorder. OTPs have the capacity to provide daily direct administration of medications without the prescribing of medications. Medication supplies for patients to take outside of OTPs originate from within OTPs. OTPs offer medication assisted treatment, patient-centered, recovery-oriented individualized treatment through addiction counseling, mental health therapy, case management, and health education.

(*2*) *Eligibility*. (*i*) Every free-standing Opioid Treatment Program must be accredited by an accrediting organization recognized by Director, under the current standards of an accrediting organization, as well as meet additional elaborative criteria and standards as the Director determines are necessary to implement the basic standards. OTPs adhere to requirements of the Department of Health and Human Services' 42 CFR part 8, the Substance Abuse and Mental Health Services Administration's Center for Substance Abuse Treatment, and the Drug Enforcement Agency. OTPs must be either a distinct part of an otherwise authorized institutional provider or a free-standing program. Approval of hospitals by TRICARE is sufficient for their OTPs to be authorized TRICARE providers. Such hospital-based OTPs, if certified under 42 CFR 8, are not required to be separately authorized by TRICARE.

(*ii*) To qualify as a TRICARE authorized provider, OTPs are required to be licensed and operate in substantial compliance with state and federal regulations.

(*iii*) OTPs have a written participation agreement with OCHAMPUS. OTPs are not considered a TRICARE authorized provider, and CHAMPUS benefits are not paid for services provided until the date upon which a participation agreement is signed by the Director.

(B) Participation agreement requirements. In addition to other requirements set forth in this paragraph (b)(4)(xix), in order for the services of OTPs to be authorized, OTPs shall have entered into a Participation Agreement with TRICARE. A single consolidated participation agreement is acceptable for all units of a TRICARE authorized facility. The period of a Participation Agreement shall be specified in the agreement, and will generally be for not more than five years. In addition to review of a facility's application and supporting documentation, an on-site inspection by DHA authorized personnel may be required prior to signing a participation agreement. The Participation Agreement shall include at least the following requirements:

(*1*) Render services from OTPs to eligible TRICARE beneficiaries in need of such services, in accordance with the participation agreement and TRICARE regulation.

(*2*) Accept payment for its services based upon the methodology provided in § 199.14, or such other method as determined by the Director;

(*3*) Collect from the TRICARE beneficiary or the family of the TRICARE beneficiary only those amounts that represent the beneficiary's liability, as defined in § 199.4, and charges for services and supplies that are not a benefit of TRICARE;

(*4*) Make all reasonable efforts acceptable to the Director to collect those amounts, which represent the beneficiary's liability, as defined in § 199.4;

(*5*) Comply with the provisions of § 199.8, and submit claims first to all health insurance coverage to which the beneficiary is entitled that is primary to TRICARE;

(*6*) Submit claims for services provided to TRICARE beneficiaries at least every 30 days (except to the extent a delay is necessitated by efforts to first collect from other health insurance). If claims are not submitted at least every 30 days, OTPs agree not to bill the beneficiary or the beneficiary's family for any amounts disallowed by TRICARE;

(*7*) Free-standing opioid treatment programs shall certify that:

(*i*) It is and will remain in compliance with the provisions of paragraph (b)(4)(xii) of this section establishing standards for opioid treatment programs;

(*ii*) It will maintain compliance with the TRICARE standards for OTPs, as issued by the Director, except for any such standards regarding which the facility notifies the Director, or a designee, that it is not in compliance.

(*8*) Designate an individual who will act as liaison for TRICARE inquiries. OTPs shall inform TRICARE, or a designee, in writing of the designated individual;

(*9*) Furnish TRICARE, or a designee, with cost data, as requested by TRICARE, certified by an independent accounting firm or other agency as authorized by the Director;

(*10*) Comply with all requirements of this section applicable to institutional providers generally concerning accreditation requirements, claims processing, beneficiary liability, double coverage, utilization and quality review, and other matters;

(*11*) Grant the Director, or designee, the right to conduct quality assurance audits or accounting audits with full access to patients and records (including records relating to patients who are not TRICARE beneficiaries) to determine the quality and cost effectiveness of care rendered. The audits may be conducted on a scheduled or unscheduled (unannounced) basis. This right to audit/review includes, but is not limited to:

(*i*) Examination of fiscal and all other records of OTPs which would confirm compliance with the participation agreement and designation as an authorized TRICARE provider;

(*ii*) Conducting such audits of OTPs' records including clinical, financial, and census records, as may be necessary to determine the nature of the services being provided, and the basis for charges and claims against the United States for services provided TRICARE beneficiaries;

(*iii*) Examining reports of evaluations and inspections conducted by federal, state and local government, and private agencies and organizations.

(C) *Other requirements applicable to OTPs*. (*1*) Even though OTPs may qualify as a TRICARE authorized provider and may have entered into a participation agreement with CHAMPUS, payment by CHAMPUS for particular services provided is contingent upon OTPs also meeting all conditions set forth in § 199.4.

(*2*) OTPs may not discriminate against CHAMPUS beneficiaries in any manner, including admission practices or provisions of special or limited treatment.

(*3*) OTPs shall assure that all certifications and information provided to the Director incident to the process of obtaining and retaining authorized provider status is accurate and that is has no material errors or omissions. In the case of any misrepresentations, whether by inaccurate information being provided or material facts withheld, authorized provider status will be denied or terminated, and OTPs will be ineligible for consideration for authorized provider status for a two year period.

(xx) *Inpatient Rehabilitation Facility (IRF)*. IRFs must meet all the criteria for classification as an IRF under 42 CFR part 412, subpart B, and meet all applicable requirements established in this part in order to be considered an authorized IRF under the TRICARE program.

(A) In order for the services of inpatient rehabilitation facilities to be covered, the facility must comply with the provisions outlined in paragraph

(b)(4)(i) of this section. In addition, in order for services provided by these facilities to be covered by TRICARE, they must be primarily for the treatment of the presenting illness.

(B) Custodial or domiciliary care is not coverable under TRICARE, even if rendered in an otherwise authorized inpatient rehabilitation facility.

(C) The controlling factor in determining whether a beneficiary's stay in an inpatient rehabilitation facility is coverable by TRICARE is the level of professional care, supervision, and skilled nursing care that the beneficiary requires, in addition to the diagnosis, type of condition, or degree of functional limitations. The type and level of medical services required or rendered is controlling for purposes of extending TRICARE benefits; not the type of provider or condition of the beneficiary.

(c) *Individual professional providers of care*—(1) *General*—(i) *Purpose*. This individual professional provider class is established to accommodate individuals who are recognized by 10 U.S.C. 1079(a) as authorized to assess or diagnose illness, injury, or bodily malfunction as a prerequisite for CHAMPUS cost-share of otherwise allowable related preventive or treatment services or supplies, and to accommodate such other qualified individuals who the Director, OCHAMPUS, or designee, may authorize to render otherwise allowable services essential to the efficient implementation of a plan-of-care established and managed by a 10 U.S.C. 1079(a) authorized professional.

(ii) *Professional corporation affiliation or association membership permitted*. Paragraph (c) of this section applies to those individual health care professionals who have formed a professional corporation or association pursuant to applicable state laws. Such a professional corporation or association may file claims on behalf of a CHAMPUS-authorized individual professional provider and be the payee for any payment resulting from such claims when the CHAMPUS-authorized individual certifies to the Director, OCHAMPUS, or designee, in writing that the professional corporation or association is acting on the authorized individual's behalf.

(iii) *Scope of practice limitation*. For CHAMPUS cost-sharing to be authorized, otherwise allowable services provided by a CHAMPUS-authorized individual professional provider shall be within the scope of the individual's license as regulated by the applicable state practice act of the state where the individual rendered the service to the CHAMPUS beneficiary or shall be within the scope of the test which was the basis for the individual's qualifying certification.

(iv) *Employee status exclusion*. An individual employed directly, or indirectly by contract, by an individual or entity to render professional services otherwise allowable by this part is excluded from provider status as established by this paragraph (c) for the duration of each employment.

(v) *Training status exclusion*. Individual health care professionals who are allowed to render health care services only under direct and ongoing supervision as training to be credited towards earning a clinical academic degree or other clinical credential required for the individual to practice independently are excluded from provider status as established by this paragraph (c) for the duration of such training.

(2) *Conditions of authorization*—(i) *Professional license requirement*. The individual must be currently licensed to render professional health care services in each state in which the individual renders services to CHAMPUS beneficiaries. Such license is required when a specific state provides, but does not require, license for a specific category of individual professional provider. The license must be at full clinical practice level to meet this requirement. A temporary license at the full clinical practice level is acceptable. During the period of national emergency for the global coronavirus 2019 (COVID–19) pandemic, a license is not required in the United States for each state in which the provider practices, so long as the provider holds an equivalent license in another state, the state in which the provider is practicing permits such practice under its interstate

licensing requirements or the state licensing requirements have been preempted by Federal law, and the provider is not affirmatively barred or restricted from practicing in any state. During the COVID–19 pandemic, providers overseas are not required to be licensed in each nation in which the provider operates, so long as the provider holds an equivalent license in another nation, the host nation permits such practice under its licensing requirements, and the provider is not on the Department of Health and Human Services sanction list.

(ii) *Professional certification requirement.* When a state does not license a specific category of individual professional, certification by a Qualified Accreditation Organization, as defined in §199.2, is required. Certification must be at full clinical practice level. A temporary certification at the full clinical practice level is acceptable.

(iii) *Education, training and experience requirement.* The Director, OCHAMPUS, or designee, may establish for each category or type of provider allowed by this paragraph (c) specific education, training, and experience requirements as necessary to promote the delivery of services by fully qualified individuals.

(iv) *Physician referral and supervision.* When physician referral and supervision is a prerequisite for CHAMPUS cost-sharing of the services of a provider authorized under this paragraph (c), such referral and supervision means that the physicians must actually see the patient to evaluate and diagnose the condition to be treated prior to referring the beneficiary to another provider and that the referring physician provides ongoing oversight of the course of referral related treatment throughout the period during which the beneficiary is being treated in response to the referral. Written contemporaneous documentation of the referring physician's basis for referral and ongoing communication between the referring and treating provider regarding the oversight of the treatment rendered as a result of the referral must meet all requirements for medical records established by this part. Referring physician supervision does not require physical location on the premises of the treating provider or at the site of treatment.

(v) Subject to section 1079(a) of title 10, U.S.C., chapter 55, a physician or other health care practitioner who is eligible to receive reimbursement for services provided under Medicare (as defined in section 1086(d)(3)(C) of title 10 U.S.C., chapter 55) shall be considered approved to provide medical care authorized under section 1079 and section 1086 of title 10, U.S.C., chapter 55 unless the administering Secretaries have information indicating Medicare, TRICARE, or other Federal health care program integrity violations by the physician or other health care practitioner. Approval is limited to those classes of provider currently considered TRICARE authorized providers as outlined in 32 CFR 199.6. Services and supplies rendered by those providers who are not currently considered authorized providers shall be denied.

(3) *Types of providers.* Subject to the standards of participation provisions of this part, the following individual professional providers of medical care are authorized to provide services to CHAMPUS beneficiaries:

(i) *Physicians.* (A) Doctors of Medicine (M.D.).

(B) Doctors of Osteopathy (D.O.).

(ii) *Dentists.* Except for covered oral surgery as specified in §199.4(e) of this part, all otherwise covered services rendered by dentists require preauthorization.

(A) Doctors of Dental Medicine (D.M.D.).

(B) Doctors of Dental Surgery (D.D.S.).

(iii) *Other allied health professionals.* The services of the following individual professional providers of care are coverable on a fee-for-service basis provided such services are otherwise authorized in this or other sections of this part.

(A) *Clinical psychologist.* For purposes of CHAMPUS, a clinical psychologist is an individual who is licensed or certified by the state for the independent practice of psychology and:

(*1*) Possesses a doctoral degree in psychology from a regionally accredited university; and

(*2*) Has had 2 years of supervised clinical experience in psychological health

services of which at least 1 year is post-doctoral and 1 year (may be the post-doctoral year) is in an organized psychological health service training program; or

(*3*) As an alternative to paragraphs (c)(3)(iii)(A)(*1*) and (*2*) of this section is listed in the National Register of Health Service Providers in Psychology.

(B) *Doctors of Optometry*.

(C) *Doctors of Podiatric Medicine or Podiatrists*.

(D) *Certified nurse midwives*.

(*1*) A certified nurse midwife may provide covered care independent of physician referral and supervision, provided the nurse midwife is:

(*i*) Licensed, when required, by the local licensing agency for the jurisdiction in which the care is provided; and

(*ii*) Certified by the American College of Nurse Midwives. To receive certification, a candidate must be a registered nurse who has completed successfully an educational program approved by the American College of Nurse Midwives, and passed the American College of Nurse Midwives National Certification Examination.

(*2*) The services of a registered nurse who is not a certified nurse midwife may be authorized only when the patient has been referred for care by a licensed physician and a licensed physician provides continuing supervision of the course of care. A lay midwife who is neither a certified nurse midwife nor a registered nurse is not a CHAMPUS-authorized provider, regardless of whether the services rendered may otherwise be covered.

(E) *Certified nurse practitioner*. Within the scope of applicable licensure or certification requirements, a certified nurse practitioner may provide covered care independent of physician referral and supervision, provided the nurse practitioner is:

(*1*) A licensed, registered nurse; and

(*2*) Specifically licensed or certified as a nurse practitioner by the state in which the care was provided, if the state offers such specific licensure or certification; or

(*3*) Certified as a nurse practitioner (certified nurse) by a professional organization offering certification in the specialty of practice, if the state does not offer specific licensure or certification for nurse practitioners.

(F) *Certified Clinical Social Worker*. A clinical social worker may provide covered services independent of physician referral and supervision, provided the clinical social worker:

(*1*) Is licensed or certified as a clinical social worker by the jurisdiction where practicing; or, if the jurisdiction does not provide for licensure or certification of clinical social workers, is certified by a national professional organization offering certification of clinical social workers; and

(*2*) Has at least a master's degree in social work from a graduate school of social work accredited by the Council on Social Work Education; and

(*3*) Has had a minimum of 2 years or 3,000 hours of post-master's degree supervised clinical social work practice under the supervision of a master's level social worker in an appropriate clinical setting, as determined by the Director, OCHAMPUS, or a designee.

NOTE: Patients' organic medical problems must receive appropriate concurrent management by a physician.

(G) *Certified psychiatric nurse specialist*. A certified psychiatric nurse specialist may provide covered care independent of physician referral and supervision. For purposes of CHAMPUS, a certified psychiatric nurse specialist is an individual who:

(*1*) Is a licensed, registered nurse; and

(*2*) Has at least a master's degree in nursing from a regionally accredited institution with a specialization in psychiatric and mental health nursing; and

(*3*) Has had at least 2 years of post-master's degree practice in the field of psychiatric and mental health nursing, including an average of 8 hours of direct patient contact per week; or

(*4*) Is listed in a CHAMPUS-recognized, professionally sanctioned listing of clinical specialists in psychiatric and mental health nursing.

(H) *Certified physician assistant*. A physician assistant may provide care under general supervision of a physician (see § 199.14(j)(1)(ix) of this part for limitations on reimbursement). For purposes of CHAMPUS, a physician assistant must meet the applicable state

requirements governing the qualifications of physician assistants and at least one of the following conditions:

(*1*) Is currently certified by the National Commission on Certification of Physician Assistants to assist primary care physicians, or

(*2*) Has satisfactorily completed a program for preparing physician assistants that:

(*i*) Was at least 1 academic year in length;

(*ii*) Consisted of supervised clinical practice and at least 4 months (in the aggregate) of classroom instruction directed toward preparing students to deliver health care; and

(*iii*) Was accredited by the American Medical Association's Committee on Allied Health Education and Accreditation; or

(*3*) Has satisfactorily completed a formal educational program for preparing program physician assistants that does not meet the requirement of paragraph (c)(3)(iii)(H)(*2*) of this section and had been assisting primary care physicians for a minimum of 12 months during the 18-month period immediately preceding January 1, 1987.

(I) *Anesthesiologist Assistant*. An anesthesiologist assistant may provide covered anesthesia services, if the anesthesiologist assistant:

(*1*) Works under the direct supervision of an anesthesiologist who bills for the services and for each patient;

(*i*) The anesthesiologist performs a pre-anesthetic examination and evaluation;

(*ii*) The anesthesiologist prescribes the anesthesia plan;

(*iii*) The anesthesiologist personally participates in the most demanding aspects of the anesthesia plan including, if applicable, induction and emergence;

(*iv*) The anesthesiologist ensures that any procedures in the anesthesia plan that he or she does not perform are performed by a qualified anesthesiologist assistant;

(*v*) The anesthesiologist monitors the course of anesthesia administration at frequent intervals;

(*vi*) The anesthesiologist remains physically present and available for immediate personal diagnosis and treatment of emergencies;

(*vii*) The anesthesiologist provides indicated post-anesthesia care; and

(*viii*) The anesthesiologist performs no other services while he or she supervises no more than four anesthesiologist assistants concurrently or a lesser number if so limited by the state in which the procedure is performed.

(*2*) Is in compliance with all applicable requirements of state law, including any licensure requirements the state imposes on nonphysician anesthetists; and

(*3*) Is a graduate of a Master's level anesthesiologist assistant educational program that is established under the auspices of an accredited medical school and that:

(*i*) Is accredited by the Committee on Allied Health Education and Accreditation, or its successor organization; and

(*ii*) Includes approximately two years of specialized basic science and clinical education in anesthesia at a level that builds on a premedical undergraduate science background.

(*4*) The Director, TMA, or a designee, shall issue TRICARE policies, instructions, procedures, guidelines, standards, and criteria as may be necessary to implement the intent of this section.

(J) *Certified Registered Nurse Anesthetist (CRNA)*. A certified registered nurse anesthetist may provide covered care independent of physician referral and supervision as specified by state licensure. For purposes of CHAMPUS, a certified registered nurse anesthetist is an individual who:

(*1*) Is a licensed, registered nurse; and

(*2*) Is certified by the Council on Certification of Nurse Anesthetists, or its successor organization.

(K) *Other individual paramedical providers*. (*1*) The services of the following individual professional providers of care to be considered for benefits on a fee-for-service basis may be provided only if the beneficiary is referred by a physician for the treatment of a medically diagnosed condition and a physician must also provide continuing and ongoing oversight and supervision of the program or episode of treatment provided by these individual paramedical providers.

(*i*) Licensed registered nurses.

(*ii*) Audiologists.

(*2*) The services of the following individual paramedical providers of care to be considered for benefits on a fee-for-service basis may be provided only if: The beneficiary is referred by a physician, certified physician assistant, certified nurse practitioner, or podiatrist; and a physician, certified physician assistant, certified nurse practitioner, or podiatrist must also provide continuing and ongoing oversight and supervision of the program or episode of treatment provided by these individual paramedical providers.

(*i*) Licensed registered physical therapist (PT), including a licensed or certified physical therapist assistant (PTA) performing under the supervision of a TRICARE-authorized PT. PTAs shall meet the qualifications specified by Medicare (42 CFR 484.115, or successor regulation) and the Director, DHA, shall issue policy adopting, to the extent practicable, Medicare's requirements for PTA supervision.

(*ii*) Licensed registered occupational therapist (OT), including a licensed or certified occupational therapy assistant (OTA) performing under the supervision of a TRICARE authorized OT. OTAs shall meet the qualifications specified by Medicare (42 CFR 484.115, or successor regulation) and the Director, DHA, shall issue policy adopting, to the extent practicable, Medicare's requirements for OTA supervision.

(*3*) Licensed registered speech therapists (speech pathologists). In order to be considered for benefits on a fee-for-service basis, the services of a licensed registered speech therapist as an individual paramedical provider of care may be provided only if: (1) The beneficiary is referred by a physician, a certified physician assistant, or a certified nurse practitioner; and (2) a physician, a certified physician assistant, or a certified nurse practitioner must also provide continuing and ongoing oversight and supervision of the program or episode of treatment provided by these individual paramedical providers.

(L) *Nutritionist*. The nutritionist must be licensed by the State in which the care is provided and must be under the supervision of a physician who is overseeing the episode of treatment or the covered program of services.

(M) *Registered dietician*. The dietician must be licensed by the State in which the care is provided and must be under the supervision of a physician who is overseeing the episode of treatment or the covered program of services.

(N) *TRICARE certified mental health counselor*. For the purposes of CHAMPUS, a TRICARE certified mental health counselor (TCMHC) must be licensed for independent practice in mental health counseling by the jurisdiction where practicing. In jurisdictions with two or more licenses allowing for differing scopes of independent practice, the licensed mental health counselor may only practice within the scope of the license he or she possesses. In addition, a TCMHC must meet the requirements of either paragraph (c)(3)(iii)(N)(*1*) or the requirements of paragraph (c)(3)(iii)(N)(*2*) of this section.

(*1*) The requirements of this paragraph are that the TCMHC:

(*i*) Must have passed the National Clinical Mental Health Counselor Examination (NCMHCE) or its successor as determined by the Director, TMA; and

(*ii*) Must possess a master's or higher-level degree from a mental health counseling program of education and training accredited by the Council for Accreditation of Counseling and Related Educational Programs (CACREP); and

(*iii*) Must have a minimum of two (2) years of post-master's degree supervised mental health counseling practice which includes a minimum of 3,000 hours of supervised clinical practice and 100 hours of face-to-face supervision. Supervision must be provided by mental health counselors at the highest level of state licensure, psychiatrists, clinical psychologists, certified clinical social workers, or certified psychiatric nurse specialists who are licensed for independent practice in the jurisdiction where practicing and who are practicing within the scope of their licenses. Supervised clinical practice must be received in a manner that is consistent with the guidelines regarding knowledge, skills, and practice standards for supervision of the American Mental Health Counselors Association; and

(*iv*) Is licensed or certified for independent practice in mental health counseling by the jurisdiction where practicing (see paragraph (c)(2)(ii) of this section for more specific information).

(*2*) The requirements of this paragraph are that the TCMHC, prior to January 1, 2017:

(*i*) Possess a master's or higher-level degree from a mental health counseling program of education and training accredited by CACREP and must have passed the National Counselor Examination (NCE); or

(*ii*) Possess a master's or higher-level degree from a mental health counseling program of education and training from either a CACREP or regionally accredited institution and have passed the NCMHCE; and

(*iii*) Must have a minimum of two (2) years of post-master's degree supervised mental health counseling practice which includes a minimum of 3,000 hours of supervised clinical practice and 100 hours of face-to-face supervision. Supervision must be provided by mental health counselors at the highest level of state licensure, psychiatrists, clinical psychologists, certified clinical social workers, or certified psychiatric nurse specialists who are licensed for independent practice in the jurisdiction where practicing and who are practicing within the scope of their licenses. Supervised clinical practice must be received in a manner that is consistent with the guidelines regarding knowledge, skills, and practice standards for supervision of the American Mental Health Counselors Association; and

(*iv*) Is licensed or certified for independent practice in mental health counseling by the jurisdiction where practicing (see paragraph (c)(2)(ii) of this section for more specific information).

(*3*) The Director, TRICARE Management Activity may amend or modify existing or specify additional certification requirements as needed to accommodate future practice and licensing standards and to ensure that all TCMHCs continue to meet educational, licensing, and clinical training requirements considered appropriate.

(iv) *Extramedical individual providers.* Extramedical individual providers are those who do counseling or nonmedical therapy and whose training and therapeutic concepts are outside the medical field. The services of extramedical individual professionals are coverable following the CHAMPUS determined allowable charge methodology provided such services are otherwise authorized in this or other sections of the regulation.

(A) *Certified marriage and family therapists.* For the purposes of CHAMPUS, a certified marriage and family therapist is an individual who meets the following requirements:

(*1*) Recognized graduate professional education with the minimum of an earned master's degree from a regionally accredited educational institution in an appropriate behavioral science field, mental health discipline; and

(*2*) The following experience:

(*i*) Either 200 hours of approved supervision in the practice of marriage and family counseling, ordinarily to be completed in a 2- to 3-year period, of which at least 100 hours must be in individual supervision. This supervision will occur preferably with more than one supervisor and should include a continuous process of supervision with at least three cases; and

(*ii*) 1,000 hours of clinical experience in the practice of marriage and family counseling under approved supervision, involving at least 50 different cases; or

(*iii*) 150 hours of approved supervision in the practice of psychotherapy, ordinarily to be completed in a 2- to 3-year period, of which at least 50 hours must be individual supervision; plus at least 50 hours of approved individual supervision in the practice of marriage and family counseling, ordinarily to be completed within a period of not less than 1 nor more than 2 years; and

(*iv*) 750 hours of clinical experience in the practice of psychotherapy under approved supervision involving at least 30 cases; plus at least 250 hours of clinical practice in marriage and family counseling under approved supervision, involving at least 20 cases; and

(*3*) Is licensed or certified to practice as a marriage and family therapist by the jurisdiction where practicing (see paragraph (c)(3)(iv)(D) of this section

for more specific information regarding licensure); and

(*4*) Agrees that a patients' organic medical problems must receive appropriate concurrent management by a physician.

(*5*) Agrees to accept the CHAMPUS determined allowable charge as payment in full, except for applicable deductibles and cost-shares, and hold CHAMPUS beneficiaries harmless for noncovered care (i.e., may not bill a beneficiary for noncovered care, and may not balance bill a beneficiary for amounts above the allowable charge). The certified marriage and family therapist must enter into a participation agreement with the Office of CHAMPUS within which the certified marriage and family therapist agrees to all provisions specified above.

(*6*) As of the effective date of termination, the certified marriage and family therapist will no longer be recognized as an authorized provider under CHAMPUS. Subsequent to termination, the certified marriage and family therapist may only be reinstated as an authorized CHAMPUS extramedical provider by entering into a new participation agreement as a certified marriage and family therapist.

(B) *Pastoral counselors.* For the purposes of CHAMPUS, a pastoral counselor is an individual who meets the following requirements:

(*1*) Recognized graduate professional education with the minimum of an earned master's degree from a regionally accredited educational institution in an appropriate behavioral science field, mental health discipline; and

(*2*) The following experience:

(*i*) Either 200 hours of approved supervision in the practice of pastoral counseling, ordinarily to be completed in a 2- to 3-year period, of which at least 100 hours must be in individual supervision. This supervision will occur preferably with more than one supervisor and should include a continuous process of supervision with at least three cases; and

(*ii*) 1,000 hours of clinical experience in the practice of pastoral counseling under approved supervision, involving at least 50 different cases; or

(*iii*) 150 hours of approved supervision in the practice of psychotherapy, ordinarily to be completed in a 2- to 3-year period, of which at least 50 hours must be individual supervision; plus at least 50 hours of approved individual supervision in the practice of pastoral counseling, ordinarily to be completed within a period of not less than 1 nor more than 2 years; and

(*iv*) 750 hours of clinical experience in the practice of psychotherapy under approved supervision involving at least 30 cases; plus at least 250 hours of clinical practice in pastoral counseling under approved supervision, involving at least 20 cases; and

(*3*) Is licensed or certified to practice as a pastoral counselor by the jurisdiction where practicing (see paragraph (c)(3)(iv)(D) of this section for more specific information regarding licensure); and

(*4*) The services of a pastoral counselor meeting the above requirements are coverable following the CHAMPUS determined allowable charge methodology, under the following specified conditions:

(*i*) The CHAMPUS beneficiary must be referred for therapy by a physician; and

(*ii*) A physician is providing ongoing oversight and supervision of the therapy being provided; and

(*iii*) The pastoral counselor must certify on each claim for reimbursement that a written communication has been made or will be made to the referring physician of the results of the treatment. Such communication will be made at the end of the treatment, or more frequently, as required by the referring physician (refer to § 199.7).

(*5*) Because of the similarity of the requirements for licensure, certification, experience, and education, a pastoral counselor may elect to be authorized under CHAMPUS as a certified marriage and family therapist, and as such, be subject to all previously defined criteria for the certified marriage and family therapist category, to include acceptance of the CHAMPUS determined allowable charge as payment in full, except for applicable deductibles and cost-shares (i.e., balance billing of a beneficiary above the allowable charge is prohibited; may not bill beneficiary for noncovered care). The pastoral counselor must also agree

to enter into the same participation agreement as a certified marriage and family therapist with the Office of CHAMPUS within which the pastoral counselor agrees to all provisions including licensure, national association membership and conditions upon termination, outlined above for certified marriage and family therapist.

NOTE: No dual status will be recognized by the Office of CHAMPUS. Pastoral counselors must elect to become one of the categories of extramedical CHAMPUS provides specified above. Once authorized as either a pastoral counselor, or a certified marriage and family therapist, claims review and reimbursement will be in accordance with the criteria established for the elected provider category.

(C) *Supervised mental health counselor*. For the purposes of TRICARE, a supervised mental health counselor is an individual who does not meet the requirements of a TRICARE certified mental health counselor in paragraph (c)(3)(iii)(N) of this section, but meets all of the following requirements and conditions of practice:

(*1*) Minimum of a master's degree in mental health counseling or allied mental health field from a regionally accredited institution; and

(*2*) Two years of post-masters experience which includes 3,000 hours of clinical work and 100 hours of face-to-face supervision; and

(*3*) Is licensed or certified to practice as a mental health counselor by the jurisdiction where practicing (see paragraph (c)(3)(iv)(D) of this section for more specific information); and

(*4*) May only be reimbursed when:

(*i*) The TRICARE beneficiary is referred for therapy by a physician; and

(*ii*) A physician is providing ongoing oversight and supervision of the therapy being provided; and

(*iii*) The mental health counselor certifies on each claim for reimbursement that a written communication has been made or will be made to the referring physician of the results of the treatment. Such communication will be made at the end of the treatment, or more frequently, as required by the referring physician (refer to § 199.7).

(D) The following additional information applies to each of the above categories of extramedical individual providers:

(*1*) These providers must also be licensed or certified to practice as a certified marriage and family therapist, pastoral counselor or mental health counselor by the jurisdiction where practicing. In jurisdictions that do not provide for licensure or certification, the provider must be certified by or eligible for full clinical membership in the appropriate national professional association that sets standards for the specific profession.

(*2*) Grace period for therapists or counselors in states where licensure/certification is optional. CHAMPUS is providing a grace period for those therapists or counselors who did not obtain optional licensure/certification in their jurisdiction, not realizing it was a CHAMPUS requirement for authorization. The exemption by state law for pastoral counselors may have misled this group into thinking licensure was not required. The same situation may have occurred with the other therapist or counselor categories where licensure was either not mandated by the state or was provided under a more general category such as ''professional counselors.'' This grace period pertains only to the licensure/certification requirement, applies only to therapists or counselors who are already approved as of October 29, 1990, and only in those areas where the licensure/certification is optional. Any therapist or counselor who is not licensed/certified in the state in which he/she is practicing by August 1, 1991, will be terminated under the provisions of § 199.9. This grace period does not change any of the other existing requirements which remain in effect. During this grace period, membership or proof of eligibility for full clinical membership in a recognized professional association is required for those therapists or counselors who are not licensed or certified by the state. The following organizations are recognized for therapists or counselors at the level indicated: Full clinical member of the American Association of Marriage and Family Therapy; membership at the fellow or diplomate level of the American Association of Pastoral Counselors; and membership in the National Academy of Certified Clinical Mental Health Counselors. Acceptable proof of eligibility

for membership is a letter from the appropriate certifying organization. This opportunity for delayed certification/licensure is limited to the counselor or therapist category only as the language in all of the other provider categories has been consistent and unmodified from the time each of the other provider categories were added. The grace period does not apply in those states where licensure is mandatory.

(E) *Christian Science practitioners and Christian Science nurses.* CHAMPUS cost-shares the services of Christian Science practitioners and nurses. In order to bill as such, practitioners or nurses must be listed or be eligible for listing in the Christian Science Journal[1] at the time the service is provided.

(d) *Other providers.* Certain medical supplies and services of an ancillary or supplemental nature are coverable by CHAMPUS, subject to certain controls. This category of provider includes the following:

(1) *Independent laboratory.* Laboratory services of independent laboratories may be cost-shared if the laboratory is approved for participation under Medicare and certified by the Medicare Bureau, Health Care Financing Administration.

(2) *Suppliers of portable x-ray services.* Such suppliers must meet the conditions of coverage of the Medicare program, set forth in the Medicare regulations, or the Medicaid program in that state in which the covered service is provided.

(3) *Pharmacies.* Pharmacies must meet the applicable requirements of state law in the state in which the pharmacy is located. In addition to being subject to the policies and procedures for authorized providers established by this section, additional policies and procedures may be established for authorized pharmacies under § 199.21 of this part implementing the Pharmacy Benefits Program.

[1] Copies of this journal can be obtained through the Christian Science Publishing Company, 1 Norway Street, Boston, MA 02115–3122 or the Christian Science Publishing Society, P.O. Box 11369, Des Moines, IA 50340.

(4) *Ambulance companies.* Such companies must meet the requirements of state and local laws in the jurisdiction in which the ambulance firm is licensed.

(5) *Medical equipment firms, medical supply firms, and Durable Medical Equipment, Prosthetic, Orthotic, Supplies providers/suppliers.* Any firm, supplier, or provider that is an authorized provider under Medicare or is otherwise designated an authorized provider by the Director, TRICARE Management Activity.

(6) *Mammography suppliers.* Mammography services may be cost-shared only if the supplier is certified by Medicare for participation as a mammography supplier, or is certified by the American College of Radiology as having met its mammography supplier standards.

(e) *Extended Care Health Option Providers*—(1) *General.* (i) Services and items cost-shared through § 199.5 must be rendered by a CHAMPUS-authorized provider.

(ii) A Program for Persons with Disabilities (PFPWD) provider with TRICARE-authorized status on the effective date for the Extended Care Health Option (ECHO) Program shall be deemed to be a TRICARE-authorized provider until the expiration of all outstanding PFPWD benefit authorizations for services or items being rendered by the provider.

(2) *ECHO provider categories*—(i) *ECHO inpatient care provider.* A provider of residential institutional care, which is otherwise an ECHO benefit, shall be:

(A) A not-for-profit entity or a public facility; and

(B) Located within a state; and

(C) Be certified as eligible for Medicaid payment in accordance with a state plan for medical assistance under Title XIX of the Social Security Act (Medicaid) as a Medicaid Nursing Facility, or Intermediate Care Facility for the Mentally Retarded, or be a TRICARE-authorized institutional provider as defined in paragraph (b) of this section, or be approved by a state educational agency as a training institution.

(ii) *ECHO outpatient care provider.* A provider of ECHO outpatient, ambulatory, or in-home services shall be:

(A) A TRICARE-authorized provider of services as defined in this section; or

(B) An individual, corporation, foundation, or public entity that predominantly renders services of a type uniquely allowable as an ECHO benefit and not otherwise allowable as a benefit of § 199.4, that meets all applicable licensing or other regulatory requirements of the state, county, municipality, or other political jurisdiction in which the ECHO service is rendered, or in the absence of such licensing or regulatory requirements, as determined by the Director, TRICARE Management Activity or designee.

(iii) *ECHO vendor*. A provider of an allowable ECHO item, such as supplies or equipment, shall be deemed to be a TRICARE-authorized vendor for the provision of the specific item, supply or equipment when the vendor supplies such information as the Director, TRICARE Management Activity or designee determines necessary to adjudicate a specific claim.

(3) *ECHO provider exclusion or suspension*. A provider of ECHO services or items may be excluded or suspended for a pattern of discrimination on the basis of disability. Such exclusion or suspension shall be accomplished according to the provisions of § 199.9.

(f) *Corporate services providers*—(1) *General*. (i) This corporate services provider class is established to accommodate individuals who would meet the criteria for status as a CHAMPUS authorized individual professional provider as established by paragraph (c) of this section but for the fact that they are employed directly or contractually by a corporation or foundation that provides principally professional services which are within the scope of the CHAMPUS benefit.

(ii) Payment for otherwise allowable services may be made to a CHAMPUS-authorized corporate services provider subject to the applicable requirements, exclusions and limitations of this part.

(iii) The Director, OCHAMPUS, or designee, may create discrete types within any allowable category of provider established by this paragraph (f) to improve the efficiency of CHAMPUS management.

(iv) The Director, OCHAMPUS, or designee, may require, as a condition of authorization, that a specific category or type of provider established by this paragraph (f):

(A) Maintain certain accreditation in addition to or in lieu of the requirement of paragraph (f)(2)(v) of this section;

(B) Cooperate fully with a designated utilization and clinical quality management organization which has a contract with the Department of Defense for the geographic area in which the provider does business;

(C) Render services for which direct or indirect payment is expected to be made by CHAMPUS only after obtaining CHAMPUS written authorization; and

(D) Maintain Medicare approval for payment when the Director, OCHAMPUS, or designee, determines that a category, or type, of provider established by this paragraph (f) is substantially comparable to a provider or supplier for which Medicare has regulatory conditions of participation or conditions of coverage.

(v) Otherwise allowable services may be rendered at the authorized corporate services provider's place of business, or in the beneficiary's home under such circumstances as the Director, OCHAMPUS, or designee, determines to be necessary for the efficient delivery of such in-home services.

(vi) The Director, OCHAMPUS, or designee, may limit the term of a participation agreement for any category or type of provider established by this paragraph (f).

(vii) Corporate services providers shall be assigned to only one of the following allowable categories based upon the predominate type of procedure rendered by the organization;

(A) Medical treatment procedures;

(B) Surgical treatment procedures;

(C) Maternity management procedures;

(D) Rehabilitation and/or habilitation procedures; or

(E) Diagnostic technical procedures.

(viii) The Director, OCHAMPUS, or designee, shall determine the appropriate procedural category of a qualified organization and may change the category based upon the provider's CHAMPUS claim characteristics. The

category determination of the Director, OCHAMPUS, designee, is conclusive and may not be appealed.

(2) *Conditions of authorization.* An applicant must meet the following conditions to be eligible for authorization as a CHAMPUS corporate services provider:

(i) Be a corporation or a foundation, but not a professional corporation or professional association; and

(ii) Be institution-affiliated or freestanding as defined in § 199.2; and

(iii) Provide:

(A) Services and related supplies of a type rendered by CHAMPUS individual professional providers or diagnostic technical services and related supplies of a type which requires direct patient contact and a technologist who is licensed by the state in which the procedure is rendered or who is certified by a Qualified Accreditation Organization as defined in § 199.2; and

(B) A level of care which does not necessitate that the beneficiary be provided with on-site sleeping accommodations and food in conjunction with the delivery of services; and

(iv) Complies with all applicable organizational and individual licensing or certification requirements that are extant in the state, county, municipality, or other political jurisdiction in which the provider renders services; and

(v) Be approved for Medicare payment when determined to be substantially comparable under the provisions of paragraph (f)(1)(iv)(D) of this section or, when Medicare approved status is not required, be accredited by a qualified accreditation organization, as defined in § 199.2; and

(vi) Has entered into a participation agreement approved by the Director, OCHAMPUS, or designee, which at least complies with the minimum participation agreement requirements of this section.

(3) *Transfer of participation agreement.* In order to provide continuity of care for beneficiaries when there is a change of provider ownership, the provider agreement is automatically assigned to the new owner, subject to all the terms and conditions under which the original agreement was made.

(i) The merger of the provider corporation or foundation into another corporation or foundation, or the consolidation of two or more corporations or foundations resulting in the creation of a new corporation or foundation, constitutes a change of ownership.

(ii) Transfer of corporate stock or the merger of another corporation or foundation into the provider corporation or foundation does not constitute change of ownership.

(iii) The surviving corporation or foundation shall notify the Director, OCHAMPUS, or designee, in writing of the change of ownership promptly after the effective date of the transfer or change in ownership.

(4) *Pricing and payment methodology:* The pricing and payment of procedures rendered by a provider authorized under this paragraph (f) shall be limited to those methods for pricing and payment allowed by this part which the Director, OCHAMPUS, or designee, determines contribute to the efficient management of CHAMPUS.

(5) *Termination of participation agreement.* A provider may terminate a participation agreement upon 45 days written notice to the Director, OCHAMPUS, or designee, and to the public.

[51 FR 24008, July 1, 1986]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 199.6, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov.*

### § 199.7 Claims submission, review, and payment.

(a) *General.* The Director, OCHAMPUS, or a designee, is responsible for ensuring that benefits under CHAMPUS are paid only to the extent described in this part. Before benefits can be paid, an appropriate claim must be submitted that includes sufficient information as to beneficiary identification, the medical services and supplies provided, and double coverage information, to permit proper, accurate, and timely adjudication of the claim by the CHAMPUS contractor or OCHAMPUS. Providers must be able to document that the care or service shown on the claim was rendered. This

section sets forth minimum medical record requirements for verification of services. Subject to such definitions, conditions, limitations, exclusions, and requirements as may be set forth in this part, the following are the CHAMPUS claim filing requirements:

(1) *CHAMPUS identification card required.* A patient shall present his or her applicable CHAMPUS identification card (that is, Uniformed Services identification card) to the authorized provider of care that identifies the patient as an eligible CHAMPUS beneficiary (refer to § 199.3 of this part).

(2) *Claim required.* No benefit may be extended under the Basic Program or Extended Care Health Option (ECHO) without submission of an appropriate, complete and properly executed claim form.

(3) *Responsibility for perfecting claim.* It is the responsibility of the CHAMPUS beneficiary or sponsor or the authorized provider acting on behalf of the CHAMPUS beneficiary to perfect a claim for submission to the appropriate CHAMPUS fiscal intermediary. Neither a CHAMPUS fiscal intermediary nor OCHAMPUS is authorized to prepare a claim on behalf of a CHAMPUS beneficiary.

(4) *Obtaining appropriate claim form.* CHAMPUS provides specific CHAMPUS forms appropriate for making a claim for benefits for various types of medical services and supplies (such as hospital, physician, or prescription drugs). Claim forms may be obtained from the appropriate CHAMPUS fiscal intermediary who processes claims for the beneficiary's state of residence, from the Director, OCHAMPUS, or a designee, or from CHAMPUS health benefits advisors (HBAs) located at all Uniformed Services medical facilities.

(5) *Prepayment not required.* A CHAMPUS beneficiary or sponsor is not required to pay for the medical services or supplies before submitting a claim for benefits.

(6) *Deductible certificate.* If the calendar year outpatient deductible, as defined in § 199.4(f)(2) has been met by a beneficiary or a family through the submission of a claim or claims to a CHAMPUS fiscal intermediary in a geographic location different from the location where a current claim is being submitted, the beneficiary or sponsor must obtain a deductible certificate from the CHAMPUS fiscal intermediary where the applicable individual or family calendar year deductible was met. Such deductible certificate must be attached to the current claim being submitted for benefits. Failure to obtain a deductible certificate under such circumstances will result in a second individual or family calendar year deductible being applied. However, this second deductible may be reimbursed once appropriate documentation, as described in this paragraph is supplied to the CHAMPUS fiscal intermediary applying the second deductible (refer to § 199.4 (f)(2)(i)(F)).

(7) *Nonavailability Statement (DD Form 1251).* In some geographic locations or under certain circumstances, it is necessary for a CHAMPUS beneficiary to determine whether the required medical care can be provided through a Uniformed Services facility. If the required medical care cannot be provided by the Uniformed Services facility, a Nonavailability Statement will be issued. When required (except for emergencies), this Nonavailability Statement must be issued before medical care is obtained from civilian sources. Failure to secure such a statement will waive the beneficiary's rights to benefits under CHAMPUS, subject to appeal to the appropriate hospital commander (or higher medical authority).

(i) *Rules applicable to issuance of Nonavailability Statement.* Appropriate policy guidance may be issued as necessary to prescribe the conditions for issuance and use of a Nonavailability Statement.

(ii) *Beneficiary responsibility.* The beneficiary shall ascertain whether or not he or she resides in a geographic area that requires obtaining a Nonavailability Statement. Information concerning current rules may be obtained from the CHAMPUS fiscal intermediary concerned, a CHAMPUS HBA or the Director, OCHAMPUS, or a designee.

(iii) *Rules in effect at time civilian care is provided apply.* The applicable rules regarding Nonavailability Statements in effect at the time the civilian care is rendered apply in determining whether

a Nonavailability Statement is required.

(iv) *Nonavailability Statement must be filed with applicable claim.* When a claim is submitted for CHAMPUS benefits that includes services for which a Nonavailability Statement is required, such statement must be submitted along with the claim form.

(b) *Information required to adjudicate a CHAMPUS claim.* Claims received that are not completed fully and that do not provide the following minimum information may be returned. If enough space is not available on the appropriate claim form, the required information must be attached separately and include the patient's name and address, be dated, and signed.

(1) *Patient's identification information.* The following patient identification information must be completed on every CHAMPUS claim form submitted for benefits before a claim will be adjudicated and processed:

(i) *Patient's full name.*

(ii) *Patient's residence address.*

(iii) *Patient's date of birth.*

(iv) *Patient's relationship to sponsor.*

NOTE: If name of patient is different from sponsor, explain (for example, stepchild or illegitimate child).

(v) *Patient's identification number (from DD Form 1173).*

(vi) *Patient's identification card effective date and expiration date (from DD Form 1173).*

(vii) *Sponsor's full name.*

(viii) *Sponsor's service or social security number.*

(ix) *Sponsor's grade.*

(x) *Sponsor's organization and duty station.* Home port for ships; home address for retiree.

(xi) *Sponsor's branch of service or deceased or retiree's former branch of service.*

(xii) *Sponsor's current status.* Active duty, retired, or deceased.

(2) *Patient treatment information.* The following patient treatment information routinely is required relative to the medical services and supplies for which a claim for benefits is being made before a claim will be adjudicated and processed:

(i) *Diagnosis.* All applicable diagnoses are required; standard nomenclature is acceptable. In the absence of a diagnosis, a narrative description of the definitive set of symptoms for which the medical care was rendered must be provided.

(ii) *Source of care.* Full name of source of care (such as hospital or physician) providing the specific medical services being claimed.

(iii) *Full address of source of care.* This address must be where the care actually was provided, not a billing address.

(iv) *Attending physician.* Name of attending physician (or other authorized individual professional provider).

(v) *Referring physician.* Name and address of ordering, prescribing, or referring physician.

(vi) *Status of patient.* Status of patient at the time the medical services and supplies were rendered (that is, inpatient or outpatient).

(vii) *Dates of service.* Specific and inclusive dates of service.

(viii) *Inpatient stay.* Source and dates of related inpatient stay (if applicable).

(ix) *Physicians or other authorized individual professional providers.* The claims must give the name of the individual actually rendering the care, along with the individual's professional status (e.g., M.D., Ph.D., R.N., etc.) and provider number, if the individual signing the claim is not the provider who actually rendered the service. The following information must also be included:

(A) Date each service was rendered.

(B) Procedure code or narrative description of each procedure or service for each date of service.

(C) Individual charge for each item of service or each supply for each date.

(D) Detailed description of any unusual complicating circumstances related to the medical care provided that the physician or other individual professional provider may choose to submit separately.

(x) *Hospitals or other authorized institutional providers.* For care provided by hospitals (or other authorized institutional providers), the following information also must be provided before a claim will be adjudicated and processed:

(A) An itemized billing showing each item of service or supply provided for each day covered by the claim.

NOTE: The Director, OCHAMPUS, or a designee, may approve, in writing, an alternative billing procedure for RTCs or other special institutions, in which case the itemized billing requirement may be waived. The particular facility will be aware of such approved alternate billing procedure.

(B) Any absences from a hospital or other authorized institution during a period for which inpatient benefits are being claimed must be identified specifically as to date or dates and provide details on the purpose of the absence. Failure to provide such information will result in denial of benefits and, in an ongoing case, termination of benefits for the inpatient stay at least back to the date of the absence.

(C) For hospitals subject to the CHAMPUS DRG-based payment system (see paragraph (a)(1)(ii)(D) of §199.14), the following information is also required:

(*1*) The principal diagnosis (the diagnosis established, after study, to be chiefly responsible for causing the patient's admission to the hospital).

(*2*) All secondary diagnoses.

(*3*) All significant procedures performed.

(*4*) The discharge status of the beneficiary.

(*5*) The hospital's Medicare provider number.

(*6*) The source of the admission.

(D) Claims submitted by hospitals (or other authorized institutional providers) must include the name of the individual actually rendering the care, along with the individual's professional status (e.g., M.D., Ph.D., R.N., etc.).

(xi) *Prescription drugs and medicines (and insulin).* For prescription drugs and medicines (and insulin, whether or not a prescription is required) receipted bills must be attached and the following additional information provided:

(A) Name of drug.

NOTE: When the physician or pharmacist so requests, the name of the drugs may be submitted to the CHAMPUS fiscal intermediary directly by the physician or pharmacist.

(B) Strength of drug.

(C) Name and address of pharmacy where drug was purchased.

(D) Prescription number of drug being claimed.

(xii) *Other authorized providers.* For items from other authorized providers (such as medical supplies), an explanation as to the medical need must be attached to the appropriate claim form. For purchases of durable equipment under the ECHO it is necessary also to attach a copy of the authorization.

(xiii) *Nonparticipating providers.* When the beneficiary or sponsor submits the claim to the CHAMPUS fiscal intermediary (that is, the provider elects not to participate), an itemized bill from the provider to the beneficiary or sponsor must be attached to the CHAMPUS claim form.

(3) *Medical records/medical documentation.* Medical records are of vital importance in the care and treatment of the patient. Medical records serve as a basis for planning of patient care and for the ongoing evaluation of the patient's treatment and progress. Accurate and timely completion of orders, notes, etc., enable different members of a health care team and subsequent health care providers to have access to relevant data concerning the patient. Appropriate medical records must be maintained in order to accommodate utilization review and to substantiate that billed services were actually rendered.

(i) All care rendered and billed must be appropriately documented in writing. Failure to document the care billed will result in the claim or specific services on the claim being denied CHAMPUS cost-sharing.

(ii) A pattern of failure to adequately document medical care will result in episodes of care being denied CHAMPUS cost-sharing.

(iii) Cursory notes of a generalized nature that do not identify the specific treatment and the patient's response to the treatment are not acceptable.

(iv) The documentation of medical records must be legible and prepared as soon as possible after the care is rendered. Entries should be made when the treatment described is given or the observations to be documented are made. The following are documentation requirements and specific time frames for entry into the medical records:

(A) General requirements for acute medical/surgical services:

(*1*) Admission evaluation report within 24 hours of admission.

(*2*) Completed history and physical examination report within 72 hours of admission.

(*3*) Registered nursing notes at the end of each shift.

(*4*) Daily physician notes.

(B) Requirements specific to mental health services:

(*1*) Psychiatric admission evaluation report within 24 hours of admission.

(*2*) History and physical examination within 24 hours of admission; complete report documented within 72 hours for acute and residential programs and within 3 working days for partial programs.

(*3*) Individual and family therapy notes within 24 hours of procedure for acute, detoxification and Residential Treatment Center (RTC) programs and within 48 hours for partial programs.

(*4*) Preliminary treatment plan within 24 hours of admission.

(*5*) Master treatment plan within 5 calendar days of admission for acute care, 10 days for RTC care, 5 days for full-day partial programs and within 7 days for half-day partial programs.

(*6*) Family assessment report within 72 hours of admission for acute care and 7 days for RTC and partial programs.

(*7*) Nursing assessment report within 24 hours of admission.

(*8*) Nursing notes at the end of each shift for acute and detoxification programs; every ten visits for partial hospitalization; and at least once a week for RTCs.

(*9*) Daily physician notes for intensive treatment, detoxification, and rapid stabilization programs; twice per week for acute programs; and once per week for RTC and partial programs.

(*10*) Group therapy notes once per week.

(*11*) Ancillary service notes once per week.

NOTE: A pattern of failure to meet the above criteria may result in provider sanctions prescribed under § 199.9.

(4) *Double coverage information.* When the CHAMPUS beneficiary is eligible for medical benefits coverage through another plan, insurance, or program, either private or Government, the following information must be provided:

(i) *Name of other coverage.* Full name and address of double coverage plan, insurance, or program (such as Blue Cross, Medicare, commercial insurance, and state program).

(ii) *Source of double coverage.* Source of double coverage (such as employment, including retirement, private purchase, membership in a group, and law).

(iii) *Employer information.* If source of double coverage is employment, give name and address of employer.

(iv) *Identification number.* Identification number or group number of other coverage.

(5) *Right to additional information.* (i) As a condition precedent to the cost-sharing of benefits under this part or pursuant to a review or audit, whether the review or audit is prospective, concurrent, or retroactive, OCHAMPUS or CHAMPUS contractors may request, and shall be entitled to receive, information from a physician or hospital or other person, institution, or organization (including a local, state, or Federal Government agency) providing services or supplies to the beneficiary for whom claims or requests for approval for benefits are submitted. Such information and records may relate to the attendance, testing, monitoring, examination, diagnosis, treatment, or services and supplies furnished to a beneficiary and, as such, shall be necessary for the accurate and efficient administration of CHAMPUS benefits. This may include requests for copies of all medical records or documentation related to the episode of care. In addition, before a determination on a request for preauthorization or claim of benefits is made, a beneficiary, or sponsor, shall provide additional information relevant to the requested determination, when necessary. The recipient of such information shall hold such records confidential except when:

(A) Disclosure of such information is authorized specifically by the beneficiary;

(B) Disclosure is necessary to permit authorized governmental officials to investigate and prosecute criminal actions; or

(C) Disclosure is authorized or required specifically under the terms of DoD Directive 5400.7 and 5400.11, the

Freedom of Information Act, and the Privacy Act (refer to paragraph (m) of § 199.1 of this part).

(ii) For the purposes of determining the applicability of and implementing the provisions of §§ 199.8 and 199.9, or any provision of similar purpose of any other medical benefits coverage or entitlement, OCHAMPUS or CHAMPUS fiscal intermediaries, without consent or notice to any beneficiary or sponsor, may release to or obtain from any insurance company or other organization, governmental agency, provider, or person, any information with respect to any beneficiary when such release constitutes a routine use duly published in the FEDERAL REGISTER in accordance with the Privacy Act.

(iii) Before a beneficiary's claim of benefits is adjudicated, the beneficiary or the provider(s) must furnish to CHAMPUS that information which is necessary to make the benefit determination. Failure to provide the requested information will result in denial of the claim. A beneficiary, by submitting a CHAMPUS claim(s) (either a participating or nonparticipating claim), is deemed to have given consent to the release of any and all medical records or documentation pertaining to the claims and the episode of care.

(c) *Signature on CHAMPUS Claim Form*—(1) *Beneficiary signature.* CHAMPUS claim forms must be signed by the beneficiary except under the conditions identified in paragraph (c)(1)(v) of this section. The parent or guardian may sign for any beneficiary under 18 years.

(i) *Certification of identity.* This signature certifies that the patient identification information provided is correct.

(ii) *Certification of medical care provided.* This signature certifies that the specific medical care for which benefits are being claimed actually were rendered to the beneficiary on the dates indicated.

(iii) *Authorization to obtain or release information.* Before requesting additional information necessary to process a claim or releasing medical information, the signature of the beneficiary who is 18 years old or older must be recorded on or obtained on the CHAMPUS claim form or on a separate release form. The signature of the beneficiary, parent, or guardian will be requested when the beneficiary is under 18 years.

NOTE: If the care was rendered to a minor and a custodial parent or legal guardian requests information prior to the minor turning 18 years of age, medical records may still be released pursuant to the signature of the parent or guardian, and claims information may still be released to the parent or guardian in response to the request, even though the beneficiary has turned 18 between the time of the request and the response. However, any follow-up request or subsequent request from the parent or guardian, after the beneficiary turns 18 years of age, will necessitate the authorization of the beneficiary (or the beneficiary's legal guardian as appointed by a cognizant court), before records and information can be released to the parent or guardian.

(iv) *Certification of accuracy and authorization to release double coverage information.* This signature certifies to the accuracy of the double coverage information and authorizes the release of any information related to double coverage. (Refer to § 199.8 of this part).

(v) *Exceptions to beneficiary signature requirement.* (A) Except as required by paragraph (c)(1)(iii) of this section, the signature of a spouse, parent, or guardian will be accepted on a claim submitted for a beneficiary who is 18 years old or older.

(B) When the institutional provider obtains the signature of the beneficiary (or the signature of the parent or guardian when the beneficiary is under 18 years) on a CHAMPUS claim form at admission, the following participating claims may be submitted without the beneficiary's signature.

(*1*) Claims for laboratory and diagnostic tests and test interpretations from radiologists, pathologists, neurologists, and cardiologists.

(*2*) Claims from anesthesiologists.

(C) Claims filed by providers using CHAMPUS-approved signature-on-file and claims submission procedures.

(2) *Provider's signature.* A participating provider (see paragraph (a)(8) of § 199.6) is required to sign the CHAMPUS claim form.

(i) *Certification.* A participating provider's signature on a CHAMPUS claim form:

(A) Certifies that the specific medical care listed on the claim form was, in fact, rendered to the specific beneficiary for which benefits are being claimed, on the specific date or dates indicated, at the level indicated and by the provider signing the claim unless the claim otherwise indicates another individual provided the care. For example, if the claim is signed by a psychiatrist and the care billed was rendered by a psychologist or licensed social worker, the claim must indicate both the name and profession of the individual who rendered the care.

(B) Certifies that the provider has agreed to participate (providing this agreement has been indicated on the claim form) and that the CHAMPUS-determined allowable charge or cost will constitute the full charge or cost for the medical care listed on the specific claim form; and further agrees to accept the amount paid by CHAMPUS or the CHAMPUS payment combined with the cost-shared amount paid by, or on behalf of the beneficiary, as full payment for the covered medical services or supplies.

(*1*) Thus, neither CHAMPUS nor the sponsor is responsible for any additional charges, whether or not the CHAMPUS-determined charge or cost is less than the billed amount.

(*2*) Any provider who signs and submits a CHAMPUS claim form and then violates this agreement by billing the beneficiary or sponsor for any difference between the CHAMPUS-determined charge or cost and the amount billed is acting in bad faith and is subject to penalties including withdrawal of CHAMPUS approval as a CHAMPUS provider by administrative action of the Director, OCHAMPUS, or a designee, and possible legal action on the part of CHAMPUS, either directly or as a part of a beneficiary action, to recover monies improperly obtained from CHAMPUS beneficiaries or sponsors (refer to § 199.6 of this part.)

(ii) *Physician or other authorized individual professional provider*. A physician or other authorized individual professional provider is liable for any signature submitted on his or her behalf. Further, a facsimile signature is not acceptable unless such facsimile signature is on file with, and has been authorized specifically by, the CHAMPUS fiscal intermediary serving the state where the physician or other authorized individual professional provider practices.

(iii) *Hospital or other authorized institutional provider*. The provider signature on a claim form for institutional services must be that of an authorized representative of the hospital or other authorized institutional provider, whose signature is on file with and approved by the appropriate CHAMPUS fiscal intermediary.

(d) *Claims filing deadline*. For all services provided on or after January 1, 1993, to be considered for benefits, all claims submitted for benefits must, except as provided in paragraph (d)(2) of this section, be filed with the appropriate CHAMPUS contractor no later than one year after the services are provided. Unless the requirement is waived, failure to file a claim within this deadline waives all rights to benefits for such services or supplies.

(1) *Claims returned for additional information*. When a claim is submitted initially within the claim filing time limit, but is returned in whole or in part for additional information to be considered for benefits, the returned claim, along with the requested information, must be resubmitted and received by the appropriate CHAMPUS contractor no later than the later of:

(i) One year after the services are provided; or

(ii) 90 days from the date the claim was returned to the provider or beneficiary.

(2) *Exception to claims filing deadline*. The Director, OCHAMPUS, or a designee, may grant exceptions to the claims filing deadline requirements.

(i) *Types of exception*. (A) *Retroactive eligibility*. Retroactive CHAMPUS eligibility determinations.

(B) *Administrative error*. Administrative error (that is, misrepresentation, mistake, or other accountable action) of an officer or employee of OCHAMPUS (including OCHAMPUSEUR) or a CHAMPUS fiscal intermediary, performing functions under CHAMPUS and acting within the scope of that official's authority.

(C) *Mental incompetency*. Mental incompetency of the beneficiary or

guardian or sponsor, in the case of a minor child (which includes inability to communicate, even if it is the result of a physical disability).

(D) *Delays by other health insurance.* When not attributable to the beneficiary, delays in adjudication by other health insurance companies when double coverage coordination is required before the CHAMPUS benefit determination.

(E) *Other waiver authority.* The Director, OCHAMPUS may waive the claims filing deadline in other circumstances in which the Director determines that the waiver is necessary in order to ensure adequate access for CHAMPUS beneficiaries to health care services.

(ii) *Request for exception to claims filing deadline.* Beneficiaries who wish to request an exception to the claims filing deadline may submit such a request to the CHAMPUS fiscal intermediary having jurisdiction over the location in which the service was rendered, or as otherwise designated by the Director, OCHAMPUS.

(A) Such requests for an exception must include a complete explanation of the circumstances of the late filing, together with all available documentation supporting the request, and the specific claim denied for late filing.

(B) Each request for an exception to the claims filing deadline is reviewed individually and considered on its own merits.

(e) *Other claims filing requirements.* Notwithstanding the claims filing deadline described in paragraph (d) of this section, to lessen any potential adverse impact on a CHAMPUS beneficiary or sponsor that could result from a retroactive denial, the following additional claims filing procedures are recommended or required.

(1) *Continuing care.* Except for claims subject to the CHAMPUS DRG-based payment system, whenever medical services and supplies are being rendered on a continuing basis, an appropriate claim or claims should be submitted every 30 days (monthly) whether submitted directly by the beneficiary or sponsor or by the provider on behalf of the beneficiary. Such claims may be submitted more frequently if the beneficiary or provider so elects. The Director, OCHAMPUS, or a designee, also may require more frequent claims submission based on dollars. Examples of care that may be rendered on a continuing basis are outpatient physical therapy, private duty (special) nursing, or inpatient stays. For claims subject to the CHAMPUS DRG-based payment system, claims may be submitted only after the beneficiary has been discharged or transferred from the hospital.

(2) [Reserved]

(3) Claims involving the services of marriage and family counselors, pastoral counselors, and supervised mental health counselors. CHAMPUS requires that marriage and family counselors, pastoral counselors, and supervised mental health counselors make a written report to the referring physician concerning the CHAMPUS beneficiary's progress. Therefore, each claim for reimbursement for services of marriage and family counselors, pastoral counselors, and supervised mental health counselors must include certification to the effect that a written communication has been made or will be made to the referring physician at the end of treatment, or more frequently, as required by the referring physician.

(f) *Preauthorization.* When specifically required in other sections of this part, preauthorization requires the following:

(1) *Preauthorization must be granted before benefits can be extended.* In those situations requiring preauthorization, the request for such preauthorization shall be submitted and approved before benefits may be extended, except as provided in §199.4(a)(11). If a claim for services or supplies is submitted without the required preauthorization, no benefits shall be paid, unless the Director, OCHAMPUS, or a designee, has granted an exception to the requirement for preauthorization.

(i) *Specifically preauthorized services.* An approved preauthorization specifies the exact services or supplies for which authorization is being given. In a preauthorization situation, benefits cannot be extended for services or supplies provided beyond the specific authorization.

(ii) *Time limit on preauthorization.* Approved preauthorizations are valid for

specific periods of time, appropriate for the circumstances presented and specified at the time the preauthorization is approved. In general, preauthorizations are valid for 30 days. If the preauthorized service or supplies are not obtained or commenced within the specified time limit, a new preauthorization is required before benefits may be extended. For organ and stem cell transplants, the preauthorization shall remain in effect as long as the beneficiary continues to meet the specific transplant criteria set forth in the TRICARE/CHAMPUS Policy Manual, or until the approved transplant occurs.

(2) *Treatment plan.* Each preauthorization request shall be accompanied by a proposed medical treatment plan (for inpatient stays under the Basic Program) which shall include generally a diagnosis; a detailed summary of complete history and physical; a detailed statement of the problem; the proposed treatment modality, including anticipated length of time the proposed modality will be required; any available test results; consultant's reports; and the prognosis. When the preauthorization request involves transfer from a hospital to another inpatient facility, medical records related to the inpatient stay also must be provided.

(3) *Claims for services and supplies that have been preauthorized.* Whenever a claim is submitted for benefits under CHAMPUS involving preauthorized services and supplies, the date of the approved preauthorization must be indicated on the claim form and a copy of the written preauthorization must be attached to the appropriate CHAMPUS claim.

(4) *Advance payment prohibited.* No CHAMPUS payment shall be made for otherwise authorized services or items not yet rendered or delivered to the beneficiary.

(g) *Claims review.* It is the responsibility of the CHAMPUS fiscal intermediary (or OCHAMPUS, including OCHAMPUSEUR) to review each CHAMPUS claim submitted for benefit consideration to ensure compliance with all applicable definitions, conditions, limitations, or exclusions specified or enumerated in this part. It is also required that before any CHAMPUS benefits may be extended, claims for medical services and supplies will be subject to utilization review and quality assurance standards, norms, and criteria issued by the Director, OCHAMPUS, or a designee (see paragraph (a)(1)(v) of §199.14 for review standards for claims subject to the CHAMPUS DRG-based payment system).

(h) *Benefit payments.* CHAMPUS benefit payments are made either directly to the beneficiary or sponsor or to the provider, depending on the manner in which the CHAMPUS claim is submitted.

(1) *Benefit payments made to beneficiary or sponsor.* When the CHAMPUS beneficiary or sponsor signs and submits a specific claim form directly to the appropriate CHAMPUS fiscal intermediary (or OCHAMPUS, including OCHAMPUSEUR), any CHAMPUS benefit payments due as a result of that specific claim submission will be made in the name of, and mailed to, the beneficiary or sponsor. In such circumstances, the beneficiary or sponsor is responsible to the provider for any amounts billed.

(2) *Benefit payments made to participating provider.* When the authorized provider elects to participate by signing a CHAMPUS claim form, indicating participation in the appropriate space on the claim form, and submitting a specific claim on behalf of the beneficiary to the appropriate CHAMPUS fiscal intermediary, any CHAMPUS benefit payments due as a result of that claim submission will be made in the name of and mailed to the participating provider. Thus, by signing the claim form, the authorized provider agrees to abide by the CHAMPUS-determined allowable charge or cost, whether or not lower than the amount billed. Therefore, the beneficiary or sponsor is responsible only for any required deductible amount and any cost-sharing portion of the CHAMPUS-determined allowable charge or cost as may be required under the terms and conditions set forth in §§199.4 and 199.5 of this part.

(3) *CEOB.* When a CHAMPUS claim is adjudicated, a CEOB is sent to the beneficiary or sponsor. A copy of the CEOB

also is sent to the provider if the claim was submitted on a participating basis. The CEOB form provides, at a minimum, the following information:

(i) Name and address of beneficiary.

(ii) Name and address of provider.

(iii) Services or supplies covered by claim for which CEOB applies.

(iv) Dates services or supplies provided.

(v) Amount billed; CHAMPUS-determined allowable charge or cost; and amount of CHAMPUS payment.

(vi) To whom payment, if any, was made.

(vii) Reasons for any denial.

(viii) Recourse available to beneficiary for review of claim decision (refer to § 199.10 of this part).

NOTE: The Director, OCHAMPUS, or a designee, may authorize a CHAMPUS fiscal intermediary to waive a CEOB to protect the privacy of a CHAMPUS beneficiary.

(4) *Benefit under $1*. If the CHAMPUS benefit is determined to be under $1, payment is waived.

(i) *Extension of the Active Duty Dependents Dental Plan to areas outside the United States*. The Assistant Secretary of Defense (Health Affairs) (ASD(HA) may, under the authority of 10 U.S.C. 1076a(h), extend the Active Duty Dependents Dental Plan to areas other than those areas specified in paragraph (a)(2)(i) of this section for the eligible beneficiaries of members of the Uniformed Services. In extending the program outside the Continental United States, the ASD(HA), or designee, is authorized to establish program elements, methods of administration and payment rates and procedures to providers that are different from those in effect under this section in the Continental United States to the extent the ASD(HA), or designee, determines necessary for the effective and efficient operation of the plan outside the Continental United States. This includes provisions for preauthorization of care if the needed services are not available in a Uniformed Service overseas dental treatment facility and payment by the Department of certain cost-shares and other portions of a provider's billed charges. Other differences may occur based on limitations in the availability and capabilities of the Uniformed Services overseas dental treatment facility and a particular nation's civilian sector providers in certain areas. Otherwise, rules pertaining to services covered under the plan and quality of care standards for providers shall be comparable to those in effect under this section in the Continental United States and available military guidelines. In addition, all provisions of 10 U.S.C. 1076a shall remain in effect.

(j) *General assignment of benefits not recognized*. CHAMPUS does not recognize any general assignment of CHAMPUS benefits to another person. All CHAMPUS benefits are payable as described in this and other Sections of this part.

[51 FR 24008, July 1, 1986]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 199.7, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

## § 199.8 Double coverage.

(a) *Introduction*. (1) In enacting TRICARE legislation, Congress clearly has intended that TRICARE be the secondary payer to all health benefit, insurance and third-party payer plans. 10 U.S.C. 1079(j)(1) specifically provides that a benefit may not be paid under a plan (CHAMPUS) covered by this section in the case of a person enrolled in, or covered by, any other insurance, medical service, or health plan, including any plan offered by a third-party payer (as defined in 10 U.S.C. 1095(h)(1)) to the extent that the benefit is also a benefit under the other plan, except in the case of a plan administered under title XIX of the Social Security Act (42 U.S.C. 1396 *et seq.*).

(2) The provision in paragraph (a)(1) of this section is made applicable specifically to retired members, dependents, and survivors by 10 U.S.C. 1086(g). The underlying intent, in addition to preventing waste of Federal resources, is to ensure that TRICARE beneficiaries receive maximum benefits while ensuring that the combined payments of TRICARE and other health and insurance plans do not exceed the total charges.

(b) *Double coverage plan*. A double coverage plan is one of the following:

(1) *Insurance plan*. An insurance plan is any plan or program that is designed

to provide compensation or coverage for expenses incurred by a beneficiary for medical services and supplies. It includes plans or programs for which the beneficiary pays a premium to an issuing agent as well as those plans or programs to which the beneficiary is entitled as a result of employment or membership in, or association with, an organization or group.

(2) *Medical service or health plan.* A medical service or health plan is any plan or program of an organized health care group, corporation, or other entity for the provision of health care to an individual from plan providers, both professional and institutional. It includes plans or programs for which the beneficiary pays a premium to an issuing agent as well as those plans or programs to which the beneficiary is entitled as a result of employment or membership in, or association with, an organization or group.

(3) *Third-party payer.* A third-party payer means an entity that provides an insurance, medical service, or health plan by contract or agreement, including an automobile liability insurance or no-fault insurance carrier and a workers' compensation program or plan, and any other plan or program (e.g., homeowners insurance, etc.) that is designed to provide compensation or coverage for expenses incurred by a beneficiary for medical services or supplies. For purposes of the definition of ''third-party payer,'' an insurance, medical service or health plan includes a preferred provider organization, an insurance plan described as Medicare supplemental insurance, and a personal injury protection plan or medical payments benefit plan for personal injuries resulting from the operation of a motor vehicle.

(4) *Exceptions.* Double coverage plans do not include:

(i) Plans administered under title XIX of the Social Security Act (Medicaid);

(ii) Coverage specifically designed to supplement CHAMPUS benefits (a health insurance policy or other health benefit plan that meets the definition and criteria under supplemental insurance plan as set forth in §199.2(b));

(iii) Entitlement to receive care from Uniformed Services medical care facilities;

(iv) Certain Federal Government programs, as prescribed by the Director, OCHAMPUS, that are designed to provide benefits to a distinct beneficiary population and for which entitlement does not derive from either premium payment of monetary contribution (for example, the Indian Health Service); or

(v) State Victims of Crime Compensation Programs.

(c) *Application of double coverage provisions.* CHAMPUS claims submitted for otherwise covered services or supplies and which involve double coverage shall be adjudicated as follows:

(1) *TRICARE last pay.* For any claim that involves a double coverage plan as defined in paragraph (b) of this section, TRICARE shall be last pay *except* as may be authorized by the Director, TRICARE Management Activity, or a designee, pursuant to paragraph (c)(2) of this section. That is, TRICARE benefits may not be extended until all other double coverage plans have adjudicated the claim.

(2) *TRICARE advance payment.* The Director, TRICARE Management Activity, or a designee, may authorize payment of a claim in advance of adjudication of the claim by a double coverage plan and recover, under §199.12, the TRICARE costs of health care incurred on behalf of the covered beneficiary under the following conditions:

(i) The claim is submitted for health care services furnished to a covered beneficiary; and,

(ii) The claim is identified as involving services for which a third-party payer, other than a primary medical insurer, may be liable.

(3) *Primary medical insurer.* For purposes of paragraph (c)(2) of this section, a ''primary medical insurer'' is an insurance plan, medical service or health plan, or a third-party payer under this section, the primary or sole purpose of which is to provide or pay for health care services, supplies, or equipment. The term ''primary medical insurer'' does not include automobile liability insurance, no-fault insurance, workers' compensation program or plan, homeowners insurance, or any other similar third-party payer as may be designated

by the Director, TRICARE Management Activity, or a designee, in any policy guidance or instructions issued in implementation of this Part.

(4) *Waiver of benefits.* A CHAMPUS beneficiary may not elect to waive benefits under a double coverage plan and use CHAMPUS. Whenever double coverage exists, the provisions of this Section shall be applied.

(5) *Lack of payment by double coverage plan.* Amounts that have been denied by a double coverage plan simply because a claim was not filed timely or because the beneficiary failed to meet some other requirement of coverage cannot be paid. If a statement from the double coverage plan as to how much that plan would have paid had the claim met the plan's requirements is provided to the CHAMPUS contractor, the claim can be processed as if the double coverage plan actually paid the amount shown on the statement. If no such statement is received, no payment from CHAMPUS is authorized.

(d) *Special considerations*—(1) *CHAMPUS and Medicare*—(i) *General rule.* In any case in which a beneficiary is eligible for both Medicare and CHAMPUS received medical or dental care for which payment may be made under Medicare and CHAMPUS, Medicare is always the primary payer except in the case of retroactive determinations of disability as provided in paragraph (d)(1)(v) of this section. For dependents of active duty members, payment will be determined in accordance to paragraph (c) of this section. For all other beneficiaries eligible for Medicare, the amount payable under CHAMPUS shall be the amount of actual out-of-pocket costs incurred by the beneficiary for that care over the sum of the amount paid for that care under Medicare and the total of all amounts paid or payable by third party payers other than Medicare.

(ii) *Payment limit.* The total CHAMPUS amount payable for care under paragraph (d)(1)(i) of this section may not exceed the total amount that would be paid under CHAMPUS if payment for that care was made solely under CHAMPUS.

(iii) *Application of general rule.* In applying the general rule under paragraph (d)(1)(i) of this section, the first determination will be whether payment may be made under Medicare. For this purpose, Medicare exclusions, conditions, and limitations will be based for the determination.

(A) For items or services or portions or segments of items or services for which payment may be made under Medicare, the CHAMPUS payment will be the amount of the beneficiary's actual out of pocket liability, minus the amount payable by Medicare, also minus amount payable by other third party payers, subject to the limit under paragraph (d)(1)(ii) of this section.

(B) For items or services or segments of items or services for which no payment may be made under Medicare, the CHAMPUS payment will be the same as it would be for a CHAMPUS eligible retiree, dependent, or survivor beneficiary who is not Medicare eligible.

(C) For Medicare beneficiaries who enroll in Medicare Part D, the Part D plan is primary and TRICARE is secondary payer. TRICARE will pay the beneficiary's out-of-pocket costs for Medicare and TRICARE covered medications, including the initial deductible and Medicare Part D cost-sharing amounts up to the initial coverage limit of the Medicare Part D plan. The Medicare Part D plan, although the primary plan, pays nothing during any coverage gap period. When the beneficiary becomes responsible for 100 percent of the drug costs under a Part D coverage gap period, the beneficiary may use the TRICARE pharmacy benefit as the secondary payer. TRICARE will cost share during the coverage gap to the same extent as it does under Section 199.21 for beneficiaries not enrolled in Medicare Part D plan. The beneficiary is responsible for the applicable TRICARE pharmacy cost-sharing amounts (and deductible if using a retail non-network pharmacy). Part D plan sponsors may offer a defined standard benefit, or an actuarially equivalent standard benefit. Part D plan sponsors may also offer alternative prescription drug coverage, which may consist of basic alternative coverage or enhanced alternative coverage. Therefore depending on the Part D plan that a beneficiary chooses, monthly premiums, coinsurances, co-

pays, deductibles and benefit design may vary from plan to plan. TRICARE payment of the beneficiary's initial deductible, if any, along with payment of any beneficiary cost share count towards total spending on drugs, and may have the effect of moving the beneficiary more quickly through the initial phase of coverage to the coverage gap. Irrespective of the phase of the benefit in which a beneficiary may be, if a beneficiary is accessing a pharmacy under contract with his or her Part D plan, the provider will bill the Part D plan first, then TRICARE. If the beneficiary chooses to use his or her TRICARE pharmacy benefit during a coverage gap under Part D, the beneficiary may do so, but the beneficiary is responsible for the TRICARE cost-shares.

(iv) *Examples of applications of general rule*. The following examples are illustrative. They are not all-inclusive.

(A) In the case of a Medicare-eligible beneficiary receiving typical physician office visit services, Medicare payment generally will be made. CHAMPUS payment will be determined consistent with paragraph (d)(1)(iii)(A) of this section.

(B) In the case of a Medicare-eligible beneficiary residing and receiving medical care overseas, Medicare payment generally may not be made. CHAMPUS payment will be determined consistent with paragraph (d)(1)(iii)(B) of this section.

(C) In the case of a Medicare-eligible beneficiary receiving skilled nursing facility services a portion of which is payable by Medicare (such as during the first 100 days) and a portion of which is not payable by Medicare (such as after 100 days), CHAMPUS payment for the first portion will be determined consistent with paragraph (d)(1)(iii)(A) of this section and for the second portion consistent with paragraph (d)(1)(iii)(B) of this section.

(v) *Application of catastrophic cap*. Only in cases in which CHAMPUS payment is determined consistent with paragraph (d)(1)(iii)(B) of this section, actual beneficiary out of pocket liability remaining after CHAMPUS payments will be counted for purposes of the annual catastrophic loss protection, set forth under §199.4(f)(10). When a family has met the cap, CHAMPUS will pay allowable amounts for remaining covered services through the end of that calendar year.

(vi) *Retroactive determinations of disability*. In circumstances involving determinations of retroactive Medicare Part A entitlement for persons under 65 years of age, Medicare becomes the primary payer effective as of the date of issuance of the retroactive determination by the Social Security Administration. For care and services rendered prior to issuance of the retroactive determination, the CHAMPUS payment will be determined consistent with paragraph (d)(1)(iii)(B) of this section notwithstanding the beneficiary's retroactive entitlement for Medicare Part A during that period.

(vii) *Effect on enrollment in Medicare Advantage Prescription Drug (MA–PD) plan*. In the case of a beneficiary enrolled in a MA–PD plan who receives items or services for which payment may be made under both the MA–PD plan and CHAMPUS/TRICARE, a claim for the beneficiary's normal out-of-pocket costs under the MA–PD plan may be submitted for CHAMPUS/TRICARE payment. However, consistent with paragraph (c)(4) of this section, out-of-pocket costs do not include costs associated with unauthorized out-of-system care or care otherwise obtained under circumstances that result in a denial or limitation of coverage for care that would have been covered or fully covered had the beneficiary met applicable requirements and procedures. In such cases, the CHAMPUS/TRICARE amount payable is limited to the amount that would have been paid if the beneficiary had received care covered by the Medicare Advantage plan. If the TRICARE-Medicare beneficiary enrolls in a MA–PD drug plan, it generally will be governed by Medicare Part C, although plans that offer a prescription drug benefit must comply with Medicare Part D rules. The beneficiary has to pay the plan's monthly premiums and obtain all medical care and prescription drugs through the Medicare Advantage plan before seeking CHAMPUS/TRICARE payment. CHAMPUS/TRICARE payment for such beneficiaries may not exceed that which would be payable for a

beneficiary under paragraph (d)(1)(iii)(C) of this section.

(viii) *Effect of other double coverage plans, including medigap plans.* CHAMPUS is second payer to other third-party payers of health insurance, including Medicare supplemental plans.

(ix) *Effect of employer-provided insurance.* In the case of individuals with health insurance due to their current employment status, the employer insurance plan shall be first payer, Medicare shall be the second payer, and CHAMPUS shall be the tertiary payer.

(2) *CHAMPUS and Medicaid.* Medicaid is not a double coverage plan. In any double coverage situation involving Medicaid, CHAMPUS is always the primary payer.

(3) *TRICARE and Workers' Compensation.* TRICARE benefits are not payable for a work-related illness or injury that is covered under a workers' compensation program. Pursuant to paragraph (c)(2) of this section, however, the Director, TRICARE Management Activity, or a designee, may authorize payment of a claim involving a work-related illness or injury covered under a workers' compensation program in advance of adjudication and payment of the workers' compensation claim and then recover, under §199.12, the TRICARE costs of health care incurred on behalf of the covered beneficiary.

(4) *Extended Care Health Option (ECHO).* For those services or supplies that require use of public facilities, an ECHO eligible beneficiary (or sponsor or guardian acting on behalf of the beneficiary) does not have the option of waiving the full use of public facilities which are determined by the Director, TRICARE Management Activity or designee to be available and adequate to meet a disability related need for which an ECHO benefit was requested. Benefits eligible for payment under a state plan for medical assistance under Title XIX of the Social Security Act (Medicaid) are never considered to be available in the adjudication of ECHO benefits.

(5) *Primary payer.* The requirements of paragraph (d)(4) of this section notwithstanding, TRICARE is primary payer for services and items that are provided in accordance with the Individualized Family Service Plan as required by Part C of the Individuals with Disabilities Education Act and that are medically or psychologically necessary and otherwise allowable under the TRICARE Basic Program or the Extended Care Health Option.

(6) *Prohibition against financial and other incentives not to enroll in a group health plan*—(i) *General rule.* Under 10 U.S.C. 1097c, an employer or other entity is prohibited from offering TRICARE beneficiaries financial or other benefits as incentives not to enroll in, or to terminate enrollment in, a group health plan that is or would be primary to TRICARE. This prohibition applies in the same manner as section 1862(b)(3)(C) of the Social Security Act applies to incentives for a Medicare-eligible employee not to enroll in a group health plan that is or would be primary to Medicare.

(ii) *Application of general rule.* The prohibition in paragraph (d)(6)(i) of this section precludes offering to TRICARE beneficiaries an alternative to the employer primary plan unless:

(A) The beneficiary has primary coverage other than TRICARE; or

(B) The benefit is offered under a cafeteria plan under section 125 of the Internal Revenue Code and is offered to all similarly situated employees, including non-TRICARE eligible employees; or

(C) The benefit is offered under a cafeteria plan under section 125 of the Internal Revenue Code and, although offered only to TRICARE-eligible employees, the employer does not provide any payment for the benefit nor receive any direct or indirect consideration or compensation for offering the benefit; the employer's only involvement is providing the administrative support for the benefits under the cafeteria plan, and the employee's participation in the plan is completely voluntary.

(iii) *Documentation.* In the case of a benefit excluded by paragraph (d)(6)(ii)(C) of this section from the prohibition in paragraph (d)(6)(i) of this section, the exclusion is dependent on the employer maintaining in the employer's files a certification signed by the employer that the conditions described in paragraph (d)(6)(ii)(C) of

this section are met, and, upon request of the Department of Defense, providing a copy of that certification to the Department of Defense.

(iv) *Remedies and penalties.* (A) Remedies for violation of this paragraph (d)(6) include but are not limited to remedies under the Federal Claims Collection Act, 31 U.S.C. 3701 *et seq.*

(B) Penalties for violation of this paragraph (d)(6) include a civil monetary penalty of up to $5,000 for each violation. The provisions of section 1128A of the Social Security Act, 42 U.S.C. 1320a–7a, (other than subsections (a) and (b)) apply to the civil monetary penalty in the same manner as the provisions apply to a penalty or proceeding under section 1128A.

(v) *Definitions.* For the purposes of this paragraph (d)(6):

(A) The term ''employer'' includes any State or unit of local government and any employer that employs at least 20 employees.

(B) The term ''group health plan'' means a group health plan as that term is defined in section 5000(b)(1) of the Internal Revenue Code of 1986 without regard to section 5000(d) of the Internal Revenue Code of 1986.

(C) The term ''similarly situated'' means sharing common attributes, such as part-time employees, or other bona fide employment-based classifications consistent with the employer's usual business practice. (Internal Revenue Service regulations at 26 CFR 54.9802–1(d) may be used as a reference for this purpose). However, in no event shall eligibility for or entitlement to TRICARE (or ineligibility or non-entitlement to TRICARE) be considered a bona fide employment-based classification.

(D) The term ''TRICARE-eligible employee'' means a covered beneficiary under section 1086 of title 10, United States Code, Chapter 55, entitled to health care benefits under the TRICARE program.

(vi) *Procedures.* The Departments of Defense and Health and Human Services are authorized to enter into agreements to further carry out this section.

(e) *Implementing instructions.* The Director, OCHAMPUS, or a designee, shall issue such instructions, procedures, or guidelines, as necessary, to implement the intent of this section.

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## § 199.9 Administrative remedies for fraud, abuse, and conflict of interest.

(a) *General.* (1) This section sets forth provisions for invoking administrative remedies under CHAMPUS in situations involving fraud, abuse, or conflict of interest. The remedies impact institutional providers, professional providers, and beneficiaries (including parents, guardians, or other representatives of beneficiaries), and cover situations involving criminal fraud, civil fraud, administrative determinations of conflicts of interest or dual compensation, and administrative determinations of fraud or abuse. The administrative actions, remedies, and procedures may differ based upon whether the initial findings were made by a court of law, another agency, or the Director, OCHAMPUS (or designee).

(2) This section also sets forth provisions for invoking administrative remedies in situations requiring administrative action to enforce provisions of law, regulation, and policy in the administration of CHAMPUS and to ensure quality of care for CHAMPUS beneficiaries. Examples of such situations may include a case in which it is discovered that a provider fails to meet requirements under this part to be an authorized CHAMPUS provider; a case in which the provider ceases to be qualified as a CHAMPUS provider because of suspension or revocation of the provider's license by a local licensing authority; or a case in which a provider meets the minimum requirements under this part but, nonetheless, it is determined that it is in the best interest of the CHAMPUS or CHAMPUS beneficiaries that the provider should not be an authorized CHAMPUS provider.

(3) The administrative remedies set forth in this section are in addition to, and not in lieu of, any other remedies or sanctions authorized by law or regulation. For example, administrative action under this section may be taken in a particular case even if the same case will be or has been processed under the administrative procedures established by the Department of Defense to implement the Program Fraud Civil Remedies Act.

(4) Providers seeking payment from the Federal Government through programs such as CHAMPUS have a duty to familiarize themselves with, and comply with, the program requirements.

(5) CHAMPUS contractors and peer review organizations have a responsibility to apply provisions of this regulation in the discharge of their duties, and to report all known situations involving fraud, abuse, or conflict of interest. Failure to report known situations involving fraud, abuse, or conflict of interest will result in the withholding of administrative payments or other contractual remedies as determined by the Director, OCHAMPUS, or a designee.

(b) *Abuse*. The term ''abuse'' generally describes incidents and practices which may directly or indirectly cause financial loss to the Government under CHAMPUS or to CHAMPUS beneficiaries. For the definition of abuse, see §199.2 of this part. The type of abuse to which CHAMPUS is most vulnerable is the CHAMPUS claim involving the overutilization of medical and health care services. To avoid abuse situations, providers have certain obligations to provide services and supplies under CHAMPUS which are: Furnished at the appropriate level and only when and to the extent medically necessary as determined under the provisions of this part; of a quality that meets professionally recognized standards of health care; and, supported by adequate medical documentation as may reasonably be required under this part by the Director, OCHAMPUS, or a designee, to evidence the medical necessity and quality of services furnished, as well as the appropriateness of the level of care. A provider's failure to comply with these obligations can result in sanctions being imposed by the Director, OCHAMPUS, or a designee, under this section. Even when administrative remedies are not initiated under this section, abuse situations under CHAMPUS are a sufficient basis for denying all or any part of CHAMPUS cost-sharing of individual claims. The types of abuse or possible abuse situations under CHAMPUS include, but are not limited, to the following:

(1) A pattern of waiver of beneficiary (patient) cost-share or deductible.

NOTE: In a case of a legitimate bad debt write-off of patient cost-share or deductible, the provider's record should include documentation as to what efforts were made to collect the debt, when the debt was written off, why the debt was written off, and the amount of the debt written off.

(2) Improper billing practices. Examples include, charging CHAMPUS beneficiaries rates for services and supplies that are in excess of those charges routinely charged by the provider to the general public, commercial health insurance carriers, or other federal health benefit entitlement programs for the same or similar services. (This includes dual fee schedules—one for CHAMPUS beneficiaries and one for other patients or third-party payers. This also includes billing other third-party payers the same as CHAMPUS is billed but accepting less than the billed amount as reimbursement. However, a formal discount arrangement such as through a preferred provider organization, may not necessarily constitute an improper billing practice.)

(3) A pattern of claims for services which are not medically necessary or, if medically necessary, not to the extent rendered. For example, a battery of diagnostic tests are given when, based on the diagnosis, fewer tests were needed.

(4) Care of inferior quality. For example, consistently furnishing medical or mental health services that do not meet accepted standards of care.

(5) Failure to maintain adequate medical or financial records.

(6) Refusal to furnish or allow the Government (for example, OCHAMPUS) or Government contractors access to records related to CHAMPUS claims.

(7) Billing substantially in excess of customary or reasonable charges unless it is determined by OCHAMPUS that the excess charges are justified by unusual circumstances or medical complications requiring additional time, effort, or expense in localities when it is accepted medical practice to make an extra charge in such cases.

(8) Unauthorized use of the term ''Civilian Health and Medical Program of the Uniformed Services (CHAMPUS)'' in private business. While the use of the term ''CHAMPUS'' is not prohibited by federal statute, misrepresentation or deception by use of the term ''CHAMPUS'' to imply an official connection with the Government or to defraud CHAMPUS beneficiaries may be a violation of federal statute. Regardless of whether the actual use of the term ''CHAMPUS'' may be actionable under federal statute, the unauthorized or deceptive use of the term ''CHAMPUS'' in private business will be considered abuse for purposes of this Section.

(c) *Fraud.* For the definition of fraud, see §199.2 of this part. Examples of situations which, for the purpose of this part, are presumed to be fraud include, but are not limited to:

(1) Submitting CHAMPUS claims (including billings by providers when the claim is submitted by the beneficiary) for services, supplies, or equipment not furnished to, or used by, CHAMPUS beneficiaries. For example, billing or claiming services when the provider was on call (other than an authorized standby charge) and did not provide any specific medical care to the beneficiary; providing services to an ineligible person and billing or submitting a claim for the services in the name of an eligible CHAMPUS beneficiary; billing or submitting a CHAMPUS claim for an office visit for a missed appointment; or billing or submitting a CHAMPUS claim for individual psychotherapy when a medical visit was the only service provided.

(2) Billing or submitting a CHAMPUS claim for costs for noncovered or nonchargeable services, supplies, or equipment disguised as covered items. Some examples are: (i) Billings or CHAMPUS claims for services which would be covered except for the frequency or duration of the services, such as billing or submitting a claim for two one-hour psychotherapy sessions furnished on separate days when the actual service furnished was a two-hour therapy session on a single day, (ii) spreading the billing or claims for services over a time period that reduces the apparent frequency to a level that may be cost-shared by CHAMPUS, (iii) charging to CHAMPUS, directly or indirectly, costs not incurred or not reasonably allowable to the services billed or claimed under CHAMPUS, for example, costs attributable to nonprogram activities, other enterprises, or the personal expenses of principals, or (iv) billing or submitting claim on a fee-for-service basis when in fact a personal service to a specific patient was not performed and the service rendered is part of the overall management of, for example, the laboratory or x-ray department.

(3) Breach of a provider participation agreement which results in the beneficiary (including parent, guardian, or other representative) being billed for amounts which exceed the CHAMPUS-determined allowable charge or cost.

(4) Billings or CHAMPUS claims for supplies or equipment which are clearly unsuitable for the patient's needs or are so lacking in quality or sufficiency for the purpose as to be virtually worthless.

(5) Billings or CHAMPUS claims which involve flagrant and persistent overutilization of services without proper regard for results, the patient's ailments, condition, medical needs, or the physician's orders.

(6) Misrepresentations of dates, frequency, duration, or description of services rendered, or of the identity of the recipient of the services or the individual who rendered the services.

(7) Submitting falsified or altered CHAMPUS claims or medical or mental health patient records which misrepresent the type, frequency, or duration of services or supplies or misrepresent the name(s) of the individual(s) who provided the services or supplies.

(8) Duplicate billings or CHAMPUS claims. This includes billing or submitting CHAMPUS claims more than once for the same services, billing or submitting claims both to CHAMPUS and the beneficiary for the same services,

or billing or submitting claims both to CHAMPUS and other third-parties (such as other health insurance or government agencies) for the same services, without making full disclosure of material facts or immediate, voluntary repayment or notification to CHAMPUS upon receipt of payments which combined exceed the CHAMPUS-determined allowable charge of the services involved.

(9) Misrepresentation by a provider of his or her credentials or concealing information or business practices which bear on the provider's qualifications for authorized CHAMPUS provider status. For example, a provider representing that he or she has a qualifying doctorate in clinical psychology when the degree is not from a regionally accredited university.

(10) Reciprocal billing. Billing or claiming services which were furnished by another provider or furnished by the billing provider in a capacity other than as billed or claimed. For example, practices such as the following: (i) One provider performing services for another provider and the latter bills as though he had actually performed the services (e.g., a weekend fill-in); (ii) providing service as an institutional employee and billing as a professional provider for the services; (iii) billing for professional services when the services were provided by another individual who was an institutional employee; (iv) billing for professional services at a higher provider profile than would be paid for the person actually furnishing the services, (for example, bills reflecting that an M.D. or Ph.D. performed the services when services were actually furnished by a licensed social worker, psychiatric nurse, or marriage and family counselor); or (v) an authorized provider billing for services which were actually furnished by an unauthorized or sanctioned provider.

(11) Submitting CHAMPUS claims at a rate higher than a rate established between CHAMPUS and the provider, if such a rate has been established. For example, billing or claiming a rate in excess of the provider's most favored rate limitation specified in a residential treatment center agreement.

(12) Arrangements by providers with employees, independent contractors, suppliers, or others which appear to be designed primarily to overcharge the CHAMPUS through various means (such as commissions, fee-splitting, and kickbacks) used to divert or conceal improper or unnecessary costs or profits.

(13) Agreements or arrangements between the supplier and recipient (recipient could be either a provider or beneficiary, including the parent, guardian, or other representative of the beneficiary) that result in billings or claims which include unnecessary costs or charges to CHAMPUS.

(d) *Conflict of Interest*. (1) Conflict of interest includes any situation where an active duty member of the Uniformed Services (including a reserve member while on active duty, active duty for training, or inactive duty training) or civilian employee of the United States Government, through an official federal position has the apparent or actual opportunity to exert, directly or indirectly, any influence on the referral of CHAMPUS beneficiaries to himself/herself or others with some potential for personal gain or the appearance of impropriety. Although individuals under contract to the Uniformed Services are not considered ''employees,'' such individuals are subject to conflict of interest provisions by express terms of their contracts and, for purposes of this part, may be considered to be involved in conflict of interest situations as a result of their contract positions. In any situation involving potential conflict of interest of a Uniformed Service employee, the Director, OCHAMPUS, or a designee, may refer the case to the Uniformed Service concerned for appropriate review and action. If such a referral is made, a report of the results of findings and action taken shall be made to the Director, OCHAMPUS, by the Uniformed Service having jurisdiction within 90 days of receiving the referral.

(2) CHAMPUS cost-sharing shall be denied on any claim where a conflict of interest situation is found to exist. This denial of cost-sharing applies whether the claim is submitted by the individual who provided the care, the

institutional provider in which the care was furnished, or the beneficiary.

(e) *Dual Compensation.* (1) Federal law (5 U.S.C. 5536) prohibits active duty members of the Uniformed Services or employees (including part-time or intermittent) appointed in the civil service of the United States Government from receiving additional compensation from the Government above their normal pay and allowances. This prohibition applies to CHAMPUS payments for care furnished to CHAMPUS beneficiaries by active duty members of the Uniformed Services or civilian employees of the Government.

(2) CHAMPUS cost-sharing of a claim shall be denied where the services or supplies were provided by an active duty member of the Uniformed Services or a civilian employee of the Government. This denial of CHAMPUS payment applies whether the claim for reimbursement is filed by the individual who provided the care, the institutional provider in which the care was furnished, or by the beneficiary.

NOTE: Physicians of the National Health Service Corps (NHSC) may be assigned to areas where there is a shortage of medical providers. Although these physicians would be prohibited from accepting CHAMPUS payments as individuals if they are employees of the United States Government, the private organizations to which they may be assigned may be eligible for payment, as determined by the Director, OCHAMPUS, or a designee.

(3) The prohibition against dual compensation does not apply to individuals under contract to the Uniformed Services or the Government.

(f) *Administrative Remedies.* Administrative remedies available under CHAMPUS in this section are set forth below.

(1) *Provider exclusion or suspension.* The Director, OCHAMPUS, or a designee, shall have the authority to exclude or suspend an otherwise authorized CHAMPUS provider from the program based on any criminal conviction or civil judgment involving fraud by the provider; fraud or abuse under CHAMPUS by the provider; exclusion or suspension of the provider by another agency of the Federal Government, a state, or local licensing authority; participation in a conflict of interest situation by the provider; or, when it is in the best interests of the program or CHAMPUS beneficiaries to exclude or suspend a provider under CHAMPUS. In all cases, the exclusion or suspension of a provider shall be effective 15 calendar days from the date on the written initial determination issued under paragraph (h)(2) of this section.

(i) *Criminal conviction or civil judgment involving fraud by a provider*—(A) *Criminal conviction involving CHAMPUS fraud.* A provider convicted by a Federal, state, foreign, or other court of competent jurisdiction of a crime involving CHAMPUS fraud, whether the crime is a felony or misdemeanor, shall be excluded or suspended from CHAMPUS for a period of time as determined by the Director, OCHAMPUS, or a designee. The CHAMPUS exclusion or suspension applies whether or not the provider, as a result of the conviction, receives probation or the sentence is suspended or deferred, and whether or not the conviction or sentence is under appeal.

NOTE: Under the above paragraph (f)(1)(i)(A) of this section, an entity may be excluded or suspended from CHAMPUS whenever the entity is found to have a person, convicted of a crime involving CHAMPUS fraud, who has a direct or indirect ownership or control interest (see § 199.2) of 5 percent or more in the entity, or is an officer, director, agent or managing employee of the entity. The entity will have an opportunity to provide evidence to show that the ownership or control relationship has ceased. While an entity will not be excluded or suspended from CHAMPUS for employing a provider who has been sanctioned under this Section, the entity will be denied CHAMPUS payment for any services furnished by the sanctioned employee. As an authorized CHAMPUS provider, the entity is responsible for ensuring that all CHAMPUS claims involve services furnished to CHAMPUS beneficiaries by employees who meet all requirements under CHAMPUS for provider status.

(B) *Criminal conviction involving fraud of other Federal programs.* Any provider convicted by a Federal, state, or other court of competent jurisdiction of a crime involving another Federal health care or benefit program (such as plans administered under titles XVIII and XIX of the Social Security Act, Federal Workmen's Compensation, and the Federal Employees Program (FEP) for

employee health insurance), whether the crime is a felony or misdemeanor, shall be excluded from CHAMPUS for a period of time as determined by the Director, OCHAMPUS, or a designee. The CHAMPUS exclusion or suspension applies whether or not the provider, as a result of the conviction, receives probation or the sentence is suspended or deferred, and whether or not the conviction or sentence is under appeal.

(C) *Criminal conviction involving fraud of non-Federal programs.* Any provider convicted by a Federal, state, foreign, or other court of competent jurisdiction of a crime involving any non-Federal health benefit program or private insurance involving health benefits may be excluded or suspended from CHAMPUS for a period of time as determined by the Director, OCHAMPUS, or a designee.

(D) *Civil fraud involving CHAMPUS.* If a judgment involving civil fraud has been entered (whether or not it is appealed) against a provider in a civil action involving CHAMPUS benefits (whether or not other Federal programs are involved), the provider shall be excluded or suspended from CHAMPUS for a period determined by the Director, OCHAMPUS, or a designee.

(E) *Civil fraud involving other programs.* If a judgment involving civil fraud has been entered against a provider (whether or not it has been appealed) in a civil action involving other public or private health care programs or health insurance, the provider may be excluded or suspended for a period of time determined by the Director, OCHAMPUS, or a designee.

(ii) *Administrative determination of fraud or abuse under CHAMPUS.* If the Director of the Defense Health Agency determines a provider committed fraud or abuse as defined in this part, the provider shall be excluded or suspended from CHAMPUS/TRICARE for a period of time determined by the Director. A final determination of an imposition of a civil money penalty (CMP) under 32 CFR part 200 shall constitute an administrative determination of fraud and abuse.

(iii) *Administrative determination that the provider has been excluded or suspended by another agency of the Federal Government, a state, or local licensing authority.* Any provider who is excluded or suspended by any other Federal health care program (for example, Medicare), shall be excluded or suspended under CHAMPUS. A provider who has his/her credentials revoked through a Veterans Administration or Military Department credentials review process and who is excluded, suspended, terminated, retired, or separated, shall also be excluded or suspended under CHAMPUS. The period of time of exclusion or suspension shall be determined by the Director, OCHAMPUS, or a designee, pursuant to paragraph (g) of this section.

(iv) *Administrative determination that the provider has participated in a conflict of interest situation.* The Director, OCHAMPUS, or a designee, may exclude or suspend any provider who has knowingly been involved in a conflict of interest situation under CHAMPUS. The period of time of exclusion or suspension shall be determined by the Director, OCHAMPUS, or a designee, pursuant to paragraph (g) of this section. For purposes of this administrative determination, it will be presumed that a CHAMPUS provider knowingly participated in a conflict of interest situation if the provider employs, in the treatment of a CHAMPUS beneficiary (resulting in a CHAMPUS claim), any medical personnel who are active duty members of the Uniformed Services or civilian employees of the Government. The burden of proof to rebut this presumption rests with the CHAMPUS provider. Two exceptions will be recognized to the presumption that a conflict of interest exists. First, indirect CHAMPUS payments may be made to private organizations to which physicians of the National Health Service Corps (NHSC) are assigned. Second, any off-duty Government medical personnel employed in an emergency room of an acute care hospital will be presumed not to have had the opportunity to exert, directly or indirectly, any influence on the referral of CHAMPUS beneficiaries; therefore, CHAMPUS payments may be made to the employing hospital *provided* the medical care was not furnished directly by the off-duty Government medical personnel in

violation of dual compensation provisions.

(v) *Administrative determination that it is in the best interests of the CHAMPUS or CHAMPUS beneficiaries to exclude or suspend a provider*—(A) *Unethical or improper practices or unprofessional conduct.* (*1*) In most instances, unethical or improper practices or unprofessional conduct by a provider will be program abuse and subject the provider to exclusion or suspension for abuse. However, in some cases such practices and conduct may provide an independent basis for exclusion or suspension of the provider by the Director, OCHAMPUS, or a designee.

(*2*) Such exclusions or suspensions may be based on findings or recommendations of state licensure boards, boards of quality assurance, other regulatory agencies, state medical societies, peer review organizations, or other professional associations.

(B) *In any other case in which the Director, OCHAMPUS (or designee), determines that exclusion or suspension of a provider is in the best interests of CHAMPUS or CHAMPUS beneficiaries.* The Director, OCHAMPUS, or a designee, may exclude or suspend any provider if it is determined that the authorization of that particular provider under CHAMPUS poses an unreasonable potential for fraud, abuse, or professional misconduct. Any documented misconduct by the provider reflecting on the business or professional competence or integrity of the provider may be considered. Situations in which the Director, OCHAMPUS, or a designee, may take administrative action under this Section to protect CHAMPUS or CHAMPUS beneficiaries include, but are not limited to, a case in which it is determined that a provider poses an unreasonable potential cost to the Government to monitor the provider for fraud or abuse and to avoid the issuance of erroneous payments; or that the provider poses an unreasonable potential harm to the financial or health status of CHAMPUS beneficiaries; or that the provider poses any other unreasonable threat to the interests of CHAMPUS or CHAMPUS beneficiaries. One example of such circumstances involves a provider who, for his/her entire practice or for most of his/her practice, provides or bills for treatment that is not a CHAMPUS benefit, resulting in CHAMPUS frequently and repeatedly denying claims as noncovered services. This may occur when a professional provider furnishes sex therapy (a therapy which may be recognized by the provider's licensing authority but which is excluded from CHAMPUS coverage) and repeatedly submits CHAMPUS claims for the services.

(2) *Provider termination.* The Director, OCHAMPUS, or a designee, shall terminate the provider status of any provider determined not to meet the qualifications established by this part to be an authorized CHAMPUS provider.

(i) *Effective date of termination.* Except as provided in paragraph (g)(2)(ii) of this section, the termination shall be retroactive to the date on which the provider did not meet the requirements of this part.

(A) The retroactive effective date of termination shall not be limited due to the passage of time, erroneous payment of claims, or any other events which may be cited as a basis for CHAMPUS recognition of the provider notwithstanding the fact that the provider does not meet program qualifications. Unless specific provision is made in this part to ''grandfather'' or authorize a provider who does not otherwise meet the qualifications established by this part, all unqualified providers shall be terminated.

(B) Any claims cost-shared or paid under CHAMPUS for services or supplies furnished by the provider on or after the effective date of termination, even when the effective date is retroactive, shall be deemed an erroneous payment unless specific exception is provided in this part. All erroneous payments are subject to collection under § 199.11 of this part.

(C) If an institution is terminated as an authorized CHAMPUS provider, the institution shall immediately give written notice of the termination to any CHAMPUS beneficiary (or their parent, guardian, or other representative) admitted to, or receiving care at, the institution on or after the effective date of the termination. In addition, when an institution is terminated with

an effective date of termination after the date of the initial determination terminating the provider, any beneficiary admitted to the institution prior to the effective date of termination (or their parent, guardian, or other representative) shall be notified by the Director, OCHAMPUS, or a designee, by certified mail of the termination, and that CHAMPUS cost-sharing of the beneficiary's care in the institution will cease as of the effective date of the termination. However, any beneficiary admitted to the institution prior to any grace period extended to the institution under paragraph (f)(2)(ii)(A) of this section shall be advised that, if the beneficiary's care otherwise qualifies for CHAMPUS coverage, CHAMPUS cost-sharing of the care in the institution will continue in order to provide a reasonable period of transition of care; however the transitional period of CHAMPUS cost-sharing shall not exceed the last day of the month following the month in which the institution's status as a CHAMPUS provider is terminated. (This authorized CHAMPUS cost-sharing of the inpatient care received during the transition period is an exception to the general rule that CHAMPUS payment for care furnished after the effective date of termination of the provider's status shall be deemed to be an erroneous payment.) If a major violation under paragraph (f)(2)(ii)(B) of this section is involved, in order to ensure immediate action is taken to transfer beneficiaries to an approved provider, CHAMPUS cost-sharing shall not be authorized after the effective date of termination of the provider's status.

(ii) *Institutions not in compliance with CHAMPUS standards.* If it is determined that an institution is not in compliance with one or more of the standards applicable to its specific category of institution under this part, the Director, OCHAMPUS, or a designee, shall take immediate steps to bring about compliance or terminate the status of the provider as an authorized CHAMPUS provider.

(A) *Minor violations.* An institution determined to be in violation of one or more of the standards shall be advised by certified mail of the nature of the discrepancy or discrepancies and will be given a grace period of 30 days to effect appropriate corrections. The grace period may be extended at the discretion of the Director, OCHAMPUS, or a designee, but in no event shall the extension exceed 90 days.

(*1*) CHAMPUS will not cost-share a claim for any beneficiary admitted during the grace period.

(*2*) Any beneficiary admitted to the institution prior to the grace period (or the beneficiary's parent, guardian, or other representative) will be notified by the Director, OCHAMPUS, or a designee, in writing, of the minor violations and the grace period granted the institution to correct the violations. The beneficiary will also be advised that, if the beneficiary's care otherwise meets all requirements for CHAMPUS coverage, CHAMPUS cost-sharing will continue during the grace period.

(*3*) If the institution submits written notice before the end of the grace period that corrective action has been taken *and* if the Director, OCHAMPUS, or a designee, determines that the corrective action has eliminated the minor violations, the provider will be advised that the institution is restored to full status as an authorized CHAMPUS provider as of 12:01 a.m. on the day written notice of correction was received by the Director, OCHAMPUS, or a designee, or the day on which acceptable corrective action was completed in the judgment of the Director, OCHAMPUS, or a designee. Any beneficiary admitted to the institution prior to the grace period will be notified by the Director, OCHAMPUS, or a designee, of the corrective action and that the provider continues to be an authorized CHAMPUS provider. CHAMPUS cost-sharing for any beneficiary admitted to the institution during the grace period shall be allowed only for care received after 12:01 a.m. on the day written notice of correction was received by the Director, OCHAMPUS, or a designee, or the day on which acceptable corrective action was completed in the judgment of the Director, OCHAMPUS, or a designee.

(*4*) If the institution has failed to give notification in writing before the end of the grace period that corrective action has been completed *or*, in the judgment of the Director, OCHAMPUS,

or a designee, the institution has not completed acceptable corrective action during the grace period, the Director, OCHAMPUS, or a designee, may initiate action to terminate the provider as an authorized CHAMPUS provider.

(B) *Major violations.* If the Director, OCHAMPUS, or a designee, determines that an institution is in violation of standards detrimental to life, safety, or health, or substantially in violation of approved treatment programs, immediate action shall be taken to terminate the institution as an authorized CHAMPUS provider. The institution shall be notified by telegram, certified mail, or express mail of the termination under this subparagraph, effective on receipt of the notice. The notice shall include a brief statement of the nature of violations resulting in the termination and advise the institution that an initial determination formalizing the administrative action of termination will be issued pursuant to paragraph (h)(3)(ii) of this section within 15 days.

(3) *Beneficiary sanctions.* (i) With entitlement to CHAMPUS benefits based on public law, an eligible beneficiary will not be suspended or excluded from CHAMPUS. However, the Director, OCHAMPUS, or a designee, may take action deemed appropriate and reasonable to protect the Government from those beneficiaries (including sponsors, parents, guardians, or representatives of beneficiaries) who have submitted false claims.

(ii) Pursuant to §199.11 of this part, the Director, OCHAMPUS, or a designee, may recover erroneous payments on claims involving fraud or false or misleading statements. Remedies for recovery of the erroneous payments include the use of offset against future CHAMPUS payments.

(iii) Under policies adopted by the Director, OCHAMPUS, or a designee, individuals who, based on reliable information, have previously submitted fraudulent or false CHAMPUS claims, may be required to comply with any procedures (e.g., partial or total prepayment audit or review, restriction to a designated primary care provider, etc.) which the Director, OCHAMPUS, or a designee, deems appropriate to ensure that their future medical care and CHAMPUS claims (including the medical care and CHAMPUS claims submitted by or for members of their family) are valid.

(g) *Period of exclusion, suspension, or termination*—(1) *Exclusions or suspensions.* Except as otherwise required by paragraph (g)(1)(i) of this section, the Director, OCHAMPUS, or a designee, shall determine the period of exclusion or suspension for a provider using the factors set forth in paragraph (g)(1)(ii) of this section.

(i) *Exclusion or suspension of a provider based on the provider's exclusion or suspension by another agency of the Federal Government, a state, or a local licensing authority.* If the administrative action under CHAMPUS is based *solely* on the provider's exclusion or suspension by another agency, state, or local licensing authority, the period of exclusion or suspension under CHAMPUS shall be for the same length of time of exclusion or suspension imposed by the other agency, state, or local licensing authority. The provider may request reinstatement as an authorized CHAMPUS provider if reinstatement is achieved under the other program prior to the end of the period of exclusion or suspension. If the administrative action under CHAMPUS is not based *solely* on the provider's exclusion or suspension by another agency, state, or local licensing authority, the minimum period of exclusion or suspension shall be for the same period of exclusion or suspension imposed by the other agency, state, or local licensing authority.

(ii) *Factors to be considered in determining the period of exclusion or suspension of providers under CHAMPUS.* In determining the period of exclusion or suspension of a provider, the Director, OCHAMPUS, or a designee, may consider any or all of the following:

(A) When the case concerns all or any part of the same issues which have been the subject of criminal conviction or civil judgment involving fraud by a provider:

(*1*) The period(s) of sentence, probation, and other sanction imposed by court order against the provider may be presumed reasonable and adopted as the administrative period of exclusion or suspension under CHAMPUS, unless

aggravating or mitigating factors exist.

(*2*) If any aggravating factors exist, then cause exists for the Director, OCHAMPUS, or a designee, to consider the factors set forth in paragraph (g)(1)(ii)(B) of this section, in imposing a period of administrative exclusion or suspension in excess of the period(s) of sentence, probation, and/or other sanctions imposed by court order. Examples of aggravating factors include, but are not limited to:

(*i*) An administrative determination by the Director, OCHAMPUS, or a designee, that the basis for administrative exclusion or suspension includes an act(s) of fraud or abuse under CHAMPUS in addition to, or unrelated to, an act(s) of fraud included in the court conviction or civil judgment.

(*ii*) The fraudulent act(s) involved in the criminal conviction or civil judgment, or similar acts, were committed over a significant period of time; that is, one year or more.

(*iii*) The act(s) of fraud or abuse had an adverse physical, mental, or financial impact on one or more CHAMPUS beneficiaries.

(*iv*) The loss or potential loss to CHAMPUS is over $5,000. The entire amount of loss or potential loss to CHAMPUS due to acts of fraud and abuse will be considered, in addition to the amount of loss involved in the court conviction or civil judgment, regardless of whether full or partial restitution has been made to CHAMPUS.

(*v*) The provider has a prior court record, criminal or civil, or administrative record or finding of fraud or abuse.

(*3*) If any mitigating factors exist, then cause may exist for the Director, OCHAMPUS, or a designee, to reduce a period of administrative exclusion or suspension from any period(s) imposed by court conviction or civil judgment. Only the existence of either of the following two factors may be considered in mitigation:

(*i*) The criminal conviction or civil judgment only involved three or fewer misdemeanor offenses, and the total of the estimated losses incurred (including any loss from act(s) not involved in the conviction or judgment) is less than $1,000, regardless of whether full or partial restitution has been made.

(*ii*) The criminal or civil court proceedings establish that the provider had a mental, emotional or physical condition, prior to or contemporaneous with the commission of the act(s), that reduced the provider's criminal or civil culpability.

(B) The Director, OCHAMPUS, or a designee, may consider the following factors in determining a reasonable period of exclusion or suspension of a provider under CHAMPUS:

(*1*) The nature of the claims and the circumstances under which they were presented;

(*2*) The degree of culpability;

(*3*) History of prior offenses (including whether claims were submitted while the provider was either excluded or suspended pursuant to prior administrative action);

(*4*) Number of claims involved;

(*5*) Dollar amount of claims involved;

(*6*) Whether, if a crime was involved, it was a felony or misdemeanor;

(*7*) If patients were injured financially, mentally, or physically; the number of patients; and the seriousness of the injury(ies);

(*8*) The previous record of the provider under CHAMPUS;

(*9*) Whether restitution has been made or arrangements for repayment accepted by the Government;

(*10*) Whether the provider has resolved the conflict of interest situations or implemented procedures acceptable to the Director, OCHAMPUS, or a designee, which will prevent conflict of interest in the future; and,

(*11*) Such other factors as may be deemed appropriate.

(2) *Terminations.* When a provider's status as an authorized CHAMPUS provider is ended, other than through exclusion or suspension, the termination is based on a finding that the provider does not meet the qualifications to be an authorized provider, as set forth in this part. Therefore, the period of termination in all cases will be indefinite and will end only after the provider has successfully met the established qualifications for authorized provider status under CHAMPUS and has been reinstated under CHAMPUS. Except as otherwise provided in this subparagraph,

the following guidelines control the termination of authorized CHAMPUS provider status for a provider whose license to practice (or, in the case of an institutional provider, to operate) has been temporarily or permanently suspended or revoked by the jurisdiction issuing the license.

(i) Termination of the provider under CHAMPUS shall continue even if the provider obtains a license to practice in a second jurisdiction during the period of suspension or revocation of the provider's license by the original licensing jurisdiction. A provider who has licenses to practice in two or more jurisdictions and has one or more license(s) suspended or revoked will also be terminated as a CHAMPUS provider.

(A) Professional providers shall remain terminated from the CHAMPUS until the jurisdiction(s) suspending or revoking the provider's license(s) to practice restores it or removes the impediment to restoration.

(B) Institutional providers shall remain terminated under CHAMPUS until their license is restored. In the event the facility is sold, transferred, or reorganized as a new legal entity, and a license issued under a new name or to a different legal entity, the new entity must submit an application to be an authorized CHAMPUS provider.

(ii) If the CHAMPUS provider status is terminated due to the loss of the provider's license, the effective date shall be retroactive to the date the provider lost the license; however, in the case of a professional provider who has licenses in two or more jurisdictions and submitted claims from a jurisdiction from which he/she had a valid license, the effective date of the termination will be 15 calendar days from the date of the written initial determination of termination for purposes of claims from the jurisdiction in which the provider still has a valid license.

(h) *Procedures for initiating and implementing the administrative remedies*—(1) *Temporary suspension of claims processing*. (i) In general, temporary suspension of claims processing may be invoked to protect the interests of the Government for a period reasonably necessary to complete investigation or appropriate criminal, civil, and administrative proceedings. The temporary suspension only delays the ultimate payment of otherwise appropriate claims. When claims processing involving a participating provider is temporarily suspended, the participation agreement remains in full force and the provider cannot repudiate the agreement because of the delay in the final disposition of the claim(s). Once it has been determined appropriate to end the temporary suspension of claims processing, CHAMPUS claims which were the subject of the suspension and which are otherwise determined to be in compliance with the requirements of law and regulation, will be processed to completion and payment *unless* such action is deemed inappropriate as a result of criminal, civil, or administrative remedies ultimately invoked in the case.

(ii) When adequate evidence exists to determine that a provider or beneficiary is submitting fraudulent or false claims or claims involving practices that may be fraud or abuse as defined by this part, the Director, OCHAMPUS, or a designee, may suspend CHAMPUS claims processing (in whole or in part) for claims submitted by the beneficiary or any CHAMPUS claims involving care furnished by the provider. The temporary suspension of claims processing for care furnished by a provider may be invoked against all such claims, whether or not the claims are submitted by the beneficiary or by the provider as a participating CHAMPUS provider. In cases involving a provider, notice of the suspension of claims processing may also be given to the beneficiary community either directly or indirectly through notice to appropriate military facilities, health benefit advisors, and the information or news media.

(A) Adequate evidence is any information sufficient to support the reasonable belief that a particular act or omission has occurred.

(B) Indictment or any other initiation of criminal charges, filing of a complaint for civil fraud, issuance of an administrative complaint under the Program Fraud Civil Remedies Act, or issuance of an initial determination under this part for submitting fraudulent or false claims or claims involving

practices that may be fraud or abuse as defined by this part, shall constitute adequate evidence for invoking temporary suspension of claims processing.

(iii) The Director, OCHAMPUS, or a designee, may suspend CHAMPUS claims processing without first notifying the provider or beneficiary of the intent to suspend payments. Following a decision to invoke a temporary suspension, however, the Director, OCHAMPUS, or a designee, shall issue written notice advising the provider or beneficiary that:

(A) A temporary suspension of claims processing has been ordered and a statement of the basis of the decision to suspend payment. Unless the suspension is based on any of the actions set forth in paragraph (h)(1)(ii)(B) of this section, the notice shall describe the suspected acts or omissions in terms sufficient to place the provider or beneficiary on notice without disclosing the Government's evidence.

(B) Within 30 days (or, upon written request received by OCHAMPUS during the 30 days and for good cause shown, within 60 days) from the date of the notice, the provider or beneficiary may:

(*1*) Submit to the Director, OCHAMPUS, or a designee, in writing, information (including documentary evidence) and argument in opposition to the suspension, provided the additional specific information raises a genuine dispute over the material facts, or

(*2*) Submit a written request to present in person evidence or argument to the Director, OCHAMPUS, or a designee. All such presentations shall be made at the Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) in Aurora, Colorado, at the provider's or beneficiary's own expense.

(C) Additional proceedings to determine disputed material facts may be conducted unless:

(*1*) The suspension is based on any of the actions set forth in paragraph (h)(1)(ii)(B) of this section, or,

(*2*) A determination is made, on the basis of the advice of the responsible Government official (e.g., an official of the Department of Justice, the designated Reviewing Official under the Program Fraud Civil Remedies Act, etc.), that the substantial interests of the Government in pending or contemplated legal or administrative proceedings based on the same facts as the suspension would be prejudiced.

(iv) If the beneficiary or provider submits, either in writing or in person, additional information or argument in opposition to the suspension, the Director, OCHAMPUS, or a designee, shall issue a suspending official's decision which modifies, terminates, or leaves in force the suspension of claims processing. However, a decision to terminate or modify the suspension shall be without prejudice to the subsequent imposition of suspension of claims processing, imposition of sanctions under this §199.9, the recovery of erroneous payments under §199.11 of this part, or any other administrative or legal action authorized by law or regulation. The suspending official's decision shall be in writing as follows:

(A) A written decision based on all the information in the administrative record, including any submission by the beneficiary or provider, shall be final in a case:

(*1*) Based on any of the actions set forth in paragraph (h)(1)(ii)(B) of this section,

(*2*) In which the beneficiary's or provider's submission does not raise a genuine dispute over material facts, or

(*3*) In which additional proceedings to determine disputed material facts have been denied on the basis of advice of a responsible Government official that the substantial interests of the Government in pending or contemplated legal or administrative proceedings would be prejudiced.

(B) In a case in which additional proceedings are necessary as to disputed material facts, the suspending official's decision shall advise the beneficiary or provider that the case has been referred for handling as a hearing under §199.10 of this part.

(v) A suspension of claims processing may be modified or terminated for reasons such as:

(A) Newly discovered evidence;

(B) Elimination of any of the causes for which the suspension was invoked; or

(C) Other reasons the Director, OCHAMPUS, or a designee, deems appropriate.

(vi) A suspension of claims processing shall be for a temporary period pending the completion of investigation and any ensuing legal or administrative proceedings, unless sooner terminated by the Director, OCHAMPUS, or a designee, or as provided in this subparagraph.

(A) If legal or administrative proceedings are not initiated within 12 months after the date of the suspension notice, the suspension shall be terminated unless the Government official responsible for initiation of the legal or administrative action requests its extension, in which case it may be extended for an additional 6 months. In no event may a suspension extend beyond 18 months, unless legal or administrative proceedings have been initiated during that period.

(B) The Director, OCHAMPUS, or a designee, shall notify the Government official responsible for initiation of the legal or administrative action of the proposed termination of the suspension, at least 30 days before the 12-month period expires, to give the official an opportunity to request an extension.

(2) *Notice of proposed administrative sanction.* (i) A provider shall be notified in writing of the proposed action to exclude, suspend, or terminate the provider's status as an authorized CHAMPUS provider.

(A) The notice shall state which sanction will be taken and the effective date of that sanction as determined in accordance with the provisions of this part.

(B) The notice shall inform the provider of the situation(s), circumstance(s), or action(s) which form the basis for the proposed sanction and reference the paragraph of this part under which the administrative action is being taken.

(C) The notice will be sent to the provider's last known business or office address (or home address if there is no known business address.)

(D) The notice shall offer the provider an opportunity to respond within 30 days (or, upon written request received by OCHAMPUS during the 30 days and for good cause shown, within 60 days) from the date on the notice with either:

(*1*) Documentary evidence and written argument contesting the proposed action; or,

(*2*) A written request to present in person evidence or argument to the Director, OCHAMPUS, or a designee. All such presentations shall be made at the Office of the Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) in Aurora, Colorado, at the provider's own expense.

(3) *Initial determination.* (i) If, after the provider has exhausted, or failed to comply with, the procedures specified in paragraph (h)(2) of this section, the Director, OCHAMPUS, or a designee, decides to invoke an administrative remedy of exclusion, suspension, or termination of a provider under CHAMPUS, written notice of the decision will be sent to the provider by certified mail. Except in those cases where the sanction has a retroactive effective date, the written notice shall be dated no later than 15 days before the decision becomes effective. For terminations under paragraph (f)(2)(ii)(B) of this section, the initial determination may be issued without first implementing or exhausting the procedures specified in paragraph (h)(2) of this section.

(ii) The initial determination shall include:

(A) A statement of the sanction being invoked;

(B) A statement of the effective date of the sanction;

(C) A statement of the facts, circumstances, or actions which form the basis for the sanction and a discussion of any information submitted by the provider relevant to the sanction;

(D) A statement of the factors considered in determining the period of sanction;

(E) The earliest date on which a request for reinstatement under CHAMPUS will be accepted;

(F) The requirements and procedures for reinstatement; and,

(G) Notice of the available hearing upon request of the sanctioned provider.

(4) *Reinstatement procedures*—(i) *Restitution.* (A) There is no entitlement

under CHAMPUS for payment (cost-sharing) of any claim that involves either criminal or civil fraud as defined by law, or fraud or abuse or conflict of interest as defined by this part. In addition, except as specifically provided in this part, there is no entitlement under CHAMPUS for payment (cost-sharing) of any claim for services or supplies furnished by a provider who does not meet the requirements to be an authorized CHAMPUS provider. In any of the situations described above, CHAMPUS payment shall be denied whether the claim is submitted by the provider as a participating claim or by the beneficiary for reimbursement. If an erroneous payment has been issued in any such case, collection of the payment will be processed under § 199.11 of this part.

(B) If the Government has made erroneous payments to a provider because of claims involving fraud, abuse, or conflicts of interest, restitution of the erroneous payments shall be made before a request for reinstatement as a CHAMPUS authorized provider will be considered. Without restitution or resolution of the debt under § 199.11 of this part, a provider shall not be reinstated as an authorized CHAMPUS provider. This is not an appealable issue under § 199.10 of this part.

(C) For purposes of authorization as a CHAMPUS provider, a provider who is excluded or suspended under this § 199.9 and who submits participating claims for services furnished on or after the effective date of the exclusion or suspension is considered to have forfeited or waived any right or entitlement to bill the beneficiary for the care involved in the claims. Similarly, because a provider is expected to know the CHAMPUS requirements for qualification as an authorized provider, any participating provider who fails to meet the qualification requirements for CHAMPUS is considered to have forfeited or waived any right or entitlement to bill the beneficiary for the care involved in the CHAMPUS claims. If, in either situation, the provider bills the beneficiary, restitution to the beneficiary may be required by the Director, OCHAMPUS, or a designee, as a condition for consideration of reinstatement as a CHAMPUS authorized provider.

(ii) *Terminated providers.* A terminated provider who subsequently achieves the minimum qualifications to be an authorized CHAMPUS provider or who has had his/her license reinstated or the impediment to reinstatement removed by the appropriate licensing jurisdiction may submit a written request for reinstatement under CHAMPUS to the Director, OCHAMPUS, or a designee. If restitution or proper reinstatement of license is not at issue, the Director, OCHAMPUS, or a designee, will process the request for reinstatement under the procedures established for initial requests for authorized CHAMPUS provider status.

(iii) *Providers (other than entities) excluded or suspended under CHAMPUS.* (A) A provider excluded or suspended from CHAMPUS (other than an entity excluded under § 199.9(f)(1)(i)) may seek reinstatement by submitting a written request to the Director, OCHAMPUS, or a designee, any time after the date specified in the notice of exclusion or suspension or any earlier date specified in an appeal decision issued in the provider's appeal under § 199.10 of this part. The request for reinstatement shall include:

(*1*) Documentation sufficient to establish the provider's qualifications under this part to be a CHAMPUS authorized provider;

(*2*) A statement from the provider setting forth the reasons why the provider should be reinstated, accompanied by written statements from professional associates, peer review bodies, and/or probation officers (if appropriate), attesting to their belief that the violations that led to exclusion or suspension will not be repeated.

(B) A provider entity excluded from CHAMPUS under § 199.9(f)(1)(i) may seek reinstatement by submitting a written request to the Director, OCHAMPUS, or a designee, with documentation sufficient to establish the provider's qualifications under this part to be a CHAMPUS authorized provider and either:

(*1*) Documentation showing the CHAMPUS reinstatement of the excluded individual provider whose conviction led to the CHAMPUS exclusion or suspension of the provider entity; *or*

(*2*) Documentation acceptable to the Director, OCHAMPUS, or a designee, that shows that the individual whose conviction led to the entity's exclusion:

(*i*) Has reduced his or her ownership or control interest in the entity below 5 percent; or

(*ii*) Is no longer an officer, director, agent or managing employee of the entity; or

(*iii*) Continues to maintain a 5 percent or more ownership or control interest in such entity, and that the entity due to circumstances beyond its control, is unable to obtain a divestiture.

NOTE: Under paragraph (h)(4)(iii)(B)(*2*) of this section, the request for reinstatement may be submitted any time prior to the date specified in the notice of exclusion or suspension or an earlier date specified in the appeal decision issued under §199.10 of this part.

(iv) *Action on request for reinstatement.* In order to reinstate a provider as a CHAMPUS authorized provider, the Director, OCHAMPUS, or a designee, must determine that:

(A) The provider meets all requirements under this part to be an authorized CHAMPUS provider;

(B) No additional criminal, civil, or administrative action has been taken or is being considered which could subject the provider to exclusion, suspension, or termination under this section;

(C) In the case of a provider entity, verification has been made of the divestiture or termination of the owner, controlling party, officer, director, agent or managing employee whose conviction led to the entity's exclusion, *or* that the provider entity should be reinstated because the entity, due to circumstances beyond its control, cannot obtain a divestiture of the 5 percent or more ownership or controlling interest by the convicted party.

(v) *Notice of action on request for reinstatement*—(A) *Notice of approval of request.* If the Director, OCHAMPUS, or a designee, approves the request for reinstatement, he or she will:

(*1*) Give written notice to the sanctioned party specifying the date when the authorized provider status under CHAMPUS may resume; and

(*2*) Give notice to those agencies and groups that were originally notified, in accordance with §199.9(k), of the imposition of the sanction. General notice may also be given to beneficiaries and other parties as deemed appropriate by the Director, OCHAMPUS, or a designee.

(B) *Notice of denial of request.* If the Director, OCHAMPUS, or a designee, does not approve the request for reinstatement, written notice will be given to the provider. If established procedures for processing initial requests for authorized provider status are used to review the request for reinstatement, the established procedures may be used to provide the notice that the provider does not meet requirements of this part for such status. If the provider continues to be excluded, suspended, or terminated under the provisions of this section, the procedures set forth in this paragraph (h) may be followed in denying the provider's request for reinstatement.

(5) *Reversed or vacated convictions or civil judgments involving CHAMPUS fraud.* (i) If a CHAMPUS provider is excluded or suspended *solely* on the basis of a criminal conviction or civil judgment involving a CHAMPUS fraud and the conviction or judgment is reversed or vacated on appeal, CHAMPUS will void the exclusion of a provider. Such action will not preclude the initiation of additional independent administrative action under this section or any other administrative remedy based on the same facts or events which were the subject of the criminal conviction or civil judgment.

(ii) If an exclusion is voided under paragraph (h)(5)(i) of this section, CHAMPUS will make payment, either to the provider or the beneficiary (if the claim was not a participating claim) for otherwise authorized services under CHAMPUS that are furnished or performed during the period of exclusion.

(iii) CHAMPUS will also void the exclusion of any entity that was excluded under §199.9(f)(1)(i) based *solely* on an

individual's conviction that has been reversed or vacated on appeal.

(iv) When CHAMPUS voids the exclusion of a provider or an entity, notice will be given to the agencies and others that were originally notified, in accordance with § 199.9(k).

(i) *Evidence required for determinations to invoke administrative remedies*—(1) *General*. Any relevant evidence may be used by the Director, OCHAMPUS, or a designee, if it is the type of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil or criminal courts.

(2) *Types of evidence*. The types of evidence which the Director, OCHAMPUS, or a designee, may rely on in reaching a determination to invoke administrative remedies under this section include but are not limited to the following:

(i) Results of audits conducted by or on behalf of the Government. Such audits can include the results of 100 percent review of claims and related records or a statistically valid sample audit of the claims or records. A statistical sampling shall constitute *prima facie* evidence of the number and amount of claims and the instances of fraud, abuse, or conflict of interest.

(ii) Reports, including sanction reports, from various sources including a peer review organization (PRO) for the area served by the provider; state or local licensing or certification authorities; peer or medical review consultants of the Government, including consultants for Government contractors; state or local professional societies; or other sources deemed appropriate by the Director, OCHAMPUS, or a designee.

(iii) Orders or documents issued by Federal, state, foreign, or other courts of competent jurisdiction which issue findings and/or criminal convictions or civil judgments involving the provider, and administrative rulings, findings, or determinations by any agency of the Federal Government, a state, or local licensing or certification authority regarding the provider's status with that agency or authority.

(j) *Suspending Administrative Action*. (1) All or any administrative action may be suspended by the Director, OCHAMPUS, or a designee, pending action in the case by the Department of Defense—Inspector General, Defense Criminal Investigative Service, or the Department of Justice (including the responsible United States Attorney). However, action by the Department of Defense—Inspector General or the Department of Justice, including investigation, criminal prosecution, or civil litigation, does not preclude administrative action by OCHAMPUS.

(2) The normal OCHAMPUS procedure is to suspend action on the administrative process pending an investigation by the Department of Defense—Inspector General or final disposition by the Department of Justice.

(3) Though OCHAMPUS administrative action is taken independently of any action by the Department of Defense-Inspector General or by the Department of Justice, once a case is forwarded to the Department of Defense-Inspector General or the Department of Justice for legal action (criminal or civil), administrative action may be held in abeyance.

(4) In some instances there may be dual jurisdiction between agencies; as in, for example, the joint regulations issued by the Department of Justice and the Government Accounting Office regarding debt collection.

(k) *Notice to Other Agencies*. (1) When CHAMPUS excludes, suspends, or terminates a provider, the Director, OCHAMPUS, or a designee, will notify other appropriate agencies (for example, the Department of Health and Human Services and the state licensing agency that issued the provider's license to practice) that the individual has been excluded, suspended, or terminated as an authorized provider under CHAMPUS. An exclusion, suspension, or termination action is considered a public record. Such notice can include the notices and determinations sent to the suspended provider and other public documents such as testimony given at a hearing or exhibits or depositions given in a lawsuit or hearing. Notice may also be given to Uniformed Services Military Treatment Facilities, Health Benefit Advisors, beneficiaries

and sponsors, the news media, and institutional providers if inpatient care was involved.

(2) If CHAMPUS has temporarily suspended claims processing, notice of such action normally will be given to the affected provider and Uniformed Services Medical Treatment Facilities, Health Benefits Advisors, beneficiaries, and sponsors. Notice may also be given to any information or news media and any other individual, professional provider, or institutional provider, as deemed appropriate. However, since a ''temporary suspension of claims processing'' is by definition not a final or formal agency action, the basis for the action generally will not be disclosed. It is noted that the basis for the action can be a result of questions arising from routine audits to investigation of possible criminal violations.

(l) *Compromise, Settlement, and Resolution Authority*. (1) In lieu of invoking any remedy provided by this Section, the Director, OCHAMPUS, or a designee, may elect to enter into an agreement with the provider intended to correct the situation within an established time period and subject to any remedies deemed appropriate by the Director, OCHAMPUS, or a designee.

(2) When it is in the best interest of CHAMPUS, the Director, OCHAMPUS, has the discretionary authority to waive an action or enter into compromise or settlement of administrative actions taken under this § 199.9.

(m) *Government-wide effect of exclusion or suspension from CHAMPUS*. As provided by section 2455 of the Federal Acquisition Streamlining Act of 1994, Pub. L. 103–355, October 13 1994, and Executive Order 12549, ''Debarment and Suspension from Federal Financial and Nonfinancial Assistance Programs,'' February 18, 1986, any health care provider excluded or suspended from CHAMPUS under this section shall, as a general rule, also be debarred, suspended, or otherwise excluded from all other programs and activities involving Federal financial assistance. Among the other programs for which this debarment, suspension, or exclusion shall operate are the Medicare and Medicaid programs. This debarment, suspension, or termination requirement is subject to limited exceptions in the regulations governing the respective Federal programs affected. (Note: Other regulations related to this government-wide exclusion or suspension authority are 32 CFR Part 25 and 45 CFR Part 76.)

(n) Third-party billing agents as defined in § 199.2(b) of this part, while not considered providers, are subject to the provisions of this section to the same extent as such provisions apply to providers.

[54 FR 25246, June 14, 1989, as amended at 63 FR 48445, Sept. 10, 1998; 78 FR 12954, Feb. 26, 2013; 85 FR 60705, Sept. 28, 2020]

### § 199.10 Appeal and hearing procedures.

(a) *General*. This Section sets forth the policies and procedures for appealing decisions made by OCHAMPUS, OCHAMPUSEUR, and CHAMPUS contractors adversely affecting the rights and liabilities of CHAMPUS beneficiaries, CHAMPUS participating providers, and providers denied the status of authorized provider under CHAMPUS. An appeal under CHAMPUS is an administrative review of program determinations made under the provisions of law and regulation. An appeal cannot challenge the propriety, equity, or legality of any provision of law or regulation.

(1) *Initial determination*—(i) *Notice of initial determination and right to appeal*. (A) OCHAMPUS, OCHAMPUSEUR, and CHAMPUS contractors shall mail notices of initial determinations to the affected provider or CHAMPUS beneficiary (or representative) at the last known address. For beneficiaries who are under 18 years of age or who are incompetent, a notice issued to the parent, guardian, or other representative, under established CHAMPUS procedures, constitutes notice to the beneficiary.

(B) CHAMPUS contractors and OCHAMPUSEUR shall notify a provider of an initial determination on a claim only if the provider participated in the claim. (See § 199.7 of this part.)

(C) CHAMPUS peer review organizations shall notify providers and fiscal intermediaries of a denial determination on a claim.

(D) Notice of an initial determination on a claim processed by a

CHAMPUS contractor or OCHAMPUSEUR normally will be made on a CHAMPUS Explanation of Benefits (CEOB) form.

(E) Each notice of an initial determination on a request for benefit authorization, a request by a provider for approval as an authorized CHAMPUS provider, or a decision to disqualify or exclude a provider as an authorized provider under CHAMPUS shall state the reason for the determination and the underlying facts supporting the determination.

(F) In any case when the initial determination is adverse to the beneficiary or participating provider, or to the provider seeking approval as an authorized CHAMPUS provider, the notice shall include a statement of the beneficiary's or provider's right to appeal the determination. The procedure for filing the appeal also shall be explained.

(ii) *Effect of initial determination.* (A) The initial determination is final unless appealed in accordance with this chapter, or unless the initial determination is reopened by the TRICARE Management Activity, the CHAMPUS contractor, or the CHAMPUS peer review organization.

(B) An initial determination involving a CHAMPUS beneficiary entitled to Medicare Part A, who is enrolled in Medicare Part B, may be appealed by the beneficiary or their provider under this section of this Part only when the claimed services or supplies are payable by CHAMPUS and are not payable under Medicare. Both Medicare and CHAMPUS offer an appeal process when a claim for healthcare services or supplies is denied and most healthcare services and supplies are a benefit payable under both Medicare and CHAMPUS. In order to avoid confusion on the part of beneficiaries and providers and to expedite the appeal process, services and supplies denied payment by Medicare will not be considered for coverage by CHAMPUS if the Medicare denial of payment is appealable under Medicare. Because such claims are not considered for payment by CHAMPUS, there can be no CHAMPUS appeal. If, however, a Medicare claim or appeal results in some payment by Medicare, the services and supplies paid by Medicare will be considered for payment by CHAMPUS. In that situation, any decision to deny CHAMPUS payment will be appealable under this section. The following examples of CHAMPUS appealable issues involving Medicare-eligible CHAMPUS beneficiaries are illustrative; they are not all-inclusive.

(*1*) If Medicare processes a claim for a healthcare service or supply that is a Medicare benefit and the claim is denied by Medicare for a patient-specific reason, the claim is appealable through the Medicare appeal process. The Medicare decision will be final if the claim is denied by Medicare. The claimed services or supplies will not be considered for CHAMPUS payment and there is no CHAMPUS appeal of the CHAMPUS decision denying the claim.

(*2*) If Medicare processes a claim for a healthcare service or supply that is a Medicare benefit and the claim is paid, either on initial submission or as a result of a Medicare appeal decision, the claim will be submitted to CHAMPUS for processing as a second payer to Medicare. If CHAMPUS denies payment of the claim, the Medicare-eligible beneficiary or their provider have the same appeal rights as other CHAMPUS beneficiaries and their providers under this section.

(*3*) If Medicare processes a claim and the claim is denied by Medicare because it is not a healthcare service or supply that is a benefit under Medicare, the claim is submitted to CHAMPUS. CHAMPUS will process the claim under this Part 199 as primary payer (or as secondary payer if another double coverage plan exists). If any part of the claim is denied, the Medicare-eligible beneficiary and their provider will have the same appeal rights as other CHAMPUS beneficiaries and their providers under this section.

(2) *Participation in an appeal.* Participation in an appeal is limited to any party to the initial determination, including CHAMPUS, and authorized representatives of the parties. Any party to the initial determination, except CHAMPUS, may appeal an adverse determination. The appealing party is the party who actually files the appeal.

(i) *Parties to the initial determination.* For purposes of the CHAMPUS appeals

and hearing procedures, the following are not parties to an initial determination and are not entitled to administrative review under this section.

(A) A provider disqualified or excluded as an authorized provider under CHAMPUS based on a determination of abuse or fraudulent practices or procedures under another Federal or federally funded program is not a party to the CHAMPUS action and may not appeal under this section.

(B) A beneficiary who has an interest in receiving care or has received care from a particular provider cannot be an appealing party regarding the exclusion, suspension, or termination of the provider under § 199.9 of this part.

(C) A sponsor or parent of a beneficiary under 18 years of age or guardian or an incompetent beneficiary is not a party to the initial determination and may not serve as the appealing party, although such persons may represent the appealing party in an appeal.

(D) A third party, such as an insurance company, is not a party to the initial determination and is not entitled to appeal even though it may have an indirect interest in the initial determination.

(E) A nonparticipating provider is not a party to the initial determination and may not appeal.

(ii) *Representative.* Any party to the initial determination may appoint a representative to act on behalf of the party in connection with an appeal. Generally, the parent of a minor beneficiary and the legally appointed guardian of an incompetent beneficiary shall be presumed to have been appointed representative without specific designation by the beneficiary. The custodial parent or legal guardian (appointed by a cognizant court) of a minor beneficiary may initiate an appeal based on the above presumption. However, should a minor beneficiary turn 18 years of age during the course of an appeal, then any further requests to appeal on behalf of the beneficiary must be from the beneficiary or pursuant to the written authorization of the beneficiary appointing a representative. For example, if the beneficiary is 17 years of age and the sponsor (who is a custodial parent) requests a formal review, absent written objection by the minor beneficiary, the sponsor is presumed to be acting on behalf of the minor beneficiary. Following the issuance of the formal review, the sponsor requests a hearing; however if, at the time of the request for a hearing, the beneficiary is 18 years of age or older, the request must either be by the beneficiary or the beneficiary must appoint a representative. The sponsor, in this example, could not pursue the request for hearing without being appointed by the beneficiary as the beneficiary's representative.

(A) The representative shall have the same authority as the party to the appeal and notice given to the representative shall constitute notice required to be given to the party under this part.

(B) To avoid possible conflicts of interest, an officer or employee of the United States, such as an employee or member of a Uniformed Service, including an employee or staff member of a Uniformed Service legal office, or a CHAMPUS advisor, subject to the exceptions in 18 U.S.C. 205, is not eligible to serve as a representative. An exception usually is made for an employee or member of a Uniformed Service who represents an immediate family member. In addition, the Director, OCHAMPUS, or designee, may appoint an officer or employee of the United States as the CHAMPUS representative at a hearing.

(3) *Burden of proof.* The burden of proof is on the appealing party to establish affirmatively by substantial evidence the appealing party's entitlement under law and this part to the authorization of CHAMPUS benefits, approval of authorized CHAMPUS provider status, or removal of sanctions imposed under § 199.9 of this part. If a presumption exists under the provisions of this part or information constitutes *prima facie* evidence under the provisions of this part, the appealing party must produce evidence reasonably sufficient to rebut the presumption or *prima facie* evidence as part of the appealing party's burden of proof. CHAMPUS shall not pay any part of the cost or fee, including attorney fees, associated with producing or submitting evidence in support of an appeal.

(4) *Evidence in appeal and hearing cases.* Any relevant evidence may be used in the administrative appeal and hearing process if it is the type of evidence on which reasonable persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil or criminal courts.

(5) *Late filing.* If a request for reconsideration, formal review, or hearings is filed after the time permitted in this section, written notice shall be issued denying the request. Late filing may be permitted only if the appealing party reasonably can demonstrate to the satisfaction of the Director, OCHAMPUS, or a designee, that the timely filing of the request was not feasible due to extraordinary circumstances over which the appealing party had no practical control. Each request for an exception to the filing requirement will be considered on its own merits. The decision of the Director, OCHAMPUS, or a designee, on the request for an exception to the filing requirement shall be final.

(6) *Appealable issue.* An appealable issue is required in order for an adverse determination to be appealed under the provisions of this section. Examples of issues that are not appealable under this section include:

(i) A dispute regarding a requirement of the law or regulation.

(ii) The amount of the CHAMPUS-determined allowable cost or charge, since the methodology for determining allowable costs or charges is established by this part.

(iii) The establishment of diagnosis-related groups (DRGs), or the methodology for the classification of inpatient discharges within the DRGs, or the weighting factors that reflect the relative hospital resources used with respect to discharges within each DRG, since each of these is established by this part.

(iv) Certain other issues on the basis that the authority for the initial determination is not vested in CHAMPUS. Such issues include but are not limited to the following examples:

(A) Determination of a person's eligibility as a CHAMPUS beneficiary is the responsibility of the appropriate Uniformed Service. Although OCHAMPUS, OCHAMPUSEUR, and CHAMPUS contractors must make determinations concerning a beneficiary's eligibility in order to ensure proper disbursement of appropriated funds on each CHAMPUS claim processed, ultimate responsibility for resolving a beneficiary's eligibility rests with the Uniformed Services. Accordingly, disputed question of fact concerning a beneficiary's eligibility will not be considered an appealable issue under the provisions of this section, but shall be resolved in accordance with § 199.3 of this part.

(B) Similarly, decisions relating to the issuance of a Nonavailability Statement (DD Form 1251) in each case are made by the Uniformed Services. Disputes over the need for a Nonavailability Statement or a refusal to issue a Nonavailability Statement are not appealable under this section. The one exception is when a dispute arises over whether the facts of the case demonstrate a medical emergency for which a Nonavailability Statement is not required. Denial of payment in this one situation is an appealable issue.

(C) Any sanction, including the period of the sanction, imposed under § 199.9 of this part which is based solely on a provider's exclusion or suspension by another agency of the Federal Government, a state, or a local licensing authority is not appealable under this section. The provider must exhaust administrative appeal rights offered by the other agency that made the initial determination to exclude or suspend the provider. Similarly, any sanction imposed under § 199.9 which is based solely on a criminal conviction or civil judgment against the provider is not appealable under this section. If the sanction imposed under § 199.9 is not based solely on the provider's criminal conviction or civil judgment or on the provider's exclusion or suspension by another agency of the Federal Government, a state, or a local licensing authority, that portion of the CHAMPUS administrative determination which is in addition to the criminal conviction/civil judgment or exclusion/suspension by the other agency may be appealed under this section.

(v) A decision by the Director, OCHAMPUS, or a designee, as a suspending official when the decision is final under the provisions of § 199.9(h)(1)(iv)(A).

(7) *Amount in dispute.* An amount in dispute is required for an adverse determination to be appealed under the provisions of this section, except as set forth below.

(i) The amount in dispute is calculated as the amount of money CHAMPUS would pay if the services and supplies involved in dispute were determined to be authorized CHAMPUS benefits. Examples of amounts of money that are excluded by the Regulation from CHAMPUS payments for authorized benefits include, but are not limited to:

(A) Amounts in excess of the CHAMPUS-determined allowable charge or cost.

(B) The beneficiary's CHAMPUS deductible and cost-share amounts.

(C) Amounts that the CHAMPUS beneficiary, or parent, guardian, or other responsible person has no legal obligation to pay.

(D) Amounts excluded under the provisions of § 199.8 of this part.

(ii) The amount of dispute for appeals involving a denial of a request for authorization in advance of obtaining care shall be the estimated allowable charge or cost for the services requested.

(iii) There is no requirement for an amount in dispute when the appealable issue involves a denial of a provider's request for approval as an authorized CHAMPUS provider or the determination to exclude, suspend, or terminate a provider's authorized CHAMPUS provider status.

(iv) Individual claims may be combined to meet the required amount in dispute if all of the following exist:

(A) The claims involve the same beneficiary.

(B) The claims involve the same issue.

(C) At least one of the claims so combined has had a reconsideration decision issued by OCHAMPUSEUR, a CHAMPUS contractor, or a CHAMPUS peer review organization.

NOTE: A request for administrative review under this appeal process which involves a dispute regarding a requirement of law or regulation (paragraph (a)(6)(i) of this section) or does not involve a sufficient amount in dispute (paragraph (a)(7) of this section) may not be rejected at the reconsideration level of appeal. However, an appeal shall involve an appealable issue and sufficient amount in dispute under these paragraphs to be granted a formal review or hearing.

(8) *Levels of appeal.* The sequence and procedures of a CHAMPUS appeal vary, depending on whether the initial determination was made by OCHAMPUS, OCHAMPUSEUR, a CHAMPUS contractor, or a CHAMPUS peer review organization.

(i) *Appeal levels for initial determination made by OCHAMPUSEUR, CHAMPUS contractor, or CHAMPUS peer review organization.* (A) Reconsideration by OCHAMPUSEUR, CHAMPUS contractor, or CHAMPUS peer review organization.

(B) Formal review by OCHAMPUS (except for CHAMPUS peer review organization reconsiderations).

(C) Hearing.

(ii) *Appeal levels for initial determination made by OCHAMPUS.* (A) Reconsideration by OCHAMPUSEUR or CHAMPUS contractor.

(B) Formal review by OCHAMPUS *except* (*1*) initial determinations involving the suspension of claims processing where the Director, OCHAMPUS, or a designee, determines that additional proceedings are necessary as to disputed material facts and the suspending official's decision is not final under the provisions of § 199.9(h)(1)(iv)(A) or (*2*) initial determinations involving the sanctioning (exclusion, suspension, or termination) of CHAMPUS providers. Initial determinations involving these matters shall be appealed directly to the hearing level.

(C) Hearing.

(9) *Appeal decision.* An appeal decision at any level may address all pertinent issues which arise under the appeal or are otherwise presented by the information in the case record (for example, the entire episode of care in the appeal), and shall not be limited to addressing the specific issue appealed by a party. In the case of sanctions imposed under § 199.9, the final decision may affirm, increase or reduce the sanction period imposed by CHAMPUS,

or otherwise modify or reverse the imposition of the sanction.

(b) *Reconsideration*. Any party to the initial determination made by the CHAMPUS contractor, or a CHAMPUS peer review organization may request reconsideration.

(1) *Requesting a reconsideration*—(i) *Written request required*. The request must be in writing, shall state the specific matter in dispute, and shall include a copy of the notice of initial determination (such as the CEOB form) made by OCHAMPUSEUR, the CHAMPUS contractor, or the CHAMPUS peer review organization.

(ii) *Where to file*. The request shall be submitted to the office that made the initial determination (i.e., OCHAMPUSEUR, the CHAMPUS contractor, or the CHAMPUS peer review organization) or any other CHAMPUS contractor designated in the notice of initial determination.

(iii) *Allowed time to file*. The request must be mailed within 90 days after the date of the notice of initial determination.

(iv) *Official filing date*. A request for a reconsideration shall be deemed filed on the date it is mailed and postmarked. If the request does not have a postmark, it shall be deemed filed on the date received by OCHAMPUSEUR, the CHAMPUS contractor or the CHAMPUS peer review organization.

(2) *The reconsideration process*. The purpose of the reconsideration is to determine whether the initial determination was made in accordance with law, regulation, policies, and guidelines in effect at the time the care was provided or requested, or at the time of the initial determination and/or reconsideration decision involving a provider request for approval as an authorized provider under CHAMPUS. The reconsideration is performed by a member of the OCHAMPUSEUR, CHAMPUS contractor, or CHAMPUS peer review organization staff who was not involved in making the initial determination and is a thorough and independent review of the case. The reconsideration is based on the information submitted that led to the initial determination, plus any additional information that the appealing party may submit or OCHAMPUSEUR, the CHAMPUS contractor, or CHAMPUS peer review organization may obtain.

(3) *Timeliness of reconsideration determination*. OCHAMPUSEUR, the CHAMPUS contractor, or CHAMPUS peer review organization normally shall issue its reconsideration determination no later than 60 days from the date of receipt of the request for reconsideration by OCHAMPUSEUR, the CHAMPUS contractor, or the CHAMPUS peer review organization.

(4) *Notice of reconsideration determination*. OCHAMPUSEUR, the CHAMPUS contractor, or the CHAMPUS peer review organization shall issue a written notice of the reconsideration determination to the appealing party at his or her last known address. The notice of the reconsideration must contain the following elements:

(i) A statement of the issues or issue under appeal.

(ii) The provisions of law, regulation, policies, and guidelines that apply to the issue or issues under appeal.

(iii) A discussion of the original and additional information that is relevant to the issue or issues under appeal.

(iv) Whether the reconsideration upholds the initial determination or reverses it, in whole or in part, and the rationale for the action.

(v) A statement of the right to appeal further in any case when the reconsideration determination is less than fully favorable to the appealing party and the amount in dispute is $50 or more.

(5) *Effect of reconsideration determination*. The reconsideration determination is final if either of the following exist:

(i) The amount in dispute is less than $50.

(ii) Appeal rights have been offered, but a request for formal review is not received by OCHAMPUS within 60 days of the date of the notice of the reconsideration determination.

(c) *Formal review*. Except as explained in this paragraph, any party to an initial determination made by OCHAMPUS, or a reconsideration determination made by the CHAMPUS contractor, may request a formal review by OCHAMPUS if the party is dissatisfied with the initial or reconsideration determination unless the initial or reconsideration determination is

final under paragraph (b)(5) of this section; involves the sanctioning of a provider by the exclusion, suspension or termination of authorized provider status; involves a written decision issued pursuant to §199.9(h)(1)(iv)(A) regarding the temporary suspension of claims processing; or involves a reconsideration determination by a CHAMPUS peer review organization. A hearing, but not a formal review level of appeal, may be available to a party to an initial determination involving the sanctioning of a provider or to a party to a written decision involving a temporary suspension of claims processing. A beneficiary (or an authorized representative of a beneficiary), but not a provider (except as provided in §199.15), may request a hearing, but not a formal review, of a reconsideration determination made by a CHAMPUS peer review organization.

(1) *Requesting a formal review.* (i) *Written request required.* The request must be in writing, shall state the specific matter in dispute, shall include copies of the written determination (notice of reconsideration determination or OCHAMPUS initial determination) being appealed, and shall include any additional information or documents not submitted previously.

(ii) *Where to file.* The request shall be submitted to the Chief, Office of Appeals and Hearings, TRICARE Management Activity, 16401 East Centretech Parkway, Auroa, Colorado 80011–9066.

(iii) *Allowed time to file.* The request shall be mailed within 60 days after the date of the notice of the reconsideration determination or OCHAMPUS initial determination being appealed.

(iv) *Official filing date.* A request for a formal review shall be deemed filed on the date it is mailed and postmarked. If the request does not have a postmark, it shall be deemed filed on the date received by OCHAMPUS.

(2) *The formal review process.* The purpose of the formal review is to determine whether the initial determination or reconsideration determination was made in accordance with law, regulation, policies, and guidelines in effect at the time the care was provided or requested or at the time of the initial determination, reconsideration, or formal review decision involving a provider request for approval as an authorized CHAMPUS provider. The formal review is performed by the Chief, Office of Appeals and Hearings, OCHAMPUS, or a designee, and is a thorough review of the case. The formal review determination shall be based on the information, upon which the initial determination and/or reconsideration determination was based, and any additional information the appealing party may submit or OCHAMPUS may obtain.

(3) *Timeliness of formal review determination.* The Chief, Office of Appeals and Hearings, OCHAMPUS, or a designee normally shall issue the formal review determination no later than 90 days from the date of receipt of the request for formal review by the OCHAMPUS.

(4) *Notice of formal review determination.* The Chief, Office of Appeals and Hearings, OCHAMPUS, or a designee shall issue a written notice of the formal review determination to the appealing party at his or her last known address. The notice of the formal review determination must contain the following elements:

(i) A statement of the issue or issues under appeal.

(ii) The provisions of law, regulation, policies, and guidelines that apply to the issue or issues under appeal.

(iii) A discussion of the original and additional information that is relevant to the issue or issues under appeal.

(iv) Whether the formal review upholds the prior determination or determinations or reverses the prior determination or determinations in whole or in part and the rationale for the action.

(v) A statement of the right to request a hearing in any case when the formal review determination is less than fully favorable, the issue is appealable, and the amount in dispute is $300 or more.

(5) *Effect of formal review determination.* The formal review determination is final if one or more of the following exist:

(i) The issue is not appealable. (See paragraph (a)(6) of this section.)

(ii) The amount in dispute is less than $300. (See paragraph (a)(7) of this section.)

(iii) Appeal rights have been offered but a request for hearing is not received by OCHAMPUS within 60 days of the date of the notice of the formal review determination.

(d) *Hearing*. Any party to the initial determination may request a hearing if the party is dissatisfied with the formal review determination and the formal review determination is not final under the provisions of paragraph (c)(5), of this section, *or* the initial determination involves the sanctioning of a provider under § 199.9 of this part and involves an appealable issue.

(1) *Requesting a hearing*—(i) *Written request required*. The request shall be in writing, state the specific matter in dispute, include a copy of the appropriate initial determination or formal review determination being appealed, and include any additional information or documents not submitted previously.

(ii) *Where to file*. The request shall be submitted to the Chief, Appeals and Hearings, OCHAMPUS, Aurora, Colorado 80045–6900.

(iii) *Allowed time to file*. The request shall be mailed within 60 days after the date of the notice of the initial determination or formal review determination being appealed.

(iv) *Official filing date*. A request for hearing shall be deemed filed on the date it is mailed and postmarked. If a request for hearing does not have a postmark, it shall be deemed filed on the day received by OCHAMPUS.

(2) *Hearing process*. A hearing is an administrative proceeding in which facts relevant to the appealable issue(s) in the case are presented and evaluated in relation to applicable law, regulation, policies, and guidelines in effect at the time the care in dispute was provided or requested; at the time of the initial determination, formal review determination, or hearing decision involving a provider request for approval under CHAMPUS as an authorized provider; or at the time of the act or event which is the basis for the imposition of sanctions under this part. A hearing, except for an appeal involving a provider sanction, generally shall be conducted as a nonadversary, administrative proceeding. However, an authorized party to any hearing, including CHAMPUS, may submit additional evidence or testimony relevant to the appealable issue(s) and may appoint a representative, including legal counsel, to participate in the hearing process.

(3) *Timeliness of hearing*. (i) Except as otherwise provided in this section, within 60 days following receipt of a request for hearing, the Director, OCHAMPUS, or a designee, normally will appoint a hearing officer to hear the appeal. Copies of all records in the possession of OCHAMPUS that are pertinent to the matter to be heard or that formed the basis of the formal review determination shall be provided to the hearing officer and, upon request, to the appealing party.

(ii) The hearing officer, except as otherwise provided in this Section, normally shall have 60 days from the date of written notice of assignment to review the file, schedule and hold the hearing, and issue a recommended decision to the Director, OCHAMPUS, or designee.

(iii) The Director, OCHAMPUS, or designee, may delay the case assignment to the hearing officer if additional information is needed that cannot be obtained and included in the record within the time period specified above. The appealing party will be notified in writing of the delay resulting from the request for additional information. The Director, OCHAMPUS, or a designee, in such circumstances, will assign the case to a hearing officer within 30 days of receipt of all such additional information, or within 60 days of receipt of the request for hearing, whichever shall occur last.

(iv) The hearing officer may delay submitting the recommended decision if, at the close of the hearing, any party to the hearing requests that the record remain open for submission of additional information. In such circumstances, the hearing officer will have 30 days following receipt of all such additional information including comments from the other parties to the hearing concerning the additional information to submit the recommended decision to the Director, OCHAMPUS, or a designee.

(4) *Representation at a hearing*. Any party to the hearing may appoint a

representative to act on behalf of the party at the hearing, unless such person currently is disqualified or suspended from acting in another Federal administrative proceeding, or unless otherwise prohibited by law, this part, or any other DoD regulation (see paragraph (a)(2)(ii) of this section). A hearing officer may refuse to allow any person to represent a party at the hearing when such person engages in unethical, disruptive, or contemptuous conduct, or intentionally fails to comply with proper instructions or requests of the hearing officer, or the provisions of this part. The representative shall have the same authority as the appealing party and notice given to the representative shall constitute notice required to be given to the appealing party.

(5) *Consolidation of proceedings.* The Director, OCHAMPUS, or a designee, may consolidate any number of proceedings for hearing when the facts and circumstances are similar and no substantial right of an appealing party will be prejudiced.

(6) *Authority of the hearing officer.* The hearing officer in exercising the authority to conduct a hearing under this part will be bound by 10 U.S.C. chapter 55 and this part. The hearing officer in addressing substantive, appealable issues shall be bound by policy manuals, instructions, procedures, and other guidelines issued by the ASD(HA), or a designee, or by the Director, OCHAMPUS, or a designee, in effect for the period in which the matter in dispute arose. A hearing officer may not establish or amend policy, procedures, instructions, or guidelines. However, the hearing officer may recommend reconsideration of the policy, procedures, instructions or guidelines by the ASD(HA), or a designee, when the final decision is issued in the case.

(7) *Disqualification of hearing officer.* A hearing officer voluntarily shall disqualify himself or herself and withdraw from any proceeding in which the hearing officer cannot give fair or impartial hearing, or in which there is a conflict of interest. A party to the hearing may request the disqualification of a hearing officer by filing a statement detailing the reasons the party believes that a fair and impartial hearing cannot be given or that a conflict of interest exists. Such request immediately shall be sent by the appealing party or the hearing officer to the Director, OCHAMPUS, or a designee, who shall investigate the allegations and advise the complaining party of the decision in writing. A copy of such decision also shall be mailed to all other parties to the hearing. If the Director, OCHAMPUS, or a designee, reassigns the case to another hearing officer, no investigation shall be required.

(8) *Notice and scheduling of hearing.* The hearing officer shall issue by certified mail, when practicable, a written notice to the parties to the hearing of the time and place for the hearing. Such notice shall be mailed at least 15 days before the scheduled date of the hearing. The notice shall contain sufficient information about the hearing procedure, including the party's right to representation, to allow for effective preparation. The notice also shall advise the appealing party of the right to request a copy of the record before the hearing. Additionally, the notice shall advise the appealing party of his or her responsibility to furnish the hearing officer, no later than 7 days before the scheduled date of the hearing, a list of all witnesses who will testify and a copy of all additional information to be presented at the hearing. The time and place of the hearing shall be determined by the hearing officer, who shall select a reasonable time and location mutually convenient to the appealing party and OCHAMPUS.

(9) *Dismissal of request for hearing.* (i) *By application of appealing party.* A request for hearing may be dismissed by the Director, OCHAMPUS, or a designee, at any time before the mailing of the final decision, upon the application of the appealing party. A request for dismissal must be in writing and filed with the Chief, Appeals and Hearings, OCHAMPUS, or the hearing officer. When dismissal is requested, the formal review determination in the case shall be deemed final, unless the dismissal is vacated in accordance with paragraph (d)(9)(v) of this section.

(ii) *By stipulation of the parties to the hearing.* A request for a hearing may be dismissed by the Director, OCHAMPUS, or a designee, at any time

before to the mailing of notice of the final decision under a stipulation agreement between the appealing party and OCHAMPUS. When dismissal is entered under a stipulation, the formal review decision shall be deemed final, unless the dismissal is vacated in accordance with paragraph (d)(9)(v) of this section.

(iii) *By abandonment.* The Director, OCHAMPUS, or a designee, may dismiss a request for hearing upon abandonment by the appealing party.

(A) An appealing party shall be deemed to have abandoned a request for hearing, other than when personal appearance is waived in accordance with §199.10(d)(11)(xii), if neither the appealing party nor an appointed representative appears at the time and place fixed for the hearing and if, within 10 days after the mailing of a notice by certified mail to the appealing party by the hearing officer to show cause, such party does not show good and sufficient cause for such failure to appear and failure to notify the hearing officer before the time fixed for hearing that an appearance could not be made.

(B) An appealing party shall be deemed to have abandoned a request for hearing if, before assignment of the case to the hearing officer, OCHAMPUS is unable to locate either the appealing party or an appointed representative.

(C) An appealing party shall be deemed to have abandoned a request for hearing if the appealing party fails to prosecute the appeal. Failure to prosecute the appeal includes, but is not limited to, an appealing party's failure to provide information reasonably requested by OCHAMPUS or the hearing officer for consideration in the appeal.

(D) If the Director, OCHAMPUS, or a designee, dismisses the request for hearing because of abandonment, the formal review determination in the case shall be deemed to be final, unless the dismissal is vacated in accordance with paragraph (d)(9)(v) of this section.

(iv) *For cause.* The Director, OCHAMPUS, or a designee, may dismiss for cause a request for hearing either entirely or as to any stated issue. If the Director, OCHAMPUS, or a designee, dismisses a hearing request for cause, the formal review determination in the case shall be deemed to be final, unless the dismissal is vacated in accordance with paragraph (d)(9)(v) of this section. A dismissal for cause may be issued under any of the following circumstances:

(A) When the appealing party requesting the hearing is not a proper party under paragraph (a)(2)(i) of this section, or does not otherwise have a right to participate in a hearing.

(B) When the appealing party who filed the hearing request dies, and there is no information before the Director, OCHAMPUS, or a designee, showing that a party to the initial determination who is not an appealing party may be prejudiced by the formal review determination.

(C) When the issue is not appealable (see §199.10(a)(6)).

(D) When the amount in dispute is less than $300 (see §199.10(a)(7)).

(E) When all appealable issues have been resolved in favor of the appealing party.

(v) *Vacation of dismissal.* Dismissal of a request for hearing may be vacated by the Director, OCHAMPUS, or a designee, upon written request of the appealing party, if the request is received within 6 months of the date of the notice of dismissal mailed to the last known address of the party requesting the hearing.

(10) *Preparation for hearing.* (i) *Prehearing statement of contentions.* The hearing officer may on reasonable notice require a party to the hearing to submit a written statement of contentions and reasons. The written statement shall be provided to all parties to the hearing before the hearing takes place.

(ii) *Discovery.* Upon the written request of a party to the initial determination (including OCHAMPUS) and for good cause shown, the hearing officer will allow that party to inspect and copy all documents, unless privileged, relevant to issues in the proceeding that are in the possession or control of the other party participating in the appeal. The written request shall state clearly what information and documents are required for inspection and the relevance of the documents to the issues in the proceeding. Depositions,

interrogatories, requests for admissions, and other forms of prehearing discovery are generally not authorized and the Department of Defense does not have subpoena authority for purposes of administrative hearings under this Section. If the hearing officer finds that good cause exists for taking a deposition or interrogatory, the expense shall be assessed to the requesting party, with copies furnished to the hearing officer and the other party or parties to the hearing.

(iii) *Witnesses and evidence.* All parties to a hearing are responsible for producing, at each party's expense, meaning without reimbursement of payment by CHAMPUS, witnesses and other evidence in their own behalf, and for furnishing copies of any such documentary evidence to the hearing officer and other party or parties to the hearing. The Department of Defense is not authorized to subpoena witnesses or records. The hearing officer may issue invitations and requests to individuals to appear and testify without cost to the Government, so that the full facts in the case may be presented.

(11) *Conduct of hearing.* (i) *Right to open hearing.* Because of the personal nature of the matters to be considered, hearings normally shall be closed to the public. However, the appealing party may request an open hearing. If this occurs, the hearing shall be open except when protection of other legitimate Government purposes dictates closing certain portions of the hearing.

(ii) *Right to examine parties to the hearing and their witnesses.* Each party to the hearing shall have the right to produce and examine witnesses, to introduce exhibits, to question opposing witnesses on any matter relevant to the issue even though the matter was not covered in the direct examination, to impeach any witness regardless of which party to the hearing first called the witness to testify, and to rebut any evidence presented. Except for those witnesses employed by OCHAMPUS at the time of the hearing, or records in the possession of OCHAMPUS, a party to a hearing shall be responsible, that is to say no payment or reimbursement shall be made by CHAMPUS for the cost or fee associated with producing witnesses or other evidence in the party's own behalf, or for furnishing copies of documentary evidence to the hearing officer and other party or parties to the hearing.

(iii) *Taking of evidence.* The hearing officer shall control the taking of evidence in a manner best suited ascertain the facts and safeguard the rights of the parties to the hearing. Before taking evidence, the hearing officer shall identify and state the issues in dispute on the record and the order in which evidence will be received.

(iv) *Questioning and admission of evidence.* A hearing officer may question any witness and shall admit any relevant evidence. Evidence that is irrelevant or unduly repetitious shall be excluded.

(v) *Relevant evidence.* Any relevant evidence shall be admitted, unless unduly repetitious, if it is the type of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule that might make improper the admission of such evidence over objection in civil or criminal actions.

(vi) *CHAMPUS determination first.* The basis of the CHAMPUS determinations shall be presented to the hearing officer first. The appealing party shall then be given the opportunity to establish affirmatively why this determination is held to be in error.

(vii) *Testimony.* Testimony shall be taken only on oath, affirmation, or penalty of perjury.

(viii) *Oral argument and briefs.* At the request of any party to the hearing made before the close of the hearing, the hearing officer shall grant oral argument. If written argument is requested, it shall be granted, and the parties to the hearing shall be advised as to the time and manner within which such argument is to be filed. The hearing officer may require any party to the hearing to submit written memoranda pertaining to any or all issues raised in the hearing.

(ix) *Continuance of hearing.* A hearing officer may continue a hearing to another time or place on his or her own motion or, upon showing of good cause, at the request of any party. Written notice of the time and place of the continued hearing, except as otherwise

provided here, shall be in accordance with this part. When a continuance is ordered during a hearing, oral notice of the time and place of the continued hearing may be given to each party to the hearing who is present at the hearing.

(x) *Continuance for additional evidence*. If the hearing officer determines, after a hearing has begun, that additional evidence is necessary for the proper determination of the case, the following procedures may be invoked:

(A) *Continue hearing*. The hearing may be continued to a later date in accordance with § 199.10(d)(11)(ix), above.

(B) *Closed hearing*. The hearing may be closed, but the record held open in order to permit the introduction of additional evidence. Any evidence submitted after the close of the hearing shall be made available to all parties to the hearing, and all parties to the hearing shall have the opportunity for comment. The hearing officer may reopen the hearing if any portion of the additional evidence makes further hearing desirable. Notice thereof shall be given in accordance with paragraph (d)(8) of this section.

(xi) *Transcript of hearing*. A verbatim taped record of the hearing shall be made and shall become a permanent part of the record. Upon request, the appealing party shall be furnished a duplicate copy of the tape. A typed transcript of the testimony will be made only when determined to be necessary by OCHAMPUS. If a typed transcript is made, the appealing party shall be furnished a copy without charge. Corrections shall be allowed in the typed transcript by the hearing officer solely for the purpose of conforming the transcript to the actual testimony.

(xii) *Waiver of right to appear and present evidence*. If all parties waive their right to appear before the hearing officer for presenting evidence and contentions personally or by representation, it will not be necessary for the hearing officer to give notice of, or to conduct a formal hearing. A waiver of the right to appear must be in writing and filed with the hearing officer or the Chief, Appeals and Hearings, OCHAMPUS. Such waiver may be withdrawn by the party by written notice received by the hearing officer or Chief, Appeals and Hearings, no later than 7 days before the scheduled hearing or the mailing of notice of the final decision, whichever occurs first. For purposes of this Section, failure of a party to appear personally or by representation after filing written notice of waiver, will not be cause for finding of abandonment and the hearing officer shall make the recommended decision on the basis of all evidence of record.

(12) *Recommended decision*. At the conclusion of the hearing and after the record has been closed, the matter shall be taken under consideration by the hearing officer. Within the time frames previously set forth in this Section, the hearing officer shall submit to the Director, OCHAMPUS, or a designee, a written recommended decision containing a statement of findings and a statement of reasons based on the evidence adduced at the hearing and otherwise included in the hearing record.

(i) *Statement of findings*. A statement of findings is a clear and concise statement of fact evidenced in the record or conclusions that readily can be deduced from the evidence of record. Each finding must be supported by substantial evidence that is defined as such evidence as a reasonable mind can accept as adequate to support a conclusion.

(ii) *Statement of reasons*. A reason is a clear and concise statement of law, regulation, policies, or guidelines relating to the statement of findings that provides the basis for the recommended decision.

(e) *Final decision*—(1) *Director, OCHAMPUS*. The recommended decision shall be reviewed by the Director, OCHAMPUS, or a designee, who shall adopt or reject the recommended decision or refer the recommended decision for review by the Assistant Secretary of Defense (Health Affairs). The Director, OCHAMPUS, or designee, normally will take action with regard to the recommended decision within 90 days of receipt of the recommended decision or receipt of the revised recommended decision following a remand order to the Hearing Officer.

(i) *Final action*. If the Director, OCHAMPUS, or a designee, concurs in the recommended decision, no further

agency action is required and the recommended decision, as adopted by the Director, OCHAMPUS, is the final agency decision in the appeal. In the case of rejection, the Director, OCHAMPUS, or a designee, shall state the reason for disagreement with the recommended decision and the underlying facts supporting such disagreement. In these circumstances, the Director, OCHAMPUS, or a designee, may have a final decision prepared based on the record, or may remand the matter to the Hearing Officer for appropriate action. In the latter instance, the Hearing Officer shall take appropriate action and submit a new recommended decision within 60 days of receipt of the remand order. The decision by the Director, OCHAMPUS, or a designee, concerning a case arising under the procedures of this section, shall be the final agency decision and the final decision shall be sent by certified mail to the appealing party or parties. A final agency decision under paragraph (e)(1) of this section will not be relied on, used, or cited as precedent by the Department of Defense in the administration of CHAMPUS.

(ii) *Referral for review by ASD(HA).* The Director, OCHAMPUS, or a designee, may refer a hearing case to the Assistant Secretary of Defense (Health Affairs) when the hearing involves the resolution of CHAMPUS policy and issuance of a final decision which may be relied on, used, or cited as precedent in the administration of CHAMPUS. In such a circumstance, the Director, OCHAMPUS, or a designee, shall forward the recommended decision, together with the recommendation of the Director, OCHAMPUS, or a designee, regarding disposition of the hearing case.

(2) *ASD(HA).* The ASD(HA), or a designee, after reviewing a case arising under the procedures of this section may issue a final decision based on the record in the hearing case or remand the case to the Director, OCHAMPUS, or a designee, for appropriate action. A decision issued by the ASD(HA), or a designee, shall be the final agency decision in the appeal and a copy of the final decision shall be sent by certified mail to the appealing party or parties. A final decision of the ASD(HA), or a designee, issued under this paragraph (e)(2) may be relied on, used, or cited as precedent in the administration of CHAMPUS.

[51 FR 24008, July 1, 1986, as amended at 52 FR 33007, Sept. 1, 1987; 54 FR 25255, June 14, 1989; 55 FR 43341, Nov. 16, 1990; 56 FR 59880, Nov. 26, 1991; 66 FR 40607, Aug. 3, 2001; 68 FR 11973, Mar. 13, 2003; 68 FR 23033, Apr. 30, 2003; 68 FR 32362, May 30, 2003; 69 FR 6920, Feb. 12, 2004]

### § 199.11 Overpayments recovery.

(a) *General.* Actions to recover overpayments arise when the government has a right to recover money, funds, or property from any person, partnership, association, corporation, governmental body or other legal entity, foreign or domestic, except another Federal agency, because of an erroneous payment of benefits under both CHAMPUS and the TRICARE program under this part. The term ''Civilian Health and Medical Program of the Uniformed Services'' (CHAMPUS) is defined in 10 U.S.C. 1072(2), referred to as the CHAMPUS basic program. Prior to January 1, 2018, the term ''TRICARE program'' referred to the triple-option of health benefits known as TRICARE Prime, TRICARE Extra, and TRICARE Standard. Specifically, TRICARE Standard was the TRICARE program under which the basic program of health care benefits generally referred to as CHAMPUS was made available to eligible beneficiaries under this Part 199. Effective January 1, 2018, the term ''TRICARE program'' is defined in 10 U.S.C. 1072(2) and includes TRICARE Prime, TRICARE Select and TRICARE for Life. It is the purpose of this section to prescribe procedures for investigation, determination, assertion, collection, compromise, waiver and termination of claims in favor of the United States for erroneous benefit payments arising out of the administration CHAMPUS and the TRICARE program. For the purpose of this section, references herein to TRICARE beneficiaries, claims, benefits, payments, or appeals shall include CHAMPUS beneficiaries, claims, benefits, payments, or appeals. A claim against several joint debtors arising from a single incident or transaction is considered one claim. The Director, or a designee, may pursue collection

against all joint debtors and is not required to allocate the burden of payment between debtors.

(b) *Authority*—(1) *Federal statutory authority*. The Federal Claims Collection Act, 31 U.S.C. 3701, *et seq.*, as amended by the Debt Collection Act of 1982 and the Debt Collection Improvement Act of 1996 (DCIA), provides the basic authority under which claims may be asserted pursuant to this section. The DCIA is implemented by the Federal Claims Collection Standards, joint regulations issued by the Department of the Treasury (Treasury) and the Department of Justice (DOJ) (31 CFR Parts 900–904), that prescribe government-wide standards for administrative collection, offset, compromise, suspension, or termination of agency collection action, disclosure of debt information to credit reporting agencies, referral of debts to private collection contractors for resolution, and referral to the Department of Justice for litigation to collect debts owed the Federal government. The regulations under this part are also issued under Treasury regulations implementing the DCIA (31 CFR part 285) and related statutes and regulations governing the offset of Federal salaries (5 U.S.C. 5514; 5 CFR part 550, subpart K), administrative offset (31 U.S.C. 3716; 31 CFR part 285, subpart A); administrative offset of tax refunds (31 U.S.C. 3720A) and offset of military pay (37 U.S.C. 1007(c); Volume 7A, Chapter 50 and Volume 7B, Chapter 28 of the Department of Defense Financial Management Regulation, DOD 7000.14–R[1] (DoDFMR)).

(2) *Other authority*. Federal claims may arise under authorities other than the federal statutes, referenced above. These include, but are not limited to:

(i) State worker's compensation laws.

(ii) State hospital lien laws.

(iii) State no-fault automobile statutes.

(iv) Contract rights under terms of insurance policies.

(c) *Policy*. The Director, TMA, or a designee, shall aggressively collect all debts arising out of its activities. Claims arising out of any incident, which has or probably will generate a claim in favor of the government, will not be compromised, except as otherwise provided in this section, nor will any person not authorized to take final action on the government's claim, compromise or terminate collection action. Title 28 U.S.C. 2415–2416 establishes a statute of limitation applicable to the government where previously neither limitations nor latches were available as a defense. Claims falling within the provisions of this statute will be referred to the Department of Justice without attempting administrative collection action, if such action cannot be accomplished in sufficient time to preclude the running of the statute of limitations.

(d) *Appealability*. This section describes the procedures to be followed in the recovery and collection of federal claims in favor of the United States arising from the operation of TRICARE. Actions taken under this section are not initial determinations for the purpose of the appeal procedures of § 199.10 of this part. However, the proper exercise of the right to appeal benefit or provider status determinations under the procedures set forth in § 199.10 of this part may affect the processing of federal claims arising under this section. Those appeal procedures afford a TRICARE beneficiary or participating provider an opportunity for administrative appellate review in cases in which benefits have been denied and in which there is an appealable issue. For example, a TRICARE contractor may erroneously make payment for services, which are excluded as TRICARE benefits because they are determined to be not medically necessary. In that event, the contractor will initiate recoupment action, and at the same time, the contractor will offer an administrative appeal as provided in § 199.10 of this part on the medical necessity issue raised by the adverse benefit determination. The recoupment action and the administrative appeal are separate actions. However, in an appropriate case, the pendency of the appeal may provide a basis for the suspension of collection in the recoupment case. If an appeal were resolved entirely in favor of the appealing party, it would provide a basis for

[1] Copies may be obtained at *http://www.dtic.mil/whs/directives/*.

the termination of collection action in the recoupment case.

(e) *Delegation.* Subject to the limitations imposed by law or contained in this section, the authority to assert, settle, and compromise or to suspend or terminate collection action arising on claims under the Federal Claims Collection Act has been delegated to the Director, TMA, or a designee.

(f) *Recoupment of erroneous payments.* (1) Erroneous payments are expenditures of government funds, which are not authorized by law or this part. Examples which are sometimes encountered in the administration of TRICARE include mathematical errors, payment for care provided to an ineligible person, payment for care which is not an authorized benefit, payment for duplicate claims, incorrect application of the deductible or co-payment or payment for services which were not medically necessary. Claims in favor of the government arising as the result of the filing of false TRICARE claims or other fraud fall under the cognizance of the Department of Justice. Consequently, procedures in this section apply to such claims only when specifically authorized or directed by the Department of Justice. (*See* 31 CFR 900.3.) Due to the nature of contractual agreements between network providers and TRICARE prime contractors, recoupment procedures may be modified or adapted to conform to network agreements. The provisions of §199.11 shall apply if recoupment under the network agreements is not successful.

(2) *Scope*—(i) *General.* Paragraph (f) of this section and the paragraphs following contain requirements and procedures for the assertion, collection or compromise of, and the suspension or termination of collection action on claims for erroneous payments against a sponsor, patient, beneficiary, provider, physician or other supplier of products or services under TRICARE.

(ii) *Debtor defined.* As used herein, ''debtor'' means a sponsor, beneficiary, provider, physician, other supplier of services or supplies, or any other person who for any reason has been erroneously paid under TRICARE. It includes an individual, partnership, corporation, professional corporation or association, estate, trust or any other legal entity.

(iii) *Delinquency defined.* A debt is ''delinquent'' if it has not been paid by the date specified in the initial written demand for payment (that is, the initial written notification) or other applicable contractual agreement, unless other satisfactory payment arrangements have been made by the date specified in the initial written demand for payment. A debt is considered delinquent if at any time after entering into a repayment agreement, the debtor fails to satisfy any obligations under that agreement.

(3) Claims arising from erroneous TRICARE payments in situations where the beneficiary has entitlement to an insurance, medical service, health and medical plan, including any plan offered by a third party payer as defined in 10 U.S.C. 1095(h)(1) or other government program, except in the case of a plan administered under Title XIX of the Social Security Act (42 U.S.C. 1396, *et seq.*) through employment, by law, through membership in an organization, or as a student, or through the purchase of a private insurance or health plan, shall be recouped following the procedures in paragraph (f) of this section. If the other plan has not made payment to the beneficiary or provider, the contractor shall first attempt to recover the overpayment from the other plan through the contractor's coordination of benefits procedures. If the overpayment cannot be recovered from the other plan, or if the other plan has made payment, the overpayment will be recovered from the party that received the erroneous payment from TRICARE. Nothing in this section shall be construed to require recoupment from any sponsor, beneficiary, provider, supplier and/or the Medicare Program under Title XVIII of the Social Security Act in the event of a retroactive determination of entitlement to SSDI and Medicare Part A coverage made by the Social Security Administration as discussed in §199.8(d) of this part.

(4) *Claim denials due to clarification or change.* In those instances where claim review results in the denial of benefits previously provided, but now denied

due to a change, clarification or interpretation of the public law or this part, no recoupment action need be taken to recover funds expended prior to the effective date of such change, clarification or interpretation.

(5) *Good faith payment.* (i) The Department of Defense, through the Defense Enrollment Eligibility Reporting System (DEERS), is responsible for establishing and maintaining a file listing of persons eligible to receive benefits under TRICARE. However, it is the responsibility of the Uniformed Services to provide eligible TRICARE beneficiaries with accurate and appropriate means of identification. When sources of civilian medical care exercise reasonable care and precaution identifying persons claiming to be eligible TRICARE beneficiaries, and furnish otherwise covered services and supplies to such persons in good faith, TRICARE benefits may be paid subject to prior approval by the Director, TMA, or a designee, notwithstanding the fact that the person receiving the services and supplies is subsequently determined to be ineligible for benefits. Good faith payments will not be authorized for services and supplies provided by a civilian source of medical care because of its own careless identification procedures.

(ii) When it is determined that a person was not a TRICARE beneficiary, the TRICARE contractor and the civilian source of medical care are expected to make all reasonable efforts to obtain payment or to recoup the amount of the good faith payment from the person who erroneously claimed to be the TRICARE beneficiary. Recoupment of good faith payments initiated by the TRICARE contractor will be processed pursuant to the provisions of paragraph (f) of this section.

(6) *Recoupment procedures.* (i) *Initial action.* When an erroneous payment is discovered, the TRICARE contractor normally will be required to take the initial action to effect recoupment. Such actions will be in accordance with the provisions of this part and the TRICARE contracts and will include a demand (or demands) for refund or an offset against any other TRICARE payment(s) becoming due the debtor. When the efforts of the TRICARE contractor to effect recoupment are not successful within a reasonable time, recoupment cases will be referred to the Office of General Counsel, TMA, for further action in accordance with the provisions of paragraph (f) of this section. All requests to debtors for refund or notices of intent to offset shall be in writing.

(ii) *Demand for payment.* Written demand(s) for payment shall inform the debtor of the following:

(A) The basis for and amount of the debt and the consequences of failing to cooperate to resolve the debt;

(B) The right to inspect and copy TRICARE records pertaining to the debt;

(C) The opportunity to request an administrative review by the TRICARE contractor; and that such a request must be received by the TRICARE contractor within 90 days from the date of the initial demand letter;

(D) That payment of the debt is due within 30 days from the date of the initial demand notification;

(E) That interest will be assessed on the debt at the Treasury Current Value of Funds rate, pursuant to 31 U.S.C. 3717, and will begin to accrue on the date of the initial demand letter; and that interest will be waived on the debt, or any portion thereof, which is paid within 30 days from the date of the initial demand notification letter;

(F) That administrative costs and penalties will be charged pursuant to 31 CFR 901.9;

(G) That collection by offset against current or subsequent claims or other amounts payable from the government may be taken;

(H) The opportunity to enter into a written agreement to repay the debt;

(I) The name, address, and phone number of a contact person or office that the debtor may contact regarding the debt.

(iii) A minimum of one demand letter is required. However, the specific content, timing and number of demand letters may be tailored to the type and amount of the debt, and the debtor's response, if any. Contractors' demand letters must be mailed or hand-delivered on the same date they are dated.

(iv) The initial or subsequent demand letters may also inform the debtor of the requirement to report delinquent

debts to credit reporting agencies and to collection agencies, the requirement to refer debts to the Treasury Offset Program for offset from Federal income tax refunds and other amounts payable by the Government, offset from state payments, the requirement to refer debts to Treasury for collection and TRICARE policies concerning the referral of delinquent debts to the Department of Justice for enforced collection action. The initial or subsequent demand letter may also inform the debtor of TRICARE policies concerning waiver. When necessary to protect the Government's interest (for example to prevent the running of a statute of limitations), written demand may be preceded by other appropriate actions under this regulation, including referral to the Department of Justice for litigation. There should be no undue delay in responding to any communication received from the debtor. Responses to communications from debtors should be made within 30 days of receipt whenever feasible. If prior to the initiation of the demand process or at any time during or after completion of the demand process, the Director, TMA, or a designee, determines to pursue or is required to pursue offset, the procedures applicable to administrative offset, found at paragraph (f)(6)(v) of this section, must be followed. If it appears that initial collection efforts are not productive or if immediate legal action on the claim appears necessary, the claim shall be referred promptly by the contractor to the Office of General Counsel, TMA.

(v) *Collection by administrative offset.* Collections by offset will be undertaken administratively in every instance when feasible. Collections may be taken by administrative offset under 31 U.S.C. 3716, the common law or other applicable statutory authority. No collection by offset may be undertaken unless the debtor has been sent a written demand for payment, including the procedural safeguards described in paragraph (f)(6)(ii) of this section, unless the failure to take the offset would substantially prejudice the Government's ability to collect the debt, and the time before payment is to be made does not reasonably permit the time for sending written notice. Such prior offset must be promptly followed by sending a written notice and affording the debtor the opportunity for a review by the TRICARE contractor. Examples of erroneous payments include, but are not limited to, claims submitted by individuals ineligible for TRICARE benefits, claims submitted for non-covered services or supplies, claims for which payments by another insurance or health plan reduce TRICARE liability, and from claims made from participating providers in which payment was initially erroneously made to the beneficiary. The resolution of recoupment claims rarely involves issues of credibility or veracity and a review of the written record is ordinarily an adequate means to correct prior mistakes. For this reason, the pre-offset oral hearing requirements of the Federal Claims Collection Standards, 31 CFR 901.3(e) do not apply to the recoupment of erroneous TRICARE payments. However, in instances where an oral hearing is not required, the debtor will be afforded an administrative review if the TRICARE contractor receives a written request for an administrative review within 90 days from the date of the initial demand letter. The appeals procedures described in § 199.10 of this part, afford a TRICARE beneficiary or participating provider an opportunity for an administrative appellate review, including under certain circumstances, the right to an oral hearing before a hearing officer when an appealable issue exists. TRICARE contractors may take administrative action to offset erroneous payments against other current TRICARE payments owing a debtor. Payments on the claims of a debtor pending at or filed subsequent to the time collection action is initiated should be suspended pending the outcome of the collection action so that these funds will be available for offset. All or part of a debt may be offset depending on the amount available for offset. Any requests for offset received from other agencies and garnishment orders issued by courts of competent jurisdiction will be forwarded to the Office of General Counsel, TMA. Unless otherwise provided by law, administrative offset of payments under the authority of 31 U.S.C. 3716

may not be conducted more than 10 years after the Government's right to collect the debt first accrued, unless facts material to the Government's right to collect the debt were not known and could not reasonably have been known by the TRICARE official or officials charged with the responsibility to discover and collect such debts. This limitation does not apply to debts reduced to judgment. This section does not apply to debts arising under the Social Security Act, except as provided in 42 U.S.C. 404, payments made under the Social Security Act, except as provided for in 31 U.S.C. 3716(c), debts arising under, or payments made under, the Internal Revenue Code, except for offset of tax refunds or tariff laws of the United States; offsets against Federal salaries to the extent these standards are inconsistent with regulations published to implement such offsets under 5 U.S.C. 5514 and 31 U.S.C. 3716; offsets under 31 U.S.C. 3728 against a judgment obtained by a debtor against the United States; offset or recoupment under common law, state law, or federal statutes specifically prohibiting offset or recoupment of particular types of debts or offsets in the course of judicial proceedings, including bankruptcy.

(A) *Referral for centralized administrative offset.* When cost-effective, legally enforceable non-tax debts delinquent over 180 days that are eligible for collection through administrative offset shall be referred to Treasury for administrative offset, unless otherwise exempted from referral. Referrals shall include certification that the debt is past due and legally enforceable and that TMA has complied with all due process requirements of the statute-authorizing offset. Administrative offset, including administrative offset against tax refunds due debtors under 26 U.S.C. 6402, in accordance with 31 U.S.C. 3720A, shall be effected through referral for centralized administrative offset, after debtors have been afforded at least sixty (60) days notice required in paragraph (f)(6) of this section. Salary offsets shall be effected through referral for centralized administrative offset, after debtors have been afforded due process required by 5 U.S.C. 5514, in accordance with 31 CFR 285.7. Referrals for salary offset shall include certification that the debts are past due, legally enforceable debts and that TMA has complied with all due process requirements under 5 U.S.C. 5514 and applicable agency regulations. The Treasury, Financial Management Service (FMS) may waive the salary offset certification requirement set forth in 31 CFR 285.7, as a prerequisite to submitting the debt to FMS for offset from other payment types. If FMS waives the certification requirement, before an offset occurs, TMA will provide the employee with the notice and opportunity for a hearing as required by 5 U.S.C. 5514 and applicable regulations, and will certify to FMS that the requirements of 5 U.S.C. 5514 and applicable agency regulations have been met. TMA is not required to duplicate notice and administrative review or salary offset hearing opportunities before referring debts for centralized administrative offset when the debtor has been previously given them.

(B) *Referral for non-centralized administrative offset.* Unless otherwise prohibited by law, when centralized administrative offset is not available or appropriate, past due legally enforceable non-tax-delinquent debts that are eligible for referral may be collected through non-centralized administrative offset through a request directly to the payment-authorizing agency. Referrals shall include certification that the debts are past due and that the agency has complied with due process requirements under 31 U.S.C. 3716(a) or other applicable authority and applicable agency regulations concerning administrative offset. Generally, non-centralized administrative offsets will be made on an *ad hoc* case-by-case basis, in cooperation with the agency certifying or authorizing payments to the debtor.

(vi) *Collection by transfer of debts to Treasury or a Treasury-designated debt collection center for collection through cross servicing.* (A) The Director, TMA or a designee, is required to transfer legally enforceable non-tax debts that are delinquent 180 days or more to Treasury for collection through cross-servicing (31 U.S.C. 3711(g); 31 CFR 285.12.) Debts referred or transferred to

Treasury or Treasury-designated debt collection centers shall be serviced, collected, or compromised, or the collection action will be suspended or terminated, in accordance with the statutory requirements and authorities applicable to the collection of such debts. Agencies operating Treasury-designated debt collection centers are authorized to charge a fee for services rendered regarding referred or transferred debts. This fee may be paid out of amounts collected and may be added to the debt as an administrative cost. Referrals will include certification that the debts transferred are valid, legally enforceable debts, that there are no legal bars to collection and that the agency has complied with all prerequisites to a particular collection action under the applicable laws, regulations or policies, unless the agency and Treasury agree that Treasury will do so on behalf of the agency.

(B) The requirement of paragraph (f)(1) of this section does not apply to any debt that:

(*1*) Is in litigation or foreclosure.

(*2*) Will be disposed of under an approved asset sale program.

(*3*) Has been referred to a private collection contractor for a period of time acceptable to Treasury.

(*4*) Will be collected under internal offset procedures within 3 years after the debt first became delinquent.

(*5*) Is exempt from this requirement based on a determination by the Secretary of the Treasury that exemption for a certain class of debt is in the best interest of the United States.

(vii) *Collection by salary offset*. When a debtor is a member of the military service or a retired member and collection by offset against other TRICARE payments due the debtor cannot be accomplished, and there have been no positive responses to a demand for payment, the Director, TMA, or a designee, may refer the debt for offset from the debtor's pay account pursuant to 37 U.S.C. 1007(c), as implemented by Volume 7A, Chapter 50 and Volume 7B, Chapter 28 of the DoDFMR. Collection from a Federal employee may be effected through salary offset under 5 U.S.C. 5514.

(A) For collections by salary offset the Director, TMA, or designee, will issue written notification, as required by 5 CFR 550.1104(d) at least 30 days before any offsets are taken. In addition, the notification will advise the employee that if he or she retires, resigns or his or her employment ends before collection of the debt is completed, collection may be made from subsequent payments of any nature due from the United States (e.g., final salary payment, lump-sum leave under 31 U.S.C. 3716 due the employee as of date of separation.) A debtor's involuntary payment of all or part of a debt being collected will not be construed as a waiver of any rights the debtor may have under 5 U.S.C. 5514 or any other provision of contract or law, unless there are statutory or contractual provisions to the contrary or the employee's paying agency is directed by an administrative or judicial order to refund amounts deducted from his or her current pay. No interest will be paid on amounts waived or determined not to be owed unless there are statutory or contractual provisions to the contrary.

(B) *Petition for hearing*. The notice of the proposed offset will advise the debtor of his or her right to petition for a hearing. The petition for hearing must be signed by the debtor or his or her representative and must state whether he or she is contesting debt validity, debt amount and/or the terms of the proposed offset schedule. It must explain with reasonable specificity all the facts, evidence and witnesses, if any (in the case of an oral hearing and a summary of their anticipated testimony), which the debtor believes support his or her position, and include any supporting documentation. If contesting the terms of the proposed offset schedule, the debtor must provide financial information including a completed Department of Justice Financial Statement of Debtor form (OBD–500 or other form prescribed by DOJ), including specific details concerning income and expenses of the employee, his or her spouse and dependents for 1-year period preceding the debt notification and projected income and expenses for the proposed offset period and a statement of the reason why the debtor believes the salary offset schedule will impose extreme financial hardship.

Upon receipt of the petition for hearing, the Director, TMA, or a designee, will complete reconsideration. If the Director, TMA, or a designee determines that the debt amount is not owed, that a less amount is owed, or that the terms of the employee's proposed offset schedule are acceptable, it will advise the debtor and request that the employee accept the results of the reconsideration in lieu of a hearing. If the employee declines to accept the results of reconsideration in lieu of a hearing, the debtor will be afforded a hearing. Ordinarily, a petition for hearing and required submissions that are not timely filed, shall be accepted after expiration of the deadline provided in the notice of the proposed offset, only when the debtor can demonstrate to the Director, TMA, or a designee, that the timely filing of the request was not feasible due to extraordinary circumstances over which the appealing party had no practical control or because of failure to receive notice of the time limit (unless he or she was otherwise aware of it). Each request for an exception to the timely filing requirement will be considered on its own merits. The decision of the Director, TMA, or a designee, on a request for an exception to the timely filing requirement shall be final.

(C) *Extreme financial hardship*. The maximum authorized amount that may be collected through involuntary salary offset is the lesser of 15 percent of the employee's disposable pay or the full amount of the debt. An employee who has petitioned for a hearing may assert that the maximum allowable rate of involuntary offset produces extreme financial hardship. An offset produces an extreme financial hardship if the offset prevents the employee from meeting the costs necessarily incurred for the essential expenses of the employee, employee's spouse and dependents. These essential expenses include costs incurred for food, housing, necessary public utilities, clothing, transportation and medical care. In determining whether the offset would prevent the employee from meeting the essential expenses identified above, the following shall be considered:

(*1*) Income from all sources of the employee, the employee's spouse, and dependents;

(*2*) The extent to which assets of the employee, employee's spouse and dependents are available to meet the offset and essential subsistence expenses;

(*3*) Whether these essential subsistence expenses have been minimized to the greatest extent possible;

(*4*) The extent to which the employee or the employee's spouse can borrow money to meet the offset and other essential expenses; and

(*5*) The extent to which the employee and the employee's spouse and dependents have other exceptional expenses that should be taken into account and whether these expenses have been minimized.

(D) *Form and content of hearings*. The resolution of recoupment claims rarely involves issues of credibility or veracity and a review of the written record is ordinarily an adequate means to determine the validity or amount of the debt and/or the terms of a proposed offset schedule. The Director, TMA, or a designee, will determine whether an oral hearing is required. A debtor who has petitioned for a hearing, but who is not entitled to an oral hearing will be given an administrative hearing, based on the written documentation submitted by the debtor and the Director, TMA, or a designee. If the Director, TMA, or a designee, determines that the debtor should be afforded the opportunity for an oral hearing, the debtor may elect to have a hearing based on the written record in lieu of an oral hearing. The Director, TMA, or a designee, will provide the debtor (or his representative) notification of the time, date and location of the oral hearing to be held if the debtor has been afforded an oral hearing. Copies of records documenting the debt will be provided to the debtor or his representative (if they have not been previously provided), at least 3 calendar days prior to the date of the oral hearing. At oral hearings, the only evidence permitted, except oral testimony, will be that which was previously submitted as prehearing submissions. At oral hearings, the debtor may not raise any issues not previously raised with TMA. In the absence of good cause shown, a debtor

who fails to appear at an oral hearing will be deemed to have waived the right to a hearing and salary offset may be initiated.

(E) *Costs for attendance at oral hearings.* Debtors and their witnesses will bear their own costs for attendance at oral hearings.

(F) *Hearing official's decision.* The Hearing Official's decision will be in writing and will identify the documentation reviewed. It will indicate the amount of debt that he or she determined is valid and shall state the amount of the offset and the estimated duration of the offset. The determination of a hearing official designated under this section is considered an official certification regarding the existence and amount of the debt and/or the terms of the proposed offset schedule for the purposes of executing salary offset under 5 U.S.C. 5514. The Hearing Official's decision must be issued at the earliest practical date, but not later than 60 days from the date the petition for hearing is received by the Office of General Counsel, TMA, unless the debtor requests, and the Hearing Official grants a delay in the proceedings. If a hearing official determines that the debt may not be collected by salary offset, but the Director, TMA, or a designee, finds the debt is still valid, the Director, TMA or a designee, may seek collection through other means, including but not limited to, offset from other payments due from the United States.

(viii) [Reserved]

(ix) *Collection of installments.* Debts, including interest, penalty and administrative costs shall be collected in one lump sum whenever possible. However, when the debtor is financially unable to pay the debt in one lump sum, the TRICARE contractor or the Director, TMA, or designee, may accept payment in installments. Debtors claiming that lump sum payment will create financial hardship may be required to complete a Department of Justice Financial Statement of Debtor form or provide other financial information that will permit TMA to verify such representations. TMA may also obtain credit reports to assess installment requests. Normally, debtors will make installment payments on a monthly basis. Installment payment shall bear a reasonable relationship to the size of the debt and the debtor's ability to pay. Except when a debtor can demonstrate financial hardship or another reasonable cause exists, installment payments should be sufficient in size and frequency to liquidate the debt in 3 years or less. (31 CFR 901.8(b)). Normally, installment payments of $75 or less will not be accepted unless the debtor demonstrates financial hardship. Any installment agreement with a debtor in which the total amount of deferred installments will exceed $750, should normally include an executed promissory agreement. Copies of installment agreements will be retained in the contractor's or TMA, Office of General Counsel's files.

(x) *Interest, penalties, and administrative costs.* Title 31 U.S.C. 3717 and the Federal Claims Collection Standards, 31 CFR 901.9, require the assessment of interest, penalty and administrative costs on delinquent debts. Interest shall accrue from the date the initial debt notification is mailed to the debtor. The rate of interest assessed shall be the rate of the current value of funds to the United States Treasury (the Treasury tax and loan account rate). The collection of interest on the debt or any portion of the debt, which is paid within 30 days after the date on which interest begins to accrue, shall be waived. The Director, TMA, or designee, may extend this 30-day period on a case-by-case basis, if it reasonably determines that such action is appropriate. The rate of interest as initially assessed shall remain fixed for the duration of the indebtedness; except that where the debtor has defaulted on a repayment agreement and seeks to enter into a new agreement, a new interest rate may be set which reflects the current value of funds to the Treasury at the time the new agreement is executed. Interest shall not be compounded; that is, interest shall not be charged on interest, penalties, or administrative costs required by this section. However, if a debtor defaults on a previous repayment agreement, charges that accrued but were not collected under the defaulted agreement, shall be added to the principal under the new repayment agreement. The

collection of interest, penalties and administrative costs may be waived in whole or in part as a part of the compromise of a debt as provided in paragraph (g) of this section. In addition, the Director, TMA, or designee may waive in whole or in part, the collection of interest, penalties, or administrative costs assessed herein if he or she determines that collection would be against equity and good conscience and not in the best interest of the United States. Some situations in which a waiver may be appropriate include:

(A) Waiver of interest consistent with 31 CFR 903.2(c)(2) in connection with a suspension of collection when a TRICARE appeal is pending under § 199.10 of this part where there is a substantial issue of fact in dispute.

(B) Waiver of interest where the original debt arose through no fault or lack of good faith on the part of the debtor and the collection of interest would impose a financial hardship or burden on the debtor. Some examples in which such a waiver would be appropriate include: A debt arising when a TRICARE beneficiary in good faith files and is paid for a claim for medical services or supplies, which are later determined not to be covered benefits, or a debt arising when a TRICARE beneficiary is overpaid as the result of a calculation error on the part of the TRICARE contractor or TMA.

(C) Waiver of interest where there has been an agreement to repay a debt in installments, there is no indication of fault or lack of good faith on the part of the debtor, and the amount of interest is so large in relation to the size of the installments that the debtor can reasonably afford to pay, that it is likely the debt will never be repaid in full. When a debt is paid in installments, the installment payments first will be applied to the payment of outstanding penalty and administrative cost charges, second, to accrued interest and then to principal. Administrative costs incurred as the result of a debt becoming delinquent (as defined in paragraph (f)(2)(iii) of this section) shall be assessed against a debtor. These administrative costs represent the additional costs incurred in processing and handling the debt because it became delinquent. The calculation of administrative costs should be based upon cost analysis establishing an average of actual additional costs incurred in processing and handling claims against other debtors in similar stages of delinquency. A penalty charge, not exceeding six percent a year, shall be assessed on the amount due on a debt that is delinquent for more than 90 days. This charge, which need not be calculated until the 91st day of delinquency, shall accrue from the date that the debt became delinquent.

(xi) *Referral to private collection agencies.* TMA shall use government-wide debt collection contracts to obtain debt collection services provided by private contractors in accordance with 31 CFR 901.5(b).

(xii) *Reporting delinquent debts to credit reporting agencies.* Delinquent consumer debts shall be reported to credit reporting agencies. Delinquent debts are debts which are not paid or for which satisfactory payment arrangements are not made by the due date specified in the initial debt notification letter, or those for which the debtor has entered into a written payment agreement and installment payments are past due 30 days or longer. Such referrals shall comply with the Bankruptcy Code and the Privacy Act of 1974, 5 U.S.C. 552a, as amended. The provisions of the Privacy Act do not apply to credit bureaus (31 CFR 901.4(1)). There is no requirement to duplicate the notice and review opportunities before referring debts to credit bureaus. Debtors will be advised of the specific information to be transmitted (i.e., name, address, and taxpayer identification number, information about the debt). Procedures developed for such referrals must ensure that an accounting of the disclosures shall be kept which is available to the debtor; that the credit reporting agencies are provided with corrections and annotations of disagreements of the debtor; and that reasonable efforts are made to ensure that the information to be reported is accurate, complete, timely and relevant. When requested by a credit-reporting agency, verification of the information disclosed will be provided promptly. Once a claim has been

reviewed and determined to be valid, a complete explanation of the claim will be given the debtor. When the claim is overdue, the individual will be notified in writing that payment is overdue; that within not less than 60 days, disclosure of the claim shall be made to a consumer reporting agency unless satisfactory payment arrangements are made, or unless the debtor requests an administrative review and demonstrates some basis on which the debt is legitimately disputed; and of the specific information to be disclosed to the consumer reporting agency. The information to be disclosed to the credit reporting agency will be limited to information necessary to establish the identity of the debtor, including name, address and taxpayer identification number; the amount, status and history of the claim; and the agency or program under which the claim arose. Reasonable action will be taken to locate an individual for whom a current address is not available. The requirements of this section do not apply to commercial debts, although commercial debts shall be reported to commercial credit bureaus. Treasury will report debts transferred to it for collection to credit reporting agencies on behalf of the Director, TMA, or a designee.

(xiii) *Use and disclosure of mailing addresses*. In attempting to locate a debtor in order to collect or compromise a debt under this section, the Director, TMA, or a designee, may send a written request to the Secretary of the Treasury, or a designee, for current address information from records of the Internal Revenue Service. TMA may disclose mailing addresses obtained under this authority to other agencies and to collection agencies for collection purposes.

(g) *Compromise, suspension or termination of collection actions arising under the Federal Claims Collection Act*—(1) *Basic considerations*. Federal claims against the debtor and in favor of the United States arising out of the administration of TRICARE may be compromised or collection action taken thereon may be suspended or terminated in compliance with the Federal Claims Collection Act, 31 U.S.C. 3711, as implemented by the Federal Claims Collection Standards, 31 CFR parts 900–904. The provisions concerning compromise, suspension or termination of collection activity pursuant to 31 U.S.C. 3711 apply to debts, which do not exceed $100,000 or any higher amount authorized by the Attorney General, exclusive of interest, penalties, and administrative costs, after deducting the amount of partial payments or collections, if any. If, after deducting the amount of any partial payments or collections, the principal amount of a debt exceeds $100,000, or any higher amount authorized by the Attorney General, exclusive of interest, penalties and administrative costs, the authority to suspend or terminate rests solely with the DOJ.

(2) *Authority*. TRICARE contractors are not authorized to compromise or to suspend or terminate collection action on TRICARE claims. Only the Director, TMA, or designee or Uniformed Services claims officers acting under the provisions of their own regulations are so authorized.

(3) *Basis for compromise*. A compromise should be for an amount that bears a reasonable relation to the amount that can be recovered by enforced collection procedures, with regard to the exemptions available to the debtor and the time collection will take. A claim may be compromised hereunder if the government cannot collect the full amount if:

(i) The debtor or the estate of a debtor does not have the present or prospective ability to pay the full amount within a reasonable time;

(ii) The cost of collecting the claim does not justify enforced collection of the full amount; or

(iii) The government is unable to enforce collection of the full amount within a reasonable time by enforced collection proceedings; or

(iv) There is significant doubt concerning the Government's ability to prove its case in court for the full amount claimed; or

(v) The cost of collecting the claim does not justify enforced collection of the full amount.

(4) *Basis for suspension*. Collection action may be suspended for the following reasons if future collection action may be sufficiently productive to justify periodic review and action on

the claim, considering its size and the amount, which may be realized thereon:

(i) The debtor cannot be located; or

(ii) The debtor's financial condition is expected to improve; or

(iii) The debtor is unable to make payments on the government's claim or effect a compromise at the time, but the debtor's future prospects justify retention of the claim for periodic review and action and;

(A) The applicable statute of limitations has been tolled or started running anew; or

(B) Future collections can be effected by administrative offset, notwithstanding the expiration of the applicable statute of limitations for litigation of claims with due regard to the 10-year limitation for administrative offset under 31 U.S.C. 3716(e)(1); or

(C) The debtor agrees to pay interest on the amount of the debt on which collection action will be temporarily suspended and such temporary suspension is likely to enhance the debtor's ability fully to pay the principal amount of the debt with interest at a later date.

(iv) Consideration may be given by the Director, TMA, or designee to suspend collection action pending action on a request for a review of the government's claim against the debtor or pending an administrative review under §199.10 of this part of any TRICARE claim or claims directly involved in the government's claim against the debtor. Suspension under this paragraph will be made on a case-by-case basis as to whether:

(A) There is a reasonable possibility that the debt (in whole or in part) will be found not owing from the debtor;

(B) The government's interest would be protected if suspension were granted by reasonable assurance that the debt would be recovered if the debtor does not prevail; and

(C) Collection of the debt will cause undue hardship.

(5) Collection action may be terminated for one or more of the following reasons:

(i) TMA cannot collect or enforce collection of any substantial amount through its own efforts or the efforts of others, including consideration of the judicial remedies available to the government, the debtor's future financial prospects, and the exemptions available to the debtor under state and federal law;

(ii) The debtor cannot be located, and either;

(iii) The costs of collection are anticipated to exceed the amount recoverable; or

(iv) It is determined that the debt is legally without merit or enforcement of the debt is barred by any applicable statute of limitations; or

(v) The debt cannot be substantiated; or

(vi) The debt against the debtor has been discharged in bankruptcy. Collection activity may be continued subject to the provisions of the Bankruptcy Code, such as collection of any payments provided under a plan of reorganization or in cases when TMA did not receive notice of the bankruptcy proceedings.

(6) In determining whether the debt should be compromised, suspended or terminated, the responsible TMA collection authority will consider the following factors:

(i) Age and health of the debtor; present and potential income; inheritance prospects; the possibility that assets have been concealed or improperly transferred by the debtor; and the availability of assets or income which may be realized by enforced collection proceedings;

(ii) Applicability of exemptions available to a debtor under state or federal law;

(iii) Uncertainty as to the price which collateral or other property may bring at a forced sale;

(iv) The probability of proving the claim in court because of legal issues involved or because of a bona fide dispute of the facts; the probability of full or partial recovery; the availability of necessary evidence and related pragmatic considerations. Debtors may be required to provide a completed Department of Justice Financial Statement of Debtor form (OBD–500 or such other form that DOJ shall prescribe) or other financial information that will permit TMA to verify debtors' representations. TMA may obtain credit reports or other financial information

to enable it independently to verify debtors' representations.

(7) Payment of compromised claims. (i) *Time and manner*. Compromised claims are to be paid in one lump sum whenever possible. However, if installment payments of a compromised claim are necessary, a legally enforceable compromise agreement must be obtained. Payment of the amount that TMA has agreed to accept as a compromise in full settlement of a TRICARE claim must be made within the time and in the manner prescribed in the compromise agreement. Any such compromised amount is not settled until full payment of the compromised amount has been made within the time and manner prescribed. Compromise agreements must provide for the reinstatement of the prior indebtedness, less sums paid thereon, and acceleration of the balance due upon default in the payment of any installment.

(ii) *Failure to pay the compromised amount*. Failure of any debtor to make payment as provided in the compromise agreement will have the effect of reinstating the full amount of the original claim, less any amounts paid prior to default.

(iii) Effect of compromise, waiver, suspension or termination of collection action. Pursuant to the Internal Revenue Code, 26 U.S.C. 6050P, compromises and terminations of undisputed debts totaling $600 or more for the year will be reported to the Internal Revenue Service in the manner prescribed. Amounts, other than those discharged in bankruptcy, will be included in the debtor's gross income for that year. Any action taken under paragraph (g) of this section regarding the compromise of a federal claim, or waiver or suspension or termination of collection action on a federal claim is not an initial determination for the purposes of the appeal procedures in § 199.10.

(h) *Referrals for collection*—(1) *Prompt referral*. Federal claims of $2,500, exclusive of interest, penalties and administrative costs, or such other amount as the Attorney General shall from time to time prescribe on which collection action has been taken under the provisions of this section which cannot be collected or compromised or on which collection action cannot be suspended or terminated as provided herein, will be promptly referred to the Department of Justice for litigation in accordance with 31 CFR part 904. Such referrals shall be made as early as possible consistent with aggressive collection action made by TRICARE contractors and TMA. Referral will be made with sufficient time to bring timely suit against the debtor. Referral shall be made by submission of a completed Claims Collection Litigation Report (CCLR), accompanied by a signed Certificate of Indebtedness. Claims of less than the minimum amount shall not be referred unless litigation to collect such smaller claims is important to ensure compliance with TRICARE's policies or programs; the claim is being referred solely for the purpose of securing a judgment against the debtor, which will be filed as a lien against the debtor's property pursuant to 28 U.S.C. 3201 and returned to the referring office for enforcement; or the debtor has the clear ability to pay the claim and the Government effectively can enforce payment, with due regard for the exemptions available to the debtor under state and Federal law and judicial remedies available to the Government.

(2) *Preservation of evidence*. The Director, TMA, or a designee will take such action as is necessary to ensure that all files, records and exhibits on claims referred, hereunder, are properly preserved.

(i) *Claims involving indication of fraud, filing of false claims or misrepresentation*. Any case in which there is an indication of fraud, the filing of a false claim or misrepresentation on the part of the debtor or any party having an interest in the claim, shall be promptly referred to the Director, TMA, or designee. The Director, TMA, or a designee, will investigate and evaluate the case and either refer the case to an appropriate investigative law enforcement agency or return the claim for other appropriate administrative action, including collection action under this section. Payment on all TRICARE beneficiary or provider claims in which fraud, filing false claims or misrepresentation is suspected will be suspended until the Director, TMA, or designee, authorizes

payment or denial of the claims. Collection action on all claims in which a suspicion of fraud, misrepresentation or filing false claims arises, will be suspended pending referral to the appropriate law enforcement agencies by the Director, TMA, or a designee. Only the Department of Justice has authority to compromise, suspend or terminate collection of such debts.

(ii) [Reserved]

[73 FR 71547, Nov. 25, 2008, as amended at 77 FR 38176, June 27, 2012; 82 FR 45447, Sept. 29, 2017]

### § 199.12 Third party recoveries.

(a) *General.* This section deals with the right of the United States to recover from third-parties the costs of medical care furnished to or paid on behalf of TRICARE beneficiaries. These third-parties may be individuals or entities that are liable for tort damages to the injured TRICARE beneficiary or a liability insurance carrier covering the individual or entity. These third-parties may also include other entities who are primarily responsible to pay for the medical care provided to the injured beneficiary by reason of an insurance policy, workers' compensation program or other source of primary payment.

*Authority*—(1) *Third-party payers.* This part implements the provisions of 10 U.S.C. 1095b which, in general, allow the Secretary of Defense to authorize certain TRICARE claims to be paid, even though a third-party payer may be primary payer, with authority to collect from the third-party payer the TRICARE costs incurred on behalf of the beneficiary. (See § 199.2 for definition of ''third-party payer.'') Therefore, 10 U.S.C. 1095b establishes the statutory obligation of third-party payers to reimburse the United States the costs incurred on behalf of TRICARE beneficiaries who are also covered by the third-party payer's plan.

(2) *Federal Medical Care Recovery Act*—(i) *In general.* In many cases covered by this section, the United States has a right to collect under both 10 U.S.C. 1095b and the Federal Medical Care Recovery Act (FMCRA), Public Law 87–693 (42 U.S.C. 2651 *et. seq.*). In such cases, the authority is concurrent and the United States may pursue collection under both statutory authorities.

(ii) *Cases involving tort liability.* In cases in which the right of the United States to collect from an automobile liability insurance carrier is premised on establishing some tort liability on some third person, matters regarding the determination of such tort liability shall be governed by the same substantive standards as would be applied under the FMCRA including reliance on state law for determinations regarding tort liability. In addition, the provisions of 28 CFR part 43 (Department of Justice regulations pertaining to the FMCRA) shall apply to claims made under the concurrent authority of the FMCRA and 10 U.S.C. 1095b. All other matters and procedures concerning the right of the United States to collect shall, if a claim is made under the concurrent authority of the FMCRA and this section, be governed by 10 U.S.C. 1095b and this part.

(c) *Appealability.* This section describes the procedures to be followed in the assertion and collection of third-party recovery claims in favor of the United States arising from the operation of TRICARE. Actions taken under this section are not initial determinations for the purpose of the appeal procedures of § 199.10 of this part. However, the proper exercise of the right to appeal benefit or provider status determinations under the procedures set forth in § 199.10 may affect the processing of federal claims arising under this section. Those appeal procedures afford a TRICARE beneficiary or participating provider an opportunity for administrative appellate review in cases in which benefits have been denied and in which there is a significant factual dispute. For example, a TRICARE contractor may deny payment for services that are determined to be excluded as TRICARE benefits because they are found to be not medically necessary. In that event the TRICARE contractor will offer an administrative appeal as provided in § 199.10 of this part on the medical necessity issue raised by the adverse benefit determination. If the care in question results from an accidental injury and if the appeal results in a reversal of the initial determination to deny

the benefit, a third-party recovery claim may arise as a result of the appeal decision to pay the benefit. However, in no case is the decision to initiate such a claim itself appealable under § 199.10.

(d) *Statutory obligation of third-party payer to pay*—(1) *Basic Rule.* Pursuant to 10 U.S.C. 1095b, when the Secretary of Defense authorizes certain TRICARE claims to be paid, even though a third-party payer may be primary payer (as specified under § 199.8(c)(2)), the right to collect from a third-party payer the TRICARE costs incurred on behalf of the beneficiary is the same as exists for the United States to collect from third-party payers the cost of care provided by a facility of the uniformed services under 10 U.S.C. 1095 and part 220 of this title. Therefore the obligation of a third-party payer to pay is to the same extent that the beneficiary would be eligible to receive reimbursement or indemnification from the third-party payer if the beneficiary were to incur the costs on the beneficiary's own behalf.

(2) *Application of cost shares.* If the third-party payer's plan includes a requirement for a deductible or copayment by the beneficiary of the plan, then the amount the United States may collect from the third-party payer is the cost of care incurred on behalf of the beneficiary less the appropriate deductible or copayment amount.

(3) *Claim from the United States exclusive.* The only way for a third-party payer to satisfy its obligation under 10 U.S.C. 1095b is to pay the United States or authorized representative of the United States. Payment by a third-party payer to the beneficiary does not satisfy 10 U.S.C. 1095b.

(4) *Assignment of benefits not necessary.* The obligation of the third-party to pay is not dependent upon the beneficiary executing an assignment of benefits to the United States.

(e) *Exclusions impermissible*—(1) *Statutory requirement.* With the same right to collect from third-party payers as exists under 10 U.S.C. 1095(b), no provision of any third-party payer's plan having the effect of excluding from coverage or limiting payment for certain care if that care is provided or paid by the United States shall operate to prevent collection by the United States.

(2) *Regulatory application.* No provision of any third-party payer's plan or program purporting to have the effect of excluding or limiting payment for certain care that would not be given such effect under the standards established in part 220 of this title to implement 10 U.S.C. 1095 shall operate to exclude or limit payment under 10 U.S.C. 1095b or this section.

(f) *Records available.* When requested, TRICARE contractors or other representatives of the United States shall make available to representatives of any third-party payer from which the United States seeks payment under 10 U.S.C. 1095b, for inspection and review, appropriate health care records (or copies of such records) of individuals for whose care payment is sought. Appropriate records which will be made available are records which document that the TRICARE costs incurred on behalf of beneficiaries which are the subject of the claims for payment under 10 U.S.C. 1095b were incurred as claimed and the health care service were provided in a manner consistent with permissible terms and conditions of the third-party payer's plan. This is the sole purpose for which patient care records will be made available. Records not needed for this purpose will not be made available.

(g) *Remedies.* Pursuant to 10 U.S.C. 1095b, when the Director, TRICARE Management Activity, or a designee, authorizes certain TRICARE claims to be paid, even though a third-party payer may be primary payer, the right to collect from a third-party payer the TRICARE costs incurred on behalf of the beneficiary is the same as exists for the United States to collect from third-party payers the cost of care provided by a facility of the uniformed services under 10 U.S.C. 1095.

(1) This includes the authority under 10 U.S.C. 1095(e)(1) for the United States to institute and prosecute legal proceedings against a third-party payer to enforce a right of the United States under 10 U.S.C. 1095b and this section.

(2) This also includes the authority under 10 U.S.C. 1095(e)(2) for an authorized representative of the United States to compromise, settle or waive a

claim of the United States under 10 U.S.C. 1095b and this section.

(3) The authorities provided by the Federal Claims Collection Act of 1966, as amended (31 U.S.C. 3701 *et. seq.*) and any implementing regulations (including §199.11) regarding collection of indebtedness due the United States shall also be available to effect collections pursuant to 10 U.S.C. 1095b and this section.

(h) *Obligations of beneficiaries*. To insure the expeditious and efficient processing of third-party payer claims, any person furnished care and treatment under TRICARE, his or her guardian, personal representative, counsel, estate, dependents or survivors shall be required:

(1) To provide information regarding coverage by a third-party payer plan and/or the circumstances surrounding an injury to the patient as a conditional precedent of the processing of a TRICARE claim involving possible third-party payer coverage.

(2) To furnish such additional information as may be requested concerning the circumstances giving rise to the injury or disease for which care and treatment are being given and concerning any action instituted or to be instituted by or against a third person; and,

(3) To cooperate in the prosecution of all claims and actions by the United States against such third person.

(i) *Responsibility for recovery*. The Director, TRICARE Management Activity, or a designee, is responsible for insuring that TRICARE claims arising under 10 U.S.C. 1095b and this section (including claims involving the FMCRA) are properly referred to and coordinated with designated claims authorities of the uniformed services who shall assert and recover TRICARE costs incurred on behalf of beneficiaries. Generally, claims arising under this section will be processed as follows:

(1) *Identification and referral*. In most cases where civilian providers provide medical care and payment for such care has been by a TRICARE contractor, initial identification of potential third-party payers will be by the TRICARE contractor. In such cases, the TRICARE contractor is responsible for conducting a preliminary investigation and referring the case to designated appropriate claims authorities of the Uniformed Services.

(2) *Processing TRICARE claims*. When the TRICARE contractor initially identifies a claim as involving a potential third-party payer, it shall request additional information concerning the circumstances of the injury or disease and/or the identify of any potential third-party payer from the beneficiary or other responsible party unless adequate information is submitted with the claim. The TRICARE claim will be suspended and no payment issued pending receipt of the requested information. If the requested information is not received, the claim will be denied. A TRICARE beneficiary may expedite the processing of his or her TRICARE claim by submitting appropriate information with the first claim for treatment of an accidental injury. Third-party payer information normally is required only once concerning any single accidental injury on episode of care. Once the third-party payer information pertaining to a single incident or episode of care is received, subsequent claims associated with the same incident or episode of care may be processed to payment in the usual manner. If, however, the requested third-party payer information is not received, subsequent claims involving the same incident or episode of care will be suspended or denied as stated above.

(3) *Ascertaining total potential liability*. It is essential that the appropriate claims responsible for asserting the claim against the third-party payer receive from the TRICARE contractor a report of all amounts expended by the United States for care resulting from the incident upon which potential liability in the third party is based (including amounts paid by TRICARE for both inpatient and outpatient care). Prior to assertion and final settlement of a claim, it will be necessary for the responsible claims authority to secure from the TRICARE contractor updated information to insure that all amounts expended under TRICARE are included in the government's claim. It is equally important that information on future medical payments be obtained through

the investigative process and included as a part of the government's claim. No TRICARE-related claim will be settled, compromised or waived without full consideration being given to the possible future medical payment aspects of the individual case.

(j) *Reporting requirements.* Pursuant to 10 U.S.C. 1079a, all refunds and other amounts collected in the administration of TRICARE shall be credited to the appropriation available for that program for the fiscal year in which the refund or amount is collected. Therefore, the Department of Defense requires an annual report stating the number and dollar amount of claims asserted against, and the number and dollar amount of recoveries from third-party payers (including FMCRA recoveries) arising from the operation of the TRICARE. To facilitate the preparation of this report and to maintain program integrity, the following reporting requirements are established:

(1) *TRICARE contractors.* Each TRICARE contractor shall submit on or before January 31 of each year an annual report to the Director, TRICARE Management Activity, or a designee, covering the 12 months of the previous calendar year. This report shall contain, as a minimum, the number and total dollar of cases of potential third-party payer/FMCRA liability referred to uniformed services claims authorities for further investigation and collection. These figures are to be itemized by the states and uniformed services to which the cases are referred.

(2) *Uniformed Services.* Each uniformed service will submit to the Director, TRICARE Management Activity, or designee, an annual report covering the 12 calendar months of the previous year, setting forth, as a minimum, the number and total dollar amount of cases involving TRICARE payments received from TRICARE contractors, the number and dollar amount of cases involving TRICARE payments received from other sources, and the number and dollar amount of claims actually asserted against, and the dollar amount of recoveries from, third-payment payers or under the FMCRA. The report, itemized by state and foreign claims jurisdictions, shall be provided no later than February 28 of each year.

(3) *Implementation of the reporting requirements.* The Director, TRICARE Management Activity, or a designee shall issue guidance for implementation of the reporting requirements prescribed by this section.

[68 FR 6619, Feb. 10, 2003]

### § 199.13 TRICARE Dental Program.

(a) *General provisions*—(1) *Purpose.* This section prescribes guidelines and policies for the delivery and administration of the TRICARE Dental Program (TDP) of the Uniformed Services of the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, the Commissioned Corps of the U.S. Public Health Service (USPHS) and the National Oceanic and Atmospheric Administration (NOAA) Corps. The TDP is a premium based indemnity dental insurance coverage plan that is available to specified categories of individuals who are qualified for these benefits by virtue of their relationship to one of the seven (7) Uniformed Services and their voluntary decision to accept enrollment in the plan and cost share (when applicable) with the Government in the premium cost of the benefits. The TDP is authorized by 10 U.S.C. 1076a, TRICARE dental program, and this section was previously titled the ''Active Duty Dependents Dental Plan''. The TDP incorporates the former 10 U.S.C. 1076b, Selected Reserve dental insurance, and the section previously titled the ''TRICARE Selected Reserve Dental Program'', § 199.21.

(2) *Applicability*—(i) *Geographic scope.* (A) The TDP is applicable geographically within the fifty (50) States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands. These areas are collectively referred to as the ''CONUS (or Continental United States) service area''.

(B) Extension of the TDP to areas outside the CONUS service area. In accordance with the authority cited in 10 U.S.C. 1076a(h), the Assistant Secretary of Defense (Health Affairs) (ASD(HA)) may extend the TDP to areas other than those areas specified in paragraph

(a)(2)(i)(A) of this section for the eligible members and eligible dependents of members of the Uniformed Services. These areas are collectively referred to as the ''OCONUS (or outside the Continental United States) service area''. In extending the TDP outside the CONUS service area, the ASD(HA), or designee, is authorized to establish program elements, methods of administration and payment rates and procedures to providers that are different from those in effect for the CONUS service area to the extent the ASD(HA), or designee, determines necessary for the effective and efficient operation of the TDP. This includes provisions for preauthorization of care if the needed services are not available in a Uniformed Service overseas dental treatment facility and payment by the Department of certain cost-shares (or copayments) and other portions of a provider's billed charges for certain beneficiary categories. Other differences may occur based on limitations in the availability and capabilities of the Uniformed Service overseas dental treatment facility and a particular nation's civilian sector providers in certain areas. These differences include varying licensure and certification requirements of OCONUS providers, Uniformed Service provider selection criteria and local results of provider selection, referral, beneficiary pre-authorization and marketing procedures, and care for beneficiaries residing in distant areas. The Director, Office of Civilian Health and Medical Program of the Uniformed Services (OCHAMPUS) shall issue guidance, as necessary, to implement the provisions of paragraph (a)(2)(i)(B). Beneficiaries will be eligible for the same TDP benefits in the OCONUS service area although services may not be available or accessible in all OCONUS countries.

(ii) *Agency*. The provisions of this section apply throughout the Department of Defense (DoD), the United States Coast Guard, the USPHS and NOAA.

(iii) *Exclusion of benefit services performed in military dental care facilities*. Except for emergency treatment, dental care provided outside the United States, services incidental to noncovered services, and services provided under paragraph (a)(2)(iv), dependents of active duty, Selected Reserve and Individual Ready Reserve members enrolled in the TDP may not obtain those services that are benefits of the TDP in military dental care facilities, as long as those covered benefits are available for cost-sharing under the TDP. Enrolled dependents of active duty, Selected Reserve and Individual Ready Reserve members may continue to obtain noncovered services from military dental care facilities subject to the provisions for space available care.

(iv) *Exception to the exclusion of services performed in military dental care facilities*.

(A) Dependents who are 12 years of age or younger and are covered by a dental plan established under this section may be treated by postgraduate dental residents in a dental treatment facility of the uniformed services under a graduate dental education program accredited by the American Dental Association if

(*1*) Treatment of pediatric dental patients is necessary in order to satisfy an accreditation standard of the American Dental Association that is applicable to such program, or training in pediatric dental care is necessary for the residents to be professionally qualified to provide dental care for dependent children accompanying members of the uniformed services outside the United States; and

(*2*) The number of pediatric patients at such facility is insufficient to support satisfaction of the accreditation or professional requirements in pediatric dental care that apply to such programs or students.

(B) The total number of dependents treated in all facilities of the uniformed services under paragraph (a)(2)(iv) in a fiscal year may not exceed 2,000.

(3) *Authority and responsibility*—(i) *Legislative authority*—(A) *Joint regulations*. 10 U.S.C. 1076a authorized the Secretary of Defense, in consultation with the Secretary of Health and Human Services, and the Secretary of Transportation, to prescribe regulations for the administration of the TDP.

(B) *Administration.* 10 U.S.C. 1073 authorizes the Secretary of Defense to administer the TDP for the Army, Navy, Air Force, and Marine Corps under DoD jurisdiction, the Secretary of Transportation to administer the TDP for the Coast Guard, when the Coast Guard is not operating as a service in the Navy, and the Secretary of Health and Human Services to administer the TDP for the Commissioned Corps of the USPHS and the NOAA Corps.

(ii) *Organizational delegations and assignments*—(A) *Assistant Secretary of Defense (Health Affairs) (ASD(HA)).* The Secretary of Defense, by 32 CFR part 367, delegated authority to the ASD(HA) to provide policy guidance, management control, and coordination as required for all DoD health and medical resources and functional areas including health benefit programs. Implementing authority is contained in 32 CFR part 367. For additional implementing authority see §199.1. Any guidelines or policy necessary for implementation of this §199.13 shall be issued by the Director, OCHAMPUS.

(B) *Evidence of eligibility.* DoD, through the Defense Enrollment Eligibility Reporting System (DEERS), is responsible for establishing and maintaining a listing of persons eligible to receive benefits under the TDP.

(4) *Preemption of State and local laws.* (i) Pursuant to 10 U.S.C. 1103 and section 8025 (fourth proviso) of the Department of Defense Appropriations Act, 1994, DoD has determined that, in the administration of 10 U.S.C. chapter 55, preemption of State and local laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods is necessary to achieve important Federal interests, including, but not limited to, the assurance of uniform national health programs for Uniformed Service beneficiaries and the operation of such programs at the lowest possible cost to DoD, that have a direct and substantial effect on the conduct of military affairs and national security policy of the United States. This determination is applicable to the dental services contracts that implement this section.

(ii) Based on the determination set forth in paragraph (a)(4)(i) of this section, any State or local law relating to health or dental insurance, prepaid health or dental plans, or other health or dental care delivery or financing methods is preempted and does not apply in connection with the TDP contract. Any such law, or regulation pursuant to such law, is without any force or effect, and State or local governments have no legal authority to enforce them in relation to the TDP contract. (However, DoD may, by contract, establish legal obligations on the part of the dental plan contractor to conform with requirements similar or identical to requirements of State or local laws or regulations.)

(iii) The preemption of State and local laws set forth in paragraph (a)(4)(ii) of this section includes State and local laws imposing premium taxes on health or dental insurance carriers or underwriters or other plan managers, or similar taxes on such entities. Such laws are laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods, within the meaning of the statutes identified in paragraph (a)(4)(i) of this section. Preemption, however, does not apply to taxes, fees, or other payments on net income or profit realized by such entities in the conduct of business relating to DoD health services contracts, if those taxes, fees, or other payments are applicable to a broad range of business activity. For purposes of assessing the effect of Federal preemption of State and local taxes and fees in connection with DoD health and dental services contracts, interpretations shall be consistent with those applicable to the Federal Employees Health Benefits Program under 5 U.S.C. 8909(f).

(5) *Plan funds*—(i) *Funding sources.* The funds used by the TDP are appropriated funds furnished by the Congress through the annual appropriation acts for DoD, the Department of Health and Human Services and the Department of Transportation and funds collected by the Uniformed Services or contractor through payroll deductions or through direct billing as premium shares from beneficiaries.

(ii) *Disposition of funds.* TDP funds are paid by the Government (or in the case of direct billing, by the beneficiary) as premiums to an insurer,

service, or prepaid dental care organization under a contract negotiated by the Director, OCHAMPUS, or a designee, under the provisions of the Federal Acquisition Regulation (FAR) (48 CFR chapter 1).

(iii) *Plan*. The Director, OCHAMPUS, or designee provides an insurance policy, service plan, or prepaid contract of benefits in accordance with those prescribed by law and regulation; as interpreted and adjudicated in accord with the policy, service plan, or contract and a dental benefits brochure; and as prescribed by requirements of the dental plan contractor's contract with the Government.

(iv) *Contracting out*. The method of delivery of the TDP is through a competitively procured contract. The Director, OCHAMPUS, or a designee, is responsible for negotiating, under provisions of the FAR, a contract for dental benefits insurance or prepayment that includes responsibility for:

(A) Development, publication, and enforcement of benefit policy, exclusions, and limitations in compliance with the law, regulation, and the contract provisions;

(B) Adjudicating and processing claims; and conducting related supporting activities, such as enrollment, disenrollment, collection of premiums, eligibility verification, provider relations, and beneficiary communications.

(6) *Role of Health Benefits Advisor (HBA)*. The HBA is appointed (generally by the commander of an Uniformed Services medical treatment facility) to serve as an advisor to patients and staff in matters involving the TDP. The HBA may assist beneficiaries in applying for benefits, in the preparation of claims, and in their relations with OCHAMPUS and the dental plan contractor. However, the HBA is not responsible for the TDP's policies and procedures and has no authority to make benefit determinations or obligate the TDP's funds. Advice given to beneficiaries by HBAs as to determination of benefits or level of payment is not binding on OCHAMPUS or the dental plan contractor.

(7) *Right to information*. As a condition precedent to the provision of benefits hereunder, the Director, OCHAMPUS, or designee, shall be entitled to receive information from an authorized provider or other person, institution, or organization (including a local, State, or United States Government agency) providing services or supplies to the beneficiary for which claims for benefits are submitted. While establishing enrollment and eligibility, benefits, and benefit utilization and performance reporting information standards, the Government has established and does maintain a system of records for dental information under the TDP. By contract, the Government audits the adequacy and accuracy of the dental plan contractor's system of records and requires access to information and records to meet plan accountabilities, to assist in contractor surveillance and program integrity investigations and to audit OCONUS financial transactions where the Department has a financial stake. Such information and records may relate to attendance, testing, monitoring, examination, or diagnosis of dental disease or conditions; or treatment rendered; or services and supplies furnished to a beneficiary; and shall be necessary for the accurate and efficient administration and payment of benefits under this plan. To assist in claims adjudication, grievance and fraud investigations, and the appeals process, and before an interim or final determination can be made on a claim of benefits, a beneficiary or active duty, Selected Reserve or individual Ready Reserve member must provide particular additional information relevant to the requested determination, when necessary. Failure to provide the requested information may result in denial of the claim and inability to effectively investigate the grievance or fraud or process the appeal. The recipient of such information shall in every case hold such records confidential except when:

(i) Disclosure of such information is necessary to the determination by a provider or the dental plan contractor of beneficiary enrollment or eligibility for coverage of specific services;

(ii) Disclosure of such information is authorized specifically by the beneficiary;

(iii) Disclosure is necessary to permit authorized Government officials to investigate and prosecute criminal actions;

(iv) Disclosure constitutes a routine use of a routine use of a record which is compatible with the purpose for which it was collected. This includes a standard and acceptable business practice commonly used among dental insurers which is consistent with the principle of preserving confidentiality of personal information and detailed clinical data. For example, the release of utilization information for the purpose of determining eligibility for certain services, such as the number of dental prophylaxis procedures performed for a beneficiary, is authorized;

(v) Disclosure is pursuant to an order from a court of competent jurisdiction; or

(vi) Disclosure by the Director, OCHAMPUS, or designee, is for the purpose of determining the applicability of, and implementing the provisions of, other dental benefits coverage or entitlement.

(8) *Utilization review and quality assurance.* Claims submitted for benefits under the TDP are subject to review by the Director, OCHAMPUS, or designee, for quality of care and appropriate utilization. The Director, OCHAMPUS, or designee, is responsible for appropriate utilization review and quality assurance standards, norms, and criteria consistent with the level of benefits.

(b) *Definitions.* For most definitions applicable to the provisions of this section, refer to Sec. 199.2. The following definitions apply only to this section:

(1) *Assignment of benefits.* Acceptance by a nonparticipating provider of payment directly from the insurer while reserving the right to charge the beneficiary or active duty, Selected Reserve or Individual Ready Reserve member for any remaining amount of the fees for services which exceeds the prevailing fee allowance of the insurer.

(2) *Authorized provider.* A dentist, dental hygienist, or certified and licensed anesthetist specifically authorized to provide benefits under the TDP in paragraph (f) of this section.

(3) *Beneficiary.* A dependent of an active duty, Selected Reserve or Individual Ready Reserve member, or a member of the Selected Reserve or Individual Ready Reserve, who has been enrolled in the TDP, and has been determined to be eligible for benefits, as set forth in paragraph (c) of this section.

(4) *Beneficiary liability.* The legal obligation of the beneficiary, his or her estate, or responsible family member to pay for the costs of dental care or treatment received. Specifically, for the purposes of services and supplies covered by the TDP, beneficiary liability including cost-sharing amounts or any amount above the network maximum allowable charge where the provider selected by the beneficiary is not a participating provider or a provider within an approved alternative delivery system. In cases where a nonparticipating provider does not accept assignment of benefits.

(5) *By report.* Dental procedures which are authorized as benefits only in unusual circumstances requiring justification of exceptional conditions related to otherwise authorized procedures. These services are further defined in paragraph (e) of this section.

(6) *Contingency operation.* Defined in 10 U.S.C. 101(a)(13) as a military operation designated as a contingency operation by the Secretary of Defense or a military operation that results in the exercise of authorities for ordering Reserve Component members to active duty without their consent and is therefore automatically a contingency operation.

(7) *Cost-share.* The amount of money for which the beneficiary (or active duty, Selected Reserve or Individual Ready Reserve member) is responsible in connection with otherwise covered dental services (other than disallowed amounts) as set forth in paragraph (e) of this section. A cost-share may also be referred to as a ''co-payment.''

(8) *Defense Enrollment Eligibility Reporting System (DEERS).* The automated system that is composed of two (2) phases:

(i) Enrolling all active duty, Reserve and retired service members, their dependents, and the dependents of deceased service members; and

(ii) Verifying their eligibility for health care benefits in the direct care facilities and through the TDP.

(9) *Dental hygienist*. Practitioner in rendering complete oral prophylaxis services, applying medication, performing dental radiography, and providing dental education services with a certificate, associate degree, or bachelor's degree in the field, and licensed by an appropriate authority.

(10) *Dentist*. Doctor of Dental Medicine (D.M.D.) or Doctor of Dental Surgery (D.D.S.) who is licensed to practice dentistry by an appropriate authority.

(11) *Diagnostic services*. Category of dental services including:

(i) Clinical oral examinations;

(ii) Radiographic examinations; and

(iii) Diagnostic laboratory tests and examinations provided in connection with other dental procedures authorized as benefits of the TDP and further defined in paragraph (e) of the section.

(12) *Endodontics*. The etiology, prevention, diagnosis, and treatment of diseases and injuries affecting the dental pulp, tooth root, and periapical tissue as further defined in paragraph (e) of this section.

(13) *Initial determination*. A formal written decision on a TDP claim, a request for TDP benefit pre-determination, a request by a provider for approval as an authorized provider, or a decision suspending, excluding or terminating a provider as an authorized provider under the TDP. Rejection of a claim or pre-determination, or of a request for benefit or provider authorization for failure to comply with administrative requirements, including failure to submit reasonably requested information, is not an initial determination. Responses to general or specific inquiries regarding TDP benefits are not initial determinations.

(14) *Nonparticipating provider*. A dentist or dental hygienist that furnished dental services to a TDP beneficiary, but who has not agreed to participate in the contractor's network and accept reimbursement in accordance with the contractor's network agreement. A nonparticipating provider looks to the beneficiary or active duty, Selected Reserve or Individual Ready Reserve member for final responsibility for payment of his or her charge, but may accept payment (assignment of benefits) directly from the insurer or assist the beneficiary in filing the claim for reimbursement by the dental plan contractor. Where the nonparticipating provider does not accept payment directly from the insurer, the insurer pays the beneficiary or active duty, Selected Reserve or Individual Ready Reserve member, not the provider.

(15) *Oral and maxillofacial surgery*. Surgical procedures performed in the oral cavity as further defined in paragraph (e) of this section.

(16) *Orthodontics*. The supervision, guidance, and correction of the growing or mature dentofacial structures, including those conditions that require movement of teeth or correction of malrelationships and malformations of their related structures and adjustment of relationships between and among teeth and facial bones by the application of forces and/or the stimulation and redirection of functional forces within the craniofacial complex as further defined in paragraph (e) of this section.

(17) *Participating provider*. A dentist or dental hygienist who has agreed to participate in the contractor's network and accept reimbursement in accordance with the contractor's network agreement as the total charge (even though less than the actual billed amount), including provision for payment to the provider by the beneficiary (or active duty, Selected Reserve or Individual Ready Reserve member) or any cost-share for covered services.

(18) *Party to the initial determination*. Includes the TDP, a beneficiary of the TDP and a participating provider of services whose interests have been adjudicated by the initial determination. In addition, provider who has been denied approval as an authorized TDP provider is a party to the initial determination, as is a provider who is suspended, excluded or terminated as an authorized provider, unless the provider is excluded or suspended by another agency of the Federal Government, a state, or a local licensing authority.

(19) *Periodontics*. The examination, diagnosis, and treatment of diseases affecting the supporting structures of the teeth as further defined in paragraph (e) of this section.

(20) *Preventive services*. Traditional prophylaxis including scaling deposits from teeth, polishing teeth, and topical application of fluoride to teeth, as well as other dental services authorized in paragraph (e) of this section.

(21) *Prosthodontics*. The diagnosis, planning, making, insertion, adjustment, refinement, and repair of artificial devices intended for the replacement of missing teeth and associated tissues as further defined in paragraph (e) of this section.

(22) *Provider*. A dentist, dental hygienist, or certified and licensed anesthetist as specified in paragraph (f) of this section. This term, when used in relation to OCONUS service area providers, may include other recognized professions authorized to furnish care under laws of that particular country.

(23) *Restorative services*. Restoration of teeth including those procedures commonly described as amalgam restorations, resin restorations, pin retention, and stainless steel crowns for primary teeth as further defined in paragraph (e) of this section.

(c) *Eligibility and enrollment*—(1) *General*. 10 U.S.C. 1076a, 1072(2)(A), (D), or (I), 1072(6), 10143 and 10144 set forth those persons who are eligible for voluntary enrollment in the TDP. A determination that a person is eligible for voluntary enrollment does not automatically entitle that person to benefit payments. The person must be enrolled in accordance with the provisions set forth in this section and meet any additional eligibility requirements in this part in order for dental benefits to be extended.

(2) *Eligibility*—(i) *Persons eligible*. Eligibility for the TDP is continuous in situations where the sponsor or member changes status between any of these eligible categories and there is no break in service or transfer to a non-eligible status.

(A) A person who bears one of the following relationships to an active duty member (under a call or order that does not specify a period of thirty (30) days or less) or a member of the Selected Reserve (as specified in 10 U.S.C. 10143) or Individual Ready Reserve (as specified in 10 U.S.C. 10144):

(*1*) *Spouse*. A lawful husband or wife, regardless of whether or not dependent upon the active duty, Selected Reserve or Individual Ready Reserve member.

(*2*) *Child*. To be eligible, the child must be unmarried and meet one of the requirements set forth in section 199.3(b)(2)(ii)(A)–(F) or 199.3(b)(2)(ii)(H).

(B) A member of the Selected Reserve of the Ready Reserve (as specified in 10 U.S.C. 10143).

(C) A member of the Individual Ready Reserve of the Ready Reserve (as specified in 10 U.S.C. 10144(b)) who is subject to being ordered to active duty involuntarily in accordance with 10 U.S.C. 12304.

(D) All other members of the Individual Ready Reserve of the Ready Reserve (as specified in 10 U.S.C. 10144(a)).

(ii) *Determination of eligibility status and evidence of eligibility*—(A) *Eligibility determination responsibility of the Uniformed Services*. Determination of a person's eligibility for the TDP is the responsibility of the member's Uniformed Service. For the purpose of program integrity, the appropriate Uniformed Service shall, upon request of the Director, OCHAMPUS, or designee, review the eligibility of a specified person when there is reason to question the eligibility status. In such cases, a report on the result of the review and any action taken will be submitted to the Director, OCHAMPUS, or designee.

(B) *Procedures for determination of eligibility*. Uniformed Service identification cards do not distinguish eligibility for the TDP. Procedures for the determination of eligibility are identified in §199.3(f)(2), except that Uniformed Service identification cards do not provide evidence of eligibility for the TDP. Although OCHAMPUS and the dental plan contractor must make determinations concerning a member or dependent's eligibility in order to ensure proper enrollment and proper disbursement of appropriated funds, ultimate responsibility for resolving a member or dependent's eligibility rests with the Uniformed Services.

(C) *Evidence of eligibility required*. Eligibility and enrollment in the TDP will be verified through the DEERS. Eligibility and enrollment information established and maintained in the

DEERS file is the only acceptable evidence of TDP eligibility and enrollment. It is the responsibility of the active duty, Selected Reserve or Individual Ready Reserve member or TDP beneficiary, parent, or legal representative, when appropriate, to provide adequate evidence for entry into the DEERS file to establish eligibility for the TDP, and to ensure that all changes in status that may affect eligibility are reported immediately to the appropriate Uniformed Service for action. Ineligibility for benefits is presumed in the absence of prescribed eligibility evidence in the DEERS file.

(3) *Enrollment*—(i) *Previous plans*—(A) *Basic Active Duty Dependents Dental Benefit Plan*. The Basic Active Duty Dependents Dental Plan was effective from August 1, 1987, up to the date of implementation of the Expanded Active Duty Dependents Dental Benefit Plan. The Basic Active Duty Dependents Dental Benefit Plan terminated upon implementation of the expanded plan.

(B) *Expanded Active Duty Dependents Dental Benefit Plan*. The Expanded Active Duty Dependents Dental Benefit Plan (also known as the TRICARE Family Member Dental Plan) was effective from August 1, 1993, up to the date of implementation of the TDP. The Expanded Active Duty Dependents Dental Benefit Plan terminates upon implementation of the TDP.

(ii) *TRICARE Dental Program (TDP)*—(A) *Election of coverage*. (*1*) Except as provided in paragraph (c)(3)(ii)(A)(2) of this section, active duty, Selected Reserve and Individual Ready Reserve service members may voluntarily elect to enroll their eligible dependents and members of the Selected Reserve and Individual Ready Reserve may voluntarily elect to enroll themselves following implementation of the TDP. In order to obtain TDP coverage, written or telephonic election by the active duty, Selected Reserve or Individual Ready Reserve member must be made and will be accomplished by submission or telephonic completion of an application to the dental plan contractor. This election can also be accomplished via electronic means.

(*2*) Eligible dependents of active duty members enrolled in the Expanded Active Duty Dependents Dental Benefit Plan at the time of implementation of the TDP will automatically be enrolled in the TDP. Eligible members of the Selected Reserve enrolled in the TRICARE Selected Reserve Dental Program at the time of implementation of the TDP will automatically be enrolled in the TDP. No election to enroll in the TDP will be required by the active duty or Selected Reserve member.

(B) *Premiums*—(*1*) Enrollment will be by either single or family premium as defined as follows:

(*i*) Single premium. One (1) covered eligible dependent or one (1) covered eligible Selected Reserve or Individual Ready Reserve member.

(*ii*) Family premium. Two (2) or more covered eligible dependents. Under the family premium, all eligible dependents of the active duty, Selected Reserve or Individual Ready Reserve member are enrolled.

(*2*) *Exceptions*. (*i*) An active duty, Selected Reserve or Individual Ready Reserve member may elect to enroll only those eligible dependents residing in one (1) location when the active duty, Selected Reserve or Individual Ready Reserve member has eligible dependents residing in two or more geographically separate locations (e.g., children living with a divorced spouse; a child attending college).

(*ii*) Instances where a dependent of an active duty member requires a hospital or special treatment environment (due to a medical, physical handicap, or mental condition) for dental care otherwise covered by the TDP, the dependent may be excluded from TDP enrollment and may continue to receive care from a military treatment facility.

(*iii*) A member of the Selected Reserve or Individual Ready Reserve may enroll separately from his or her eligible dependents. A member of the Selected Reserve or Individual Ready Reserve does not have to be enrolled in order for his or her eligible dependents to enroll under the TDP.

(C) *Enrollment period*—(*1*) *General*. Enrollment of eligible dependents or members is for a period of one (1) year

followed by month-to-month enrollment as long as the active duty, Selected Reserve or Individual Ready Reserve member chooses to continue enrollment. Active duty members may enroll their eligible dependents and eligible members of the Selected Reserve or Individual Ready Reserve may enroll themselves or their eligible dependents in the TDP provided there is an intent to remain on active duty or as a member of the Selected Reserve or Individual Ready Reserve (or any combination thereof without a break in service or transfer to a non-eligible status) for a period of not less than one (1) year by the service member and their parent Uniformed Service. Beneficiaries enrolled in the TDP must remain enrolled for a minimum period of one (1) year unless one of the conditions for disenrollment specified in paragraph (c)(3)(ii)(E) of this section is met.

(*2*) *Special enrollment period for Reserve component members ordered to active duty in support of contingency operations*. The mandatory twelve (12) month enrollment period does not apply to Reserve component members ordered to active duty (other than for training) in support of a contingency operation as designated by the Secretary of Defense. Affected Reserve component members may enroll in the TDP only if their orders specify that they are ordered to active duty in support of a contingency operation, as defined by 10 U.S.C., for a period of thirty-one (31) days or more. An affected Reserve component member must elect to enroll in the TDP and complete the enrollment application within thirty (30) days following entry on active duty or within sixty (60) days following implementation of the TDP. Following enrollment, beneficiaries must remain enrolled, with the member paying premiums, until the end of the member's active duty period in support of the contingency operation or twelve (12) months, whichever occurs first unless one of the conditions for disenrollment specified in paragraph (c)(3)(ii)(E) of this section is met.

(*3*) *Continuation of enrollment from Expanded Active Duty Dependents Dental Benefit Plan*. Beneficiaries enrolled in the Expanded Active Duty Dependents Dental Benefit Plan at the time when TDP coverage begins must complete their two (2) year enrollment period established under this former plan except if one of the conditions for disenrollment specified in paragraph (c)(3)(ii)(E) of this section is met. Once this original two (2) year enrollment period is met, the active duty member may continue TDP enrollment on a month-to-month basis. A new one (1) year enrollment period will only be incurred if the active duty member disenrolls and attempts to reenroll in the TDP at a later date.

(*4*) *Continuation of enrollment from TRICARE Selected Reserve Dental Program*. Beneficiaries enrolled in the TRICARE Selected Reserve Dental Program at the time when TDP coverage begins must complete their one (1) year enrollment period established under this former program except if one of the conditions for disenrollment specified in paragraph (c)(3)(ii)(E) of this section is met. Once this original one (1) year enrollment period is met, the Selected Reserve member may continue TDP enrollment on a month-to-month basis. A new one (1) year enrollment period will only be incurred if the Selected Reserve member disenrolls and attempts to reenroll in the TDP at a later date.

(D) *Beginning dates of eligibility*. The beginning date of eligibility for TDP benefits is the first day of the month following the month in which the election of enrollment is completed, signed, and the enrollment and premium is received by the dental plan contractor, subject to a predetermined and publicized dental plan contractor monthly cut-off date, except that the date of eligibility shall not be earlier than the first day of the month in which the TDP is implemented. This includes any changes between single and family member premium coverage and coverage of newly eligible or enrolled dependents or members.

(E) *Changes in and termination of enrollment—(1) Changes in status of active duty, Selected Reserve or Individual Ready Reserve member*. When the active duty, Selected Reserve or Individual Ready Reserve member is separated, discharged, retired, transferred to the Standby or Retired Reserve, his or her enrolled dependents and/or the enrolled

Selected Reserve or Individual Ready Reserve member loses eligibility and enrollment as of 11:59 p.m. on the last day of the month in which the change in status takes place. When the Selected Reserve or Individual Ready Reserve member is ordered to active duty for a period of more than 30 days without a break in service, the member loses eligibility and is disenrolled, if previously enrolled; however, their enrolled dependents maintain their eligibility and previous enrollment subject to eligibility, enrollment and disenrollment provisions described in this section and in the TDP contract.

(*i*) *Reserve component members separated from active duty in support of a contingency operation*. When a member of a reserve component who is separated from active duty to which called or ordered in support of a contingency operation if the active duty is for more than 30 days, the member becomes eligible for Transitional Health Care pursuant to 10 U.S.C. 1145(a) and the member is entitled to dental care to which a member of the uniformed services on active duty for more than 30 days is entitled. Thus the member has no requirement for the TDP and is not eligible to purchase the TDP. Upon the termination of Transitional Health Care eligibility, the member regains TDP eligibility and is reenrolled, if previously enrolled.

(*ii*) *Dependents of members separated from active duty in support of a contingency operation*. Dependents of a member of a reserve component who is separated from active duty to which called or ordered in support of a contingency operation if the active duty is active for more than 30 days maintain their eligibility and previous enrollment, subject to eligibility, enrollment and disenrollment provisions described in this section and in the TDP contract. During the member's Transitional Health Care eligibility, the dependents are considered family members of Reserve Component members.

(*iii*) *Members separated from active duty and not covered by 10 U.S.C. 1145(a)(2)(B)*. When the previously enrolled active duty member is transferred back to the Selected Reserve or Individual Ready Reserve, and is not covered by 10 U.S.C. 1145(a)(2)(B), without a break in service, the member regains TDP eligibility and is reenrolled; however, enrolled dependents maintain their eligibility and previous enrollment subject to eligibility, enrollment and disenrollment provisions described in this section and in the TDP contract.

(*iv*) Eligible dependents of an active duty, Selected Reserve or Individual Ready Reserve member serving a sentence of confinement in conjunction with a sentence of punitive discharge are still eligible for the TDP until such time as the active duty, Selected Reserve or Individual Ready Reserve member's discharge is executed.

(*2*) *Survivor eligibility*. Eligible dependents of active duty members who die while on active duty for a period of more than 30 days and eligible dependents of members of the Ready Reserve (*i.e.*, Selected Reserve or Individual Ready Reserve, as specified in 10 U.S.C. 10143 and 10144(b) respectively) who die, shall be eligible for survivor enrollment in the TDP. During the period of survivor enrollment, the government will pay both the government and the eligible dependent's portion of the premium share. This survivor enrollment shall be up to (3) three years from the date of the member's death, except that, in the case of a dependent of the deceased who is described in 10 U.S.C. 1072(2)(D) or (I), the period of survivor enrollment shall be the longer of the following periods beginning on the date of the member's death:

(*i*) Three years.

(*ii*) The period ending on the date on which such dependent attains 21 years of age.

(*iii*) In the case of such dependent who, at 21 years of age, is enrolled in a full-time course of study in a secondary school or in a full-time course of study in an institution of higher education approved by the administering Secretary and was, at the time of the member's death, in fact dependent on the member for over one-half of such dependent's support, the period ending on the earlier of the following dates: The date on which such dependent ceases to pursue such a course of study, as determined by the administering Secretary; or the date on

which such dependent attains 23 years of age.

(*3*) *Changes in status of dependent*—(*i*) *Divorce.* A spouse separated from an active duty, Selected Reserve or Individual Ready Reserve member by a final divorce decree loses all eligibility based on his or her former marital relationship as of 11:59 p.m. of the last day of the month in which the divorce becomes final. The eligibility of the active duty, Selected Reserve or Individual Ready Reserve member's own children (including adopted and eligible illegitimate children) is unaffected by the divorce. An unadopted stepchild, however, loses eligibility with the termination of the marriage, also as of 11:59 p.m. of the last day of the month in which the divorce becomes final.

(*ii*) *Annulment.* A spouse whose marriage to an active duty, Selected Reserve or Individual Ready Reserve member is dissolved by annulment loses eligibility as of 11:59 p.m. of the last day of the month in which the court grants the annulment order. The fact that the annulment legally declares the entire marriage void from its inception does not affect the termination date of eligibility. When there are children, the eligibility of the active duty, Selected Reserve or Individual Ready Reserve member's own children (including adopted and eligible illegitimate children) is unaffected by the annulment. An unadopted stepchild, however, loses eligibility with the annulment of the marriage, also as of 11:59 p.m. of the last day of the month in which the court grants the annulment order.

(*iii*) *Adoption.* A child of an active duty, Selected Reserve or Individual Ready Reserve member who is adopted by a person, other than a person whose dependents are eligible for TDP benefits while the active duty, Selected Reserve or Individual Ready Reserve member is living, thereby severing the legal relationship between the child and the active duty, Selected Reserve or Individual Ready Reserve member, loses eligibility as of 11:59 p.m. of the last day of the month in which the adoption becomes final.

(*iv*) *Marriage of child.* A child of an active duty, Selected Reserve or Individual Ready Reserve member who marries a person whose dependents are not eligible for the TDP, loses eligibility as of 11:59 p.m. on the last day of the month in which the marriage takes place. However, should the marriage be terminated by death, divorce, or annulment before the child is twenty-one (21) years old, the child again become eligible for enrollment as a dependent as of 12:00 a.m. of the first day of the month following the month in which the occurrence takes place that terminates the marriage and continues up to age twenty-one (21) if the child does not remarry before that time. If the marriage terminates after the child's 21st birthday, there is no reinstatement of eligibility.

(*v*) *Disabling illness or injury of child age 21 or 22 who has eligibility based on his or her student status.* A child twenty-one (21) or twenty-two (22) years old who is pursuing a full-time course of higher education and who, either during the school year or between semesters, suffers a disabling illness or injury with resultant inability to resume attendance at the institution remains eligible for the TDP for six (6) months after the disability is removed or until the student passes his or her 23rd birthday, whichever occurs first. However, if recovery occurs before the 23rd birthday and there is resumption of a full-time course of higher education, the TDP can be continued until the 23rd birthday. The normal vacation periods during an established school year do not change the eligibility status of a dependent child twenty-one (21) or twenty-two (22) years old in full-time student status. Unless an incapacitating condition existed before, and at the time of, a dependent child's 21st birthday, a dependent child twenty-one (21) or twenty-two (22) years old in student status does not have eligibility related to mental or physical incapacity as described in §199.3(b)(2)(iv)(C)(*2*).

(*4*) *Other*—(*i*) *Disenrollment because of no eligible beneficiaries.* When an active duty, Selected Reserve or Individual Ready Reserve member ceases to have any eligible beneficiaries, enrollment is terminated for those enrolled dependents.

(*ii*) *Option to disenroll as a result of a change in active duty station.* When an

active duty member transfers with enrolled dependents to a duty station where space-available dental care for the enrolled dependents is readily available at the local Uniformed Service dental treatment facility, the active duty member may elect, within ninety (90) calendar days of the transfer, to disenroll their dependents from the TDP. If the active duty member is later transferred to a duty station where dental care for the dependents is not available in the local Uniformed Service dental treatment facility, the active duty member may reenroll their eligible dependents in the TDP provided the member, as of the date of reenrollment, otherwise meets the requirements for enrollment, including the intent to remain on active duty for a period of not less than one (1) year. This disenrollment provision does not apply to enrolled dependents of members of the Selected Reserve or Individual Ready Reserve or to enrolled members of the Selected Reserve or Individual Ready Reserve.

(*iii*) *Option to disenroll due to transfer to OCONUS service area.* When an enrolled dependent of an active duty, Selected Reserve or Individual Ready Reserve member or an enrolled Selected Reserve or Individual Ready Reserve member relocates to locations within the OCONUS service area, the active duty, Selected Reserve or Individual Ready Reserve member may elect, within ninety (90) calendar days of the relocation, to disenroll their dependents from the TDP, or in the case of enrolled members of the Selected Reserve or Individual Ready Reserve, to disenroll themselves from the TDP. The active duty, Selected Reserve or Individual Ready Reserve member may reenroll their eligible dependents, or in the case of members of the Selected Reserve or Individual Ready Reserve, may reenroll themselves in the TDP provided the member, as of the date of reenrollment, otherwise meets the requirements for enrollment, including the intent to remain on active duty or as a member of the Selected Reserve or Individual Ready Reserve (or any combination thereof without a break in service or transfer to a non-eligible status) for a period of not less than one (1) year.

(*iv*) *Option to disenroll after an initial one (1) year enrollment.* When a dependent's enrollment under an active duty, Selected Reserve or Individual Ready Reserve member or a Selected Reserve or Individual Ready Reserve member's own enrollment has been in effect for a continuous period of one (1) year, the active duty, Selected Reserve or Individual Ready Reserve member may disenroll their dependents, or in the case of enrolled members of the Selected Reserve or Individual Ready Reserve may disenroll themselves at any time following procedures as set up by the dental plan contractor. Subsequent to the disenrollment, the active duty, Selected Reserve or Individual Ready Reserve member may reenroll their eligible dependents, or in the case of members of the Selected Reserve or Individual Ready Reserve may reenroll themselves, for another minimum period of one (1) year. If, during any one (1) year enrollment period, the active duty, Selected Reserve or Individual Ready Reserve member disenrolls their dependents, or in the case of members of the Selected Reserve or Individual Ready Reserve disenrolls themselves, for reasons other than those listed in this paragraph (c)(3)(ii)(E) or fails to make premium payments, dependents enrolled under the active duty, Selected Reserve or Individual Ready Reserve member, or enrolled members of the Selected Reserve and Individual Ready Reserve, will be subject to a lock-out period of twelve (12) months. Following this period of time, active duty, Selected Reserve or Individual Ready Reserve members will be able to reenroll their eligible dependents, or members of the Selected Reserve or Individual Ready Reserve will be able to reenroll themselves, if they so choose. The twelve (12) month lock-out period applies to enrolled dependents of a Reserve component member who disenrolls for reasons other than those listed in this paragraph (c)(3)(ii)(E) or fails to make premium payments after the member has enrolled pursuant to paragraph (c)(3)(ii)(C) of this section.

(*5*) TRICARE Dental Program coverage shall terminate for members who no longer qualify for the TRICARE

Dental Program as specified in paragraph (c)(2) of this section, with one exception. If a member is involuntarily separated from the Selected Reserve under other than adverse conditions, as characterized by the Secretary concerned, and TRICARE Dental Program coverage is in effect for the member and/or the family on the last day of his or her membership in the Selected Reserve; then the TRICARE Dental Program coverage that was actually in effect may terminate no earlier than 180 days after the date on which the member is separated from the Selected Reserve. This exception expires December 31, 2018.

(d) *Premium sharing*—(1) *General*. Active duty, Selected Reserve or Individual Ready Reserve members enrolling their eligible dependents, or members of the Selected Reserve or Individual Ready Reserve enrolling themselves, in the TDP shall be required to pay all or a portion of the premium cost depending on their status.

(i) *Members required to pay a portion of the premium cost*. This premium category includes active duty members (under a call or order to active duty that does not specify a period of thirty (30) days or less) on behalf of their enrolled dependents. It also includes members of the Selected Reserve (as specified in 10 U.S.C. 10143) and the Individual Ready Reserve (as specified in 10 U.S.C. 10144(b)) enrolled on their own behalf.

(ii) *Members required to pay the full premium cost*. This premium category includes members of the Selected Reserve (as specified in 10 U.S.C. 10143), and the Individual Ready Reserve (as specified in 10 U.S.C. 10144), on behalf of their enrolled dependents. It also includes members of the Individual Ready Reserve (as specified in 10 U.S.C. 10144(a)) enrolled on their own behalf.

(2) *Proportion of premium share*. The proportion of premium share to be paid by the active duty, Selected Reserve and Individual Reserve member pursuant to paragraph (d)(1)(i) of this section is established by the ASD(HA), or designee, at not more than forty (40) percent of the total premium. The proportion of premium share to be paid by the Selected Reserve and Individual Reserve member pursuant to paragraph (d)(1)(ii) of this section is established by the ASD(HA), or designee, at one hundred (100) percent of the total premium.

(3) *Provision for increases in active duty, Selected Reserve and Individual Ready Reserve member's premium share*. (i) Although previously capped at $20 per month, the law has been amended to authorize the cap on active duty, Selected Reserve and Individual Ready Reserve member's premiums pursuant to paragraph (d)(1)(i) of this section to rise, effective as of January 1 of each year, by the percent equal to the lesser of:

(A) The percent by which the rates of basic pay of members of the Uniformed Services are increased on such date; or

(B) The sum of one-half percent and the percent computed under 5 U.S.C. 5303(a) for the increase in rates of basic pay for statutory pay systems for pay periods beginning on or after such date.

(ii) Under the legislation authorizing an increase in the monthly premium cap, the methodology for determining the active duty, Selected Reserve and Individual Ready Reserve member's TDP premium pursuant to paragraph (d)(1)(i) of this section will be applied as if the methodology had been in continuous use since December 31, 1993.

(4) *Reduction of premium share for enlisted members*. For enlisted members in pay grades E–1 through E–4, the ASD(HA) or designee, may reduce the monthly premium these active duty, Selected Reserve and Individual Ready Reserve members pay pursuant to paragraph (d)(1)(i) of this section.

(5) *Reduction of cost-shares for enlisted members*. For enlisted members in pay grades E–1 through E–4, the ASD(HA) or designee, may reduce the cost-shares that active duty, Selected Reserve and Individual Ready Reserve members pay on behalf of their enrolled dependents and that members of the Selected Reserve and Individual Ready Reserve pay on their own behalf for selected benefits as specified in paragraph (e)(3)(i) of this section.

(6) *Premium payment method*. The active duty, Selected Reserve and Individual Ready Reserve member's premium share may be deducted from the active duty, Selected Reserve or Individual Ready Reserve member's basic

pay or compensation paid under 37 U.S.C. 206, if sufficient pay is available. For members who are otherwise eligible for TDP benefits and who do not receive such pay and dependents who are otherwise eligible for TDP benefits and whose sponsors do not receive such pay, or if insufficient pay is available, the premium payment may be collected pursuant to procedures established by the Director, OCHAMPUS, or designee.

(7) *Annual notification of premium rates*. TDP premium rates will be determined as part of the competitive contracting process. Information on the premium rates will be widely distributed by the dental plan contractor and the Government.

(e) *Plan benefits*—(1) *General*—(i) *Scope of benefits*. The TDP provides coverage for diagnostic and preventive services, sealants, restorative services, endodontics, periodontics, prosthodontics, orthodontics and oral and maxillofacial surgery.

(ii) *Authority to act for the plan*. The authority to make benefit determinations and authorize plan payments under the TDP rests primarily with the insurance, service plan, or prepayment dental plan contractor, subject to compliance with Federal law and regulation and Government contract provisions. The Director, OCHAMPUS, or designee, provides required benefit policy decisions resulting from changes in Federal law and regulation and appeal decisions. No other persons or agents (such as dentists or Uniformed Services HBAs) have such authority.

(iii) *Dental benefits brochure*—(A) *Content*. The Director, OCHAMPUS, or designee, shall establish a comprehensive dental benefits brochure explaining the benefits of the plan in common lay terminology. The brochure shall include the limitations and exclusions and other benefit determination rules for administering the benefits in accordance with the law and this part. The brochure shall include the rules for adjudication and payment of claims, appealable issues, and appeal procedures in sufficient detail to serve as a common basis for interpretation and understanding of the rules by providers, beneficiaries, claims examiners, correspondence specialists, employees and representatives of other Government bodies, HBAs, and other interested parties. Any conflict, which may occur between the dental benefits brochure and law or regulation, shall be resolved in favor of law and regulation.

(B) *Distribution*. The dental benefits brochure will be available through the dental plan contractor and will be distributed with the assistance of the Uniformed Services HBAs and major personnel centers at Uniformed Service installations and headquarters to all members enrolling themselves or their eligible dependents.

(iv) *Alternative course of treatment policy*. The Director, OCHAMPUS, or designee, may establish, in accordance with generally accepted dental benefit practices, an alternative course of treatment policy which provides reimbursement in instances where the dentist and beneficiary select a more expensive service, procedure, or course of treatment than is customarily provided. The alternative course of treatment policy must meet following conditions:

(A) The service, procedure, or course of treatment must be consistent with sound professional standards of dental practice for the dental condition concerned.

(B) The service, procedure, or course of treatment must be a generally accepted alternative for a service or procedure covered by the TDP for the dental condition.

(C) Payment for the alternative service or procedure may not exceed the lower of the prevailing limits for the alternative procedure, the prevailing limits or dental plan contractor's scheduled allowance for the otherwise authorized benefit procedure for which the alternative is substituted, or the actual charge for the alternative procedure.

(2) *Benefits*. The following benefits are defined (subject to the TDP's exclusions, limitations, and benefit determination rules approved by OCHAMPUS) using the American Dental Association's Council on Dental Care Program's Code on Dental Procedures and Nomenclature. The Director, OCHAMPUS, or designee, may modify

these services, to the extent determined appropriate based on developments in common dental care practices and standard dental insurance programs.

(i) Diagnostic and preventive services. Benefits may be extended for those dental services described as oral examination, diagnostic, and preventive services when performed directly by dentists and dental hygienists as authorized under paragraph (f) of this section. These include the following categories of service:

(A) Diagnostic services. (*1*) Clinical oral examinations.

(*2*) Radiographs and diagnostic imaging.

(*3*) Tests and laboratory examinations.

(B) Preventive services. (*1*) Dental prophylaxis.

(*2*) Topical fluoride treatment (office procedure).

(*3*) Other preventive services.

(*4*) Space maintenance (passive appliances).

(*5*) Sealants.

(ii) *General services and services ''by report''*. The following categories of services are authorized when performed directly by dentists or dental hygienists, as authorized under paragraph (f) of this section, only in unusual circumstances requiring justification of exceptional conditions directly related to otherwise authorized procedures. Use of the procedures may not result in the fragmentation of services normally included in a single procedure. The dental plan contractor may recognize a ''by report'' condition by providing additional allowance to the primary covered procedure instead of recognizing or permitting a distinct billing for the ''by report'' service. These include the following categories of general services:

(A) Unclassified treatment.

(B) Anesthesia.

(C) Professional consultation.

(D) Professional visits.

(E) Drugs.

(F) Miscellaneous services.

(iii) *Restorative services*. Benefits may be extended for restorative services when performed directly by dentists or dental hygienists, or under orders and supervision by dentists, as authorized under paragraph (f) of this section. These include the following categories of restorative services:

(A) Amalgam restorations.

(B) Resin restorations.

(C) Inlay and onlay restorations.

(D) Crowns.

(E) Other restorative services.

(iv) *Endodontic services*. Benefits may be extended for those dental services involved in treatment of diseases and injuries affecting the dental pulp, tooth root, and periapical tissue when performed directly by dentists as authorized under paragraph (f) of this section. These include the following categories of endodontic services:

(A) Pulp capping.

(B) Pulpotomy and pulpectomy.

(C) Endodontic therapy.

(D) Apexification and recalcification procedures.

(E) Apicoectomy and periradicular services.

(F) Other endodontic procedures.

(v) *Periodontic services*. Benefits may be extended for those dental services involved in prevention and treatment of diseases affecting the supporting structures of the teeth to include periodontal prophylaxis, gingivectomy or gingivoplasty, gingival curettage, etc., when performed directly by dentists as authorized under paragraph (f) of this section. These include the following categories of periodontic services:

(A) Surgical services.

(B) Periodontal services.

(C) Other periodontal services.

(vi) *Prosthodontic services*. Benefits may be extended for those dental services involved in fabrication, insertion adjustment, relinement, and repair of artificial teeth and associated tissues to include removable complete and partial dentures, fixed crowns and bridges when performed directly by dentists as authorized under paragraph (f)(4) of this section. These include the following categories of prosthodontic services:

(A) Prosthodontics (removable).

(*1*) Complete and partial dentures.

(*2*) Adjustments to dentures.

(*3*) Repairs to complete and partial dentures.

(*4*) Denture rebase procedures.

(*5*) Denture reline procedures.

(*6*) Other removable prosthetic services.

(B) Prosthodontics (fixed).

(*1*) Fixed partial denture pontics.

(*2*) Fixed partial denture retainers.

(*3*) Other partial denture services.

(vii) *Orthodontic services*. Benefits may be extended for the supervision, guidance, and correction of growing or mature dentofacial structures, including those conditions that require movement of teeth or correction of malrelationships and malformations through the use of orthodontic procedures and devices when performed directly by dentists as authorized under paragraph (f) of this section to include in-process orthodontics. These include the following categories of orthodontic services:

(A) Limited orthodontic treatment.

(B) Minor treatment to control harmful habits.

(C) Interceptive orthodontic treatment.

(D) Comprehensive orthodontic treatment.

(E) Other orthodontic services.

(viii) *Oral and maxillofacial surgery services*. Benefits may be extended for basic surgical procedure of the extraction, reimplantation, stabilization and repositioning of teeth, alveoloplasties, incision and drainage of abscesses, suturing of wounds, biopsies, etc., when performed directly by dentists as authorized under paragraph (f) of this section. These include the following categories of oral and maxillofacial surgery services:

(A) Extractions.

(B) Surgical extractions.

(C) Other surgical procedures.

(D) Alveoloplasty—surgical preparation of ridge for denture.

(E) Surgical incision.

(F) Repair of traumatic wounds.

(G) Complicated suturing.

(H) Other repair procedures.

(ix) Exclusion of adjunctive dental care. Adjunctive dental care benefits are excluded under the TDP. For further information on adjunctive dental care benefits under TRICARE/CHAMPUS, see § 199.4(e)(10).

(x) *Benefit limitations and exclusions*. The Director, OCHAMPUS, or designee, may establish such exclusions and limitations as are consistent with those established by dental insurance and prepayment plans to control utilization and quality of care for the services and items covered by the TDP.

(xi) *Limitation on reduction of benefits*. If a reduction in benefits is planned, the Secretary of Defense, or designee, may not reduce TDP benefits without notifying the appropriate Congressional committees. If a reduction is approved, the Secretary of Defense, or designee, must wait one (1) year from the date of notice before a benefit reduction can be implemented.

(3) *Cost-shares, liability and maximum coverage*—(i) *Cost-shares*. The following table lists maximum active duty, Selected Reserve and Individual Ready Reserve member and dependent cost-shares for covered services for participating and nonparticipating providers of care (see paragraph (f)(6) of this section for additional active duty, Selected Reserve and Individual Ready Reserve costs). These are percentages of the dental plan contractor's determined allowable amount that the active duty, Selected Reserve and Individual Ready Reserve member or beneficiary must pay to these providers. For care received in the OCONUS service area, the ASD(HA), or designee, may pay certain cost-shares and other portions of a provider's billed charge for enrolled dependents of active duty members (under a call or order that does not specify a period of thirty (30) days or less), and for members of the Selected Reserve (as specified in 10 U.S.C. 10143) and Individual Ready Reserve (as specified in 10 U.S.C. 10144(b)) enrolled on their own behalf.

[In percent]

| Covered services | Cost-share for pay grades E-1, E-2, E-3 and E-4 | Cost-share for all other pay grades |
|---|---|---|
| Diagnostic | 0 | 0 |
| Preventive, except Sealants | 0 | 0 |
| Emergency Services | 0 | 0 |
| Professional Consultations | 20 | 20 |
| Professional Visits | 20 | 20 |
| Post Surgical Services | 20 | 20 |
| Basic Restorative (example: amalgams, resins, stainless steel crowns) | 20 | 20 |
| Endodontic | 30 | 40 |
| Periodontic | 30 | 40 |
| Oral and Maxillofacial Surgery | 30 | 40 |
| General Anesthesia | 40 | 40 |
| Intravenous Sedation | 50 | 50 |

[In percent]

| Covered services | Cost-share for pay grades E-1, E-2, E-3 and E-4 | Cost-share for all other pay grades |
|---|---|---|
| Other Restorative (example: crowns, onlays, casts) | 50 | 50 |
| Prosthodontics | 50 | 50 |
| Medications | 50 | 50 |
| Orthodontic | 50 | 50 |
| Miscellaneous | 50 | 50 |

(ii) *Dental plan contractor liability.* When more than twenty-five (25) percent or more than two hundred (200) enrollees in a specific five (5) digit zip code area are unable to obtain a periodic or initial (non-emergency) dentistry appointment with a network provider within twenty-one (21) calendar days and within thirty-five (35) miles of the enrollee's place of residence, then the TRICARE Management Activity (TMA) will designate that area as ''non-compliant with the access standard.'' Once so designated, the dental program contractor will reimburse the beneficiary, or active duty, Selected Reserve or Individual Ready Reserve member, or the nonparticipating provider selected by enrollees in that area (or a subset of the area or nearby zip codes in other five (5) digit zip code areas as determined by TMA) at the level of the provider's usual fees less the applicable enrollee cost-share, if any. TMA shall determine when such area becomes compliant with the access standards. This access standard and associated liability does not apply to care received in the OCONUS service area.

(iii) *Maximum coverage amounts.* Beneficiaries are subject to an annual maximum coverage amount for non-orthodontic dental benefits and a lifetime maximum coverage amount for orthodontics as established by the ASD (HA) or designee.

(f) *Authorized providers*—(1) *General.* Beneficiaries may seek covered services from any provider who is fully licensed and approved to provide dental care or covered anesthesia benefits in the state where the provider is located. This includes licensed dental hygienists, practicing within the scope of their licensure, subject to any restrictions a state licensure or legislative body imposes regarding their status as independent providers of care.

(2) *Authorized provider status does not guarantee payment of benefits.* The fact that a provider is ''authorized'' is not to be construed to mean that the TDP will automatically pay a claim for services or supplies provided by such a provider. The Director, OCHAMPUS, or designee, also must determine if the patient is an eligible beneficiary, whether the services or supplies billed are authorized and medically necessary, and whether any of the authorized exclusions of otherwise qualified providers presented in this section apply.

(3) *Utilization review and quality assurance.* Services and supplies furnished by providers of care shall be subject to utilization review and quality assurance standards, norms, and criteria established under the TDP. Utilization review and quality assurance assessments shall be performed under the TDP consistent with the nature and level of benefits of the plan, and shall include analysis of the data and findings by the dental plan contractor from other dental accounts.

(4) *Provider required.* In order to be considered benefits, all services and supplies shall be rendered by, prescribed by, or furnished at the direction of, or on the order of a TDP authorized provider practicing within the scope of his or her license.

(5) *Participating provider.* An authorized provider may elect to participate as a network provider in the dental plan contractor's network and any such election will apply to all TDP beneficiaries. The authorized provider may not participate on a claim-by-claim basis. The participating provide must agree to accept, within one (1) day of a request for appointment, beneficiaries in need of emergency palliative treatment. Payment to the participating provider is based on the methodology specified in paragraph (g)(2)(ii) of this section. The fee or charge determinations are binding upon the provider in accordance with the dental plan contractor's procedures for participation in the network. Payment is made directly to the participating provider, and the participating

provider may only charge the beneficiary the applicable percent cost-share of the dental plan contractor's allowable charge for those benefit categories as specified in paragraph (e) of this section, in addition to the full charges for any services not authorized as benefits.

(6) *Nonparticipating provider*. An authorized provider may elect to not participate for all TDP beneficiaries and request the beneficiary or active duty, Selected Reserve or Individual Ready Reserve member to pay any amount of the provider's billed charge in excess of the dental plan contractor's determination of allowable charges (to include the appropriate cost-share). Neither the Government nor the dental plan contractor shall have any responsibility for any amounts over the allowable charges as determined by the dental plan contractor, except where the dental plan contractor is unable to identify a participating provider of care within thirty-five (35) miles of the beneficiary's place of residence with appointment availability within twenty-one (21) calendar days. In such instances of the nonavailability of a participating provider and in accordance with the provisions of the dental contract, the nonparticipating provider located within thirty-five (35) miles of the beneficiary's place of residence shall be paid his or her usual fees (either by the beneficiary or the dental plan contractor if the beneficiary elected assignment of benefits), less the percent cost-share as specified in paragraph (e)(3)(i) of this section.

(i) *Assignment of benefits*. A nonparticipating provider may accept assignment of benefits for claims (for beneficiaries certifying their willingness to make such assignment of benefits) by filing the claims completed with the assistance of the beneficiary or active duty, Selected Reserve or Individual Ready Reserve member for direct payment by the dental plan contractor to the provider.

(ii) *No assignment of benefits*. A nonparticipating provider for all beneficiaries may request that the beneficiary or active duty, Selected Reserve or Individual Ready Reserve member file the claim directly with the dental plan contractor, making arrangements with the beneficiary or active duty, Selected Reserve or Individual Ready Reserve member for direct payment by the beneficiary or active duty, Selected Reserve or Individual Ready Reserve member.

(7) *Alternative delivery system*—(i) *General*. Alternative delivery systems may be established by the Director, OCHAMPUS, or designee, as authorized providers. Only dentists, dental hygienists and licensed anesthetists shall be authorized to provide or direct the provision of authorized services and supplies in an approved alternative delivery system.

(ii) *Defined*. An alternative delivery system may be any approved arrangement for a preferred provider organization, capitation plan, dental health maintenance or clinic organization, or other contracted arrangement which is approved by OCHAMPUS in accordance with requirements and guidelines.

(iii) *Elective or exclusive arrangement*. Alternative delivery systems may be established by contract or other arrangement on either an elective or exclusive basis for beneficiary selection of participating and authorized providers in accordance with contractual requirements and guidelines.

(iv) *Provider election of participation*. Otherwise authorized providers must be provided with the opportunity of applying for participation in an alternative delivery system and of achieving participation status based on reasonable criteria for timeliness of application, quality of care, cost containment, geographic location, patient availability, and acceptance of reimbursement allowance.

(v) *Limitation on authorized providers*. Where exclusive alternative delivery systems are established, only providers participating in the alternative delivery system are authorized providers of care. In such instances, the TDP shall continue to pay beneficiary claims for services rendered by otherwise authorized providers in accordance with established rules for reimbursement of nonparticipating providers where the beneficiary has established a patient relationship with the nonparticipating provider prior to the TDP's proposal to subcontract with the alternative delivery system.

(vi) *Charge agreements*. Where the alternative delivery system employs a discounted fee-for-service reimbursement methodology or schedule of charges or rates which includes all or most dental services and procedures recognized by the American Dental Association's Council on Dental Care Program's Code on Dental Procedures and Nomenclature, the discounts or schedule of charges or rates for all dental services and procedures shall be extended by its participating providers to beneficiaries of the TDP as an incentive for beneficiary participation in the alternative delivery system.

(g) *Benefit payment*—(1) *General*. TDP benefits payments are made either directly to the provider or to the beneficiary or active duty, Selected Reserve or Individual Ready Reserve member, depending on the manner in which the claim is submitted or the terms of the subcontract of an alternative delivery system with the dental plan contractor.

(2) *Benefit payment*. Beneficiaries are not required to utilize participating providers. For beneficiaries who do use these participating providers, however, these providers shall not balance bill any amount in excess of the maximum payment allowed by the dental plan contractor for covered services. Beneficiaries using nonparticipating providers may be balance-billed amounts in excess of the dental plan contractor's determination of allowable charges. The following general requirements for the TDP benefit payment methodology shall be met, subject to modifications and exceptions approved by the Director, OCHAMPUS, or designee:

(i) Nonparticipating providers (or the Beneficiaries or active duty, Selected Reserve or Individual Ready Reserve members for unassigned claims) shall be reimbursed at the lesser of the provider's actual charge: Or the network maximum allowable charge for similar services for that same locality (region) or state, whichever is lower, subject to the exception listed in paragraph (e)(3)(ii) of this section, less any cost-share amount due for authorized services. The network maximum allowable charge is the maximum negotiated fee between the dental contractor and any TDP participating provider for similar services covered by the dental plan in that same locality (region) or state.

(ii) Participating providers shall be reimbursed in accordance with the contractor's network agreements, less any cost-share amount due for authorized services.

(3) *Fraud, abuse, and conflict of interest*. The provisions of §199.9 shall apply except for §199.9(e). All references to ''CHAMPUS contractors'', ''CHAMPUS beneficiaries'' and ''CHAMPUS providers'' in §199.9 shall be construed to mean the ''dental plan contractor'', ''TDP beneficiaries'' and ''TPD providers'' respectively for the purposes of this section. Examples of fraud include situations in which ineligible persons not enrolled in the TDP obtain care and file claims for benefits under the name and identification of a beneficiary; or when providers submit claims for services and supplies not rendered to Beneficiaries; or when a participating provider bills the beneficiary for amounts over the dental plan contractor's determination of allowable charges; or when a provider fails to collect the specified patient cost-share amount.

(h) *Appeal and hearing procedures*. The provisions of §199.10 shall apply except where noted in this section. All references to ''CHAMPUS contractors'', ''CHAMPUS beneficiaries'', ''CHAMPUS participating providers'' and ''CHAMPUS Explanation of Benefits'' in §199.10 shall be construed to mean the ''dental plan contractor'', ''TDP beneficiaries'', ''TDP participating providers'' and ''Dental Explanation of Benefits or DEOB'' respectively for the purposes of this section. References to ''OCHAMPUSEUR'' in §199.10 are not applicable to the TDP or this section.

(1) *General*. See §199.10(a).

(i) *Initial determination*—(A) *Notice of initial determination and right to appeal*. See §199.10(a)(1)(i).

(B) *Effect of initial determination*. See §199.10(a)(1)(ii).

(ii) *Participation in an appeal*. Participation in an appeal is limited to any party to the initial determination, including OCHAMPUS, the dental plan contractor, and authorized representatives of the parties. Any party to the

initial determination, except OCHAMPUS and the dental plan contractor, may appeal an adverse determination. The appealing party is the party who actually files the appeal.

(A) *Parties to the initial determination.* See §§ 199.10(a)(2)(i) and 199.10(a)(2)(i)(A), (B), (C) and (E). In addition, a third party other than the dental plan contractor, such as an insurance company, is not a party to the initial determination and is not entitled to appeal, even though it may have an indirect interest in the initial determination.

(B) *Representative.* See § 199.10(a)(2)(ii).

(iii) *Burden of proof.* See § 199.10(a)(3).

(iv) *Evidence in appeal and hearing cases.* See § 199.10(a)(4).

(v) *Late filing.* If a request for reconsideration, formal review, or hearing is filed after the time permitted in this section, written notice shall be issued denying the request. Late filing may be permitted only if the appealing party reasonably can demonstrate to the satisfaction of the dental plan contractor, or the Director, OCHAMPUS, or designee, that timely filing of the request was not feasible due to extraordinary circumstances over which the appealing party had no practical control. Each request for an exception to the filing requirement will be considered on its own merits. The decision of the Director, OCHAMPUS, or a designee, on the request for an exception to the filing requirement shall be final.

(vi) *Appealable issue.* See §§ 199.10(a)(6), 199.10(a)(6)(i), 199.10(a)(6)(iv), including §§ 199.10(a)(6)(iv) (A) and (C), and 199.10(a)(6)(v) for an explanation and examples of non-appealable issues. Other examples of issues that are not appealable under this section include:

(A) The amount of the dental plan contractor-determined allowable charge since the methodology constitutes a limitation on benefits under the provisions of this section.

(B) Certain other issues on the basis that the authority for the initial determination is not vested in OCHAMPUS. Such issues include but are not limited to the following examples:

(*1*) A determination of a person's enrollment in the TDP is the responsibility of the dental plan contractor and ultimate responsibility for resolving a beneficiary's enrollment rests with the dental plan contractor. Accordingly, a disputed question of fact concerning a beneficiary's enrollment will not be considered an appealable issue under the provisions of this section, but shall be resolved in accordance with paragraph (c) of this section and the dental plan contractor's enrollment policies and procedures.

(*2*) Decisions relating to the issuance of a nonavailability statement (NAS) in each case are made by the Uniformed Services. Disputes over the need for an NAS or a refusal to issue an NAS are not appealable under this section. The one exception is when a dispute arises over whether the facts of the case demonstrate a dental emergency for which an NAS is not required. Denial of payment in this one situation is an appealable issue.

(*3*) Any decision or action on the part of the dental plan contractor to include a provider in their network or to designate a provider as participating is not appealable under this section. Similarly, any decision or action on the part of the dental plan contractor to exclude a provider from their network or to deny participating provider status is not appealable under this section.

(vii) *Amount in dispute*—(A) *General.* An amount in dispute is required for an adverse determination to be appealed under the provisions of this section, except as set forth or further explained in § 199.10(a)(7)(ii), (iii) and (iv).

(B) *Calculated amount.* The amount in dispute is calculated as the amount of money the dental plan contractor would pay if the services involved in the dispute were determined to be authorized benefits of the TDP. Examples of amounts of money that are excluded by this section from payments for authorized benefits include, but are not limited to:

(*1*) Amounts in excess of the dental plan contractor's—determined allowable charge.

(*2*) The beneficiary's cost-share amounts.

(*3*) Amounts that the beneficiary, or parent, guardian, or other responsible person has no legal obligation to pay.

(*4*) Amounts excluded under the provisions of § 199.8 of this part.

(viii) *Levels of appeal.* See § 199.10(a)(8)(i). Initial determinations involving the sanctioning (exclusion, suspension, or termination) of TDP providers shall be appealed directly to the hearing level.

(ix) *Appeal decision.* See § 199.10(a)(9).

(2) *Reconsideration.* See § 199.10(b).

(3) *Formal review.* See § 199.10(c).

(4) *Hearing*—(i) *General.* See §§ 1.99.10(d) and 199.10(d)(1) through (d)(5) and (d0(7) through (d)(12) for information on the hearing process.

(ii) *Authority of the hearing officer.* The hearing officer, in exercising the authority to conduct a hearing under this part, will be bound by 10 U.S.C., chapter 55, and this part. The hearing officer in addressing substantive, appealable issues shall be bound by the dental benefits brochure applicable for the date(s) of service, policies, procedures, instructions and other guidelines issued by the ASD(HA), or a designee, or by the Director, OCHAMPUS, or a designee, in effect for the period in which the matter in dispute arose. A hearing officer may not establish or amend the dental benefits brochure, policy, procedures, instructions, or guidelines. However, the hearing officer may recommend reconsideration of the policy, procedures, instructions or guidelines by the ASD (HA), or a designee, when the final decisions is issued in the case.

(5) *Final decision.* See §§ 199.10(e)(1) and 199.10(e)(1)(i) for information on final decisions in the appeal and hearing process, with the exception that no recommended decision shall be referred for review by ASD(HA).

(i) *Implementing Instructions.* The Director, TRICARE Management Activity or designee may issue TRICARE Dental Program policies, standards, and criteria as may be necessary to implement the intent of this section.

[66 FR 12860, Mar. 1, 2001; 66 FR 16400, Mar. 26, 2001, as amended at 68 FR 65174, Nov. 19, 2003; 69 FR 55359, Sept. 14, 2004; 70 FR 55252, Sept. 21, 2005; 71 FR 1696, Jan. 11, 2006; 71 FR 66872, Nov. 17, 2006; 72 FR 53685, Sept. 20, 2007; 76 FR 57643, Sept. 16, 2011; 76 FR 81367, Dec. 28, 2011; 80 FR 55254, Sept. 15, 2015; 81 FR 11667, Mar. 7, 2016]

**§ 199.14 Provider reimbursement methods.**

(a) *Hospitals.* The CHAMPUS-determined allowable cost for reimbursement of a hospital shall be determined on the basis of one of the following methodologies.

(1) *CHAMPUS Diagnosis Related Group (DRG)-based payment system.* Under the CHAMPUS DRG-based payment system, payment for the operating costs of inpatient hospital services furnished by hospitals subject to the system is made on the basis of prospectively-determined rates and applied on a per discharge basis using DRGs. Payments under this system will include a differentiation for urban (using large urban and other urban areas) and rural hospitals and an adjustment for area wage differences and indirect medical education costs. Additional payments will be made for capital costs, direct medical education costs, and outlier cases.

(i) *General*—(A) *DRGs used.* The CHAMPUS DRG-based payment system will use the same DRGs used in the most recently available grouper for the Medicare Prospective Payment System, except as necessary to recognize distinct characteristics of CHAMPUS beneficiaries and as described in instructions issued by the Director, OCHAMPUS.

(B) *Assignment of discharges to DRGs.* (*1*) The classification of a particular discharge shall be based on the patient's age, sex, principal diagnosis (that is, the diagnosis established, after study, to be chiefly responsible for causing the patient's admission to the hospital), secondary diagnoses, procedures performed and discharge status. In addition, for neonatal cases (other than normal newborns) the classification shall also account for birthweight, surgery and the presence of multiple, major and other neonatal problems, and shall incorporate annual updates to these classification features.

(*2*) Each discharge shall be assigned to only one DRG regardless of the number of conditions treated or services furnished during the patient's stay.

(C) *Basis of payment*—(*1*) *Hospital billing.* Under the CHAMPUS DRG-based payment system, hospitals are required

to submit claims (including itemized charges) in accordance with §199.7(b). The CHAMPUS fiscal intermediary will assign the appropriate DRG to the claim based on the information contained in the claim. Any request from a hospital for reclassification of a claim to a higher weighted DRG must be submitted, within 60 days from the date of the initial payment, in a manner prescribed by the Director, OCHAMPUS.

(*2*) *Payment on a per discharge basis.* Under the CHAMPUS DRG-based payment system, hospitals are paid a predetermined amount per discharge for inpatient hospital services furnished to CHAMPUS beneficiaries.

(*3*) *Pricing of claims.* All final claims with discharge dates of September 30, 2014, or earlier that are reimbursed under the CHAMPUS DRG-based payment system are to be priced as of the date of admission, regardless of when the claim is submitted. All final claims with discharge dates of October 1, 2014, or later that are reimbursed under the CHAMPUS DRG-based payment system are to be priced as of the date of discharge.

(*4*) *Payment in full.* The DRG-based amount paid for inpatient hospital services is the total CHAMPUS payment for the inpatient operating costs (as described in paragraph (a)(1)(i)(C)(*5*) of this section) incurred in furnishing services covered by the CHAMPUS. The full prospective payment amount is payable for each stay during which there is at least one covered day of care, except as provided in paragraph (a)(1)(iii)(E)(*1*)(*i*)(*A*) of this section.

(*5*) *Inpatient operating costs.* The CHAMPUS DRG-based payment system provides a payment amount for inpatient operating costs, including:

(*i*) Operating costs for routine services, such as the costs of room, board, and routine nursing services;

(*ii*) Operating costs for ancillary services, such as hospital radiology and laboratory services (other than physicians' services) furnished to hospital inpatients;

(*iii*) Special care unit operating costs; and

(*iv*) Malpractice insurance costs related to services furnished to inpatients.

(*6*) *Discharges and transfers*—(*i*) *Discharges.* A hospital inpatient is discharged when:

(*A*) The patient is formally released from the hospital (release of the patient to another hospital as described in paragraph (a)(1)(i)(C)(*6*)(*ii*) of this section, or a leave of absence from the hospital, will not be recognized as a discharge for the purpose of determining payment under the CHAMPUS DRG-based payment system);

(*B*) The patient dies in the hospital; or

(*C*) The patient is transferred from the care of a hospital included under the CHAMPUS DRG-based payment system to a hospital or unit that is excluded from the prospective payment system.

(*ii*) *Transfers.* Except as provided under paragraph (a)(1)(i)(C)(*6*)(*i*) of this section, a discharge of a hospital inpatient is not counted for purposes of the CHAMPUS DRG-based payment system when the patient is transferred:

(*A*) From one inpatient area or unit of the hospital to another area or unit of the same hospital;

(*B*) From the care of a hospital included under the CHAMPUS DRG-based payment system to the care of another hospital paid under this system;

(*C*) From the care of a hospital included under the CHAMPUS DRG-based payment system to the care of another hospital that is excluded from the CHAMPUS DRG-based payment system because of participation in a statewide cost control program which is exempt from the CHAMPUS DRG-based payment system under paragraph (a)(1)(ii)(A) of this section; or

(*D*) From the care of a hospital included under the CHAMPUS DRG-based payment system to the care of a uniformed services treatment facility.

(*iii*) *Payment in full to the discharging hospital.* The hospital discharging an inpatient shall be paid in full under the CHAMPUS DRG-based payment system.

(*iv*) *Payment to a hospital transferring an inpatient to another hospital.* If a hospital subject to the CHAMPUS DRG-based payment system transfers an inpatient to another such hospital, the transferring hospital shall be paid a per

diem rate (except that in neonatal cases, other than normal newborns, the hospital will be paid at 125 percent of that per diem rate), as determined under instructions issued by TSO, for each day of the patient's stay in that hospital, not to exceed the DRG-based payment that would have been paid if the patient had been discharged to another setting. For admissions occurring on or after October 1, 1995, the transferring hospital shall be paid twice the per diem rate for the first day of any transfer stay, and the per diem amount for each subsequent day, up to the limit described in this paragraph.

(*v*) *Additional payments to transferring hospitals.* A transferring hospital may qualify for an additional payment for extraordinary cases that meet the criteria for long-stay or cost outliers.

(D) *DRG system updates.* The CHAMPUS DRG-based payment system is modeled on the Medicare Prospective Payment System (PPS) and uses annually updated items and numbers from the Medicare PPS as provided for in this part and in instructions issued by the Director, DHA. The effective date of these items and numbers shall not correspond to that under Medicare PPS but shall be delayed until January 1, to align with TRICARE's program year reporting. This allows for an administrative simplicity that optimizes healthcare delivery by reducing existing administrative burden and costs.

(ii) *Applicability of the DRG system*—(A) *Areas affected.* The CHAMPUS DRG-based payment system shall apply to hospitals' services in the fifty states, the District of Columbia, and Puerto Rico, except that any state which has implemented a separate DRG-based payment system or similar payment system in order to control costs and is exempt from the Medicare Prospective Payment System may be exempt from the CHAMPUS DRG-based payment system if it requests exemption in writing, and provided payment under such system does not exceed payment which would otherwise be made under the CHAMPUS DRG-based payment system.

(B) *Services subject to the DRG-based payment system.* All normally covered inpatient hospital services furnished to CHAMPUS beneficiaries by hospitals are subject to the CHAMPUS DRG-based payment system.

(C) *Services exempt from the DRG-based payment system.* The following hospital services, even when provided in a hospital subject to the CHAMPUS DRG-based payment system, are exempt from the CHAMPUS DRG-based payment system. The services in paragraphs (a)(1)(ii)(C)(*1*) through (a)(1)(ii)(C)(*4*) and (a)(1)(ii)(C)(*7*) through (a)(1)(ii)(C)(*9*) of this section shall be reimbursed under the procedures in paragraph (a)(4) of this section, and the services in paragraphs (a)(1)(ii)(C)(*5*) and (a)(1)(ii)(C)(*6*) of this section shall be reimbursed under the procedures in paragraph (j) of this section.

(*1*) Services provided by hospitals exempt from the DRG-based payment system.

(*2*) All services related to solid organ acquisition for CHAMPUS covered transplants by CHAMPUS-authorized transplantation centers.

(*3*) All services related to heart and liver transplantation for admissions prior to October 1, 1998, which would otherwise be paid under the respective DRG.

(*4*) All services related to CHAMPUS covered solid organ transplantations for which there is no DRG assignment.

(*5*) All professional services provided by hospital-based physicians.

(*6*) All services provided by nurse anesthetists.

(*7*) All services related to discharges involving pediatric bone marrow transplants (patient under 18 at admission).

(*8*) All services related to discharges involving children who have been determined to be HIV seropositive (patient under 18 at admission).

(*9*) All services related to discharges involving pediatric cystic fibrosis (patient under 18 at admission).

(*10*) For admissions occurring on or after October 1, 1990, and before October 1, 1994, and for discharges occurring on or after October 1, 1997, the costs of blood clotting factor for hemophilia inpatients. An additional payment shall be made to a hospital for each unit of blood clotting factor furnished to a CHAMPUS inpatient who is hemophiliac in accordance with the amounts

established under the Medicare Prospective Payment System (42 CFR 412.115).

(D) *Hospitals subject to the CHAMPUS DRG-based payment system.* All hospitals within the fifty states, the District of Columbia, and Puerto Rico which are certified to provide services to CHAMPUS beneficiaries are subject to the DRG-based payment system except for the following hospitals or hospital units which are exempt.

(*1*) *Psychiatric hospitals.* A psychiatric hospital which is exempt from the Medicare Prospective Payment System is also exempt from the CHAMPUS DRG-based payment system. In order for a psychiatric hospital which does not participate in Medicare to be exempt from the CHAMPUS DRG-based payment system, it must meet the same criteria (as determined by the Director, OCHAMPUS, or a designee) as required for exemption from the Medicare Prospective Payment System as contained in 42 CFR 412.23.

(*2*) *Inpatient Rehabilitation Facilities (IRF).* Prior to implementation of the IRF PPS methodology described in paragraph (a)(10) of this section, an inpatient rehabilitation facility which is exempt from the Medicare prospective payment system is also exempt from the TRICARE DRG-based payment system.

(*3*) *Psychiatric and rehabilitation units (distinct parts).* Prior to implementation of the IRF PPS methodology described in paragraph (a)(10) of this section, a rehabilitation unit which is exempt from the Medicare prospective payment system is also exempt from the TRICARE DRG-based payment system. A psychiatric unit which is exempt from the Medicare prospective payment system is also exempt from the TRICARE DRG-based payment system.

(*4*) *Long Term Care Hospitals.* Prior to implementation of the LTCH PPS methodology described in paragraph (a)(9) of this section, a long-term care hospital which is exempt from the Medicare prospective payment system is also exempt from the CHAMPUS DRG-based payment system.

(*5*) *Hospitals within hospitals.* A hospital within a hospital which is exempt from the Medicare prospective payment system is also exempt from the CHAMPUS DRG-based payment system. In order for a hospital within a hospital which does not participate in Medicare to be exempt from the CHAMPUS DRG-based payment system, it must meet the same criteria (as determined by the Director, TSO, or a designee) as required for exemption from the Medicare Prospective Payment System as contained in 42 CFR 412.22 and the criteria for one or more of the excluded hospital classifications described in § 412.23 of Title 42 CFR.

(*6*) *Sole community hospitals (SCHs).* Prior to implementation of the SCH reimbursement method described in paragraph (a)(7) of this section, any hospital that has qualified for special treatment under the Medicare prospective payment system as an SCH (see subpart G of 42 CFR part 412) and has not given up that classification is exempt from the CHAMPUS DRG-based payment system.

(*7*) *Christian Science sanitoriums.* All Christian Science sanitoriums (as defined in paragraph (b)(4)(viii) of § 199.6) are exempt from the CHAMPUS DRG-based payment system.

(*8*) *Cancer hospitals.* Any hospital which qualifies as a cancer hospital under the Medicare standards and has elected to be exempt from the Medicare prospective payment system is exempt from the CHAMPUS DRG-based payment system. (See 42 CFR 412.94.)

(*9*) *Hospitals outside the 50 states, the District of Columbia, and Puerto Rico.* A hospital is excluded from the CHAMPUS DRG-based payment system if it is not located in one of the fifty States, the District of Colubmia, or Puerto Rico.

(*10*) *CAHs.* Effective December 1, 2009, any facility which has been designated and certified as a CAH as contained in 42 CFR Part 485.606 is exempt from the CHAMPUS DRG-based payment system.

(E) *Hospitals which do not participate in Medicare.* Any hospital which is subject to the CHAMPUS DRG-based payment system and which otherwise meets CHAMPUS requirements but which is not a Medicare-participating provider (having completed a form

HCA–1514, Hospital Request for Certification in the Medicare/Medicaid Program and a form HCFA–1561, Health Insurance Benefit Agreement) must complete a participation agreement with TRICARE. By completing the participation agreement, the hospital agrees to participate on all CHAMPUS inpatient claims and to accept the CHAMPUS-determined allowable amount as payment in full for these claims. Any hospital which does not participate in Medicare and does not complete a participation agreement with TRICARE will not be authorized to provide services to TRICARE beneficiaries.

(F) *Substance Use Disorder Rehabilitation facilities.* With admissions on or after July 1, 1995, substance use disorder rehabilitation facilities, authorized under §199.6(b)(4)(xiv), are subject to the DRG-based payment system.

(iii) *Determination of payment amounts.* The actual payment for an individual claim under the CHAMPUS DRG-based payment system is calculated by multiplying the appropriate adjusted standardized amount (adjusted to account for area wage differences using the wage indexes used in the Medicare program) by a weighting factor specific to each DRG.

(A) *Calculation of DRG weights—(1) Grouping of charges.* All discharge records in the database shall be grouped by DRG.

(*2*) Remove DRGs. Those DRGs that represent discharges with invalid data or diagnoses insufficient for DRG assignment purposes are removed from the database.

(*3*) *Indirect medical education standardization.* To standardize the charges for the cost effects of indirect medical education factors, each teaching hospital's charges will be divided by 1.0 plus the following ratio on a hospital-specific basis:

$$1.43 \times \left[ \left( 1.0 + \frac{\text{number of interns} + \text{residents}}{\text{number of beds}} \right).5795 - 1.0 \right]$$

(*4*) *Wage level standardization.* To standardize the charge records for area wage differences, each charge record will be divided into labor-related and nonlabor-related portions, and the labor-related portion shall be divided by the most recently available Medicare wage index for the area. The labor-related and nonlabor-related portions will then be added together.

(*5*) *Elimination of statistical outliers.* All unusually high or low charges shall be removed from the database.

(*6*) *Calculation of DRG average charge.* After the standardization for indirect medical education, and area wage differences, an average charge for each DRG shall be computed by summing charges in a DRG and dividing that sum by the number of records in the DRG.

(*7*) *Calculation of national average charge per discharge.* A national average charge per discharge shall be calculated by summing all charges and dividing that sum by the total number of records from all DRG categories.

(*8*) *DRG relative weights.* DRG relative weights shall be calculated for each DRG category by dividing each DRG average charge by the national average charge.

(B) *Empty and low-volume DRGs.* For any DRG with less than ten (10) occurrences in the CHAMPUS database, the Director, TSO, or designee, has the authority to consider alternative methods for estimating CHAMPUS weights in these low-volume DRG categories.

(C) *Updating DRG weights.* The CHAMPUS DRG weights shall be updated or adjusted as follows:

(*1*) DRG weights shall be recalculated annually using CHAMPUS charge data and the methodology described in paragraph (a)(1)(iii)(A) of this section.

(*2*) When a new DRG is created, CHAMPUS will, if practical, calculate a weight for it using an appropriate charge sample (if available) and the

methodology described in paragraph (a)(1)(iii)(A) of this section.

(*3*) In the case of any other change under Medicare to an existing DRG weight (such as in connection with technology changes), CHAMPUS shall adjust its weight for that DRG in a manner comparable to the change made by Medicare.

(D) *Calculation of the adjusted standardized amounts.* The following procedures shall be followed in calculating the CHAMPUS adjusted standardized amounts. (*1*) Differentiate large urban and other area charges. All charges in the database shall be sorted into large urban and other area groups (using the same definitions for these categories used in the Medicare program. The following procedures will be applied to each group.

(*2*) *Indirect medical education standardization.* To standardize the charges for the cost effects of indirect medical education factors, each teaching hospital's charges will be divided by 1.0 plus the following ratio on a hospital-specific basis:

$$1.43 \times \left[ \left( 1.0 + \frac{\text{number of interns} + \text{residents}}{\text{number of beds}} \right) .5795 - 1.0 \right]$$

(*3*) *Wage level standardization.* To standardize the charge records for area wage differences, each charge record will be divided into labor-related and nonlabor-related portions, and the labor-related portion shall be divided by the most recently available Medicare wage index for the area. The labor-related and nonlabor-related portions will then be added together.

(*4*) *Apply the cost to charge ratio.* Each charge is to be reduced to a representative cost by using the Medicare cost to charge ratio. This amount shall be increased by 1 percentage point in order to reimburse hospitals for bad debt expenses attributable to CHAMPUS beneficiaries.

(*5*) Preliminary base year standardized amount. A preliminary base year standardized amount shall be calculated by summing all costs in the database applicable to the large urban or other area group and dividing by the total number of discharges in the respective group.

(*6*) *Update for inflation.* The preliminary base year standardized amounts shall be updated using an annual update factor equal to 1.07 to produce fiscal year 1988 preliminary standardized amounts. Therefore, any development of a new standardized amount will use an inflation factor equal to the hospital market basket index used by the Health Care Financing Administration in their Prospective Payment System.

(*7*) The preliminary standardized amounts, updated for inflation, shall be divided by a system standardization factor so that total DRG outlays, given the database distribution across hospitals and diagnosis, are equal to the total charges reduced to costs.

(*8*) *Labor and nonlabor portions of the adjusted standardized amounts.* The adjusted standardized amounts shall be divided into labor and nonlabor portions in accordance with the Medicare division of labor and nonlabor portions.

(E) *Adjustments to the DRG-based payments amounts.* The following adjustments to the DRG-based amounts (the weight multiplied by the adjusted standardized amount) will be made. Additional adjustments to DRG amounts are included in paragraph (a)(1)(iv) of this section.

(*1*) *Outliers.* The DRG-based payment to a hospital shall be adjusted for atypical cases. These outliers are those cases that have either an unusually short length-of-stay or extremely long length-of-stay or that involve extraordinarily high costs when compared to most discharges classified in the same DRG. Cases which qualify as both a length-of-stay outlier and a cost outlier shall be paid at the rate which results in the greater payment.

(*i*) *Length-of-stay outliers.* Length-of-stay outliers shall be identified and paid by the fiscal intermediary when the claims are processed.

(*A*) *Short-stay outliers.* Any discharge with a length-of-stay (LOS) less than 1.94 standard deviations from the DRG's arithmetic LOS shall be classified as a short-stay outlier. Short-stay outliers shall be reimbursed at 200 percent of the per diem rate for the DRG for each covered day of the hospital stay, not to exceed the DRG amount. The per diem rate shall equal the DRG amount divided by the arithmetic mean length-of-stay for the DRG.

(*B*) *Long-stay outliers.* Any discharge (except for neonatal services and services in children's hospitals) which has a length-of-stay (LOS) exceeding a threshold established in accordance with the criteria used for the Medicare Prospective Payment System as contained in 42 CFR 412.82 shall be classified as a long-stay outlier. Any discharge for neonatal services or for services in a children's hospital which has a LOS exceeding the lesser of 1.94 standard deviations or 17 days from the DRG's arithmetic mean LOS also shall be classified as a long-stay outlier. Long-stay outliers shall be reimbursed the DRG-based amount plus a percentage (as established for the Medicare Prospective Payment System) of the per diem rate for the DRG for each covered day of care beyond the long-stay outlier threshold. The per diem rate shall equal the DRG amount divided by the arithmetic mean LOS for the DRG. For admissions on or after October 1, 1997, the long stay outlier has been eliminated for all cases except children's hospitals and neonates. For admissions on or after October 1, 1998, the long stay outlier has been eliminated for children's hospitals and neonates.

(*ii*) *Cost outliers.* Additional payment for cost outliers shall be made only upon request by the hospital.

(*A*) Cost outliers except those in children's hospitals or for neonatal services. Any discharge which has standardized costs that exceed a threshold established in accordance with the criteria used for the Medicare Prospective Payment System as contained in 42 CFR 412.84 shall qualify as a cost outlier. The standardized costs shall be calculated by multiplying the total charges by the factor described in paragraph (a)(1)(iii)(D)(*4*) of this section and adjusting this amount for indirect medical education costs. Cost outliers shall be reimbursed the DRG-based amount plus a percentage (as established for the Medicare Prospective Payment System) of all costs exceeding the threshold. Effective with admissions occurring on or after October 1, 1997, the standardized costs are no longer adjusted for indirect medical education costs.

(*B*) Cost outliers in children's hospitals for neonatal services. Any discharge for services in a children's hospital or for neonatal services which has standardized costs that exceed a threshold of the greater of two times the DRG-based amount or $13,500 shall qualify as a cost outlier. The standardized costs shall be calculated by multiplying the total charges by the factor described in paragraph (a)(1) (iii) (D) (*4*) of this section (adjusted to include average capital and direct medical education costs) and adjusting this amount for indirect medical education costs. Cost outliers for services in children's hospitals and for neonatal services shall be reimbursed the DRG-based amount plus a percentage (as established for the Medicare Prospective Payment System) of all costs exceeding the threshold. Effective with admissions occurring on or after October 1, 1998, standardized costs are no longer adjusted for indirect medical education costs. In addition, CHAMPUS will calculate the outlier payments that would have occurred at each of the 59 Children's hospitals under the FY99 outlier policy for all cases that would have been outliers under the FY94 policies using the most accurate data available in September 1998. A ratio will be calculated which equals the level of outlier payments that would have been made under the FY94 outlier policies and the outlier payments that would be made if the FY99 outlier policies had applied to each of these potential outlier cases for these hospitals. The ratio will be calculated across all outlier claims for the 59 hospitals and will not be hospital specific. The ratio will be used to increase cost outlier payments in FY 1999 and FY 2000, unless the hospital has a negotiated agreement with a managed care support contractor which would affect this payment. For hospitals with managed

care support agreements which affect these payments, CHAMPUS will apply these payments if the increased payments would be consistent with the agreements. In FY 2000 the ratio of outlier payments (long stay and cost) that would have occurred under the FY 94 policy and actual cost outlier payments made under the FY 99 policy will be recalculated. If the ratio has changed significantly, the ratio will be revised for use in FY 2001 and thereafter. In FY 2002, the actual cost outlier cases in FY 2000 and 2001 will be reexamined. The ratio of outlier payments that would have occurred under the FY94 policy and the actual cost outlier payments made under the FY 2000 and FY 2001 policies. If the ratio has changed significantly, the ratio will be revised for use in FY 2003.

(*C*) *Cost outliers for burn cases.* All cost outliers for DRGs related to burn cases shall be reimbursed the DRG-based amount plus a percentage (as established for the Medicare Prospective Payment System) of all costs exceeding the threshold. The standardized costs and thresholds for these cases shall be calculated in accordance with § 199.14(a)(1)(iii)(E)(*1*)(*ii*)(*A*) and § 199.14(a)(1)(iii)(E)(*1*)(*ii*)(*B*).

(*2*) *Wage adjustment.* CHAMPUS will adjust the labor portion of the standardized amounts according to the hospital's area wage index. The wage adjusted DRG payment will also be multiplied by 1.2 for an individual diagnosed with COVID–19 and/or Coronavirus discharged during the Secretary of Health and Human Services' declared public health emergency (PHE).

(*3*) *Indirect medical education adjustment.* The wage adjusted DRG payment will also be multiplied by 1.0 plus the hospital's indirect medical education ratio.

(*4*) *Children's hospital differential.* With respect to claims from children's hospitals, the appropriate adjusted standardized amount shall also be adjusted by a children's hospital differential.

(*i*) *Qualifying children's hospitals.* Hospitals qualifying for the children's hospital differential are hospitals that are exempt from the Medicare Prospective Payment System, or, in the case of hospitals that do not participate in Medicare, that meet the same criteria (as determined by the Director, OCHAMPUS, or a designee) as required for exemption from the Medicare Prospective Payment System as contained in 42 CFR 412.23.

(*ii*) *Calculation of differential.* The differential shall be equal to the difference between a specially calculated children's hospital adjusted standardized amount and the adjusted standardized amount for fiscal year 1988. The specially calculated children's hospital adjusted standardized amount shall be calculated in the same manner as set forth in § 199.14(a)(1)(iii)(D), except that:

(*A*) The base period shall be fiscal year 1988 and shall represent total estimated charges for discharges that occurred during fiscal year 1988.

(*B*) No cost to charge ratio shall be applied.

(*C*) Capital costs and direct medical education costs will be included in the calculation.

(*D*) The factor used to update the database for inflation to produce the fiscal year 1988 base period amount shall be the applicable Medicare inpatient hospital market basket rate.

(*iii*) *Transition rule.* Until March 1, 1992, separate differentials shall be used for each higher volume children's hospital (individually) and for all other children's hospitals (in the aggregate). For this purpose, a higher volume hospital is a hospital that had 50 or more CHAMPUS discharges in fiscal year 1988.

(*iv*) *Hold harmless provision.* At such time as the weights initially assigned to neonatal DRGs are recalibrated based on sufficient volume of CHAMPUS claims records, children's hospital differentials shall be recalculated and appropriate retrospective and prospective adjustments shall be made. To the extent practicable, the recalculation shall also include reestimated values of other factors (including but not limited to direct education and capital costs and indirect education factors) for which more accurate data became available.

(*v*) *No update for inflation.* The children's hospital differential, calculated (and later recalculated under the hold

harmless provision) for the base period of fiscal year 1988, shall not be updated for subsequent fiscal years.

(*vi*) *Administrative corrections.* In connection with determinations pursuant to paragraph (a)(1)(iii) (E)(*4*)(*iii*) of this section, any children's hospital that believes OCHAMPUS erroneously failed to classify the hospital as a high volume hospital or incorrectly calculated (in the case of a high volume hospital) the hospital's differential may obtain administrative corrections by submitting appropriate documentation to the Director, OCHAMPUS (or a designee).

(F) *Updating the adjusted standardized amounts.* Beginning in FY 1989, the adjusted standardized amounts will be updated by the Medicare annual update factor, unless the adjusted standardized amounts are recalculated.

(G) *Annual cost pass-throughs*—(*1*) *Capital costs.* When requested in writing by a hospital, CHAMPUS shall reimburse the hospital its share of actual capital costs as reported annually to the CHAMPUS fiscal intermediary. Payment for capital costs shall be made annually based on the ratio of CHAMPUS inpatient days for those beneficiaries subject to the CHAMPUS DRG-based payment system to total inpatient days applied to the hospital's total allowable capital costs. Reductions in payments for capital costs which are required under Medicare shall also be applied to payments for capital costs under CHAMPUS.

(*i*) *Costs included as capital costs.* Allowable capital costs are those specified in Medicare Regulation § 413.130, as modified by § 412.72.

(*ii*) *Services, facilities, or supplies provided by supplying organizations.* If services, facilities, or supplies are provided to the hospital by a supplying organization related to the hospital within the meaning of Medicare Regulation § 413.17, then the hospital must include in its capital-related costs, the capital-related costs of the supplying organization. However, if the supplying organization is not related to the provider within the meaning of § 413.17, no part of the change to the provider may be considered a capital-related cost unless the services, facilities, or supplies are capital-related in nature and:

(*A*) The capital-related equipment is leased or rented by the provider;

(*B*) The capital-related equipment is located on the provider's premises; and

(*C*) The capital-related portion of the charge is separately specified in the charge to the provider.

(*2*) *Direct medical education costs.* When requested in writing by a hospital, CHAMPUS shall reimburse the hospital its actual direct medical education costs as reported annually to the CHAMPUS fiscal intermediary. Such teaching costs must be for a teaching program approved under Medicare Regulation § 413.85. Payment for direct medical education costs shall be made annually based on the ratio of CHAMPUS inpatient days for those beneficiaries subject to the CHAMPUS DRG-based payment system to total inpatient days applied to the hospital's total allowable direct medical education costs. Allowable direct medical education costs are those specified in Medicare Regulation § 413.85.

(*3*) Information necessary for payment of capital and direct medical education costs. All hospitals subject to the CHAMPUS DRG-based payment system, except for children's hospitals, may be reimbursed for allowed capital and direct medical education costs by submitting a request to the CHAMPUS contractor. Beginning October 1, 1998, such request shall be filed with CHAMPUS on or before the last day of the twelfth month following the close of the hospitals' cost reporting period, and shall cover the one-year period corresponding to the hospital's Medicare cost-reporting period. The first such request may cover a period of less than a full year—from the effective date of the CHAMPUS DRG-based payment system to the end of the hospital's Medicare cost-reporting period. All costs reported to the CHAMPUS contractor must correspond to the costs reported on the hospital's Medicare cost report. An extension of the due date for filing the request may only be granted if an extension has been granted by HCFA due to a provider's operations being significantly adversely affected due to extraordinary circumstances over which the provider has no control, such as flood or fire. (If

these costs change as a result of a subsequent audit by Medicare, the revised costs are to be reported to the hospital's CHAMPUS contractor within 30 days of the date the hospital is notified of the change). The request must be signed by the hospital official responsible for verifying the amounts and shall contain the following information.

(*i*) The hospital's name.

(*ii*) The hospital's address.

(*iii*) The hospital's CHAMPUS provider number.

(*iv*) The hospital's Medicare provider number.

(*v*) The period covered—this must correspond to the hospital's Medicare cost-reporting period.

(*vi*) Total inpatient days provided to all patients in units subject to DRG-based payment.

(*vii*) Total allowed CHAMPUS inpatient days provided in units subject to DRG-based payment.

(*viii*) Total allowable capital costs.

(*ix*) Total allowable direct medical education costs.

(*x*) Total full-time equivalents for:

(*A*) Residents.

(*B*) Interns.

(*xi*) Total inpatient beds as of the end of the cost-reporting period. If this has changed during the reporting period, an explanation of the change must be provided.

(*xii*) Title of official signing the report.

(*xiii*) Reporting date.

(*xiv*) The report shall contain a certification statement that any changes to the items in paragraphs (a)(1)(iii)(G)(*3*)(*vi*), (*vii*), (*viii*), (*ix*), or (*x*), which are a result of an audit of the hospital's Medicare cost-report, shall be reported to CHAMPUS within thirty (30) days of the date the hospital is notified of the change.

(iv) *Special Programs and Incentive Payments.* (A) *Additional payment for new medical services and technologies.* TRICARE will make New Technology Add On Payments (NTAPs) adjustments to DRGs as provided in paragraphs (a)(1)(iv)(A)(*1*) through (a)(1)(iv)(A)(*11*) of this section. The Director, Defense Health Agency (DHA), shall provide notice of the issuance of policies and guidelines adopting such adjustments together with any variations deemed necessary to address unique issues involving the beneficiary population or program administration.

(*1*) *Adoption of Medicare NTAPs.* For TRICARE covered services and supplies, TRICARE will adopt Medicare NTAPs as implemented under 42 CFR 412.87 under the same conditions as published by the Centers for Medicare & Medicaid Services, except for pediatric cases.

(*2*) *Pediatric cases.* For pediatric NTAP DRGs, the TRICARE NTAP adjustment shall be modified to be set at 100 percent of the costs in excess of the Medicare Severity-Diagnosis Related Group (MS–DRG) payment. As used in this paragraph, pediatric is defined as services and supplies provided to individuals under the age of 18, or who are being treated in a children's hospital or in a pediatric ward.

(*3*) *TRICARE designated NTAP adjustments.* For categories of TRICARE covered services and supplies for which Medicare has not established an NTAP adjustment for DRGs, the Director, DHA may designate a TRICARE NTAP adjustment through a process using criteria to identify and select such new technology services/supplies similar to that utilized by Medicare under 42 CFR 412.87. The Director, DHA may then designate a TRICARE NTAP reimbursement adjustment through a process using a methodology similar to the Medicare methodology outlined in 42 CFR 412.88. This discretionary authority to designate TRICARE NTAP adjustments shall apply to services and supplies typically provided to TRICARE beneficiaries age 64 or younger when Medicare has not established an NTAP adjustment for such services/supplies. As with other discretionary authority under this part, a decision to designate a TRICARE category of services/supplies for an NTAP adjustment to DRGs and the amount of such an adjustment are not subject to the appeal and hearing procedures of § 199.10. The Director, DHA, shall select which new technologies may be designated as TRICARE NTAPs and will publish this list based on the eligibility criteria and reimbursement methodology provided in paragraphs

(a)(1)(iv)(A)(*4*) through (a)(1)(iv)(A)(*11*) of this section.

(*4*) *Eligibility requirements and reimbursement methodology for TRICARE designated NTAP adjustments.* A new medical service or technology represents an advance that substantially improves, relative to technologies previously available, the diagnosis or treatment of TRICARE beneficiaries. The totality of the circumstances is considered when making a determination that a new medical service or technology represents an advance that substantially improves, relative to services or technologies previously available, the diagnosis or treatment of TRICARE beneficiaries.

(*5*) *Criteria for improvement.* A determination that a new medical service or technology represents an advance that substantially improves, relative to services or technologies previously available, the diagnosis or treatment of TRICARE beneficiaries means one or more of the following:

(*i*) The new medical service or technology offers a treatment option for a patient population unresponsive to, or ineligible for, currently available treatments.

(*ii*) The new medical service or technology offers the ability to diagnose a medical condition in a patient population where that medical condition is currently undetectable, or offers the ability to diagnose a medical condition earlier in a patient population than allowed by currently available methods and there must also be evidence that use of the new medical service or technology to make a diagnosis affects the management of the patient.

(*iii*) The use of the new medical service or technology significantly improves clinical outcomes relative to services or technologies previously available as demonstrated by one or more of the following seven outcomes: A reduction in at least one clinically significant adverse event, including a reduction in mortality or a clinically significant complication; A decreased rate of at least one subsequent diagnostic or therapeutic intervention; A decreased number of future hospitalizations or physician visits; A more rapid beneficial resolution of the disease process treatment including, but not limited to, a reduced length of stay or recovery time; An improvement in one or more activities of daily living; An improved quality of life; or A demonstrated greater medication adherence or compliance.

(*iv*) The totality of the information otherwise demonstrates that the new medical service or technology substantially improves, relative to technologies previously available, the diagnosis or treatment of TRICARE beneficiaries.

(*6*) *Evidence.* Evidence from scientific literature may be sufficient to establish that a new medical service or technology represents an advance that substantially improves, relative to services or technologies previously available, the diagnosis or treatment of TRICARE beneficiaries.

(*7*) *Prevalence.* The medical condition diagnosed or treated by the new medical service or technology may have a low prevalence among TRICARE beneficiaries.

(*8*) *Subpopulation.* The new medical service or technology may represent an advance that substantially improves, relative to services or technologies previously available, the diagnosis or treatment of a subpopulation of patients with the medical condition diagnosed or treated by the new medical service or technology.

(*9*) *Newness criteria.* A medical service or technology may be considered new within 2 or 3 years after the point at which data begin to become available reflecting the inpatient hospital code assigned to the new service or technology (depending on when a new code is assigned and data on the new service or technology becomes available for DRG recalibration). After TRICARE has recalibrated the DRGs, based on available data, to reflect the costs of an otherwise new medical service or technology, the medical service or technology will no longer be considered ''new'' under the criterion of this section.

(*10*) *Payment methodology.* For discharges involving new medical services or technologies that meet the criteria specified in paragraphs (a)(1)(iv)(A)(*4*) through (a)(1)(iv)(A)(*9*) and that are approved as TRICARE NTAPs per paragraph (a)(1)(iv)(A)(*11*) of this section,

TRICARE payment will be the lesser of:

(*i*) The CMS designated percentage of the estimated costs of the new technology or medical service, as published in 42 CFR 412.88; or

(*ii*) The CMS designated percentage of the difference between the full DRG payment and the hospital's estimated cost for the case, as published in 42 CFR 412.88.

(*11*) *Publication and timing*. TRICARE may consider whether a new medical service or technology meets the eligibility criteria specified in paragraphs (a)(1)(iv)(A)(*4*) through (a)(1)(iv)(A)(*9*) of this section and announce the results on the NTAP website. In doing so, TRICARE only considers, for add-on payments for a particular fiscal year, an application for which the new medical device or product has received FDA marketing authorization by July 1 prior to the particular fiscal year; or the application is submitted under an alternative pathway to the FDA for which conditional NTAP approval for FDA marketing authorization is granted before July 1 of the fiscal year for which the applicant applied for new technology add-on payments.

(B) *Hospital Value Based Purchasing*. TRICARE will adopt the Medicare Hospital Value Based Purchasing (HVBP) Program adjustments to DRGs to incentivize hospitals as implemented under 42 CFR 412.160, when determined by the ASD(HA), as practicable. The Director, DHA, shall provide notice of the issuance of policies and guidelines adopting such adjustments together with any variations deemed necessary to address unique issues involving the beneficiary population or program administration.

(2) *CHAMPUS mental health per diem payment system*. The CHAMPUS mental health per diem payment system shall be used to reimburse for inpatient mental health hospital care in specialty psychiatric hospitals and units. Payment is made on the basis of prospectively determined rates and paid on a per diem basis. The system uses two sets of per diems. One set of per diems applies to hospitals and units that have a relatively higher number of CHAMPUS discharges. For these hospitals and units, the system uses hospital-specific per diem rates. The other set of per diems applies to hospitals and units with a relatively lower number of CHAMPUS discharges. For these hospitals and units, the system uses regional per diems, and further provides for adjustments for area wage differences and indirect medical education costs and additional pass-through payments for direct medical education costs.

(i) *Applicability of the mental health per diem payment system*—(A) *Hospitals and units covered*. The CHAMPUS mental health per diem payment system applies to services covered (see paragraph (a)(2)(i)(B) of this section) that are provided in Medicare prospective payment system (PPS) exempt psychiatric specialty hospitals and all Medicare PPS exempt psychiatric specialty units of other hospitals. In addition, any psychiatric hospital that does not participate in Medicare, or any other hospital that has a psychiatric specialty unit that has not been so designated for exemption from the Medicare prospective payment system because the hospital does not participate in Medicare, may be designated as a psychiatric hospital or psychiatric specialty unit for purposes of the CHAMPUS mental health per diem payment system upon demonstrating that it meets the same criteria (as determined by the Director, OCHAMPUS) as required for the Medicare exemption. The CHAMPUS mental health per diem payment system does not apply to mental health services provided in other hospitals.

(B) *Services covered*. Unless specifically exempted, all covered hospitals' and units' inpatient claims which are classified into a mental health DRG (DRG categories 425–432, but not DRG 424) or an alcohol/drug abuse DRG (DRG categories 433–437) shall be subject to the mental health per diem payment system.

(ii) *Hospital-specific per diems for higher volume hospitals and units*. This paragraph describes the per diem payment amounts for hospitals and units with a higher volume of CHAMPUS discharges.

(A)(*1*) *Per diem amount*. A hospital-specific per diem amount shall be calculated for each hospital and unit with

a higher volume of CHAMPUS discharges. The base period per diem amount shall be equal to the hospital's average daily charge in the base period. The base period amount, however, may not exceed the cap described in paragraph (a)(2)(ii)(B) of this section. The base period amount shall be updated in accordance with paragraph (a)(2)(iv) of this section.

(*2*) In states that have implemented a payment system in connection with which hospitals in that state have been exempted from the CHAMPUS DRG-based payment system pursuant to paragraph (a)(1)(ii)(A) of this section, psychiatric hospitals and units may have per diem amounts established based on the payment system applicable to such hospitals and units in the state. The per diem amount, however, may not exceed the cap amount applicable to other higher volume hospitals.

(B) *Cap*—(*1*) As it affects payment for care provided to patients prior to April 6, 1995, the base period per diem amount may not exceed the 80th percentile of the average daily charge weighted for all discharges throughout the United States from all higher volume hospitals.

(*2*) Applicable to payments for care provided to patients on or after April 6, 1996, the base period per diem amount may not exceed the 70th percentile of the average daily charge weighted for all discharges throughout the United States from all higher volume hospitals. For this purpose, base year charges shall be deemed to be charges during the period of July 1, 1991 to June 30, 1992, adjusted to correspond to base year (FY 1988) charges by the percentage change in average daily charges for all higher volume hospitals and units between the period of July 1, 1991 to June 30, 1992 and the base year.

(C) *Review of per diem.* Any hospital or unit which believes OCHAMPUS calculated a hospital-specific per diem which differs by more than $5.00 from that calculated by the hospital or unit may apply to the Director, OCHAMPUS, or a designee, for a recalculation. The burden of proof shall be on the hospital.

(iii) *Regional per diems for lower volume hospitals and units.* This paragraph describes the per diem amounts for hospitals and units with a lower volume of CHAMPUS discharges.

(A) *Per diem amounts.* Hospitals and units with a lower volume of CHAMPUS patients shall be paid on the basis of a regional per diem amount, adjusted for area wages and indirect medical education. Base period regional per diems shall be calculated based upon all CHAMPUS lower volume hospitals' claims paid during the base period. Each regional per diem amount shall be the quotient of all covered charges divided by all covered days of care, reported on all CHAMPUS claims from lower volume hospitals in the region paid during the base period, after having standardized for indirect medical education costs and area wage indexes and subtracted direct medical education costs. Regional per diem amounts are adjusted in accordance with paragraph (a)(2)(iii)(C) of this section. Additional pass-through payments to lower volume hospitals are made in accordance with paragraph (a)(2)(iii)(D) of this section. The regions shall be the same as the Federal census regions.

(B) *Review of per diem amount.* Any hospital that believes the regional per diem amount applicable to that hospital has been erroneously calculated by OCHAMPUS by more than $5.00 may submit to the Director, OCHAMPUS, or a designee, evidence supporting a different regional per diem. The burden of proof shall be on the hospital.

(C) *Adjustments to regional per diems.* Two adjustments shall be made to the regional per diem rates.

(*1*) *Area wage index.* The same area wage indexes used for the CHAMPUS DRG-based payment system (see paragraph (a)(1)(iii)(E)(*2*) of this section) shall be applied to the wage portion of the applicable regional per diem rate for each day of the admission. The wage portion shall be the same as that used for the CHAMPUS DRG-based payment system.

(*2*) *Indirect medical education.* The indirect medical education adjustment factors shall be calculated for teaching hospitals in the same manner as is used in the CHAMPUS DRG-based payment system (see paragraph (a)(1)(iii)(E)(*3*) of

this section) and applied to the applicable regional per diem rate for each day of the admission.

(D) *Annual cost pass-through for direct medical education.* In addition to payments made to lower volume hospitals under paragraph (a)(2)(iii) of this section, CHAMPUS shall annually reimburse hospitals for actual direct medical education costs associated with services to CHAMPUS beneficiaries. This reimbursement shall be done pursuant to the same procedures as are applicable to the CHAMPUS DRG-based payment system (see paragraph (a)(1)(iii)(G) of this section).

(iv) *Base period and update factors*—(A) *Base period.* The base period for calculating the hospital-specific and regional per diems, as described in paragraphs (a)(2)(ii) and (a)(2)(iii) of this section, is Federal fiscal year 1988. Base period calculations shall be based on actual claims paid during the period July 1, 1987 through May 31, 1988, trended forward to represent the 12-month period ending September 30, 1988 on the basis of the Medicare inpatient hospital market basket rate.

(B) *Alternative hospital-specific data base.* Upon application of a higher volume hospital or unit to the Director, OCHAMPUS, or a designee, the hospital or unit may have its hospital-specific base period calculations based on claims with a date of discharge (rather than date of payment) between July 1, 1987 through May 31, 1988 if it has generally experienced unusual delays in claims payments and if the use of such an alternative data base would result in a difference in the per diem amount of at least $5.00. For this purpose, the unusual delays means that the hospital's or unit's average time period between date of discharge and date of payment is more than two standard deviations longer than the national average.

(C) *Update factors*—(*1*) The hospital-specific per diems and the regional per diems calculated for the base period pursuant to paragraphs (a)(2)(ii) of this section shall remain in effect for federal fiscal year 1989; there will be no additional update for fiscal year 1989.

(*2*) Except as provided in paragraph (a)(2)(iv)(C)(*3*) of this section, for subsequent federal fiscal years, each per diem shall be updated by the Medicare Inpatient Prospective Payment System update factor.

(*3*) As an exception to the update required by paragraph (a)(2)(iv)(C)(*2*) of this section, all per diems in effect at the end of fiscal year 1995 shall remain in effect, with no additional update, throughout fiscal years 1996 and 1997. For fiscal year 1998 and thereafter, the per diems in effect at the end of fiscal year 1997 will be updated in accordance with paragraph (a)(2)(iv)(C)(*2*).

(*4*) Hospitals and units with hospital-specific rates will be notified of their respective rates prior to the beginning of each Federal fiscal year. New hospitals shall be notified at such time as the hospital rate is determined. The actual amount of each regional per diem that will apply in any Federal fiscal year shall be posted to the Agency's official Web site at the start of that fiscal year.

(v) *Higher volume hospitals.* This paragraph describes the classification of and other provisions pertinent to hospitals with a higher volume of CHAMPUS patients.

(A) *In general.* Any hospital or unit that had an annual rate of 25 or more CHAMPUS discharges of CHAMPUS patients during the period July 1, 1987 through May 31, 1988 shall be considered a higher volume hospital has 25 or more CHAMPUS discharges, that hospital shall be considered to be a higher volume hospital during Federal fiscal year 1989 and all subsequent fiscal years. All other hospitals and units covered by the CHAMPUS mental health per diem payment system shall be considered lower volume hospitals.

(B) *Hospitals that subsequently become higher volume hospitals.* In any Federal fiscal year in which a hospital, including a new hospital (see paragraph (a)(2)(v)(C) of this section), not previously classified as a higher volume hospital has 25 or more CHAMPUS discharges, that hospital shall be considered to be a higher volume hospital during the next Federal fiscal year and all subsequent fiscal years. The hospital specific per diem amount shall be calculated in accordance with the provisions of paragraph (a)(2)(ii) of this section, except that the base period average daily charge shall be deemed to

be the hospital's average daily charge in the year in which the hospital had 25 or more discharges, adjusted by the percentage change in average daily charges for all higher volume hospitals and units between the year in which the hospital had 25 or more CHAMPUS discharges and the base period. The base period amount, however, may not exceed the cap described in paragraph (a)(2)(ii)(B) of this section.

(C) *Special retrospective payment provision for new hospitals.* For purposes of this paragraph, a new hospital is a hospital that qualifies for the Medicare exemption from the rate of increase ceiling applicable to new hospitals which are PPS-exempt psychiatric hospitals. Any new hospital that becomes a higher volume hospital, in addition to qualifying prospectively as a higher volume hospital for purposes of paragraph (a)(2)(v)(B) of this section, may additionally, upon application to the Director, OCHAMPUS, receive a retrospective adjustment. The retrospective adjustment shall be calculated so that the hospital receives the same government share payments it would have received had it been designated a higher volume hospital for the federal fiscal year in which it first had 25 or more CHAMPUS discharges and the preceding fiscal year (if it had any CHAMPUS patients during the preceding fiscal year). Such new hospitals must agree not to bill CHAMPUS beneficiaries for any additional costs beyond that determined initially.

(D) *Review of classification.* Any hospital or unit which OCHAMPUS erroneously fails to classify as a higher volume hospital may apply to the Director, OCHAMPUS, or a designee, for such a classification. The hospital shall have the burden of proof.

(vi) *Payment for hospital based professional services.* Lower volume hospitals and units may not bill separately for hospital based professional mental health services; payment for those services is included in the per diems. Higher volume hospitals and units, whether they billed CHAMPUS separately for hospital based professional mental health services or included those services in the hospital's billing to CHAMPUS, shall continue the practice in effect during the period July 1, 1987 to May 31, 1988 (or other data base period used for calculating the hospital's or unit's per diem), except that any such hospital or unit may change its prior practice (and obtain an appropriate revision in its per diem) by providing to OCHAMPUS notice in accordance with procedures established by the Director, OCHAMPUS, or a designee.

(vii) *Leave days.* CHAMPUS shall not pay for days where the patient is absent on leave from the specialty psychiatric hospital or unit. The hospital must identify these days when claiming reimbursement. CHAMPUS shall not count a patients's leave of absence as a discharge in determining whether a facility should be classified as a higher volume hospital pursuant to paragraph (a)(2)(v) of this section.

(viii) *Exemptions from the CHAMPUS mental health per diem payment system.* The following providers and procedures are exempt from the CHAMPUS mental health per diem payment system.

(A) *Non-specialty providers.* Providers of inpatient care which are not either psychiatric hospitals or psychiatric specialty units as described in paragraph (a)(2)(i)(A) of this section are exempt from the CHAMPUS mental health per diem payment system. Such providers should refer to paragraph (a)(1) of this section for provisions pertinent to the CHAMPUS DRG-based payment system.

(B) *DRG 424.* Admissions for operating room procedures involving a principal diagnosis of mental illness (services which group into DRG 424) are exempt from the per diem payment system. They will be reimbursed pursuant to the provisions of paragraph (a)(3) of this section.

(C) *Non-mental health services.* Admissions for non-mental health procedures in specialty psychiatric hospitals and units are exempt from the per diem payment system. They will be reimbursed pursuant to the provisions of paragraph (a)(3) of this section.

(D) *Sole community hospitals (SCHs).* Prior to implementation of the SCH reimbursement method described in paragraph (a)(7) of this section, any hospital that has qualified for special treatment under the Medicare prospective payment system as an SCH and

has not given up that classification is exempt.

(E) *Hospitals outside the U.S.* A hospital is exempt if it is not located in one of the 50 states, the District of Columbia or Puerto Rico.

(ix) *Payment for psychiatric and substance use disorder rehabilitation partial hospitalization services, intensive outpatient psychiatric and substance use disorder services and opioid treatment services*—(A) *Per diem payments.* Psychiatric and substance use disorder partial hospitalization services, intensive outpatient psychiatric and substance use disorder services and opioid treatment services authorized by §199.4(b)(9), (b)(10), and (b)(11), respectively, and provided by institutional providers authorized under §199.6(b)(4)(xii), (b)(4)(xviii) and (b)(4)(xix), respectively, are reimbursed on the basis of prospectively determined, all-inclusive per diem rates pursuant to the provisions of paragraphs (a)(2)(ix)(A)(*1*) through (*3*) of this section, with the exception of hospital-based psychiatric and substance use disorder and opioid services which are reimbursed in accordance with provisions of paragraph (a)(6)(ii) of this section and free-standing opioid treatment programs when reimbursed on a fee-for-service basis as specified in paragraph (a)(2)(ix)(A)(*3*)(*ii*) of this section. The per diem payment amount must be accepted as payment in full, subject to the outpatient cost-sharing provisions under §199.4(f), for institutional services provided, including board, routine nursing services, group therapy, ancillary services (*e.g.*, music, dance, and occupational and other such therapies), psychological testing and assessment, overhead and any other services for which the customary practice among similar providers is included in the institutional charges, except for those services which may be billed separately under paragraph (a)(2)(ix)(B) of this section. Per diem payment will not be allowed for leave days during which treatment is not provided.

(*1*) *Partial hospitalization programs.* For any full-day partial hospitalization program (minimum of 6 hours), the maximum per diem payment amount is 40 percent of the average inpatient per diem amount per case established under the TRICARE mental health per diem reimbursement system during the fiscal year for both high and low volume psychiatric hospitals and units [as defined in paragraph (a)(2) of this section]. Intensive outpatient services provided in a PHP setting lasting less than 6 hours, with a minimum of 2 hours, will be paid as provided in paragraph (a)(2)(ix)(A)(2) of this section. PHP per diem rates will be updated annually by the Medicare update factor used for their Inpatient Prospective Payment System.

(*2*) *Intensive outpatient programs.* For intensive outpatient programs (IOPs) (minimum of 2 hours), the maximum per diem amount is 75 percent of the rate for a full-day partial hospitalization program as established in paragraph (a)(2)(ix)(A)(1) of this section. IOP per diem rates will be updated annually by the Medicare update factor used for their Inpatient Prospective Payment System.

(*3*) *Opioid treatment programs.* Opioid treatment programs (OTPs) authorized by §199.4(b)(11) and provided by providers authorized under §199.6(b)(4)(xix) will be reimbursed based on the variability in the dosage and frequency of the drug being administered and in related supportive services.

(*i*) *Weekly all-inclusive per diem rate.* Methadone OTPs will be reimbursed the lower of the billed charge or the weekly all-inclusive per diem rate (the weekly national all-inclusive rate adjusted for locality), including the cost of the drug and related services (*i.e.*, the costs related to the initial intake/assessment, drug dispensing and screening and integrated psychosocial and medical treatment and support services). The bundled weekly per diem payments will be accepted as payment in full, subject to the outpatient cost-sharing provisions under §199.4(f). The methadone per diem rate for OTPs will be updated annually by the Medicare update factor used for their Inpatient Prospective Payment System.

(*ii*) *Exceptions to per diem reimbursement.* When providing other medications which are more likely to be prescribed and administered in an office-based opioid treatment setting, but which are still available for treatment

of substance use disorders in an outpatient treatment program setting, OTPs will be reimbursed on a fee-for-service basis (*i.e.*, separate payments will be allowed for both the medication and accompanying support services), subject to the outpatient cost-sharing provisions under §199.4(f). OTPs' rates will be updated annually by the Medicare update factor used for their Inpatient Prospective Payment System.

(*iii*) *Discretionary authority*. The Director, TRICARE, will have discretionary authority in establishing the reimbursement methodologies for new drugs and biologicals that may become available for the treatment of substance use disorders in OTPs. The type of reimbursement (*e.g.*, fee-for-service versus bundled per diem payments) will be dependent on the variability of the dosage and frequency of the medication being administered, as well as the support services.

(B) *Services which may be billed separately*. Psychotherapy sessions and nonmental health related medical services not normally included in the evaluation and assessment of PHP, IOP or OTPs, provided by authorized independent professional providers who are not employed by, or under contract with, PHP, IOP or OTPs for the purposes of providing clinical patient care are not included in the per diem rate and may be billed separately. This includes ambulance services when medically necessary for emergency transport.

(3) *Reimbursement for inpatient services provided by a CAH*. (i) For admissions on or after December 1, 2009, inpatient services provided by a CAH, other than services provided in psychiatric and rehabilitation distinct part units, shall be reimbursed at allowable cost (*i.e.*, 101 percent of reasonable cost) under procedures, guidelines, and instructions issued by the Director, DHA, or designee. This does not include any costs of physicians' services or other professional services provided to CAH inpatients. Inpatient services provided in psychiatric distinct part units would be subject to the TRICARE mental health payment system. Inpatient services provided in rehabilitation distinct part units would be subject to billed charges. Upon implementation of TRICARE's IRF PPS, inpatient services provided in rehabilitation distinct part units would be subject to the TRICARE IRF PPS methodology in paragraph (a)(10) of this section.

(ii) The percentage amount stated in paragraph (a)(3)(i) of this section is subject to possible upward adjustment based on a inpatient GTMCPA for TRICARE network hospitals deemed essential for military readiness and support during contingency operations under paragraph (a)(8) of this section.

(4) The allowable cost for authorized care in all hospitals not subject to the TRICARE DRG-based payment system, the TRICARE mental health per-diem system, the TRICARE reasonable cost method for CAHs, the TRICARE reimbursement rules for SCHs, the TRICARE LTCH–PPS, or the TRICARE IRF PPS shall be determined on the basis of billed charges or set rates.

(i) The actual charge for such service made to the general public; or

(ii) The allowed charge applicable to the policyholders or subscribers of the CHAMPUS fiscal intermediary for comparable services under comparable circumstances, when extended to CHAMPUS beneficiaries by consent or agreement; or

(iii) The allowed charge applicable to the citizens of the community or state as established by local or state regulatory authority, excluding title XIX of the Social Security Act or other welfare program, when extended to CHAMPUS beneficiaries by consent or agreement.

(5) *CHAMPUS discount rates*. The CHAMPUS-determined allowable cost for authorized care in any hospital may be based on discount rates established under paragraph (l) of this section.

(6) *Hospital outpatient services*. This paragraph (a)(6) identifies and clarifies payment methods for certain outpatient services, including emergency services, provided by hospitals.

(i) *Outpatient Services Not Subject to Hospital Outpatient Prospective Payment System (OPPS)*. The following are payment methods for outpatient services that are either provided in an OPPS exempt hospital or paid outside the OPPS payment methodology under existing

fee schedules or other prospectively determined rates in a hospital subject to OPPS reimbursement.

(A) *Laboratory services.* TRICARE payments for hospital outpatient laboratory services including clinical laboratory services are based on the allowable charge method under paragraph (j)(1) of the section. In the case of laboratory services for which the CMAC rates are established under that paragraph, a payment rate for the technical component of the laboratory services is provided. Hospital charges for an outpatient laboratory service are reimbursed using the CMAC technical component rate.

(B) *Rehabilitation therapy services.* Rehabilitation therapy services provided on an outpatient basis by hospitals are paid on the same basis as rehabilitation therapy services covered by the allowable charge method under paragraph (j)(1) of this section.

(C) *Venipuncture.* Routine venipuncture services provided on an outpatient basis by hospitals are paid on the same basis as such services covered by the allowable charge method under paragraph (j)(1) of this section. Routine venipuncture services provided on an outpatient basis by institutional providers other than hospitals are also paid on this basis.

(D) *Radiology services.* TRICARE payments for hospital outpatient radiology services are based on the allowable charge method under paragraph (j)(1) of the section. In the case of radiology services for which the CMAC rates are established under that paragraph, a payment rate for the technical component of the radiology services is provided. Hospital charges for an outpatient radiology service are reimbursed using the CMAC technical component rate.

(E) *Diagnostic services.* TRICARE payments for hospital outpatient diagnostic services are based on the allowable charge method under paragraph (j)(1) of the section. In the case of diagnostic services for which the CMAC rates are established under that paragraph, a payment rate for the technical component of the diagnostic services is provided. Hospital charges for an outpatient diagnostic service are reimbursed using the CMAC technical component rate.

(F) *Ambulance services.* Ambulance services provided on an outpatient basis by hospitals are paid on the same basis as ambulance services covered by the allowable charge method under paragraph (j)(1) of this section.

(G) *Durable medical equipment (DME) and supplies.* Durable medical equipment and supplies provided on an outpatient basis by hospitals are paid on the same basis as durable medical equipment and supplies covered by the allowable charge method under paragraph (j)(1) of this section.

(H) *Oxygen and related supplies.* Oxygen and related supplies provided on an outpatient basis by hospitals are paid on the same basis as oxygen and related supplies covered by the allowable charge method under paragraph (j)(1) of this section.

(I) *Drugs administered other than by oral method.* Drugs administered other than by oral method provided on an outpatient basis by hospitals are paid on the same basis as drugs administered other than by oral method covered by the allowable charge method under paragraph (j)(1) of this section.

(J) *Professional provider services.* TRICARE payments for hospital outpatient professional provider services rendered in an emergency room, clinic, or hospital outpatient department, etc., are based on the allowable charge method under paragraph (j)(1) of the section. In the case of professional services for which the CMAC rates are established under that paragraph, a payment rate for the professional component of the services is provided. Hospital charges for an outpatient professional service are reimbursed using the CMAC professional component rate. If the professional outpatient hospital services are billed by a professional provider group, not by the hospital, no payment shall be made to the hospital for these services.

(K) *Facility charges.* TRICARE payments for hospital outpatient facility charges that would include the overhead costs of providing the outpatient service would be paid as billed. For the definition of facility charge, see §199.2(b).

(L) *Ambulatory surgery services.* Hospital outpatient ambulatory surgery services shall be paid in accordance with § 199.14(d).

(ii) *Outpatient services subject to OPPS*—(A) *General.* Outpatient services provided in hospitals subject to Medicare OPPS as specified in 42 CFR 413.65 and 42 CFR 419.20 will be paid in accordance with the provisions outlined in sections 1833t of the Social Security Act and its implementing Medicare regulation (42 CFR part 419) subject to exceptions as authorized by this paragraph (a)(6)(ii).

(B) Under the above governing provisions, TRICARE will recognize to the extent practicable, in accordance with 10 U.S.C. 1089(j)(2), Medicare's OPPS reimbursement methodology to include specific coding requirements, ambulatory payment classifications (APCs), nationally established APC amounts and associated adjustments (*e.g.*, discounting across geographical regions and outlier calculations).

(C) While TRICARE intends to remain as true as possible to Medicare's basic OPPS methodology, there will be some deviations required to accommodate TRICARE's unique benefit structure and beneficiary population as authorized under the provisions of 10 U.S.C. 1079(j)(2).

(D) TRICARE is also authorized to deviate from Medicare's basic OPPS methodology to establish special reimbursement methods, amounts, and procedures to encourage use of high-value products and discourage use of low-value products with respect to pharmaceutical agents provided as part of medical services from authorized providers. Therefore, drugs administered other than oral method provided on an outpatient basis by hospitals are paid on the same basis as drugs administered other than oral method covered by the allowable charge method under paragraph (j)(1) of this section.

(E) *Temporary transitional payment adjustments (TTPAs).* Temporary transitional payment adjustments will be in place for all hospitals, both network and non-network, in order to buffer the initial decline in payments upon implementation of TRICARE's OPPS.

(*1*) *For network hospitals.* The temporary transitional payment adjustments will cover a four-year period. The four-year transition will set higher payment percentages for the ten Ambulatory Payment Classification (APC) codes 604–609 and 613–616, with reductions in each of the transition years. For non-network hospitals, the adjustments will cover a three year period, with reductions in each of the transition years. For network hospitals, under the TTPAs, the APC payment level for the five clinic visit APCs would be set at 175 percent of the Medicare APC level, while the five ER visit APCs would be increased by 200 percent in the first year of OPPS implementation. In the second year, the APC payment levels would be set at 150 percent of the Medicare APC level for clinic visits and 175 percent for ER APCs. In the third year, the APC visit amounts would be set at 130 percent of the Medicare APC level for clinic visits and 150 percent for ER APCs. In the fourth year, the APC visit amounts would be set at 115 percent of the Medicare APC level for clinic visits and 130 percent for ER APCs. In the fifth year, the TRICARE and Medicare payment levels for the 10 APC visit codes would be identical.

(*2*) *For non-network hospitals.* Under the TTPAs, the APC payment level for the five clinic and ER visit APCs would be set at 140 percent of the Medicare APC level in the first year of OPPS implementation. In the second year, the APC payment levels would be set at 125 percent of the Medicare APC level for clinic and ER visits. In the third year, the APC visit amounts would be set at 110 percent of the Medicare APC level for clinic and ER visits. In the fourth year, the TRICARE and Medicare payment levels for the 10 APC visit codes would be identical.

(*3*) An additional temporary military contingency payment adjustment (TMCPA) will also be available at the discretion of the Director, Defense Health Agency (DHA), or a designee, at any time after implementation to adopt, modify and/or extend temporary adjustments to OPPS payments for TRICARE network hospitals deemed essential for military readiness and deployment in time of contingency operations. Any TMCPAs to OPPS payments shall be made only on the basis

of a determination that it is impracticable to support military readiness or contingency operations by making OPPS payments in accordance with the same reimbursement rules implemented by Medicare. The criteria for adopting, modifying, and/or extending deviations and/or adjustments to OPPS payments shall be issued through TRICARE policies, instructions, procedures and guidelines as deemed appropriate by the Director, DHA, or a designee. TMCPAs may also be extended to non-network hospitals on a case-by-case basis for specific procedures where it is determined that the procedures cannot be obtained timely enough from a network hospital. For such case-by-case extensions, ''Temporary'' might be less than three years at the discretion of the DHA Director, or designee.

(iii) *Outpatient Services Subject to CAH Reasonable Cost Method*. For services on or after December 1, 2009, outpatient services provided by a CAH, shall be reimbursed at 101 percent of reasonable cost. This does not include any costs of physician services or other professional services provided to CAH outpatients.

(iv) *CAH Ambulance Services*. Effective for services provided on or after December 1, 2009, payment for ambulance services furnished by a CAH or an entity that is owned and operated by a CAH is the reasonable costs of the CAH or the entity in furnishing those services, but only if the CAH or the entity is the only provider or supplier of ambulance services located within a 35-mile drive of the CAH or the entity as specified under 42 CFR part 413.70(b)(5)(ii).

(7) *Reimbursement for inpatient services provided by an SCH*. (i) In accordance with 10 U.S.C. 1079(j)(2), TRICARE payment methods for institutional care shall be determined, to the extent practicable, in accordance with the same reimbursement rules as those that apply to payments to providers of services of the same type under Medicare. TRICARE's SCH reimbursements approximate Medicare's for SCHs. Inpatient services provided by an SCH, other than services provided in psychiatric and rehabilitation distinct part units, shall be reimbursed through a two-step process.

(ii) The first step referred to in paragraph (a)(7)(i) of this section will be to calculate the TRICARE allowable cost by multiplying the applicable TRICARE percentage by the billed charge amount on each institutional inpatient claim. The applicable TRICARE percentage is the greater of: the SCH's most recently available cost-to-charge ratio (CCR) from the Centers for Medicare and Medicaid Services' (CMS') inpatient Provider Specific File (after the ratio has been converted to a percentage), or the TRICARE allowed-to-billed ratio, defined as the ratio of the TRICARE allowed amounts (including discounts) to the amount of billed charges for TRICARE inpatient admissions at the SCH in FY 2012 (after it has been converted to a percentage). The TRICARE allowed-to-billed ratio in FY 2012 shall be reduced as follows (after the ratio has been converted to a percentage):

(A) In the first year of implementation, 10 percentage points for network SCHs and 15 percentage points for non-network SCHs.

(B) In the second year of implementation, 20 percentage points for network SCHs and 30 percentage points for non-network SCHs.

(C) In the third year of implementation, 30 percentage points for network SCHs and 45 percentage points for non-network SCHs.

(D) In the fourth year of implementation, 40 percentage points for network SCHs and 60 percentage points for non-network SCHs.

(E) In the fifth year of implementation, 50 percentage points for network SCHs and 75 percentage points for non-network SCHs.

(F) In the sixth year of implementation, 60 percentage points for network SCHs and 90 percentage points for non-network SCHs.

(G) In the seventh year of implementation, 70 percentage points for network SCHs and 100 percentage points for non-network SCHs.

(H) In the eighth year of implementation, 80 percentage points for network SCHs and 100 percentage points for non-network SCHs.

(I) In the ninth year of implementation, 90 percentage points for network

SCHs and 100 percentage points for non-network SCHs.

(J) In the tenth year of implementation, 100 percentage points for network SCHs and 100 percentage points for non-network SCHs.

(iii) The second step referred to in paragraph (a)(7)(i) of this section is a year-end adjustment. The year-end adjustment will compare the aggregate allowable costs over a 12-month period under paragraph (a)(7)(ii) of this section to the aggregate amount that would have been allowed for the same care using the TRICARE DRG-method (under paragraph (a)(1) of this section). In the event that the DRG method amount is the greater, the year-end adjustment will be the amount by which it exceeds the aggregate allowable costs. In addition, the year-end adjustment also may incorporate a possible upward adjustment for inpatient services based on a GTMCPA for TRICARE network hospitals under paragraph (a)(8) of this section.

(iv) At the end of an SCH's transition period, when the SCH reaches its Medicare CCR, a special allowable cost shall be applicable for discharges that group to inpatient nursery and labor/delivery DRGs. For these discharges, instead of using the percentage of the SCH's Medicare cost-to-charge ratio (as described in paragraph (a)(7)(ii) of this section), the percentage will be 130 percent of the Medicare CCR.

(v) The SCH reimbursement provisions of paragraphs (a)(7)(i) through (iv) of this section do not apply to any costs of physician services or other professional services provided to SCH inpatients (which are subject to individual provider payment provisions of this section), inpatient services provided in psychiatric distinct part units (which are subject to the CHAMPUS mental health per-diem payment system), or inpatient services provided in rehabilitation distinct part units (which are reimbursed on the basis of billed charges or set rates).

(vi) The SCH payment system under this paragraph (a)(7) applies to hospitals classified by CMS as Essential Access Community Hospitals (EACHs).

(vii) The SCH payment system under this paragraph (a)(7) does not apply to hospitals in States that are paid by Medicare and TRICARE under a cost containment waiver.

(8) *General temporary military contingency payment adjustment for SCHs and CAHs.* (i) Payments under paragraph (a) of this section for inpatient services provided by SCHs and CAHs may be supplemented by a GTMCPA. This is a year-end discretionary, temporary adjustment that the TMA Director may approve based on all the following criteria:

(A) The hospital serves a disproportionate share of ADSMs and ADDs;

(B) The hospital is a TRICARE network hospital;

(C) The hospital's actual costs for inpatient services exceed TRICARE payments or other extraordinary economic circumstance exists; and,

(D) Without the GTMCPA, DoD's ability to meet military contingency mission requirements will be significantly compromised.

(ii) Policy and procedural instructions implementing the GTMCPA will be issued as deemed appropriate by the Director, TMA, or a designee. As with other discretionary authority under this Part, a decision to allow or deny a GTMCPA to a hospital is not subject to the appeal and hearing procedures of § 199.10.

(9) *Reimbursement for inpatient services provided by a Long Term Care Hospital (LTCH).* (i) In accordance with 10 U.S.C. 1079(i)(2), TRICARE payment methods for institutional care shall be determined, to the extent practicable, in accordance with the same reimbursement rules as those that apply to payments to providers of services of the same type under Medicare. The TRICARE–LTC–DRG reimbursement methodology shall be in accordance with Medicare's Medicare Severity Long Term Care Diagnosis Related Groups (MS–LTC–DRGs) as found in regulation at 42 CFR part 412, subpart O. Inpatient services provided in hospitals subject to the Medicare LTCH Prospective Payment System (PPS) and classified as LTCHs and also as specified in 42 CFR parts 412 and 413 will be paid in accordance with the provisions outlined in sections 1886(d)(1)(B)(IV) and 1886(m)(6) of the Social Security Act and its implementing Medicare regulation (42 CFR parts 412, 413, and 170) to the extent

practicable. Under the above governing provisions, TRICARE will recognize, to the extent practicable, in accordance with 10 U.S.C. 1079(i)(2), Medicare's LTCH PPS methodology to include the relative weights, inpatient operating and capital costs of furnishing covered services (including routine and ancillary services), interrupted stay policy, short-stay and high cost outlier payments, site-neutral payments, wage adjustments for variations in labor-related costs across geographical regions, cost-of-living adjustments, payment adjustments associated with the quality reporting program, method of payment for preadmission services, and updates to the system. TRICARE will not be adopting Medicare's 25 percent threshold payment adjustment.

NOTE TO PARAGRAPH (A)(9)(I): LTCH admissions that are in response to the COVID–19 declared PHE and occur during the COVID–19 PHE period will be reimbursed the LTCH PPS standard Federal rate.

(ii) Implementation of the TRICARE LTCH PPS will include a gradual transition to full implementation of the Medicare LTCH PPS rates as follows:

(A) For the first 12 months following implementation, the TRICARE LTCH PPS allowable cost will be 135 percent of Medicare LTCH PPS amounts.

(B) For the second 12 months of implementation, TRICARE LTCH PPS allowable cost will be 115 percent of the Medicare LTCH PPS amounts.

(C) For the third 12 months of implementation, and subsequent years, TRICARE LTCH PPS allowable cost will be 100 percent of the Medicare LTCH PPS amounts.

(iii) *Exemption*. The TRICARE LTCH PPS methodology under this paragraph does not apply to hospitals in States that are reimbursed by Medicare and TRICARE under a waiver that exempts them from Medicare's inpatient prospective payment system or the TRICARE DRG-based payment system, to Children's Hospitals, or to Neoplastic Disease Care Hospitals, respectively.

(10) *Reimbursement for inpatient services provided by Inpatient Rehabilitation Facilities (IRF)*. (i) In accordance with 10 U.S.C. 1079(i)(2), TRICARE payment methods for institutional care shall be determined to the extent practicable, in accordance with the same reimbursement rules as those that apply to payments to providers of services of the same type under Medicare. The TRICARE IRF PPS reimbursement methodology shall be in accordance with Medicare's IRF PPS as found in 42 CFR part 412. Inpatient services provided in IRFs subject to the Medicare IRF prospective payment system (PPS) and classified as IRFs and also as specified in 42 CFR 412.604 will be paid in accordance with the provisions outlined in section 1886(j) of the Social Security Act and its implementing Medicare regulation found at 42 CFR part 412, subpart P to the extent practicable. Under the above governing provisions, TRICARE will recognize, to the extent practicable, in accordance with 10 U.S.C. 1079(i)(2), Medicare's IRF PPS methodology to include the relative weights, payment rates covering all operating and capitals costs of furnishing rehabilitative services adjusted for wage variations in labor-related costs across geographical regions, adjustments for the 60 percent compliance threshold, teaching adjustment, rural adjustment, high-cost outlier payments, low income payment adjustment, payment adjustments associated with the quality reporting program, and updates to the system.

(ii) Implementation of the TRICARE IRF PPS will include a gradual transition to full implementation of the Medicare IRF PPS rates as follows:

(A) For the first 12 months of implementation, the TRICARE IRF PPS allowable cost will be 135 percent of Medicare IRF PPS amounts.

(B) For the second 12 months of implementation, the TRICARE IRF PPS allowable cost will be 115 percent of the Medicare IRF PPS amounts.

(C) For the third 12 months of implementation, and subsequent years, the TRICARE IRF PPS allowable cost will be 100 percent of the Medicare IRF PPS amounts.

(iii) The IRF PPS allowable cost in paragraph (a)(10)(ii) of this section may be supplemented by an inpatient general temporary military contingency payment adjustment (GTMCPA) for TRICARE authorized IRFs.

(A) This is a year-end discretionary, temporary adjustment that the Director, DHA (or designee) may approve based on the following criteria:

(*1*) The IRF serves a disproportionate share of ADSMs and ADDs;

(*2*) The IRF is a TRICARE network hospital;

(*3*) The IRF's actual costs for inpatient services exceed TRICARE payments or other extraordinary economic circumstance exists; and

(*4*) Without the GTMCPA, DoD's ability to meet military contingency mission requirements will be significantly compromised.

(B) Policy and procedural instructions implementing the GTMCPA will be issued as deemed appropriate by the Director, DHA (or designee). As with other discretionary authority under this part, a decision to allow or deny a GTMCPA to an IRF is not subject to the appeal and hearing procedures of § 199.10.

(iv) *Exemption.* The TRICARE IRF PPS methodology under this paragraph does not apply to hospitals in States that are reimbursed by Medicare and TRICARE under a waiver that exempts them from Medicare's inpatient prospective payment system or the TRICARE DRG-based payment system, to Children's hospitals, or to VA hospitals, respectively.

(b) *Skilled nursing facilities (SNFs)*—(1) *Use of Medicare prospective payment system and rates.* TRICARE payments to SNFs are determined using the same methods and rates used under the Medicare prospective payment system for SNFs under 42 CFR part 413, subpart J, except for children under age ten. SNFs receive a per diem payment of a predetermined Federal payment rate appropriate for the case based on patient classification (using the RUG classification system), urban or rural location of the facility, and area wage index.

(2) *Payment in full.* The SNF payment rates represent payment in full (subject to any applicable beneficiary cost shares) for all costs (routine, ancillary, and capital-related) associated with furnishing inpatient SNF services to TRICARE beneficiaries other than costs associated with operating approved educational activities.

(3) *Education costs.* Costs for approved educational activities shall be subject to separate payment under procedures established by the Director, TRICARE Management Activity. Such procedures shall be similar to procedures for payments for direct medical education costs of hospitals under paragraph (a)(1)(iii)(G)(*2*) of this section.

(4) *Resident assessment data.* SNFs are required to submit the same resident assessment data as is required under the Medicare program. (The residential assessment is addressed in the Medicare regulations at 42 CFR 483.20.) SNFs must submit assessments according to an assessment schedule. This schedule must include performance of patient assessments on the 5th, 14th, and 30th days of SNF care and at each successive 30 day interval of SNF admissions that are longer than 30 days. It must also include such other assessments that are necessary to account for changes in patient care needs. TRICARE pays a default rate for the days of a patient's care for which the SNF has failed to comply with the assessment schedule.

(c) *Reimbursement for Other Than Hospitals and SNFs.* The Director, OCHAMPUS, or a designee, shall establish such other methods of determining allowable cost or charge reimbursement for those institutions, other than hospitals and SNFs, as may be required.

(d) *Payment of institutional facility costs for ambulatory surgery*—(1) *In general.* CHAMPUS pays institutional facility costs for ambulatory surgery on the basis of prospectively determined amounts, as provided in this paragraph, with the exception of ambulatory surgery procedures performed in hospital outpatient departments or in CAHs, which are to be reimbursed in accordance with the provisions of paragraph (a)(6)(ii) or (a)(6)(iii) respectively, of this section. This payment method is similar to that used by the Medicare program for ambulatory surgery. This paragraph applies to payment for freestanding ambulatory surgical centers. It does not apply to professional services. A list of ambulatory surgery procedures subject to the payment method set forth in the paragraph shall be published periodically

by the Director, TRICARE Management Activity (TMA). Payment to freestanding ambulatory surgery centers is limited to these procedures.

(2) *Payment in full.* The payment provided for under this paragraph is the payment in full for services covered by this paragraph. Facilities may not charge beneficiaries for amounts, if any, in excess of the payment amounts determined pursuant to this paragraph.

(3) *Calculation of standard payment rates.* Standard payment rates are calculated for groups of procedures under the following steps:

(i) *Step 1: Calculate a median standardized cost for each procedure.* For each ambulatory surgery procedure, a median standardized cost will be calculated on the basis of all ambulatory surgery charges nationally under CHAMPUS during a recent one-year base period. The steps in this calculation include standardizing for local labor costs by reference to the same wage index and labor/non-labor-related cost ratio as applies to the facility under Medicare, applying a cost-to-charge ratio, calculating a median cost for each procedure, and updating to the year for which the payment rates will be in effect by the Consumer Price Index-Urban. In applying a cost-to-charge ratio, the Medicare cost-to-charge ratio for freestanding ambulatory surgery centers (FASCs) will be used for all charges from FASCs, and the Medicare cost-to-charge ratio for hospital outpatient settings will be used for all charges from hospitals.

(ii) *Step 2: Grouping procedures.* Procedures will then be placed into one of ten groups by their median per procedure cost, starting with $0 to $299 for group 1 and ending with $1000 to $1299 for group 9 and $1300 and above for group 10, with groups 2 through 8 set on the basis of $100 fixed intervals.

(iii) *Step 3: Adjustments to groups.* The Director, OCHAMPUS may make adjustments to the groupings resulting from step 2 to account for any ambulatory surgery procedures for which there were insufficient data to allow a grouping or to correct for any anomalies resulting from data or statistical factors or other special factors that fairness requires be specially recognized. In making any such adjustments, the Director may take into consideration the placing of particular procedures in the ambulatory surgery groups under Medicare.

(iv) *Step 4*: standard payment amount per group. The standard payment amount per group will be the volume weighted median per procedure cost for the procedures in that group. For cases in which the standard payment amount per group exceeds the CHAMPUS-determined inpatient allowable amount, the Director, TSO or his designee, may make adjustments.

(v) *Step 5: Actual payments.* Actual payment for a procedure will be the standard payment amount for the group which covers that procedure, adjusted for local labor costs by reference to the same labor/non-labor- related cost ratio and hospital wage index as used for ambulatory surgery centers by Medicare.

(4) *Multiple procedures.* In cases in which authorized multiple procedures are performed during the same operative session, payment shall be based on 100 percent of the payment amount for the procedure with the highest ambulatory surgery payment amount, plus, for each other procedure performed during the session, 50 percent of its payment amount.

(5) *Annual updates.* The standard payment amounts will be updated annually by the same update factor as is used in the Medicare annual updates for ambulatory surgery center payments.

(6) *Recalculation of rates.* The Director, OCHAMPUS may periodically recalculate standard payment rates for ambulatory surgery using the steps set forth in paragraph (d)(3) of this section.

(e) *Reimbursement of Birthing Centers.* (1) Reimbursement for maternity care and childbirth services furnished by an authorized birthing center shall be limited to the lower of the CHAMPUS established all-inclusive rate or the center's most-favored all-inclusive rate.

(2) The all-inclusive rate shall include the following to the extent that they are usually associated with a normal pregnancy and childbirth: Laboratory studies, prenatal management, labor management, delivery, postpartum management, newborn care, birth assistant, certified nurse-midwife

professional services, physician professional services, and the use of the facility.

(3) The CHAMPUS established all-inclusive rate is equal to the sum of the CHAMPUS area prevailing professional charge for total obstetrical care for a normal pregnancy and delivery and the sum of the average CHAMPUS allowable institutional charges for supplies, laboratory, and delivery room for a hospital inpatient normal delivery. The CHAMPUS established all-inclusive rate areas will coincide with those established for prevailing professional charges and will be updated concurrently with the CHAMPUS area prevailing professional charge database.

(4) Extraordinary maternity care services, when otherwise authorized, may be reimbursed at the lesser of the billed charge or the CHAMPUS allowable charge.

(5) Reimbursement for an incomplete course of care will be limited to claims for professional services and tests where the beneficiary has been screened but rejected for admission into the birthing center program, or where the woman has been admitted but is discharged from the birthing center program prior to delivery, adjudicated as individual professional services and items.

(6) The beneficiary's share of the total reimbursement to a birthing center is limited to the cost-share amount plus the amount billed for non-covered services and supplies.

(f) *Reimbursement of Residential Treatment Centers*. The CHAMPUS rate is the per diem rate that CHAMPUS will authorize for all mental health services rendered to a patient and the patient's family as part of the total treatment plan submitted by a CHAMPUS-approved RTC, and approved by the Director, OCHAMPUS, or designee.

(1) The all-inclusive per diem rate for RTCs operating or participating in CHAMPUS during the base period of July 1, 1987, through June 30, 1988, will be the lowest of the following conditions:

(i) The CHAMPUS rate paid to the RTC for all-inclusive services as of June 30, 1988, adjusted by the Consumer Price Index—Urban (CPI-U) for medical care as determined applicable by the Director, OCHAMPUS, or designee; or

(ii) The per diem rate accepted by the RTC from any other agency or organization (public or private) that is high enough to cover one-third of the total patient days during the 12-month period ending June 30, 1988, adjusted by the CPI-U; or

NOTE: The per diem rate accepted by the RTC from any other agency or organization includes the rates accepted from entities such as Government contractors in CHAMPUS demonstration projects.

(iii) An OCHAMPUS determined capped per diem amount not to exceed the 80th percentile of all established CHAMPUS RTC rates nationally, weighted by total CHAMPUS days provided at each rate during the base period discussed in paragraph (f)(1) of this section.

(2) The all-inclusive per diem rates for RTCs which began operation after June 30, 1988, or began operation before July 1, 1988, but had less than 6 months of operation by June 30, 1988, will be calculated based on the lower of the per diem rate accepted by the RTC that is high enough to cover one-third of the total patient days during its first 6 to 12 consecutive months of operation, or the CHAMPUS determined capped amount. Rates for RTCs beginning operation prior to July 1, 1988, will be adjusted by an appropriate CPI-U inflation factor for the period ending June 30, 1988. A period of less than 12 months will be used only when the RTC has been in operation for less than 12 months. Once a full 12 months is available, the rate will be recalculated.

(3) For care on or after April 6, 1995, the per diem amount may not exceed a cap of the 70th percentile of all established Federal fiscal year 1994 RTC rates nationally, weighted by total CHAMPUS days provided at each rate during the first half of Federal fiscal year 1994, and updated to FY95. For Federal fiscal years 1996 and 1997, the cap shall remain unchanged. For Federal fiscal years after fiscal year 1997, the cap shall be adjusted by the Medicare update factor for hospitals and units exempt from the Medicare prospective payment system.

(4) All educational costs, whether they include routine education or special education costs, are excluded from reimbursement except when appropriate education is not available from, or not payable by, a cognizant public entity.

(i) The RTC shall exclude educational costs from its daily costs.

(ii) The RTC's accounting system must be adequate to assure CHAMPUS is not billed for educational costs.

(iii) The RTC may request payment of educational costs on an individual case basis from the Director, OCHAMPUS, or designee, when appropriate education is not available from, or not payable by, a cognizant public entity. To qualify for reimbursement of educational costs in individual cases, the RTC shall comply with the application procedures established by the Director, OCHAMPUS, or designee, including, but not limited to, the following:

(A) As part of its admission procedures, the RTC must counsel and assist the beneficiary and the beneficiary's family in the necessary procedures for assuring their rights to a free and appropriate public education.

(B) The RTC must document any reasons why an individual beneficiary cannot attend public educational facilities and, in such a case, why alternative educational arrangements have not been provided by the cognizant public entity.

(C) If reimbursement of educational costs is approved for an individual beneficiary by the Director, OCHAMPUS, or designee, such educational costs shall be shown separately from the RTC's daily costs on the CHAMPUS claim. The amount paid shall not exceed the RTC's most-favorable rate to any other patient, agency, or organization for special or general educational services whichever is appropriate.

(D) If the RTC fails to request CHAMPUS approval of the educational costs on an individual case, the RTC agrees not to bill the beneficiary or the beneficiary's family for any amounts disallowed by CHAMPUS. Requests for payment of educational costs must be referred to the Director, OCHAMPUS, or designee for review and a determination of the applicability of CHAMPUS benefits.

(5) Subject to the applicable RTC cap, adjustments to the RTC rates may be made annually.

(i) For Federal fiscal years through 1995, the adjustment shall be based on the Consumer Price Index-Urban (CPI-U) for medical care as determined applicable by the Director, OCHAMPUS.

(ii) For purposes of rates for Federal fiscal years 1996 and 1997:

(A) For any RTC whose 1995 rate was at or above the thirtieth percentile of all established Federal fiscal year 1995 RTC rates normally, weighted by total CHAMPUS days provided at each rate during the first half of Federal fiscal year 1994, that rate shall remain in effect, with no additional update, throughout fiscal years 1996 and 1997; and

(B) For any RTC whose 1995 rate was below the 30th percentile level determined under paragraph (f)(5)(ii)(A) of this section, the rate shall be adjusted by the lesser of: the CPI-U for medical care, or the amount that brings the rate up to that 30th percentile level.

(iii) For subsequent Federal fiscal years after fiscal year 1997, RTC rates shall be updated by the Medicare update factor for hospitals and units exempt from the Medicare prospective payment system.

(6) For care provided on or after July 1, 1995, CHAMPUS will not pay for days in which the patient is absent on leave from the RTC. The RTC must identify these days when claiming reimbursement.

(g) *Reimbursement of hospice programs.* Hospice care will be reimbursed at one of four predetermined national CHAMPUS rates based on the type and intensity of services furnished to the beneficiary. A single rate is applicable for each day of care except for continuous home care where payment is based on the number of hours of care furnished during a 24-hour period. These rates will be adjusted for regional differences in wages using wage indices for hospice care.

(1) *National hospice rates.* CHAMPUS will use the national hospice rates for reimbursement of each of the following

levels of care provided by or under arrangement with a CHAMPUS approved hospice program:

(i) *Routine home care.* The hospice will be paid the routine home care rate for each day the patient is at home, under the care of the hospice, and not receiving continuous home care. This rate is paid without regard to the volume or intensity of routine home care services provided on any given day.

(ii) *Continuous home care.* The hospice will be paid the continuous home care rate when continuous home care is provided. The continuous home care rate is divided by 24 hours in order to arrive at an hourly rate.

(A) A minimum of 8 hours of care must be provided within a 24-hour day starting and ending at midnight.

(B) More than half of the total actual hours being billed for each 24-hour period must be provided by either a registered or licensed practical nurse.

(C) Homemaker and home health aide services may be provided to supplement the nursing care to enable the beneficiary to remain at home.

(D) For every hour or part of an hour of continuous care furnished, the hourly rate will be reimbursed to the hospice up to 24 hours a day.

(iii) *Inpatient respite care.* The hospice will be paid at the inpatient respite care rate for each day on which the beneficiary is in an approved inpatient facility and is receiving respite care.

(A) Payment for respite care may be made for a maximum of 5 days at a time, including the date of admission but not counting the date of discharge. The necessity and frequency of respite care will be determined by the hospice interdisciplinary group with input from the patient's attending physician and the hospice's medical director.

(B) Payment for the sixth and any subsequent days is to be made at the routine home care rate.

(iv) *General inpatient care.* Payment at the inpatient rate will be made when general inpatient care is provided for pain control or acute or chronic symptom management which cannot be managed in other settings. None of the other fixed payment rates (i.e., routine home care) will be applicable for a day on which the patient receives general inpatient care except on the date of discharge.

(v) *Date of discharge.* For the day of discharge from an inpatient unit, the appropriate home care rate is to be paid unless the patient dies as an inpatient. When the patient is discharged deceased, the inpatient rate (general or respite) is to be paid for the discharge date.

(2) *Use of Medicare rates.* CHAMPUS will use the most current Medicare rates to reimburse hospice programs for services provided to CHAMPUS beneficiaries. It is CHAMPUS' intent to adopt changes in the Medicare reimbursement methodology as they occur; e.g., Medicare's adoption of an updated, more accurate wage index.

(3) *Physician reimbursement.* Payment is dependent on the physician's relationship with both the beneficiary and the hospice program.

(i) *Physicians employed by, or contracted with, the hospice.* (A) Administrative and supervisory activities (i.e., establishment, review and updating of plans of care, supervising care and services, and establishing governing policies) are included in the adjusted national payment rate.

(B) Direct patient care services are paid in addition to the adjusted national payment rate.

(*1*) Physician services will be reimbursed an amount equivalent to 100 percent of the CHAMPUS' allowable charge; i.e., there will be no cost-sharing and/or deductibles for hospice physician services.

(*2*) Physician payments will be counted toward the hospice cap limitation.

(ii) *Independent attending physician.* Patient care services rendered by an independent attending physician (a physician who is not considered employed by or under contract with the hospice) are not part of the hospice benefit.

(A) Attending physician may bill in his/her own right.

(B) Services will be subject to the appropriate allowable charge methodology.

(C) Reimbursement is not counted toward the hospice cap limitation.

(D) Services provided by an independent attending physician must be

coordinated with any direct care services provided by hospice physicians.

(E) The hospice must notify the CHAMPUS contractor of the name of the physician whenever the attending physician is not a hospice employee.

(iii) *Voluntary physician services.* No payment will be allowed for physician services furnished voluntarily (both physicians employed by, and under contract with, the hospice and independent attending physicians). Physicians may not discriminate against CHAMPUS beneficiaries; e.g., designate all services rendered to non-CHAMPUS patients as volunteer and at the same time bill for CHAMPUS patients.

(4) *Unrelated medical treatment.* Any covered CHAMPUS services not related to the treatment of the terminal condition for which hospice care was elected will be paid in accordance with standard reimbursement methodologies; i.e., payment for these services will be subject to standard deductible and cost-sharing provisions under the CHAMPUS. A determination must be made whether or not services provided are related to the individual's terminal illness. Many illnesses may occur when an individual is terminally ill which are brought on by the underlying condition of the ill patient. For example, it is not unusual for a terminally ill patient to develop pneumonia or some other illness as a result of his or her weakened condition. Similarly, the setting of bones after fractures occur in a bone cancer patient would be treatment of a related condition. Thus, if the treatment or control of an upper respiratory tract infection is due to the weakened state of the terminal patient, it will be considered a related condition, and as such, will be included in the hospice daily rates.

(5) *Cap amount.* Each CHAMPUS-approved hospice program will be subject to a cap on aggregate CHAMPUS payments from November 1 through October 31 of each year, hereafter known as ''the cap period.''

(i) The cap amount will be adjusted annually by the percent of increase or decrease in the medical expenditure category of the Consumer Price Index for all urban consumers (CPI-U).

(ii) The aggregate cap amount (i.e., the statutory cap amount times the number of CHAMPUS beneficiaries electing hospice care during the cap period) will be compared with total actual CHAMPUS payments made during the same cap period.

(iii) Payments in excess of the cap amount must be refunded by the hospice program. The adjusted cap amount will be obtained from the Health Care Financing Administration (HCFA) prior to the end of each cap period.

(iv) Calculation of the cap amount for a hospice which has not participated in the program for an entire cap year (November 1 through October 31) will be based on a period of at least 12 months but no more than 23 months. For example, the first cap period for a hospice entering the program on October 1, 1994, would run from October 1, 1994 through October 31, 1995. Similarly, the first cap period for hospice providers entering the program after November 1, 1993 but before November 1, 1994 would end October 31, 1995.

(6) *Inpatient limitation.* During the 12-month period beginning November 1 of each year and ending October 31, the aggregate number of inpatient days, both for general inpatient care and respite care, may not exceed 20 percent of the aggregate total number of days of hospice care provided to all CHAMPUS beneficiaries during the same period.

(i) If the number of days of inpatient care furnished to CHAMPUS beneficiaries exceeds 20 percent of the total days of hospice care to CHAMPUS beneficiaries, the total payment for inpatient care is determined follows:

(A) Calculate the ratio of the maximum number of allowable inpatient days of the actual number of inpatient care days furnished by the hospice to Medicare patients.

(B) Multiply this ratio by the total reimbursement for inpatient care made by the CHAMPUS contractor.

(C) Multiply the number of actual inpatient days in excess of the limitation by the routine home care rate.

(D) Add the amounts calculated in paragraphs (g)(6)(i) (B) and (C) of this section.

(ii) Compare the total payment for inpatient care calculated in paragraph (g)(6)(i)(D) of this section to actual

payments made to the hospice for inpatient care during the cap period.

(iii) Payments in excess of the inpatient limitation must be refunded by the hospice program.

(7) *Hospice reporting responsibilities.* The hospice is responsible for reporting the following data within 30 days after the end of the cap period:

(i) Total reimbursement received and receivable for services furnished CHAMPUS beneficiaries during the cap period, including physician's services not of an administrative or general supervisory nature.

(ii) Total reimbursement received and receivable for general inpatient care and inpatient respite care furnished to CHAMPUS beneficiaries during the cap period.

(iii) Total number of inpatient days furnished to CHAMPUS hospice patients (both general inpatient and inpatient respite days) during the cap period.

(iv) Total number of CHAMPUS hospice days (both inpatient and home care) during the cap period.

(v) Total number of beneficiaries electing hospice care. The following rules must be adhered to by the hospice in determining the number of CHAMPUS beneficiaries who have elected hospice care during the period:

(A) The beneficiary must not have been counted previously in either another hospice's cap or another reporting year.

(B) The beneficiary must file an initial election statement during the period beginning September 28 of the previous cap year through September 27 of the current cap year in order to be counted as an electing CHAMPUS beneficiary during the current cap year.

(C) Once a beneficiary has been included in the calculation of a hospice cap amount, he or she may not be included in the cap for that hospice again, even if the number of covered days in a subsequent reporting period exceeds that of the period where the beneficiary was included.

(D) There will be proportional application of the cap amount when a beneficiary elects to receive hospice benefits from two or more different CHAMPUS-certified hospices. A calculation must be made to determine the percentage of the patient's length of stay in each hospice relative to the total length of hospice stay.

(8) *Reconsideration of cap amount and inpatient limit.* A hospice dissatisfied with the contractor's calculation and application of its cap amount and/or inpatient limitation may request and obtain a contractor review if the amount of program reimbursement in controversy—with respect to matters which the hospice has a right to review—is at least $1000. The administrative review by the contractor of the calculation and application of the cap amount and inpatient limitation is the only administrative review available. These calculations are not subject to the appeal procedures set forth in § 199.10. The methods and standards for calculation of the hospice payment rates established by CHAMPUS, as well as questions as to the validity of the applicable law, regulations or CHAMPUS decisions, are not subject to administrative review, including the appeal procedures of § 199.10.

(9) *Beneficiary cost-sharing.* There are no deductibles under the CHAMPUS hospice benefit. CHAMPUS pays the full cost of all covered services for the terminal illness, except for small cost-share amounts which *may be* collected by the individual hospice for outpatient drugs and biologicals and inpatient respite care.

(i) The patient is responsible for 5 percent of the cost of outpatient drugs or $5 toward each prescription, whichever is less. Additionally, the cost of prescription drugs (drugs or biologicals) may not exceed that which a prudent buyer would pay in similar circumstances; that is, a buyer who refuses to pay more than the going price for an item or service and also seeks to economize by minimizing costs.

(ii) For inpatient respite care, the cost-share for each respite care day is equal to 5 percent of the amount CHAMPUS has estimated to be the cost of respite care, after adjusting the national rate for local wage differences.

(iii) The amount of the individual cost-share liability for respite care during a hospice cost-share period may not exceed the Medicare inpatient hospital deductible applicable for the year in which the hospice cost-share period

began. The individual hospice cost-share period begins on the first day an election is in effect for the beneficiary and ends with the close of the first period of 14 consecutive days on each of which an election is not in effect for the beneficiary.

(h) *Reimbursement of Home Health Agencies (HHAs).* HHAs will be reimbursed using the same methods and rates as used under the Medicare HHA prospective payment system under Section 1895 of the Social Security Act (42 U.S.C. 1395fff) and 42 CFR Part 484, Subpart E except as otherwise necessary to recognize distinct characteristics of TRICARE beneficiaries and as described in instructions issued by the Director, TMA. Under this methodology, an HHA will receive a fixed case-mix and wage-adjusted national 60-day episode payment amount as payment in full for all costs associated with furnishing home health services to TRICARE-eligible beneficiaries with the exception of osteoporosis drugs and DME. The full case-mix and wage-adjusted 60-day episode amount will be payment in full subject to the following adjustments and additional payments:

(1) *Split percentage payments.* The initial percentage payment for initial episodes is paid to an HHA at 60 percent of the case-mix and wage adjusted 60-day episode rate. The residual final payment for initial episodes is paid at 40 percent of the case-mix and wage adjusted 60-day episode rate subject to appropriate adjustments. The initial percentage payment for subsequent episodes is paid at 50 percent of the case-mix and wage-adjusted 60-day episode rate. The residual final payment for subsequent episodes is paid at 50 percent of the case-mix and wage-adjusted 60-day episode rate subject to appropriate adjustments.

(2) *Low-utilization payment.* A low utilization payment is applied when a HHA furnishes four or fewer visits to a beneficiary during the 60-day episode. The visits are paid at the national per-visit amount by discipline updated annually by the applicable market basket for each visit type.

(3) *Partial episode payment (PEP).* A PEP adjustment is used for payment of an episode of less than 60 days resulting from a beneficiary's elected transfer to another HHA prior to the end of the 60-day episode or discharge and readmission of a beneficiary to the same HHA before the end of the 60-day episode. The PEP payment is calculated by multiplying the proportion of the 60-day episode during which the beneficiary remained under the care of the original HHA by the beneficiary's assigned 60-day episode payment.

(4) *Significant change in condition (SCIC).* The full-episode payment amount is adjusted if a beneficiary experiences a significant change in condition during the 60-day episode that was not envisioned in the initial treatment plan. The total significant change in condition payment adjustment is a proportional payment adjustment reflecting the time both prior to and after the patient experienced a significant change in condition during the 60-day episode. The initial percentage payment provided at the start of the 60-day episode will be adjusted at the end of the episode to reflect the first and second parts of the total SCIC adjustment determined at the end of the 60-day episode. The SCIC payment adjustment is calculated in two parts:

(i) The first part of the SCIC payment adjustment reflects the adjustment to the level of payment prior to the significant change in the patient's condition during the 60-day episode.

(ii) The second part of the SCIC payment adjustment reflects the adjustment to the level of payment after the significant change in the patient's condition occurs during the 60-day episode.

(5) *Outlier payment.* Outlier payments are allowed in addition to regular 60-day episode payments for beneficiaries generating excessively high treatment costs. The following methodology is used for calculation of the outlier payment:

(i) TRICARE makes an outlier payment for an episode whose estimated cost exceeds a threshold amount for each case-mix group.

(ii) The outlier threshold for each case-mix group is the episode payment amount for that group, the PEP adjustment amount for the episode or the total significant change in condition adjustment amount for the episode

plus a fixed dollar loss amount that is the same for all case-mix groups.

(iii) The outlier payment is a proportion of the amount of estimated cost beyond the threshold.

(iv) TRICARE imputes the cost for each episode by multiplying the national per-visit amount of each discipline by the number of visits in the discipline and computing the total imputed cost for all disciplines.

(v) The fixed dollar loss amount and the loss sharing proportion are chosen so that the estimated total outlier payment is no more than the predetermined percentage of total payment under the home health PPS as set by the Centers for Medicare & Medicaid Services (CMS).

(6) *Services paid outside the HHA prospective payment system.* The following are services that receive a separate payment amount in addition to the prospective payment amount for home health services:

(i) *Durable medical equipment (DME).* Reimbursement of DME is based on the same amounts established under the Medicare Durable Medical Equipment, Prosthetics, Orthotics and Supplies (DMEPOS) fee schedule under 42 CFR part 414, subpart D.

(ii) *Osteoporosis drugs.* Although osteoporosis drugs are subject to home health consolidated billing, they continue to be paid on a cost basis, in addition to episode payments.

(7) *Accelerated payments.* Upon request, an accelerated payment may be made to an HHA that is receiving payment under the home health prospective payment system if the HHA is experiencing financial difficulties because there is a delay by the contractor in making payment to the HHA. The following are criteria for making accelerated payments:

(i) *Approval of payment.* An HHA's request for an accelerated payment must be approved by the contractor and TRICARE Management Activity (TMA).

(ii) *Amount of payment.* The amount of the accelerated payment is computed as a percentage of the net payment for unbilled or unpaid covered services.

(iii) *Recovery of payment.* Recovery of the accelerated payment is made by recoupment as HHA bills are processed or by direct payment by the HHA.

(8) *Assessment data.* Beneficiary assessment data, incorporating the use of the current version of the OASIS items, must be submitted to the contractor for payment under the HHA prospective payment system.

(9) *Administrative review.* An HHA is not entitled to judicial or administrative review with regard to:

(i) Establishment of the payment unit, including the national 60-day prospective episode payment rate, adjustments and outlier payment.

(ii) Establishment of transition period, definition and application of the unit of payment.

(iii) Computation of the initial standard prospective payment amounts.

(iv) Establishment of case-mix and area wage adjustment factors.

(i) *Changes in Federal Law affecting Medicare.* With regard to paragraph (b) and (h) of this section, the Department of Defense must, within the time frame specified in law and to the extent it is practicable, bring the TRICARE program into compliance with any changes in Federal Law affecting the Medicare program that occur after the effective date of the DoD rule to implement the prospective payment systems for skilled nursing facilities and home health agencies.

(j) Reimbursement of individual health care professionals and other non-institutional, non-professional providers. The CHAMPUS-determined reasonable charge (the amount allowed by CHAMPUS) for the service of an individual health care professional or other non-institutional, non-professional provider (even if employed by or under contract to an institutional provider) shall be determined by one of the following methodologies, that is, whichever is in effect in the specific geographic location at the time covered services and supplies are provided to a CHAMPUS beneficiary.

(1) *Allowable charge method*—(i) *Introduction*—(A) *In general.* The allowable charge method is the preferred and primary method for reimbursement of individual health care professionals and other non-institutional health care providers (covered by 10 U.S.C.

1079(h)(1)). The allowable charge for authorized care shall be the lower of the billed charge or the local CHAMPUS Maximum Allowable Charge (CMAC).

(B) *CHAMPUS Maximum Allowable Charge*. Beginning in calendar year 1992, prevailing charge levels and appropriate charge levels will be calculated on a national level. There will then be calculated a national CHAMPUS Maximum Allowable Charge (CMAC) level for each procedure, which shall be the lesser of the national prevailing charge level or the national appropriate charge level. The national CMAC will then be adjusted for localities in accordance with paragraph (j)(1)(iv) of this section.

(C) *Limits on balance billing by nonparticipating providers*. Nonparticipating providers may not balance bill a beneficiary an amount which exceeds the applicable balance billing limit. The balance billing limit shall be the same percentage as the Medicare limiting charge percentage for nonparticipating physicians. The balance billing limit may be waived by the Director, OCHAMPUS on a case-by-case basis if requested by the CHAMPUS beneficiary (or sponsor) involved. A decision by the Director to waive or not waive the limit in any particular case is not subject to the appeal and hearing procedures of § 199.10.

(D) *Special rule for TRICARE Prime Enrollees*. In the case of a TRICARE Prime enrollee (see section 199.17) who receives authorized care from a nonparticipating provider, the CHAMPUS determined reasonable charge will be the CMAC level as established in paragraph (j)(1)(i)(B) of this section plus any balance billing amount up to the balance billing limit as referred to in paragraph (j)(1)(i)(C) of this section. The authorization for such care shall be pursuant to the procedures established by the Director, OCHAMPUS (also referred to as the TRICARE Support Office).

(E) *Special rule for certain TRICARE Standard Beneficiaries*. In the case of dependent spouse or child, as defined in paragraphs (b)(2)(ii)(A) through (F) and (b)(2)(ii)(H)(1), (2), and (4) of § 199.3, of a Reserve Component member serving on active duty pursuant to a call or order to active duty for a period of more than 30 days in support of a contingency operation under a provision of law referred to in section 101(a)(13)(B) of title 10, United States Code, the Director, TRICARE Management Activity, may authorize non-participating providers the allowable charge to be the CMAC level as established in paragraph (j)(1)(i)(B) of this section plus any balance billing amount up to the balance billing limit as referred to in paragraph (j)(1)(i)(C) of this section.

(ii) *Prevailing charge level*. (A) Beginning in calendar year 1992, the prevailing charge level shall be calculated on a national basis.

(B) The national prevailing charge level referred to in paragraph (j)(1)(ii)(A) of this section is the level that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services during the base period. The 80th percentile of charges shall be determined on the basis of statistical data and methodology acceptable to the Director, OCHAMPUS (or a designee).

(C) For purposes of paragraph (j)(1)(ii)(B) of this section, the base period shall be a period of 12 calendar months and shall be adjusted once a year, unless the Director, OCHAMPUS, determines that a different period for adjustment is appropriate and publishes a notice to that effect in the FEDERAL REGISTER.

(iii) *Appropriate charge level*. Beginning in calendar year 1992, the appropriate charge level shall be calculated on a national basis. The appropriate charge level for each procedure is the product of the two-step process set forth in paragraphs (j)(1)(iii) (A) and (B) of this section. This process involves comparing the prior year's CMAC with the fully phased in Medicare fee. For years after the Medicare fee has been fully phased in, the comparison shall be to the current year Medicare fee. For any particular procedure for which comparable Medicare fee and CHAMPUS data are unavailable, but for which alternative data are available that the Director, OCHAMPUS (or designee) determines provide a reasonable approximation of relative value or price, the comparison may be based on such alternative data.

(A) *Step 1: Procedures classified.* All procedures are classified into one of three categories, as follows:

(*1*) *Overpriced procedures.* These are the procedures for which the prior year's national CMAC exceeds the Medicare fee.

(*2*) *Other procedures.* These are procedures subject to the allowable charge method that are not included in either the overpriced procedures group or the underpriced procedures group.

(*3*) *Underpriced procedures.* These are the procedures for which the prior year's national CMAC is less than the Medicare fee.

(B) *Step 2: Calculating appropriate charge levels.* For each year, appropriate charge levels will be calculated by adjusting the prior year's CMAC as follows:

(*1*) For overpriced procedures, the appropriate charge level for each procedure shall be the prior year's CMAC, reduced by the lesser of: the percentage by which it exceeds the Medicare fee or fifteen percent.

(*2*) For other procedures, the appropriate charge level for each procedure shall be the same as the prior year's CMAC.

(*3*) For underpriced procedures, the appropriate charge level for each procedure shall be the prior year's CMAC, increased by the lesser of: the percentage by which it is exceeded by the Medicare fee or the Medicare Economic Index.

(C) *Special rule for cases in which the CHAMPUS appropriate charge was prematurely reduced.* In any case in which a recalculation of the Medicare fee results in a Medicare rate higher than the CHAMPUS appropriate charge for a procedure that had been considered an overpriced procedure, the reduction in the CHAMPUS appropriate charge shall be restored up to the level of the recalculated Medicare rate.

(D) *Special rule for cases in which the national CMAC is less than the Medicare rate.*

NOTE: This paragraph will be implemented when CMAC rates are published.

In any case in which the national CMAC calculated in accordance with paragraphs (j)(1)(i) through (iii) of this section is less than the Medicare rate, the Director, TSO, may determine that the use of the Medicare Economic Index under paragraph (j)(1)(iii)(B) of this section will result in a CMAC rate below the level necessary to assure that beneficiaries will retain adequate access to health care services. Upon making such a determination, the Director, TSO, may increase the national CMAC to a level not greater than the Medicare rate.

(iv) *Calculating CHAMPUS Maximum Allowable Charge levels for localities*—(A) *In general.* The national CHAMPUS Maximum Allowable Charge level for each procedure will be adjusted for localities using the same (or similar) geographical areas and the same geographic adjustment factors as are used for determining allowable charges under Medicare.

(B) *Special locality-based phase-in provision*—(*1*) *In general.* Beginning with the recalculation of CMACS for calendar year 1993, the CMAC in a locality will not be less than 72.25 percent of the maximum charge level in effect for that locality on December 31, 1991. For recalculations of CMACs for calendar years after 1993, the CMAC in a locality will not be less than 85 percent of the CMAC in effect for that locality at the end of the prior calendar year.

(*2*) *Exception.* The special locality-based phase-in provision established by paragraph (j)(1)(iv)(B)(*1*) of this section shall not be applicable in the case of any procedure code for which there were not CHAMPUS claims in the locality accounting for at least 50 services.

(C) *Special locality-based waivers of reductions to assure adequate access to care.* Beginning with the recalculation of CMACs for calendar year 1993, in the case of any procedure classified as an overpriced procedure pursuant to paragraph (j)(1)(iii)(A)(*1*) of this section, a reduction in the CMAC in a locality below the level in effect at the end of the previous calendar year that would otherwise occur pursuant to paragraphs (j)(1)(iii) and (j)(1)(iv) of this section may be waived pursuant to paragraph (j)(1)(iii)(C) of this section.

(*1*) *Waiver based on balanced billing rates.* Except as provided in paragraph (j)(1)(iv)(C)(*2*) of this section such a reduction will be waived if there has been

excessive balance billing in the locality for the procedure involved. For this purpose, the extent of balance billing will be determined based on a review of all services under the procedure code involved in the prior year (or most recent period for which data are available). If the number of services for which balance billing was not required was less than 60 percent of all services provided, the Director will determine that there was excessive balance billing with respect to that procedure in that locality and will waive the reduction in the CMAC that would otherwise occur. A decision by the Director to waive or not waive the reduction is not subject to the appeal and hearing procedures of § 199.10.

(*2*) *Exception*. As an exception to the paragraph (j)(1)(iv)(C)(*1*) of this section, the waiver required by that paragraph shall not be applicable in the case of any procedure code for which there were not CHAMPUS claims in the locality accounting for at least 50 services. A waiver may, however, be granted in such cases pursuant to paragraph (j)(1)(iv)(C)(*3*) of this section.

(*3*) *Waiver based on other evidence that adequate access to care would be impaired*. The Director, OCHAMPUS may waive a reduction that would otherwise occur (or restore a reduction that was already taken) if the Director determines that available evidence shows that the reduction would impair adequate access. For this purpose, such evidence may include consideration of the number of providers in the locality who provide the affected services, the number of such providers who are CHAMPUS Participating Providers, the number of CHAMPUS beneficiaries in the area, and other relevant factors. Providers or beneficiaries in a locality may submit to the Director, OCHAMPUS a petition, together with appropriate documentation regarding relevant factors, for a determination that adequate access would be impaired. The Director, OCHAMPUS will consider and respond to all such petitions. Petitions may be filed at any time. Any petition received by the date which is 120 days prior to the implementation of a recalculation of CMACs will be assured of consideration prior to that implementation. The Director, OCHAMPUS may establish procedures for handling petitions. A decision by the Director to waive or not waive a reduction is not subject to the appeal and hearing procedures of § 199.10.

(D) *Special locality-based exception to applicable CMACs to assure adequate beneficiary access to care*. In addition to the authority to waive reductions under paragraph (j)(1)(iv)(C) of this section, the Director may authorize establishment of higher payment rates for specific services than would otherwise be allowable, under paragraph (j)(1) of this section, if the Director determines that available evidence shows that access to health care services is severely impaired. For this purpose, such evidence may include consideration of the number of providers in the locality who provide the affected services, the number of providers who are CHAMPUS participating providers, the number of CHAMPUS beneficiaries in the locality, the availability of military providers in the location or nearby, and any other factors the Director determines relevant.

(*1*) *Procedure*. Providers or beneficiaries in a locality may submit to the Director, a petition, together with appropriate documentation regarding relevant factors, for a determination that adequate access to health care services is severely impaired. The Director, will consider and respond to all petitions. A decision to authorize a higher payment amount is subject to review and determination or modification by the Director at any time if circumstances change so that adequate access to health care services would no longer be severely impaired. A decision by the Director, to authorize, not authorize, terminate, or modify authorization of higher payment amounts is not subject to the appeal and hearing procedures of § 199.10 of the part.

(*2*) *Establishing the higher payment rate(s)*. When the Director, determines that beneficiary access to health care services in a locality is severely impaired, the Director may establish the higher payment rate(s) as he or she deems appropriate and cost-effective through one of the following methodologies to assure adequate access:

(*i*) A percent factor may be added to the otherwise applicable payment

amount allowable under paragraph (j)(1) of this section;

(*ii*) A prevailing charge may be calculated, by applying the prevailing charge methodology of paragraph (j)(1)(ii) of this section to a specific locality (which need not be the same as the localities used for purposes of paragraph (j)(1)(iv)(A) of this section; or another government payment rate may be adopted, for example, an applicable state Medicaid rate).

(*3*) *Application of higher payment rates.* Higher payment rates defined under paragraph (j)(1)(iv)(D) of this section may be applied to all similar services performed in a locality, or, if circumstances warrant, a new locality may be defined for application of the higher payments. Establishment of a new locality may be undertaken where access impairment is localized and not pervasive across the existing locality. Generally, establishment of a new, more specific locality will occur when the area is remote so that geographical characteristics and other factors significantly impair transportation through normal means to health care services routinely available within the existing locality.

(E) *Special locality-based exception to applicable CMACs to ensure an adequate TRICARE Prime preferred network.* The Director, may authorize reimbursements to health care providers participating in a TRICARE preferred provider network under § 199.17(p) of this part at rates higher than would otherwise be allowable under paragraph (j)(1) of this section, if the Director, determines that application of the higher rates is necessary to ensure the availability of an adequate number and mix of qualified health care providers in a network in a specific locality. This authority may only be used to ensure adequate networks in those localities designated by the Director, as requiring TRICAR preferred provider networks, not in localities in which preferred provider networks have been suggested or established but are not determined by the Director to be necessary. Appropriate evidence for determining that higher rates are necessary may include consideration of the number of available primary care and specialist providers in the network locality, availability (including reassignment) of military providers in the location or nearby, the appropriate mix of primary care and specialists needed to satisfy demand and meet appropriate patient access standards (appointment/waiting time, travel distance, etc.), the efforts that have been made to create an adequate network, other cost-effective alternatives, and other relevant factors. The Director, may establish procedures by which exceptions to applicable CMACs are requested and approved or denied under paragraph (j)(1)(iv)(E) of this section. A decision by the Director, to authorize or deny an exception is not subject to the appeal and hearing procedures of § 199.10. When the Director, determines that it is necessary and cost-effective to approve a higher rate or rates in order to ensure the availability of an adequate number of qualified health care providers in a network in a specific locality, the higher rate may not exceed the lesser of the following:

(*1*) The amount equal to the local fee for service charge for the service in the service area in which the service is provided as determined by the Director, based on one or more of the following payment rates:

(*i*) Usual, customary, and reasonable;

(*ii*) The Health Care Financing Administration's Resource Based Relative Value Scale;

(*iii*) Negotiated fee schedules;

(*iv*) Global fees; or

(*v*) Sliding scale individual fee allowances.

(*2*) The amount equal to 115 percent of the otherwise allowable charge under paragraph (j)(1) of the section for the service.

(v) *Special rules for 1991.* (A) Appropriate charge levels for care provided on or after January 1, 1991, and before the 1992 appropriate levels take effect shall be the same as those in effect on December 31, 1990, except that appropriate charge levels for care provided on or after October 7, 1991, shall be those established pursuant to this paragraph (j)(1)(v) of this section.

(B) Appropriate charge levels will be established for each locality for which an appropriate charge level was in effect immediately prior to October 7,

1991. For each procedure, the appropriate charge level shall be the prevailing charge level in effect immediately prior to October 7, 1991, adjusted as provided in (j)(1)(v)(B) (*1*) through (*3*) of this section.

(*1*) For each overpriced procedure, the level shall be reduced by fifteen percent. For this purpose, overpriced procedures are the procedures determined by the Physician Payment Review Commission to be overvalued pursuant to the process established under the Medicare program, other procedures considered overvalued in the Medicare program (for which Congress directed reductions in Medicare allowable levels for 1991), radiology procedures and pathology procedures.

(*2*) For each other procedure, the level shall remain unchanged. For this purpose, other procedures are procedures which are not overpriced procedures or primary care procedures.

(*3*) For each primary care procedure, the level shall be adjusted by the MEI, as the MEI is applied to Medicare prevailing charge levels. For this purpose, primary care procedures include maternity care and delivery services and well baby care services.

(C) For purposes of this paragraph (j)(i)(v), ''appropriate charge levels'' in effect at any time prior to October 7, 1991 shall mean the lesser of:

(*1*) The prevailing charge levels then in effect, or

(*2*) The fiscal year 1988 prevailing charge levels adjusted by the Medicare Economic Index (MEI), as the MEI was applied beginning in the fiscal year 1989.

(vi) *Special transition rule for 1992.* (A) For purposes of calculating the national appropriate charge levels for 1992, the prior year's appropriate charge level for each service will be considered to be the level that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services during the base period of July 1, 1986 to June 30, 1987 (determined as under paragraph (j)(1)(ii)(B) of this section), adjusted to calendar year 1991 based on the adjustments made for maximum CHAMPUS allowable charge levels through 1990 and the application of paragraph (j)(1)(v) of this section for 1991.

(B) The adjustment to calendar year 1991 of the product of paragraph (j)(1)(vi)(A) of this section shall be as follows:

(*1*) For procedures other than those described in paragraph (j)(1)(vi)(B)(*2*) of this section, the adjustment to 1991 shall be on the same basis as that provided under paragraph (j)(1)(v) of this section.

(*2*) For any procedure that was considered an overpriced procedure for purposes of the 1991 appropriate charge levels under paragraph (j)(1)(v) of this section for which the resulting 1991 appropriate charge level was less than 150 percent of the Medicare converted relative value unit, the adjustment to 1991 for purposes of the special transition rule for 1992 shall be as if the procedure had been treated under paragraph (j)(1)(v)(B)(*2*) of this section for purposes of the 1991 appropriate charge level.

(vii) *Adjustments and procedural rules.* (A) The Director, OCHAMPUS may make adjustments to the appropriate charge levels calculated pursuant to paragraphs (j)(1)(iii) and (j)(1)(v) of this section to correct any anomalies resulting from data or statistical factors, significant differences between Medicare-relevant information and CHAMPUS-relevant considerations or other special factors that fairness requires be specially recognized. However, no such adjustment may result in reducing an appropriate charge level.

(B) The Director, OCHAMPUS will issue procedural instructions for administration of the allowable charge method.

(viii) *Clinical laboratory services.* The allowable charge for clinical diagnostic laboratory test services shall be calculated in the same manner as allowable charges for other individual health care providers are calculated pursuant to paragraphs (j)(1)(i) through (j)(1)(iv) of this section, with the following exceptions and clarifications.

(A) The calculation of national prevailing charge levels, national appropriate charge levels and national CMACs for laboratory service shall begin in calendar year 1993. For purposes of the 1993 calculation, the prior year's national appropriate charge level or national prevailing charge

level shall be the level that does not exceed the amount equivalent to the 80th percentile of billed charges made for similar services during the period July 1, 1991, through June 30, 1992 (referred to in this paragraph (j)(1)(viii) of this section as the ''base period'').

(B) For purposes of comparison to Medicare allowable payment amounts pursuant to paragraph (j)(1)(iii) of this section, the Medicare national laboratory payment limitation amounts shall be used.

(C) For purposes of establishing laboratory service local CMACs pursuant to paragraph (j)(1)(iv) of this section, the adjustment factor shall equal the ratio of the local average charge (standardized for the distribution of clinical laboratory services) to the national average charge for all clinical laboratory services during the base period.

(D) For purposes of a special locality-based phase-in provision similar to that established by paragraph (j)(1)(iv)(B) of this section, the CMAC in a locality will not be less than 85 percent of the maximum charge level in effect for that locality during the base period.

(ix) The allowable charge for physician assistant services other than assistant-at-surgery shall be at the same percentage, used by Medicare, of the allowable charge for a comparable service rendered by a physician performing the service in a similar location. For cases in which the physician assistant and the physician perform component services of a procedure other than assistant-at-surgery (e.g., home, office, or hospital visit), the combined allowable charge for the procedure may not exceed the allowable charge for the procedure rendered by a physician alone. The allowable charge for physician assistant services performed as an assistant-at-surgery shall be at the same percentage, used by Medicare, of the allowable charge for a physician serving as an assistant surgeon when authorized as CHAMPUS benefits in accordance with the provisions of §199.4(c)(3)(iii). Physician assistant services must be billed through the employing physician who must be an authorized CHAMPUS provider.

(x) A charge that exceeds the CHAMPUS Maximum Allowable Charge can be determined to be allowable only when unusual circumstances or medical complications justify the higher charge. The allowable charge may not exceed the billed charge under any circumstances.

(xi) *Pharmaceutical agents utilized as part of medically necessary medical services.* In general, the TRICARE-determined allowed amount shall be equal to an amount determined to be appropriate, to the extent practicable, in accordance with the same reimbursement rules as apply to payments for similar services under Medicare. Under the authority of 10 U.S.C. 1079(q), in the case of any pharmaceutical agent utilized as part of medically necessary medical services, the Director may adopt special reimbursement methods, amounts, and procedures to encourage the use of high-value products and discourage the use of low-value products, as determined by the Director. For this purpose, the Director may obtain recommendations from the Pharmaceutical and Therapeutics Committee under §199.21 or other entities as the Director, DHA deems appropriate with respect to the relative value of products in a class of products subject to this paragraph (j)(1)(xi). Among the special reimbursement methods the Director may choose to adopt under this paragraph (j)(1)(xi) is to reimburse the average sales price of a product plus six percent of the median of the average sales prices of products in the product class or category. The Director shall issue guidance regarding the special reimbursement methods adopted and the appropriate reimbursement rates.

(2) *Bonus payments in medically underserved areas.* A bonus payment, in addition to the amount normally paid under the allowable charge methodology, may be made to physicians in medically underserved areas. For purposes of this paragraph, medically underserved areas are the same as those determined by the Secretary of Health and Human Services for the Medicare program. Such bonus payments shall be equal to the bonus payments authorized by Medicare, except as necessary to recognize any unique or distinct characteristics or requirements

of the TRICARE program, and as described in instructions issued by the Executive Director, TRICARE Management Activity. If the Department of Health and Human Services acts to amend or remove the provision for bonus payments under Medicare, TRICARE likewise may follow Medicare in amending or removing provision for such payments.

(3) *All-inclusive rate*. Claims from individual health-care professional providers for services rendered to CHAMPUS beneficiaries residing in an RTC that is either being reimbursed on an all-inclusive per diem rate, or is billing an all-inclusive per diem rate, shall be denied; with the exception of independent health-care professionals providing geographically distant family therapy to a family member residing a minimum of 250 miles from the RTC or covered medical services related to a nonmental health condition rendered outside the RTC. Reimbursement for individual professional services is included in the rate paid the institutional provider.

(4) *Alternative method*. The Director, OCHAMPUS, or a designee, may, subject to the approval of the ASD(HA), establish an alternative method of reimbursement designed to produce reasonable control over health care costs and to ensure a high level of acceptance of the CHAMPUS-determined charge by the individual health-care professionals or other noninstitutional health-care providers furnishing services and supplies to CHAMPUS beneficiaries. Alternative methods may not result in reimbursement greater than the allowable charge method above.

(k) *Reimbursement of Durable Medical Equipment, Prosthetics, orthotics and Supplies 9DMEPOS)*. Reimbursement of DMEPOS may be based on the same amounts established under the Centers for Medicare and Medicaid Services (CMS) DMEPOS fee schedule under 42 CFR part 414, subpart D.

(l) *Reimbursement Under the Military-Civilian Health Services Partnership Program*. The Military-Civilian Health Services Partnership Program, as authorized by section 1096, chapter 55, title 10, provides for the sharing of staff, equipment, and resources between the civilian and military health care system in order to achieve more effective, efficient, or economical health care for authorized beneficiaries. Military treatment facility commanders, based upon the authority provided by their respective Surgeons General of the military departments, are responsible for entering into individual partnership agreements only when they have determined specifically that use of the Partnership Program is more economical overall to the Government than referring the need for health care services to the civilian community under the normal operation of the CHAMPUS Program. (See paragraph (p) of §199.1 for general requirements of the Partnership Program.)

(1) *Reimbursement of institutional health care providers*. Reimbursement of institutional health care providers under the Partnership Program shall be on the same basis as non-Partnership providers.

(2) *Reimbursement of individual health-care professionals and other non-institutional health care providers*. Reimbursement of individual health care professionals and other non-institutional health care providers shall be on the same basis as non-Partnership providers as detailed in paragraph (j) of this section.

(m) *Accommodation of Discounts Under Provider Reimbursement Methods*—(1) *General rule*. The Director. OCHAMPUS (or designee) has authority to reimburse a provider at an amount below the amount usually paid pursuant to this section when, under a program approved by the Director, the provider has agreed to the lower amount.

(2) *Special applications*. The following are examples of applications of the general rule; they are not all inclusive.

(i) In the case and individual health care professionals and other non-institutional providers, if the discounted fee is below the provider's normal billed charge and the prevailing charge level (see paragraph (g) of this section), the discounted fee shall be the provider's actual billed charge and the CHAMPUS allowable charge.

(ii) In the case of institutional providers normally paid on the basis of a pre-set amount (such as DRG-based amount under paragraph (a)(1) of this

section or per-diem amount under paragraph (a)(2) of this section), if the discount rate is lower than the pre-set rate, the discounted rate shall be the CHAMPUS-determined allowable cost. This is an exception to the usual rule that the pre-set rate is paid regardless of the institutional provider's billed charges or other factors.

(3) *Procedures.* (i) This paragraph applies only when both the provider and the Director have agreed to the discounted payment rate. The Director's agreement may be in the context of approval of a program that allows for such discounts.

(ii) The Director of OCHAMPUS may establish uniform terms, conditions and limitations for this payment method in order to avoid administrative complexity.

(n) *Outside the United States.* The Director, OCHAMPUS, or a designee, shall determine the appropriate reimbursement method or methods to be used in the extension of CHAMPUS benefits for otherwise covered medical services or supplies provided by hospitals or other institutional providers, physicians or other individual professional providers, or other providers outside the United States.

(o) *Implementing Instructions.* The Director, OCHAMPUS, or a designee, shall issue CHAMPUS policies, instructions, procedures, and guidelines, as may be necessary to implement the intent of this section.

[55 FR 13266, Apr. 10, 1990]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 199.14, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov.*

### § 199.15 Quality and utilization review peer review organization program.

(a) *General*—(1) *Purpose.* The purpose of this section is to establish rules and procedures for the CHAMPUS Quality and Utilization Review Peer Review Organization program.

(2) *Applicability of program.* All claims submitted for health services under CHAMPUS are subject to review for quality of care and appropriate utilization. The Director, OCHAMPUS shall establish generally accepted standards, norms and criteria as are necessary for this program of utilization and quality review. These standards, norms and criteria shall include, but not be limited to, need for inpatient admission or inpatient or outpatient service, length of inpatient stay, intensity of care, appropriateness of treatment, and level of institutional care required. The Director, OCHAMPUS may issue implementing instructions, procedures and guidelines for retrospective, concurrent and prospective review.

(3) *Contractor implementation.* The CHAMPUS Quality and Utilization Review Peer Review Organization program may be implemented through contracts administered by the Director, OCHAMPUS. These contractors may include contractors that have exclusive functions in the area of utilization and quality review, fiscal intermediary contractors (which perform these functions along with a broad range of administrative services), and managed care contractors (which perform a range of functions concerning management of the delivery and financing of health care services under CHAMPUS). Regardless of the contractors involved, utilization and quality review activities follow the same standards, rules and procedures set forth in this section, unless otherwise specifically provided in this section or elsewhere in this part.

(4) *Medical issues affected.* The CHAMPUS Quality and Utilization Review Peer Review Organization program is distinguishable in purpose and impact from other activities relating to the administration and management of CHAMPUS in that the Peer Review Organization program is concerned primarily with medical judgments regarding the quality and appropriateness of health care services. Issues regarding such matters as benefit limitations are similar, but, if not determined on the basis of medical judgments, are governed by CHAMPUS rules and procedures other than those provided in this section. (See, for example, § 199.7 regarding claims submission, review and payment.) Based on this purpose, a major attribute of the Peer Review Organization program is that medical judgments are made by (directly or pursuant to guidelines and subject to direct review) reviewers who are peers

of the health care providers providing the services under review.

(5) *Provider responsibilities.* Because of the dominance of medical judgments in the quality and utilization review program, principal responsibility for complying with program rules and procedures rests with health care providers. For this reason, there are limitations, set forth in this section and in § 199.4(h), on the extent to which beneficiaries may be held financially liable for health care services not provided in conformity with rules and procedures of the quality and utilization review program concerning medical necessity of care.

(6) *Medicare rules used as model.* The CHAMPUS Quality and Utilization Review Peer Review Organization program, based on specific statutory authority, follows many of the quality and utilization review requirements and procedures in effect for the Medicare Peer Review Organization program, subject to adaptations appropriate for the CHAMPUS program. In recognition of the similarity of purpose and design between the Medicare and CHAMPUS PRO programs, and to avoid unnecessary duplication of effort, the CHAMPUS Quality and Utilization Review Peer Review Organization program will have special procedures applicable to supplies and services furnished to Medicare-eligible CHAMPUS beneficiaries. These procedures will enable CHAMPUS normally to rely upon Medicare determinations of medical necessity and appropriateness in the processing of CHAMPUS claims as a second payer to Medicare. As a general rule, only in cases involving Medicare-eligible CHAMPUS beneficiaries where Medicare payment for services and supplies is denied for reasons other than medical necessity and appropriateness will the CHAMPUS claim be subject to review for quality of care and appropriate utilization under the CHAMPUS PRO program. TRICARE will continue to perform a medical necessity and appropriateness review for quality of care and appropriate utilization under the CHAMPUS PRO program where required by statute.

(b) *Objectives and general requirements of review system*—(1) *In general.* Broadly, the program of quality and utilization review has as its objective to review the quality, completeness and adequacy of care provided, as well as its necessity, appropriateness and reasonableness.

(2) *Payment exclusion for services provided contrary to utilization and quality standards.* (i) In any case in which health care services are provided in a manner determined to be contrary to quality or necessity standards established under the quality and utilization review program, payment may be wholly or partially excluded.

(ii) In any case in which payment is excluded pursuant to paragraph (b)(2)(i) of this section, the patient (or the patient's family) may not be billed for the excluded services.

(iii) Limited exceptions and other special provisions pertaining to the requirements established in paragraphs (b)(2) (i) and (ii) of this section, are set forth in § 199.4(h).

(3) *Review of services covered by DRG-based payment system.* Application of these objectives in the context of hospital services covered by the DRG-based payment system also includes a validation of diagnosis and procedural information that determines CHAMPUS reimbursement, and a review of the necessity and appropriateness of care for which payment is sought on an outlier basis.

(4) *Preauthorization and other utilization review procedures*—(i) *In general.* all health care services for which payment is sought under TRICARE are subject to review for appropriateness of utilization as determined by the Director, TRICARE Management Activity, or a designee.

(A) The procedures for this review may be prospective (before the care is provided), concurrent (while the care is in process), or retrospective (after the care has been provided). Regardless of the procedures of this utilization review, the same generally accepted standards, norms and criteria for evaluating the medical necessity, appropriateness and reasonableness of the care involved shall apply. The Director, TRICARE Management Activity, or a designee, shall establish procedures for conducting reviews, including types of health care services for which preauthorization or concurrent review

shall be required. Preauthorization or concurrent review may be required for categories of health care services. Except where required by law, the categories of health care services for which preauthorization or concurrent review is required may vary in different geographical locations or for different types of providers.

(B) For healthcare services provided under TRICARE contracts entered into by the Department of Defense after October 30, 2000, medical necessity preauthorization will not be required for referrals for specialty consultation appointment services requested by primary care providers or specialty providers when referring TRICARE Prime beneficiaries for specialty consultation appointment services within the TRICARE contractor's network. However, the lack of medical necessity preauthorization requirements for consultative appointment services does not mean that non-emergent admissions or invasive diagnostic or therapeutic procedures which in and of themselves constitute categories of health care services related to, but beyond the level of the consultation appointment service, are not subject to medical necessity prior authorization. In fact many such health care services may continue to require medical necessity prior authorization as determined by the Director, TRICARE Management Activity, or a designee. TRICARE Prime beneficiaries are also required to obtain preauthorization before seeking health care services from a non-network provider.

(ii) *Preauthorization procedures.* With respect to categories of health care (inpatient or outpatient) for which preauthorization is required, the following procedures shall apply:

(A) The requirement for preauthorization shall be widely publicized to beneficiaries and providers.

(B) All requests for preauthorization shall be responded to in writing. Notification of approval or denial shall be sent to the beneficiary. Approvals shall specify the health care services and supplies approved and identify any special limits or further requirements applicable to the particular case.

(C) An approved preauthorization shall state the number of days, appropriate for the type of care involved, for which it is valid. In general, preauthorizations will be valid for 30 days. If the services or supplies are not obtained within the number of days specified, a new preauthorization request is required. For organ and stem cell transplants, the preauthorization shall remain in effect as long as the beneficiary continues to meet the specific transplant criteria set forth in the TRICARE/CHAMPUS Policy Manual, or until the approved transplant occurs.

(D) For healthcare services provided under TRICARE contracts entered into by the Department of Defense after October 30, 2000, medical necessity preauthorization for specialty consultation appointment services within the TRICARE contractor's network will not be required. However, the Director, TRICARE Management Activity, or designee, may continue to require or waive medical necessity prior (or pre) authorization for other categories of other health care services based on best business practice.

(iii) *Payment reduction for noncompliance with required utilization review procedures.* (A) Paragraph (b)(4)(iii) of this section applies to any case in which:

(*1*) A provider was required to obtain preauthorization or continued stay (in connection with required concurrent review procedures) approval.

(*2*) The provider failed to obtain the necessary approval; and

(*3*) The health care services have not been disallowed on the basis of necessity, appropriateness or reasonableness.

In such a case, reimbursement will be reduced, unless such reduction is waived based on special circumstances.

(B) In a case described in paragraph (b)(4)(iii)(A) of this section, reimbursement will be reduced, unless such reduction is waived based on special circumstances. The amount of this reduction shall be at least ten percent of the amount otherwise allowable for services for which preauthorization (including preauthorization for continued stays in connection with concurrent review requirements) approval should have been obtained, but was not obtained.

(C) The payment reduction set forth in paragraph (b)(4)(iii)(B) of this section may be waived by the Director, OCHAMPUS when the provider could not reasonably have been expected to know of the preauthorization requirement or some other special circumstance justifies the waiver.

(D) Services for which payment is disallowed under paragraph (b)(4)(iii) of this section may not be billed to the patient (or the patient's family).

(c) *Hospital cooperation.* All hospitals which participate in CHAMPUS and submit CHAMPUS claims are required to provide all information necessary for CHAMPUS to properly process the claims. In order for CHAMPUS to be assured that services for which claims are submitted meet quality of care standards, hospitals are required to provide the Peer Review Organization (PRO) responsible for quality review with all the information, within timeframes to be established by OCHAMPUS, necessary to perform the review functions required by this paragraph. Additionally, all participating hospitals shall provide CHAMPUS beneficiaries, upon admission, with information about the admission and quality review system including their appeal rights. A hospital which does not cooperate in this activity shall be subject to termination as a CHAMPUS-authorized provider.

(1) Documentation that the beneficiary has received the required information about the CHAMPUS PRO program must be maintained in the same manner as is the notice required for the Medicare program by 42 CFR 466.78(b).

(2) The physician acknowledgment required for Medicare under 42 CFR 412.46 is also required for CHAMPUS as a condition for payment and may be satisfied by the same statement as required for Medicare, with substitution or addition of ''CHAMPUS'' when the word ''Medicare'' is used.

(3) Participating hospitals must execute a memorandum of understanding with the PRO providing appropriate procedures for implementation of the PRO program.

(4) Participating hospitals may not charge a CHAMPUS beneficiary for inpatient hospital services excluded on the basis of §199.4(g)(1) (not medically necessary), §199.4(g)(3) (inappropriate level), or §199.4(g)(7) (custodial care) unless all of the conditions established by 42 CFR 412.42(c) with respect to Medicare beneficiaries have been met with respect to the CHAMPUS beneficiary. In such cases in which the patient requests a PRO review while the patient is still an inpatient in the hospital, the hospital shall provide to the PRO the records required for the review by the close of business of the day the patient requests review, if such request was made before noon. If the hospital fails to provide the records by the close of business, that day and any subsequent working day during which the hospital continues to fail to provide the records shall not be counted for purposes of the two-day period of 42 CFR 412.42(c)(3)(ii).

(d) *Areas of review*—(1) *Admissions.* The following areas shall be subject to review to determine whether inpatient care was medically appropriate and necessary, was delivered in the most appropriate setting and met acceptable standards of quality. This review may include preadmission or prepayment review when appropriate.

(i) Transfers of CHAMPUS beneficiaries from a hospital or hospital unit subject to the CHAMPUS DRG-based payment system to another hospital or hospital unit.

(ii) CHAMPUS admissions to a hospital or hospital unit subject to the CHAMPUS DRG-based payment system which occur within a certain period (specified by OCHAMPUS) of discharge from a hospital or hospital unit subject to the CHAMPUS DRG-based payment system.

(iii) A random sample of other CHAMPUS admissions for each hospital subject to the CHAMPUS DRG-based payment system.

(iv) CHAMPUS admissions in any DRGs which have been specifically identified by OCHAMPUS for review or which are under review for any other reason.

(2) *DRG validation.* The review organization responsible for quality of care reviews shall be responsible for ensuring that the diagnostic and procedural information reported by hospitals on CHAMPUS claims which is used by the

fiscal intermediary to assign claims to DRGs is correct and matches the information contained in the medical records. In order to accomplish this, the following review activities shall be done.

(i) Perform DRG validation reviews of each case under review.

(ii) Review of claim adjustments submitted by hospitals which result in the assignment of a higher weighted DRG.

(iii) Review for physician's acknowledgement of annual receipt of the penalty statement as contained in the Medicare regulation at 42 CFR 412.46.

(iv) Review of a sample of claims for each hospital reimbursed under the CHAMPUS DRG-based payment system. Sample size shall be determined based upon the volume of claims submitted.

(3) *Outlier review*. Claims which qualify for additional payment as a long-stay outlier or as a cost-outlier shall be subject to review to ensure that the additional days or costs were medically necessary and appropriate and met all other requirements for CHAMPUS coverage. In addition, claims which qualify as short-stay outliers shall be reviewed to ensure that the admission was medically necessary and appropriate and that the discharge was not premature.

(4) *Procedure review*. Claims for procedures identified by OCHAMPUS as subject to a pattern of abuse shall be the subject of intensified quality assurance review.

(5) *Other review*. Any other cases or types of cases identified by OCHAMPUS shall be subject to focused review.

(e) *Actions as a result of review*—(1) *Findings related to individual claims*. If it is determined, based upon information obtained during reviews, that a hospital has misrepresented admission, discharge, or billing information, or is found to have quality of care defects, or has taken an action that results in the unnecessary admissions of an individual entitled to benefits, unnecessary multiple admission of an individual, or other inappropriate medical or other practices with respect to beneficiaries or billing for services furnished to beneficiaries, the PRO, in conjunction with the fiscal intermediary, shall, as appropriate:

(i) Deny payment for or recoup (in whole or in part) any amount claimed or paid for the inpatient hospital and professional services related to such determination.

(ii) Require the hospital to take other corrective action necessary to prevent or correct the inappropriate practice.

(iii) Advise the provider and beneficiary of appeal rights, as required by § 199.10 of this part.

(iv) Notify OCHAMPUS of all such actions.

(2) *Findings related to a pattern of inappropriate practices*. In all cases where a pattern of inappropriate admissions and billing practices that have the effect of circumventing the CHAMPUS DRG-based payment system is identified, OCHAMPUS shall be notified of the hospital and practice involved.

(3) *Revision of coding relating to DRG validation*. The following provisions apply in connection with the DRG validation process set forth in paragraph (d)(2) of this section.

(i) If the diagnostic and procedural information in the patient's medical record is found to be inconsistent with the hospital's coding or DRG assignment, the hospital's coding on the CHAMPUS claim will be appropriately changed and payments recalculated on the basis of the appropriate DRG assignment.

(ii) If the information stipulated under paragraph (d)(2) of this section is found not to be correct, the PRO will change the coding and assign the appropriate DRG on the basis of the changed coding.

(f) *Special procedures in connection with certain types of health care services or certain types of review activities*—(1) *In general*. Many provisions of this section are directed to the context of services covered by the CHAMPUS DRG-based payment system. This section, however, is also applicable to other services. In addition, many provisions of this section relate to the context of peer review activities performed by Peer Review Organizations whose sole functions for CHAMPUS relate to the Quality and Utilization Review Peer

Review Organization program. However, it also applies to review activities conducted by contractors who have responsibilities broader than those related to the quality and utilization review program. Paragraph (f) of this section authorizes certain special procedures that will apply in connection with such services and such review activities.

(2) *Services not covered by the DRG-based payment system.* In implementing the quality and utilization review program in the context of services not covered by the DRG-based payment system, the Director, OCHAMPUS may establish procedures, appropriate to the types of services being reviewed, substantively comparable to services covered by the DRG-based payment system regarding obligations of providers to cooperate in the quality and utilization review program, authority to require appropriate corrective actions and other procedures. The Director, OCHAMPUS may also establish such special, substantively comparable procedures in connection with review of health care services which, although covered by the DRG-based payment method, are also affected by some other special circumstances concerning payment method, nature of care, or other potential utilization or quality issue.

(3) *Peer review activities by contractors also performing other administration or management functions*—(i) *Sole-function PRO versus multi-function PRO.* In all cases, peer review activities under the Quality and Utilization Review Peer Review Organization program are carried out by physicians and other qualified health care professionals, usually under contract with OCHAMPUS. In some cases, the Peer Review Organization contractor's only functions are pursuant to the quality and utilization review program. In paragraph (f)(3) of this section, this type of contractor is referred to as a ''sole function PRO.'' In other cases, the Peer Review Organization contractor is also performing other functions in connection with the administration and management of CHAMPUS. In paragraph (f)(3) of this section, this type of contractor is referred to as a ''multi-function PRO.'' As an example of the latter type, managed care contractors may perform a wide range of functions regarding management of the delivery and financing of health care services under CHAMPUS, including but not limited to functions under the Quality and Utilization Review Peer Review Organization program.

(ii) *Special rules and procedures.* With respect to multi-function PROs, the Director, OCHAMPUS may establish special procedures to assure the independence of the Quality and Utilization Review Peer Review Organization program and otherwise advance the objectives of the program. These special rules and procedures include, but are not limited to, the following:

(A) A reconsidered determination that would be final in cases involving sole-function PROs under paragraph (i)(2) of this section will not be final in connection with multi-function PROs. Rather, in such cases (other than any case which is appealable under paragraph (i)(3) of this section), an opportunity for a second reconsideration shall be provided. The second reconsideration will be provided by OCHAMPUS or another contractor independent of the multi-function PRO that performed the review. The second reconsideration may not be further appealed by the provider.

(B) Procedures established by paragraphs (g) through (m) of this section shall not apply to any action of a multi-function PRO (or employee or other person or entity affiliated with the PRO) carried out in performance of functions other than functions under this section.

(g) *Procedures regarding initial determinations.* The CHAMPUS PROs shall establish and follow procedures for initial determinations that are substantively the same or comparable to the procedures applicable to Medicare under 42 CFR 466.83 to 466.104. In addition, these procedures shall provide that a PRO's determination that an admission is medically necessary is not a guarantee of payment by CHAMPUS; normal CHAMPUS benefit and procedural coverage requirements must also be applied.

(h) *Procedures regarding reconsiderations.* The CHAMPUS PROs shall establish and follow procedures for reconsiderations that are substantively the same or comparable to the procedures applicable to reconsiderations under Medicare pursuant to 42 CFR 473.15 to 473.34, except that the time limit for requesting reconsideration (see 42 CFR 473.20(a)(1)) shall be 90 days. A PRO reconsidered determination is final and binding upon all parties to the reconsideration except to the extent of any further appeal pursuant to paragraph (i) of this section.

(i) *Appeals and hearings.* (1) Beneficiaries may appeal a PRO reconsideration determination of OCHAMPUS and obtain a hearing on such appeal to the extent allowed and under the procedures set forth in §199.10(d).

(2) Except as provided in paragraph (i)(3), a PRO reconsidered determination may not be further appealed by a provider.

(3) A provider may appeal a PRO reconsideration determination to OCHAMPUS and obtain a hearing on such appeal to the extent allowed under the procedures set forth in §199.10(d) if it is a determination pursuant to §199.4(h) that the provider knew or could reasonably have been expected to know that the services were excludable.

(4) For purposes of the hearing process, a PRO reconsidered determination shall be considered as the procedural equivalent of a formal review determination under §199.10, unless revised at the initiative of the Director, OCHAMPUS prior to a hearing on the appeal, in which case the revised determination shall be considered as the procedural equivalent of a formal review determination under §199.10.

(5) The provisions of §199.10(e) concerning final action shall apply to hearings cases.

(j) *Acquisition, protection and disclosure of peer review information.* The provisions of 42 CFR part 476, except §476.108, shall be applicable to the CHAMPUS PRO program as they are to the Medicare PRO program.

(k) *Limited immunity from liability for participants in PRO program.* The provisions of section 1157 of the Social Security Act (42 U.S.C. 1320c–6) are applicable to the CHAMPUS PRO program in the same manner as they apply to the Medicare PRO program. Section 1102(g) of title 10, United States Code also applies to the CHAMPUS PRO program.

(l) *Additional provision regarding confidentiality of records*—(1) *General rule.* The provisions of 10 U.S.C. 1102 regarding the confidentiality of medical quality assurance records shall apply to the activities of the CHAMPUS PRO program as they do to the activities of the external civilian PRO program that reviews medical care provided in military hospitals.

(2) *Specific applications.* (i) Records concerning PRO deliberations are generally nondisclosable quality assurance records under 10 U.S.C. 1102.

(ii) Initial denial determinations by PROs pursuant to paragraph (g) of this section (concerning medical necessity determinations, DRG validation actions, etc.) and subsequent decisions regarding those determinations are not nondisclosable quality assurance records under 10 U.S.C. 1102.

(iii) Information the subject of mandatory PRO disclosure under 42 CFR part 476 is not a nondisclosable quality assurance record under 10 U.S.C. 1102.

(m) *Obligations, sanctions and procedures.* (1) The provisions of 42 CFR 1004.1–1004.80 shall apply to the CHAMPUS PRO program as they do the Medicare PRO program, except that the functions specified in those sections for the Office of Inspector General of the Department of Health and Human Services shall be the responsibility of OCHAMPUS.

(2) The provisions of 42 U.S.C. section 1395ww(f)(2) concerning circumvention by any hospital of the applicable payment methods for inpatient services shall apply to CHAMPUS payment methods as they do to Medicare payment methods.

(3) The Director, or a designee, of CHAMPUS shall determine whether to impose a sanction pursuant to paragraphs (m)(1) and (m)(2) of this section. Providers may appeal adverse sanctions decisions under the procedures set forth in §199.10(d).

(n) *Authority to integrate CHAMPUS PRO and military medical treatment facility utilization review activities.* (1) In the case of a military medical treatment

facility (MTF) that has established utilization review requirements similar to those under the CHAMPUS PRO program, the contractor carrying out this function may, at the request of the MTF, utilize procedures comparable to the CHAMPUS PRO program procedures to render determinations or recommendations with respect to utilization review requirements.

(2) In any case in which such a contractor has comparable responsibility and authority regarding utilization review in both an MTF (or MTFs) and CHAMPUS, determinations as to medical necessity in connection with services from an MTF or CHAMPUS-authorized provider may be consolidated.

(3) In any case in which an MTF reserves authority to separate an MTF determination on medical necessity from a CHAMPUS PRO program determination on medical necessity, the MTF determination is not binding on CHAMPUS.

[55 FR 625, Jan. 8, 1990, as amended at 58 FR 58961, Nov. 5, 1993; 60 FR 52095, Oct. 5, 1995; 63 FR 48447, Sept. 10, 1998; 66 FR 40608, Aug. 3, 2001; 67 FR 42721, June 25, 2002; 68 FR 23033, Apr. 30, 2003; 68 FR 32363, May 30, 2003; 68 FR 44881, July 31, 2003; 70 FR 19266, Apr. 13, 2005; 81 FR 61098, Sept. 2, 2016]

### § 199.16 Supplemental Health Care Program for active duty members.

(a) *Purpose and applicability*. (1) The purpose of this section is to implement, with respect to health care services provided under the supplemental health care program for active duty members of the uniformed services, the provision of 10 U.S.C. 1074(c). This section of law authorizes DoD to establish for the supplemental care program the same payment rules, subject to appropriate modifications, as apply under CHAMPUS.

(2) This section applies to the program, known as the supplemental care program, which provides for the payment by the uniformed services to private sector health care providers for health care services provided to active duty members of the uniformed services. Although not part of CHAMPUS, the supplemental care program is similar to CHAMPUS in that it is a program for the uniformed services to purchase civilian health care services for active duty members. For this reason, the Director, OCHAMPUS assists the uniformed services in the administration of the supplemental care program.

(3) This section applies to all health care services covered by the CHAMPUS. For purposes of this section, health care services ordered by a military treatment facility (MTF) provider for an MTF patient (who is not an active duty member) for whom the MTF provider maintains responsibility are also covered by the supplemental care program and subject to the requirements of this section.

(b) *Obligation of providers concerning payment for supplemental health care for active duty members*—(1) *Hospitals covered by DRG-based payment system*. For a hospital covered by the CHAMPUS DRG-based payment system to maintain its status as an authorized provider for CHAMPUS pursuant to § 199.6, that hospital must also be a participating provider for purposes of the supplemental care program. As a participating provider, each hospital must accept the DRG-based payment system amount determined pursuant to § 199.14 as payment in full for the hospital services covered by the system. The failure of any hospital to comply with this obligation subjects that hospital to exclusion as a CHAMPUS-authorized provider.

(2) *Other participating providers*. For any institutional or individual provider, other than those described in paragraph (b)(1) of this section that is a participating provider, the provider must also be a participating provider for purposes of the supplemental care program. The provider must accept the CHAMPUS allowable amount determined pursuant to § 199.14 as payment in full for the hospital services covered by the system. The failure of any provider to comply with this obligation subjects the provider to exclusion as a participating provider.

(c) *General rule for payment and administration*. Subject to the special rules and procedures in paragraph (d) of this section and the waiver authority in paragraph (e) of this section, as a general rule the provisions of § 199.14 shall govern payment and administration of claims under the supplemental care program as they do claims under

CHAMPUS. To the extent necessary to interpret or implement the provisions of § 199.14, related provisions of this part shall also be applicable.

(d) *Special rules and procedure.* As exceptions to the general rule in paragraph (c) of this section, the special rules and procedures in this section shall govern payment and administration of claims under the supplemental care program. These special rules and procedures are subject to the TRICARE Prime Remote program for active duty service members set forth in paragraph (e) of this section and the waiver authority of paragraph (f) of this section.

(1) There is no patient cost sharing under the supplemental care program. All amounts due to be paid to the provider shall be paid by the program.

(2) Preauthorization by the Uniformed Services of each service is required for the supplemental care program except for services in cases of medical emergency (for which the definition in Sec. 199.2 shall apply) or in cases governed by the TRICARE Prime Remote program for active duty service members set forth in paragraph (e) of this section. It is the responsibility of the active duty members to obtain preauthorization for each service. With respect to each emergency inpatient admission, after such time as the emergency condition is addressed, authorization for any proposed continued stay must be obtained within two working days of admission.

(3) With respect to the filing of claims and similar administrative matters for which this part refers to activities of the CHAMPUS fiscal intermediaries, for purposes of the supplemental care program, responsibilities for claims processing, payment and some other administrative matters may be assigned by the Director, OCHAMPUS to the same fiscal intermediaries, other contractor, or to the nearest military medical treatment facility or medical claims office.

(4) The annual cost pass-throughs for capital and direct medical education costs that are available under the CHAMPUS DRG-based payment system are also available, upon request, under the supplemental care program. To obtain payment include the number of active duty bed days as a separate line item on the annual request to the CHAMPUS fiscal intermediaries.

(5) For providers other than participating providers, the Director, OCHAMPUS may authorize payment in excess of CHAMPUS allowable amounts. No provider may bill an active duty member any amount in excess of the CHAMPUS allowable amount.

(e) *TRICARE Prime Remote for Active Duty Members*—(1) *General.* The TRICARE Prime Remote (TPR) program is available for certain active duty members of the Uniformed Services assigned to remote locations in the United States and the District of Columbia who are entitled to coverage of medical care, and the standards for timely access to such care, outside a military treatment facility that are comparable to coverage for medical care and standards for timely access to such care as exist under TRICARE Prime under § 199.17. Those active duty members who are eligible under the provisions of 10 U.S.C. 1074(c)(3) and who enroll in the TRICARE Prime Remote program, may not be required to receive routine primary medical care at a military medical treatment facility.

(2) *Eligibility.* To receive health care services under the TRICARE Prime Remote program, an individual must be an active duty member of the Uniformed Services on orders for more than thirty consecutive days who meet the following requirements:

(i) Has a permanent duty assignment that is greater than fifty miles or approximately one hour drive from a military treatment facility or military clinic designated as adequate to provide the needed primary care services to the active duty service member; and

(ii) Pursuant to the assignment of such duty, resides at a location that is greater than fifty miles or approximately one hour from a military medical treatment facility or military clinic designated as adequate to provide the needed primary care services to the active duty service member.

(3) *Enrollment.* An active duty service member eligible for the TRICARE Prime Remote program must enroll in the program. If an eligible active duty member does not enroll in the

TRICARE Prime Remote program, the member shall receive health care services provide under the supplemental health program subject to all requirements of this section without application of the provisions of paragraph (e) of this section.

(4) *Preauthorization*. If a TRICARE Prime network under § 199.17 exists in the remote location, the TRICARE Prime Remote enrolled active duty member will select or be assigned a primary care manager. In the absence of a TRICARE primary care manager in the remote location and if the active duty member is not assigned to a military primary care manager based on fitness for duty requirements, the TRICARE Prime Remote enrolled active duty member may use a local TRICARE authorized provider for primary health care services without preauthorization. Any referral for specialty care will require the TRICARE Prime Remote enrolled active duty member to obtain preauthorization for such services.

(f) *Waiver authority*. With the exception of statutory requirements, any restrictions or limitations pursuant to the general rule in paragraph (c) of this section, and special rules and procedures in paragraph (d) of this section, may be waived by the Director, OCHAMPUS, at the request of an authorized official of the uniformed service concerned, based on a determination that such waiver is necessary to assure adequate availability of health care services to active duty members.

(g) *Authorities*. (1) The Uniformed Services may establish additional procedures, consistent with this part, for the effective administration of the supplemental care program in their respective services.

(2) The Assistant Secretary of Defense for Health Affairs is responsible for the overall policy direction of the supplemental care program and the administration of this part.

(3) The Director, OCHAMPUS shall issue procedural requirements for the implementation of this section, including requirement for claims submission similar to those established by § 199.7.

[56 FR 23801, May 24, 1991, as amended at 58 FR 58963, Nov. 5, 1993; 67 FR 5479, Feb. 6, 2002; 71 FR 50348, Aug. 25, 2006]

**§ 199.17 TRICARE program.**

(a) *Establishment*. The TRICARE program is established for the purpose of implementing a comprehensive managed health care program for the delivery and financing of health care services in the Military Health System.

(1) *Purpose*. The TRICARE program implements a number of improvements primarily through modernized managed care support contracts that include special arrangements with civilian sector health care providers and better coordination between military medical treatment facilities (MTFs) and these civilian providers to deliver an integrated, health care delivery system that provides beneficiaries with access to high quality healthcare. Implementation of these improvements, to include enhanced access, improved health outcomes, increased efficiencies and elimination of waste, in addition to improving and maintaining operational medical force readiness, includes adoption of special rules and procedures not ordinarily followed under CHAMPUS or MTF requirements. This section establishes those special rules and procedures.

(2) *Statutory authority*. Many of the provisions of this section are authorized by statutory authorities other than those which authorize the usual operation of the CHAMPUS program, especially 10 U.S.C. 1079 and 1086. The TRICARE program also relies upon other available statutory authorities, including 10 U.S.C. 1075 (TRICARE Select), 10 U.S.C. 1075a (TRICARE Prime cost sharing), 10 U.S.C. 1095f (referrals and pre-authorizations under TRICARE Prime), 10 U.S.C. 1099 (health care enrollment system), 10 U.S.C. 1097 (contracts for medical care for retirees, dependents and survivors: Alternative delivery of health care), and 10 U.S.C. 1096 (resource sharing agreements).

(3) *Scope of the program*. The TRICARE program is applicable to all the uniformed services. TRICARE Select and TRICARE-for-Life shall be available in all areas, including overseas as authorized in paragraph (u) of this section. The geographic availability of TRICARE Prime is generally limited as provided in this section. The Assistant Secretary of Defense (Health

Affairs) may also authorize modifications to TRICARE program rules and procedures as may be appropriate to the area involved.

(4) *Rules and procedures affected.* Much of this section relates to rules and procedures applicable to the delivery and financing of health care services provided by civilian providers outside military treatment facilities. This section provides that certain rules, procedures, rights and obligations set forth elsewhere in this part (and usually applicable to CHAMPUS) are different under the TRICARE program. To the extent that TRICARE program rules, procedures, rights and obligations set forth in this section are not different from or otherwise in conflict with those set forth elsewhere in this part as applicable to CHAMPUS, the CHAMPUS provisions are incorporated into the TRICARE program. In addition, some rules, procedures, rights and obligations relating to health care services in military treatment facilities are also different under the TRICARE program. In such cases, provisions of this section take precedence and are binding.

(5) *Implementation based on local action.* The TRICARE program is not automatically implemented in all respects in all areas where it is potentially applicable. Therefore, not all provisions of this section are automatically implemented. Rather, implementation of the TRICARE program and this section requires an official action by the Director, Defense Health Agency. Public notice of the initiation of portions of the TRICARE program will be achieved through appropriate communication and media methods and by way of an official announcement by the Director identifying the military medical treatment facility catchment area or other geographical area covered.

(6) *Major features of the TRICARE program.* The major features of the TRICARE program, described in this section, include the following:

(i) *Beneficiary categories.* Under the TRICARE program, health care beneficiaries are generally classified into one of several categories:

(A) Active duty members, who are covered by 10 U.S.C. 1074(a).

(B) Active duty family members, who are beneficiaries covered by 10 U.S.C. 1079 (also referred to in this section as ''active duty family category'').

(C) Retirees and their family members (also referred to in this section as ''retired category''), who are beneficiaries covered by 10 U.S.C. 1086(c) other than those beneficiaries eligible for Medicare Part A.

(D) Medicare eligible retirees and Medicare eligible retiree family members who are beneficiaries covered by 10 U.S.C. 1086(d) as each become individually eligible for Medicare Part A and enroll in Medicare Part B.

(E) Military treatment facility (MTF) only beneficiaries are beneficiaries eligible for health care services in military treatment facilities, but not eligible for a TRICARE plan covering non-MTF care.

(ii) *Health plans available.* The major TRICARE health plans are as follows:

(A) *TRICARE Prime.* ''TRICARE Prime'' is a health maintenance organization (HMO)-like program. It generally features use of military treatment facilities and substantially reduced out-of-pocket costs for care provided outside MTFs. Beneficiaries generally agree to use military treatment facilities and designated civilian provider networks and to follow certain managed care rules and procedures. The primary purpose of TRICARE Prime is to support the effective operation of an MTF, which exists to support the medical readiness of the armed forces and the readiness of medical personnel. TRICARE Prime will be offered in areas where the Director determines that it is appropriate to support the effective operation of one or more MTFs.

(B) *TRICARE Select.* ''TRICARE Select'' is a self-managed, preferred provider organization (PPO) program. It allows beneficiaries to use the TRICARE provider civilian network, with reduced out-of-pocket costs compared to care from non-network providers, as well as military treatment facilities (where they exist and when space is available). TRICARE Select enrollees will not have restrictions on their freedom of choice with respect to

authorized health care providers. However, when a TRICARE Select beneficiary receives services covered under the basic program from an authorized health care provider who is not part of the TRICARE provider network that care is covered by TRICARE but is subject to higher cost sharing amounts for ''out-of-network'' care. Those amounts are the same as under the basic program under § 199.4.

(C) *TRICARE for Life*. ''TRICARE for Life'' is the Medicare wraparound coverage plan under 10 U.S.C. 1086(d). Rules applicable to this plan are unaffected by this section; they are generally set forth in §§ 199.3 (Eligibility), 199.4 (Basic Program Benefits), and 199.8 (Double Coverage).

(D) *TRICARE Standard*. ''TRICARE Standard'' generally referred to the basic CHAMPUS program of benefits under § 199.4. While the law required termination of TRICARE Standard as a distinct TRICARE plan December 31, 2017, the CHAMPUS basic program benefits under § 199.4 continues as the baseline of benefits common to the TRICARE Prime and TRICARE Select plans.

(iii) *Comprehensive enrollment system*. The TRICARE program includes a comprehensive enrollment system for all categories of beneficiaries except TRICARE-for-Life beneficiaries. When eligibility for enrollment for TRICARE Prime and/or TRICARE Select exists, a beneficiary must enroll in one of the plans. Refer to paragraph (o) of this section for TRICARE program enrollment procedures.

(7) *Preemption of State laws*. (i) Pursuant to 10 U.S.C. 1103 the Department of Defense has determined that in the administration of 10 U.S.C. chapter 55, preemption of State and local laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods is necessary to achieve important Federal interests, including but not limited to the assurance of uniform national health programs for military families and the operation of such programs at the lowest possible cost to the Department of Defense, that have a direct and substantial effect on the conduct of military affairs and national security policy of the United States.

(ii) Based on the determination set forth in paragraph (a)(7)(i) of this section, any State or local law relating to health insurance, prepaid health plans, or other health care delivery or financing methods is preempted and does not apply in connection with TRICARE regional contracts. Any such law, or regulation pursuant to such law, is without any force or effect, and State or local governments have no legal authority to enforce them in relation to the TRICARE regional contracts. (However, the Department of Defense may by contract establish legal obligations of the part of TRICARE contractors to conform with requirements similar or identical to requirements of State or local laws or regulations).

(iii) The preemption of State and local laws set forth in paragraph (a)(7)(ii) of this section includes State and local laws imposing premium taxes on health or dental insurance carriers or underwriters or other plan managers, or similar taxes on such entities. Such laws are laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods, within the meaning of the statutes identified in paragraph (a)(7)(i) of this section. Preemption, however, does not apply to taxes, fees, or other payments on net income or profit realized by such entities in the conduct of business relating to DoD health services contracts, if those taxes, fees or other payments are applicable to a broad range of business activity. For purposes of assessing the effect of Federal preemption of State and local taxes and fees in connection with DoD health and dental services contracts, interpretations shall be consistent with those applicable to the Federal Employees Health Benefits Program under 5 U.S.C. 8909(f).

(b) *TRICARE Prime and TRICARE Select health plans in general*. The two primary plans for beneficiaries in the active duty family category and the retired category (which does not include most Medicare-eligible retirees/dependents) are TRICARE Prime and TRICARE Select. This paragraph (b) further describes the TRICARE Prime and TRICARE Select health plans.

(1) *TRICARE Prime*. TRICARE Prime is a managed care option that provides

enhanced medical services to beneficiaries at reduced cost-sharing amounts for beneficiaries whose care is managed by a designated primary care manager and provided by an MTF or network provider. TRICARE Prime is offered in a location in which an MTF is located (other than a facility limited to members of the armed forces) that has been designated by the Director as a Prime Service Area. In addition, where TRICARE Prime is offered it may be limited to active duty family members if the Director determines it is not practicable to offer TRICARE Prime to retired category beneficiaries. TRICARE Prime is not offered in areas where the Director determines it is impracticable. If TRICARE Prime is not offered in a geographical area, certain active duty family members residing in the area may be eligible to enroll in TRICARE Prime Remote program under paragraph (g) of this section.

(2) *TRICARE Select*. TRICARE Select is the self-managed option under which beneficiaries may receive authorized basic program benefits from any TRICARE authorized provider. The TRICARE Select health care plan also provides enhanced program benefits to beneficiaries with access to a preferred-provider network with broad geographic availability within the United States at reduced out-of-pocket expenses. However, when a beneficiary receives services from an authorized health care provider who is not part of the TRICARE provider network, only basic program benefits (not enhanced Select care) are covered by TRICARE and the beneficiary is subject to higher cost sharing amounts for ''out-of-network'' care. Those amounts are the same as under the basic program under § 199.4.

(c) *Eligibility for enrollment in TRICARE Prime and TRICARE Select*. Beneficiaries in the active duty family category and the retired category are eligible to enroll in TRICARE Prime and/or TRICARE Select as outlined in this paragraph (c). A retiree or retiree family member who becomes eligible for Medicare Part A is not eligible to enroll in TRICARE Select; however, as provided in this paragraph (c), some Medicare eligible retirees/family members may be allowed to enroll in TRICARE Prime where available. In general, when a retiree or retiree family member becomes individually eligible for Medicare Part A and enrolls in Medicare Part B, he/she is automatically eligible for TRICARE-for-Life and is required to enroll in the Defense Enrollment Eligibility Reporting System (DEERS) to verify eligibility. Further, some rules and procedures are different for dependents of active duty members and retirees, dependents, and survivors.

(1) *Active duty members*. Active duty members are required to enroll in Prime where it is offered. Active duty members shall have first priority for enrollment in Prime.

(2) *Dependents of active duty members*. Beneficiaries in the active duty family member category are eligible to enroll in Prime (where offered) or Select.

(3) *Survivors of deceased members*. (i) The surviving spouse of a member who dies while on active duty for a period of more than 30 days is eligible to enroll in Prime (where offered) or Select for a 3 year period beginning on the date of the member's death under the same rules and provisions as dependents of active duty members.

(ii) A dependent child or unmarried person (as described in § 199.3(b)(2)(ii) or (iv)) of a member who dies while on active duty for a period of more than 30 days whose death occurred on or after October 7, 2001, is eligible to enroll in Prime (where offered) or Select and is subject to the same rules and provisions of dependents of active duty members for a period of three years from the date the active duty sponsor dies or until the surviving eligible dependent:

(A) Attains 21 years of age; or

(B) Attains 23 years of age or ceases to pursue a full-time course of study prior to attaining 23 years of age, if, at 21 years of age, the eligible surviving dependent is enrolled in a full-time course of study in a secondary school or in a full-time course of study in an institution of higher education approved by the Secretary of Defense and was, at the time of the sponsor's death, in fact dependent on the member for over one-half of such dependent's support.

(4) *Retirees, dependents of retirees, and survivors (other than survivors of deceased members covered under paragraph (c)(3) of this section).* All retirees, dependents of retirees, and survivors who are not eligible for Medicare Part A are eligible to enroll in Select. Additionally, retirees, dependents of retirees, and survivors who are not eligible for Medicare Part A based on age are also eligible to enroll in TRICARE Prime in locations where it is offered and where an MTF has, in the judgment of the Director, a significant number of health care providers, including specialty care providers, and sufficient capability to support the efficient operation of TRICARE Prime for projected retired beneficiary enrollees in that location.

(d) *Health benefits under TRICARE Prime*—(1) *Military treatment facility (MTF) care*—(i) *In general.* All participants in Prime are eligible to receive care in military treatment facilities. Participants in Prime will be given priority for such care over other beneficiaries. Among the following beneficiary groups, access priority for care in military treatment facilities where TRICARE is implemented as follows:

(A) Active duty service members;

(B) Active duty service members' dependents and survivors of service members who died on active duty, who are enrolled in TRICARE Prime;

(C) Retirees, their dependents and survivors, who are enrolled in TRICARE Prime;

(D) Active duty service members' dependents and survivors of deceased members, who are not enrolled in TRICARE Prime; and

(E) Retirees, their dependents and survivors who are not enrolled in TRICARE Prime. For purposes of this paragraph (d)(1), survivors of members who died while on active duty are considered as among dependents of active duty service members.

(ii) *Special provisions.* Enrollment in Prime does not affect access priority for care in military treatment facilities for several miscellaneous beneficiary groups and special circumstances. Those include Secretarial designees, NATO and other foreign military personnel and dependents authorized care through international agreements, civilian employees under workers' compensation programs or under safety programs, members on the Temporary Disability Retired List (for statutorily required periodic medical examinations), members of the reserve components not on active duty (for covered medical services), military prisoners, active duty dependents unable to enroll in Prime and temporarily away from place of residence, and others as designated by the Assistant Secretary of Defense (Health Affairs). Additional exceptions to the normal Prime enrollment access priority rules may be granted for other categories of individuals, eligible for treatment in the MTF, whose access to care is necessary to provide an adequate clinical case mix to support graduate medical education programs or readiness-related medical skills sustainment activities, to the extent approved by the ASD(HA).

(2) *Non-MTF care for active duty members.* Under Prime, non-MTF care needed by active duty members continues to be arranged under the supplemental care program and subject to the rules and procedures of that program, including those set forth in § 199.16.

(3) *Civilian sector Prime benefits.* Health benefits for Prime enrollees for care received from civilian providers are those under § 199.4 and the additional benefits identified in paragraph (f) of this section.

(e) *Health benefits under the TRICARE Select plan*—(1) *Civilian sector care.* The health benefits under TRICARE Select for enrolled beneficiaries received from civilian providers are those under § 199.4, and, in addition, those in paragraph (f) of this section when received from a civilian network provider.

(2) *Military treatment facility (MTF) care.* All TRICARE Select enrolled beneficiaries continue to be eligible to receive care in military treatment facilities on a space available basis.

(f) *Benefits under TRICARE Prime and TRICARE Select*—(1) *In general.* Except as specifically provided or authorized by this section, all benefits provided, and benefit limitations established, pursuant to this part, shall apply to TRICARE Prime and TRICARE Select.

(2) *Preventive care services.* Certain preventive care services not normally

provided as part of basic program benefits under § 199.4 are covered benefits when provided to Prime or Select enrollees by providers in the civilian provider network. Such additional services are authorized under 10 U.S.C. 1097, including preventive care services not part of the entitlement under 10 U.S.C. 1074d and services that would otherwise be excluded under 10 U.S.C. 1079(a)(10). Other authority for such additional services includes section 706 of the National Defense Authorization Act for Fiscal Year 2017. The specific set of such services shall be established by the Director and announced annually before the open season enrollment period. Standards for preventive care services shall be developed based on guidelines from the U.S. Department of Health and Human Services. Such standards shall establish a specific schedule, including frequency or age specifications for services that may include, but are not limited to:

(i) Laboratory and imaging tests, including blood lead, rubella, cholesterol, fecal occult blood testing, and mammography;

(ii) Cancer screenings (including cervical, breast, lung, prostate, and colon cancer screenings);

(iii) Immunizations;

(iv) Periodic health promotion and disease prevention exams;

(v) Blood pressure screening;

(vi) Hearing exams;

(vii) Sigmoidoscopy or colonoscopy;

(viii) Serologic screening; and

(ix) Appropriate education and counseling services. The exact services offered shall be established under uniform standards established by the Director.

(3) *Treatment of obesity*. Under the authority of 10 U.S.C. 1097 and sections 706 and 729 of the National Defense Authorization Act for Fiscal Year 2017, notwithstanding 10 U.S.C. 1079(a)(10), treatment of obesity is covered under TRICARE Prime and TRICARE Select even if it is the sole or major condition treated. Such services must be provided by a TRICARE network provider and be medically necessary and appropriate in the context of the particular patient's treatment.

(4) *High value services*. Under the authority of 10 U.S.C. 1097 and other authority, including sections 706 and 729 of the NDAA–17, for purposes of improving population-based health outcomes and incentivizing medical intervention programs to address chronic diseases and other conditions and healthy lifestyle interventions, the Director may waive or reduce cost sharing requirements for TRICARE Prime and TRICARE Select enrollees for care received from network providers for certain health care services designated for this purpose. The specific services designated for this purpose will be those the Director determines provide especially high value in terms of better health outcomes. The specific services affected for any plan year will be announced by the Director prior to the open season enrollment period for that plan year. Services affected by actions of the Director under this paragraph (f)(4) may be associated with actions taken for high value medications under § 199.21(j)(3) for select pharmaceutical agents to be cost-shared at a reduced or zero dollar rate.

(5) *Other services*. In addition to services provided pursuant to paragraphs (f)(2) through (4) of this section, other benefit enhancements may be added and other benefit restrictions may be waived or relaxed in connection with health care services provided to TRICARE Prime and TRICARE Select enrollees. Any such other enhancements or changes must be approved by the Director based on uniform standards.

(g) *TRICARE Prime Remote for Active Duty Family Members*—(1) *In general*. In geographic areas in which TRICARE Prime is not offered and in which eligible family members reside, there is offered under 10 U.S.C. 1079(p) TRICARE Prime Remote for Active Duty Family Members as an enrollment option. TRICARE Prime Remote for Active Duty Family Members (TPRADFM) will generally follow the rules and procedures of TRICARE Prime, except as provided in this paragraph (g) and otherwise except to the extent the Director determines them to be infeasible because of the remote area.

(2) *Active duty family member*. For purposes of this paragraph (g), the term ''active duty family member'' means one of the following dependents of an

active duty member of the Uniformed Services:

(i) Spouse, child, or unmarried person, as defined in §199.3(b)(2)(i), (ii), or (iv);

(ii) For a 3-year period, the surviving spouse of a member who dies while on active duty for a period of more than 30 days whose death occurred on or after October 7, 2001; and

(iii) The surviving dependent child or unmarried person, as defined in §199.3(b)(2)(ii) or (iv), of a member who dies while on active duty for a period of more than 30 days whose death occurred on or after October 7, 2001. Active duty family member status is for a period of 3 years from the date the active duty sponsor dies or until the surviving eligible dependent:

(A) Attains 21 years of age; or

(B) Attains 23 years of age or ceases to pursue a full-time course of study prior to attaining 23 years of age, if, at 21 years of age, the eligible surviving dependent is enrolled in a full-time course of study in a secondary school or in a full-time course of study in an institution of higher education approved by the Secretary of Defense and was, at the time of the sponsor's death, in fact dependent on the member for over one-half of such dependent's support.

(3) *Eligibility*. (i) An active duty family member is eligible for TRICARE Prime Remote for Active Duty Family Members if he or she is eligible for CHAMPUS and, on or after December 2, 2003, meets the criteria of paragraphs (g)(3)(i)(A) and (B) or paragraph (g)(3)(i)(C) of this section or on or after October 7, 2001, meets the criteria of paragraph (g)(3)(i)(D) or (E) of this section:

(A) The family member's active duty sponsor has been assigned permanent duty as a recruiter; as an instructor at an educational institution, an administrator of a program, or to provide administrative services in support of a program of instruction for the Reserve Officers' Training Corps; as a full-time adviser to a unit of a reserve component; or any other permanent duty designated by the Director that the Director determines is more than 50 miles, or approximately one hour driving time, from the nearest military treatment facility that is adequate to provide care.

(B) The family members and active duty sponsor, pursuant to the assignment of duty described in paragraph (g)(3)(i)(A) of this section, reside at a location designated by the Director, that the Director determines is more than 50 miles, or approximately one hour driving time, from the nearest military medical treatment facility adequate to provide care.

(C) The family member, having resided together with the active duty sponsor while the sponsor served in an assignment described in paragraph (g)(3)(i)(A) of this section, continues to reside at the same location after the sponsor relocates without the family member pursuant to orders for a permanent change of duty station, and the orders do not authorize dependents to accompany the sponsor to the new duty station at the expense of the United States.

(D) For a 3 year period, the surviving spouse of a member who dies while on active duty for a period of more than 30 days whose death occurred on or after October 7, 2001.

(E) The surviving dependent child or unmarried person as defined in §199.3(b)(2)(ii) or (iv), of a member who dies while on active duty for a period of more than 30 days whose death occurred on or after October 7, 2001, for three years from the date the active duty sponsor dies or until the surviving eligible dependent:

(*1*) Attains 21 years of age; or

(*2*) Attains 23 years of age or ceases to pursue a full-time course of study prior to attaining 23 years of age, if, at 21 years of age, the eligible surviving dependent is enrolled in a full-time course of study in a secondary school or in a full-time course of study in an institution of higher education approved by the Secretary of Defense and was, at the time of the sponsor's death, in fact dependent on the member for over one-half of such dependent's support.

(ii) A family member who is a dependent of a reserve component member is eligible for TRICARE Prime Remote for Active Duty Family Members if he or she is eligible for CHAMPUS

and meets all of the following additional criteria:

(A) The reserve component member has been ordered to active duty for a period of more than 30 days.

(B) The family member resides with the member.

(C) The Director, determines the residence of the reserve component member is more than 50 miles, or approximately one hour driving time, from the nearest military medical treatment facility that is adequate to provide care.

(D) ''Resides with'' is defined as the TRICARE Prime Remote residence address at which the family resides with the activated reservist upon activation.

(4) *Enrollment*. TRICARE Prime Remote for Active Duty Family Members requires enrollment under procedures set forth in paragraph (o) of this section or as otherwise established by the Director.

(5) *Health care management requirements under TRICARE Prime Remote for Active Duty Family Members*. The additional health care management requirements applicable to Prime enrollees under paragraph (n) of this section are applicable under TRICARE Prime Remote for Active Duty Family Members unless the Director determines they are infeasible because of the particular remote location. Enrollees will be given notice of the applicable management requirements in their remote location.

(6) *Cost sharing*. Beneficiary cost sharing requirements under TRICARE Prime Remote for Active Duty Family Members are the same as those under TRICARE Prime under paragraph (m) of this section, except that the higher point-of-service option cost sharing and deductible shall not apply to routine primary health care services in cases in which, because of the remote location, the beneficiary is not assigned a primary care manager or the Director determines that care from a TRICARE network provider is not available within the TRICARE access standards under paragraph (p)(5) of this section. The higher point-of-service option cost sharing and deductible shall apply to specialty health care services received by any TRICARE Prime Remote for Active Duty Family Members enrollee unless an appropriate referral/preauthorization is obtained as required by paragraph (n) of this section under TRICARE Prime. In the case of pharmacy services under § 199.21, where the Director determines that no TRICARE network retail pharmacy has been established within a reasonable distance of the residence of the TRICARE Prime Remote for Active Duty Family Members enrollee, cost sharing applicable to TRICARE network retail pharmacies will be applicable to all CHAMPUS eligible pharmacies in the remote area.

(h) *Resource sharing agreements*. Under the TRICARE program, any military medical treatment facility (MTF) commander may establish resource sharing agreements with the applicable managed care support contractor for the purpose of providing for the sharing of resources between the two parties. Internal resource sharing and external resource sharing agreements are authorized. The provisions of this paragraph (h) shall apply to resource sharing agreements under the TRICARE program.

(1) In connection with internal resource sharing agreements, beneficiary cost sharing requirements shall be the same as those applicable to health care services provided in facilities of the uniformed services.

(2) Under internal resource sharing agreements, the double coverage requirements of § 199.8 shall be replaced by the Third Party Collection procedures of 32 CFR part 220, to the extent permissible under such part. In such a case, payments made to a resource sharing agreement provider through the TRICARE managed care support contractor shall be deemed to be payments by the MTF concerned.

(3) Under internal or external resource sharing agreements, the commander of the MTF concerned may authorize the provision of services, pursuant to the agreement, to Medicare-eligible beneficiaries, if such services are not reimbursable by Medicare, and if the commander determines that this will promote the most cost-effective provision of services under the TRICARE program.

(4) Under external resource sharing agreements, there is no cost sharing

applicable to services provided by military facility personnel. Cost sharing for non-MTF institutional and related ancillary charges shall be as applicable to services provided under TRICARE Prime or TRICARE Select, as appropriate.

(i) *General quality assurance, utilization review, and preauthorization requirements under the TRICARE program.* All quality assurance, utilization review, and preauthorization requirements for the basic CHAMPUS program, as set forth in this part (see especially applicable provisions in §§199.4 and 199.15), are applicable to Prime and Select except as provided in this chapter. Pursuant to an agreement between a military medical treatment facility and TRICARE managed care support contractor, quality assurance, utilization review, and preauthorization requirements and procedures applicable to health care services outside the military medical treatment facility may be made applicable, in whole or in part, to health care services inside the military medical treatment facility.

(j) *Pharmacy services.* Pharmacy services under Prime and Select are as provided in the Pharmacy Benefits Program (see §199.21).

(k) *Design of cost sharing structures under TRICARE Prime and TRICARE Select*—(1) *In general.* The design of the cost sharing structures under TRICARE Prime and TRICARE Select includes several major factors: beneficiary category (*e.g.*, active duty family member category or retired category, and there are some special rules for survivors of active duty deceased sponsors and medically retired members and their dependents); date of initial military affiliation (*i.e.*, before or on or after January 1, 2018), category of health care service received, and network or non-network status of the provider.

(2) *Categories of health care services.* This paragraph (k)(2) describes the categories of health care services relevant to determining copayment amounts.

(i) Preventive care visits. These are outpatient visits and related services described in paragraph (f)(2) of this section. There are no cost sharing requirements for preventive care listed under §§199.4(e)(28)(i) through (iv) and 199.17(f)(2). Beneficiaries shall not be required to pay any portion of the cost of these preventive services even if the beneficiary has not satisfied any applicable deductible for that year.

(ii) Primary care outpatient visits. These are outpatient visits, not occurring in an ER or urgent care center, with the following provider specialties:

(A) General Practice.

(B) Family Practice.

(C) Internal Medicine.

(D) OB/GYN.

(E) Pediatrics.

(F) Physician's Assistant.

(G) Nurse Practitioner.

(H) Nurse Midwife.

(iii) Specialty care outpatient visits. This category applies to outpatient care provided by provider specialties other than those listed under primary care outpatient visits under paragraph (k)(2)(ii) of this section and not specifically included in one of the other categories of care (*e.g.*, emergency room visits etc.) under paragraph (k)(2) of this section. This category also includes partial hospitalization services, intensive outpatient treatment, and opioid treatment program services. The per visit fee shall be applied on a per day basis on days services are received, with the exception of opioid treatment program services reimbursed in accordance with §199.14(a)(2)(ix)(A)(*3*)(*i*) which per visit fee will apply on a weekly basis.

(iv) Emergency room visits.

(v) Urgent care center visits.

(vi) Ambulance services. This is for ground ambulance services.

(vii) Ambulatory surgery. This is for facility-based outpatient ambulatory surgery services.

(viii) Inpatient hospital admissions.

(ix) Skilled nursing facility or rehabilitation facility admissions. This category includes a residential treatment center, or substance use disorder rehabilitation facility residential treatment program.

(x) Durable medical equipment, prosthetic devices, and other authorized supplies.

(xi) Outpatient prescription pharmaceuticals. These are addressed in §199.21.

(3) *Beneficiary categories further subdivided.* For purposes of both TRICARE

Prime and TRICARE Select, enrollment fees and cost sharing by beneficiary category (*e.g.*, active duty family member category or retired category) are further differentiated between two groups:

(i) Group A consists of Prime or Select enrollees whose sponsor originally enlisted or was appointed in a uniformed service before January 1, 2018.

(ii) Group B consists of Prime or Select enrollees whose sponsor originally enlisted or was appointed in a uniformed service on or after January 1, 2018.

(l) *Enrollment fees and cost sharing (including deductibles and catastrophic cap) amounts.* This paragraph (l) provides enrollment fees and cost sharing requirements applicable to TRICARE Prime and TRICARE Select enrollees.

(1) *Enrollment fee and cost sharing under TRICARE Prime.* (i) For Group A enrollees:

(A) There is no enrollment fee for the active duty family member category.

(B) The retired category enrollment fee in calendar year 2018 is equal to the Prime enrollment fee for fiscal year 2017, indexed to calendar year 2018 and thereafter in accordance with 10 U.S.C. 1097. The Assistant Secretary of Defense (Health Affairs) may exempt survivors of active duty deceased sponsors and medically retired Uniformed Services members and their dependents from future increases in enrollment fees. The Assistant Secretary of Defense (Health Affairs) may also waive the enrollment fee requirements for Medicare-eligible beneficiaries.

(C) The cost sharing amounts are established annually in connection with the open season enrollment period. An amount is established for each category of care identified in paragraph (k)(2) of this section, taking into account all applicable statutory provisions, including 10 U.S.C. chapter 55. The amount for each category of care may not exceed the amount for Group B as set forth in 10 U.S.C. 1075a.

(D) The catastrophic cap is $1,000 for active duty families and $3,000 for retired category families.

(ii) For Group B TRICARE Prime enrollees, the enrollment fee, catastrophic cap, and cost sharing amounts are as set forth in 10 U.S.C. 1075a. The cost sharing requirements applicable to services not specifically addressed in the table set forth in 10 U.S.C. 1075a(b)(1) shall be determined by the Director, DHA.

(iii) For both Group A and Group B, for health care services obtained by a Prime enrollee but not obtained in accordance with the rules and procedures of Prime (*e.g.* failure to obtain a primary care manager referral when such a referral is required or seeing a nonnetwork provider when Prime rules require use of a network provider and one is available) will not be paid under Prime rules but may be covered by the point-of-service option. For services obtained under the point-of-service option, the deductible is $300 per person and $600 per family. The beneficiary cost share is 50 percent of the allowable charges for inpatient and outpatient care, after the deductible. Point-of-service charges do not count against the annual catastrophic cap.

(2) *Enrollment fee and cost sharing under TRICARE Select.* (i) For Group A enrollees:

(A) The enrollment fee in calendar years 2018 through 2020 is zero and the catastrophic cap is as provided in 10 U.S.C. 1079 or 1086. The enrollment fee and catastrophic cap in 2021 and thereafter for certain beneficiaries in the retired category is as provided in 10 U.S.C. 1075(e), except the enrollment fee and catastrophic cap adjustment shall not apply to survivors of active duty deceased sponsors and medically retired Uniformed Services members and their dependents.

(B) The cost sharing amounts for network care for Group A enrollees are calculated for each category of care described in paragraph (k)(2) of this section by taking into account all applicable statutory provisions, including 10 U.S.C. chapter 55, as if TRICARE Extra and Standard programs were still being implemented. When determined practicable, including efficiency and effectiveness in administration, the amounts established are converted to fixed dollar amounts for each category of care for which a fixed dollar amount is established by 10 U.S.C. 1075. When determined not to be practicable, as in the categories of care including ambulatory surgery, inpatient admissions,

and inpatient skilled nursing/rehabilitation admissions, the calculated cost-sharing amounts are not converted to fixed dollar amounts. The fixed dollar amount for each category is set prospectively for each calendar year as the amount (rounded down to the nearest dollar amount) equal to 15% for enrollees in the active duty family beneficiary category or 20% for enrollees in the retired beneficiary category of the projected average allowable payment amount for each category of care during the year, as estimated by the Director. The projected average allowable payment amount for primary care (including urgent care) and specialty care outpatient appointments include payments for ancillary services (*e.g.*, laboratory and radiology services) that are provided in connection with the respective outpatient visit. As such, there is no separate cost sharing for these ancillary services.

(C) The cost share for care received from non-network providers is as provided in § 199.4.

(D) The annual deductible amount is as provided in 10 U.S.C. 1079 or 1086.

(ii) For Group B TRICARE Select enrollees, the enrollment fee, annual deductible for services received while in an outpatient status, catastrophic cap., and cost sharing amounts are as provided in 10 U.S.C. 1075 and as consistent with this section. The cost sharing requirements applicable to services not specifically addressed in 10 U.S.C. 1075 shall be determined by the Director, DHA.

(3) *Special cost-sharing rules.* (i) There is no separate cost-sharing applicable to ancillary health care services obtained in conjunction with an outpatient primary or specialty care visit under TRICARE Prime or from network providers under TRICARE Select.

(ii) Cost-sharing for maternity care services shall be determined in accordance with § 199.4(e)(16).

(iii) Cost-sharing and copayments (including deductibles) shall be waived for in-network telehealth services during the national emergency for the global coronavirus 2019 (COVID–19) pandemic. This temporary waiver provision terminates July 1, 2022 or the date of termination of the President's declared national emergency for COVID–19, whichever is earlier.

(4) *Special transition rule for the last quarter of calendar year 2017.* In order to transition enrollment fees, deductibles, and catastrophic caps from a fiscal year basis to a calendar year basis, the following special rules apply for the last quarter of calendar year 2017:

(A) A Prime enrollee's enrollment fee for the quarter is one-fourth of the enrollment fee for fiscal year 2017.

(B) The deductible amount and the catastrophic cap amount for fiscal year 2017 will be applicable to the 15-month period of October 1, 2016 through December 31, 2017.

(m) *Limit on out-of-pocket costs under TRICARE Prime and TRICARE Select.* For the purpose of this paragraph (m), out-of-pocket costs means all payments required of beneficiaries under paragraph (l) of this section, including enrollment fees, deductibles, and cost-sharing amounts, with the exception of point-of-service charges. In any case in which a family reaches their applicable catastrophic cap, all remaining payments that would have been required of the beneficiary under paragraph (l) of this section for authorized care, with the exception of applicable point-of-service charges pursuant to paragraph (l)(1)(iii) of this section, will be paid by the program for the remainder of that calendar year.

(n) *Additional health care management requirements under TRICARE Prime.* Prime has additional, special health care management requirements not applicable under TRICARE Select.

(1) *Primary care manager.* (i) All active duty members and Prime enrollees will be assigned a primary care manager pursuant to a system established by the Director, and consistent with the access standards in paragraph (p)(5)(i) of this section. The primary care manager may be an individual, physician, a group practice, a clinic, a treatment site, or other designation. The primary care manager may be part of the MTF or the Prime civilian provider network. The enrollee will be given the opportunity to register a preference for primary care manager from a list of choices provided by the Director. This preference will be entered on a TRICARE Prime enrollment form or

similar document. Preference requests will be considered, but primary care manager assignments will be subject to availability under the MTF beneficiary category priority system under paragraph (d) of this section and subject to other operational requirements. (ii) Prime enrollees who are dependents of active duty members in pay grades E–1 through E–4 shall have priority over other active duty dependents for enrollment with MTF PCMs, subject to MTF capacity.

(2) *Referral and preauthorization requirements.* (i) Under TRICARE Prime there are certain procedures for referral and preauthorization.

(A) For the purpose of this paragraph (n)(2), referral addresses the issue of who will provide authorized health care services. In many cases, Prime beneficiaries will be referred by a primary care manager to a medical department of an MTF if the type of care needed is available at the MTF. In such a case, failure to adhere to that referral will result in the care being subject to point-of-service charges. In other cases, a referral may be to the civilian provider network, and again, point-of-service charges would apply to a failure to follow the referral.

(B) In contrast to referral, preauthorization addresses the issue of whether particular services may be covered by TRICARE, including whether they appear necessary and appropriate in the context of the patient's diagnosis and circumstances. A major purpose of preauthorization is to prevent surprises about coverage determinations, which are sometimes dependent on particular details regarding the patient's condition and circumstances. While TRICARE Prime has referral requirements that do not exist for TRICARE Select, TRICARE Select has some preauthorization requirements that do not exist for TRICARE Prime.

(ii) Except as otherwise provided in this paragraph (n)(2), a beneficiary enrolled in TRICARE Prime is required to obtain a referral for care through a designated primary care manager (or other authorized care coordinator) prior to obtaining care under the TRICARE program.

(iii) There is no referral requirement under paragraph (n)(2)(i) of this section in the following circumstances:

(A) In emergencies;

(B) For urgent care services for a certain number of visits per year (zero to unlimited), with the number specified by the Director and notice provided in connection with the open season enrollment period preceding the plan year; and

(C) In any other special circumstances identified by the Director, generally with notice provided in connection with the open season enrollment period for the plan year.

(iv) A primary care manager who believes a referral to a specialty care provider is medically necessary and appropriate need not obtain pre-authorization from the managed care support contractor before referring a patient to a network specialty care provider. Such preauthorization is only required with respect to a primary care manager's referral for:

(A) Inpatient hospitalization;

(B) Inpatient care at a skilled nursing facility;

(C) Inpatient care at a rehabilitation facility; and

(D) Inpatient care at a residential treatment facility.

(v) The restrictions in paragraph (n)(2)(iv) of this section on preauthorization requirements do not apply to any preauthorization requirements that are generally applicable under TRICARE, independent of TRICARE Prime referrals, such as:

(A) Under the Pharmacy Benefits Program under 10 U.S.C. 1074g and § 199.21.

(B) For laboratory and other ancillary services.

(C) Durable medical equipment.

(vi) The cost-sharing requirement for a beneficiary enrolled in TRICARE Prime who does not obtain a referral for care when it is required, including care from a non-network provider, is as provided in paragraph (l)(1)(iii) of this section concerning point of service care.

(vii) In the case of care for which preauthorization is not required under paragraph (n)(2)(iv) of this section, the Director may authorize a managed care support contractor to offer a voluntary

pre-authorization program to enable beneficiaries and providers to confirm covered benefit status and/or medical necessity or to understand the criteria that will be used by the managed care support contractor to adjudicate the claim associated with the proposed care. A network provider may not be required to use such a program with respect to a referral.

(3) *Restrictions on the use of providers.* The requirements of this paragraph (n)(3) shall be applicable to health care utilization under TRICARE Prime, except in cases of emergency care and under point-of-service option (see paragraph (n)(4) of this section).

(i) Prime enrollees must obtain all primary health care from the primary care manager or from another provider to which the enrollee is referred by the primary care manager or otherwise authorized.

(ii) For any necessary specialty care and non-emergent inpatient care, the primary care manager or other authorized individual will assist in making an appropriate referral.

(iii) Though referrals for specialty care are generally the responsibility of the primary care managers, subject to discretion exercised by the TRICARE Regional Directors, and established in regional policy or memoranda of understanding, specialist providers may be permitted to refer patients for additional specialty consultation appointment services within the TRICARE contractor's network without prior authorization by primary care managers.

(iv) The following procedures will apply to health care referrals under TRICARE Prime:

(A) The first priority for referral for specialty care or inpatient care will be to the local MTF (or to any other MTF in which catchment area the enrollee resides).

(B) If the local MTF(s) are unavailable for the services needed, but there is another MTF at which the needed services can be provided, the enrollee may be required to obtain the services at that MTF. However, this requirement will only apply to the extent that the enrollee was informed at the time of (or prior to) enrollment that mandatory referrals might be made to the MTF involved for the service involved.

(C) If the needed services are available within civilian preferred provider network serving the area, the enrollee may be required to obtain the services from a provider within the network. Subject to availability, the enrollee will have the freedom to choose a provider from among those in the network.

(D) If the needed services are not available within the civilian preferred provider network serving the area, the enrollee may be required to obtain the services from a designated civilian provider outside the area. However, this requirement will only apply to the extent that the enrollee was informed at the time of (or prior to) enrollment that mandatory referrals might be made to the provider involved for the service involved (with the provider and service either identified specifically or in connection with some appropriate classification).

(E) In cases in which the needed health care services cannot be provided pursuant to the procedures identified in paragraphs (n)(3)(iv)(A) through (D) of this section, the enrollee will receive authorization to obtain services from a TRICARE-authorized civilian provider(s) of the enrollee's choice not affiliated with the civilian preferred provider network.

(iv) When Prime is operating in non-catchment areas, the requirements in paragraphs (n)(3)(iv)(B) through (E) of this section shall apply.

(4) *Point-of-service option.* TRICARE Prime enrollees retain the freedom to obtain services from civilian providers on a point-of service basis. Any health care services obtained by a Prime enrollee, but not obtained in accordance with the rules and procedures of Prime, will be covered by the point-of-service option. In such cases, all requirements applicable to health benefits under §199.4 shall apply, except that there shall be higher deductible and cost sharing requirements (as set forth in paragraph (l)(1)(iii)) of this section). However, Prime rules may cover such services if the enrollee did not know and could not reasonably have been expected to know that the services were not obtained in accordance with the utilization management rules and procedures of Prime.

(5) *Prime travel benefit.* In accordance with guidelines issues by the Assistant Secretary of Defense (Health Affairs), certain travel expenses may be reimbursed when a TRICARE Prime enrollee is referred by the primary care manager for medically necessary specialty care more than 100 miles away from the primary care manager's office. Such guidelines shall be consistent with appropriate provisions of generally applicable Department of Defense rules and procedures governing travel expenses.

(o) *TRICARE program enrollment procedures.* There are certain requirements pertaining to procedures for enrollment in TRICARE Prime, TRICARE Select, and TRICARE Prime Remote for Active Duty Family Members. (These procedures do not apply to active duty members, whose enrollment is mandatory and automatic.)

(1) *Annual open season enrollment.* (i) As a general rule, enrollment (or a modification to a previous enrollment) must occur during the open season period prior to the plan year, which is on a calendar year basis. The open season enrollment period will be of at least 30 calendar days duration. An enrollment choice will be applicable for the plan year.

(ii) Open season enrollment procedures may include automatic re-enrollment in the same plan for the next plan year for enrollees or sponsors that will occur in the event the enrollee does not take other action during the open season period.

(2) *Exceptions to the calendar year enrollment process.* The Director will identify certain qualifying events that may be the basis for a change in enrollment status during a plan year, such as a change in eligibility status, marriage, divorce, birth of a new family member, relocation, loss of other health insurance, or other events. In the case of such an event, a beneficiary eligible to enroll in a plan may newly enroll, disenroll, or modify a previous enrollment during the plan year. Initial payment of the applicable enrollment fee shall be collected for new enrollments in accordance with established procedures. Any applicable enrollment fee will be pro-rated. A beneficiary who dis-enrolls without enrolling at the same time in another plan is not eligible to enroll in a plan later in the same plan year unless there is another qualifying event. A beneficiary who is dis-enrolled for failure to pay a required enrollment fee installment is not eligible to re-enroll in a plan later in the same plan year unless there is another qualifying event. Generally, the effective date of coverage will coincide with the date of the qualifying event.

(3) *Installment payments of enrollment fee.* The Director will establish procedures for installment payments of enrollment fees.(4) *Effect of failure to enroll.* Beneficiaries eligible to enroll in Prime or Select and who do not enroll will no longer have coverage under the TRICARE program until the next annual open season enrollment or they have a qualifying event, except that they do not lose any statutory eligibility for space-available care in military medical treatment facilities. There is a limited grace period exception to this enrollment requirement for calendar year 2018, as provided in section 701(d)(3) of the National Defense Authorization Act for Fiscal Year 2017.

(5) *Automatic enrollment for certain dependents.* Under 10 U.S.C. 1097a, in the case of dependents of active duty members in the grade of E–1 to E–4, such dependents who reside in a catchment area of a military treatment facility shall be enrolled in TRICARE Prime. The Director may provide for the automatic enrollment in TRICARE Prime for such dependents of active duty members in the grade of E–5 and higher. In any case of automatic enrollment under this paragraph (o)(5), the member will be provided written notice and the automatic enrollment may be cancelled at the election of the member.

(6) *Grace periods.* The Director may make provisions for grace periods for enrollment-related actions to facilitate effective operation of the enrollment program.

(p) *Civilian preferred provider networks.* A major feature of the TRICARE program is the civilian preferred provider network.

(1) *Status of network providers.* Providers in the preferred provider network are not employees or agents of the Department of Defense or the

United States Government. Although network providers must follow numerous rules and procedures of the TRICARE program, on matters of professional judgment and professional practice, the network provider is independent and not operating under the direction and control of the Department of Defense.

(2) *Utilization management policies.* Preferred providers are required to follow the utilization management policies and procedures of the TRICARE program. These policies and procedures are part of discretionary judgments by the Department of Defense regarding the methods of delivering and financing health care services that will best achieve health and economic policy objectives.

(3) *Quality assurance requirements.* A number of quality assurance requirements and procedures are applicable to preferred network providers. These are for the purpose of assuring that the health care services paid for with government funds meet the standards called for in the contract and provider agreement.

(4) *Provider qualifications.* All preferred providers must meet the following qualifications:

(i) They must be TRICARE-authorized providers and TRICARE- participating providers. In addition, a network provider may not require payment from the beneficiary for any excluded or excludable services that the beneficiary received from the network provider (*i.e.*, the beneficiary will be held harmless) except as follows:

(A) If the beneficiary did not inform the provider that he or she was a TRICARE beneficiary, the provider may bill the beneficiary for services provided.

(B) If the beneficiary was informed in writing that the specific services were excluded or excludable from TRICARE coverage and the beneficiary agreed in writing, in advance of the services being provided, to pay for the services, the provider may bill the beneficiary.

(ii) All physicians in the preferred provider network must have staff privileges in a hospital accredited by The Joint Commission (TJC) or other accrediting body determined by the Director. This requirement may be waived in any case in which a physician's practice does not include the need for admitting privileges in such a hospital, or in locations where no accredited facility exists. However, in any case in which the requirement is waived, the physician must comply with alternative qualification standards as are established by the Director.

(iii) All preferred providers must agree to follow all quality assurance, utilization management, and patient referral procedures established pursuant to this section, to make available to designated DoD utilization management or quality monitoring contractors medical records and other pertinent records, and to authorize the release of information to MTF Commanders regarding such quality assurance and utilization management activities.

(iv) All preferred network providers must be Medicare participating providers, unless this requirement is waived based on extraordinary circumstances. This requirement that a provider be a Medicare participating provider does not apply to providers who not eligible to be participating providers under Medicare.

(v) The network provider must be available to all TRICARE beneficiaries.

(vi) The provider must agree to accept the same payment rates negotiated for Prime enrollees for any person whose care is reimbursable by the Department of Defense, including, for example, Select participants, supplemental care cases, and beneficiaries from outside the area.

(vii) All preferred providers must meet all other qualification requirements, and agree to comply with all other rules and procedures established for the preferred provider network.

(viii) In locations where TRICARE Prime is not available, a TRICARE provider network will, to the extent practicable, be available for TRICARE Select enrollees. In these locations, the minimal requirements for network participation are those set forth in paragraph (p)(4)(i) of this section. Other requirements of this paragraph (p) will apply unless waived by the Director.

(5) *Access standards.* Preferred provider networks will have attributes of size, composition, mix of providers and

geographical distribution so that the networks, coupled with the MTF capabilities (when applicable), can adequately address the health care needs of the enrollees. In the event that a Prime enrollee seeks to obtain from the managed care support contractor an appointment for care but is not offered an appointment within the access time standards from a network provider, the enrollee will be authorized to receive care from a non-network provider without incurring the additional fees associated with point-of-service care. The following are the access standards:

(i) Under normal circumstances, enrollee travel time may not exceed 30 minutes from home to primary care delivery site unless a longer time is necessary because of the absence of providers (including providers not part of the network) in the area.

(ii) The wait time for an appointment for a well-patient visit or a specialty care referral shall not exceed four weeks; for a routine visit, the wait time for an appointment shall not exceed one week; and for an urgent care visit the wait time for an appointment shall generally not exceed 24 hours.

(iii) Emergency services shall be available and accessible to handle emergencies (and urgent care visits if not available from other primary care providers pursuant to paragraph (p)(5)(ii) of this section), within the service area 24 hours a day, seven days a week.

(iv) The network shall include a sufficient number and mix of board certified specialists to meet reasonably the anticipated needs of enrollees. Travel time for specialty care shall not exceed one hour under normal circumstances, unless a longer time is necessary because of the absence of providers (including providers not part of the network) in the area. This requirement does not apply under the Specialized Treatment Services Program.

(v) Office waiting times in non-emergency circumstances shall not exceed 30 minutes, except when emergency care is being provided to patients, and the normal schedule is disrupted.

(6) *Special reimbursement methods for network providers.* The Director, may establish, for preferred provider networks, reimbursement rates and methods different from those established pursuant to § 199.14. Such provisions may be expressed in terms of percentage discounts off CHAMPUS allowable amounts, or in other terms. In circumstances in which payments are based on hospital-specific rates (or other rates specific to particular institutional providers), special reimbursement methods may permit payments based on discounts off national or regional prevailing payment levels, even if higher than particular institution-specific payment rates.

(q) *Preferred provider network establishment.* (1) The any qualified provider method may be used to establish a civilian preferred provider network. Under this method, any TRICARE-authorized provider that meets the qualification standards established by the Director, or designee, may become a part of the preferred provider network. Such standards must be publicly announced and uniformly applied. Also under this method, any provider who meets all applicable qualification standards may not be excluded from the preferred provider network. Qualifications include:

(i) The provider must meet all applicable requirements in paragraph (p)(4) of this section.

(ii) The provider must agree to follow all quality assurance and utilization management procedures established pursuant to this section.

(iii) The provider must be a participating provider under TRICARE for all claims.

(iv) The provider must meet all other qualification requirements, and agree to all other rules and procedures, that are established, publicly announced, and uniformly applies by the Director (or other authorized official).

(v) The provider must sign a preferred provider network agreement covering all applicable requirements. Such agreements will be for a duration of one year, are renewable, and may be canceled by the provider or the Director (or other authorized official) upon appropriate notice to the other party.

The Director shall establish an agreement model or other guidelines to promote uniformity in the agreements.

(2) In addition to the above requirements, the Director, or designee, may establish additional categories of preferred providers of high quality/high value that require additional qualifications.

(r) *General fraud, abuse, and conflict of interest requirements under TRICARE program.* All fraud, abuse, and conflict of interest requirements for the basic CHAMPUS program, as set forth in this part (see especially applicable provisions of § 199.9) are applicable to the TRICARE program.

(s) [Reserved]

(t) *Inclusion of Department of Veterans Affairs Medical Centers in TRICARE networks.* TRICARE preferred provider networks may include Department of Veterans Affairs health facilities pursuant to arrangements, made with the approval of the Assistant Secretary of Defense (Health Affairs), between those centers and the Director, or designated TRICARE contractor.

(u) *Care provided outside the United States.* The TRICARE program is not automatically implemented in all respects outside the United States. This paragraph (u) sets forth the provisions of this section applicable to care received outside the United States under the following TRICARE health plans.

(1) *TRICARE Prime.* The Director may, in conjunction with implementation of the TRICARE program, authorize a special Prime program for command sponsored dependents of active duty members who accompany the members in their assignments in foreign countries. Under this special program, a preferred provider network may be established through contracts or agreements with selected health care providers. Under the network, Prime covered services will be provided to the enrolled covered dependents subject to applicable Prime deductibles, copayments, and point-of-service charges. To the extent practicable, rules and procedures applicable to TRICARE Prime under this section shall apply unless specific exemptions are granted in writing by the Director. The use of this authority by the Director for any particular geographical area will be published on the primary publicly available Internet Web site of the Department and on the publicly available Internet Web site of the managed care support contractor that has established the provider network under the TRICARE program. Published information will include a description of the preferred provider network program and other pertinent information. The Director shall also issue policies, instructions, and guidelines necessary to implement this special program.

(2) *TRICARE Select.* The TRICARE Select option shall be available outside the United States except that a preferred provider network of providers shall only be established in areas where the Director determines that it is economically in the best interest of the Department of Defense. In such a case, the Director shall establish a preferred provider network through contracts or agreements with selected health care providers for eligible beneficiaries to receive covered benefits subject to the enrollment and cost-sharing amounts applicable to the specific category of beneficiary. When an eligible beneficiary, other than a TRICARE for Life beneficiary, receives covered services from an authorized TRICARE non-network provider, including in areas where a preferred provider network has not been established by the Director, the beneficiary shall be subject to cost-sharing amounts applicable to out-of-network care. To the extent practicable, rules and procedures applicable to TRICARE Select under this section shall apply unless specific exemptions are granted in writing by the Director. The use of this authority by the Director to establish a TRICARE preferred provider network for any particular geographical area will be published on the primary publicly available Internet Web site of the Department and on the publicly available Internet Web site of the managed care support contractor that has established the provider network under the TRICARE program. Published information will include a description of the preferred provider network program and other pertinent information. The Director shall also issue policies, instructions, and guidelines necessary to implement this special program.

(3) *TRICARE for Life*. The TRICARE for Life (TFL) option shall be available outside the United States. Eligible TFL beneficiaries may receive covered services and supplies authorized under § 199.4, subject to the applicable catastrophic cap, deductibles and cost-shares under § 199.4, whether received from a network provider or any authorized TRICARE provider not in a preferred provider network. However, if a TFL beneficiary receives covered services from a PPN provider, the beneficiary's out-of-pocket costs will generally be lower.

(v) *Administration of the TRICARE program in the state of Alaska*. In view of the unique geographical and environmental characteristics impacting the delivery of health care in the state of Alaska, administration of the TRICARE program in the state of Alaska will not include financial underwriting of the delivery of health care by a TRICARE contractor. All other provisions of this section shall apply to administration of the TRICARE program in the state of Alaska as they apply to the other 49 states and the District of Columbia.

(w) *Administrative procedures*. The Assistant Secretary of Defense (Health Affairs), the Director, and MTF Commanders (or other authorized officials) are authorized to establish administrative requirements and procedures, consistent with this section, this part, and other applicable DoD Directives or Instructions, for the implementation and operation of the TRICARE program.

[82 FR 45448, Sept. 29, 2017, as amended at 84 FR 4333, Feb. 15, 2019; 85 FR 27927, May 12, 2020; 87 FR 33014, June 1, 2022]

## § 199.18 [Reserved]

## § 199.20 Continued Health Care Benefit Program (CHCBP).

(a) *Purpose*. The CHCBP is a premium-based temporary health care coverage program, authorized by 10 U.S.C. 1078a, and available to individuals who meet the eligibility and enrollment criteria as set forth in paragraph (d)(1) of this section. The CHCBP is not part of the TRICARE program. However, as set forth in this section, it functions under similar rules and procedures to the TRICARE Select program. Because the purpose of the CHCBP is to provide a continuation health care benefit for Department of Defense and the other uniformed services beneficiaries losing eligibility, it will be administered so that it appears, to the maximum extent practicable, to be part of the TRICARE Select program. Medical coverage under this program will be the same as the benefits payable under the TRICARE Select program. There is a cost for enrollment to the CHCBP and these premium costs must be paid by CHCBP enrollees before any care may be cost shared.

(b) *General provisions*. Except for any provisions the Director of the TRICARE Management Activity may exclude, the general provisions of § 199.1 shall apply to the CHCBP as they do to TRICARE.

(c) *Definitions*. Except as may be specifically provided in this section, to the extent terms defined in § 199.2 are relevant to the administration of the CHCBP, the definitions contained in that section shall apply to the CHCBP as they do to the TRICARE Select program.

(d) *Eligibility and enrollment*. (1) *Eligibility*, Enrollment in the CHCBP is open to any individual, except as noted in this section, who:

(i) Ceases to meet the requirements for eligibility under 10 U.S.C. chapter 55 or 10 U.S.C. 1145, and

(ii) Who on the day before they cease to meet the eligibility requirements for such care they were covered under a health benefit plan under 10 U.S.C. chapter 55 or transitional healthcare under 10 U.S.C. 1145, and

(iii) Who would otherwise not be eligible for any benefits under 10 U.S.C. chapter 55 or 10 U.S.C. 1145 except for CHCBP.

(2) *Exceptions*. The following individuals are not eligible to enroll in CHCBP:

(i) Members of uniformed services, who are discharged or released from active duty either voluntarily or involuntarily under conditions that are adverse.

(ii) Individuals who lost their eligibility or entitlement to care under 10 U.S.C. chapter 55 or 10 U.S.C. 1145 before October 1, 1994.

(iii) Individuals who are locked out of other TRICARE programs per that program's requirements.

(3) *Effective date.* Eligibility in the CHCBP is limited to individuals who lost their entitlement to benefits under the MHS on or after October 1, 1994. The effective date of their coverage under CHCBP shall begin on the day after they cease to be eligible for care under 10 U.S.C. chapter 55 or 10 U.S.C. 1145.

(4) *Notification of eligibility.*

(i) The Department of Defense and the other uniformed services (National Oceanic and Atmospheric Administration (NOAA), Public Health Service (PHS), and Coast Guard) will notify persons in the uniformed services eligible to receive health benefits under the CHCBP. In the case of a member who becomes (or will become) eligible for continued coverage, the Department of Defense shall notify the member of their rights for coverage as part of preseparation counseling conducted under 10 U.S.C. 1142.

(ii) In the case of a dependent of a member or former member who become eligible for continued coverage under paragraph (d)(1)(ii) of this section:

(A) The member or former member may submit to the CHCBP contractor a notice with supporting documentation of the dependent's change in status (including the dependent's name, address, and such other information needed); and

(B) The CHCBP contractor, within fourteen (14) days after receiving such information, will inform the dependent of the dependent's rights under 10 U.S.C. 1142.

(iii) In the case of a former spouse of a member or former member who becomes eligible for continued coverage, the member, former member or former spouse may submit to the CHCBP contractor a notice of the former spouse's change in status. The CHCBP contractor within fourteen (14) days after receiving such information will notify the individual of their potential eligibility for CHCBP.

(5) *Election of coverage.* In order to obtain coverage under the CHCBP, a written election by the eligible beneficiary must be made within a prescribed time period.

(i) In the case of a member discharged or released from active duty or full-time National Guard duty (whether voluntarily or involuntarily), or a RC member formerly eligible for care under 10 U.S.C. chapter 55, the written election shall be submitted to the CHCBP contractor before the end of the 60-day period beginning on the later of:

(A) The date of the discharge or release of the member; or

(B) The date that the period of transitional health care applicable to the member under 10 U.S.C. 1145(a) ends; or

(C) The date the member receives the notification required in paragraph (d)(3) of this section.

(ii) In the case of a child who ceases to meet the requirements for being an unremarried dependent child of a member or former member under 10 U.S.C. 1072(2)(D) or an unmarried dependent of a member or former member of the uniformed services under 10 U.S.C. 1072(2)(I), the written election shall be submitted to the CHCBP contractor before the end of the 60-day period beginning on the later of:

(A) The date that the dependent ceases to meet the definition of a dependent under 10 U.S.C. 1072(2)(D) or 10 U.S.C. 1072(2)(I); or

(B) The date that the dependent receives the notification required in paragraph (d)(3) of this section,

(iii) In the case of former spouse of a member or former member, the written election shall be submitted to the CHCBP contractor before the end of the 60-day period beginning on the date as of which the former spouse first ceases to meet the requirements for being considered a dependent under 10 U.S.C. 1072(2).

(iv) In the case of an unmarried surviving spouse of a member or former member of the uniformed services who on the day before the death of the member or former member was covered under 10 U.S.C. chapter 55 or 10 U.S.C. 1145(a), the written election shall be submitted to the CHCBP contractor within 60 days of the date of the member or former member's death.

(v) A member of the uniformed services who is eligible for enrollment under paragraph (d)(1) of this section may elect self-only or family coverage.

Family members who may be included in such family coverage are the spouse and children of the member.

(vi) All other categories eligible for enrollment under paragraph (d)(1) of this section must elect self-only coverage.

(6) *Enrollment*. To enroll in the CHCBP, an eligible individual must submit the completed enrollment form designated by the Director, TRICARE as well as any documentation as requested on the enrollment form to verify the applicant's eligibility for enrolling in CHCBP, and payment to cover the quarter's premium. The CHCBP contractor may request additional information and documentation to confirm the applicant's eligibility for CHCBP.

(7) *Period of coverage*. Except as noted below CHCBP coverage may not extend beyond 18 months from the date the individual becomes eligible for CHCBP. Although beneficiaries have sixty (60) days to elect coverage under the CHCBP, upon enrolling, the period of coverage must begin the day after entitlement or eligibility to a military health care plan ends as though no break in coverage had occurred notwithstanding the date the enrollment form with any applicable premium is submitted.

(i) Exceptions:

(A) In the case of a child of a member or former member, the date which is 36 months after the date on which the person first ceases to meet the requirements for being considered an unmarried dependent child under 10 U.S.C. 1072(2)(D) or 10 U.S.C. 1072(2)(I).

(B) In the case of an unremarried former spouse (as this term is defined in 10 U.S.C. 1072(2)(G) or (H)) of a member or former member, the date which is 36 months after the later of:

(*1*) The date on which the final decree of divorce, dissolution, or annulment occurs; or

(*2*) If applicable, the date the one-year extension of dependency under 10 U.S.C. 1072(2)(H) expires.

(C) In the case of an unremarried surviving spouse (widow or widower) (under 10 U.S.C. 1072(2)(B) or (C)) of a member or former member of the uniformed services who is not otherwise eligible for care under 10 U.S.C. chapter 55, the date which is 36 months after the date the surviving spouse becomes ineligible under 10 U.S.C chapter 55 or 10 U.S.C. 1145(a).

(D) In the case of a former spouse of a member or former member (other than the former spouse whose marriage was dissolved after the separation of the member from the service unless such separation was by retirement), the period of coverage under the CHCBP is unlimited, if former spouse:

(*1*) Has not remarried before age of 55 after the marriage to the member or former member was dissolved; and

(*2*) Was eligible for TRICARE as a dependent or enrolled in CHCBP at any time during the 18 month period before the date of the divorce, dissolution, or annulment; and

(*3*) Is receiving a portion of the retired or retainer pay of a member or former member or an annuity based on the retainer pay of the member; or

(*4*) Has a court order for payment of any portion of the retired or retainer pay or has a written agreement (whether voluntary or pursuant to a court order) which provides for an election by the member or former member to provide an annuity to the former spouse.

(E) For the beneficiary who becomes eligible for the CHCBP by ceasing to meet the requirements for being considered an unmarried dependent child of a member or former member, health care coverage may not extend beyond the date which is 36 months after the date the member becomes ineligible for medical and dental care under 10 U.S.C. 1074(a) and any transitional health care under 10 U.S.C. 1145(a).

(e) *CHCBP benefits*—(1) *In general*. Except as provided in paragraph (e)(2) of this section, the provisions of § 199.4 shall apply to the CHCBP as they do to TRICARE Select under § 199.17.

(2) *Exceptions*. The following provisions of § 199.4 are not applicable to the CHCBP:

(i) Section 199.4(a)(2) concerning eligibility.

(ii) All provisions regarding requirements to use facilities of the uniformed services because CHCBP enrollees are not eligible to use those facilities.

(3) *Beneficiary liability*. For purposes of CHCBP coverage, the beneficiary deductible, catastrophic cap and cost share provisions of the TRICARE Select plan applicable to Group B beneficiaries under §199.17(l)(2)(ii) shall apply based on the category of beneficiary (*e.g.*, Active Duty Family Member or Retiree Family) to which the CHCBP enrollee last belonged, except that for separating active duty members, amounts applicable to TRICARE Select Active Duty Family Members shall apply. The premium under paragraph (q) of this section applies instead of any TRICARE Select plan enrollment fee under §199.17.

(f) *Authorized providers*. The provisions of §199.6 shall apply to the CHCBP as they do to TRICARE Select program.

(g) *Claims submission, review, and payment*. The provisions of §199.7 shall apply to the CHCBP as they do to TRICARE Select program except no provisions regarding nonavailability statements shall apply.

(h) *Double coverage*. The provisions of §199.8 shall apply to the CHCBP as they do to TRICARE Select program.

(i) *Administrative remedies for fraud, abuse, and conflict of interest*. The provisions of §199.9 shall apply to the CHCBP as they do to TRICARE Select program.

(j) *Appeal and hearing procedures*. The provisions of §199.10 shall apply to the CHCBP as they do to TRICARE Select program.

(k) *Overpayments recovery*. The provisions of §199.11 shall apply to the CHCBP as they do to TRICARE Select program.

(l) *Third party recoveries*. The provisions of §199.12 shall apply to the CHCBP as they do to TRICARE Select program.

(m) *Provider reimbursement methods*. The provisions of §199.14 shall apply to the CHCBP as they do to TRICARE Select program.

(n) *Quality and Utilization Review Peer Review Organization Program*. The provisions of §199.15 shall apply to the CHCBP as they do to TRICARE Select program.

(o) [Reserved]

(p) *Special programs not applicable*—(1) *In general*. Special programs established under this part that are not part of the TRICARE Select program are not, unless specifically provided in this section, available to participants in the CHCBP.

(2) *Examples*. The special programs referred to in paragraph (p)(1) of this section include but are not limited to:

(i) The Extended Care Health Option under §199.5;

(ii) The TRICARE Dental Program or Retiree Dental Program under §199.13 and 199.22 respectively;

(iii) The Supplemental Health Care Program under §199.16; and

(iv) The TRICARE Prime Program under §199.17.

(q) *Premiums*—(1) *Rates*. Premium rates will be established by the Assistant Secretary of Defense (Health Affairs) for two rate groups—individual and family. Eligible beneficiaries will select the level of coverage they require at the time of initial enrollment (either individual or family) and pay the appropriate premium payment. The rates are based on Federal Employees Health Benefits Program employee and agency contributions required for a comparable health benefits plan, plus an administrative fee. The administrative fee, not to exceed ten percent of the basic premium amount, shall be determined based on actual expected administrative costs for administration of the program. Premiums may be revised annually and shall be published when the premium amount is changed. Premiums will be paid by enrollees quarterly.

(2) *Effects of failure to make premium payments*. Failure by enrollees to submit timely and proper premium payments will result in denial of continued enrollment and denial of payment of medical claims. Premium payments that are late thirty (30) days or more past the start of the quarter for which payment is due will result in the termination of beneficiary enrollment. Beneficiaries denied continued enrollment due to lack of premium payments will not be allowed to reenroll. In such a case, benefit coverage will cease at the end of the ninety (90) day period for which a premium payment was received. Enrollees will be held liable for medical costs incurred after losing eligibility.

(r) *Procedures.* The Director, TRICARE Management Activity, may establish other rules and procedures for the administration of the CHCBP.

[76 FR 57639, Sept. 16, 2011, as amended at 82 FR 45457, Sept. 29, 2017]

### § 199.21 TRICARE Pharmacy Benefits Program.

(a) General—(1) *Statutory authority.* Title 10, U.S. Code, Section 1074g requires that the Department of Defense establish an effective, efficient, integrated pharmacy benefits program for the Military Health System. This law is independent of a number of sections of Title 10 and other laws that affect the benefits, rules, and procedures of TRICARE, resulting in changes to the rules otherwise applicable to TRICARE Prime, Standard, and Extra.

(2) *Pharmacy benefits program.* (i) *Applicability.* The pharmacy benefits program, which includes the uniform formulary and its associated tiered copayment structure, is applicable to all of the uniformed services. Geographically, except as specifically provided in paragraph (a)(2)(ii) of this section, this program is applicable to all 50 states and the District of Columbia, Guam, Puerto Rico, and the Virgin Islands. In addition, if authorized by the Assistant Secretary of Defense (Health Affairs) (ASD(HA)), the TRICARE pharmacy benefits program may be implemented in areas outside the 50 states and the District of Columbia, Guam, Puerto Rico, and the Virgin Islands. In such case, the ASD (HA) may also authorize modifications to the pharmacy benefits program rules and procedures as may be appropriate to the area involved.

(ii) *Applicability exception.* The pharmaceutical benefit under the TRICARE smoking cessation program under § 199.4(e)(30) is available to TRICARE beneficiaries who are not entitled to Medicare benefits authorized under Title XVIII of the Social Security Act. Except as noted in § 199.4(e)(30), the smoking cessation program, including the pharmaceutical benefit, is not applicable or available to beneficiaries who reside overseas, including the U. S. territories of Guam, Puerto Rico, and the Virgin Islands, except that under the authority of § 199.17 active duty service members and active duty dependents enrolled in TRICARE Prime residing overseas, including the U. S. territories of Guam, Puerto Rico, and the Virgin Islands, shall have access to smoking cessation pharmaceuticals through either an MTF or the TMOP program where available.

(3) *Uniform formulary.* The pharmacy benefits program features a uniform formulary of pharmaceutical agents as defined in § 199.2.

(i) The uniform formulary will assure the availability of pharmaceutical agents in the complete range of therapeutic classes authorized as basic program benefits.

(ii) As required by 10 U.S.C. 1074g(a)(2) and implemented under the procedures established by paragraphs (e) and (f) of this section, pharmaceutical agents in each therapeutic class are selected for inclusion on the uniform formulary based upon the relative clinical effectiveness and cost effectiveness of the agents in such class. If a pharmaceutical agent in a therapeutic class is determined by the Department of Defense Pharmacy and Therapeutics Committee not to have a significant, clinically meaningful therapeutic advantage in terms of safety, effectiveness, or clinical outcome over other pharmaceutical agents included on the uniform formulary, the Committee may recommend it be classified as a non-formulary agent. In addition, if the evaluation by the Pharmacy and Therapeutics Committee concludes that a pharmaceutical agent in a therapeutic class is not cost effective relative to other pharmaceutical agents in that therapeutic class, considering costs, safety, effectiveness, and clinical outcomes, the Committee may recommend it be classified as a non-formulary agent.

(iii) Pharmaceutical agents which are used exclusively in medical treatments or procedures that are expressly excluded from the TRICARE benefit by statute or regulation will not be considered for inclusion on the uniform formulary. Excluded pharmaceutical agents shall not be available as non-formulary agents, nor will they be cost-shared under the TRICARE pharmacy benefits program.

(b) *Definitions*. For most definitions applicable to the provisions of this section, refer to § 199.2. The following definitions apply only to this section:

(1) *Clinically necessary*. Also referred to as clinical necessity. Sufficient evidence submitted by a beneficiary or provider on behalf of the beneficiary that establishes that one or more of the following conditions exist: The use of formulary pharmaceutical agents is contraindicated; the patient experiences significant adverse effects from formulary pharmaceutical agents in the therapeutic class, or is likely to experience significant adverse effects from formulary pharmaceutical agents in the therapeutic class; formulary pharmaceutical agents result in therapeutic failure, or the formulary pharmaceutical agent is likely to result in therapeutic failure; the patient previously responded to a non-formulary pharmaceutical agent and changing to a formulary pharmaceutical agent would incur an unacceptable clinical risk; or there is no alternative pharmaceutical agent on the formulary.

(2) *Therapeutic class*. A group of pharmaceutical agents that are similar in chemical structure, pharmacological effect, and/or clinical use.

(3) *Over-the-counter drug*. A drug that is not subject to section 503(b)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 353(b)(1)).

(c) *Department of Defense Pharmacy and Therapeutics Committee*—(1) *Purpose*. The Department of Defense Pharmacy and Therapeutics Committee is established by 10 U.S.C. 1074g to assure that the selection of pharmaceutical agents for the uniform formulary is based on broadly representative professional expertise concerning relative clinical and cost effectiveness of pharmaceutical agents and accomplishes an effective, efficient, integrated pharmacy benefits program.

(2) *Composition*. As required by 10 U.S.C. 1074g(b), the committee includes representatives of pharmacies of the uniformed services facilities and representatives of providers in facilities of the uniformed services. Committee members will have expertise in treating the medical needs of the populations served through such entities and in the range of pharmaceutical and biological medicines available for treating such populations.

(3) *Executive Council*. The Pharmacy and Therapeutics Committee may have an Executive Council, composed of those voting and non-voting members of the Committee who are military or civilian employees of the Department of Defense. The function of the Executive Council is to review and analyze issues relating to the operation of the uniform formulary, including issues of an inherently governmental nature, procurement sensitive information, and matters affecting military readiness. The Executive Council presents information to the Pharmacy and Therapeutics Committee, but is not authorized to act for the Committee.

(d) *Uniform Formulary Beneficiary Advisory Panel*. As required by 10 U.S.C. 1074g(c), a Uniform Formulary Beneficiary Advisory Panel reviews and comments on the development of the uniform formulary. The Panel includes members that represent non-governmental organizations and associations that represent the views and interests of a large number of eligible covered beneficiaries, contractors responsible for the TRICARE retail pharmacy program, contractors responsible for the TRICARE mail-order pharmacy program, and TRICARE network providers. The panel will meet after each Pharmacy and Therapeutics Committee quarterly meeting. The Panel's comments will be submitted to the Director, TRICARE Management Activity. The Director will consider the comments before implementing the uniform formulary or any recommendations for change made by the Pharmacy and Therapeutics Committee. The Panel will function in accordance with the Federated Advisory Committee Act (5 U.S.C. App. 2).

(e) *Determinations regarding relative clinical and cost effectiveness for the selection of pharmaceutical agents for the uniform formulary*—(1) *Clinical effectiveness*. (i) It is presumed that pharmaceutical agents in a therapeutic class are clinically effective and should be included on the uniform formulary unless the Pharmacy and Therapeutics Committee finds by a majority vote that a pharmaceutical agent does not

have a significant, clinically meaningful therapeutic advantage in terms of safety, effectiveness, or clinical outcome over the other pharmaceutical agents included on the uniform formulary in that therapeutic class. This determination is based on the collective professional judgment of the DoD Pharmacy and Therapeutics Committee and consideration of pertinent information from a variety of sources determined by the Committee to be relevant and reliable. The DoD Pharmacy and Therapeutics Committee has discretion based on its collective professional judgment in determining what sources should be reviewed or relied upon in evaluating the clinical effectiveness of a pharmaceutical agent in a therapeutic class.

(ii) Sources of information may include but are not limited to:

(A) Medical and pharmaceutical textbooks and reference books;

(B) Clinical literature;

(C) U.S. Food and Drug Administration determinations and information;

(D) Information from pharmaceutical companies;

(E) Clinical practice guidelines, and

(F) Expert opinion.

(iii) The DoD Pharmacy and Therapeutics Committee will evaluate the relative clinical effectiveness of pharmaceutical agents within a therapeutic class by considering information about their safety, effectiveness, and clinical outcome.

(iv) Information considered by the Committee may include but is not limited to:

(A) U.S. Food and Drug Administration approved and other studied indications;

(B) Pharmacology;

(C) Pharmacokinetics;

(D) Contraindications;

(E) Warnings/precautions;

(F) Incidence and severity of adverse effects;

(G) Drug to drug, drug to food, and drug to disease interactions;

(H) Availability, dosing, and method of administration;

(I) Epidemiology and relevant risk factors for diseases/conditions in which the pharmaceutical agents are used;

(J) Concomitant therapies;

(K) Results of safety and efficacy studies;

(L) Results of effectiveness/clinical outcomes studies, and

(M) Results of meta-analyses.

(2) Cost effectiveness. (i) In considering the relative cost effectiveness of pharmaceutical agents in a therapeutic class, the DoD Pharmacy and Therapeutics Committee shall evaluate the costs of the agents in relation to the safety, effectiveness, and clinical outcomes of the other agents in the class.

(ii) Information considered by the Committee concerning the relative cost effectiveness of pharmaceutical agents may include but is not limited to:

(A) Cost of the pharmaceutical agent to the Government;

(B) Impact on overall medical resource utilization and costs;

(C) Cost-efficacy studies;

(D) Cost-effectiveness studies;

(E) Cross-sectional or retrospective economic evaluations;

(F) Pharmacoeconomic models;

(G) Patent expiration dates;

(H) Clinical practice guideline recommendations, and

(I) Existence of existing or proposed blanket purchase agreements, incentive price agreements, or contracts.

(3) *Special rules for best clinical effectiveness.* (i) Under the authority of 10 U.S.C. 1074g(a)(10), the Pharmacy and Therapeutics Committee may recommend and the Director may, after considering the comments and recommendations of the Beneficiary Advisory Panel, approve special uniform formulary actions to encourage use of pharmaceutical agents that provide the best clinical effectiveness to covered beneficiaries and DoD, including consideration of better care, healthier people, and smarter spending. Such special actions may operate as exceptions to the normal rules and procedures under 10 U.S.C. 1074g(a)(2), (5) and (6) and the related provisions of this section.

(ii) Actions under paragraph (e)(3)(i) of this section may include a complete or partial exclusion from the pharmacy benefits program of any pharmaceutical agent the Director determines provides very little or no clinical effectiveness relative to similar agents to

covered beneficiaries and DoD. A partial exclusion under this paragraph may take the form (as one example) of a limitation on the clinical conditions, diagnoses, or indications for which the pharmaceutical agent may be prescribed. A partial exclusion may be implemented through any means recommended by the Pharmacy and Therapeutics Committee, including but not limited to preauthorization under paragraph (k) of this section. In the case of a partial exclusion, a pharmaceutical agent may be available on the non-formulary tier of the uniform formulary for limited purposes and for other purposes be excluded.

(iii) Actions under paragraph (e)(3)(i) of this section may also include giving preferential status to any non-generic pharmaceutical agent of the uniform formulary by treating it for purposes of cost-sharing as a generic product.

(f) *Evaluation of pharmaceutical agents for determinations regarding inclusion on the uniform formulary*. The DoD Pharmacy and Therapeutics Committee will periodically evaluate or re-evaluate individual pharmaceutical agents and therapeutic classes of pharmaceutical agents for determinations regarding inclusion or continuation on the uniform formulary. Such evaluation or re-evaluation may be prompted by a variety of circumstances including, but not limited to:

(1) Approval of a new pharmaceutical agent by the U.S. Food and Drug Administration;

(2) Approval of a new indication for an existing pharmaceutical agent;

(3) Changes in the clinical use of existing pharmaceutical agents;

(4) New information concerning the safety, effectiveness or clinical outcomes of existing pharmaceutical agents;

(5) Price changes;

(6) Shifts in market share;

(7) Scheduled review of a therapeutic class; and

(8) Requests from Pharmacy and Therapeutics Committee members, military treatment facilities, or other Military Health System officials.

(g) *Administrative procedures for establishing and maintaining the uniform formulary*—(1) *Pharmacy and Therapeutics Committee determinations*. Determinations of the Pharmacy and Therapeutics Committee are by majority vote and recorded in minutes of Committee meetings. The minutes set forth the determinations of the committee regarding the pharmaceutical agents selected for inclusion in the uniform formulary and summarize the reasons for those determinations. For any pharmaceutical agent (including maintenance medications) for which a recommendation is made that the status of the agent be changed from the formulary tier to the non-formulary tier of the uniform formulary, or that the agent requires a pre-authorization, the Committee shall also make a recommendation as to effective date of such change that will not be longer than 180 days from the final decision date but may be less. The minutes will include a record of the number of members voting for and against the Committee's action.

(2) *Beneficiary Advisory Panel*. Comments and recommendations of the Beneficiary Advisory Panel are recorded in minutes of Panel meetings. The minutes set forth the comments and recommendations of the Panel and summarize the reasons for those comments and recommendations. The minutes will include a record of the number of members voting for or against the Panel's comments and recommendations.

(3) *Uniform formulary final decisions*. The Director of the TRICARE Management Activity makes the final DoD decisions regarding the uniform formulary. Those decisions are based on the Director's review of the final determinations of the Pharmacy and Therapeutics Committee and the comments and recommendations of the Beneficiary Advisory Panel. No pharmaceutical agent may be designated as non-formulary on the uniform formulary unless it is preceded by such recommendation by the Pharmacy and Therapeutics Committee. The decisions of the Director of the TRICARE Management Activity are in writing and establish the effective date(s) of the uniform formulary actions.

(4) *Transition to the Uniform Formulary*. Beginning in Fiscal Year 2005, under an updated charter for the DoD P&T Committee, the committee shall

meet at least quarterly to review therapeutic classes of pharmaceutical agents and make recommendations concerning which pharmaceutical agents should be on the Uniform Formulary, the Basic Care Formulary (BCF), and Extended Core Formulary (ECF). The P&T Committee will review the classes in a methodical, but expeditious manner. During the transition period from the previous methodology of formulary management involving only the MTFs and the TMOP Program, previous decisions by the predecessor DoD P&T Committee concerning MTF and Mail Order Pharmacy Program formularies shall continue in effect. As therapeutic classes are reviewed under the new formulary management process, the processes established by this section shall apply.

(5) *Administrative procedure for newly approved drugs.* In the case of a newly approved innovator drug, other than a generic drug, the innovator drug will, not later than 120 days after the date of approval by the Food and Drug Administration, be added to the uniform formulary unless prior to that date the P&T Committee has recommended that the agent be listed as a non-formulary drug. If the Director, DHA subsequently approves that recommendation, the drug will be so listed. If the Director, DHA disapproves the recommendation to list the drug as non-formulary Third Tier, the drug will be then classified per the Director's decision. If, prior to the expiration of 120 days, the P&T Committee recommends that the agent be added to the uniform formulary and the recommendation is approved by the Director, DHA, that will be done as soon as feasible. Pending action under this paragraph (g)(5), the newly approved pharmaceutical agent will be considered to be in a classification pending status and will be available to beneficiaries under Third Tier terms applicable to all other non-formulary agents.

(h) *Obtaining pharmacy services under the retail network pharmacy benefits program.* —(1) *Points of service.* There are four outpatient pharmacy points of service:

(i) Military Treatment Facilities (MTFs);

(ii) Retail network pharmacies: Those are non-MTF pharmacies that are a part of the network established for TRICARE retail pharmacy services;

(iii) Retail non-network pharmacies: Those are non-MTF pharmacies that are not part of the network established for TRICARE retail pharmacy services, and

(iv) the TRICARE Mail Order Pharmacy (TMOP).

(2) *Availability of formulary pharmaceutical agents*—(i) *General.* Subject to paragraphs (h)(2)(ii) and (h)(2)(iii) of this section, formulary pharmaceutical agents are available under the Pharmacy Benefits Program from all points of service identified in paragraph (h)(1) of this section.

(ii) *Availability of formulary pharmaceutical agents at military treatment facilities (MTF).* Pharmaceutical agents included on the uniform formulary are available through facilities of uniformed services, consistent with the scope of health care services offered in such facilities and additional determinations by the P&T Committee of the relative clinical effectiveness and cost effectiveness, based on costs to the Program associated with providing the agents to beneficiaries. The BCF is a subset of the uniform formulary and is a mandatory component of formularies at all full-service MTF pharmacies. The BCF contains the minimum set of pharmaceutical agents that each full-service MTF pharmacy must have on its formulary to support the primary care scope of practice for Primary Care Manager enrollment sites. Limited-service MTF pharmacies (e.g., specialty pharmacies within an MTF or pharmacies servicing only active duty military members) are not required to include the entire BCF on their formularies, but may limit their formularies to those BCF agents appropriate to the needs of the patients they serve. An ECF may list preferred agents in drug classes other than those covered by the BCF. Among BCF and ECF agents, individual MTF formularies are determined by local P&T Committees based on the scope of health care services provided at the respective MTFs. All pharmaceutical agents on the local formulary of full-

service MTF pharmacies must be available to all categories of beneficiaries.

(iii) Pharmaceutical agents prescribed for smoking cessation are not available for coverage when obtained through a retail pharmacy. This includes network and non-network retail pharmacies.

(3) *Availability of non-formulary pharmaceutical agents*—(i) *General*. Non-formulary pharmaceutical agents are generally not available in military treatment facilities or in the retail point of service. They are available in the mail order program.

(ii) *Availability of non-formulary pharmaceutical agents at military treatment facilities*. Even when particular non-formulary agents are not generally available at military treatment facilities, they will be made available to eligible covered beneficiaries through the non-formulary special approval process as noted in this paragraph (h)(3)(ii) when there is a valid medical necessity for use of the non-formulary pharmaceutical agent.

(iii) *Availability of clinically appropriate non-formulary pharmaceutical agents to members of the Uniformed Services*. The pharmacy benefits program is required to assure the availability of clinically appropriate pharmaceutical agents to members of the uniformed services, including, where appropriate, agents not included on the uniform formulary. Clinically appropriate pharmaceutical agents will be made available to members of the Uniformed Services, including, where medical necessity has been validated, agents not included on the uniform formulary. MTFs shall establish procedures to evaluate the clinical necessity of prescriptions written for members of the uniformed services for pharmaceutical agents not included on the uniform formulary. If it is determined that the prescription is clinically necessary, the MTF will provide the pharmaceutical agent to the member.

(iv) *Availability of clinically appropriate pharmaceutical agents to other eligible beneficiaries at retail pharmacies or the TMOP*. Eligible beneficiaries will receive non-formulary pharmaceutical agents at the formulary cost-share when medical necessity has been established by the beneficiary and/or his/her provider. The peer review provisions of § 199.15 shall apply to the clinical necessity pre-authorization determinations. TRICARE may require that the time for review be expedited under the pharmacy benefits program.

(4) *Availability of vaccines/immunizations*. This paragraph (h)(4) applies to the following three immunizations: H1N1 vaccine, seasonal influenza vaccine, and pneumococcal vaccine. A retail network pharmacy may be an authorized provider under the Pharmacy Benefits Program when functioning within the scope of its state laws to provide authorized vaccines/immunizations to an eligible beneficiary. The Pharmacy Benefits Program will cover the vaccine and its administration by the retail network pharmacy, including administration by pharmacists who meet the applicable requirements of state law to administer the vaccine. A TRICARE authorized vaccine/immunization includes vaccines/immunizations authorized as preventive care under the basic program benefits of § 199.4 of this Part, as well as such care authorized for Prime enrollees under the uniform HMO benefit of section 199.18. For Prime enrollees under the uniform HMO benefit, a referral is not required under paragraph (n)(2) of § 199.18 for preventive care vaccines/immunizations received from a retail network pharmacy that is a TRICARE authorized provider. Any additional policies, instructions, procedures, and guidelines appropriate for implementation of this benefit may be issued by the TMA Director, or designee.

(5) *Availability of selected over-the-counter (OTC) drugs under the pharmacy benefits program*. Although the pharmacy benefits program generally covers only prescription drugs, in some cases over-the-counter drugs may be covered and may be placed on the uniform formulary.

(i) An OTC drug may be included on the uniform formulary upon the recommendation of the Pharmacy and Therapeutics Committee and approval of the Director, DHA, based on a finding that it is cost-effective and clinically effective, as compared with other drugs in the same therapeutic class of pharmaceutical agents. Clinical need is

judged by the criteria found in paragraph (e)(1)(i) and (ii) of this section. Cost effectiveness is determined based on criteria found in paragraph (e)(2) of this section.

(ii) OTC drugs placed on the uniform formulary, in general, will be treated the same as generic drugs on the uniform formulary for purposes of availability in MTF pharmacies, retail pharmacies, and the mail order pharmacy program and other requirements. However, upon the recommendation of the Pharmacy and Therapeutics Committee and approval of the Director, DHA, the requirement for a prescription may be waived for a particular OTC drug for certain emergency care treatment situations. In addition, a special copayment may be established under paragraph (i)(2)(xii) of this section for OTC drugs specifically used in certain emergency care treatment situations.

(i) *Cost-sharing requirements under the pharmacy benefits program*—(1) *General.* Under 10 U.S.C. 1074g(a)(6), cost-sharing requirements are established in this section for the pharmacy benefits program independent of those established under other provisions of this Part. Cost-shares under this section partially defray government costs of administering the pharmacy benefits program when collected by the government for prescriptions dispensed through the retail network pharmacies or the TRICARE Mail Order Pharmacy. The higher cost-share paid for prescriptions dispensed by a non-network retail pharmacy is established to encourage the use of the most economical venue to the government. Cost-sharing requirements are based on the classification of a pharmaceutical agent as generic, formulary, or non-formulary, in conjunction with the point of service from which the agent is acquired.

(2) *Cost-sharing amounts.* Active duty members of the uniformed services do not pay cost-shares or annual deductibles. For other categories of beneficiaries, after applicable annual deductibles are met, cost-sharing amounts prior to October 1, 2016, are set forth in this paragraph (i)(2).

(i) For pharmaceutical agents obtained from a military treatment facility, there is no cost-sharing or annual deductible.

(ii) For pharmaceutical agents obtained from a retail network pharmacy, the cost share will be as provided in 10 U.S.C. 1074g(a)(6), except that there is a $0 cost-share for vaccines/immunizations authorized as preventive care for eligible beneficiaries.

(iii) For formulary and generic pharmaceutical agents obtained from a retail non-network pharmacy, except as provided in paragraph (i)(2)(vi) of this section, there is a 20 percent or $20.00 cost-share (whichever is greater) per prescription for up to a 30-day supply of the pharmaceutical agent.

(iv) For pharmaceutical agents obtained under the TRICARE mail order program, the cost share will be as provided in 10 U.S.C. 1074g(a)(6), except that there is a $0 cost-share for smoking cessation pharmaceutical agents covered under the smoking cessation program.

(v) [Reserved]

(vi) For TRICARE Prime beneficiaries there is no annual deductible applicable for pharmaceutical agents obtained from retail network pharmacies or the TRICARE mail-order program. However, for TRICARE Prime beneficiaries who obtain formulary or generic pharmaceutical agents from retail non-network pharmacies, an enrollment year deductible of $300 per person and $600 per family must be met after which there is a beneficiary cost-share of 50 percent per prescription for up to a 30-day supply of the pharmaceutical agent.

(vii) For TRICARE Select beneficiaries the annual deductible which must be met before the cost-sharing amounts for pharmaceutical agents in paragraph (i)(2) of this section are applicable is as provided for each category of TRICARE Select enrollee in § 199.17(l)(2).

(viii) For TRICARE beneficiaries not otherwise qualified to enroll in TRICARE Prime or Select, the annual deductible which must be met before the cost-sharing amounts for pharmaceutical agents in paragraph (i)(2) of this section are applicable is as provided in § 199.4(f).

(ix) The TRICARE catastrophic cap limits apply to pharmacy benefits program cost-sharing.

(x) For any year after 2027, the cost-sharing amounts under this paragraph shall be equal to the cost-sharing amounts for the previous year adjusted by an amount, if any, determined by the Director to reflect changes in the costs of pharmaceutical agents and prescription dispensing, rounded to the nearest dollar. These cost changes, if any, will consider costs under the TRICARE pharmacy benefits program calculated separately for each of the following categories based on prescriptions filled in the most recent period for which TRICARE cost data are available, updated to the current year, if necessary, by appropriate industry data:

(A) Generic drugs in the retail point of service;

(B) Formulary drugs in the retail point of service;

(C) Generic drugs in the mail order point of service;

(D) Formulary drugs in the mail order point of service;

(E) Non-formulary drugs.

(xi) For a Medicare-eligible beneficiary, the cost-sharing requirements may not be in excess of the cost-sharing requirements applicable to all other beneficiaries covered by 10 U.S.C. 1086.

(xii) *Special copayment rule for OTC drugs in the retail pharmacy network.* As a general rule, OTC drugs placed on the uniform formulary under paragraph (h)(5) of this section will have copayments equal to those for generic drugs on the uniform formulary. However, upon the recommendation of the Pharmacy and Therapeutics Committee and approval of the Director, DHA, the copayment may be established at $0.00 for any particular OTC drug in the retail pharmacy network.

(3) *Special cost-sharing rule when there is a clinical necessity for use of a non-formulary pharmaceutical agent.* (i) When there is a clinical necessity for the use of a non-formulary pharmaceutical agent that is not otherwise excluded as a covered benefit, the pharmaceutical agent will be provided at the same copayment as a formulary pharmaceutical agent can be obtained.

(ii) A clinical necessity for use of a non-formulary pharmaceutical agent is established when the beneficiary or their provider submits sufficient information to show that one or more of the following conditions exist:

(A) The use of formualry pharmaceutical agents is contraindicated;

(B) The patient experiences significant adverse effects from formulary pharmaceutical agents, or the provider shows that the patient is likely to experience significant adverse effects from formulary pharmaceutical agents;

(C) Formulary pharmaceutical agents result in therapeutic failure, or the provider shows that the formulary pharmaceutical agent is likely to result in therapeutic failure;

(D) The patient previously responded to a non-formulary pharmaceutical agent and changing to a formulary pharmaceutical agent would incur unacceptable clinical risk; or

(E) There is no alternative pharmaceutical agent on the formulary.

(iii) Information to establish clinical necessity for use of a non-formulary pharmaceutical agent should be provided to TRICARE for prescriptions submitted to a retail network pharmacy.

(iv) Information to establish clinical necessity for use of a non-formulary pharmaceutical agent should be provided as part of the claims processes for non-formulary pharmaceutical agents obtained through non-network points of service, claims as a result of other health insurance, or any other situations requiring the submission of a manual claim.

(v) Information to establish clinical necessity for use of a non-formulary pharmaceutical agent may be provided with the prescription submitted to the TMOP contractor.

(vi) Information to establish clinical necessity for use of a non-formulary pharmaceutical agent may also be provided at a later date, but no later than sixty days from the dispensing date, as an appeal to reduce the non-formulary co-payment to the same co-payment as a formulary drug.

(vii) The process of establishing clinical necessity will not unnecessarily delay the dispensing of a prescription. In situations where clinical necessity

cannot be determined in a timely manner, the non-formulary pharmaceutical agent will be dispensed at the non-formulary co-payment and a refund provided to the beneficiary should clinical necessity be established.

(viii) Peer review and appeal and hearing procedures. All levels of peer review, appeals, and grievances established by the Contractor for internal review shall be exhausted prior to forwarding to TRICARE Management Activity for a formal review. Procedures comparable to those established under §§199.15 and 199.10 of this part shall apply. If it is determined that the prescription is clinically necessary, the pharmaceutical agent will be provided to the beneficiary at the formulary cost-share. TRICARE may require that the time periods for peer review or for appeal and hearing be expedited under the pharmacy benefits program. For purposes of meeting the amount in dispute requirement of §199.10(a)(7), the relevant amount is the difference between the cost shares of a formulary versus non-formulary drug. The amount for each of multiple prescriptions involving the same drug to treat the same medical condition and filled within a 12-month period may be combined to meet the required amount in dispute.

(j) *Use of generic drugs under the pharmacy benefits program.* (1) The designation of a drug as a generic, for the purpose of applying cost-shares at the generic rate, will be determined through the use of standard pharmaceutical references as part of commercial best business practices. Pharmaceutical agents will be designated as generics when listed with an ''A'' rating in the current Approved Drug Products with Therapeutic Equivalence Evaluations (Orange Book) published by the Food and Drug Administration, or any successor to such reference. Generics are multisource products that must contain the same active ingredients, are of the same dosage form, route of administration and are identical in strength or concentration.

(2) The pharmacy benefits program generally requires mandatory substitution of generic drugs listed with an ''A'' rating in the current Approved Drug Products with Therapeutic Equivalence Evaluations (Orange Book) published by the FDA and generic equivalents of grandfather or Drug Efficacy Study Implementation (DESI) category drugs for brand name drugs. In cases in which there is a clinical justification for a brand name drug in lieu of a generic equivalent, under the standards and procedures of paragraph (h)(3) of this section, the generic substitution policy is waived.

(3) When a blanket purchase agreement, incentive price agreement, Government contract, or other circumstances results in a brand pharmaceutical agent being the most cost effective agent for purchase by the Government, the Pharmacy and Therapeutics Committee may also designate that the drug be cost-shared at the generic rate.

(4) Upon the recommendation of the Pharmacy and Therapeutics Committee, a generic drug may be classified as non-formulary if it is less cost effective than non-generic formulary drugs in the same drug class.

(5) The beneficiary copayment amount for any generic drug prescription may not exceed the total charge for that prescription.

(k) *Preauthorization of certain pharmaceutical agents.* (1) Selected pharmaceutical agents may be subject to prior authorization or utilization review requirements to assure medical necessity, clinical appropriateness and/or cost effectiveness.

(2) The Pharmacy and Therapeutics Committee will assess the need to prior authorize a given agent by considering the relative clinical and cost effectiveness of pharmaceutical agents within a therapeutic class. Pharmaceutical agents that require prior authorization will be identified by a majority vote of the Pharmacy and Therapeutics Committee. The Pharmacy and Therapeutics Committee will establish the prior authorization criteria for the pharamaceutical agent.

(3) Prescriptions for pharmaceutical agents for which prior authorization criteria are not met will not be cost-shared under the TRICARE pharmacy benefits program.

(4) The Director, TRICARE Management Activity, may issue policies, procedures, instructions, guidelines,

standards or criteria to implement this paragraph (k).

(l) *TRICARE Senior Pharmacy Program.* Section 711 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001 (Public Law 106–398, 114 Stat. 1654A–175) established the TRICARE Senior Pharmacy Program for Medicare eligible beneficiaries effective April 1, 2001. These beneficiaries are required to meet the eligibility criteria as prescribed in § 199.3 of this part. The benefit under the TRICARE Senior Pharmacy Program applies to prescription drugs and medicines provided on or after April 1, 2001.

(m) *Effect of other health insurance.* The double coverage rules of section 199.8 of this part are applicable to services provided under the pharmacy benefits program. For this purpose, the Medicare prescription drug benefit under Medicare Part D, prescription drug benefits provided under Medicare Part D plans are double coverage plans and such plans will be the primary payer, to the extent described in section 199.8 of this part. Beneficiaries who elect to use these pharmacy benefits shall provide DoD with other health insurance information.

(n) *Procedures.* The Director, TRICARE Management Activity shall establish procedures for the effective operation of the pharmacy benefits program. Such procedures may include restrictions of the quantity of pharmaceuticals to be included under the benefit, encouragement of the use of generic drugs, implementation of quality assurance and utilization management activities, and other appropriate matters.

(o) *Preemption of State laws.* (1) Pursuant to 10 U.S.C. 1103, the Department of Defense has determined that in the administration of 10 U.S.C. chapter 55, preemption of State and local laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods is necessary to achieve important Federal interests, including but not limited to the assurance of uniform national health programs for military families and the operation of such programs at the lowest possible cost to the Department of Defense, that have a direct and substantial effect on the conduct of military affairs and national security policy of the United States.

(2) Based on the determination set forth in paragraph (o)(1) of this section, any State or local law relating to health insurance, prepaid health plans, or other health care delivery or financing methods is preempted and does not apply in connection with TRICARE pharmacy contracts. Any such law, or regulation pursuant to such law, is without any force or effect, and State or local governments have no legal authority to enforce them in relation to the TRICARE pharmacy contracts. However, the Department of Defense may by contract establish legal obligations on the part of TRICARE contractors to conform with requirements similar or identical to requirements of State or local laws or regulations.

(3) The preemption of State and local laws set forth in paragraph (o)(1) of this section includes State and local laws imposing premium taxes on health or dental insurance carriers or underwriters or other plan managers, or similar taxes on such entities. Such laws are laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods, within the meaning of the statutes identified in paragraph (o)(1) of this section. Preemption, however, does not apply to taxes, fees, or other payments on net income or profit realized by such entities in the conduct of business relating to DoD pharmacy services contracts, if those taxes, fees or other payments are applicable to a broad range of business activity. For purposes of assessing the effect of Federal preemption of State and local taxes and fees in connection with DoD pharmacy services contracts, interpretations shall be consistent with those applicable to the Federal Employees Health Benefits Program under 5 U.S.C. 8909(f).

(p) *General fraud, abuse, and conflict of interest requirements under TRICARE pharmacy benefits program.* All fraud, abuse, and conflict of interest requirements for the basic CHAMPUS program, as set forth in this part 199 (see applicable provisions of § 199.9 of this part) are applicable to the TRICARE pharmacy benefits program. Some

methods and procedures for implementing and enforcing these requirements may differ from the methods and procedures followed under the basic CHAMPUS program.

(q) *Pricing standards for retail pharmacy program*—(1) *Statutory requirement.* (i) As required by 10 U.S.C. 1074g(f), with respect to any prescription filled on or after the date of the enactment of the National Defense Authorization Act for Fiscal Year 2008, the TRICARE retail pharmacy program shall be treated as an element of the DoD for purposes of the procurement of drugs by Federal agencies under 38 U.S.C. 8126 to the extent necessary to ensure pharmaceuticals paid for by the DoD that are provided by pharmacies under the program to eligible covered beneficiaries under this section are subject to the pricing standards in such section 8126.

(ii) Under paragraph (q)(1)(i) of this section, all covered drug TRICARE retail pharmacy network prescriptions are subject to Federal Ceiling Prices under 38 U.S.C. 8126.

(2) *Manufacturer written agreement.* (i) A written agreement by a manufacturer to honor the pricing standards required by 10 U.S.C. 1074g(f) and referred to in paragraph (q)(1) of this section for pharmaceuticals provided through retail network pharmacies shall with respect to a particular covered drug be a condition for:

(A) Inclusion of that drug on the uniform formulary under this section; and

(B) Availability of that drug through retail network pharmacies without preauthorization under paragraph (k) of this section.

(ii) A covered drug not under an agreement under paragraph (q)(2)(i) of this section requires preauthorization under paragraph (k) of this section to be provided through a retail network pharmacy under the Pharmacy Benefits Program. This preauthorization requirement does not apply to other points of service under the Pharmacy Benefits Program.

(iii) For purposes of this paragraph (q)(2), a covered drug is a drug that is a covered drug under 38 U.S.C. 8126, but does not include:

(A) A drug that is not a covered drug under 38 U.S.C. 8126;

(B) A drug provided under a prescription that is not covered by 10 U.S.C. 1074g(f);

(C) A drug that is not provided through a retail network pharmacy under this section;

(D) A drug provided under a prescription which the TRICARE Pharmacy Benefits Program is the second payer under paragraph (m) of this section;

(E) A drug provided under a prescription and dispensed by a pharmacy under section 340B of the Public Health Service Act; or

(F) Any other exception for a drug, consistent with law, established by the Director, TMA.

(iv) The requirement of this paragraph (q)(2) may, upon the recommendation of the Pharmacy and Therapeutics Committee, be waived by the Director, TMA if necessary to ensure that at least one drug in the drug class is included on the Uniform Formulary. Any such waiver, however, does not waive the statutory requirement referred to in paragraph (q)(1) that all covered TRICARE retail network pharmacy prescriptions are subject to Federal Ceiling Prices under 38 U.S.C. 8126; it only waives the exclusion from the Uniform Formulary of drugs not covered by agreements under this paragraph (q)(2).

(3) *Refund procedures.* (i) Refund procedures to ensure that pharmaceuticals paid for by the DoD that are provided by retail network pharmacies under the pharmacy benefits program are subject to the pricing standards referred to in paragraph (q)(1) of this section shall be established. Such procedures may be established as part of the agreement referred to in paragraph (q)(2), or in a separate agreement, or pursuant to § 199.11.

(ii) The refund procedures referred to in paragraph (q)(3)(i) of this section shall, to the extent practicable, incorporate common industry practices for implementing pricing agreements between manufacturers and large pharmacy benefit plan sponsors. Such procedures shall provide the manufacturer at least 70 days from the date of the submission of the TRICARE pharmaceutical utilization data needed to calculate the refund before the refund payment is due. The basis of the refund

will be the difference between the average non-federal price of the drug sold by the manufacturer to wholesalers, as represented by the most recent annual non-Federal average manufacturing prices (non-FAMP) (reported to the Department of Veterans Affairs (VA)) and the corresponding FCP or, in the discretion of the manufacturer, the difference between the FCP and direct commercial contract sales prices specifically attributable to the reported TRICARE paid pharmaceuticals, determined for each applicable NDC listing. The current annual FCP and the annual non-FAMP from which it was derived will be applicable to all prescriptions filled during the calendar year.

(iii) A refund due under this paragraph (q) is subject to §199.11 of this part and will be treated as an erroneous payment under that section.

(A) A manufacturer may under section 199.11 of this part request waiver or compromise of a refund amount due under 10 U.S.C. 1074g(f) and this paragraph (q).

(B) During the pendency of any request for waiver or compromise under paragraph (q)(3)(iii)(A) of this section, a manufacturer's written agreement under paragraph (q)(2) shall be deemed to exclude the matter that is the subject of the request for waiver or compromise. In such cases the agreement, if otherwise sufficient for the purpose of the condition referred to in paragraph (q)(2), will continue to be sufficient for that purpose. Further, during the pendency of any such request, the matter that is the subject of the request shall not be considered a failure of a manufacturer to honor a requirement or an agreement for purposes of paragraph (q)(4).

(C) In addition to the criteria established in §199.11, a request for waiver may also be premised on the voluntary removal by the manufacturer in writing of a drug from coverage in the TRICARE Pharmacy Benefit Program.

(iv) In the case of disputes by the manufacturer of the accuracy of TMA's utilization data, a refund obligation as to the amount in dispute will be deferred pending good faith efforts to resolve the dispute in accordance with procedures established by the Director, TMA. If the dispute is not resolved within 60 days, the Director, TMA will issue an initial administrative decision and provide the manufacturer with opportunity to request reconsideration or appeal consistent with procedures under section 199.10 of this part. When the dispute is ultimately resolved, any refund owed relating to the amount in dispute will be subject to an interest charge from the date payment of the amount was initially due, consistent with section 199.11 of this part.

(4) *Remedies*. In the case of the failure of a manufacturer of a covered drug to honor a requirement of this paragraph (q) or to honor an agreement under this paragraph (q), the Director, TMA, in addition to other actions referred to in this paragraph (q), may take any other action authorized by law.

(5) *Beneficiary transition provisions*. In cases in which a pharmaceutical is removed from the uniform formulary or designated for preauthorization under paragraph (q)(2) of this section, the Director, TMA may for transitional time periods determined appropriate by the Director or for particular circumstances authorize the continued availability of the pharmaceutical in the retail pharmacy network or in MTF pharmacies for some or all beneficiaries as if the pharmaceutical were still on the uniform formulary.

(r) *Refills of maintenance medications for eligible covered beneficiaries through the mail order pharmacy program*—(1) *In general*. Consistent with section 702 of the National Defense Authorization Act for Fiscal Year 2015, this paragraph requires that for non-generic covered maintenance medications, beneficiaries are generally required to obtain their prescription through the national mail-order pharmacy program or through military treatment facility pharmacies. For purposes of this paragraph, eligible covered beneficiaries are those defined under sections 1072 and 1086 of title 10, United States Code.

(2) *Medications covered*. The Director, DHA, will establish, maintain, and periodically revise and update a list of non-generic covered maintenance medications subject to the requirement of paragraph (r)(1) of this section. The current list will be accessible through the TRICARE Pharmacy Program Internet Web site and by telephone

through the TRICARE Pharmacy Program Service Center. Each medication included on the list will meet the following requirements:

(i) It will be a medication prescribed for a chronic, long-term condition that is taken on a regular, recurring basis.

(ii) It will be clinically appropriate to dispense the medication from the mail order pharmacy.

(iii) It will be cost effective to dispense the medication from the mail order pharmacy.

(iv) It will be available for an initial filling of a 30-day or less supply through retail pharmacies.

(v) It will be generally available at military treatment facility pharmacies for initial fill and refills.

(vi) It will be available for refill through the national mail-order pharmacy program.

(3) *Refills covered*. For purposes of the program under paragraph (r)(1) of this section, a refill is:

(i) A subsequent filling of an original prescription under the same prescription number or other authorization as the original prescription; or

(ii) A new original prescription issued at or near the end date of an earlier prescription for the same medication for the same patient.

(4) *Waiver of requirement*. A waiver of the general requirement to obtain maintenance medication prescription refills from the mail order pharmacy or military treatment facility pharmacy will be granted in the following circumstances:

(i) There is a blanket waiver for prescription medications that are for acute care needs.

(ii) There is a blanket waiver for prescriptions covered by other health insurance.

(iii) There is a case-by-case waiver to permit prescription maintenance medication refills at a retail pharmacy when necessary due to personal need or hardship, emergency, or other special circumstance. This waiver is obtained through an administrative override request to the TRICARE pharmacy benefits manager under procedures established by the Director, DHA.

(5) *Procedures*. Under the program established by paragraph (r)(1) of this section, the Director, DHA will establish procedures for the effective operation of the program. Among these procedures are the following:

(i) The Department will implement the program by utilizing best commercial practices to the extent practicable.

(ii) An effective communication plan that includes efforts to educate beneficiaries in order to optimize participation and satisfaction will be implemented.

(iii) Beneficiaries with active retail prescriptions for a medication on the maintenance medication list will be notified that their medication is included under the program. Beneficiaries will be advised that they may receive two 30 day fill at retail while they transition their prescription to the mail order program.

(iv) Requests for a third fill at retail will result in 100% patient cost shares and will be blocked from any TRICARE payments and the beneficiary advised to call the pharmacy benefits manager (PBM) for assistance.

(v) The PBM will provide a toll free number to assist beneficiaries in transferring their prescriptions from retail to the mail order program. With the beneficiary's permission, the PBM will contact the physician or other health care provider who prescribed the medication to assist in transferring the prescription to the mail order program.

(vi) In any case in which a beneficiary required under paragraph (r) of this section to obtain a maintenance medication prescription refill from national mail order pharmacy program and attempts instead to refill such medications at a retail pharmacy, the PBM will also maintain the toll free number to assist the beneficiary. This assistance may include information on how to request a waiver, consistent with paragraph (r)(4)(iii) of this section, or in taking any other appropriate action to meet the beneficiary's needs and to implement the program.

(vii) The PBM will ensure that a pharmacist is available at all times through the toll-free telephone number to answer beneficiary questions or provide other appropriate assistance.

(6) This program will remain in effect indefinitely with any adjustments or modifications required by law.

[69 FR 17048, Apr. 1, 2004, as amended at 74 FR 11292, Mar. 17, 2009; 74 FR 55776, Oct. 29, 2009; 74 FR 65438, Dec. 10, 2009; 75 FR 63397, Oct. 15, 2010; 76 FR 41065, July 13, 2011; 78 FR 13241, Feb. 27, 2013; 78 FR 75247, Dec. 11, 2013; 80 FR 46798, Aug. 6, 2015; 80 FR 44272, July 27, 2015; 81 FR 76310, Nov. 2, 2016; 82 FR 45458, Sept. 29, 2017; 83 FR 63577, Dec. 11, 2018]

## § 199.22 TRICARE Retiree Dental Program (TRDP).

(a) *Establishment*. The TRDP is a premium based indemnity dental insurance coverage program that will be available to certain retirees and their surviving spouses, their dependents, and certain other beneficiaries, as specified in paragraph (d) of this section. The TRDP is authorized by 10 U.S.C. 1076c.

(1) The Director will, except as authorized in paragraph (a)(2) of this section, make available a premium based indemnity dental insurance plan for eligible TRDP beneficiaries specified in paragraph (d) of this section consistent with the provisions of this section.

(2) The TRDP premium based indemnity dental insurance program under paragraph (a) of this section may be provided by allowing eligible beneficiaries specified in paragraph (d) of this section to enroll in an insurance plan under chapter 89A of title 5, United States Code that provides benefits similar to those benefits provided under paragraph (f) of this section. Such enrollment shall be authorized pursuant to an agreement entered into between the Department of Defense and the Office of Personnel Management which agreement, in the event of any inconsistency, shall take precedence over provisions in this section.

(b) *General provisions*. (1) At a minimum, benefits are the diagnostic services, preventive services, basic restorative services (including endodontics), oral surgery services, and emergency services specified in paragraph (f)(1) of this section. Additional services comparable to those contained in paragraph (e)(2) of § 199.13 may be covered pursuant to benefit policy decisions made by the Director, TRICARE Management Activity, or designee.

(2) Premium costs for this coverage will be paid by the enrollee.

(3) *Geographic scope*. (i) The TRDP is applicable to authorized providers in the 50 United States and the District of Columbia, Canada, Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands.

(ii) The Assistant Secretary of Defense (Health Affairs) (ASD (HA)) may extend the TRDP to geographic areas other than those specified in paragraph (b)(3)(i) of this section. In extending the TRDP overseas, the ASD (HA) is authorized to establish program elements, methods of administration, and payment rates and procedures that are different from those in effect for the areas specified in paragraph (b)(3)(i) of this section to the extent the ASD (HA), or designee, determines necessary for the effective and efficient operation of the TRDP. These differences may include, but are not limited to, specific provisions for preauthorization of care, varying licensure and certification requirements for foreign providers, and other differences based on limitations in the availability and capabilities of the Uniformed Services overseas dental treatment facilities and a particular nation's civilian sector providers in certain areas. The Director, TRICARE Management Activity shall issue guidance, as necessary, to implement the provisions of this paragraph. TRDP enrollees residing in overseas locations will be eligible for the same benefits as enrollees residing in the continental United States, although dental services may not be available or accessible in all locations.

(4) Except as otherwise provided in this section or by the Assistant Secretary of Defense (Health Affairs) or designee, the TRDP is administered in a manner similar to the TRICARE Dental Program under § 199.13 of this part.

(5) The TRDP shall be administered through a contract.

(c) Except as may be specifically provided in this section, to the extent terms defined in § 199.2 and § 199.13(b) are relevant to the administration of the TRICARE Retiree Dental Program, the definitions contained in § 199.2 and § 199.13(b) shall apply to the TRDP as

they do to TRICARE/CHAMPUS and the TRICARE Dental Program.

(d) *Eligibility and enrollment*—(1) *Eligibility*. Enrollment in the TRICARE Retiree Dental Program is open to:

(i) Members of the Uniformed Services who are entitled to retired pay, or former members of the armed forces who are Medal of Honor recipients and who are not otherwise entitled to dental benefits;

(ii) Members of the Retired Reserve under the age of 60;

(iii) Eligible dependents of a member described in paragraph (d)(1)(i) or paragraph (d)(1)(ii) of this section who are covered by the enrollment of the member;

(iv) Eligible dependents of a member described in paragraph (d)(1)(i) or paragraph (d)(1)(ii) of this section when the member is not enrolled in the program and the member meets at least one of the conditions in paragraphs (d)(1)(iv)(A) through (C) of this section. Already enrolled members must satisfy any remaining enrollment commitment prior to enrollment of dependents becoming effective under this paragraph, at which time the dependent-only enrollment will continue on a voluntary basis as specified in paragraph (d)(4) of this section. Members must provide documentation to the TRDP contractor giving evidence of compliance with paragraphs (d)(1)(iv)(A), (B), or (C) of this section at the time of application for enrollment of their dependents under this paragraph.

(A) The member is enrolled under Section 1705 of Title 38, United States Code, to receive ongoing, comprehensive dental care from the Department of Veterans Affairs pursuant to Section 1712 of Title 38, United States Code, and 38 CFR 17.93, 17.161, or 17.166. Authorization of such dental care must be confirmed in writing by the Department of Veterans Affairs.

(B) The member is enrolled in a dental plan that is available to the member as a result of employment of the member that is separate from the Uniformed Service of the member, and the dental plan is not available to dependents of the member as a result of such separate employment by the member. Enrollment in this dental plan and the exclusion of dependents from enrollment in the plan must be confirmed by documentation from the member's employer or the dental plan's administrator.

(C) The member is prevented by a current and enduring medical or dental condition from being able to obtain benefits under the TRDP. The specific medical or dental condition and reason for the inability to use the program's benefits over time, if not apparent based on the condition, must be documented by the member's physician or dentist.

(v) The unremarried surviving spouse and eligible child dependents of a deceased member who died while in status described in paragraph (d)(1)(i) or paragraph (d)(1)(ii) of this section; the unremarried surviving spouse and eligible child dependents who receive a surviving spouse annuity; or the unremarried surviving spouse and eligible child dependents of a deceased member who died while on active duty for a period of more than 30 days and whose eligible dependents are not eligible or no longer for the TRICARE Dental Program.

NOTE TO PARAGRAPHS (d)(1)(iii), (d)(1)(iv), AND (d)(1)(v): Eligible dependents of Medal of Honor recipients are described in §199.3(b)(2)(i) (except for former spouses) and §199.3(b)(2)(ii) (except for a child placed in legal custody of a Medal of Honor recipient under §199.3(b)(2)(ii)(H)(*4*)).

(2) *Notification of eligibility*. The contractor will notify persons eligible to receive dental benefits under the TRICARE Retiree Dental Program.

(3) *Election of coverage*. In order to initiate dental coverage, election to enroll must be made by the member or eligible dependent. Enrollment in the TRICARE Retiree Dental Program is voluntary and will be accomplished by submission of an application to the TRDP contractor.

(4) *Enrollment periods*—(i) *Enrollment period for basic benefits*. The initial enrollment for the basic dental benefits described in paragraph (f)(1) of this section shall be for a period of 24 months followed by month-to-month enrollment as long as the enrollee remains eligible and chooses to continue enrollment. An enrollee's disenrollment from the TRDP at any time for any reason, including termination for failure to

pay premiums, is subject to a lockout period of 12 months. After any lockout period, eligible individuals may elect to reenroll and are subject to a new initial enrollment period. The enrollment periods and conditions stipulated in this paragraph apply only to the basic benefit coverage described in paragraph (f)(1) of this section. Effective with the implementation of an enhanced benefit program, new enrollments for basic coverage will cease. Enrollees in the basic program at that time may continue their enrollment for basic coverage, subject to the applicable provisions of this section, as long as the contract administering that coverage is in effect.

(ii) *Enrollment period for enhanced benefits*. The initial enrollment period for enhanced benefit coverage described in paragraph (f)(2) of this section shall be established by the Director, TMA, or designee, to be a period of not less than 12 months and not more than 24 months. The initial enrollment period shall be followed by renewal enrollment periods of up to 12 months as long as the enrollee chooses to continue enrollment and remains eligible. An enrollee who chooses not to continue enrollment upon completion of an enrollment period may re-enroll at any time. However, an enrollee who is disenrolled from the TRDP before completion of an initial or subsequent enrollment period for reasons other than those in paragraphs in (d)(5)(ii)(A) and (B) of this section shall incur a lockout period of 12 months before re-enrollment can occur. Former enrollees who re-enroll following a lockout period or following a period of disenrollment after completion of an enrollment period must comply with all provisions that apply to new enrollees, including a new enrollment commitment.

(5) *Termination of coverage*—(i) *Involuntary termination*. TRDP coverage is terminated when the member's entitlement to retired pay is terminated, the member's status as a member of the Retired Reserve is terminated, a dependent child loses eligible child dependent status, or a surviving spouse remarries.

(ii) *Voluntary termination*. All enrollee requests for termination of TRDP coverage before the completion of an enrollment period shall be submitted to the TRDP contractor for determination of whether the enrollee qualifies to be disenrolled under paragraphs (d)(5)(ii)(A) or (B) of this section.

(A) *Enrollment grace period*. Regardless of the reason, TRDP coverage shall be cancelled, or otherwise terminated, upon request from an enrollee if the request is received by the TRDP contractor within 30 calendar days following the enrollment effective date and there has been no use of TRDP benefits under the enrollment during that period. If such is the case, the enrollment is voided and all premium payments are refunded. However, use of benefits during this 30-day enrollment grace period constitutes acceptance by the enrollee of the enrollment and the enrollment period commitment. In this case, a request for termination of enrollment under paragraph (d)(5)(ii)(A) of this section will not be honored, and premiums will not be refunded.

(B) *Extenuating circumstances*. Under limited circumstances, TRDP enrollees shall be disenrolled by the contractor before the completion of an enrollment period commitment upon request by an enrollee if the enrollee submits written, factual documentation that independently verifies that one of the following extenuating circumstances occurred during the enrollment period. In general, the circumstances must be unforeseen and long-term and must have originated after the effective date of TRDP coverage.

(*1*) The enrollee is prevented by a serious medical condition from being able to utilize TRDP benefits,

(*2*) The enrollee would suffer severe financial hardship by continuing TRDP enrollment; or

(*3*) Any other circumstances which the Secretary considers appropriate.

(C) *Effective date of voluntary termination*. For cases determined to qualify for disenrollment under the grace period provisions in paragraph (d)(5)(ii)(A) of this section, enrollment is completely nullified effective from the beginning date of coverage. For cases determined to qualify for disenrollment under the extenuating circumstances provisions in paragraph (d)(5)(ii)(B) of this section, the effective date of disenrollment is the first of the

month following the contractor's initial determination on the disenrollment request or the first of the month following the last use of TRDP benefits under the enrollment, whichever is later.

(D) *Appeal process for denied voluntary enrollment termination.* An enrollee has the right to appeal the contractor's determination that a disenrollment request does not qualify under paragraphs (d)(5)(ii)(A) or (B) of this section. The enrollee may appeal that determination by submitting a written appeal to the TMA, Office of Appeals and Hearings, with a copy of the contractor's determination notice and relevant documentation supporting the disenrollment request. This appeal must be received by TMA within 60 days of the date on the contractor's determination notice. The burden of proof is on the enrollee to establish affirmatively by substantial evidence that the enrollee qualifies to be disenrolled under paragraphs (d)(5)(ii)(A) or (B) of this section. TMA will issue written notification to the enrollee and the contractor of its appeal determination within 60 days from the date of receipt of the appeal request. That determination is final.

(6) *Continuation of dependents' enrollment upon death of enrollee.* Coverage of a dependent in the TRDP under an enrollment of a member or surviving spouse who dies during the period of enrollment shall continue until the end of that period and may be renewed by (or for) the dependent, so long as the premium paid is sufficient to cover continuation of the dependent's enrollment. Coverage may be terminated when the premiums paid are no longer sufficient to cover continuation of the enrollment.

(e) *Premium payments.* Persons enrolled in the dental plan will be responsible for paying the full cost of the premiums in order to obtain the dental insurance.

(1) *Premium payment method.* The premium payment may be collected pursuant to procedures established by the Assistant Secretary of Defense (Health Affairs) or designee.

(2) *Effects of failure to make premium payments.* Failure to make premium payments will result in the enrollee's disenrollment from the TRDP and a lockout period of 12 months. Following this period of time, eligible individuals will be able to re-enroll.

(3) *Member's payment of premiums.* The cost of the TRDP monthly premium will be paid by the enrollee. Interested beneficiaries may contact the dental contractor-insurer to obtain the enrollee premium cost.

(f) *Plan benefits.* The Director, TRICARE Management Activity, or designee, may modify the services covered by the TRDP to the extent determined appropriate based on developments in common dental care practices and standard dental programs. In addition, the Director, TRICARE Management Activity, or designee, may establish such exclusions and limitations as are consistent with those established by dental insurance and prepayment plans to control utilization and quality of care for the services and items covered by the TRDP.

(1) The minimum TRDP benefit is basic dental care to include diagnostic services, preventive services, restorative services, endodontic services, periodontic services, oral surgery services, and other general services. The following is the minimum TRDP covered dental benefit:

(i) *Diagnostic services.*

(A) Clinical oral examinations.

(B) Radiographs and diagnostic imaging.

(C) Tests and laboratory examinations.

(ii) *Preventive services.*

(A) Dental prophylaxis.

(B) Topical fluoride treatment (office procedure).

(C) Sealants.

(D) Other preventive services.

(E) Space maintenance.

(iii) *Restorative services.*

(A) Amalgam restorations.

(B) Resin-based composite restorations.

(C) Other restorative services.

(iv) *Endodontic services.*

(A) Pulp capping.

(B) Pulpotomy and pulpectomy.

(C) Root canal therapy.

(D) Apexification and recalcification procedures.

(E) Apicoectomy and periradicular services.

(F) Other endodontic procedures.

(v) *Periodontic Services.*

(A) Surgical services.

(B) Periodontal services.

(vi) *Oral surgery.*

(A) Extractions.

(B) Surgical extractions.

(C) Alveoloplasty.

(D) Biopsy.

(E) Other surgical procedures.

(vii) *Other general services.*

(A) Palliative (emergenery) treatment of dental pain.

(B) Therapeutic drug injection.

(C) Other drugs and/or medicaments.

(D) Treatment of postsurgical complications.

(2) *Enhanced benefits.* In addition to the minimum TRDP services in paragraph (f)(1) of this section, other services that are comparable to those contained in paragraph (e)(2) of § 199.13 may be covered pursuant to TRDP benefit policy decisions made by the Director, OCHAMPUS, or designee. In general, these include additional diagnostic and preventive services, major restorative services, prosthodontics (removable and fixed), additional oral surgery services, orthodontics, and additional adjunctive general services (including general anesthesia and intravenous sedation). Enrollees in the basis plan will be given an enrollment option at the time the enhanced plan is implemented.

(3) *Alternative course of treatment policy.* The Director, TRICARE Management Activity, or designee, may establish, in accordance with generally accepted dental benefit practices, an alternative course of treatment policy which provides reimbursement in instances where the dentist and TRDP enrollee select a more expensive service, procedure, or course of treatement than in customarily provided. The alternative course of treatment policy must meet the following conditions:

(i) The service, procedure, or course of treatment must be consistent with sound professional standards of generally accepted dental practice for the dental condition concerned.

(ii) The service, procedure, or course of treatment must be a generally accepted alternative for a service or procedure covered by the TRDP for the dental condition.

(iii) Payment for the alternative service or procedure may not exceed the lower of the prevailing limits for the alternative procedure, the prevailing limits or dental plan contractor's scheduled allowance for the otherwise authorized benefit procedure for which the alternative is substituted, or the actual charge for the alternative procedure.

(g) *Maximum coverage amounts.* Each enrollee is subject to an annual maximum coverage amount for non-orthodontic dental benefits and, if an orthodontic benefit is offered, a lifetime maximum coverage amount for orthodontics as established by the Director, TRICARE Management Activity, or designee.

(h) *Annual notification of rates.* TRDP premiums will be determined as part of the competitive contracting process. Information on the premium rates will be widely distributed.

(i) *Authorized providers.* The TRDP enrollee may seek covered services from any provider who is fully licensed and approved to provide dental care in the state where the provider is located.

(j) *Benefit payment.* Enrollees are not required to utilize the special network of dental providers established by the TRDP contractor. For enrollees who do use these network providers, however, providers shall not balance bill any amount in excess of the maximum payment allowable by the TRDP. Enrollees using non-network providers may balance billed amounts in excess of allowable charges. The maximum payment allowable by the TRDP (minus the appropriate cost-share) will be the lesser of:

(1) Billed charges; or

(2) Usual, Customary and Reasonable rates, in which the customary rate is calculated at the 50th percentile of billed charges in that geographic area, as measured in an undiscounted charge profile in 1995 or later for that geographic area (as defined by three-digit zip code).

(k) *Appeal procedures.* All levels of appeal established by the contractor shall be exhausted prior to an appeal being filed with the TMA. Procedures comparable to those established for appeal of benefit determinations under § 199.10 of this part shall apply together with

the procedures for appeal of voluntary disenrollment determinations described in paragraph (d)(5)(ii)(D) of this section.

(l) *Preemption of State laws.* (1) Pursuant to 10 U.S.C. 1103, the Department of Defense has determined that in the administration of chapter 55 of title 10, U.S. Code, preemption of State and local laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods is necessary to achieve important Federal interests, including but not limited to the assurance of uniform national health programs for military families and the operation of such programs at the lowest possible cost to the Department of Defense, that have a direct and substantial effect on the conduct of military affairs and national security policy of the United States. This determination is applicable to the dental services contracts that implement this section.

(2) Based on the determination set forth in paragraph (l)(1) of this section, any State or local law or regulation pertaining to health or dental insurance, prepaid health or dental plans, or other health or dental care delivery, administration, and financing methods is preempted and does not apply in connection with the TRICARE Retiree Dental Program contract. Any such law, or regulation pursuant to such law, is without any force or effect, and State or local governments have no legal authority to enforce them in relation to the TRICARE Retiree Dental Program contract. (However, the Department of Defense may, by contract, establish legal obligations on the part of the TRICARE Retiree Dental Program contractor to conform with requirements similar to or identical to requirements of State or local laws or regulations).

(3) The preemption of State and local laws set forth in paragraph (l)(2) of this section includes State and local laws imposing premium taxes on health or dental insurance carriers or underwriters or other plan managers, or similar taxes on such entities. Such laws are laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods, within the meaning of section 1103. Preemption, however, does not apply to taxes, fees, or other payments on net income or profit realized by such entities in the conduct of business relating to DoD health services contracts, if those taxes, fees or other payments are applicable to a broad range of business activity. For the purposes of assessing the effect of Federal preemption of State and local taxes and fees in connection with DoD health and dental services contracts, interpretations shall be consistent with those applicable to the Federal Employees Health Benefits Program under 5 U.S.C. 8909(f).

(m) *Administration.* The Assistant Secretary of Defense (Health Affairs) or designee may establish other rules and procedures for the administration of the TRICARE Retiree Dental Program.

[62 FR 66993, Dec. 23, 1997, as amended at 65 FR 48913, Aug. 10, 2000; 65 FR 49492, Aug. 14, 2000; 66 FR 9658, Feb. 9, 2001; 67 FR 4354, Jan. 30, 2002; 67 FR 15725, Apr. 3, 2002; 72 FR 54213, Sept. 24, 2007; 72 FR 64537, Nov. 16, 2007; 73 FR 59504, Oct. 9, 2008; 82 FR 45458, Sept. 29, 2017]

## § 199.23 Special Supplemental Food Program.

(a) *General provisions.* This section prescribes guidelines and policies for the delivery and administration of the Special Supplemental Food Program for Women, Infants, and Children Overseas (WIC Overseas Program). The purpose of the WIC Overseas Program is to provide supplemental foods and nutrition education, at no cost, to eligible persons and to serve as an adjunct to good health care during critical times of growth and development, in order to prevent the occurrence of health problems, including drug and other substance abuse, and to improve the health status of program participants. The benefit is similar to the benefit provided under the U.S. Department of Agriculture (USDA) administered Women, Infants, and Children (WIC) Program.

(b) *Definitions.* For most definitions applicable to the provisions of this section, refer to sec. 199.2. The following definitions apply only to this section:

(1) *Applicant.* Pregnant women, breastfeeding women, postpartum women, infants, and children who are

applying to receive WIC Overseas benefits, and the breastfed infants of applicant breastfeeding women. This term also includes individuals who are currently participating in the Program but are re-applying because their certification is about to expire.

(2) *Breastfeeding women*. Women up to 1-year postpartum who are breastfeeding their infants. Their eligibility will end on the last day of the month of their infant's first birthday.

(3) *Certification*. The implementation of criteria and procedures to assess and document each applicant's eligibility for the Program.

(4) *Children*. Persons who have had their first birthday but have not yet attained their fifth birthday. Their eligibility will end on the last day of the month of their fifth birthday.

(5) *Competent Professional Authority (CPA)*. An individual on the staff of the WIC Overseas office authorized to determine nutritional risk, prescribe supplemental foods, and design nutrition education programs. The following are authorized to serve as a competent professional authority: physicians, nutritionists, registered nurses, and dieticians may serve as a competent professional authority. Additionally, a CPA may be other persons designated by the regional program manager who meet the definition of CPA prescribed by the USDA as being professionally competent to evaluate nutritional risk. The definition also applies to an individual who is not on the staff of the WIC Overseas office but who is qualified to provide data upon which nutritional risk determinations are made by a competent professional authority on the staff of the local WIC Overseas office.

(6) *Contract brand*. The brand of a particular food item that has been competitively selected by the DoD to be the exclusive supplier of that type of food item to the program.

(7) *Date-to-use*. The date by which the drafts must be used to purchase food items.

(8) *Department*. The Department of Defense (DoD), unless otherwise noted.

(9) *Dependent*. (i) A spouse, or (ii) An unmarried child who is:

(A) Under 21 years of age; or

(B) Incapable of self-support because of mental or physical incapacity and is in fact dependent on the member for more than ½ of the child's support; or

(C) Is under 23 years of age, is enrolled in a full-time course of study in an institution of higher education and is in fact dependent on the member for more than one-half of the child's support.

(10) *Drafts*. Paper food instruments, similar to vouchers, issued in the WIC Overseas offices to program participants. Participants may redeem their drafts at participating commissaries and NEXMARTs for the types and quantities of foods specified on the face of the draft.

(11) *Economic unit*. All individuals contributing to or subsidizing the income of a household, whether they physically reside in that household or not.

(12) *Eligible civilian*. An eligible civilian is a person who is not a member of the armed forces and who is:

(i) A dependent of a member of the armed forces residing with the member outside the United States, whether or not that dependent is command sponsored, or

(ii) An employee of a military department who is a national of the United States and is residing outside the United States in connection with such individual's employment or a dependent of such individual residing with the employee outside the United States; or

(iii) An employee of a Department of Defense contractor who is a national of the United States and is residing outside the United States in connection with such individual's employment or a dependent of such individual residing with the employee outside the United States.

(13) *Family*. A group of related or nonrelated individuals who are one economic unit.

(14) *Hematological test*. A test of an applicant's or participant's blood as described in 7 CFR part 246.7(e).

(15) *Income guidelines*. Income poverty guidelines published by the U.S. DHHS. These guidelines are adjusted annually by the Department of Health and Human Services (DHHS), with each annual adjustment effective July 1 of

each year. For purposes of WIC Overseas Program income eligibility determinations, income guidelines shall mean the income guidelines published by the DHHS pertaining to the State of Alaska.

(16) *Infants*. Persons under 1 year of age.

(17) *National of the U.S*. A person who:

(i) Is a citizen of the U.S.; or

(ii) Is not a citizen of the United States, but who owes permanent allegiance to the United States, as determined in accordance with the Immigration and Nationality Act.

(18) *NEXMART*. Navy Exchange Market.

(19) *Nutrition education*. Individual or group sessions and the provision of materials designed to improve health status, achieve positive change in dietary habits, and emphasize relationships between nutrition and health, all in keeping with the individual's personal, cultural, and socioeconomic preferences.

(20) *Nutritional risk*. (i) The presence of detrimental or abnormal nutritional conditions detectable by biochemical, physical, developmental or anthropometric data, or

(ii) Other documented nutritionally related medical conditions, or

(iii) Documented evidence of dietary deficiencies that impair or endanger health, or

(iv) Conditions that directly affect the nutritional health of a person, such as alcoholism or drug abuse, or

(v) Conditions that predispose persons to inadequate nutritional patterns, habits of poor nutritional choices or nutritionally related medical conditions.

(21) *Participants*. Pregnant women, breastfeeding women, postpartum women, infants, and children who are receiving supplemental foods or food instruments under the WIC Overseas Program, and the breastfed infants of participant breastfeeding women.

(22) *Postpartum Women*. Women up to 6 months after the end of their pregnancy. Their eligibility will end on the last day of the sixth month after their delivery.

(23) *Pregnant Women*. Women determined to have one or more embryos or fetuses in utero. Pregnant women are eligible to receive WIC benefits through 6 weeks postpartum, at which time they reapply for the program as postpartum or breastfeeding women.

(24) *Rebate*. The amount of money refunded under cost containment procedures to the Department from the manufacturer of a contract brand food item.

(25) *Regional Lead Agent*. The designated major military medical center that acts as the regional lead agent, having tri-service responsibility for the development and execution of a single, integrated health care network.

(26) *Supplemental foods*. Foods containing nutrients determined by nutritional research to be lacking in the diets of certain pregnant, breastfeeding, and postpartum women, infants, and children. WIC Overseas may substitute different foods providing the nutritional equivalent of foods prescribed by Domestic WIC programs, as required by 10 U.S.C. 1060a(c)(1)(B).

(27) *Verification*. Verification of drafts is a review before payment out of Defense Health Program funds to determine whether the commissary or NEXMART complied with applicable date-to-use, food specification, and other redemption criteria.

(c) *Certification of eligibility*. (1) to the extent practicable, participants shall be certified as eligible to receive Program benefits according to income and nutritional risk certification guidelines contained in regulations published by the USDA pertaining to the Women, Infants, and Children program required under 7 CFR 246.7(d)(2)(iv)(B). Applicants must meet the following eligibility criteria:

(i) Meet one of the participant type requirements: be a member of the armed forces on duty overseas; a family member/dependent of a member of the armed forces on duty overseas; a U.S. national employee of a military department serving overseas; a family member of a U.S. national employee of a DoD contractor serving overseas; a family member of a U.S. national employee of a DoD contractor serving overseas;

(ii) Reside in the geographic area served by the WIC Overseas office;

(iii) Meet the income criteria specified in this section; and

(iv) Meet the nutrition risk criteria specified in this section.

(2) In terms of income eligibility, the following apply:

(i) The Department of Defense shall use the Alaska income poverty guidelines published by the DHHS for making determinations regarding income eligibility for the Program.

(ii) Program income eligibility guidelines shall be adjusted annually to conform to annual adjustments made by the DHHS.

(iii) For income eligibility, the Program may consider the income of the family during the past 12 months and the family's current rate of income to determine which indicator accurately reflects the family's status.

(iv) A pregnant woman who is ineligible for participation in the Program because she does not meet income criteria shall be deemed eligible if the criteria would be met by increasing the number of individuals in her family (economic unit) by the number of children in utero.

(v) The Program shall define income according to USDA regulations with regard to the USDA-administered WIC Program. In particular—

(A) A basic allowance for housing is excluded from income as required by section 674 of the National Defense Authorization Act for Fiscal Year 2000.

(B) The value of in-kind housing benefits is excluded from income as required under USDA regulations.

(C) Cost of living allowances for duty outside the continental U.S. (OCONUS) is excluded from income as required under 7 CFR 246.7(d)(2)(iv)(A)(*2*).

(D) Public assistance and welfare payments are included in income.

(3) Participants must be found to be at nutritional risk to be eligible for program benefits.

(i) A Competent Professional Authority (CPA) shall determine if an applicant is at nutritional risk.

(ii) At the request of the program, applicants shall provide, according to schedules set by the USDA in 7 CFR 246.7(e) (unless deemed impracticable), nutritional risk data as a condition of certification in the Program. Such data includes:

(A) Anthropometric measurements,

(B) The results of hematological tests,

(C) Physical examination,

(D) Dietary information, or

(E) Developmental testing

(iii) A pregnant woman who meets all other eligibility criteria and for whom a nutritional risk assessment cannot immediately be completed will be considered presumptively eligible to participate in the Program for a period up to 60 days.

(iv) Infants under 6 months of age may be deemed to be at nutritional risk if the infant's mother was a Program participant during pregnancy or if medical records document that the mother was at nutritional risk during pregnancy.

(v) Unless otherwise specified herein or in 7 CFR 246.7(e), required nutritional risk data shall be provided to, or obtained by, the WIC Overseas Program office within 90 days of enrollment.

(4) In the event that it is impracticable for the WIC Overseas Program to adhere to the income and nutritional risk eligibility guidelines contained in USDA regulations, the Director, TRICARE Management Activity (TMA) may waive the Department's use of USDA WIC Program eligibility criteria by determining that it is impracticable to use these standards to certify participants in the WIC Overseas Program.

(i) Such determination shall consider relevant practical, administrative, national security, financial factors and existing Department policies and their application to the population served by the WIC Overseas Program.

(ii) Absent a written finding of impracticability described in section 199.23(c)(4), the eligibility criteria for the WIC program, contained in USDA regulations shall apply.

(5) An applicant for the WIC Overseas Program who presents a valid WIC Program Verification of Certification card, which is issued to participants in the domestic WIC Program when they intend to move, shall be considered eligible for participation in the WIC Overseas Program for the duration of the individual's current domestic WIC certification period, as long as he/she is an eligible service/family member or eligible civilian/family member.

(d) *Program benefits.* (1) Drafts. WIC participants shall be issued drafts that may be redeemed for supplemental food prescribed under the program.

(i) Drafts shall at a minimum list the food items to be redeemed and the date-to-use.

(ii) Food items listed on the draft must be approved for use under the Program.

(iii) Drafts generally shall allow for a three-month supply of food items for each participant, unless the participant's nutritional status necessitates more frequent contacts with the WIC Overseas office.

(iv) Participating commissaries and NEXMARTS shall accept the drafts in exchange for approved food items.

(v) Commissary and NEXMART personnel shall be trained on verification and processing of drafts.

(vi) Program guidelines shall provide for training of new participants in how to redeem drafts.

(2) *Supplemental Food.* Participants shall redeem drafts for appropriate food packages at intervals determined in accordance with the USDA regulations.

(i) The Director, TMA shall identify to the Defense Commissary Agency (DeCA) and NEXCOM a list of food items approved for the WIC Overseas Program. This list shall be developed in consultation with the USDA and shall include information regarding the appropriate package and/or container sizes and quantities available for participants, as well as the frequency with which food items can be acquired. Additions and/or deletions of food items from this list shall be communicated to the commissaries and NEXMARTS on an ongoing basis.

(ii) A CPA shall prescribe appropriate foods from among the approved list to be included in food packages.

(iii) A CPA shall coordinate documentation of medical need when such documentation is a prerequisite for prescribing certain food items.

(iv) The Director, TMA may authorize changes regarding the supplemental foods to be made available in the WIC Overseas Program when local conditions preclude strict compliance or when such compliance is impracticable.

(3) *Nutrition Education.* Nutrition education shall be provided to all participants at intervals prescribed in USDA regulations at 7 CFR Part 246.11.

(i) The WIC Overseas nutrition education program shall be locally overseen by a CPA based on guidance and materials provided by TMA.

(ii) Nutrition education and its means of delivery be tailored to the greatest extent practicable to the specific nutritional, cultural, practical, and other needs of the participant. Participant profiles created during certification may be used in designing appropriate nutrition education. A CPA may develop individual care plans, as necessary, consistent with USDA regulations.

(iii) Nutrition education shall consist of sessions wherein individual participants or groups of participants meet with a CPA in an interactive setting such that participants can ask, and the CPA can answer, questions related to nutrition practices. In addition, nutrition education shall utilize prepared educational materials and/or Internet sites. Both the sessions and the information materials shall be designed to improve health status, achieve positive change in dietary habits, and emphasize relationships between nutrition and health. Individual and group sessions can be accomplished through, among other things, face-to-face meetings, remote tele-videoconferencing, real-time computer-based distance learning, or other means.

(iv) Nutrition education services shall generally be provided to participants twice during each 6-month certification period, unless a different schedule is specified in USDA regulations.

(v) The nutrition education program shall promote breastfeeding as the optimal method of infant nutrition, encourage pregnant participants to breastfeed unless contraindicated for health reasons, and educate all participating women about the harmful effects of substance abuse.

(vi) Individual participants shall not be denied supplemental food due to the failure to attend scheduled nutrition education sessions.

(e) *Financial management.* The Department shall establish procedures to

provide for the verification of drafts prior to payment.

(i) Verification may utilize sampling techniques.

(ii) Payment of drafts shall be made out of Defense Health Program funds.

(f) *Rebate agreements.* (1) DoD is authorized to enter into an agreement with a manufacturer of a particular brand of a food item that provides for the exclusive supply to the program of the same or similar types of food items by that manufacturer.

(i) The agreement shall identify a contract brand of food item.

(ii) Under the agreement, the manufacturer shall rebate to the Department an agreed portion of the amounts paid by DoD for the procurement of the contract brand.

(2) The DoD shall use competitive procedures under title 10, chapter 137 to select the contract brand.

(3) Amounts rebated shall be credited to the appropriation available for carrying out the program and shall be applied against expenditures for the program in the same period as the other sums in the appropriation.

(g) *Administrative appeals and civil rights.* (1) Applicants who are denied certification or participants that are denied recertification shall be provided with a notice of ineligibility. The notice shall include information on the applicant's right to appeal the determination and instructions on doing so.

(2) Benefits shall not be provided while an appeal is pending when an applicant is denied benefits, a participant's certification has expired or a participant becomes categorically ineligible.

(3) A request for appeal shall be submitted in writing within five working days. If the decision is an adverse one it shall include notice to the applicant of his further appeal rights as reflected in (iii) below, and that he/she has five working days to effect any such appeal.

(4) Appeal reviews shall be conducted in the first instance by the CPA or team leader in charge of the local WIC Overseas office.

(i) Written notice of a decision shall be provided to the applicant within five working days.

(ii) If the appeal is upheld, retroactive benefits shall not be provided.

(iii) At an applicant's request a denied appeal may be forwarded to the regional program manager for review, who will provide a decision on the appeal within 5 working days.

(iv) If the regional program manager denies the appeal, there shall be no further right of appeal.

(5) Complaints about discriminatory treatment shall be handled in accordance with procedures established at each local WIC Overseas site.

(h) *Operations and Administration.* (1) Information collected about WIC Overseas applicants and participants shall be collected, maintained, and disclosed in accordance with applicable laws and regulations.

(2) Information and personnel security requirements shall be consistent with applicable laws and regulations.

[69 FR 15678, Mar. 26, 2004]

### § 199.24 TRICARE Reserve Select.

(a) *Establishment.* TRICARE Reserve Select offers the TRICARE Select self-managed, preferred-provider network option under § 199.17 to qualified members of the Selected Reserve, their immediate family members, and qualified survivors under this section.

(1) *Purpose.* TRICARE Reserve Select is a premium-based health plan that is available for purchase by members of the Selected Reserve and certain survivors of Selected Reserve members as specified in paragraph (c) of this section.

(2) *Statutory Authority.* TRICARE Reserve Select is authorized by 10 U.S.C. 1076d.

(3) *Scope of the Program.* TRICARE Reserve Select is applicable in the 50 United States, the District of Columbia, Puerto Rico, and, to the extent practicable, other areas where members of the Selected Reserve serve. In locations other than the 50 states of the United States and the District of Columbia, the Assistant Secretary of Defense (Health Affairs) may authorize modifications to the program rules and procedures as may be appropriate to the area involved.

(4) *Major Features of TRICARE Reserve Select.* The major features of the program include the following:

(i) *TRICARE Select rules applicable.* (A) Unless specified in this section or

otherwise prescribed by the Director, provisions of TRICARE Select under § 199.17 apply to TRICARE Reserve Select.

(B) Certain special programs established in 32 CFR part 199 are not available to members covered under TRICARE Reserve Select. These include the Extended Care Health Option (§ 199.5), the Special Supplemental Food Program (see § 199.23), and the Supplemental Health Care Program (§ 199.16), except when referred by a Military Treatment Facility (MTF) provider for incidental consults and the MTF provider maintains clinical control over the episode of care. The TRICARE Dental Program (§ 199.13) is independent of this program and is otherwise available to all members of the Selected Reserve and their eligible family members whether or not they purchase TRICARE Reserve Select coverage. The Continued Health Care Benefits Program (§ 199.20) is also independent of this program and is otherwise available to all members who qualify.

(ii) *Premiums*. TRICARE Reserve Select coverage is available for purchase by any Selected Reserve member if the member fulfills all of the statutory qualifications. A member of the Selected Reserve covered under TRICARE Reserve Select shall pay 28 percent of the total amount that the ASD(HA) determines on an appropriate actuarial basis as being appropriate for that coverage. There is one premium rate for member-only coverage and one premium rate for member and family coverage.

(iii) *Procedures*. Under TRICARE Reserve Select, Reserve Component members who fulfilled all of the statutory qualifications may purchase either the member-only type of coverage or the member-and-family type of coverage by submitting a completed request in the appropriate format along with an initial payment of the applicable premium. Rules and procedures for purchasing coverage and paying applicable premiums are prescribed in this section.

(iv) *Benefits*. When their coverage becomes effective, TRICARE Reserve Select beneficiaries receive the TRICARE Select benefit including access to military treatment facility services and pharmacies, as described in §§ 199.17 and 199.21. TRICARE Reserve Select coverage features the deductible, catastrophic cap and cost share provisions of the TRICARE Select plan applicable to Group B active duty family members under § 199.17(l)(2)(ii) for both the member and the member's covered family members; however, the TRICARE Reserve Select premium under paragraph (c) of this section applies instead of any TRICARE Select plan enrollment fee under § 199.17. Both the member and the member's covered family members are provided access priority for care in military treatment facilities on the same basis as active duty service members' dependents who are not enrolled in TRICARE Prime as described in § 199.17(d)(1)(i)(D).

(b) *Qualifications for TRICARE Reserve Select coverage*—(1) *Ready Reserve member*. A Ready Reserve member qualifies to purchase TRICARE Reserve Select coverage prior to January 1, 2030, if the Service member meets the criteria listed in both paragraphs (b)(1)(i) and (ii) of this section. Beginning January 1, 2030, only the criteria in paragraph (b)(1)(i) of this section is necessary for qualification.

(i) Is a member of the Selected Reserve of the Ready Reserve of the Armed Forces, or a member of the Individual Ready Reserve of the Armed Forces who has volunteered to be ordered to active duty pursuant to the provisions of 10 U.S.C. 12304 in accordance with section 10 U.S.C. 10144(b); and

(ii) Is not enrolled in, or eligible to enroll in, a health benefits plan under 5 U.S.C. chapter 89. That statute has been implemented under 5 CFR part 890 as the Federal Employees Health Benefits (FEHB) program. For purposes of the FEHB program, the terms ''enrolled,'' ''enroll'' and ''enrollee'' are defined in 5 CFR 890.101. Further, the member (or certain former member involuntarily separated) no longer qualifies for TRICARE Reserve Select when the member (or former member) has been eligible for coverage to be effective in a health benefits plan under the FEHB program for more than 60 days.

(2) *TRICARE Reserve Select survivor*. If a qualified Service member dies while in a period of TRICARE Reserve Select

coverage, the immediate family member(s) of such member is qualified to purchase new or continue existing TRICARE Reserve Select coverage for up to six months beyond the date of the member's death as long as they meet the definition of immediate family members as specified in paragraph (g)(2) of this section. This applies regardless of type of coverage in effect on the day of the TRICARE Reserve Select member's death.

(c) *TRICARE Reserve Select premiums.* Members are charge premiums for coverage under TRICARE Reserve Select that represent 28 percent of the total annual premium amount that the Director determines on an appropriate actuarial basis as being appropriate for coverage under the TRICARE Select benefit for the TRICARE Reserve Select eligible population. Premiums are to be paid monthly, except as otherwise provided through administrative implementation, pursuant to procedures established by the Director. The monthly rate for each month of a calendar year is one-twelfth of the annual rate for that calendar year.

(1) *Annual establishment of rates.* TRICARE Reserve Select monthly premium rates shall be established and updated annually on a calendar year basis for each of the two types of coverage, member-only and member- and-family as described in paragraph (d)(1) of this section. Starting with calendar year 2009, the appropriate actuarial basis for purposes of this paragraph (c) shall be determined for each calendar year by utilizing the actual reported cost of providing benefits under this section to members and their dependents during the calendar years preceding such calendar year. Reported actual TRS cost data from calendar years 2006 and 2007 was used to determine premium rates for calendar year 2009. This established pattern will be followed to determine premium rates for all calendar years subsequent to 2009.

(2) *Premium adjustments.* In addition to the determinations described in paragraph (c)(1) of this section, premium adjustments may be made prospectively for any calendar year to reflect any significant program changes or any actual experience in the costs of administering TRICARE Reserve Select.

(3) *Survivor premiums.* A surviving family member of a Reserve Component service member who qualified for TRICARE Reserve Select coverage as described in paragraph (b)(2) of this section will pay premium rates as follows. The premium amount shall be at the member-only rate if there is only one surviving family member to be covered by TRICARE Reserve Select and at the member and family rate if there are two or more survivors to be covered.

(d) *Procedures.* The Director may establish procedures for the following.

(1) *Purchasing coverage.* Procedures may be established for a qualified member to purchase one of two types of coverage: Member-only coverage or member and family coverage. Immediate family members of a qualified member as specified in paragraph (g)(2) of this section may be included in such family coverage. To purchase either type of TRICARE Reserve Select coverage for effective dates of coverage described below, members and survivors qualified under either paragraph (b)(1) or (2) of this section must submit a request in the appropriate format, along with an initial payment of the applicable premium required by paragraph (c) of this section in accordance with established procedures.

(i) *Continuation coverage.* Procedures may be established for a qualified member or qualified survivor to purchase TRICARE Reserve Select coverage with an effective date immediately following the date of termination of coverage under another TRICARE program.

(ii) *Qualifying event.* Procedures for qualifying events in TRICARE Select plans under §199.17(o) shall apply to TRICARE Reserve Select coverage. Additionally, the Director may identify other events unique to needs of the Reserve Components as qualifying events.

(iii) *Enrollment.* Procedures for enrollment in TRICARE Select plans under §199.17(o) shall apply to TRICARE Reserve Select enrollment. Generally, the effective date of coverage will coincide with the first day of a month unless enrollment is due to a qualifying event and a different date on

or after the qualifying event is required to prevent a lapse in health care coverage.

(iv) *Survivor coverage under TRICARE Reserve Select.* Procedures may be established for a surviving family member of a Reserve Component service member who qualified for TRICARE Reserve Select coverage as described in paragraph (b)(2) of this section to purchase new TRICARE Reserve Select coverage or continue existing TRICARE Reserve Select coverage for up to six months beyond the date of the member's death. The effective date of coverage will be the day following the date of the member's death.

(2) *Termination.* Termination of coverage for the TRS member/survivor will result in termination of coverage for the member's/survivor's family members in TRICARE Reserve Select. Procedures may be established for coverage to be terminated as follows.

(i) Coverage shall terminate when members or survivors no longer qualify for TRICARE Reserve Select as specified in paragraph (b) of this section, with one exception. If a member is involuntarily separated from the Selected Reserve under other than adverse conditions, as characterized by the Secretary concerned, and is covered by TRICARE Reserve Select on the last day of his or her membership in the Selected Reserve, then TRICARE Reserve Select coverage may terminate up to 180 days after the date on which the member was separated from the Selected Reserve. This applies regardless of type of coverage. This exception expires December 31, 2018.

(ii) Coverage may terminate for members, former members, and survivors who gain coverage under another TRICARE program.

(iii) In accordance with the provisions of §199.17(o)(2) coverage terminates for members/survivors who fail to make premium payments in accordance with established procedures.

(iv) Coverage may be terminated for members/survivors upon request at any time by submitting a completed request in the appropriate format in accordance with established procedures.

(3) *Re-enrollment following termination.* Absent a new qualifying event, members/survivors (subject to paragraph (d)(1)(iv) of this section) are not eligible to re-enroll in TRICARE Reserve Select until the next annual open season.

(4) *Processing.* Upon receipt of a completed request in the appropriate format, enrollment actions will be processed into DEERS in accordance with established procedures.

(5) *Periodic revision.* Periodically, certain features, rules or procedures of TRICARE Reserve Select may be revised. If such revisions will have a significant effect on members' or survivors' costs or access to care, members or survivors may be given the opportunity to change their type of coverage or terminate coverage coincident with the revisions.

(e) *Preemption of State laws.* (1) Pursuant to 10 U.S.C. 1103, the Department of Defense has determined that in the administration of chapter 55 of title 10, U.S. Code, preemption of State and local laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods is necessary to achieve important Federal interests, including but not limited to the assurance of uniform national health programs for military families and the operation of such programs, at the lowest possible cost to the Department of Defense, that have a direct and substantial effect on the conduct of military affairs and national security policy of the United States. This determination is applicable to contracts that implement this section.

(2) Based on the determination set forth in paragraph (f)(1) of this section, any State or local law or regulation pertaining to health insurance, prepaid health plans, or other health care delivery, administration, and financing methods is preempted and does not apply in connection with TRICARE Reserve Select. Any such law, or regulation pursuant to such law, is without any force or effect, and State or local governments have no legal authority to enforce them in relation to TRICARE Reserve Select. (However, the Department of Defense may, by contract, establish legal obligations on the part of DoD contractors to conform with requirements similar to or identical to requirements of State or local

laws or regulations with respect to TRICARE Reserve Select).

(3) The preemption of State and local laws set forth in paragraph (f)(2) of this section includes State and local laws imposing premium taxes on health insurance carriers or underwriters or other plan managers, or similar taxes on such entities. Such laws are laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods, within the meaning of 10 U.S.C. 1103. Preemption, however, does not apply to taxes, fees, or other payments on net income or profit realized by such entities in the conduct of business relating to DoD health services contracts, if those taxes, fees or other payments are applicable to a broad range of business activity. For the purposes of assessing the effect of Federal preemption of State and local taxes and fees in connection with DoD health services contracts, interpretations shall be consistent with those applicable to the Federal Employees Health Benefits Program under 5 U.S.C. 8909(f).

(f) *Administration*. The Director may establish other rules and procedures for the effective administration of TRICARE Reserve Select, and may authorize exceptions to requirements of this section, if permitted by law.

(g) *Terminology*. The following terms are applicable to the TRICARE Reserve Select program.

(1) *Coverage*. This term means the medical benefits covered under the TRICARE Select program as further outlined in § 199.17 whether delivered in military treatment facilities or purchased from civilian sources.

(2) *Immediate family member*. This term means spouse (except former spouses) as defined in § 199.3(b)(2)(i), or child as defined in § 199.3(b)(2)(ii).

(3) *Qualified member*. This term means a member who has satisfied all the criteria that must be met before the member is authorized for TRS coverage.

(4) *Qualified survivor*. This term means an immediate family member who has satisfied all the criteria that must be met before the survivor is authorized for TRS coverage.

[72 FR 46383, Aug. 20, 2007, as amended at 76 FR 57641, Sept. 16, 2011; 80 FR 55254, Sept. 15, 2015; 82 FR 45458, Sept. 29, 2017; 86 FR 67862, Nov. 30, 2021]

### § 199.25 TRICARE Retired Reserve.

(a) *Establishment*. TRICARE Retired Reserve offers the TRICARE Select self-managed, preferred-provider network option under § 199.17 to qualified members of the Retired Reserve, their immediate family members, and qualified survivors under this section.

(1) *Purpose*. As specified in paragraph (c) of this section, TRICARE Retired Reserve is a premium-based health plan that is available for purchase by any Retired Reserve member who is qualified for non-regular retirement, but is not yet 60 years of age, unless that member is either enrolled in, or eligible to enroll in, a health benefit plan under Chapter 89 of Title 5, United States Code, as well as certain survivors of Retired Reserve members.

(2) *Statutory Authority*. TRICARE Retired Reserve is authorized by 10 U.S.C. 1076e.

(3) *Scope of the Program*. TRICARE Retired Reserve is geographically applicable to the same extent as specified in 32 CFR 199.1(b)(1).

(4) *Major Features of TRICARE Retired Reserve*. The major features of the program include the following:

(i) *TRICARE Select rules applicable*. (A) Unless specified in this section or otherwise prescribed by the ASD (HA), provisions of TRICARE Select under § 199.17 apply to TRICARE Retired Reserve.

(B) Certain special programs established in 32 CFR part 199 are not available to members covered under TRICARE Retired Reserve. The Extended Health Care Option (ECHO) program (sec. 199.5) is not included. The Supplemental Health Care Program (sec. 199.16) is not included, except when a TRICARE Retired Reserve covered beneficiary is referred by a Military Treatment Facility (MTF) provider for incidental consults and the MTF provider maintains clinical control over the episode of care. The TRICARE Retiree Dental Program

(sec. 199.13) is independent of this program and is otherwise available to all members who qualify for the TRICARE Retiree Dental Program whether or not they purchase TRICARE Retired Reserve coverage. The Continued Health Care Benefits Program (sec. 199.13) is also independent of this program and is otherwise available to all members who qualify for the Continued Health Care Benefits Program.

(ii) *Premiums*. TRICARE Retired Reserve coverage is available for purchase by any Retired Reserve member if the member fulfills all of the statutory qualifications as well as certain survivors. A member of the Retired Reserve or qualified survivor covered under TRICARE Retired Reserve shall pay the amount equal to the total amount that the ASD(HA) determines on an appropriate actuarial basis as being appropriate for that coverage. There is one premium rate for member-only coverage and one premium rate for member and family coverage.

(iii) *Procedures*. Under TRICARE Retired Reserve, Retired Reserve members (or their survivors) who fulfilled all of the statutory qualifications may purchase either the member-only type of coverage or the member and family type of coverage by submitting a completed request in the appropriate format along with an initial payment of the applicable premium. Procedures for purchasing coverage and paying applicable premiums are prescribed in this section.

(iv) *Benefits*. When their coverage becomes effective, TRICARE Retired Reserve beneficiaries receive the TRICARE Select benefit including access to military treatment facilities on a space available basis and pharmacies, as described in §199.17. TRICARE Retired Reserve coverage features the deductible, cost sharing, and catastrophic cap provisions of the TRICARE Select plan applicable to Group B retired members and dependents of retired members under §199.17(l)(2)(ii); however, the TRICARE Reserve Select premium under paragraph (c) of this section applies instead of any TRICARE Select plan enrollment fee under §199.17. Both the member and the member's covered family members are provided access priority for care in military treatment facilities on the same basis as retired members and their dependents who are not enrolled in TRICARE Prime as described in §199.17(d)(1)(i)(E).

(b) *Qualifications for TRICARE Retired Reserve coverage—(1) Retired Reserve Member*. A Retired Reserve member qualifies to purchase TRICARE Retired Reserve coverage if the member meets both the following criteria:

(i) Is a member of a Reserve component of the armed forces who is qualified for a non-regular retirement at age 60 under chapter 1223 of title 10, U.S.C., but who is not yet age 60 and

(ii) Is not enrolled in, or eligible to enroll in, a health benefits plan under chapter 89 of title 5, U.S.C. That statute has been implemented under part 890 of title 5, CFR as the Federal Employee Health Benefits (FEHB) program. For purposes of the FEHB program, the terms ''enrolled,'' ''enroll'' and ''enrollee'' are defined in §890.101 of title 5, CFR.

(2) *Retired Reserve Survivor*. If a qualified member of the Retired Reserves dies while in a period of TRICARE Retired Reserve coverage, the immediate family member(s) of such member shall remain qualified to purchase new or continue existing TRICARE Retired Reserve coverage until the date on which the deceased member of the Retired Reserve would have attained age 60 as long as they meet the definition of immediate family members specified in paragraph (g)(2) of this section. This applies regardless whether either member-only coverage or member and family coverage was in effect on the day of the TRICARE Retired Reserve member's death.

(c) *TRICARE Retired Reserve premiums*. Members are charged for coverage under TRICARE Retired Reserve that represent the full cost of the program as determined by the Director utilizing an appropriate actuarial basis for the provision of the benefits provided under the TRICARE Select program for the TRICARE Retired Reserve eligible beneficiary population. Premiums are to be paid monthly, except as otherwise provided through administrative implementation, pursuant to procedures established by the Director. The

monthly rate for each month of a calendar year is one-twelfth of the annual rate for that calendar year.

(1) *Annual establishment of rates.*—(i) TRICARE Retired Reserve monthly premium rates shall be established and updated annually on a calendar year basis by the ASD(HA) for each of the two types of coverage, member-only coverage and member-and-family coverage as described in paragraph (d)(1) of this section.

(ii) The appropriate actuarial basis used for calculating premium rates shall be one that most closely approximates the actual cost of providing care to the same demographic population as those enrolled in TRICARE Retired Reserve as determined by the ASD(HA). TRICARE Retired Reserve premiums shall be based on the actual costs of providing benefits to TRICARE Retired Reserve members and their dependents during the preceding years if the population of Retired Reserve members enrolled in TRICARE Retired Reserve is large enough during those preceding years to be considered actuarially appropriate. Until such time that actual costs from those preceding years becomes available, TRICARE Retired Reserve premiums shall be based on the actual costs during the preceding calendar years for providing benefits to the population of retired members and their dependents in the same age categories as the retired reserve population in order to make the underlying group actuarially appropriate. An adjustment may be applied to cover overhead costs for administration of the program by the government.

(2) *Premium adjustments.* In addition to the determinations described in paragraph (c)(1) of this section, premium adjustments may be made prospectively for any calendar year to reflect any significant program changes or any actual experience in the costs of administering the TRICARE Retired Reserve Program.

(3) *Survivor Premiums.* A surviving family member of a Retired Reserve member who qualified for TRICARE Retired Reserve coverage as described herein will pay premium rates at the member-only rate if there is only one surviving family member to be covered by TRICARE Retired Reserve and at the member-and-family rate if there are two or more survivors to be covered.

(d) *Procedures.* The Director may establish procedures for the following.

(1) *Purchasing Coverage.* Procedures may be established for a qualified member to purchase one of two types of coverage: Member-only coverage or member and family coverage. Immediate family members of the Retired Reserve member as specified in paragraph (g)(2) of this section may be included in such family coverage. To purchase either type of TRICARE Retired Reserve coverage for effective dates of coverage described below, Retired Reserve members and survivors qualified under either paragraph (b)(1) or (b)(2) of this section must submit a request in the appropriate format, along with an initial payment of the applicable premium required by paragraph (c) of this section in accordance with established procedures.

(i) *Continuation Coverage.* Procedures may be established for a qualified member or qualified survivor to purchase TRICARE Retired Reserve coverage with an effective date immediately following the date of termination of coverage under another TRICARE program.

(ii) *Qualifying event.* Procedures for qualifying events in TRICARE Select plans under §199.17(o) shall apply to TRICARE Retired Reserve coverage.

(iii) *Enrollment.* Procedures for enrollment in TRICARE Select plans under §199.17(o) shall apply to TRICARE Retired Reserve enrollment. Generally, the effective date of coverage will coincide with the first day of a month unless enrollment is due to a qualifying event and a different date on or after the qualifying event is required to prevent a lapse in health care coverage.

(iv) *Survivor coverage under TRICARE Retired Reserve.* Procedures may be established for a surviving family member of a qualified Retired Reserve member who qualified for TRICARE Retired Reserve coverage as described in paragraph (b)(2) of this section to purchase new TRICARE Retired Reserve coverage or continue existing TRICARE Retired Reserve coverage.

Procedures similar to those for qualifying life events may be established for a qualified surviving family member to purchase new or continuing coverage with an effective date coinciding with the day of the member's death. Procedures similar to those for open enrollment may be established for a qualified surviving family member to purchase new coverage at any time with an effective date coinciding with the first day of a month.

(2) *Termination*. Termination of coverage for the TRR member/survivor will result in termination of coverage for the member's/survivor's family members in TRICARE Retired Reserve. Procedures may be established for coverage to be terminated as follows.

(i) Coverage shall terminate when members or survivors no longer qualify for TRICARE Retired Reserve as specified in paragraph (c) of this section. For purposes of this section, the member or their survivor no longer qualifies for TRICARE Retired Reserve when the member has been eligible for coverage in a health benefits plan under Chapter 89 of Title 5, U.S.C. for more than 60 days. Further, coverage shall terminate when the Retired Reserve member attains the age of 60 or, if survivor coverage is in effect, when the deceased Retired Reserve member would have attained the age of 60.

(ii) Coverage may terminate for members, former members, and survivors who gain coverage under another TRICARE program.

(iii) In accordance with the provisions of §199.17(o)(2) coverage terminates for members/survivors who fail to make premium payments in accordance with established procedures.

(iv) Coverage may be terminated for members/survivors upon request at any time by submitting a completed request in the appropriate format in accordance with established procedures.

(3) *Re-enrollment following termination*. Absent a new qualifying event, members/survivors are not eligible to re-enroll in TRICARE Retired Reserve until the next annual open season.

(4) *Processing*. Upon receipt of a completed request in the appropriate format, enrollment actions will be processed into DEERS in accordance with established procedures.

(5) *Periodic revision*. Periodically, certain features, rules or procedures of TRICARE Retired Reserve may be revised. If such revisions will have a significant effect on members' or survivors' costs or access to care, members or survivors may be given the opportunity to change their type of coverage or terminate coverage coincident with the revisions.

(e) *Preemption of State laws*.— (1) Pursuant to 10 U.S.C. 1103, the Department of Defense has determined that in the administration of chapter 55 of title 10, U.S. Code, preemption of State and local laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods is necessary to achieve important Federal interests, including but not limited to the assurance of uniform national health programs for military families and the operation of such programs, at the lowest possible cost to the Department of Defense, that have a direct and substantial effect on the conduct of military affairs and national security policy of the United States. This determination is applicable to contracts that implement this section.

(2) Based on the determination set forth in paragraph (f)(1) of this section, any State or local law or regulation pertaining to health insurance, prepaid health plans, or other health care delivery, administration, and financing methods is preempted and does not apply in connection with TRICARE Retired Reserve. Any such law, or regulation pursuant to such law, is without any force or effect, and State or local governments have no legal authority to enforce them in relation to TRICARE Retired Reserve. (However, the Department of Defense may, by contract, establish legal obligations on the part of DoD contractors to conform with requirements similar to or identical to requirements of State or local laws or regulations with respect to TRICARE Retired Reserve).

(3) The preemption of State and local laws set forth in paragraph (f)(2) of this section includes State and local laws imposing premium taxes on health insurance carriers or underwriters or other plan managers, or similar taxes

on such entities. Such laws are laws relating to health insurance, prepaid health plans, or other health care delivery or financing methods, within the meaning of 10 U.S.C. 1103. Preemption, however, does not apply to taxes, fees, or other payments on net income or profit realized by such entities in the conduct of business relating to DoD health services contracts, if those taxes, fees or other payments are applicable to a broad range of business activity. For the purposes of assessing the effect of Federal preemption of State and local taxes and fees in connection with DoD health services contracts, interpretations shall be consistent with those of the Federal Employees Health Benefits Program under 5 U.S.C. 8909(f).

(f) *Administration*. The Director may establish other rules and procedures for the effective administration of TRICARE Retired Reserve, and may authorize exceptions to requirements of this section, if permitted by law.

(g) *Terminology*. The following terms are applicable to the TRICARE Retired Reserve program.

(1) *Coverage*. This term means the medical benefits covered under the TRICARE Select program as further outlined in § 199.17 whether delivered in military treatment facilities or purchased from civilian sources.

(2) *Immediate family member*. This term means spouse (except former spouses) as defined in paragraph 199.3(b)(2)(i) of this part, or child as defined in paragraph 199.3 (b)(2)(ii).

(3) *Qualified member*. This term means a member who has satisfied all the criteria that must be met before the member is authorized for TRR coverage.

(4) *Qualified survivor*. This term means an immediate family member who has satisfied all the criteria that must be met before the survivor is authorized for TRR coverage.

[75 FR 47455, Aug. 6, 2010, as amended at 79 FR 78702, Dec. 31, 2014; 82 FR 45459, Sept. 29, 2017]

### § 199.26 TRICARE Young Adult.

(a) *Establishment*. The TRICARE Young Adult (TYA) program offers options of medical benefits provided under the TRICARE program to qualified unmarried adult children of TRICARE-eligible uniformed service sponsors who do not otherwise have eligibility for medical coverage under a TRICARE program at age 21 (23 if enrolled in a full-time course of study at an approved institution of higher learning, and the sponsor provides over 50 percent of the student's financial support), and are under age 26.

(1) *Purpose*. As specified in paragraph (c) of this section, TYA is a premium-based health option that is available for purchase by any qualified adult child as that term is defined in paragraph (b) of this section. The TYA program allows a qualified adult child to purchase TRICARE coverage.

(2) *Statutory authority*. TYA is authorized by 10 U.S.C. 1110b.

(3) *Scope of the program*. TYA is geographically applicable to the same extent as specified in § 199.1(b)(1).

(4) *Major features of TYA*. (i) *TRICARE rules applicable*.

(A) Unless specified in this section or otherwise prescribed by the Assistant Secretary of Defense (Health Affairs) (ASD (HA)), provisions of this part apply to TYA.

(B) The TRICARE Dental Program (§ 199.13) and the TRICARE Retiree Dental Program (§ 199.22) are not covered under TYA.

(C) TRICARE Select is available to all TYA-eligible young adult dependents.

(D) TRICARE Prime is available to TYA-eligible young adult dependents, provided that TRICARE Prime (including the Uniformed Services Family Health Plan) is available in the geographic location where the TYA enrollee resides. TYA-eligible young adults are:

(*1*) Dependents of sponsors on active duty orders written, or otherwise continuously, for more than 30 days or covered by TAMP (under § 199.3(e));

(*2*) Dependents of sponsors who are retired members other than retired members of the Retired Reserve; and

(*3*) Survivors of members who died while on active duty for more than 30 days or while receiving retired or retainer pay.

(ii) *Premiums*. TYA coverage is a premium based program that an eligible young adult dependent may purchase.

There is only individual coverage, and a premium shall be charged for each dependent even if there is more than one qualified dependent in the uniformed service sponsor's family that qualifies for TYA coverage. Dependents qualifying for TYA status can purchase individual TRICARE Select or TRICARE Prime coverage (as applicable) according to the rules governing the TRICARE option for which they are qualified on the basis of their uniformed service sponsor's TRICARE-eligible status (active duty, retired, Selected Reserve, or Retired Reserve) and the availability of a desired option in their geographic location. Premiums shall be determined in accordance with paragraph (c) of this section.

(iii) *Procedures*. Under TYA, qualified dependents under paragraph (b) of this section may purchase individual TYA coverage by submitting a completed request in the appropriate format along with an initial payment of the applicable premium. Procedures for purchasing coverage and paying applicable premiums are prescribed in paragraph (d) of this section.

(iv) *Benefits*. When their TYA coverage becomes effective, qualified beneficiaries receive the benefit of the TRICARE option that they selected, including, if applicable, access to military treatment facilities and pharmacies. TYA coverage features the cost share, deductible and catastrophic cap provisions applicable to Group B beneficiaries based on the program selected, *i.e.*, the TRICARE Select program under §199.17(l)(2)(ii) or the TRICARE Prime program under §199.17(l)(ii), as well as the status of their military sponsor. Access to military treatment facilities under the system of access priorities in §199.17(d)(1) is also based on the program selected as well as the status of the military sponsor. Premiums are not credited to deductibles or catastrophic caps; however, TYA premiums shall apply instead of any applicable TRICARE Prime or Select enrollment fee.

(b) *Eligibility for TRICARE Young Adult coverage*—(1) *Young Adult Dependent*. A young adult dependent qualifies to purchase TYA coverage if the dependent meets the following criteria:

(i) Would be a dependent child under 10 U.S.C. 1072, but for exceeding the age limit under that section (abused dependents and NATO dependents are not eligible for TYA coverage); and

(ii) Is a dependent under the age of 26; and

(iii) Is not enrolled, or eligible to enroll, for medical coverage in an eligible employer-sponsored health plan as defined in section 5000A(f)(2) of the Internal Revenue Code of 1986; and

(iv) Is not otherwise eligible under §199.3; and

(v) Is not a member of the uniformed services.

(2) The dependents' sponsor is responsible for keeping the Defense Enrollment Eligibility Reporting System (DEERS) current with eligibility data through the sponsor's Service personnel office. Using information from the DEERS, the TRICARE regional contractors have the responsibility to validate a dependent's qualifications to purchase TYA coverage.

(c) *TRICARE Young Adult premiums*. Qualified young adult dependents are charged premiums for coverage under TYA that represent the full cost of the program, including reasonable administrative costs, as determined by the Director utilizing an appropriate actuarial basis for the provision of TRICARE benefits for the TYA-eligible beneficiary population. Separate premiums shall be established for TRICARE Select and Prime plans. There may also be separate premiums based on the uniformed services sponsor's status. Premiums are to be paid monthly, except as otherwise provided through administrative implementation, pursuant to procedures established by the Director. The monthly rate for each month of a calendar year is one-twelfth of the annual rate for that calendar year.

(1) *Annual establishment of rates*. (i) Monthly premium rates shall be established and updated annually on a calendar year basis by the ASD(HA) for TYA individual coverage.

(ii) The appropriate actuarial basis used for calculating premium rates shall be one that most closely approximates the actual cost of providing care to a similar demographic population (based on age and health plans) as

those enrolled in TYA, as determined by the ASD(HA). TYA premiums shall be based on the actual costs of providing benefits to TYA dependents during the preceding years if the population of TYA enrollees is large enough during those preceding years to be considered actuarially appropriate. Until such time that actual costs from those preceding years become available, TYA premiums shall be based on the actual costs during the preceding calendar years for providing benefits to the population of similarly aged dependents to make the underlying group actuarially appropriate. An adjustment may be applied to cover overhead costs for administration of the program.

(2) *Premium adjustments*. In addition to the determinations described in paragraph (c)(1) of this section, premium adjustments may be made prospectively for any calendar year to reflect any significant program changes mandated by legislative enactment, including but not limited to significant new programs or benefits.

(d) *Procedures*. The Director may establish procedures for the following.

(1) *Purchasing coverage*. Procedures may be established for a qualified dependent to purchase individual coverage. To purchase TYA coverage for effective dates of coverage described below, qualified dependents must submit a request in the appropriate format, along with an initial payment of the applicable premium required by paragraph (c) of this section in accordance with established procedures.

(i) *Continuation coverage*. Procedures may be established for a qualified dependent to purchase TYA coverage with an effective date immediately following the date of termination of coverage under another TRICARE program. Application for continuation coverage must be made within 30 days of the date of termination of coverage under another TRICARE program.

(ii) *Enrollment*. Procedures for enrollment in TRICARE plans under §199.17(o) shall apply to a qualified dependent purchasing TYA coverage. Generally, the effective date of coverage will coincide with the first day of a month unless enrollment is due to a qualifying event and a different date on or after the qualifying event is required to prevent a lapse in health care coverage.

(2) *Termination*. Procedures may be established for TYA coverage to be terminated as follows.

(i) Loss of eligibility or entitlement for coverage by the sponsor will result in termination of the dependent's TYA coverage unless otherwise specified. The effective date of the sponsor's loss of eligibility for care will also be the effective date of termination of benefits under the TYA program unless specified otherwise.

(A) *Active duty military sponsor*. TYA coverage ends effective the date of military sponsor's separation from military service, unless the dependent would be eligible under section 199.3(e) of this Part but for the dependent's age, for the duration of the Transitional Assistance Management Program (TAMP) eligibility or until reaching age 26, whichever comes first. Upon the death of an active duty sponsor, dependents eligible for Transitional Survivor coverage may purchase TYA coverage if otherwise qualified.

(B) *Selected Reserve (Sel Res) Sponsor*. Sel Res sponsors must be currently enrolled in TRICARE Reserve Select (TRS) before a young adult dependent is eligible to purchase TYA. If TRS coverage is terminated by the sponsor, TYA coverage ends effective the same termination date as the sponsor. If the Sel Res sponsor dies while enrolled in TRS, the young adult dependent is eligible to purchase TYA coverage for six months after the date of death of the Sel Res sponsor, if otherwise qualified.

(C) *Retired Reserve Sponsor*. Retired Reserve members not yet eligible for retired or retainer pay must be enrolled in TRICARE Retired Reserve (TRR) to establish TYA eligibility for their young adult dependents. If TRR coverage is terminated by the sponsor, the TYA coverage for the young adult dependent ends effective the same date as the sponsor's termination of coverage under TRR. If the retired reserve sponsor dies while enrolled in TRR, the young adult dependent may continue to purchase TYA coverage until the date on which the deceased member would have attained age 60, if otherwise qualified. If the Retired Reserve member dies and is not enrolled in

TRR, there is no eligibility for TYA coverage until the sponsor would have reached age 60. On the date the Retired Reserve member would have reached 60, a young adult dependent who otherwise qualifies for TYA qualifies as a dependent of a deceased retired sponsor and can purchase TYA coverage.

(ii) Failure of a young adult dependent to maintain the eligibility qualifications in paragraph (b) of this section shall result in the termination of coverage under the TYA program. The effective date of termination shall be the date upon which the adult young dependent failed to meet any of the prerequisite qualifications. If a subsequent change in circumstances re-establishes eligibility (such as losing eligibility for an eligible employer-sponsored plan), the young adult dependent may re-enroll for coverage under the TYA program.

(iii) Coverage may also be terminated due to a change in the sponsor's status, and the young adult dependent must re-qualify and reapply for TYA coverage within 30 days of termination to preclude a gap in coverage.

(iv) Termination of coverage results in denial of claims for services with a date of service after the effective date of termination.

(v) Coverage may be terminated for young adult dependents upon request at any time by submitting a completed request in the appropriate format in accordance with established procedures.

(vi) In accordance with the provisions of §199.17(o)(2), coverage terminates for young adult dependents who fail to make premium payments in accordance with established procedures.

(vii) Absent a new qualifying event, young adults are not eligible to re-enroll in TYA until the next annual open season.

(3) *Eligibility for the Continued Health Care Benefit Program.* Upon termination of eligibility to purchase TYA coverage, dependents may purchase coverage for up to 36 months through the Continued Health Care Benefit Program under §199.20 unless locked out of TYA.

(4) *Changing coverage.* Upon application and payment of appropriate premiums, qualified dependents already enrolled in and who are current in their premium payments may elect to change to another TRICARE program for which the qualified dependent is eligible based on the sponsor's eligibility and the geographic location of the qualified young adult dependent. Upon change in sponsor status (for example, active duty to retired status), TYA coverage may be automatically transferred to the appropriate TRICARE option consistent with the sponsor's new status. Recurring TYA premiums may be adjusted accordingly. Administrative processes may be established for changes in program enrollment; however, no change shall be effective until the applicable premium has been paid.

(e) *Preemption of State laws.*—The preemption provisions of §199.17(a)(7) are applicable to the TYA program.

(f) *Administration.* The Director may establish other processes, policies and procedures for the effective administration of the TYA Program and may authorize exceptions to requirements of this section, if permitted.

[78 FR 32119, May 29, 2013, as amended at 82 FR 45460, Sept. 29, 2017]

## APPENDIX A TO PART 199—ACRONYMS

AFR—Air Force Regulation
AR—Army Regulation
ASD (HA)—Assistant Secretary of Defense (Health Affairs)
CCLR—Claims Collection Litigation Report
CEOB—CHAMPUS Explanation of Benefits
CFR—Code of Federal Regulations
CHAMPUS—Civilian Health and Medical Program of the Uniformed Services
CRD—Chronic Renal Disease
CT—Computerized Tomography
DASD (A)—Deputy Assistant Secretary of Defense (Administration)
D.D.S.—Doctor of Dental Surgery
DEERS—Defense Enrollment Eligibility Reporting System
DHHS—Department of Health and Human Services
D.M.D.—Doctor of Dental Medicine
DME—Durable Medical Equipment
D.O.—Doctor of Osteopathy
DoD—Department of Defense
DSM-III—Diagnostic and Statistical Manual of Mental Disorders (Third Edition)
ECHO—Extended Care Health Option
EEG—Electroencephalogram
EST—Electroshock Therapy
FAR—Federal Acquisition Regulation
FEHBP—Federal Employees Health Benefits Program
FMCRA—Federal Medical Care Recovery Act

FR—Federal Register
HBA—Health Benefits Advisor
HL—Hearing Threshold Level
Hz—Hertz
ICD–9–CM—International Classification of Diseases, 9th Revision, Clinical Modification
ICU—Intensive Care Unit
IQ—Intelligence Quotient
JCAH—Joint Commission on Accreditation of Hospitals
L.P.N.—Licensed Practical Nurse
L.V.N.—Licensed Vocational Nurse
MBD—Minimal Brain Dysfunction
MCO—Marine Corps Order
M.D.—Doctor of Medicine
MIA—Missing in Action
NATO—North Atlantic Treaty Organization
NAVMILPERSCOMINST—Navy Military Personnel Command Instruction
NAVPERS—Navy Personnel
NOAA—National Oceanic and Atmospheric Administration
OCHAMPUS—Office of Civilian Health and Medical Program of the Uniformed Services
OCHAMPUSEUR—Office of Civilian Health and Medical Program of the Uniformed Services for Europe
OCHAMPUSPAC—Office of Civilian Health and Medical Program of the Uniformed Services for the Pacific Area
OCHAMPUSSO—Office of Civilian Health and Medical Program of the Uniformed Services for the Southern Hemisphere
OMB—Office of Management and Budget
PKU—Phenylketonuria
R.N.—Registered Nurse
RTC—Residential Treatment Center
SNF—Skilled Nursing Facility
STF—Specialized Treatment Facility
U.S.C.—United States Code
USPHS—U.S. Public Health Service

[51 FR 24008, July 1, 1986, as amended at 62 FR 35097, June 30, 1997; 63 FR 48448, Sept. 10, 1998; 69 FR 44952, July 28, 2004; 69 FR 51569, Aug. 20, 2004]

# PART 200—CIVIL MONEY PENALTY AUTHORITIES FOR THE TRICARE PROGRAM

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200.2019 Post-hearing briefs.
200.2020 Initial decision.
200.2021 Appeal to DAB.
200.2022 Stay of initial decision.

200.2023 Harmless error.

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. chapter 55; 42 U.S.C. 1320a–7a.

SOURCE: 85 FR 60705, Sept. 28, 2020, unless otherwise noted.

## Subpart A—General Provisions

### § 200.100 Basis and purpose.

(a) *Basis*. This part implements section 1128A of the Social Security Act (42 U.S.C. 1320a–7a) (the Act).

(b) *Purpose*. This part—

(1) Provides for the imposition of civil money penalties and, as applicable, assessments against persons who have committed an act or omission that violates one or more provisions of this part; and

(2) Sets forth the appeal rights of persons subject to a penalty and assessment.

### § 200.110 Definitions.

For purposes of this part, with respect to terms not defined in this section but defined in 32 CFR 199.2, the definition in such § 199.2 shall apply. For purposes of this part, the following definitions apply:

*Assessment* means the amounts described in this part and includes the plural of that term.

*Claim* means an application for payment for an item or service under TRICARE/CHAMPUS.

*Defense Health Agency or DHA* means the Director of the Defense Health Agency or designee.

*Items and services or items or services* includes without limitation, any item, device, drug, biological, supply, or service (including management or administrative services), including, but not limited to, those that are listed in an itemized claim for program payment or a request for payment; for which payment is included in any TRICARE/CHAMPUS reimbursement method, such as a prospective payment system or managed care system; or that are, in the case of a claim based on costs, required to be entered in a cost report, books of account, or other documents supporting the claim (whether or not actually entered).

*Knowingly* means that a person, with respect to an act, has actual knowledge of the act, acts in deliberate ignorance of the act, or acts in reckless disregard of the act, and no proof of specific intent to defraud is required.

*Material* means having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property.

*Non-separately-billable item or service* means an item or service that is a component of, or otherwise contributes to the provision of, an item or a service, but is not itself a separately billable item or service.

*Office of Inspector General or OIG* means the Office of Inspector General of the Department of Defense; the Defense Criminal Investigative Service (DCIS); or the Office of Inspector General for the Defense Health Agency.

*Overpayment* means any funds that a person receives or retains under TRICARE/CHAMPUS to which the person, after applicable reconciliation, is not entitled under such program.

*Penalty* means the amount described in this part and includes the plural of that term.

*Person* means an individual, trust or estate, partnership, corporation, professional association or corporation, or other entity, public or private.

*Preventive care*, for purposes of the definition of the term ''remuneration'' as set forth in this section and the preventive care exception to section 231(h) of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), means any service that—

(1) Is a prenatal service or a postnatal well-baby visit or is a specific clinical service covered by TRICARE; and

(2) Is reimbursable in whole or in part by TRICARE as a preventive care service.

*Reasonable request*, with respect to § 200.200(b)(6), means a written request, signed by a designated representative of the OIG and made by a properly identified agent of the OIG during reasonable business hours. The request will include: A statement of the authority for the request, the person's rights in responding to the request, the definition of ''reasonable request'' and ''failure to grant timely access'' under this part, the deadline by which the OIG requests access, and the amount of the civil money penalty or assessment

that could be imposed for failure to comply with the request, and the earliest date that a request for reinstatement would be considered.

*Remuneration,* for the purposes of this part, is consistent with the definition in section 1128A(i)(6) of the Social Security Act and includes the waiver of copayment, coinsurance and deductible amounts (or any part thereof) and transfers of items or services for free or for other than fair market value. The term ''remuneration'' does not include:

(1) The waiver of coinsurance and deductible amounts by a person, if the waiver is not offered as part of any advertisement or solicitation; the person does not routinely waive coinsurance or deductible amounts; and the person waives coinsurance and deductible amounts after determining in good faith that the individual is in financial need or failure by the person to collect coinsurance or deductible amounts after making reasonable collection efforts.

(2) Any permissible practice as specified in section 1128B(b)(3) of the Act or in regulations issued by the Secretary.

(3) Differentials in coinsurance and deductible amounts as part of a benefit plan design (as long as the differentials have been disclosed in writing to all beneficiaries, third party payers and providers), to whom claims are presented.

(4) Incentives given to individuals to promote the delivery of preventive care services where the delivery of such services is not tied (directly or indirectly) to the provision of other services reimbursed in whole or in part by TRICARE, Medicare or an applicable State health care program. Such incentives may include the provision of preventive care, but may not include—

(i) Cash or instruments convertible to cash; or

(ii) An incentive the value of which is disproportionally large in relationship to the value of the preventive care service (*i.e.,* either the value of the service itself or the future health care costs reasonably expected to be avoided as a result of the preventive care).

(5) Items or services that improve a beneficiary's ability to obtain items and services payable by TRICARE, and pose a low risk of harm to TRICARE beneficiaries and the TRICARE program by—

(i) Being unlikely to interfere with, or skew, clinical decision making;

(ii) Being unlikely to increase costs to Federal health care programs or beneficiaries through overutilization or inappropriate utilization; and

(iii) Not raising patient safety or quality-of-care concerns.

(6) The offer or transfer of items or services for free or less than fair market value by a person if—

(i) The items or services consist of coupons, rebates, or other rewards from a retailer;

(ii) The items or services are offered or transferred on equal terms available to the general public, regardless of health insurance status; and

(iii) The offer or transfer of the items or services is not tied to the provision of other items or services reimbursed in whole or in part by the program under chapter 55 of title 10, U.S. Code.

(7) The offer or transfer of items or services for free or less than fair market value by a person, if—

(i) The items or services are not offered as part of any advertisement or solicitation;

(ii) The offer or transfer of the items or services is not tied to the provision of other items or services reimbursed in whole or in part by the program under chapter 55 of title 10, U.S. Code;

(iii) There is a reasonable connection between the items or services and the medical care of the individual; and

(iv) The person provides the items or services after determining in good faith that the individual is in financial need.

*Request for payment* means an application submitted by a person to any person for payment for an item or service.

*Respondent* means the person upon whom the Department has imposed, or proposes to impose, a penalty and/or assessment.

*Separately billable item or service* means an item or service for which an identifiable payment may be made under a Federal health care program, *e.g.,* an itemized claim or a payment under a prospective payment system or other reimbursement methodology.

*Should know, or should have known,* means that a person, with respect to

information, either acts in deliberate ignorance of the truth or falsity of the information or acts in reckless disregard of the truth or falsity of the information. For purposes of this definition, no proof of specific intent to defraud is required.

*TRICARE or TRICARE/CHAMPUS or CHAMPUS* means any program operated under the authority of 32 CFR part 199.

### § 200.120 Liability for penalties and assessments.

(a) In any case in which it is determined that more than one person was responsible for a violation described in this part, each such person may be held separately liable for the entire penalty prescribed by this part.

(b) In any case in which it is determined that more than one person was responsible for a violation described in this part, an assessment may be imposed, when authorized, against any one such person or jointly and severally against two or more such persons, but the aggregate amount of the assessments collected may not exceed the amount that could be assessed if only one person was responsible.

(c) Under this part, a principal is liable for penalties and assessments for the actions of his or her agent acting within the scope of his or her agency. The provision in this paragraph (c) does not limit the underlying liability of the agent.

### § 200.130 Assessments.

The assessment in this part is in lieu of damages sustained by the Department because of the violation.

### § 200.140 Determinations regarding the amount of penalties and assessments.

(a) Except as otherwise provided in this part, in determining the amount of any penalty or assessment in accordance with this part, the DHA will consider the following factors—

(1) The nature and circumstances of the violation;

(2) The degree of culpability of the person against whom a civil money penalty and assessment is proposed. It should be considered an aggravating circumstance if the respondent had actual knowledge where a lower level of knowledge was required to establish liability (*e.g.*, for a provision that establishes liability if the respondent ''knew or should have known'' a claim was false or fraudulent, it will be an aggravating circumstance if the respondent knew the claim was false or fraudulent). It should be a mitigating circumstance if the person took appropriate and timely corrective action in response to the violation. For purposes of this part, corrective action must include disclosing the violation to the DHA by initiating a self-disclosure and fully cooperating with the DHA's review and resolution of such disclosure;

(3) The history of prior offenses. Aggravating circumstances include, if at any time prior to the violation, the individual—or in the case of an entity, the entity itself; any individual who had a direct or indirect ownership or control interest (as defined in section 1124(a)(3) of the Act) in a sanctioned entity at the time the violation occurred and who knew, or should have known, of the violation; or any individual who was an officer or a managing employee (as defined in section 1126(b) of the Act) of such an entity at the time the violation occurred—was held liable for criminal, civil, or administrative sanctions in connection with a program covered by this part or in connection with the delivery of a health care item or service;

(4) Other wrongful conduct. Aggravating circumstances include proof that the individual—or in the case of an entity, the entity itself; any individual who had a direct or indirect ownership or control interest (as defined in section 1124(a)(3) of the Act) in a sanctioned entity at the time the violation occurred and who knew, or should have known, of the violation; or any individual who was an officer or a managing employee (as defined in section 1126(b) of the Act) of such an entity at the time the violation occurred—engaged in wrongful conduct, other than the specific conduct upon which liability is based, relating to a government program or in connection with the delivery of a health care item or service. The statute of limitations governing civil money penalty proceedings

does not apply to proof of other wrongful conduct as an aggravating circumstance; and

(5) Such other matters as justice may require. Other circumstances of an aggravating or mitigating nature should be considered if, in the interests of justice, they require either a reduction or an increase in the penalty or assessment to achieve the purposes of this part.

(b)(1) After determining the amount of any penalty and assessment in accordance with this part, the DHA considers the ability of the person to pay the proposed civil money penalty or assessment. The person shall provide, in a time and manner requested by the DHA, sufficient financial documentation, including, but not limited to, audited financial statements, tax returns, and financial disclosure statements, deemed necessary by the DHA to determine the person's ability to pay the penalty or assessment.

(2) If the person requests a hearing in accordance with § 200.2002, the only financial documentation subject to review is that which the person provided to the DHA during the administrative process, unless the Administrative Law Judge (ALJ) finds that extraordinary circumstances prevented the person from providing the financial documentation to the DHA in the time and manner requested by the DHA prior to the hearing request.

(c) In determining the amount of any penalty and assessment to be imposed under this part the following circumstances are also to be considered—

(1) If there are substantial or several mitigating circumstances, the aggregate amount of the penalty and assessment should be set at an amount sufficiently below the maximum permitted by this part to reflect that fact.

(2) If there are substantial or several aggravating circumstances, the aggregate amount of the penalty and assessment should be set at an amount sufficiently close to or at the maximum permitted by this part to reflect that fact.

(3) Unless there are extraordinary mitigating circumstances, the aggregate amount of the penalty and assessment should not be less than double the approximate amount of damages and costs (as defined by paragraph (e)(2) of this section) sustained by the United States, or any State, as a result of the violation.

(4) The presence of any single aggravating circumstance may justify imposing a penalty and assessment at or close to the maximum even when one or more mitigating factors is present.

(d)(1) The standards set forth in this section are binding, except to the extent that their application would result in imposition of an amount that would exceed limits imposed by the United States Constitution.

(2) The amount imposed will not be less than the approximate amount required to fully compensate the United States, for its damages and costs, tangible and intangible, including, but not limited to, the costs attributable to the investigation, prosecution, and administrative review of the case.

(3) Nothing in this part limits the authority of the Department or the DHA to settle any issue or case as provided by § 200.1530 or to compromise any penalty and assessment as provided by § 200.1550.

(4) Penalties and assessments imposed under this part are in addition to any other penalties, assessments, or other sanctions prescribed by law.

### § 200.150 Delegation of authority.

The DHA is delegated authority from the Secretary to impose civil money penalties and, as applicable, assessments against any person who has violated one or more provisions of this part. The delegation of authority includes all powers to impose and compromise civil money penalties, assessments under section 1128A of the Act.

## Subpart B—Civil Money Penalties (CMPs) and Assessments for False or Fraudulent Claims and Other Similar Misconduct

### § 200.200 Basis for civil money penalties and assessments.

(a) The DHA may impose a penalty, assessment against any person who it determines has knowingly presented, or caused to be presented, a claim that was for—

(1) An item or service that the person knew, or should have known, was not provided as claimed, including a claim that was part of a pattern or practice of claims based on codes that the person knew, or should have known, would result in greater payment to the person than the code applicable to the item or service actually provided;

(2) An item or service for which the person knew, or should have known, that the claim was false or fraudulent;

(3) An item or service furnished during a period in which the person was excluded from participation under 32 CFR 199.9(f) or by another Federal health care program (as defined in section 1128B(f) of the Act) to which the claim was presented;

(4) A physician's services (or an item or service) for which the person knew, or should have known, that the individual who furnished (or supervised the furnishing of) the service—

(i) Was not licensed as a physician;

(ii) Was licensed as a physician, but such license had been obtained through a misrepresentation of material fact (including cheating on an examination required for licensing); or

(iii) Represented to the patient at the time the service was furnished that the physician was certified by a medical specialty board when he or she was not so certified; or

(5) An item or service that a person knew, or should have known was not medically necessary, and which is part of a pattern of such claims.

(b) The DHA may impose a penalty and, where authorized, an assessment against any person who it determines—

(1) Arranges or contracts (by employment or otherwise) with an individual or entity that the person knows, or should know, is excluded from participation in Federal health care programs for the provision of items or services for which payment may be made under such a program;

(2) Orders or prescribes a medical or other item or service during a period in which the person was excluded from a Federal health care program, in the case when the person knows, or should know, that a claim for such medical or other item or service will be made under such a program;

(3) Knowingly makes, or causes to be made, any false statement, omission, or misrepresentation of a material fact in any application, bid, or contract to participate or enroll as a provider of services or a supplier under a Federal health care program;

(4) Knows of an overpayment and does not report and return the overpayment in accordance with section 1128J(d) of the Act;

(5) Knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim for payment for items and services furnished under a Federal health care program; or

(6) Fails to grant timely access to records, documents, and other material or data in any medium (including electronically stored information and any tangible thing), upon reasonable request, to the OIG, for the purpose of audits, investigations, evaluations, or other OIG statutory functions. Such failure to grant timely access means:

(i) Except when the OIG reasonably believes that the requested material is about to be altered or destroyed, the failure to produce or make available for inspection and copying the requested material upon reasonable request or to provide a compelling reason why they cannot be produced, by the deadline specified in the OIG's written request; and

(ii) When the OIG has reason to believe that the requested material is about to be altered or destroyed, the failure to provide access to the requested material at the time the request is made.

### § 200.210 Amount of penalties and assessments.

(a) *Penalties.*[1] (1) Except as provided in this section, the DHA may impose a penalty of not more than $20,504 for each individual violation that is subject to a determination under this subpart.

[1]The penalty amounts in this section are updated annually, as adjusted in accordance with the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990 (Pub. L. 101–140), as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (section 701 of Pub. L. 114–

74). Annually adjusted amounts are published at 32 CFR part 269. The maximum penalty amount is based on the most recent statutory adjustment included in the Bipartisan Budget Act of 2018 and includes the cost of living multiplier for 2019, based on the Consumer Price Index for all Urban Consumers (CPI–U) for the month of October 2018, not seasonally adjusted, is 1.02522, as indicated in Office of Management and Budget (OMB) Memorandum M–19–04.

(2) For each individual violation of § 200.200(b)(1), the DHA may impose a penalty of not more than $20,504 for each separately billable or non-separately-billable item or service provided, furnished, ordered, or prescribed by an excluded individual or entity.

(3) The DHA may impose a penalty of not more than $100,522 for each false statement, omission, or misrepresentation of a material fact in violation of § 200.200(b)(3).

(4) The DHA may impose a penalty of not more than $100,522 for each false record or statement in violation of § 200.200(b)(5).

(5) The DHA may impose a penalty of not more than $20,504 for each item or service related to an overpayment that is not reported and returned in accordance with section 1128J(d) of the Act in violation of § 200.200(b)(4).

(6) The DHA may impose a penalty of not more than $30,757 for each day of failure to grant timely access in violation of § 200.200(b)(6).

(b) *Assessments*. (1) Except for violations of § 200.200(b)(1) and (3), the DHA may impose an assessment for each individual violation of § 200.200, of not more than 3 times the amount claimed for each item or service.

(2) For violations of § 200.200(b)(1), the DHA may impose an assessment of not more than 3 times—

(i) The amount claimed for each separately billable item or service provided, furnished, ordered, or prescribed by an excluded individual or entity; or

(ii) The total costs (including salary, benefits, taxes, and other money or items of value) related to the excluded individual or entity incurred by the person that employs, contracts with, or otherwise arranges for an excluded individual or entity to provide, furnish, order, or prescribe a non-separately-billable item or service.

(3) For violations of § 200.200(b)(3), the DHA may impose an assessment of not more than 3 times the total amount claimed for each item or service for which payment was made based upon the application containing the false statement, omission, or misrepresentation of material fact.

### § 200.220 Determinations regarding the amount of penalties and assessments.

In considering the factors listed in § 200.140—

(a) It should be considered a mitigating circumstance if all the items or services or violations included in the action brought under this part were of the same type and occurred within a short period of time, there were few such items or services or violations, and the total amount claimed or requested for such items or services was less than $5,000.

(b) Aggravating circumstances include—

(1) The violations were of several types or occurred over a lengthy period of time;

(2) There were many such items or services or violations (or the nature and circumstances indicate a pattern of claims or requests for payment for such items or services or a pattern of violations);

(3) The amount claimed or requested for such items or services, or the amount of the overpayment was $50,000 or more;

(4) The violation resulted, or could have resulted, in patient harm, premature discharge, or a need for additional services or subsequent hospital admission; or

(5) The amount or type of financial, ownership, or control interest or the degree of responsibility a person has in an entity was substantial with respect to an action brought under § 200.200(b)(3).

## Subpart C—CMPs and Assessments for Anti-Kickback Violations

### § 200.300 Basis for civil money penalties and assessments.

The DHA may impose a penalty and an assessment against any person who

it determines in accordance with this part has violated section 1128B(b) of the Act by unlawfully offering, paying, soliciting, or receiving remuneration to induce or in return for the referral of business paid for, in whole or in part, by TRICARE/CHAMPUS.

### § 200.310 Amount of penalties and assessments.

(a) *Penalties*.[2] The DHA may impose a penalty of not more than $100,522 for each offer, payment, solicitation, or receipt of remuneration that is subject to a determination under § 200.300.

[2] The penalty amounts in this section are updated annually, as adjusted in accordance with the Federal Civil Monetary Penalty Inflation Adjustment Act of 1990 (Pub. L. 101–140), as amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (section 701 of Pub. L. 114–74). Annually adjusted amounts are published at 32 CFR part 269. The maximum penalty amount is based on the most recent statutory adjustment included in the Bipartisan Budget Act of 2018 and includes the cost of living multiplier for 2019, based on the CPI–U for the month of October 2018, not seasonally adjusted, is 1.02522, as indicated in OMB Memorandum M–19–04.

(b) *Assessments*. The DHA may impose an assessment of not more than 3 times the total remuneration offered, paid, solicited, or received that is subject to a determination under § 200.300. Calculation of the total remuneration for purposes of an assessment shall be without regard to whether a portion of such remuneration was offered, paid, solicited, or received for a lawful purpose.

### § 200.320 Determinations regarding the amount of penalties and assessments.

In considering the factors listed in § 200.140:

(a) It should be considered a mitigating circumstance if all the items, services, or violations included in the action brought under this part were of the same type and occurred within a short period of time; there were few such items, services, or violations; and the total amount claimed or requested for such items or services was less than $5,000.

(b) Aggravating circumstances include—

(1) The violations were of several types or occurred over a lengthy period of time;

(2) There were many such items, services, or violations (or the nature and circumstances indicate a pattern of claims or requests for payment for such items or services or a pattern of violations);

(3) The amount claimed or requested for such items or services or the amount of the remuneration was $50,000 or more; or

(4) The violation resulted, or could have resulted, in harm to the patient, a premature discharge, or a need for additional services or subsequent hospital admission.

## Subparts D–N [Reserved]

## Subpart O—Procedures for the Imposition of CMPs and Assessments

### § 200.1500 Notice of proposed determination.

(a) If the DHA proposes a penalty and, when applicable, an assessment, as applicable, in accordance with this part, the DHA must serve on the respondent, in any manner authorized by Rule 4 of the Federal Rules of Civil Procedure, written notice of the DHA's intent to impose a penalty and if applicable an assessment. The notice will include—

(1) Reference to the statutory basis for the penalty and the assessment;

(2) A description of the violation for which the penalty, and assessment are proposed (except in cases in which the DHA is relying upon statistical sampling in accordance with § 200.1580, in which case the notice shall describe those claims and requests for payment constituting the sample upon which the DHA is relying and will briefly describe the statistical sampling technique used by the DHA);

(3) The reason why such violation subjects the respondent to a penalty, and an assessment;

(4) The amount of the proposed penalty and assessment (where applicable);

(5) Any factors and circumstances described in this part that were considered when determining the amount of

the proposed penalty and assessment; and

(6) Instructions for responding to the notice, including—

(i) A specific statement of the respondent's right to a hearing; and

(ii) A statement that failure to request a hearing within 60 days permits the imposition of the proposed penalty, assessment, without right of appeal.

(b) Any person upon whom the DHA has proposed the imposition of a penalty, and/or an assessment, may appeal such proposed penalty, and/or assessment to the Departmental Appeals Board in accordance with § 200.2002. The provisions of subpart P of this part govern such appeals.

(c) If the respondent fails, within the time period permitted, to exercise his or her right to a hearing under this section, any penalty, and/or assessment becomes final.

### § 200.1510 Failure to request a hearing.

If the respondent does not request a hearing within 60 days after the notice prescribed by § 200.1500(a) is received, as determined by § 200.2002(c), by the respondent, the DHA may impose the proposed penalty and assessment, or any less severe penalty and assessment. The DHA shall notify the respondent in any manner authorized by Rule 4 of the Federal Rules of Civil Procedure of any penalty and assessment that have been imposed and of the means by which the respondent may satisfy the judgment. The respondent has no right to appeal a penalty, an assessment with respect to which he or she has not made a timely request for a hearing under § 200.2002.

### § 200.1520 Collateral estoppel.

(a) Where a final determination pertaining to the respondent's liability for acts that violate this part has been rendered in any proceeding in which the respondent was a party and had an opportunity to be heard, the respondent shall be bound by such determination in any proceeding under this part.

(b) In a proceeding under this part, a person is estopped from denying the essential elements of the criminal offense if the proceeding—

(1) Is against a person who has been convicted (whether upon a verdict after trial or upon a plea of guilty or nolo contendere) of a Federal crime charging fraud or false statements; and

(2) Involves the same transactions as in the criminal action.

### § 200.1530 Settlement.

The DHA has exclusive authority to settle any issues or case without consent of the ALJ.

### § 200.1540 Judicial review.

(a) Section 1128A(e) of the Social Security Act authorizes judicial review of a penalty and an assessment that has become final. The only matters subject to judicial review are those that the respondent raised pursuant to § 200.2021, unless the court finds that extraordinary circumstances existed that prevented the respondent from raising the issue in the underlying administrative appeal.

(b) A respondent must exhaust all administrative appeal procedures established by the Secretary or required by law before a respondent may bring an action in Federal court, as provided in section 1128A(e) of the Social Security Act, concerning any penalty and assessment imposed pursuant to this part.

(c) Administrative remedies are exhausted when a decision becomes final in accordance with § 200.2021(j).

### § 200.1550 Collection of penalties and assessments.

(a) Once a determination by the Secretary has become final, collection of any penalty and assessment will be the responsibility of the Defense Health Agency.

(b) A penalty or an assessment imposed under this part may be compromised by the DHA and may be recovered in a civil action brought in the United States district court for the district where the claim was presented or where the respondent resides.

(c) The amount of penalty or assessment, when finally determined, or the amount agreed upon in compromise, may be deducted from any sum then or

later owing by the United States Government or a State agency to the person against whom the penalty or assessment has been assessed.

(d) Matters that were raised, or that could have been raised, in a hearing before an ALJ or in an appeal under section 1128A(e) of the Social Security Act may not be raised as a defense in a civil action by the United States to collect a penalty or assessment under this part.

### § 200.1560 Notice to other agencies.

Whenever a penalty and/or an assessment becomes final, the following organizations and entities will be notified about such action and the reasons for it: Department of Health and Human Service (HHS) Office of Inspector General, the appropriate State or local medical or professional association; the appropriate quality improvement organization; as appropriate, the State agency that administers each State health care program; the appropriate TRICARE Contractor; the appropriate State or local licensing agency or organization (including the Medicare and Medicaid State survey agencies); and the long-term-care ombudsman.

### § 200.1570 Limitations.

No action under this part will be entertained unless commenced, in accordance with § 200.1500(a), within 6 years from the date on which the violation occurred.

### § 200.1580 Statistical sampling.

(a) In meeting the burden of proof in § 200.2015, the DHA may introduce the results of a statistical sampling study as evidence of the number and amount of claims and/or requests for payment, as described in this part, that were presented, or caused to be presented, by the respondent. Such a statistical sampling study, if based upon an appropriate sampling and computed by valid statistical methods, shall constitute prima facie evidence of the number and amount of claims or requests for payment, as described in this part.

(b) Once the DHA has made a prima facie case, as described in paragraph (a) of this section, the burden of production shall shift to the respondent to produce evidence reasonably calculated to rebut the findings of the statistical sampling study. The DHA will then be given the opportunity to rebut this evidence.

(c) Where the DHA establishes a number and amount of claims subject to penalties using a statistical sampling study, the DHA may use the results of the study to extrapolate a total amount of overpaid funds to be collected pursuant to 32 CFR 199.11.

### § § 200.1590–200.1990 [Reserved]

## Subpart P—Appeals of CMPs and Assessments

### § 200.2001 Definitions.

For purposes of this subpart, the following definitions apply:

*Civil money penalty cases* refer to all proceedings arising under any of the statutory bases for which the DHA has been delegated authority to impose civil money penalties under TRICARE.

*DAB* refers to the Department of Health and Human Services, Departmental Appeals Board or its delegate, or other administrative appeals decision maker designated by the Director, DHA.

### § 200.2002 Hearing before an ALJ.

(a) A party sanctioned under any criteria specified in this part may request a hearing before an ALJ.

(b) In civil money penalty cases, the parties to the proceeding will consist of the respondent and the DHA.

(c) The request for a hearing will be made in writing to the DAB; signed by the petitioner or respondent, or by his or her attorney; and sent by certified mail. The request must be filed within 60 days after the notice, provided in accordance with § 200.1500, is received by the petitioner or respondent. For purposes of this section, the date of receipt of the notice letter will be presumed to be 5 days after the date of such notice unless there is a reasonable showing to the contrary.

(d) The request for a hearing will contain a statement as to the specific issues or findings of fact and conclusions of law in the notice letter with

which the petitioner or respondent disagrees, and the basis for his or her contention that the specific issues or findings and conclusions were incorrect.

(e) The ALJ will dismiss a hearing request where—

(1) The petitioner's or the respondent's hearing request is not filed in a timely manner;

(2) The petitioner or respondent withdraws his or her request for a hearing;

(3) The petitioner or respondent abandons his or her request for a hearing; or

(4) The petitioner's or respondent's hearing request fails to raise any issue which may properly be addressed in a hearing.

### § 200.2003 Rights of parties.

(a) Except as otherwise limited by this part, all parties may—

(1) Be accompanied, represented, and advised by an attorney;

(2) Participate in any conference held by the ALJ;

(3) Conduct discovery of documents as permitted by this part;

(4) Agree to stipulations of fact or law which will be made part of the record;

(5) Present evidence relevant to the issues at the hearing;

(6) Present and cross-examine witnesses;

(7) Present oral arguments at the hearing as permitted by the ALJ; and

(8) Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

(b) Fees for any services performed on behalf of a party by an attorney are not subject to the provisions of section 206 of title II of the Act, which authorizes the Secretary to specify or limit these fees.

### § 200.2004 Authority of the ALJ.

(a) The ALJ will conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

(b) The ALJ has the authority to—

(1) Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

(2) Continue or recess the hearing in whole or in part for a reasonable period of time;

(3) Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

(4) Administer oaths and affirmations;

(5) Issue subpoenas requiring the attendance of witnesses at hearings and the production of documents at or in relation to hearings;

(6) Rule on motions and other procedural matters;

(7) Regulate the scope and timing of documentary discovery as permitted by this part;

(8) Regulate the course of the hearing and the conduct of representatives, parties, and witnesses;

(9) Examine witnesses;

(10) Receive, rule on, exclude, or limit evidence;

(11) Upon motion of a party, take official notice of facts;

(12) Upon motion of a party, decide cases, in whole or in part, by summary judgment where there is no disputed issue of material fact; and

(13) Conduct any conference, argument or hearing in person or, upon agreement of the parties, by telephone.

(c) The ALJ does not have the authority to—

(1) Find invalid or refuse to follow Federal statutes or regulations or secretarial delegations of authority;

(2) Enter an order in the nature of a directed verdict;

(3) Compel settlement negotiations;

(4) Enjoin any act of the Secretary; or

(5) Review the exercise of discretion by the DHA to impose a CMP or assessment under this part.

### § 200.2005 Ex parte contacts.

No party or person (except employees of the ALJ's office) will communicate in any way with the ALJ on any matter at issue in a case, unless on notice and opportunity for all parties to participate. This section does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

### § 200.2006 Prehearing conferences.

(a) The ALJ will schedule at least one prehearing conference, and may

schedule additional prehearing conferences as appropriate, upon reasonable notice to the parties.

(b) The ALJ may use prehearing conferences to discuss the following—

(1) Simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

(3) Stipulations and admissions of fact or as to the contents and authenticity of documents;

(4) Whether the parties can agree to submission of the case on a stipulated record;

(5) Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objection of other parties) and written argument;

(6) Limitation of the number of witnesses;

(7) Scheduling dates for the exchange of witness lists and of proposed exhibits;

(8) Discovery of documents as permitted by this part;

(9) The time and place for the hearing;

(10) Such other matters as may tend to encourage the fair, just and expeditious disposition of the proceedings; and

(11) Potential settlement of the case.

(c) The ALJ will issue an order containing the matters agreed upon by the parties or ordered by the ALJ at a prehearing conference.

### § 200.2007 Discovery.

(a) A party may make a request to another party for production of documents for inspection and copying which are relevant and material to the issues before the ALJ.

(b) For the purpose of this section, the term documents includes information, reports, answers, records, accounts, papers, and other data and documentary evidence. Nothing contained in this section will be interpreted to require the creation of a document, except that requested data stored in an electronic data storage system will be produced in a form accessible to the requesting party.

(c) Requests for documents, requests for admissions, written interrogatories, depositions, and any forms of discovery, other than those permitted under paragraph (a) of this section, are not authorized.

(d) This section will not be construed to require the disclosure of interview reports or statements obtained by any party, or on behalf of any party, of persons who will not be called as witnesses by that party, or analyses and summaries prepared in conjunction with the investigation or litigation of the case, or any otherwise privileged documents.

(e)(1) When a request for production of documents has been received, within 30 days, the party receiving that request will either fully respond to the request, or state that the request is being objected to and the reasons for that objection. If objection is made to part of an item or category, the part will be specified. Upon receiving any objections, the party seeking production may then, within 30 days or any other time frame set by the ALJ, file a motion for an order compelling discovery. (The party receiving a request for production may also file a motion for protective order any time prior to the date the production is due.)

(2) The ALJ may grant a motion for protective order or deny a motion for an order compelling discovery if the ALJ finds that the discovery sought—

(i) Is irrelevant;

(ii) Is unduly costly or burdensome;

(iii) Will unduly delay the proceeding; or

(iv) Seeks privileged information.

(3) The ALJ may extend any of the time frames set forth in paragraph (e)(1) of this section.

(4) The burden of showing that discovery should be allowed is on the party seeking discovery.

### § 200.2008 Exchange of witness lists, witness statements, and exhibits.

(a) At least 15 days before the hearing, the ALJ will order the parties to exchange witness lists, copies of prior written statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with § 200.2016.

(b)(1) If at any time a party objects to the proposed admission of evidence not exchanged in accordance with paragraph (a) of this section, the ALJ will determine whether the failure to comply with paragraph (a) of this section should result in the exclusion of such evidence.

(2) Unless the ALJ finds that extraordinary circumstances justified the failure to timely exchange the information listed under paragraph (a) of this section, the ALJ must exclude from the party's case-in-chief:

(i) The testimony of any witness whose name does not appear on the witness list; and

(ii) Any exhibit not provided to the opposing party as specified in paragraph (a) of this section.

(3) If the ALJ finds that extraordinary circumstances existed, the ALJ must then determine whether the admission of such evidence would cause substantial prejudice to the objecting party. If the ALJ finds that there is no substantial prejudice, the evidence may be admitted. If the ALJ finds that there is substantial prejudice, the ALJ may exclude the evidence, or at his or her discretion, may postpone the hearing for such time as is necessary for the objecting party to prepare and respond to the evidence.

(c) Unless another party objects within a reasonable period of time prior to the hearing, documents exchanged in accordance with paragraph (a) of this section will be deemed to be authentic for the purpose of admissibility at the hearing.

### § 200.2009 Subpoenas for attendance at hearing.

(a) A party wishing to procure the appearance and testimony of any individual at the hearing may make a motion requesting the ALJ to issue a subpoena if the appearance and testimony are reasonably necessary for the presentation of a party's case.

(b) A subpoena requiring the attendance of an individual in accordance with paragraph (a) of this section may also require the individual (whether or not the individual is a party) to produce evidence authorized under § 200.2007 at or prior to the hearing.

(c) When a subpoena is served by a respondent or petitioner on a particular individual or particular office of the DHA, the DHA may comply by designating any of its representatives to appear and testify.

(d) A party seeking a subpoena will file a written motion not less than 30 days before the date fixed for the hearing, unless otherwise allowed by the ALJ for good cause shown. Such request will:

(1) Specify any evidence to be produced;

(2) Designate the witnesses; and

(3) Describe the address and location with sufficient particularity to permit such witnesses to be found.

(e) The subpoena will specify the time and place at which the witness is to appear and any evidence the witness is to produce.

(f) Within 15 days after the written motion requesting issuance of a subpoena is served, any party may file an opposition or other response.

(g) If the motion requesting issuance of a subpoena is granted, the party seeking the subpoena will serve it by delivery to the individual named, or by certified mail addressed to such individual at his or her last dwelling place or principal place of business.

(h) The individual to whom the subpoena is directed may file with the ALJ a motion to quash the subpoena within 10 days after service.

(i) The exclusive remedy for contumacy by, or refusal to obey a subpoena duly served upon, any person is specified in section 205(e) of the Social Security Act (42 U.S.C. 405(e)).

### § 200.2010 Fees.

The party requesting a subpoena will pay the cost of the fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in United States District Court. A check for witness fees and mileage will accompany the subpoena when served, except that when a subpoena is issued on behalf of the DHA, a check for witness fees and mileage need not accompany the subpoena.

**§ 200.2011 Form, filing, and service of papers.**

(a) *Forms.* (1) Unless the ALJ directs the parties to do otherwise, documents filed with the ALJ will include an original and two copies.

(2) Every pleading and paper filed in the proceeding will contain a caption setting forth the title of the action, the case number, and a designation of the paper, such as motion to quash subpoena.

(3) Every pleading and paper will be signed by, and will contain the address and telephone number of the party or the person on whose behalf the paper was filed, or his or her representative.

(4) Papers are considered filed when they are mailed.

(b) *Service.* A party filing a document with the ALJ or the Secretary will, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document will be made by delivering a copy, or placing a copy of the document in the United States mail, postage prepaid and addressed, or with a private delivery service, to the party's last known address. When a party is represented by an attorney, service will be made upon such attorney in lieu of the party.

(c) *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, will be proof of service.

**§ 200.2012 Computation of time.**

(a) In computing any period of time under this part or in an order issued under this part, the time begins with the day following the act, event or default, and includes the last day of the period unless it is a Saturday, Sunday or legal holiday observed by the Federal Government, in which event it includes the next business day.

(b) When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays observed by the Federal Government will be excluded from the computation.

(c) Where a document has been served or issued by placing it in the mail, an additional 5 days will be added to the time permitted for any response. This paragraph (c) does not apply to requests for hearing under § 200.2002.

**§ 200.2013 Motions.**

(a) An application to the ALJ for an order or ruling will be by motion. Motions will state the relief sought, the authority relied upon and the facts alleged, and will be filed with the ALJ and served on all other parties.

(b) Except for motions made during a prehearing conference or at the hearing, all motions will be in writing. The ALJ may require that oral motions be reduced to writing.

(c) Within 10 days after a written motion is served, or such other time as may be fixed by the ALJ, any party may file a response to such motion.

(d) The ALJ may not grant a written motion before the time for filing responses has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

(e) The ALJ will make a reasonable effort to dispose of all outstanding motions prior to the beginning of the hearing.

**§ 200.2014 Sanctions.**

(a) The ALJ may sanction a person, including any party or attorney, for failing to comply with an order or procedure, for failing to defend an action or for other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing. Such sanctions will reasonably relate to the severity and nature of the failure or misconduct. Such sanction may include—

(1) In the case of refusal to provide or permit discovery under the terms of this part, drawing negative factual inferences or treating such refusal as an admission by deeming the matter, or certain facts, to be established;

(2) Prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense;

(3) Striking pleadings, in whole or in part;

(4) Staying the proceedings;

(5) Dismissal of the action;

(6) Entering a decision by default; and

(7) Refusing to consider any motion or other action that is not filed in a timely manner.

(b) In civil money penalty cases commenced under section 1128A of the Social Security Act or under any provision in this part which incorporates section 1128A(c)(4) of the Social Security Act, the ALJ may also order the party or attorney who has engaged in any of the acts described in paragraph (a) of this section to pay attorney's fees and other costs caused by the failure or misconduct.

### § 200.2015 The hearing and burden of proof.

(a) The ALJ will conduct a hearing on the record in order to determine whether the petitioner or respondent should be found liable under this part.

(b) With regard to the burden of proof in civil money penalty cases under this part—

(1) The respondent or petitioner, as applicable, bears the burden of going forward and the burden of persuasion with respect to affirmative defenses and any mitigating circumstances; and

(2) The DHA bears the burden of going forward and the burden of persuasion with respect to all other issues.

(c) The burden of persuasion will be judged by a preponderance of the evidence.

(d) The hearing will be open to the public unless otherwise ordered by the ALJ for good cause shown.

(e)(1) A hearing under this part is not limited to specific items and information set forth in the notice letter to the petitioner or respondent. Subject to the 15-day requirement under § 200.2008, additional items and information, including aggravating or mitigating circumstances that arose or became known subsequent to the issuance of the notice letter, may be introduced by either party during its case-in-chief unless such information or items are—

(i) Privileged; or

(ii) Deemed otherwise inadmissible under § 200.2017.

(2) After both parties have presented their cases, evidence may be admitted on rebuttal even if not previously exchanged in accordance with § 200.2008.

### § 200.2016 Witnesses.

(a) Except as provided in paragraph (b) of this section, testimony at the hearing will be given orally by witnesses under oath or affirmation.

(b) At the discretion of the ALJ, testimony (other than expert testimony) may be admitted in the form of a written statement. The ALJ may, at his or her discretion, admit prior sworn testimony of experts which has been subject to adverse examination, such as a deposition or trial testimony. Any such written statement must be provided to all other parties along with the last known address of such witnesses, in a manner that allows sufficient time for other parties to subpoena such witness for cross-examination at the hearing. Prior written statements of witnesses proposed to testify at the hearing will be exchanged as provided in § 200.2008.

(c) The ALJ will exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

(1) Make the interrogation and presentation effective for the ascertainment of the truth;

(2) Avoid repetition or needless consumption of time; and

(3) Protect witnesses from harassment or undue embarrassment.

(d) The ALJ will permit the parties to conduct such cross-examination of witnesses as may be required for a full and true disclosure of the facts.

(e) The ALJ may order witnesses excluded so that they cannot hear the testimony of other witnesses. This does not authorize exclusion of—

(1) A party who is an individual;

(2) In the case of a party that is not an individual, an officer or employee of the party appearing for the entity pro se or designated as the party's representative; or

(3) An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual engaged in assisting the attorney for the Inspector General (IG).

### § 200.2017 Evidence.

(a) The ALJ will determine the admissibility of evidence.

(b) Except as provided in this part, the ALJ will not be bound by the Federal Rules of Evidence. However, the ALJ may apply the Federal Rules of Evidence where appropriate, for example, to exclude unreliable evidence.

(c) The ALJ must exclude irrelevant or immaterial evidence.

(d) Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by considerations of undue delay or needless presentation of cumulative evidence.

(e) Although relevant, evidence must be excluded if it is privileged under Federal law.

(f) Evidence concerning offers of compromise or settlement made in this action will be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

(g) Evidence of crimes, wrongs, or acts other than those at issue in the instant case is admissible in order to show motive, opportunity, intent, knowledge, preparation, identity, lack of mistake, or existence of a scheme. Such evidence is admissible regardless of whether the crimes, wrongs, or acts occurred during the statute of limitations period applicable to the acts which constitute the basis for liability in the case, and regardless of whether they were referenced in the DHA's notice sent in accordance with § 200.1500.

(h) The ALJ will permit the parties to introduce rebuttal witnesses and evidence.

(i) All documents and other evidence offered or taken for the record will be open to examination by all parties, unless otherwise ordered by the ALJ for good cause shown.

(j) The ALJ may not consider evidence regarding the issue of willingness and ability to enter into and successfully complete a corrective action plan when such evidence pertains to matters occurring after the submittal of the case to the Secretary. The determination regarding the appropriateness of any corrective action plan is not reviewable.

### § 200.2018 The record.

(a) The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the ALJ.

(b) The transcript of testimony, exhibits and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the ALJ and the Secretary.

(c) The record may be inspected and copied (upon payment of a reasonable fee) by any person, unless otherwise ordered by the ALJ for good cause shown.

(d) For good cause, the ALJ may order appropriate redactions made to the record.

### § 200.2019 Post-hearing briefs.

The ALJ may require the parties to file post-hearing briefs. In any event, any party may file a post-hearing brief. The ALJ will fix the time for filing such briefs which are not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The ALJ may permit the parties to file reply briefs.

### § 200.2020 Initial decision.

(a) The ALJ will issue an initial decision, based only on the record, which will contain findings of fact and conclusions of law.

(b) The ALJ may affirm, increase or reduce the penalties, assessment proposed or imposed by the DHA.

(c) The ALJ will issue the initial decision to all parties within 120 days after the time for submission of post-hearing briefs and reply briefs, if permitted, has expired. The decision will be accompanied by a statement describing the right of any party to file a notice of appeal with the DAB and instructions for how to file such appeal. If the ALJ fails to meet the deadline contained in this paragraph (c), he or she will notify the parties of the reason for the delay and will set a new deadline.

(d) Except as provided in paragraph (e) of this section, unless the initial decision is appealed to the DAB, it will be final and binding on the parties 30 days after the ALJ serves the parties with a copy of the decision. If service is by mail, the date of service will be deemed to be 5 days from the date of mailing.

(e) If an extension of time within which to appeal the initial decision is granted under § 200.2021(a), except as provided in § 200.2022(a), the initial decision will become final and binding on

the day following the end of the extension period.

**§ 200.2021 Appeal to DAB.**

(a) Any party may appeal the initial decision of the ALJ to the DAB by filing a notice of appeal with the DAB within 30 days of the date of service of the initial decision. The DAB may extend the initial 30 day period for a period of time not to exceed 30 days if a party files with the DAB a request for an extension within the initial 30 day period and shows good cause.

(b) If a party files a timely notice of appeal with the DAB, the ALJ will forward the record of the proceeding to the DAB.

(c) A notice of appeal will be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions. Any party may file a brief in opposition to exceptions, which may raise any relevant issue not addressed in the exceptions, within 30 days of receiving the notice of appeal and accompanying brief. The DAB may permit the parties to file reply briefs.

(d) There is no right to appear personally before the DAB or to appeal to the DAB any interlocutory ruling by the ALJ, except on the timeliness of a filing of the hearing request.

(e) The DAB will not consider any issue not raised in the parties' briefs, nor any issue in the briefs that could have been raised before the ALJ but was not.

(f) If any party demonstrates to the satisfaction of the DAB that additional evidence not presented at such hearing is relevant and material and that there were reasonable grounds for the failure to adduce such evidence at such hearing, the DAB may remand the matter to the ALJ for consideration of such additional evidence.

(g) The DAB may decline to review the case, or may affirm, increase, reduce, reverse, or remand any penalty or assessment determined by the ALJ.

(h) The standard of review on a disputed issue of fact is whether the initial decision is supported by substantial evidence on the whole record. The standard of review on a disputed issue of law is whether the initial decision is erroneous.

(i) Within 120 days after the time for submission of briefs and reply briefs, if permitted, has expired, the DAB will issue to each party to the appeal a copy of the DAB's decision and a statement describing the right of any petitioner or respondent who is found liable to seek judicial review.

(j) Except with respect to any penalty or assessment remanded by the ALJ, the DAB's decision, including a decision to decline review of the initial decision, becomes final and binding 60 days after the date on which the DAB serves the parties with a copy of the decision. If service is by mail, the date of service will be deemed to be 5 days from the date of mailing.

(k)(1) Any petition for judicial review must be filed within 60 days after the DAB serves the parties with a copy of the decision. If service is by mail, the date of service will be deemed to be 5 days from the date of mailing.

(2) In compliance with 28 U.S.C. 2112(a), a copy of any petition for judicial review filed in any U.S. Court of Appeals challenging a final action of the DAB will be sent by certified mail, return receipt requested, to the General Counsel of the DHA. The petition copy will be time-stamped by the clerk of the court when the original is filed with the court.

(3) If the General Counsel of the DHA receives two or more petitions within 10 days after the DAB issues its decision, the General Counsel of the DHA will notify the U.S. Judicial Panel on Multidistrict Litigation of any petitions that were received within the 10-day period.

**§ 200.2022 Stay of initial decision.**

(a) In a CMP case under section 1128A of the Act, the filing of a respondent's request for review by the DAB will automatically stay the effective date of the ALJ's decision.

(b)(1) After the DAB renders a decision in a CMP case, pending judicial review, the respondent may file a request for stay of the effective date of any penalty or assessment with the ALJ. The request must be accompanied by a copy of the notice of appeal filed with the Federal court. The filing of such a request will automatically act to stay

the effective date of the penalty or assessment until such time as the ALJ rules upon the request.

(2) The ALJ may not grant a respondent's request for stay of any penalty or assessment unless the respondent posts a bond or provides other adequate security.

(3) The ALJ will rule upon a respondent's request for stay within 10 days of receipt.

### § 200.2023 Harmless error.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in any act done or omitted by the ALJ or by any of the parties, including Federal representatives or TRICARE contractors is ground for vacating, modifying, or otherwise disturbing an otherwise appropriate ruling or order or act, unless refusal to take such action appears to the ALJ or the DAB inconsistent with substantial justice. The ALJ and the DAB at every stage of the proceeding will disregard any error or defect in the proceeding that does not affect the substantial rights of the parties.

# PART 202—RESTORATION ADVISORY BOARDS

## Subpart A—General Requirements

Sec.
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202.2 Criteria for establishment.
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## Subpart C—Administrative Support, Funding, and Reporting Requirements

202.12 Administrative support and eligible expenses.
202.13 Technical assistance for public participation.
202.14 Documenting and reporting activities and expenses.

AUTHORITY: 5 U.S.C. 551 *et seq.* and 10 U.S.C. 2705.

SOURCE: 71 FR 27618, May 12, 2006, unless otherwise noted.

## Subpart A—General Requirements

### § 202.1 Purpose, scope, definitions, and applicability.

(a) *Purpose.* The purpose of this part to establish regulations regarding the scope, characteristics, composition, funding, establishment, operation, adjournment, and dissolution of Restoration Advisory Boards (RABs).

(b) *Purpose and scope of responsibilities of RABs.* The purpose of a RAB is to provide:

(1) An opportunity for stakeholder involvement in the environmental restoration process at Department of Defense (DoD) installations. Stakeholders are those parties that may be affected by environmental restoration activities at the installation.

(2) A forum for the early discussion and continued exchange of environmental restoration program information between DoD installations, regulatory agencies, tribes, and the community.

(3) An opportunity for RAB members to review progress, participate in a dialogue with, and provide comments and advice to the installation's decision makers concerning environmental restoration matters. Installations shall give careful consideration to the comments provided by the RAB members.

(4) A forum for addressing issues associated with environmental restoration activities under the Defense Environmental Restoration Program (DERP) at DoD installations, including activities conducted under the Military Munitions Response program (MMRP) to address unexploded ordnance, discarded military munitions, and the chemical constituents of munitions. Environmental groups or advisory boards that address issues other than environmental restoration activities are not governed by this regulation.

(c) *Definitions.* In this section:

(1) *Community RAB member* shall mean those individuals identified by community members and appointed by the Installation Commander to participate in a RAB who live and/or work in

the affected community or are affected by the installation's environmental restoration program.

(2) *Environmental restoration* shall include the identification, investigation, research and development, and cleanup of contamination from hazardous substances, including munitions and explosives of concern, and pollutants and contaminants.

(3) *Installation* shall include active and closing DoD installations and formerly used defense sites (FUDS).

(4) *Installation Commander* shall include the Commanding Officer or the equivalent of a Commanding Officer at active installations; the Installation Commander or other Military Department officials who close the facility and are responsible for its disposal at Base Realignment and Closure (BRAC) installations; or the U.S. Army Corps of Engineers Project Management District Commander at FUDS.

(5) *Public participants* shall include anyone else who may want to attend the RAB meetings, including those individuals that may not live and/or work in the affected community or may not be affected by the installation's environmental restoration program but would like to attend and provide comments to the RAB.

(6) *Stakeholders* are those parties that may be affected by environmental restoration activities at an installation, including family members of military personnel and civilian workers, local and state governments and EPA for NPL properties, tribal community members and indigenous people, and current landowners, as appropriate.

(7) *Tribes* shall mean any Federally-recognized American Indian and Alaska Native government as defined by the most current Department of Interior/Bureau of Indian Affairs list of tribal entities published in the FEDERAL REGISTER pursuant to Section 104 of the Federally Recognized Tribe Act.

(8) *RAB adjournment* shall mean when an Installation Commander, in consultation with the Environmental Protection Agency (EPA), state, tribes, RAB members, and the local community, as appropriate, close the RAB based on a determination that there is no longer a need for a RAB or when community interest in the RAB declines.

(9) *RAB dissolution* shall mean when an Installation Commander, with the appropriate Military Component's Environmental Deputy Assistant Secretary's approval, disbands a RAB that is no longer fulfilling the intended purpose of advising and providing community input to an Installation Commander and decision makers on environmental restoration projects. Installation Commanders are expected to make every reasonable effort to ensure that a RAB performs its role as effectively as possible and a concerted attempt is made to resolve issues that affect the RAB's effectiveness. There are circumstances, however, that may prevent a RAB from operating effectively or fulfilling its intended purpose.

(d) *Other public involvement activities.* A RAB should complement other community involvement efforts occurring at an installation; however, it does not replace other types of community outreach and participation activities required by applicable laws and regulations.

(e) *Applicability of regulations to existing RABs.* The regulations in this part apply to all RABs regardless of when the RAB was established.

(f) *Guidance.* The Office of the Deputy Under Secretary of Defense for Environment shall issue guidance regarding the scope, characteristics, composition, funding, establishment, operation, adjournment, and dissolution of RABs pursuant to this rule. The issuance of any such guidance shall not be a precondition to the establishment of RABs or the implementation of this part.

[71 FR 27617, May 12, 2006; 71 FR 30719, May 30, 2006]

### § 202.2 Criteria for establishment.

(a) *Determining if sufficient interest warrants establishing a RAB.* A RAB should be established when there is sufficient and sustained community interest, and any of the following criteria are met:

(1) The closure of an installation involves the transfer of property to the community,

(2) At least 50 local citizens petition the installation for creation of a RAB,

(3) Federal, state, tribal, or local government representatives request the formation of a RAB, or

(4) The installation determines the need for a RAB. To determine the need for establishing a RAB, an installation should:

(i) Review correspondence files,

(ii) Review media coverage,

(iii) Consult local community members,

(iv) Consult relevant government officials, and

(v) Evaluate responses to communication efforts, such as notices placed in local newspapers and, if applicable, announced on the installation's Web site.

(b) *Responsibility for forming or operating a RAB.* The installation shall have lead responsibility for forming and operating a RAB.

(c) *Converting existing Technical Review Committees (TRCs) to RABs.* In accordance with 10 U.S.C. 2705(d)(1), a RAB may fulfill the requirements of 10 U.S.C. 2705(c), which directs DoD to establish TRCs. DoD recommends that, where TRCs or similar advisory groups already exist, the TRC or similar advisory group be considered for conversion to a RAB, provided there is sufficient and sustained interest within the community.

[71 FR 27617, May 12, 2006; 71 FR 30719, May 30, 2006]

### § 202.3 Notification of formation of a Restoration Advisory Board.

Prior to establishing a RAB, an installation shall notify potential stakeholders of its intent to form a RAB. In announcing the formation of a RAB, the installation should describe the purpose of a RAB and discuss opportunities for membership.

### § 202.4 Composition of a RAB.

(a) *Membership.* At a minimum, each RAB shall include representatives from DoD and the community. RAB community membership shall be well balanced and reflect the diverse interests within the local community.

(1) *Government representation.* The RAB may also include representatives from the EPA at the discretion of the Regional Administrator of the appropriate EPA Regional Office, and state, tribal, and local governments, as appropriate. At closing installations where BRAC Cleanup Teams (BCT) exist, representatives of the BCT may also serve as the government representative(s) of the RAB. The Department encourages individuals and agencies involved with BRAC to participate in RABs at closing installations.

(2) *Community representation.* Community RAB members should live and/or work in the affected community or be affected by the installation's environmental restoration program. While DoD encourages individual tribal members to participate on RABs, RABs in no way replace or serve as a substitute forum for the government-to-government relationship between DoD and Federally-recognized tribes.

(i) To support the objective selection of community RAB members, installations will use a selection panel comprised of community members to nominate community RAB members. The Installation Commander, in consultation with the state, tribal, and local governments and EPA, as appropriate, will identify community interests and solicit names of individuals who can represent these interests on the selection panel. The panel will establish the procedures for nominating community RAB members, the process for reviewing community interest, and criteria for selecting community RAB members. The panel will transmit the list of RAB nominees to the Installation Commander for appointment.

(ii) Following the panel nominations, the Installation Commander, in consultation with the state and EPA, as appropriate, will review the nominations to ensure the panel fairly represents the local community. The Installation Commander will accept or reject the entire list of RAB nominees for appointment.

(b) *Chairmanship.* Each RAB established shall have two co-chairs, one representing the DoD installation and the other the community. Co-chairs shall be responsible for directing and managing the RAB operations.

(c) *Compensation for community members of the RAB.* The community co-chair and community RAB members

serve voluntarily. DoD will not compensate them for their participation.

[71 FR 27617, May 12, 2006; 71 FR 30719, May 30, 2006]

## Subpart B—Operating Requirements

### § 202.5 Creating a mission statement.

The installation and community co-chair, in conjunction with the RAB members, shall determine the RAB mission statement in accordance with guidance provided by the DoD Components.

### § 202.6 Selecting co-chairs.

(a) *DoD installation co-chair*. The DoD installation co-chair shall be selected by the Installation Commander or equivalent, or in accordance with Military Component-specific guidance.

(b) *Community co-chair*. The community co-chair shall be selected by the community RAB members.

[71 FR 27617, May 12, 2006; 71 FR 30719, May 30, 2006]

### § 202.7 Developing operating procedures.

Each RAB shall develop a set of operating procedures and the co-chairs are responsible for carrying them out. Areas that should be addressed in the procedures include:

(a) Clearly defined goals and objectives for the RAB, as determined by the co-chairs in consultation with the RAB,

(b) Meeting announcements,

(c) Attendance requirements of members at meetings,

(d) Development, approval and distribution procedures for the minutes of RAB meetings,

(e) Meeting frequency and location,

(f) Rules of order,

(g) The frequency and procedures for conducting training,

(h) Procedures for selecting or replacing co-chairs and selecting, replacing, or adding RAB members,

(i) Specifics on the size of the RAB, periods of membership, and co-chair length of service,

(j) Review of public comments and responses,

(k) Participation of the general public,

(l) Keeping the public informed about proceedings of the RAB,

(m) Discussing the agenda for the next meeting and issues to be addressed, and

(n) Methods for resolving disputes.

### § 202.8 Training RAB members.

Training is not required for RAB members. It may be advisable, however, to provide RAB members with some initial orientation training regarding the purpose and responsibilities of the RAB, familiarization on cleanup technologies, chemicals of concern, and sampling protocols, as well as informing them of the availability of independent technical advice and document review through EPA's Technical Assistant Grant program and DoD's Technical Assistance for Public Participation (TAPP) program, to enable them to fulfill their responsibilities. Training should be site-specific and beneficial to RAB members. The DoD installation may also provide in-house assistance to discuss technical issues. Funding for training activities must be within the scope of administrative support for RABs, as permitted in § 202.12.

### § 202.9 Conducting RAB meetings.

(a) *Public participation*. RAB meetings shall be open to the public.

(1) The installation co-chair shall prepare and publish a timely public notice in a local newspaper of general circulation announcing each RAB meeting. If applicable, it is recommended that the meeting also be announced on the installation's Web site.

(2) Each RAB meeting shall be held at a reasonable time and in a manner or place reasonably accessible to and usable by all participants, including persons with disabilities.

(3) Presentation materials and readable maps should be provided to all meeting participants as appropriate.

(4) Interested persons shall be permitted to attend, appear before, or file statements with any RAB, subject to such reasonable rules or regulations as may be prescribed. Open solicitation of public comments shall be permitted and members of the public will have a

designated time on the agenda to speak to the RAB committee as a whole.

(b) *Nature of discussions*. The installation shall give careful consideration to all comments provided by individual RAB members. Group consensus is not a prerequisite for RAB input. Each member of the RAB may provide advice as an individual; however, when a RAB decides to vote or poll for consensus, only community members should participate.

(c) *Meeting minutes*. The installation co-chair, in coordination with the community co-chair, shall prepare the minutes of each RAB meeting.

(1) The RAB meeting minutes shall contain a record of the persons present; a complete and accurate description of matters discussed and comments received; and copies of all reports received, issued, or approved by the RAB. The accuracy of all minutes shall be certified by the RAB co-chairs. RAB minutes should be kept in the information repository; however, if the RAB minutes reflect decision-making, copies should also be documented in the Administrative Record.

(2) The records, reports, minutes, appendixes, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by each RAB shall be available for public inspection and copying at a publicly accessible location, such as the information repositories established under the installation's Community Relations Plan, a public library, or in the offices of the installation to which the RAB reports, until the RAB ceases to exist.

[71 FR 27617, May 12, 2006; 71 FR 30719, May 30, 2006]

### § 202.10 RAB adjournment and dissolution.

(a) *RAB adjournment*—(1) *Requirements for RAB adjournment*. An Installation Commander may adjourn a RAB with input from the community when there is no longer a need for a RAB or when community interest in the RAB no longer exists. An Installation Commander may consider adjourning the RAB in the following situations:

(i) A record of decision has been signed for all DERP sites on the installation,

(ii) An installation has achieved response complete at all sites and no further environmental restoration decisions are required,

(iii) An installation has all remedies in place,

(iv) The RAB has achieved the desired end goal as defined in the RAB Operating Procedures,

(v) There is no longer sufficient, sustained community interest, as documented by the installation with RAB community members and community-at-large input, to sustain the RAB. The installation shall continue to monitor for any changes in community interest that could warrant reactivating or reestablishing the RAB, or

(vi) The installation has been transferred out of DoD control and day-to-day responsibility for making restoration response decisions has been assumed by the transferee.

(2) *Adjournment procedures*. If the Installation Commander is considering adjourning the RAB, the Installation Commander shall:

(i) Consult with EPA, state, tribes, RAB members, and the local community, as appropriate, regarding adjourning the RAB and consider all responses before making a final decision.

(ii) Document the rationale for adjournment in a memorandum in a memorandum for inclusion in the Administrative Record, notify the public of the decision through written notice to the RAB members and through publication of a notice in a local newspaper of general circulation, and describe other ongoing public involvement opportunities that are available if the Installation Commander decides to adjourn the RAB.

(b) *RAB dissolution*—(1) *Requirements for RAB dissolution*. An Installation Commander may recommend dissolution of a RAB when a RAB is no longer fulfilling the intended purpose of advising and providing community input to an Installation Commander and decision makers on environmental restoration projects as described in § 202.1(b).

(2) *Dissolution procedures*. If the Installation Commander is considering dissolving the RAB, the Installation Commander shall:

(i) Consult with EPA, state, tribal and local government representatives,

as appropriate, regarding dissolving the RAB.

(ii) Notify the RAB community co-chair and members in writing of the intent to dissolve the RAB and the reasons for doing so and provide the RAB members 30 days to respond in writing. The Installation Commander shall consider RAB member responses, and in consultation with EPA, state, tribal and local government representatives, as appropriate, determine the appropriate actions.

(iii) Notify the public of the proposal to dissolve the RAB and provide a 30-day public comment period on the proposal, if the Installation Commander decides to proceed with dissolution. At the conclusion of the public comment period, the Installation Commander will review the public comments, consult with EPA, state, tribal and local government representatives, as appropriate, and, if the Installation Commander still believes dissolution is appropriate, render a recommendation to that effect.

(iv) Send the recommendation, responsiveness summary, and all supporting documentation via the chain-of-command to the Military Component's Environmental Deputy Assistant Secretary (or equivalent) for approval or disapproval. The Military Component's Environmental Deputy Assistant Secretary (or equivalent) shall notify the Office of the Deputy Under Secretary of Defense (Installations & Environment) (or equivalent) of the decision to approve or disapprove the request to dissolve the RAB and the rationale for that decision.

(v) Document the recommendation, responsiveness summary, and the rationale for dissolution in a memorandum for inclusion in the Administrative Record, notify the public of the decision through written notice to the RAB members and through publication of a notice in a local newspaper of general circulation and describe other ongoing public involvement opportunities that are available, once the Military Component's Environmental Deputy Assistant Secretary (or equivalent) makes a final decision.

(c) *Reestablishing an adjourned or dissolved RAB.* An Installation Commander may reestablish an adjourned or dissolved RAB if there is sufficient and sustained community interest in doing so, and there are environmental restoration activities still ongoing at the installation or that may start up again. Where a RAB is adjourned or dissolved and environmental restoration activities continue, the Installation Commander should reassess community interest at least every 24 months. When all environmental restoration decisions have been made and required remedies are in place and are properly operating at an installation, reassessment of the community interest for reestablishing the RAB is not necessary. When additional environmental restoration decisions have to be made resulting from subsequent actions, such as long-term management and five-year reviews, the installation will reassess community interest for reestablishing the RAB. Where the reassessment finds sufficient and sustained community interest at previously adjourned or dissolved RABs, the Installation Commander should reestablish a RAB. Where the reassessment does not find sufficient and sustained community interest in reestablishing the RAB, the Installation Commander shall document in a memorandum for the record the procedures followed in the reassessment and the findings of the reassessment. This document shall be included in the Administrative Record for the installation. If there is interest in reestablishment at a previously dissolved RAB, but the Installation Commander determines that the same conditions exist that required the original dissolution, he or she will request, through the chain-of-command to the Military Component's Deputy Assistant Secretary, an exception to reestablishing the RAB. If those conditions no longer exist at a previously dissolved RAB, and there is sufficient and sustained interest in reestablishment, the Installation Commander should recommend to the Deputy Assistant Secretary that the RAB be reestablished. The Deputy Assistant Secretary will take the Installation Commander's recommendation under advisement and may approve that RAB for reestablishment.

(d) *Public comment.* If the Installation Commander intends to recommend dissolution of a RAB or reestablish a dissolved RAB, the Installation Commander shall notify the public of the proposal to dissolve or reestablish the RAB and provide a 30-day public comment period on the proposal. At the conclusion of the public comment period, the Installation Commander shall review public comments; consult with EPA and state, tribal, or local government representatives, as appropriate; prepare a responsiveness summary; and render a recommendation. The recommendation, responsiveness summary, and all supporting documentation should be sent via the chain-of-command to the Military Component's Environmental Deputy Assistant Secretary (or equivalent) for approval or disapproval. The Installation Commander shall notify the public of the decision.

### § 202.11 Documenting RAB activities.

(a) The installation shall document information on the activities of a RAB in the Information Repository. These activities shall include, but are not limited to:

(1) Installation's efforts to survey community interest in forming a RAB,

(2) Steps taken to establish a RAB where there is sufficient and sustained community interest,

(3) How the RAB relates to the overall community involvement program, and

(4) Steps taken to adjourn, dissolve, or reestablish the RAB.

(b) When RAB input has been used in decision-making, it should be documented as part of the Administrative Record.

[71 FR 27617, May 12, 2006; 71 FR 30719, May 30, 2006]

## Subpart C—Administrative Support, Funding, and Reporting Requirements

### § 202.12 Administrative support and eligible expenses.

(a) *Administrative support.* Subject to the availability of funding, the installation shall provide administrative support to establish and operate a RAB.

(b) *Eligible administrative expenses for a RAB.* The following activities specifically and directly associated with establishing and operating a RAB shall qualify as an administrative expense of a RAB:

(1) RAB establishment.

(2) Membership selection.

(3) Training if it is:

(i) Site specific and benefits the establishment and operation of a RAB.

(ii) Relevant to the environmental restoration activities occurring at the installation.

(4) Meeting announcements.

(5) Meeting facilities.

(6) Meeting facilitators, including translators.

(7) Preparation of meeting agenda materials and minutes.

(8) RAB-member mailing list maintenance and RAB materials distribution.

(c) *Funding.* Subject to the availability of funds, administrative support to RABs may be funded as follows:

(1) At active installations, administrative expenses for a RAB shall be paid using funds from the Military Component's Environmental Restoration accounts.

(2) At BRAC installations, administrative expenses for a RAB shall be paid using BRAC funds.

(3) At FUDS, administrative expenses for a RAB shall be paid using funds from the Environmental Restoration account for the Formerly Used Defense Sites program.

### § 202.13 Technical assistance for public participation.

Community members of a RAB or TRC may request technical assistance for interpreting scientific and engineering issues with regard to the nature of environmental hazards at the installation and environmental restoration activities conducted, or proposed to be conducted, at the installation in accordance with 10 U.S.C. 2705(e) and the TAPP regulations located in 32 CFR Part 203.

### § 202.14 Documenting and reporting activities and expenses.

The installation at which a RAB is established shall document the activities and meeting minutes and record the administrative expenses associated with the RAB in the information repository at a publicly accessible location. Installations shall use internal department and Military Component-specific reporting mechanisms to submit required information on RAB activities and expenditures.

## PART 203—TECHNICAL ASSISTANCE FOR PUBLIC PARTICIPATION (TAPP) IN DEFENSE ENVIRONMENTAL RESTORATION ACTIVITIES

Sec.

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APPENDIX A TO PART 203—TECHNICAL ASSISTANCE FOR PUBLIC PARTICIPATION APPLICATION REQUEST FORM

AUTHORITY: 10 U.S.C. 2705.

SOURCE: 63 FR 5261, Feb. 2, 1998, unless otherwise noted.

### § 203.1 Authority.

Part 203 is issued under the authority of section 2705 of Title 10, United States Code. In 1994, Congress authorized the Department of Defense (DoD) to develop a program to facilitate public participation by providing technical assistance to local community members of Restoration Advisory Boards (RABs) and Technical Review Committees (TRCs) (section 326 of the National Defense Authorization Act for Fiscal Year 1995, Pub.L. 103–337). In 1996, Congress revised this authority (section 324 of the National Defense Authorization Act for Fiscal Year 1996, Pub.L. 104–112). It is pursuant to this revised authority, which is codified as new subsection (3) of section 2705, that the Department of Defense issues this part.

### § 203.2 Purpose and availability of referenced material.

(a) This part establishes the Technical Assistance for Public Participation (TAPP) program for the Department of Defense. It sets forth policies and procedures for providing technical assistance to community members of TRCs and RABs established at DoD installations in the United States and its territories. This part sets forth the procedures for the Department of Defense to accept and evaluate TAPP applications, to procure the assistance desired by community members of RABs and TRCs, and to manage the TAPP program. These provisions are applicable to all applicants/recipients of technical assistance as discussed in § 203.4 of this part.

(b) Any reference to documents made in this part necessary to apply for TAPP (e.g., the Office of Management and Budget (OMB) Circulars or DoD forms) are available through the DoD installations, the military department headquarters, or from the Department of Defense, Office of the Deputy Under Secretary of Defense for Environmental Security (DUSD(ES)), 3400 Defense Pentagon, Washington, DC 20301–3400.

### § 203.3 Definitions.

As used in this part, the following terms shall have the meaning set forth:

*Affected.* Subject to an actual or potential health or environmental threat arising from a release or a threatened release at an installation where the Secretary of Defense is planning or implementing environmental restoration activities including a response action

under the Comprehensive Environmental Response Compensation and Liability Act as amended (CERCLA), corrective action under the Resource Conservation and Recovery Act (RCRA), or other such actions under applicable Federal or State environmental restoration laws. This would include actions at active, closing, realigning, and formerly used defense installations. Examples of affected parties include individuals living in areas adjacent to installations whose health is or may be endangered by the release of hazardous substances at the facility.

*Applicant*. Any group of individuals that files an application for TAPP, limited by this part to community members of the RAB or TRC.

*Application*. A completed formal written request for TAPP that is submitted to the installation commander or to the identified decision authority designated for the installation. A completed application will include a TAPP project description.

*Assistance provider*. An individual, group of individuals, or company contracted by the Department of Defense to provide technical assistance under the Technical Assistance for Public Participation program announced in this part.

*Assistance provider's project manager*. The person legally authorized to obligate the organization executing a TAPP purchase order to the terms and conditions of the DoD's regulations and the contract, and designated by the provider to serve as the principal contact with the Department of Defense.

*Community Co-chair*. The individual selected by the community members of the RAB/TRC to represent them.

*Community member*. A member of the RAB or TRC who is also a member of the affected community. For the purpose of this part, community members do not include local, State, or Federal government officials acting in any official capacity.

*Community point of contact*. The community member of the RAB or TRC designated in the TAPP application as the focal point for communications with the Department of Defense regarding the TAPP procurement process. The community point of contact is responsible for completing the reporting requirements specified in § 203.14 of this part.

*Contact*. A written agreement between the installation or other instrumentality of the Department of Defense and another party for services or supplies necessary to complete the TAPP project. Contracts include written agreements and subagreements for professional services or supplies necessary to complete the TAPP projects, agreements with consultants, and purchase orders.

*Contracting officer*. The Federal official designated to manage the contract used to fulfill the TAPP request by the RAB or TRC.

*Contractor*. Any party (e.g., Technical Assistance Provider) to whom the installation or other instrumentality of the Department of Defense awards a contract. In the context of this part, it is synonymous with assistance provider.

*Cost estimate*. An estimate of the total funding required for the assistance provider to complete the TAPP project.

*DoD Component*. The military services including the Army, Navy, Marine Corps, and Air Force and those defense agencies with an environmental restoration program.

*DoD Component Deputy Assistant Secretary*. The individual in the office of the Secretary of the Army, Navy, Air Force responsible for making environmental decisions for their component or the director of the Defense Agencies.

*DoD Installation*. A facility that is controlled or operated or otherwise possessed by a department, or agency of the United States Department of Defense within the United States and its territories. In the context of this part, formerly used defense sites (FUDS) are included within the definition of a DoD Installation.

*DoD RAB Co-chair*. The individual selected by the installation commander, or equivalent, to serve as the installation co-chair of the RAB, represent DoD's interests, serve as liaison with community RAB members, and advocate RAB concerns within the installation staff.

*EPA*. The United States Environmental Protection Agency.

*Firm fixed price contract*. A contract wherein funding is fixed, prior to the

initiation of a contract, for an agreed upon service or product.

*Formerly Used Defense Site (FUDS).* A site that has been owned by, leased to, possessed by, or otherwise under the jurisdiction of the Department of Defense. The FUDS program does not apply to those sites outside U.S. jurisdiction.

*Purchase order.* An offer by the Government to buy supplies or services from a commercial source, upon specified terms and conditions, the total cost of which cannot exceed the small purchase limit of $100,000. Purchase orders are governed by Federal Acquisition Regulations (FAR) (48 CFR part 13), and the Simplified Acquisition Procedures (SAP).

*Restoration Advisory Board (RAB).* The RAB is a forum for representatives of the Department of Defense, local community, and EPA and/or State, local, and tribal officials to discuss and exchange information about the installation's environmental restoration program. The RAB provides stakeholders an opportunity make their views known, review progress and participate in dialogue with the decision makers.

*Statement of Work.* That portion of a contract which describes the actual work to be done by means of specifications or minimum requirements, quantities, performance dates, time and place of performance, and quality requirements. It is key to any procurement because it is the basis for the contractor's response and development of proposed costs.

*TAPP approval.* Signifies that the Department of Defense has approved the eligibility of the proposed TAPP project and will, subject to the availability of funds, undertake an acquisition to obtain the services specified in the TAPP application submitted by the RAB or TRC. The government will conduct the acquisition in accordance with all of the applicable rules and requirements of the FAR and the SAP. Approval does not constitute an agreement to direct an award to a specific source if such an action would be contrary to the FAR.

*TAPP project description.* A discussion of the assistance requested that includes the elements listed in Section 203.10 of this part. The project description should contain sufficient detail to enable the Department of Defense to determine the nature and eligibility of the project, identify potential providers and estimate costs, and prepare a statement of work to begin the procurement process.

*Technical assistance.* Those activities specified in § 203.10 of this part that will contribute to the public's ability to provide input to the decision-making process by improving the public's understanding of overall conditions and activities. Technical assistance may include interpreting technical documents; assessing technologies; participating in relative risk evaluations, understanding health implications; and, training.

Technical assistance does not include those activities prohibited under Section 203.11 of this part, such as litigation or underwriting legal actions; political activity; generation of new primary data such as well drilling and testing, including split sampling; reopening final DoD decisions or conducting disputes with the Department of Defense; or epidemiological or health studies, such as blood or urine testing.

*Technical Review Committee (TRC).* A group comprised of the Department of Defense, EPA, State, and local authorities and a public representative of the community formed to meet the requirements of 10 U.S.C. 2705(c), the Department of Defense Environmental Restoration Program. Primarily functioning to review installation restoration documents, these committees are being expanded and modified at installations where interest or need necessitates the creation of a RAB.

### § 203.4 Major components of the TAPP process.

(a) The Department of Defense will issue purchase orders to technical assistance, facilitation, training, and other public participation assistance providers subject to the purchase limit per order as resources continue to be available. If multiple purchase orders are needed to assist community members of a particular RAB or TRC, the combined sum of these purchase orders cannot exceed $100,000 or, during any

one year, the lesser of $25,000 or 1 percent of the installation's total projected environmental restoration cost-to-complete. Note that these limitations refer to the maximum allowable technical assistance funding per RAB/TRC. Resources available within a given year may vary. These limitations apply unless a waiver is granted by the DoD Component Secretary or equivalent for the installation in question. The $100,000 total and $25,000 annual limitations may be waived, as appropriate, to reflect the complexity of response action, the nature and extent of contamination at the installation, the level of activity at the installation, projected total needs as identified by the TAPP recipient, the size and diversity of the affected population, and the ability of the TAPP recipient to identify and raise funds from other sources.

(b) Community members of the RAB/TRC will provide a description of the services requested (TAPP Project Description) and, if desired, the names of one or more proposed technical assistance providers to the DoD RAB Co-Chair, who will ensure the application is submitted to the installation commander or other designated authority and to the appropriate DoD contracting office. Technical assistance providers proposed by the community members of a RAB or TRC at each DoD installation that meets the minimum set of organizational qualifications guidelines provided by the Department of Defense in § 203.12 of this part will be added to the governments list of bidders for the proposed procurement.

### § 203.5 TAPP process.

This section provides an overview of the TAPP process. Specific details referred to in this section can be found in subsequent sections of this part.

(a) *TAPP funding*. Funding for this TAPP program will come from the Environmental Restoration Accounts established for Army, Navy, and Air Force for operational installations. The funding for Defense Agencies' operating installations will be from the Defense-Wide Environmental Restoration Account. Funding will be from the component's base closure account for transferring or closing installations. Funding for Formerly Used Defense Sites will come from the Environmental Restoration Account established for Formerly Used Defense Sites. After justification of the TAPP proposal, each DoD Component will make funds available from their individual installation's environmental restoration or BRAC accounts, considering a number of factors related to the restoration program at the installation and its impact upon the community. These factors include, but are not limited to:

(1) Closure status.

(2) Budget.

(3) Installation restoration program status.

(4) Presence (or absence) of alternate funding.

(5) Relative risk posed by sites at the installation.

(6) Type of task to be funded.

(7) Community concern.

(8) Available funding.

(b) *Identification of proposed TAPP project*. Eligible applicants of RABs and TRCs, established in § 203.7 of this part, should determine whether a TAPP project is required to assist the community members of the RAB or TRC to interpret information regarding the nature and extent of contamination or the proposed remedial actions. Eligibility requirements for TAPP projects are described in §§ 203.10 and 203.11 of this part. In keeping with the requirements of 10 U.S.C. 2705(e), the RAB or TRC must be able to demonstrate that the technical expertise necessary for the proposed TAPP project is not available through the Federal, State, or local agencies responsible for overseeing environmental restoration at the installation, or that the selection of an independent provider will contribute to environmental restoration activities and the community acceptance of such activities. In addition, the Department of Defense encourages the RAB or TRC to seek other available sources of assistance prior to submitting a request for TAPP in order to preserve limited resources. These sources include DoD's installation restoration contractor, or other DoD contractors or personnel, EPA or state regulatory personnel, volunteer services from local universities or other experts, or assistance from state and

local health and environmental organizations.

(c) *TAPP project request.* The RAB or TRC should notify the installation of its intent to pursue TAPP upon the determination that other sources of assistance are unavailable or unlikely to contribute to the community acceptance of environmental restoration activities at the installation and should prepare a formal request specifying the type of assistance required and, if desired, one or more sources for this assistance. Details concerning this request are stated in § 203.9 of this part. The RAB or TRC must certify to the Department of Defense that the TAPP request represents a request by a majority of the community members of the RAB or TRC. The RAB or TRC should ensure that the request meets the eligibility requirements specified in §§ 203.10 and 203.11 of this part. Furthermore, the RAB or TRC may outline additional criteria for the Department of Defense to consider in the selection of a provider (such as knowledge of local environmental conditions or specific technical issues, a prior work history within the study area which has relevant specific circumstances or unique challenges, or other relevant expertise or capabilities), keeping in mind that providers must meet the minimum technical qualifications outlined in § 203.12 of this part. The formal request should be submitted to the installation commander or designated decision authority, either directly, or through the DoD RAB Co-chair. The installation commander, or other designated decision authority, will review the proposed project to determine whether the proposed project conforms to the eligibility requirements. If the installation commander, or other designated authority, fails to approve the project request, the rationale for that decision will be provided to the RAB/TRC in writing.

(d) *Purchase orders.* Upon receipt of a completed TAPP request, the installation will begin the procurement process necessary to obtain the desired services by means of a purchase order or will forward the request to the contracting authority designated by the DoD Component to act for that installation. The government is required to follow the rules and regulations for purchase orders as outlined in the FAR (48 CFR part 13). As a result, the government cannot direct awards to a specified supplier unless the procurement is under $2,500, and then only if the cost is comparable to other suppliers. For procurements over $2,500 but under $100,000, the acquisition is reserved for small businesses, unless there is a reasonable expectation that small businesses could not provide the best scientific and technological sources consistent with the demands of the proposed acquisition for the best mix of cost, performance, and schedules. Furthermore, the award must be on a competitive basis. In addition to proposing potential providers, the application for technical assistance may indicate specific criteria or qualifications that are deemed necessary by the RAB/TRC for the completion of the project to their satisfaction. This information will be used to assist the Department of Defense in preparing a bidders list. The Department of Defense will solicit bids from those providers meeting the criteria and will select a provider offering the best value to the government. Should the procurement process identify a qualified respondent other than the proposed provider(s) identified by the RAB/TRC or fail to identify any qualified respondents, the RAB/TRC will be consulted prior to the award of a purchase order. If the Department of Defense determines that the TAPP request represents an eligible project for which no funds are available, it will ask the RAB or TRC to specify whether the project should be reconsidered upon the availability of additional funds.

(e) *Reporting requirements.* The applicant must assure that copies of delivered reports are made available to the Department of Defense and must comply with the reporting requirements established in § 203.14 of this part.

### § 203.6 Cost principles.

(a) Non-profit contractors must comply with the cost principles in OMB Circular A–122. Copies of the circular may be obtained from EOP Publications, 725 17th NW, NEOB, Washington, DC 20503.

(b) For-profit contractors and subcontractors must comply with the cost principles in the FAR (48 CFR part 31).

### § 203.7 Eligible applicants.

Eligible applicants are community members of RABs or TRCs. Furthermore, the RABs or TRCs must be comprised of at least three community members to ensure community interests are broadly represented. The applicant must certify that the request represents the wishes of a simple majority of the community members of the RAB or TRC. Certification includes, but is not limited to, the results of a roll call vote of community members of the RAB or TRC documented in the meeting minutes. Other requirements of the application are detailed in § 203.9 of this part.

### § 203.8 Evaluation criteria.

The Department of Defense will begin the TAPP procurement process only after it has determined that all eligibility and responsibility requirements listed in §§ 203.6, 203.7, and 203.9 of this part are met, and after review of the specific provider qualifications as submitted in the narrative section of the application. In addition, the proposed TAPP project must meet the eligibility criteria as specified in §§ 203.10 and 203.11 of this part. Projects that fail to meet those requirements relating to the relevance of the proposed project to the restoration activities at the installation will not be approved.

### § 203.9 Submission of application.

The applicant must submit a TAPP application to begin the TAPP procurement process. The application form is included as appendix A of this part and can be obtained from the DoD installation, the DoD Component headquarters, or directly from the Department of Defense, Office of the Deputy Under Secretary of Defense for Environmental Security, 3400 Defense Pentagon, Washington, D.C. 20301–3400. The applications will not be considered complete until the following data elements have been entered into the form:

(a) Installation.

(b) Source of TAPP request (names of RAB or TRC).

(c) Certification of majority request.

(d) RAB/TRC contact point for TAPP project.

(e) Project title.

(f) Project type (e.g. data interpretation, training, etc.).

(g) Project purpose and description (descriptions, time and locations of products or services desired).

(h) Statement of eligibility of project.

(i) Proposed provider, if known.

(j) Specific qualifications or criteria for provider.

### § 203.10 Eligible activities.

(a) TAPP procurements should be pursued by the RAB or TRC only to the extent that Federal, State, or local agencies responsible for overseeing environmental restoration at the facility do not have the necessary technical expertise for the proposed project, or the proposed technical assistance will contribute to the efficiency, effectiveness, or timeliness of environmental restoration activities at the installation and is likely to contribute to community acceptance of those activities.

(b) TAPP procurements may be used to fund activities that will contribute to the public's ability to provide advice to decision-makers by improving the public's understanding of overall conditions and activities. Categories of eligible activities include the following:

(1) *Interpret technical documents.* The installation restoration program documents each stage of investigation and decision-making with technical reports that summarize data and support cleanup decisions. Technical assistance may be provided to review plans and interpret technical reports for community members of RABs and TRCs. These reports include, but are not limited to:

(i) Installation restoration program site studies, engineering documents, such as site inspections, remedial investigations, feasibility studies, engineering evaluation and cost analyses, and decision documents (including records of decision);

(ii) Risk assessments, including baseline and ecological risk assessments conducted by the installation; and

(iii) Health assessments, such as those conducted by the Agency for

Toxic Substances and Disease Registry (ATSDR).

(2) *Assess technologies.* Technical assistance may be provided to help RAB/TRC community members understand the function and implications of those technologies selected to investigate or clean up sites at the installation.

(3) *Participate in relative risk site evaluations.* Technical assistance may be provided to help RAB/TRC community members contribute to the relative risk evaluation process for specific sites.

(4) *Understand health implications.* Technical assistance may be provided to help RAB/TRC community members interpret the potential health implications of cleanup levels or remedial technologies, or to explain the health implications of site contaminants and exposure scenarios.

(5) *Training, where appropriate.* Technical trainers on specific restoration issues may be appropriate in circumstances where RAB/TRC members need supplemental information on installation restoration projects.

### § 203.11 Ineligible activities.

The following activities are ineligible for assistance under the TAPP program:

(a) Litigation or underwriting legal actions, such as paying for attorney fees or paying for a technical assistance provider to assist an attorney in preparing legal action or preparing for and serving as an expert witness at any legal proceeding regarding or affecting the site.

(b) Political activity and lobbying as defined by OMB Circular A–122.

(c) Other activities inconsistent with the cost principles stated in OMB Circular A–122, ''Cost Principles for Non-Profit Organizations.''

(d) Generation of new primary data, such as well drilling and testing, including split sampling.

(e) Reopening final DoD decisions, such as the Records of Decision (see limitations on judicial review of remedial actions under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) Section 113(h)) or conducting disputes with the Department of Defense).

(f) Epidemiological or health studies, such as blood or urine testing.

(g) Community outreach efforts, such as renting a facility and conducting public meetings, or producing and distributing newsletters.

### § 203.12 Technical assistance for public participation provider qualifications.

(a) A technical assistance provider must possess the following credentials:

(1) Demonstrated knowledge of hazardous or toxic waste issues and/or laws.

(2) Academic training in a relevant discipline (e.g., biochemistry, toxicology, environmental sciences, engineering).

(3) Ability to translate technical information into terms understandable to lay persons.

(b) A technical assistance provider should possess the following credentials:

(1) Experience working on hazardous or toxic waste problems.

(2) Experience in making technical presentations.

(3) Demonstrated writing skills.

(4) Previous experience working with affected individuals or community groups or other groups of individuals.

(c) The technical assistance provider's qualifications will vary according to the type of assistance to be provided. Community members of the RAB/TRC may suggest additional provider qualifications as part of the application for technical assistance. These additional qualifications may be used by the Department of Defense to target the most appropriate providers during the procurement process. Examples of such criteria could include prior work in the area, knowledge of local environmental conditions or laws, specific technical capabilities, or other relevant expertise.

### § 203.13 Procurement.

Procurements will be conducted as purchase orders in accordance with the FAR (48 CFR part 13). Under these procedures, procurements not exceeding $100,000 are reserved exclusively for small businesses, and will be conducted

as competitive procurements. Procurements below a value of $2,500 are considered ''micro-purchases.'' These procurements do not require the solicitation of bids and may be conducted at the discretion of the contracting officer.

### § 203.14 RAB/TRC reporting requirements.

The community point of contact of the RAB or TRC must submit a report, to be provided to the installation and to DUSD(ES), to enable the Department of Defense to meet DoD reporting requirements to Congress. This report should include a description of the TAPP project, a summary of services and products obtained, and a statement regarding the overall satisfaction of the community member of the RAB or TRC with the quality of service and/or products received.

### § 203.15 Method of payment.

The SAP set forth in FAR (48 CFR part 13) require purchase orders to be conducted on a firm-fixed-price basis, unless otherwise authorized by agency procedures. The Department of Defense anticipates all TAPP awards to be firm-fixed-price procurements.

### § 203.16 Record retention and audits.

The recipient technical assistance providers shall keep and preserve detailed records in connection with the contract reflecting acquisitions, work progress, reports, expenditures and commitments, and indicate the relationship to established costs and schedules.

### § 203.17 Technical assistance provider reporting requirements.

Each technical assistance provider shall submit progress reports, financial status reports, materials prepared for the RAB/TRC, and a final report to the DoD installation for the TAPP project as specified by the specific purchase order agreement. The final report shall document TAPP project activities over the entire period of support and shall describe the achievements with respect to stated TAPP project purposes and objectives.

### § 203.18 Conflict of interest and disclosure requirements.

The Department of Defense shall require each prospective assistance provider on any contract to provide, with its bid or proposal:

(a) Information on its financial and business relationship with the installation, RAB/TRC members, or any/all potentially responsible parties (PRPs) at the site, and with their parent companies, subsidiaries, affiliates, subcontractors, contractors, and current clients or attorneys and agents. This disclosure requirement encompasses past and anticipated financial and business relationships, including services related to any proposed or pending litigation, with such parties.

(b) Certification that, to the best of its knowledge and belief, it has disclosed such information or no such information exists.

(c) A statement that it shall disclose immediately any such information discovered after submission of its bid or after award. The contracting officer shall evaluate such information and shall exclude any prospective contractor if the contracting officer determines the prospective contractor has a potential conflict of interest that is both significant and cannot be avoided or otherwise resolved. If, after award, the contracting officer determines that a conflict of interest exists that is both significant and cannot be avoided or resolved, the contract will be terminated for cause.

(d) Contractors and subcontractors may not be technical assistance providers to community members of RABs/TRCs at an installation where they are performing cleanup activities for the Federal or State government or any other entity.

### § 203.19 Appeals process.

DoD Components will establish an appeals process to settle potential disputes between the Department of Defense and the public regarding certain decisions arising out of the TAPP process. The Department of Defense recognizes that the RAB/TRC may disagree with the findings of the installation commander that a proposed TAPP project is ineligible, either because of the availability of alternate sources of

assistance or because the project does not meet the eligibility criteria established in this part. It is in the best interests of the Department of Defense and the community members of RABs and TRCs to anticipate and avoid disputes and to work cooperatively to resolve potential differences of opinion. However, in certain circumstances, the RAB/TRC community members may feel that their needs were not adequately served by the decisions of the Department of Defense. In this instance, the hierarchical structure and chain-of-command within each DoD Component will serve as the avenue for appeal. Appeals will be considered within the chain-of-command, and, in general, will be resolved at the lowest level possible. The highest level of appeal will be at the DoD Component Deputy Assistant Secretary level with authority over the DERP and BRAC environmental programs. Inherently governmental functions, such as the procurement process governed by the FAR, are not subject to appeal.

## APPENDIX A TO PART 203—TECHNICAL ASSISTANCE FOR PUBLIC PARTICIPATION REQUEST FORM

APPENDIX A TO PART 203 - Technical Assistance for Public Participartion Request Form

**TECHNICAL ASSISTANCE FOR PUBLIC PARTICIPATION (TAPP) APPLICATION**

*Form Approved*
*OMB No. 0704-0392*
*Expires Dec 31, 1999*

The public reporting burden for this collection of information is estimated to average 4 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, to Department of Defense, Washington Headquarters Services, Directorate for Information Operations and Reports (0704-0392), 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202-4302. Respondents should be aware that notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information if it does not display a currently valid OMB control number.

**PLEASE DO NOT RETURN YOUR FORM TO THE ABOVE ADDRESS. RETURN COMPLETED FORM TO INSTALLATION LISTED IN SECTION I, BLOCK 1.**

**SECTION I - TAPP REQUEST SOURCE IDENTIFICATION DATA**

**1. INSTALLATION**

**2. SOURCE OF TAPP REQUEST** *(Name of Restoration Advisory Board (RAB) or Technical Review Committee (TRC)*

**3. CERTIFICATION OF MAJORITY REQUEST**

**4. DATE OF REQUEST** *(YYYYMMDD)*

**5. RAB POINT OF CONTACT**

**a. NAME** *(Last, First, Middle Initial)*

**b. ADDRESS** *(Street, Apt. or Suite Number, City, State, ZIP Code)*

**c. TELEPHONE NUMBER** *(Include Area Code)*

**SECTION II - TAPP PROJECT DESCRIPTION**

**6. PROJECT TITLE**

**7. PROJECT TYPE** *(Data Interpretation, Training, etc.)*

**8. PROJECT PURPOSE AND DESCRIPTION** *(State anticipated goals of project and relate to increased understanding/participation in restoration process at the installation. Include descriptions, locations, and timetables of products or services requested.)*

**9. STATEMENT OF ELIGIBILITY** *(Refer to eligibility criteria in S203.10 and S203.11 of TAPP rule. Note other sources that were considered for this support and state reasons why these sources are inadequate.)*

**10. ADDITIONAL QUALIFICATIONS OR CRITERIA TO BE CONSIDERED** *(Additional qualifications (beyond those specified in S203.12) a provider should demonstrate to perform the project to the satisfaction of the RAB/TRC. Attach separate statement, if necessary.)*

**SECTION III - INSTALLATION COMMANDER/DESIGNATED DECISION AUTHORITY APPROVAL**

| | | | |
|---|---|---|---|
| APPROVED | 11. SIGNATURE | 12. TITLE | 13. DATE *(YYYYMMDD)* |
| NOT APPROVED | | | |

**DD FORM 2749, DEC 1997 (EG)** PREVIOUS EDITION IS OBSOLETE. Designed using Perform Pro, WHS/DIOR, Dec 97

APPENDIX A TO PART 203 - Technical Assistance for Public Participation Request Form

| SECTION IV - PROPOSED PROVIDER DATA | |
|---|---|
| 14. PROPOSED PROVIDER | |
| a. NAME | b. ADDRESS *(Street, Apt. or Suite Number, City, State, ZIP Code)* |
| c. TELEPHONE NUMBER *(Include Area Code)* | |
| 15. PROVIDER QUALIFICATIONS *(Attach separate statement, if necessary. A statement of qualifications from the proposed technical assistance provider will be acceptable.)* | |
| 16. ALTERNATE PROPOSED PROVIDER *(If known. Attach additional pages as required.)* | |
| a. NAME | b. ADDRESS *(Street, Apt. or Suite Number, City, State, ZIP Code)* |
| c. TELEPHONE NUMBER *(Include Area Code)* | |
| 17. ALTERNATE PROVIDER QUALIFICATIONS *(Attach separate statement, if necessary. A statement of qualifications from the proposed technical assistance provider will be acceptable.)* | |

| SECTION V - CONTRACTING OFFICE APPROVAL | | | |
|---|---|---|---|
| ☐ APPROVED<br>☐ NOT APPROVED | 18. SIGNATURE | 19. TITLE | 20. DATE *(YYYYMMDD)* |

DD FORM 2749 (BACK), DEC 1997

## PART 207 [RESERVED]

## PART 208—NATIONAL SECURITY EDUCATION PROGRAM (NSEP) AND NSEP SERVICE AGREEMENT

Sec.
208.1 Purpose.
208.2 Applicability.
208.3 Definitions.
208.4 Policy.
208.5 Responsibilities.
208.6 Procedures.

AUTHORITY: 50 U.S.C. 1901–1912, 50 U.S.C. 1903, 50 U.S.C. chapter 37.

SOURCE: 81 FR 87450, Dec. 5, 2016, unless otherwise noted.

### § 208.1 208.1 Purpose.

This part:

(a) Implements the responsibilities of the Secretary of Defense for administering NSEP.

(b) Updates DoD policy, assigns responsibilities, and prescribes procedures and requirements for administering and executing the NSEP service agreement in accordance with 50 U.S.C. chapter 37.

(c) Modifies requirements related to the NSEP service agreement.

(d) Assigns oversight of NSEP to the Defense Language and National Security Education Office.

### § 208.2 Applicability.

This part applies to:

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

(b) The administrative agent, and all recipients of awards by NSEP.

### § 208.3 Definitions.

These terms and their definitions are for the purpose of this part.

*Administrative agent*. Organization that will administer, direct, and manage resources for NSEP.

*Boren Fellowship*. A competitive award granted for graduate study under NSEP.

*Boren Scholarship*. A competitive award granted for undergraduate study abroad under NSEP.

*Critical area*. Determined by the Secretary of Defense, in consultation with the members of the National Security Education Board, in accordance with 50 U.S.C. chapter 37 and 50 U.S.C. 1903.

*Critical foreign language*. Determined by the Secretary of Defense, in consultation with the members of the National Security Education Board in accordance with 50 U.S.C. chapter 37.

*Deferral of the NSEP service agreement*. Official NSEP documentation signed by the Director, NSEP, or his or her designee, by which an NSEP award recipient pursuing approved, qualified further education is allowed to postpone meeting the service deadline.

(1) A deferral reschedules the date by which an NSEP award recipient must begin to fulfill service.

(2) Qualified further education includes, but is not limited to, no less than half-time enrollment in any degree-granting, accredited institution of higher education worldwide or participation in an academic fellowship program (*e.g.*, Fulbright Fellowship, Thomas R. Pickering Foreign Affairs Fellowship).

(3) A deferral is calculated by first calculating the length of enrollment in the degree program from start date to anticipated graduation date, and then adding the length of enrollment in the degree program to the service deadline.

(4) Approvals of deferrals will be considered on a case-by-case basis.

*Extension of the NSEP service agreement*. Official NSEP documentation signed by the ASD(R), through the DASD(FE&T), by which an NSEP award recipient who has completed award requirements, reached the service deadline, and is actively seeking to fulfill the NSEP service agreement in a well-documented manner is allowed to extend the service deadline. An extension reschedules the date by which an NSEP award recipient must complete the service required in the NSEP service agreement.

*Intelligence Community*. The U.S. Intelligence Community is a coalition of

17 agencies and organizations within the executive branch that work both independently and collaboratively to gather the intelligence necessary to conduct foreign relations and national security activities.

*Language proficiency*. The U.S. Government relies on the Interagency Language Roundtable (ILR) scale to determine language proficiency. According to the ILR scale:

(1) 0 is No Proficiency.

(2) 0+ is Memorized Proficiency.

(3) 1 is Elementary Proficiency.

(4) 1+ is Elementary Proficiency, Plus.

(5) 2 is Limited Working Proficiency.

(6) 2+ is Limited Working Proficiency, Plus.

(7) 3 is General Professional Proficiency.

(8) 3+ is General Professional Proficiency, Plus.

(9) 4 is Advanced Professional Proficiency.

(10) 4+ is Advanced Professional Proficiency, Plus.

(11) 5 is Functional Native Proficiency.

*NSEP Service Approval Committee*. Committee of key NSEP staff members who review the merits of all requests for service credit, deferrals, extensions, or waivers of the NSEP service agreement, including adjudication of all cases involving award recipients who decline job offers, in order to provide recommendations to the Director, NSEP.

*Other federal agencies*. Includes any federal government agency, department, bureau, office or any other federal government organization of any nature other than the Department of Defense or any component, agency, department, field activity or any other subcomponent of any kind within or subordinate to the Department of Defense.

*Program end date*. Official end of an NSEP award recipient's program, as set forth within the individual's NSEP service agreement.

*Request of service credit in fulfillment of the NSEP service agreement*. Written request made through submission of a DD Form 2753 to the NSEP office, documenting how employment an NSEP award recipient held or holds complies with fulfillment of the NSEP service agreement.

*Reserve Officer Training Corps (ROTC)*. College program offered at colleges and universities across the United States that prepares young adults to become officers in the U.S. Military. In exchange for a paid college education and a guaranteed post-college career, cadets commit to serve in the Military after graduation. Each Service branch has its own take on ROTC.

*Satisfactory academic progress*. Maintenance of academic standards at both home and host institution(s) for every NSEP award recipient for the duration of the study program.

*Service deadline*. Date by which NSEP award recipient must begin to fulfill the NSEP service agreement.

*Waiver of the NSEP service agreement*. Official NSEP documentation, signed by the ASD(R), through the DASD(FE&T), by which an NSEP award recipient is relieved of responsibilities associated with the NSEP service agreement.

*Work in fulfillment of the NSEP service agreement*. Upon completion of the NSEP award recipient's study program, such individual must seek employment in the DoD, Department of Homeland Security (DHS), Department of State (DOS), or the Intelligence Community, or if no suitable position is available, anywhere in the U.S. Government in a position with national security responsibilities. If such individual is unsuccessful in finding a federal position after making a good faith effort to do so, award recipient agrees to seek employment in the field of education in a position related to the study supported by such scholarship or fellowship. The award recipient further agrees to fulfill the service requirement, as described in this rule.

## § 208.4 Policy.

It is DoD policy that:

(a) NSEP assist in making available to DoD and other federal entities, as applicable, personnel possessing proficiency in languages and foreign regional expertise critical to national security by providing scholarships and fellowships pursuant to 50 U.S.C. 1902(a). These scholarships and fellowships will be awarded to:

(1) Students who are U.S. citizens, to pursue qualifying undergraduate and graduate study in domestic and foreign education systems to assist in meeting national security needs for professionals with in-depth knowledge of world languages and cultures, and who enter into an NSEP service agreement as required by 50 U.S.C. 1902(b); or

(2) Students who are U.S. citizens who are native speakers of a foreign language identified as critical to the national security of the United States, but who are not proficient at a professional level in the English language with respect to reading, writing, and other skills, to enable such students to pursue English language studies at institutions of higher education. Recipients must agree to enter into an NSEP service agreement as required by 50 U.S.C. 1902(b).

(b) Grants will be awarded to institutions of higher education for programs in critical areas pursuant to 50 U.S.C. 1902(a) and 1902(f) to implement a national system of programs to produce advanced language expertise critical to the national security of the United States.

(c) An NSEP award recipient must enter into an NSEP service agreement before receipt of an award as required by 50 U.S.C. chapter 37. The award recipient must agree to maintain satisfactory academic progress and work in fulfillment of the NSEP service agreement until all service requirements are satisfied.

(d) All NSEP award recipients who are government employees or members of the uniformed services at the time of award must confirm that they have resigned from such employment or service before receiving support for their NSEP-funded overseas study. These stipulations apply to all individuals, including employees of a department, agency, or entity of the U.S. Government and members of the uniformed services, including members of a Reserve Component of the uniformed services. ROTC participants who are also members of a Reserve Component must be in an inactive, non-drilling status during the course of their NSEP-funded overseas study.

(e) Neither DoD nor the U.S. Government is obligated to provide, or offer work or employment to, award recipients as a result of participation in the program. All federal agencies are encouraged to assist in placing NSEP award recipients upon successful completion of the program.

**§ 208.5 Responsibilities.**

(a) Under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness (USD(P&R)), the ASD(R):

(1) Develops programs, processes, and policies to support NSEP award recipients in fulfilling their NSEP service agreement through internships or employment in federal service pursuant to 50 U.S.C. chapter 37.

(2) Determines, pursuant to 50 U.S.C. 1902(a), after consultation with the National Security Education Board, which countries, languages, and disciplines are critical and in which there are deficiencies of knowledgeable personnel within federal entities.

(b) Under the authority, direction, and control of the USD(P&R) through the ASD(R), and in coordination with the Director, Department of Defense Human Resources Activity (DoDHRA), the DASD(FE&T), or his or her designee:

(1) Makes available competitive scholarship, fellowship, and English for Heritage Language Speakers (EHLS) awards to U.S. citizens who wish to engage in study for the purposes of national security in accordance with 50 U.S.C. chapter 37.

(2) Manages, oversees, and monitors compliance of NSEP service agreements on behalf of the Secretary of Defense.

(3) Advises NSEP award recipients who are seeking federal or national security positions on how to fulfill their NSEP service agreement in national security positions.

(4) Maintains documentation of successful completion of federal service or initiates debt collection procedures for those NSEP recipients who fail to comply with the NSEP service agreement.

(5) Works with agencies or offices in the U.S. Government to identify potential employment opportunities for

NSEP award recipients and make employment opportunities and information readily available to all award recipients.

(6) Approves or disapproves all DD Form 2573 written requests for service credit, deferrals, extensions, or waivers of the NSEP service agreement, including adjudication of all cases involving award recipients who decline job offers.

(c) Under the authority, direction, and control of the USD(P&R), and in coordination with the DASD(FE&T), the Director, DoDHRA:

(1) Provides administrative and operational support to NSEP.

(2) Provides fiscal management and oversight to ensure all funds provided for NSEP are separately and visibly accounted for in the DoD budget.

**§ 208.6 Procedures.**

(a) *NSEP award recipients*. The award recipient of any scholarship or fellowship award through NSEP will:

(1) Maintain satisfactory academic progress in the course of study for which assistance is provided, according to the regularly prescribed standards and practices of the institution in which the award recipient is matriculating.

(2) As a condition of receiving an award, sign an NSEP service agreement as required by 50 U.S.C. chapter 37, which among other requirements, must acknowledge an understanding and agreement by the award recipient that failure to maintain satisfactory academic progress constitutes grounds upon which the award may be terminated and trigger the mandatory requirement to return to the U.S. Treasury the scholarship, fellowship, or EHLS funds provided to the award recipient.

(3) Notify the DASD(FE&T) within ten business days if advised of failure to maintain academic progress by the institution of matriculation.

(4) Notify the DASD(FE&T) in a timely manner and in advance of the service deadline should any request for deferral, extension, or waiver become necessary.

(i) *Deferrals*. NSEP award recipients actively seeking to fulfill the NSEP service agreement in a well-documented manner may request approval of a one-year extension of their service deadline. Approvals of deferrals for pursuit of education will be considered on a case-by-case basis. Renewal of a deferral may be granted if adequately justified.

(ii) *Extensions*. A thorough outline describing all further plans to complete the NSEP service agreement must accompany all extension requests. No more than two extensions may be granted to an NSEP award recipient.

(iii) *Waivers*. (A) In extraordinary circumstances, an NSEP award recipient may be relieved of responsibilities associated with the NSEP service agreement. As a result of receiving a waiver, the award recipient will no longer receive job search assistance from NSEP; is no longer a beneficiary of the special hiring advantages available to award recipients who have a service requirement; and will not be eligible to receive NSEP letters of certification, or endorsements or recommendations. Upon request, the NSEP office will continue to certify that the award recipient received an NSEP scholarship or fellowship.

(B) The DASD(FE&T), will consider requests for extensions and waivers of the NSEP service agreement only under special circumstances as defined in paragraph (b) of this section. The request must set forth the basis, situation, and causes which support the requested action. The award recipient must submit requests electronically on *www.nsepnet.org* or to *nsep@nsep.gov*. Final approval of work in fulfillment of the NSEP service agreement, deferrals, extensions, and waivers rest with, and are at the discretion of, the DASD(FE&T).

(5) Immediately upon successful completion of the award program and either completion of the degree for which the award recipient is matriculated or withdrawal from such degree program, begin the federal job search. Award recipients should concurrently seek positions within DoD, any element of the Intelligence Community, the DHS, or DOS.

(6) Work to satisfy all service requirements in accordance with applicable NSEP service agreements until all NSEP service requirements are satisfied. Work in fulfillment of the NSEP

service agreement must be wholly completed within five years of the award recipient's first date of service unless an approved deferral or extension has been granted.

(7) Work for the total period of time specified in the NSEP service agreement either consecutively in one organization, or through follow-on employment in two or more organizations.

(8) Repay the U.S. Treasury the award funds provided to the award recipient if the requirements of the NSEP service agreement are not met.

(9) Submit DD Form 2753 to NSEP no later than one month after termination of the period of study funded by NSEP and annual reports thereafter until the NSEP service requirement is satisfied. The DD Form 2753 will include:

(i) Any requests for deferrals, extensions, or waivers with adequate support for such requests.

(ii) The award recipient's current status (*e.g.*, not yet graduated from, or terminated enrollment in, the degree program pursued while receiving NSEP support; engaged in work in fulfillment of the requirement.)

(iii) Updated contact information.

(10) Notify the ASD(R), through the DASD(FE&T), within ten business days of any changes to the award recipient's mailing address.

(b) *Procedures and requirements applicable to NSEP aard recipients*—(1) *NSEP service agreement*. Award recipients of any scholarship, fellowship, or EHLS award through this program must comply with the terms of the NSEP service agreement they signed. NSEP awards entered into before the date of this part will be governed by the laws, regulations, and policies in effect at the time that the award was made. The NSEP service agreement for recipients awarded as of the date of this part will:

(i) In accordance with 50 U.S.C. 1902(b) outlines requirements for NSEP award recipients to fulfill their federal service requirement through work in positions that contribute to the national security of the United States. An emphasis is placed on work within one of four organizations: DoD, any element of the Intelligence Community, DHS, or DOS. On a case-by-case basis, NSEP may consider employment with a federal contractor of one of these four priority organizations as meeting the service requirement should the award recipient provide adequate documentary evidence that the salary for the position is funded by the U.S. Government.

(ii) Stipulate that absent the availability of a suitable position in the four priority organizations or a contractor thereof, award recipients may satisfy the service requirement by serving in any federal agency or office in a position with national security responsibilities. It will also stipulate that absent the availability of a suitable position in DoD, any element of the Intelligence Community, DHS, DOS, a contractor thereof, or any federal agency with national security responsibilities, award recipients may satisfy the service requirement by working in the field of education in a discipline related to the study supported by the program if the recipient satisfactorily demonstrates to the Secretary of Defense through the Director, NSEP, that no position is available in the departments, agencies, and offices covered by paragraph (b)(1)(i) of this section.

(2) *Implementation*. The NSEP service agreement will be implemented as follows:

(i) Prior to receiving assistance, the award recipient must sign an NSEP service agreement. The award recipient will submit to the NSEP Administrative Agent, in advance of program of study start date, any proposed changes to the approved award program (*i.e.*, course and schedule changes, withdrawals, course or program incompletions, unanticipated or increased costs).

(ii) The minimum length of service requirement for undergraduate scholarship, graduate fellowship, and EHLS award recipients is one year. The duration of the service requirement for graduate fellowship award recipients is equal to the duration of assistance provided by NSEP.

(iii) In accordance with 50 U.S.C. 1902(b), undergraduate scholarship students must begin fulfilling the NSEP service agreement within three years of completion or termination of their undergraduate degree program.

(iv) In accordance with 50 U.S.C. 1902(b), graduate fellowship students must begin fulfilling the NSEP service agreement within two years of completion or termination of their graduate degree program.

(v) In accordance with 50 U.S.C. 1902(b), EHLS award recipients must begin fulfilling the service requirement within three years of completion of their program.

(vi) The award recipient must accept a reasonable offer of employment, as defined by the Director, NSEP, or his or her designee, in accordance with the NSEP service agreement, at a salary deemed by the hiring organization as commensurate with the award recipient's education level, and consistent with the terms and conditions of the NSEP service agreement.

(vii) The award recipient will annually submit a DD Form 2753 to NSEP until all NSEP service agreement requirements are satisfied. The DD Form 2753 must be received and reviewed by the NSEP Service Approval Committee. The receipt of a completed DD Form 2753 will be acknowledged through official correspondence from NSEP. Award recipients who do not submit the DD Form 2753 as required will be notified by NSEP of the intent to pursue collection action.

(viii) If the award recipient fails to maintain satisfactory academic progress for any term in which assistance is provided, probationary measures of the host institution will apply to the award recipient. Failure to meet the institution's requirements to resume satisfactory academic progress within the prescribed guidelines of the institution will result in the termination of assistance to the award recipient.

(ix) Extenuating circumstances, such as illness of the award recipient or a close relative, death of a close relative, or an interruption of study caused by the host institution, may be considered acceptable reasons for non-satisfactory academic progress. The award recipient must notify the NSEP Administrative Agent of any extenuating circumstances within 10 business days of occurrence. The NSEP Administrative Agent will review these requests to determine what course of action is appropriate and make a recommendation to NSEP for final determination. The DASD(FE&T) will upon receipt of the NSEP Administrative Agent recommendation, determine by what conditions to terminate or reinstate the award to the award recipient.

(x) NSEP award recipients may apply to the DASD(FE&T) for a deferral of the NSEP service agreement requirement if pursuing qualified further education.

(xi) NSEP award recipients may apply to the DASD(FE&T), to receive an extension of the NSEP service agreement requirement if actively seeking to fulfill the NSEP service agreement in a well-documented manner.

(xii) In extraordinary circumstances an NSEP award recipient may request a waiver to be relieved of responsibilities associated with the NSEP service agreement. Conditions for requesting a waiver to the NSEP service agreement may include:

(A) Situations in which compliance is either impossible or would involve extreme hardship to the award recipient.

(B) Interruptions in service due to temporary physical or medical disability or other causes beyond the award recipient's control.

(C) Unreasonable delays in the hiring process not caused by the award recipient, including delays in obtaining a security clearance if required for employment.

(D) Hiring freezes that adversely affect award recipients who are seeking positions with the U.S. Government.

(E) Permanent physical or medical disability that prevent the award recipient from fulfilling the obligation.

(F) Inability to complete the NSEP service agreement due to terminations or interruptions of work beyond the award recipient's control.

(G) Death of the award recipient.

(xiii) In cases where assistance to the award recipient is terminated, the amount owed to the U.S. Government is equal to the support received from NSEP. Repayment to the U.S. Treasury must be made within a period not to exceed six months from expiration of the service deadline. Noncompliance with repayment requirements will result in the initiation of standard U.S.

Government collection procedures to obtain payment for overdue indebtedness, unless a waiver is specifically granted by the DASD(FE&T). Further job search assistance to an award recipient will be denied if any outstanding debt remains unpaid as a result of an award termination.

(A) Repayment to the U.S. Treasury for the amount of assistance provided becomes due, either in whole or in part, if the award recipient fails to fulfill the NSEP service agreement. Award recipients who do not submit the SAR as required will be notified by NSEP of the intent to pursue collection action. Noncompliance with repayment requirements will result in the initiation of standard U.S. Government collection procedures to obtain payment for overdue indebtedness, unless a waiver is specifically granted by the DASD(FE&T).

(B) Repayment recovery procedures will include one or a combination of the following:

(*1*) Voluntary repayment schedule arranged between the award recipient and the administrative agent.

(*2*) Deduction from accrued pay, compensation, amount of retirement credit, or any other amount due the employee from the U.S. Government.

(*3*) Such other methods as are provided by law for recovery of amounts owed to the U.S. Government.

## PART 209 [RESERVED]

## PART 210—ENFORCEMENT OF STATE TRAFFIC LAWS ON DOD INSTALLATIONS

Sec.

210.1 Purpose.
210.2 Applicability and scope.
210.3 Policy.
210.4 Responsibilities.

AUTHORITY: 63 Stat. 377, as amended, 18 U.S.C. 13; 40 U.S.C. 318a through d., 40 U.S.C. 612.

SOURCE: 46 FR 58306, Dec. 1, 1981, unless otherwise noted.

### § 210.1 Purpose.

This part establishes policies pursuant to the requirements of DoD Directive 6055.4,[1] ''Department of Defense Traffic Safety Program,'' November 7, 1978, and to authority delegated to the Secretary of Defense under Enclosure 1 for the enforcement, on DoD military installations, of those state vehicular and pedestrian traffic laws that cannot be assimilated under U.S.C., Title 18, section 13.

[46 FR 58306, Dec. 1, 1981, as amended at 56 FR 13285, Apr. 1, 1991]

### § 210.2 Applicability and scope.

(a) The provisions of this part apply to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Unified and Specified Commands, and the Defense Agencies.

(b) The provisions encompass all persons who operate or control a motor vehicle or otherwise use the streets of a military installation over which the United States exercises exclusive or concurrent legislative jurisdiction.

(c) The provisions govern only vehicular and traffic offenses or infractions that cannot be assimilated under 18 U.S.C. 13, thereby precluding application of state laws to traffic offenses committed on military installations.

### § 210.3 Policy.

(a) It is the policy of the Department of Defense that an effective, comprehensive traffic safety program be established and maintained at all military installations as prescribed in DoD Directive 6055.4.[1]

(b) State vehicular and pedestrian traffic laws that are now or may hereafter be in effect shall be expressly adopted and made applicable on military installations to the extent provided by this part. All persons on a military installation shall comply with the vehicular and pedestrian traffic laws of the state in which the installation is located.

(c) Pursuant to the authority established in the Enclosure 1 to DoD Directive 5525.4[2], installation commanders of all DoD installations in the United States and over which the United

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

[2] See footnote 1 to § 210.1.

States has exclusive or concurrent legislative jurisdiction are delegated the authority to establish additional vehicular and pedestrian traffic rules and regulations for their installations. All persons on a military installation shall comply with locally established vehicular and pedestrian traffic rules and regulations.

(d) A person found guilty of violating, on a military installation, any state vehicular or pedestrian traffic law or local installation vehicular or pedestrian traffic rule or regulation made applicable to the installation under the provisions of this part is subject to a fine of not more than $50 or imprisonment for not more than 30 days, or both, for each violation (40 U.S.C. 318c).

(e) A copy of this part shall be posted in an appropriate place on the DoD installation concerned.

[46 FR 58306, Dec. 1, 1981, as amended at 56 FR 13285, Apr. 1, 1991; 56 FR 42939, Aug. 30, 1991]

### §210.4 Responsibilities.

(a) The Assistant Secretary of Defense (Manpower, Reserve Affairs, and Logistics) shall modify this part as appropriate.

(b) Secretaries of the Military Departments shall comply with this part.

# PART 211—MISSION COMPATIBILITY EVALUATION PROCESS

## Subpart A—General

Sec.
211.1 Purpose.
211.2 Applicability.
211.3 Definitions.

## Subpart B—Policy

211.4 Policy.
211.5 Responsibilities.

## Subpart C—Project Evaluation Procedures

211.6 Initiating a formal DoD review of a proposed project.
211.7 Initiating an informal DoD review of a project.
211.8 Inquiries received by DoD Components.
211.9 Mitigation options.
211.10 Reporting determinations to Congress.

## Subpart D—Communications and Outreach

211.11 Communications with the Clearinghouse.
211.12 Public outreach.

AUTHORITY: Public Law 111–383, Section 358, as amended by Public Law 112–81, Section 331.

SOURCE: 78 FR 73088, Dec. 5, 2013, unless otherwise noted.

## Subpart A—General

### §211.1 Purpose.

This part prescribes procedures pursuant to section 358 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011 to provide:

(a) A formal review of projects for which applications are filed with the Secretary of Transportation under 49 U.S.C. 44718, to determine if they pose an unacceptable risk to the national security of the United States.

(b) An informal review of a renewable energy development or other energy project in advance of the filing of an application with the Secretary of Transportation under 49 U.S.C. 44718.

### §211.2 Applicability.

This part applies to:

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

(b) Persons filing applications with the Secretary of Transportation for proposed projects pursuant to 49 U.S.C. 44718, when such applications are received by the Department of Defense from the Secretary of Transportation.

(c) A State, Indian tribal, or local official, a landowner, or a developer of a renewable energy development or other energy project seeking a review of such project by DoD.

(d) Members of the general public from whom comments are received on notices of actions being taken by the Department of Defense under this part.

(e) The United States.

### § 211.3 Definitions.

*Adverse impact on military operations and readiness.* Any adverse impact upon military operations and readiness, including flight operations research, development, testing, and evaluation and training, that is demonstrable and is likely to impair or degrade the ability of the armed forces to perform their warfighting missions.

*Applicant.* An entity filing an application with the Secretary of Transportation pursuant to 49 U.S.C. 44718, and whose proper application has been provided by the Secretary of Transportation to the Clearinghouse.

*Armed forces.* This term has the same meaning as provided in 10 U.S.C. 101(a)(4) but does not include the Coast Guard.

*Clearinghouse.* The DoD Siting Clearinghouse, established under the Deputy Under Secretary of Defense (Installations & Environment).

*Congressional defense committees.* The—

(1) Committee on Armed Services and the Committee on Appropriations of the Senate; and

(2) Committee on Armed Services and the Committee on Appropriations of the House of Representatives.

*Days.* All days are calendar days but do not include Federal holidays.

*Landowner.* A person, partnership, corporation, or other legal entity, that owns a fee interest in real property on which a proposed project is planned to be located.

*Military readiness.* Includes any training or operation that could be related to combat readiness, including testing and evaluation activities.

*Mitigation.* Actions taken by either or both the DoD or the applicant to ensure that a project does not create an unacceptable risk to the national security of the United States.

*Proposed project.* A proposed project is the project as described in the application submitted to the Secretary of Transportation pursuant to 49 U.S.C. 44718 and transmitted by the Secretary of Transportation to the Clearinghouse.

*Requester.* A developer of a renewable energy development or other energy project, a State, Indian tribal, or local official, or a landowner seeking an informal review by the DoD of a project.

*Section 358.* Section 358 of the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Public Law 111–383.

*Unacceptable risk to the national security of the United States.* The construction, alteration, establishment, or expansion, or the proposed construction, alteration, establishment, or expansion, of a structure or sanitary landfill that would:

(1) Endanger safety in air commerce, related to the activities of the DoD.

(2) Interfere with the efficient use and preservation of the navigable airspace and of airport traffic capacity at public-use airports, related to the activities of the DoD.

(3) Significantly impair or degrade the capability of the DoD to conduct training, research, development, testing, and evaluation, and operations or to maintain military readiness.

*United States.* The several States, the District of Columbia, the Commonwealths of Puerto Rico and the Northern Mariana Islands, American Samoa, Guam, Midway and Wake Islands, the U.S. Virgin Islands, any other territory or possession of the United States, and associated navigable waters, contiguous zones, and territorial seas and the airspace of those areas.

## Subpart B—Policy

### § 211.4 Policy.

(a) It is an objective of the Department of Defense to ensure that the robust development of renewable energy sources and the increased resiliency of the commercial electrical grid may move forward in the United States, while minimizing or mitigating any adverse impacts on military operations and readiness.

(b) The participation of the DoD in the process of the Federal Aviation Administration conducted pursuant to 49 U.S.C. 44718 shall be conducted in accordance with this part. No other process shall be used by a DoD Component.

(c) Nothing in this part shall be construed as affecting the authority of the Secretary of Transportation under 49 U.S.C. 44718.

**§211.5 Responsibilities.**

(a) Pursuant to subsection (e)(4) of section 358, the Deputy Secretary of Defense is designated as the senior officer. Only the senior officer may convey to the Secretary of Transportation a determination that a project filed with the Secretary of Transportation pursuant to 49 U.S.C. 44718 would result in an unacceptable risk to the national security of the United States.

(b) Pursuant to subsection (b)(1) of section 358, the Under Secretary of Defense for Acquisition, Technology, and Logistics is designated as the senior official. Only the senior official may provide to the senior officer a recommendation that the senior officer determine a project filed with the Secretary of Transportation pursuant to 49 U.S.C. 44718 would result in an unacceptable risk to the national security of the United States.

(c) Pursuant to subsection (e)(1) of section 358, the Deputy Under Secretary of Defense (Installations & Environment), in coordination with the Deputy Assistant Secretary of Defense (Readiness) and the Principal Deputy Director, Operational Test and Evaluation, shall review a proper application for a project filed pursuant to 49 U.S.C. 44718 and received from the Secretary of Transportation and provide a preliminary assessment of the level of risk of adverse impact on military operations and readiness that would arise from the project and the extent of mitigation that may be needed to address such risk.

(d) Pursuant to subsection (b)(1) of section 358, the Office of the Deputy Under Secretary of Defense (Installations & Environment) is designated as the lead organization. Under the authority, direction, and control of the Under Secretary of Defense for Acquisition, Technology, and Logistics, there is, within the Office of the Deputy Under Secretary, a DoD Siting Clearinghouse. The Clearinghouse:

(1) Shall have a governing board organized in accordance with DoD Instruction 5105.18, DoD Intergovernmental and Intragovernmental Committee Management Program.

(2) Has an executive director who is a Federal Government employee, appointed by the Deputy Under Secretary of Defense (Installations & Environment).

(3) Performs such duties as assigned in this part and as the Deputy Under Secretary directs.

## Subpart C—Project Evaluation Procedures

**§211.6 Initiating a formal DoD review of a proposed project.**

(a) A formal review of a proposed project begins with the receipt from the Secretary of Transportation by the Clearinghouse of a proper application filed with the Secretary of Transportation pursuant to 49 U.S.C. 44718.

(1) The Clearinghouse will convey the application as received to those DoD Components it believes may have an interest in reviewing the application.

(2) The DoD Components that receive the application shall provide their comments and recommendations on the application to the Clearinghouse no later than 20 days after they receive the application.

(3) Not later than 30 days after receiving the application from the Secretary of Transportation, the Clearinghouse shall evaluate all comments and recommendations received and take one of three actions:

(i) Determine that the proposed project will not have an adverse impact on military operations and readiness, in which case it shall notify the Secretary of Transportation of such determination.

(ii) Determine that the proposed project will have an adverse impact on military operations and readiness but that the adverse impact involved is sufficiently attenuated that it does not require mitigation. When the Clearinghouse makes such a determination, it shall notify the Secretary of Transportation of such determination.

(iii) Determine that the proposed project may have an adverse impact on military operations and readiness. When the Clearinghouse makes such a determination it shall immediately—

(A) Notify the applicant of the determination of the Clearinghouse and offer to discuss mitigation with the applicant to reduce the adverse impact;

(B) Designate one or more DoD Components to engage in discussions with

the applicant to attempt to mitigate the adverse impact;

(C) Notify the Secretary of Transportation that the Department of Defense has determined that the proposed project may have an adverse impact on military operations and readiness, and, if the cause of the adverse impact is due to the proposed project exceeding an obstruction standard set forth in subpart C of part 77 of title 14 of the Code of Federal Regulations, identify the specific standard and how it would be exceeded; and

(D) Notify the Secretary of Transportation and the Secretary of Homeland Security that the Clearinghouse has offered to engage in mitigation discussions with the applicant.

(4) The applicant must provide to the Clearinghouse its agreement to discuss the possibility of mitigation within five days of receipt of the notification from the Clearinghouse.

(b) If the applicant agrees to enter into discussions with the DoD to seek to mitigate an adverse impact, the designated DoD Components shall engage in discussions with the applicant to attempt to reach agreement on measures that would mitigate the adverse impact of the proposed project on military operations and readiness. The Clearinghouse shall invite the Administrator of the Federal Aviation Administration and the Secretary of Homeland Security to participate in such discussions. The Clearinghouse may also invite other Federal agencies to participate in such discussions.

(1) Such discussions shall not extend more than 90 days beyond the initial notification to the applicant, unless both the designated DoD Components and the applicant agree, in writing, to an extension of a specific period of time.

(i) If agreement between the applicant and the designated DoD Components has not been reached on mitigation measures by that time and no extension has been mutually agreed to, the designated DoD Components shall notify the Clearinghouse of the results of the discussions and the analysis and recommendations of the Components with regard to the proposed project as it is proposed after discussions.

(ii) If agreement between the applicant and the designated DoD Components has been reached on mitigation measures that remove the adverse impact of the proposed project on military operations and readiness, the DoD Components shall notify the Clearinghouse of the agreement. If the mitigation measures entail modification to the proposed project, the applicant shall notify the Secretary of Transportation of such agreement and amend its application accordingly.

(2) If the applicant and the designated DoD Components are unable to reach agreement on mitigation, the Clearinghouse shall review the analysis and recommendations of the DoD Components and determine if the proposed project as it may have been modified by the applicant after discussions would result in an unacceptable risk to the national security of the United States.

(i) If the Clearinghouse determines that the proposed project as it may have been modified by the applicant after discussions would result in an unacceptable risk to the national security of the United States, it shall make a recommendation to the senior official to that effect. If the Clearinghouse determines, contrary to the recommendations of the DoD Components, that the proposed project as it may have been modified by the applicant after discussions would not result in an unacceptable risk to the national security of the United States, it shall make a recommendation to the senior official to that effect.

(ii) If the senior official concurs with the recommendation of the Clearinghouse, the senior official shall make a recommendation to the senior officer that is consistent with the recommendation of the Clearinghouse. If the senior official does not agree with the recommendation of the Clearinghouse, the senior official may make a recommendation to the senior officer to that effect.

(iii) The senior officer shall consider the recommendation of the senior official, and, after giving full consideration to mitigation actions available to the DoD and those agreed to by the applicant, determine whether the proposed project as it may have been

modified by the applicant would result in an unacceptable risk to the national security of the United States. If the senior officer makes such a determination, the senior officer shall convey that determination to the Secretary of Transportation, identifying which of the three criteria in §211.3 creates the unacceptable risk to the national security of the United States.

(iv) Any mitigation discussions engaged in by the Department of Defense pursuant to this part shall not be binding upon any other Federal agency, nor waive required compliance with any other law or regulation.

(c) If the applicant does not agree to enter into discussions with the DoD to seek to mitigate an adverse impact, the Clearinghouse shall review the analysis and recommendations of the designated DoD Components and determine if the proposed project would result in an unacceptable risk to the national security of the United States.

(1) If the Clearinghouse determines that the proposed project would result in an unacceptable risk to the national security of the United States, it shall make a recommendation to the senior official to that effect. If the Clearinghouse determines, contrary to the recommendations of the DoD Components, that the proposed project would not result in an unacceptable risk to the national security of the United States, it shall make a recommendation to the senior official to that effect.

(2) If the senior official concurs with the recommendation of the Clearinghouse, the senior official shall make a recommendation to the senior officer that is consistent with the recommendation of the Clearinghouse. If the senior official does not agree with the recommendation of the Clearinghouse, the senior official may make a recommendation to the senior officer to that effect.

(3) The senior officer shall consider the recommendation of the senior official, and, after giving full consideration to mitigation actions available to the DoD and those agreed to by the applicant, determine whether the proposed project would result in an unacceptable risk to the national security of the United States. If the senior officer makes such a determination, the senior officer shall convey that determination to the Secretary of Transportation, identifying which of the three criteria in §211.3 creates the unacceptable risk to the national security of the United States.

(d) The Clearinghouse may, on behalf of itself, the senior official, or the senior officer, seek an extension of time from the Secretary of Transportation for consideration of the application.

### §211.7 Initiating an informal DoD review of a proposed project.

(a) An informal review of a project begins with the receipt from a requester by the Clearinghouse of a request for an informal review. In seeking an informal review, the requester shall provide the following information to the Clearinghouse:

(1) The geographic location of the project including its latitude and longitude,

(2) The height of the project,

(3) The nature of the project.

(4) The requester is encouraged to provide as much additional information as is available. The more information provided by the requester, the greater will be the accuracy and reliability of the resulting DoD review. When a request for an informal review includes information that is proprietary or competition sensitive, requesters are encouraged to mark the documents they submit accordingly.

(b) The Clearinghouse shall, within five days of receiving the information provided by the requester, convey that information to those DoD Components it believes may have an interest in reviewing the request.

(1) The DoD Components that receive the request from the Clearinghouse shall provide their comments and recommendations on the request to the Clearinghouse no later than 30 days after they receive the request.

(2) Not later than 50 days after receiving the request from the requester, the Clearinghouse shall evaluate all comments and recommendations received and take one of three actions:

(i) Determine that the project will not have an adverse impact on military operations and readiness, in which case

it shall notify the requester of such determination. In doing so, the Clearinghouse shall also advise the requester that the informal review by the DoD does not constitute an action under 49 U.S.C. 44718 and that neither the DoD nor the Secretary of Transportation are bound by the determination made under the informal review.

(ii) Determine that the project will have an adverse impact on military operations and readiness but that the adverse impact involved is sufficiently attenuated that it does not require mitigation. The Clearinghouse shall notify the requester of such determination. In doing so, the Clearinghouse shall also advise the requester that the informal review by the DoD does not constitute an action under 49 U.S.C. 44718 and that neither the DoD nor the Secretary of Transportation are bound by the determination made under the informal review.

(iii) Determine that the project will have an adverse impact on military operations and readiness.

(A) When the requester is the project proponent, the Clearinghouse shall immediately—

(*1*) Notify the requester of the determination and the reasons for the conclusion of the Clearinghouse and advise the requester that the DoD would like to discuss the possibility of mitigation to reduce any adverse impact; and

(*2*) Designate one or more DoD Components to engage in discussions with the requester to attempt to mitigate the adverse impact.

(B) When the requester is a State, Indian tribal, or local official or a landowner, notify the requester of the determination and the reasons for that conclusion.

(c) If the requester is the project proponent and agrees to enter into discussions with the DoD to seek to mitigate an adverse impact, the designated DoD Components shall engage in discussions with the requester in an attempt to reach agreement on measures that would mitigate the adverse impact of the project on military operations and readiness.

**§ 211.8 Inquiries received by DoD Components.**

(a) An inquiry received by a DoD Component other than the Clearinghouse relating to an application filed with the Secretary of Transportation pursuant to 49 U.S.C. 44718 shall be forwarded to the Clearinghouse by the DoD Component except when that DoD Component has been designated by the Clearinghouse to engage in discussions with the entity making the inquiry.

(b) A request for informal DoD review or any other inquiry related to matters covered by this part and received by a DoD Component other than the Clearinghouse shall be forwarded to the Clearinghouse by that Component except when that DoD Component has been designated by the Clearinghouse to engage in discussions with the entity making the request.

**§ 211.9 Mitigation options.**

(a) In discussing mitigation to avoid an unacceptable risk to the national security of the United States, the DoD Components designated to discuss mitigation with an applicant or requester shall, as appropriate and as time allows, analyze the following types of DoD mitigation to determine if they identify feasible and affordable actions that may be taken to mitigate adverse impacts of projects on military operations and readiness:

(1) Modifications to military operations.

(2) Modifications to radars or other items of military equipment.

(3) Modifications to military test and evaluation activities, military training routes, or military training procedures.

(4) Providing upgrades or modifications to existing systems or procedures.

(5) The acquisition of new systems by the DoD and other departments and agencies of the Federal Government.

(b) In discussing mitigation to avoid an unacceptable risk to the national security of the United States, the applicant or requester, as the case may be, should consider the following possible actions:

(1) Modification of the proposed structure, operating characteristics, or the equipment in the proposed project.

(2) Changing the location of the proposed project.

(3) Limiting daily operating hours or the number of days the equipment in the proposed structure is in use in order to avoid interference with military activities.

(4) Providing a voluntary contribution of funds to offset the cost of measures undertaken by the Secretary of Defense to mitigate adverse impacts of the project on military operations and readiness.

### §211.10 Reporting determinations to Congress.

(a) Not later than 30 days after making a determination of unacceptable risk pursuant to §211.6, the senior officer shall submit to the congressional defense committees a report on such determination and the basis for such determination.

(b) Such a report shall include—

(1) An explanation of the operational impact that led to the determination.

(2) A discussion of the mitigation options considered.

(3) An explanation of why the mitigation options were not feasible or did not resolve the conflict.

## Subpart D—Communications and Outreach

### §211.11 Communications with the Clearinghouse.

All communications to the Clearinghouse by applicants, requesters, or members of the public should be addressed to: Executive Director, DoD Siting Clearinghouse, Office of the Deputy Under Secretary of Defense (Installations and Environment), Room 5C646, 3400 Defense Pentagon, Washington, DC 20301–3400, or, if by electronic mail, to *DoDSitingClearinghouse@osd.mil*. Additional information about the Clearinghouse and means of contacting it are available at the following URL: *http://www.acq.mil/ie/sch*.

### §211.12 Public outreach.

(a) The DoD shall establish a Web site accessible to the public that—

(1) Lists the applications that the DoD is currently considering.

(2) Identifies the stage of the action, e.g., preliminary review, referred for mitigation discussions, determined to be an unacceptable risk.

(3) Indicates how the public may provide comments to the DoD.

(b) The Clearinghouse shall publish a handbook to provide applicants, requesters, and members of the public with necessary information to assist them in participating in the Mission Compatibility Evaluation Process.

# PART 212—PROCEDURES AND SUPPORT FOR NON-FEDERAL ENTITIES AUTHORIZED TO OPERATE ON DEPARTMENT OF DEFENSE (DOD) INSTALLATIONS

Sec.

212.1 Purpose.
212.2 Applicability.
212.3 Definitions.
212.4 Policy.
212.5 Responsibilities.
212.6 Procedures.
APPENDIX A TO PART 212—NON-FEDERAL ENTITIES HAVING STATUTORY AUTHORIZATION FOR PARTICULAR SUPPORT

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 2554; 10 U.S.C. 2606; and 36 U.S.C. 300110

SOURCE: 73 FR 59506, Oct. 9, 2008, unless otherwise noted.

### §212.1 Purpose.

This part:

(a) Implements 32 CFR part 213.

(b) Updates responsibilities and procedures to define and reestablish a framework for non-Federal entities authorized to operate on Department of Defense (DoD) installations.

### §212.2 Applicability.

(a) This part applies to:

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

(2) Non-Federal entities authorized to operate on DoD installations.

(b) This part shall not apply to:

(1) Military relief societies.

(2) Banks or credit unions according to 32 CFR part 230.

(3) Support provided under Innovative Readiness Training according to DoD Directive 1100.20.[1]

### § 212.3 Definitions.

*DoD installation:* As used in this instruction, a base, camp, post, station, yard, center, homeport facility for any ship, or other activity under the jurisdiction of the Department of Defense, including any leased facility or, in the case of an activity in a foreign country, under the operational control of the Department of Defense. This term does not include any facility used primarily for civil works, rivers and harbor projects, or flood control projects.

*Non-Federal entities.* A self-sustaining organization, incorporated or unincorporated, that is not an agency or instrumentality of the Federal government. This part addresses only those entities that operate on DoD installations with the express consent of the installation commander or higher authority. Membership of these organizations consists of individuals acting exclusively outside the scope of any official capacity as officers, employees, or agents of the Federal Government. Non-Federal entities include a State, interstate, Indian tribal, or local government, as well as private organizations.

*United States.* As used in this part, the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, the U.S. Virgin Islands, Guam, American Samoa, Johnston Atoll, Kingman Reef, Midway Island, Nassau Island, Palmyra Island, Wake Island, and any other territory or possession of the United States, and associated navigable waters, including the territorial seas.

### § 212.4 Policy.

It is DoD policy, consistent with 32 CFR part 213, that procedures be established for the operation of non-Federal entities on DoD installations to prevent official sanction, endorsement, or support by the DoD Components except as authorized in DoD 5500.7–R and applicable law. The Department recognizes that non-Federal entity support of Service members and their families can be important to their welfare. Non-Federal entities are not entitled to sovereign immunity and privileges accorded to Federal agencies and instrumentalities. The DoD Components shall take action to preclude unauthorized expenditures of appropriated funds, commissary surcharge, or nonappropriated funds (NAF) in support of these organizations.

### § 212.5 Responsibilities.

(a) The Principal Deputy Under Secretary for Personnel and Readiness, under the Under Secretary of Defense for Personnel and Readiness and in coordination with the Deputy Under Secretary of Defense for Installations and Environment and subject to DoD Directive 4165.6, shall be responsible for implementing policy and oversight of non-Federal entities on DoD installations.

(b) The Heads of the DoD Components shall:

(1) Implement this part.

(2) Be aware of all non-Federal entities operating on installations under their jurisdiction.

(3) Conduct reviews to ensure installation commanders periodically review facilities, programs, and services provided by non-Federal entities operating on DoD installations. Installation commanders will also review membership provisions and the original purpose for which each organization was originally approved. Substantial changes to those original conditions shall necessitate further review, documentation, and approval for continued permission to operate on the installation.

### § 212.6 Procedures.

(a) To prevent the appearance of official sanction or support by the Department of Defense:

(1) Non-Federal entities may not use the seals, logos, or insignia of the Department of Defense or any DoD Component, DoD organizational unit, or

[1] Copies of unclassified DoD Directives, Instructions, Publications, and Administrative Instructions may be obtained at *http://www.dtic.mil/whs/directives/*.

DoD installation on organization letterhead, correspondence, titles, or in association with organization programs, locations, or activities.

(2) Non-Federal entities operating on DoD installations may use the name or abbreviation of the Department of Defense, a DoD Component, organizational unit, or installation in its name provided that its status as a non-Federal entity is apparent and unambiguous and there is no appearance of official sanction or support by the Department of Defense. The following applies:

(i) The non-Federal entity must have approval from the appropriate DoD organization whose name or abbreviation is to be used before using the name or abbreviation.

(ii) Any use of the name or abbreviation of a DoD Component, organizational unit, or installation must not mislead members of the public to assume a non-Federal entity is an organizational unit of the Department of Defense.

(iii) A non-Federal entity must prominently display the following disclaimer on all print and electronic media mentioning the entity's name confirming that the entity is not a part of the Department of Defense: ''THIS IS A NON-FEDERAL ENTITY. IT IS NOT A PART OF THE DEPARTMENT OF DEFENSE OR ANY OF ITS COMPONENTS AND IT HAS NO GOVERNMENTAL STATUS.'' This disclaimer must also be provided in appropriate oral communications and public announcements when the name of the entity is used.

(b) Activities of non-Federal entities covered by this part shall not in any way prejudice or discredit the DoD Components or other Federal Government agencies.

(c) Subject to DoD Directive 4165.6 as it relates to real property, installation commanders shall approve written agreements that indicate permission to operate on the installation and any logistical support that will be provided. DoD personnel acting in an official capacity will not execute any charter that will serve as the legal basis for the non-Federal entity. The nature, function, and objectives of a non-Federal entity covered by this part shall be delineated in articles of incorporation, a written constitution, bylaws, charters, articles of agreement, or other authorization documents before receiving approval from the installation commander to operate on the installation. That documentation shall also include:

(1) Description of eligible membership in the non-Federal entity.

(i) No person because of race, color, creed, sex, age, disability, or national origin shall be unlawfully denied membership, unlawfully excluded from participation, or otherwise subjected to unlawful discrimination by any non-Federal entity or other private organization covered by this part.

(ii) Installation commanders will distribute information on procedures for individuals to follow when they suspect unlawful discrimination by the organization.

(2) Designation of management responsibilities, including the accountability for assets, satisfaction of liabilities, disposition of any residual assets on dissolution, and other documentation that shows responsible financial management.

(3) A certification indicating that members understand they are personally liable, as provided by law, if the assets of the non-Federal entity are insufficient to discharge all liabilities.

(4) Guidance relating to professional scouting organizations operating at U.S. military installations located overseas can be found in DoD Instruction 1015.9.

(i) In accordance with DoD 5500.7–R, which contains a policy on sponsorship of non-Federal entities by DoD personnel acting in an official capacity, DoD personnel acting in an official capacity shall not execute charters that serve as the legal basis for the creation of Boy Scouts organizations (including Boy Scouts, Cub Scout Packs, or Venturer Crews).

(ii) In accordance with U.S. District Court for the Northern District of Illinois, Eastern Division, Decision No. 1999 CV 02424, while such chartering is not allowed, nothing in this part is intended to preclude, if otherwise authorized by law or regulation, DoD support to Boy Scouts or their official affiliates; Boy Scouts activities on DoD installations; or sponsorship of Boy Scout organizations by DoD personnel

in their personal capacity. Existing charters executed by DoD personnel in their official capacity shall be terminated or amended to substitute sponsorship by an appropriate individual, volunteer, group, or organization, consistent with DoD policy.[2]

(d) A non-Federal entity covered by this part shall not offer programs or services on DoD installations that compete with appropriated or NAF activities, but may, when specifically authorized, supplement those activities.

(1) Installation commanders, or higher authorities if the installation commander has not been delegated such authority, will determine if the services of a non-Federal entity conflict with or detract from local DoD programs. The cognizant commander has discretionary authority over the operations of non-Federal entities on DoD installations. Commanders are authorized to eliminate duplication of services, particularly when these services compete with the installation's revenue-generating activities.

(2) Background checks are required for employees and volunteers of non-Federal entities who have contact with children under the age of 18 in DoD- operated, -contracted, or community-based programs that are used to supplement or expand child care or youth services, according to DoD Instruction 1402.5.

(e) Non-Federal entities covered by this part shall be self-sustaining, primarily through dues, contributions, service charges, fees, or special assessment of members. There shall be no financial assistance to such an entity from a NAF Instrumentality (NAFI) in the form of contributions, repairs, services, dividends, or other donations of money or other assets. Fundraising and membership drives are governed by DoD 5500.7–R.

(f) Non-Federal entities are not entitled to DoD support. However, support may be provided when it is consistent with and supportive of the military mission of the DoD Component concerned. Such support may be provided only when it can be offered within the capability of the installation commander without detriment to the commander's ability to fulfill the military mission, and when it is permitted under applicable Status of Forces Agreements. The DoD Components may provide logistical support to non-Federal entities with appropriated funds to the extent authorized by DoD 5500.7–R and applicable law. NAFI funds or assets shall not be directly or indirectly transferred to non-Federal entities according to DoD Instruction 1015.15.

(g) Personal and professional participation in non-Federal entities by DoD employees is governed by DoD 5500.7–R. DoD personnel acting in an official capacity will not execute charters that serve as the legal basis for any non-Federal entity or other private organization.

(h) Neither appropriated fund activities nor NAFIs may assert any claim to the assets, or incur or assume any obligation, of any non-Federal entity covered by this part, except as may arise out of contractual relationships or as provided by law. Property shall not be abandoned on the installation by a non-Federal entity and may only be acquired by the DoD installation by purchase or through donation agreed to by the Department of Defense.

(i) The non-Federal entity shall have adequate insurance, as defined by the DoD Component concerned, to protect against liability and property damage claims or other legal actions that may arise due to its activities, those of its members, or the operation of its equipment or devices. The DoD Components will not assume liability (through insurance or other means) for any activities or assets of non-Federal entities.

(j) Non-Federal entities shall comply with applicable fire and safety regulations; environmental laws; local, State, and Federal tax codes; and any other applicable statutes or regulations.

(k) Income from a non-Federal entity or its activities shall not accrue to individual members of a non-Federal entity except through wages and salaries as employees of the non-Federal entity or as award recognition for services

[2] Paragraph mandated by ''Partial Settlement Agreement Between Plaintiffs and Secretary Rumsfeld'', United States District Court for the Northern District of Illinois, Eastern Division, No. 1999 CV 02424 (*Eugene Winkler, et al.*, v. *Chicago School Reform Board of Trustees, et al.*)

rendered to the non-Federal entity or military community. This prohibition is not meant to preclude operation of investment clubs, in which the investment of members' personal funds result in a return on investment directly and solely to the individual members.

(l) Employees of non-Federal entities are not employees of the United States or of an instrumentality of the United States. Applicable laws on labor standards for employment shall be observed, including worker's compensation insurance. Employees of non-Federal entities shall not participate in NAF employee benefit programs based upon their affiliation with the non-Federal entity.

(m) Non-Federal entities that have statutory authorization for particular support are listed at Appendix A to this part.

(n) Certain unofficial activities conducted on DoD installations do not need formal authorization because of the limited scope of their activities. Examples are office coffee funds, flower funds, and similar small, informal activities and funds. The DoD Components shall establish the basis upon which such informal activities and funds shall operate.

## Appendix A to Part 212—Non-Federal Entities Having Statutory Authorization for Particular Support

| Non-Federal entity | Authority |
|---|---|
| Certain banks and credit unions | Chapter 1770 of title 12, United States Code (U.S.C.).<br>Title 32, Code of Federal Regulations (CFR), part 230. |
| United Service Organization | Section 220101 of title 36, U.S.C.<br>Title 32, CFR, part 213.<br>Memorandum of Understanding (MOU) between DoD and the United Service Organization. |
| Labor organizations | Title 5, U.S.C., Chapter 71.<br>DoD 1400.25–M, subchapter 711. |
| Combined Federal Campaign | Executive Order 12353.<br>Title 5, CFR, part 950.<br>DoD Instruction 5035.1.<br>DoD Instruction 5035.5. |
| American Registry of Pathology | Section 177 of title 10 U.S.C. |
| Henry M. Jackson Foundation for the Advancement of Military Medicine. | Section 178 of title 10 U.S.C. |
| American National Red Cross | Section 2552 of title 10 U.S.C.<br>Section 2602 of title 10 U.S.C.<br>Secretary of The Army Memorandum. "Support to the Red Cross During Times of Conflict".<br>Title 32, CFR, part 213.<br>MOU between the Department of Justice and American Red Cross. |
| Boy Scouts Jamborees | Section 2554 of title 10 U.S.C. |
| Girl Scouts International Events (Transportation) | Section 2555 of title 10 U.S.C.<br>DoD Instruction 1015.9. |
| Shelter for Homeless | Section 2556 of title 10 U.S.C. |
| National Military Associations; Assistance at National Conventions. | Section 2558 of title 10 U.S.C.<br>DoD Directive 5410.18.<br>DoD Instruction 5410.19. |
| National Veterans' Organizations (Beds and Barracks) | Section 2551 of title 10 U.S.C. |
| United Seamen's Service Organization | Section 2604 of title 10 U.S.C.<br>Title 32, CFR, part 213. |
| Scouting: Cooperation and Assistance in Foreign Areas | Section 2606 of title 10 U.S.C.<br>DoD Instruction 1015.9. |
| Civil Air Patrol | Section 9441 of title 10 U.S.C.<br>Section 9442 of title 10 U.S.C.<br>Section 40301 of title 36 U.S.C. |
| Assistance for certain youth and charitable organizations | Section 508 of title 32 U.S.C.<br>DoD Directive 1100.20. |
| Presidential Inaugural Ceremonies | Section 2553 of title 10 U.S.C. |
| Specified Sporting Events (Olympics) | Section 2564 of title 10 U.S.C.<br>DoD Directive 2000.15. |
| Fire Protection Agreements | Section 1856 of title 42 U.S.C. *et seq.* |
| Armed Services Young Men's Christian Association | Section 2012 of title 10 U.S.C.<br>Section 2648 of title 10 U.S.C.<br>Section 508 of title 32, U.S.C.<br>MOU between DoD and the Armed Services YMCA. |

| Non-Federal entity | Authority |
|---|---|
| Support for Youth Organizations | Section 1058 of Public Law 109–163 (Note to Section 301 of title 5 U.S.C.).<br>Section 8126 of Public Law 109–148 (Note to Section 101 of title 10 U.S.C. and Section 301 of title 5 U.S.C.). |

# PART 213—SUPPORT FOR NON-FEDERAL ENTITIES AUTHORIZED TO OPERATE ON DOD INSTALLATIONS

Sec.
213.1 Purpose.
213.2 Applicability and scope.
213.3 Definition.
213.4 Policy.
213.5 Responsibilities.

AUTHORITY: 10 U.S.C. 2554 and 2606.

SOURCE: 72 FR 56012, Oct. 2, 2007, unless otherwise noted.

## § 213.1 Purpose.

(a) Authorizes 32 CFR part 212.

(b) Establishes policy and assigns responsibilities under DoD Directive 5124.8[1] for standardizing support to non-Federal entities authorized to operate on DoD installations.

(c) Designates the Secretary of the Army as the DoD Executive Agent (DoD EA) according to DoD Directive 5101.1:[2]

(1) For DoD support to the Boy Scouts of America (BSA) and Girl Scouts of the United States of America (GSUSA) local councils and organizations in areas outside of the United States 10 U.S.C. 2606. DoD support will also cover the periodic national jamboree according to 10 U.S.C. 2606.

(2) To perform the annual audit of the American Red Cross (ARC) accounts and to prepare and submit the annual report to Congress according to 36 U.S.C. 300110.

(3) To provide the ARC with the necessary deployment support.

(d) Designates the Secretary of the Air Force as the DoD EA responsible for conducting the Armed Forces Entertainment (AFE) program.

[1] Copies may be obtained at *http://www.dtic.mil/whs/directives/*.

[2] Copies may be obtained at *http://www.dtic.mil/whs/directives/*.

## § 213.2 Applicability and scope.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the ''DoD Components'') and non-Federal entities authorized to operate on DoD installations.

(b) Shall not revise, modify, or rescind any Memorandum of Understanding (MOU) between a non-Federal entity and the U.S. Government or the Department of Defense or their implementing arrangements in existence as of the effective date of this Directive. Additionally, the Directive shall not revise, modify, or rescind any MOU between the Department of Justice (DoJ) and the Department of Defense that is in existence as of the effective date of this Directive. Any such agreements shall, as they expire, come up for renewal, or as circumstances otherwise permit, be revised to conform to this Directive and any implementing guidance.

(c) Does not apply to banks or credit unions addressed in DoD Directive 1000.11[3] or the Civil Air Patrol according to 10 U.S.C. 2554, 2606 and 9441.

## § 213.3 Definition.

*Non-federal entities.* A non-Federal entity is generally a self-sustaining, non-Federal person or organization, established, operated, and controlled by any individual(s) acting outside the scope of any official capacity as officers, employees, or agents of the Federal Government. This Directive addresses only those entities that may operate on

[3] Copies may be obtained at *http://www.dtic.mil/whs/directives/*.

DoD installations with the express consent of the installation commander or higher authority under applicable regulations. Non-Federal entities may include elements of state, interstate, Indian tribal, and local government, as well as private organizations.

### § 213.4 Policy.

It is DoD policy that:

(a) DoD support for non-Federal entities shall be in accordance with relevant statutes as well as DoD 5500.7–R[4]. In accordance with DoD 5500.7–R and to avoid preferential treatment, DoD support should be uniform, recognizing that non-Federal entity support of Service members and their families can be important to their welfare.

(b) Under DoD Directive 5124.8 procedures shall be established as Instructions and agreements for the operation of non-Federal entities on DoD installations and for the prohibition of official sanction, endorsement, or support by the DoD Components and officials, except as authorized by DoD 5500.7–R and applicable law. Instructions and agreements must be compatible with the primary mission of the Department and provide for Congressionally authorized support to non-Federal entities on DoD installations.

(c) In accordance with DoD 5500.7–R, installation commanders or higher authority may authorize, in writing, logistical support for events, including fundraising events, sponsored by non-Federal entities covered by this part.

(d) Installation commanders or higher authority may coordinate with non-Federal entities in order to support appropriated or nonappropriated fund activities on DoD installations, so long as the support provided by the non-Federal entities does not compete with appropriated or nonappropriated fund activities.

(e) Non-Federal entities are not entitled to sovereign immunity and the privileges given to Federal entities and instrumentalities.

### § 213.5 Responsibilities.

(a) The Principal Deputy Under Secretary of Defense for Personnel and Readiness (PDUSD(P&R)), under the Under Secretary of Defense for Personnel and Readiness, shall:

(1) Be responsible for implementing all policy matters and Office of the Secretary of Defense oversight of non-Federal entities on DoD installations.

(2) Develop procedures and execute any necessary agreements to implement policy for the operation of non-Federal entities on DoD installations.

(3) Assign responsibilities to the DoD Components to accomplish specific oversight and administrative responsibilities with respect to non-Federal entities operating on DoD installations.

(4) Oversee the activities of the designated DoD EA, assessing the need for continuation, currency, effectiveness, and efficiency of the DoD EA according to 10 U.S.C. 2554 and 2606. Make recommendations for establishment of additional DoD EA assignments and arrangements as necessary.

(b) The Secretary of the Army, as the designated DoD EA, and according to 10 U.S.C. 2554 and 2606, shall:

(1) Perform the audit of the annual ARC accounts and prepare and submit the annual report according to 36 U.S.C. 300110 and this part.

(2) Coordinate support to the BSA and GSUSA according to DoD Instruction 1015.9[5] and this part.

(3) Provide necessary deployment support to ARC according to an approved DoD and ARC MOU. Initially, the Army will cover costs, except those paid by the ARC. The Army will then be reimbursed, upon its request, by the entity directly benefiting from the ARC support.

(4) Designate a point of contact to coordinate matters regarding the DoD EA responsibilities, functions, and authorities.

(c) The Secretary of the Air Force, as the designated DoD EA with responsibility for conducting the AFE program, shall administer the AFE program according to 10 U.S.C. 2554 and 2606, DoD Instruction 1330.13[6], and this part to include the following:

[4] Copies may be obtained at *http://www.dtic.mil/whs/directives/*.

[5] Copies may be obtained at *http://www.dtic.mil/whs/directives/*.

[6] Copies may be obtained at *http://www.dtic.mil/whs/directives/*.

(1) Annually determine with the other DoD Components and the PDUSD(P&R) the scope of the program.

(2) Budget, fund, and maintain accountability for approved appropriated fund expenses. Develop and implement supplemental guidance to identify allowable expenses and reimbursements.

(3) Provide centralized services for selecting, declining, scheduling, and processing entertainment groups for overseas.

(4) Designate a point of contact to coordinate matters regarding the DoD EA responsibilities, functions, and authorities.

# PART 216—MILITARY RECRUITING AND RESERVE OFFICER TRAINING CORPS PROGRAM ACCESS TO INSTITUTIONS OF HIGHER EDUCATION

Sec.
216.1 Purpose.
216.2 Applicability.
216.3 Definitions.
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APPENDIX A TO PART 216—MILITARY RECRUITING SAMPLE LETTER OF INQUIRY
APPENDIX B TO PART 216—ROTC SAMPLE LETTER OF INQUIRY

AUTHORITY: 10 U.S.C. 983.

SOURCE: 73 FR 16527, Apr. 28, 2008, unless otherwise noted.

## § 216.1 Purpose.

This part:

(a) Implements 10 U.S.C. 983.

(b) Updates policy and responsibilities relating to the management of covered schools that have a policy of denying or effectively preventing military recruiting personnel access to their campuses or access to students on their campuses in a manner that is at least equal in quality and scope to the access to campuses and to students provided to any other employer, or access to student-recruiting information. The term ''equal in quality and scope'' means the same access to campus and students provided by the school to the any other nonmilitary recruiters or employers receiving the most favorable access. The focus is not on the content of a school's recruiting policy, but instead on the result achieved by the policy and compares the access provided military recruiters to that provided other recruiters. Therefore, it is insufficient to comply with the statute (10 U.S.C. 983) if the policy results in a greater level of access for other recruiters than for the military.

(c) Updates policy and responsibilities relating to the management of covered schools that have an anti-ROTC policy.

## § 216.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments (including the Coast Guard when it is operating as a Military Service in the Navy), the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as ''the DoD Components''). This part also applies, by agreement with the Department of Homeland Security (DHS), to the Coast Guard at all times, including when it is a service in the Department of Homeland Security. The policies herein also affect the Departments of Transportation, Homeland Security, Energy (National Nuclear Security Administration), the Central Intelligence Agency, and any department or agency in which regular appropriations are made in the Departments of Labor, Health and Human Services, Education, and Related Agencies Appropriations Act. The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Marine Corps, the Air Force, and the Coast Guard, including their Reserve or National Guard Components. The term ''Related Agencies'' as used herein refers to the Armed Forces Retirement Home, the Corporation for National and Community Service, the Corporation for Public Broadcasting, the Federal Mediation and Conciliation Service, the Federal Mine Safety and Health Review Commission, the National Commission on Libraries and Information Science, the National Council on Disability, the National Education Goals Panel, the National Labor Relations Board, the National Mediation Board, the Occupational Safety and Health Review Commission, the

Social Security Administration, the Railroad Retirement Board and the United States Institute of Peace.

**§216.3 Definitions.**

(a) *Anti-ROTC policy*. A policy or practice whereby a covered school prohibits or in effect prevents the Secretary of Defense from maintaining, establishing, or efficiently operating a unit of the Senior ROTC at the covered school, or prohibits or in effect prevents a student at the covered school from enrolling in a Senior ROTC unit at another institution of higher education.

(b) *Covered funds*. ''Covered funds'' is defined in 10 U.S.C. 983 as any funds made available for the Departments of Defense, Transportation, Homeland Security, or National Nuclear Security Administration of the Department of Energy, the Central Intelligence Agency, or any department or agency in which regular appropriations are made in the Departments of Labor, Health and Human Services, and Education, as well as in Related Agencies Appropriations Act (excluding any Federal funds provided to an institution of higher education, or to an individual, to be available solely for student financial assistance, related administrative costs, or costs associated with attendance).

(c) *Covered school*. An institution of higher education, or a subelement of an institution of higher education, subject to the following clarifications:

(1) A determination (§216.5(a)) affecting only a subelement of a parent institution (see §216.3(f)) effects a limitation on the use of funds (see §216.4 (a)) applicable to the parent institution as a whole, including the institution's offending subelement and all of its subelements, if any.

(2) When an individual institution of higher education that is part of a single university system (*e.g.*, University of (State) at (City)—a part of that state's university system) has a policy or practice that prohibits, or in effect prevents, access to campuses or access to students on campuses in a manner that is at least equal in quality and scope to the access to its campus and students as it provides to any other employer, or access to student-recruiting information by military recruiters, or has an anti-ROTC policy, as defined in this rule, it is only that individual institution within that university system that is affected by the loss of Federal funds. This limited effect applies even though another campus of the same university system may or may not be affected by a separate determination under §216.5 (a). The funding of a subelement of the offending individual institution of a single university system, if any, will also be withheld as a result of the policies or practices of that offending individual institution.

(d) *Enrolled*. Students are ''enrolled'' when registered for at least one credit hour of academic credit at the covered school during the most recent, current, or next term. Students who are enrolled during the most recent term, but who are no longer attending the institution, are included.

(e) *Equal in quality and scope*. The term means the same access to campus and students provided by the school to the any other nonmilitary recruiters or employers receiving the most favorable access. The focus is not on the content of a school's recruiting policy, but instead on the result achieved by the policy and compares the access provided military recruiters to that provided other recruiters. Therefore, it is insufficient to comply with the statute if the policy results in a greater level of access for other recruiters than for the military. The U.S. Supreme Court further explained that ''the statute does not call for an inquiry into why or how the 'other employer' secured its access * * * We do not think that the military recruiter has received equal 'access' [when a law firm is permitted on campus to recruit students and the military is not]—regardless of whether the disparate treatment is attributable to the military's failure to comply with the school's nondiscrimination policy.''

(f) *Institution of higher education*. A domestic college, university, or other institution (or subelement thereof) providing postsecondary school courses of study, including foreign campuses of such domestic institutions. The term includes junior colleges, community colleges, and institutions providing courses leading to undergraduate and post-graduate degrees. The term does

not include entities that operate exclusively outside the United States, its territories, and possessions. A subelement of an institution of higher education is a discrete (although not necessarily autonomous) organizational entity that may establish policies or practices affecting military recruiting and related actions (*e.g.*, an undergraduate school, a law school, a medical school, other graduate schools, or a national laboratory connected or affiliated with that parent institution). For example, the School of Law of XYZ University is a subelement of its parent institution (XYZ University).

(g) *Military recruiters.* Personnel of DoD whose current assignment or detail is to a recruiting activity of the DoD.

(h) *Pacifism.* Opposition to war or violence, demonstrated by refusal to participate in military service.

(i) *Student.* An individual who is 17 years of age or older and is enrolled at a covered school.

(j) *Student-recruiting information.* For those students currently enrolled, the student's name, address, telephone listing, age (or year of birth), place of birth, level of education (*e.g.*, freshman, sophomore, or degree awarded for a recent graduate), most recent educational institution attended, and current major(s).

### § 216.4 Policy.

It is DoD policy that:

(a) Under 10 U.S.C. 983, no covered funds may be provided by contract or grant (to include payment on such contracts or grants previously obligated) to a covered school if the Secretary of Defense determines that the covered school:

(1) Has a policy or practice (regardless of when implemented) that either prohibits or in effect prevents the Secretary of Defense or Secretary of Homeland Security from obtaining, for military recruiting purposes, access to campuses or access to students on campuses that is at least equal in quality and scope, as defined in § 216.3(d), to the access to campuses and to students provided to any other employer, or access to directory information on students;

(2) Has failed to disseminate military visit information or alerts at least on par with nonmilitary recruiters since schools offering such services to nonmilitary recruiters must also send e-mails, post notices, etc., on behalf of military recruiters to comply with the Solomon Amendment;

(3) Has failed to schedule visits at times requested by military recruiters that coincide with nonmilitary recruiters' visits to campus if this results in a greater level of access for other recruiters than for the military (*e.g.*, offering non-military recruiters a choice of a variety of dates for on-campus interviews while only offering the military recruiters the final day of interviews), as schools must ensure that their recruiting policies operate such that military recruiters are given access to students equal to that provided to any other employer;

(4) Has failed to provide military recruiters with a mainstream recruiting location amidst nonmilitary employers to allow unfettered access to interviewees since military recruiters must be given the same access as recruiters who comply with a school's nondiscrimination policy;

(5) Has failed to enforce time, place, and manner policies established by the covered school such that the military recruiters experience an inferior or unsafe recruiting climate, as schools must allow military recruiters on campus and must assist them in whatever way the school assists other employers;

(6) Has through policy or practice in effect denied students permission to participate, or has prevented students from participating, in recruiting activities; or

(7) Has an anti-ROTC policy or practice, as defined in this rule, regardless of when implemented.

(b) The limitations established in paragraph (a) of this section shall not apply to a covered school if the Secretary of Defense determines that the covered school:

(1) Has ceased the policies or practices defined in paragraph (a) of this section;

(2) Has a long-standing policy of pacifism (see § 216.3(j)) based on historical religious affiliation;

(3) When not providing requested access to campuses or to students on campus, certifies that all employers are similarly excluded from recruiting on the premises of the covered school, or presents evidence that the degree of access by military recruiters is the same access to campuses or to students on campuses provided to the nonmilitary recruiters;

(4) When not providing any student-recruiting information, certifies that such information is not maintained by the covered school; or that such information already has been provided to the Military Service concerned for that current semester, trimester, quarter, or other academic term, or within the past 4 months (for institutions without academic terms); or

(5) When not providing student-recruiting information for a specific student certifies that the student concerned has formally requested, in writing, that the covered school withhold this information from all third parties.

(c) A covered school may charge military recruiters a fee for the costs incurred in providing access to student-recruiting information when that institution can certify that such charges are the actual costs, provided that such charges are reasonable, customary and identical to fees charged to other employers.

(d) An evaluation to determine whether a covered school maintains a policy or practice covered by paragraphs (a)(1) through (a)(6) of this section shall be undertaken when:

(1) Military recruiting personnel are prohibited, or in effect prevented, from the same access to campuses or access to students on campuses provided to nonmilitary recruiters, or are denied access to student-recruiting information;

(2) Information or alerts on military visits are not distributed at least on par with nonmilitary recruiters since schools offering such services to nonmilitary recruiters must also send e-mails, post notices, etc., on behalf of the military recruiter to comply with the Solomon Amendment;

(3) Military recruiters are prohibited from scheduling their visits at requested times that coincide with nonmilitary recruiters' visits to its campus if this results in a greater level of access for other recruiters than for the military as schools must ensure their recruiting policy operates in such a way that military recruiters are given access to students equal to that provided to any other employer;

(4) Military recruiters do not receive a mainstream recruiting location amidst nonmilitary employers to allow unfettered access to interviewees since military recruiters must be given the same access as recruiters who comply with the school's nondiscrimination policy;

(5) The school has failed to enforce time, place, and manner policies established by that school such that military recruiters experience an unsafe recruiting climate, as schools must allow military recruiters on campus and must assist them in whatever way the school chooses to assist other employers;

(6) Evidence is discovered of an institution-sponsored policy or practice that in effect denied students permission to participate, or prevented students from participating in recruiting activities.

(7) The costs being charged by the school for providing student-recruiting information are believed by the military recruiter to be excessive, and the school does not provide information sufficient to support a conclusion that such are the actual costs, provided that they are reasonable and customary, and are identical to those costs charged to other employers; or

(8) The covered school is unwilling to declare in writing, in response to an inquiry from a representative of a DoD Component or a representative from the Department of Homeland Security, that the covered school does not have a policy or practice of prohibiting, or in effect preventing, the Secretary of a Military Department or Secretary of Homeland Security from the same access to campuses or access to students on campuses provided to nonmilitary recruiters, or access to student-recruiting information by military recruiters for purposes of military recruiting.

(e) An evaluation to determine whether a covered school has an anti-ROTC policy covered by paragraph

(a)(7) of this section shall be undertaken when:

(1) A Secretary of a Military Department or designee cannot obtain permission to establish, maintain, or efficiently operate a unit of the Senior ROTC; or

(2) Absent a Senior ROTC unit at the covered school, students cannot obtain permission from a covered school to participate, or are effectively prevented from participating, in a unit of the Senior ROTC at another institution of higher education.

**§ 216.5 Responsibilities.**

(a) The PDUSD(P&R), under the Under Secretary of Defense for Personnel and Readiness, shall:

(1) Not later than 45 days after receipt of the information described in paragraphs (b)(3) and (c)(1) of this section:

(i) Inform the Office of Naval Research (ONR) and the Director, Defense Finance and Accounting Service that a final determination will be made so those offices can make appropriate preparations to carry out their responsibilities should a covered school be determined ineligible to receive federal funds.

(ii) Make a final determination under 10 U.S.C. 983, as implemented by this part, and notify any affected school of that determination and its basis, and that the school is therefore ineligible to receive covered funds as a result of that determination.

(iii) Disseminate to Federal entities affected by the decision, including the DoD Components and the GSA, and to the Secretary of Education and the head of each other department and agency the funds of which are subject to the determination, the names of the affected institutions identified under paragraph (a)(1)(ii) of this section.

(iv) Notify the Committees on Armed Services of the Senate and the House of Representatives of the affected institutions identified under paragraph (a)(1)(ii) of this section.

(v) Inform the affected school identified under paragraph (a)(1)(ii) of this section that its funding eligibility may be restored if the school provides sufficient new information that the basis for the determination under paragraph (a)(1)(ii) of this section no longer exists.

(2) Not later than 45 days after receipt of a covered school's request to restore its eligibility:

(i) Determine whether the funding status of the covered school should be changed, and notify the applicable school of that determination.

(ii) Notify the parties reflected in paragraphs (a)(1)(i), (a)(1)(iii), and (a)(1)(iv) of this section when a determination of funding ineligibility (paragraph (a)(1)(ii) of this section) has been rescinded.

(3) Publish in the FEDERAL REGISTER each determination of the PDUSD(P&R) that a covered school is ineligible for contracts and grants made under 10 U.S.C. 983, as implemented by this part.

(4) Publish in the FEDERAL REGISTER at least once every 6 months a list of covered schools that are ineligible for contracts and grants by reason of a determination of the Secretary of Defense under 10 U.S.C. 983, as implemented by this part.

(5) Enter information into the Excluded Parties List System[1] about each covered school that the PDUSD(P&R) determines to be ineligible for contracts and grants under 10 U.S.C. 983 and/or this part, generally within 5 days of making the determination.

(6) Provide ONR with an updated list of the names of institutions identified under paragraph (a)(1)(ii) of this section whenever the list changes due to an institution being added to or dropped from the list, so that ONR can carry out its responsibilities for post-award administration of DoD Components' contracts and grants with institutions of higher education.

(7) Provide the Office of the Deputy Chief Financial Officer, DoD, and the Director, Defense Finance and Accounting Service with an updated list of the names of institutions identified

[1] The Excluded Parties List System (EPLS) is the system that the General Services Administration maintains for Executive Branch agencies, with names and other pertinent information of persons who are debarred, suspended, or otherwise ineligible for Federal procurement and/or covered nonprocurement transactions.

under paragraph (a)(1)(ii) of this section whenever the list changes due to an institution being added or dropped from the list, so those offices can carry out their responsibilities related to cessation of payments of prior contract and grant obligations to institutions of higher education that are on the list.

(8) Publish in the FEDERAL REGISTER the list of names of affected institutions that have changed their policies or practices such that they are determined no longer to be in violation of 10 U.S.C. 983 and this part.

(b) The Secretaries of the Military Departments and the Secretary of Homeland Security shall:

(1) Identify covered schools that, by policy or practice, prohibit, or in effect prevent, the same access to campuses or access to students on campuses provided to nonmilitary recruiters, or access to student-recruiting information by military recruiters for military recruiting purposes.

(i) When requests by military recruiters to schedule recruiting visits are unsuccessful, the Military Service concerned, and the Office of the Secretary of Homeland Security when the Coast Guard is operating as a service in the Department of Homeland Security, shall seek written confirmation of the school's present policy from the head of the school through a letter of inquiry. A letter similar to that shown in Appendix A of this part shall be used, but it should be tailored to the situation presented. If written confirmation cannot be obtained, oral policy statements or attempts to obtain such statements from an appropriate official of the school shall be documented. A copy of the documentation shall be provided to the covered school, which shall be informed of its opportunity to forward clarifying comments within 30 days to accompany the submission to the PDUSD(P&R).

(ii) When a request for student-recruiting information is not fulfilled within a reasonable period, normally 30 days, a letter similar to that shown in Appendix A shall be used to communicate the problem to the school, and the inquiry shall be managed as described in §216.5.(b)(1)(ii). Schools may stipulate that requests for student-recruiting information be in writing.

(2) Identify covered schools that, by policy or practice, deny establishment, maintenance, or efficient operation of a unit of the Senior ROTC, or deny students permission to participate, or effectively prevent students from participating in a unit of the Senior ROTC at another institution of higher education. The Military Service concerned, and the Office of the Secretary of Homeland Security when the Coast Guard is operating as a service in the Department of Homeland Security, shall seek written confirmation of the school's policy from the head of the school through a letter of inquiry. A letter similar to that shown in Appendix B of this part shall be used, but it should be tailored to the situation presented. If written confirmation cannot be obtained, oral policy statements or attempts to obtain such statements from an appropriate official of the school shall be documented. A copy of the documentation shall be provided to the covered school, which shall be informed of its opportunity to forward clarifying comments within 30 days to accompany the submission to the PDUSD(P&R).

(3) Evaluate responses to the letter of inquiry, and other such evidence obtained in accordance with this part, and submit to the PDUSD(P&R) the names and addresses of covered schools that are believed to be in violation of policies established in §216.4. Full documentation shall be furnished to the PDUSD(P&R) for each such covered school, including the school's formal response to the letter of inquiry, documentation of any oral response, or evidence showing that attempts were made to obtain either written confirmation or an oral statement of the school's policies.

(c) The Heads of the DoD Components and Secretary of Homeland Security shall:

(1) Provide the PDUSD(P&R) with the names and addresses of covered schools identified as a result of evaluation(s) required under §216.4(d) and (e).

(2) Take immediate action to deny obligations of covered funds to covered schools identified under paragraph (a)(1)(ii) of this section, and to restore eligibility of covered schools identified under paragraph (a)(2) of this section.

### § 216.6 Information requirements.

The information requirements identified at § 216.5(b) and (c)(1) have been assigned Report Control Symbol DD–P&R–(AR)–2038 in accordance with DoD 8910.1–M[2].

## APPENDIX A TO PART 216—MILITARY RECRUITING SAMPLE LETTER OF INQUIRY

(Tailor letter to situation presented)
Dr. John Doe,
*President, ABC University, Anywhere, USA 12345–9876.*

Dear Dr. Doe: I understand that military recruiting personnel [have been unable to recruit or have been refused student-recruiting information[3] at (subelement of) ABC University)] by a policy or practice of the school. Specifically, military recruiting personnel have reported [here state policy decisions or practices encountered]. [If preliminary information coming to the attention of a Military Service indicates that other Military Services' recruiting representatives have been similarly informed of the policy or experienced a similar practice affecting their ability for military recruiting purposes to have the access or information require, so state.]

Current Federal law (10 U.S.C. 983) denies the use of certain Federal funds through grants or contracts, to include payment on such contracts or grants previously obligated, (excluding any Federal funding to an institution of higher education, or to an individual, to be available solely for student financial assistance, related administrative costs, or costs associated with attendance) from appropriations of the Departments of Defense, Transportation, Labor, Health and Human Services, Education, and related agencies to institutions of higher education (including any subelements of such institutions) that have a policy or practice of denying military recruiting personnel access to campuses or access to students on campuses, in a manner that is at least equal in quality and scope (as explained in § 216.3 of Title 32, Code of Federal Regulations, Part 216), as it provides to nonmilitary recruiters, or access to student recruiting information. Implementing regulations are codified at Title 32, Code of Federal Regulations, Part 216.

This letter provides you an opportunity to clarify your institution's policy regarding military recruiting on the campus of [University]. In that regard, I request, within the next 30 days, a written policy statement of the institution with respect to access to campus and students by military recruiting personnel. Your response should highlight any difference between access for military recruiters and access for recruiting by other potential employers.

Based on this information and any additional facts you can provide, Department of Defense officials will make a determination as to your institution's eligibility to receive funds by grant or contract. That decision may affect eligibility for funding from appropriations of the Departments of Defense, Transportation, Labor, Health and Human Services, Education, and related agencies. Should it be determined that [University] as an institution of higher education (or any subelement of the institution) is in violation of the aforementioned statutes and regulations, such funding would be stopped, and the institution of higher education (including any subelements of the institution) would remain ineligible to receive such funds until and unless the Department of Defense determines that the institution has ceased the offending policies and practices.

I regret that this action may have to be taken. Successful recruiting requires that Department of Defense recruiters have equal access to students on the campuses of colleges and universities [and student-recruiting information], and at the same time, have effective relationships with the officials and student bodies of those institutions. I hope it will be possible to identify and correct any policies or practices that inhibit military recruiting at your school. [My representative, (name), is] [I am] available to answer any of your questions by telephone at [telephone number]. I look forward to your reply.

Sincerely,

## APPENDIX B TO PART 216—ROTC SAMPLE LETTER OF INQUIRY

(Tailor letter to situation presented)
Dr. Jane Smith,
*President, ABC University, Anywhere, USA 12345–9876.*

Dear Dr. Smith: I understand that ABC University has [refused a request from a Military Department to establish a Senior ROTC unit at your institution] [refused to continue existing ROTC programs at your institution][prevented students from participation at a Senior ROTC program at another institution] by a policy or practice of the University.

Current Federal law (10 U.S.C. 983) denies the use of certain Federal funds through grants or contracts, to include payment on such contracts or grants previously obligated, (excluding any Federal funding to an institution of higher education, or to an individual, to be available solely for student financial assistance, related administrative

[2] Copies may be obtained at *http://www.dtic.mil/whs/directives/.*

[3] Student-recruiting information refers to a student's name, address, telephone listing, age (or year of birth), level of education (e.g., freshman, sophomore, or degree awarded for a recent graduate), and major(s).

costs, or costs associated with attendance) from appropriations of the Departments of Defense, Transportation, Labor, Health and Human Services, Education, and related agencies to institutions of higher education (including any subelements of such institutions) that have a policy or practice of prohibiting or preventing the Secretary of Defense from maintaining, establishing, or efficiently operating a Senior ROTC unit. Implementing regulations are codified at Title 32, Code of Federal Regulations, Part 216.

This letter provides you an opportunity to clarify your institution's policy regarding ROTC access on the campus of ABC University. In that regard, I request, within the next 30 days, a written statement of the institution with respect to [define the problem area(s)].

Based on this information, Department of Defense officials will make a determination as to your institution's eligibility to receive the above-referenced funds by grant or contract. That decision may affect eligibility for funding from appropriations of the Departments of Defense, Transportation, Labor, Health and Human Services, Education, and related agencies. Should it be determined that [University] as an institution of higher education (or any subelement of the institution) is in violation of the aforementioned statutes and regulations, such funding would be stopped, and the institution of higher education (including any subelements of the institution) would remain ineligible to receive such funds until and unless the Department of Defense determines that the institution has ceased the offending policies and practices.

I regret that this action may have to be taken. Successful officer procurement requires that the Department of Defense maintain a strong ROTC program. I hope it will be possible to [define the correction to the aforementioned problem area(s)]. [My representative, (name), is] [I am] available to answer any of your questions by telephone at [telephone number]. I look forward to your reply.

Sincerely,

# PART 218—GUIDANCE FOR THE DETERMINATION AND REPORTING OF NUCLEAR RADIATION DOSE FOR DOD PARTICIPANTS IN THE ATMOSPHERIC NUCLEAR TEST PROGRAM (1945–1962)

Sec.
218.1 Policies.
218.2 General procedures.
218.3 Dose reconstruction methodology.
218.4 Dose estimate reporting standards.

AUTHORITY: Pub. L. 98–542, 98 Stat. 2725 (38 U.S.C. 354 Note.)

SOURCE: 50 FR 42521, Oct. 21, 1985, unless otherwise noted.

## §218.1 Policies.

(a) Upon request by the Veterans Administration in connection with a claim for compensation, or by a veteran or his or her representative, available information shall be provided by the applicable Military Service which shall include all material aspects of the radiation environment to which the veteran was exposed and shall include inhaled, ingested and neutron doses. In determining the veteran's dose, initial neutron, initial gamma, residual gamma, and internal (inhaled and ingested) alpha, beta, and gamma shall be considered. However, doses will be reported as gamma dose, neutron dose, and internal dose. The minimum standards for reporting dose estimates are set forth in §218.4.

(b) The basic means by which to measure dose from exposure to ionizing radiation is the film badge. Of the estimated 220,000 Department of Defense participants in atmospheric nuclear weapons tests, about 145,000 have film badge dose data available. The information contained in the records has been reproduced in a standard format and is being provided to each military service, which can use the film badge dose data to obtain a radiation dose for a particular individual from that service. This is done upon request from the individual, the individual's representative, the Veterans Administration, or others as authorized by the Privacy Act. Upon request, the participant or his or her authorized representative will be informed of the specific methodologies and assumptions employed in estimating his or her dose. The participant can use this information to obtain independent options regarding exposure.

(c) From 1945 through 1954, the DoD and Atomic Energy Commission (AEC) policy was to issue badges only to a portion of the personnel in a homogeneous unit such as a platoon of a battalion combat team, Naval ship or aircraft crew. Either one person was badged in a group performing the same function, or only personnel expected to

be exposed to radiation were badged. After 1954, the policy was to badge all personnel. But, some badges were unreadable and some records were lost or destroyed, as in the fire at the Federal Records Center in St. Louis. For these reasons the Nuclear Test Personnel Review (NTPR) Program has focused on determining the radiation dose for those personnel (about 75,000) who were not issued film badges or for whom film badge records are not available.

(d) In order to determine the radiation dose to individuals for whom film badge data are not available, alternative approaches are used as circumstances warrant. All approaches require investigation of individual or group activities and their relationship to the radiological environment. First, if it is apparent that personnel were not present in the radiological environment and had no other potential for exposure, then their dose is zero. Second, if some members of a group had film badge readings and others did not—and if all members had a common relationship with the radiological enviroment—then doses for unbadged personnel can be calculated. Third, where sufficient badge readings or a common relationship to the radiological environment does not exist, dose reconstruction is performed. This involves correlating a unit's or individual's detailed activities with the quantitively determined radiological environment. The three approaches are described as follows:

(1) Activities of an individual or his unit are researched for the period of participation in an atmospheric nuclear test. Unit locations and movements are related to areas of radiation. If personnel were far distant from the nuclear detonation(s), did not experience fallout or enter a fallout area, and did not come in contact with radioactive samples or contaminated objects, they were judged to have received no dose.

(2) Film badge data from badged personnel may be used to estimate individual doses for unbadged personnel. First, a group of participants must be identified that have certain common characteristics and a similar potential for exposure to radiation. Such characteristics are: Individuals must be doing the same kind of work, referred to as activity, and all members of the group must have a common relationship to the radiological environment in terms of time, location or other factors. Identification of these groups is based upon research of historical records, technical reports or correspondence. A military unit may consist of several groups or several units may comprise a single group. Using proven statistical methods, the badge data for each group is examined to determine if it adequately reflects the entire group, is valid for use in statistical calculations, or if the badge data indicate the group should be sub-divided into smaller groups. For a group that meets the tests described above, the mean dose, variance and confidence limits are determined. An estimated dose equal to 95% probability that the actual exposure did not exceed the estimate is assigned to unbadged personnel. This procedure is statistically sound and will insure that unbadged personnel are assigned doses much higher than the average/mean for the group.

(3) Dose reconstruction is performed if film badge data are unavailable for all or part of the period or radiation exposure, if film badge data are partially available but cannot be used statistically for calculations, special activities are indicated for specific individuals, or if other types of radiation exposures are indicated. In dose reconstruction, the conditions of exposure are reconstructed analytically to arrive at a radiation dose. Such reconstruction is not a new concept; it is standard scientific practice used by health physicists when the circumstances of a radiation exposure require investigation. The underlying method is in each case the same. The radiation environment is characterized in time and space, as are the activities and geometrical position of the individual. Thus, the rate at which radiation is accrued is determined throughout the time of exposure, from which the total dose is integrated. An uncertainty analysis of the reconstruction provides a calculated mean dose with confidence limits. The specific method used in a dose reconstruction depends on what type of data are available to

provide the required characterizations as well as the nature of the radiation environment. The radiation environment is not limited to the gamma radiation that would have been measured by a film badge, but also includes neutron radiation for personnel sufficiently close to a nuclear detonation, as well as beta and alpha radiation (internally) for personnel whose activities indicate the possibility of inhalation or ingestion of radioactive particles.

### §218.2 General procedures.

The following procedures govern the approach taken in dose determination:

(a) Use individual film badge data where available and complete, for determining the external gamma dose.

(b) Identify group activities and locations for period(s) of possible exposure.

(c) Qualitatively assess the radiation environment in order to delineate contaminated areas. If no activities occurred in these areas, and if no other potential for exposure exists, a no dose received estimate is made.

(d) If partial film badge data are available, define group(s) of personnel with common activities and relationships to radiation environment.

(e) Using standard statistical methods, verify from the distribution of film badge readings whether the badged sample adequately represents the intended group.

(f) Calculate the mean external gamma dose, with variance and confidence limits, for each unbadged population. Assign a dose equal to 95% probability that actual exposure did not exceed the assigned dose.

(g) If badge data is not available for a statistical calculation, conduct a dose reconstruction.

(h) For dose reconstruction, define radiation environment through use of all available scientific data, e.g., measurements of radiation intensity, decay, radioisotopic composition.

(i) Quantitatively relate activities shielding, position, and other factors to radiation environment as a function of time. Integrate dose throughout period of exposure.

(j) Where possible, calculate mean dose with confidence limits; otherwise calculate best estimate dose or, if data are too sparse, upper limit dose.

(k) Compare calculations with available film badge records to verify the calculated doses. Whether or not film badge data is available, calculate initial and internal doses where identified as a meaningful contribution to the total dose.

### §218.3 Dose reconstruction methodology.

(a) *Concept.* The specific methodology consists of the characterization of the radiation environments to which participants through all relevant activities, were exposed. The environments, both initial and residual radiation are corrected with the activities of participants to determine accrued doses due to initial radiation, residual radiation and/or inhaled/ingested radioactive material, as warranted by the radiation environment and the specific personnel activities. Due to the range of activities, times, geometries, shielding, and weapon characteristics, as well as the normal spread in the available data pertaining to the radiation environment, an uncertainty analysis is performed. This analysis quantifies the uncertainties due to time/space variations, group size, and available data. Due to the large amounts of data, an automated (computer-assisted) procedure is often used to facilitate the data-handling and the dose integration, and to investigate the sensitivity to variations in the parameters used. The results of the gamma data calculations are then compared with film badge data as they apply to the specific period of the film badges and to the comparable activities of the exposed personnel, in order to validate the procedure and to identify personnel activities that could have led to atypical doses. Radiation dose from neutrons and dose commitments due to inhaled or ingested radioactive material are not detected by film badges. Where required, these values are calculated and recorded separately.

(b) *Characterization of the radiological environment.* (1) This step describes and defines the radiological conditions as a function of time for all locations of concern, that is, where personnel were

positioned or where personnel activities took place. The radiation environment is divided into two standard categories—initial radiation and residual radiation.

(2) The initial radiation environment results from several types of gamma and neutron emissions. Prompt neutron and gamma radiation are emitted at the time of detonation, while delayed neutrons and fission-product gamma, from the decay of radioactive products in the fireball, continue to be emitted as the fireball rises. In contrast to these essentially point sources of radiation, there is gamma radiation from neutron interactions with air and soil, generated within a fraction of a second. Because of the complexity of these radiation sources and their varied interaction properties with air and soil, it is necessary to obtain solutions of the Boltzmann radiation transport equation. The radiation environment thus derived includes the effects of shot-specific parameters such as weapon type and yield, neutron and gamma output, source and target geometry, and atmospheric conditions. The calculated neutron and gamma radiation environments are checked for consistency with existing measured data as available. In those few cases displaying significant discrepancies that cannot be resolved, an environment based on extrapolation of the data is used if it leads to a larger calculated dose.

(3) In determining the residual radiation environment, all possible sources are considered including radioactive clouds, radiation that may have been encountered from other tests, and radioactive debris that may have been deposited in water during oceanic tests. The residual radiation environment is divided into two general components—neutron-activated material that subsequently emits, over a period of time, beta and gamma radiation; and radioactive debris from the fission reaction or from unfissioned materials that emit alpha, beta, and gamma radiation. Because residual radiation decays, the characterization of the residual environment is defined by the radiation intensity as a function of type and time. Radiological survey data are used to determine specific intensities at times of personnel exposure. Interpolation and extrapolation are based on known decay characteristics of the individual materials that comprise the residual contamination. In those rare cases where insufficient radiation data exist to adequately define the residual environment, source data are obtained from the appropriate weapon design laboratory and applied in standard radiation transport codes to determine the initial radiation at specific distances from the burst. This radiation, together with material composition and characteristics, leads to description of the neutron-activated field for each location and time of interest. In all cases observed data, as obtained at the time of the operation, are used to calibrate the calculations.

(c) *Activities of participants.* This step uses all official records, augmented by personnel interviews where gaps exist, to depict a scenario of activities for each individual or definable group. When a dose reconstruction is performed for a specific individual, information available from the individual is accepted unless demonstrably inaccurate. For military units, whose operations were closely controlled and further constrained by radiological safety monitors, the scenario is usually well defined. The same is true for observers, who were restricted to specific locations both during and after the nuclear burst. Ships' locations and activities are usually known with a high degree of precision from deck logs. Aircraft tracks and altitudes are also usually well defined. Personnel engaged in scientific experiments often kept logs of their activities; moreover, the locations of their experiments are usually a matter of record. Where the records are insufficiently complete for the degree of precision required to determine radiation exposure, participants' comments are used and reasonable judgements are made to further the analysis. Possible variations in the activities, as well as possible individual deviations from group activities, with respect to both time and location, are considered in the uncertainty analysis of the radiation dose calculations.

(d) *Calculation of dose.* (1) The initial radiation doses to close-in personnel (who were normally positioned in trenches at the time of detonation) are

calculated from the above-ground environment by simulating the radiation transport into the trenches. Various calculational approaches, standard in health physics, are employed to relate in-trench to above-trench doses for each source of radiation. Detailed modeling of the human body, in appropriate postures in the trench, is performed to calculate the gamma dose that would have been recorded on a film badge and the maximum neutron dose. The neutron, neutron-generated gamma, and prompt gamma doses are accrued during such a short time interval that the posture in a trench could not be altered significantly during this exposure. The fission-product gamma dose, however, is delivered over a period of many seconds. Therefore, the possibility of individual reorientation (e.g., standing up) in the trench is considered.

(2) The calculation of the dose from residual radiation follows from the characterized radiation environment and personnel activities. Because radiation intensities are calculated for a field (i.e., in two spatial dimensions) and in time, the radiation intensity is determinable for each increment of personnel activity regardless of direction or at what time. The dose from exposure to a radiation field is obtained by summing the contribution (product of intensity and time) to dose at each step. The dose calculated from the radiation field does not reflect the shielding of the film badge afforded by the human body. This shielding has been determined for pertinent body positions by the solution of radiation transport equations as applied to a radiation field. Conversion factors are used to arrive at a calculated film badge dose, which not only facilitates comparison with film badge data, but serves as a substitute for an unavailable film badge reading.

(3) The calculation of the dose from inhaled or ingested radioactivity primarily involves the determination of what radiosotopes entered the body in what quantity. Published conversion factors are then applied to these data to arrive at the radiation dose and future dose commitments to internal organs. Inhalation or ingestion of radioactive material is calculated from the radioactive environment and the processes of making these materials inhalable or ingestible. Activities and processes that cause material to become airborne (such as wind, decontamination or traffic) are used with empirical data on particle lofting to determine airborne concentrations under specific circumstances. Volumetric breathing rates and durations of exposure are used to calculate the total material intake. Data on time-dependent weapon debris isotopic composition and the above-mentioned conversion factors are used to calculate the dose commitment to the body and to specific body organs.

(e) *Uncertainty analysis.* Because of the uncertainties associated with the radiological data or calculations used in the absence of data, as well as the uncertainties with respect to personnel activities, confidence limits are determined where possible for group dose calculations. The uncertainty analysis quantifies the errors in available data or in the model used in the absence of data. Confidence limits are based on the uncertainty of all relevant input parameters, and thus vary with the quality of the input data. They also consider the possible range of doses due to the size of the exposure group being examined. Typical sources of error include orientation of the weapons, specific weapon yields, instrument error, fallout intensity data, time(s) at which data were obtained, fallout decay rate, route of personnel movements, and arrival/stay times for specific activities.

(f) *Comparison with film badge records.* (1) Calculations of gamma dose were compared with film badge records for two military units at Operation PLUMBBOB to initially validate this methodology. Where all parameters relating to radiation exposure were identified, direct comparison of gamma dose calculations with actual film badge readings was possible. Resultant correlations provided high confidence in the methodology.

(2) Film badge data may, in some cases, be unrepresentative of the total exposure of a given individual or group; nevertheless, they are extremely useful for direct comparison of incremental

doses for specific periods, e.g., validating the calculations for the remaining, unbadged period of exposure. Moreover, a wide distribution of film badge data often leads to more definitive personnel grouping for dose calculations and to further investigation of the reason(s) for such distribution. In all cases, personnel film badge data are not used in the dose calculations, but rather are used solely for comparison with and validation of the calculations. For dose reconstructions accomplished to date, comparison has been favorable and within the confidence limits of the calculations.

### § 218.4 Dose estimate reporting standards.

The following minimum standards for reporting dose estimates shall be uniformly applied by the Military Services when preparing information in response to an inquiry by the Veterans Administration, in connection with a claim for compensation, or by a veteran or his or her representative. The information shall include all material aspects of the radiation environment to which the veteran was exposed and shall include inhaled, ingested, and neutron doses, when applicable. In determining the veteran's dose, initial neutron, initial gamma, residual gamma, and internal (inhaled and ingested) alpha, beta, and gamma shall be considered. However, doses will be reported as gamma dose, neutron dose, and internal dose. To the extent to which the information is available, the responses will address the following questions:

(a) Can it be documented that the veteran was a test participant? If so, what tests did he attend and what were the specifics of these tests (date, time, yield (unless classified) type, location and other relevant details)?

(b) What unit was the man in? What were the mission and activities of the units at the test?

(c) To the extent to which the available records indicate, what were his duties at the test?

(d) Can you corroborate the specific information relevant to the potential exposure provided by the claimant to the Veterans Administration and forwarded to the Department of Defense? What is the impact of these specific activities on the claimant's reconstructed dose?

(e) Is there any recorded radiation exposure for the individual? Does this recorded exposure cover the full period of test participation? What are the uncertainties associated with the recorded film badge dose?

(f) If recorded dosimetry data is unavailable or incomplete, what is the dose reconstruction for the most probable dose, with error limits, if available?

(g) Is there evidence of a neutron or internal exposure? What is the reconstruction?

Upon request, the participant or his or her authorized representative will be informed of the specific methodologies and assumptions employed in estimating his or her dose.

## PART 219—PROTECTION OF HUMAN SUBJECTS

Sec.

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AUTHORITY: 5 U.S.C. 301; 42 U.S.C. 300v–1(b).

SOURCE: 82 FR 7272, January 19, 2018, unless otherwise noted.

### §219.101 To what does this policy apply?

(a) Except as detailed in §219.104, this policy applies to all research involving human subjects conducted, supported, or otherwise subject to regulation by any Federal department or agency that takes appropriate administrative action to make the policy applicable to such research. This includes research conducted by Federal civilian employees or military personnel, except that each department or agency head may adopt such procedural modifications as may be appropriate from an administrative standpoint. It also includes research conducted, supported, or otherwise subject to regulation by the Federal Government outside the United States. Institutions that are engaged in research described in this paragraph and institutional review boards (IRBs) reviewing research that is subject to this policy must comply with this policy.

(b) [Reserved]

(c) Department or agency heads retain final judgment as to whether a particular activity is covered by this policy and this judgment shall be exercised consistent with the ethical principles of the Belmont Report.[62]

(d) Department or agency heads may require that specific research activities or classes of research activities conducted, supported, or otherwise subject to regulation by the Federal department or agency but not otherwise covered by this policy comply with some or all of the requirements of this policy.

(e) Compliance with this policy requires compliance with pertinent federal laws or regulations that provide additional protections for human subjects.

(f) This policy does not affect any state or local laws or regulations (including tribal law passed by the official governing body of an American Indian or Alaska Native tribe) that may otherwise be applicable and that provide additional protections for human subjects.

(g) This policy does not affect any foreign laws or regulations that may otherwise be applicable and that provide additional protections to human subjects of research.

(h) When research covered by this policy takes place in foreign countries, procedures normally followed in the foreign countries to protect human subjects may differ from those set forth in this policy. In these circumstances, if a department or agency head determines that the procedures prescribed by the institution afford protections that are at least equivalent to those provided in this policy, the department or agency head may approve the substitution of the foreign procedures in lieu of the procedural requirements provided in this policy. Except when otherwise required by statute, Executive Order, or the department or agency head, notices of these actions as they occur will be published in the FEDERAL REGISTER or will be otherwise published as provided in department or agency procedures.

(i) Unless otherwise required by law, department or agency heads may waive the applicability of some or all of the provisions of this policy to specific research activities or classes of research activities otherwise covered by this policy, provided the alternative procedures to be followed are consistent with the principles of the Belmont Report.[63] Except when otherwise required by statute or Executive Order, the department or agency head shall forward advance notices of these actions to the Office for Human Research Protections, Department of Health and Human Services (HHS), or any successor office, or to the equivalent office within the appropriate Federal department or agency, and shall also publish them in the FEDERAL REGISTER or in such other manner as provided in department or agency procedures. The

[62] The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research.– Belmont Report. Washington, DC: U.S. Department of Health and Human Services. 1979.

[63] *Id.*

waiver notice must include a statement that identifies the conditions under which the waiver will be applied and a justification as to why the waiver is appropriate for the research, including how the decision is consistent with the principles of the Belmont Report.

(j) Federal guidance on the requirements of this policy shall be issued only after consultation, for the purpose of harmonization (to the extent appropriate), with other Federal departments and agencies that have adopted this policy, unless such consultation is not feasible.

(k) [Reserved]

(l) Compliance dates and transition provisions:

(1) *Pre-2018 Requirements*. For purposes of this section, the *pre-2018 Requirements* means this subpart as published in the 2016 edition of the Code of Federal Regulations.

(2) *2018 Requirements*. For purposes of this section, the *2018 Requirements* means the Federal Policy for the Protection of Human Subjects requirements contained in this part. The general compliance date for the 2018 Requirements is January 21, 2019. The compliance date for § 219.114(b) (cooperative research) of the 2018 Requirements is January 20, 2020.

(3) *Research subject to pre-2018 requirements*. The pre-2018 Requirements shall apply to the following research, unless the research is transitioning to comply with the 2018 Requirements in accordance with paragraph (l)(4) of this section:

(i) Research initially approved by an IRB under the pre-2018 Requirements before January 21, 2019;

(ii) Research for which IRB review was waived pursuant to § 219.101(i) of the pre-2018 Requirements before January 21, 2019; and

(iii) Research for which a determination was made that the research was exempt under § 219.101(b) of the pre-2018 Requirements before January 21, 2019.

(4) *Transitioning research*. If, on or after July 19, 2018, an institution planning or engaged in research otherwise covered by paragraph (l)(3) of this section determines that such research instead will transition to comply with the 2018 Requirements, the institution or an IRB must document and date such determination.

(i) If the determination to transition is documented between July 19, 2018, and January 20, 2019, the research shall:

(A) Beginning on the date of such documentation through January 20, 2019, comply with the pre-2018 Requirements, except that the research shall comply with the following:

(*1*) Section 219.102(l) of the 2018 Requirements (definition of research) (instead of § 219.102(d) of the pre-2018 Requirements);

(*2*) Section 219.103(d) of the 2018 Requirements (revised certification requirement that eliminates IRB review of application or proposal) (instead of § 219.103(f) of the pre-2018 Requirements); and

(*3*) Section 219.109(f)(1)(i) and (iii) of the 2018 Requirements (exceptions to mandated continuing review) (instead of § 219.103(b), as related to the requirement for continuing review, and in addition to § 219.109, of the pre-2018 Requirements); and

(B) Beginning on January 21, 2019, comply with the 2018 Requirements.

(ii) If the determination to transition is documented on or after January 21, 2019, the research shall, beginning on the date of such documentation, comply with the 2018 Requirements.

(5) *Research subject to 2018 Requirements*. The 2018 Requirements shall apply to the following research:

(i) Research initially approved by an IRB on or after January 21, 2019;

(ii) Research for which IRB review is waived pursuant to paragraph (i) of this section on or after January 21, 2019; and

(iii) Research for which a determination is made that the research is exempt on or after January 21, 2019.

(m) Severability: Any provision of this part held to be invalid or unenforceable by its terms, or as applied to any person or circumstance, shall be construed so as to continue to give maximum effect to the provision permitted by law, unless such holding shall be one of utter invalidity or unenforceability, in which event the provision shall be severable from this part and shall not affect the remainder

thereof or the application of the provision to other persons not similarly situated or to other dissimilar circumstances.

82 FR 7272, Jan. 19, 2017, as amended at 83 FR 28516, June 19, 2018.]

**§ 219.102 Definitions for purposes of this policy.**

(a) *Certification* means the official notification by the institution to the supporting Federal department or agency component, in accordance with the requirements of this policy, that a research project or activity involving human subjects has been reviewed and approved by an IRB in accordance with an approved assurance.

(b) *Clinical trial* means a research study in which one or more human subjects are prospectively assigned to one or more interventions (which may include placebo or other control) to evaluate the effects of the interventions on biomedical or behavioral health-related outcomes.

(c) *Department or agency head* means the head of any Federal department or agency, for example, the Secretary of HHS, and any other officer or employee of any Federal department or agency to whom the authority provided by these regulations to the department or agency head has been delegated.

(d) *Federal department or agency* refers to a federal department or agency (the department or agency itself rather than its bureaus, offices or divisions) that takes appropriate administrative action to make this policy applicable to the research involving human subjects it conducts, supports, or otherwise regulates (*e.g.*, the U.S. Department of Health and Human Services, the U.S. Department of Defense, or the Central Intelligence Agency).

(e)(1) *Human subject* means a living individual about whom an investigator (whether professional or student) conducting research:

(i) Obtains information or biospecimens through intervention or interaction with the individual, and uses, studies, or analyzes the information or biospecimens; or (ii) Obtains, uses, studies, analyzes, or generates identifiable private information or identifiable biospecimens.

(2) *Intervention* includes both physical procedures by which information or biospecimens are gathered (*e.g.*, venipuncture) and manipulations of the subject or the subject's environment that are performed for research purposes.

(3) *Interaction* includes communication or interpersonal contact between investigator and subject.

(4) *Private information* includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information that has been provided for specific purposes by an individual and that the individual can reasonably expect will not be made public (*e.g.*, a medical record).

(5) *Identifiable private information* is private information for which the identity of the subject is or may readily be ascertained by the investigator or associated with the information.

(6) *An identifiable biospecimen* is a biospecimen for which the identity of the subject is or may readily be ascertained by the investigator or associated with the biospecimen.

(7) Federal departments or agencies implementing this policy shall:

(i) Upon consultation with appropriate experts (including experts in data matching and re-identification), reexamine the meaning of ''identifiable private information,'' as defined in paragraph (e)(5) of this section, and ''identifiable biospecimen,'' as defined in paragraph (e)(6) of this section. This reexamination shall take place within 1 year and regularly thereafter (at least every 4 years). This process will be conducted by collaboration among the Federal departments and agencies implementing this policy. If appropriate and permitted by law, such Federal departments and agencies may alter the interpretation of these terms, including through the use of guidance.

(ii) Upon consultation with appropriate experts, assess whether there are analytic technologies or techniques that should be considered by investigators to generate ''identifiable private information,'' as defined in paragraph

(e)(5) of this section, or an ''identifiable biospecimen,'' as defined in paragraph (e)(6) of this section. This assessment shall take place within 1 year and regularly thereafter (at least every 4 years). This process will be conducted by collaboration among the Federal departments and agencies implementing this policy. Any such technologies or techniques will be included on a list of technologies or techniques that produce identifiable private information or identifiable biospecimens. This list will be published in the FEDERAL REGISTER after notice and an opportunity for public comment. The Secretary, HHS, shall maintain the list on a publicly accessible Web site.

(f) *Institution* means any public or private entity, or department or agency (including federal, state, and other agencies).

(g) *IRB* means an institutional review board established in accord with and for the purposes expressed in this policy.

(h) *IRB approval* means the determination of the IRB that the research has been reviewed and may be conducted at an institution within the constraints set forth by the IRB and by other institutional and federal requirements.

(i) *Legally authorized representative* means an individual or judicial or other body authorized under applicable law to consent on behalf of a prospective subject to the subject's participation in the procedure(s) involved in the research. If there is no applicable law addressing this issue, *legally authorized representative* means an individual recognized by institutional policy as acceptable for providing consent in the nonresearch context on behalf of the prospective subject to the subject's participation in the procedure(s) involved in the research.

(j) *Minimal risk* means that the probability and magnitude of harm or discomfort anticipated in the research are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

(k) *Public health authority* means an agency or authority of the United States, a state, a territory, a political subdivision of a state or territory, an Indian tribe, or a foreign government, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is responsible for public health matters as part of its official mandate.

(l) *Research* means a systematic investigation, including research development, testing, and evaluation, designed to develop or contribute to generalizable knowledge. Activities that meet this definition constitute research for purposes of this policy, whether or not they are conducted or supported under a program that is considered research for other purposes. For example, some demonstration and service programs may include research activities. For purposes of this part, the following activities are deemed not to be research:

(1) Scholarly and journalistic activities (*e.g.*, oral history, journalism, biography, literary criticism, legal research, and historical scholarship), including the collection and use of information, that focus directly on the specific individuals about whom the information is collected.

(2) Public health surveillance activities, including the collection and testing of information or biospecimens, conducted, supported, requested, ordered, required, or authorized by a public health authority. Such activities are limited to those necessary to allow a public health authority to identify, monitor, assess, or investigate potential public health signals, onsets of disease outbreaks, or conditions of public health importance (including trends, signals, risk factors, patterns in diseases, or increases in injuries from using consumer products). Such activities include those associated with providing timely situational awareness and priority setting during the course of an event or crisis that threatens public health (including natural or man-made disasters).

(3) Collection and analysis of information, biospecimens, or records by or for a criminal justice agency for activities authorized by law or court order

solely for criminal justice or criminal investigative purposes.

(4) Authorized operational activities (as determined by each agency) in support of intelligence, homeland security, defense, or other national security missions.

(m) *Written*, or *in writing*, for purposes of this part, refers to writing on a tangible medium (*e.g.*, paper) or in an electronic format.

**§ 219.103 Assuring compliance with this policy—research conducted or supported by any Federal department or agency.**

(a) Each institution engaged in research that is covered by this policy, with the exception of research eligible for exemption under § 219.104, and that is conducted or supported by a Federal department or agency, shall provide written assurance satisfactory to the department or agency head that it will comply with the requirements of this policy. In lieu of requiring submission of an assurance, individual department or agency heads shall accept the existence of a current assurance, appropriate for the research in question, on file with the Office for Human Research Protections, HHS, or any successor office, and approved for Federal-wide use by that office. When the existence of an HHS-approved assurance is accepted in lieu of requiring submission of an assurance, reports (except certification) required by this policy to be made to department and agency heads shall also be made to the Office for Human Research Protections, HHS, or any successor office. Federal departments and agencies will conduct or support research covered by this policy only if the institution has provided an assurance that it will comply with the requirements of this policy, as provided in this section, and only if the institution has certified to the department or agency head that the research has been reviewed and approved by an IRB (if such certification is required by § 219.103(d)).

(b) The assurance shall be executed by an individual authorized to act for the institution and to assume on behalf of the institution the obligations imposed by this policy and shall be filed in such form and manner as the department or agency head prescribes.

(c) The department or agency head may limit the period during which any assurance shall remain effective or otherwise condition or restrict the assurance.

(d) Certification is required when the research is supported by a Federal department or agency and not otherwise waived under § 219.101(i) or exempted under § 219.104. For such research, institutions shall certify that each proposed research study covered by the assurance and this section has been reviewed and approved by the IRB. Such certification must be submitted as prescribed by the Federal department or agency component supporting the research. Under no condition shall research covered by this section be initiated prior to receipt of the certification that the research has been reviewed and approved by the IRB.

(e) For nonexempt research involving human subjects covered by this policy (or exempt research for which limited IRB review takes place pursuant to § 219.104(d)(2)(iii), (d)(3)(i)(C), or (d)(7) or (8)) that takes place at an institution in which IRB oversight is conducted by an IRB that is not operated by the institution, the institution and the organization operating the IRB shall document the institution's reliance on the IRB for oversight of the research and the responsibilities that each entity will undertake to ensure compliance with the requirements of this policy (*e.g.*, in a written agreement between the institution and the IRB, by implementation of an institution-wide policy directive providing the allocation of responsibilities between the institution and an IRB that is not affiliated with the institution, or as set forth in a research protocol).

(Approved by the Office of Management and Budget under Control Number 0990–0260)

**§ 219.104 Exempt research.**

(a) Unless otherwise required by law or by department or agency heads, research activities in which the only involvement of human subjects will be in one or more of the categories in paragraph (d) of this section are exempt from the requirements of this policy,

except that such activities must comply with the requirements of this section and as specified in each category.

(b) Use of the exemption categories for research subject to the requirements of subparts B, C, and D: Application of the exemption categories to research subject to the requirements of 45 CFR part 46, subparts B, C, and D, is as follows:

(1) *Subpart B*. Each of the exemptions at this section may be applied to research subject to subpart B if the conditions of the exemption are met.

(2) *Subpart C*. The exemptions at this section do not apply to research subject to subpart C, except for research aimed at involving a broader subject population that only incidentally includes prisoners.

(3) *Subpart D*. The exemptions at paragraphs (d)(1), (4), (5), (6), (7), and (8) of this section may be applied to research subject to subpart D if the conditions of the exemption are met. Paragraphs (d)(2)(i) and (ii) of this section only may apply to research subject to subpart D involving educational tests or the observation of public behavior when the investigator(s) do not participate in the activities being observed. Paragraph (d)(2)(iii) of this section may not be applied to research subject to subpart D.

(c) [Reserved]

(d) Except as described in paragraph (a) of this section, the following categories of human subjects research are exempt from this policy:

(1) Research, conducted in established or commonly accepted educational settings, that specifically involves normal educational practices that are not likely to adversely impact students' opportunity to learn required educational content or the assessment of educators who provide instruction. This includes most research on regular and special education instructional strategies, and research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research that only includes interactions involving educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures, or observation of public behavior (including visual or auditory recording) if at least one of the following criteria is met:

(i) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained, directly or through identifiers linked to the subjects;

(ii) Any disclosure of the human subjects' responses outside the research would not reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, educational advancement, or reputation; or

(iii) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects can readily be ascertained, directly or through identifiers linked to the subjects, and an IRB conducts a limited IRB review to make the determination required by § 219.111(a)(7).

(3)(i) Research involving benign behavioral interventions in conjunction with the collection of information from an adult subject through verbal or written responses (including data entry) or audiovisual recording if the subject prospectively agrees to the intervention and information collection and at least one of the following criteria is met:

(A) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained, directly or through identifiers linked to the subjects;

(B) Any disclosure of the human subjects' responses outside the research would not reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, educational advancement, or reputation; or

(C) The information obtained is recorded by the investigator in such a manner that the identity of the human subjects can readily be ascertained, directly or through identifiers linked to the subjects, and an IRB conducts a limited IRB review to make the determination required by § 219.111(a)(7).

(ii) For the purpose of this provision, benign behavioral interventions are brief in duration, harmless, painless,

not physically invasive, not likely to have a significant adverse lasting impact on the subjects, and the investigator has no reason to think the subjects will find the interventions offensive or embarrassing. Provided all such criteria are met, examples of such benign behavioral interventions would include having the subjects play an online game, having them solve puzzles under various noise conditions, or having them decide how to allocate a nominal amount of received cash between themselves and someone else.

(iii) If the research involves deceiving the subjects regarding the nature or purposes of the research, this exemption is not applicable unless the subject authorizes the deception through a prospective agreement to participate in research in circumstances in which the subject is informed that he or she will be unaware of or misled regarding the nature or purposes of the research.

(4) Secondary research for which consent is not required: Secondary research uses of identifiable private information or identifiable biospecimens, if at least one of the following criteria is met:

(i) The identifiable private information or identifiable biospecimens are publicly available;

(ii) Information, which may include information about biospecimens, is recorded by the investigator in such a manner that the identity of the human subjects cannot readily be ascertained directly or through identifiers linked to the subjects, the investigator does not contact the subjects, and the investigator will not re-identify subjects;

(iii) The research involves only information collection and analysis involving the investigator's use of identifiable health information when that use is regulated under 45 CFR parts 160 and 164, subparts A and E, for the purposes of ''health care operations'' or ''research'' as those terms are defined at 45 CFR 164.501 or for ''public health activities and purposes'' as described under 45 CFR 164.512(b); or

(iv) The research is conducted by, or on behalf of, a Federal department or agency using government-generated or government-collected information obtained for nonresearch activities, if the research generates identifiable private information that is or will be maintained on information technology that is subject to and in compliance with section 208(b) of the E-Government Act of 2002, 44 U.S.C. 3501 note, if all of the identifiable private information collected, used, or generated as part of the activity will be maintained in systems of records subject to the Privacy Act of 1974, 5 U.S.C. 552a, and, if applicable, the information used in the research was collected subject to the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq*.

(5) Research and demonstration projects that are conducted or supported by a Federal department or agency, or otherwise subject to the approval of department or agency heads (or the approval of the heads of bureaus or other subordinate agencies that have been delegated authority to conduct the research and demonstration projects), and that are designed to study, evaluate, improve, or otherwise examine public benefit or service programs, including procedures for obtaining benefits or services under those programs, possible changes in or alternatives to those programs or procedures, or possible changes in methods or levels of payment for benefits or services under those programs. Such projects include, but are not limited to, internal studies by Federal employees, and studies under contracts or consulting arrangements, cooperative agreements, or grants. Exempt projects also include waivers of otherwise mandatory requirements using authorities such as sections 1115 and 1115A of the Social Security Act, as amended.

(i) Each Federal department or agency conducting or supporting the research and demonstration projects must establish, on a publicly accessible Federal Web site or in such other manner as the department or agency head may determine, a list of the research and demonstration projects that the Federal department or agency conducts or supports under this provision. The research or demonstration project must be published on this list prior to commencing the research involving human subjects.

(ii) [Reserved]

(6) Taste and food quality evaluation and consumer acceptance studies:

(i) If wholesome foods without additives are consumed, or

(ii) If a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S. Department of Agriculture.

(7) Storage or maintenance for secondary research for which broad consent is required: Storage or maintenance of identifiable private information or identifiable biospecimens for potential secondary research use if an IRB conducts a limited IRB review and makes the determinations required by § 219.111(a)(8).

(8) Secondary research for which broad consent is required: Research involving the use of identifiable private information or identifiable biospecimens for secondary research use, if the following criteria are met:

(i) Broad consent for the storage, maintenance, and secondary research use of the identifiable private information or identifiable biospecimens was obtained in accordance with § 219.116(a)(1) through (4), (a)(6), and (d);

(ii) Documentation of informed consent or waiver of documentation of consent was obtained in accordance with § 219.117;

(iii) An IRB conducts a limited IRB review and makes the determination required by § 219.111(a)(7) and makes the determination that the research to be conducted is within the scope of the broad consent referenced in paragraph (d)(8)(i) of this section; and (iv) The investigator does not include returning individual research results to subjects as part of the study plan. This provision does not prevent an investigator from abiding by any legal requirements to return individual research results.

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**§§ 219.105–219.106 [Reserved]**

**§ 219.107 IRB membership.**

(a) Each IRB shall have at least five members, with varying backgrounds to promote complete and adequate review of research activities commonly conducted by the institution. The IRB shall be sufficiently qualified through the experience and expertise of its members (professional competence), and the diversity of its members, including race, gender, and cultural backgrounds and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects. The IRB shall be able to ascertain the acceptability of proposed research in terms of institutional commitments (including policies and resources) and regulations, applicable law, and standards of professional conduct and practice. The IRB shall therefore include persons knowledgeable in these areas. If an IRB regularly reviews research that involves a category of subjects that is vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons, consideration shall be given to the inclusion of one or more individuals who are knowledgeable about and experienced in working with these categories of subjects.

(b) Each IRB shall include at least one member whose primary concerns are in scientific areas and at least one member whose primary concerns are in nonscientific areas.

(c) Each IRB shall include at least one member who is not otherwise affiliated with the institution and who is not part of the immediate family of a person who is affiliated with the institution.

(d) No IRB may have a member participate in the IRB's initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the IRB.

(e) An IRB may, in its discretion, invite individuals with competence in special areas to assist in the review of issues that require expertise beyond or in addition to that available on the

IRB. These individuals may not vote with the IRB.

**§219.108 IRB functions and operations.**

(a) In order to fulfill the requirements of this policy each IRB shall:

(1) Have access to meeting space and sufficient staff to support the IRB's review and recordkeeping duties;

(2) Prepare and maintain a current list of the IRB members identified by name; earned degrees; representative capacity; indications of experience such as board certifications or licenses sufficient to describe each member's chief anticipated contributions to IRB deliberations; and any employment or other relationship between each member and the institution, for example, full-time employee, part-time employee, member of governing panel or board, stockholder, paid or unpaid consultant;

(3) Establish and follow written procedures for:

(i) Conducting its initial and continuing review of research and for reporting its findings and actions to the investigator and the institution;

(ii) Determining which projects require review more often than annually and which projects need verification from sources other than the investigators that no material changes have occurred since previous IRB review; and

(iii) Ensuring prompt reporting to the IRB of proposed changes in a research activity, and for ensuring that investigators will conduct the research activity in accordance with the terms of the IRB approval until any proposed changes have been reviewed and approved by the IRB, except when necessary to eliminate apparent immediate hazards to the subject.

(4) Establish and follow written procedures for ensuring prompt reporting to the IRB; appropriate institutional officials; the department or agency head; and the Office for Human Research Protections, HHS, or any successor office, or the equivalent office within the appropriate Federal department or agency of

(i) Any unanticipated problems involving risks to subjects or others or any serious or continuing noncompliance with this policy or the requirements or determinations of the IRB; and

(ii) Any suspension or termination of IRB approval.

(b) Except when an expedited review procedure is used (as described in §219.110), an IRB must review proposed research at convened meetings at which a majority of the members of the IRB are present, including at least one member whose primary concerns are in nonscientific areas. In order for the research to be approved, it shall receive the approval of a majority of those members present at the meeting.

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**§219.109 IRB review of research.**

(a) An IRB shall review and have authority to approve, require modifications in (to secure approval), or disapprove all research activities covered by this policy, including exempt research activities under §219.104 for which limited IRB review is a condition of exemption (under §219.104(d)(2)(iii), (d)(3)(i)(C), and (d)(7), and (8)).

(b) An IRB shall require that information given to subjects (or legally authorized representatives, when appropriate) as part of informed consent is in accordance with §219.116. The IRB may require that information, in addition to that specifically mentioned in §219.116, be given to the subjects when in the IRB's judgment the information would meaningfully add to the protection of the rights and welfare of subjects.

(c) An IRB shall require documentation of informed consent or may waive documentation in accordance with §219.117.

(d) An IRB shall notify investigators and the institution in writing of its decision to approve or disapprove the proposed research activity, or of modifications required to secure IRB approval of the research activity. If the IRB decides to disapprove a research activity, it shall include in its written notification a statement of the reasons for its decision and give the investigator an opportunity to respond in person or in writing.

(e) An IRB shall conduct continuing review of research requiring review by

the convened IRB at intervals appropriate to the degree of risk, not less than once per year, except as described in § 219.109(f).

(f)(1) Unless an IRB determines otherwise, continuing review of research is not required in the following circumstances:

(i) Research eligible for expedited review in accordance with § 219.110;

(ii) Research reviewed by the IRB in accordance with the limited IRB review described in § 219.104(d)(2)(iii), (d)(3)(i)(C), or (d)(7) or (8);

(iii) Research that has progressed to the point that it involves only one or both of the following, which are part of the IRB-approved study:

(A) Data analysis, including analysis of identifiable private information or identifiable biospecimens, or

(B) Accessing follow-up clinical data from procedures that subjects would undergo as part of clinical care.

(2) [Reserved]

(g) An IRB shall have authority to observe or have a third party observe the consent process and the research.

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### § 219.110 Expedited review procedures for certain kinds of research involving no more than minimal risk, and for minor changes in approved research.

(a) The Secretary of HHS has established, and published as a Notice in the FEDERAL REGISTER, a list of categories of research that may be reviewed by the IRB through an expedited review procedure. The Secretary will evaluate the list at least every 8 years and amend it, as appropriate, after consultation with other federal departments and agencies and after publication in the FEDERAL REGISTER for public comment. A copy of the list is available from the Office for Human Research Protections, HHS, or any successor office.

(b)(1) An IRB may use the expedited review procedure to review the following:

(i) Some or all of the research appearing on the list described in paragraph (a) of this section, unless the reviewer determines that the study involves more than minimal risk;

(ii) Minor changes in previously approved research during the period for which approval is authorized; or

(iii) Research for which limited IRB review is a condition of exemption under § 219.104(d)(2)(iii), (d)(3)(i)(C), and (d)(7) and (8).

(2) Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the nonexpedited procedure set forth in § 219.108(b).

(c) Each IRB that uses an expedited review procedure shall adopt a method for keeping all members advised of research proposals that have been approved under the procedure.

(d) The department or agency head may restrict, suspend, terminate, or choose not to authorize an institution's or IRB's use of the expedited review procedure.

### § 219.111 Criteria for IRB approval of research.

(a) In order to approve research covered by this policy the IRB shall determine that all of the following requirements are satisfied:

(1) Risks to subjects are minimized:

(i) By using procedures that are consistent with sound research design and that do not unnecessarily expose subjects to risk, and

(ii) Whenever appropriate, by using procedures already being performed on the subjects for diagnostic or treatment purposes.

(2) Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. In evaluating risks and benefits, the IRB should consider only those risks and benefits that may result from the research (as distinguished from risks and benefits of therapies subjects would receive even if not participating in the research). The IRB should not consider possible long-range effects of applying knowledge

gained in the research (*e.g.*, the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.

(3) Selection of subjects is equitable. In making this assessment the IRB should take into account the purposes of the research and the setting in which the research will be conducted. The IRB should be particularly cognizant of the special problems of research that involves a category of subjects who are vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons.

(4) Informed consent will be sought from each prospective subject or the subject's legally authorized representative, in accordance with, and to the extent required by, § 219.116.

(5) Informed consent will be appropriately documented or appropriately waived in accordance with § 219.117.

(6) When appropriate, the research plan makes adequate provision for monitoring the data collected to ensure the safety of subjects.

(7) When appropriate, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(i) The Secretary of HHS will, after consultation with the Office of Management and Budget's privacy office and other Federal departments and agencies that have adopted this policy, issue guidance to assist IRBs in assessing what provisions are adequate to protect the privacy of subjects and to maintain the confidentiality of data.

(ii) [Reserved]

(8) For purposes of conducting the limited IRB review required by § 219.104(d)(7)), the IRB need not make the determinations at paragraphs (a)(1) through (7) of this section, and shall make the following determinations:

(i) Broad consent for storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens is obtained in accordance with the requirements of § 219.116(a)(1)–(4), (a)(6), and (d);

(ii) Broad consent is appropriately documented or waiver of documentation is appropriate, in accordance with § 219.117; and

(iii) If there is a change made for research purposes in the way the identifiable private information or identifiable biospecimens are stored or maintained, there are adequate provisions to protect the privacy of subjects and to maintain the confidentiality of data.

(b) When some or all of the subjects are likely to be vulnerable to coercion or undue influence, such as children, prisoners, individuals with impaired decision-making capacity, or economically or educationally disadvantaged persons, additional safeguards have been included in the study to protect the rights and welfare of these subjects.

### § 219.112 Review by Institution

Research covered by this policy that has been approved by an IRB may be subject to further appropriate review and approval or disapproval by officials of the institution. However, those officials may not approve the research if it has not been approved by an IRB.

### § 219.113 Suspension or Termination of IRB Approval of Research.

An IRB shall have authority to suspend or terminate approval of research that is not being conducted in accordance with the IRB's requirements or that has been associated with unexpected serious harm to subjects. Any suspension or termination of approval shall include a statement of the reasons for the IRB's action and shall be reported promptly to the investigator, appropriate institutional officials, and the department or agency head.

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### § 219.114 Cooperative Research.

(a) Cooperative research projects are those projects covered by this policy that involve more than one institution. In the conduct of cooperative research projects, each institution is responsible for safeguarding the rights and welfare of human subjects and for complying with this policy.

(b)(1) Any institution located in the United States that is engaged in cooperative research must rely upon approval by a single IRB for that portion

of the research that is conducted in the United States. The reviewing IRB will be identified by the Federal department or agency supporting or conducting the research or proposed by the lead institution subject to the acceptance of the Federal department or agency supporting the research.

(2) The following research is not subject to this provision:

(i) Cooperative research for which more than single IRB review is required by law (including tribal law passed by the official governing body of an American Indian or Alaska Native tribe); or

(ii) Research for which any Federal department or agency supporting or conducting the research determines and documents that the use of a single IRB is not appropriate for the particular context.

(c) For research not subject to paragraph (b) of this section, an institution participating in a cooperative project may enter into a joint review arrangement, rely on the review of another IRB, or make similar arrangements for avoiding duplication of effort.

### § 219.115 IRB Records.

(a) An institution, or when appropriate an IRB, shall prepare and maintain adequate documentation of IRB activities, including the following:

(1) Copies of all research proposals reviewed, scientific evaluations, if any, that accompany the proposals, approved sample consent forms, progress reports submitted by investigators, and reports of injuries to subjects.

(2) Minutes of IRB meetings, which shall be in sufficient detail to show attendance at the meetings; actions taken by the IRB; the vote on these actions including the number of members voting for, against, and abstaining; the basis for requiring changes in or disapproving research; and a written summary of the discussion of controverted issues and their resolution.

(3) Records of continuing review activities, including the rationale for conducting continuing review of research that otherwise would not require continuing review as described in § 219.109(f)(1).

(4) Copies of all correspondence between the IRB and the investigators.

(5) A list of IRB members in the same detail as described in § 219.108(a)(2).

(6) Written procedures for the IRB in the same detail as described in § 219.108(a)(3) and (4).

(7) Statements of significant new findings provided to subjects, as required by § 219.116(c)(5).

(8) The rationale for an expedited reviewer's determination under § 219.110(b)(1)(i) that research appearing on the expedited review list described in § 219.110(a) is more than minimal risk.

(9) Documentation specifying the responsibilities that an institution and an organization operating an IRB each will undertake to ensure compliance with the requirements of this policy, as described in § 219.103(e).

(b) The records required by this policy shall be retained for at least 3 years, and records relating to research that is conducted shall be retained for at least 3 years after completion of the research. The institution or IRB may maintain the records in printed form, or electronically. All records shall be accessible for inspection and copying by authorized representatives of the Federal department or agency at reasonable times and in a reasonable manner.

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### § 219.116 General Requirements for Informed Consent.

(a) *General.* General requirements for informed consent, whether written or oral, are set forth in this paragraph and apply to consent obtained in accordance with the requirements set forth in paragraphs (b) through (d) of this section. Broad consent may be obtained in lieu of informed consent obtained in accordance with paragraphs (b) and (c) of this section only with respect to the storage, maintenance, and secondary research uses of identifiable private information and identifiable biospecimens. Waiver or alteration of consent in research involving public benefit and service programs conducted by or subject to the approval of state or local officials is described in paragraph (e) of this section. General waiver or alteration of informed consent is

described in paragraph (f) of this section. Except as provided elsewhere in this policy:

(1) Before involving a human subject in research covered by this policy, an investigator shall obtain the legally effective informed consent of the subject or the subject's legally authorized representative.

(2) An investigator shall seek informed consent only under circumstances that provide the prospective subject or the legally authorized representative sufficient opportunity to discuss and consider whether or not to participate and that minimize the possibility of coercion or undue influence.

(3) The information that is given to the subject or the legally authorized representative shall be in language understandable to the subject or the legally authorized representative.

(4) The prospective subject or the legally authorized representative must be provided with the information that a reasonable person would want to have in order to make an informed decision about whether to participate, and an opportunity to discuss that information.

(5) Except for broad consent obtained in accordance with paragraph (d) of this section:

(i) Informed consent must begin with a concise and focused presentation of the key information that is most likely to assist a prospective subject or legally authorized representative in understanding the reasons why one might or might not want to participate in the research. This part of the informed consent must be organized and presented in a way that facilitates comprehension.

(ii) Informed consent as a whole must present information in sufficient detail relating to the research, and must be organized and presented in a way that does not merely provide lists of isolated facts, but rather facilitates the prospective subject's or legally authorized representative's understanding of the reasons why one might or might not want to participate.

(6) No informed consent may include any exculpatory language through which the subject or the legally authorized representative is made to waive or appear to waive any of the subject's legal rights, or releases or appears to release the investigator, the sponsor, the institution, or its agents from liability for negligence.

(b) *Basic elements of informed consent.* Except as provided in paragraph (d), (e), or (f) of this section, in seeking informed consent the following information shall be provided to each subject or the legally authorized representative:

(1) A statement that the study involves research, an explanation of the purposes of the research and the expected duration of the subject's participation, a description of the procedures to be followed, and identification of any procedures that are experimental;

(2) A description of any reasonably foreseeable risks or discomforts to the subject;

(3) A description of any benefits to the subject or to others that may reasonably be expected from the research;

(4) A disclosure of appropriate alternative procedures or courses of treatment, if any, that might be advantageous to the subject;

(5) A statement describing the extent, if any, to which confidentiality of records identifying the subject will be maintained;

(6) For research involving more than minimal risk, an explanation as to whether any compensation and an explanation as to whether any medical treatments are available if injury occurs and, if so, what they consist of, or where further information may be obtained;

(7) An explanation of whom to contact for answers to pertinent questions about the research and research subjects' rights, and whom to contact in the event of a research-related injury to the subject;

(8) A statement that participation is voluntary, refusal to participate will involve no penalty or loss of benefits to which the subject is otherwise entitled, and the subject may discontinue participation at any time without penalty or loss of benefits to which the subject is otherwise entitled; and

(9) One of the following statements about any research that involves the collection of identifiable private information or identifiable biospecimens:

(i) A statement that identifiers might be removed from the identifiable private information or identifiable biospecimens and that, after such removal, the information or biospecimens could be used for future research studies or distributed to another investigator for future research studies without additional informed consent from the subject or the legally authorized representative, if this might be a possibility; or

(ii) A statement that the subject's information or biospecimens collected as part of the research, even if identifiers are removed, will not be used or distributed for future research studies.

(c) *Additional elements of informed consent.* Except as provided in paragraph (d), (e), or (f) of this section, one or more of the following elements of information, when appropriate, shall also be provided to each subject or the legally authorized representative:

(1) A statement that the particular treatment or procedure may involve risks to the subject (or to the embryo or fetus, if the subject is or may become pregnant) that are currently unforeseeable;

(2) Anticipated circumstances under which the subject's participation may be terminated by the investigator without regard to the subject's or the legally authorized representative's consent;

(3) Any additional costs to the subject that may result from participation in the research;

(4) The consequences of a subject's decision to withdraw from the research and procedures for orderly termination of participation by the subject;

(5) A statement that significant new findings developed during the course of the research that may relate to the subject's willingness to continue participation will be provided to the subject;

(6) The approximate number of subjects involved in the study;

(7) A statement that the subject's biospecimens (even if identifiers are removed) may be used for commercial profit and whether the subject will or will not share in this commercial profit;

(8) A statement regarding whether clinically relevant research results, including individual research results, will be disclosed to subjects, and if so, under what conditions; and

(9) For research involving biospecimens, whether the research will (if known) or might include whole genome sequencing (*i.e.*, sequencing of a human germline or somatic specimen with the intent to generate the genome or exome sequence of that specimen).

(d) *Elements of broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens.* Broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens (collected for either research studies other than the proposed research or nonresearch purposes) is permitted as an alternative to the informed consent requirements in paragraphs (b) and (c) of this section. If the subject or the legally authorized representative is asked to provide broad consent, the following shall be provided to each subject or the subject's legally authorized representative:

(1) The information required in paragraphs (b)(2), (b)(3), (b)(5), and (b)(8) and, when appropriate, (c)(7) and (9) of this section;

(2) A general description of the types of research that may be conducted with the identifiable private information or identifiable biospecimens. This description must include sufficient information such that a reasonable person would expect that the broad consent would permit the types of research conducted;

(3) A description of the identifiable private information or identifiable biospecimens that might be used in research, whether sharing of identifiable private information or identifiable biospecimens might occur, and the types of institutions or researchers that might conduct research with the identifiable private information or identifiable biospecimens;

(4) A description of the period of time that the identifiable private information or identifiable biospecimens may be stored and maintained (which period of time could be indefinite), and a description of the period of time that the identifiable private information or identifiable biospecimens may be used

for research purposes (which period of time could be indefinite);

(5) Unless the subject or legally authorized representative will be provided details about specific research studies, a statement that they will not be informed of the details of any specific research studies that might be conducted using the subject's identifiable private information or identifiable biospecimens, including the purposes of the research, and that they might have chosen not to consent to some of those specific research studies;

(6) Unless it is known that clinically relevant research results, including individual research results, will be disclosed to the subject in all circumstances, a statement that such results may not be disclosed to the subject; and

(7) An explanation of whom to contact for answers to questions about the subject's rights and about storage and use of the subject's identifiable private information or identifiable biospecimens, and whom to contact in the event of a research-related harm.

(e) *Waiver or alteration of consent in research involving public benefit and service programs conducted by or subject to the approval of state or local officials*—(1) *Waiver*. An IRB may waive the requirement to obtain informed consent for research under paragraphs (a) through (c) of this section, provided the IRB satisfies the requirements of paragraph (e)(3) of this section. If an individual was asked to provide broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens in accordance with the requirements at paragraph (d) of this section, and refused to consent, an IRB cannot waive consent for the storage, maintenance, or secondary research use of the identifiable private information or identifiable biospecimens.

(2) *Alteration*. An IRB may approve a consent procedure that omits some, or alters some or all, of the elements of informed consent set forth in paragraphs (b) and (c) of this section provided the IRB satisfies the requirements of paragraph (e)(3) of this section. An IRB may not omit or alter any of the requirements described in paragraph (a) of this section. If a broad consent procedure is used, an IRB may not omit or alter any of the elements required under paragraph (d) of this section.

(3) *Requirements for waiver and alteration*. In order for an IRB to waive or alter consent as described in this subsection, the IRB must find and document that:

(i) The research or demonstration project is to be conducted by or subject to the approval of state or local government officials and is designed to study, evaluate, or otherwise examine:

(A) Public benefit or service programs;

(B) Procedures for obtaining benefits or services under those programs;

(C) Possible changes in or alternatives to those programs or procedures; or

(D) Possible changes in methods or levels of payment for benefits or services under those programs; and

(ii) The research could not practicably be carried out without the waiver or alteration.

(f) *General waiver or alteration of consent*—(1) *Waiver*. An IRB may waive the requirement to obtain informed consent for research under paragraphs (a) through (c) of this section, provided the IRB satisfies the requirements of paragraph (f)(3) of this section. If an individual was asked to provide broad consent for the storage, maintenance, and secondary research use of identifiable private information or identifiable biospecimens in accordance with the requirements at paragraph (d) of this section, and refused to consent, an IRB cannot waive consent for the storage, maintenance, or secondary research use of the identifiable private information or identifiable biospecimens.

(2) *Alteration*. An IRB may approve a consent procedure that omits some, or alters some or all, of the elements of informed consent set forth in paragraphs (b) and (c) of this section provided the IRB satisfies the requirements of paragraph (f)(3) of this section. An IRB may not omit or alter any of the requirements described in paragraph (a) of this section. If a broad consent procedure is used, an IRB may not omit or alter any of the elements required under paragraph (d) of this section.

(3) *Requirements for waiver and alteration.* In order for an IRB to waive or alter consent as described in this subsection, the IRB must find and document that:

(i) The research involves no more than minimal risk to the subjects;

(ii) The research could not practicably be carried out without the requested waiver or alteration;

(iii) If the research involves using identifiable private information or identifiable biospecimens, the research could not practicably be carried out without using such information or biospecimens in an identifiable format;

(iv) The waiver or alteration will not adversely affect the rights and welfare of the subjects; and

(v) Whenever appropriate, the subjects or legally authorized representatives will be provided with additional pertinent information after participation.

(g) *Screening, recruiting, or determining eligibility.* An IRB may approve a research proposal in which an investigator will obtain information or biospecimens for the purpose of screening, recruiting, or determining the eligibility of prospective subjects without the informed consent of the prospective subject or the subject's legally authorized representative, if either of the following conditions are met:

(1) The investigator will obtain information through oral or written communication with the prospective subject or legally authorized representative, or

(2) The investigator will obtain identifiable private information or identifiable biospecimens by accessing records or stored identifiable biospecimens.

(h) *Posting of clinical trial consent form.* (1) For each clinical trial conducted or supported by a Federal department or agency, one IRB-approved informed consent form used to enroll subjects must be posted by the awardee or the Federal department or agency component conducting the trial on a publicly available Federal Web site that will be established as a repository for such informed consent forms.

(2) If the Federal department or agency supporting or conducting the clinical trial determines that certain information should not be made publicly available on a Federal Web site (*e.g.* confidential commercial information), such Federal department or agency may permit or require redactions to the information posted.

(3) The informed consent form must be posted on the Federal Web site after the clinical trial is closed to recruitment, and no later than 60 days after the last study visit by any subject, as required by the protocol.

(i) *Preemption.* The informed consent requirements in this policy are not intended to preempt any applicable Federal, state, or local laws (including tribal laws passed by the official governing body of an American Indian or Alaska Native tribe) that require additional information to be disclosed in order for informed consent to be legally effective.

(j) *Emergency medical care.* Nothing in this policy is intended to limit the authority of a physician to provide emergency medical care, to the extent the physician is permitted to do so under applicable Federal, state, or local law (including tribal law passed by the official governing body of an American Indian or Alaska Native tribe).

(Approved by the Office of Management and Budget under Control Number 0990–0260)

### § 219.117 Documentation of informed consent.

(a) Except as provided in paragraph (c) of this section, informed consent shall be documented by the use of a written informed consent form approved by the IRB and signed (including in an electronic format) by the subject or the subject's legally authorized representative. A written copy shall be given to the person signing the informed consent form.

(b) Except as provided in paragraph (c) of this section, the informed consent form may be either of the following:

(1) A written informed consent form that meets the requirements of § 219.116. The investigator shall give either the subject or the subject's legally authorized representative adequate opportunity to read the informed consent form before it is signed; alternatively, this form may be read to the subject or the subject's legally authorized representative.

(2) A short form written informed consent form stating that the elements of informed consent required by §219.116 have been presented orally to the subject or the subject's legally authorized representative, and that the key information required by §219.116(a)(5)(i) was presented first to the subject, before other information, if any, was provided. The IRB shall approve a written summary of what is to be said to the subject or the legally authorized representative. When this method is used, there shall be a witness to the oral presentation. Only the short form itself is to be signed by the subject or the subject's legally authorized representative. However, the witness shall sign both the short form and a copy of the summary, and the person actually obtaining consent shall sign a copy of the summary. A copy of the summary shall be given to the subject or the subject's legally authorized representative, in addition to a copy of the short form.

(c)(1) An IRB may waive the requirement for the investigator to obtain a signed informed consent form for some or all subjects if it finds any of the following:

(i) That the only record linking the subject and the research would be the informed consent form and the principal risk would be potential harm resulting from a breach of confidentiality. Each subject (or legally authorized representative) will be asked whether the subject wants documentation linking the subject with the research, and the subject's wishes will govern;

(ii) That the research presents no more than minimal risk of harm to subjects and involves no procedures for which written consent is normally required outside of the research context; or

(iii) If the subjects or legally authorized representatives are members of a distinct cultural group or community in which signing forms is not the norm, that the research presents no more than minimal risk of harm to subjects and provided there is an appropriate alternative mechanism for documenting that informed consent was obtained.

(2) In cases in which the documentation requirement is waived, the IRB may require the investigator to provide subjects or legally authorized representatives with a written statement regarding the research.

(Approved by the Office of Management and Budget under Control Number 0990–0260)

### §219.118 Applications and proposals lacking definite plans for involvement of human subjects.

Certain types of applications for grants, cooperative agreements, or contracts are submitted to Federal departments or agencies with the knowledge that subjects may be involved within the period of support, but definite plans would not normally be set forth in the application or proposal. These include activities such as institutional type grants when selection of specific projects is the institution's responsibility; research training grants in which the activities involving subjects remain to be selected; and projects in which human subjects' involvement will depend upon completion of instruments, prior animal studies, or purification of compounds. Except for research waived under §219.101(i) or exempted under §219.104, no human subjects may be involved in any project supported by these awards until the project has been reviewed and approved by the IRB, as provided in this policy, and certification submitted, by the institution, to the Federal department or agency component supporting the research.

### §219.119 Research undertaken without the intention of involving human subjects.

Except for research waived under §219.101(i) or exempted under §219.104, in the event research is undertaken without the intention of involving human subjects, but it is later proposed to involve human subjects in the research, the research shall first be reviewed and approved by an IRB, as provided in this policy, a certification submitted by the institution to the Federal department or agency component supporting the research, and final approval given to the proposed change by the Federal department or agency component.

### § 219.120 Evaluation and disposition of applications and proposals for research to be conducted or supported by a Federal department or agency.

(a) The department or agency head will evaluate all applications and proposals involving human subjects submitted to the Federal department or agency through such officers and employees of the Federal department or agency and such experts and consultants as the department or agency head determines to be appropriate. This evaluation will take into consideration the risks to the subjects, the adequacy of protection against these risks, the potential benefits of the research to the subjects and others, and the importance of the knowledge gained or to be gained.

(b) On the basis of this evaluation, the department or agency head may approve or disapprove the application or proposal, or enter into negotiations to develop an approvable one.

### § 219.121 [Reserved]

### § 219.122 Use of Federal funds.

Federal funds administered by a Federal department or agency may not be expended for research involving human subjects unless the requirements of this policy have been satisfied.

### § 219.123 Early termination of research support: Evaluation of applications and proposals.

(a) The department or agency head may require that Federal department or agency support for any project be terminated or suspended in the manner prescribed in applicable program requirements, when the department or agency head finds an institution has materially failed to comply with the terms of this policy.

(b) In making decisions about supporting or approving applications or proposals covered by this policy the department or agency head may take into account, in addition to all other eligibility requirements and program criteria, factors such as whether the applicant has been subject to a termination or suspension under paragraph (a) of this section and whether the applicant or the person or persons who would direct or has/have directed the scientific and technical aspects of an activity has/have, in the judgment of the department or agency head, materially failed to discharge responsibility for the protection of the rights and welfare of human subjects (whether or not the research was subject to federal regulation).

### § 219.124 Conditions.

With respect to any research project or any class of research projects the department or agency head of either the conducting or the supporting Federal department or agency may impose additional conditions prior to or at the time of approval when in the judgment of the department or agency head additional conditions are necessary for the protection of human subjects.

## PART 220—COLLECTION FROM THIRD PARTY PAYERS OF REASONABLE CHARGES FOR HEALTHCARE SERVICES

Sec.

220.1 Purpose and applicability.
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220.13 Special rules for workers' compensation programs.
220.14 Definitions.

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 1095(f), 1097b(b) and 1079b.

SOURCE: 55 FR 21748, May 29, 1990, unless otherwise noted.

### § 220.1 Purpose and applicability.

(a) This part implements the provisions of 10 U.S.C. 1095, 1097b(b), and 1079b. In general, 10 U.S.C. 1095 establishes the statutory obligation of third party payers to reimburse the United

States the reasonable charges of healthcare services provided by facilities of the Uniformed Services to covered beneficiaries who are also covered by a third party payer's plan. Section 1097b(b) elaborates on the methods for computation of reasonable charges. Section 1079b addresses charges for civilian patients who are not normally beneficiaries of the Military Health System. This part establishes the Department of Defense interpretations and requirements applicable to all healthcare services subject to 10 U.S.C. 1095, 1097b(b), and 1079b.

(b) This part applies to all facilities of the Uniformed Services; the Department of Transportation administers this part with respect to facilities to the Coast Guard, not the Department of Defense.

(c) This part applies to pathology services provided by the Armed Forces Institute of Pathology. However, in lieu of the rules and procedures otherwise applicable under this part, the Assistant Secretary of Defense (Health Affairs) may establish special rules and procedures under the authority of 10 U.S.C. 176 and 177 in relation to cooperative enterprises between the Armed Forces Institute of Pathology and the American Registry of Pathology.

[67 FR 57740, Sept. 12, 2002]

### § 220.2 Statutory obligation of third party payer to pay.

(a) *Basic rule*. Pursuant to 10 U.S.C. 1095(a)(1), a third party payer has an obligation to pay the United States the reasonable charges for healthcare services provided in or through any facility of the Uniformed Services to a covered beneficiary who is also a beneficiary under the third party payer's plan. The obligation to pay is to the extent that the beneficiary would be eligible to receive reimbursement or indemnification from the third party payer if the beneficiary were to incur the costs on the beneficiary's own behalf.

(b) *Application of cost shares*. If the third party payer's plan includes a requirement for a deductible or copayment by the beneficiary of the plan, then the amount the United States may collect from the third party payer is the reasonable charge for the care provided less the appropriate deductible or copayment amount.

(c) *Claim from United States exclusive*. The only way for a third party payer to satisfy its obligation under 10 U.S.C. 1095 is to pay the facility of the uniformed service or other authorized representative of the United States. Payment by a third party payer to the beneficiary does not satisfy 10 U.S.C. 1095.

(d) *Assignment of benefits or other submission by beneficiary not necessary*. The obligation of the third party payer to pay is not dependent upon the beneficiary executing an assignment of benefits to the United States. Nor is the obligation to pay dependent upon any other submission by the beneficiary to the third party payer, including any claim or appeal. In any case in which a facility of the Uniformed Services makes a claim, appeal, representation, or other filing under the authority of this part, any procedural requirement in any third party payer plan for the beneficiary of such plan to make the claim, appeal, representation, or other filing must be deemed to be satisfied. A copy of the completed and signed DoD insurance declaration form will be provided to payers upon request, in lieu of a claimant's statement or coordination of benefits form.

(e) *Preemption of conflicting State laws*. Any provision of a law or regulation of a State or political subdivision thereof that purports to establish any requirement on a third party payer that would have the effect of excluding from coverage or limiting payment, for any health care services for which payment by the third party payer under 10 U.S.C. 1095 or this part is required, is preempted by 10 U.S.C. 1095 and shall have no force or effect in connection with the third party payer's obligations under 10 U.S.C. 1095 or this part.

[55 FR 21748, May 29, 1990, as amended at 57 FR 41101, Sept. 9, 1992; 65 FR 7727, Feb. 16, 2000; 67 FR 57740, Sept. 12, 2002]

### § 220.3 Exclusions impermissible.

(a) *Statutory requirement*. Under 10 U.S.C. 1095(b), no provision of any third party payer's plan having the effect of excluding from coverage or limiting payment for certain care if that care is provided in a facility of the uniformed

services shall operate to prevent collection by the United States.

(b) *General rules.* Based on the statutory requirement, the following are general rules for the administration of 10 U.S.C. 1095 and this part.

(1) Express exclusions or limitations in third party payer plans that are inconsistent with 10 U.S.C. 1095(b) are inoperative.

(2) No objection, precondition or limitation may be asserted that defeats the statutory purpose of collecting from third party payers.

(3) Third party payers may not treat claims arising from services provided in facilities of the uniformed services less favorably than they treat claims arising from services provided in other hospitals.

(4) No objection, precondition or limitation may be asserted that is contrary to the basic nature of facilities of the uniformed services.

(c) *Specific examples of impermissible exclusion.* The following are several specific examples of impermissible exclusions, limitations or preconditions. These examples are not all inclusive.

(1) *Care provided by a government entity.* A provision in a third party payer's plan that purports to disallow or limit payment for services provided by a government entity or paid for by a government program (or similar exclusion) is not a permissible ground for refusing or reducing third party payment.

(2) *No obligation to pay.* A provision in a third party payer's plan that purports to disallow or limit payment for services for which the patient has no obligation to pay (or similar exclusion) is not a permissible ground for refusing or reducing third party payment.

(3) *Exclusion of military beneficiaries.* No provision of an employer sponsored program or plan that purports to make ineligible for coverage individuals who are uniformed services health care beneficiaries shall be permissible.

(4) *No participation agreement.* The lack of a participation agreement or the absence of privity of contract between a third party payer and a facility of the uniformed services is not a permissible ground for refusing or reducing third party payment.

(5) *Medicare carve-out and Medicare secondary payer provisions.* A provision in a third party payer plan, other than a Medicare supplemental plan under § 220.10, that seeks to make Medicare the primary payer and the plan the secondary payer or that would operate to carve out of the plan's coverage an amount equivalent to the Medicare payment that would be made if the services were provided by a provider to whom payment would be made under Part A or Part B of Medicare is not a permissible ground for refusing or reducing payment as the primary payer to the facility of the Uniformed Services by the third party payer unless the provision:

(i) Expressly disallows payment as the primary payer to all providers to whom payment would not be made under Medicare (including payment under Part A, Part B, a Medicare HMO, or a Medicare+Choice plan); and

(ii) Is otherwise in accordance with applicable law.

[55 FR 21748, May 29, 1990, as amended at 57 FR 41101, Sept. 9, 1992; 65 FR 7728, Feb. 16, 2000]

### § 220.4 Reasonable terms and conditions of health plan permissible.

(a) *Statutory requirement.* The statutory obligation of the third party to pay is not unqualified. Under 10 U.S.C. 1095(a)(1) (as noted in § 220.2 of this part), the obligation to pay is to the extent the third party payer would be obliged to pay if the beneficiary incurred the costs personally.

(b) *General rules.* (1) Based on the statutory requirement, after any impermissible exclusions have been made inoperative (see § 220.3 of this part), reasonable terms and conditions of the third party payer's plan that apply generally and uniformly to services provided in facilities other than facilities of the uniformed services may also be applied to services provided in facilities of the uniformed services.

(2) Except as provided by 10 U.S.C. 1095, this part, or other applicable law, third party payers are not required to treat claims arising from services provided in or through facilities of the Uniformed Services more favorably than they treat claims arising from services provided in other facilities or by other health care providers.

(c) *Specific examples of permissible terms and conditions.* The following are several specific examples of permissible terms and conditions of third party payer plans. These examples are not all inclusive.

(1) *Generally applicable coverage provisions.* Generally applicable provisions regarding particular types of medical care or medical conditions covered by the third party payer's plan are permissible grounds to refuse or limit third party payment.

(2) *Generally applicable utilization review provisions.* (i) Reasonable and generally applicable provisions of a third party payer's plan requiring pre-admission screening, second surgical opinions, retrospective review or other similar utilization management activities may be permissible grounds to refuse or reduce third party payment if such refusal or reduction is required by the third party payer's plan.

(ii) Such provisions are not permissible if they are applied in a manner that would result in claims arising from services provided by or through facilities of the Uniformed Services being treated less favorably than claims arising from services provided by other hospitals or providers.

(iii) Such provisions are not permissible if they would not affect a third party payer's obligation under this part. For example, concurrent review of an inpatient hospitalization would generally not affect the third party payer's obligation because of the DRG-based, per-admission basis for calculating reasonable charges under § 220.8(a) (except in long stay outlier cases, noted in § 220.8(a)(4)).

(3) *Restrictions in HMO plans.* Generally applicable exclusions in Health Maintenance Organization (HMO) plans of non-emergency or non-urgent services provided outside the HMO (or similar exclusions) are permissible. However, HMOs may not exclude claims or refuse to certify emergent and urgent services provided within the HMO's service area or otherwise covered non-emergency services provided out of the HMO's service area. In addition, opt-out or point-of-service options available under an HMO plan may not exclude services otherwise payable under 10 U.S.C. 1095 or this part.

(d) *Procedures for establishing reasonable terms and conditions.* In order to establish that a term or condition of a third party payer's plan is permissible, the third party payer must provide appropriate documentation to the facility of the Uniformed Services. This includes, when applicable, copies of explanation of benefits (EOBs), remittance advice, or payment to provider forms. It also includes copies of policies, employee certificates, booklets, or handbooks, or other documentation detailing the plan's health care benefits, exclusions, limitations, deductibles, co-insurance, and other pertinent policy or plan coverage and benefit information.

[55 FR 21748, May 29, 1990, as amended at 65 FR 7728, Feb. 16, 2000; 67 FR 57740, Sept. 12, 2002]

### § 220.5 Records available.

Pursuant to 10 U.S.C. 1095(c), facilities of the uniformed services, when requested, shall make available to representatives of any third party payer from which the United States seeks payment under 10 U.S.C. 1095 for inspection and review appropriate health care records (or copies of such records) of individuals for whose care payment is sought. Appropriate records which will be made available are records which document that the services which are the subject of the claims for payment under 10 U.S.C. 1095 were provided as claimed and were provided in a manner consistent with permissible terms and conditions of the third party payer's plan. This is the sole purpose for which patient care records will be made available. Records not needed for this purpose will not be made available.

### § 220.6 Certain payers excluded.

(a) *Medicare and Medicaid.* Under 10 U.S.C. 1095(d), claims for payment from the Medicare or Medicaid programs (titles XVIII and XIX of the Social Security Act) are not authorized.

(b) *Supplemental plans.* CHAMPUS (see 32 CFR part 199) supplemental plans and income supplemental plans are excluded from any obligation to pay under 10 U.S.C. 1095.

(c) *Third party payer plans prior to April 7, 1986.* 10 U.S.C. 1095 is not applicable to third party payer plans which have been in continuous effect without amendment or renewal since prior to April 7, 1986. Plans entered into, amended or renewed on or after April 7, 1986, are subject to 10 U.S.C. 1095.

(d) *Third party payer plans prior to November 5, 1990, in connection with outpatient care.* The provisions of 10 U.S.C. 1095 and this section concerning outpatient services are not applicable to third party payer plans:

(1) That have been in continuous effect without amendment or renewal since prior to November 5, 1990; and

(2) For which the facility of the Uniformed Services or other authorized representative for the United States makes a determination, based on documentation provided by the third party payer, that the policy or plan clearly excludes payment for such services. Plans entered into, amended or renewed on or after November 5, 1990, are subject to this section, as are prior plans that do not clearly exclude payment for services covered by this section.

[55 FR 21748, May 29, 1990, as amended at 57 FR 41101, Sept. 9, 1992]

### § 220.7 Remedies and procedures.

(a) Pursuant to 10 U.S.C. 1095(e)(1), the United States may institute and prosecute legal proceedings against a third party payer to enforce a right of the United States under 10 U.S.C. 1095 and this part.

(b) Pursuant to 10 U.S.C. 1095(e)(2), an authorized representative of the United States may compromise, settle or waive a claim of the United States under 10 U.S.C. 1095 and this part.

(c) The authorities provided by 31 U.S.C. 3701, *et seq.*, 28 CFR part 11, and 4 CFR parts 101–104 regarding collection of indebtedness due the United States shall be available to effect collections pursuant to 10 U.S.C. 1095 and this part.

(d) A third party payer may not, without the consent of a U.S. Government official authorized to take action under 10 U.S.C. 1095 and this part, offset or reduce any payment due under 10 U.S.C. 1095 or this part on the grounds that the payer considers itself due a refund from a facility of the Uniformed Services. A request for refund must be submitted and adjudicated separately from any other claims submitted to the third party payer under 10 U.S.C. 1095 or this part.

[55 FR 21748, May 29, 1990, as amended at 65 FR 7728, Feb. 16, 2000]

### § 220.8 Reasonable charges.

(a) *In general.* (1) Section 1095(f) and section 1097b(b) both address the issue of computation of rates. Between them, the effect is to authorize the calculation of all third party payer collections on the basis of reasonable charges and the computation of reasonable charges on the basis of per diem rates, all-inclusive per-visit rates, diagnosis related groups rates, rates used by the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS) program to reimburse authorized providers, or any other method the Assistant Secretary of Defense (Health Affairs) considers appropriate and establishes in this part. Such rates, representative of costs, are also endorsed by section 1079(a).

(2) The general rule is that reasonable charges under this part are based on the rates used by CHAMPUS under 32 CFR 199.14 to reimburse authorized providers. There are some exceptions to this general rule, as outlined in this section.

(b) *Inpatient institutional and professional services on or after October 1, 2017.* Reasonable charges for inpatient institutional services provided on or after October 1, 2017, are based on either of two methods as determined by the ASD(HA). The first uses the CHAMPUS Diagnosis Related Group (DRG) payment system rates under 32 CFR 199.14(a)(1). Certain adjustments are made to reflect differences between the CHAMPUS payment system and MHS billing solutions. Among these are to include in the inpatient hospital service charges adjustments related to direct medical education and capital costs (which in the CHAMPUS system are handled as annual pass through payments). Additional adjustments are made for long stay outlier cases. The second method uses Itemized Resource Utilization (IRU) rates based on the cost to provide inpatient institutional

resources. Like the CHAMPUS system, inpatient professional services are not included in the inpatient institutional services charges calculated under either methodology, but are billed separately in accordance with paragraph (e) of this section. In lieu of either method described in this paragraph (b), the method in effect prior to April 1, 2003 (described in paragraph (c) of this section), may continue to be used for a period of time after April 1, 2003, if the ASD(HA) determines that effective implementation requires a temporary deferral.

(c) *Inpatient hospital and inpatient professional services before April 1, 2003*—(1) *In general.* Prior to April 1, 2003, the computation of reasonable charges for inpatient institutional and professional services is reasonable costs based on diagnosis related groups (DRGs). Costs shall be based on the inpatient full reimbursement rate per hospital discharge, weighted to reflect the intensity of the principal diagnosis involved. The average charge per case shall be published annually as an inpatient standardized amount. A relative weight for each DRG shall be the same as the DRG weights published annually for hospital reimbursement rates under CHAMPUS pursuant to 32 CFR 199.14(a)(1). The method in effect prior to April 1, 2003 (as described in this paragraph (c)), may continue to be used for a period of time after April 1, 2003, if the ASD(HA) determines that effective implementation requires a temporary deferral of the method described in paragraph (b) of this section.

(2) *Standard amount.* The standard amount is determined by dividing the total costs of all inpatient care in all military treatment facilities by the total number of discharges. This produces a single national standardized amount. The Department of Defense is authorized, but not required by this part, to calculate three standardized amounts, one for large urban, other urban/rural, and overseas area, utilizing the same distinctions in identifying the first two areas as is used for CHAMPUS under 32 CFR 199.14(a)(1). Using this applicable standardized amount, the Department of Defense may make adjustments for area wage rates and indirect medical education costs (as identified in paragraph (c)(4) of this section), producing for each inpatient facility of the Uniformed Services a facility-specific ''adjusted standardized amount'' (ASA).

(3) *DRG relative weights.* Costs for each DRG will be determined by multiplying the standardized amount per discharge by the DRG relative weight. For this purpose, the DRG relative weights used for CHAMPUS pursuant to 32 CFR 199.14(a)(1) shall be used.

(4) *Adjustments for outliers, area wages, and indirect medical education.* The Department of Defense may, but is not required by this part, to adjust charge determinations in particular cases for length-of-stay outliers (long stay and short stay), cost outliers, area wage rates, and indirect medical education. If any such adjustments are used, the method shall be comparable to that used for CHAMPUS hospital reimbursements pursuant to 32 CFR 199.14(a)(1)(iii)(E), and the calculation of the standardized amount under paragraph (a)(2) of this section will reflect that such adjustments will be used.

(5) *Identification of professional and institutional charges.* For purposes of billing third party payers other than automobile liability and no-fault insurance carriers, inpatient billings are subdivided into two categories:

(i) Institutional charges (which refer to routine service charges associated with the facility encounter or hospital stay and ancillary charges).

(ii) Professional charges (which refers to professional services provided by physicians and certain other providers).

(d) *Medical services and subsistence charges included.* Medical services charges pursuant to 10 U.S.C. 1078 or subsistence charges pursuant to 10 U.S.C. 1075 are included in the claim filed with the third party payer pursuant to 10 U.S.C. 1095. For any patient of a facility of the Uniformed Services who indicates that he or she is a beneficiary of a third party payer plan, the usual medical services or subsistence charge will not be collected from the patient to the extent that payment received from the payer exceeds the medical services or subsistence charge. Thus, except in cases covered by § 220.8(k), payment of the claim made

pursuant to 10 U.S.C. 1095 which exceeds the medical services or subsistence charge, will satisfy all of the third party payer's obligation arising from the care provided by the facility of the Uniformed Services on that occasion.

(e) *Reasonable charges for professional services.* The CHAMPUS Maximum Allowable Charge rate table, established under 32 CFR 199.14(h), is used for determining the appropriate charge for professional services in an itemized format, based on Healthcare Common Procedure Coding System (HCPCS) methodology. This applies to outpatient professional charges only prior to implementation of the method described in paragraph (b) of this section, and to all professional charges, both inpatient and outpatient, thereafter.

(f) *Miscellaneous Healthcare services.* Some special services are provided by or through facilities of the Uniformed Services for which reasonable charges are computed based on reasonable costs. Those services are the following:

(1) The charge for ambulance services is based on the full costs of operating the ambulance service.

(2) With respect to inpatient institutional charges in the Burn Center at Brooke Army Medical Center, the ASD(HA) may establish an adjustment to the rate otherwise applicable under the payment methodologies under this section to reflect unique attributes of the Burn Center.

(3) Charges for dental services (including oral diagnosis and prevention, periodontics, prosthodontics (fixed and removable), implantology, oral surgery, orthodontics, pediatric dentistry and endodontics) will be based on a full cost of the dental services.

(4) With respect to service provided prior to January 1, 2003, reasonable charges for anesthesia services will be based on an average DoD cost of service in all Military Treatment Facilities. With respect to services provided on or after January 1, 2003, reasonable charges for anesthesia services will be based on an average cost per minute of service in all Military Treatment Facilities.

(5) The charge for immunizations, allergen extracts, allergic condition tests, and the administration of certain medications when these services are provided by or through a facility of the Uniformed Services or a separate immunizations or shot clinic, are based either on CHAMPUS prevailing rates or on IRU rates based on the cost to provide these items, exclusive of any costs considered for purposes of any outpatient visit. A separate charge shall be made for each immunization, injection or medication administered.

(6) The charges for pharmacy, durable medical equipment and supply resources are based either on CHAMPUS prevailing rates or on IRU rates based on the cost to provide these items, exclusive of any costs considered for purposes of any outpatient visit. A separate charge shall be made for each item provided.

(7) Charges for aero-medical evacuation will be based on the full cost of the aero-medical evacuation services.

(8) Ambulatory (outpatient) institutional services on or after October 1, 2017. Reasonable charges for institutional facility charges for ambulatory services provided on or after October 1, 2017, are based on any of three methods as determined by the ASD(HA). The first uses the CHAMPUS Ambulatory Payment Classification (APC) and Ambulatory Surgery Center (ASC) payment system rates under 32 CFR 199.14(a)(1)(ii) and (iii) and 32 CFR 199.14(d) respectively. The second uses a bundled MHS Ambulatory Procedure Visit (APV) payment system rate charge reflected by the average cost of providing an APV exclusive of professional services. The third method uses IRU rates based on the cost to provide ambulatory institutional resources. Like the CHAMPUS system, ambulatory professional services are not included in the ambulatory institutional facility charges calculated under any of the three methodologies, but are billed separately in accordance with paragraph (e) of this section.

(g) *Special rule for services ordered and paid for by a facility of the Uniformed Services but provided by another provider.* In cases where a facility of the Uniformed Services purchases ancillary services or procedures, from a source other than a Uniformed Services facility, the cost of the purchased services will be added to the standard rate. Examples of ancillary services and other

procedures covered by this special rule include (but are not limited to): laboratory, radiology, pharmacy, pulmonary function, cardiac catheterization, hemodialysis, hyperbaric medicine, electrocardiography, electroencephalography, electroneuromyography, pulmonary function, inhalation and respiratory therapy and physical therapy services.

(h) *Special rule for TRICARE Resource Sharing Agreements.* Services provided in facilities of the Uniformed Services in whole or in part through personnel or other resources supplied under a TRICARE Resource Sharing Agreement under 32 CFR 199.17(h) are considered for purposes of this part as services provided by the facility of the Uniformed Services. Thus, third party payers will receive a claim for such services in the same manner and for the same charges as any similar services provided by a facility of the Uniformed Services.

(i) *Alternative determination of reasonable charges.* Any third party payer that can satisfactorily demonstrate a prevailing rate of payment in the same geographic area for the same or similar aggregate groups of services that is less than the charges prescribed under this section may, with the agreement of the facility of the Uniformed Services (or other authorized representatives of the United States), limit payments under 10 U.S.C. 1095 to that prevailing rate for those services. The determination of the third party payer's prevailing rate shall be based on a review of valid contractual arrangements with other facilities or providers constituting a majority of the services for which payment is made under the third party payer's plan. This paragraph does not apply to cases covered by § 220.11.

(j) *Exception authority for extraordinary circumstances.* The Assistant Secretary of Defense (Health Affairs) may authorize exceptions to this section, not inconsistent with law, based on extraordinary circumstances.

[57 FR 41101, Sept. 9, 1992, as amended at 59 FR 49002, Sept. 26, 1994; 61 FR 6542, Feb. 21, 1996; 62 FR 941, Jan. 7, 1997; 65 FR 7728, Feb. 16, 2000; 67 FR 57740, Sept. 12, 2002; 85 FR 51351, Aug. 20, 2020]

## § 220.9 Rights and obligations of beneficiaries.

(a) *No additional cost share.* Pursuant to 10 U.S.C. 1095(a)(2), uniformed services beneficiaries will not be required to pay to the facility of the uniformed services any amount greater than the normal medical services or subsistence charges (under 10 U.S.C. 1075 or 1078). In every case in which payment from a third party payer is received, it will be considered as satisfying the normal medical services or subsistence charges, and no further payment from the beneficiary will be required.

(b) *Availability of healthcare services unaffected.* The availability of healthcare services in any facility of the Uniformed Services will not be affected by the participation or nonparticipation of a Uniformed Services beneficiary in a health care plan of a third party payer. Whether or not a Uniformed Services beneficiary is covered by a third party payer's plan will not be considered in determining the availability of healthcare services in a facility of the Uniformed Services.

(c) *Obligation to disclose information and cooperate with collection efforts.* (1) Uniformed Services beneficiaries are required to provide correct information to the facility of the Uniformed Services regarding whether the beneficiary is covered by a third party payer's plan. Such beneficiaries are also required to provide correct information regarding whether particular health care services might be covered by a third party payer's plan, including services arising from an accident or workplace injury or illness. In the event a third party payer's plan might be applicable, a beneficiary has an obligation to provide such information as may be necessary to carry out 10 U.S.C. 1095 and this part, including identification of policy numbers, claim numbers, involved parties and their representatives, and other relevant information.

(2) Uniformed Services beneficiaries are required to take other reasonable steps to cooperate with the efforts of the facility of the Uniformed Services to make collections under 10 U.S.C. 1095 and this part, such as submitting to the third party payer (or other entity involved in adjudicating a claim) any requests or documentation that

might be required by the third party payer (or other entity), if consistent with this part, to facilitate payment under this part.

(3) Intentionally providing false information or willfully failing to satisfy a beneficiary's obligations are grounds for disqualification for health care services from facilities of the Uniformed Services.

(d) *Mandatory disclosure of Social Security account numbers.* Pursuant to 10 U.S.C. 1095(k)(2), every covered beneficiary eligible for care in facilities of the Uniformed Services is, as a condition of eligibility, required to disclose to authorized personnel his or her Social Security account number.

[55 FR 21748, May 29, 1990, as amended at 57 FR 41102, Sept. 9, 1992; 63 FR 11600, Mar. 10, 1998; 65 FR 7729, Feb. 16, 2000]

### § 220.10 Special rules for Medicare supplemental plans.

(a) *Statutory obligation of Medicare supplemental plans to pay.* The obligation of a Medicare supplemental plan to pay shall be determined as if the facility of the Uniformed Services were a medicare-eligible provider and the services provided as if they were Medicare-covered services. A Medicare supplemental plan is required to pay only to the extent that the plan would have incurred a payment obligation if the services had been furnished by a Medicare eligible provider.

(b) *Inpatient hospital care charges.* (1) Notwithstanding the provisions of § 220.8, charges to Medicare supplemental plans for inpatient hospital care services provided to beneficiaries of such plans shall not, for any admission, exceed the Medicare inpatient hospital deductible amount.

(2) Only one deductible charge shall be made per hospital admission (or Medicare benefit period), regardless of whether the admission is to a facility of the Uniformed Services or a Medicare certified civilian hospital. To ensure that a Medicare supplemental insurer is not charged the inpatient hospital deductible twice when an individual who is entitled to benefits under both DoD retiree benefits and Medicare, the following payment rules apply:

(i) If a dual beneficiary is first admitted to a Medicare-certified hospital and is later admitted to a facility of the Uniformed Services within the same benefit period initiated by the admission to the Medicare-certified hospital, the facility of the Uniformed Services shall not charge the Medicare supplemental insurance plan an inpatient hospital deductible.

(ii) If a dual beneficiary is admitted first to a facility of the Uniformed Services and secondly to a Medicare-certified hospital within 60 days of discharge from the facility of the Uniformed Services, the facility of the Uniformed Services shall refund to the Medicare supplemental insurer any inpatient hospital deductible that the insurer paid to the facility of the Uniformed Services so that it may pay the deductible to the Medicare-certified hospital.

(c) *Charges for Healthcare services other than inpatient deductible amount.* (1) The Assistant Secretary of Defense (Health Affairs) may establish charge amounts for Medicare supplemental plans to collect reasonable charges for inpatient and outpatient copayments and other services covered by the Medicare supplemental plan. Any such schedule of charge amounts shall:

(i) Be based on percentage amounts of the per diem, per visit and other rates established by § 220.8 comparable to the percentage amounts of beneficiary financial responsibility under Medicare for the service involved;

(ii) Include adjustments, as appropriate, to identify major components of the all inclusive per diem or per visit rates for which Medicare has special rules.

(iii) Provide for offsets and/or refunds to ensure that Medicare supplemental insurers are not required to pay a limited benefit more than one time in cases in which beneficiaries receive similar services from both a facility of the uniformed services and a Medicare certified provider; and

(iv) Otherwise conform with the requirements of this section and this part.

(2) If collections are sought under paragraph (c) of this section, the effective date of such collections will be prospective from the date the Assistant

Secretary of Defense (Health Affairs) provides notice of such collections, and will exempt policies in continuous effect without amendment or renewal since the date the Assistant Secretary of Defense (Health Affairs) provides notice of such collections.

(d) *Medicare claim not required.* Notwithstanding any requirement of the Medicare supplemental plan policy, a Medicare supplemental plan may not refuse payment to a claim made pursuant to this section on the grounds that no claim had previously been submitted by the provider or beneficiary for payment under the Medicare program.

(e) *Exclusion of Medicare supplemental plans prior to November 5, 1990.* This section is not applicable to Medicare supplemental plans:

(1) That have been in continuous effect without amendment since prior to November 5, 1990; and

(2) For which the facility of the Uniformed Services (or other authorized representative of the United States) makes a determination, based on documentation provided by the Medicare supplemental plan, that the plan agreement clearly excludes payment for services covered by this section. Plans entered into, amended or renewed on or after November 5, 1990, are subject to this section, as are prior plans that do not clearly exclude payment for services covered by this section.

[57 FR 41102, Sept. 9, 1992, as amended at 59 FR 49003, Sept. 26, 1994; 67 FR 57742, Sept. 12, 2002]

### § 220.11 Special rules for automobile liability insurance and no-fault automobile insurance.

(a) *Active duty members covered.* In addition to Uniformed Services beneficiaries covered by other provisions of this part, this section also applies to active duty members of the Uniformed Services. As used in this section, ''beneficiaries'' includes active duty members.

(b) *Effect of concurrent applicability of the Federal Medical Care Recovery Act*—(1) *In general.* In many cases covered by this section, the United States has a right to collect under both 10 U.S.C. 1095 and the Federal Medical Care Recovery Act (FMCRA), Pub. L. 87–693 (42 U.S.C. 2651 *et seq.*). In such cases, the authority is concurrent and the United States may pursue collection under both statutory authorities.

(2) *Cases involving tort liability.* In cases in which the right of the United States to collect from the automobile liability insurance carrier is premised on establishing some tort liability on some third person, matters regarding the determination of such tort liability shall be governed by the same substantive standards as would be applied under the FMCRA including reliance on state law for determinations regarding tort liability. In addition, the provisions of 28 CFR part 43 (Department of Justice regulations pertaining to the FMCRA) shall apply to claims made under the concurrent authority of the FMCRA and 10 U.S.C. 1095. All other matters and procedures concerning the right of the United States to collect shall, if a claim is made under the concurrent authority of the FMCRA and this section, be governed by 10 U.S.C. 1095 and this part.

(c) *Exclusion of automobile liability insurance and no-fault automobile insurance plans prior to November 5, 1990.* This section is not applicable to automobile liability insurance and no-fault automobile insurance plans:

(1) That have been in continuous effect without amendment since prior to November 5, 1990; and

(2) For which the facility of the Uniformed Services (or other authorized representative of the United States) makes a determination, based on documentation provided by the third party payer, that the policy or plan clearly excludes payment for services covered by this section. Plans entered into, amended or renewed on or after November 5, 1990, are subject to this section, as are prior plans that do not clearly exclude payment for services covered by this section.

[57 FR 41103, Sept. 9, 1992]

### § 220.12 [Reserved]

### § 220.13 Special rules for workers' compensation programs.

(a) *Basic rule.* Pursuant to the general duty of third party payers under 10 U.S.C. 1095(a)(1) and the definitions of

10 U.S.C. 1095(h), a workers' compensation program or plan generally has an obligation to pay the United States the reasonable charges for healthcare services provided in or through any facility of the Uniformed Services to a Uniformed Services beneficiary who is also a beneficiary under a workers' compensation program due to an employment related injury, illness, or disease. Except to the extent modified or supplemented by this section, all provisions of this part are applicable to any workers' compensation program or plan in the same manner as they are applicable to any other third party payer.

(b) *Special rules for lump-sum settlements.* In cases in which a lump-sum workers' compensation settlement is made, the special rules established in this paragraph (b) shall apply for purposes of compliance with this section.

(1) *Lump-sum commutation of future benefits.* If a lump-sum worker's compensation award stipulates that the amount paid is intended to compensate the individual for all future medical expenses required because of the work-related injury, illness, or disease, the Uniformed Service health care facility is entitled to reimbursement for injury, illness, or disease related, future health care services or items rendered or provided to the individual up to the amount of the lump-sum payment.

(2) *Lump-sum compromise settlement.* (i) A lump sum compromise settlement, unless otherwise stipulated by an official authorized to take action under 10 U.S.C. 1095 and this part, is deemed to be a workers' compensation payment for the purpose of reimbursement to the facility of the Uniformed Services for services and items provided, even if the settlement agreement stipulates that there is no liability under the workers' compensation law, program, or plan.

(ii) If a settlement appears to represent an attempt to shift to the facility of the Uniformed Services the responsibility of providing uncompensated services or items for the treatment of the work-related condition, the settlement will not be recognized and reimbursement to the uniformed health care facility will be required. For example, if the parties to a settlement attempt to maximize the amount of disability benefits paid under workers' compensation by releasing the employer or workers' compensation carrier from liability for medical expenses for a particular condition even though the facts show that the condition is work-related, the facility of the Uniformed Services must be reimbursed.

(iii) Except as specified in paragraph (b)(2)(iv) of this section, if a lump-sum compromise settlement forecloses the possibility of future payment or workers' compensation benefits, medical expenses incurred by a facility of the Uniformed Services after the date of the settlement are not reimbursable under this section.

(iv) As an exception to the rule of paragraph (b)(2)(iii) of this section, if the settlement agreement allocates certain amounts for specific future medical services, the facility of the Uniformed Services is entitled to reimbursement for those specific services and items provided resulting from the work-related injury, illness, or disease up to the amount of the lump-sum settlement allocated to future expenses.

(3) *Apportionment of a lump-sum compromise settlement of a workers' compensation claim.* If a compromise settlement allocates a portion of the payment for medical expenses and also gives reasonable recognition to the income replacement element, that apportionment may be accepted as a basis for determining the payment obligation of a workers' compensation program or plan under this section to a facility of the Uniformed Services. If the settlement does not give reasonable recognition to both elements of a workers' compensation award or does not apportion the sum granted, the portion to be considered as payment for medical expenses is computed as follows: determine the ratio of the amount awarded (less the reasonable and necessary costs incurred in procuring the settlement) to the total amount that would have been payable under workers' compensation if the claim had not been compromised; multiply that ratio by the total medical expenses incurred as a result of the injury or disease up to the date of settlement. The product is the amount of workers' compensation settlement to

be considered as payment or reimbursement for medical expenses.

[65 FR 7730, Feb. 16, 2000, as amended at 67 FR 57742, Sept. 12, 2002]

### § 220.14 Definitions.

*Ambulatory procedure visit.* An ambulatory procedure visit is a type of outpatient visit in which immediate (day of procedure) pre-procedure and immediate post-procedure care require an unusual degree of intensity and are provided in an ambulatory procedure unit (APU) of the facility of the Uniformed Services. Care is required in the facility for less than 24 hours. An APU is specially designated and is accounted for separately from any outpatient clinic.

*Assistant Secretary of Defense (Health Affairs).* This term includes any authorized designee of the Assistant Secretary of Defense (Health Affairs).

*Automobile liability insurance.* Automobile liability insurance means insurance against legal liability for health and medical expenses resulting from personal injuries arising from operation of a motor vehicle. Automobile liability insurance includes:

(1) Circumstances in which liability benefits are paid to an injured party only when the insured party's tortious acts are the cause of the injuries; and

(2) Uninsured and underinsured coverage, in which there is a third party tortfeasor who caused the injuries (i.e., benefits are not paid on a no-fault basis), but the insured party is not the tortfeasor.

*CHAMPUS supplemental plan.* A CHAMPUS supplemental plan is an insurance, medical service or health plan exclusively for the purpose of supplementing an eligible person's benefit under CHAMPUS. (For information concerning CHAMPUS, see 32 CFR part 199.) The term has the same meaning as set forth in the CHAMPUS regulation (32 CFR 199.2).

*Covered beneficiaries.* Covered beneficiaries are all healthcare beneficiaries under chapter 55 of title 10, United States Code, except members of the Uniformed Services on active duty (as specified in 10 U.S.C. 1074(a)). However, for purposes of § 220.11 of this part, such members of the Uniformed Services are included as covered beneficiaries.

*Facility of the Uniformed Services.* A facility of the Uniformed Services means any medical or dental treatment facility of the Uniformed Services (as that term is defined in 10 U.S.C. 101(43)). Contract facilities such as Navy NAVCARE clinics and Army and Air Force PRIMUS clinics that are funded by a facility of the Uniformed Services are considered to operate as an extension of the local military treatment facility and are included within the scope of this program. Facilities of the Uniformed Services also include several former Public Health Services facilities that are deemed to be facilities of the Uniformed Services pursuant to section 911 of Pub. L. 97–99 (often referred to as ''Uniformed Services Treatment Facilities'' or ''USTFs'').

*Healthcare services.* Healthcare services include inpatient, outpatient, and designated high-cost ancillary services.

*Inpatient hospital care.* Treatment provided to an individual other than a transient patient, who is admitted (i.e., placed under treatment or observation) to a bed in a facility of the uniformed services that has authorized beds for inpatient medical or dental care.

*Insurance, medical service or health plan.* Any plan (including any plan, policy, program, contract, or liability arrangement) that provides compensation, coverage, or indemnification for expenses incurred by a beneficiary for health or medical services, items, products, and supplies. It includes but is not limited to:

(1) Any plan offered by an insurer, reinsurer, employer, corporation, organization, trust, organized health care group or other entity.

(2) Any plan for which the beneficiary pays a premium to an issuing agent as well as any plan to which the beneficiary is entitled as a result of employment or membership in or association with an organization or group.

(3) Any Employee Retirement Income and Security Act (ERISA) plan.

(4) Any Multiple Employer Trust (MET).

(5) Any Multiple Employer Welfare Arrangement (MEWA).

(6) Any Health Maintenance Organization (HMO) plan, including any such plan with a point-of-service provision or option.

(7) Any individual practice association (IPA) plan.

(8) Any exclusive provider organization (EPO) plan.

(9) Any physician hospital organization (PHO) plan.

(10) Any integrated delivery system (IDS) plan.

(11) Any management service organization (MSO) plan.

(12) Any group or individual medical services account.

(13) Any preferred provider organization (PPO) plan or any PPO provision or option of any third party payer plan.

(14) Any Medicare supplemental insurance plan.

(15) Any automobile liability insurance plan.

(16) Any no fault insurance plan, including any personal injury protection plan or medical payments benefit plan for personal injuries arising from the operation of a motor vehicle.

*Medicare eligible provider*. Medicare participating (institutional) providers and physicians, suppliers and other individual providers eligible to participate in the Medicare program.

*Medicare supplemental insurance plan*. A Medicare supplemental insurance plan is an insurance, medical service or health plan primarily for the purpose of supplementing an eligible person's benefit under Medicare. The term has the same meaning as ''Medicare supplemental policy'' in section 1882(g)(1) of the Social Security Act (42 U.S.C. 1395ss) and 42 CFR part 403, subpart B.

*No-fault insurance*. No-fault insurance means an insurance contract providing compensation for health and medical expenses relating to personal injury arising from the operation of a motor vehicle in which the compensation is not premised on who may have been responsible for causing such injury. No-fault insurance includes personal injury protection and medical payments benefits in cases involving personal injuries resulting from operation of a motor vehicle.

*Preferred provider organization*. A preferred provider organization (PPO) is any arrangement in a third party payer plan under which coverage is limited to services provided by a select group of providers who are members of the PPO or incentives (for example, reduced copayments) are provided for beneficiaries under the plan to receive health care services from the members of the PPO rather than from other providers who, although authorized to be paid, are not included in the PPO. However, a PPO does not include any organization that is recognized as a health maintenance organization.

*Third party payer*. A third party payer is any entity that provides an insurance, medical service, or health plan by contract or agreement. It includes but is not limited to:

(1) State and local governments that provide such plans other than Medicaid.

(2) Insurance underwriters or carriers.

(3) Private employers or employer groups offering self-insured or partially self-insured medical service or health plans.

(4) Automobile liability insurance underwriter or carrier.

(5) No fault insurance underwriter or carrier.

(6) Workers' compensation program or plan sponsor, underwriter, carrier, or self-insurer.

(7) Any other plan or program that is designed to provide compensation or coverage for expenses incurred by a beneficiary for healthcare services or products.

*Third party payer plan*. A third party payer plan is any plan or program provided by a third party payer, but not including an income or wage supplemental plan.

*Uniformed Services beneficiary*. For purposes of this part, a Uniformed Services beneficiary is any person who is covered by 10 U.S.C. 1074(b), 1076(a), or 1076(b). For purposes of § 220.11 (but not for other sections), a Uniformed Services beneficiary also includes active duty members of the Uniformed Services.

*Workers' compensation program or plan*. A workers' compensation program or plan is any program or plan that provides compensation for loss, to employees or their dependents, resulting from the injury, disablement, or

death of an employee due to an employment related accident, casualty or disease. The common characteristic of such a plan or program is the provision of compensation regardless of fault, in accordance with a delineated schedule based upon loss or impairment of the worker's wage earning capacity, as well as indemnification or compensation for medical expenses relating to the employment related injury or disease. A workers' compensation program or plan includes any such program or plan:

(1) Operated by or under the authority of any law of any State (or the District of Columbia, American Samoa, Guam, Puerto Rico, and the Virgin Islands).

(2) Operated through an insurance arrangement or on a self-insured basis by an employer.

(3) Operated under the authority of the Federal Employees Compensation Act or the Longshoremen's and Harbor Workers' Compensation Act.

[57 FR 41103, Sept. 9, 1992. Redesignated and amended at 65 FR 7729, 7731, Feb. 16, 2000; 67 FR 57742, Sept. 12, 2002]

## PART 221—DOD IDENTITY MANAGEMENT

Sec.
221.1 Purpose.
221.2 Applicability.
221.3 Definitions.
221.4 Policy.
221.5 Responsibilities.
221.6 Procedures.

AUTHORITY: 10 U.S.C. 1044a.

SOURCE: 83 FR 59304, Nov. 23, 2018, unless otherwise noted.

### § 221.1 Purpose.

(a) The purpose of the overall part is to implement policy, assign responsibilities, and provide procedures for DoD personnel identification.

(b) This part establishes implementation guidelines for DoD Self-Service (DS) Logon Program.

### § 221.2 Applicability.

This part applies to:

(a) The Office of the Secretary of Defense, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security, by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (referred to collectively in this part as the ''DoD Components'').

(b) The Commissioned Corps of the U.S. Public Health Service (USPHS), under agreement with the Department of Health and Human Services, and the National Oceanic and Atmospheric Administration (NOAA), under agreement with the Department of Commerce.

### § 221.3 Definitions.

Unless otherwise noted, the following terms and their definitions are for the purposes of this part:

*Beneficiary*. Individuals affiliated with the DoD and any of the uniformed Services identified in § 221.2 Applicability, that may be eligible for benefits or entitlements.

*Certified copy*. A copy of a document that is certified as a true original and:

(1) Conveys the appropriate seal or markings of the issuer;

(2) Has a means to validate the authenticity of the document by a reference or source number;

(3) Is a notarized legal document or other document approved by a judge advocate, member of any of the armed forces, or other eligible person in accordance with 10 U.S.C. 1044a; or

(4) Has the appropriate certificate of authentication by a U.S. Consular Officer in the foreign country of issuance which attests to the authenticity of the signature and seal.

*DoD beneficiary (DB)*. Beneficiaries who qualify for DoD benefits or entitlements who may be credentialed in accordance with National Institute of Science and Technology Special Publication 800–63–2, ''Electronic Authentication Guideline'' (available at *http://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-63-2.pdf*). This population may include widows, widowers, and eligible former spouses.

*Dependent*. An individual whose relationship to the sponsor leads to entitlement to benefits and privileges.

*DS Logon credential*. A username and password to allow Service members, beneficiaries, and other individuals affiliated with the DoD secure access to self-service websites.

*DS Logon credential holder*. A Service member, beneficiary, and other individual affiliated with the DoD who has applied for and received a DS Logon credential.

*Former member*. An individual who is eligible for, or entitled to, retired pay for non-regular service in accordance with 31 U.S.C. chapter 1223, but who has been discharged from the Service and who maintains no military affiliation.

*Former spouse*. An individual who was married to a uniformed services member for at least 20 years, and the member had at least 20 years of service creditable toward retirement, and the marriage overlapped as follows:

(1) Twenty years marriage, 20 years creditable service for retirement, and 20 years overlap between the marriage and the service (referred to as 20/20/20). The benefits eligibility begins on the date of divorce;

(2) Twenty years marriage, 20 years creditable service for retirement, and 15 years overlap between the marriage and the service (referred to as 20/20/15). The benefits eligibility begins on the date of divorce; or

(3) A spouse whose marriage was terminated from a uniformed Service member who has their eligibility to receive retired pay terminated as a result of misconduct based on Service-documented abuse of the spouse and has 10 years of marriage, 20 years of creditable service for retirement, 10 years of overlap between the marriage and the service (referred to as 10/20/10). The benefits eligibility begins on the date of divorce.

*Legal guardian (LG)*. The terms ''guardian'' and ''conservator'' are used synonymously. Some States may limit the authority of a guardian to specific types of health care decisions; a court may also impose limitations on the health care decisions.

*Surrogate*. A person who has been delegated authority, either by an eligible individual who is at least 18 years of age and mentally competent to consent or by a court of competent jurisdiction in the United States (or possession of the United States), to act on behalf of the eligible individual in a specific role.

*Widow*. The female spouse of a deceased member of the uniformed services.

*Widower*. The male spouse of a deceased member of the uniformed services.

**§ 221.4 Policy.**

In accordance with DoD Instruction 1000.25, ''DoD Personnel Identity Protection (PIP) Program'' (available at *http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/100025p.pdf*), DoD Instruction 1341.02, ''Defense Enrollment Eligibility Reporting System (DEERS) Procedures'' (available at *http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/134102p.pdf*), Office of Management and Budget M–04–04, ''E-Authentication Guidance for Federal Agencies'' (available at *www.whitehouse.gov/sites/default/files/omb/memoranda/fy04/m04-04.pdf*) and 32 CFR part 310, it is DoD policy that DoD will provide a secure means of authentication to PII and personal health information (PHI) for all beneficiaries and other individuals with a continuing affiliation with DoD.

**§ 221.5 Responsibilities.**

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) oversees implementation of the procedures within this part.

(b) Under the authority, direction, and control of the USD(P&R), and in addition to the responsibilities in paragraph (c) of this section, the Director, DoDHRA, through the Director, DMDC:

(1) Approves the addition or elimination of population categories for DS Logon eligibility.

(2) Develops and fields the required Defense Enrollment Eligibility Reporting System (DEERS) and RAPIDS infrastructure and all elements of field support required to support the management of the DS Logon credential including, but not limited to, issuance, storage, maintenance, and customer service.

(3) Obtains and distributes DS Logon credentials, and provides a secure means for delivery.

(c) The DoD Component heads:

(1) Comply with this part and distribute this guidance to applicable stakeholders.

(2) Provide manpower for issuance of DS Logon credentials and instruction for use to all eligible individuals who are requesting a DS Logon credential in conjunction with the issuance of a DoD identification (ID) card or who are applying for a DS Logon credential as a surrogate, when responsible for a DoD ID card site(s).

(d) The Secretaries of the Military Departments, in addition to the responsibilities in paragraph (c) of this section, and the heads of the non-DoD uniformed services:

(1) Comply with this part and distribute this guidance to applicable stakeholders.

(2) Provide manpower for issuance of DS Logon credentials and instruction for use to all eligible individuals who are requesting a DS Logon credential in conjunction with the issuance of a DoD ID card or who are applying for a DS Logon credential as a surrogate.

(3) Ensure all Active Duty, National Guard and Reserve, and Commissioned Corps members of their uniformed services obtain a DS Logon credential when separating from active duty or from the uniformed service.

## § 221.6 Procedures.

(a) *General*. A DS Logon credential will be made available to all beneficiaries that are eligible for DoD-related benefits or entitlements to facilitate secure authentication to critical websites. This includes members of the uniformed services, veterans with a continuing affiliation to the DoD, spouses, dependent children aged 18 and over, and other eligible individuals identified in paragraph (b) of this section.

(b) *Overview*. Only one DS Logon credential may exist for an individual, regardless of the number of affiliations an individual may have to the DoD.

(1) *Eligibility*. Beneficiaries of DoD-related benefits or entitlements and other individuals with a continuing affiliation with the DoD may be eligible for a DS Logon credential. Eligible populations include:

(i) Veterans, including former members, retirees, Medal of Honor recipients, disabled American veterans, and other veterans with a continuing affiliation to the DoD.

(ii) Eligible retired DoD civilian employees in accordance with DoD Instruction 1330.17, ''DoD Commissary Program'' (available at *http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133017p.pdf*), and DoD Instruction 1330.21, ''Armed Services Exchange Regulations'' (available at *http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodi/133021p.pdf*).

(iii) Eligible dependents in accordance with Volume 2 of DoD Manual 1000.13, ''DoD Identification (ID) Cards: Benefits for Members of the Uniformed Services, Their Dependents, and Other Eligible Individuals'' (available at *http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/100013_vol2.pdf*), including spouses, dependent children aged 18 or older, and dependent parents.

(iv) DBs, including eligible widows, widowers, and former spouses, in accordance with Volume 2 of DoD Manual 1000.13.

(v) Surrogates, as described in paragraph (d) of this section.

(vi) Other populations as determined by the Director, DMDC.

(2) [Reserved]

(c) *Lifecycle*—(1) *Application*. Eligible individuals, as identified in paragraph (b)(1) of this section, may apply for a DS Logon credential:

(i) *Online*. Individuals with internet access may apply for a sponsor or dependent DS Logon by submitting a:

(A) *My Access Center website request*. This type of request supports the provisioning of a Basic DS Logon credential. The My Access Center website can be accessed at *https://myaccess.dmdc.osd.mil/*.

(B) *CAC request*. Individuals with a CAC, a computer with internet access and a CAC reader may apply for either a sponsor or a dependent DS Logon credential via the My Access Center website or any application that has implemented DS Logon.

(*1*) A sponsor DS Logon credential is provisioned immediately upon request.

This type of request supports the provisioning of a Premium DS Logon credential.

(*2*) A request for a DS Logon credential on behalf of a dependent generates an activation letter with an activation code that is mailed to the sponsor at his or her home address in DEERS. Once complete, this type of request supports the provisioning of a Premium DS Logon credential.

(C) *Request using a Defense Finance and Accounting Services (DFAS) myPay account*. Eligible individuals may apply for a sponsor or dependent DS Logon credential using a DFAS myPay personal identification number via the My Access Center website. A request for a DS Logon credential generates an activation letter with an activation code that is mailed to the sponsor at his or her home address in DEERS. Once complete, this type of request supports the provisioning of a Premium DS Logon credential.

(ii) *Via remote proofing*. Eligible individuals with an existing DEERS record may apply for a sponsor or dependent DS Logon credential using remote proofing via the My Access Center website. Individuals requesting a DS Logon credential via remote proofing must correctly answer a number of system-generated questions. Once remote proofing is completed, a Premium DS Logon credential is provisioned immediately.

(iii) *Via in-person proofing*. Eligible individuals may apply for a sponsor or dependent DS Logon credential using in-person proofing. In-person proofing is performed at Department of Veterans Affairs regional offices where the DS access station application is implemented, and at DoD ID card sites when a DS Logon credential is requested either in conjunction with DoD ID card issuance or during initial enrollment of a surrogate. Once in-person proofing is completed, a Premium DS Logon credential is provisioned immediately. Individuals requesting a DS Logon credential via in-person proofing must present:

(A) *Identity documents*. DS Logon credential applicants must satisfy the identity verification criteria in paragraph 4a of Volume 1 of DoD Manual 1000.13, ''DoD Identification (ID) Cards: ID Card Life-Cycle'' (available at *http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/100013_vol1.pdf*), by presenting two forms of government-issued ID, one of which must contain a photograph. The requirement for the primary ID to have a photo cannot be waived. Identity documents must be original or a certified copy. All documentation not in English must have a certified English translation.

(B) *Proof of address*. DS Logon credential applicants must present proof of address, if address on the presented ID is different than the address in DEERS.

(C) *DD Form 214, ''Certificate of Release or Discharge from Active Duty.''* DS Logon credential applicants must present a DD Form 214 if a veteran who was separated before 1982. If separated from the Reserve Component, a DS Logon credential applicant may present a Reserve Component separation document in lieu of a DD Form 214.

(2) *Use*. DS Logon credential holders may use their DS Logon credential at the My Access Center website and any other DoD self-service website that accepts DS Logon.

(3) *Maintenance*. DS Logon credential holders may use the My Access Center website to maintain and update their DS Logon credential and manage their personal settings. The DS Logon credential holder may:

(i) Activate or deactivate an account.

(ii) Reset password.

(iii) Update challenge questions and answers.

(iv) Upgrade from a Basic DS Logon to a Premium DS Logon credential.

(v) Select or update preferred sponsor, if a dependent of two sponsors.

(vi) Manage personal and advanced security settings.

(vii) Manage contact information.

(viii) Manage relationships and access granting.

(ix) Manage the DS Logon credential using additional capabilities as implemented by the Director, DMDC.

(4) *Decommissioning*. DS Logon credentials may be decommissioned by the DS Logon credential holder, via self-service; by an operator, at the request of the DS Logon credential holder; or by the system, when the credential holder no longer has an affiliation

to the DoD or is identified as deceased in DEERS.

(5) *Reactivation*. DS Logon credentials may be reactivated if the person is living and still eligible for the credential.

(d) *Associations*. DS Logon supports several types of associations, including DEERS-identified family relationships and operator-initiated and -approved surrogates.

(1) *Family*. Individuals are connected to one another based on their family relationship information in DEERS. A family relationship must exist in DEERS before the relationship can exist in DS Logon.

(i) *Multiple sponsors*. An individual has only one DS Logon credential, regardless of the number of sponsors the individual has (*e.g.*, a dependent child whose parents are both Service members).

(ii) *Transferring families*. If an individual has a second family in DEERS, the individual can move their DS Logon credential to the second family. This changes the assignment of the DS Logon credential from the first family to the second family and removes any granted permissions from the first family.

(2) *Surrogacy*. Surrogacy is a feature that allows an individual who may not be affiliated with the DoD and who may not be related to the DS Logon credential holder or eligible individual by a DoD-recognized family relationship to be granted access to a DS Logon credential holder's or an eligible individual's information. A surrogate may be established as the custodian of a deceased Service member's unmarried minor child(ren) who is under 18, who is at least 18 but under 23 and attending school full-time, or who is incapacitated. A surrogate may also be established as the agent of an incapacitated dependent (*e.g.*, spouse, parent) or of a wounded, ill, or incapacitated Service member.

(i) *Eligibility*. An operator must first establish an identity in DEERS before establishing the surrogacy association in DS Logon. To establish a surrogate association, the surrogate must present to an operator for approval:

(A) A completed and signed DD Form 3005, ''Application for Surrogate Association for DoD Self-Service (DS) Logon.''

(B) Any additional eligibility documents required by the DD Form 3005 which describe the scope of the surrogate's authority.

(C) Proof of identity, in accordance with the requirements for in-person proofing in paragraph (c)(1)(iii) of this section.

(ii) *Types of surrogates*—(A) *Financial agent (FA)*. An eligible individual names an FA to assist with specific financial matters.

(B) *Legal agent (LA)*. An eligible individual names an LA to assist with legal matters.

(C) *Caregiver (CG)*. An eligible individual names a CG to assist with general health care requirements (example, viewing general health-care related information, scheduling appointments, refilling prescriptions, and tracking medical expenses), but does not make health care decisions.

(D) *Health care agent (HA)*. An eligible individual (the patient) names an HA in a durable power of attorney for health care documents to make health care decisions.

(E) *Legal guardian (LG)*. An LG is appointed by a court of competent jurisdiction in the United States (or jurisdiction of the United States) to make legal decisions for an eligible individual.

(F) *Special guardian (SG)*. An SG is appointed by a court of competent jurisdiction in the United States (or jurisdiction of the United States) for the specific purpose of making health care-related decisions for an eligible individual.

(e) *Permissions*. A sponsor, a sponsor's spouse, and a sponsor's dependent over the age of 18 can manage who has access to their information (*i.e.*, who has access to view and edit their information and who is eligible to act on their behalf). The provisions of this section may be superseded by order of a court of competent jurisdiction.

(1) *Sponsor access*. Sponsors will automatically have access to the information of all dependents under the age of 18.

(2) *Spousal access*—(i) *Automatic*. A sponsor's spouse will automatically have access to the information of all

dependent children under the age of 18 whose relationship to the sponsor began on or after the date of marriage of the sponsor and sponsor's spouse.

(ii) *Sponsor-granted.* The sponsor may grant the sponsor's spouse access to the information of dependent children under the age of 18 whose relationship to the sponsor began before the date of marriage of the sponsor and the sponsor's spouse.

(3) *Granted access.* A sponsor, a sponsor's spouse, and a sponsor's dependent over the age of 18 may grant access to their information via the My Access Center website in accordance with paragraph (c)(3) of this section. Surrogate access to the information of a sponsor, a sponsor's spouse, and a sponsor's dependent (regardless of age) must be granted via in-person proofing, including the submission of eligibility documents to an operator for approval in accordance with paragraph (d)(2) of this section.

(i) *Access granting by a sponsor.* Sponsors may grant their spouse access to the sponsor's information and the information of any sponsor's dependents under the age of 18. Access to the sponsor's information and the information of any sponsor's dependents under the age of 18 may not be granted to any other sponsor's dependent, unless that dependent has been identified as a surrogate.

(ii) *Access granting by a spouse.* Spouses may grant the sponsor access to the spouse's information. Access to the spouse's information may not be granted to any other sponsor's dependent, unless that sponsor's dependent has been identified as a surrogate.

(iii) *Access granting by a dependent over 18.* A sponsor's dependent over the age of 18 may grant the sponsor and the sponsor's spouse access to the dependent's information. Access to the information of a sponsor's dependent over the age of 18 may not be granted to any other sponsor's dependent, unless that sponsor's dependent has been identified as a surrogate.

# PART 222—DOD MANDATORY DECLASSIFICATION REVIEW (MDR) PROGRAM

Sec.
222.1 Purpose.
222.2 Applicability.
222.3 Definitions.
222.4 Responsibilities.
222.5 MDR processing procedures.
APPENDIX A TO PART 222—ADDRESSING MDR REQUESTS.

AUTHORITY: 5 U.S.C. 552.

SOURCE: 76 FR 80745, Dec. 27, 2011, unless otherwise noted.

## § 222.1 Purpose.

This part implements policy established in DoD Instruction 5200.01. It assigns responsibilities and provides procedures for members of the public to request a declassification review of information classified under the provisions of Executive Order 13526, or predecessor orders.

## § 222.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within DoD (hereafter referred to collectively as the ''DoD Components'').

## § 222.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

*Foreign Government Information (FGI).* Defined in DoD 5200.1–R (available at *http://www.dtic.mil/whs/directives/corres/pdf/520001r.pdf*).

*Formal Control System.* A system designed to ensure DoD Component accountability and compliance. For each MDR request, the system shall contain, at a minimum, a unique tracking number, requester's name and organizational affiliation, information requested, date of receipt, and date of closure.

*Formerly Restricted Data.* Defined in DoD 5200.1–R.

*MDR*. The review of classified information for declassification in response to a declassification request that meets the requirements under section 3.5 of Executive Order 13526, ''Classified National Security Information,'' December 29, 2009.

*Restricted Data*. Defined in DoD 5200.1–R.

**§ 222.4 Responsibilities.**

(a) The Director, Washington Headquarters Services, shall process MDR requests for OSD, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, and DoD Components not listed in the Appendix A to this part.

(b) *Heads of the DoD Components*. The Heads of the DoD Components listed in the Appendix A to this part shall:

(1) Establish procedures for the processing of MDR requests and appeals for information originating within the Component.

(2) Appoint an appellate authority to adjudicate MDR appeals for the Component.

**§ 222.5 MDR processing procedures.**

(a) *General*. The DoD Components shall process MDR requests from the public for classified information originating within the DoD Component in accordance with DoD 5200.1–R and 32 CFR part 2001.

(b) Information not subject to review for public release under the MDR includes:

(1) Unclassified information (to include documents) or previously classified documents that are declassified prior to the receipt of the MDR request. These documents must be requested under the provisions of 5 U.S.C. 552(b) (also known and hereinafter referred to as the ''Freedom of Information Act'' (FOIA) and 32 CFR part 286.

(2) Information (to include documents) reviewed for declassification within 2 years preceding the date of receipt of the MDR request. If this is the case, the requester shall be provided the documents as previously released and advised of the right to appeal to the DoD Component within 60 days unless the documents are already under appeal to the Interagency Security Classification Appeals Panel (ISCAP).

(3) Information exempted from search and review by statute of 50 U.S.C. 431, 432, 432a, 432b, and 432d.

(4) Documents originated by the incumbent President; the incumbent President's White House Staff; committees, commissions, or boards appointed by the incumbent President; or other entities within the Executive Office of the President that solely advise and assist the incumbent President.

(5) Information marked as Restricted Data or Formerly Restricted Data.

(6) Information that is the subject of pending litigation.

(c) *MDR Requester Guidelines*. Members of the public seeking the declassification of DoD documents under the provisions of section 3.5 of Executive Order 13526, and 50 U.S.C. 431, 432, 432a, 432b, and 432d shall:

(1) Address the written request to the appropriate DoD Component listed in the appendix to this enclosure.

(2) Identify the requested document or information with sufficient specificity to enable the DoD Component to locate it with a reasonable amount of effort. Information that would provide the sufficient specificity would include a document identifier such as originator, date, title, subject, the National Archives and Records Administration accession number, or other applicable unique document identifying number. Broad or topical MDR requests for records on a particular subject, such as ''any and all documents concerning'' a subject do not meet this standard.

(3) Include a correct return mailing address with the request.

(4) Include a statement that the requester understands that the request may incur processing charges in accordance with paragraph (k) of this section.

(d) *Receipt and Control*. Upon receipt of an MDR request, the DoD Component shall send the requester an acknowledgement and open a file in a formal control system. The acknowledgement shall include the tracking number and date of receipt of the request.

(e) *Simultaneous MDR and FOIA Requests*. DoD Components should be aware of possible requests under both the MDR and the FOIA. In accordance with 32 CFR part 286, if a requester asks for the same information under

the FOIA and the MDR, the DoD Component shall ask the requester to select only one process. If the requester does not select a process, the DoD Component shall process the requested information under the FOIA.

(f) *MDR Document Review Process.* (1) Requests normally will be processed on a first in first out basis by date of receipt.

(2) Every effort shall be made to ensure that a response to an MDR request is provided to the requester within 1 year from the date of receipt.

(3) The DoD Components shall conduct line-by-line reviews of documents responsive to an MDR request to determine if the information contained within the documents continues to adhere to the standards for classification according to Executive Order 13526 Classified National Security Information. This line-by-line review must take into account the unique sensitivity of FGI as outlined in paragraph (h) of this section. In accordance with section 3.6(b) of Executive Order 13526 Classified National Security Information, classified information originating with another U.S. Government agency contained in records of the DoD Components will be referred to the originating agency for a declassification and release determination. Likewise, classified information in a DoD Component's records originating with another DoD Component will be referred to the originating Component. It is the responsibility of the DoD Component originally receiving the MDR request to manage these referrals and to incorporate the other agency's or DoD Component's determinations when preparing the final decision on the request. The review of each document will determine if the document:

(i) No longer meets the standards for classification as established by Executive Order 13526 ''Classified National Security Information'', and is therefore declassified in full.

(ii) Contains portions still meeting the standards for classification and is therefore declassified in part and denied in part.

(iii) Still meets the standards for classification in its entirety and is therefore denied in full.

(4) For documents meeting the criteria of paragraphs (f)(3)(i) and (f)(3)(ii) of this section, the DoD Components shall not release any unclassified information exempt from public release pursuant to Exemptions 2 through 9 of the FOIA. DoD 5400.7–R, ''DoD Freedom of Information Act Program'' provides a more detailed explanation of the FOIA exemptions.

(5) When this process is complete, the DoD Components shall redact all information, both classified and unclassified, determined to be exempt from release as warranted under applicable law and authority. All of the remaining information within the documents, which is determined to be publicly releasable information, shall be provided promptly to the requester.

(g) *Public Access.* In the interest of transparency, the DoD Components should make efforts to post documents released under the MDR program on DoD Component Web sites.

(h) *FGI.* Every effort must be made to ensure that FGI is not subject to declassification without the prior consent of the originating government. Therefore, if a requested document originated with a foreign government or organization and was classified by that government or organization, the DoD Component shall conduct MDR of the document in accordance with DoD 5200.1–R and 32 CFR part 2001.

(i) *Denial of Information.* (1) When classified information is denied, the DoD Component shall advise the requester, in writing:

(i) That information currently and properly classified has been denied (whether a document in its entirety or partially) in accordance with the appropriate sections of Executive Order 13526 Classified National Security Information.

(ii) Of the right to appeal the denial to the DoD Component within 60 days of receipt of the denial.

(iii) Of the mailing address for the appellate authority.

(2) When unclassified information is withheld because it is determined to be exempt from release pursuant to Exemptions 2 through 9 of the FOIA (whether or not classified information

was also withheld within the same document), the DoD Component shall advise the requester that:

(i) Section 3.5(c) of Executive Order 13526 Classified National Security Information allows for the denial of information when withholding it is authorized and warranted under applicable law.

(ii) Unclassified information exempt from public release pursuant to one or more exemptions of the FOIA has been withheld.

(3) For the denial of unclassified information, the requester shall not be given MDR appeal rights because the MDR applies only to the denial of classified information and because the request was not processed under the FOIA.

(4) The DoD Component is not required to confirm or deny the existence or nonexistence of requested information whenever the fact of its existence or nonexistence is itself classified pursuant to Executive Order 13526 Classified National Security Information.

(j) *MDR Appeals*. MDR appeals are for the denial of classified information only. DoD Components shall make an appellate decision within 60 working days of receipt of an MDR appeal. If additional time is required to make a determination, the appellate authority shall notify the requester of the additional time needed and provide the requester with the reason for the extension. When the appellate review is complete, the appellate authority shall notify the requester in writing of the final determination and of the reasons for any denial. If the appellate authority determines that some information remains classified under the provisions of Executive Order 13526 Classified National Security Information, the requester will be advised of the right to appeal the final decision to the ISCAP within 60 days of the final Component decision, in accordance with section 5.3 of Executive Order 13526 Classified National Security Information.

(k) *FEES*. In responding to MDR requests, the DoD Components may charge fees as permitted by 32 CFR Part 2001. Fees for search, review, and reproduction shall be in accordance with the fee schedule in Appendix 2 of Chapter 4 of Volume 11A of DoD 7000.14–R (available at *http://comptroller.defense.gov/fmr/11a/11a_04.pdf*).

[76 FR 80745, Dec. 27, 2011; 77 FR 745, Jan. 6, 2012]

## APPENDIX A TO PART 222—ADDRESSING MDR REQUESTS

(a) *General*. The Department of Defense does not have a central repository for DoD records. MDR requests therefore should be addressed to the DoD Component that has custody of the requested record. If a requester is not sure which DoD Component has custody or if the DoD Component is not listed below, the MDR request should be directed to the Washington Headquarters Services in paragraph (b)(1) of this appendix.

(b) *DoD Component MDR Addresses:*

(1) *OSD and the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff*. Department of Defense, Washington Headquarters Services, Records and Declassification Division, Suite 02F09–02, 4800 Mark Center Drive, Alexandria, VA 22350–3100. EXCEPTION: DoD Inspector General. DoD Office of Inspector General, 400 Army Navy Drive, Arlington, VA 22202–4704.

(2) *Department of the Army*. U.S. Army Declassification Activity, Attention: AHRC–RDD, 8850 Richmond Highway, Suite 300, Alexandria, VA 22309.

(3) *Department of the Navy*.

(i) Department of the Navy, Chief of Naval Operations, CNO N09N2, 2000 Navy Pentagon, Washington, DC 20350–2000. (Collateral MDR).

(ii) Department of the Navy, Chief of Naval Operations, CNO N2/N6, 2000 Navy Pentagon, Washington, DC 20350–2000. (Sensitive Compartmented Information MDR).

(4) *Department of the Air Force*. Department of the Air Force, HAF/IMIO (MDR), 1000 Air Force Pentagon, Washington, DC 20330–1000.

(5) *United States Marine Corps*. Commandant of the Marine Corps, HQMC Code PP&O, Security Division (PS), 3000 Marine Corps Pentagon, Room 4A324, Washington, DC 20350–3000

(6) *Defense Advanced Research Projects Agency*. Defense Advanced Research Projects Agency, 3701 N. Fairfax Drive, Arlington, VA 22203–1714.

(7) *Defense Contract Audit Agency*. Director, Defense Contract Audit Agency, Attention: CPS, 8725 John J. Kingman Road, Suite 2135, Fort Belvoir, VA 22060–6219.

(8) *Defense Information Systems Agency*. Defense Information Systems Agency, Attention: Security Division, MPS 6, 5111 Leesburg Pike, Suite 100, Falls Church, VA 22041.

(9) *Defense Intelligence Agency*. Defense Intelligence Agency, Attention: DAN–1A (FOIA), Washington, DC 20340–5100.

(10) *Defense Logistics Agency*. Defense Logistics Agency, Attention: DLA/DSS–S, 8725

John J. Kingman Road, Suite 2533, Fort Belvoir, VA 22060–6221.

(11) *Defense Security Service*. Defense Security Service, Office of FOIA & Privacy, 1340 Braddock Place, Alexandria, VA 22314–1651.

(12) *Defense Threat Reduction Agency*. Defense Threat Reduction Agency, Attention: SCR 8725 John J. Kingman Road, Fort Belvoir, VA 22060–6201.

(13) *Missile Defense Agency*. Missile Defense Agency, Attention: MDA/DS, 7100 Defense Pentagon, Washington, DC 20301–7100.

(14) *National Geospatial-Intelligence Agency*. National Geospatial-Intelligence Agency, Mail Stop D–10, 4600 Sangamore Road, Bethesda, MD 20816–5003.

(15) *National Reconnaissance Office*. National Reconnaissance Office, NRO–MSO–ASG–IMSC–IART', 14675 Lee Road, Chantilly, VA 20151–1715.

(16) *National Security Agency/Central Security Service*. National Security Agency, Declassification Office, DJP5, 9800 Savage Road, Suite 6884, Fort George G. Meade, MD 20755–6884.

(17) *North American Aerospace Defense Command*. HQ NORAD/CSO, 250 Vandenberg St. Ste B016, Peterson AFB, CO 80914.

(18) *U.S. Africa Command*. US Africa Command, Unit 29951, ATTN: COS–FOIA, APO AE 09751.

(19) *U.S. Central Command*. U.S. Central Command, Attention: CCJ6–RDD, 7115 South Boundary Blvd., MacDill AFB, FL 33621–5101.

(20) *U.S. European Command*. U.S. European Command, Attention: ECJ1–AX, Unit 30400, APO AE 09131.

(21) *U.S. Joint Forces Command*. U.S. Joint Forces Command, Code J02SM, 1562 Mitscher Ave., Suite 200, Norfolk, VA 23511–2488.

(22) *U.S. Northern Command*. U.S. Northern Command, HQ USNORTHCOM/CSO, 250 Vandenberg Street, Suite B016, Peterson AFB, CO 80914–3804.

(23) *U.S. Pacific Command*. U.S. Pacific Command, Attention: J151 FOIA, Box 64017, Camp Smith, HI 96861–4017.

(24) *U.S. Southern Command*. U.S. Southern Command, Attention: SCJ2–SM–CFO (FOIA)''.3511 NW 91st Avenue, Miami, FL 33172–1217.

(25) *U.S. Special Operations Command*. U.S. Special Operations Command, Attention: SOCS–SJS–SI (FOIA), 7701 Tampa Point Blvd., MacDill AFB, FL 33621–5323.

(26) *U.S. Strategic Command*. U.S. Strategic Command, Attention: CS50, 901 SAC Blvd., STE 1C17, Offutt AFB, NE 68113–6000.

(27) *U.S. Transportation Command*. U.S. Transportation Command, Chief, Command Information Management, ATTN: TCCSIM, 508 Scott Drive, Scott AFB IL 62225–5357.

(28) Interagency Security Classification Appeals Panel *http://www.archives.gov/isoo/oversight-groups/iscap/index.html*.

(29) Principal Mandatory Declassification Review (MDR) Contacts at Federal Agencies *http://www.archives.gov/isoo/contact/mdr-contact.html*.

# PART 223—DOD UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION (UCNI)

Sec.
223.1 Purpose.
223.2 Applicability.
223.3 Definitions.
223.4 Policy.
223.5 Responsibilities.
223.6 Procedures-identifying and controlling DoD UCNI.
223.7 Procedures-determination of DoD UCNI.

AUTHORITY: 10 U.S.C. 128 and 5 U.S.C. 552(b)(3).

SOURCE: 77 FR 43506, July 25, 2012, unless otherwise noted.

## § 223.1 Purpose.

This part:

(a) Updates policies, assigns responsibilities and prescribes procedures for the implementation of 10 United States Code (U.S.C.) 128, which is the statutory basis for controlling unclassified information on the physical protection of DoD special nuclear material (SNM), SNM equipment, and SNM facilities. Such information is referred to as DoD UCNI, to distinguish it from a similar Department of Energy (DOE) program.

(b) Identifies the authority to be used for denying disclosure of DoD UCNI pursuant to 5 U.S.C. 552.

(c) Supplements security classification guidance contained in DoD Instruction 5210.67,[1] DOE classification guide CG–SS–4,[2] and DoD/DOE joint classification guides by establishing procedures for identifying, controlling, and limiting the dissemination of unclassified information on the physical protection of DoD SNM.

## § 223.2 Applicability.

This part applies to:

(a) Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of

[1] Copies available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/521067p.pdf*.

[2] Copies available to authorized recipients from the Director of Classification, Department of Energy.

Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereinafter referred to collectively as the ''DoD Components'').

(b) All SNM, regardless of form, whether in reactor cores or other items under the direct control of the DoD Components (hereinafter referred to as ''DoD SNM'').

(c) Nuclear weapons containing SNM that are in DoD custody (hereinafter referred to as ''nuclear weapons in DoD custody'').

(d) Contractors, consultants, and grantees of the Department of Defense.

### § 223.3 Definitions.

These terms and their definitions are for the purposes of this part:

(a) *Atomic Energy Defense Programs.* Activities, equipment, and facilities of the Department of Defense that are capable of the following:

(1) Development, production, testing, sampling, maintenance, repair, modification, assembly, utilization, transportation, or retirement of nuclear weapons or nuclear weapon components.

(2) Production, utilization, or transportation of DoD SNM for military applications.

(3) Safeguarding of activities, equipment, or facilities that support the functions in paragraphs (a)(1) and (a)(2) of this section, including the protection of nuclear weapons, nuclear weapon components, or DoD SNM for military applications at a fixed facility or in transit.

(b) *Document or material.* The physical medium on or in which information is recorded, or a product or substance that contains or reveals information, regardless of its physical form or characteristics.

(c) *DoD UCNI.* Unclassified information on the physical protection of DoD SNM, SNM equipment, and SNM facilities, including unclassified information on the physical protection of nuclear weapons containing SNM that are in DoD custody.

(d) *Information.* Any fact or concept, regardless of the physical form or characteristics of the medium on or in which it is recorded, contained, or revealed.

(e) *Intelligence Community.* An element or agency of the U.S. Government identified in or designated pursuant section 3.5(h) of Executive Order 12333, as amended.

(f) *Reviewing official.* An individual appointed by the Assistant Secretary of Defense for Nuclear, Chemical, and Biological Defense Programs who may make a determination that a document or material contains, does not contain, or no longer contains DoD UCNI.

(g) *Safeguards.* An integrated system of physical protection, document and material accounting, and control measures designed to deter, prevent, detect, and respond to unauthorized possession, use, or sabotage of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody.

(h) *SNM.* Defined in 42 U.S.C. 2014.

(i) *SNM equipment.* Equipment, systems, or components whose failure or destruction would cause an impact on safeguarding DoD SNM resulting in an unacceptable interruption to a national security program or an unacceptable impact on the health and safety of the public.

(j) *SNM facility.* A DoD facility that performs a function in support of Atomic Energy Defense Programs whose disruption could reasonably be expected to have a significant adverse effect on safeguarding DoD SNM, the health and safety of the public or the common defense and security.

(k) *Unauthorized dissemination.* The intentional or negligent transfer, in any manner and by any person, of information contained in a document or material determined by a reviewing official to contain DoD UCNI, and so marked in accordance with the procedures in § 223.6 of this part, to any person or entity other than an individual or entity authorized access to DoD UCNI in accordance with 10 U.S.C. 128 and this part.

### § 223.4 Policy.

It is DoD policy that:

(a) Unauthorized dissemination of unclassified information pertaining to

security measures, including security plans, procedures, and equipment, for the physical protection of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody is prohibited.

(b) Unclassified information shall be protected as DoD UCNI based on a determination that the unauthorized dissemination of such information could reasonably be expected to have a significant adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of the illegal production of nuclear weapons or the theft, diversion, or sabotage of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody.

(c) Unclassified information regarding physical protection of DoD SNM and nuclear weapons in DoD custody shall be made publicly available to the fullest extent possible by applying the minimum restrictions, consistent with the requirements of 10 U.S.C. 128, necessary to protect the health and safety of the public or the common defense and security.

(d) This part and title 10 of the Code of Federal Regulations (CFR) part 1017 shall be used as guidance for handling DOE UCNI that is under DoD control.

(e) This part does not prevent a determination that information previously determined to be DoD UCNI is classified information in accordance with Volume 1 of DoD Manual 5200.01[3] and other applicable standards of classification.

### § 223.5 Responsibilities.

(a) The Under Secretary of Defense for Intelligence (USD(I)) shall oversee the DoD program for controlling DoD UCNI and coordinate DoD compliance with the DOE program for controlling DOE UCNI.

(b) The Assistant Secretary of Defense for Nuclear, Chemical, and Biological Defense Programs (ASD(NCB)), under the authority, direction, and control of the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall:

(1) Identify information regarding nuclear weapons security and the protection of SNM at DoD nuclear reactor facilities as DoD UCNI and protect it from unauthorized dissemination, consistent with the requirements of 10 U.S.C. 128 and this part.

(2) Advise the USD(I) on implementation of the DoD UCNI program.

(3) Designate a DoD UCNI reviewing official, who shall be authorized to determine that materials or documents contain, do not contain, or no longer contain DoD UCNI.

(c) The Director, Administration and Management shall provide guidance, as needed, to the Heads of the DoD Components regarding 5 U.S.C. 552, as implemented by 32 CFR part 286, as it applies to the DoD UCNI program.

(d) The Heads of the DoD Components shall identify DoD UCNI within their Component and protect it from unauthorized dissemination, consistent with the requirements of 10 U.S.C. 128 and this part.

### § 223.6 Procedures-identifying and controlling DoD UCNI.

(a) *General*. (1) The decision to protect unclassified information as DoD UCNI shall be based on a determination that the unauthorized dissemination of such information could reasonably be expected to have an adverse effect on the health and safety of the public or the common defense and security by increasing significantly the likelihood of the illegal production of nuclear weapons or the theft, diversion, or sabotage of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody. This is called the ''adverse effects test.''

(2) DoD UCNI shall be identified, controlled, marked, transmitted, and safeguarded in the DoD Components, the Intelligence Community, and the North Atlantic Treaty Organization (NATO), and among DoD contractors, consultants, and grantees. Within NATO, DoD UCNI shall be marked, controlled, and safeguarded as ''NATO RESTRICTED'' information.

(3) Contracts requiring access to or the preparation of unclassified information that is or could be DoD UCNI shall require compliance with this part and any applicable DoD Component

[3] Available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/520001_vol1.pdf*.

regulations, and shall specify requirements for identifying, marking, handling, and safeguarding DoD UCNI.

(b) *Identifying DoD UCNI.* (1) To be designated and protected as DoD UCNI, information must:

(i) Be unclassified.

(ii) Pertain to security measures, including plans, procedures, and equipment, for the physical protection of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody.

(iii) Meet the adverse effects test.

(2) Information shall be protected as DoD UCNI if it qualifies for one or more of the categories listed in § 223.7(c) and meets the criteria in paragraph (b)(1) of this section.

(3) DoD personnel, in making a determination to protect unclassified information as DoD UCNI, shall consider the probability of illegal production of nuclear weapons or of theft, diversion, or sabotage of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody if the information proposed for protection were made available for public disclosure and dissemination. The cognizant official shall consider how the unauthorized disclosure or dissemination of such information could assist a potential adversary in:

(i) Selecting a target for an act of theft, diversion, or sabotage of nuclear weapons in DoD custody, DoD SNM, SNM equipment, or SNM facilities (e.g., relative importance of a facility or the location, form, and quantity of DoD SNM). Information that can be obtained by observation from public areas outside controlled locations should not be considered as DoD UCNI.

(ii) Planning or committing an act of theft, diversion, or sabotage of nuclear weapons in DoD custody, DoD SNM, SNM equipment, or SNM facilities (e.g., design of security systems; building plans; methods and procedures for transfer, accountability, and handling of nuclear weapons or DoD SNM; or security plans, procedures, and capabilities).

(iii) Measuring the success of an act of theft, diversion, or sabotage of nuclear weapons in DoD custody, DoD SNM, SNM equipment, or SNM facilities (e.g., actual or hypothetical consequences of the sabotage of specific vital equipment or facilities).

(iv) Illegally producing a nuclear explosive device (e.g., unclassified nuclear weapon design information useful in designing a primitive nuclear device; location of unique DoD SNM needed to fabricate such a device; or location of a nuclear weapon).

(v) Dispersing DoD SNM in the environment (e.g., location, form, and quantity of DoD SNM).

(c) Where questions or disagreements arise on designation or continued protection of information as DoD UCNI, the reviewing official appointed by the ASD(NCB) shall make the final determination. If a determination cannot be made because applicable guidance is unclear or does not exist, the document or material in question shall be referred to the reviewing official for a determination.

(d) *Access to DoD UCNI.* (1) No explicit designation or security clearance is required for access to DoD UCNI; however, a person granted access to DoD UCNI must have a need to know the specific DoD UCNI to which access is granted in the performance of official duties or of DoD-authorized activities.

(2) The individual granting access to DoD UCNI shall notify each person granted such access of applicable regulations, including the physical protection and access requirements, concerning the protection of DoD UCNI as well as any special dissemination limitations that apply to the specific DoD UCNI to which access is being granted, prior to dissemination of the DoD UCNI to the person.

(3) The requirement to notify persons granted access to DoD UCNI of applicable regulations concerning protection and dissemination of DoD UCNI may be met by attachment of an appropriate cover sheet to the front of each document or material containing DoD UCNI prior to its transmittal to the person granted access.

(e) *Marking DoD UCNI.* (1) An unclassified document with DoD UCNI shall be marked ''DOD UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION'' (or abbreviated ''DOD UCNI'') at the bottom on: the outside of the front cover, if any; the outside of the back cover, if any; the first page; and

each individual page containing DoD UCNI.

(2) Within an unclassified document, an individual page containing DoD UCNI shall be marked to show which of its portions contain DoD UCNI. In marking sections, parts, paragraphs, or similar portions, the parenthetical term ''(DCNI)'' shall be used and placed at the beginning of the applicable portions.

(3) In a classified document, an individual page that has both DoD UCNI and classified information shall be marked at the top and bottom of the page with the highest security classification of information appearing on that page or with the overall classification of the document. In marking sections, parts, paragraphs, or similar portions, the parenthetical term ''(U//DCNI)'' shall be used and placed at the beginning of those portions containing DoD UCNI. In a classified document, an individual page that has DoD UCNI, but no classified information, shall be marked ''UNCLASSIFIED//DOD UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION'' (or ''UNCLASSIFIED//DOD UCNI'') at the top and bottom of the page, unless the page is marked with the overall classification of the document. The DoD UCNI information may be included in the same portion with other classified or unclassified information, if all relevant statutory and regulatory markings and citations are included. Volume 2 of DoD Manual 5200.01[4] provides additional guidance on marking classified documents.

(4) Other material (e.g., electronic media, photographs, films, tapes, or slides) containing DoD UCNI shall be conspicuously marked ''DOD UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION'' (or ''DOD UCNI''), in accordance with paragraphs (d)(1) through (d)(3) of this section, to ensure that a recipient or viewer is aware of the status of the information.

(e) *Dissemination and Transmission*. (1) DoD UCNI may be disseminated among the DoD Components, members of the Intelligence Community, NATO, and DoD contractors, consultants, and grantees on a need-to-know basis for the conduct of official business for the Department of Defense. Dissemination to NATO or other foreign or international entities requires prior review and approval by the appropriate dissemination entity.

(2) Recipients shall be made aware of the status as DoD UCNI for all such information disseminated to them. Transmission of DoD UCNI shall be by means which preclude unauthorized disclosure or dissemination (e.g., secure phone, encrypted email).

(3) Documents containing DoD UCNI shall be marked as prescribed in paragraph (d) of this section. Transmittal documents shall call attention to the presence of DoD UCNI attachments using an appropriate statement in the text or including at the bottom of the transmittal document a statement similar to: ''The attached document contains DoD Unclassified Controlled Nuclear Information (DoD UCNI).''

(4) DoD UCNI transmitted outside the Department of Defense requires application of an expanded marking to explain the significance of the DoD UCNI marking. That may be accomplished by adding the transmittal statement ''DEPARTMENT OF DEFENSE/UNCLASSIFIED CONTROLLED NUCLEAR INFORMATION/EXEMPT FROM MANDATORY DISCLOSURE PURSUANT TO 5 U.S.C. 552(b)(3), AS AUTHORIZED BY 10 U.S.C. 128'' to the document cover before transfer.

(5) When not commingled with classified information, DoD UCNI may be sent by first-class mail in a single, opaque envelope, or wrapping.

(6) DoD UCNI shall not be discussed or transmitted over an unprotected telephone or telecommunications circuit (to include facsimile transmissions) except in case of an emergency.

(7) Each part of electronically transmitted messages containing DoD UCNI portions shall be marked appropriately. Unclassified messages, including email, with DoD UCNI portions shall have the abbreviation ''DOD UCNI'' at the top of the message, before the beginning of the text, and the

[4] Available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/520001_vol2.pdf*.

parenthetical marking ''(DCNI)'' preceding each portion of text containing DoD UCNI information. Classified messages containing DoD UCNI portions shall be marked with the highest classification of information within the message; use the parenthetical marking ''(U//DCNI)'' preceding each portion of text containing DoD UCNI information.

(8) DoD UCNI processed, stored, or produced on stand-alone or networked computers or other information technology systems shall enforce protection from unauthorized disclosure or dissemination, in accordance with the procedures in paragraph (f) of this section.

(9) A document marked as having DoD UCNI may be reproduced minimally without permission of the originator and consistent with the need to carry out official business.

(f) *Safeguarding DoD UCNI.* (1) During normal working hours, documents and materials determined to contain DoD UCNI shall be safeguarded and controlled by measures designed to reduce the risk of access to DoD UCNI by unauthorized individuals. Particular attention should be paid to areas where DoD UCNI is used or stored if unescorted access by unauthorized individuals is possible.

(2) At the close of business, DoD UCNI shall be stored to preclude disclosure. Storage of such information with other unclassified information in unlocked receptacles (e.g., desks, bookcases) is adequate if Government or Government-contractor internal building security is provided during nonduty hours. When such internal building security is not provided, locked rooms or buildings normally provide adequate after-hours protection. If such protection is not considered adequate, DoD UCNI shall be stored in locked receptacles (e.g., locked file cabinet, locked desk drawer, safe).

(3) Non-record copies of DoD UCNI shall be destroyed by shredding or burning or, if the sensitivity or volume of the information justifies it, in accordance with the procedures specified by Volume 3 of DoD Manual 5200.01[5] for classified information. Record copies of DoD UCNI shall be disposed of in accordance with the DoD Component's record management regulations. DoD UCNI on magnetic storage media shall be disposed of by overwriting to preclude its reconstruction. DoD UCNI in electronic form shall be deleted and also removed from any desktop trash or recycling files.

(4) Unauthorized dissemination and disclosure of DoD UCNI justifies investigative and administrative actions to determine cause, assess impact, and fix responsibility. The DoD Component that originated the DoD UCNI shall be informed of its unauthorized disclosure and the outcome of the investigative and administrative actions. Unauthorized disclosure of DoD UCNI does not constitute a compromise of classified information.

(g) *Retirement of Document or Material.* (1) Any unclassified document or material that is not marked as containing DoD UCNI but that may contain DoD UCNI shall be marked upon retirement in accordance with the DoD Component's record management regulations.

(2) A document or material marked as containing DoD UCNI is not required to be reviewed upon, or subsequent, to retirement. Retired documents or materials shall be reviewed in accordance with paragraph (h) of this section upon a request for their release made pursuant to 5 U.S.C. 552.

(h) *Requests for Public Release of UCNI.* (1) Pursuant to 10 U.S.C. 128, information that qualifies as DoD UCNI is exempt from mandatory disclosure pursuant to 5 U.S.C. 552. Requests for the public release of DoD UCNI shall be denied, in accordance with procedures established in 32 CFR part 286, pursuant to 5 U.S.C. 552(b)(3), citing 10 U.S.C. 128 as authority.

(2) Requests for DOE UCNI contained within DoD documents shall also be denied pursuant to 5 U.S.C. 552(b)(3), but 42 U.S.C 2168 shall be cited, after formal FOIA consultation with the DOE, as the basis for invoking the exemption. Requests for DOE documents will

[5] Available on the Internet at *http://www.dtic.mil/whs/directives/corres/pdf/520001_vol3.pdf.*

be formally referred to DOE for final adjudication and response to the requestor.

(3) The reviewing official designated by the ASD (NCB) shall review any retired DoD UCNI document or material upon a request for its release made pursuant to 5 U.S.C. 552.

### § 223.7 Procedures-determination of DoD UCNI.

(a) *Use of the Guidelines.* (1) The guidelines in this section are the basis for determining what unclassified information regarding the physical protection of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody, in a given technical or programmatic subject area are to be designated as DoD UCNI.

(2) The decision to protect unclassified information as DoD UCNI shall be based on a determination that the unauthorized dissemination of such information could reasonably be expected to have an adverse effect on the health and safety of the public or the common defense and security by significantly increasing the likelihood of the illegal production of nuclear weapons or the theft, diversion, or sabotage of SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody.

(b) *General Guidance.* (1) Unclassified information relating to the physical protection of DoD SNM, SNM equipment, SNM facilities, or nuclear weapons in DoD custody is to be protected from public disclosure to prevent the adverse effects identified in paragraph (a)(2) of this section. Public availability of information that would not result in such adverse effects is not to be restricted.

(2) In controlling DoD SNM information, only the minimum restrictions needed to protect the health and safety of the public or the common defense and security shall be applied to prohibit the disclosure and dissemination of DoD UCNI.

(3) Any information that has been, or is, widely and irretrievably disseminated in the public domain and whose dissemination was not, or is not, under Government control is exempt from control under these guidelines. However, the fact that information is in the public domain is not a sufficient basis for determining that similar or updated Government-owned and -controlled information in another document or other material is not, or is no longer, DoD UCNI; case-by-case determinations are required.

(c) *Topical Guidance.* DoD Components shall consider the topics discussed in this section during the preparation of unclassified information that addresses the physical protection of DoD SNM or nuclear weapons in DoD custody to determine if it qualifies for control as DoD UCNI.

(1) *Vulnerability Assessments.* (i) General vulnerabilities that could be associated with specific DoD SNM, SNM equipment, SNM facility locations, or DoD nuclear weapons storage facilities.

(ii) The fact that DoD SNM or nuclear weapons facility security-related projects or upgrades are planned or in progress, if not observable from a public area.

(iii) Identification and description of security system components intended to mitigate the consequences of an accident or act of sabotage at a DoD SNM or nuclear weapons facility.

(2) *Material Control and Accountability.* (i) Total quantity or categories of DoD SNM at a facility.

(ii) Control and accountability plans or procedures.

(iii) Receipts that, cumulatively, would reveal quantities and categories of DoD SNM of potential interest to an adversary.

(iv) Measured discards, decay losses, or losses due to fission and transmutation for a reporting period.

(v) Frequency and schedule of DoD SNM inventories.

(3) *Facility Description.* (i) Maps, conceptual design, and construction drawings of a DoD SNM or nuclear weapons facility showing construction characteristics of building(s) and associated electrical systems, barriers, and backup power systems not observable from a public area.

(ii) Maps, plans, photographs, or drawings of man-made or natural features in a DoD SNM or nuclear weapons facility not observable from a public area; e.g., tunnels, storm or waste sewers, water intake and discharge conduits, or other features having the

potential for concealing surreptitious movement.

(iii) Communications and computer network configurations and capabilities.

(4) *Intrusion Detection and Security Alarm Systems*. (i) Information on the layout or design of security and alarm systems at a specific DoD SNM or nuclear weapons facility, if the information is not observable from a public area.

(ii) The fact that a particular system make or model has been installed at a specific DoD SNM or nuclear weapons facility, if the information is not observable from a public area.

(iii) Performance characteristics of installed systems.

(5) *Keys, Locks, Combinations, and Tamper-Indicating Devices*. (i) Types and models of keys, locks, and combinations of locks used in DoD SNM or nuclear weapons facilities and during shipment.

(ii) Method of application of tamper-indicating devices.

(iii) Vulnerability information available from unclassified vendor specifications.

(6) *Threat Response Capability and Procedures*. (i) Information about arrangements with local, State, and Federal law enforcement agencies of potential interest to an adversary.

(ii) Information in ''non-hostile'' contingency plans of potential value to an adversary to defeat a security measure, e.g., fire, safety, nuclear accident, radiological release, or other administrative plans.

(iii) Required response time of security forces.

(7) *Physical Security Evaluations*. (i) Method of evaluating physical security measures not observable from public areas.

(ii) Procedures for inspecting and testing communications and security systems.

(8) *In-Transit Security*. (i) Fact that a shipment is going to take place.

(ii) Specific means of protecting shipments.

(iii) Number and size of packages.

(iv) Mobile operating and communications procedures that an adversary could exploit.

(v) Information on mode, routing, protection, communications, and operations that must be shared with law enforcement or other civil agencies, but not visible to the public.

(vi) Description and specifications of transport vehicle compartments or security systems not visible to the public.

(9) *Information on Nuclear Weapon Stockpile and Storage Requirements, Nuclear Weapon Destruction and Disablement Systems, and Nuclear Weapon Physical Characteristics*. Refer to DOE CG–SS–4 for guidance about the physical protection of information on nuclear weapon stockpile and storage requirements, nuclear weapon destruction and disablement systems, and nuclear weapon physical characteristics that may, under certain circumstances, be unclassified. Such information meeting the adverse effects test shall be protected as DoD UCNI.

# PART 225—COMMISSARY CREDIT AND DEBIT CARD USER FEE

Sec.
225.1 Purpose.
225.2 Applicability.
225.3 Definitions.
225.4 Policy.
225.5 Responsibilities.
225.6 Procedures.

AUTHORITY: 10 U.S.C. 1065

SOURCE: 84 FR 71822, Dec. 30, 2019, unless otherwise noted.

## § 225.1 Purpose.

This part establishes policy, assigns responsibilities, and provides procedures for the implementation of patronage expansion pursuant to 10 U.S.C. 1065.

## § 225.2 Applicability.

This part applies to veterans who are Purple Heart recipients, veterans who are former prisoners of war, veterans who have a Department of Veterans Affairs-documented service-connected disability rating between 0–90 percent, and individuals approved and designated as the caregiver or family caregiver of an eligible veteran under a formalized Department of Veterans Affairs caregiver program (as of January 1, 2020, authorized caregivers are the

primary family caregiver of an eligible veteran under the Program of Comprehensive Assistance for Family Caregivers).

### § 225.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this part.

*Caregiver*. Defined in 38 U.S.C. 1720G(d)

*Family Caregiver*. Defined in 38 U.S.C. 1720G(d)

*Former POW*. Defined in 38 U.S.C. 101

*Service-connected*. Defined in 38 U.S.C. 101

*Veteran*. Defined in 38 U.S.C. 101

### § 225.4 Policy.

In accordance with 10 U.S.C. 1065, the following new patron groups are authorized access to DoD commissary, exchange, and morale, welfare, and recreation (MWR) revenue generating activities on the same basis as a member of the Military Services entitled to retired or retainer pay, effective January 1, 2020:

(a) Veterans who were awarded the Purple Heart.

(b) Veterans who are former prisoners of war (POWs).

(c) Veterans classified by the Department of Veterans Affairs (VA) as having a service-connected disability rating below 100 percent.

(d) Caregivers or family caregivers for veterans under the VA caregiver program. These caregivers are only eligible for these privileges during their period of active enrollment as the caregiver or family caregiver for a veteran.

### § 225.5 Responsibilities.

DIRECTOR, DeCA. Under the authority, direction, and control of the Under Secretary of Defense for Personnel and Readiness through the Assistant Secretary of Defense for Manpower and Reserve Affairs, the Director, DeCA:

(a) Establishes processes and updates systems necessary to collect and deposit with U.S. Treasury, user fees related to commercial debit/credit card use in commissaries in accordance with section 225.6 of this part.

(b) Implements commissary credit/debit card user fee requirements.

### § 225.6 Procedures.

(a) *Commissary Credit/Debit Card User Fee*. (1) Only patrons of groups newly authorized privileges by this part must pay a user fee when using a credit or debit card to pay for commissary purchases to offset additional costs charged to the U.S. Treasury associated with credit or debit card use.

(2) The user fee will be set as a transaction-based flat rate, calculated within a range of the average annual rates of credit and debit card transaction costs incurred by the Department of Treasury on behalf of DeCA and in compliance with applicable card network rules. One rate will be set for credit and signature debit card transactions, which are processed as credit cards. Another rate will be set for personal identification number debit card transactions. These rates will be reviewed annually and adjustments may be made as necessary to meet the requirements of 10 U.S.C. 1065.

(3) Purchases made with electronic benefit transfer cards (*e.g.*, Women, Infants, and Children or Supplemental Nutrition Assistance Program) and the MILITARY STAR card are not subject to this credit/debit card user fee.

(4) No user fee reimbursement will be made on customer return of merchandise.

(5) All credit/debit card user fee amounts collected in commissary stores will be deposited in the General Fund of the Treasury.

(b) [Reserved]

## PART 226—SHELTER FOR THE HOMELESS

Sec.
226.1 Purpose.
226.2 Applicability.
226.3 [Reserved]
226.4 Procedures.
226.5 Responsibilities.

AUTHORITY: 10 U.S.C. 2546.

SOURCE: 52 FR 42638, Nov. 6, 1987, unless otherwise noted.

### § 226.1 Purpose.

This part implements 10 U.S.C. 2556 by establishing DoD policy, assigning

responsibilities, and prescribing procedures for providing shelter for the homeless on military installations.

[78 FR 21257, Apr. 10, 2013]

### § 226.2 Applicability.

This part applies to the Office of the Secretary of Defense (OSD), the Military Departments (including their National Guard and Reserve components), the Unified and Specified Commands, the Defense Agencies, and Department of Defense Field Activities (hereafter referred to collectively as ''Department of Defense Components'').

### § 226.3 [Reserved]

### § 226.4 Procedures.

It is DoD policy that:

(a) Shelters for the homeless may be established on military installations.

(b) The Secretary of a Military Department, or designee, may make military installations under his or her jurisdiction available for the furnishing of shelter to persons without adequate shelter in accordance with 10 U.S.C. 2556 and this part if he or she, or designee, determines that such shelter will not interfere with military preparedness or ongoing military functions.

(c) The Secretary of a Military Department, after determining that a shelter for the homeless may be established on a military installation, shall ensure that the plans for the shelter be developed in cooperation with appropriate State or local governmental entities and charitable organizations. The State or local government entity, either separately or in conjunction with the charitable organization, shall be responsible for operating and staffing any shelter established by this program. Shelter and incidental services provided under this part may be provided without reimbursement.

(d) Services that may be provided by a Military Department incident to the furnishing of shelter under 10 U.S.C. 2556 are the following:

(1) Utilities.

(2) Bedding.

(3) Security.

(4) Transportation.

(5) Renovation of facilities.

(6) Minor repairs undertaken specifically to make suitable space available for shelter to be provided in accordance with 10 U.S.C. 2556.

(7) Property liability insurance.

(e) The Military Departments should be especially sensitive to establishing shelters in the following areas:

(1) Family housing areas,

(2) Troop billeting areas,

(3) Service facilities such as commissaries, exchanges, dining facilities, hospitals, clinics, recreation centers, etc.,

(4) Safety arcs formed by firing ranges and impact areas,

(5) Frequently used training areas.

(f) Shelters for the homeless shall normally be established in only those facilities where the homeless will have exclusive use at all times. Shelters for the homeless shall normally not be established in facilities ''shared'' with military functions.

(g) In addition to providing shelter and incidental services, Department of Defense Components may provide bedding for support of shelters for the homeless that are located on other than Department of Defense real property. Bedding may be provided without reimbursement, but may only be provided to the extent that the provision of such bedding will not interfere with military requirements.

(h) Individuals or entities interested in establishing shelters on military installations shall:

(1) Submit a request to the Installation Commander where the shelter is desired, and

(2) Provide, at a minimum, the following data: The name and address of the organization that will operate the shelter, the name and address of the affiliated state or local governmental entity, numbers of people to be served, type of program, hours of operation, special needs of the people to be served, incidental services required, estimated date when the services are requested, estimate of when services will no longer be necessary, and what security provisions are to be provided (physical security).

[52 FR 42638, Nov. 6, 1987. Redesignated and amended at 78 FR 21257, Apr. 10, 2013]

### § 226.5 Responsibilities.

(a) The Deputy Under Secretary of Defense (Installations and Environment) (DUSD(I&E)), under the authority, direction and control of the Under Secretary of Defense for Acquisition, Technology, and Logistics, shall administer the program and issue such supplemental guidance as is necessary.

(b) The Under Secretary of Defense (Comptroller) shall provide guidance on the use of Department of Defense funds to finance the items issued in support of the Shelter for the Homeless program.

(c) The Secretaries of the Military Departments shall:

(1) Implement the Shelter for the Homeless program.

(2) Appoint a senior manager to monitor the program within the Department and to provide any assistance that may be required to the Office of the Deputy Under Secretary of Defense (Installations and Environment) (ODUSD(I&E)). Such official, after consultation with the ODUSD(I&E), shall approve or disapprove all requests to establish a shelter in accordance with 10 U.S.C. 2556 and this part.

(3) Ensure that upon receipt of a formal request for assistance, as defined in § 226.3(h) of this part, the Military Department concerned provides an appropriate response to the requester within 30 days.

(4) Ensure that each Installation Commander is informed about the Program and the types of assistance that they may provide as authorized by 10 U.S.C. 2556.

(d) Department of Defense Installation Commanders shall:

(1) Acknowledge all requests for assistance.

(2) Upon receipt of a request, initiate such action as is necessary to determine the availability of facilities at that installation for use as a shelter for the homeless.

(3) Forward each request, through the chain of command, to the Service Senior Manager with a copy to the DUSD(I&E). The Installation Commander's recommendation shall accompany each request.

[52 FR 42638, Nov. 6, 1987. Redesignated and amended at 78 FR 21257, Apr. 10, 2013]

## PART 228—SECURITY PROTECTIVE FORCE

Sec.

228.1 Applicability.
228.2 Control of activities on protected property.
228.3 Restrictions on admission to protected property.
228.4 Control of vehicles on protected property.
228.5 Enforcement of parking regulations.
228.6 Security inspection.
228.7 Prohibition on weapons and explosives.
228.8 Prohibition on photographic or electronic recording or transmitting equipment.
228.9 Prohibition on narcotics and illegal substances.
228.10 Prohibition on alcohol.
228.11 Restrictions on the taking of photographs.
228.12 Physical protection of facilities.
228.13 Disturbances on protected property.
228.14 Prohibition on gambling.
228.15 Restriction regarding animals.
228.16 Soliciting, vending, and debt collection.
228.17 Distribution of unauthorized materials.
228.18 Penalties and the effect on other laws.

AUTHORITY: 40 U.S.C. 318–318c.

SOURCE: 59 FR 5948, Feb. 9, 1994, unless otherwise noted.

### § 228.1 Applicability.

This part applies to all property under the charge and control of the Director, NSA, and to all persons entering in or on such property (hereinafter referred to as ''protected property''). Employees of the NSA and any other persons entering upon protected property shall be subject to these regulations.

### § 228.2 Control of activities on protected property.

Persons in and on protected property shall at all times comply with official signs of a prohibitory, regulatory, or directory nature and with the direction of Security Protective Officers and any other duly authorized personnel.

### § 228.3 Restrictions on admission to protected property.

Access to protected property shall be restricted to ensure the orderly and secure conduct of Agency business. Admission to protected property will be restricted to employees and other persons with proper authorization who shall, when requested, display government or other identifying credentials to the Security Protective Officers or other duly authorized personnel when entering, leaving, or while on the property.

### § 228.4 Control of vehicles on protected property.

Drivers of all vehicles entering or while on protected property shall comply with the signals and directions of Security Protective Officers or other duly authorized personnel and any posted traffic instructions. All vehicles shall be driven in a safe and careful manner at all times, in compliance with applicable motor vehicle laws.

### § 228.5 Enforcement of parking regulations.

For reasons of security, parking regulations shall be strictly enforced. Except with proper authorization, parking on protected property is not allowed without a permit. Parking without a permit or other authorization, parking in unauthorized locations or in locations reserved for other persons, or parking contrary to the direction of posted signs or applicable state or federal laws and regulations is prohibited. Vehicles parked in violation, where warning signs are posted, shall be subject to removal at the owner's risk, which shall be in addition to any penalties assessed pursuant to § 228.18. The Agency assumes no responsibility for the payment of any fees or costs related to such removal which may be charged to the owner of the vehicle by the towing organization. This paragraph may be supplemented from time to time with the approval of the NSA Director of Security or his designee by the issuance and posting of such specific traffic directives as may be required, and when so issued and posted such directives shall have the same force and effect as if made a part hereof. Proof that a vehicle was parked in violation of these regulations or directives may be taken as *prima facie* evidence that the registered owner was responsible for the violation.

### § 228.6 Security inspection.

Any personal property, including but not limited to any packages, briefcases, containers or vehicles brought into, while on, or being removed from protected property are subject to inspection. A search of a person may accompany an investigative stop or an arrest.

### § 228.7 Prohibition on weapons and explosives.

No persons entering or while on protected property shall carry or possess, either openly or concealed, firearms, any illegal or legally controlled weapon (e.g., throwing stars, switchblades), explosives, or items intended to be used to fabricate an explosive or incendiary device, except as authorized by the NSA Director of Security or his designee at each Agency facility. The use of chemical agents (Mace, tear gas, etc.) on protected property in circumstances that do not include an immediate and unlawful threat of physical harm to any person or persons is prohibited; however, this prohibition does not apply to use by law enforcement personnel in the performance of their duties.

### § 228.8 Prohibition on photographic or electronic recording or transmitting equipment.

No person entering or while on protected property shall bring or possess any kind of photographic, recording or transmitting equipment (including but not limited to cameras, cellular telephones, or recorders), except as specially authorized by the NSA Director of Security or his designee at each Agency facility.

### § 228.9 Prohibition on narcotics and illegal substances.

Entering or being on protected property under the influence of, or while using or possessing, any narcotic drug, hallucinogen, marijuana, barbiturate or amphetamine is prohibited. Operation of a motor vehicle entering or

while on protected property by a person under the influence of narcotic drugs, hallucinogens, marijuana, barbiturates or amphetamines is also prohibited. These prohibitions shall not apply in cases where the drug is being used as prescribed for a patient by a licensed physician.

### § 228.10 Prohibition on alcohol.

Entering or being on protected property under the influence of alcoholic beverages is prohibited. Operation of a motor vehicle entering or while on protected property by a person under the influence of alcoholic beverages is prohibited. The use of alcoholic beverages on protected property is also prohibited, except on occasions and on protected property for which the NSA Deputy Director for Support Services or his designee has granted approval for such use.

### § 228.11 Restrictions on the taking of photographs.

In order to protect the security of the Agency's facilities, photographs may be taken on protected property only with the consent of the NSA Director of Security or his designee. The taking of photographs includes the use of television cameras, video taping equipment, and still or motion picture cameras.

### § 228.12 Physical protection of facilities.

The willful destruction of, or damage to any protected property, or any buildings or personal property thereon, is prohibited. The theft of any personal property, the creation of any hazard on protected property to persons or things, and the throwing of articles of any kind at buildings or persons on protected property is prohibited. The improper disposal of trash or rubbish, or any unauthorized or hazardous materials on protected property is also prohibited.

### § 228.13 Disturbances on protected property.

Any conduct which impedes or threatens the security of protected property, or any buildings or persons thereon, or which disrupts the performance of official duties by Agency employees, or which interferes with ingress to or egress from protected property is prohibited. Also prohibited is any disorderly conduct, any failure to obey an order to depart the premises, any unwarranted loitering, any behavior which creates loud or unusual noise or nuisance, or any conduct which obstructs the usual use of entrances, foyers, lobbies, corridors, offices, elevators, stairways or parking lots.

### § 228.14 Prohibition on gambling.

Participating in games for money or other personal property, or the operating of gambling devices, the conduct of a lottery, or the selling or purchasing of numbers tickets, in or on protected property is prohibited. This prohibition shall not apply to the vending or exchange of chances by licensed blind operators of vending facilities for any lottery set forth in a State law and conducted by an agency of a State as authorized by section 2(a)(5) of the Randolph-Sheppard Act, as amended (20 U.S.C. 107(a)(5)).

### § 228.15 Restriction regarding animals.

No animals except guide dogs for the blind or hearing impaired, or guard or search dogs used by authorized state or federal officials, shall be brought upon protected property, except as authorized by the NSA Director of Security or his designee at each Agency facility.

### § 228.16 Soliciting, vending, and debt collection.

Commercial or political soliciting, vending of all kinds, displaying or distributing commercial advertising, collecting private debts or soliciting alms on protected property is prohibited. This does not apply to:

(a) National or local drives for welfare, health, or other purposes as authorized by the ''Manual on Fund Raising Within the Federal Service,'' issued by the U.S. Office of Personnel Management under Executive Order 12353, 47 FR 12785, 3 CFR, 1982 Comp., p. 139, or by other federal laws or regulations; and

(b) Authorized employee notices posted on Agency bulletin boards.

### § 228.17 Distribution of unauthorized materials.

Distributing, posting or affixing materials, such as pamphlets, handbills, or flyers, on protected property is prohibited, except as provided by § 228.16, as authorized by the NSA Director of Security or his designee at each Agency facility, or when conducted as part of authorized Government activities.

### § 228.18 Penalties and the effect on other laws.

Whoever shall be found guilty of violating any provision of these regulations is subject to a fine of not more than $50 or imprisonment of not more than 30 days, or both. In the case of traffic and parking violations, fines assessed shall be in accordance with the schedule(s) of fines adopted by the United States District Court for the District where the offense occurred. Nothing in these regulations shall be construed to abrogate or supersede any other Federal laws or any State or local laws or regulations applicable to any area in which the protected property is situated.

## PART 229—PROTECTION OF ARCHAEOLOGICAL RESOURCES: UNIFORM REGULATIONS

Sec.

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The information collection and reporting requirements in this part were approved by the Office of Management and Budget under control number 1024–0037.

AUTHORITY: Pub. L. 96–95, 93 Stat. 721, as amended, 102 Stat. 2983 (16 U.S.C. 470aa–mm) Sec. 10(a). Related Authority: Pub. L. 59–209, 34 Stat. 225 (16 U.S.C. 432, 433); Pub. L. 86–523, 74 Stat. 220, 221 (16 U.S.C. 469), as amended, 88 Stat. 174 (1974); Pub. L. 89–665, 80 Stat. 915 (16 U.S.C. 470a–t), as amended, 84 Stat. 204 (1970), 87 Stat. 139 (1973), 90 Stat. 1320 (1976), 92 Stat. 3467 (1978), 94 Stat. 2987 (1980); Pub. L. 95–341, 92 Stat. 469 (42 U.S.C. 1996).

SOURCE: 72 FR 42298, August 2, 2007, unless otherwise noted.

### § 229.1 Purpose.

(a) The regulations in this part implement provisions of the Archaeological Resources Protection Act of 1979, as amended (16 U.S.C. 470aa–mm) by establishing the uniform definitions, standards, and procedures to be followed by all Federal land managers in providing protection for archaeological resources, located on public lands and Indian lands of the United States. These regulations enable Federal land managers to protect archaeological resources, taking into consideration provisions of the American Indian Religious Freedom Act (92 Stat. 469; 42 U.S.C. 1996), through permits authorizing excavation and/or removal of archaeological resources, through civil penalties for unauthorized excavation and/or removal, through provisions for the preservation of archaeological resource collections and data, and through provisions for ensuring confidentiality of information about archaeological resources when disclosure would threaten the archaeological resources.

(b) The regulations in this part do not impose any new restrictions on activities permitted under other laws, authorities, and regulations relating to mining, mineral leasing, reclamation, and other multiple uses of the public lands.

**§ 229.2 Authority.**

(a) The regulations in this part are promulgated pursuant to section 10(a) of the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470ii), which requires that the Secretaries of the Interior, Agriculture and Defense and the Chairman of the Board of the Tennessee Valley Authority jointly develop uniform rules and regulations for carrying out the purposes of the Act.

(b) In addition to the regulations in this part, section 10(b) of the Act (16 U.S.C. 470ii) provides that each Federal land manager shall promulgate such rules and regulations, consistent with the uniform rules and regulations in this part, as may be necessary for carrying out the purposes of the Act.

**§ 229.3 Definitions.**

As used for purposes of this part:

(a) *Archaeological resource* means any material remains of human life or activities which are at least 100 years of age, and which are of archaeological interest.

(1) *Of archaeological interest* means capable of providing scientific or humanistic understandings of past human behavior, cultural adaptation, and related topics through the application of scientific or scholarly techniques such as controlled observation, contextual measurement, controlled collection, analysis, interpretation and explanation.

(2) *Material remains* means physical evidence of human habitation, occupation, use, or activity, including the site, location, or context in which such evidence is situated.

(3) The following classes of material remains (and illustrative examples), if they are at least 100 years of age, are of archaeological interest and shall be considered archaeological resources unless determined otherwise pursuant to paragraph (a)(4) or (a)(5) of this section:

(i) Surface or subsurface structures, shelters, facilities, or features (including, but not limited to, domestic structures, storage structures, cooking structures, ceremonial structures, artificial mounds, earthworks, fortifications, canals, reservoirs, horticultural/agricultural gardens or fields, bedrock mortars or grinding surfaces, rock alignments, cairns, trails, borrow pits, cooking pits, refuse pits, burial pits or graves, hearths, kilns, post molds, wall trenches, middens);

(ii) Surface or subsurface artifact concentrations or scatters;

(iii) Whole or fragmentary tools, implements, containers, weapons and weapon projectiles, clothing, and ornaments (including, but not limited to, pottery and other ceramics, cordage, basketry and other weaving, bottles and other glassware, bone, ivory, shell, metal, wood, hide, feathers, pigments, and flaked, ground, or pecked stone);

(iv) By-products, waste products, or debris resulting from manufacture or use of human-made or natural materials;

(v) Organic waste (including, but not limited to, vegetal and animal remains, coprolites);

(vi) Human remains (including, but not limited to, bone, teeth, mummified flesh, burials, cremations);

(vii) Rock carvings, rock paintings, intaglios and other works of artistic or symbolic representation;

(viii) Rockshelters and caves or portions thereof containing any of the above material remains;

(ix) All portions of shipwrecks (including, but not limited to, armaments, apparel, tackle, cargo);

(x) Any portion or piece of any of the foregoing.

(4) The following material remains shall not be considered of archaeological interest, and shall not be considered to be archaeological resources for purposes of the Act and this part, unless found in a direct physical relationship with archaeological resources as defined in this section:

(i) Paleontological remains;

(ii) Coins, bullets, and unworked minerals and rocks.

(5) The Federal land manager may determine that certain material remains, in specified areas under the Federal land manager's jurisdiction, and under specified circumstances, are not or are no longer of archaeological interest and are not to be considered archaeological resources under this part. Any determination made pursuant to this subparagraph shall be documented. Such determination shall in

no way affect the Federal land manager's obligations under other applicable laws or regulations.

(6) For the disposition following lawful removal or excavations of Native American human remains and ''cultural items'', as defined by the Native American Graves Protection and Repatriation Act (NAGPRA; Pub. L. 101–601; 104 Stat. 3050; 25 U.S.C. 3001–13), the Federal land manager is referred to NAGPRA and its implementing regulations.

(b) *Arrowhead* means any projectile point which appears to have been designed for use with an arrow.

(c) *Federal land manager* means:

(1) With respect to any public lands, the secretary of the department, or the head of any other agency or instrumentality of the United States, having primary management authority over such lands, including persons to whom such management authority has been officially delegated;

(2) In the case of Indian lands, or any public lands with respect to which no department, agency or instrumentality has primary management authority, such term means the Secretary of the Interior;

(3) The Secretary of the Interior, when the head of any other agency or instrumentality has, pursuant to section 3(2) of the Act and with the consent of the Secretary of the Interior, delegated to the Secretary of the Interior the responsibilities (in whole or in part) in this part.

(d) *Public lands* means:

(1) Lands which are owned and administered by the United States as part of the national park system, the national wildlife refuge system, or the national forest system; and

(2) All other lands the fee title to which is held by the United States, except lands on the Outer Continental Shelf, lands under the jurisdiction of the Smithsonian Institution, and Indian lands.

(e) *Indian lands* means lands of Indian tribes, or Indian individuals, which are either held in trust by the United States or subject to a restriction against alienation imposed by the United States, except for subsurface interests not owned or controlled by an Indian tribe or Indian individual.

(f) *Indian tribe as defined in the Act* means any Indian tribe, band, nation, or other organized group or community, including any Alaska village or regional or village corporation as defined in, or established pursuant to, the Alaska Native Claims Settlement Act (85 Stat. 688). In order to clarify this statutory definition for purposes of this part, ''Indian tribe'' means:

(1) Any tribal entity which is included in the annual list of recognized tribes published in the FEDERAL REGISTER by the Secretary of the Interior pursuant to 25 CFR part 54;

(2) Any other tribal entity acknowledged by the Secretary of the Interior pursuant to 25 CFR part 54 since the most recent publication of the annual list; and

(3) Any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (85 Stat. 688), and any Alaska Native village or tribe which is recognized by the Secretary of the Interior as eligible for services provided by the Bureau of Indian Affairs.

(g) *Person* means an individual, corporation, partnership, trust, institution, association, or any other private entity, or any officer, employee, agent, department, or instrumentality of the United States, or of any Indian tribe, or of any State or political subdivision thereof.

(h) *State* means any of the fifty states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands.

(i) *Act* means the Archaeological Resources Protection Act of 1979 (16 U.S.C. 470aa–mm).

### § 229.4 Prohibited acts and criminal penalties.

(a) Under section 6(a) of the Act, no person may excavate, remove, damage, or otherwise alter or deface, or attempt to excavate, remove, damage, or otherwise alter or deface any archaeological resource located on public lands or Indian lands unless such activity is pursuant to a permit issued under § 229.8 or exempted by § 229.5(b) of this part.

(b) No person may sell, purchase, exchange, transport, or receive any archaeological resource, if such resource

was excavated or removed in violation of:

(1) The prohibitions contained in paragraph (a) of this section; or

(2) Any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law.

(c) Under section (d) of the Act, any person who knowingly violates or counsels, procures, solicits, or employs any other person to violate any prohibition contained in section 6 (a), (b), or (c) of the Act will, upon conviction, be fined not more than $10,000.00 or imprisoned not more than one year, or both: provided, however, that if the commercial or archaeological value of the archaeological resources involved and the cost of restoration and repair of such resources exceeds the sum of $500.00, such person will be fined not more than $20,000.00 or imprisoned not more than two years, or both. In the case of a second or subsequent such violation upon conviction such person will be fined not more than $100,000.00, or imprisoned not more than 5 years, or both.

### § 229.5 Permit requirements and exceptions.

(a) Any person proposing to excavate and/or remove archaeological resources from public lands or Indian lands, and to carry out activities associated with such excavation and/or removal, shall apply to the Federal land manager for a permit for the proposed work, and shall not begin the proposed work until a permit has been issued. The Federal land manager may issue a permit to any qualified person, subject to appropriate terms and conditions, provided that the person applying for a permit meets conditions in § 229.8(a) of this part.

(b) Exceptions:

(1) No permit shall be required under this part for any person conducting activities on the public lands under other permits, leases, licenses, or entitlements for use, when those activities are exclusively for purposes other than the excavation and/or removal of archaeological resources, even though those activities might incidentally result in the disturbance of archaeological resources. General earth-moving excavation conducted under a permit or other authorization shall not be construed to mean excavation and/or removal as used in this part. This exception does not, however, affect the Federal land manager's responsibility to comply with other authorities which protect archaeological resources prior to approving permits, leases, licenses, or entitlements for use; any excavation and/or removal of archaeological resources required for compliance with those authorities shall be conducted in accordance with the permit requirements of this part.

(2) No permit shall be required under this part for any person collecting for private purposes any rock, coin, bullet, or mineral which is not an archaeological resource as defined in this part, provided that such collecting does not result in disturbance of any archaeological resource.

(3) No permit shall be required under this part or under section 3 of the Act of June 8, 1906 (16 U.S.C. 432), for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe, except that in the absence of tribal law regulating the excavation or removal or archaeological resources on Indian lands, an individual tribal member shall be required to obtain a permit under this part;

(4) No permit shall be required under this part for any person to carry out any archaeological activity authorized by a permit issued under section 3 of the Act of June 8, 1906 (16 U.S.C. 432), before the enactment of the Archaeological Resources Protection Act of 1979. Such permit shall remain in effect according to its terms and conditions until expiration.

(5) No permit shall be required under section 3 of the Act of June 8, 1906 (16 U.S.C. 432) for any archaeological work for which a permit is issued under this part.

(c) Persons carrying out official agency duties under the Federal land manager's direction, associated with the management of archaeological resources, need not follow the permit application procedures of § 229.6. However, the Federal land manager shall insure that provisions of § 229.8 and § 229.9 have been met by other documented means,

and that any official duties which might result in harm to or destruction of any Indian tribal religious or cultural site, as determined by the Federal land manager, have been the subject of consideration under § 229.7.

(d) Upon the written request of the Governor of any State, on behalf of the State or its educational institutions, the Federal land manager shall issue a permit, subject to the provisions of §§ 229.5(b)(5), 229.7, 229.8(a)(3), (4), (5), (6), and (7), 229.9, 229.10, 229.12, and 229.13(a) to such Governor or to such designee as the Governor deems qualified to carry out the intent of the Act, for purposes of conducting archaeological research, excavating and/or removing archaeological resources, and safeguarding and preserving any materials and data collected in a university, museum, or other scientific or educational institution approved by the Federal land manager.

(e) Under other statutory, regulatory, or administrative authorities governing the use of public lands and Indian lands, authorizations may be required for activities which do not require a permit under this part. Any person wishing to conduct on public lands or Indian lands any activities related to but believed to fall outside the scope of this part should consult with the Federal land manager, for the purpose of determining whether any authorization is required, prior to beginning such activities.

### § 229.6 Application for permits and information collection.

(a) Any person may apply to the appropriate Federal land manager for a permit to excavate and/or remove archaeological resources from public lands or Indian lands and to carry out activities associated with such excavation and/or removal.

(b) Each application for a permit shall include:

(1) The nature and extent of the work proposed, including how and why it is proposed to be conducted, proposed time of performance, locational maps, and proposed outlet for public written dissemination of the results.

(2) The name and address of the individual(s) proposed to be responsible for conducting the work, institutional affiliation, if any, and evidence of education, training, and experience in accord with the minimal qualifications listed in § 229.8(a).

(3) The name and address of the individual(s), if different from the individual(s) named in paragraph (b)(2) of this section, proposed to be responsible for carrying out the terms and conditions of the permit.

(4) Evidence of the applicant's ability to initiate, conduct, and complete the proposed work, including evidence of logistical support and laboratory facilities.

(5) Where the application is for the excavation and/or removal of archaeological resources on public lands, the names of the university, museum, or other scientific or educational institution in which the applicant proposes to store all collections, and copies of records, data, photographs, and other documents derived from the proposed work. Applicants shall submit written certification, signed by an authorized official of the institution, of willingness to assume curatorial responsibility for the collections, records, data, photographs and other documents and to safeguard and preserve these materials as property of the United States.

(6) Where the application is for the excavation and/or removal of archaeological resources on Indian lands, the name of the university, museum, or other scientific or educational institution in which the applicant proposes to store copies of records, data, photographs, and other documents derived from the proposed work, and all collections in the event the Indian owners do not wish to take custody or otherwise dispose of the archaeological resources. Applicants shall submit written certification, signed by an authorized official of the institution, or willingness to assume curatorial responsibility for the collections, if applicable, and/or the records, data, photographs, and other documents derived from the proposed work.

(c) The Federal land manager may require additional information, pertinent to land management responsibilities, to be included in the application for permit and shall so inform the applicant.

(d) *Paperwork Reduction Act.* The information collection requirement contained in this section of these regulations has been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1024–0037. The purpose of the information collection is to meet statutory and administrative requirements in the public interest. The information will be used to assist Federal land managers in determining that applicants for permits are qualified, that the work proposed would further archaeological knowledge, that archaeological resources and associated records and data will be properly preserved, and that the permitted activity would not conflict with the management of the public lands involved. Response to the information requirement is necessary in order for an applicant to obtain a benefit.

### § 229.7 Notification to Indian tribes of possible harm to, or destruction of, sites on public lands having religious or cultural importance.

(a) If the issuance of a permit under this part may result in harm to, or destruction of, any Indian tribal religious or cultural site on public lands, as determined by the Federal land manager, at least 30 days before issuing such a permit the Federal land manager shall notify any Indian tribe which may consider the site as having religious or cultural importance. Such notice shall not be deemed a disclosure to the public for purposes of section 9 of the Act.

(1) Notice by the Federal land manager to any Indian tribe shall be sent to the chief executive officer or other designated official of the tribe. Indian tribes are encouraged to designate a tribal official to be the focal point for any notification and discussion between the tribe and the Federal land manager.

(2) The Federal land manager may provide notice to any other Native American group that is known by the Federal land manager to consider sites potentially affected as being of religious or cultural importance.

(3) Upon request during the 30-day period, the Federal land manager may meet with official representatives of any Indian tribe or group to discuss their interests, including ways to avoid or mitigate potential harm or destruction such as excluding sites from the permit area. Any mitigation measures which are adopted shall be incorporated into the terms and conditions of the permit under § 229.9.

(4) When the Federal land manager determines that a permit applied for under this part must be issued immediately because of an imminent threat of loss or destruction of an archaeological resource, the Federal land manager shall so notify the appropriate tribe.

(b)(1) In order to identify sites of religious or cultural importance, the Federal land manager shall seek to identify all Indian tribes having aboriginal or historic ties to the lands under the Federal land manager's jurisdiction and seek to determine, from the chief executive officer or other designated official of any such tribe, the location and nature of specific sites of religious or cultural importance so that such information may be on file for land management purposes. Information on sites eligible for or included in the National Register of Historic Places may be withheld from public disclosure pursuant to section 304 of the Act of October 15, 1966, as amended (16 U.S.C. 470w–3).

(2) If the Federal land manager becomes aware of a Native American group that is not an Indian tribe as defined in this part but has aboriginal or historic ties to public lands under the Federal land manager's jurisdiction, the Federal land manager may seek to communicate with official representatives of that group to obtain information on sites they may consider to be of religious or cultural importance.

(3) The Federal land manager may enter into agreement with any Indian tribe or other Native American group for determining locations for which such tribe or group wishes to receive notice under this section.

(4) The Federal land manager should also seek to determine, in consultation with official representatives of Indian tribes or other Native American groups, what circumstances should be the subject of special notification to the tribe or group after a permit has been issued. Circumstances calling for

notification might include the discovery of human remains. When circumstances for special notification have been determined by the Federal land manager, the Federal land manager will include a requirement in the terms and conditions of permits, under § 229.9(c), for permittees to notify the Federal land manager immediately upon the occurrence of such circumstances. Following the permittee's notification, the Federal land manager will notify and consult with the tribe or group as appropriate. In cases involving Native American human remains and other ''cultural items'', as defined by NAGPRA, the Federal land manager is referred to NAGPRA and its implementing

**§ 229.8 Issuance of permits.**

(a) The Federal land manager may issue a permit, for a specified period of time appropriate to the work to be conducted, upon determining that:

(1) The applicant is appropriately qualified, as evidenced by training, education, and/or experience, and possesses demonstrable competence in archaeological theory and methods, and in collecting, handling, analyzing, evaluating, and reporting archaeological data, relative to the type and scope of the work proposed, and also meets the following minimum qualifications:

(i) A graduate degree in anthropology or archaeology, or equivalent training and experience;

(ii) The demonstrated ability to plan, equip, staff, organize, and supervise activity of the type and scope proposed;

(iii) The demonstrated ability to carry research to completion, as evidenced by timely completion of theses, research reports, or similar documents;

(iv) Completion of at least 16 months of professional experience and/or specialized training in archaeological field, laboratory, or library research, administration, or management, including at least 4 months experience and/or specialized training in the kind of activity the individual proposes to conduct under authority of a permit; and

(v) Applicants proposing to engage in historical archaeology should have had at least one year of experience in research concerning archaeological resources of the historic period. Applicants proposing to engage in prehistoric archaeology should have had at least one year of experience in research concerning archaeological resources of the prehistoric period.

(2) The proposed work is to be undertaken for the purpose of furthering archaeological knowledge in the public interest, which may include but need not be limited to, scientific or scholarly research, and preservation of archaeological data;

(3) The proposed work, including time, scope, location, and purpose, is not inconsistent with any management plan or established policy, objectives, or requirements applicable to the management of the public lands concerned;

(4) Where the proposed work consists of archaeological survey and/or data recovery undertaken in accordance with other approved uses of the public lands or Indian lands, and the proposed work has been agreed to in writing by the Federal land manager pursuant to section 106 of the National Historic Preservation Act (16 U.S.C. 470f), paragraphs (a) (2) and (a) (3) shall be deemed satisfied by the prior approval.

(5) Written consent has been obtained, for work proposed on Indian lands, from the Indian landowner and the Indian tribe having jurisdiction over such lands;

(6) Evidence is submitted to the Federal land manager that any university, museum, or other scientific or educational institution proposed in the application as the repository possesses adequate curatorial capability for safeguarding and preserving the archaeological resources and all associated records; and

(7) The applicant has certified that, not later than 90 days after the date the final report is submitted to the Federal land manager, the following will be delivered to the appropriate official of the approved university, museum, or other scientific or educational institution, which shall be named in the permit:

(i) All artifacts, samples, collections, and copies of records, data, photographs, and other documents resulting from work conducted under the requested permit where the permit is for

the excavation and/or removal of archaeological resources from public lands.

(ii) All artifacts, samples and collections resulting from work under the requested permit for which the custody or disposition is not undertaken by the Indian owners, and copies of records, data, photographs, and other documents resulting from work conducted under the requested permit, where the permit is for the excavation and/or removal of archaeological resources from Indian lands.

(b) When the area of the proposed work would cross jurisdictional boundaries, so that permit applications must be submitted to more than one Federal land manager, the Federal land manager shall coordinate the review and evaluation of applications and the issuance of permits.

### § 229.9 Terms and conditions of permits.

(a) In all permits issued, the Federal land manager shall specify:

(1) The nature and extent of work allowed and required under the permit, including the time, duration, scope, location, and purpose of the work;

(2) The name of the individual(s) responsible for conducting the work and, if different, the name of the individual(s) responsible for carrying out the terms and conditions of the permit;

(3) The name of any university, museum, or other scientific or educational institutions in which any collected materials and data shall be deposited; and

(4) Reporting requirements.

(b) The Federal land manager may specify such terms and conditions as deemed necessary, consistent with this part, to protect public safety and other values and/or resources, to secure work areas, to safeguard other legitimate land uses, and to limit activities incidental to work authorized under a permit.

(c) The Federal land manager shall include in permits issued for archaeological work on Indian lands such terms and conditions as may be requested by the Indian landowner and the Indian tribe having jurisdiction over the lands, and for archaeological work on public lands shall include such terms and conditions as may have been developed pursuant to § 229.7.

(d) Initiation of work or other activities under the authority of a permit signifies the permittee's acceptance of the terms and conditions of the permit.

(e) The permittee shall not be released from requirements of a permit until all outstanding obligations have been satisfied, whether or not the term of the permit has expired.

(f) The permittee may request that the Federal land manager extend or modify a permit.

(g) The permittee's performance under any permit issued for a period greater than 1 year shall be subject to review by the Federal land manager, at least annually.

### § 229.10 Suspension and revocation of permits.

(a) *Suspension or revocation for cause.* (1) The Federal land manager may suspend a permit issued pursuant to this part upon determining that the permittee has failed to meet any of the terms and conditions of the permit or has violated any prohibition of the Act or § 229.4. The Federal land manager shall provide written notice to the permittee of the suspension, the cause thereof, and the requirements which must be met before the suspension will be removed.

(2) The Federal land manager may revoke a permit upon assessment of a civil penalty under § 229.15 upon the permittee's conviction under section 6 of the Act, or upon determining that the permittee has failed after notice under this section to correct the situation which led to suspension of the permit.

(b) *Suspension or revocation for management purposes.* The Federal land manager may suspend or revoke a permit, without liability to the United States, its agents, or employees, when continuation of work under the permit would be in conflict with management requirements not in effect when the permit was issued. The Federal land manager shall provide written notice to the permittee stating the nature of and basis for the suspension or revocation.

### § 229.11 Appeals relating to permits.

Any affected person may appeal permit issuance, denial of permit issuance, suspension, revocation, and terms and conditions of a permit through existing administrative appeal procedures, or through procedures which may be established by the Federal land manager pursuant to section 10(b) of the Act and this part.

### § 229.12 Relationship to section 106 of the National Historic Preservation Act.

Issuance of a permit in accordance with the Act and this part does not constitute an undertaking requiring compliance with section 106 of the Act of October 15, 1966 (16 U.S.C. 470f). However, the mere issuance of such a permit does not excuse the Federal land manager from compliance with section 106 where otherwise required.

### § 229.13 Custody of archaeological resources.

(a) Archaeological resources excavated or removed from the public lands remain the property of the United States.

(b) Archaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources.

(c) The Secretary of the Interior may promulgate regulations providing for the exchange of archaeological resources among suitable universities, museums, or other scientific or educational institutions, for the ultimate disposition of archaeological resources, and for standards by which archaeological resources shall be preserved and maintained, when such resources have been excavated or removed from public lands and Indian lands.

(d) In the absence of regulations referenced in paragraph (c) of this section, the Federal land manager may provide for the exchange of archaeological resources among suitable universities, museums, or other scientific or educational institutions, when such resources have been excavated or removed from public lands under the authority of a permit issued by the Federal land manager.

(e) Notwithstanding the provisions of paragraphs (a) through (d) of this section, the Federal land manager will follow the procedures required by NAGPRA and its implementing regulations for determining the disposition of Native American human remains and other ''cultural items'', as defined by NAGPRA, that have been excavated, removed, or discovered on public lands.

### § 229.14 Determination of archaeological or commercial value and cost of restoration and repair.

(a) *Archaeological value*. For purposes of this part, the archaeological value of any archaeological resource involved in a violation of the prohibitions in § 229.4 of this part or conditions of a permit issued pursuant to this part shall be the value of the information associated with the archaeological resource. This value shall be appraised in terms of the costs of the retrieval of the scientific information which would have been obtainable prior to the violation. These costs may include, but need not be limited to, the cost of preparing a research design, conducting field work, carrying out laboratory analysis, and preparing reports as would be necessary to realize the information potential.

(b) *Commercial value*. For purposes of this part, the commercial value of any archaeological resource involved in a violation of the prohibitions in § 229.4 of this part or conditions of a permit issued pursuant to this part shall be its fair market value. Where the violation has resulted in damage to the archaeological resource, the fair market value should be determined using the condition of the archaeological resource prior to the violation, to the extent that its prior condition can be ascertained.

(c) *Cost of restoration and repair*. For purposes of this part, the cost of restoration and repair of archaeological resources damaged as a result of a violation of prohibitions or conditions pursuant to this part, shall be the sum of the costs already incurred for emergency restoration or repair work, plus those costs projected to be necessary to complete restoration and repair, which may include, but need not be limited to, the costs of the following:

(1) Reconstruction of the archaeological resource;

(2) Stabilization of the archaeological resource;

(3) Ground contour reconstruction and surface stabilization;

(4) Research necessary to carry out reconstruction or stabilization;

(5) Physical barriers or other protective devices, necessitated by the disturbance of the archaeological resource, to protect it from further disturbance;

(6) Examination and analysis of the archaeological resource including recording remaining archaeological information, where necessitated by disturbance, in order to salvage remaining values which cannot be otherwise conserved;

(7) Reinterment of human remains in accordance with religious custom and State, local, or tribal law, where appropriate, as determined by the Federal land manager.

(8) Preparation of reports relating to any of the above activities.

### § 229.15 Assessment of civil penalties.

(a) The Federal land manager may assess a civil penalty against any person who has violated any prohibition contained in § 229.4 or who has violated any term or condition included in a permit issued in accordance with the Act and this part.

(b) *Notice of violation*. The Federal land manager shall serve a notice of violation upon any person believed to be subject to a civil penalty, either in person or by registered or certified mail (return receipt requested). The Federal land manager shall include in the notice:

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provision(s) of this part or to a permit issued pursuant to this part allegedly violated;

(3) The amount of penalty proposed to be assessed, including any initial proposal to mitigate or remit where appropriate, or a statement that notice of a proposed penalty amount will be served after the damages associated with the alleged violation have been ascertained;

(4) Notification of the right to file a petition for relief pursuant to paragraph (d) of this section, or to await the Federal land manager's notice of assessment, and to request a hearing in accordance with paragraph (g) of this section. The notice shall also inform the person of the right to seek judicial review of any final administrative decision assessing a civil penalty.

(c) The person served with a notice of violation shall have 45 calendar days from the date of its service (or the date of service of a proposed penalty amount, if later) in which to respond. During this time the person may:

(1) Seek informal discussions with the Federal land manager;

(2) File a petition for relief in accordance with paragraph (d) of this section;

(3) Take no action and await the Federal land manager's notice of assessment;

(4) Accept in writing or by payment the proposed penalty, or any mitigation or remission offered in the notice. Acceptance of the proposed penalty or mitigation or remission shall be deemed a waiver of the notice of assessment and of the right to request a hearing under paragraph (g) of this section.

(d) *Petition for relief*. The person served with a notice of violation may request that no penalty be assessed or that the amount be reduced, by filing a petition for relief with the Federal land manager within 45 calendar days of the date of service of the notice of violation (or of a proposed penalty amount, if later). The petition shall be in writing and signed by the person served with the notice of violation. If the person is a corporation, the petition must be signed by an officer authorized to sign such documents. The petition shall set forth in full the legal or factual basis for the requested relief.

(e) *Assessment of penalty*. (1) The Federal land manager shall assess a civil penalty upon expiration of the period for filing a petition for relief, upon completion of review of any petition filed, or upon completion of informal discussions, whichever is later.

(2) The Federal land manager shall take into consideration all available information, including information provided pursuant to paragraphs (c)

and (d) of this section or furnished upon further request by the Federal land manager.

(3) If the facts warrant a conclusion that no violation has occurred, the Federal land manager shall so notify the person served with a notice of violation, and no penalty shall be assessed. (4) Where the facts warrant a conclusion that a violation has occurred, the Federal land manager shall determine a penalty amount in accordance with § 229.16.

(f) *Notice of assessment*. The Federal land manager shall notify the person served with a notice of violation of the penalty amount assessed by serving a written notice of assessment, either in person or by registered or certified mail (return receipt requested). The Federal land manager shall include in the notice of assessment:

(1) The facts and conclusions from which it was determined that a violation did occur;

(2) The basis in § 229.16 for determining the penalty amount assessed and/or any offer to mitigate or remit the penalty; and

(3) Notification of the right to request a hearing, including the procedures to be followed, and to seek judicial review of any final administrative decision assessing a civil penalty.

(g) *Hearings*. (1) Except where the right to request a hearing is deemed to have been waived as provided in paragraph (c)(4) of this section, the person served with a notice of assessment may file a written request for a hearing with the adjudicatory body specified in the notice. The person shall enclose with the request for hearing a copy of the notice of assessment, and shall deliver the request as specified in the notice of assessment, personally or by registered or certified mail (return receipt requested).

(2) Failure to deliver a written request for a hearing within 45 days of the date of service of the notice of assessment shall be deemed a waiver of the right to a hearing.

(3) Any hearing conducted pursuant to this section shall be held in accordance with 5 U.S.C. 554. In any such hearing, the amount of civil penalty assessed shall be determined in accordance with this part, and shall not be limited by the amount assessed by the Federal land manager under paragraph (f) of this section or any offer of mitigation or remission made by the Federal land manager.

(h) *Final administrative decision*. (1) Where the person served with a notice of violation has accepted the penalty pursuant to paragraph (c)(4) of this section, the notice of violation shall constitute the final administrative decision;

(2) Where the person served with a notice of assessment has not filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the notice of assessment shall constitute the final administrative decision;

(3) Where the person served with a notice of assessment has filed a timely request for a hearing pursuant to paragraph (g)(1) of this section, the decision resulting from the hearing or any applicable administrative appeal therefrom shall constitute the final administrative decision.

(i) *Payment of penalty*. (1) The person assessed a civil penalty shall have 45 calendar days from the date of issuance of the final administrative decision in which to make full payment of the penalty assessed, unless a timely request for appeal has been filed with a U.S. District Court as provided in section 7(b)(1) of the Act.

(2) Upon failure to pay the penalty, the Federal land manager may request the Attorney General to institute a civil action to collect the penalty in a U.S. District Court for any district in which the person assessed a civil penalty is found, resides, or transacts business. Where the Federal land manager is not represented by the Attorney General, a civil action may be initiated directly by the Federal land manager.

(j) *Other remedies not waived*. Assessment of a penalty under this section shall not be deemed a waiver of the right to pursue other available legal or administrative remedies.

### § 229.16 Civil penalty amounts.

(a) *Maximum amount of penalty*. (1) Where the person being assessed a civil penalty has not committed any previous violation of any prohibition in § 229.4 or of any term or condition included in a permit issued pursuant to

this part, the maximum amount of the penalty shall be the full cost of restoration and repair of archaeological resources damaged plus the archaeological or commercial value of archaeological resources destroyed or not recovered.

(2) Where the person being assessed a civil penalty has committed any previous violation of any prohibition in § 229.4 or of any term or condition included in a permit issued pursuant to this part, the maximum amount of the penalty shall be double the cost of restoration and repair plus double the archaeological or commercial value of archaeological resources destroyed or not recovered.

(3) Violations limited to the removal of arrowheads located on the surface of the ground shall not be subject to the penalties prescribed in this section.

(b) *Determination of penalty amount, mitigation, and remission.* The Federal land manager may assess a penalty amount less than the maximum amount of penalty and may offer to mitigate or remit the penalty.

(1) Determination of the penalty amount and/or a proposal to mitigate or remit the penalty may be based upon any of the following factors:

(i) Agreement by the person being assessed a civil penalty to return to the Federal land manager archaeological resources removed from public lands or Indian lands;

(ii) Agreement by the person being assessed a civil penalty to assist the Federal land manager in activity to preserve, restore, or otherwise contribute to the protection and study of archaeological resources on public lands or Indian lands;

(iii) Agreement by the person being assessed a civil penalty to provide information which will assist in the detection, prevention, or prosecution of violations of the Act or this part;

(iv) Demonstration of hardship or inability to pay, provided that this factor shall only be considered when the person being assessed a civil penalty has not been found to have previously violated the regulations in this part;

(v) Determination that the person being assessed a civil penalty did not willfully commit the violation;

(vi) Determination that the proposed penalty would constitute excessive punishment under the circumstances;

(vii) Determination of other mitigating circumstances appropriate to consideration in reaching a fair and expeditious assessment.

(2) When the penalty is for a violation on Indian lands, the Federal land manager shall consult with and consider the interests of the Indian landowner and the Indian tribe having jurisdiction over the Indian lands prior to proposing to mitigate or remit the penalty.

(3) When the penalty is for a violation which may have had an effect on a known Indian tribal religious or cultural site on public lands, the Federal land manager should consult with and consider the interests of the affected tribe(s) prior to proposing to mitigate or remit the penalty.

### § 229.17 Other penalties and rewards.

(a) Section 6 of the Act contains criminal prohibitions and provisions for criminal penalties. Section 8(b) of the Act provides that archaeological resources, vehicles, or equipment involved in a violation may be subject to forfeiture.

(b) Section 8(a) of the Act provides for rewards to be made to persons who furnish information which leads to conviction for a criminal violation or to assessment of a civil penalty. The Federal land manager may certify to the Secretary of the Treasury that a person is eligible to receive payment. Officers and employees of Federal, State, or local government who furnish information or render service in the performance of their official duties, and persons who have provided information under § 229.16(b)(1)(iii) shall not be certified eligible to receive payment of rewards.

(c) In cases involving Indian lands, all civil penalty monies and any item forfeited under the provisions of this section shall be transferred to the appropriate Indian or Indian tribe.

### § 229.18 Confidentiality of archaeological resource information.

(a) The Federal land manager shall not make available to the public, under subchapter II of chapter 5 of title 5 of

the U.S. Code or any other provision of law, information concerning the nature and location of any archaeological resource, with the following exceptions:

(1) The Federal land manager may make information available, provided that the disclosure will further the purposes of the Act and this part, or the Act of June 27, 1960, as amended (16 U.S.C. 469–469c), without risking harm to the archaeological resource or to the site in which it is located.

(2) The Federal land manager shall make information available, when the Governor of any State has submitted to the Federal land manager a written request for information, concerning the archaeological resources within the requesting Governor's State, provided that the request includes:

(i) The specific archaeological resource or area about which information is sought;

(ii) The purpose for which the information is sought; and

(iii) The Governor's written commitment to adequately protect the confidentiality of the information.

(b) [Reserved]

### § 229.19 Report.

(a) Each Federal land manager, when requested by the Secretary of the Interior, will submit such information as is necessary to enable the Secretary to comply with section 13 of the Act and comprehensively report on activities carried out under provisions of the Act.

(b) The Secretary of the Interior will include in the annual comprehensive report, submitted to the Committee on Interior and Insular Affairs of the United States House of Representatives and to the Committee on Energy and Natural Resources of the United States Senate under section 13 of the Act, information on public awareness programs submitted by each Federal land manager under § 229.20(b). Such submittal will fulfill the Federal land manager's responsibility under section 10(c) of the Act to report on public awareness programs.

(c) The comprehensive report by the Secretary of the Interior also will include information on the activities carried out under section 14 of the Act. Each Federal land manager, when requested by the Secretary, will submit any available information on surveys and schedules and suspected violations in order to enable the Secretary to summarize in the comprehensive report actions taken pursuant to section 14 of the Act.

### § 229.20 Public awareness programs.

(a) Each Federal land manager will establish a program to increase public awareness of the need to protect important archaeological resources located on public and Indian lands. Educational activities required by section 10(c) of the Act should be incorporated into other current agency public education and interpretation programs where appropriate.

(b) Each Federal land manager annually will submit to the Secretary of the Interior the relevant information on public awareness activities required by section 10(c) of the Act for inclusion in the comprehensive report on activities required by section 13 of the Act.

### § 229.21 Surveys and schedules.

(a) The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Board of the Tennessee Valley Authority will develop plans for surveying lands under each agency's control to determine the nature and extent of archaeological resources pursuant to section 14(a) of the Act. Such activities should be consistent with Federal agency planning policies and other historic preservation program responsibilities required by 16 U.S.C. 470 *et seq*. Survey plans prepared under this section will be designed to comply with the purpose of the Act regarding the protection of archaeological resources.

(b) The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Tennessee Valley Authority will prepare schedules for surveying lands under each agency's control that are likely to contain the most scientifically valuable archaeological resources pursuant to section 14(b) of the Act. Such schedules will be developed based on objectives and information identified in survey plans described in paragraph (a) of this section and implemented systematically to

cover areas where the most scientifically valuable archaeological resources are likely to exist.

(c) Guidance for the activities undertaken as part of paragraphs (a) through (b) of this section is provided by the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation.

(d) Other Federal land managing agencies are encouraged to develop plans for surveying lands under their jurisdictions and prepare schedules for surveying to improve protection and management of archaeological resources.

(e) The Secretaries of the Interior, Agriculture, and Defense and the Chairman of the Tennessee Valley Authority will develop a system for documenting and reporting suspected violations of the various provisions of the Act. This system will reference a set of procedures for use by officers, employees, or agents of Federal agencies to assist them in recognizing violations, documenting relevant evidence, and reporting assembled information to the appropriate authorities. Methods employed to document and report such violations should be compatible with existing agency reporting systems for documenting violations of other appropriate Federal statutes and regulations. Summary information to be included in the Secretary's comprehensive report will be based upon the system developed by each Federal land manager for documenting suspected violations.

## PART 230—FINANCIAL INSTITUTIONS ON DOD INSTALLATIONS

Sec.
230.1 Purpose.
230.2 Applicability.
230.3 Definitions.
230.4 Policy.
230.5 Responsibilities.

AUTHORITY: 10 U.S.C. 136.

SOURCE: 66 FR 46373, Sept. 5, 2001, unless otherwise noted.

### § 230.1 Purpose.

This part:

(a) Updates policies and responsibilities for financial institutions that serve Department of Defense (DoD) personnel on DoD installations worldwide. Associated procedures are contained in 32 CFR part 231.

(b) Prescribes consistent arrangements for the provision of services by financial institutions among the DoD Components, and requires that financial institutions operating on DoD installations provide, and are provided, support consistent with the policies stated in this part.

### § 230.2 Applicability.

This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the Joint Chiefs of Staff (JCS), the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter collectively referred to as ''the DoD Components'') and all nonappropriated fund instrumentalities including the Military Exchange Services and morale, welfare and recreation (MWR) activities.

### § 230.3 Definitions.

Terms used in this part are set forth in 32 CFR part 231.

### § 230.4 Policy.

(a) The following pertains to financial institutions on DoD installations:

(1) Except where they already may exist as of May 1, 2000, no more than one banking institution and one credit union shall be permitted to operate on a DoD installation.

(2) Upon the request of an installation commander and with the approval of the Secretary of the Military Department concerned (or designee), duly chartered financial institutions may be authorized to provide financial services on DoD installations to enhance the morale and welfare of DoD personnel and facilitate the administration of public and quasi-public monies. Arrangement for the provision of such services shall be in accordance with this part and the applicable provisions of 32 CFR part 231.

(3) Financial institutions or branches thereof, shall be established on DoD installations only after approval by the Secretary of the Military Department

concerned (or designee) and the appropriate regulatory agency.

(i) Except in limited situations overseas (see paragraph (b)(2)(iii) of this section), only banking institutions insured by the Federal Deposit Insurance Corporation and credit unions insured by the National Credit Union Share Insurance Fund or by another insurance organization specifically qualified by the Secretary of the Treasury, shall operate on DoD installations. These financial institutions may either be State or federally chartered; however, U.S. credit unions operated overseas shall be federally insured.

(ii) Military banking facilities (MBFs) shall be established on DoD installations only when a demonstrated and justified need cannot be met through other means. An MBF is a financial institution that is established by the Department of the Treasury under statutory authority that is separate from State or Federal laws that govern commercial banking. Section 265 of title 12, United States Code contains the provisions for the Department of the Treasury to establish MBFs. Normally, MBFs shall be authorized only at overseas locations. This form of financial institution may be considered for use at domestic DoD installations only when the cognizant DoD Component has been unable to obtain, through normal means, financial services from a State or federally chartered financial institution authorized to operate in the State in which the installation is located. In times of mobilization, it may become necessary to designate additional MBFs as an emergency measure. The Director, Defense Finance and Accounting Service (DFAS) may recommend the designation of MBFs to the Department of the Treasury.

(iii) Retail banking operations shall not be performed by any DoD Component. Solicitations for such services shall be issued, or proposals accepted, only in accordance with the policies identified in this part. The DoD Components shall rely on commercially available sources in accordance with DoD Directive 4100.15.[1]

[1] See footnote 1 to § 231.1(a).

(4) Installation commanders shall not seek the provision of financial services from any entity other than the on-base banking office or credit union. The Director, DFAS, with the concurrence of the Under Secretary of Defense (Comptroller) (USD(C)), may approve exceptions to this policy.

(5) Financial institutions authorized to locate on DoD installations shall be provided logistic support as set forth in 32 CFR part 231.

(6) Military disbursing offices, nonappropriated fund instrumentalities (including MWR activities and the Military Exchange Services) and other DoD Component activities requiring financial services shall use on-base financial institutions to the maximum extent feasible.

(7) The Department encourages the delivery of retail financial services on DoD installations via nationally networked automated teller machines (ATMs).

(i) ATMs are considered electronic banking services and, as such, shall be provided only by financial institutions that are chartered and insured in accordance with the provisions of paragraph (a)(3) of this section.

(ii) Proposals by the installation commander to install ATMs from other than on-base financial institutions shall comply with the provisions of paragraph (a)(4) of this section.

(8) Expansion of financial services (to include in-store banking) requiring the outgrant of additional space or logistical support shall be approved by the installation commander. Any DoD activity or financial institution seeking to expand financial services shall coordinate such requests with the installation bank/credit union liaison officer prior to the commander's consideration.

(9) The installation commander shall ensure, to the maximum extent feasible, that all financial institutions operating on that installation are given the opportunity to participate in pilot programs to demonstrate new financial-related technology or establish new business lines (e.g., in-store banking) where a determination has been made by the respective DoD Component that the offering of such services is warranted.

(10) The installation commander shall approve requests for termination of financial services that are substantiated by sufficient evidence and forwarded to the Secretary of the Military Department concerned (or designee). The Secretary of the Military Department (or designee) shall coordinate such requests with the USD(C), through the Director, DFAS, before notification to the appropriate regulatory agency.

(11) Additional guidance pertaining to financial services is set forth in 32 CFR part 231.

(b) The following additional provisions pertain only to financial institutions on overseas DoD installations:

(1) The extension of services by MBFs and credit unions overseas shall be consistent with the policies stated in this part and with the applicable status of forces agreements, other intergovernmental agreements, or host-country law.

(2) Financial services at overseas DoD installations may be provided by:

(i) Domestic on-base credit unions operating overseas under a geographic franchise and, where applicable, as authorized by the pertinent status of forces agreements, other intergovernmental agreements, or host-country law.

(ii) MBFs operated under and authorized by the pertinent status of forces agreement, other intergovernmental agreement, or host-country law.

(iii) Domestic and foreign banks located on overseas DoD installations that are:

(A) Chartered to provide financial services in that country, and

(B) A party to a formal operating agreement with the installation commander to provide such services, and

(C) Identified, where applicable, in the status of forces agreements, other intergovernmental agreements, or host-country law.

(3) In countries served by MBFs operated under contract, nonappropriated fund instrumentalities and on-base credit unions that desire, and are authorized, to provide accommodation exchange services shall acquire foreign currency from the MBF at the MBF accommodation rate; and shall sell such foreign currency at a rate of exchange that is no more favorable to the customer than the customer rate available at the MBF.

### § 230.5 Responsibilities.

(a) The Under Secretary of Defense (Comptroller) (USD(C)) shall develop policies governing establishment, operation, and termination of financial institutions on DoD installations and take final action on requests for exceptions to this part.

(b) The Under Secretary of Defense (Acquisition, Technology and Logistics) (USD(AT&L)) shall monitor policies and procedures governing logistical support furnished to financial institutions on DoD installations, including the use of DoD real property and equipment.

(c) The Under Secretary of Defense (Personnel and Readiness) (USD(P&R)) shall advise the USD(C) on all aspects of on-base financial institution services that affect the morale and welfare of DoD personnel.

(d) DoD Component responsibilities pertaining to this part are set forth in 32 CFR part 231.

## PART 231—PROCEDURES GOVERNING BANKS, CREDIT UNIONS AND OTHER FINANCIAL INSTITUTIONS ON DOD INSTALLATIONS

### Subpart A—Guidelines

Sec.
231.1 Overview.
231.2 Policy.
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231.5 Procedures—domestic banks.
231.6 Procedures—overseas banks.
231.7 Procedures—domestic credit unions.
231.8 Procedures—overseas credit unions.
231.9 Definitions.

### Subpart B—DoD Directive 1000.11

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### Subpart C—Guidelines for Applications of the Privacy Act to Financial Institution Operations

231.11 Guidelines.
APPENDIX A TO PART 231—SAMPLE OPERATING AGREEMENT BETWEEN MILITARY INSTALLATIONS AND FINANCIAL INSTITUTIONS
APPENDIX B TO PART 231—IN-STORE BANKING.

APPENDIX C TO PART 231—SAMPLE CERTIFICATE OF COMPLIANCE FOR CREDIT UNIONS.

AUTHORITY: 10 U.S.C. 136.

SOURCE: 66 FR 46708, Sept. 7, 2001, unless otherwise noted.

## Subpart A—Guidelines

### §231.1 Overview.

(a) *Purpose*. This part implements DoD Directive 1000.11 (32 CFR part 230)[1] and prescribes guidance and procedures governing the establishment, support, operation, and termination of banks and credit unions operating on DoD installations worldwide, to include military banking facilities (MBFs). In addition, this part provides guidance intended to ensure that arrangements for the provision of services by financial institutions are consistent among DoD Components, and that financial institutions operating on DoD installations provide, and are provided, support consistent with the guidance and procedures stated herein.

(b) *Applicability*. This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Joint Chiefs of Staff (JCS), the Joint Staff and the supporting Joint Agencies, the Combatant Commands, the Inspector General of the Department of Defense (IG, DoD), the Defense Agencies, the DoD Field Activities, the Uniformed Services University of the Health Sciences (USUHS), all DoD nonappropriated fund instrumentalities including the Military Exchange Services and morale, welfare and recreation (MWR) activities, and all other organizational entities within the Department of Defense.

### §231.2 Policy.

The policy pertaining to financial institutions operating on DoD installations is contained in DoD Directive 1000.11 (32 CFR part 230) and in §231.4.

### §231.3 Responsibilities.

(a) The Under Secretary of Defense (Comptroller) (USD(C)) shall develop and monitor policies governing establishment, operation, and termination of financial institutions on DoD installations and take final action on requests for exceptions to this part.

(b) The Under Secretary of Defense (Acquisition, Technology and Logistics) (USD(AT&L)) shall monitor policies and procedures governing logistical support furnished to financial institutions on DoD installations, including the use of DoD real property and equipment.

(c) The Under Secretary of Defense (Personnel and Readiness) (USD(P&R)) shall advise the USD(C) on all aspects of on-base financial institution services that affect the morale and welfare of DoD personnel.

(d) The Director, Defense Finance and Accounting Service (DFAS) shall:

(1) Develop procedures governing banks and credit unions on DoD installations for promulgation in this part.

(2) For domestic DoD installations, coordinate with the Secretaries of the Military Departments (or designees) on requests from subordinate installation commanders to establish or terminate banking offices or on-base credit unions. For overseas DoD installations, coordinate with the Secretary of the Military Department concerned (or designee) on requests from subordinate installation commanders to establish or discontinue the provision of financial services from the on-base financial institution under contract with the Department of Defense or to establish or terminate banking offices or credit unions located on DoD installations.

(3) In coordination with affected DoD Components, authorize the specific types of banking services that will be provided by overseas military banking facilities (MBFs) and specify the charges or fees, or the basis for these, to be levied on users of these services.

(4) Coordinate with the Fiscal Assistant Secretary of the Treasury on the designation of domestic and overseas MBFs as depositaries and financial agents of the U.S. Government.

(5) Designate a technical representative to provide policy direction for the procuring and administrative contracting officer(s) responsible under the Federal Acquisition Regulation (FAR) for acquiring banking services required at overseas DoD installations.

[1] Copies may be obtained via Internet at *http://www.dtic.whs/directives*.

(6) Serve as principal liaison with banking institutions having offices on overseas DoD installations. In this capacity, monitor MBF managerial and operational policies, procedures, and operating results and take action as appropriate.

(7) As necessary, assist in the formation of government-to-government agreements for the provision of banking services on overseas DoD installations, in accordance with DoD Directive 5530.3[2].

(8) Provide procedural guidance to DoD Components, as required.

(9) Maintain liaison with financial institution trade associations, leagues, and councils in order to interpret DoD policies toward respective memberships and aid in resolving mutual concerns affecting the provision of financial services.

(10) Coordinate with the USD(P&R), through the USD(C), on all aspects of morale and welfare and with the USD(AT&L), through the USD(C), on all aspects of logistic support for on-base financial institutions.

(11) Monitor industry trends, conduct studies and surveys, and facilitate appropriate dialogues on banking and credit union arrangements and cost-benefit relationships, coordinate as necessary with DoD Components, financial institutions, and trade associations as appropriate.

(12) Maintain liaison, as appropriate, with financial institution regulatory agencies at federal and state levels.

(13) Ensure that recommendations of the Combatant Commands are considered before processing requests for overseas banking and credit union service or related actions.

(14) Maintain a listing of all geographic franchises assigned to credit unions serving DoD overseas installations.

(e) Secretaries of the Military Departments (or designees) shall:

(1) For domestic DoD installations, take action on requests from subordinate installation commanders to establish or terminate financial institution operations. For overseas DoD installations, take action in accordance with guidance contained herein on requests from subordinate installation commanders to establish or discontinue the provision of financial services from the DoD contracted banking institution, or to establish or terminate other financial institutions located on DoD installations.

(2) Provide for liaison to those financial institutions that operate banking offices on respective domestic DoD installations.

(3) Oversee the use of banking offices and credit unions on respective DoD installations within the guidance contained herein and in DoD Directive 1000.11 (32 CFR part 230).

(4) Evaluate the services provided and related charges and fees by respective on-base banking offices and credit unions to ensure that they fulfill the requirements upon which the establishment and retention of those services were justified.

(5) Monitor practices and procedures of respective banking offices and credit unions to ensure that the welfare and interests of DoD personnel as consumers are protected.

(6) Assist on-base banking offices and credit unions to develop and expand necessary services for DoD personnel consistent with this part.

(7) Encourage the conversion of existing domestic MBFs on respective installations to independent or branch bank status where feasible.

(8) Provide logistical support to overseas MBFs under terms and conditions identified in this part as well as with the applicable terms of DoD contracts with financial institutions responsible for the operations of overseas MBFs.

(9) Refer matters requiring policy decisions or proposed changes to this part or DoD Directive 1000.11 (32 CFR part 230) to the USD(C) through the Director, DFAS.

(10) Monitor and encourage the use of financial institutions on DoD installations to accomplish the following ends.

(i) Facilitate convenient, effective management of the appropriated, nonappropriated, and private funds of on-base activities.

(ii) Assist DoD personnel in managing their personal finances through participation in programs such as direct deposit and regular savings plans, including U.S. savings bonds. The use

[2] See footnote 1 to § 231.1(a).

of on-base financial institutions shall be on a voluntary basis and should not be urged in preference to, or to the exclusion of, other financial institutions.

(11) Encourage and assist duly chartered financial institutions on domestic DoD installations to provide complete financial services to include, without charge, basic financial education and counseling services. Financial education and counseling services refer to basic personal and family finances such as budgeting, checkbook balancing and account reconciliation, benefits of savings, prudent use of credit, how to start a savings program, how to shop and apply for credit, and the consequences of excessive credit.

(12) Establish liaison, as appropriate, with federal and state regulatory agencies and financial institution trade associations, leagues, and councils.

(13) Make military locator services available to on-base financial institutions in accordance with the Privacy Act guidelines in subpart B of this part.

(14) Permit DoD personnel to serve on volunteer boards or committees of on-base financial institutions, without compensation, when neither a conflict of duty nor a conflict of interest is involved, in accordance with DoD Directive 5500.7.[3]

(15) Allow DoD personnel to attend conferences and meetings that bring together representatives of on-base financial institutions, when neither a conflict of duty nor a conflict of interest is involved, in accordance with DoD Directive 1327.5,[4] subchapter 630 of the DoD Civilian Personnel Manual (DoD 1400.25–M[5]), and Comptroller General Decision B–212457.

(f) The Commanders of the Combatant Commands (or designees) shall:

(1) Ensure the appropriate coordination of the following types of requests affecting financial institutions overseas.

(i) Establish financial institutions in countries not presently served. Such requests will include a statement that the requirement has been coordinated with the U.S. Chief of Diplomatic Mission or U.S. Embassy and that the host country will permit the operation.

(ii) Eliminate any or all financial institutions on DoD installations within a foreign country. Such requests will include a statement that the U.S. Chief of Diplomatic Mission has been informed and that appropriate arrangements to coordinate local termination announcements and procedures have been made with the U.S. Embassy.

(2) Monitor and coordinate military banking operations within the command area. Personnel assigned to security assistance positions will not perform this function without the prior approval of the Director, Defense Security Cooperation Agency (DSCA).

(g) The Commanders of Major Commands and subordinate installation commanders shall:

(1) Monitor the banking and credit union program within their commands.

(2) Coordinate requests to establish or construct bank and credit union offices or terminate logistical support as specified in this part to banks and credit unions within their commands. Personnel assigned to overseas security assistance positions will not monitor, coordinate, or assist in military banking operations without the prior approval of the DSCA.

(3) Assign, as appropriate, responsibility for paragraphs (g)(1) and (g)(2) of this section, to comptroller or resource management personnel.

(4) Cooperate with financial institution associations, leagues, and councils.

(5) Recognize the right of all DoD personnel to organize and join credit unions and promote the credit union movement in DoD worldwide.

(6) Permit DoD personnel to serve on volunteer boards or committees of on-base financial institutions, without compensation, when neither a conflict of duty nor a conflict of interest is involved, in accordance with DoD Directive 5500.7.

(7) Allow DoD personnel to attend conferences and meetings that bring together representatives of on-base financial institutions, when neither a conflict of duty nor a conflict of interest is involved, in accordance with DoD Directive 1327.5, Subchapter 630 of the DoD Civilian Personnel Manual (DoD

[3] See footnote 1 to §231.1(a).
[4] See footnote 1 to §231.1(a).
[5] See footnote 1 to §231.1(a).

1400.25–M), and Comptroller General Decision B–212457.

(8) Seek the provision of financial services only from existing on-base financial institutions, proposing alternatives only where on-base financial institutions fail to respond favorably to a valid requirement.

**§ 231.4 General provisions.**

(a) *Security*. The installation commander (or designee) and officials of the on-base financial institutions shall work with the installation security authorities to establish an understanding as to each entity's responsibilities. The on-base financial institutions are encouraged to establish an ongoing relationship with installation security authorities on all matters of asset protection.

(1) A written agreement shall be established outlining the security procedures that the financial institution will follow and the role that installation security authorities will play with regard to alarms, movement of cash, and procedures to be followed in response to criminal activity (e.g., armed robbery).

(2) Cash and other assets in on-base banking offices and credit unions are the property of those financial institutions. Maintenance of alarms and use of armored cars is the sole responsibility of the on-base financial institution. The on-base financial institution is also solely responsible for the guarding or escorting of cash unless the installation commander determines that providing such services is desirable or necessary.

(b) *Central locator services*. Military locator services shall be provided per the guidelines in subpart B of this part.

(1) When appropriate, installations will process financial institution requests for central locator service to obtain military addresses of active duty personnel. This service will be used to locate persons for settling accounts, and recovering funds on checks that did not clear or loans that are delinquent or in default (see DoD Directive 1344.9[6]). If delinquent loans or dishonored checks are not recouped within 48 hours, financial institutions operating on DoD installations may bring this information to the attention of the local commander, bank liaison officer, or other designee for assistance in effecting restitution of the amount due, if not otherwise prohibited by law. The financial institution will pay the appropriate fee for each request to the respective Military Department.

(2) The DoD Components shall assist financial institutions to locate DoD personnel whose whereabouts cannot be locally determined. The request should be on the financial institution's letterhead, include the Service member's name and social security number, and cite the cognizant Military Service regulation that authorizes the use of locator services. If a financial institution needs immediate service, the cognizant institution official should contact the bank or credit union liaison officer.

(i) For addresses of Department of the Army active, retired, separated and civilian personnel, financial institutions may telephone (703) 325–3732 or write to: Department of the Army Worldwide Locator, U.S. Army Enlisted Record and Evaluation Center, 8899 E. 56th Street, Indianapolis, IN 46249–5301.

(ii) For addresses of Navy active, retired, separated and civilian personnel, financial institutions may telephone (901) 874–3388 or write to: Navy Personnel Command, PERS–312F, 5720 Integrity Drive, Millington, TN 38055–3120.

(iii) For addresses of Department of the Air Force active, retired, separated and civilian personnel, financial institutions may telephone (210) 565–2660 or write to: Air Force Personnel Center, MSIMDL Suite 50, 550 C Street West, Randolph AFB, TX 78150–4752.

(iv) For addresses of United States Marine Corps active, retired, separated and civilian personnel, financial institutions may telephone (703) 784–3942 or write to:

*Active*

U.S. Marine Corps—CMC, HQ MC MMS B 10, 2008 Elliot Road, Room 201, Quantico, VA 22134–5030.

[6] See footnote 1 to § 231.1(a).

*Retired-Separated*

Q U.S. MMRS–6, 280 Russell Road, Quantico, VA 22134–5105.

*Civilian*

Commanding General, 15303 Andrew Road, Kansas City, MO 64147–1207.

(c) *Advertising*. (1) An on-base financial institution may use the unofficial section of that installation's daily bulletin, provided space is available, to inform DoD personnel of financial services and announce seminars, consumer information programs, and other matters of broad general interest. Announcements of free financial counseling services are encouraged. Such media may not be used for competitive or comparative advertising of, for example, specific interest rates on savings or loans.

(2) An on-base financial institution may use installation bulletin boards, newsletters or web pages to post general information that complements the installation's financial counseling programs and promotes financial responsibility and thrift. Message center services may distribute a reasonable number of announcements to units for use on bulletin boards so long as this does not impose an unreasonable workload.

(3) An on-base financial institution may include an insert in the installation's newcomers package (or equivalent). This insert should benefit newcomers by identifying the financial services that are available on the installation.

(4) DoD Directive 5120.20[7] prevents use of the Armed Forces Radio and Television Service to promote a specific financial institution.

(5) Off-base financial institutions are not permitted to distribute competitive literature or forms on the installation. These institutions, however, may use commercial advertising, mailings or telecommunications to reach their customers.

(6) Advertising in government-funded (official) installation papers is not permitted with the exception of insert advertising in the *Stars and Stripes* overseas. Installation newspapers funded by advertisers are not official publications and, thus, may include advertising paid for by any financial institution.

(7) Installation activities, including Military Exchange Services and concessionaire outlets, shall not permit the distribution of literature from off-base financial institutions if there is an on-base financial institution. This does not prevent the Military Exchange Services from distributing literature on affinity credit card services that those Military Exchange Services may acquire centrally through competitive solicitation.

(d) *Automated teller machine (ATM) service*. On-base financial institutions are encouraged to install ATMs at those installation(s) on which they are located.

(1) Financial institutions that propose to install ATMs on DoD installations shall bear the cost of ATM installation, maintenance and operation. The installation commander may enter into an agreement with the on-base financial institution wherein the installation may acquire and provide ATMs to on-base financial institutions under certain circumstances, such as when it is advantageous to the government to have one or more ATMs available for use but the acquisition cost to the financial institution is prohibitive. No ATM shall be purchased by an installation unless approved by the Secretary of the Military Department concerned (or designee). In all such cases, installation costs and all logistic support shall be borne by the financial institution.

(2) ATM approval authority is as shown:

(i) The installation commander has approval authority when an on-base financial institution wishes to place an ATM on the installation. This approval should be reflected as an amendment to the operating agreement.

(ii) Where there is no on-base financial institution, follow the solicitation procedures to obtain financial services set forth in §§231.5(c) and 231.7(b).

(3) The availability of ATM service shall not preclude the later establishment of a banking office should conditions change on an installation.

(4) Proposals by an installation commander to install ATMs on domestic installations from other than on-base

[7] See footnote 1 to §231.1(a).

financial institutions, including the Military Exchange Services, morale, welfare and recreational activities and/or other nonappropriated fund instrumentalities, shall be considered only when:

(i) ATM service is unavailable or existing service is inadequate, and

(ii) The on-base financial institution(s) either declines to provide the service, fails to improve existing service so that it is adequate, or does not formally respond to the request for such service within 30 days of the date of the request. Any ATM service from other than on-base financial institutions is considered an exception to policy. The procedures to establish an on-base financial institution set forth in §§ 231.5(c) and 231.7(b) shall be followed when soliciting for such ATM services. Proposals offering shared-access ATMs (e.g., ATMs operated by two or more financial institutions where their accountholders are not assessed any or all fees applicable to nonaccountholders) shall receive preference.

(5) ATM service from foreign banking institutions may be authorized on overseas installations with or without MBFs operated under contract where the installation or community commander determines that a bonafide need exists to support local national hires. On installations with MBFs operated under contract, the MBFs shall be the primary source of the ATM service except when a determination has been made by the cognizant contract program office that providing the service is either not cost effective or precluded by pertinent status of forces agreements, other intergovernmental agreements or host-country law. In those instances where ATM service from foreign banking institutions is authorized and provided by other than the on-base financial institution, ATM connectivity shall be limited to host country networks and the ATMs shall dispense only local currency (no U.S. dollars). The operating agreement covering ATM service shall be negotiated by the installation or community commander and submitted for approval by the appropriate Combatant Commander (or designee) prior to its execution. A copy of the operating agreement will be forwarded through DoD Component channels to the DFAS.

(e) *Domestic and international treasury general accounts*. In cases where authorization will be required for the on-base banking office or credit union to act as a Treasury General Account (TGA) domestic depositary (or, on overseas installations, an International Treasury General Account (ITGA) depository), the financial institution shall satisfy the risk management standard established by the Secretary of the Treasury. Local operating funds may be used if the on-base financial institution requests reimbursement for costs incurred. On-base financial institutions shall accept deposits for credit to the TGA (or ITGA) when so authorized.

(f) *Staffing*. (1) On-base financial institutions shall be staffed adequately (i.e., commensurate with industry standards for similar numbers of accountholders and financial services rendered). Staffing at overseas MBFs operated under DoD contract shall be maintained within negotiated ceilings.

(2) All staffing shall comply fully with applicable equal employment opportunity laws and with the spirit of DoD equal employment opportunity policies as set forth in DoD Directive 1440.1.[8]

(3) DoD personnel, excluding military retirees and their dependents, may not serve as directors of domestic or foreign banking institutions operating banking offices on those DoD installations where they currently are assigned. This does not preclude a member of a Reserve Component, who has been serving as a director of a domestic or foreign banking institution operating a banking office on a DoD installation, from retaining his or her directorship if called to active duty.

(4) DoD personnel may not be detailed to duty with an on-base financial institution located on a DoD installation. Off-duty personnel, however, may be employed by an on-base financial institution subject to approval by the installation commander (or designee). Such employment must not interfere with the performance of the individual's official duties and responsibilities.

[8] See footnote 1 to § 231.1(a).

(g) *Departure clearance*. The installation commander establishes the clearance policy for all DoD personnel leaving the installation. The on-base financial institutions shall be included as places requiring clearance. The purpose of a clearance is to report change of address, reaffirm allotments or outstanding debts, and receive financial counseling, if desired or appropriate. Clearance may not be denied in order to collect debts or resolve disputes with financial institution management.

(h) *Financial education*. (1) Officials of on-base financial institutions shall be invited to take part in seminars to educate personnel on personal financial management and financial services. Financial institutions shall be encouraged to provide financial education and counseling services as an integral part of their financial service offerings. Officials of on-base financial institutions shall submit advance briefing texts for approval by the installation commander to ensure that the program is not used to promote services of a specific financial institution.

(2) DoD personnel who tender uncollectible checks, overdraw their accounts or fail to meet their financial obligations in a proper and timely manner damage their credit reputation and adversely affect the public image of all government personnel. For uniformed personnel, military financial counselors and legal advisors shall recommend workable repayment plans that avoid further endangering credit ratings and counsel affected personnel to protect their credit standing and career. Counselors shall ensure that such personnel are aware of the stigma associated with bankruptcy and difficulties in obtaining future credit at reasonable rates and terms and shall recommend its use only when no other alternative will alleviate the situation.

(i) *Operating agreements*. (1) Before operations of an on-base banking office or credit union begin, a written operating agreement (Appendix C of this part) and the appropriate real estate outgrant (i.e., a lease, permit or license issued as identified in §§231.5(e), 231.5(f), 231.5(g), 231.7(d), 231.7(e) and 231.7(f) shall be negotiated directly between the installation commander and officials of the designated financial institution. Thereafter, the operating agreement shall be jointly reviewed by the installation commander and the financial institution at least once every 5 years. The operating agreement shall define the basic relationship between the on-base financial institution and the installation commander and identify mutual support activities such as hours of operation, service fees and security provided. One copy of the agreement shall be sent through command channels to the Secretary of the Military Department concerned (or designee). A copy of the agreement shall be maintained by the installation commander and the banking office or on-base credit union. At a minimum, the agreement shall include the following provisions:

(i) Identification of services to be rendered and the conditions for service. Full financial services shall be provided where feasible. Agreements, however, may not restrict either entity's right to renegotiate services and fees.

(ii) Agreement by both parties that they will comply with this part and DoD Directive 1000.11 (32 CFR part 230).

(iii) Agreement by the on-base financial institution that it will furnish copies of its financial reports and other local publications on an ''as needed'' basis in response to a formal request from the installation commander (or designee).

(iv) Agreement that the on-base financial institution will indemnify and hold harmless the U.S. Government from (and against) any loss, expense, claim, or demand to which the U.S. Government may be subjected as a result of death, loss, destruction, or damage in conjunction with the use and occupancy of the premises caused in whole or in part by agents or employees of the on-base financial institution.

(v) Agreement that neither the Department of Defense nor its representatives shall be responsible or liable for the financial operation of the on-base financial institution or for any loss (including criminal losses), expense, or claim for damages arising from operations.

(vi) Agreement by the on-base financial institution (or any successor) that

it will provide no less than 180 days advance written notice to the installation commander before ceasing operations.

(vii) Specification of the security services to be provided for guarding cash shipments, at times of unusual risk to the financial institution and to avoid excessive insurance costs charged to that institution.

(viii) Statement that the physical security for cash and negotiable items will be in a manner consistent with the requirements of the on-base financial institution's insurer. A copy of those requirements will be provided to the installation commander on request.

(ix) Statement that the financial institution, whenever possible, will accommodate local command requests for lectures and printed materials for consumer credit education programs. Officials invited to participate in such programs shall not use the occasion to promote the exclusive services of a particular financial institution.

(x) Agreement that the financial institution will reimburse the installation for the provision of logistical support (such as custodial, janitorial, and other services provided by the government) at rates set forth in the lease or agreement between the installation and the financial institution.

(xi) Statement that on-base financial institution operations shall be terminated, when required, under provisions specified in this part.

(2) Approved expansion of services will be documented as an amendment to the existing operating agreement between the installation commander and the on-base financial institution. The amendment to the operating agreement and any required lease (to include a change to an existing lease) shall be in place prior to the initiation of new financial services or offices.

(j) *Installation financial services.* (1) Retail banking operations shall not be performed by any DoD Component or nonappropriated fund instrumentality including the Military Exchange Services and morale, welfare and recreation (MWR) activities or any other organizational entity within the Department of Defense.

(2) Financial services provided on DoD installations will be as uniform as possible for all personnel. As separately negotiated, or based on a fee schedule, custodians of nonappropriated funds shall compensate on-base financial institutions for services received. Compensation may be made with compensating balances or paying fees based on the services provided or a combination of these payment mechanisms. Fees shall not exceed the charge customary for the financial institution less an offsetting credit on balances maintained. Banking offices shall classify nonappropriated fund accounts as commercial accounts.

(3) At a minimum, banking offices shall provide the same services to individuals and nonappropriated fund instrumentalities as are available in the surrounding geographic area.

(4) On-base financial institutions may conduct operations during normal duty hours provided they do not disrupt the performance of official duties. Operating hours shall be set, in consultation with the bank or credit union liaison officer, to meet the needs of all concerned. ATMs may be used to expand financial services and operating hours.

(5) DoD personnel may use their allotment of pay privileges to establish sound credit and savings practices through on-base financial institutions.

(i) The on-base financial institution shall credit customer accounts not later than the deposit date of the allotment check or electronic funds transfer.

(ii) The initiation of an allotment is voluntary (See Volume 7a, Chapter 42, Section 4202 of The DoD Financial Management Regulation (7200.14–R)). Thus, DoD personnel generally cannot be required to initiate an allotment for the repayment of a loan. Allotments voluntarily established by DoD personnel for the purpose of repaying a loan or otherwise providing funds to an on-base financial institution shall continue in effect at the option of the allotter.

(6) In accordance with sound lending practice, policies on loans to individuals are expected to be as liberal as feasible while remaining consistent with the overall interests of the on-

base financial institution. On-base financial institutions shall conform to the Standards of Fairness principles before executing loan or credit agreements. See DoD Directive 1344.9.

(7) On-base financial institutions shall make basic financial education and counseling services available without charge to individuals seeking these services. Financial education and counseling services refer to basic personal and family finances such as budgeting, checkbook balancing and account reconciliation, benefits of savings, prudent use of credit, how to start a savings program, how to shop and apply for credit, and the consequences of excessive credit. DoD personnel in junior enlisted or civilian grades, or newly married couples who apply for loans, shall be given special attention and counseling.

(8) On-base financial institutions must strive to provide the best service to all customers. On-base financial institutions that evidence a policy of discrimination in their services are in violation of this part. In resolving complaints of discrimination, use the procedures specified in §231.5(h)(8).

(9) All correspondence regarding on-base financial institutions, and questions concerning their operation that cannot be resolved locally, shall be referred through command channels to the Secretary of the Military Department concerned (or designee) for consideration.

### §231.5 Procedures—domestic banks.

(a) *General policy*. Given their role in promoting morale and welfare, on-base banks shall be recognized and assisted by DoD Components at all levels.

(b) *Establishment*. (1) The following information shall be included in the installation commander's request to the Secretary of the Military Department concerned (or designee) for establishment of banking offices:

(i) The approximate number of DoD personnel at the installation, and other persons who may be authorized to use the banking office.

(ii) The distance between the installation and the financial institutions in the vicinity, and the names of those institutions.

(iii) Available transportation between the installation and the financial institutions listed in paragraph (b)(1)(ii) of this section.

(iv) The number of DoD personnel in duty assignments that confine them to the installation or who cannot obtain transportation (such as hospital patients).

(v) The name and location of the depositary used to make official deposits for credit to the TGA.

(vi) A list of organizational and non-appropriated fund accounts, the name and location of the financial institutions where deposited, and the average daily activity and balance of each account.

(vii) A written description and photographs of the space proposed for banking office use.

(viii) A statement listing the requirements of the proposed banking office for safes and a vault, alarm systems, and surveillance equipment, when necessary.

(ix) Reasons for use of space controlled by the General Services Administration (GSA). All the GSA assigned space, whether leased space or federal office building space, is reimbursable to the GSA at the standard level user charge. As such, space occupied by a banking office to serve military needs will be assigned and charged by the GSA.

(x) Any other information pertinent to the establishment of a banking office.

(2) The Secretary of the Military Departments (or designee) shall:

(i) Review each request for the establishment of banking offices.

(ii) Conduct a solicitation for the services when warranted.

(iii) Approve proposals for banking offices.

(iv) Notify the selected financial institution either directly or through the installation commander. The selected banking institution will, in turn, obtain operating authority from their regulating agencies.

(v) Forward proposals to establish TGAs to the DFAS for subsequent forwarding to the Fiscal Assistant Secretary of the Treasury in accordance with Volume 5, Chapter 5, paragraph

050102 of The DoD Financial Management Regulation (7000.14–R).

(c) *Solicitations.* The Secretary of the Military Department concerned (or designee), or the installation commander with advice from the cognizant Secretary of the Military Department (or designee), shall conduct solicitations to include pre-proposal conferences for on-base banking. Subject to the criteria for selection outlined in paragraph (c)(4) of this section the preferred sources of on-base financial services at domestic installations are federally-insured, state-chartered or federally-insured, federally-chartered banking institutions operating in the local area. The guidance at paragraph (c)(1) of this section addresses distribution of the solicitation only and does not preclude any federally-insured, state-chartered or federally-insured, federally-chartered banking institution from responding at any stage (from local distribution in paragraph (c)(1)(i) of this section to publication in the *Commerce Business Daily* and financial institution trade journals as outlined in paragraph (c)(1)(iii) of this section of the solicitation process. No commitment may be made to any banking institution regarding its proposal until a designation is made by the appropriate regulatory agency.

(1) Solicitations for banking services shall be accomplished in the following order:

(i) Solicitation letters will be sent to local banking institutions and a solicitation announcement will be published in the local newspaper(s) and forwarded to financial institution associations.

(ii) If the Secretary of the Military Department concerned (or designee) or, where delegated, the installation commander, determines that the geographic scope of the solicitation needs to be expanded, a prospectus will be forwarded to financial institutions in a larger geographic area, as well as financial institution associations and regulatory authorities in the state where the installation is located.

(iii) If the Secretary of the Military Department concerned (or designee) or, where delegated, the installation commander, determines that the geographic scope of the solicitation needs to be expanded further, the prospectus will be published in the Commerce Business Daily and financial institution trade journals.

(2) For solicitations conducted at the installation level, the installation commander shall review proposals to establish banking offices, select the banking institution making the best offer and forward a recommendation to the Secretary of the Military Department concerned (or designee) for final approval.

(3) Banking institutions shall not be coerced when banking arrangements are under consideration or after banking offices are established. If otherwise proper, this prohibition does not preclude:

(i) Discussions with banking institutions prior to submitting a proposal for a new banking office.

(ii) Helping banking offices extend their operations in support of an installation requirement.

(iii) Discussions with banking institutions to improve services or to create savings for the banking institution or DoD personnel.

(iv) Seeking proposals for banking service as directed by the Secretary of the Military Department concerned (or designee).

(v) Negotiations preparatory to signing a banking agreement.

(4) When soliciting for banking services, proposals shall be evaluated on specific factors identified in the solicitation. These factors, at a minimum, shall be predicated on the services to be provided as outlined in appendix A, paragraph 3, of this part, the financial institution's schedule of service fees and charges, and the extent of logistical support required. Prior to issuance of the solicitation, the preparing office shall identify (for internal use during the subsequent evaluation period) the weights to be applied to the factors reflected in the solicitation. Proposals shall be evaluated and ultimate selection made based upon the factors and weights developed for the solicitation.

(5) The Secretary of the Military Department concerned (or designee), or the installation commander with advice from the cognizant Secretary of the Military Department (or designee),

shall make the selection of the banking institution based on the provisions outlined in this section.

(d) *Terminations.* (1) Requests for termination of financial services shall be approved by the installation commander, substantiated by sufficient evidence and forwarded to the Secretary of the Military Department concerned (or designee). The termination of banking office operations shall be initiated by the installation commander only under one of the following conditions:

(i) The mission of the installation has changed, or is scheduled to be changed, thereby eliminating or substantially reducing the requirement for financial services.

(ii) Active military operations prevent continuation of on-base financial services.

(iii) Performance of the banking office in providing services is not satisfactory according to standards ordinarily associated with the financial services industry or is inconsistent with the operating agreements or the procedures prescribed herein.

(iv) When merger, acquisition, change of control or other action results in violation of the terms and conditions of the existing operating agreement, the Secretary of the Military Department (or designee) shall terminate the operating agreement with the existing banking institution. When the merger, acquisition, change of control or other action does not result in violation of the terms and conditions of the existing operating agreement, the Secretary of the Military Department (or designee) shall initiate a novation action of the operating agreement identifying the change in control.

(2) The installation commander shall forward requests for termination to the Secretary of the Military Department concerned (or designee). The Secretary of the Military Department (or designee) shall coordinate all termination actions with the USD(C), through the Director, DFAS, before notification to the appropriate regulatory agency. Subsequent to this coordination process:

(i) The Secretary of the Military Department (or designee) shall inform the regulatory agency of the action.

(ii) The installation commander shall revoke the authority of the financial institution to operate. The lease will be terminated.

(3) Any banking office that intends to terminate its operations should notify the installation commander at least 180 days before the closing date. This notification should precede any public announcement of the planned closure. When appropriate, the commander shall attempt to negotiate an agreement permitting the banking office to continue operations until the installation has made other arrangements. Immediately upon notification of a closing, the commander shall advise the DoD Component headquarters concerned. If it is determined that continuation of banking services is justified, action to establish another banking office shall be taken in accordance with the guidance prescribed herein.

(e) *Use of space, logistical support, and military real property for domestic banks*—(1) *Lease Terms.* (i) The consideration for a lease shall be determined by appraisal of fair market rental value in accordance with 10 U.S.C. 2667. Periodic reappraisals shall be based upon the fair market rental value exclusive of the improvements made by the banks.

(ii) The term of the lease shall not exceed 5 years except where the banking institution uses its own funds to improve existing government space as outlined in paragraph (e)(5) of this section. If space occupied is assigned by the GSA, charges to financial institutions for space and services shall be at the GSA standard level user rate.

(iii) Leases shall include the following provisions:

(A) The government has the right to terminate the lease due to national emergency; installation inactivation, closing, or other disposal action; or default by the lessee.

(B) The lessee shall provide written notice 180 days prior to voluntarily terminating the lease.

(C) Upon a lease termination, the government has the option to cause the title of all structures and other improvements to be conveyed to the United States without reimbursement, or require the lessee to remove the improvements and restore the land to its original condition.

(2) *Logistical support*. (i) The banking office shall be housed in a building accessible to DoD personnel on the installation and in a location permitting reasonable security.

(ii) Banking institutions shall perform all maintenance, repair, improvements, alterations, and construction on the banking premises.

(iii) Banking institutions shall pay for all utilities (i.e., electricity, natural gas or fuel oil, water and sewage), heating and air conditioning, intrastation telephone service, and custodial and janitorial services to include garbage disposal and outdoor maintenance (such as grass cutting and snow removal) at rates set forth in the lease, operating agreement or other written agreement between the installation and the banking institution.

(3) Leases executed before the issuance of this part may not be altered solely as a result of the provisions of this part unless a lessee specifically requests a renegotiation under these provisions. No lease may be negotiated or renegotiated, nor may any rights be waived or surrendered without compensation to the government.

(4) When a banking institution participates in the construction of a shopping mall complex the lease shall cover only land where the banking office physically is located.

(5) When a banking institution uses its own funds to improve existing government space, leases, for a period not to exceed 25 years subject to periodic review every 5 years to assess changes in fair market value, may be negotiated for a period commensurate with the appraised value of the leasehold improvements divided by the annual lease fee.

(f) *Land leases*. (1) A lease for construction of a building to house a banking office shall be at the appraised fair market rental value. Charges shall apply for the term of the lease not to exceed 25 years, subject to periodic review every 5 years to assess changes in fair market value.

(2) If determined to be in the government's interest, an existing lease of land may be extended prior to expiration of its term. Passage of title to facilities shall be deferred until all extensions have expired. Such extensions shall be for periods not to exceed 5 years with lease payments set at the appraised fair market rental of the land only as determined on the date of each such extension. Banking institution lessees shall continue to maintain the premises and pay for utilities and services furnished.

(3) When, under the terms of a lease, title to improvements passes to the government, arrangements normally will be made as follows:

(i) When the square footage involved exceeds that authorized in DoD 4270.1–M[9], the banking institution shall be given first choice to continue occupying the excess space under a lease that provides for fair market rental for the land underlying that excess space.

(ii) The charge for continued occupancy of improved space by a banking office shall be at fair market rental value only for the associated land. The lessee shall continue to maintain the premises and pay the cost of utilities and services furnished.

(g) *Construction*. Banks may construct buildings subject to the following provisions:

(1) The building shall be solely for the use of the banking institution and may not provide for other commercial enterprises or government instrumentalities.

(2) Construction projects must meet the criteria in DoD 4270.1–M.

(3) *Construction projects approval authority*. (i) Projects costing $25,000 or more shall be approved by the Major Command with an information copy sent to the Secretary of the Military Department concerned (or designee). The Secretary of the Military Department (or designee) shall have 30 days to provide comments to the Major Command before final approval can be granted.

(ii) Projects costing less than $25,000, to include interior alterations and room or office additions to existing banking offices, shall be approved by installation commanders. Copies of approvals, including the identification of project cost, shall be furnished to the Secretary of the Military Department concerned (or designee).

[9] See footnote 1 to § 231.1(a).

(4) The Congress shall be notified of all construction projects, using other than appropriated funds and costing over $500,000, in accordance with DoD Instruction 7700.18[10].

(5) Proposals for construction of structures on installations at a banking institution's expense shall be reviewed and reported in accordance with regulations of the Military Department concerned. The following information shall be listed to support each proposal:

(i) Number of DoD personnel at the installation plus others who may use the banking office.

(ii) Square footage of the proposed building.

(iii) Land area to be leased to the banking institution.

(iv) Term of the lease.

(v) Estimated cost of construction.

(vi) Estimated fair market value of the land to be leased.

(vii) Statement that the banking institution will be responsible for utility connections and other utility and maintenance costs.

(viii) Statement that the building will be used only for financial services.

(ix) A statement that financial institution officials understand the potential loss of the building in the event of installation closure or other delimiting condition.

(x) Justification for a waiver of space criteria if the building exceeds that specified in DoD 4270.1–M.

(6) Banks shall pay for interior alterations and maintenance as well as utilities, custodial, and other furnished services.

(7) Banks shall pay all construction costs.

(h) *Bank liaison officer (BLO).* Each installation commander having an on-base banking office shall appoint a BLO. The BLO's name and duty telephone number shall be displayed prominently at each banking office on the installation. As appropriate, the BLO's responsibility shall be assigned to comptroller or resource management personnel. Employees, officials or directors of a financial institution may not serve as BLOs. The BLO shall:

(1) Ensure that the banking institution operating the banking office has the latest version of this part.

(2) Ensure that traveler's checks and money orders are not being sold by other on-base organizations when banking offices are open for business. Postal units and credit unions, however, are exempt from this restriction. Also, ensure that other financial services, to include vehicle financing on domestic installations, are offered only by the banking office.

(3) Attend financial workshops, conferences, and seminars as appropriate. These gatherings offer excellent opportunities for personnel of financial institutions and the Department to improve the military banking program. Free discussion among the attendees gives an excellent forum for planning, developing, and reviewing programs that improve financial services made available to DoD personnel and organizations.

(4) Assist, when requested by the banking office manager or the installation commander, in locating and collecting from individuals tendering uncollectible checks, overdrawing accounts, or defaulting on loans (within the guidelines of subpart C) if not otherwise prohibited by law.

(5) Maintain regular contact with the banking office manager to confer and discuss quantitative and qualitative improvements in the services provided. In executing this authority, the BLO shall not become involved in the internal operations of the financial institution.

(6) Review the schedule of service charges and fees annually, and ensure that the operating agreement is updated at least every 5 years. Renegotiate the financial services offered and related service charges and fees as necessary.

(7) Assist in resolving customer complaints about banking services.

(8) Assist in resolving complaints of discrimination with financial services by the banking institution. If a complaint cannot be resolved, a written request for investigation shall be forwarded to the appropriate regulatory agency. Any such request must document the problem and command efforts

[10] See footnote 1 to §231.1(a).

taken toward its resolution. Information copies of all related correspondence shall be sent through channels to the Secretary of the Military Department concerned (or designee) for transmittal to the DFAS.

(9) Assist the installation commander to report to the appropriate regulatory agency any evidence suggesting malpractice by banking office personnel.

(i) *In-store banking.* Under the direction and approval of the installation commander, an on-base financial institution may provide in-store banking within the premises of a commissary operated by the Defense Commissary Agency, a Military Exchange, or any other on-base retail facility.

(1) Provision of the requested services, and any associated stipulations, shall be documented as an amendment to the existing operating agreement between the installation commander and the on-base financial institution that will provide in-store services.

(2) The amendment to the operating agreement shall be drafted through close coordination between the requesting DoD Component representative, the on-base financial institution representative, the bank liaison officer, and the installation commander (or designee). The final amendment shall be signed by the installation commander and the on-base financial institution with the acknowledgement of the DoD Component that will host the in-store banking operation.

(3) The installation commander shall extend the opportunity to provide the requested in-store banking services to all financial institutions located on the installation. The selection process is outlined in Appendix B of this part.

(4) Space shall be granted by the installation commander through a lease to the banking institution that will provide in-store service.

(j) *Domestic military banking facilities (MBFs)*—(1) *Domestic MBF establishment.* (i) Requests to establish MBFs shall be made only when a need for services cannot be met by other means. During mobilization, however, MBFs may be designated as an emergency measure.

(ii) Installation commanders shall send requests for an MBF with justification for its establishment through the Secretary of the Military Department concerned (or designee) to the Director, DFAS, for coordination with the Department of the Treasury. The Department of the Treasury may approve the designation of an MBF under provisions of 12 U.S.C. 265.

(iii) MBF operations may begin only after approval for MBF status is granted by the Department of the Treasury.

(2) *MBF conversion.* (i) Where MBFs exist, installation commanders shall encourage their conversion to independent or branch banks.

(ii) Proposals from the on-base banking institution to convert an existing MBF to an independent or branch bank shall be sent through command channels to the Secretary of the Military Department concerned (or designee) for approval. The Secretary of the Military Department (or designee) shall forward the request to the Director, DFAS, for coordination with the Department of the Treasury.

(iii) Unsolicited proposals from banking institutions to establish independent or branch banks where an MBF exists shall be forwarded through command channels to the Secretary of the Military Department concerned (or designee). Each proposal shall be evaluated on its own merits.

(A) The installation commander shall inform the banking institution operating the MBF that an unsolicited proposal for a banking office has been received and shall offer that incumbent institution the opportunity to submit its own proposal.

(B) Preference to operate an independent or branch bank shall be given to the banking institution that has operated the MBF, provided that the banking service previously rendered has been satisfactory and that the institution's proposal is adequate.

(3) *MBF termination.* The Director, DFAS, shall coordinate the termination of a financial institution's authority to operate an MBF with the Department of the Treasury.

[66 FR 46708, Sept. 7, 2001; 66 FR 54136, Oct. 26, 2001]

### § 231.6 Procedures—overseas banks.

(a) *General provisions of banking services overseas.* The Department acquires banking services overseas for use by

authorized persons and organizations from the following sources:

(1) MBFs operated under contract and authorized by the pertinent status of forces agreement, other intergovernmental agreements, or host-country law.

(2) Domestic and foreign banking institutions located on overseas DoD installations. Each such institution shall be:

(i) Chartered to provide financial services in that country.

(ii) A party to a formal operating agreement with the installation commander to provide such services.

(iii) Identified, where applicable, in the status of forces agreements, other intergovernmental agreements, or host-country law.

(b) *Establishment*—(1) *Overseas MBFs operated under contract.* Installation or community commanders requiring banking services will send a request through command channels to the Secretary of the Military Department concerned (or designee) for concurrence and subsequent transmittal to the Director, DFAS, for approval.

(i) Requests to establish MBFs shall include, but are not limited to, the following information:

(A) The approximate number of DoD personnel at the installation and in the community and any other persons who may be authorized to use the MBF.

(B) The distance between the installation and the nearest MBF and credit union office, the names; addresses, and telephone numbers of the operators of those institutions; and the installations and communities where they are located.

(C) The availability of official and public transportation between the installation or community and the nearest MBF and credit union office.

(D) The name and location of the depository used to make official deposits for credit to the TGA.

(E) A list of organizational and nonappropriated fund accounts, the name and location of the financial institutions where deposited, and the average daily activity and balance of each account.

(F) A written description and photographs or drawings of the space proposed for MBF use. The extent and approximate cost of required alterations, including the construction of counters and teller cages.

(G) A statement that recognizes the logistical support, including equipment, to be provided by the local command as detailed in paragraph (c) of this section. The statement will include the costs of such equipment and the manner in which it will be acquired.

(H) In countries where no MBFs currently are operated under contract, a statement from the cognizant Combatant Command that the requirement has been coordinated with the U.S. Chief of Diplomatic Mission or U.S. Embassy and that the host country will permit the operation in accordance with paragraph (c)(1)(i) of this section.

(I) Any other pertinent information to justify the establishment of an MBF.

(ii) As a general rule, MBFs may be established only when the installation or community population meets the following criteria:

(A) *Full-time MBF.* Except in unusual circumstances, a total of at least 1,000 permanent military personnel and DoD civilian employees are necessary to qualify for a full-time MBF.

(B) *Part-time MBF.* Except in unusual circumstances, a total of at least 250 permanent military personnel and DoD civilian employees are necessary to qualify for a part time MBF.

(iii) If the population at a certain remote area is not sufficient to qualify under the criteria for full-time or part-time MBFs, the installation or community commander will explore all other alternatives for acquiring limited banking services before requesting establishment of an MBF as an exception to these provisions. Alternatives to limited banking services include installation of ATMs and check cashing and accommodation exchange service by disbursing officers and their agents.

(iv) Establishment of an overseas MBF is predicated on and requires:

(A) Designation of the MBF contractor as a depositary and financial agent of the U.S. Government by the Department of the Treasury.

(B) The availability of banking contractors interested in bidding for the

operation of the facility and the viability of such proposals.

(C) The availability of appropriated funds to underwrite such banking services.

(D) Establishment of a U.S. dollar currency custody account to support banking operations.

(2) *Other overseas banking offices.* Where a need for financial services has been identified and either the banking and currency control laws of certain host countries do not permit MBFs to operate on DoD installations or MBFs, where permitted, have not been established, then the following applies:

(i) Installation or community commanders shall send requests for banking services or unsolicited proposals from foreign banking institutions to their Major Commands with supporting data as required in § 231.5(b)(1).

(ii) Major Commands shall forward installation or community commander requests to the Secretary of the Military Department concerned (or designee) for approval. The Secretary of the Military Department concerned (or designee) shall coordinate with the DFAS to seek the designation of the parent foreign banking institution as a depositary and financial agent of the U.S. Government by the Department of the Treasury.

(iii) Banking offices in this category cannot become operational until the foreign parent banking institution has been designated a depositary and financial agent of the U.S. Government. The institution also shall indicate a willingness and ability to provide collateral backing for any official and nonappropriated fund U.S. dollar deposits. Any collateral pledged shall be in a form acceptable to the DFAS and the Department of the Treasury.

(c) *Logistical support*—(1) *Overseas MBFs operated under contract.* (i) Given that appropriated funds support those MBFs that are operated under contract, installation or community commanders shall provide the MBFs logistical support to the maximum possible extent. Such support normally includes:

(A) Adequate office space, including steel bars; grillwork; security doors; a vault, safes, or both; security alarm systems and camera surveillance equipment (where deemed necessary) that meet documented requirements of the MBF contractor's insurance carrier; construction of counters, teller cages, and customer and work areas; necessary modifications and alterations to existing buildings; and construction of new MBF premises, if necessary.

(*1*) The size and arrangement of space should permit efficient operations. Space assigned may not exceed that prescribed in DoD 4270.1–M.

(*2*) All maintenance, repair, rehabilitation, alterations, or construction for banking offices shall comply with guidelines established by the installation commander.

(B) Office space in a building that is accessible to most users and permits the maximum security. In addition, office space for MBF area and district administrations and storage space for retention of records, files, and storage of supplies.

(C) DoD housing on a rental basis to assigned MBF staff that are designated as key and essential MBF managerial personnel who are unable to find suitable, reasonably priced housing in the vicinity of the DoD installation, subject to the assignment procedures and other requirements of DoD 4165.63–M.[11]

(D) Education, on a space-available, tuition-paying basis, provided by the Department of Defense Education Activity to minor dependents of assigned staff in accordance with DoD Directive 1342.13.[12]

(E) Air conditioning, which is considered a normal utility for banking offices located at installations that qualify for air conditioning under applicable regulations. Banking space is classified as administrative space at military installations.

(F) Utilities (i.e., electricity, natural gas or fuel oil, water and sewage), heating, intrastation telephone service, and custodial and janitorial services to include garbage disposal and outdoor maintenance (such as grass cutting and snow removal).

(G) Defense Switched Network (DSN) voice and data communication to include, where feasible, Internet access.

[11] See footnote 1 to § 231.1(a).

[12] See footnote 1 to § 231.1(a).

(H) Military guards, civilian guards (for use within the installation), military police, or other protective services to accompany shipments of money. This level of protective service also shall be provided at other times as required to include replenishment of ATM currency and receipts, alarm system failures, and to avoid undue risks or insurance costs on the part of the MBF.

(I) U.S. Military Postal Service access in accordance with DoD Directive 4525.6.[13] Use of free intra-theater delivery system (IDS) is authorized for all routine mail sent and received between Army Post Offices (APOs) and Fleet Post Offices (FPOs) within a theater.

(J) Office equipment and furniture on memorandum receipt if available from local stock. If office equipment or furniture is unavailable, statements of nonavailability shall be issued.

(K) Vehicle registration and fuel sales from government-owned facilities for bank-operated vehicles, if not in conflict with host government agreements. Vehicle registration shall be subject to normal fees.

(L) Issuance by local commanders of invitational travel orders, at no expense to the U.S. Government when required for official onsite visits by U.S. based banking institution officials.

(ii) Suggestions for changes to the logistical support provisions of the MBF contract may be forwarded for consideration through command channels to the Director, DFAS.

(2) *Other overseas banking offices.* (i) Logistical support provided to such offices will be negotiated with the parent foreign banking institution and incorporated into the written operating agreement.

(ii) Logistical support shall not exceed that provided to contract MBFs, as specified in paragraph (c)(1) of this section.

(d) *Operations*—(1) *General conditions of MBF operation.* (i) Before initiating MBF operations, a written agreement shall be negotiated directly and signed by the installation or community commander and a senior official of the banking contractor or other financial institution concerned. One copy of the agreement with U.S. banking contractors and two copies of the agreement with institutions other than U.S. banking contractors shall be forwarded through command channels to the Secretary of the Military Department concerned (or designee). The Secretary of the Military Department (or designee) shall forward one copy of the agreement with institutions other than U.S. banking contractors through command channels to the Director, DFAS. A copy of the agreement also shall be maintained at all times by the installation or community commander and the banking institution manager.

(ii) For MBFs operated by U.S. banking contractors, the agreement shall state operating details not set forth in the contract. Though the contract limits the number of operating hours per week, local commanders and MBF managers should set days and hours of operation to best meet local needs. Operating times may include Saturdays and evening hours when necessary to complement other retail services for DoD personnel, provided the contractor can implement that service at no additional cost to the government. When added cost is involved, the commander shall send a request including reasons for expanded or modified times of operation, through command channels, to the Secretary of the Military Department concerned (or designee) for action. If approved, the request, with recommendations, shall be forwarded to the Director, DFAS (or designee).

(2) *Overseas MBFs operated under contract*—(i) *General.* Overseas MBFs shall operate under terms and conditions established at the time of contract negotiations and confirmed in respective contracts or contracting officer determinations.

(ii) *Authorized customers.* DoD banking contracts specify the personnel authorized to receive service. Additionally, overseas major commanders may approve banking services for other individuals that qualify for individual logistic support under the regulations of the DoD Component concerned, provided that the use of banking services is not precluded by status of forces agreements, other intergovernmental agreements, or host-country law.

[13] See footnote 1 to §231.1(a).

(iii) *Services rendered.* DoD banking contracts specify the services to be rendered and related charges. Suggestions for expansion or modification of authorized services, fees or charges may be forwarded through DoD Component channels to the Director, DFAS. Proposals for any new service must be coordinated with the appropriate Combatant Command and U.S. Chief of Diplomatic Mission or U.S. Embassy to make certain that the proposal does not conflict with the status of forces agreements, other intergovernmental agreements, or host-country law.

(iv) *Regulation to be provided.* The Director, DFAS (or designee) shall advise each U.S. banking contractor operating an overseas MBF of this Regulation and furnish a copy to the contractor.

(v) *Conditions of operation.* (A) Part-time and payday service MBFs shall provide limited services that mirror, to the extent feasible, those provided by full-time MBFs. Since part-time MBFs operate out of nearby MBFs, installation or community commanders shall provide and fund transportation and guards for their operation.

(B) Any deficiency of banking services under DoD banking contracts shall be reported to the manager of the MBF within 7 calendar days of noting the deficiency. If the problem has not been corrected within 30 calendar days after being noted, the commander shall report the problem through DoD Component channels to the Director, DFAS (or designee).

(C) The MBF contractor and military disbursing officers shall establish cash management practices that minimize the cash required conducting business.

(D) Commanders shall assist MBF contractors to develop and update contingency plans for banking services in the event of hostilities or other emergencies.

(E) MBF provision of foreign currency shall be in accordance with Volume 5, Chapter 13 of The DoD Financial Management Regulation (DoD 7000.14–R).

(3) *Other overseas banking offices*—(i) *Authorized customers.* The list of authorized customers shall be negotiated between the installation commander and the foreign banking institution and shall be reflected in the operating agreement. The list of authorized customers included in the operating agreement shall be consistent with the applicable status of forces agreement, other intergovernmental agreements, or host-country law.

(ii) *Services rendered.* Services and charges shall parallel, whenever practical, the services and charges of MBFs operated under contract. Specific services shall be negotiated and included in the agreement with the foreign banking institution. A copy of the agreement shall be sent through DoD Component channels to the Director, DFAS (or designee).

(iii) *Operating agreements.* Before agreements are executed, they will be coordinated with and approved by the cognizant Combatant Command (or designee).

(iv) *Conditions of operation.* A foreign banking institution shall provide equipment (except that furnished by the installation or community), supplies, and trained personnel.

(4) *Relocation of MBF.* (i) When an MBF is moved from one location to another at the same installation or community, the commander shall notify the cognizant Military Department, through command channels. The Military Department shall forward the information to the Director, DFAS (or designee).

(ii) For all other relocations, prior approval from the Director, DFAS (or designee) shall be obtained through DoD Component channels.

(5) *Comments.* Installation or community commanders shall send their banking comments through DoD Component channels to the Director, DFAS (or designee) for any of the following:

(i) Major changes in installation population that would affect use of the MBF.

(ii) Opinion that the space assigned is not adequate for the efficient operation of the MBF including a statement concerning corrective action.

(iii) Suggestions that might improve the MBF operation, increase efficiency, or decrease costs.

(iv) Pending developments that may have a material impact on the MBF operation.

(6) *Bank liaison officer.* The duties of the BLO are outlined in § 231.5(h).

(e) *Termination*. Requests to eliminate any or all MBFs in a foreign country shall include documentation that the U.S. Chief of Diplomatic Mission has been informed and that arrangement for local termination announcements and procedures have been made with the U.S. Embassy.

(1) *Overseas MBFs operated under contract*. In cases where an installation or community no longer can justify overseas MBF operations, the commander shall notify the Secretary of the Military Department concerned (or designee) through command channels.

(i) The report shall state whether a part-time MBF should be established and specify the days each week that the MBF would be needed.

(ii) The Secretary of the Military Department (or designee) shall send this report with recommendations to the Director, DFAS (or designee).

(2) *Other overseas banking offices*. Termination actions, when required, shall be taken in accordance with the applicable clauses in the operating agreement. Notice of intent to terminate, including the closing date, shall be sent through DoD Component channels to Director, DFAS (or designee), who shall notify the Department of the Treasury so that the foreign banking institution's authority as a Depositary and Financial Agent of the U.S. Government at that location may be revoked.

### §231.7 Procedures—domestic credit unions.

(a) *General policy*. Given their role in promoting morale and welfare, on-base credit unions shall be recognized and assisted by DoD Components at all levels. These financial institutions shall provide services to DoD personnel of all ranks and grades within their respective fields of membership.

(b) *Establishment*. A demonstrated need for credit union services may be addressed by establishing a new full-service credit union or by opening a branch office or facility of an existing credit union under the common bond principle.

(1) DoD personnel seeking to establish a new full-service credit union shall submit a proposal to the installation commander for review. In addition to the information identified in §231.5(b)(1), the proposal shall include a request for the establishment of a field of membership that includes all personnel at the installation. Upon installation commander concurrence, the proposal shall be forwarded through DoD Component channels to the Secretary of the Military Department (or designee).

(2) The Secretary of the Military Department concerned (or designee) shall:

(i) Obtain a list of credit unions that could establish eligibility to serve the installation's military members and civilian employees from the National Credit Union Administration (NCUA) Regional Office that has geographic jurisdiction and the applicable state regulatory agency.

(ii) Prepare and send formal solicitation letters to eligible credit unions informing them of an opportunity to establish a branch office at the installation.

(iii) In coordination with the installation commander, establish the criteria for selection of a specific credit union in accordance with §231.5(c)(4). Proposals shall be evaluated, and a selection made, based upon the factors and weights developed for the solicitation.

(3) Upon approval by the Secretary of the Military Department (or designee), the NCUA or applicable state regulatory agency shall be notified and asked to establish or amend the selected credit union's charter to include the new location.

(4) No commitment may be made to a credit union regarding its proposal until the appropriate regulatory agency has approved the requested charter change.

(c) *Terminations*—(1) *Voluntary credit union terminations*. (i) When a credit union plans to end operations on a DoD installation, it shall be required to notify the installation commander 180 days before the closing date. Such notification shall be required to precede public announcement of the planned closure. When appropriate, the commander shall attempt to negotiate an agreement permitting the credit union to continue operations until the installation has made other arrangements.

(ii) The installation commander shall inform the Secretary of the Military Department concerned (or designee) immediately upon receiving notification of a closing. The report shall include a recommendation about continued credit union service on the installation. Paragraph (b) of this section applies if continued service is needed.

(2) *Termination for cause.* If, after discussion with credit union officials, an installation commander determines that the operating policies of a credit union are inconsistent with this Regulation, a recommendation for termination of logistical support and space arrangements may be made through the Secretary of the Military Department concerned (or designee). A credit union shall be removed from the installation only with approval of the Secretary of the Military Department (or designee) after coordination with the USD(C) through the Director, DFAS, and the appropriate regulatory agency.

(3) *Termination in the interest of national defense.* At the option of the government, leases may be terminated in the event of national emergency or as a result of installation deactivation, closing, or other disposal action.

(4) *Termination resulting from merger, acquisition, or change of control.* When merger, acquisition, change of control or other action results in violation of the terms and conditions of the existing operating agreement, the Secretary of the Military Department (or designee) shall, subsequent to coordination with the USD(C), through the Director, DFAS, terminate the operating agreement with the existing credit union. When the merger, acquisition, change of control or other action does not result in violation of the terms and conditions of the existing operating agreement, the Secretary of the Military Department (or designee) shall initiate a novation action of the operating agreement identifying the change in control.

(5) *Termination of lease.* The lessee shall provide written notice 180 days prior to a voluntary termination of the lease. Upon lease termination, the government has the option to cause the title of all structures and other improvements to be conveyed to the United States without reimbursement, or require the lessee to remove the improvements and restore the land to its original condition.

(d) *Use of space, logistical support, and military real property for domestic credit unions*—(1) *Criteria for use of space in Government-owned real property.* (i) Criteria governing the assignment of space and construction of new space for credit unions are in DoD 4270.1–M.

(ii) A credit union may be furnished space on a DoD installation at one or more locations for periods not exceeding 5 years except where the credit union uses its own funds to improve existing government space as outlined in paragraphs (d)(1)(ii)(C) and (d)(1)(ii)(D) of this section. The cumulative total of space furnished shall be subject to the limitations of DoD 4270.1–M.

(A) The furnishing of office space (including ATM placement) to on-base credit unions is governed by section 170 of the Federal Credit Union Act (12 U.S.C. 1770). The provision of no-cost office space for a period not to exceed 5 years is limited to credit unions if at least 95 percent of the membership to be served by the allotment of space is composed of individuals who are, or who were at the time of admission into the credit union, military personnel or federal employees, or members of their families. A written statement to the effect that the credit union meets the 95 percent criterion shall be required to justify and document the allotment of free government space. This statement shall be prepared on the credit union's letterhead and signed either by the chairman of the board of directors or the president. A certification also shall be required whenever there is a merger, takeover, or significant change in a field of membership. This certification shall serve as justification and documentation for the continued allocation of free government space including space renovated with credit union funds. The statement shall be updated every 5 years and on renewal of each no-cost permit or license. (See appendix C of this part for a sample format of the statement.)

(B) Credit unions that fail to meet the 95 percent criterion shall be charged fair market rental for space provided. Except where more than one credit union exists on an installation

prior to June 9, 2000, credit unions giving less than full service or not serving all assigned DoD personnel are not authorized no-cost office space.

(C) When a credit union that meets the 95 percent criterion uses its own funds to expand, modify, or renovate government-owned space, it may be provided a no-cost permit or license for a period commensurate with the extent of the improvements not to exceed 25 years as determined by the DoD Component concerned. The permit or license shall be effective until the agreed date of expiration or until the credit union ceases to satisfy the 95 percent criterion. In this latter case, the no-cost permit shall be cancelled in favor of a lease immediately negotiated at fair market value under the provisions of paragraph (d)(1)(ii)(B) of this section. If the credit union desires, this permit or license may extend through the period identified in the original permit or license not to exceed 25 years.

(D) Similarly, a credit union not meeting the 95 percent criterion that uses its own funds to expand, modify, or renovate government-owned space, may be provided a lease at fair market value for a period not to exceed 25 years subject to periodic review every 5 years to assess changes in fair market value. Duration of this lease shall be commensurate with the extent of the improvements as determined by the DoD Component concerned.

(iii) All space assigned by the GSA, whether leased or in a federal office building, is reimbursable to the GSA at the standard level user charge. Consequently, the GSA shall charge the benefiting DoD Component for any space assigned for credit union operations. Such space is subject to the provisions of paragraph (d)(1)(i) and (ii) of this section.

(2) *Logistical support*. When available, custodial and janitorial services to include garbage disposal and outdoor maintenance (such as grass cutting and snow removal), heating and air conditioning, utilities (i.e., electricity, natural gas or fuel oil, water, and sewage), fixtures, and maintenance shall be furnished without cost to credit unions occupying no-cost office space in government buildings. With the exception of intrastation telephone service, credit unions shall be required to pay for all communication services to include telephone lines, long distance data services and Internet connections. Credit unions also shall pay for space alterations. Should a credit union fail to meet the 95 percent membership criterion, any logistical support furnished shall be on a reimbursable basis.

(3) Leases executed before the issuance of this part may not be altered solely as a result of the provisions of this part unless a lessee specifically requests a renegotiation under these provisions. No lease may be negotiated or renegotiated, nor may any rights be waived or surrendered without compensation to the government.

(4) When a credit union participates in the construction of a shopping mall complex the lease shall cover only land where the branch or facility physically is located.

(5) *Administrative fees*. All administrative fees associated with the initiation, modification, or renewal of an outgrant shall be borne by the installation, provided that the credit union satisfies the 95 percent membership criterion requirement for no-cost office space as outlined paragraph (d)(1)(ii)(A) of this section, and that the fees are associated with the no-cost space.

(e) *Land leases*. Credit unions entering into a land lease to construct a building on a DoD installation shall do so in accordance with §231.5(f).

(f) *Construction*. Credit unions constructing a building on a DoD installation shall do so in accordance with §231.5(g).

(g) Credit unions offering ATM service shall do so in accordance with §231.4(d).

(h) *Staffing*. (1) On-base credit unions shall provide full service. To do so, credit union offices shall be staffed by:

(i) An official authorized to act on loan applications.

(ii) An individual authorized to sign checks; and

(iii) A qualified financial counselor available to serve members during operating hours.

(2) Exceptions to paragraph (h)(1)(i) of this section may be approved by the installation commander with advice

from the Secretary of the Military Department concerned (or designee) in the case of newly organized credit unions.

(3) When an on-base credit union can support only minimum staffing, one of the positions required in paragraph (h)(1)(i) of this section or paragraph (h)(1)(ii) of this section also may be subsumed under the counselor duties.

(4) Credit union remote service locations at the same installation may be staffed with one person alone, provided that a direct courier or an electronic or automated message service links each remote location to the credit union's main office.

(i) *Credit union liaison officer (CULO).* When a credit union office is located on an installation, the commander shall appoint a CULO. As appropriate, the CULO responsibility should be assigned to comptroller or resource management personnel. The CULO's name and duty telephone number shall be displayed prominently at each credit union office on the installation. Anyone who serves as a credit union board member or in any other official credit union capacity may not serve as a CULO. The duties of a CULO are the same as the duties listed for a BLO (see § 231.5(h)).

(j) *In-store banking.* In-store banking services may be provided in accordance with § 231.5(i) except that:

(1) Credit unions interested in submitting proposals to provide requested in-store banking services shall provide a statement from the NCUA or applicable state regulatory agency certifying the credit union's authority to offer the requested financial services to the commissary, Military Exchange, or other on-base facilities.

(2) Space granted to a credit union selected to provide in-store banking services should be issued through a no-cost license in accordance with section 170 of the Federal Credit Union Act (12 U.S.C. 1770).

## § 231.8 Procedures—overseas credit unions.

(a) *General policy.* (1) Credit union services to authorized persons and organizations may be provided by domestic on-base credit unions operating under a geographic franchise.

(2) The extension of credit union service overseas is encouraged consistent with the principles prescribed for domestic credit unions and with applicable status of forces agreements or other intergovernmental agreements, or host-country law.

(3) Where permitted by the status of forces agreements or other intergovernmental agreements, or host-country law, only federal credit unions or federally insured state chartered credit unions may operate on overseas DoD installations. The ultimate decision to provide services overseas rests with the credit union itself.

(b) *Establishment.* (1) Commanders shall notify the Secretary of the Military Department concerned (or designee), through command channels, when overseas credit union services are needed. Such requests shall include:

(i) Full information about available space and logistical support.

(ii) The name and location of the nearest credit union facility or branch.

(iii) The distance between the installation and the nearest credit union facility or branch.

(iv) The availability of any official or public transportation.

(v) The number of DoD personnel in duty assignments that confine them to the installation or who cannot obtain transportation (such as hospital patients).

(vi) In countries not presently served, a statement concurred in by the cognizant Combatant Command that the requirement has been coordinated with the U.S. Chief of Diplomatic Mission or U.S. Embassy. The statement shall include that the host country will permit credit union operations and will indicate any conditions imposed by the host country with respect to those operations.

(2) Subsequent to approval of the request from the installation or community commander to establish an overseas credit union facility, the Secretary of the Military Department concerned (or designee) shall solicit proposals for the provision of full credit union services under the following provisions.

(i) Where there is a DoD designated geographic franchise with a specific field of membership, the Secretary of

the Military Department (or designee) shall direct the installation or community commander to contact the supporting credit union and request that a branch or facility be established. The basic decision concerning such extensions of service rests with the servicing credit union. The Director, DFAS (or designee) shall maintain a listing of all geographic franchises assigned to credit unions serving DoD overseas installations.

(ii) Where there is no DoD designated geographic franchise, the Secretary of the Military Department (or designee) shall:

(A) Coordinate requests, through the Director, DFAS (or designee), to obtain a geographic franchise. A geographic franchise is the authorization granted to a credit union by the Office of the Under Secretary of Defense (Comptroller) (OUSD(C)) to provide financial services in a specific geographic region located outside the United States, its territories and possessions.

(B) Solicit proposals from credit unions currently operating on DoD installations.

(C) Review proposals of interested credit unions.

(D) Coordinate with field commands, as needed.

(E) Recommend selection to the NCUA or applicable state regulatory agency with a copy to the DFAS and the OUSD(C), requesting that the appropriate field of membership adjustment be made. Such a recommendation shall identify the primary installations on which the credit union would operate and, if applicable, the contiguous geographic boundaries for future facilities and branches.

(3) Where there is an existing field of membership, the Secretary of the Military Department concerned (or designee) shall take the following actions:

(i) If a credit union on an installation terminates operation, afford any other credit union having a geographic franchise within that country an opportunity to assume the franchise being vacated. If all such institutions decline, the geographic franchise shall be offered to the federally insured credit union community. If, as a result of a credit union decision to decline service to an installation or a termination action, another credit union:

(A) Offers to provide service.

(B) Meets host country requirements (if any) and

(C) Is assigned the former geographic franchise or portion thereof, the NCUA or the applicable state regulatory agency shall be notified and requested to make appropriate field of membership adjustments.

(ii) When other credit union(s) having a geographic franchise within a country decline the opportunity, or there is no other credit union having a franchise within that country, the provisions of paragraph (b)(2)(ii) of this section apply.

(4) No commitment may be made to a credit union regarding its proposal until the appropriate regulatory agency has announced a selection.

(c) *Logistical support.* Installation or community commanders shall provide logistical credit union support. Such support normally shall include:

(1) Adequate office space, including steel bars; grillwork; security doors; a vault, safes or both; security alarm systems and camera surveillance equipment (where deemed necessary) that meet documented requirements of the credit union's insurance carrier; construction of counters, teller cages, and customer and work areas; necessary modifications and alterations to existing buildings. The size and arrangement of space should permit efficient operations. The credit union shall pay for all improvements to the space given. Space assigned may not exceed that prescribed in DoD 4270.1–M.

(2) DoD housing on a rental basis to key credit union personnel unable to find suitable, reasonably priced housing in the vicinity of the DoD installation, if available.

(3) Education, on a space-available, tuition-paying basis, provided by the Department of Defense Education Activity to minor dependents of assigned staff in accordance with DoD Directive 1342.13.

(4) Utilities (i.e., electricity, natural gas or fuel oil, water and sewage), heating, intrastation telephone service, and custodial and janitorial services.

(5) DSN voice and data communication to include, where feasible, internet access.

(6) U.S. Military Postal Service support under DoD Directive 4525.6. The use of free intra-theater delivery system (IDS) is authorized for all routine mail sent and received between Army Post Offices (APOs) and Fleet Post Offices (FPOs) within a theater.

(7) Military guards, civilian guards (for use within the installation), military police, or other protective services to accompany shipments of money from the MBF to the credit union and return where it is impractical or not authorized to have a local armored car service or civilian police authorities entering a military installation to provide cash escort service or when the cost of obtaining such service is prohibitive. This level of protective service also shall be provided at other times as required to include replenishment of ATM currency and receipts, alarm system failures, and to avoid undue risks or insurance costs.

(d) *Travel*. Travel by credit union officials must be at no expense to the U.S. Government. Overseas commanders may issue invitational travel orders for official on-base visits by credit union officials at no cost to the U.S. Government.

(e) *Operations*. (1) An overseas credit union shall confine its field of membership to individuals or organizations eligible by law or regulation to receive services and benefits from the installation. Services shall not be provided to those personnel precluded such services by the applicable status of forces agreement, other intergovernmental agreements, or host-country law.

(2) The Department assigns overseas credit unions a prescribed geographic franchise. Any credit union, however, may continue to serve its members stationed overseas by mail or telecommunications, to include access to the Internet.

(3) A credit union proposing a new service to be offered by a branch office that is not authorized by the operating agreement shall coordinate the establishment of the new service through the cognizant Component command to the Combatant Command. The new service shall be offered only after the appropriate command's approval and coordination with the U.S. Chief of Diplomatic Mission or U.S. Embassy to ensure that the service does not conflict with the applicable status of forces agreement, other intergovernmental agreements, or host-country law.

(4) Credit unions that operate full service branches shall have U.S. currency and coin available for member transactions. In areas served by currency custody accounts, transactional U. S. currency and coins shall be made available from the servicing MBF with no direct or analysis charge to the credit union, provided settlement is made via the local MBF account or equivalent arrangements are made with the MBF.

(5) In countries served by MBFs operated under contract, credit unions shall purchase foreign currency only from the servicing MBF.

(i) The bulk rate purchase price shall apply to currency used by the credit union to make payments to vendors or to make payroll payments.

(ii) Credit unions that desire and are authorized to provide accommodation exchange services to its members shall acquire foreign currency from the servicing MBF at the MBF wholesale rate and sell it at a rate of exchange no more favorable than that available to customers of the MBF.

(6) Credit unions operating under a geographic franchise on an overseas DoD installation shall not publicize, display or sell vehicles on the installation.

(7) The NCUA or applicable state regulatory agency may review operations of overseas credit union offices either when it examines the main credit union or at other times of its choosing. For federally insured, state chartered credit unions, the applicable state regulatory agency also may examine credit unions operations.

### § 231.9 Definitions.

(a) *Automated Teller Machine (ATM)*. An electronic machine that dispenses cash, and may perform such other functions as funds transfers among a customer's various accounts and acceptance of deposits. Equipment generally

is activated by a plastic card in combination with a personal identification number (PIN). Typically, when the cardholder's account is with a financial institution other than that operating the ATM, its use results in the assessment of a fee from the ATM network (e.g., Armed Forces Financial Network (AFFN), Cirrus, or PLUS) that processes the transaction.

(b) *Banking institution*. An entity chartered by a state or the federal government to provide financial services.

(c) *Banking office*. A branch bank, or independent bank operated by a banking institution on a domestic DoD installation or by a foreign banking institution on an overseas DoD installation.

(d) *Branch bank*. A separate unit chartered to operate at an on-base location geographically remote from its parent banking institution.

(e) *Credit union*. A cooperative nonprofit association, incorporated under the Federal Credit Union Act (12 U.S.C. 1751 *et seq.*), or similar state statute, for the purposes of encouraging thrift among its members and creating a source of credit at a fair and reasonable rate of interest.

(f) *Credit union facility*. A facility employing a communications system with the parent credit union to conduct business at remote locations where a full-service credit union or credit union branch is impractical. Credit union facilities need not provide cash transaction services but must disburse loans and shares by check or draft and provide competent financial counseling during normal working hours.

(g) *Discrimination*. Any differential treatment in provision of services, including loan services, by a financial institution to DoD personnel and their dependents on the basis of race, color, religion, national origin, sex, marital status, age, rank, or grade.

(h) *DoD Component*. For the purposes of this part, DoD Components include the Office of the Secretary of Defense, the Military Departments, the Joint Chiefs of Staff, the Joint Staff and the supporting Joint Agencies, the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, the Uniformed Services University of the Health Sciences, all nonappropriated fund instrumentalities including the Military Exchange Services, and morale, welfare and recreation activities, and all other organizational entities within the Department of Defense.

(i) *DoD Personnel*. All military personnel; DoD civil service employees; other civilian employees, including special government employees of all offices, Agencies, and Departments performing functions on a DoD installation (including nonappropriated fund instrumentalities); and their dependents. On domestic DoD installations, retired U.S. military personnel and their dependents are included.

(j) *Domestic DoD installation*. For the purposes of this Regulation, a military installation located within a state of the United States, the District of Columbia, Guam or the Commonwealth of Puerto Rico.

(k) *Fair market rental*. A reasonable charge for on-base land, buildings, or building space. Rental is determined by a government appraisal based on comparable properties in the local civilian economy. The appraiser, however, shall consider that on-base property may not always be comparable to similar property in the local commercial geographic area. Examples of circumstances that may affect fair market rental include limitations of usage and access to the financial institution by persons other than those on the installation, proximity to the community center or installation business district, and the government's right to terminate the lease or take title to improvements constructed at the financial institution's expense.

(l) *Field of membership*. A group of people entitled to credit union membership because of a common bond of occupation, association, employment, or residence within a well-defined neighborhood, community, rural district, and other persons sharing a common bond as described by credit union board of directors policy or by Interpretation Ruling and Policy Statement (IRPS) 99–1. A field of membership is defined in the credit union's charter by the appropriate regulatory agency.

(m) *Financial institution*. This term encompasses any banking institution,

credit union, thrift institution and subordinate office branch or facility, each as separately defined herein.

(n) *Financial services.* Those services commonly associated with financial institutions in the United States, such as electronic banking (e.g., ATMs and personal computing banking), in-store banking, checking, share and savings accounts, funds transfers, sales of official checks, money orders, and travelers checks, loan services, safe deposit boxes, trust services, sale and redemption of U.S. Savings Bonds, and acceptance of utility payments and any other services provided by financial institutions.

(o) *Foreign banking institution.* A bank located outside the United States chartered by the country in which it is domiciled.

(p) *Full service credit union.* A credit union that provides full-time counter transaction services, to include cash operations, and is staffed during normal working hours by a loan officer, a person authorized to sign checks, and a qualified financial counselor. In overseas areas, ''full service'' includes cash operations where not prevented by:

(1) Status of forces agreements, other intergovernmental agreements, or host-country law.

(2) Physical security requirements that cannot be resolved by the credit union or local command.

(q) *Geographic franchise.* Authorization granted to a credit union by the Office of the Under Secretary of Defense (Comptroller) to provide financial services in a specific geographic region located outside the United States, its territories and possessions.

(r) *Independent bank.* A bank specifically chartered to operate on one or more DoD installations whose directors and officers usually come from the local business and professional community. Such operations are thus differentiated from county-wide or state-wide branch systems consisting of a head office and one or more geographically separate branch offices.

(s) *In-store banking.* An expansion of financial services provided by an on-base financial institution within the premises of a commissary store operated by the Defense Commissary Agency, a Military Exchange outlet, and other on-base retail facilities.

(t) *Malpractice.* Any unreasonable lack of skill or fidelity in fiduciary duties or the intentional violation of an applicable law or regulation or both that governs the operations of the financial institution. A violation shall be considered intentional if the responsible officials know that the applicable action or inaction violated a law or regulation.

(u) *Military banking facility (MBF).* A banking office located on a DoD installation and operated by a financial institution that the Department of the Treasury specifically has authorized, under its designation as a ''Depository and Financial Agent of the U.S. Government,'' to provide certain banking services at the installation.

(v) *National bank.* An association approved and chartered by the Comptroller of the Currency to operate a banking business.

(w) *On-base.* Refers to physical presence on a domestic or overseas DoD installation.

(x) *Operating agreement.* A mutual agreement between the installation commander and the on-base financial institution to document their relationships.

(y) *Overseas DoD installation.* A military installation (or community) located outside the states of the United States, the District of Columbia, Guam or the Commonwealth of Puerto Rico.

(z) *Part-time MBF.* A MBF that operates fewer than 5 days a week exclusive of additional payday service. When only payday service is provided, the MBF may be termed a ''payday service facility.''

(aa) *Regulatory Agency.* Includes the Office of the Comptroller of the Currency, Department of the Treasury; the Federal Deposit Insurance Corporation; the Board of Governors of the Federal Reserve System; the respective Federal Reserve Banks; the National Credit Union Administration; Office of Thrift Supervision; the various state agencies and commissions that oversee financial institutions; and, for military banking facilities (MBFs), the Fiscal Assistant Secretary of the Treasury (or designee).

(bb) *State bank*. An institution organized and chartered under the laws of one of the states of the United States to operate a banking business within that state.

(cc) *Thrift institution*. An institution organized and chartered under federal or state law as a Savings Bank, Savings Association, or Savings and Loan Association.

[66 FR 46708, Sept. 7, 2001; 66 FR 54136, Oct. 26, 2001]

## Subpart B—DoD Directive 1000.11

### § 231.10 Financial institutions on DoD installations.

(a) *Purpose*. This subpart:

(1) Updates policies and responsibilities for financial institutions that serve Department of Defense (DoD) personnel on DoD installations worldwide. Associated procedures are contained in subpart A of this part.

(2) Prescribes consistent arrangements for the provision of services by financial institutions among the DoD Components, and requires that financial institutions operating on DoD installations provide, and are provided, support consistent with the policies stated herein.

(b) *Applicability*. This subpart applies to the Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter collectively referred to as ''the DoD Components''), and all nonappropriated fund instrumentalities including the Military Exchange Services and morale, welfare and recreation (MWR) activities.

(c) *Definitions*. Terms used in this subpart are set forth in subpart A of this part.

(d) *Policy*. (1) The following pertains to financial institutions on DoD installations:

(i) Except where they already may exist as of May 1, 2000, no more than one banking institution and one credit union shall be permitted to operate on a DoD installation.

(ii) Upon the request of an installation commander and with the approval of the Secretary of the Military Department concerned (or designee), duly chartered financial institutions may be authorized to provide financial services on DoD installations to enhance the morale and welfare of DoD personnel and facilitate the administration of public and quasi-public monies. Arrangement for the provision of such services shall be in accordance with this subpart and the applicable provisions of subpart A of this part.

(iii) Financial institutions or branches thereof, shall be established on DoD installations only after approval by the Secretary of the Military Department concerned (or designee) and the appropriate regulatory agency.

(A) Except in limited situations overseas (see paragraph (d)(2)(ii)(C) of this section), only banking institutions insured by the Federal Deposit Insurance Corporation and credit unions insured by the National Credit Union Share Insurance Fund or by another insurance organization specifically qualified by the Secretary of the Treasury, shall operate on DoD installations. These financial institutions may either be State or federally chartered; however, U.S. credit unions operated overseas shall be federally insured.

(B) Military banking facilities (MBFs) shall be established on DoD installations only when a demonstrated and justified need cannot be met through other means. An MBF is a financial institution that is established by the Department of the Treasury under statutory authority that is separate from State or Federal laws that govern commercial banking. Section 265 of title 12, United States Code contains the provisions for the Department of the Treasury to establish MBFs. Normally, MBFs shall be authorized only at overseas locations. This form of financial institution may be considered for use at domestic DoD installations only when the cognizant DoD Component has been unable to obtain, through normal means, financial services from a State or federally chartered financial institution authorized to operate in the State in which the installation is located. In times of mobilization, it may become necessary to

designate additional MBFs as an emergency measure. The Director, Defense Finance and Accounting Service (DFAS) may recommend the designation of MBFs to the Department of the Treasury.

(C) Retail banking operations shall not be performed by any DoD Component. Solicitations for such services shall be issued, or proposals accepted, only in accordance with the policies identified in this subpart. The DoD Components shall rely on commercially available sources in accordance with DoD Directive 4100.15.[14]

(iv) Installation commanders shall not seek the provision of financial services from any entity other than the on-base banking office or credit union. The Director, DFAS, with the concurrence of the Under Secretary of Defense (Comptroller) (USD(C)), may approve exceptions to this policy.

(v) Financial institutions authorized to locate on DoD installations shall be provided logistic support as set forth in subpart A of this part.

(vi) Military disbursing offices, nonappropriated fund instrumentalities (including MWR activities and the Military Exchange Services) and other DoD Component activities requiring financial services shall use on-base financial institutions to the maximum extent feasible.

(vii) The Department encourages the delivery of retail financial services on DoD installations via nationally networked automated teller machines (ATMs).

(A) ATMs are considered electronic banking services and, as such, shall be provided only by financial institutions that are chartered and insured in accordance with the provisions of paragraph (d)(1)(iii) of this section.

(B) Proposals by the installation commander to install ATMs from other than on-base financial institutions shall comply with the provisions of paragraph (d)(1)(iv) of this section.

(viii) Expansion of financial services (to include in-store banking) requiring the outgrant of additional space or logistical support shall be approved by the installation commander. Any DoD activity or financial institution seeking to expand financial services shall coordinate such requests with the installation bank/credit union liaison officer prior to the commander's consideration.

(ix) The installation commander shall ensure, to the maximum extent feasible, that all financial institutions operating on that installation are given the opportunity to participate in pilot programs to demonstrate new financial-related technology or establish new business lines (e.g., in-store banking) where a determination has been made by the respective DoD Component that the offering of such services is warranted.

(x) The installation commander shall approve requests for termination of financial services that are substantiated by sufficient evidence and forwarded to the Secretary of the Military Department concerned (or designee). The Secretary of the Military Department (or designee) shall coordinate such requests with the USD(C), through the Director, DFAS, before notification to the appropriate regulatory agency.

(xi) Additional guidance pertaining to financial services is set forth in subpart A of this part.

(2) The following additional provisions pertain to only to financial institutions on overseas DoD installations:

(i) The extension of services by MBFs and credit unions overseas shall be consistent with the policies stated herein and with the applicable status of forces agreements, other intergovernmental agreements, or host-country law.

(ii) Financial services at overseas DoD installations may be provided by:

(A) Domestic on-base credit unions operating overseas under a geographic franchise and, where applicable, as authorized by the pertinent status of forces agreements, other intergovernmental agreements, or host-country law.

(B) MBFs operated under and authorized by the pertinent status of forces agreement, other intergovernmental agreement, or host-country law.

(C) Domestic and foreign banks located on overseas DoD installations that are:

(*1*) Chartered to provide financial services in that country, and

[14] See footnote 1 to § 231.1(a).

(*2*) A party to a formal operating agreement with the installation commander to provide such services, and

(*3*) Identified, where applicable, in the status of forces agreements, other intergovernmental agreements, or host-country law.

(iii) In countries served by MBFs operated under contract, nonappropriated fund instrumentalities and on-base credit unions that desire, and are authorized, to provide accommodation exchange services shall acquire foreign currency from the MBF at the MBF accommodation rate; and shall sell such foreign currency at a rate of exchange that is no more favorable to the customer than the customer rate available at the MBF.

(e) *Responsibilities*. (1) The Under Secretary of Defense (Comptroller) (USD(C)) shall develop policies governing establishment, operation, and termination of financial institutions on DoD installations and take final action on requests for exceptions to this subpart.

(2) The Under Secretary of Defense (Acquisition, Technology and Logistics) (USD(AT&L)) shall monitor policies and procedures governing logistical support furnished to financial institutions on DoD installations, including the use of DoD real property and equipment.

(3) The Under Secretary of Defense (Personnel and Readiness) (USD(P&R)) shall advise the USD(C) on all aspects of on-base financial institution services that affect the morale and welfare of DoD personnel.

(4) DoD Component responsibilities pertaining to this subpart are set forth in subpart A of this part.

## Subpart C—Guidelines for Application of the Privacy Act to Financial Institution Operations

### § 231.11 Guidelines.

(a) The following guidelines govern the application of DoD Directive 5400.11[15] to those financial institutions that operate under this part:

(1) Financial institutions and their branches and facilities operating on DoD military installations do not fall within the purview of 5 U.S.C. 552 *et seq*.

(i) These financial institutions do not fit the definition of ''agency'' to which the Privacy Act applies, that is, any executive department, Military Department, government corporation, government-controlled corporation, or other establishment in the executive branch of the government (including the Executive Office of the President), or an independent regulatory agency (5 U.S.C. 552(e) and 552a(a)(1)).

(ii) These financial institutions are not ''government contractors'' within the meaning of 5 U.S.C. 552a(o), as they do not operate a system of records on behalf of an agency to accomplish an agency function. According to the Office of Management and Budget Privacy Act Guidelines, the provision relating to government contractors applies only to systems of records actually taking the place of a federal system which, but for the contract, would have been performed by an agency and covered by the Privacy Act. Clearly, the subject institutions do not meet these criteria.

(iii) Since the Act does not apply to them, these financial institutions are not required to comply with 5 U.S.C. 552a(e)(3) in obtaining and making use of personal information in their relationships with personnel authorized to use such institutions. Thus, these institutions are not required to inform individuals from whom information is requested of the authority for its solicitation, the principal purpose for which it is intended to be used, the routine uses that may be made of it, or the effects of not providing the information. There also is no requirement to post information of this nature within on-base banking and credit union offices.

(2) The financial institutions concerned hold the same position and relationship to their account holders, members, and to the government as they did before enactment of OMB Circular A–130. Within their usual business relationships, they still are responsible for safeguarding the information provided by their account holders or members and for obtaining only

[15] See footnote 1 to § 231.1(a).

such information as is reasonable and necessary to conduct business. This includes credit information and proper identification, which may include social security number, as a precondition for the cashing of checks.

(3) Financial institutions may incorporate the following conditions of disclosure of personal identification in all contracts, including loan agreements, account signature cards, certificates of deposit agreements, and any other agreements signed by their account holders or members:

I hereby authorize the Department of Defense and its various Components to verify my social security number or other identifier and disclose my home address to authorized (name of financial institution) officials so that they may contact me in connection with my business with (name of financial institution). All information furnished will be used solely in connection with my financial relationship with (name of financial institution).

(ii) When the financial institution presents such signed authorizations, the receiving military command or installation shall provide the appropriate information.

(4) Even though an agreement described in paragraph (a)(3) of this section has not been obtained, the Department of Defense may provide these financial institutions with salary information and, when pertinent, the length or type of civilian or military appointment, consistent with DoD Directives 5400.11 and 5400.7.[16] Some examples of personal information pertaining to DoD personnel that normally can be released without creating an unwarranted invasion of personal privacy are name, rank, date of rank, salary, present and past duty assignments, future assignments that have been finalized, office phone number, source of commission, and promotion sequence number.

(5) When DoD personnel with financial obligations are reassigned and fail to inform the financial institution of their whereabouts, they should be located by contacting the individual's last known commander or supervisor at the official position or duty station within that particular DoD Component. That commander or supervisor either shall furnish the individual's new official duty location address to the financial institution, or shall forward, through official channels, any correspondence received pertaining thereto to the individual's new commander or supervisor for appropriate assistance and response. Correspondence addressed to the individual concerned at his or her last official place of business or duty station shall be forwarded as provided by postal regulations to the new location. Once an individual's affiliation with the Department of Defense is terminated through separation or retirement, however, the Department's ability to render locator assistance (i.e., disclose a home address) is severely curtailed unless the public interest dictates disclosure of the last known home address. The Department may, at its discretion, forward correspondence to the individual's last known home address. The Department may not act as an intermediary for private matters concerning former DoD personnel who are no longer affiliated with the Department.

(b) Questions concerning this guidance should be forwarded through channels to the Deputy Chief Financial Officer, Office of the Under Secretary of Defense (Comptroller), The Pentagon, Washington, DC 20301–1100.

[16] See footnote 1 to 231.1(a).

## APPENDIX A TO PART 231—SAMPLE OPERATING AGREEMENT

### SAMPLE OPERATING AGREEMENT BETWEEN MILITARY INSTALLATIONS AND FINANCIAL INSTITUTIONS

NOTE: The following operating agreement template identifies general arrangement and content. Content of the actual operating agreement may vary according to the circumstances of each installation.

*Operating Agreement Between (Name of Installation), (State or Country Installation Located) and (Name of Financial Institution).*

This Agreement is made and entered into this day by and between the installation commander of (name of installation) in his or her official capacity as installation commander, hereinafter referred to as the ''commander'' and the (name of financial institution), having its principal office at (location of home office) hereinafter referred to as the

''financial institution,'' together hereinafter referred to as ''the parties.'' Whereas the commander and the financial institution enter into this Operating Agreement upon the mutual consideration of the promises, covenants, and agreements hereinafter contained.

1. The parties understand and agree that this Agreement shall in no way modify, change, or alter the terms and conditions of Lease Number (number of lease) covering the use of real property described therein, and this Agreement shall continue, subject to the termination provisions herein-after set forth, during the terms of said lease and any extensions thereof. In the case of a banking institution operating a military banking facility (MBF) overseas, this agreement will not change the conditions of the contract between the banking institution and the Department of Defense.

2. The financial institution agrees to operate a (federally or state) chartered office on-base in accordance with the policies and procedures set forth in DoD Directive 1000.11, and Volume 5, Chapter 34, of the DoD 7000.14–R (as codified in the Code of Federal Regulations (CFR) at 32 CFR parts 230 and 231, respectively); and, in addition for the Overseas Military Banking Program (OMBP), the policies and procedures set forth in the applicable DoD contract. The hours of operations shall be between (hour office opens) and (hour office closes), and on the following days (weekdays office open), except on government holidays when the financial institution may be closed. The Program Office for the OMBP shall notify the commander of any changes to the DoD contract.

3. The financial institution shall provide the following services:

a. *Services for Individuals.*

(1) Demand (checking) account services.

(2) Cashing personal checks and government checks for accountholders.

(3) Maintaining savings accounts and (any other interestbearing accounts).

(4) Selling official checks, money orders, and traveler's checks.

(5) Selling and redeeming United States savings bonds.

(6) Providing direct deposit service.

(7) Loan services.

(8) Electronic banking (i.e., automated teller machines, internet banking).

b. *Services for disbursing officers.*

(1) Furnishing cash (if the financial institution's terms for doing so is consistent with sound management practices).

(2) Accepting deposits for credit to the Treasury General Account (where the financial institution has entered into an agreement with the Department of the Treasury).

c. *Services for nonappropriated fund instrumentalities and private organizations.*

(1) Demand (checking) account services, including wire transfers.

(2) Savings accounts and nonnegotiable certificates of deposit or other interestbearing accounts offered by the banking institution.

(3) Currency and coin for change.

4. Service charges shall be as follows:

a. *Service for individuals.*

(1) No fees shall be charged to individuals for the services listed in subparagraphs 3.a.(2), and 3.a.(5), above, except for subparagraph 3.a.(2), wherein checks drawn on other financial institutions may be treated in accordance with the financial institution's established policy. Any charge to cash a government check shall not exceed that typically charged by financial institutions in the vicinity of the installation. Fees assessed to accountholders and nonaccountholders for use of automated teller machines shall be the customary service charges of the financial institution or those negotiated for base personnel per the attached schedule.

(2) Checking and savings accounts. Fees for individual checking and savings accounts shall be the customary service charges of the financial institution or those negotiated for base personnel per the attached schedule.

(3) Sale of official checks, money orders, traveler's checks and other types of financial paper. Charges for these services shall be the customary charges of the financial institution operating the on-base office.

b. *Service for Disbursing Officers.* No charge shall be made for the services listed in subparagraph 3.b.(2), above. Compensation to the financial institution shall be per its separate agreement with the Department of the Treasury. Charges, if any, for the services stated in subparagraph 3.b.(1) shall be as locally negotiated with the financial institution.

c. *Nonappropriated Fund Instrumentalities and Private Organizations.* State the charges or refer to a schedule of charges for funds and organizations that do not participate in a central banking program. For those activities participating in a central banking program, determine the compensation to the financial institution by account analysis.

5. It is agreed that the financial institution shall:

a. Notify the commander or designated representative of any proposed changes to the attached schedule of fees and services at least 30 days prior to implementation.

b. Follow the requirements in Volume 5, Chapter 34, of DoD 7000.14–R, as codified in the Code of Federal Regulations (CFR), and any changes thereto.

c. Comply with Department of the Treasury requirements for establishment and operation of a Treasury General Account where the financial institution agrees to act as a depository for government funds.

d. Absolve the (Military Service) and its representatives of responsibility or liability for the financial operation of the financial

institution; and for any loss (including losses due to criminal activity), expenses, or claims for damages arising from financial institution operations.

e. Indemnify, and hold harmless the United States from (and against) any loss, expense, claim, or demand, including attorney fees, court costs, and costs of litigation, to which the government may be subjected as a result of death, loss, destruction, or damage in connection with the use and occupancy of (Military Service) premises occasioned in whole or in part by officers, agents or employees of the financial institution operating an office of the financial institution.

f. Favorably respond, whenever feasible, to reasonable local command requests for lectures and printed materials to support consumer credit education programs, financial management program and newcomer's briefings.

g. Prominently post in the lobby of the financial institution the name, duty telephone number of the (Bank or Credit Union) Liaison Officer.

h. Accept the government travel card in all on-base ATMs operated by the financial institution.

i. Abide by the installation fire protection program, including immediate correction of fire hazards noted by the installation fire inspector during periodic fire prevention inspections.

6. The commander shall provide the following space and support:

a. Space requirements for financial institution operations shall be administered in accordance with the existing outgrant (i.e., lease, permit or license). (Show Number of Outgrant).

b. Utilities (i.e., electricity, natural gas or fuel oil, water and sewage), heating and air conditioning, intrastation telephone service, and custodial and janitorial services to include garbage disposal and outdoor maintenance (such as grass cutting and snow removal) on a reimbursable basis.

c. DoD housing and minor dependent education in overseas locations for military banking facility (MBF) and credit union personnel in accordance with §§ 231.6(c)(1)(i)(C), 231.6(c)(1)(D), 231.8(c)(2) and 231.8(c)(3).

7. Termination of this Agreement shall be consistent with the termination provision of the real property lease and subpart A. The Secretary of the (Military Department) shall have the right to terminate this Agreement at any time. Any termination of the right of the financial institution to operate on the installation shall render this Agreement terminated without any applicable action by the commander.

8. Any provision of this Agreement that is contrary to or violates any laws, rules, or regulations of the United States, its agencies, or the state of (state in which the financial institution is located) that apply on federal installations shall be void and have no force or effect; however, both parties to this Agreement agree to notify the other party promptly of any known or suspected continuing violation of such laws, rules, or regulations.

9. So long as this Agreement remains in effect, it shall be reviewed jointly by the commander and the financial institution at least once every 5 years to ensure compatibility with current DoD issuances and to determine if any changes are required to the Agreement.

*In witness whereof*, the commander, and the financial institution, by their duly authorized office, have hereunto set their hands this day of (month, day, year).

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Financial Institution Official

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Installation Commander

## APPENDIX B TO PART 231—IN-STORE BANKING

A. *Selection Process*. The purpose of this guidance is to assure an impartial and thorough process to select the best on-base financial institution to provide in-store banking services when such services are desired and approved by the installation commander.

1. Consistent with DoD Component delegation, the final decision to solicit for an in-store banking office rests with the installation commander.

2. The DoD Component seeking in-store banking (e.g., in buildings operated by the Defense Commissary Agency, Military Exchange Services and MWR activities) shall draft the solicitation letter.

3. Close coordination among all cognizant DoD organizations is essential throughout the selection process.

B. *Specific Procedures*

1. The need for in-store banking service may be identified from either:

a. An unsolicited proposal from an on-base financial institution,

b. A DoD Component's request, or

c. An installation commander's request.

2. The cognizant installation commander (or designee) is responsible for assessing the environment and authorizing the Bank/Credit Union Liaison Officer(s) to pursue the acquisition of in-store banking services. If no authorization is given, no further action is required.

3. The cognizant installation commander shall determine whether a solicitation is required. (A solicitation shall be required whenever there are two or more financial institutions on a DoD installation.) If no solicitation is required, then the Bank/Credit Union Liaison Officer shall work directly with the on-base financial institution to obtain the requested services. Where there is

neither a banking office nor an on-base credit union, use the solicitation process outlined in § 231.5(c) of this chapter, as supplemented by the provisions outlined in paragraph A, above.

4. The solicitation letter shall identify the financial services being requested and classify these services as either mandatory or optional. In addition, the solicitation letter shall highlight any services that will be weighed as more important than others during the evaluation of the proposals. Any space consideration and terms of the proposed agreement also shall be identified in the letter.

5. The installation commander (or designee) formally shall notify the selected financial institution and request that institution to coordinate with the proper activity to begin any construction, modifications or renovations necessary to open the in-store banking office. The cognizant facility management personnel shall begin the process of obtaining the necessary outgrant instruments. Concurrently, the requesting DoD Component representative and the financial institution representative shall draft the appropriate amendment to the operating agreement. The amendment should contain provisions regarding:

a. The roles and responsibilities of all parties involved.

b. The financial services to be provided, and

c. The logistical support arrangements to include custodial services and security provisions. The amendment should be coordinated with the Bank/Credit Union Liaison Officer(s) prior to forwarding that document to the installation commander for signature. The amendment shall be signed by the installation commander (or designee) and the appropriate financial institution official with a copy furnished to the Secretary of the Military Department concerned (or designee) and the Director, DFAS (or designee).

## APPENDIX C TO PART 231—SAMPLE CERTIFICATE OF COMPLIANCE FOR CREDIT UNIONS CERTIFICATE OF COMPLIANCE

I, (name), Chairman of the Board of Directors or President of the (credit union), located at (place), certify that this credit union complies with the requirements of section 170 of the Federal Credit Union Act (12 U.S.C 1770), for the allotment of space in federal buildings without charge for rent or services. The provision of no-cost office space is limited to credit unions if at least 95 percent of the membership to be served by the allotment of space is composed of individuals who are, or who were at the time of admission into the credit union, military personnel or federal employees, or members of their families.

_____
(Date)

_____
(Name)
(Chairman of the Board of Directors or the President)

NOTE: The Certificate of Compliance shall be written on credit union letterhead.

# PART 232—LIMITATIONS ON TERMS OF CONSUMER CREDIT EXTENDED TO SERVICE MEMBERS AND DEPENDENTS

Sec.
232.1 Authority, purpose, and coverage.
232.2 Applicability; examples.
232.3 Definitions.
232.4 Terms of consumer credit extended to covered borrowers.
232.5 Identification of covered borrower.
232.6 Mandatory loan disclosures.
232.7 Preemption.
232.8 Limitations.
232.9 Penalties and remedies.
232.10 Administrative enforcement.
232.11 Servicemembers Civil Relief Act provisions unaffected.
232.12 Effective dates.
232.13 Compliance dates.

AUTHORITY: 10 U.S.C. 987.

SOURCE: 80 FR 43606, July 22, 2015, unless otherwise noted.

### § 232.1 Authority, purpose, and coverage.

(a) *Authority*. This part is issued by the Department of Defense to implement 10 U.S.C. 987.

(b) *Purpose*. The purpose of this part is to impose limitations on the cost and terms of certain extensions of credit to Service members and their dependents, and to provide additional protections relating to such transactions in accordance with 10 U.S.C. 987.

(c) *Coverage*. This part defines the types of transactions involving ''consumer credit,'' a ''creditor,'' and a ''covered borrower'' that are subject to the regulation, consistent with the provisions of 10 U.S.C. 987. In addition, this part:

(1) Provides the maximum allowable amount of all charges, and the types of charges, that may be associated with a covered extension of consumer credit;

(2) Requires a creditor to provide to a covered borrower a statement of the Military Annual Percentage Rate, or

MAPR, before or at the time the borrower becomes obligated on the transaction or establishes an account for the consumer credit. The statement required by § 232.6(a)(1) differs from and is in addition to the disclosures that must be provided to consumers under the Truth in Lending Act;

(3) Provides for the method a creditor must use in calculating the MAPR; and

(4) Contains such other criteria and limitations as the Secretary of Defense has determined appropriate, consistent with the provisions of 10 U.S.C. 987.

### § 232.2 Applicability; examples.

(a)(1) *Applicability*. This part applies to consumer credit extended by a creditor to a covered borrower, as those terms are defined in this part. Nothing in this part applies to a credit transaction or account relating to a consumer who is not a covered borrower at the time he or she becomes obligated on a credit transaction or establishes an account for credit. Nothing in this part applies to a credit transaction or account relating to a consumer (which otherwise would be consumer credit) when the consumer no longer is a covered borrower.

(2) *Examples*—(i) *Covered borrower*. Consumer A is a member of the armed forces but not serving on active duty, and holds an account for closed-end credit with a financial institution. After establishing the closed-end credit account, Consumer A is ordered to serve on active duty, thereby becoming a covered borrower, and soon thereafter separately establishes an open-end line of credit for personal purposes (which is not subject to any exception or temporary exemption) with the financial institution. This part applies to the open-end line of credit, but not to the closed-end credit account.

(ii) *Not a covered borrower*. Same facts as described in paragraph (a)(2)(i) of this section. One year after establishing the open-end line of credit, Consumer A ceases to serve on active duty. This part never did apply to the closed-end credit account, and because Consumer A no longer is a covered borrower, this part no longer applies to the open-end line of credit.

(b) *Examples*. The examples in this part are not exclusive. To the extent that an example in this part implicates a term or provision of Regulation Z (12 CFR part 1026), issued by the Consumer Financial Protection Bureau to implement the Truth in Lending Act, Regulation Z shall control the meaning of that term or provision.

### § 232.3 Definitions.

As used in this part:

(a) *Affiliate* means any person that controls, is controlled by, or is under common control with another person.

(b) *Billing cycle* has the same meaning as ''billing cycle'' in Regulation Z.

(c) *Bureau* means the Consumer Financial Protection Bureau.

(d) *Closed-end credit* means consumer credit (but for the conditions applicable to consumer credit under this part) other than consumer credit that is ''open-end credit'' as that term is defined in Regulation Z.

(e) *Consumer* means a natural person.

(f)(1) *Consumer credit* means credit offered or extended to a covered borrower primarily for personal, family, or household purposes, and that is:

(i) Subject to a finance charge; or

(ii) Payable by a written agreement in more than four installments.

(2) *Exceptions*. Notwithstanding paragraph (f)(1) of this section, consumer credit does not mean:

(i) A residential mortgage, which is any credit transaction secured by an interest in a dwelling, including a transaction to finance the purchase or initial construction of the dwelling, any refinance transaction, home equity loan or line of credit, or reverse mortgage;

(ii) Any credit transaction that is expressly intended to finance the purchase of a motor vehicle when the credit is secured by the vehicle being purchased;

(iii) Any credit transaction that is expressly intended to finance the purchase of personal property when the credit is secured by the property being purchased;

(iv) Any credit transaction that is an exempt transaction for the purposes of Regulation Z (other than a transaction exempt under 12 CFR 1026.29) or otherwise is not subject to disclosure requirements under Regulation Z; and

(v) Any credit transaction or account for credit for which a creditor determines that a consumer is not a covered borrower by using a method and by complying with the recordkeeping requirement set forth in § 232.5(b).

(g)(1) *Covered borrower* means a consumer who, at the time the consumer becomes obligated on a consumer credit transaction or establishes an account for consumer credit, is a covered member (as defined in paragraph (g)(2) of this section) or a dependent (as defined in paragraph (g)(3) of this section) of a covered member.

(2) The term ''covered member'' means a member of the armed forces who is serving on—

(i) Active duty pursuant to title 10, title 14, or title 32, United States Code, under a call or order that does not specify a period of 30 days or fewer; or

(ii) Active Guard and Reserve duty, as that term is defined in 10 U.S.C. 101(d)(6).

(3) The term ''dependent'' with respect to a covered member means a person described in subparagraph (A), (D), (E), or (I) of 10 U.S.C. 1072(2).

(4) Notwithstanding paragraph (g)(1) of this section, covered borrower does not mean a consumer who (though a covered borrower at the time he or she became obligated on a consumer credit transaction or established an account for consumer credit) no longer is a covered member (as defined in paragraph (g)(2) of this section) or a dependent (as defined in paragraph (g)(2) of this section) of a covered member.

(h) *Credit* means the right granted to a consumer by a creditor to defer payment of debt or to incur debt and defer its payment.

(i) *Creditor*, except as provided in § 232.8(a), (f), and (g), means a person who is:

(1) Engaged in the business of extending consumer credit; or

(2) An assignee of a person described in paragraph (i)(1) of this section with respect to any consumer credit extended.

(3) For the purposes of this definition, a creditor is engaged in the business of extending consumer credit if the creditor considered by itself and together with its affiliates meets the transaction standard for a ''creditor'' under Regulation Z with respect to extensions of consumer credit to covered borrowers.

(j) *Department* means the Department of Defense.

(k) *Dwelling* means a residential structure that contains one to four units, whether or not the structure is attached to real property. The term includes an individual condominium unit, cooperative unit, mobile home, and manufactured home.

(*l*) *Electronic fund transfer* has the same meaning as in the regulation issued by the Bureau to implement the Electronic Fund Transfer Act, as amended from time to time (12 CFR part 1005).

(m) *Federal credit union* has the same meaning as ''Federal credit union'' in the Federal Credit Union Act (12 U.S.C. 1752(1)).

(n) *Finance charge* has the same meaning as ''finance charge'' in Regulation Z.

(o) *Insured depository institution* has the same meaning as ''insured depository institution'' in the Federal Deposit Insurance Act (12 U.S.C. 1813(c)).

(p) *Military annual percentage rate (MAPR)*. The MAPR is the cost of the consumer credit expressed as an annual rate, and shall be calculated in accordance with § 232.4(c).

(q) *Open-end credit* means consumer credit that (but for the conditions applicable to consumer credit under this part) is ''open-end credit'' under Regulation Z.

(r) *Person* means a natural person or organization, including any corporation, partnership, proprietorship, association, cooperative, estate, trust, or government unit.

(s) *Regulation Z* means any rules, or interpretations thereof, issued by the Bureau to implement the Truth in Lending Act, as amended from time to time, including any interpretation or approval issued by an official or employee duly authorized by the Bureau to issue such interpretations or approvals. However, for any provision of this part requiring a creditor to comply with Regulation Z, a creditor who is subject to Regulation Z (12 CFR part 226) issued by the Board of Governors of the Federal Reserve System must continue to comply with 12 CFR part

226. Words that are not defined in this part have the same meanings given to them in Regulation Z (12 CFR part 1026) issued by the Bureau, as amended from time to time, including any interpretation thereof by the Bureau or an official or employee of the Bureau duly authorized by the Bureau to issue such interpretations. Words that are not defined in this part or Regulation Z, or any interpretation thereof, have the meanings given to them by State or Federal law.

(t) *Short-term, small amount loan* means a closed-end loan that is—

(1) Subject to and made in accordance with a Federal law (other than 10 U.S.C. 987) that expressly limits the rate of interest that a Federal credit union or an insured depository institution may charge on an extension of credit, provided that the limitation set forth in that law is comparable to a limitation of an annual percentage rate of interest of 36 percent; and

(2) Made in accordance with the requirements, terms, and conditions of a rule, prescribed by the appropriate Federal regulatory agency (or jointly by such agencies), that implements the Federal law described in paragraph (t)(1) of this section, provided further that such law or rule contains—

(i) A fixed numerical limit on the maximum maturity term, which term shall not exceed 9 months; and

(ii) A fixed numerical limit on any application fee that may be charged to a consumer who applies for such closed-end loan.

### § 232.4 Terms of consumer credit extended to covered borrowers.

(a) *General conditions.* A creditor who extends consumer credit to a covered borrower may not require the covered borrower to pay an MAPR for the credit with respect to such extension of credit, except as:

(1) Agreed to under the terms of the credit agreement or promissory note;

(2) Authorized by applicable State or Federal law; and

(3) Not specifically prohibited by this part.

(b) *Limit on cost of consumer credit.* A creditor may not impose an MAPR greater than 36 percent in connection with an extension of consumer credit that is closed-end credit or in any billing cycle for open-end credit.

(c) *Calculation of the MAPR.*—(1) *Charges included in the MAPR.* The charges for the MAPR shall include, as applicable to the extension of consumer credit:

(i) Any credit insurance premium or fee, any charge for single premium credit insurance, any fee for a debt cancellation contract, or any fee for a debt suspension agreement;

(ii) Any fee for a credit-related ancillary product sold in connection with the credit transaction for closed-end credit or an account for open-end credit; and

(iii) Except for a bona fide fee (other than a periodic rate) which may be excluded under paragraph (d) of this section:

(A) Finance charges associated with the consumer credit;

(B) Any application fee charged to a covered borrower who applies for consumer credit, other than an application fee charged by a Federal credit union or an insured depository institution when making a short-term, small amount loan, provided that the application fee is charged to the covered borrower not more than once in any rolling 12-month period; and

(C) Any fee imposed for participation in any plan or arrangement for consumer credit, subject to paragraph (c)(2)(ii)(B) of this section.

(iv) *Certain exclusions of Regulation Z inapplicable.* Any charge set forth in paragraphs (c)(1)(i) through (iii) of this section shall be included in the calculation of the MAPR even if that charge would be excluded from the finance charge under Regulation Z.

(2) *Computing the MAPR*—(i) *Closed-end credit.* For closed-end credit, the MAPR shall be calculated following the rules for calculating and disclosing the ''Annual Percentage Rate (APR)'' for credit transactions under Regulation Z based on the charges set forth in paragraph (c)(1) of this section.

(ii) *Open-end credit*—(A) *In general.* Except as provided in paragraph (c)(2)(ii)(B) of this section, for open-end credit, the MAPR shall be calculated following the rules for calculating the effective annual percentage rate for a billing cycle as set forth in § 1026.14(c)

and (d) of Regulation Z (as if a creditor must comply with that section) based on the charges set forth in paragraph (c)(1) of this section. Notwithstanding § 1026.14(c) and (d) of Regulation Z, the amount of charges related to opening, renewing, or continuing an account must be included in the calculation of the MAPR to the extent those charges are set forth in paragraph (c)(1) of this section.

(B) *No balance during a billing cycle.* For open-end credit, if the MAPR cannot be calculated in a billing cycle because there is no balance in the billing cycle, a creditor may not impose any fee or charge during that billing cycle, except that the creditor may impose a fee for participation in any plan or arrangement for that open-end credit so long as the participation fee does not exceed $100 per annum, regardless of the billing cycle in which the participation fee is imposed; *provided, however,* that the $100-per annum limitation on the amount of the participation fee does not apply to a bona fide participation fee imposed in accordance with paragraph (d) of this section.

(d) *Bona fide fee charged to a credit card account*—(1) *In general.* For consumer credit extended in a credit card account under an open-end (not home-secured) consumer credit plan, a bona fide fee, other than a periodic rate, is not a charge required to be included in the MAPR pursuant to paragraph (c)(1) of this section. The exclusion provided for any bona fide fee under this paragraph (d) applies only to the extent that the charge by the creditor is a bona fide fee, and must be reasonable for that type of fee.

(2) *Ineligible items.* The exclusion for bona fide fees in paragraph (d)(1) of this section does not apply to—

(i) Any credit insurance premium or fee, including any charge for single premium credit insurance, any fee for a debt cancellation contract, or any fee for a debt suspension agreement; or

(ii) Any fee for a credit-related ancillary product sold in connection with the credit transaction for closed-end credit or an account for open-end credit.

(3) *Standards relating to bona fide fees*—(i) *Like-kind fees.* To assess whether a bona fide fee is reasonable under paragraph (d)(1) of this section, the fee must be compared to fees typically imposed by other creditors for the same or a substantially similar product or service. For example, when assessing a bona fide cash advance fee, that fee must be compared to fees charged by other creditors for transactions in which consumers receive extensions of credit in the form of cash or its equivalent. Conversely, when assessing a foreign transaction fee, that fee may not be compared to a cash advance fee because the foreign transaction fee involves the service of exchanging the consumer's currency (*e.g.*, a reserve currency) for the local currency demanded by a merchant for a good or service, and does not involve the provision of cash to the consumer.

(ii) *Safe harbor.* A bona fide fee is reasonable under paragraph (d)(1) of this section if the amount of the fee is less than or equal to an average amount of a fee for the same or a substantially similar product or service charged by 5 or more creditors each of whose U.S. credit cards in force is at least $3 billion in an outstanding balance (or at least $3 billion in loans on U.S. credit card accounts initially extended by the creditor) at any time during the 3-year period preceding the time such average is computed.

(iii) *Reasonable fee.* A bona fide fee that is higher than an average amount, as calculated under paragraph (d)(3)(ii) of this section, also may be reasonable under paragraph (d)(1) of this section depending on other factors relating to the credit card account. A bona fide fee charged by a creditor is not unreasonable solely because other creditors do not charge a fee for the same or a substantially similar product or service.

(iv) *Indicia of reasonableness for a participation fee.* An amount of a bona fide fee for participation in a credit card account may be reasonable under paragraph (d)(1) of this section if that amount reasonably corresponds to the credit limit in effect or credit made available when the fee is imposed, to the services offered under the credit card account, or to other factors relating to the credit card account. For example, even if other creditors typically charge $100 per annum for participation

in credit card accounts, a $400 fee nevertheless may be reasonable if (relative to other accounts carrying participation fees) the credit made available to the covered borrower is significantly higher or additional services or other benefits are offered under that account.

(4) *Effect of charging fees on bona fide fees*—(i) *Bona fide fees treated separately from charges for credit insurance products or credit-related ancillary products.* If a creditor imposes a fee described in paragraph (c)(1) of this section and imposes a finance charge to a covered borrower, the total amount of the fee(s) and finance charge(s) shall be included in the MAPR pursuant to paragraph (c) of this section, and the imposition of any fee or finance charge described in paragraph (c)(1) of this section shall not affect whether another type of fee may be excluded as a bona fide fee under this paragraph (d).

(ii) *Effect of charges for non-bona fide fees.* If a creditor imposes any fee (other than a periodic rate or a fee that must be included in the MAPR pursuant to paragraph (c)(1) of this section) that is not a bona fide fee and imposes a finance charge to a covered borrower, the total amount of those fees, including any bona fide fees, and other finance charges shall be included in the MAPR pursuant to paragraph (c) of this section.

(iii) *Examples.* (A) In a credit card account under an open-end (not home-secured) consumer credit plan during a given billing cycle, Creditor A imposes on a covered borrower a fee for a debt cancellation product (as described in paragraph (c)(1)(i) of this section), a finance charge (as described in paragraph (c)(1)(iii)(A)), and a bona fide foreign transaction fee that qualifies for the exclusion under this paragraph (d). Only the fee for the debt cancellation product and the finance charge must be included when calculating the MAPR.

(B) In a credit card account under an open-end (not home-secured) consumer credit plan during a given billing cycle, Creditor B imposes on a covered borrower a fee for a debt cancellation product (as described in paragraph (c)(1)(i) of this section), a finance charge (as described in paragraph (c)(1)(iii)(A)), a bona fide foreign transaction fee that qualifies for the exclusion under this paragraph (d), and a bona fide, but unreasonable cash advance fee. All of the fees—including the foreign transaction fee that otherwise would qualify for the exclusion under this paragraph (d)—and the finance charge must be included when calculating the MAPR.

(5) *Rule of construction.* Nothing in paragraph (d)(1) of this section authorizes the imposition of fees or charges otherwise prohibited by this part or by other applicable State or Federal law.

### § 232.5 Optional identification of covered borrower.

(a) *No restriction on method for covered-borrower check.* A creditor is permitted to apply its own method to assess whether a consumer is a covered borrower.

(b) *Safe harbor*—(1) *In general.* A creditor may conclusively determine whether credit is offered or extended to a covered borrower, and thus may be subject to 10 U.S.C. 987 and the requirements of this part, by assessing the status of a consumer in accordance with this paragraph (b).

(2) *Methods to check status of consumer*—(i) *Department database*—(A) *In general.* To determine whether a consumer is a covered borrower, a creditor may verify the status of a consumer by using information relating to that consumer, if any, obtained directly or indirectly from the database maintained by the Department, available at *https://www.dmdc.osd.mil/mla/welcome.xhtml.* A search of the Department's database requires the entry of the consumer's last name, date of birth, and Social Security number.

(B) *Historic lookback prohibited.* At any time after a consumer has entered into a transaction or established an account involving an extension of credit, a creditor (including an assignee) may not, directly or indirectly, obtain any information from any database maintained by the Department to ascertain whether a consumer had been a covered borrower as of the date of that transaction or as of the date that account was established.

(ii) *Consumer report from a nationwide consumer reporting agency.* To determine whether a consumer is a covered borrower, a creditor may verify the

status of a consumer by using a statement, code, or similar indicator describing that status, if any, contained in a consumer report obtained from a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, or a reseller of such a consumer report (as each of those terms is defined in the Fair Credit Reporting Act (15 U.S.C. 1681a) and any implementing regulation (12 CFR part 1022)).

(3) *Determination and recordkeeping; one-time determination permitted.* A creditor who makes a determination regarding the status of a consumer by using one or both of the methods set forth in paragraph (b)(2) of this section shall be deemed to be conclusive with respect to that transaction or account involving consumer credit between the creditor and that consumer, so long as that creditor timely creates and thereafter maintains a record of the information so obtained. A creditor may make the determination described in this paragraph (b), and keep the record of that information obtained at that time, solely at the time—

(i) A consumer initiates the transaction or 30 days prior to that time;

(ii) A consumer applies to establish the account or 30 days prior to that time; or

(iii) The creditor develops or processes, with respect to a consumer, a firm offer of credit that (among the criteria used by the creditor for the offer) includes the status of the consumer as a covered borrower, so long as the consumer responds to that offer not later than 60 days after the time that the creditor had provided that offer to the consumer. If the consumer responds to the creditor's offer later than 60 days after the time that the creditor had provided that offer to the consumer, then the creditor may not rely upon its initial determination in developing or processing that offer, and, instead, may act on the consumer's response as if the consumer is initiating the transaction or applying to establish the account (as described in paragraph (b)(3)(i) or (ii) of this section).

## § 232.6 Mandatory loan disclosures.

(a) *Required information.* With respect to any extension of consumer credit (including any consumer credit originated or extended through the internet) to a covered borrower, a creditor shall provide to the covered borrower the following information before or at the time the borrower becomes obligated on the transaction or establishes an account for the consumer credit:

(1) A statement of the MAPR applicable to the extension of consumer credit;

(2) Any disclosure required by Regulation Z, which shall be provided only in accordance with the requirements of Regulation Z that apply to that disclosure; and

(3) A clear description of the payment obligation of the covered borrower, as applicable. A payment schedule (in the case of closed-end credit) or account-opening disclosure (in the case of open-end credit) provided pursuant to paragraph (a)(2) of this section satisfies this requirement.

(b) *One-time delivery; multiple creditors.* (1) The information described in paragraphs (a)(1) and (a)(3) of this section are not required to be provided to a covered borrower more than once for the transaction or the account established for consumer credit with respect to that borrower.

(2) *Multiple creditors.* If a transaction involves more than one creditor, then only one of those creditors must provide the disclosures in accordance with this section. The creditors may agree among themselves which creditor may provide the information described in paragraphs (a)(1) and (a)(3) of this section.

(c) *Statement of the MAPR*—(1) *In general.* A creditor may satisfy the requirement of paragraph (a)(1) of this section by describing the charges the creditor may impose, in accordance with this part and subject to the terms and conditions of the agreement, relating to the consumer credit to calculate the MAPR. Paragraph (a)(1) of this section shall not be construed as requiring a creditor to describe the MAPR as a numerical value or to describe the total dollar amount of all charges in the MAPR that apply to the extension of consumer credit.

(2) *Method of providing a statement regarding the MAPR.* A creditor may include a statement of the MAPR applicable to the consumer credit in the agreement with the covered borrower involving the consumer credit transaction. Paragraph (a)(1) of this section shall not be construed as requiring a creditor to include a statement of the MAPR applicable to an extension of consumer credit in any advertisement relating to the credit.

(3) *Model statement.* A statement substantially similar to the following statement may be used for the purpose of paragraph (a)(1) of this section: ''Federal law provides important protections to members of the Armed Forces and their dependents relating to extensions of consumer credit. In general, the cost of consumer credit to a member of the Armed Forces and his or her dependent may not exceed an annual percentage rate of 36 percent. This rate must include, as applicable to the credit transaction or account: The costs associated with credit insurance premiums; fees for ancillary products sold in connection with the credit transaction; any application fee charged (other than certain application fees for specified credit transactions or accounts); and any participation fee charged (other than certain participation fees for a credit card account).''

(d) *Methods of delivery*—(1) *Written disclosures.* The creditor shall provide the information required by paragraphs (a)(1) and (3) of this section in writing in a form the covered borrower can keep.

(2) *Oral disclosures.* (i) *In general.* The creditor also shall orally provide the information required by paragraphs (a)(1) and (3) of this section.

(ii) *Methods to provide oral disclosures.* A creditor may satisfy the requirement in paragraph (d)(2)(i) of this section if the creditor provides—

(A) The information to the covered borrower in person; or

(B) A toll-free telephone number in order to deliver the oral disclosures to a covered borrower when the covered borrower contacts the creditor for this purpose.

(iii) *Toll-free telephone number on application or disclosure.* If applicable, the toll-free telephone number must be included on—

(A) A form the creditor directs the consumer to use to apply for the transaction or account involving consumer credit; or

(B) A written disclosure the creditor provides to the covered borrower, pursuant to paragraph (d)(1) of this section.

(e) *When disclosures are required for refinancing or renewal of covered loan.* The refinancing or renewal of consumer credit requires new disclosures under this section only when the transaction for that credit would be considered a new transaction that requires disclosures under Regulation Z.

### § 232.7 Preemption.

(a) *Inconsistent laws.* 10 U.S.C. 987 as implemented by this part preempts any State or Federal law, rule or regulation, including any State usury law, to the extent such law, rule or regulation is inconsistent with this part, except that any such law, rule or regulation is not preempted by this part to the extent that it provides protection to a covered borrower greater than those protections provided by 10 U.S.C. 987 and this part.

(b) *Different treatment under State law of covered borrowers is prohibited.* A State may not:

(1) Authorize creditors to charge covered borrowers rates of interest for any consumer credit or loans that are higher than the legal limit for residents of the State, or

(2) Permit the violation or waiver of any State consumer lending protection covering consumer credit that is for the benefit of residents of the State on the basis of the covered borrower's nonresident or military status, regardless of the covered borrower's domicile or permanent home of record, provided that the protection would otherwise apply to the covered borrower.

### § 232.8 Limitations.

Title 10 U.S.C. 987 makes it unlawful for any creditor to extend consumer credit to a covered borrower with respect to which:

(a) The creditor rolls over, renews, repays, refinances, or consolidates any

consumer credit extended to the covered borrower by the same creditor with the proceeds of other consumer credit extended by that creditor to the same covered borrower. This paragraph shall not apply to a transaction when the same creditor extends consumer credit to a covered borrower to refinance or renew an extension of credit that was not covered by this paragraph because the consumer was not a covered borrower at the time of the original transaction. For the purposes of this paragraph, the term ''creditor'' means a person engaged in the business of extending consumer credit subject to applicable law to engage in deferred presentment transactions or similar payday loan transactions (as described in the relevant law), *provided however*, that the term does not include a person that is chartered or licensed under Federal or State law as a bank, savings association, or credit union.

(b) The covered borrower is required to waive the covered borrower's right to legal recourse under any otherwise applicable provision of State or Federal law, including any provision of the Servicemembers Civil Relief Act (50 U.S.C. App. 501 *et seq.*).

(c) The creditor requires the covered borrower to submit to arbitration or imposes other onerous legal notice provisions in the case of a dispute.

(d) The creditor demands unreasonable notice from the covered borrower as a condition for legal action.

(e) The creditor uses a check or other method of access to a deposit, savings, or other financial account maintained by the covered borrower, except that, in connection with a consumer credit transaction with an MAPR consistent with § 232.4(b), the creditor may:

(1) Require an electronic fund transfer to repay a consumer credit transaction, unless otherwise prohibited by law;

(2) Require direct deposit of the consumer's salary as a condition of eligibility for consumer credit, unless otherwise prohibited by law; or

(3) If not otherwise prohibited by applicable law, take a security interest in funds deposited after the extension of credit in an account established in connection with the consumer credit transaction.

(f) The creditor uses the title of a vehicle as security for the obligation involving the consumer credit, *provided however*, that for the purposes of this paragraph, the term ''creditor'' does not include a person that is chartered or licensed under Federal or State law as a bank, savings association, or credit union.

(g) The creditor requires as a condition for the extension of consumer credit that the covered borrower establish an allotment to repay the obligation. For the purposes of this paragraph only, the term ''creditor'' shall not include a ''military welfare society,'' as defined in 10 U.S.C. 1033(b)(2), or a ''service relief society,'' as defined in 37 U.S.C. 1007(h)(4).

(h) The covered borrower is prohibited from prepaying the consumer credit or is charged a penalty fee for prepaying all or part of the consumer credit.

### § 232.9 Penalties and remedies.

(a) *Misdemeanor*. A creditor who knowingly violates 10 U.S.C. 987 as implemented by this part shall be fined as provided in title 18, United States Code, or imprisoned for not more than one year, or both.

(b) *Preservation of other remedies*. The remedies and rights provided under 10 U.S.C. 987 as implemented by this part are in addition to and do not preclude any remedy otherwise available under State or Federal law or regulation to the person claiming relief under the statute, including any award for consequential damages and punitive damages.

(c) *Contract void*. Any credit agreement, promissory note, or other contract with a covered borrower that fails to comply with 10 U.S.C. 987 as implemented by this part or which contains one or more provisions prohibited under 10 U.S.C. 987 as implemented by this part is void from the inception of the contract.

(d) *Arbitration*. Notwithstanding 9 U.S.C. 2, or any other Federal or State law, rule, or regulation, no agreement to arbitrate any dispute involving the extension of consumer credit to a covered borrower pursuant to this part shall be enforceable against any covered borrower, or any person who was a

covered borrower when the agreement was made.

(e) *Civil liability*—(1) *In general.* A person who violates 10 U.S.C. 987 as implemented by this part with respect to any person is civilly liable to such person for:

(i) Any actual damage sustained as a result, but not less than $500 for each violation;

(ii) Appropriate punitive damages;

(iii) Appropriate equitable or declaratory relief; and

(iv) Any other relief provided by law.

(2) *Costs of the action.* In any successful action to enforce the civil liability described in paragraph (e)(1) of this section, the person who violated 10 U.S.C. 987 as implemented by this part is also liable for the costs of the action, together with reasonable attorney fees as determined by the court.

(3) *Effect of finding of bad faith and harassment.* In any successful action by a defendant under this section, if the court finds the action was brought in bad faith and for the purpose of harassment, the plaintiff is liable for the attorney fees of the defendant as determined by the court to be reasonable in relation to the work expended and costs incurred.

(4) *Defenses.* A person may not be held liable for civil liability under paragraph (e) of this section if the person shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include clerical, calculation, computer malfunction and programming, and printing errors, except that an error of legal judgment with respect to a person's obligations under 10 U.S.C. 987 as implemented by this part is not a bona fide error.

(5) *Jurisdiction, venue, and statute of limitations.* An action for civil liability under paragraph (e) of this section may be brought in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction, not later than the earlier of:

(i) Two years after the date of discovery by the plaintiff of the violation that is the basis for such liability; or

(ii) Five years after the date on which the violation that is the basis for such liability occurs.

### § 232.10 Administrative enforcement.

The provisions of this part, other than § 232.9(a), shall be enforced by the agencies specified in section 108 of the Truth in Lending Act (15 U.S.C. 1607) in the manner set forth in that section or under any other applicable authorities available to such agencies by law.

### § 232.11 Servicemembers Civil Relief Act protections unaffected.

Nothing in this part may be construed to limit or otherwise affect the applicability of section 207 and any other provisions of the Servicemembers Civil Relief Act (50 U.S.C. App. 527).

### § 232.12 Effective dates.

(a) *In general.* This regulation shall take effect October 1, 2015, except that, other than as provided in this section and in § 232.13(b)(1), nothing in this part shall apply to consumer credit that is extended to a covered borrower and consummated before October 3, 2016.

(b) *Prior extensions of consumer credit.* Consumer credit that is extended to a covered borrower and consummated any time between October 1, 2007, and October 3, 2016, is subject to the definitions, conditions, and requirements of this part as were established by the Department and effective on October 1, 2007.

(c) *New extensions of consumer credit.* Except as provided in paragraphs (d) and (e) of this section with respect to extensions of consumer credit under paragraph (b) of this section (and except as permitted by § 232.13(b)(1)), the requirements of this part that are effective as of October 1, 2015, shall apply only to a consumer credit transaction or account for consumer credit consummated or established on or after October 3, 2016.

(d) *Provisions of 10 U.S.C. 987(d)(2).* The amendments to 10 U.S.C. 987(d)(2) enacted in section 661(a) of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112–239, 126 Stat. 1785), as reflected in § 232.7(b), took effect on January 2, 2014.

(e) *Civil liability remedies*. The provisions set forth in § 232.9(e) shall apply with respect to consumer credit extended on or after January 2, 2013.

### § 232.13 Compliance dates.

(a) *In general*. Except as provided in paragraph (c) of this section, a creditor must comply with the requirements of this part, as may be applicable, with respect to a consumer credit transaction or account for consumer credit consummated or established on or after October 3, 2016, not later than that date.

(b) *Safe harbors for identifying a covered borrower*—(1) *New safe harbors*. Section 232.5 shall apply October 3, 2016.

(2) *Prior safe harbor valid until general compliance date*. The provisions relating to the identification of a covered borrower set forth in § 232.5(a) of the regulation established by the Department and effective on October 1, 2007 (including the interpretation by the Department that provides an exception from the safe harbor for the creditor's knowledge that the applicant is a covered borrower) shall remain in effect until October 3, 2016.

(c) *Limited exemption for credit card account; reservation of authority*—(1) *In general*. Notwithstanding § 232.3(f)(1) and subject to paragraph (c)(2) of this section, until October 3, 2017, consumer credit does not mean credit extended in a credit card account under an open-end (not home-secured) consumer credit plan.

(2) *Authority to issue an order to extend exemption*. The Secretary, or an official of the Department duly authorized by the Secretary, may, by order, extend the expiration of the exemption set forth in paragraph (c)(1) of this section, until a date not later than October 3, 2018.

## PART 233—FEDERAL VOTING ASSISTANCE PROGRAM (FVAP)

Sec.

233.1 Purpose
233.2 Applicability
233.3 Definitions
233.4 Policy
233.5 Responsibilities
233.6 Procedures

AUTHORITY: E.O. 12642; 10 U.S.C. 1566a; 52 U.S.C. 20506; 52 U.S.C. Ch. 203.

SOURCE: 77 FR 57487, Sept. 18, 2012, unless otherwise noted.

### § 233.1 Purpose.

This part:

(a) Establishes policy and assigns responsibilities for the FVAP in accordance with Executive Order 12642 and the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. Ch. 203.

(b) Establishes policy and assigns responsibilities for the development and implementation of installation voter assistance (IVA) offices in accordance with 10 U.S.C. 1566a.

(c) Establishes policy and assigns responsibilities for the development and implementation, jointly with each State, of procedures for persons to apply to register to vote at recruitment offices of the Military Services in accordance with 52 U.S.C. 20506.

[77 FR 57487, Sept. 18, 2012, as amended at 84 FR 59722, Nov. 6, 2019]

### § 233.2 Applicability.

This part applies to:

(a) The Office of the Secretary of Defense, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense (IG DoD), the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD (hereinafter referred to collectively as the ''DoD Components'').

(b) The Commissioned Corps of the Public Health Service (PHS), under agreement with the Department of Health and Human Services, and the Commissioned Corps of the National Oceanic and Atmospheric Administration (NOAA), under agreement with the Department of Commerce, and the United States Maritime Administration (MARAD) under agreement with the Department of Transportation. The term ''uniformed services'' refers to the Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, and

their Reserve Components, as well as the Commissioned Corps of the PHS and the NOAA.

(c) Other Federal Executive departments and agencies with employees assigned outside the United States that provide assistance to the FVAP under 52 U.S.C. 20301(c). Recommended procedures for these departments and agencies are contained in § 233.6(c) of this part.

(d) United States Postal Service pursuant to 52 U.S.C. 20304(b)(2) and (4).

[77 FR 57487, Sept. 18, 2012, as amended at 84 FR 59722, Nov. 6, 2019; 85 FR 13047, Mar. 6, 2020]

### § 233.3 Definitions.

Terms used in this part are defined in DoD Dictionary of Military Terms (available at *http://www.jcs.mil/Doctrine*) and this section. These terms and their definitions are for the purpose of this part.

*Eligible voter*. Any of the following:

(1) *Absent uniformed services voter:*

(i) A member of a uniformed service on active duty who, by reason of such active duty, is absent from the place of residence where the member is otherwise qualified to vote.

(ii) A member of the merchant marine who, by reason of service in the merchant marine, is absent from the place of residence where the member is otherwise qualified to vote.

(iii) A spouse or dependent of a member referred to in the first two sentences of this definition who, by reason of the active duty or service of the member, is absent from the place of residence where the spouse or dependent is otherwise qualified to vote.

(2) *Overseas voter:*

(i) An absent uniformed services voter who, by reason of active duty or service, is absent from the United States on the date of the election involved;

(ii) A person who resides outside of the United States and is qualified to vote in the last place in which the person was domiciled before leaving the United States; or

(iii) A person who resides outside of the United States and (but for such residence) would be qualified to vote in the last place in which the person was domiciled before leaving the United States.

*Federal office*. The offices of President or Vice President; Presidential Elector; or of Senator or Representative in; or Delegate or Resident Commissioner to Congress.

*Installation voter assistance (IVA) offices*. The office designated by the installation commander, pursuant to 10 U.S.C. 1556a, to provide voter assistance to military personnel, voting-age military dependents, Government employees, contractors, and other civilian U.S. citizens with access to the installation. IVA offices also serve as voter registration agencies pursuant to 52 U.S.C. 20506(a)(2).

*Installation voter assistance officer (IVAO)*. An individual responsible for voting assistance coordination at the installation level.

*Recruitment offices of the Military Services*. Any office of a military service open to the public and engaged in the recruitment of persons for appointment or enlistment in an Active Component of the Military Services. This does not include Army National Guard and Air National Guard recruiting offices.

*State*. A State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and American Samoa.

*State election*. Any non-Federal election held solely, or in part, for selecting, nominating, or electing any candidate for any State office, such as Governor, Lieutenant Governor, State Attorney General, or State Legislator, or on issues of Statewide interest.

*Uniformed services*. The Army, Navy, Air Force, Marine Corps, Space Force, and Coast Guard, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

*Voter registration agency*. An office designated pursuant to 52 U.S.C. 20506 to perform voter registration activities. Pursuant to 52 U.S.C. 20506(c), a recruitment office of the Military Services is considered to be a voter registration agency. All IVA offices are also designated as voter registration agencies pursuant to 52 U.S.C. 20506(a)(2).

*Voting assistance officer (VAO).* An individual responsible for voting assistance.

[77 FR 57487, Sept. 18, 2012, as amended at 84 FR 59722, Nov. 6, 2019; 86 FR 70748, Dec. 13, 2021]

### § 233.4 Policy.

It is DoD policy that:

(a) The FVAP shall ensure that eligible voters receive, pursuant to 52 U.S.C. 20301(b)(5), information about registration and voting procedures and materials pertaining to scheduled elections, including dates, offices, constitutional amendments, and other ballot proposals.

(b) The right of U.S. citizens to vote is a fundamental right that is afforded protection by the U.S. Constitution. Every eligible voter shall:

(1) Be given an opportunity to register and vote in any election for which he or she is eligible.

(2) Be able to vote in person or by absentee.

(c) All persons assisting in the voting process shall take all necessary steps to prevent discrimination, fraud, intimidation or coercion, and unfair registration and voting assistance procedures. This includes, but is not limited to, preventing actions such as:

(1) Using military authority to influence the vote of any other member of the uniformed services or to require any member to march to any polling place or place of voting as proscribed by 18 U.S.C. 592, 18 U.S.C. 593, and 18 U.S.C. 609. This subsection does not, in any way, prohibit free discussion about political issues or candidates for public office as stated in 18 U.S.C. 609.

(2) Polling any member of the uniformed services before or after he or she votes, as proscribed in 18 U.S.C. 596.

(d) The FVAP shall conduct official surveys authorized by 52 U.S.C. 20301 to report to the President and the Congress on the effectiveness of the assistance provided to eligible voters (including a separate statistical analysis of voter participation and a description of Federal-State cooperation).

(e) DoD personnel involved in assisting in the voter registration or absentee voting process shall use the names of persons applying or declining to register to vote only for voter registration purposes and shall not release such information for any other purpose.

(f) Military or civilian personnel employed in recruitment offices of the Military Services shall be subject to the restrictions outlined in § 233.6(b) of this part.

(g) An installation commander may permit non-partisan voter registration activities on an installation by State and county officials, or groups recognized in accordance with section 501(c)(19) of the Internal Revenue Code, subject to all applicable military installation rules and regulations governing such activities on military installations.

[77 FR 57487, Sept. 18, 2012, as amended at 84 FR 59722, Nov. 6, 2019]

### § 233.5 Responsibilities.

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) shall:

(1) Execute the responsibilities of the Presidential designee in accordance with DoD Directive 5124.02 (available at *https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodd/512402p.pdf*).

(2) Administer the FVAP in accordance with Executive Order 12642, 10 U.S.C. 1566a, 52 U.S.C. 20506; 52 U.S.C. Ch. 203.

(3) Coordinate and implement actions that may be necessary to discharge Federal responsibilities assigned in DoD Directive 5124.02, Executive Order 12642, 10 U.S.C. 1566, 52 U.S.C. 20506; 52 U.S.C. Ch. 203.

(4) Develop policy and procedures to implement DoD responsibilities under 52 U.S.C. 20506 (also known as the ''National Voter Registration Act (NVRA)'').

(5) Grant or deny any hardship exemption waivers submitted by a State pursuant to 52 U.S.C. 20302(g) (after consultation with the Attorney General's designee) and inform the State of the results of the waiver request.

(b) The Heads of the DoD Components and the Uniformed Services shall disseminate voting information and assist eligible voters, as required, in their respective organization, following the procedures in § 233.6(b) of this part.

[77 FR 57487, Sept. 18, 2012, as amended at 84 FR 59722, Nov. 6, 2019]

**§ 233.6 Procedures.**

(a) *FVAP Procedures.* FVAP, shall:

(1) Manage, coordinate, and perform the Presidential designee's responsibilities pursuant to 52 U.S.C. Ch. 203.

(2) Encourage and assist States and other U.S. jurisdictions to adopt the mandatory and recommended provisions of 52 U.S.C. 20302 and ensure they are aware of the requirements of 52 U.S.C. Ch. 203.

(3) Establish and maintain contact with State election officials, State legislators, and with other State and local government officials to improve the absentee voting process for the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) citizens.

(4) Obtain, from each State, current voter registration and absentee voting information and disseminate it to other Federal Executive departments, agencies, DoD Components, and voters qualified to vote, pursuant to 52 U.S.C. 20301(b)(5).

(5) Establish and maintain a voting assistance program to assist all eligible voters as covered by 52 U.S.C. Ch. 203, and to assist those persons to vote.

(6) Establish and maintain an FVAP Web site that provides:

(i) Information to citizens on the voter registration and absentee voting process.

(ii) Information on the means of electronic transmission of election materials allowed by each State.

(iii) A method to assist citizens in the voter registration process and how to request an absentee ballot.

(iv) A list of State contact information in accordance with 52 U.S.C. 20302(e)(4).

(v) The ability to print a Standard Form (SF) 186, ''Federal Write-In Absentee Ballot,'' and a list of all candidates in a Federal election.

(vi) A portal that hosts Service-specific information regarding voting assistance programs, including links to IVA offices; the contact information for voting assistance officers (installation, major command and commissioned units) within the DoD Component; procedures to order voting materials; and links to other Federal and State voting Web sites.

(vii) Absentee ballot data reported under 52 U.S.C. 20301(b)(6) and (b)(11) and 52 U.S.C. 20308.

(viii) Other information as deemed necessary by FVAP.

(7) Survey U.S. citizens including, but not limited to, uniformed services and their dependents as well as overseas U.S. civilians covered by 52 U.S.C. Ch. 203, voting assistance officers (VAOs), and election officials to gather necessary statistical information and prepare the reports to the President and the Congress required by 52 U.S.C. 20301(6) and 52 U.S.C. 20308.

(8) Prescribe the standard oath to be used with any document pursuant to 52 U.S.C. 20301(7).

(9) Coordinate with the Military Postal Service Agency, as addressed in DoD 4525.6–M (available at *http://www.dtic.mil/whs/directives/corres/pdf/452506m.pdf*), to implement measures to ensure a postmark or other proof of mailing date is provided on each absentee ballot collected at any overseas location or vessel at sea, and that voting materials are moved expeditiously to the maximum extent practicable by military postal authorities.

(10) Establish procedures, in consultation with the Attorney General, regarding hardship exemption waivers submitted by a State pursuant to 52 U.S.C. 20302(g).

(11) Prescribe the required voting program metrics to be used by the DoD Components and uniformed services to be used in evaluating their individual voting assistance programs, and report on compliance with those metrics. To the extent practicable, establish and maintain an online portal to collect and consolidate voting program metrics.

(12) In coordination with the Services, develop multiple types of training materials for use by IVA offices, IVAOs, UVAOs, and recruiters to provide voter registration and absentee ballot assistance and at recruitment offices of the Military Services to provide voter registration assistance. Conduct voting assistance training during even-numbered years worldwide.

(13) Maintain multiple lines of support for use by uniformed services and overseas voters, personnel assigned to recruitment offices of the Military

Services and State election officials to provide assistance outlined pursuant to 52 U.S.C. 20301.

(b) *DoD Component and Uniformed Services Procedures.* The DoD Components and the uniformed services shall:

(1) Establish IVA offices on each military installation and maintain an updated list of IVA offices, including location, address, hours of operation, phone number and email address, published on the Service voting assistance Web site. At the discretion of the installation commander, satellite offices may be established under the primary IVA office.

(i) The IVA office will provide voter assistance to military personnel, their dependents, civilian Federal employees, and all qualified voters who have access to such installation offices. IVA offices shall also serve as voter registration agencies under 52 U.S.C. 20506(a)(2).

(ii) The IVA office shall be established within the installation headquarters organization reporting directly to the installation commander, even if geographically located in another office.

(iii) The IVA office should be located in a well-advertised, fixed location, consistent throughout the Service, and should be physically co-located with an existing office that receives extensive visits by Service personnel, family members, and DoD civilians. The IVA office shall be staffed during the hours the installation office is open with trained personnel to provide direct assistance in registration and voting procedures, including the assistance required under 52 U.S.C. 20506(a)(4).

(iv) The IVA office shall:

(A) Be included in the administrative in-processing and out-processing activities required of reporting and detaching personnel.

(B) Ensure that members of a uniformed service, their voting-age dependents, and overseas DoD civilians are provided proper voting assistance at the IVA office, including the opportunity to update their voter registration information through the submission of a revised SF 76, ''Federal Post Card Application (FPCA)'' or National Mail Voter Registration Form.

(C) Ensure that voting assistance is provided to all personnel, military and civilian, reporting for duty on the installation, detaching from duty, deploying, and returning from deployment of 6 months or longer.

(*1*) SF 76s shall be used to notify local election officials of the change of mailing address for absentee ballot delivery purposes.

(D) Provide written information on voter registration and absentee ballot procedures. This can be met by providing the applicant with the SF 76, SF 186, (if applicable), or the National Mail Voter Registration Form, the attached instructions for those forms, and the State-specific instructions from the Voting Assistance Guide (available at *http://www.fvap.gov*) for absent uniformed services voters, voting-age dependent voters, and overseas civilians. Citizens may also be provided with all of the necessary resources including, but not limited to, access to a computer system connected to the Internet, a printer, and a scanner to use the FPCA wizard available at the FVAP Web site, *www.fvap.gov*.

(*1*) SF 76 and SF 186 (if applicable) shall be provided to absent uniformed services personnel and their family members (within and outside of the United States) and to Federal civilian employees and other U.S. citizens who have access to an IVA office outside the United States.

(*2*) The National Mail Voter Registration Form shall be provided to Federal civilian employees and other U.S. citizens who have access to the IVA office within the United States, and to uniformed services voters who currently reside in their voting districts.

(E) Provide direct assistance to individuals in completing the forms necessary to register to vote, update their voter registration information, and request absentee ballots.

(F) Collect from the voter and transmit the completed SF 76 or National Mail Voter Registration Form for the applicant, within 5 calendar days, to the appropriate local election office.

(2) To the greatest extent practicable, ensure voters who are eligible to cast absentee ballots on DoD facilities are able to do so in a private and independent manner.

(3) Ensure all personnel assigned to recruitment offices are informed of the policies in this part and are trained to provide voter registration assistance. Ensure the recruitment offices of the Military Services:

(i) Provide each prospective enlistee with the National Mail Voter Registration Form, available at *https://www.eac.gov/voters/register-and-vote-in-your-state/*, and DD Form 2645, Voter Registration Information Form, available at *http://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd2645.pdf*, unless the applicant, in writing, declines to register to vote.

(ii) Distribute the National Mail Voter Registration Form to each eligible citizen and provide assistance in completing the form unless the applicant refuses such assistance.

(iii) Provide each eligible citizen or prospective enlistee who does not decline to register to vote the same degree of assistance for the completion of the National Mail Voter Registration Form as is provided by the office for the completion of its own forms, e.g., the application for enlistment, unless the person refuses such assistance.

(iv) Transmit all completed registration applications within 5 calendar days to the appropriate State election officials.

(v) Maintain statistical information and records on voter registration assistance provided by recruitment offices in the format prescribed by the FVAP, for a period of 2 years, in accordance with 52 U.S.C. 20507(i).

(4) Revise all voting assistance program instructions and procedures to incorporate the provisions of this part.

(5) Establish a DoD Component-wide means to communicate effectively with and expeditiously disseminate voting information to Commanders, VAOs, and uniformed services and overseas DoD civilian members of the DoD Component and their voting age dependents. This communication effort should be coordinated with the FVAP.

(c) *Executive Department and Agency Procedures.* (1) Federal Executive departments and agencies, including, but not limited to, the Department of State, the Department of Commerce, and the Department of Health and Human Services, shall enter into agreements with the Presidential designee to adopt regulations and procedures that conform to this part to the maximum extent practicable, consistent with their organizational missions. By doing so, the FVAP will be able to assist the Executive departments, agencies, and their voting constituencies to the maximum extent.

(2) The head of each Government department, agency, or other entity shall distribute balloting materials and develop a non-partisan program of information and education for all employees and family members pursuant to 52 U.S.C. 20301(c).

(i) The department or agency is responsible for providing voter assistance with assistance available from the FVAP.

(ii) Each department or agency with employees or family members covered by 52 U.S.C. 20301 shall designate an individual to coordinate and administer a voting assistance program for the department or agency to include, where practicable, the responsibilities in this part. The name, mailing address, email address, and telephone number of this individual shall be provided to the FVAP.

(iii) The Secretary of State shall designate a voting action officer at the Department of State headquarters to oversee the Department's program as well as a U.S. citizen at each U.S. embassy or consulate to assist, to the fullest extent practicable, other U.S. citizens residing outside of the United States who are eligible to vote. The Secretary of State shall provide annually, or as requested by the FVAP, estimates of the numbers of U.S. citizens currently residing in each country with an established embassy.

(iv) Each embassy and consulate should have sufficient quantities of materials to include SF 76s, and SF 186s, needed by U.S. citizens to register and vote. Embassies and consulates will also inform and educate U.S. citizens regarding their right to register and vote, and will publicize voter assistance programs.

(v) The Department of State's voting action officer shall coordinate with the FVAP, in the development and conduct of voting events, programs to inform and educate U.S. citizens outside of the

United States, and provision of voting information and resources for assistance.

(vi) Department of State and the Military Service voting action officers shall assist, as requested, installation, embassy and consulate VAOs with post-election surveys of U.S. civilians outside of the United States.

[77 FR 57487, Sept. 18, 2012, as amended at 84 FR 59722, Nov. 6, 2019; 85 FR 13047, Mar. 6, 2020]

# PART 234—CONDUCT ON THE PENTAGON RESERVATION

Sec.

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AUTHORITY: 10 U.S.C. 131 and 2674(c).

SOURCE: 72 FR 29251, May 25, 2007, unless otherwise noted.

## § 234.1 Definitions.

As used in this part.

*Authorized person*. An employee or agent of the Pentagon Force Protection Agency, or any other Department of Defense employee or agent who has delegated authority to enforce the provisions of this part.

*Operator*. A person who operates, drives, controls, otherwise has charge of, or is in actual physical control of a mechanical mode of transportation or any other mechanical equipment.

*Pentagon Reservation*. Area of land and improvements thereon, located in Arlington, Virginia, on which the Pentagon Office Building, Federal Building Number 2, the Pentagon heating and sewage treatment plants, and other related facilities are located. Pursuant to 10 U.S.C. 674, the Pentagon Reservation also includes the area of land known as Raven Rock Mountain Complex (''RRMC''), located in Adams County, Pennsylvania, and Site ''C,'' which is located in Washington County, Maryland, and other related facilities. The Pentagon Reservation shall include all roadways, walkways, waterways, and all areas designated for the parking of vehicles.

*Permit*. A written authorization to engage in uses or activities that are otherwise prohibited, restricted, or regulated.

*Possession*. Exercising direct physical control or dominion, with or without ownership, over property.

*State law*. The applicable and nonconflicting laws, statutes, regulations, ordinances, and codes of the state(s) and other political subdivision(s) within whose exterior boundaries the Pentagon Reservation or a portion thereof is located.

*Traffic*. Pedestrians, ridden or herded animals, vehicles, and other conveyances, either singly or together, while using any road, path, street, or other thoroughfare for the purposes of travel.

*Vehicle*. Any vehicle that is self-propelled or designed for self-propulsion, any motorized vehicle, and any vehicle drawn by or designed to be drawn by a motor vehicle, including any device in, upon, or by which any person or property is or can be transported or drawn upon a highway, hallway, or pathway; to include any device moved by human or animal power, whether required to be licensed in any state or otherwise.

*Weapons*. Any loaded or unloaded pistol, rifle, shotgun, or other device which is designed to, or may be readily converted to, expel a projectile by the ignition of a propellant, by compressed gas, or by spring power; any bow and arrow, crossbow, blowgun, spear gun, hand-thrown spear, slingshot, irritant gas device, explosive device, or any other implement designed to discharge missiles; any other weapon, device, instrument, material, or substance, animate or inanimate that is used for or is readily capable of, causing death or serious bodily injury, including any weapon the possession of which is prohibited under the laws of the state in

which the Pentagon Reservation or portion thereof is located; except that such term does not include a pocket knife with a blade of less than 2½ inches in length.

### § 234.2 Applicability.

The provisions of this part apply to all areas, lands, and waters on or adjoining the Pentagon Reservation and under the jurisdiction of the United States, and to all persons entering in or on the property. They supplement those penal provisions of Title 18, United States Code, relating to crimes and criminal procedure and those provisions of State law that are federal criminal offenses by virtue of the Assimilative Crimes Act, 18 U.S.C. 13.

### § 234.3 Admission to property.

(a) Access to the Pentagon Reservation or facilities thereon shall be restricted in accordance with AI Number 30[1] and other applicable Department of Defense rules and regulations in order to ensure the orderly and secure conduct of Department of Defense business. Admission to facilities or restricted areas shall be limited to employees and other persons with proper authorization. Forward written requests for copies of the document to Washington Headquarters Services, Executive Services Division, Freedom of Information Division, 1155 Defense Pentagon, Washington, DC 20301–1155.

(b) All persons entering or upon the Pentagon Reservation shall, when required and/or requested, display identification to authorized persons.

(c) All packages, briefcases, and other containers brought into, on, or being removed from facilities or restricted areas on the Pentagon Reservation are subject to inspection and search by authorized persons. Persons entering on facilities or restricted areas who refuse to permit an inspection and search will be denied entry.

(d) Any person or organization desiring to conduct activities anywhere on the Pentagon Reservation shall file an application for permit with the applicable Building Management Office or Installation Commander. Such application shall be made on a form provided by the Department of Defense and shall be submitted in the manner specified by the Department of Defense. Violation of the conditions of a permit issued in accordance with this section is prohibited and may result in the loss of access to the Pentagon Reservation.

[1] Copies may be obtained at *http://www.dtic.mil/whs/directives/corres/ins2.html*.

### § 234.4 Trespassing.

(a) Trespassing, entering, or remaining in or upon property not open to the public, except with the express invitation or consent of the person or persons having lawful control of the property, is prohibited. Failure to obey an order to leave under paragraph (b) of this section, or reentry upon property after being ordered to leave or not reenter under paragraph (b) of this section, is also prohibited.

(b) Any person who violates a Department of Defense rule or regulation may be ordered to leave the Pentagon Reservation by an authorized person. A violator's reentry may also be prohibited.

### § 234.5 Compliance with official signs.

Persons on the Pentagon Reservation shall at all times comply with official signs of a prohibitory, regulatory, or directory nature.

### § 234.6 Interfering with agency functions.

The following are prohibited:

(a) *Interference*. Threatening, resisting, intimidating, or intentionally interfering with a government employee or agent engaged in an official duty, or on account of the performance of an official duty.

(b) *Violation of a lawful order*. Violating the lawful order of a government employee or agent authorized to maintain order and control public access and movement during fire fighting operations, search and rescue operations, law enforcement actions, and emergency operations that involve a threat to public safety or government resources, or other activities where the control of public movement and activities is necessary to maintain order and public health or safety.

(c) *False information*. Knowingly giving a false or fictitious report or other false information:

(1) To an authorized person investigating an accident or violation of law or regulation, or

(2) On an application for a permit.

(d) *False report.* Knowingly giving a false report for the purpose of misleading a government employee or agent in the conduct of official duties, or making a false report that causes a response by the government to a fictitious event.

**§ 234.7 Disorderly conduct.**

A person commits disorderly conduct when, with intent to cause public alarm, nuisance, jeopardy, or violence, or knowingly or recklessly creating a risk thereof, such person commits any of the following prohibited acts:

(a) Engages in fighting or threatening, or in violent behavior.

(b) Uses language, an utterance, or gesture, or engages in a display or act that is obscene, physically threatening or menacing, or done in a manner that is likely to inflict injury or incite an immediate breach of the peace.

(c) Makes noise that is unreasonable, considering the nature and purpose of the actor's conduct, location, time of day or night, and other factors that would govern the conduct of a reasonably prudent person under the circumstances.

(d) Creates or maintains a hazardous or physically offensive condition.

(e) Impedes or threatens the security of persons or property, or disrupts the performance of official duties by Department of Defense employees, or obstructs the use of areas such as entrances, foyers, lobbies, corridors, concourses, offices, elevators, stairways, roadways, driveways, walkways, or parking lots.

**§ 234.8 Preservation of property.**

Willfully destroying or damaging private or government property is prohibited. The throwing of articles of any kind from or at buildings or persons, improper disposal of rubbish, and open fires are also prohibited.

**§ 234.9 Explosives.**

(a) Using, possessing, storing, or transporting explosives, blasting agents or explosive materials is prohibited, except pursuant to the terms and conditions of a permit issued by the applicable Building Management Office or Installation Commander. When permitted, the use, possession, storage and transportation shall be in accordance with applicable Federal and State law.

(b) Using or possessing fireworks or firecrackers is prohibited.

(c) Violation of the conditions established by the applicable Building Management Office or Installation Commander or of the terms and conditions of a permit issued in accordance with this section is prohibited and may result in the loss of access to the Pentagon Reservation.

**§ 234.10 Weapons.**

(a) Except as otherwise authorized under this section, the following are prohibited:

(1) Possessing a weapon.

(2) Carrying a weapon.

(3) Using a weapon.

(b) This section does not apply to any agency or Department of Defense component that has received prior written approval from the Pentagon Force Protection Agency or the Installation Commander to carry, transport, or use a weapon in support of a security, law enforcement, or other lawful purpose while on the Pentagon Reservation.

**§ 234.11 Alcoholic beverages and controlled substances.**

(a) *Alcoholic beverages.* The consumption of alcoholic beverages or the possession of an open container of an alcoholic beverage within the Pentagon Reservation is prohibited unless authorized by the Director, Washington Headquarters Services, or his designee, the Installation Commander, or the Heads of the Military Departments, or their designees. Written notice of such authorizations shall be provided to the Pentagon Force Protection Agency.

(b) Controlled substances. The following are prohibited:

(1) The delivery of a controlled substance, except when distribution is made by a licensed physician or pharmacist in accordance with applicable law. For the purposes of this paragraph, delivery means the actual, attempted, or constructive transfer of a controlled substance.

(2) The possession of a controlled substance, unless such substance was obtained by the possessor directly from, or pursuant to a valid prescription or order by, a licensed physician or pharmacist, or as otherwise allowed by Federal or State law.

(c) Presence on the Pentagon Reservation when under the influence of alcohol, a drug, a controlled substance, or any combination thereof, to a degree that may endanger oneself or another person, or damage property, is prohibited.

### § 234.12 Restriction on animals.

Animals, except guide dogs for persons with disabilities, shall not be brought upon the Pentagon Reservation for other than official purposes.

### § 234.13 Soliciting, vending, and debt collection.

Commercial or political soliciting, vending of all kinds, displaying or distributing commercial advertising, collecting private debts or soliciting alms upon the Pentagon Reservation is prohibited. This does not apply to:

(a) National or local drives for funds for welfare, health, or other purposes as authorized by 5 CFR parts 110 and 950, Solicitation of Federal Civilian and Uniformed Services Personnel for Contributions to Private Voluntary Organizations, issued by the U.S. Office of Personnel Management under Executive Order 12353, 3 CFR, 1982 Comp., p. 139, as amended.

(b) Personal notices posted on authorized bulletin boards, and in compliance with building rules governing the use of such authorized bulletin boards, advertising to sell or rent property of Pentagon Reservation employees or their immediate families.

(c) Solicitation of labor organization membership or dues authorized by the Department of Defense under the Civil Service Reform Act of 1978.

(d) Licensees, or their agents and employees, with respect to space licensed for their use.

(e) Solicitations conducted by organizations composed of civilian employees of the Department of Defense or members of the uniformed services among their own members for organizational support or for the benefit of welfare funds for their members, after compliance with the requirements of § 234.3(d).

### § 234.14 Posting of materials.

Posting or affixing materials, such as pamphlets, handbills, or fliers on the Pentagon Reservation is prohibited except as provided by § 234.13(b) or when conducted as part of activities approved by the applicable Building Management Office or Installation Commander under § 234.3(d).

### § 234.15 Use of visual recording devices.

(a) The use of cameras or other visual recording devices on the Pentagon Reservation is prohibited, unless the use of such items are approved by the Pentagon Force Protection Agency, the Installation Commander, or the Office of the Assistant to the Secretary of Defense for Public Affairs.

(b) It shall be unlawful to make any photograph, sketch, picture, drawing, map or graphical representation of the Pentagon Reservation without first obtaining permission of the Pentagon Force Protection Agency, Installation Commander, or the Office of the Assistant to the Secretary of Defense for Public Affairs.

### § 234.16 Gambling.

Gambling in any form, or the operation of gambling devices, is prohibited. This prohibition shall not apply to the vending or exchange of chances by licensed blind operators of vending facilities for any lottery set forth in a State law and authorized by the provisions of the Randolph-Sheppard Act (20 U.S.C. 107, *et seq.*).

### § 234.17 Vehicles and traffic safety.

(a) *In general.* Unless specifically addressed by regulations in this part, traffic and the use of vehicles within the Pentagon Reservation are governed by State law. Violating a provision of State law is prohibited.

(b) *Open container of an alcoholic beverage.* (1) Each person within a vehicle is responsible for complying with the provisions of this section that pertain to carrying an open container. The operator of a vehicle is the person responsible for complying with the provisions

of this section that pertain to the storage of an open container.

(2) Carrying or storing a bottle, can, or other receptacle containing an alcoholic beverage that is open or has been opened, or whose seal is broken, or the contents of which have been partially removed, within a vehicle on the Pentagon Reservation is prohibited.

(3) This section does not apply to:

(i) An open container stored in the trunk of a vehicle or, if a vehicle is not equipped with a trunk, an open container stored in some other portion of the vehicle designed for the storage of luggage and not normally occupied by or readily accessible to the operator or passengers; or

(ii) An open container stored in the living quarters of a motor home or camper.

(4) For the purpose of paragraph (a)(3)(i) of this section, a utility compartment or glove compartment is deemed to be readily accessible to the operator and passengers of a vehicle.

(c) *Operating under the influence of alcohol, drugs, or controlled substances.* (1) Operating or being in actual physical control of a vehicle is prohibited while:

(i) Under the influence of alcohol, a drug or drugs, a controlled substance or controlled substances, or any combination thereof, to a degree that renders the operator incapable of safe operation; or

(ii) The alcohol concentration in the operator's blood or breath is 0.08 grams or more of alcohol per 100 milliliters of blood or 0.08 grams or more of alcohol per 210 liters of breath. Provided, however, that if State law that applies to operating a vehicle while under the influence of alcohol establishes more restrictive limits of alcohol concentration in the operator's blood or breath, those limits supersede the limits specified in this paragraph.

(2) The provisions of paragraph (c)(1) of this section shall also apply to an operator who is or has been legally entitled to use alcohol or another drug.

(3) Tests.

(i) At the request or direction of an authorized person who has probable cause to believe that an operator of a vehicle within the Pentagon Reservation has violated a provision of paragraph (c)(1) of this section, the operator shall submit to one or more tests of the blood, breath, saliva, or urine for the purpose of determining blood alcohol, drug, and controlled substance content.

(ii) Refusal by an operator to submit to a test is prohibited and may result in detention and citation by an authorized person. Proof of refusal may be admissible in any related judicial proceeding.

(iii) Any test or tests for the presence of alcohol, drugs, and controlled substances shall be determined by and administered at the direction of an authorized person.

(iv) Any test shall be conducted by using accepted scientific methods and equipment of proven accuracy and reliability operated by personnel certified in its use.

(4) Presumptive levels.

(i) The results of chemical or other quantitative tests are intended to supplement the elements of probable cause used as the basis for the arrest of an operator charged with a violation of this section. If the alcohol concentration in the operator's blood or breath at the time of the testing is less than the alcohol concentration specified in paragraph (c)(1)(ii) of this section, this fact does not give rise to any presumption that the operator is or is not under the influence of alcohol.

(ii) The provisions of paragraphs (c)(3) and (c)(4)(i) of this section are not intended to limit the introduction of any other competent evidence bearing upon the question of whether the operator, at the time of the alleged violation, was under the influence of alcohol, a drug or drugs, or a controlled substance or controlled substances, or any combination thereof.

### § 234.18 Enforcement of parking regulations.

Parking regulations for the Pentagon Reservation shall be enforced in accordance with the Pentagon Reservation Parking Program and State law; violating such provisions is prohibited. A vehicle parked in any location without authorization, or parked contrary to the directions of posted signs or markings, shall be subject to removal at the owner's risk and expense, in addition to any penalties imposed. The

Department of Defense assumes no responsibility for the payment of any fees or costs related to such removal which may be charged to the owner of the vehicle by the towing organization. This section may be supplemented from time to time with the approval of the Director, Washington Headquarters Services, or his designee, or the Installation Commander, by the issuance and posting of such parking directives as may be required, and when so issued and posted such directive shall have the same force and effect as if made a part hereof.

### § 234.19 Penalties and effect on other laws.

(a) Whoever shall be found guilty of willfully violating any rule or regulation enumerated in this part is subject to the penalties imposed by Federal law for the commission of a Class B misdemeanor offense.

(b) Whoever violates any rule or regulation enumerated in this part is liable to the United States for a civil penalty of not more than $1,000.

(c) Nothing in this part shall be construed to abrogate any other Federal laws.

## PART 236—DEPARTMENT OF DEFENSE (DoD)—DEFENSE INDUSTRIAL BASE (DIB) CYBER SECURITY (CS) ACTIVITIES

Sec.

236.1 Purpose.
236.2 Definitions.
236.3 Policy.
236.4 Mandatory cyber incident reporting procedures.
236.5 DoD's DIB CS program.
236.6 General provisions of DoD's DIB CS program.
236.7 DoD's DIB CS program requirements.

AUTHORITY: 10 U.S.C. 391, 393, and 2224; 44 U.S.C. 3506 and 3544; 50 U.S.C. 3330.

SOURCE: 80 FR 59584, Oct. 2, 2015, unless otherwise noted.

### § 236.1 Purpose.

Cyber threats to contractor unclassified information systems represent an unacceptable risk of compromise of DoD information and pose an imminent threat to U.S. national security and economic security interests. This part requires all DoD contractors to rapidly report cyber incidents involving covered defense information on their covered contractor information systems or cyber incidents affecting the contractor's ability to provide operationally critical support. The part also permits eligible DIB participants to participate in the voluntary DIB CS program to share cyber threat information and cybersecurity best practices with DIB CS participants. The DIB CS program enhances and supplements DIB participants' capabilities to safeguard DoD information that resides on, or transits, DIB unclassified information systems.

[80 FR 59584, Oct. 2, 2015, as amended at 81 FR 68317, Oct. 4, 2016]

### § 236.2 Definitions.

As used in this part:

*Access to media* means provision of media, or access to media physically or remotely to DoD personnel, as determined by the contractor.

*Cleared defense contractor (CDC)* means a private entity granted clearance by DoD to access, receive, or store classified information for the purpose of bidding for a contract or conducting activities in support of any program of DoD.

*Compromise* means disclosure of information to unauthorized persons, or a violation of the security policy of a system, in which unauthorized intentional or unintentional disclosure, modification, destruction, or loss of an object, or the copying of information to unauthorized media may have occurred.

*Contractor* means an individual or organization outside the U.S. Government who has accepted any type of agreement or order to provide research, supplies, or services to DoD, including prime contractors and subcontractors.

*Contractor attributional/proprietary information* means information that identifies the contractor(s), whether directly or indirectly, by the grouping of information that can be traced back to the contractor(s) (*e.g.*, program description, facility locations), personally identifiable information, as well as trade secrets, commercial or financial information, or other commercially

sensitive information that is not customarily shared outside of the company.

*Controlled Technical Information* means technical information with military or space application that is subject to controls on the access, use, reproduction, modification, performance, display, release, disclosure, or dissemination. Controlled technical information would meet the criteria, if disseminated, for distribution statements B through F using the criteria set forth in DoD Instruction 5230.24, ''Distribution Statements of Technical Documents,'' available at *http://www.dtic.mil/whs/directives/corres/pdf/523024p.pdf*. The term does not include information that is lawfully publicly available without restrictions.

*Covered contractor information system* means an unclassified information system that is owned or operated by or for a contractor and that processes, stores, or transmits covered defense information.

*Covered defense information* means unclassified controlled technical information or other information (as described in the Controlled Unclassified Information (CUI) Registry at *http://www.archives.gov/cui/registry/category-list.html*) that requires safeguarding or dissemination controls pursuant to and consistent with law, regulations, and Government wide policies, and is:

(1) Marked or otherwise identified in an agreement and provided to the contractor by or on behalf of the DoD in support of the performance of the agreement; or

(2) Collected, developed, received, transmitted, used, or stored by or on behalf of the contractor in support of the performance of the agreement.

*Cyber incident* means actions taken through the use of computer networks that result in a compromise or an actual or potentially adverse effect on an information system and/or the information residing therein.

*Cyber incident damage assessment* means a managed, coordinated process to determine the effect on defense programs, defense scientific and research projects, or defense warfighting capabilities resulting from compromise of a contractor's unclassified computer system or network.

*Defense Industrial Base (DIB)* means the Department of Defense, Government, and private sector worldwide industrial complex with capabilities to perform research and development, design, produce, and maintain military weapon systems, subsystems, components, or parts to satisfy military requirements.

*DIB participant* means a contractor that has met all of the eligibility requirements to participate in the voluntary DIB CS program as set forth in this part (see § 236.7).

*Forensic analysis* means the practice of gathering, retaining, and analyzing computer-related data for investigative purposes in a manner that maintains the integrity of the data.

*Government furnished information (GFI)* means information provided by the Government under the voluntary DIB CS program including but not limited to cyber threat information and cybersecurity practices.

*Information* means any communication or representation of knowledge such as facts, data, or opinions in any medium or form, including textual, numerical, graphic, cartographic, narrative, or audiovisual.

*Information system* means a discrete set of information resources organized for the collection, processing, maintenance, use, sharing, dissemination, or disposition of information.

*Malicious software* means software or firmware intended to perform an unauthorized process that will have adverse impact on the confidentiality, integrity, or availability of an information system. This definition includes a virus, worm, Trojan horse, or other code-based entity that infects a host, as well as spyware and some forms of adware.

*Media* means physical devices or writing surfaces, including but not limited to, magnetic tapes, optical disks, magnetic disks, large-scale integration memory chips, and printouts onto which covered defense information is recorded, stored, or printed within a covered contractor information system.

*Operationally critical support* means supplies or services designated by the

Government as critical for airlift, sealift, intermodal transportation services, or logistical support that is essential to the mobilization, deployment, or sustainment of the Armed Forces in a contingency operation.

*Rapid(ly) report(ing)* means within 72 hours of discovery of any cyber incident.

*Technical Information* means technical data or computer software, as those terms are defined in DFARS 252.227–7013, ''Rights in Technical Data—Noncommercial Items'' (48 CFR 252.227–7013). Examples of technical information include research and engineering data, engineering drawings and associated lists, specifications, standards, process sheets, manuals, technical reports, technical orders, catalog-item identifications, data sets, studies and analyses and related information, and computer software executable code and source code.

*Threat* means any circumstance or event with the potential to adversely impact organization operations (including mission, functions, image, or reputation), organization assets, individuals, other organizations, or the Nation through an information system via unauthorized access, destruction, disclosure, modification of information and/or denial of service.

*U.S. based* means provisioned, maintained, or operated within the physical boundaries of the United States.

*U.S. citizen* means a person born in the United States or naturalized.

[80 FR 59584, Oct. 2, 2015, as amended at 81 FR 68317, Oct. 4, 2016]

EDITORIAL NOTE: At 81 FR 68317, Oct. 4, 2016, § 236.2 was amended; however, a portion of the amendment could not be incorporated due to inaccurate amendatory instruction.

### § 236.3 Policy.

It is DoD policy to:

(a) Establish a comprehensive approach to require safeguarding of covered defense information on covered contractor information systems and to require contractor cyber incident reporting.

(b) Increase Government stakeholder and DIB situational awareness of the extent and severity of cyber threats to DoD information by implementing a streamlined approval process that enables the contractor to elect, in conjunction with the cyber incident reporting and sharing, the extent to which DoD may share cyber threat information obtained from a contractor (or derived from information obtained from the company) under this part that is not information created by or for DoD with:

(1) DIB CS program to enhance their cybersecurity posture to better protect covered defense information on covered contractor information systems, or a contractor's ability to provide operationally critical support; and

(2) Other Government stakeholders for lawful Government activities, including cybersecurity for the protection of Government information or information systems, law enforcement and counterintelligence (LE/CI), and other lawful national security activities directed against the cyber threat (*e.g.*, those attempting to infiltrate and compromise information on the contractor information systems).

(c) Modify eligibility criteria to permit greater participation in the voluntary DIB CS program.

[80 FR 59584, Oct. 2, 2015, as amended at 81 FR 68317, Oct. 4, 2016]

### § 236.4 Mandatory cyber incident reporting procedures.

(a) *Applicability and order of precedence.* The requirement to report cyber incidents shall be included in all forms of agreements (*e.g.*, contracts, grants, cooperative agreements, other transaction agreements, technology investment agreements, and any other type of legal instrument or agreement) between the Government and the contractor in which covered defense information resides on, or transits covered contractor information systems or under which a contractor provides operationally critical support, and shall be identical to those requirements provided in this section (*e.g.*, by incorporating the requirements of this section by reference, or by expressly setting forth such reporting requirements consistent with those of this section). Any inconsistency between the relevant terms and condition of any such agreement and this section shall be resolved in favor of the terms

and conditions of the agreement, provided and to the extent that such terms and conditions are authorized to have been included in the agreement in accordance with applicable laws and regulations.

(b) *Cyber incident reporting requirement.* When a contractor discovers a cyber incident that affects a covered contractor information system or the covered defense information residing therein or that affects the contractor's ability to provide operationally critical support, the contractor shall:

(1) Conduct a review for evidence of compromise of covered defense information including, but not limited to, identifying compromised computers, servers, specific data, and user accounts. This review shall also include analyzing covered contractor information system(s) that were part of the cyber incident, as well as other information systems on the contractor's network(s), that may have been accessed as a result of the incident in order to identify compromised covered defense information, or that affect the contractor's ability to provide operationally critical support; and

(2) Rapidly report cyber incidents to DoD at *http://dibnet.dod.mil.*

(c) *Cyber incident report.* The cyber incident report shall be treated as information created by or for DoD and shall include, at a minimum, the required elements at *http://dibnet.dod.mil.*

(d) *Subcontractor reporting procedures.* Contractors shall flow down the cyber incident reporting requirements of this part to their subcontractors that are providing operationally critical support or for which subcontract performance will involve a covered contractor information system. Contractors shall require subcontractors to rapidly report cyber incidents directly to DoD at *http://dibnet.dod.mil* and the prime contractor. This includes providing the incident report number, automatically assigned by DoD, to the prime contractor (or next higher-tier subcontractor) as soon as practicable.

(e) *Medium assurance certificate requirement.* In order to report cyber incidents in accordance with this part, the contractor or subcontractor shall have or acquire a DoD-approved medium assurance certificate to report cyber incidents. For information on obtaining a DoD-approved medium assurance certificate, see *http://iase.disa.mil/pki/eca/Pages/index.aspx.*

(f) If the contractor utilizes a third-party service provider (SP) for information system security services, the SP may report cyber incidents on behalf of the contractor.

(g) Contractors are encouraged to report information to promote sharing of cyber threat indicators that they believe are valuable in alerting the Government and others, as appropriate in order to better counter threat actor activity. Cyber incidents that are not compromises of covered defense information or do not adversely affect the contractor's ability to perform operationally critical support may be of interest to the DIB and DoD for situational awareness purposes.

(h) *Malicious software.* Malicious software discovered and isolated by the contractor will be submitted to the DoD Cyber Crime Center (DC3) for forensic analysis.

(i) *Media preservation and protection.* When a contractor discovers a cyber incident has occurred, the contractor shall preserve and protect images of known affected information systems identified in paragraph (b) of this section and all relevant monitoring/packet capture data for at least 90 days from submission of the cyber incident report to allow DoD to request the media or decline interest.

(j) *Access to additional information or equipment necessary for forensics analysis.* Upon request by DoD, the contractor shall provide DoD with access to additional information or equipment that is necessary to conduct a forensic analysis.

(k) *Cyber incident damage assessment activities.* If DoD elects to conduct a damage assessment, DoD will request that the contractor provide all of the damage assessment information gathered in accordance with paragraph (e) of this section.

(l) *DoD safeguarding and use of contractor attributional/proprietary information.* The Government shall protect against the unauthorized use or release of information obtained from the contractor (or derived from information obtained from the contractor) under

this part that includes contractor attributional/proprietary information, including such information submitted in accordance with paragraph (b) of this section. To the maximum extent practicable, the contractor shall identify and mark attributional/proprietary information. In making an authorized release of such information, the Government will implement appropriate procedures to minimize the contractor attributional/proprietary information that is included in such authorized release, seeking to include only that information that is necessary for the authorized purpose(s) for which the information is being released.

(m) *Use and release of contractor attributional/proprietary information not created by or for DoD*. Information that is obtained from the contractor (or derived from information obtained from the contractor) under this part that is not created by or for DoD is authorized to be released outside of DoD:

(1) To entities with missions that may be affected by such information;

(2) To entities that may be called upon to assist in the diagnosis, detection, or mitigation of cyber incidents;

(3) To Government entities that conduct LE/CI investigations;

(4) For national security purposes, including cyber situational awareness and defense purposes (including sharing non-attributional cyber threat information with DIB contractors participating in the DIB CS program authorized by this part); or

(5) To a support services contractor (''recipient'') that is directly supporting Government activities related to this part and is bound by use and non-disclosure restrictions that include all of the following conditions:

(i) The recipient shall access and use the information only for the purpose of furnishing advice or technical assistance directly to the Government in support of the Government's activities related to this part, and shall not be used for any other purpose;

(ii) The recipient shall protect the information against unauthorized release or disclosure;

(iii) The recipient shall ensure that its employees are subject to use and non-disclosure obligations consistent with this part prior to the employees being provided access to or use of the information;

(iv) The third-party contractor that reported the cyber incident is a third-party beneficiary of the non-disclosure agreement between the Government and the recipient, as required by paragraph (m)(5)(iii) of this section;

(v) That a breach of these obligations or restrictions may subject the recipient to:

(A) Criminal, civil, administrative, and contractual actions in law and equity for penalties, damages, and other appropriate remedies by the United States; and

(B) Civil actions for damages and other appropriate remedies by the third party that reported the incident, as a third party beneficiary of the non-disclosure agreement.

(n) Use and release of contractor attributional/proprietary information created by or for DoD. Information that is obtained from the contractor (or derived from information obtained from the contractor) under this part that is created by or for DoD (including the information submitted pursuant to paragraph (b) of this section) is authorized to be used and released outside of DoD for purposes and activities authorized by this section, and for any other lawful Government purpose or activity, subject to all applicable statutory, regulatory, and policy based restrictions on the Government's use and release of such information.

(o) Contractors shall conduct their respective activities under this part in accordance with applicable laws and regulations on the interception, monitoring, access, use, and disclosure of electronic communications and data.

(p) *Freedom of Information Act (FOIA)*. Agency records, which may include qualifying information received from non-federal entities, are subject to request under the Freedom of Information Act (5 U.S.C. 552) (FOIA), which is implemented in the DoD by DoD Directive 5400.07 and DoD Regulation 5400.7–R (see 32 CFR parts 285 and 286, respectively). Pursuant to established procedures and applicable regulations, the Government will protect sensitive non-public information reported under mandatory reporting requirements against unauthorized public disclosure

by asserting applicable FOIA exemptions. The Government will inform the non-Government source or submitter (*e.g.*, contractor or DIB participant of any such information that may be subject to release in response to a FOIA request), in order to permit the source or submitter to support the withholding of such information or pursue any other available legal remedies.

(q) *Other reporting requirements.* Cyber incident reporting required by this part in no way abrogates the contractor's responsibility for other cyber incident reporting pertaining to its unclassified information systems under other clauses that may apply to its contract(s), or as a result of other applicable U.S. Government statutory or regulatory requirements, including Federal or DoD requirements for Controlled Unclassified Information as established by Executive Order 13556, as well as regulations and guidance established pursuant thereto.

[80 FR 59584, Oct. 2, 2015, as amended at 81 FR 68317, Oct. 4, 2016]

### § 236.5 DoD's DIB CS program.

(a) All contractors that are CDCs and meet the requirements set forth in § 236.7 are eligible to join the voluntary DIB CS program as a DIB participant.

(b) Under the voluntary activities of the DIB CS program, the Government and each DIB participant will execute a standardized agreement, referred to as a Framework Agreement (FA) to share, in a timely and secure manner, on a recurring basis, and to the greatest extent possible, cybersecurity information.

(c) Each such FA between the Government and a DIB participant must comply with and implement the requirements of this part, and will include additional terms and conditions as necessary to effectively implement the voluntary information sharing activities described in this part with individual DIB participants.

(d) DoD's DIB CS Program Office is the overall point of contact for the program. The DC3 managed DoD DIB Collaborative Information Sharing Environment (DCISE) is the operational focal point for cyber threat information sharing and incident reporting under the DIB CS program.

(e) The Government will maintain a Web site or other internet-based capability to provide potential DIB participants with information about eligibility and participation in the program, to enable online application or registration for participation, and to support the execution of necessary agreements with the Government.

(f) *GFI.* The Government shall share GFI with DIB participants or designated SP in accordance with this part.

(g) Prior to receiving GFI from the Government, each DIB participant shall provide the requisite points of contact information, to include security clearance and citizenship information, for the designated personnel within their company (*e.g.*, typically 3–10 company designated points of contact) in order to facilitate the DoD–DIB interaction in the DIB CS program. The Government will confirm the accuracy of the information provided as a condition of that point of contact being authorized to act on behalf of the DIB participant for this program.

(h) GFI will be issued via both unclassified and classified means. DIB participant handling and safeguarding of classified information shall be in compliance with DoD 5220.22–M, ''National Industrial Security Program Operating Manual (NISPOM),'' available at *http://www.dss.mil/documents/odaa/nispom2006-5220.pdf*. The Government shall specify transmission and distribution procedures for all GFI, and shall inform DIB participants of any revisions to previously specified transmission or procedures.

(i) Except as authorized in this part or in writing by the Government, DIB participants may:

(1) Use GFI only on U.S. based covered contractor information systems, or U.S. based networks or information systems used to provide operationally critical support; and

(2) Share GFI only within their company or organization, on a need-to-know basis, with distribution restricted to U.S. citizens.

(j) In individual cases DIB participants may request, and the Government may authorize, disclosure and use of GFI under applicable terms and conditions when the DIB participant can

demonstrate that appropriate information handling and protection mechanisms are in place and has determined that it requires the ability:

(1) To share the GFI with a non-U.S. citizen; or

(2) To use the GFI on a non-U.S. based covered contractor information system; or

(3) To use the GFI on a non-U.S. based network or information system in order to better protect a contractor's ability to provide operationally critical support.

(k) DIB participants shall maintain the capability to electronically disseminate GFI within the Company in an encrypted fashion (*e.g.*, using Secure/Multipurpose Internet Mail Extensions (S/MIME), secure socket layer (SSL), Transport Layer Security (TLS) protocol version 1.2, DoD-approved medium assurance certificates).

(l) DIB participants shall not share GFI outside of their company or organization, regardless of personnel clearance level, except as authorized in this part or otherwise authorized in writing by the Government.

(m) If the DIB participant utilizes a SP for information system security services, the DIB participant may share GFI with that SP under the following conditions and as authorized in writing by the Government:

(1) The DIB participant must identify the SP to the Government and request permission to share or disclose any GFI with that SP (which may include a request that the Government share information directly with the SP on behalf of the DIB participant) solely for the authorized purposes of this program.

(2) The SP must provide the Government with sufficient information to enable the Government to determine whether the SP is eligible to receive such information, and possesses the capability to provide appropriate protections for the GFI.

(3) Upon approval by the Government, the SP must enter into a legally binding agreement with the DIB participant (and also an appropriate agreement with the Government in any case in which the SP will receive or share information directly with the Government on behalf of the DIB participant) under which the SP is subject to all applicable requirements of this part and of any supplemental terms and conditions in the DIB participant's FA with the Government, and which authorizes the SP to use the GFI only as authorized by the Government.

(n) The DIB participant may not sell, lease, license, or otherwise incorporate the GFI into its products or services, except that this does not prohibit a DIB participant from being appropriately designated an SP in accordance with paragraph (m) of this section.

[80 FR 59584, Oct. 2, 2015, as amended at 81 FR 68317, Oct. 4, 2016]

### § 236.6 General provisions of DoD's DIB CS program.

(a) Confidentiality of information that is exchanged under the DIB CS program will be protected to the maximum extent authorized by law, regulation, and policy. DoD and DIB participants each bear responsibility for their own actions under the voluntary DIB CS program.

(b) All DIB CS participants may participate in the Department of Homeland Security's Enhanced Cybersecurity Services (ECS) program (*http://www.dhs.gov/enhanced-cybersecurity-services*).

(c) Participation in the voluntary DIB CS program does not obligate the DIB participant to utilize the GFI in, or otherwise to implement any changes to, its information systems. Any action taken by the DIB participant based on the GFI or other participation in this program is taken on the DIB participant's own volition and at its own risk and expense.

(d) A DIB participant's participation in the voluntary DIB CS program is not intended to create any unfair competitive advantage or disadvantage in DoD source selections or competitions, or to provide any other form of unfair preferential treatment, and shall not in any way be represented or interpreted as a Government endorsement or approval of the DIB participant, its information systems, or its products or services.

(e) The DIB participant and the Government may each unilaterally limit or discontinue participation in the voluntary DIB CS program at any time.

Termination shall not relieve the DIB participant or the Government from obligations to continue to protect against the unauthorized use or disclosure of GFI, attribution information, contractor proprietary information, third-party proprietary information, or any other information exchanged under this program, as required by law, regulation, contract, or the FA.

(f) Upon termination of the FA, and/or change of Facility Security Clearance (FCL) status below Secret, GFI must be returned to the Government or destroyed pursuant to direction of, and at the discretion of, the Government.

(g) Participation in these activities does not abrogate the Government's, or the DIB participants' rights or obligations regarding the handling, safeguarding, sharing, or reporting of information, or regarding any physical, personnel, or other security requirements, as required by law, regulation, policy, or a valid legal contractual obligation. However, participation in the voluntary activities of the DIB CS program does not eliminate the requirement for DIB participants to report cyber incidents in accordance with § 236.4.

[80 FR 59584, Oct. 2, 2015, as amended at 81 FR 68317, Oct. 4, 2016]

### § 236.7 DoD's DIB CS program requirements.

(a) To participate in the DIB CS program, a contractor must be a CDC and shall:

(1) Have an existing active FCL to at least the Secret level granted under the NISPOM (DoD 5220.22–M); and

(2) Execute the standardized FA with the Government (available during the application process), which implements the requirements set forth in §§ 236.5 through 236.7, and allows the CDC to select their level of participation in the voluntary DIB CS program.

(3) In order for participating CDCs to receive classified cyber threat information electronically, they must:

(i) Have or acquire a Communication Security (COMSEC) account in accordance with the NISPOM Chapter 9, Section 4 (DoD 5220.22–M), which provides procedures and requirements for COMSEC activities; and

(ii) Have or acquire approved safeguarding for at least Secret information, and continue to qualify under the NISPOM for retention of its FCL and approved safeguarding; and

(iii) Obtain access to DoD's secure voice and data transmission systems supporting the voluntary DIB CS program.

(b) [Reserved]

[80 FR 59584, Oct. 2, 2015, as amended at 81 FR 68317, Oct. 4, 2016]

## PART 238—DoD ASSISTANCE TO NON-GOVERNMENT, ENTERTAINMENT-ORIENTED MEDIA PRODUCTIONS

Sec.
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APPENDIX A TO PART 238—SAMPLE PRODUCTION ASSISTANCE AGREEMENT
APPENDIX B TO PART 238—SAMPLE DOCUMENTARY PRODUCTION ASSISTANCE AGREEMENT

AUTHORITY: 10 U.S.C. 2264; 31 U.S.C. 9701.

SOURCE: 80 FR 47836, Aug. 10, 2015, unless otherwise noted.

### § 238.1 Purpose.

This part establishes policy, assigns responsibilities, and prescribes procedures for DoD assistance to non-Government entertainment media productions such as feature motion pictures, episodic television programs, documentaries, and electronic games.

### § 238.2 Applicability.

This part:

(a) Applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the combatant commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (referred to collectively in this part as the ''DoD Components'').

(b) Does not apply to productions that are intended to inform the public

of fast-breaking or developing news stories.

### § 238.3 Definitions.

Unless otherwise noted, this term and its definition are for the purposes of this part.

*Assistance (as in ''DoD Assistance to Non-Government, Entertainment-Oriented Media Productions'')*. The variety of support that the DoD can provide. The assistance ranges from supplying technical advice during script development, to allowing access to military installations for production.

### § 238.4 Policy.

It is DoD policy that:

(a) DoD assistance may be provided to an entertainment media production, to include fictional portrayals, when cooperation of the producers with the Department of Defense benefits the Department of Defense, or when such cooperation would be in the best interest of the Nation based on whether the production:

(1) Presents a reasonably realistic depiction of the Military Services and the Department of Defense, including Service members, civilian personnel, events, missions, assets, and policies;

(2) Is informational and considered likely to contribute to public understanding of the Military Services and the Department of Defense; or

(3) May benefit Military Service recruiting and retention programs.

(b) DoD assistance to an entertainment-oriented media production will not deviate from established DoD safety and environmental standards, nor will it impair the operational readiness of the Military Services. Diversion of equipment, personnel, and material resources will be kept to a minimum.

(c) The production company will reimburse the Government for any expenses incurred as a result of DoD assistance rendered in accordance with the procedures in this part.

(d) Official activities of Service personnel in assisting the production; use of official DoD property, facilities, and material; and employment of Service members in an off-duty, non-official status will be in accordance with the procedures in this part.

(e) Footage shot with DoD assistance and official DoD footage released for a specific production will not be reused for or sold to other productions without Department of Defense approval.

### § 238.5 Responsibilities.

(a) The Assistant to the Secretary of Defense for Public Affairs (ATSD(PA)) will serve as the sole authority for approving DoD assistance, including DoD involvement in marketing and publicity, to non-Government entertainment-oriented media. The ATSD(PA) will make DoD commitments, in consultation with the Heads of the Military Components, only after:

(1) The script, treatment, or narrative description is found to qualify in accordance with the general principles in § 238.4(a).

(2) The support requested is determined to be feasible.

(3) For episodic television, motion pictures, and other nondocumentary entertainment media productions, the producer has an acceptable public exhibition agreement with a recognized exhibition entity (*i.e.*, studio or network), and the capability to complete the production (*i.e.*, completion bond or other industry-recognized guarantor of completion, such as the commitment of a major studio or other source of financial commitment). For documentaries, the producer has indicated a clear capability to complete the production.

(b) The Heads of the Military Components will develop procedures for implementing this part and will ensure that the requirements of this part are met.

### § 238.6 Procedures.

(a) *General*. (1) The producer will be required to sign a written Production Assistance Agreement (see appendices A and B of this part for sample documents), explaining the terms under which DoD's production assistance is provided, with the designee of the Assistant to the Secretary of Defense for Public Affairs, and may be required to post advance payment or a letter of credit issued by a recognized financial institution to cover the estimated costs before receiving DoD assistance.

(2) Official activities of Service members in assisting the production must

be within the scope of normal military activities. On-duty service members and DoD civilians are prohibited from serving as actors, such as by speaking filmmaker-invented, or scripted dialogue, unless approved in writing by the ATSD(PA) or his or her designee. With the exception of assigned project officer(s) and technical advisor(s), Service members and DoD civilians will not be assigned to perform functions outside the scope of their normal duties.

(3) Official personnel services and DoD material will not be employed in such a manner as to compete directly with commercial and private enterprises. DoD assets may be provided when similar civilian assets are not reasonably available.

(4) The production company may hire Service members in an off-duty, nonofficial status to perform as extras or actors in minor roles, etc., provided there is no conflict with any existing Service regulation. In such cases, contractual arrangements are solely between those individuals and the production company; however, payment should be consistent with current industry standards. The producer is responsible for resolving any disputes with unions governing the hiring of non-union actors and extras. Service members accepting such employment will comply with the standards of conduct in DoD Directive 5500.07, ''Standards of Conduct'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/550007p.pdf*). The Heads of the Components may assist the production company in publicizing the opportunity for employment and in identifying appropriate personnel.

(5) The production company will restore all Government property and facilities used in the production to the same or better condition as when they were made available for the company's use. This includes cleaning the site and removing trash.

(6) The DoD project officer, described in paragraph (b)(3) of this section, may make DoD motion and still media archival materials available when a production qualifies for assistance in accordance with the general principles in § 238.4(a).

(b) *Specific procedures*—(1) *Script development and review*. (i) Before a producer officially submits a project to the Office of the Assistant to the Secretary of Defense for Public Affairs (OATSD(PA)), the Military Components are authorized to assist entertainment-oriented media producers, scriptwriters, etc., in their efforts to develop a script that might ultimately qualify for DoD assistance. Such activities could include guidance, suggestions, answers to research queries for technical research, and interviews with technical experts. However, the Military Departments providing such assistance are required to coordinate with and update OATSD(PA) of the status of such projects. Military Components will refrain from making commitments and rendering official DoD opinions until first coordinating through appropriate channels to obtain OATSD(PA) concurrence in such actions.

(ii) Production company officials requesting DoD assistance will submit a completed script (or a treatment or narrative description for documentaries), along with a list of desired support. If a definitive list is not available when the script is initially submitted, requirements should be stated in general terms at the outset. However, no DoD commitment will be made until the detailed list of support requested has been reviewed and deemed to be feasible.

(iii) OATSD(PA) will coordinate the review of scripts, treatment, or narrative description submitted for production assistance consideration. The coordinated review will include each Military Service depicted in the script. Although no commitment for assisting in the production is implied, OATSD(PA) may provide, or authorize the Military Services to provide, further guidance and suggestions for changes that might resolve problems that would prevent DoD assistance.

(2) *Production assistance notification*. Upon reviewing the recommendations of the Military Components concerned, the ATSD(PA) will determine whether a given production meets the DoD criteria for support and if the support requested is feasible. If both requirements are satisfied, the ATSD(PA) will

notify in writing the production company concerned, advising it that the Department of Defense has approved DoD production assistance and identifying the DoD project officer tasked with representing the Department of Defense throughout the production process. On a case-by-case basis, the ATSD(PA) may choose to delegate the responsibility of signing the Production Assistance Agreement on behalf of DoD to the designated DoD project officer or other DoD official responsible for coordinating production assistance. If so, this decision would be included in the notification letter. If production assistance is approved for only a portion of the proposed project, the written notification shall clearly describe the portion(s) approved. If assistance is not approved, ATSD(PA) or the ATSD(PA)'s designee will send a letter to the production company stating reasons for disapproval.

(3) *Role of the DoD project officer*. (i) When production assistance has been approved, the Military Components will assign a project officer (commissioned, non-commissioned, or civilian) who will be designated by OATSD(PA) as the principal DoD liaison to the production company. The DoD project officer will at a minimum:

(A) Act as liaison between the production company and the Secretaries of the Military Departments and maintain contact with OATSD(PA) through appropriate channels. In this regard, the project officer will serve as the central coordinator for billing the producer and monitoring payments to the Government. (See paragraph (d) of this section for billing procedures.)

(B) Advise the production company on technical aspects and arrange for information necessary to ensure reasonably accurate and authentic portrayals of the Department of Defense.

(C) Maintain liaison with units and commands providing assistance to ensure timely arrangements consistent with the approved support.

(D) Coordinate with installations or commands that intend to provide support to the production to ensure that no material assistance is provided before a Production Assistance Agreement is signed by both DoD and the production company.

(E) When DoD assistance to the production requires the production company to reimburse the Government for additional expenses, develop an estimate of expenses based on the assistance requested, and ensure that these are reflected in the Production Assistance Agreement.

(F) Coordinate with each installation or command providing assets to the production to ensure the production company receives accurate and prompt statements of charges assessed by the Government and that the Government receives sufficient payment for any additional expenses incurred to support the production.

(G) For project officers assigned to a documentary or a non-documentary television series, maintain close liaison with the producer(s) and writers in developing story outlines. All story ideas considered for further development by the production company should be submitted to OATSD(PA) to provide the earliest opportunity for appraisal.

(ii) When considered to be in the best interest of the Department of Defense, the assigned project officer may provide ''on-scene'' assistance to the production company. Military or civilian technical advisor(s) may also be required. In such cases:

(A) Assignment will be at no additional cost to the Government. The production company will assume payment of such items as travel (air, rental car, reimbursement for fuel, etc.) and per diem (lodging, food and incidentals).

(B) Assignment should be for the length of time required to meet preproduction requirements through completion of photography. When feasible, assignment may be extended to cover post-production stages and site clean-up.

(iii) Additional project officer responsibilities, when considered to be in the best interest of the Department of Defense, will include:

(A) Supervising the use of DoD equipment, facilities, and personnel.

(B) Attending pertinent preproduction and production conferences, being available during rehearsals to provide technical advice, and being present during filming of all

scenes pertinent to the Department of Defense.

(C) Ensuring proper selection of locations, appropriate uniforms, awards and decorations, height and weight standards, grooming standards, insignia, and set dressing applicable to the military aspects of the production. This applies to active duty members as well as paid civilian actors.

(D) Arranging for appropriate technical advisers to be present when highly specialized military technical expertise is required.

(E) Ensuring that the production adheres to the agreed-upon script and list of support to be provided.

(F) Authorizing minor deviations from the approved script or list of support to be provided, so long as such deviations are feasible, consistent with the safety standards, and in keeping with the approved story line. All other deviations shall be referred for approval to OATSD(PA) through appropriate channels.

(G) In accordance with the Production Assistance Agreement, providing notice of non-compliance, and when necessary, suspending assistance when action by the production company is contrary to stipulations governing the project and suspension is in the best interest of the Department of Defense until the matter is resolved locally or by referral to OATSD(PA).

(H) Attending the approval screening of the production, unless the Military Department concerned, OATSD(PA), and the production company mutually agree otherwise.

(I) Determining whether the production company will need to obtain the written consent of DoD personnel who may be recorded, photographed, or filmed by the production company, including when the production company uses the personally identifying information (PII) of DoD personnel. The likeness of DoD personnel in any imagery is included in the meaning of PII. If the recording or imagery captures medical treatment being performed on DoD personnel, the project officer shall require the production company to gain written consent from such DoD personnel. In the case of DoD personnel who are deceased or incapacitated, the project officer shall require the production company to gain written consent from the next of kin of the deceased or incapacitated DoD personnel.

(c) *Production company procedures*—(1) *Review of productions*. When DoD assistance has been provided to a non-documentary production, the production company must arrange for an official DoD screening in Washington, DC, or at another location agreeable to OATSD (PA), before the production is publicly exhibited. This review should be early, but at a stage in editing when changes can be accommodated, to allow the Department of Defense to confirm military sequences conform to the agreed upon script. For documentary productions, the production company will provide to the DoD project officer and the DoD designee(s) responsible for coordinating production assistance a digital videodisc (DVD) of military-themed photography and the roughly edited version of the production at a stage in editing when changes can be accommodated. In addition to confirming that the military sequences conform to the agreed upon script, treatment, or narrative, this review will also serve to preclude release or disclosure of sensitive, security-related, or classified information; and to ensure that the privacy of DoD personnel is not violated. Should DoD determine that material in the production compromises any of the preceding concerns, DoD will alert the production company of the material, and the production company will remove the material from the production.

(2) *Credit titles*. The production company will use its best efforts to place a credit in the end titles immediately above the ''Special Thanks'' section (if any) that states ''Special Thanks to the United States Department of Defense,'' with no less than one clear line above and one clear line below such credit acknowledging the DoD assistance provided. Such acknowledgment(s) will be in keeping with industry customs and practices, and will be of the same size and font used for other similar credits in the end titles.

(3) *Requests for promotional assistance*. Pursuant to DoD Directive 5122.05, ''Assistant Secretary of Defense for Public Affairs'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/*

*512205p.pdf*), the ATSD(PA) is the final authority for military participation in public events, including participation in promotional events for entertainment media productions. The production company will forward requests for promotional assistance to OATSD(PA) in sufficient detail to permit a complete evaluation.

(4) *Publicity photos and promotional material.* The production company will provide DoD with copies of all promotional and marketing materials (*e.g.*, electronic press kits, one-sheets, and television advertisements) for internal information and historical purposes in documenting DoD assistance to the production.

(5) *Copies of completed production.* The production company will provide, in a format to be specified in the Production Assistance Agreement, copies of the completed production to DoD for briefings and for historical purposes.

(d) *Billing procedures.* Pursuant to 10 U.S.C. 2264 and 31 U.S.C. 9701, production companies will reimburse the Government for additional expenses incurred as a result of DoD assistance.

(1) Each installation or Military Component will provide the production company with individual statements of charges assessed for providing assets to assist in the production. Unless agreed otherwise, statements should be presented to the production company within 45 days from the last day of the month in which filming and/or photography is completed to ensure prompt and complete accounting of charges for DoD assistance.

(2) The production company will be billed for only those expenses that are considered to be additional expenses to the Government. In accordance with paragraph (b)(3)(i)(A) of this section, the assigned project officer will serve as the central coordinator for submitting statements to the producer and monitoring receipt of payment to the Government. Items for which the costs may be reimbursed to the Government include:

(i) Petroleum, oil, and lubricants for equipment used.

(ii) Depot maintenance for equipment used.

(iii) Cost incurred in diverting or moving equipment.

(iv) Lost or damaged equipment.

(v) Expendable supplies.

(vi) Travel and per diem (unless reimbursed under 31 U.S.C. 1353).

(vii) Civilian overtime.

(viii) Commercial power or other utilities for facilities kept open beyond normal duty hours or when the production company's consumption of utilities is significant, based on average usage rates.

(ix) Should the production company not comply with requested clean-up required by production, project officer will require production company to hire a cleaning company. Should the production company not provide for the necessary clean-up, it shall reimburse the Government for any additional expenses incurred by the Government in performing such clean-up.

(3) The production company will be required to reimburse the Government for all flying hours related to production assistance, including takeoffs, landings, and ferrying aircraft from military locations to filming sites, except when such missions coincide with and can be considered legitimate operational and training missions. The production company will be required to reimburse the Government for all steaming days related to production assistance, including all costs (tugs, harbor pilots and port costs) required to move ships from military locations to filming sites, except when such missions coincide with and can be considered legitimate operational and training missions. These reimbursements will be calculated at the current DoD User Rates.

(4) In cases where provision of support provides a significant benefit to DoD, the production company will not be required to reimburse the Government for military or civilian manpower (except for civilian overtime) when such personnel are officially assigned to assist in the production. However, this limitation does not apply to Reserve Component personnel assigned in an official capacity, because such members are called to active duty at additional cost to the Government to perform the assigned mission. Reimbursement for Reserve Component personnel in an official capacity will be at

composite standard pay and reimbursement rates for military personnel published annually by the Under Secretary of Defense (Comptroller)/DoD Chief Financial Officer.

(5) Normal training and operational missions that would occur regardless of DoD assistance to a particular production are not considered to be chargeable to the production company.

(6) Beyond actual operational expenses, imputed rental charges ordinarily will not be levied for use of structures or equipment.

(7) The production company will provide proof of adequate industry standard liability insurance, naming DoD as an additional insured entity prior to the commencement of production involving DoD. The production company will maintain, at its sole expense, insurance in such amounts and under such terms and conditions as may be required by DoD to protect its interests in the property involved.

APPENDIX A TO PART 238—SAMPLE PRODUCTION ASSISTANCE AGREEMENT

U.S. DEPARTMENT OF DEFENSE
PRODUCTION ASSISTANCE AGREEMENT
DoD-[enter number]-[enter year]

The United States Department of Defense (DoD), acting on behalf of the United States of America, hereby expresses its intent, subject to the provisions herein, to provide to [enter name of production entity], hereinafter referred to as the "production company," the assistance itemized in this Production Assistance Agreement (Agreement) in conjunction with the production of a [enter type of production; e.g., feature motion picture, television series] known at this time as [enter title of production or episode]. This Agreement expresses the terms under which DoD intends to provide assistance. This Agreement does not authorize the obligation of any United States funding, nor should it be construed as a contract, grant, cooperative agreement, other transaction, or any other form of procurement agreement.

LIST OF MILITARY RESOURCES REQUESTED TO BE PROVIDED IN SUPPORT OF PRODUCTION [or "see Attachment 1"] The DoD will make reasonable efforts to provide the assistance requested in the request for production assistance, to the extent approved by DoD, and subject to the limitations contained herein.

This Agreement is subject to revocation due to non-compliance with the terms herein, with the possible consequence of a temporary suspension or permanent withdrawal of the use of some or all of the military resources identified to assist this project. In the event of dispute, the production company will be given a written notice of non-compliance by the DoD project officer. The production company will have a 72-hour cure period after receipt of written notice of non-compliance. DoD may temporarily suspend support until the non-compliance has been cured or the 72-hour cure period has expired. After the cure period has expired, DoD may permanently withdraw its support for the production. If such Agreement is either suspended or terminated, the sole right of the Production Company to appeal such decision is to the DoD designee responsible for coordinating production assistance for entertainment media operations ("DoD Director of Entertainment Media"). The requirements in Department of Defense Instruction 5410.16 shall apply to this Agreement.

It is understood between DoD and the production company that:

1. The DoD project officer, [enter name of project officer], is the official DoD representative responsible for ensuring that the terms of this Agreement are met. The DoD project officer or his or her designee will be present each day the U.S. military is being portrayed, photographed, or otherwise involved in any aspect of [enter title of production]. The DoD project officer is the military technical advisor, and all military coordination must go through him or her. The production company will consult with the DoD project officer in all phases of pre-production, production, and post-production that involves or depicts the U.S. military.

2. The production company will cast actors, extras, doubles, and stunt personnel portraying Service members who conform to individual Military Service regulations governing age, height and weight, uniform, grooming, appearance, and conduct standards. DoD reserves the right to suspend support in the event that disagreement regarding the military aspects of these portrayals cannot be resolved in negotiation between the production company and DoD within the 72-hour cure period. The DoD project officer will provide written guidance specific to each Military Service being portrayed.

3. DoD has approved production assistance as in the best interest of DoD, based on the [enter date] version of the script to the extent agreed upon by DoD [, and as further described by _____]. The production company must obtain, in advance, DoD concurrence for any subsequent changes proposed to the military depictions made to either the picture or the sound portions of the production before these changes are undertaken.

4. The operational capability and readiness of the Military Components will not be impaired. Unforeseen contingencies affecting national security or other emergency circumstances such as disaster relief may temporarily or permanently preclude the use of military resources. In these circumstances, DoD will not be liable, financially or otherwise, for any resulting negative impact or prejudice to the production caused by the premature withdrawal or change in support to the production company.

5. There will be no deviation from established DoD safety and conduct standards. The DoD project officer or his or her designee will coordinate such standards and compliance therewith. DoD will provide the production company advance notice of such safety or conduct standards upon request.

6. All DoD property or facilities damaged, used, or altered by the production company in connection with the production will be restored by the production company to the same or better condition, cleaned and free of trash, normal wear and tear excepted, as when they were made available for the production company's use.

7. The production company will reimburse the U.S. Government for any additional expenses incurred as a result of the assistance rendered for the production of [enter title of production]. The estimated amount will be detailed and included (e.g., "see Attachment 2," etc.). Unless otherwise agreed upon, the production company agrees to post advance payment or a letter of credit in the amount estimated to comprise the total additional DoD expenses or deposit such funds that may be reasonably necessary. The payment or letter of credit will be submitted to the military component(s) designated to provide the assistance, or to another DoD agency, as deemed appropriate by DoD.

a. DoD agrees to provide statements of charges assessed by each installation or DoD component providing assets to assist in the production within 45 days from the last day of the month in which filming is completed.

b. The production company will be charged for only those expenses that are considered to be additional costs to DoD in excess of those that would otherwise have been incurred, including, but not limited to fuel, resultant depot maintenance, expendable supplies, travel and per diem, civilian overtime, and lost or damaged equipment.

c. If the final aggregate of such costs and charges is less than previously anticipated, DoD agrees to remit the exact amount of the difference of any funds posted within 45 days from the last day of the month in which filming is completed.

8. The production company will be charged for the travel, lodging, per diem, and incidental expenses for the DoD project officer, the DoD Director of Entertainment Media or his or her designee, and any other assigned military technical and safety advisor(s) whose presence may be required by DoD. For each of these individuals, the production company will provide:

a. Round-trip air transportation and ground transfers to the production location(s) at which there is a military portrayal or involvement, at times deemed appropriate by the DoD project officer and DoD Director of Entertainment Media.

b. A full-size vehicle (with fuel and with loss, damage, and collision automobile insurance paid for by the production company) for his or her personal use during the filming, including for his or her stay at the production location(s). If parking at the location(s) is not available, transportation to and from the lodging location to the production site will be provided.

c. Hotel accommodations equivalent to those provided to the production company's crew.

d. A dedicated, on-location trailer room or other comparable work space with full Internet access, desk, seating, and en-suite toilet.

9. By approving DoD production assistance for [enter title of production], DoD hereby provides a general release to the production company for the use of any and all photography and sound recordings of any and all Service members, equipment, and real estate, subject to the limitations in this Agreement (e.g. Paragraphs 12-13).

10. As a condition of DoD assistance, the production company will:

a. Indemnify and hold harmless DoD, its agencies, officers, and employees against any claims (including claims for personal injury and death, damage to property, and attorneys' fees) arising from the production company's possession or use of DoD property or other assistance in connection with this production of [enter title of production], to include pre-production, post-production, and DoD-provided orientation or training. This provision will not in any event require production company to indemnify or hold harmless DoD, its agencies, officers and or employees from or against any claims arising from defects in DoD property or negligence on the part of DoD, its agencies, officers, or employees.

b. Provide proof of adequate industry standard liability insurance, naming DoD as an additional insured entity prior to the commencement of production involving DoD. The production company will maintain, at its sole expense, insurance in such amounts and under such terms and conditions as may be required by DoD to protect its interests in the property involved.

c. Not carry onto DoD property any non-prescription narcotic, hallucinogenic, or other controlled substance; or alcoholic beverage without prior coordination with the DoD project officer or his or her designee.

d. Not carry onto DoD property any real or prop firearms, weapons, explosives, or any special effects devices or equipment that cause or simulate explosions, flashes, flares, fire, loud noises, etc., without the prior approval of the DoD project officer and the supporting installation.

e. Allow DoD public affairs personnel access to the production site(s) to conduct still and motion photography of DoD personnel and assets that are directly supporting the filming, and to allow DoD the use of production company-generated publicity and marketing materials, such as production stills and electronic press kits. These materials may be used to show DoD viewers how DoD is assisting in the production; such materials may be viewed by the general public if posted on an open DoD web site or released on "The Pentagon Channel" or other publicly-accessible media source. Therefore, no DoD personnel will photograph actual filming, talent, or sets without the prior approval of the production company.

11. The production company will provide the DoD project officer with whatever internal communications equipment it is supplying to production company crew members to communicate on the set during production of military-themed sequences. The production company will also supply the DoD project officer with earphones to monitor military-themed dialogue and other sound recording during these periods.

12. The production company will screen for the DoD project officer and the DoD Director of Entertainment Media, or their designees, the roughly edited version of the production at a stage in editing when changes can be accommodated to allow DoD to confirm the military sequences conforms to the agreed script treatment, or narrative description; to preclude release or disclosure of sensitive, security-related, or classified information; and to ensure that the privacy of DoD personnel is not violated. Should DoD determine that material in the production compromises any of the preceding concerns, DoD will alert the production company of the material, and the production company will remove the material from the production. The production company will bear the travel, lodging, per diem, and incidental expenses incurred in transporting the DoD project officer and the DoD Director of Entertainment Media, or their designees, to the location where the screening is held.

13. No photography or sound recordings made with DoD assistance and no DoD photography and sound recordings released for this production will be reused or sold for use in other productions without DoD approval. The foregoing will not prohibit the production

company from exploiting the production in any and all ancillary markets, now known or hereafter devised (including, without limitation, television, web content, home video and theme parks) or from using clips in promotional material relative thereto.

14. The production company will also provide an official DoD screening of the completed production in Washington, D.C., prior to public exhibition. An alternative screening location may be authorized by DoD, in negotiation with the production company. In this case, the production company will pay the travel and lodging expenses incidental to the attendance at the screening of the DoD project officer and the Director of Entertainment Media or their designees.

15. The production company will use its best efforts to place a credit in the end titles immediately above the "Special Thanks" section (if any), substantially in the form of "Special Thanks to the United States Department of Defense," with no less than one clear line above and one clear line below such credit acknowledging the DoD assistance provided. Such acknowledgment(s) will be in keeping with industry customs and practices, and will be of the same size and font used for other similar credits in the end titles.

16. The production company will provide DoD with five copies of all promotional and marketing materials (e.g., electronic press kits, one-sheets, and television advertisements) for internal information and historical purposes in documenting DoD assistance to the production.

17. The production company will provide a minimum of ten digital videodisc (DVD) copies of the completed production to DoD for internal briefings and for historical purposes, by overnight shipment to arrive the day following the first domestic airing or commercial distribution of the production. DoD will not exhibit these DVDs publicly or copy them; however, DoD is allowed to use short clips from them in official presentations by Service members and DoD civilian personnel who were directly involved in providing DoD assistance, for the sole purpose of illustrating DoD support to the production. However, DoD is prohibited from making these clips available to any other party for any other purpose.

18. Official activities of DoD personnel in assisting the production must be within the scope of normal military activities, with the exception of the DoD project officer and assigned official technical advisor(s), whose activities must be consistent with their authorized additional duties. DoD personnel in an off-duty, non-official status may be hired by the production company to perform as actors, extras, etc., provided there is no conflict with existing Service or Department regulations. In such cases, these conditions apply:

a. Contractual agreements are solely between those individuals and the production company; however, they should be consistent with industry standards.

b. The DoD project officer will ensure that DoD personnel will comply with standards of conduct regulations in accepting employment.

c. The production company is responsible for any disputes with unions governing the hiring of non-union actors or extras.

19. The production company may make donations or gifts in-kind to morale, welfare, and recreation programs of the military unit(s) involved; however, donations of this kind are not at all required, and are not in any manner a consideration in the determination of whether or not a production should receive DoD assistance. These donations must be coordinated through the DoD project officer and must comply with law and DoD policies.

20. The undersigned parties warrant that they have the authority to enter into this Agreement and that the consent of no other party is necessary to effectuate the full and complete satisfaction of the provisions contained herein.

21. This Agreement consists of [enter number] pages including [enter number of attachment(s)]. Each page will be initialed by the undersigned DoD and production company representatives.

| FOR THE DEPARTMENT OF DEFENSE | FOR [ENTER PRODUCTION COMPANY] |
|---|---|
| _____ | _____ |
| Signature and Date | Signature and Date |
| Name of DoD Representative: | Name of Production Company Representative: |
| _____ | _____ |
| Title and Address | Title and Address |

## APPENDIX B TO PART 238—SAMPLE PRODUCTION ASSISTANCE AGREEMENT

U.S. DEPARTMENT OF DEFENSE
DOCUMENTARY PRODUCTION ASSISTANCE AGREEMENT
DoD-[enter number]-[enter year]

The United States Department of Defense (DoD), acting on behalf of the United States of America, hereby expresses its intent, subject to the provisions herein, to provide to [enter name of production entity], hereinafter referred to as the "production company," the assistance itemized in this Production Assistance Agreement (Agreement) in conjunction with the production of a documentary known at this time as [enter title of the production]. This Agreement expresses the terms under which DoD intends to provide assistance. This Agreement does not authorize the obligation of any United States funding, nor should it be construed as a contract, grant, cooperative agreement, other transaction, or any other form of procurement agreement.

LIST OF MILITARY RESOURCES REQUESTED TO BE PROVIDED IN SUPPORT OF PRODUCTION [or "see Attachment 1"] The DoD will make reasonable efforts to provide the assistance requested in the request for DoD documentary assistance, to the extent approved by DoD, and subject to the limitations contained herein.

This Agreement is subject to revocation due to non-compliance with the terms herein, with the possible consequence of a temporary suspension or permanent withdrawal of the use of some or all of the military resources identified to assist this project. In the event of dispute, the production company will be given a written notice of non-compliance by the DoD project officer. The production company will have a 72-hour cure period after receipt of written notice of non-compliance. DoD may temporarily suspend support until the non-compliance has been cured or the 72-hour cure period has expired. After the cure period has expired, DoD may permanently withdraw its support for the production. If such Agreement is either suspended or terminated, the sole right of the Production Company to appeal such decision is to the DoD designee responsible for coordinating assistance for documentary productions. The requirements in Department of Defense Instruction 5410.16 shall apply to this Agreement.

It is understood between DoD and the production company that:

1. The DoD project officer, [enter name of project officer and contact information], is the official DoD representative responsible for ensuring that the terms of this Agreement are met. The DoD project officer is the military technical advisor, and all military coordination must go through him or her. The production company will consult with the DoD project officer in all phases of pre-production, production, and post-production that involves or depicts the U.S. military. The local unit/installation public affairs officer, or a designated official, may serve as the official onsite DoD representative for this project and will act as the interface between the film crew and military units providing both filming and logistical support.

2. DoD has approved production assistance as in the best interest of DoD, based on the [enter date] version of the script, treatment, or narrative description to the extent agreed upon by DoD [and as further described by _____]. The production company must obtain, in advance, DoD concurrence for any subsequent changes proposed to the military depictions made to either the picture or the sound portions of the production before these changes are undertaken.

3. The operational capability and readiness of the Military Components will not be impaired. Unforeseen contingencies affecting national security or other emergency circumstances such as disaster relief may temporarily or permanently preclude the use of military resources. In these circumstances, DoD will not be liable, financially or otherwise, for any resulting negative impact or prejudice to the production caused by the premature withdrawal or change in support to the production company.

4. There will be no deviation from established DoD safety and conduct standards. The DoD project officer, or his or her designee, will coordinate such standards and compliance therewith. DoD will provide the production company advance notice of such safety or conduct standards upon request.

5. All DoD property or facilities damaged, used or altered by the production company in connection with the production will be restored by the production company to the same or better condition, cleaned and free of trash, normal wear and tear excepted, as when they were made available for the production company's use.

6. The production company will reimburse the U.S. Government for any additional expenses incurred as a result of the assistance rendered for the production of [enter title of production]. The estimated amount will be detailed and included in this Agreement or as an attachment to it.

7. The production company will be charged for only those expenses that are considered to be additional costs to DoD in excess of those that would otherwise have been incurred, including, but not limited to fuel, resultant depot maintenance, expendable supplies, travel and per diem, civilian overtime, and lost or damaged equipment.

8. The production company will be charged for the travel, lodging, per diem, and incidental expenses for the DoD project officer, the DoD documentary officer, or his or her designee, and any other assigned military technical and safety advisor(s) whose presence may be required by DoD. For each of these individuals, the production company will provide:

a. Round-trip air transportation and ground transfers to the production location(s) at which there is a military portrayal or involvement, at times deemed appropriate by the DoD project officer and the DoD documentary officer.

b. Hotel accommodations equivalent to those provided to the production company's crew.

9. By approving DoD production assistance for [enter title of production], DoD hereby provides a general release to the production company for the use of any and all photography and sound recordings of any and all Service members, equipment, and real estate, subject to the limitations in this Agreement (e.g., including, but not limited to, Paragraphs 11-14).

10. As a condition of DoD assistance, the production company will:

a. Indemnify and hold harmless the DoD, its agencies, officers, and employees against any claims (including claims for personal injury and death, damage to property, and attorneys' fees) arising from the production company's possession or use of DoD property or other assistance in connection with this production of [enter title of production]. This provision will not in any event require production company to indemnify or hold harmless the DoD, its agencies, officers, or employees from or against any claims arising from defects in DoD property or negligence on the part of DoD, its agencies, officers, or employees.

b. Provide proof of adequate industry standard liability insurance, naming DoD as an additional insured entity prior to the commencement of production involving DoD. The production company will maintain, at its sole expense, insurance in such amounts and under such terms and conditions as may be required by DoD to protect its interests in the property involved.

c. Not carry onto DoD property any non-prescription narcotic, hallucinogenic, or other controlled substance or alcoholic beverage without prior coordination with the DoD project officer or his or her designee.

d. Not carry onto DoD property any real or prop firearms, weapons, explosives, or any special effects devices or equipment that cause or simulate explosions, flashes, flares, fire, loud noises, etc., without the prior approval of the DoD project officer and the supporting installation.

e. Allow DoD public affairs personnel access to the production site(s) to conduct still and motion photography of DoD personnel and assets that are directly supporting the filming, and to allow DoD the use of production company-generated publicity and marketing materials. These materials may be used to show DoD viewers how DoD is assisting in the production; such materials may be viewed by the general public if posted on an open DoD web site or on "The Pentagon Channel" or other publicly-accessible media source. Therefore, no DoD personnel will photograph actual filming without the prior approval of the production company.

11. The production company will screen for the DoD project officer, and the DoD documentary officer, or their designees, the roughly edited version of the production at a stage in editing when changes can be accommodated to allow DoD to confirm the military sequences conforms to the agreed-upon script, treatment, or narrative description; to preclude release or disclosure of sensitive, security-related, or classified information; and to ensure that the privacy of DoD personnel is not violated. Should DoD determine that material in the production compromises any of the preceding concerns, DoD will alert the production company of the material, and the production company will remove the material from the production.

12. If the recording or imagery to be used in the production captures medical treatment being performed on DoD personnel, the project officer shall require the production company to gain written consent from such DoD personnel. In the case of DoD personnel who are deceased or incapacitated, the project officer shall require the production company to gain written consent from the next of kin of the deceased or incapacitated DoD personnel.

13. All Department of Defense uniformed and civilian personnel who are photographed or sound recorded by the documentary production company are considered to be on duty and are precluded from receiving any compensation from the production company or any other party as a result of their appearance in the production or subsequent authorized productions, or as a result of the use of their name, likeness, life story or other rights for any purpose. Military personnel in an off-duty, non-official status may be hired by the production company to perform as actors, extras, etc., provided there is no conflict with existing Service regulations. In such cases, these conditions apply:

a. Contractual agreements are solely between those individuals and the production company; however, they should be consistent with industry standards.

b. The DoD project officer will ensure that DoD personnel will comply with standards of conduct regulations in accepting employment.

c. The production company is responsible for any disputes with unions governing the hiring of non-union actors or extras.

14. No photography or sound recordings made with DoD assistance and no DoD photography and sound recordings released for this production will be reused or sold for use in other productions without DoD approval. The foregoing will not prohibit the production company from exploiting the production in any and all ancillary markets, now known or hereafter devised (including, without limitation, television, web content, home video and theme parks) or from using clips in promotional material relative thereto.

15. The production company will identify any and all re-enactments in the production by placing the word “RE-ENACTMENT “on the screen, in a legible format and of a legible size, for either the duration of the re-enactment or at the beginning of the re-enactment for a period of not less than 3 seconds and reappearing every subsequent 10 seconds for a period of 3 seconds until complete. This activity will occur for every instance of a re-enactment in the production.

16. The production company will use its best efforts to place a credit in the end titles immediately above the “Special Thanks” section (if any) substantially in the form of “Special Thanks to the United States Department of Defense,” with no less than one clear line above and one clear line below such credit acknowledging the DoD assistance provided. Such acknowledgment(s) will be in keeping with industry customs and practices, and will be of the same size and font used for other similar credits in the end titles.

17. The production company will provide a minimum of five digital videodisc (DVD) copies of the completed production within seven working days of initial broadcast to DoD, for internal briefings and for historical purposes. DoD will not exhibit these DVDs publicly or copy them; however, DoD is allowed to use short clips from them in official presentations by Service members and DoD civilian personnel who were directly involved in providing DoD assistance, for the sole purpose of illustrating DoD support to the production. However, DoD is prohibited from making these clips available to any other party for any other purpose.

18. The undersigned parties warrant that they have the authority to agree to the terms of this Agreement and that the consent of no other party is necessary to effectuate the full and complete satisfaction of the provisions contained herein.

19. This Agreement consists of [enter number] pages including [enter number of attachment(s)]. Each page will be initialed by the undersigned DoD and production company representatives.

| FOR THE DEPARTMENT OF DEFENSE | FOR [ENTER PRODUCTION COMPANY] |
|---|---|
| _____ | _____ |
| Signature and Date | Signature and Date |
| Name of DoD Representative: | Name of Production Company Representative: |
| _____ | _____ |
| Title and Address | Title and Address |

# PART 239—HOMEOWNERS ASSISTANCE PROGRAM—APPLICATION PROCESSING

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AUTHORITY: 42 U.S.C. 3374, as amended by Section 1001, ARRA, Public Law 111–5.

SOURCE: 75 FR 69873, Nov. 16, 2010, unless otherwise noted.

## § 239.1 Purpose.

This part:

(a) Continues to authorize the Homeowners Assistance Program (HAP) under Section 3374 of title 42, United States Code (U.S.C.), to assist eligible military and civilian Federal employee homeowners when the real estate market is adversely affected directly related to the closure or reduction-in-scope of operations due to Base Realignment and Closure (BRAC). Additionally, in accordance with section 1001, American Recovery and Reinvestment Act of 2009 (ARRA), Public Law 111–5, this part temporarily expands authority provided in section 3374, of title 42 U.S.C., to provide assistance to:

Wounded, Injured, or Ill members of the Armed Forces (30 percent or greater disability), wounded Department of Defense (DoD) and Coast Guard civilian homeowners reassigned in furtherance of medical treatment or rehabilitation or due to medical retirement in connection with their disability, surviving spouses of fallen warriors, Base Realignment and Closure (BRAC) 2005 impacted homeowners relocating during the mortgage crisis, and Service member homeowners undergoing Permanent Change of Station (PCS) moves during the mortgage crisis. This authority is referred to as ''Expanded HAP.''

(b) Establishes policy, authority, and responsibilities for managing Expanded HAP and defines eligibility for financial assistance.

(c) In accordance with this part, the Under Secretary of Defense for Acquisition, Technology, and Logistics (USD(AT&L)) has overall responsibility and, through the Deputy Under Secretary of Defense for Installations and Environment (DUSD(I&E)), provides oversight for this program. The Army, acting as the DoD Executive Agent for administering the HAP, uses the Headquarters, U.S. Army Corps of Engineers (HQUSACE) to implement the program.

### § 239.2 Applicability and scope.

This part applies to the Office of the Secretary of Defense, the Military Departments (including the U.S. Coast Guard), the Chairman of the Joints Chiefs of Staff, the Combatant Commands, the Inspector General of the Department of Defense, the Defense Agencies, DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the ''DoD Components''). This part for Expanded HAP is applicable until September 30, 2012, or as otherwise extended by law.

### § 239.3 Policy.

It is DoD policy, in implementing section 3374 of title 42, United States Code, as amended by section 1001 of the ARRA (Pub. L. 111–5), that those eligible (*see* section 239.6 of this part) to participate in the HAP and Expanded HAP are treated fairly and receive available benefit as quickly as practicable.

### § 239.4 Definitions.

(a) *Armed Forces*. The Army, Navy, Air Force, Marine Corps, and Coast Guard (see section 101(a) of title 10, U.S.C., as stipulated in section 1001(p) of Public Law 111–5).

(b) *Closing costs*. Sellers' closing costs typically include: loan payoff fees; the real estate commission; title insurance; all or part of transfer taxes and escrow fees, if there are any; attorney's fees where applicable; and other fees set by local custom. HAP pays sellers' closing costs that are customary for the region where the home is located. Applicant's realtor or lender can provide the applicant with the normal closing costs for his/her region. HAP will reimburse the seller for limited contributions made to the buyer's portion of closing costs, including appraisal cost and realtor fees.

(c) *Deficiency judgment*. Judicial recognition of personal liability under applicable state law against a Service member whose property was foreclosed on or who otherwise passed title to another person for a primary residence through a sale that realized less than the full outstanding mortgage balance.

(d) *Deployment*. Performing service in a training exercise or operation at a location or under circumstances that make it impossible or infeasible for the member to spend off-duty time in the housing in which the member resides when on garrison or installation duty at the member's permanent duty station, or home port, as the case may be.

(e) *Eligible mortgage*. A mortgage secured by the primary residence that was incurred to acquire or improve the primary residence. For a mortgage refinancing the original mortgage(s) or for a mortgage incurred subsequent to purchasing the property, funds from the refinanced or subsequent mortgages must be traced to the purchase of the primary residence or have been used to improve the primary residence. Home improvements that are documented (even if not financed through a subsequent mortgage or line of credit) may be added to the purchase price of the primary residence. Funds from a refinanced or subsequent mortgage that were used for other purposes are not eligible and may not be considered. Benefits will be calculated using the

amount of $729,750 for primary residences with an eligible mortgage that exceeds $729,750. The total benefit payable (excluding allowable closing costs) shall not exceed $729,750. The ARRA expanded HAP calculates PFMV as the purchase price plus improvements. Improvements are identified in the Internal Revenue Publication #523 (*http://www.irs.gov/publications/p523/ar02.html*) which outlines items considered home improvements and distinguishes improvements from repairs and maintenance.

(f) *Forward deployment*. Performing service in an area where the Secretary of Defense or the Secretary's designee has determined that Service members are subject to hostile fire or imminent danger under section 310(a)(2) of title 37, U.S.C.

(g) *Primary residence*. The one- or two-family dwelling from which employees or members regularly commute (or commuted) to their primary place of duty. Under § 239.6(a) and (b) of this part, the relevant property for which compensation might be offered must have been the primary residence of the member or civilian employee at the time of the relevant wound, injury, or illness. The first field grade officer (or civilian equivalent) in the member or employee's chain of command may certify primary residence status.

(h) *Prior Fair Market Value (PFMV)*. The PFMV is the purchase price of the primary residence. Benefits will be calculated using the amount of $729,750 as the PFMV for primary residences with a PFMV that exceeds $729,750.

(i) *Purchase*. Purchase occurs when the applicant enters into a contract for the purchase of the property. In the absence of a contract for purchase, the purchase occurs when the applicant closes on the property.

(j) *Reasonable effort to sell*. Applicant's primary residence must be listed, actively marketed, and available for purchase for a minimum of 120 days. With regard to marketing, applicant must demonstrate that the asking price was within the current market value of the home as determined by the HQUSACE automated value model (AVM) for no less than 30 days. It is the applicant's responsibility to explain marketing efforts by detailing how the asking price was gradually reduced until it reached the true current fair market value (*e.g.*, maintaining a log containing date and asking price recorded over period of time indicating number of visits by prospective buyers and offers to purchase). If an applicant is unable to sell the primary residence, the HQUSACE will determine whether efforts to sell were reasonable.

(k) *Permanent Change of Station (PCS)*. The assignment or transfer of a member to a different permanent duty station (PDS), to include relocation to place of retirement, when retirement is mandatory, under a competent authorization/order that does not specify the duty as temporary, provide for further assignment to a new PDS, or direct the military service member return to the old PDS.

### § 239.5 Benefit elections.

Section 3374 of title 42, U.S.C., as amended by section 1001 of the ARRA, Public Law 111–5, authorizes the Secretary of Defense, under specified conditions, to acquire title to, hold, manage, and dispose of, or, in lieu thereof, to reimburse for certain losses upon private sale of, or foreclosure against, any property improved with a one- or two-family dwelling owned by designated individuals.

(a) *General benefits*. (1) If an applicant is unable to sell the primary residence after demonstrating reasonable efforts to sell (*see* Definitions, § 239.4(i) of this part), the Government may purchase the primary residence for the greater of:

(i) The applicable percentage (identified by applicant type in § 239.5(a)(4) of this part) of the Prior Fair Market Value (PFMV) of the primary residence, or

(ii) The total amount of the eligible mortgage(s) that remains outstanding; however, the benefit payable (excluding allowable closing costs) shall not exceed $729,750.

(2) If an applicant sells, has sold, or otherwise has transferred title of the primary residence, the benefit calculation shall be the amount of closing costs plus an amount not to exceed the difference between the applicable percentage of the PFMV and the sales price.

(3) If an applicant is foreclosed upon, the benefit will pay all legally enforceable liabilities directly associated with the foreclosed mortgage (*e.g.*, a deficiency judgment).

(4) *Applicable percentages*. (i) If an applicant is eligible under § 239.6(a)(1) or (2) of this part, and sells the primary residence, the applicable percentage shall be 95 percent of the PFMV. In addition, closing costs incurred on the sale may be reimbursed.

(ii) If an applicant is eligible under § 239.6(a)(1) or (2) of this part, and is unable to sell the primary residence after demonstrating reasonable efforts to sell, the applicable percentage shall be 90 percent of the PFMV. Closing costs incurred on the sale may be reimbursed.

(iii) If an applicant is eligible under § 239.6(a)(3) or (4) of this part and sells the primary residence, the applicable percentage shall be 90 percent of the PFMV. In addition, closing costs incurred on the sale may be reimbursed.

(iv) If an applicant is eligible under § 239.6(a)(3) or (4) of this part and is unable to sell the primary residence after demonstrating reasonable efforts to sell, the applicable percentage shall be 75 percent of the PFMV. As noted under paragraph (a)(1) of this section, however, the applicant may instead be eligible for payment of the eligible mortgage outstanding.

(b) *Rules applicable to all benefit calculations*. (1) Prior to making any payment, the Government must determine that title to the property has been transferred or will be transferred as the result of making such payment. If the Government determines that making a benefit payment will not result in the transfer of title to the property, no payment will be made.

(2) A short sale will be treated as a private sale. If an applicant remains personally liable for a deficiency between the outstanding mortgage and the sale price, the amount of this deficiency may be included in the benefit, provided that the total amount of the benefit does not exceed the difference between 90 percent of the PFMV and the sales price.

(c) *Payment of benefits*. (1) *Private sale:* Where a benefit payment exceeds funds required to clear the mortgage and pay closing costs, the amount exceeding the mortgage and closing costs will be paid directly to the applicant. In the case of a short sale, if an applicant remains personally liable for a deficiency between the outstanding mortgage and the sale price, that deficiency shall be paid directly to the lender on behalf of the applicant. If the applicant was fully released from liability after a short sale, no benefit shall be paid to either the applicant or lender.

(2) *Government purchase:* Benefit is paid directly to the lender in exchange for government possession of the property. Since the benefit reimburses the applicant a percentage of the applicant's purchase price, if the benefit exceeds the mortgage payoff amount, the applicant will receive a benefit payment for the difference between the mortgage payoff and the total benefit payment. If the applicant has a buyer for the home, the payment of real estate commissions when an applicant's mortgage exceeds the property's current fair market value (i.e., upside down) will be accomplished as follows:

(i) Commission will be at the normal and customary rate for the area (normally six percent) on the price agreed upon by the applicant and the buyer and to whom the Government will then sell the home. While the commission payment is the responsibility of the applicant, the Government will make the commission payment for the applicant when the home is sold by the Government to the applicant's buyer contingent upon both the Government acquisition and Government sale contract transactions being completed and recorded. Commissions will be paid to the broker listing the property. The allocation of dollars to real estate agents will be the responsibility of the listing broker.

(ii) After Government acquisition, the Government will then sell the property to the buyer found by the applicant.

(iii) No other payment of fees or commissions will be made without the prior approval of HQUSACE.

(3) *Foreclosure:* In the case of a foreclosure, benefit is paid to lien holder for legally enforceable liabilities.

(d) *Tax Implications*. 26 U.S.C. 132(n) exempts Expanded HAP benefits from

Federal taxes and is not subject to withholding.

**§ 239.6 Eligibility.**

(a) *Eligibility by Category*. Those eligible for benefits under the Expanded HAP include the following categories of persons:

(1) *Wounded, Injured, or Ill*. (i) Members of the Armed Forces:

(A) Who receive a disability rating of 30% or more for an unfitting condition (using the Department of Veterans Affairs Schedule for Ratings Disabilities), or who are eligible for Service member's Group Life Insurance Traumatic Injury Protection Program, or whose treating physician (in a grade of at least captain in the Navy or Coast Guard or colonel in Army, Marine Corps, or Air Force) certifies that the member is likely, by a preponderance of the evidence, to receive a disability rating of 30 percent or more for an unfitting condition (using the Department of Veterans Affairs Schedule for Ratings Disabilities) for wounds, injuries, or illness incurred in the line of duty while deployed, on or after September 11, 2001, and

(B) Who are reassigned in furtherance of medical treatment or rehabilitation, or due to retirement in connection with such disability, and

(C) Who need to market the primary residence for sale due to the wound, injury, or illness. (For example, the need to be closer to a hospital or a family member caregiver or the need to find work more accommodating to the disability.)

(ii) Civilian employees of DoD or the United States Coast Guard (excluding temporary employees or contractors, but including employees of non-appropriated fund instrumentalities):

(A) Who suffer a wound, injury, or illness (not due to own misconduct), on or after September 11, 2001, in the performance of duties while forward deployed in support of the Armed Forces, whose treating physician provides written documentation that the individual, by a preponderance of the evidence, meets the criteria for a disability rating of 30 percent or more. As described in paragraph (a)(1) of this section, this documentation will be certified by a physician in the grade of at least captain in the Navy or Coast Guard or colonel in Army, Marine Corps, or Air Force.

(B) Who relocate from their primary residence in furtherance of medical treatment, rehabilitation, or due to medical retirement resulting from the wound, injury, or illness, and

(C) Who need to market the primary residence for sale due to the wound, injury, or illness. (For example, the need to be closer to a hospital or a family member caregiver or the need to find work more accommodating to the disability.)

(2) *Surviving spouse*. The surviving spouse of a Service member or of a civilian employee:

(i) Whose spouse dies as the result of a wound, injury, or illness incurred in the line of duty while deployed (or forward deployed for civilian employees) on or after September 11, 2001, and

(ii) Who relocates from the member's or civilian employee's primary residence within two years of the death of spouse.

(3) *BRAC 2005 members and civilian employees*. Members of the Armed Forces and civilian employees of the Department of Defense and the United States Coast Guard (not including temporary employees or contractors) and employees of non-appropriated fund instrumentalities meeting the assignment requirements of § 239.6(b)(4)(i)(A) of this part and who have not previously received HAP benefit payments:

(i) Whose position is eliminated or transferred because of the realignment or closure; and

(ii) Who accepts employment or is required to relocate because of a transfer beyond the normal commuting distance from the primary residence (50 miles). The new residence must be within 50 miles of the new duty station.

(4) *Permanently reassigned members of the Armed Forces*. Members who have not previously received HAP benefit payments and who are reassigned under permanent PCS orders:

(i) Dated between February 1, 2006, and September 30, 2012 (subject to availability of funds),

(ii) To a new duty station or home port outside a 50-mile radius of the

member's former duty station or home port.

(b) *Eligibility based on economic impact, timing, price, orders, and submission of application.* (1) *Minimum economic impact.* (i) BRAC 2005 Members and Civilian Employees as well as permanently reassigned members of the Armed Forces whose primary residence have suffered at least a 10 percent personal home value loss from the date of purchase to date of sale. Market value of the home will be verified by the USACE.

(ii) Applicants qualifying as Wounded, Injured, or Ill or as surviving spouse do not need to show minimum economic impact.

(2) *Timing of purchase and sale.* (i) BRAC 2005 Members and Civilian Employees must have been the owner-occupant of their primary residence before May 13, 2005, the date of the BRAC 2005 announcement or have vacated the owned residence as a result of being ordered into on-post housing after November 13, 2004. An owner-occupant is someone who has both purchased and resides in the residence.

(ii) Permanently reassigned members of the Armed Forces must have purchased their primary residence before July 1, 2006.

(iii) Wounded, injured, or ill members and employees and Surviving Spouses are eligible for compensation without respect to the date of purchase.

(iv) BRAC 2005 Members and Civilian employees and permanently reassigned members must have sold their primary residence between July 1, 2006 and September 30, 2012.

(3) *Maximum home prior fair market value and eligible mortgage.* When calculating benefits, both the PFMV and the eligible mortgage will be capped at $729,750.

(4) *Date of assignment; report date; basis for relocation.* (i) *Date of assignment, report date.* (A) BRAC 2005 Members and Civilian Employees must have been assigned to an installation or unit identified for closure or realignment under the 2005 round of the Base Realignment and Closure Act of 1990 on May 13, 2005; transferred from such an installation or unit, or employment terminated as a result of a reduction in force, after November 13, 2004; or transferred from such an installation or activity on an overseas tour after May 13, 2002. BRAC 2005 Members transferred from such an installation or activity after May 13, 2005, are also eligible if, in connection with that transfer the member was informed of a future, programmed reassignment to the installation.

(B) For initial implementation, permanently reassigned members of the Armed Forces must have received qualifying orders to relocate dated between February 1, 2006, and September 30, 2010. These dates may be extended to September 30, 2012, at the discretion of the DUSD(I&E) based on availability of funds.

(ii) *Basis for relocation:* Permanently reassigned members of the Armed Forces who are reassigned or who otherwise relocate for the following reasons are not eligible for Expanded HAP benefits:

(A) Members who voluntarily retire prior to reaching their mandatory retirement date.

(B) Members who are a new accession into the Armed Forces or who are otherwise entering active duty.

(C) Members who are voluntarily separated or discharged.

(D) Members whose separation or discharge is characterized as less than honorable.

(E) Members who request and receive voluntary release from active duty (REFRAD).

(F) Members who are REFRAD for misconduct or poor performance.

(c) *Applications will be processed according to eligibility category in the following order:* (1) *Wounded, injured, and ill.* Within this category, applications will generally be processed in chronological order of the wound, injury, or illness.

(2) *Surviving spouses.* Within this category, applications will generally be processed in chronological order of the date of death of the member or employee.

(3) *BRAC 2005 members and civilian employees.* Within this category, applications will generally be processed in chronological order of the date of job elimination.

(4) *Permanently reassigned members of the Armed Forces.* Within this category,

applications will generally be processed beginning with the earliest report-not-later-than date of PCS orders.

**§ 239.7 Responsibilities.**

(a) The DUSD(I&E), under the authority, direction, and control of the USD(AT&L), shall, in relation to the Expanded HAP:

(1) Prescribe and monitor administrative and operational policies and procedures.

(2) Determine applicable personnel benefits and policies, in coordination with the Under Secretary of Defense (Comptroller) and the Under Secretary of Defense for Personnel and Readiness.

(3) Serve as senior appeals authority for appeals submitted by applicants.

(b) The Under Secretary of Defense (Comptroller) shall, in relation to the Expanded HAP:

(1) Implement policies and prescribe procedures for financial operations.

(2) Review and approve financial plans and budgets.

(3) Issue financing and obligation authorities.

(4) Administer the DoD Homeowners Assistance Fund.

(c) The Deputy Assistant Secretary of the Army for Installations and Housing (DASA(I&H)), subject to review by the DUSD(I&E), as the DoD Executive Agent for administering, managing, and executing the HAP, shall:

(1) Establish detailed policies and procedures for execution of the program.

(2) Maintain necessary records, prepare reports, and conduct audits.

(3) Publish regulations and forms.

(4) Disseminate information on the program.

(5) Forward copies of completed responses to congressional inquiries and appeals to the DUSD(I&E) for information.

(6) Serve as the initial approval authority for HAP appeals. The DASA(I&H) may approve appeals and shall forward recommendations for Expanded HAP denial to the DUSD(I&E) for decision.

(d) The Heads of the DoD Components and the Commandant of the Coast Guard, by agreement of the Secretary of Homeland Security, shall:

(1) Designate at least one representative at the headquarters level to work with DASA(I&H) and HQUSACE HAP offices.

(2) Require each installation to establish a liaison with the nearest HAP field office to obtain guidance or assistance on the HAP.

(3) Supply the HQUSACE HAP office a copy of any internal regulation, instruction, or guidance published relative to the Expanded HAP program.

(4) Disseminate information on the Expanded HAP and, upon request, supply HAP field offices with data pertaining to the Expanded HAP.

(e) HQUSACE. (1) *Real Estate Community of Practice (CEMP–CR)*. The Director of Real Estate, acting for the Chief of Engineers, has been delegated authority and responsibility for the execution of HAP. CEMP–CR, as the central office for HAP, is responsible for the following:

(i) Supervision, interagency coordination, development of procedures, policy guidance, and processing of appeals forwarded from the districts and HQUSACE Major Subordinate Commands (MSC).

(ii) Maintaining an Expanded HAP central office and Expanded HAP field offices.

(iii) Processing appeals from the MSC where applicant agreement cannot be reached. Such appeals will be forwarded, in turn, to DASA(I&H) for consideration.

(2) *Districts*. Districts designated by the Director of Real Estate, and their Chiefs of Real Estate, have been delegated the authority to administer, manage, and execute the HAP on behalf of all applicants. Districts (as identified in § 239.9 of this part) are responsible for the following:

(i) Accepting applications (DD Form 1607) for HAP and Expanded HAP benefits.

(ii) Determining the eligibility of each applicant for Expanded HAP assistance using the criterion established by the DUSD(I&E).

(iii) Determining and advising each applicant on the most appropriate type of assistance.

(iv) Determining amounts to be paid, consistent with DoD policy, and making payments or authorizing and arranging for acquisition or transfer of the applicant's property.

(v) Maintaining, managing, and disposing of acquired properties or contracting for such services with private contractors.

(vi) Processing all appeals, except where applicant agreement cannot be reached. Such appeal cases will be forwarded, in turn, to the MSC, CEMP–CR, and DASA(I&H) for consideration.

(3) *HQUSACE Major Subordinate Commands (MSC).* MSCs have been delegated the authority to perform oversight and review of district program management and based upon that review, or in response to specific requests, to provide local policy guidance to the districts and recommend program changes or forward appeals to CEMP–CR for consideration.

### § 239.8 Funding.

(a) *Revolving fund account.* The revolving fund account contains money appropriated in accordance with the ARRA, and receipts from the management, rental, or sale of the properties acquired.

(b) *Appropriation, receipts, and allocation.* Funds required for administration of the program will be made available by DoD to the HQUSACE. Funds provided will be used for purchase or reimbursement as provided herein and to defray expenses connected with the acquisition, management, and disposal of acquired properties, including payment of mortgages or other indebtedness, as well as the cost of staff services, contract services, Title Insurance, and other indemnities.

(c) *Obligation of funds.* For government acquisition of homes under the authority of this Rule, funds will be committed prior to the Government's offer to purchase is conveyed to the applicant. The obligation will occur upon timely receipt of the accepted offer returned by the applicant.

### § 239.9 Application processing procedures.

(a) *Acceptance of applications.* The district will accept applications (DD Form 1607) for HAP and Expanded HAP benefits submitted through the U.S. Mail or other delivery system direct to the appropriate district office. *See* § 239.15 of this part for a list of District field offices.

(1) Applications for benefits by members of the Armed Forces due to eligibility pursuant to § 239.6(a)(4) of this part because of permanent reassignment must be submitted directly to the U.S. Army Corps of Engineers field office identified in § 239.15 of this part by U.S. Mail or commercial delivery service, and must be postmarked or deposited with the commercial delivery service no later than September 30, 2012. Applications postmarked or deposited after September 30, 2012, will not be accepted.

(2) Applications of eligible personnel for benefits due to eligibility pursuant to § 239.6(a)(3) of this part because of BRAC 2005 must be submitted directly to the U.S. Army Corps of Engineers field office identified in § 239.15 of this part by U.S. Mail or commercial delivery service, and must be postmarked or deposited with the commercial delivery service no later than September 30, 2012. Applications postmarked or deposited after September 30, 2012, will not be accepted.

(b) *Application Form (DD Form 1607).* Should the DD form 1607 not provide all the information required to process Expanded HAP applications, Districts must provide applicants appropriate supplemental instructions.

(c) *Assignment of application numbers.* (1) *Assignment of application numbers.* When a District receives an application, it will assign the application number and develop and maintain an individual file for each property. Applications for programs located in another District will not be assigned a number, but will be forwarded immediately to the District having jurisdiction. An application number, once assigned, will not be reassigned regardless of the disposition of the original application. Reactivation or reopening of a withdrawn application does not require a new application or application number.

(2) *Method of assignment.* An application will be numbered in the following manner:

(i) *Agency code*. Code to indicate the Federal agency accountable for installation being closed or applicant support:

(A) 1—Army

(B) 2—Air Force

(C) 3—Navy

(D) 4—Marine Corps

(E) 5—Defense Agencies

(F) 6—Non-Defense Agencies

(G) 7—U.S. Coast Guard

(ii) *District code*.

(A) Sacramento: L2

(B) Savannah: K6

(C) Fort Worth: M2

(iii) *Applicant category code* (military/civilian/wounded/surviving spouse/PCS):

(A) 1 = Civilian (BRAC)

(B) 2 = Military (BRAC)

(C) 3 = Non-appropriated Fund Instrumentalities

(D) 4 = Military Wounded

(E) 5 = Civilian Wounded

(F) 6 = Surviving Spouse (military deceased)

(G) 7 = Surviving Spouse (civilian employee deceased)

(H) 8 = Military PCS

(iv) *State:* State abbreviation.

(v) *Installation number:* The five digit ZIP Code of the applicant's present (former, if they have already moved) installation, offices, or unit address. Examples are:

(A) For a BRAC 05 applicant moving from the closing Saint Louis, Missouri, DFAS office to Minneapolis, Minnesota, use the ZIP Code of the city from which he or she is moving, e.g., 63101, for St. Louis, Missouri.

(B) For wounded warrior or surviving spouse who moved from primary residence, use present installation or home town.

(C) For Service members who are eligible based on PCS criteria, use ZIP Code of installation from which they depart.

(vi) *Application Number:* Sequential beginning with 0001.

*Example 1:*

*2 K6 2 NH0 3 8 0 30 0 0 1*

Air Force-SAS Dist.-Mil BRAC-NH-Pease AFB-Applicant #

*Example 2:*

*1–K 6– 4– NY–1 3 6 0 2–0 0 0 2*

Army-SAS Dist-Mil Wounded-NY-Ft Drum-Applicant #

(d) *Real Estate Values*. (1) Because the PFMV is the purchase price for Expanded HAP, no appraisal of the property is required. Supporting documentation to establish purchase price must be furnished by the applicant. Generally, Form HUD–1 will suffice.

(2) Districts are responsible for ensuring primary residence values are appropriate and applicants receive deserved benefit payments. Districts will use the CoreLogic AVM to determine the valuation of individual primary residences.

[75 FR 69873, Nov. 16, 2010, as amended at 77 FR 39628, July 5, 2012]

### § 239.10 Management controls.

(a) *Management systems*. Headquarters, USACE has an existing information management system that manages all information related to the HAP program.

(1) *HAPMIS*. The Homeowners Assistance Program Management Information System (HAPMIS) provides program management assistance to field offices and indicators to managers at field offices, regional headquarters and HQUSACE at the Service Member level of detail. The Privacy Act applies to this program and the management information system to protect the privacy of Expanded HAP applicant information.

(2) *CEFMS*. The Corps of Engineers Financial Management System (CEFMS) provides detailed funds execution and tracking, to include:

(i) Funds issued to field offices for execution accountability.

(ii) Funds committed and obligated by applicant category, installation, state and county.

(b) *System of Records Notice (SORN)*. The Privacy Act limits agencies to maintaining ''only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required to be accomplished by statute or Executive order of the President.'' 5 U.S.C. 552a(e)(1). The SORN for the Homeowners Assistance Program can be found at *http://www.defenselink.mil/privacy/notices/army/A0405-10q_CE.shtml*. The Privacy Impact

Assessment for the system can be reviewed at: *http://www.army.mil/ciog6/privacy.html*. Individuals seeking to determine whether information about them is contained in this system should address written inquiries to the Chief of Engineers, Headquarters U.S. Army Corps of Engineers, *Attn:* CERE–R, 441 G Street, NW., Washington, DC 20314–1000.

### § 239.11 Appeals.

Applicant appeals will be processed at the district level and forwarded through HQUSACE for review. The HQUSACE may approve an appeal but must forward any recommendation for denial to the DASA(I&H) for review and consideration. DASA(I&H) may approve an appeal but must forward recommendations for denial to the DUSD(I&E) for decision. The DUSD(I&E) is the senior appeals authority for appeals submitted by applicants.

### § 239.12 Tax documentation.

For disbursed funds, tax documents (if necessary) will be certified by HQUSACE Finance Center and distributed to applicants and the Internal Revenue Service (IRS) annually.

### § 239.13 Program performance reviews.

HQUSACE will prepare monthly program performance reviews using the HAPMIS; HQUSACE Annual Management Command Plan and Management Control Checklist. In addition, program monitoring will also be conducted (through HAPMIS and CEFMS reports) at the Headquarters Department of the Army and at the DUSD(I&E) levels.

### § 239.14 On-site inspections.

The HQUSACE and its major subordinate commands may conduct periodic on-site inspections of district offices and monitor program execution through HAPMIS and CEFMS reports.

### § 239.15. List of HAP Field Offices.

HAP FIELD OFFICE

U.S. Army Engineer District, Savannah, Corps of Engineers, Attn: CESAS–RE–HM, 100 West Oglethorpe Avenue, Savannah, Georgia 31401–3604, 1–800–861–8144, Internet Address: *http://www.sas.usace.army.mil*.

HAP CENTRAL OFFICE

Homeowners Assistance Program, HQ U.S. Army Corps of Engineers Real Estate Directorate, Military Division, 441 G Street NW., Washington, DC 20314–1000.

[77 FR 39629, July 5, 2012]

## PART 240—DOD INFORMATION ASSURANCE SCHOLARSHIP PROGRAM (IASP)

Sec.
240.1 Purpose.
240.2 Applicability.
240.3 Definitions.
240.4 Policy.
240.5 Responsibilities.
240.6 Retention program.
240.7 Recruitment program.

AUTHORITY: 10 U.S.C. 2200, 10 U.S.C. 7045.

SOURCE: 77 FR 14955, Mar. 14, 2012, unless otherwise noted.

### § 240.1 Purpose.

This part implements policy, responsibilities and procedures for executing the DoD Information Assurance Scholarship Program (IASP).

### § 240.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereafter referred to collectively as the ''DoD Components''). The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

### § 240.3 Definitions.

The following definitions are used in this part:

*CAE.* A collective term that refers to both CAE/IAE and CAE–R.

*CAE/IAE.* An institution of higher education that has met established criteria for IA education and has been jointly designated by the Department of Homeland Security and the NSA as a national center of excellence.

*CAE–R.* An institution of higher education which has met established criteria for IA research and has been jointly designated by the Department of Homeland Security and the NSA as a national center of excellence.

*IA.* For the purpose of this part, the term ''IA'' includes computer security, network security, cybersecurity, cyber operations, and other relevant IT related to information assurance pursuant to 10 U.S.C. 2200e.

*IT.* For the purpose of this part, the term ''IT'' refers to any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. ''IT'' includes computers, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related resources.

*Institution of Higher Education.* For the purpose of this part and as defined in 20 U.S.C. 1001, an ''institution of higher education'' refers to an educational institution in any state that:

(1) Admits as regular students only individuals who possess a certificate of graduation from a school providing secondary education, or the recognized equivalent of such a certificate;

(2) Is legally authorized to provide a program of education beyond secondary education;

(3) Provides an educational program that awards bachelor's degrees, or provides no less than a 2-year program that is acceptable for full credit toward a degree;

(4) Is a public or other nonprofit institution; and

(5) Is accredited by a nationally recognized accrediting agency or association, or if not so accredited, is an institution that has been granted preaccreditation status by such an agency or association that has been recognized by the Secretary of Education for the granting of preaccreditation status, and the Secretary has determined that there is satisfactory assurance that the institution will meet the accreditation standards of such an agency or association within a reasonable time.

*Partner University.* A CAE that has joined in academic partnership with the NDU IRMC to award master's and doctoral degrees through the DoD IASP.

*Principal Investigator.* The primary point of contact at each CAE, responsible for publicizing the DoD IASP to potential recruitment students and working with students during the application process. Principal investigators also serve as the primary contact for recruitment students and retention students who have transferred from the IRMC to a partner university.

*Recruitment Program.* The portion of the DoD IASP available to qualified non-DoD students currently enrolled or accepted for enrollment at a designated CAE.

*Recruitment Students.* Non-DoD students currently enrolled at a designated CAE who are active participants in the DoD IASP recruitment program.

*Retention Program.* The portion of the DoD IASP available to full-time, active duty Service personnel and permanent civilian employees of the DoD Components.

*Retention Students.* Full-time active duty Service personnel and permanent civilian employees of the DoD Components who are active participants in the DoD IASP retention program.

### § 240.4 Policy.

It is DoD policy that:

(a) The Department of Defense shall recruit, develop, and retain a highly skilled cadre of professionals to support the critical IA and information technology (IT) management, technical, digital and multimedia forensics, cyber, and infrastructure protection functions required for a secure network-centric environment.

(b) The DoD IASP shall be used to attract new entrants to the DoD IA and IT workforce and to retain current IA and IT personnel necessary to support

the DoD's diverse warfighting, business, intelligence, and enterprise information infrastructure requirements.

(c) The academic disciplines, with concentrations in IA eligible for IASP support include, but are not limited to: biometrics, business management or administration, computer crime investigations, computer engineering, computer programming, computer science, computer systems analysis, cyber operations, cybersecurity, database administration, data management, digital and multimedia forensics, electrical engineering, electronics engineering, information security (assurance), information systems, mathematics, network management/operations, software engineering, and other similar disciplines as approved by DoD Chief Information Officer (DoD CIO).

(d) Subject to availability of funds, the DoD may provide grants to institutions of higher education for faculty, curriculum, and infrastructure development and academic research to support the DoD IA/IT critical areas of interest.

**§ 240.5 Responsibilities.**

(a) The Department of Defense Chief Information Officer (DoD CIO) shall:

(1) Establish overall policy and guidance to conduct and administer the DoD IASP pursuant to Deputy Secretary of Defense Memorandum, ''Delegation of Authority and Assignment of Responsibility under section 922 of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001,'' October 30, 2000.

(2) Develop an annual budget recommendation to administer the DoD IASP and provide academic scholarships and grants in accordance with 10 U.S.C. 2200 and 7045.

(3) Oversee program administration and execution by the Director, National Security Agency (DIRNSA).

(4) Chair the DoD IASP Steering Committee, established pursuant to DoD Instruction 5105.18, to oversee and provide program direction over:

(i) Student eligibility criteria.

(ii) Grant and capacity building selection criteria for awards to CAEs.

(iii) Final approval for the allocation of individual DoD IASP scholarships and grants.

(iv) Communications and marketing plans.

(v) DoD IASP metrics and analysis of performance results, including student and CAE/IAE feedback.

(b) The DIRNSA, under the authority, direction, and control of the Under Secretary of Defense for Intelligence, shall:

(1) Serve as the DoD IASP Executive Administrator to:

(i) Implement the DoD IASP and publish in writing all of the criteria, procedures, and standards required for program implementation. Responsibilities are to:

(A) Implement the scholarship application and selection procedures for recruitment and retention students.

(B) Establish procedures for recruiting students to meet service obligations through employment with a DoD Component upon graduation from their academic program.

(C) Ensure that all students' academic eligibility is maintained, service obligations are completed, and that reimbursement obligations for program disenrollment are fulfilled.

(D) Establish procedures for CAEs and employing DoD Components to report on students' progress.

(E) Maintain appropriate accounting for all funding disbursements.

(F) Execute the debt collection process on the behalf of the DoD and in accordance with Volume 5 of DoD 7000.14–R for scholarship recipients who fail to complete a period of obligated service resulting from their participation in the DoD IASP. This includes, but is not limited to, exercising the authority under 10 U.S.C. 2200a(e), consistent with the relevant provisions of 37 U.S.C. 303a(e), to determine an amount owed and to take necessary actions to collect the amount owed, and to act upon requests for waivers, in whole or in part, when determined to be appropriate.

(ii) Subject to availability of funds, make grants on behalf of the DoD CIO to institutions of higher education to support the establishment, improvement, and administration of IA education programs pursuant to 10 U.S.C. 2200, 2200b, and 7045.

(A) Develop and implement the annual solicitation for proposals for grants.

(B) Coordinate the review process for grant proposals.

(C) Distribute grant funding and maintain appropriate accounting.

(D) Establish annual reporting procedures for grant recipients (CAEs) to detail the resulting accomplishments of their grant implementations.

(E) Obtain written documentation from grant recipients (CAEs) on how grant funding was utilized and the resulting accomplishments.

(2) Provide representation to the DoD IASP Steering Committee and provide briefings and reports, as required, to effect proper oversight by the DoD CIO and the DoD IASP Steering Committee.

(3) Maintain databases to support the analysis of performance results.

(c) The Chancellor of the Information Resources Management College (IRMC) of the National Defense University, under the authority, direction and control of the Chairman of the Joint Chiefs of Staff, shall:

(1) Establish partner university agreements with CAEs to provide master's and doctoral degree opportunities to current, former, and future IRMC students who are awarded retention scholarships.

(2) Maintain records of DoD IASP student enrollments and graduates and provide data to the DoD IASP Executive Administrator and the DoD CIO as required.

(3) Serve as the liaison between IRMC retention students, their follow-on partner university, and the DoD IASP Executive Administrator.

(4) Provide academic representation to the DoD IASP Steering Committee and provide briefings and reports, as required, on the IRMC portion of the DoD IASP retention program.

(d) The Heads of the DoD Components shall:

(1) Determine the requirement for DoD IASP usage as a primary vehicle to recruit and retain IA and IT personnel.

(2) Identify the office of primary responsibility for administering the DoD IASP within their DoD Component.

(3) Establish DoD Component-specific nomination, selection, and post-academic assignment criteria for DoD IASP retention students.

(i) Nominated personnel shall be high performing employees who are rated at the higher levels of the applicable performance appraisal system and demonstrate sustained quality performance with the potential for increased responsibilities. All individuals must be US citizens and be able to obtain a security clearance.

(ii) Nominations must fulfill specific personnel development requirements for both the individual nominee and the nominating organization.

(iii) Salaries of retention scholarship recipients shall be paid by the nominating DoD Component. When deemed necessary, DoD Components are responsible for personnel backfill while recipients are in school.

(iv) Payback assignments of graduated students shall provide relevant, follow-on utilization of academic credentials in accordance with DoD Component mission requirements.

(v) Retention students shall fulfill post-academic service obligations pursuant to 10 U.S.C. 2200 and 7045. Members of the Military Services shall serve on active duty while fulfilling designated DoD Component service obligations. DoD civilian employees shall sign a continued service agreement that complies with section 2200 of title 10, United States Code, prior to commencement of their education, to continue service within the Department of Defense upon conclusion of their education, for a period equal to three times the length of the education period. The period of obligated service is in addition to any other period for which the recipient is obligated to serve on active duty or in the civil service, as the case may be. Individuals, who fail to complete the degree program satisfactorily, or to fulfill the service commitment, shall be required to reimburse the United States pursuant to 10 U.S.C. 2200a(e) for payments paid to them through the DoD IASP unless a waiver, in whole or in part, is granted by the DoD IASP Executive Administrator. Head of Components are responsible to ensure enforcement of these agreements.

(4) Determine annual billet requirements for recruitment students (the number of DoD IASP recruitment scholars who will be placed in full-time employment positions with the Component upon graduation). This is required to ensure that IASP recruitment graduates have placement upon graduation. DoD Components who identify billet requirements for recruitment students shall:

(i) Assess DoD Component skill requirements to determine skill gaps and providing the annual recruitment student requirement to the DoD IASP Executive Administrator.

(ii) Participate in the selection process for recruitment students.

(iii) Coordinate and process security clearances for selected recruitment scholarship recipients.

(iv) Allocate billets for an internship period (if applicable).

(v) Assign mentors to recruitment students.

(vi) Determine post-academic billet assignments for recruitment students prior to the end of the students' academic program.

(5) Participate in the evaluation processes to assess and recommend improvements to the DoD IASP.

**§ 240.6 Retention program.**

(a) The DoD IASP retention program is open to qualified DoD civilian employees and Service members. Active duty military officers and permanent DoD civilian employees may apply for a master's or doctoral degree program; enlisted personnel may apply for a master's program. DoD Components may further restrict the eligibility of applicants based on Component requirements.

(b) There are three DoD academic institutions participating in the DoD IASP: the Air Force Institute of Technology (AFIT) at Wright-Patterson Air Force Base in Dayton, Ohio; the IRMC of the National Defense University (NDU) at Fort McNair in Washington, DC; and the Naval Postgraduate School (NPS) in Monterey, California. Students at AFIT and NPS attend full-time programs. Participants may attend the IRMC either full or part-time to complete the first part of their required courses and then select a follow-on partner university to complete their remaining degree requirements either full or part-time. There are no part-time doctoral programs. All candidates must meet the eligibility requirements for their selected program, which are outlined in DoD IASP Academic Programs for Retention Students.

(1) Military officers and DoD civilian employees may apply to attend any one of the three DoD academic institutions.

(2) Enlisted personnel may attend AFIT or the NPS, which is authorized to enroll enlisted DoD IASP participants pursuant to 10 U.S.C. 2200 and 7045.

(c) Students must select a degree program in one of the academic disciplines listed in § 240.4(c) and in accordance with DoD Component requirements.

(d) Scholarship funding for AFIT, IRMC, the partner universities, and NPS includes full tuition costs and required fees and books. All travel costs and necessary position back-fill for individuals selected for the program must be paid by the nominating DoD Component. Retention students shall continue to receive their military pay or civilian salary from their DoD Component throughout their course of study.

(e) DoD Component nominations are due by January 31st each year. The student nomination process is outlined in the DoD IASP Nomination Process for Retention Students.

(f) Retention students shall fulfill post-academic service obligations pursuant to 10 U.S.C. 2200a and 7045. Service members shall serve on active duty while fulfilling designated DoD Component service obligations. DoD civilian employees shall sign a continued service agreement that complies with 10 U.S.C. 2200a, prior to commencement of their education, to continue service within the DoD upon conclusion of their education, for a period equal to three times the length of the education period. The period of obligated service is in addition to any other period for which the recipient is obligated to serve on active duty or in the civil service, as the case may be. Individuals who fail to complete the degree program satisfactorily or to fulfill the service commitment shall be required

to reimburse the United States pursuant to 10 U.S.C. 2200a(e) for payments made to them through the DoD IASP unless a waiver, in whole or in part, is granted by the DoD IASP Executive Administrator.

(g) DoD IASP retention participants are obligated to remain in good standing in their degree programs, to continue in service as civilian employees or members of the Military Services, and where applicable, to repay program costs for failure to complete the degree program satisfactorily, or to fulfill the service commitment pursuant to 10 U.S.C. 2200 and 7045, DoD policy, and the policies of the respective DoD Component.

**§ 240.7 Recruitment program.**

(a) Annually, in November, the DoD IASP Executive Administrator announces a solicitation for proposal from CAEs interested in participating in the DoD IASP. Graduate students and rising junior or senior undergraduates accepted at or enrolled in one of these institutions may apply for full scholarships to complete a bachelor's, master's, or a doctoral degree, or graduate (post-baccalaureate) certificate program in one of the disciplines defined in § 240.4(c). Student application requirements are included in the solicitation proposal released by NSA.

(b) DoD Component recruitment student requirements are due to the DoD IASP Executive Administrator each year by January 31st.

(c) The student selection process occurs annually in April. The selection process is outlined in the DoD IASP Nomination Process for Recruitment Students.

(d) Recruitment students are provided scholarships, covering the full cost of tuition and selected books and fees. Students are also provided a stipend to cover room and board expenses.

(e) Recruitment students may be required to complete a student internship, depending on the length of their individual scholarship. For example, if a scholar receives a scholarship their junior year, an internship is required. If they receive the scholarship their senior year, an internship is not required. DoD Components typically use the authority granted in 5 CFR 213.3102(r) to arrange the internship.

(f) Pursuant to 10 U.S.C. 2200a, all recruitment students shall sign a service agreement prior to commencement of their education and incur a service commitment, which commences after the award of the DoD IASP authorized degree on a date to be determined by the relevant DoD Component. The obligated service in DoD shall be as a civilian employee of the Department or as an active duty enlisted member or officer in one of the Military Services.

(1) Individuals selecting employment in the civil service shall incur a service obligation of 1 year of service to the DoD upon graduation for each year or partial year of scholarship they receive, in addition to an internship, if applicable. Pursuant to the authority granted in 10 U.S.C. 2200a(g) and the Under Secretary of Defense for Personnel and Readiness Memorandum, ''Implementation Authority to Employ Individuals Completing Department of Defense Scholarship or Fellow Programs,'' April 5, 2010. DoD Components may appoint DoD IASP graduates to IT positions as members of the excepted service. Upon satisfactory completion of 2 years of substantially continuous service, DoD Components may then convert these individuals to career or career-conditional appointments without competition.

(2) Individuals enlisting or accepting a commission to serve on active duty in one of the Military Services shall incur a service obligation of a minimum of 4 years on active duty in that Service upon graduation. The Military Services may establish a service obligation longer than 4 years, depending on the occupational specialty and type of enlistment or commissioning program selected.

(g) Individuals in the recruitment program who fail to complete the degree program satisfactorily or to fulfill the service commitment upon graduation shall be required to reimburse the United States pursuant to 10 U.S.C. 2200a(e) for payments made to them through the DoD IASP unless a waiver, in whole or in part, is granted by the DoD IASP Executive Administrator.

# PART 241—PILOT PROGRAM FOR TEMPORARY EXCHANGE OF INFORMATION TECHNOLOGY PERSONNEL

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AUTHORITY: Pub. L. 111–84, sec. 1110, as amended.

SOURCE: 77 FR 36917, June 20, 2012, unless otherwise noted.

## §241.1 Purpose.

(a) The purpose of this part is to implement section 1110 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111–84), which authorizes DoD to implement a Pilot Program for the Temporary Exchange of Information Technology (IT) Personnel. This statute authorizes the temporary assignment of DoD IT employees to private sector organizations. This statute also gives DoD the authority to accept private sector IT employees assigned under the Pilot. This program is referred to as the Information Technology Exchange Program (ITEP) pilot.

(b) DoD Component authorized approving official may approve assignments as a mechanism for improving the DoD workforce's competency in using IT to deliver government information and services. DoD Component authorized approving official may not make assignments under this part to circumvent personnel ceilings, or as a substitute for other more appropriate personnel decisions or actions. Approved assignments must meet the strategic program goals of the DoD Components. The benefits to the DoD Components and the private sector organizations are the primary considerations in initiating assignments; not the desires or personal needs of an individual employee.

## §241.2 Definitions.

In this part:

*Detail* means the assignment of a DoD employee to a private sector organization without a change of position; or the assignment of a private sector employee to a DoD Component without a change of position.

*DoD employee* means a Federal civilian employee of the DoD.

*Exceptional employee* means performance meets or exceeds all standards established at the fully successful level or above and makes significant contributions towards achieving the organizational goals. Participating organizations should target highly motivated, disciplined employees.

*Information technology (IT)* as defined means use of computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including support services), and related resources. IT includes the planning, organizing, staffing, directing, integrating, or controlling of information technology, including occupational specialty areas such as systems administration, IT project management, network services, operating systems, software application, cyber security, enterprise architecture, policy and planning, internet/web services, customer support, data management and systems analysis.

*Private sector organization* means nonpublic or commercial individuals and businesses, nonprofit organizations, academia, scholastic institutions, and nongovernmental organizations.

*Small business concern* means a business concern that satisfies the definitions and standards by the Administrator of the Small Business Administration (SBA) as defined by 5 U.S.C. 3703(e)(2)(A).

## §241.3 Assignment authority.

The Secretary of Defense may with the agreement, of the private sector organization concerned, arrange for the temporary assignment of a DoD employee to a private sector organization or accept a private sector employee

from a private sector organization to a DoD Component.

### § 241.4 Eligibility.

(a) To be eligible for an ITEP detail, a DoD or private sector employee must:

(1) Work in the field of IT;

(2) Be equivalent at the GS–11 level or above

(3) Be considered an exceptional employee, meet or exceed successful performance levels and makes significant contributions towards achieving organizational goals;

(4) Be expected to assume increased IT responsibilities in the future;

(5) Be currently employed by an organization interested in participating in the ITEP pilot; and

(6) Obtain supervisor and company approval before an employee can participate in an ITEP detail.

(b) In addition to meeting the requirements of paragraph (a) of this section, the DoD employee must be serving under a career or career-conditional appointment or an appointment of equivalent tenure in the excepted service.

(c) The private sector employee must meet citizenship requirements for Federal employment in accordance with 5 CFR 7.3 and 338.101, as well as any other statutory requirements. When a position requires a security clearance, the person must possess, or be able to obtain an appropriate security clearance.

(d) Proposed assignment meets applicable requirements of section 209(b) of the E-Government Act of 2002.

### § 241.5 Written agreements.

(a) Before a detail begins, the DoD Component authorized approving official, private sector organization authorized approving official and the employee to be assigned to the ITEP detail must sign a three-party agreement. Prior to the agreement being signed the relevant legal office for the DoD Component shall review and approve the agreement. The agreement must include, but is not limited to the following elements:

(1) The duties to be performed and length of detail;

(2) Describe the core IT competencies and technical skills that the detailee will be expected to enhance or acquire;

(3) Identification of the supervisor of detailee.

(b) The agreement shall require DoD employees, upon completion of the assignment serve in the civil service for a period equal to the length of the detail; and

(c) Provide that if the employee of the DoD or of the private sector organization (as the case may be) fails to carry out the agreement, such employee shall be liable to the United States for payment of all expenses of the assignment, unless that failure was for good and sufficient reason as determined by the Secretary of Defense.

### § 241.6 Length of details.

(a) A detail shall be for a period of not less than 3 months and not more than 1 year, and may be extended in 3-month increments for a total of not more than 1 additional year by DoD Components and private sector organizations authorized approving officials.

(b) This extension may be granted in 3-month increments not to exceed 1 year. No assignment may commence after September 30, 2018.

[77 FR 36917, June 20, 2012, as amended at 79 FR 27488, May 14, 2014]

### § 241.7 Termination.

An assignment may, at any time and for any reason be terminated by the DoD or the private sector organization concerned.

### § 241.8 Terms and conditions.

(a) A DoD employee assigned under this part:

(1) Remains a Federal employee without loss of employee rights and benefits attached to that status. These include, but are not limited to:

(i) Consideration for promotion;

(ii) Leave accrual;

(iii) Continuation of retirement benefits and health, life, and long-term care insurance benefits; and

(iv) Pay increases the employee otherwise would have received if he or she had not been assigned;

(2) Remains covered for purposes of the Federal Tort Claims Act, and for

purposes of injury compensation as described in 5 U.S.C. chapter 81; and

(3) Is subject to any action that may impact the employee's position while he or she is assigned.

(b) An employee of a private sector organization:

(1) May continue to receive pay and benefits from the private sector organization from which such employee is assigned;

(2) Is deemed to be an employee of the DoD for the purposes of:

(i) Chapter 73 of title 5, United States Code (Suitability, Security, and Conduct);

(ii) Sections 201 (Bribery of Public Officials and Witnesses), 203 (Compensation to Members of Congress, Officers and Employees Against and Other Matters Affecting the Government), 205 (Activities of Officers and Employees in Claims Against Other Matters Affecting the Government), 207 (Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches), 208 (Acts Affecting a Personal Financial Interest), 209 (Salary of Government Officials and Employees Payable only by the United States), 603 (Making Political Contributions), 606 (Intimidation to Secure Political Contributions), 607, (Place of Solicitation), 643 (Accounting Generally for Public Money), 654 (Officer or Employee of the United States Converting Property of Another, 1905 (Disclosure of Confidential Information Generally), and 1913 (Lobbying with Appropriated Moneys) of title 18, United States Code;

(iii) Sections 1343, 1344, and 1349(b) of title 31, United States Code;

(iv) The Federal Tort Claims Act and any other Federal tort liability statute;

(v) The Ethics in Government Act of 1978;

(vi) Section 1043 of the Internal Revenue Code of 1986; and

(vii) Section 27 of the Office of Federal Procurement Policy Act; and

(3) May not have access to any trade secrets or to any other nonpublic information which is of commercial value to the private sector organization from which he or she is assigned;

(4) Is subject to such regulations as the President may prescribe;

(5) Is covered by 5 U.S.C. chapter 81, Compensation for Work Injuries; and

(6) Does not have any right or expectation for Federal employment solely on the basis of his or her assignment.

### § 241.9 Costs and reimbursements.

(a) *Payment of Salary and Allowances.* The lending organization (DoD or private sector organization) has full responsibility for payment of all salary and allowances to their employee participating in an ITEP pilot. Both DoD and private sector employees participating in the ITEP pilot are entitled to all benefits afforded to similar employees of their respective lending organizations, including medical care, according to subscribed plans and Worker's Compensation for injuries sustained in the line of duty.

(b) *Business Training and Travel Expenses.* The engaging organization (recipient of the ITEP pilot participant) may pay for any business training and travel expenses incurred by the employee while participating in the ITEP pilot.

(c) *Prohibition.* A private sector organization may not charge the DoD or any agency of the Federal Government, as direct or indirect costs under a Federal contract, for the costs of pay or benefits paid by that organization to an employee assigned to a DoD Component.

### § 241.10 Small business consideration.

The DoD CIO on behalf of the Secretary of Defense shall:

(a) Ensure that, of the assignments made each year, at least 20 percent are from small business concerns (as defined by 5 U.S.C. 3703(e)(2)(A)).

(b) Take into consideration the questions of how assignments might be used to help meet the needs of the DoD with respect to the training of employees in IT.

### § 241.11 Numerical limitation.

The ITEP Pilot is an opportunity for the exchange of knowledge, experience and skills between DoD and the private sector. The DoD has the flexibility to send their employees to the private sector or receive private sector employees, or participate in a one-for-one exchange. In no event may more than

10 employees participate in assignments under this section at any given time.

### § 241.12 Reporting requirements.

(a) For each of fiscal years 2010 through 2018, the Secretary of Defense shall submit annual reports to the congressional defense committees, not later than 1 month after the end of the fiscal year involved, a report on any activities carried out during such fiscal year, including the following information:

(1) Respective organizations to and from which an employee is assigned;

(2) Positions those employees held while they were so assigned;

(3) Description of the tasks they performed while they were so assigned; and

(4) Discussion of any actions that might be taken to improve the effectiveness of the Pilot program, including any proposed changes in the law.

(b) These reports will be prepared and submitted by DoD CIO in coordination with DoD Components participating in the Pilot, to the appropriate congressional committees.

[77 FR 36917, June 20, 2012, as amended at 79 FR 27488, May 14, 2014]

### § 241.13 Implementation.

The DoD CIO is responsible for administering, coordinating and implementing the Pilot Program for the Temporary Exchange of Information Personnel, referred to as the Information Technology Exchange Program (ITEP) pilot. The DoD CIO will coordinate with DoD Components.

## PART 243—DEPARTMENT OF DEFENSE RATEMAKING PROCEDURES FOR CIVIL RESERVE AIR FLEET CONTRACTS

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AUTHORITY: Section 366 National Defense Authorization Act for FY12 (Pub. L. 112–81)
10 U.S.C. Chap 931, Section 9511a.

SOURCE: 80 FR 30358, May 28, 2015, unless otherwise noted.

### § 243.1 Purpose.

The Secretary of Defense (Secretary) is required to determine a fair and reasonable rate of payment for airlift services provided to the Department of Defense (DoD) by civil air carriers and operators (hereinafter collectively referred to as ''air carriers'') who are participants in the Civil Reserve Air Fleet program (CRAF). This regulation provides the authority and methodology for such ratemaking and designates the United Stated Transportation Command (USTRANSCOM) as the rate setter for negotiated uniform rates for DoD airlift service contracts in support of the CRAF. This methodology supports a viable CRAF mobilization base that ensures sufficient capacity in time of war, contingency and humanitarian relief efforts.

### § 243.2 Applicability.

This section governs all contracts with the Department of Defense where awards to the air carriers, either through individual contracts or teaming arrangements, are commensurate with the relative amount of airlift capability committed to the Civil Reserve Air Fleet (CRAF).

### § 243.3 Definitions.

*Air carrier*. ''Air carrier'' is defined in 49 U.S.C. 40102(a)(2) as ''a citizen of the United States undertaking by any means, directly or indirectly, to provide air transportation.'' Specifically to this ratemaking procedure, 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 services are included. Commercial air carriers under contract with, or operating on behalf of, the DoD shall have a Federal Aviation Administration (FAA) or CAA certificate. The policy contained in this directive applies only to air carriers operating fixed wing aircraft under CRAF international airlift services.

*Aircraft class*. Distinct categories of aircraft with similar broad characteristics established for ratemaking purposes. These categories include aircraft such as large passenger, medium passenger, large cargo, etc. They are determined by USTRANSCOM and identified in Published Uniform Rates and Rules for International Service Appendix A (Published in FedBizOps).

*Civil Reserve Air Fleet International Airlift Services*. Those services provided in support of the Civil Reserve Air Fleet contract, whereby contractors provide personnel, training, supervision, equipment, facilities, supplies and any items and services necessary to perform international long-range and short-range airlift services during peacetime and during CRAF activation in support of the Department of Defense (DoD). Implements the Fly CRAF Act. See 49 U.S.C. 41106.

*Civil Reserve Air Fleet (CRAF) Assured Business Guarantees*. *See* 10 U.S.C. 9515.

*Civil Reserve Air Fleet (CRAF) Program*. The Civil Reserve Air Fleet (CRAF) is a wartime readiness program, based on the Defense Production Act of 1950, as amended, (50 U.S.C. App. 2601 *et seq*.), and Executive Order 13603 (National Defense Resource Preparedness), March 16, 2012, to ensure quantifiable, accessible, and reliable commercial airlift capability to augment DoD airlift and to assure a mobilization base of aircraft available to the Department of Defense for use in the event of any level of national emergency or defense-orientated situations. As a readiness program, CRAF quantifies the number of passenger and cargo commercial assets required to support various levels of wartime requirements and thus allows DoD to account for their use when developing and executing contingency operations/war plans. The CRAF is composed of U.S. registered aircraft owned or controlled by U.S. air carriers specifically allocated (by FAA registration number) for this purpose by the Department of Transportation. As used herein, CRAF aircraft are those allocated aircraft, which the carrier owning or otherwise controlling them, has contractually committed to the DoD, under stated conditions, to meet varying emergency needs for civil airlift augmentation of the military airlift capability. The contractual commitment of the aircraft includes the supporting resources required to provide the contract airlift. In return for a commitment to the CRAF program, airlines are afforded access to day-to-day business under various DoD contracts.

*Historical Costs*. Those allowable costs for airlift services for a 12 month period, gathered from Department of Transportation (DOT) Uniform System of Accounts and Reports (USAR) (hereinafter referred to as ''Form 41'') reporting (required by 14 CFR parts 217 and 241).

*Long-range aircraft*. Aircraft equipped with navigation, communication, and life support systems/emergency equipment required to operate in trans-oceanic airspace, and on international routes, for a minimum distance of 3,500 nautical miles, while carrying a productive payload (75 percent of the maximum payload it is capable of carrying.) Additionally aircraft must be equipped and able to operate worldwide (e.g., in EUROCONTROL and North Atlantic Minimum Navigation Performance Specification airspace and possess the applicable VHF, Mode-S, RNP, and RVSM communication and navigation capabilities.)

*Memorandum of Understanding with attachment (MOU)*. A written agreement between certificated air carriers willing to participate in the CRAF program and USTRANSCOM with the purpose of establishing guidelines to facilitate establishment of rates for airlift services (e.g., passenger, cargo, combi, and aeromedical evacuation.)

*Operational data*. Those statistics that are gathered from DOT Form 41 reporting, USTRANSCOM reported monthly round trip (S–1) and one-way (S–2) mileage reports, monthly fuel reports or other data deemed necessary

by the USTRANSCOM contracting officer.

*Participating carriers.* Any properly certified and DoD approved air carrier in the CRAF program which complies with the conditions of the MOU and executes a USTRANSCOM contract.

*Projected rates.* The estimated rates proposed by carriers based upon historical cost and operational data as further described in § 243.4(a) through (g).

*Ratemaking methodologies.* The methodologies agreed to by USTRANSCOM and air carriers in the MOU for the treatment of certain cost elements to determine the estimated price for the DoD for airlift services.

*Short-range aircraft.* Aircraft equipped for extended over-water operations and capable of flying a minimum distance of 1,500 nautical miles while carrying a productive payload (75 percent of the maximum payload it is capable of carrying).

### § 243.4 Ratemaking procedures for Civil Reserve Air Fleet contracts.

The ratemaking procedures contained within this section apply only to Airlift Service contracts awarded based on CRAF commitment. Competitively awarded contracts may be used by the Department of Defense when it considers such contracts to be in the best interest of the government. See §§ 243.5(b) and 243.6 for exclusions to ratemaking.

(a) *Rates of payment for airlift services.* USTRANSCOM may utilize the principles contained in the Federal Acquisition Regulation (FAR), as supplemented, in establishing fair and reasonable rate of payments for airlift service contracts in support of CRAF. Specific exceptions to FAR are noted in § 243.8 of this rule. To facilitate uniformity within the ratemaking process, USTRANSCOM will execute a MOU with air carriers to institute the basis for methods upon which the rates will be established. An updated MOU will be executed as warranted and published for public comment on FedBizOps. Under the MOU, air carriers agree to furnish historical cost and operational data, as well as their projected rates for the ensuing fiscal year. USTRANSCOM will conduct a review of air carriers' historical and projected costs and negotiate with the carriers to establish rates using ratemaking methodologies contained in the attachment to the MOU.

(b) *Obtaining data from participating carriers.* USTRANSCOM will annually notify those participating carriers to provide data using the USTRANSCOM cost package and related instructions. The data provided includes pricing data, cost data, and judgmental information necessary for the USTRANSCOM contracting officer to determine a fair and reasonable price or to determine cost realism. Carriers will be provided 60 calendar days to act upon the request.

(c) *Analysis.* (1) USTRANSCOM will consider carrier reported DOT Form 41 costs as well as other applicable costs directly assigned to performance in USTRANSCOM service. These costs will be reviewed and analyzed by USTRANSCOM for allowability, allocability, and reasonableness. Costs may also be audited by the Defense Contract Audit Agency (DCAA), as necessary, in accordance with the DCAA Contract Audit Manual 7640.01.

(2) To determine allocation of these costs to USTRANSCOM service, USTRANSCOM considers carrier reported DOT Form 41 operational data, as well as USTRANSCOM S–1, S–2 mileage reports, fuel reports, and other relevant information requested by the contracting officer.

(d) *Rates.* Rates will be determined by aircraft class (e.g., large passenger, medium passenger, large cargo, etc.) based on the average efficiency of all participating carriers within the specified class. Application of these rates, under varying conditions (e.g., ferry, one-way, etc), are addressed in the Final Rates published in accordance with § 243.4(h).

(e) *Components of the rate*—(1) *Return on Investment (ROI).* ROI for USTRANSCOM service is intended to adequately compensate carriers for cost of capital. USTRANSCOM will apply a minimum return applied to the carrier's total operating costs. If a full return on investment applied to a carrier's capital investment base is provided in the MOU, the carrier will receive whichever is greater.

(i) *Full ROI*. The full ROI will be computed using an optimal capital structure of 45 percent debt and 55 percent equity. The cost-of-debt and cost-of-equity are calculated from revenues of major carriers as reported to the Department of Transportation.

(A) *Cost-of-Debt (COD)*. COD will be calculated considering the Risk Free Rate (RFR) plus the weighted debt spread, with the formula as agreed upon in the MOU.

(B) *Cost-of-Equity (COE)*. COE will be determined by a formula agreed upon in the MOU, which considers RFR, weighted betas, annualized equity risk premium and a future expected return premium.

(C) *Owned/Capital/Long-Term Leased Aircraft*. New airframes and related support parts will receive full ROI on the net book value of equipment at mid-point of forecast year. USTRANSCOM will apply the economic service life standards to aircraft as indicated in paragraph (e)(2) of this section.

(D) *Short-term leased aircraft*. As a return on annual lease payments, short-term leased equipment will receive the Full ROI less the cost of money rate per the Secretary of the Treasury under Public Law 92–41 (85 Stat. 97), as provided by the Office of Management and Budget, in accordance with the MOU.

(E) *Working capital*. Working capital will be provided in the investment base at an established number of days provided in the MOU. The investment base will be computed on total operating cash less non cash expenses (depreciation) as calculated by USTRANSCOM.

(ii) *Minimum Return*. USTRANSCOM will determine minimum return utilizing the Weighted Guidelines methodology as set forth in DFARS Subpart 215.4, Contract Pricing, or successor and as provided in the MOU.

(2) *Depreciation*. USTRANSCOM will apply economic life standards for new aircraft at 14 years, 2 percent residual (narrowbody) and 16 years and 10 percent residual (widebody) aircraft. USTRANSCOM will apply economic life standards for used aircraft as indicated in the MOU.

(3) *Utilization*. Utilization considers the number of airborne hours flown per aircraft per day. USTRANSCOM will calculate aircraft utilization in accordance with the DOT Form 41 reporting and the MOU.

(4) *Cost escalation*. Escalation is the percentage increase or decrease applied to the historical base year costs to reliably estimate the cost of performance in the contract period. Yearly cost escalation will be calculated in accordance with the MOU.

(5) *Weighting of rate*. Rates will be weighted based upon the direct relationship between contract performance and cost incurred in execution of the contract. The specific weighting will be as defined in the MOU.

(6) *Obtaining data from participating carriers*. Carriers participating in USTRANSCOM acquisitions subject to ratemaking shall provide, other than certified cost and pricing data for USTRANSCOM, rate reviews as required in the MOU.

(f) *Contingency rate*. Authority is reserved to the Commander, USTRANSCOM, at his discretion, during conditions such as outbreak of war, armed conflict, insurrection, civil or military strife, emergency, or similar conditions, to use a temporary contingency rate in order to ensure mission accomplishment. Any such temporary rate would terminate at the Commander's discretion upon his determination that such rate is no longer needed.

(g) *Proposed rate*. Once the data is analyzed and audit findings considered, USTRANSCOM will prepare a package setting forth proposed airlift rates and supporting data. The proposed rates will be approved by the USTRANSCOM contracting officer and posted publicly on FedBizOps for comment. The comment period will be as specified in the proposed rate package.

(h) *Final rate*. Upon closing of the comment period, comments and supporting rationale will be addressed and individual negotiations conducted between USTRANSCOM and the air carriers. After negotiations have concluded, USTRANSCOM will prepare a rate package setting forth final airlift rates for each aircraft class, along with

supporting data consisting of individual carrier cost elements. Comments and disposition of those comments will be included in the final rate package. The final rates will be approved by the USTRANSCOM contracting officer and publicly posted on FedBizOps for use in the ensuing contract.

### § 243.5 Commitment of aircraft as a business factor.

For the purpose of rate making, the average fleet cost of aircraft proposed by the carriers for the forecast year is used. Actual awards to CRAF carriers are based upon the aircraft accepted into the CRAF program. The Secretary may, in determining the quantity of business to be received under an airlift services contract for which the rate of payment is determined in accordance with subsection (a) of 10 U.S.C. 9511a, use as a factor the relative amount of airlift capability committed by each air carrier to the CRAF.

(a) *Adjustments in commitment to target specific needs of the contract period.* The amount of business awarded in return for commitment to the program under a CRAF contract may be adjusted prior to the award of the contract to reflect increased importance of identified aircraft categories (e.g., Aeromedical Evacuation) or performance factors (e.g., flyer's bonus, superior on-time performers, etc.). These adjustments will be identified in the solicitation.

(b) *Exclusions of categories of business from commitment based awards.* Where adequate competition is available and USTRANSCOM determines some part of the business is more appropriate for award under competitive procedures, the rate-making will not apply. Changes to areas of business will be reflected in the solicitation.

### § 243.6 Exclusions from the uniform negotiated rate.

Domestic CRAF is handled differently than international CRAF in that aircraft committed does not factor into the amount of business awarded during peacetime. If domestic CRAF is activated, carriers will be paid in accordance with pre-negotiated prices that have been determined fair and reasonable, not a uniform rate.

### § 243.7 Inapplicable provisions of law.

An airlift services contract for which the rate of payment is determined in accordance with subsection (a) of 10 U.S.C. 9511a shall not be subject to the provisions of 10 U.S.C. 2306a, or to the provisions of subsections (a) and (b) of 41 U.S.C. 1502. Specifically, contracts establishing rates for services provided by air carriers who are participants in the CRAF program are not subject to the cost or pricing data provision of the Truth in Negotiations Act (10 U.S.C. 2306a) or the Cost Accounting Standards (41 U.S.C. 1502). CRAF carriers will, however, continue to submit data in accordance with the MOU and the DOT, Form 41.

### § 243.8 Application of FAR cost principles.

In establishing fair and reasonable rate of payments for airlift service contracts in support of CRAF, USTRANSCOM, in accordance with10 U.S.C. 9511a, procedures differ from the following provisions of FAR Part 31 and DFARS Part 231, as supplemented:

FAR 31.202, Direct Costs
FAR 31.203, Indirect Costs
FAR 31.205–6, Compensation for Personal Services, subparagraphs (g), (j), and (k)
FAR 31.205–10, Cost of Money
FAR 31.205–11, Depreciation
FAR 31.205–18, Independent Research and Development and Bid and Proposal Costs
FAR 31.205–19, Insurance and Indemnification
FAR 31.205–26, Material Costs
FAR 31.205–40, Special Tooling and Special Test Equipment Costs
FAR 31.205–41, Taxes
DFARS 231.205–18, Independent research and development and bid and proposal costs

### § 243.9 Carrier site visits.

USTRANSCOM may participate in carrier site visits, as required to determine the reasonableness or verification of cost and pricing data.

### § 243.10 Disputes.

Carriers should first address concerns to the ratemaking team for resolution. Ratemaking issues that are not resolved to the carrier's satisfaction through discussions with the ratemaking team may be directed to the USTRANSCOM contracting officer.

### § 243.11 Appeals of USTRANSCOM Contracting Officer Decisions regarding rates.

If resolution of ratemaking issues cannot be made by the USTRANSCOM contracting officer, concerned parties shall contact the USTRANSCOM Ombudsman appointed to hear and facilitate the resolution of such concerns. In the event a ratemaking issue is not resolved through the ombudsman process, the carrier may request a final agency decision from the Director of Acquisition, USTRANSCOM.

### § 243.12 Required records retention.

The air carrier is required to retain copies of data submitted to support rate determination for a period identified in Subpart 4.7 of the Federal Acquisition Regulation, Contractor Records Retention.

## PART 245—PLAN FOR THE EMERGENCY SECURITY CONTROL OF AIR TRAFFIC (ESCAT)

Sec.


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AUTHORITY: 5 U.S.C. 301, 552.

SOURCE: 71 FR 61889, Oct. 20, 2006, unless otherwise noted.

## Subpart A—General

### § 245.1 Purpose.

This part:

(a) Is authorized by the Communications Act of 1934, as amended, 5 U.S.C. 301, 552, Executive Order 12656 (''Assignment of Emergency Preparedness Responsibilities'', November 18, 1988), as amended.

(b) Defines the jointly developed and agreed upon responsibilities of the Department of Transportation/Federal Aviation Administration (DOT/FAA), Department of Homeland Security/Transportation Security Administration (DHS/TSA), and Department of Defense (DoD) authorities for the security control of civil and military air traffic. It implements policy, assigns responsibilities, and prescribes procedures for implementation and performance of the ESCAT Plan. The Emergency Security Control of Air Traffic (ESCAT) is an emergency preparedness plan that prescribes the joint action to be taken by appropriate elements of the DoD, the DOT and the DHS in the interests of national security to control air traffic under emergency conditions.

**§ 245.2 Applicability.**

This part applies to the Office of the Secretary of Defense, the Military Departments, the Organization of the Joint Chiefs of Staff, the Combatant Commands, the DOT, the FAA, the DHS, and the TSA.

**§ 245.3 Responsibilities.**

The Assistant Secretary of Defense for Networks and Information Integration will ensure the responsibilities of the DoD are implemented. The DOT and the DHS shall implement the procedures and actions requested by the Department of Defense.

## Subpart B—Explanation of Terms, Acronyms and Abbreviations

**§ 245.5 Terms.**

For the purpose of this part, the words ''will'' and ''shall'' denote mandatory action by the affected person(s) or agency(ies).

*Air control measures*. Airspace and/or flight restrictions that may be issued in support of National Defense or Homeland Security initiatives.

*Air defense*. All defensive measures designed to destroy attacking enemy aircraft or missiles as well as enemy operated aircraft or missiles in the Earth's envelope of atmosphere, or to nullify or reduce the effectiveness of such attack.

*Air defense area* (ADA). Airspace of defined dimensions designated by the appropriate agency within which the ready control of airborne vehicles is required in the interest of national security.

*Air defense emergency* (ADE). An emergency condition, declared by the appropriate military authority, that exists when attack upon the continental United States, Alaska, Hawaii, other U.S. territories and possessions or Canada by hostile aircraft or missiles is considered probable, is imminent, or is taking place.

*Air defense identification zone* (ADIZ). Airspace of defined dimensions within which the ready identification, location, and control of airborne vehicles are required.

*Air defense liaison officer* (ADLO). FAA representative at a North American Aerospace Defense Command (NORAD) air defense facility (NORAD Region or NORAD Air Defense Sector).

*Air defense region*. A geographical subdivision of an air defense area.

*Air defense sector*. A geographical subdivision of an air defense region.

*Air traffic control system command center* (ATCSCC). FAA Command Center responsible for the efficient operation of the National Airspace System, ensuring safe and efficient air travel within the United States.

*Anchor annex flight*. Classified DoD mission.

*Appropriate military authority*. The military commander with the authority to direct the implementation of this part. The appropriate military authorities are designated in part 245.11, (a)(1), (a)(2), (a)(3) and (b)(1), (b)(2), (b)(3).

*Chief of the Defense Staff* (CDS). Canada's counterpart to the Chairman, Joint Chiefs of Staff.

*Civil reserve air fleet* (CRAF). Those aircraft allocated, or identified for allocation, to the DoD under section 101 of the Defense Production Act of 1950 (50 U.S.C. App. 2071), or made available (or agreed to be made available) for use by the DoD under a contract made under this title, as part of the program developed by the DoD through which the DoD augments its airlift capability by use of civil aircraft.

*Combatant Command*. A command with a broad continuing mission under a single commander established and so designated by the President, through the Secretary of Defense and with the advice and assistance of the Chairman of the Joint Chiefs of Staff. The Combatant Commands typically have geographic or functional responsibilities. For the purposes of this part, the term ''combatant command'' also includes NORAD.

*Continental United States* (CONUS). All U.S. territory of the 48 contiguous states (does not include Alaska and Hawaii), including the adjacent territorial waters within 12 miles of the coast of the 48 contiguous states.

*Contingency operations*. A military operation that:

(1) Is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(2) Results in the call or order to, or retention on, active duty of members of the uniformed services under section 688, 12301 (a), 12302, 12304, 12305, or 12406 of title 10 U.S.C., chapter 15, as amended by E.O. 13286, February 28 2003, or any other provision of law during a war or during a national emergency declared by the President or Congress.

*Defense emergency*. An emergency condition that exists when:

(1) A major attack is made upon U.S. forces overseas or on allied forces in any theater and is confirmed by either the commander of a command established by the Secretary of Defense or higher authority; or

(2) An overt attack of any type is made upon the United States and is confirmed either by the commander of a command established by the Secretary of Defense or higher authority.

*Dispersal*. Relocation of forces for the purpose of increasing survivability.

*Diversion*. A change made in a prescribed route or destination for operational or tactical reasons.

*Domestic event network* (DEN). A 24/7 FAA sponsored, telephonic conference call network that includes all of the Air Route Traffic Control Centers (ARTCC) in the U.S. It also includes various other governmental agencies that monitor the DEN. The purpose of the DEN is to provide timely notification to the appropriate authorities that there is an emerging air-related problem or incident within the CONUS.

*ESCAT air traffic priority list* (EATPL). A list comprised of eight priorities designed to control the volume of air traffic when ESCAT has been implemented.

*National Airspace System* (NAS). The NAS consists of the overall environment for the safe operation of aircraft that are subject to the FAA's jurisdiction. It includes: air navigation facilities, equipment and services, airports or landing areas; aeronautical charts, information and services; rules, regulations and procedures, technical information, and manpower and material. Included are system components used by the DoD.

*National emergency*. A condition declared by the President or the Congress by virtue of powers previously vested in them that authorize certain emergency actions to be undertaken in the national interest. Actions to be taken may include partial, full, or total mobilization of national resources.

*Navigational aids* (NAVAIDs). Aids to navigation, including but are not limited to, Global Positioning System (GPS), Tactical Air Navigation (TACAN), VHF Omnidirectional range (VOR), VHF Omnidirectional range/Tactical Air Navigation (VORTAC), Radar, and Long Range Navigation (LORAN). GPS also includes its Federal government-provided augmentations, *i.e.*, the FAA Wide Area Augmentation System (WAAS) and Local Area Augmentation System (LAAS), United States Coast Guard (USCG) Maritime Differential GPS (MDGPS) and USCG Nationwide Differential GPS (NDGPS).

*North American Aerospace Defense Command* (NORAD). A combined military command established by the Governments of Canada and the United States responsible for North American aerospace warning and control. Headquartered in Colorado Springs, CO, NORAD is subdivided into three geographic regions: Alaska NORAD Region (ANR), Canadian NORAD Region (CANR) and the CONUS NORAD Region (CONR).

*Security assurance check*. Measures taken by DoD/DHS, as appropriate, to ensure aircraft, cargo and crew security has not been compromised by hostile organizations or individuals who are or may be engaged in espionage, sabotage, subversion, terrorism or other criminal activities.

*Security control authorization* (SCA). Authorization for an EATPL category eight aircraft to take off when ESCAT has been implemented, which will be coordinated between DHS and the appropriate military authority.

*Special Use Airspace* (SUA). Airspace of defined dimensions identified by an area on the surface of the earth wherein activities must be confined because

of their nature, and/or wherein limitation may be imposed upon aircraft operations that are not part of those activities. Types of special use airspace include Military Operations Areas, Prohibited Areas, Restricted Areas and Warning Areas.

[71 FR 61889, Oct. 20, 2006; 71 FR 66110, Nov. 13, 2006]

### § 245.6 Abbreviations and acronyms.

AADC—Area Air Defense Commander
ADE—Air Defense Emergency
ADIZ—Air Defense Identification Zone
ADLO—Air Defense Liaison Officer
AMC—Air Mobility Command
ANR—Alaska NORAD Region
AOR—Area of Responsibility
ARTCC—Air Route Traffic Control Center
ATC—Air Traffic Control
ATCSCC—Air Traffic Control System Command Center
CARDA—Continental U.S. Airborne Reconnaissance for Damage Assessment
CDS—Chief of the Defence Staff (Canada)
CERAP—Center-RAPCON
CJCS—Chairman, Joint Chiefs of Staff
CONR—CONUS NORAD Region
CONUS—Continental United States
CRAF—Civil Reserve Air Fleet
DEN—Domestic Event Network
DHS—Department of Homeland Security
DND—Department of National Defence (Canada)
DoD—Department of Defense
DOT—Department of Transportation
EATPL—ESCAT Air Traffic Priority List
E.O.—Executive Order
ESCAT—Emergency Security Control of Air Traffic
FAA—Federal Aviation Administration
IFR—Instrument Flight Rules
LEA—Law Enforcement Agencies
LIFEGUARD—Civilian air ambulance flights
LNO—Liaison Officer
MEDEVAC—Medical air evacuation flight
NAS—National Airspace System
NEADS—Northeast Air Defense Sector (NORAD)
NORAD—North American Aerospace Defense Command
PACAF—Pacific Air Forces
SCA—Security Control Authorization
SEADS—Southeast Air Defense Sector (NORAD)
SUA—Special Use Airspace
TSA—Transportation Security Administration
USNORTHCOM—U.S. Northern Command
USPACOM—U.S. Pacific Command
VFR—Visual Flight Rules
WADS—Western Air Defense Sector (NORAD)

[71 FR 61889, Oct. 20, 2006; 71 FR 66110, Nov. 13, 2006]

## Subpart C—The ESCAT Plan

### § 245.8 Purpose.

This part establishes responsibilities, procedures, and instructions for the security control of civil and military air traffic in order to provide effective use of airspace under various emergency conditions.

### § 245.9 Authority.

(a) E.O. 12656, 18 November 1988, which assigns emergency preparedness functions to Federal departments and agencies.

(b) E.O. 13074, Amendment to E.O. 12656, February 9, 1998.

(c) E.O. 13286, Amendment of E.O. 13276, 13274, 13271, 13260, 13257, 13254, and 13231, and Other Actions, in Connection With the Transfer of Certain Functions to the Secretary of Homeland Security, February 28, 2003.

(d) Title 10 U.S.C.—Armed Forces.

(e) Title 49 U.S.C., Subtitle VII—Aviation Programs.

(f) Communications Act of 1934, as amended.

(g) Aviation and Transportation Security Act of 2001 (Pub. L. 107–71), establishes the TSA and transfers civil aviation security responsibilities from FAA to TSA.

(h) Homeland Security Act of 2002 (Pub. L. 107–296), establishes DHS and transfers the transportation security functions of the DOT and Secretary of Transportation and the TSA to DHS.

(i) DoD Directive 5030.19,[1] ''DoD Responsibilities on Federal Aviation and National Airspace System Matters,''

[1] Copies may be obtained at *http://www.dtic.mil/whs/directives/corres/dir2.html*.

outlines DoD/ NORAD responsibilities for the development of plans and policies in concert with the DOT, FAA and USCG for the establishment of a system for identification and emergency security control of air traffic.

### § 245.10 Scope.

This part applies to all U.S. territorial airspace and other airspace over which the FAA has air traffic control jurisdiction by international agreement.

### § 245.11 General description of the ESCAT plan.

The part defines the authorities, responsibilities, and procedures to identify and control air traffic within a specified air defense area during air defense emergencies, defense emergency, or national emergency conditions.

(a) For the purpose of this part, the appropriate military authorities are as follows:

(1) Contiguous 48 U.S. states, including Washington, DC; Alaska; and Canada—Commander NORAD or individual NORAD Region/Sector commanders.

(2) Hawaii, Guam, Wake Island, other U.S. Pacific Territories, and Pacific oceanic airspace over which FAA has air traffic control jurisdiction by international agreement—Commander, U.S. Pacific Command (USPACOM) or designated AADC.

(3) Puerto Rico and U.S. Virgin Islands—Commander, NORAD.

(b) This part provides for security control of both civil and military air traffic. It is intended to meet threat situations such as:

(1) An emergency resulting in the declaration of an Air Defense Emergency by the appropriate military authority. Under this condition, NORAD and USPACOM Commanders have authority to implement ESCAT and may consider executing this part.

(2) An adjacent Combatant Command is under attack and an Air Defense Emergency has not yet been declared. Under these conditions, NORAD and USPACOM Commanders may direct implementation of ESCAT for their own AORs individually, if airspace control measures are warranted and agreed upon by DoD/DHS/DOT.

(3) Emergency conditions exist that either threaten national security or national interests vital to the U.S., but do not warrant declaration of Defense Emergency or Air Defense Emergency. Under these conditions, NORAD and USPACOM Commanders may direct implementation of ESCAT for their own AORs individually, if airspace control measures are warranted and agreed upon by DoD/DHS/DOT.

### § 245.12 Amplifying instructions.

(a) Prior to any formal ESCAT implementation, the appropriate military authority will consult with DOT through the FAA Administrator and DHS through the TSA Administrator to discuss the air traffic management, airspace and/or security measures required. Every effort will be made to obtain the approval of the Secretary of Defense prior to ESCAT declaration, time and circumstance permitting. Any ESCAT implementation will be passed as soon as possible through the Chairman of the Joint Chiefs of Staff to the Secretary of Defense.

(b) ESCAT may be implemented in phases to facilitate a smooth transition from normal air traffic identification and control procedures to the more restrictive identification and control procedures specific to the situation.

(c) Once ESCAT is implemented, the appropriate military authority will consult regularly with DOT (through the FAA Administrator) and DHS (through the TSA Administrator) as appropriate, regarding any changes in the air traffic management, airspace, and/or security measures required.

(d) Interference with normal air traffic should be minimized.

(e) The process for implementation of measures for mitigation of hostile use of NAVAID signals, when required, will be subject to separate agreement between DoD and other Departments and Agencies.

(f) Upon the formal declaration of ESCAT, the appropriate military authority has the final authority regarding the extent of measures necessary for successful mission completion.

(g) The rules/procedures governing Special Use Airspace (SUA) will remain

in effect until notified by the appropriate military authority. The appropriate military authority will address SUA use in the ESCAT activation message.

(h) Appropriate Combatant Commanders, in conjunction with their FAA and TSA Liaisons, will prepare supplements to this part for their area of responsibility. These supplements are to consider the special requirement of organized civil defense and disaster relief flights, agricultural and forest fire flights, border patrol flights, and other essential civil air operations so that maximum use of these flights, consistent with air defense requirements, will be made when ESCAT is in effect.

(i) Flight operations vital to national defense, as determined by appropriate military commanders, will be given priority over all other military and civil aircraft.

(j) Prior to or subsequent to the declaration of an Air Defense Emergency, Defense Emergency, or National Emergency, there may be a requirement to disperse military aircraft for their protection. If such dispersal plans are implemented when any part of this part has been placed in effect, operations will be in accordance with the requirements of that portion of the ESCAT plan that is in effect. If any part of the ESCAT plan is ordered while dispersal is in progress, dispersal operations will be revised as required to comply with ESCAT.

(k) Direct communications are authorized between appropriate agencies and units for the purpose of coordinating and implementing the procedures in this part.

(l) To ensure implementation actions can be taken expeditiously, ESCAT tests will be conducted periodically, but at least annually in accordance with § 245.31 of this part.

(m) The area of responsibility of the appropriate military authority does not always align with ARTCC boundaries, especially in the NORAD area where one ARTCC's boundaries may lie within two or more CONUS NORAD Sectors. For NORAD and USPACOM, the FAA ARTCCs/CERAPs are aligned as follows:

| Command/region/sector | ARTCC's |
|---|---|
| CONR South East Air Defense Sector (SEADS). | Atlanta, Fort Worth, Houston, Indianapolis, Jacksonville, Kansas City, Memphis, Miami, Washington, San Juan CERAP. |
| CONR North East Air Defense Sector (NEADS). | Boston, Chicago, Cleveland, Minneapolis, New York, Indianapolis, Kansas City, Atlanta, Memphis, Washington. |
| CONR Western Air Defense Sector (WADS). | Albuquerque, Denver, Los Angeles, Oakland, Salt Lake City, Seattle, Fort Worth, Houston, Kansas City, Minneapolis. |
| ANR (Alaskan NORAD Region). | Anchorage. |
| PACOM ..... | Honolulu CERAP, Oakland, Anchorage. |

(n) Commander NORAD, acting for the DoD, will process and distribute administrative and organizational changes as they occur; however, this part will be reviewed at least once every two years by DHS/TSA, DOT/FAA, and DoD and reissued or changed as required. Recommended changes should be forwarded to: Headquarters North American Air Defense Command, Commander NORAD/J3, ATTN: NJ33C, 250 Vandenberg Street, Suite B106, Peterson AFB, CO 80914–3818.

### § 245.13 Responsibilities.

(a) The NORAD and USPACOM Commanders will:

(1) Establish the military requirements for ESCAT.

(2) Implement the plan as appropriate by declaring ESCAT (including the timing and scope) within their AOR.

(3) Terminate the plan as appropriate by discontinuing ESCAT (including the timing and scope) within their AOR.

(4) Coordinate with the Secretary of Defense or his designee, the CJCS, other Combatant Commands, the Department of Transportation, the Department of Homeland Security and the Canadian Minister of National Defence, as appropriate, regarding procedures for ESCAT implementation.

(b) The DOT (through the FAA Administrator) will:

(1) Establish the necessary FAA directives/plans including special ATC procedures to implement this part.

(2) Maintain liaison with Combatant Commands whose AORs include FAA areas of authority through the appropriate LNO, or FAA ADLO offices.

(3) Administer this part in accordance with established requirements.

(4) Ensure authorized FAA ADLO positions at NORAD facilities are staffed.

(5) Publish a common use document describing ESCAT and its purpose for use by civil aviation.

(6) Ensure FAA participation with the Combatant Commands in the testing of this part.

(7) Ensure the FAA Air Traffic Organization Service Units will:

(i) Disseminate information and instructions implementing this part within their AORs.

(ii) Place in effect procedures outlined in this part.

(iii) Assist appropriate military authorities in making supplemental agreements to this part as may be required.

(iv) Ensure each ARTCC/CERAP has a plan for diverting or landing expeditiously all aircraft according to the ESCAT priorities imposed upon implementation of ESCAT. Ensure a review and verification of the diversion plan is accomplished each calendar year.

(8) Ensure the ATCSCC/ARTCC/CERAPs will:

(i) Participate with Combatant Commanders in the training/testing of this part at all operational level.

(ii) Ensure dissemination of information and instructions implementing this part within their AORs.

(iii) Place in effect procedures outlined in this part.

(iv) Develop a plan for diverting or landing expeditiously all aircraft according to the ESCAT priorities imposed upon implementation of ESCAT. Review the diversion plan each calendar year.

(c) The DHS (through the TSA Administrator) will:

(1) Establish the necessary TSA directives/plans including special security procedures to implement this part.

(2) Maintain liaison with Combatant Commands whose AORs include TSA geographic areas of authority through the appropriate Federal Security Directors or other field offices.

(3) Administer this part in accordance with established requirements.

(4) Ensure authorized TSA liaison positions at NORAD facilities are staffed.

(5) Issue security directives describing ESCAT and its purpose for use by airport and aircraft operators.

(6) Ensure TSA participation with the Combatant Commands in the testing of this part.

(7) Ensure TSA Federal Security Directors and field offices:

(i) Disseminate information and instructions implementing this part within their AOR.

(ii) Implement procedures outlined in this part.

(iii) Assist appropriate military authorities in making supplemental agreements to this part, as necessary.

(d) The Commanders of Combatant Commands will:

(1) Ensure that departing North American strategic flights are coordinated with appropriate NORAD and FAA/NAVCANADA authorities.

(2) Ensure training/testing of this part at all levels within their command, as appropriate.

## Subpart D—Procedures for Implementation of ESCAT

### § 245.15 Appropriate military authority.

Appropriate military authority will take the following actions:

(a) Notify or coordinate, as appropriate, the extent or termination of ESCAT implementation with DOT and DHS.

(b) Disseminate the extent of ESCAT implementation through the Noble Eagle Conferences and the FAA DEN.

(c) Specify what restrictions are to be implemented. Some examples of restrictions to be considered include:

(1) Defining the affected area.

(2) Defining the type of aircraft operations that are authorized.

(3) Defining the routing restrictions on flights entering or operating within appropriate portions of the affected area.

(4) Defining restrictions for the volume of air traffic within the affected area, using the EATPL, paragraph 245.22 of this part) and Security Control Authorizations, as required.

(5) Setting altitude limitations on flight operations in selected areas.

(6) Restricting operations to aircraft operators regulated under specified security programs (e.g., the Aircraft Operator Standard Security Program

(AOSSP), and the Domestic Security Integration Program (DSIP).

(d) Revise or remove restrictions on the movement of air traffic as the tactical situation permits.

### § 245.16 ATCSCC.

ATCSCC will direct appropriate ARTCCs/CERAPs to implement ESCAT restrictions as specified by the appropriate military authority. ARTCCs/CERAPs will take the following actions when directed to implement ESCAT:

(a) Provide the appropriate military authority feedback through the ATCSCC on the impact of restrictions and when the restrictions have been imposed.

(b) Impose restrictions on air traffic as directed.

(c) Disseminate ESCAT implementation instructions to U.S. civil and military air traffic control facilities and advise adjacent air traffic control facilities.

### § 245.17 U.S. civil and military air traffic control facilities.

U.S. civil and military air traffic control facilities will:

(a) Maintain current information on the status of restrictions imposed on air traffic.

(b) Process flight plans in accordance with current instructions received from the ARTCC. All flights must comply with the airspace control measures in effect, the EATPL, or must have been granted a Security Control Authorization.

(c) Disseminate instructions and restrictions to air traffic as directed by the ARTCCs.

### § 245.18 Transportation security operations center (TSOC).

TSOC will direct appropriate FSDs and field offices to implement ESCAT restrictions as specified by the appropriate military authority. FSDs and field offices will take the following actions when directed to implement ESCAT:

(a) Provide the appropriate military authority feedback through the TSOC on the impact of restrictions and when the restrictions have been implemented.

(b) Impose restrictions on civil aviation as directed by DOT/DHS.

(c) Disseminate ESCAT implementation instructions to U.S. civil aircraft operators and airports.

## Subpart E—ESCAT Air Traffic Priority List (EATPL)

### § 245.20 Purpose.

When ESCAT is implemented, a system of traffic priorities may be required to make optimum use of airspace, consistent with air defense requirements. The EATPL is a list of priorities that may be used for the movement of air traffic in a defined area. Priorities shall take precedence in the order listed and subdivisions within priorities are equal.

### § 245.21 ESCAT air traffic priority list.

(a) *Priority One.* (1) The President of the United States, Prime Minister of Canada and respective cabinet or staff members essential to national security, and other members as approved or designated by the Secretary of Defense and Chief of the Defence Staff.

(2) Aircraft engaged in active continental defense missions, including anti-submarine aircraft, interceptors, air refueling tanker aircraft, and airborne early-warning and control aircraft (e.g., E–3, E–2, P–3).

(3) Military retaliatory aircraft, including direct tanker support aircraft, executing strategic missions.

(4) Airborne command elements which provide backup to command and control systems for the combat forces.

(5) Anchor annex flights.

(b) *Priority Two.* (1) Forces being deployed or in direct support of U.S. military offensive and defensive operations including the use of activated Civil Reserve Air Fleet (CRAF) aircraft as necessary, and/or other U.S. and foreign flag civil air carrier aircraft under mission control of the U.S. military.

(2) Aircraft operating in direct and immediate support of strategic missions.

(3) Search and rescue aircraft operating in direct support of military activities.

(4) Aircraft operating in direct and immediate support of special operations missions.

(5) Federal flight operations in direct support of homeland security, e.g., Law Enforcement Agencies (LEA) and aircraft performing security for high threat targets such as Nuclear Power Plants, Dams, Chemical Plants, and other areas identified as high threat targets.

(c) *Priority Three*. (1) Forces being deployed or performing pre-deployment training/workups (e.g., Navy Field Carrier Landing Practice) in support of the emergency condition.

(2) Aircraft deployed in support of CONUS installation/base defense, i.e., aircraft operating in direct/immediate security support, or deploying ground forces for perimeter defense.

(3) Search and rescue aircraft not included in Priority Two.

(4) Flight inspection aircraft flights in connection with emergency restoration of airway and airport facilities in support of immediate emergency conditions.

(5) Continental U.S. Airborne Reconnaissance for Damage Assessment (CARDA) missions in support of immediate emergency conditions.

(d) *Priority Four*. (1) Dispersal of tactical military aircraft.

(2) Dispersal of U.S. civil air carrier aircraft allocated to the CRAF Program.

(3) Repositioning of FAA/DoD/DND flight inspection aircraft.

(4) Flight inspection activity in connection with airway and airport facilities.

(5) Specific military tactical pilot currency or proficiency in support of homeland defense.

(6) Military tactical aircraft post-maintenance test flights.

(7) Federal aircraft post maintenance check flights in support of homeland security.

(e) *Priority Five*. (1) Air transport of military commanders, their representatives, DoD/DND-sponsored key civilian personnel, non-DoD/DND or other Federal key civilian personnel who are of importance to national security.

(2) Dispersal of non-tactical military aircraft for their protection.

(3) Aircraft contracted to and/or operated by Federal agencies

(f) *Priority Six*. (1) State and local LEA directly engaged in law enforcement missions.

(2) Flight operations in accordance with approved Federal and State emergency plans.

(3) LIFEGUARD and MEDEVAC aircraft in direct support of emergency medical services.

(4) Flight operations essential to the development, production, and delivery of equipment, personnel, materials, and supplies essential to national security.

(5) Other essential CARDA missions not covered in Priority Three.

(g) *Priority Seven*. Other military flight operations.

(h) *Priority Eight*. Other flight operations not specifically listed in priorities 1 through 7.

**§ 245.22 Policy for application of EATPL.**

(a) The originator of an aircraft flight operation under the EATPL shall be responsible for determining and verifying that the mission meets the appropriate definition and priority in accordance with the list described in § 245.22 of this part , and ensuring a security check of crew, cargo and aircraft has been completed prior to take off.

(b) The individual filing the flight plan will be responsible for including the priority number as determined by the originator of the aircraft flight operation, in the remarks section of the flight plan.

(c) Situations may occur that cannot be controlled by the EATPL. Aircraft emergencies and inbound international flights that have reached the point of no return, including foreign air carrier flights en route to safe haven airports in accordance with specific international agreements are examples of such situations. These events must be treated individually through coordination between ATC and appropriate military authorities in consideration of the urgency of the in-flight situation and existing tactical military conditions.

(d) *Exceptions to EATPL*. (1) DoD aircraft in priorities three through seven that do not meet EATPL restrictions may request an exemption from the appropriate military authority. For the

contiguous 48 U.S. states, Alaska, Puerto Rico, U.S. Virgin Islands and Canada, requests shall be submitted to the appropriate NORAD Sector. For Hawaii, Guam, Wake Island, other U.S. Pacific Territories, and Pacific oceanic airspace over which FAA has air traffic control jurisdiction by international agreement, requests shall be submitted to the designated AADC.

(2) For Federal, State, local government agencies and aircraft in priority eight, a Security Control Authorization may be granted on a case-by-case basis. Requests for SCAs will be coordinated through TSA. TSA will forward those requests that it recommends for approval to the appropriate military authority. Aircraft with a SCA shall have a Security Assurance Check prior to take off. Refer to specific SCA procedures provided in separate agreement between the appropriate military authority and TSA.

[71 FR 61889, Oct. 20, 2006; 71 FR 66110, Nov. 13, 2006]

## Subpart F—Procedure for Movement of Air Traffic Under ESCAT

### § 245.24 Aircraft assigned an EATPL number 1 or 2.

Aircraft assigned an EATPL number 1 or 2 will not be delayed, diverted, or rerouted by Combatant Commanders. However, commanders may recommend that this traffic be rerouted to avoid critical or critically threatened areas.

### § 245.25 Aircraft assigned an EATPL number other than 1 or 2.

Aircraft assigned an EATPL number other than 1 or 2 may be delayed, diverted, or rerouted by Combatant Commanders to prevent degradation of the air defense system.

### § 245.26 Aircraft being recovered.

Aircraft being recovered will be expedited to home or an alternate base. Search and Rescue aircraft may be expedited on their missions. Such aircraft may be diverted to avoid critical areas or takeoff may be delayed to prevent saturation of airspace.

### § 245.27 Data entry.

Aircraft will file IFR or VFR flight plans, assigned a discrete transponder code, and must be in direct radio communication with ATC. The appropriate EATPL number will be entered in the remarks section of the flight plan. The EATPL number will be passed with flight plan data from one ATC facility to the next, and to the appropriate air defense control facilities.

## Subpart G—Test Procedures

### § 245.29 Purpose.

The purpose of establishing training/test procedures is to specify procedures that will allow all participants to determine the time required and assure the capability to notify all agencies/personnel, down to the lowest action level, that ESCAT has been implemented. To ensure the proper level of participation, the appropriate military authority will provide, at a minimum, 30 days notice of a test to the appropriate civil agencies. Testing shall be conducted at least annually.

### § 245.30 ESCAT test procedures restrictions.

(a) Aircraft will not be grounded or diverted.

(b) Test messages will not be broadcast over air/ground frequencies.

(c) Radio communications will not be interrupted.

(d) Navigation Aids will not be affected.

### § 245.31 ESCAT test.

For ESCAT testing, the responsible military commander will notify the ATCSCC using the following sample statement:

(a) Exercise, Exercise, Exercise, this is CONUS NORAD Region with a NORAD exercise message for _____ (State exercise name) _____.

Simulate implementing ESCAT for _____ (Specified Area) _____.

The following air control measures are being implemented. (Some examples are: Flight restricted zones, Temporary Flight Restrictions, and/or other specific air control measures for operators.) _____, _____, _____, _____.

All aircraft not previously mentioned as exemptions are restricted from flight in the affected area until further notice.

and/or

EATPL Priorities _____ through _____ are being implemented.

ATCSCC will advise the appropriate military commander when the affected FAA ATC facilities have reported simulating ESCAT.

This is an exercise message for _____ (State exercise name) _____. Exercise, Exercise, Exercise.

(b) ATCSCC will notify ARTCC(s)/CERAP(s).

(c) ARTCC(s)/CERAP(s) will notify all appropriate U.S. civil and military approach control facilities and FSS. Upon completion of all actions, the implementation completion time will be forwarded to the ATCSCC.

(d) ATCSCC will provide completion times to the appropriate military authority.

(e) Tests should normally be conducted in conjunction with scheduled headquarters NORAD approved exercises. Individual NORAD Regions and Sectors may conduct tests when test objectives are local in nature and prior coordination has been effected with the ATCSCC.

(g) A narrative summary of each test will be prepared by the ATCSCC and copies sent to the appropriate military authority. Each military authority will, in turn, forward copies of the summary to HQ NORAD and DHS.

## Subpart H—Authentication

### § 245.33 Approval.

Authentication will be accomplished via secure communications means between the appropriate military authority and the ATCSCC for the implementation of ESCAT. Implementation will be validated with a call back via secure communications to the appropriate military authority. Further dissemination of information may be accomplished over non-secure communications.

# PART 246—STARS AND STRIPES (S&S) NEWSPAPER AND BUSINESS OPERATIONS

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APPENDIX A TO PART 246—MISSION
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APPENDIX E TO PART 246—STARS AND STRIPES (S&S) BOARD OF DIRECTORS

AUTHORITY: 10 U.S.C. 136.

SOURCE: 59 FR 19137, Apr. 22, 1994, unless otherwise noted.

### § 246.1 Purpose.

This part:

(a) Establishes policy, assigns responsibilities, and prescribes procedures for the S&S organizations owned by designated Unified Commands consistent with 32 CFR part 372.

(b) Supersedes policies and procedures in 32 CFR part 247 about the S&S newspapers.

(c) Authorizes the establishment, management, operation, and oversight of the Stars and Stripes, including the resale of commercial publications necessary to support the overall S&S mission, production, distribution authority, and business operations as mission-essential activities of the Department of Defense and the designated Unified Commands.

(d) Designates the Secretary of the Army as the DoD Executive Agent for providing administrative and logistical support to the American Forces Information Service (AFIS), designated Unified Commands, and the S&S.

(e) Authorizes the Commander in Chief, U.S. European Command, and the Commander in Chief (CINC), U.S. Pacific Command, to establish and maintain a S&S board of directors to address S&S business operations in their Unified Commands.

**§ 246.2 Applicability.**

This part applies to the Office of the Secretary of Defense, the Military Departments (including their National Guard and Reserve components), the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Unified and Specified Commands, the Inspector General of the Department of Defense, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as ''the DoD Components''). The term ''the Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

**§ 246.3 Definitions.**

(a) *Adverse Conditions*. Conditions that may adversely affect the survival of the newspapers such as troop drawdown, increase in troop population, currency fluctuations, inflation, armed conflict, national contingency deployment, and others.

(b) *S&S Commander/Publisher*. The senior position in each S&S responsible for simultaneously performing dual functions. This military officer commands the S&S to which assigned, while also serving as the publisher of the Stars and Stripes produced by that organization.

(c) *S&S Management Action Group (MAG) and S&S Steering Committee*. These are ad hoc joint committees between the Office of the Assistant Secretary of Defense (Public Affairs) [OASD (PA)] and the Office of the Assistant Secretary of Defense (Force Management and Personnel) [OASD (FM&P)] that address S&S personnel and business policies. The S&S MAG is chaired by the senior OASD (PA) AFIS member and includes members from the OASD (FM&P) and other DoD offices with the authority and expertise to address various S&S problems. The Director of the AFIS, and the Deputy Assistant Secretary, OASD (FM&P), serves as co-chairman of the S&S Steering Committee that addresses DoD-level S&S issues. Neither the DoD S&S Steering Committee, nor the S&S MAG, involve themselves in Stars and Stripes editorial policies.

(d) *S&S Ombudsman*. A highly qualified journalist hired from outside the Department of Defense for a term of 3 years who independently advises the Unified Command CINCs, the S&S commander/publisher, the Stars and Stripes editor, the Director of the AFIS, and the Congress on matters of readership interest in the Stars and Stripes.

(e) *Stars and Stripes*. The title of one, or both, depending on the context of usage, of the newspapers produced by the S&S.

(f) *Stars and Stripes Editor*. The senior civilian position on the newspaper editorial staff of the S&S to which he or she is assigned. All mention of ''the editor'' in this part refers exclusively to this position, unless otherwise specified.

(g) *Stars and Stripes (S&S)*. The organizations that perform the administrative, editorial, and business operations, which include newspapers, bookstores, job-printing plants, etc. necessary to do their mission.

**§ 246.4 Policy.**

It is DoD policy that:

(a) The U.S. European Command and the U.S. Pacific Command are authorized to publish the Stars and Stripes and provide support to the S&S. The Unified Command component commanders and their public affairs staffs shall provide the Stars and Stripes editorial staffs the same help provided to commercial newspapers, in compliance with the principles governing the release of information to media in 32 CFR part 375.

(b) Editorial policies and practices of the Stars and Stripes shall be in accordance with journalistic standards governing U.S. daily commercial newspapers of the highest quality, with emphasis on matters of interest to the Stars and Stripes readership. Except as provided in paragraph (e) of this section, the DoD policy for the Stars and Stripes is that there shall be a free flow of news and information to its readership without news management or censorship. The calculated withholding of unfavorable news is prohibited.

(c) The S&S are basically self-sustaining operations. Each S&S shall be administered in accordance with DoD

Directive 1015.1[1] as a joint-Service nonappropriated fund (NAF) instrumentality (NAFI) in its Unified Command, except where different procedures are specified in this part. Funding shall be provided through newspaper sales, resale of commercial publications, authorized advertising, job printing, and appropriated fund (APF) support as authorized by this part, DoD Directive 1015.6[2] and DoD Instruction 1330.18[3]. The S&S shall conduct bookstore operations similar to business operations of commercial bookstores in the United States. The Stars and Stripes and the S&S bookstores provide important news and information to U.S. personnel and their families stationed overseas while generating NAF revenues.

(d) The Stars and Stripes personnel procedures shall differ from commercial newspapers only because the S&S are U.S. Government organizations that are required to operate in accordance with the following:

(1) 32 CFR part 40, other Federal laws and DoD Directives that affect all DoD employees, and the Manual for Courts Martial (MCM), 1984[4], for S&S military personnel on active duty.

(2) National security constraints prescribed by E.O. 12356 (47 FR 14874 and 15557, 3 CFR, 1982 Comp., p. 166).

(3) Overseas status of forces agreements (SOFAs), where applicable.

(e)(1) The only circumstances under which news or information that is not in the public domain may be directed to be withheld from publication in the Stars and Stripes by a Unified Command CINC are when such publication:

(i) Involves disclosure of classified national security information.

(ii) Would adversely affect national security.

(iii) Clearly endangers the lives of U.S. personnel.

(2) Those circumstances in paragraphs (e)(1)(i) through (e)(1)(iii) may not be construed to permit the calculated withholding of news unfavorable to the Department of Defense, the Military Services, or the U.S. Government. Only the Unified Command CINC may authorize withholding of news or information from the Stars and Stripes. When the CINC directs withholding of publication, the Unified Command shall immediately inform the ASD(PA) by telephone and then forward an immediate precedence, appropriately classified, message to the following: SECDEF Washington DC// OATSD-PA, with information copies to the Director, AFIS, and the Special Assistant for Public Affairs to the Chairman of the Joint Chiefs of Staff. The CINC may include the appropriate ''AMEMBASSY'' as an information addressee.

(f) Sensitivities of host-nations shall not be a reason to withhold any story from publication in the Stars and Stripes. The Unified Command theater host-nation sensitivity lists prepared for the Armed Forces Radio and Television Service (AFRTS) shall not be used to restrict the content of the Stars and Stripes. If representatives of other governments show an interest in, or concern about, the content of the Stars and Stripes, they shall be informed that:

(1) The Stars and Stripes does not represent the official position of the U.S. Government, including the Department of Defense or the Unified Command.

(2) The Stars and Stripes is an unofficial, abstracted collection of commercial news and opinion available to commercial newspapers in the United States, along with Stars and Stripes editorial staff-generated DoD, command, and local news and information. The Stars and Stripes provides this information to the members of the Department of Defense and their family members serving overseas, as do commercial daily newspapers that are published and sold throughout the United States in keeping with the principles of the First Amendment to the U.S. Constitution.

(g) The Department of the Army shall be the DoD Executive Agency to provide APF and NAF support to the S&S. APFs shall be provided, when required by adverse conditions or special circumstances as defined in § 246.3, by the Military Services, as agreed on through a memorandum of agreement

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

[2] See footnote 1 to § 246.4(c).

[3] See footnote 1 to § 246.4(c).

[4] See footnote 1 to § 246.4(c).

(MOA) detailing the shared responsibilities, and approved by the OSD and the Unified Commands.

**§ 246.5 Responsibilities.**

(a) The Assistant to the Secretary of Defense (Public Affairs), under 32 CFR part 375, as the principal staff assistant to the Secretary of Defense for internal information policy and programs, including S&S matters, shall:

(1) Provide policy and broad operational guidance to the Director of the AFIS.

(2) Monitor and evaluate the overall effectiveness of the policies in § 246.4, and procedures in § 246.6.

(b) The Director, American Forces Information Service, under 32 CFR part 372 shall:

(1) Develop, issue, and oversee the implementation of policies and procedures for the Unified Commands and the Military Departments for the operation of the S&S.

(2) Provide business and policy counsel on the mission performance and financial operations of the S&S.

(3) Serve as the DoD point of contact with the Congressional Joint Committee on Printing (JCP) for S&S matters.

(4) In coordination with the Chairman of the Joint Chiefs of Staff and the ATSD(PA), provide broad and overall planning guidelines to the Unified Commands for S&S wartime operations that involve more than one area of responsibility.

(5) Chair, as required, at the Deputy Assistant to the Secretary of Defense level, or above, the steering committee providing guidance to the S&S MAG.

(6) Select and employ the S&S Ombudsman.

(c) The Secretaries of the Military Departments shall:

(1) Nominate the most highly-qualified military personnel for positions in the S&S in accordance with appendix C to this part.

(2) Enter into appropriate MOAs, as provided by the Unified Commanders and, as required by the Office of the Secretary of Defense (OSD), to provide APF and/or NAF support when required by adverse conditions as defined in § 246.3(a).

(d) The Secretary of the Army shall:

(1) Provide administrative and logistic support, as the DoD Executive Agent, to the S&S organizations.

(2) Support NAF and APF accounting and reporting procedures required by DoD Instruction 7000.12[5], in coordination with the Unified Commands and the Director of the AFIS.

(3) Designate the successor-in-interest to the S&S, as agreed upon by the applicable Unified Command and the Director of the AFIS.

(e) The Commander in Chief, U.S. European Command, and the Commander in Chief, U.S. Pacific Command, shall:

(1) Authorize a Stars and Stripes newspaper, provide operational direction to the S&S commander publisher, and support the S&S throughout the Unified Command area of responsibility, consistent with each organization's status as a category B NAFI.

(2) Provide Unified Command regulations and guidance, as needed, to carry out this part.

(3) Establish procedures to resolve situations wherein a U.S. Ambassador (or, if so designated, the chief of mission) believes a specific issue in his or her nation of responsibility, not already in the public domain through other news sources, would violate national security or endanger the safety of American citizens, or other persons under their jurisdiction, if it were to be published in the Stars and Stripes.

(4) Select the S&S commander/publisher and other military officers in S&S positions.

(5) Aid the S&S commander/publisher to educate the Stars and Stripes editorial staff about the missions of their Unified Command and Military Service component commands.

(6) Approve the selection of the Stars and Stripes editor.

(7) Establish and maintain a S&S board of directors to address S&S business operations. (See appendix E to this part)

(8) Establish and maintain Stars and Stripes readership forums, which may take many forms, to address Stars and Stripes matters of interest and S&S bookstore operations. Those forums are to provide community feedback to the

[5] See footnote 1 to § 246.4(c).

S&S. This will enable the S&S commander/publisher and the Stars and Stripes editor to better understand and, thereby, better serve the interests and needs of the readers and bookstore customers.

(9) At the discretion of the Unified Command CINC, provide for meetings between the S&S commander/publisher and the Stars and Stripes editor, the Unified Command public affairs office, and the Unified Command component commands, represented by their directors of public affairs, to discuss the performance of the Stars and Stripes and the performance of related public affairs operations. The Unified Commands, their component commands, and the S&S may invite any attendees they choose. Representatives from the AFIS may attend. Those meetings may not serve as editorial advisory boards. The Unified Command and component commands represent the principal source, and a prominent subject, of Stars and Stripes staff-generated news coverage. Consequently, any involvement or appearance of involvement by component command staffs in the Stars and Stripes editorial policy creates an unacceptable conflict of interest damaging to the editorial integrity and credibility of the Stars and Stripes.

(10) Ensure that the S&S Commander/Publisher:

(i) Assumes the duties and responsibilities of command, leadership, management, and training for the S&S.

(ii) Executes DoD and Unified Command policy.

(iii) Is responsible to the Unified Command CINC for S&S operations to include the newspaper publication and timely circulation, the operation of the S&S resale and job printing activities, and associated distribution systems in the relevant Unified Command area of responsibility.

(iv) Provides planning and execution of initiatives to ensure support of U.S. Armed Forces during contingency operations and armed conflict. The S&S commander/publisher shall identify wartime and contingency S&S personnel asset requirements to the Unified Command CINC to fulfill the Unified Command force responsibilities during armed conflict.

(v) Selects the Stars and Stripes editor.

(vi) Approves, in coordination with the Stars and Stripes editor, military personnel selectees for the Stars and Stripes editorial staff. (See appendix C to this part)

(vii) Provides a current status briefing and 2-year financial forecast to the Director of the AFIS at the annual AFIS S&S meeting. Provides support to the S&S board of directors as required in appendix E to this part.

(viii) Conducts frequent independent readership surveys, in accordance with DoD Instruction 1100.13[6], and readership focus groups to gather information.

(f) The Other Unified Commanders in Chief shall ensure that their deployment exercise, contingency, and wartime planning documents reflect the S&S transportation, funding or reimbursement, and in-theater distribution requirements, as applicable. Information copies of such planning documents or annexes shall be furnished to the following:

(1) U.S. European Command (ATTN: Director, Public Affairs).

(2) U.S. Pacific Command (ATTN: Director, Public Affairs).

(3) The AFIS (ATTN: Assistant Director for Plans and Policy).

### § 246.6 Procedures.

(a) *General.* (1) Authority to establish or disestablish S&S operations is from the Secretary of Defense through the ATSD(PA) and the Director of the AFIS. The Unified Commands shall forward such requests to the Director of the AFIS, as required.

(2) Classified information shall be protected in accordance with 32 CFR parts 159 and 159a.

(3) The Stars and Stripes and the S&S business operations shall conform to applicable regulations and laws involving libel, copyright, U.S. Government printing and postal regulations, and DoD personnel policies and procedures.

(4) With the concurrence of the Unified Command, the S&S is authorized

[6] See footnote 1 to § 246.4(c).

direct communication with the Military Services on S&S personnel matters and with the Department of the Army on S&S financial matters. The S&S shall keep the Unified Command and the AFIS informed of all actions.

(b) *Management Review and Evaluation*. (1) The Director of the AFIS provides business counsel, assistance, and policy oversight for the S&S. The Director of the AFIS shall meet annually with the Unified Command representatives, to include the S&S commander/publisher, and senior DoD officials who have S&S responsibilities, such as the S&S MAG.

(2) The Director of the AFIS shall be assisted by a S&S MAG composed of senior representatives from the AFIS, the OASD(FM&P), and the other DoD offices with the authority and expertise to aid in solving S&S problems. As needed, the Director of the AFIS may organize a DoD steering committee to oversee and aid the S&S MAG to address specific concerns identified by the Director of the AFIS and the Unified Command CINCs.

(3) In accordance with DoD Instruction 7600.6[7], and Army implementation thereof, the S&S shall be audited on an annual basis, either by the Army Audit Agency (AAA) or by an AAA-approved audit contractor. NAF funds of the S&S shall be used for such contracts. The audits will be performance audits and may be financial in nature as prescribed by the Comptroller General of the United States Government Auditing Standards. Each annual audit will determine whether prior audit recommendations have been implemented and the reasons any have not been implemented. When the Inspector General, DoD, elects to perform an audit of the S&S organization, such audit may substitute for the required annual audit. The S&S organizations shall coordinate their audit requirements with each other and the Army Community and Family Support Center to the maximum extent practicable to avoid duplication of costs and to increase the efficiency and effectiveness of these audits. Information copies of the audit contractor reports shall be forwarded by the S&S to the Unified Commands, AFIS and AAA. The S&S shall provide a response to the audit to the Unified Command CINC within 60 days of receiving the completed report. The S&S response to the audit must indicate a concurrence or nonconcurrence for each finding and recommendation. For each concurrence the corrective actions taken or planned should be described and completion dates for actions already taken, as well as the estimated dates for completion of planned actions, should be provided. For each nonconcurrence, specific reasons must be stated. If appropriate, alternative methods for accomplishing desired improvements may be proposed. If nonconcurrences in the findings and recommendations cannot be resolved between the S&S management and the auditors or AAA endorses the contractors' findings and recommendations, then the resolution procedures established by DoD Directive 7650.3[8], and Army Regulations should be followed. The Unified Command shall forward the response to the Director of the AFIS and the AAA.

### § 246.7 Information requirements.

The reporting requirements in § 246.6, and appendix B to this part shall be submitted in accordance with DoD Instruction 7000.12, and 7600.6, unless specifically excepted by this part.

## APPENDIX A TO PART 246—MISSION

A. *General*. The Stars and Strips (S&S) organizations shall contribute to the overall U.S. joint-defense mission overseas by providing news and information for the Armed Forces internal audiences serving in a Unified Command area of responsibility, or deployed in support of designated joint-Service exercises, contingency operations, or situations of armed conflict. That shall be done through the operation of a daily newspaper and resale activities of commercial publications (primarily through the S&S bookstores).

B. *Newspapers*. The Stars and Stripes coverage of news and information makes possible the continued exercise of the responsibilities of citizenship by DoD personnel and their families overseas. The Stars and Stripes are to be published overseas during peacetime, contingency operations, and armed conflicts. They shall provide the same

[7] See footnote 1 to § 246.4(c).

[8] See footnote 1 to § 246.4(c).

range of international, national, and regional news and opinion from commercial sources, as is provided by newspapers in the United States. Additionally, to better serve their readers, the Stars and Stripes shall pay special attention to news of local, host-country conditions relevant to their audiences. They shall provide, through their reporters and bureaus, news of local military communities within the theater and news of the U.S. Government, the Department of Defense, the Military Services, and theater operations not usually available to readers from outside commercial sources. The Stars and Stripes are to serve the interests of their overseas DoD readership as do prominent commercial daily newspapers throughout the United States.

C. *S&S Bookstores and Retail Operations*. The S&S shall serve readers' needs for contemporary news and information by providing a broad selection of resale commercial publications of interest to their customers at the most reasonable prices, either directly in the S&S bookstores or through other authorized sales outlets at their discretion throughout the Unified Command designated geographic area. The S&S shall have the same authorities and rights for resale commercial publications that the military exchange services have for other nonsubsistence goods and services.

D. *S&S Job Shop Printing*. The S&S are authorized to operate job shop printing, to include book publishing and/or printing, within the Unified Commands for U.S. military community newspapers, military organizations, nonappropriated fund (NAF) instrumentalities (NAFI), Morale, Welfare, and Recreation (MWR) activities, private organizations of interest and concern to the Department of Defense, as designated by 32 CFR part 212, DoD employees and their immediate families, and others designated by the Unified Command.

E. *War-Time Mission and Contingency Operations*. The S&S shall provide the Stars and Stripes on a daily basis for transportation to, and distribution in, the designated area of operations, as requested and funded by the responsible Unified Command Commander-in-Chief (CINC), and supported by the respective Unified Command owning the S&S organization. The Unified Commands shall plan for required airlift on a timely basis and intratheater distribution of daily Stars and Stripes newspapers as part of their operational planning documents. Intratheater distribution and required airlift of the Stars and Stripes shall be the responsibility of the supported Unified Command CINC and respective component commands, who shall reimburse the S&S for nonresale issues on a per-issue basis. When deployed to an area of operations, the Stars and Stripes reporters shall operate in the same manner as commercial media representatives. The deployed Stars and Stripes reporters shall be eligible for participation in DoD and command-sponsored regional and local media pools.

## APPENDIX B TO PART 246—BUSINESS AND FINANCIAL OPERATIONS

A. *General Financial Operations*. 1. For financial management purposes, the Unified Commands shall administer the Stars and Stripes (S&S), with policy oversight exercised by the Director of the American Forces Information Service (AFIS), as nonappropriated fund instrumentalities (NAFIs) in accordance with §246.4(c), except where procedures differ as defined in this part. The S&S shall report as prescribed in DoD Instruction 7000.12,[1] providing information copies to the Unified Commands and the Director of the AFIS.

a. The S&S shall be authorized nonappropriated fund (NAF) and appropriated fund (APF) support as category B NAFIs as provided under DoD Instruction 1015.6.[2]

b. The S&S shall be funded to the maximum extent possible through the sale and distribution of the newspaper, news magazines, books, periodicals, and similar products; job printing; authorized advertising revenues; and other authorized sources of revenue, as approved by the Department of Defense and the Congress.

c. APF support shall be kept to a minimum, consistent with the S&S mission.

2. The Secretary of the Army shall be the DoD Executive Agent for APF and NAF support to the S&S. If adverse conditions occur, the other Military Services shall provide proportionate funding support through a memorandum of agreement (MOA) containing funding procedures coordinated with the affected Unified Commands and the AFIS. Copies of the agreement shall be provided to all concerned parties.

3. The Stars and Stripes and other S&S commercial resale publications may be made available within the Unified Command to other U.S. Government Agency members, and U.S. Government contractors, as approved by the Unified Command.

4. The S&S system of accounting and internal control shall conform with the requirements of DoD Instruction 7000.12, Army regulations on Morale, Welfare and Recreation (MWR) activities and NAFIs, and NAF accounting policies and procedures, except as authorized by the S&S Comptroller's Manual to meet business and consolidation requirements. The S&S shall ensure that quarterly reports are furnished to the Unified Commands, the S&S Board of Directors, and the Director of the AFIS.

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

[2] See footnote 1 to A.1. of this appendix.

B. *Appropriated Funds*. In addition to DoD Directive 1015.6, the S&S shall be authorized APF support:

1. As provided by the U.S. Army for direct funding support when adverse conditions make such funding necessary to ensure the survival of the newspaper without impairment of mission capability. The Secretary of the Army shall provide such funding when requested by the affected Unified Command Commander-in-Chief (CINC), through the Director of the AFIS.

2. For regional air transportation of the newspaper, overseas ''transportation of things'' as authorized to joint-Service NAFIs; and electronic, optical, or satellite transmission of the newspaper when long distances require these modes to ensure timely and economical delivery.

3. As required, to transport Stars and Stripes to officially designated ''remote and isolated'' locations. The Unified Commands may authorize DoD official postage to remote and isolated locations, if that action is required to ensure timely delivery. Each S&S shall annually review its mailing support to minimize APF expenditures. The U.S. postal regulations apply to the S&S.

a. The S&S shall use in-house or other nonpostal means of transportation to distribute the newspaper to areas that are not designated as remote and isolated.

b. The S&S are authorized to use official managerial and administrative mail related exclusively to the business of the U.S. Government in accordance with DoD 4525.8–M,[3] Chapter 3, Subsection O.8. Such official mail is also authorized to support archive responsibilities in the United States, as designated by the AFIS. Official mail may forward the Stars and Stripes through the Department of Defense to the Congress. Official mail is not authorized to provide the Stars and Stripes to general readership or to support in-theater distribution of S&S resale commercial publications.

4. For transportation of military personnel incident to mission-essential travel, required military training, participation in contingency operations, in military field exercises, such as ''REFORGER'' or ''TEAM SPIRIT,'' or to areas of armed conflict.

5. In times of armed conflict or national contingency deployment, as directed by the Chairman of the Joint Chiefs of Staff for production and free distribution of the Stars and Stripes to forces as designated. The other Military Services shall reimburse the Department of the Army for services as authorized in the MOA. The Unified Commands shall endeavor to provide the Stars and Stripes and other S&S services for DoD personnel engaged in military operations, contingency operations, and exercises in the most expeditious manner possible as requested by the participating commands. The requesting Unified Command shall be responsible for distribution of the Stars and Stripes within its theater of operations. These services shall be provided on a reimbursable basis to the S&S.

6. In other agreements as made with the Unified Commands, the Department of Defense, and the U.S. Army as the DoD Executive Agency.

C. *Nonapproriated Funds*. 1. So that the Department of the Army may perform its duties as the DoD Executive Agency, the S&S NAFS shall be invested in the Army's Banking and Investment Program and insured with the Army's Risk Management Insurance Program in accordance with DoD instruction 7000.12 and the implementing Army regulations.

2. Excess NAFs belonging to the S&S may be declared excess by the Unified Command CINC, upon the recommendation of the S&S board of directors, under the guidelines in section C.3. of this appendix. Disposition of excess NAFs shall be as directed by the Unified Command CINC. The S&S NAFs declared in excess in one theater may be allocated or loaned to the other Unified Command for S&S-related activities.

3. The S&S NAFs may be declared in excess only if the following conditions are met:

a. The S&S working capital is at a level to continue prudent operations.

b. The local national S&S employee retirement and severance accounts are fully funded. The other S&S employment agreements required by applicable NAF regulations must also be fully funded.

c. Sufficient capital is available from an investment and/or contingency fund to complete all planned and projected capital expenditure projects, and to fulfill the other legitimate S&S business obligations.

d. Additional sinking funds are available to sustain the S&S through foreseeable periods of financial crisis created by adverse conditions. The sinking fund level shall be determined by the S&S board of directors and recommended to the Unified Command CINC for approval.

e. The retail price of the Stars and Stripes is at, or below, the most prevalent charge for similar U.S. newspapers. That shall be determined by the S&S board of directors and recommended to the Unified Command CINC for approval. The Director of the AFIS will be informed of any decision to raise the retail sales price of Stars and Stripes and will provide the Unified Command CINC an assessment of average commercial newspaper sales prices throughout the United States. The availability of the Stars and Stripes at reasonable cost to overseas personnel, commensurate with the retail sales price of comparable commercial newspapers throughout the United States, is a major quality-of-life

[3] See footnote 1 to A.1. of this appendix.

consideration. A reasonable retail sales price is critical to ensure the greatest access for all overseas personnel and their family members to current print news and information so that they may remain informed U.S. citizens.

f. The S&S books, periodicals, magazines, and similar products are to be sold at no more than cover price and should be discounted to an appropriate level that still sustains full S&S operations, as determined by the S&S board of directors and recommended to the Unified Command CINC for approval.

4. Under adverse conditions, the S&S commander/publisher may apply for NAF support through the Unified Commands to the Director of the AFIS. Following approval by the Unified Command, the Director of the AFIS shall forward the request to the Secretary of the Army for appropriate action. Such NAF requests must first be recommended by the S&S board of directors and approved by the Unified Command CINC. In these cases, the S&S NAFs in either Unified Command may be considered as the first source before forwarding a request to the Department of the Army. The Unified Commands may lend NAFs from one S&S to the other through an MOA.

D. *Bookstores and Related Resale Activities.* 1. The S&S shall endeavor to provide the same selection of resale commercial publications that would be available in quality bookstores in the United States through its bookstores, or, at the discretion of the S&S management, other authorized sales outlets. The S&S has the same authorities and rights for resale and distribution of commercial publications that the military exchange services have on military installations for other nonsubsistence goods and services. The assortment of commercial books, periodicals, magazines, and similar products shall approximate publications commercially available in United States bookstore chains of similar size. Decisions on which publications to include shall be made by the S&S on the basis of marketability and service, not content. As an exception to the Army NAF procurement regulations, contracting authority limitations applicable to U.S. Army and joint-Service NAFIs do not apply to the S&S procurement of resale commercial publications. Limitations will be as recommended by the S&S board of directors and approved by the Unified Command.

2. The Unified Command CINC shall adjudicate publications resale issues within the theater that cannot be resolved by the S&S at the operating level.

3. Both S&S shall consolidate their wholesale purchases of commercial publications to the maximum extent, consistent with Unified Command distribution criteria, actual economies of scale, and cost-efficiencies. Consolidation initiatives shall be worked in concert with the Unified Commands, the AFIS, and the S&S board of directors. As recommended by the S&S board of directors and approved by the Unified Command CINC, the S&S bookstores shall offer discounts similar to commercial United States bookstore franchises. The offering of discounts should not endanger the financial viability of the S&S.

4. The S&S bookstores shall be audited by the S&S management at least annually. Where bookstores are operating at a consistent financial loss, the S&S may consider servicing readers through arrangements with exchanges, other military outlets, or consider consolidation at central points.

a. Bookstore inventory levels shall be verified internally on a semiannual basis. Inventory levels shall be held to cost-effective levels that still consider the servicing needs of overseas customers.

b. The S&S shall establish affidavit-return procedures to vendors and/or publishers, where possible, to return damaged merchandise, overstock, or out-of-date publications to reduce APF expenditures necessary for ''over-the-water'' transportation.

5. The S&S shall conduct local ''market-penetration'' surveys. The S&S shall also operate a ''customer-complaint'' feedback system to monitor its service and provide the best possible service to its customers. The results of those surveys shall be provided to the Unified Command with recommendations to the S&S board of directors, as required.

E. *Advertising.* 1. As U.S. Government publications, the Stars and Stripes operate under the authority of the ''Government Printing & Binding Regulations''[4] issued by the Joint Committee on Printing (JCP) of the U.S. Congress. To serve the readership, the JCP has granted an exemption to Title III of the ''Government Printing and Binding Regulations'', authorizing the Stars and Stripes to carry limited advertising so that they may provide information to overseas DoD personnel and their families on commercial goods and services. The Stars and Stripes are authorized to solicit, sell, publish, and circulate display advertising, paid classified ads, and supplement section advertising, to include price and brand names of products or services and related coupons that are available through authorized Government outlets, their concessionaires, NAF activities, or private organizations operating on DoD installations under 32 CFR part 212. The Stars and Stripes may have run-of-the-paper display advertising not to exceed 25 percent of the newspaper over a period of 1 month. In addition, the Stars and Stripes are

[4] Copies may be obtained from the Joint Committee on Printing of the U.S. Congress, 818 Hart Senate Office Building, Washington, DC 20510.

authorized to sell, publish, and circulate display advertising, and supplement section advertising for consumer goods and services not available through authorized Government outlets, their concessionaires, NAF activities, or private organizations operating on DoD installations under 32 CFR part 212 when sponsored by MWR activities, NAFIs, or Type I (Federally Sanctioned) private organizations as defined by 32 CFR part 212. Implementation of the advertising authority shall be as specified by the Director of the AFIS, who shall coordinate with the JCP.

2. The Stars and Stripes may sell, through commercial advertising agencies, run-of-the-paper advertising of DoD recruiting and retention programs or activities.

3. The S&S has the right to refuse any advertising.

4. The Stars and Stripes may publish news stories on special DoD-affiliated tours or entertainment opportunities for DoD personnel and their dependents in accordance with DoD Instructions 1015.2[5] and 1330.13[6].

5. The S&S may promote the Stars and Stripes, books, periodicals, magazines and similar products; authorized advertising; and job printing services (except APF) in the Stars and Stripes. Books, periodicals, magazines, and similar product promotions may include publications by name, title, author, and price. The Stars and Stripes also may promote literacy, health, safety, and other community service issues.

6. The S&S may promote AFRTS schedules, programs, and services in their newspapers and bookstores. The S&S shall cooperate with AFRTS outlets to promote each others' programs and services as authorized by DoD Directive 5120.20[7].

7. As a newspaper operated by the Department of Defense, the Stars and Stripes may not:

a. Contain any material that implies that the DoD Components or their subordinate levels endorse or favor a specific commercial and/or individually-owned product, commodity, or service.

b. Subscribe, even at no cost, to a commercial, feature wire, or other service whose primary purpose is the advertisement or promotion of commercial products, commodities, or services.

c. Carry any advertisement that implies discrimination as to race, age, origin, gender, politics, religion, or physical characteristics that include health.

F. *Trademark*. The S&S shall trademark the Stars and Stripes in overseas areas where it is distributed.

[5] See footnote 1 to A.1 of this appendix.

[6] See footnote 1 to A.1 of this appendix.

[7] See footnote 1 to A.1 of this appendix.

## APPENDIX C TO PART 246—PERSONNEL POLICIES AND PROCEDURES

A. *General Nonappropriated Fund (NAF) Employment Policies*. 1. The Stars and Stripes (S&S) shall have a personnel system that is business oriented in terms of personnel management concepts. The system shall provide maximum authority and accountability to the S&S managers at all levels and shall endeavor to improve productivity through a system of awards and bonuses for high-performing employees. The S&S NAF employees shall be governed in accordance with the U.S. Army NAF regulations, except where exceptions to general policy have been granted by the Unified Commands, the American Forces Information Service (AFIS), and the U.S. Army to the S&S.

2. As DoD employees, the S&S civilian personnel shall abide by 32 CFR part 40, the Department of Defense, the Unified Command, and the U.S. Army regulations, U.S. laws governing Government employees, the applicable host-nation laws, and the applicable status of forces agreements (SOFA) requirements. The S&S commander/publisher shall ensure that the S&S employees are made aware of those provisions before being hired and that employees receive adequate personnel training.

3. The S&S shall endeavor to recruit civilian personnel with solid experience, education, and performance credentials in the required business, publishing, or editorial disciplines. The S&S, as part of its hiring practices, shall specify terms of Government employment and include responsibilities, such as those in 32 CFR part 40, so that the S&S civilian employees are fully aware of their obligations as DoD employees.

B. *Appropriated Fund (APF) Personnel Assignment Authority*. Appropriated-funded manpower staffing to operate, manage, or support the S&S is authorized under DoD Directive 1015.4.[1]

C. *Military Officer Personnel Procedures*. 1. Candidates for the S&S military officer positions shall be nominated by the Military Services, through the Director of the AFIS, to the Unified Command Commander-in-Chief (CINC), who shall make the final selection. The S&S military officer positions considered for nomination shall be the S&S commander/publisher and deputy commander(s).

a. The S&S commander/publisher should have military public affairs and joint-Service experience, and a journalism degree.

b. The S&S officers supervising business operations should have experience in DoD Comptroller functions and be familiar with

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

laws and regulations applicable to DoD and NAFI business operations. A master's degree in business administration is desirable, but not mandatory.

c. Instead of an advanced degree or military public affairs experience, nominees may be authorized, by the Unified Command CINC and the AFIS, to substitute a DoD-funded ''training-with-industry'' program with comparable newspaper operations in the United States.

d. The Unified Commands shall forecast military vacancies in the S&S to allow time for the Military Services' nomination processes to be completed and provide for education before the S&S assignment.

e. The Military Services shall provide highly qualified officers for all S&S assignments at the required grade levels.

2. Military officers selected for duty as S&S commander/publisher shall undergo a ''training-with-industry'' program to provide real-world training with a commercial newspaper. That program shall be administered by the Director of the AFIS, in coordination with the Military Services and the Unified Commands.

D. *Enlisted Members of the Stars and Stripes Editorial Staff*. 1. Enlisted military personnel shall be assigned to the Stars and Stripes editorial staff, as reflected in the designated Unified Command Joint Manpower Program (JMP) documents, on a nominative basis. The Military Services shall nominate the most mature and professional personnel for assignment to the Stars and Stripes editorial staff at the required JMP grade- and experience-level, coordinating with the Unified Commands and the Director of the AFIS. Nominations shall be considered on a competitive basis by the S&S commander/publisher and the Stars and Stripes editor. The S&S shall request nominations 18 months before projected billet vacancies. The Military Services shall forward nominations 6–10 months in advance to the S&S, (ATTN: S&S Commander/Publisher). The Military Services shall provide the S&S with reasonable overlap of military enlisted members serving on the Stars and Stripes editorial staff.

2. The S&S commander/publisher shall coordinate with the Unified Commands to ensure that there is an appropriate mixture of Military Service billets and/or assignments represented in the S&S to preserve the tradition of the Stars and Stripes as joint-Service newspapers.

## APPENDIX D TO PART 246—EDITORIAL OPERATIONS

A. *General*. 1. The Stars and Stripes shall serve the interests of their overseas DoD readership, as commercial daily newspapers serve their readers throughout the United States. However, as a Government organization, the Stars and Stripes news staff may not take an independent editorial position. The Stars and Stripes editorial practices and policies shall be in accordance with the highest standards of American journalism.

2. The Stars and Stripes editor, with the concurrence of the S&S commander/publisher, and the Unified Command Commander-in-Chief (CINC), as the owner of the newspaper, may establish a standard code of personal and professional ethics and general editorial principles similar to those developed at major metropolitan newspapers or by professional journalists in organizations such as the Society of Professional Journalists. Those codes usually stress the following:

a. Responsibility of the newspaper to fully inform its readership.

b. Freedom of the press.

c. Commitment to personal and professional ethics.

d. Emphasis on content accuracy, objectivity, and fair representation of all sides of an issue.

When developed, copies of the code and style guides shall be provided to the Unified Command CINC and the Director of the American Forces Information Service (AFIS).

3. The Stars and Stripes editor shall be responsible for developing editorial procedures and, if required, a style guide that mirrors daily U.S. commercial newspapers.

4. The editorial content of the Stars and Stripes shall be governed by the general principles applicable to quality commercial press as follows:

a. *Presentation of News*. A major purpose of the Stars and Stripes is to provide news and information from varied sources. This aids DoD members and their families stationed overseas to exercise their democratic citizenship responsibilities.

b. *Commercially-Contracted News, Features, and Opinion Columns*. The Stars and Stripes purchase (or contract for) and carry news stories, features, syndicated columns, comic strips, and editorial cartoons from commercial services or sources. Wire-service news, information, and feature material may be edited in accordance with source contracts and for space requirements. The Stars and Stripes reflect the news of the day being carried in comparable U.S. commercial daily newspapers. They should reflect different sides of issues over a reasonable amount of time.

c. *Staff-Generated Copy*. In keeping with the standards established for major daily commercial newspapers in the United States, staff-generated news and features in the Stars and Stripes shall be accurate, factual, impartial, and objective. News stories and feature material shall distinguish between fact and opinion. Every effort should be made to attribute quotations and facts to

identified sources. In the case of controversial or sensitive stories, the Stars and Stripes editor, or his or her designee, shall ascertain the identity of confidential sources, as required by normal journalistic practices that ensure that sources are credible. The Stars and Stripes may use the normal range of journalistic techniques including ''people-on-the-street'' interviews if that technique does not constitute a political poll.

d. *Political Campaign News.* (1) The Stars and Stripes shall publish coverage of the U.S. political campaigns from commercial news sources. Presentation of such political campaign news shall be made on an impartial, unbiased, and nonpartisan basis reflecting DoD policies of non-endorsement of any specific candidate for an elected office. Every effort should be made to ensure that the Stars and Stripes reflect the full spectrum of campaign news being published in the United States on national candidates and issues.

(2) The Stars and Stripes shall support the Federal Voting Assistance Program by carrying factual information about registration and voting laws.

e. The Stars and Stripes shall provide balance in commercial syndicated columns. Since the Stars and Stripes may not take an independent editorial position, a balanced selection of syndicated opinion columns shall be published over a reasonable time period. The presentation of syndicated editorial cartoons should reflect the full spectrum of topical editorial cartoons being published throughout the United States. The S&S commander/publisher shall provide the Unified Commands annual assurance that the required balance for syndicated opinion columns has been met.

B. *Administrative.* 1. The Stars and Stripes shall comply with DoD Instruction 1100.13[1] on polls, surveys, and straw votes. The Stars and Stripes may not conduct a poll, a survey, exit polls, or a straw vote on any political campaign. The Stars and Stripes may publish polls, surveys, and/or straw votes furnished to the newspaper through its contracted wire services. The Stars and Stripes may not conduct lottery games.

2. The Stars and Stripes shall have the following disclaimer placed in the masthead or at the extreme bottom of one of the prominent pages, segregated from copy in a box:

This newspaper is authorized for publication by the Department of Defense for members of the Military Services overseas. However, the contents of the Stars and Stripes are unofficial, and are not to be considered as the official views of, or endorsed by, the U.S. Government, including the Department of Defense or the (name of the appropriate Unified Command). As a DoD newspaper, the Stars and Stripes may be distributed through official channels and use appropriated funds for distribution to remote and isolated locations where overseas DoD personnel are located.

The appearance of advertising in this publication, including inserts or supplements, does not constitute endorsement by the Department of Defense or the Stars and Stripes of the products or services advertised.

Products or services advertised in this publication shall be made available for purchase, use, or patronage without regard to race, color, religion, sex, national origin, age, marital status, physical handicap, political affiliation or any other nonmerit factor of the purchaser, user, or patron.

C. *Editorial.* 1. The Stars and Stripes news staffs are authorized to gather and report news, good and bad, on the Department of Defense and its subordinate commands. All reporting necessarily requires some investigation and, as with journalists on commercial newspapers, the Stars and Stripes news staff members have the right and need to ask questions and expect response to fulfill the S&S mission. However, the Stars and Stripes is not an authorized investigative agency, such as military law enforcement agencies, investigative bodies, or an Inspector General, and shall not function in that capacity. As DoD employees, the Stars and Stripes news staff members must adhere to the DoD personnel policies that may not usually apply to journalists employed by commercial newspapers and must comply with 32 CFR part 40 and, as applicable, the Manual for Courts Martial, 1984.[2]

a. Since most journalistic reporting is investigative by nature, ''investigative reporting,'' as such, is not banned. The Stars and Stripes reporters have the same need to ask questions of sources, and expect responses, as do commercial newspaper journalists. While the Stars and Stripes staff cannot conduct independent investigations that fall under the jurisdiction of various military law enforcement or designated investigative agencies, the Stars and Stripes may report on open or completed investigations by agencies authorized to perform investigative functions. If the Stars and Stripes employees note unlawful or criminal actions in their performance of duty, they must report such incidents immediately to the S&S commander/publisher or to their immediate supervisor, in accordance with 32 CFR part 40, who shall also comply with 32 CFR part 40 and, as applicable, DoD Directive 7050.1[3] and

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

[2] See footnote 1 to B.1. of this appendix.

[3] See footnote 1 to B.1. of this appendix.

DoD Instruction 5240.4.[4] If there is an authorized investigation, a Stars and Stripes reporter or editor cannot protect a source as confidential when the information may be required to complete the investigation. Coverage of an investigation, from a news perspective, should be based on case progress or the resolution provided by the investigative agency if considered newsworthy by the Stars and Stripes. The Stars and Stripes editorial procedures shall not prohibit publishing news of independent investigations furnished by commercial media and, therefore, in the public domain.

b. The Stars and Stripes staff may not knowingly place classified information in Stars and Stripes staff-generated material. That does not apply to public domain information attributed to commercially contracted news, features, or opinion columns.

2. The Stars and Stripes editorial staffs shall receive the same treatment as commercial media.

a. The Stars and Stripes reporters shall have the same right to ask questions, to gain help, to have access, and to attend gatherings available to reporters from the commercial media. Commanders or public affairs staffs may not use the U.S. Government status of Stars and Stripes reporters to block the release of, or access to, otherwise releasable news, information, or events. Under the same circumstances, the Stars and Stripes reporters may not use their U.S. Government status or credentials to gain special treatment, access to restricted areas or gatherings, or other advantages that are not given equally to civilian media.

b. In keeping with the ''Principles of Information'' in 32 CFR part 375 governing release of information to commercial media, the DoD Components are expected to make available timely and accurate information so that the Stars and Stripes news staffs and readers may assess and understand the facts about their military organizations, the national defense, and defense strategy. Consistent with statutory requirements, information shall be made fully and readily available under the principles for the release of information to the media issued by the Secretary of Defense. A Government organization may not file a request for information against another Government organization under 32 CFR part 285, which implements the Freedom of Information Act (FOIA) in the Department of Defense, but it is the responsibility of all commands to honor the DoD Principles of Information, particularly regarding the intent of open access as described in 32 CFR part 285 when responding to queries from Stars and Stripes reporters.

3. To meet organizational responsibilities, the Stars and Stripes editor, the S&S commander/publisher, and the Stars and Stripes staff members they select, should meet frequently with area commanders and public affairs officers and staffs to confer, as their counterparts in U.S. commercial daily newspapers do with local government and community interest representatives.

4. When matters of interest to the Stars and Stripes readership cut across the Unified Command component command responsibilities, the Stars and Stripes editor may use ''special project reporting teams'' to examine such concerns. Whether the areas of Stars and Stripes interest are military exercises, fast-breaking news affecting the entire Unified Command community, or policies that require a greater-than-individual-reporter effort, the Stars and Stripes editor, through the S&S commander/publisher, can gain help by keeping the Unified Command and its component command public affairs offices informed of the need for theater-wide assistance. Such aid could help dispel morale-damaging rumors.

5. The Stars and Stripes shall conduct readership surveys at least once every 3 years in the Unified Commands where the Stars and Stripes are distributed. Such formal surveys shall be conducted in accordance with DoD Instruction 1100.13. The S&S may make shorter market surveys through its bookstore operations to determine changing readership interests. The Stars and Stripes is also encouraged to make frequent use of readership focus groups throughout the Unified Command.

6. The Stars and Stripes may review commercial entertainment where relevant and where it supports readership interest.

7. All bureau personnel and field reporters shall have Stars and Stripes newsroom experience before being given independent assignments. The Stars and Stripes military reporters may wear military or civilian clothes at the discretion of the S&S commander/publisher. If authorized by the S&S commander/publisher, Stars and Stripes military members may be authorized a clothing allowance in accordance with individual Service directives.

8. The Stars and Stripes are both authorized to maintain a Washington, DC, bureau located with other correspondent bureaus in the OASD (PA) Correspondents' Corridor. A desk will be provided for each Stars and Stripes. The S&S shall select the most qualified reporters possible for assignment to the bureau. A joint memorandum of understanding on personnel support shall be established between the two newspapers and approved by the Unified Commands, with a copy provided to the Director of the AFIS.

[4] See footnote 1 to B.1. of this appendix.

APPENDIX E TO PART 246—STARS AND STRIPES (S&S) BOARD OF DIRECTORS

A. *Organization and Management.* 1. The S&S board of directors of each Unified Command shall provide advice to the S&S management, and recommend guidance to its Commander-in-Chief (CINC) on all business operations. Attendance is at the direction of the Unified Command CINC.

2. Each Unified Command CINC shall designate the chairman of its S&S board of directors.

3. Each S&S board of directors shall include a member from the Unified Command Offices of Public Affairs and the Comptroller, and at least one member from each of the Unified Command Service components. Members shall be appointed by the Unified Command CINC for 2 years to ensure continuity. They shall be the best qualified personnel available in business-related disciplines. Members should be at the grade of 0–5, GS–12, or higher. Other than the Unified Command and the S&S senior representatives, the S&S board members should not be members of any other S&S forums or councils. Representatives from the American Forces Information Service (AFIS) and one S&S may attend the meetings of the other S&S board of directors and have their observations included in the minutes, but they are not voting members. Recommendations approved by the S&S board of directors may be incorporated by the Unified Command CINC into the Unified Command S&S instruction or directive, as applicable.

4. The S&S board of directors should meet at least three times each year. The minutes of each meeting shall be approved by the Unified Command CINC. The approved S&S board recommendations shall be incorporated, as permanent policy, into the Unified Command S&S implementing instructions or directives. Where such recommendations affect DoD policy, the Unified Commands shall ask the Director of the AFIS for resolution. The S&S commander/publisher shall provide sufficient documentation to the S&S board members between meetings to inform them of on-going business operations and the execution of financial actions.

B. *Functions.* 1. The S&S board of directors shall monitor planning and execution of the S&S business activities.

2. The S&S board of directors shall aid the S&S commander/publisher with evaluation of external factors that impact the S&S, such as adverse conditions, as recommended by the S&S commander/publisher, the S&S board of directors, or the Unified Command CINC.

3. Annually, the S&S commander/publisher shall provide a financial plan that shall include a capital expenditure budget and a 2-year forecast for the S&S board of directors' evaluation and recommendation to the Unified Command CINC. The S&S shall also forecast and get approval for building and/or construction projects through the S&S board of directors.

4. The S&S shall maintain a 5-year business strategic and corporate plan that shall be forwarded to the S&S board of directors. The Unified Commands shall forward the ongoing strategic and corporate plan to the Director of the AFIS for overall DoD strategic goals.

# PART 247—DEPARTMENT OF DEFENSE NEWSPAPERS, MAGAZINES AND CIVILIAN ENTERPRISE PUBLICATIONS

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AUTHORITY: 10 U.S.C. 121 and 133.

SOURCE: 62 FR 42905, Aug. 11, 1997, unless otherwise noted.

## § 247.1 Purpose.

This part implements DoD Directive 5122.10[1] and implements policy, assigns responsibilities, and prescribes procedures concerning authorized DoD Appropriated Funded (APF) newspapers and magazines, and Civilian Enterprise (CE) newspapers, magazines, guides, and installation maps in support of the DoD Internal Information Program.

## § 247.2 Applicability.

This part:

(a) Applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman of the

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22121.

Joint Chiefs of Staff, the Combatant Commands, the Defense Agencies, and the DoD Field Activities (hereafter referred to collectively as ''the DoD Components''). The term ''Military Services,'' as used herein, refers to the Army, the Navy, the Air Force, the Marine Corps, and includes the Coast Guard when operating as a Military Service in the Navy. The term Commander, as used herein, also means Heads of the DoD Components.

(b) Does not apply to the *Stars and Stripes (S&S)* newspapers and business operations. *S&S* guidance is provided in DoD Directive 5122.11.[2]

(c) The term Commander, as used in this part, also means Heads of the DoD Components.

**§ 247.3 Definitions.**

*Civilian Enterprise (CE) guides and installation maps*. Authorized publications containing advertising that are prepared and published under contract with commercial publishers. The right to circulate the advertising in these publications to the DoD readership constitutes contractual consideration to pay for these DoD publications. The publications become the property of the command, installation, or intended recipient upon delivery in accordance with terms of the contract. Categories of these publications are:

(1) *Guides*. Publications that provide DoD personnel with information about the mission of their command; the availability of command, installation, or community services; local geography; historical background; and other information. These publications may include installation telephone directories at the discretion of the commander.

(2) *Installation maps*. Publications designed for orientation of new arrivals or for visitors.

*CE publications*. CE newspapers, CE magazines, CE guides and installation maps produced commercially under the CE concept.

*DoD newspapers*. Authorized, unofficial publications, serving as part of the commander's internal information program, that support DoD command internal communication requirements. Usually, they are distributed weekly or monthly. DoD newspapers contain most, if not all, of the following elements to communicate with the intended DoD readership: command, military department, and DoD news and features; commanders' comments; letters to the editor; editorials; commentaries; features; sports; entertainment items; morale, welfare, and recreation news and announcements; photography; line art; and installation and local community news and announcements. DoD newspapers do not necessarily reflect the official views of, or endorsement of content by, the Department of Defense.

(1) *CE newspapers*. Newspapers published by commercial publishers under contract with the DoD Components or their subordinate commands. The commander or public affairs office provides oversight and final approval authority for the news and editorial content of the paper. Authorized news and information sources include the Office of the Assistant Secretary of Defense for Public Affairs (OASD(PA)), AFIS, the Military Departments, their subordinate levels of command, and other Government Agencies. CE contractor personnel may provide material for use in the newspaper if approved by the commander or public affairs officer (PAO), as the commander's representative. These newspapers contain advertising sold by the commercial publisher on the same basis as for CE guides and installation maps and may contain supplements or inserts. They become the property of the command, installation, or intended recipient upon delivery in accordance with terms of the contract.

(2) *Funded newspapers*. Newspapers published by the DoD Components or their subordinate commands using appropriated funds. The editorial content of these newspapers is prepared by the internal information section of the public affairs staff or other internal sources. Usually, these newspapers are printed by the Government Printing Office (GPO) or under GPO contract in accordance with Government printing regulations. DoD Directive

[2] See footnote 1 to § 247.1.

5330.3[3] specifies DPS as the sole DoD conduit to the GPO.

(3) *Overseas Combatant Command newspapers.* Newspapers published for overseas audiences approved by the Assistant Secretary of Defense for Public Affairs (ASD(PA)) to provide world, U.S., and regional news from commercial sources, syndicated columns, editorial cartoons, and applicable U.S. Government, Department of Defense, Component, and subordinate command news and information.

(4) *News bulletins and summaries.* Publications of deployed or isolated commands and ships compiled from national and international news and opinion obtained from authorized sources. News bulletins or summaries may be authorized by the next higher level of command when no daily English language newspapers are readily available.

*Inserts.* A flier, circular, or free-standing advertisement placed within the folds of the newspaper. No disclaimer or other labeling is required.

*Magazines.* Authorized, unofficial publications, serving as part of the commander's internal information program. They are produced and distributed periodically, usually monthly, and contain information of interest to personnel of the publishing DoD component or organization. They usually reflect a continuing policy as to purpose, format, and content. They are normally non-directive in nature and are published to inform, motivate, and improve the performance of the personnel and organization. They may be published as funded magazines or under the CE concept.

*Option.* A unilateral right in a contract by which, for a specified time, the Government may elect to acquire additional supplies or services called for by the contract, or may elect to extend the term of the contract.

*Organizational terms*—(1) *Command.* A unit or units, an organization, or an area under the command of one individual. It includes organizations headed by senior civilians that require command internal information-type media.

(2) *DoD Components.* See § 247.2 (a).

(3) *Installation.* A DoD facility or ship that serves as the base for one or more commands. Media covered by this part may serve the command communication needs of one or several commands located at one installation.

(4) *Major command.* A designated command such as the Air Mobility Command or the Army Forces Command that serves as the headquarters for subordinate commands or installations that have the same or related missions.

(5) *Subordinate levels.* Lower levels of command.

*Publications.* As used in this part, ''publications'' refers to DoD newspapers, magazines, guides and/or installation maps serving the commander's internal information program published in both paper and electronic format, including digital printing.

*Supplements.* Features, advertising sections, or morale, welfare and recreation sections printed with or inserted into newspapers for distribution. Supplements must be labeled ''Supplement to the (name of newspaper).'' Editorial content in supplements is subject to approval by the commander or the PAO as his or her agent.

### § 247.4 Policy.

It is DoD policy that:

(a) A free flow of news and information shall be provided to all DoD personnel without censorship or news management. The calculated withholding of news unfavorable to the Department of Defense is prohibited.

(b) News coverage and other editorial content in DoD publications shall be factual and objective. News and headlines shall be selected using the dictates of good taste. Morbid, sensational, or alarming details not essential to factual reporting shall be avoided.

(c) DoD publications shall distinguish between fact and opinion, both of which may be part of a news story. When an opinion is expressed, the person or source shall be identified. Accuracy and balance in coverage are paramount.

(d) DoD publications shall distinguish between editorials (command position) and commentaries (personal opinion) by clearly identifying them as such.

(e) News content in DoD publications shall be based on releases, reports, and

[3] See footnote 1 to § 247.1.

materials provided by the DoD Components and their subordinate levels, DoD newspaper staff members, and other government agencies. DoD publications shall credit sources of all material other than local, internal sources. This includes, but is not limited to, Military Department news sources, American Forces Information Service, and command news releases.

(f) DoD publications may contain articles of local interest to installation personnel produced outside official channels (e.g., stringers, local organizations), provided that the author's permission has been obtained, the source is credited, and they do not otherwise violate this part.

(g) DoD publications normally shall not be authorized the use of commercial news and opinion sources, such as Associated Press (AP), United Press International (UPI), New York Times, etc., except as stated in this paragraph and the following paragraph. The use of such sources is beyond the scope of the mission of command or installation publications and puts them in direct competition with commercial publications. The use of such sources may be authorized for a specific DoD newspaper by the cognizant DoD Component only when other sources of national and international news and opinion are not available.

(h) Overseas Combatant Command newspapers published outside the United States may purchase or contract for and carry news stories, features, syndicated columns, and editorial cartoons from commercial services or sources. A balanced selection of commercial news or opinion shall appear in the same issue and same page, whenever possible, but in any case, over a reasonable time period. Selection of commercial news sources, syndicated columns, and editorial cartoons to be purchased or contracted for shall be approved by the Commanders. Overseas Combatant Command newspapers, news bulletins, and news summaries authorized to carry national and world news may include coverage of U.S. political campaign news from commercial news sources. Presentation of such political campaign news shall be made on a balanced, impartial, and nonpartisan basis.

(i) The masthead of all DoD publications shall contain the following disclaimer printed in type no smaller than 6-point: ''This (DoD newspaper, magazine, guide or installation map) is an authorized publication for members of the Department of Defense. Contents of (name of the DoD newspaper/magazine/this guide/this installation map) are not necessarily the official views of, or endorsed by, the U.S. Government, the Department of Defense, or (the name of the publishing DoD Component).''

(j) The masthead of DoD CE publications shall contain the following statements in addition to that contained in paragraph (i) of this section:

(1) ''Published by (name), a private firm in no way connected with the (Department of Defense/the U.S. Army/the U.S. Navy/the U.S. Air Force/the U.S. Marine Corps) under exclusive written contract with (DoD Component or subordinate level).''

(2) ''The appearance of advertising in this publication, including inserts or supplements, does not constitute endorsement by the (Department of Defense/the U.S. Army/the U.S. Navy/the U.S. Air Force/the U.S. Marine Corps), or (name of commercial publisher) of the products or services advertised.''

(3) ''Everything advertised in this publication shall be made available for purchase, use, or patronage without regard to race, color, religion, sex, national origin, age, marital status, physical handicap, political affiliation, or any other nonmerit factor of the purchaser, user, or patron.'' If a violation or rejection of this equal opportunity policy by an advertiser is confirmed, the publisher shall refuse to print advertising from that source until the violation is corrected.

(k) DoD publications shall not contain campaign news, partisan discussions, cartoons, editorials, or commentaries dealing with political campaigns, candidates, issues, or which advocate lobbying elected officials on specific issues. DoD CE publications shall not carry paid political advertisements for a candidate, party, which advocate a particular position on a political issue, or which advocate lobbying elected officials on a specific issue.

This includes those advertisements advocating a position on any proposed DoD policy or policy under review.

(l) DoD newspapers shall support the Federal Voting Assistance Program by carrying factual information about registration and voting laws, especially those on absentee voting requirements of the various States, the District of Columbia, Puerto Rico, and U.S. territories and possessions. DoD newspapers shall use voting materials provided by the Director, Federal Voting Assistance Program; the OSD; and the Military Departments. Such information is designed to encourage DoD personnel to register as voters and to exercise their right to vote as outlined in DoD Directive 1000.4.[4]

(m) DoD publications shall comply with DoD Instruction 1100.13[5] pertaining to polls, surveys, and straw votes.

(1) The DoD Components and subordinate levels may authorize polls on matters of local interest, such as soldier of the week, and favorite athlete.

(2) A DoD publication shall not conduct a poll, a survey, or a straw vote relating to a political campaign or issue.

(3) Opinion surveys must be in compliance with Military Service regulations.

(n) DoD newspapers will support officially authorized fund-raising campaigns (e.g., Combined Federal Campaign (CFC)) within the Department of Defense in accordance with DoD Directive 5035.1.[6] News coverage of the campaign will not discuss monetary goals, quotas, competition or tallies of solicitation between or among agencies. To avoid any appearance of endorsement, features and news coverage will discuss the campaign in general and not promote specific agencies within the CFC. Agencies may be mentioned routinely but must not be a main focus of features and news coverage.

(o) DoD publications shall not:

(1) Contain any material that implies that the DoD Components or their subordinate levels endorse or favor a specific commercial product, commodity, or service.

(2) Subscribe, even at no cost, to a commercial or feature wire or other service whose primary purpose is the advertisement or promotion of commercial products, commodities, or services.

(3) Carry any advertisement that violates or rejects DoD equal opportunity policy. (See paragraph (j)(3) of this section).

(p) All commercial advertising, including advertising supplements, shall be clearly identifiable as such. Paid advertorials and advertising supplements may be included but must be clearly labeled as advertising and readily distinguishable from editorial content.

(q) Alteration of official photographic and video imagery will comply with DoD Directive 5040.5.[7]

(r) Commercial sponsors of Armed Forces Professional Entertainment Program events and morale, welfare and recreation events may be mentioned routinely with other pertinent facts in news stories and announcements in DoD newspapers. (See DoD Instructions 1330.13[8] and 1015.2.[9]

(s) Book, radio, television, movie, travel, and other entertainment reviews may be carried if written objectively and if there is no implication of endorsement by the Department of Defense or any of its Components or their subordinate levels.

(t) All printing using appropriated funds will be obtained in accordance with DoD Directive 5330.3.

(u) Although DoD internet web sites are normally discouraged from linking to commercial activities, the commander may authorize an installation web site to be linked to the web site carrying the authorized civilian enterprise publication.

### § 247.5 Responsibilities.

(a) The Assistant Secretary of Defense for Public Affairs, consistent with DoD Directive 5122.5,[10] shall:

[4] See footnote 1 to § 247.1.
[5] See footnote 1 to § 247.1.
[6] See footnote 1 to § 247.1.
[7] See footnote 1 to § 247.1.
[8] See footnote 1 to § 247.1.
[9] See footnote 1 to § 247.1.
[10] See footnote 1 to § 247.1.

(1) Develop policies and provide guidance on the administration of the DoD Internal Information Program.

(2) Provide policy and operational direction to the Director, AFIS.

(3) Monitor and evaluate overall mission effectiveness within the Department of Defense for matters under this part.

(b) The Director, American Forces Information Service, shall:

(1) Develop and oversee the implementation of policies and procedures pertaining to the management, content, and publication of DoD publications encompassed by this part.

(2) Serve as DoD point of contact with the Joint Committee on Printing, Congress of the United States, for matters under this part.

(3) Serve as the DoD point of contact in the United States for Combatant Command newspaper matters.

(4) Provide guidance to the Combatant Commands, Military Departments, and other DoD Components pertaining to DoD publications.

(5) Monitor effectiveness of business and financial operations of DoD publications and provide business counsel and assistance, as appropriate.

(6) Sponsor a DoD Interservice Newspaper Committee and a Flagship Magazine Committee composed of representatives of the Military Departments to coordinate matters on publications encompassed by this part and flagship magazine matters, respectively.

(7) Provide a press service for joint-Service news and information for use by authorized DoD publication editors.

(c) The Secretaries of the Military Departments shall:

(1) Provide policy guidance and assistance to the Department's publications.

(2) Encourage the use of CE publications when they are the most cost-effective means of fulfilling the command communication requirement.

(3) Ensure that adequate resources are available to support authorized internal information products under this part.

(4) Designate a member of their public affairs staff to serve on the DoD Interservice Newspaper Committee.

(5) Ensure all printing obtained with appropriated funds complies with DoD Directive 5330.3.

(d) The Commanders of Combatant Commands shall:

(1) Publish Combatant Command newspapers, if authorized. In discharging this responsibility, the Commander shall ensure that policy, direction, resources, and administrative support are provided, as required, to produce a professional quality newspaper to support the command mission.

(2) Ensure that the newspaper is prepared to support U.S. forces in the command area during contingencies and armed conflict.

**§ 247.6 Procedures.**

(a) *General.* (1) National security information shall be protected in accordance with DoD Directive 5200.1[11] and DoD 5200.1–R.[12]

(2) Specific items of internal information of interest to DoD personnel and their family members prepared for publication in DoD publications may be made available to requesters if the information can be released as provided in DoD Directive 5400.7[13] and DoD 5400.1–R.[14]

(3) Editorial policies of DoD publications shall be designed to improve the ability of DoD personnel to execute the missions of the Department of Defense.

(4) DoD editors of publications covered under this part shall conform to applicable policies, regulations, and laws involving the collection, processing, storage, use, publication and distribution of information by DoD Components (e.g., libel, photographic image alteration, copyright, sexually explicit materials, classification of information, protection of sensitive information and U.S. Government printing and postal regulations).

(5) DoD publications shall comply with DoD Directive 5400.11[15] regarding the DoD privacy program.

(b) *Establishment of DoD newspapers.* (1) Commanders are authorized to establish Funded newspapers (appendix A

[11] See footnote 1 to § 247.1.
[12] See footnote 1 to § 247.1.
[13] See footnote 1 to § 247.1.
[14] See footnote 1 to § 247.1.
[15] See footnote 1 to § 247.1.

to this part) or CE newspapers (appendix B to this part) when:

(i) A valid internal information mission requirement exists.

(A) Command or installation newspapers provide the commander a primary means of communicating mission-essential information to members of the command. They provide feedback through such forums as letters to the editor columns. This alerts the commander to the emotional status and state of DoD knowledge of the command. The newspaper is used as a return conduit for command information to improve attitudes and increase knowledge.

(B) News reports and feature stories on individuals and organizational elements of the command provides a crossfeed of DoD information, which improves internal cooperation and mission performance. Recognition of excellence in individual or organizational performance motivates and sets forth expected norms for mission accomplishment.

(C) The newspaper improves morale by quelling rumors and keeping members informed on DoD information that will affect their futures. It provides information and assistance to family members, which improve their spirits and thereby the effectiveness of their military service and/or civilian member. The newspaper encourages participation in various positive leisure-time activities to improve morale and deter alcohol abuse and other pursuits that impair their ability to perform.

(D) The newspaper provides information to make command members aware of the hazards of the abuse of drugs and other substances, and of the negative impact that substance abuse has on readiness.

(E) CE newspapers provide advertisements that guide command members to outlets where they may fulfill their purchasing needs. A by-product of this commercial contact is increased installation-community communication, which enhances mutual support.

(F) The newspaper increases organizational cohesiveness and effectiveness by providing a visual representation of the essence of the command itself.

(G) Good journalistic practices are vital, but are not an end unto themselves. They are the primary means to enhance receptivity of command communication through the newspaper.

(H) The newspaper exists to facilitate accomplishment of the command or installation mission. That is the only basis for the expenditure of DoD resources to produce them.

(ii) A newspaper is determined by the commander and the next higher level of command to be the most cost-effective means of fulfilling the command internal communication requirement.

(2) The use of appropriated funds is authorized to establish a Funded newspaper if a CE newspaper is not feasible. The process of establishing a newspaper must include an investigation of the feasibility of publishing under the CE concept. This investigation must include careful consideration of the potential for real or apparent conflict of interest. If publishing under the CE concept is determined to be feasible, commanders must ensure that they have obtained approval to establish the newspaper before authorizing their representatives to negotiate a contract with a CE publisher.

(3) DoD newspapers are mission activities. The use of nonappropriated funds for any aspect of their operations is not authorized.

(4) Appropriated funds shall not be used to pay any part of the commercial publisher's costs incurred in publishing a CE publication.

(5) Only one DoD newspaper or magazine is authorized for each command or installation.

(i) If a newspaper is required at an installation where more than one command or headquarters is collocated, the host commander shall be responsible for publication of one funded or CE newspaper for all. The host command shall provide balanced and sufficient coverage of the other commands, their personnel, and activities in that locality. These commands, or headquarters, shall assist the staff of the host newspaper with coverage. If required by unusual circumstance, a commander other than the host may publish the single authorized newspaper when the majority of affected organizations concur.

(ii) This provision is not intended to prohibit the headquarters of a geographically dispersed command that receives its local coverage in the host installation newspaper from publishing a command-wide newspaper; nor is it intended to prohibit a command that has information needs that are significantly different from the majority of the host installation audience from publishing a separate newspaper, when authorized by the designated approving authority. (See appendix E to this part).

(iii) *Establishment of CE Guides and Installation Maps.* When valid communication requirements exist, publications in this category may be established by the commander, if feasible. (See appendix B to this part) Only one CE guide and installation map is authorized for each command or installation. The requirements of paragraph (b)(4) of this section, apply to CE guides and installation maps. These publications shall be approved by the next higher level. Approval authorities shall exercise care not to overburden community advertisers.

(iv) *Use of trademark.* The DoD Components and their subordinate levels shall trademark—State, Federal, or both—the names of their publications when possible.

(v) *Use of recycled products.* The public affairs office shall, whenever possible, based on contractual agreements, use recycled paper for publications covered under this part.

(vi) *Mailing requirements and sales and distribution of non-DoD publications.* See appendix C to this part.

(vii) *AFIS print media directorate.* See appendix D to this part.

(viii) *DoD command newspaper and magazine review system.* See appendix E to this part.

(6) When, in the opinion of the Assistant Secretary of Defense for Public Affairs, or the Combatant Command Commander, a Combatant Command newspaper is needed, establishment shall be directed by the Secretary of Defense. Both appropriated and nonappropriated funds may be used in the publication of overseas Combatant Command newspapers.

(7) *Establishment of magazines.* New magazines shall be approved by the Head of the publishing DoD Component. New magazines serving the Military Services shall be approved in accordance with Service procedures. Only one DoD magazine or newspaper is authorized for each command or installation. Magazines are normally financed through appropriated funds. When CE magazines are approved, provisions in this part regarding advertising and contracting for CE publications apply to CE magazines. Magazines must:

(i) Serve a clearly defined purpose in support of the mission of the publishing DoD Component, and the purpose must justify the cost.

(ii) Not duplicate equivalent magazines serving the same, or substantially the same purpose.

(iii) Be published and distributed efficiently and economically.

(iv) Be reviewed every two years by the publishing DoD Component to ensure they are in compliance with this part, are mission essential, and are economically achieving their desired objective.

### § 247.7 Information requirements.

The biennial reporting requirement contained in this part has been assigned Report Control Symbol DD-PA(BI) 1638.

## APPENDIX A TO PART 247—FUNDED NEWSPAPERS AND MAGAZINES

A. *Purpose.* Funded newspapers and magazines support the command communication requirements of the DoD Components and their subordinate commands. Normally, printing is accomplished by a commercial printer under contract or in government printing facilities in accordance with DoD Directive 5330.3.[1] The editorial content of these publications and distribution are accomplished by the contracting command. Overseas, Funded newspapers are authorized to be printed under contract with the *S&S*. Where printing by *S&S* is not feasible because of distance or other factors, Funded newspapers may be printed by other means. These are evaluated on a case-by-case basis with the cognizant DPS office.

B. *Name.* The name of the publication may include the name of the command or installation, or, the name of the command or installation may appear separately in the

[1] Copies may be obtained, at cost, from the National Technical Information Service, 5285 Port Royal Road, Springfield, VA 22121.

nameplate (flag). The emblem of the command or installation may be included in the nameplate, also. When possible, the DoD Components and their subordinate levels shall trademark the names of their publications, as stated in § 247.5(d).

C. *Masthead*. The masthead shall include the names of the commanding officer and the PAO, the names and editorial titles of the primary staff of the publication, and the mailing address and telephone number of the editorial staff, in addition to that required in § 247.4(i).

D. *News and editorial materials*. The commander and the public affairs staff shall generate and select news, information, photographs, editorial, and other materials to be used. Authorized news and information sources include the Office of the Assistant Secretary of Defense for Public Affairs (OASD(PA)), AFIS, the Military Departments, their subordinate levels of command, and other Government Agencies. Civilian community service news and announcements of benefit to personnel assigned to the command or installation and their family members may also be used. Photographic images used will be in compliance with § 247.4(r).

E. *Assignment of personnel*. Military and DoD civilian personnel may not be assigned to duty at the premises of the contract printer to perform any job functions that are part of the business activities or contractual responsibilities of the contract printer. Members of the public affairs staff who produce editorial content may work on the premises as liaison and monitor to specify and coordinate layout and other production details provided for in the command contract with the contract printer. A member of the public affairs staff shall review proof copy to prevent mistakes.

F. *Funding*. The expense of publishing and distributing Funded newspapers and magazines is charged to appropriated funds of the publishing command.

G. *Printing*. Printing of a funded publication shall be handled in accordance with DoD Directive 5330.3 in conjunction with the DoD Component's printing function with public affairs as the office of primary publishing interest. The use of color is authorized if the cognizant commander, the DoD Component's printing function and the PAO determine it enhances communication.

H. *Distribution*. Funded publications may be distributed through official channels. Appropriated funds and manpower may be used for distribution of Funded publications, as required.

I. *Advertising*. Funded publications shall not carry commercial advertising. As a service, the Funded newspaper may carry nonpaid listings of personally owned items and services for sale by members of the command. Noncommercial news stories and announcements concerning nonappropriated fund activities and commissaries may be published in funded publications.

J. *Employment and gratuities*. DoD personnel shall not accept any gratuities from or employment with any GPO-contracted printers in violation of the DoD 5500.7-R,[2] the Joint Ethics Regulation. In addition, DoD personnel whose spouse or children (or other relatives as described in the Joint Ethics Regulation) are offered employment by, or work for, a GPO-contracted printer, must take appropriate action to avoid conflicts of interest.

## APPENDIX B TO PART 247—CE PUBLICATIONS

A. *Purpose*. CE publications consist of DoD newspapers, magazines, guides, and installation maps. They support command internal communications. The commander or public affairs office provides oversight and final approval authority for the news and editorial content of the publication. CE publishers sell advertising to cover costs and secure earnings, print the publications, and may make all or part of the distribution. Periodically, CE publishers compete for contracts to publish these publications. Neither appropriated nor nonappropriated funds shall be used to pay for any part of a CE publisher's costs incurred in publishing a CE publication.

B. *Name*. The name of the publication may include the name of the command or installation, or the name of the command or installation may appear separately in the nameplate (flag). The emblem of the command or installation may also be included in the nameplate. When possible, the DoD Components and their subordinates shall trademark the names of their publications, as stated in § 247.6(d).

C. *Masthead*. The masthead shall include the following in addition to that required in § 247.4 (i) and (j). ''The editorial content of this publication is the responsibility of the (name of command or installation) Public Affairs Office.'' The names of the commanding officer and PAO, the names and editorial titles of the staff assigned the duty of preparing the editorial content, and the office address and telephone number of the editorial staff shall be listed in the masthead of DoD newspapers, but is not required in CE guides and installation maps. The names of the publisher and employees of the publisher may be listed separately.

D. *News and editorial materials*. The commander or the public affairs office shall provide oversight and final approval authority for news, information, photographs, editorial, and other materials to be used in a CE publication in the space allotted for that

[2] See footnote 1 to section A. of this appendix.

purpose by written contract with the commercial publisher. Authorized news and information sources include the OASD(PA), AFIS, the Military Departments and their subordinate levels of command, and other Government Agencies. CE contractor personnel may provide material for use in the publication if approved by the commander or PAO, as the commander's representative. Commercial news and opinion sources, such as AP, UPI, New York Times, etc., are not normally authorized for use in DoD publications except as stated in §247.4(q). Newspapers may publish community service news and announcements of the civilian community for the benefit of command or installation personnel and their families. Imagery used will be in compliance with §247.4(r).

E. *Assignment of personnel.* Neither military nor DoD civilian personnel shall be assigned to duty at the premises of the CE publisher. Neither military nor DoD civilian personnel shall perform any job functions that are part of the business activities or contractual responsibilities of the CE publisher either at the contractor's facility or the Government facility. The PAO and staff who produce the non-advertising content of the CE publication may perform certain installation liaison functions on publisher premises including monitoring and coordinating layout and design and other publishing details set forth in the contract to ensure the effective presentation of information. One or more members of the public affairs staff shall review proof copy to prevent mistakes. Newspaper text-editing-system pagination and copy terminals owned by the CE publisher may be placed in the command or installation public affairs office under contractual agreement for use by the public affairs staff to coordinate layout and ensure that the preparation of editorial material is performed in such a way as to enhance the efficiency and effectiveness of the printing and publication functions performed by the CE publisher. All costs of these terminals shall be borne by the CE newspaper publishers who shall retain title to the equipment and full responsibility for any damage to or loss of such equipment. The relationship between the public affairs staff and employees of the CE contractor is that of Government employees working with employees of a private contractor. Supervision of CE employees; that is, the responsibility to rate performance, set rate of pay, grant vacation time, exercise discipline, assign day-to-day administrative tasks, etc., remains with the CE publisher. Any modification of the contract must be made by the responsible contracting officer. Public affairs staff members must be aware that employees of the contractor are not employees of the government and should be treated accordingly.

F. *Distribution of CE publications.*

1. A funded newspaper shall not be distributed as an insert to a CE newspaper, unless provided for in the CE contract, nor shall a CE newspaper be distributed as an insert to a funded newspaper.

2. Supplements, clearly labeled as such, and advertising inserts, may be inserted into and distributed with a CE newspaper.

3. The commercial publisher of a CE publication shall make as much of the distribution to the intended readership as possible. CE publications may be distributed through official channels.

4. Except as authorized by the next higher headquarters for special situations or occasions (such as an installation open house), CE publications shall not be distributed outside the intended DoD audience and retirees, which includes family members. Electronic publication on the internet/world wide web is not considered distribution outside the intended DoD audience. The CE publisher may provide complete copies of each specific issue of a CE publication to an advertiser whose advertisement is carried therein.

5. The CE publisher of a CE newspaper will provide the appropriate number of news racks determined by the installation commander for publication distribution.

CE publishers are responsible for maintenance of these racks.

6. CE guides, magazines, and installation maps may be delivered in bulk quantities to the appropriate installation offices to distribute these publications through official channels as necessary.

G. *Responsibilities regarding advertising.*

1. Only the CE publisher shall use the space agreed upon for advertising. While the editorial content of the publication is completely controlled by the installation, the advertising section, including its content, is the responsibility of the CE publisher. The public affairs staff, however, retains the responsibility to review advertisements before they are printed.

2. Any decision by a CE publisher to accept or reject an advertisement is final. The PAO may discuss with a publisher their decision not to run an advertisement, but cannot substitute his judgment for that of the publisher.

3. Before each issue of a CE publication is printed, the public affairs staff shall review advertisements to identify any that are contrary to law or to DoD or Military Service regulations, including this part, or that may pose a danger or detriment to DoD personnel or their family members, or that interfere with the command or installation missions. It is in the command's best interest to carefully apply DoD and Service regulations and request exclusion of only those advertisements that are clearly in violation of this part. If any such advertisements are identified, the public affairs office shall obtain a legal coordination of the proposed exclusion.

After coordination, the public affairs office shall request, in writing if necessary, that the commercial publisher delete any such advertisements. If the publisher prints the issue containing the objectionable advertisement(s), the commander may prohibit distribution in accordance with DoD Directive 1325.6.[1]

4. DoD Directive 1325.6 gives the commander authority to prohibit distribution on the installation of a CE publication containing advertising he or she determines likely to promote a situation leading to potential riots or other disturbances, or when the circulation of such advertising may present a danger to loyalty, discipline, or morale of personnel. Each commander shall determine whether particular advertisements to be placed by the publisher in a CE publication serving the command or installation may interfere with successful mission performance. Some considerations in this decision are the local situation, the content of the proposed advertisement, and the past performance of the advertiser. Prior to making a determination to prohibit distribution of a CE publication, the commander shall obtain a legal coordination.

5. CE publications may carry paid and nonpaid advertising of the products and services of nonappropriated fund activities and commissaries, if allowed by DoD and Military Service regulations. (See DoD Instruction 1015.2[2])

6. The Military Departments will coordinate a standard set or ratios of advertising-to-editorial copy for multiples of pages for run of the publication advertising in CE publications that will be included in all DoD Component regulations supplementing this part. The recommended annual average is a ratio of 60/40. Inserts and advertising supplements will not count in the total ad-to-copy ratio; However, the commander may prohibit the distribution of supplemental advertising deemed excessive.

7. Bingo games and lotteries conducted by a commercial organization whose primary business is conducting lotteries may not be advertised in CE publications. Non-lottery activities (such as dining at a restaurant or attending a musical performance) of a commercial organization whose primary business is conducting lotteries may be advertised in CE publications. Exceptions are allowed for authorized State lotteries, lotteries conducted by a not-for-profit organization or a governmental organization, or conducted as a promotional activity by a commercial organization and clearly occasional and ancillary to the primary business of that organization. An exception also pertains to any gaming conducted by an Indian tribe under 25 U.S.C. 2720. See section D. of appendix C to this part.

H. *CE guides and maps.*

1. The name of the publication may include the name and emblem of the command or installation.

2. At the discretion of the commander, an installation telephone directory may be included as a section of a CE guide. The telephone section shall be part of the guide contract specifications. Separate contracts for CE telephone directories are not authorized. Over-run printing of the telephone directory/yellow pages section of the installation guide is authorized. The number of guides with integral telephone directories and the number of over-run copies of the telephone directory/yellow pages will be clearly specified in the single guide contract. Required communication security information shall be printed on the first page of the telephone section and not on the cover of the guide. The cover of the guide may notify users that the publication contains the telephone directory.

3. CE contracts for guides and maps shall establish firm delivery dates and shall contain provisions to ensure distribution is controlled by the command. Delivery dates may vary for guides and maps to make them more attractive to advertisers. The contract provisions shall specify delivery dates.

I. *Employment and gratuities.* DoDpersonnel shall not accept any gratuities from or employment with any CE publisher in violation of DoD Directive 5500.7–R.[3] In addition, DoD personnel whose spouse or children (or other relations as described in DoD Directive 5500.7–R) are offered employment by, or work for, a CE publisher, must take appropriate action to avoid conflicts of interest.

J. *Contracting for a CE publication.*

1. *General.* The DoD Components and their subordinate commands are authorized to contract in writing for CE publications. The underlying premise of the CE concept is that the DoD Components and their subordinate commands will save money by transferring certain publishing and distribution functions to a commercial publisher selected through a competitive process. The CE publication is printed and delivered to the command, installation, or its readership in accordance with the terms of a written contract. Oral contracts are not acceptable. The right to sell and circulate advertising to the complete readership in the CE publication provides the publisher revenue to cover costs

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

[2] See footnote 1 to section G.3. of this appendix.

[3] See footnote 1 to section G.3. of this appendix.

and secure earnings. The command or installation guarantees first publication and distribution of locally-produced editorial content in the publication. The publication becomes the property of the command, installation, or intended reader upon delivery in accordance with terms of the contract.

2. *Contracting process.* Whether a first time initiative to establish a CE publication or a recompetition of an existing CE contract, the process must start with advance planning as to the nature of the command's requirements, the contracting strategy, and the market of potential advertisers and competitors for the job. The CE contract solicitation and the contract itself must contain a statement of work that describes in legally sufficient detail the Government's requirements and the conditions and restrictions under which the contractor will perform. The cognizant contracting office for the CE contracting action shall be the contracting office which normally provides contracting support to the command for service contracts and other procurements of a general nature which are above the simplified small purchase threshold. The contracting officer shall combine the statement of work with appropriate contractual terms and conditions, using 48 CFR chapter I and II as guides, although CE contracts are not subject to the FAR or DFARS, because they do not involve the expenditure of appropriated funds. The resulting solicitation and contract shall completely identify the rights and obligations of both parties. Proposals shall be solicited from all known commercial publishers who could potentially become the CE contractor. Upon evaluation of the competing proposals by the Source Selection Advisory Committee (SSAC) and selection of a winner by the selecting official, the CE contract shall be awarded by the contracting officer. The CE contract shall not require the contractor to pay money to the command or to provide goods, services, or other consideration not directly related to the CE publication. In the event that only one offer is received, the SSAC may recommend to the selecting official that no award be made or that the contracting officer enter into negotiations with the sole offeror to obtain the best possible service and product for the Government.

3. *Statement of Work (SOW).* The SOW should be written to have the CE contractor perform as many of the publishing and distribution functions as practical to generate maximum savings to the Department of Defense. In so doing, care must be taken to balance Government requirements with a realistic view of the advertising revenue potential so as to achieve a contract that is commercially viable. The command's internal information needs shall be paramount. Some of the key issues that shall be addressed in the SOW follow:

a. A general description of the scope of the proposed contract including the name and nature of the publication involved; for example, weekly newspaper, monthly magazine, annual guide and installation map. Normally, guides and installation maps are included in the same contract.

b. A description of editorial content to be carried; e.g., news, features, supplements, and factual information, along with provisions addressing the possible inclusion of contractor-furnished advertising supplements for newspapers, provided any such supplement shall have the prior approval of the commander.

c. A description of the rules for the inclusion of advertising in the publication, substantially as follows: ''The contractor agrees not to include in the publication any advertising of the following types: (1) paid political advertisements for a candidate, party, or which advocate a particular position on a political issue, including advertisements advocating a position on any proposed DoD policy or policy under review, or which advocate lobbying elected officials on a specific issue; (2) advertisements for any establishment declared ''off limits'' by the command; (3) advertisements that are contrary to law or to DoD or Military Service regulations or that in the government's opinion pose a danger or detriment to DoD personnel or their family members, or that interfere with the command or installation missions; (4) advertisements for bingo games or lotteries conducted by a commercial organization whose primary business is conducting lotteries; (5) (other restrictions deemed appropriate by the Service/command, if any.)'' Additionally, the contract will contain provisions which: (1) specify the annual average advertising-to-editorial ratio for newspapers and magazines; (2) state that the commander's representative shall have the authority to specify newspaper advertising layout when required to enhance communication's effectiveness of the publication; and (3) which requires the contractor to notify advertisers of the requirements in §247.4(i) and §247.4(j).

d. A provision substantially as follows: ''The contractor agrees not to enter into any exclusive advertising agreement with any firm, broker, or individual for the purpose of selling advertising associated with this contract.''

e. A description of the CE contractor's responsibilities for distribution of the publication. This provision should address such matters as contractor furnishing of news racks along with contractor responsibility for maintenance of these racks.

f. A description of contractor-owned and/or contractor-furnished equipment such as text editing, copy terminals, and modems determined to be required to coordinate layout and ensure that the preparation of editorial

material is performed in such a way as to enhance the efficiency and effectiveness of the publication process.

g. A description of contractor-furnished editorial support services determined to be required. Such description must be in terms of the end product required; e.g., photography service and/or writer/reporter services, and not as a requirement to make available certain contractor personnel. In day-to-day performance and administration of the CE contract, contractor personnel performing such support services shall not be treated in any way as though they are Government employees.

h. A provision that the use, where economically feasible, of recycled paper for internal products will be a consideration for awarding the contract, as stated in §247.6 (e).

i. SOW's and RFP's for CE newspapers shall specify standard newsprint, recyclable, subject to requirements of applicable laws and regulations.

j. For CE magazines, a provision requiring the contractor to provide a bulk number of copies of each printing to the Government Printing Office (GPO) for distribution to Federal Depository Libraries. The number of copies to be provided will be determined on the number of libraries desiring to subscribe to the publication. The number could be a maximum of 1,400, but has historically averaged approximately 500 to 600 copies for military magazines. The contractor would be required to contact GPO to initiate this procedure at (202) 512–1071.

4. *Contract provisions*. The CE concept is based on an exception to the Government Printing and Binding Regulations[4] published by the Congressional Joint Committee on Printing. While CE contracts are not subject to the FAR (48 CFR chapter I) or the DFARS (48 CFR chapter II), the FAR contains many clauses that are useful in protecting the interests of the Government. The following clauses may be helpful in obtaining the best possible CE publication:

a. *Status of FAR clause*. To clarify the status of FAR clauses appearing in CE contracts, the following clause shall be included in all new CE contracts:

''The (name of DoD installation/unit/organization) is an element of the United States Government. This agreement is a United States Government contract authorized under the provisions of DoD Instruction 5120.4[5] as an exception to the Government Printing and Binding Regulations published by the Congressional Joint Committee on Printing. Although this contract is not subject to the Federal Acquisition Regulation (FAR) or the Defense FAR Supplement (DFARS), FAR clauses useful in protecting the interests of the Government and implementing those provisions required by law are included in this contract.''

b. *Option clause*. Insert a clause substantially the same as the following to extend the term of the CE publisher contract:

(1) ''The Government may extend the term of this contract by written notice to the contractor within [insert in the clause the period of time in which the contracting officer has to exercise the option]; provided that the Government shall give the contractor a preliminary written notice of its intent to exercise the option at least 60 days before the contract expires. The preliminary notice does not commit the government to exercise the option.'' In the case of base closure or realignment the publisher has the right to request a renegotiation of the contract.

(2) ''If the Government exercises this option, the extended contract shall be considered to include this option provision.''

(3) ''The total duration of this contract, including the exercise of any options under this clause, shall not exceed 6 years.''

c. *Default clause*. Insert the following clause in solicitations and contracts:

(1) ''The Government may, by written notice of default to the contractor, terminate this contract in whole or in part if the contractor fails to:

(a) Deliver the CE publications in the quantities required or to perform the services within the time specified in this contract or any extension;

(b) Make progress, so as to endanger performance of this contract;

(c) Perform any of the other provisions of this contract.''

(2) ''If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the contracting officer considers appropriate, supplies or services similar to those terminated. However, the contractor shall continue the work not terminated.''

(3) ''The rights and remedies of the Government in this clause are in addition to any other rights and remedies provided by law or under this contract.''

d. *Termination for convenience of the Government*. Insert the following clause in solicitations and contracts:

''The contracting officer, by written notice, may terminate this contract, in whole or in part if the services contracted for are no longer required by the Government, or when it is in the Government's interest, such as with installation closures. Any such termination shall be at no cost to the Government.'' The Government will use its best efforts to mitigate financial hardship on the publisher.

[4] Copies may be obtained, at cost, from the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

[5] See footnote 1 to section G.3. of this appendix.

5. *Term of contract*. CE contracts may be entered into for an initial period of up to 2 years, and may contain options to extend the contract for one or more additional periods of 1 or 2 years duration. The total period of the contract, including options, shall not exceed 6 years, after which the contract must be recompeted.

6. *Exercise of options*. Under normal circumstances, when the contractor is performing satisfactorily, options for additional periods of performance should be exercised. However, the exercise of the option is the exclusive right of the Government.

7. *Modification of the contract*. Any changes to the SOW or other terms and conditions of the contract shall be made by written contract modification signed by both parties.

8. *SSAC*. The commander shall appoint an SSAC. The committee shall participate in the development of the Source Selection Plan (SSP) before the solicitation of proposals, evaluate proposals, and recommend a source to the selecting official. Since cost is not a factor in the evaluation, award will be based on technical proposals, the offeror's experience and/or qualifications, and past performance.

a. The SSAC shall consist of a minimum of five voting members: a chairperson, who shall be a senior member of the command; senior representatives from public affairs and printing; and a minimum of two other functional specialists with skills relevant to the selection process. Each SSAC shall have non-voting legal and contracting advisors to assist in the selection process.

b. In arriving at its recommendations, the SSAC shall follow the SSP and avail itself of all relevant information, including the proposals submitted, independently derived data regarding offerors' performance records, the results of on-site surveys of offerors' facilities, where feasible, and in appropriate cases, personal presentations by offerors.

c. The work of the SSAC must be coordinated with the contracting officer to ensure that the process is objective and fair. All communications between the offerors and the Government shall be through the contracting officer. No member of the SSAC or the selecting official shall communicate directly with any offeror regarding the source selection.

d. In cases where a losing competitor requests a debriefing from the contracting officer, members of the SSAC may be called upon to participate so as to give the losing competitor the most thorough explanation practical as to why its proposal was not successful. No information regarding competitors' proposals shall be discussed with the unsuccessful offerors during debriefings, discussions, or negotiations.

9. *SSP*. A SSP (see sample SSP at attachment 1 to this appendix) must be developed early in the planning process to serve as a guide for the personnel involved and ensure a fair and objective process and a successful outcome. The contracting officer is primarily responsible for development of the SSP, in coordination with the PAO and other members of the SSAC. Ideally, the SSP should be completed and approved prior to issuance of the solicitation; it must be completed and approved before the receipt of proposals.

10. *Evaluation criteria and proposal requirements*. The solicitation must specify, in relative order of importance, the factors the Government will consider in selecting the most advantageous proposal. In addition, the solicitation must specify the types of information the proposal must contain to be properly evaluated. These two aspects of the solicitation must closely parallel one another. The contracting officer is primarily responsible for development of these two solicitation provisions, in coordination with the PAO, legal counsel, and members of the SSAC.

a. *Evaluation criteria for award*. Drawing upon the SSP, this feature of the solicitation must advise offerors what factors the Government will consider in evaluating proposals and the relative importance of each factor. The sample SSP (attachment 1 to this appendix) provides an example of criteria that might be used. Note that under the ''Services and/or Items Offered'' factor, paragraph E.2.b. of attachment 1 to this appendix, it is necessary to list and indicate the relative importance of services and/or items *above the minimum requirements of the SOW* that the command would consider desirable and that, if offered, will enhance the offeror's evaluation standing. The offer of services and/or items not listed in the evaluation criteria shall not be considered in the evaluation of proposals, but may be accepted in the contract award if deemed valuable to the Government, PROVIDED the service and/or item involved is directly related to producing the publication and not in violation of any other statute or regulation. Examples of items that cannot be considered during the evaluation process are; press kits, laminated maps, economic development reports, or other separate publications not an integral part of the CE publication.

b. *Proposal requirements*. This provision of the solicitation must describe the specific and general types of information necessary to be submitted as part of the proposal to be evaluated. Offerors shall be notified that unnecessarily elaborate proposals are not desired.

## ATTACHMENT 1 TO APPENDIX B TO PART 247—SSP

### *A. Introduction*

1. The objectives of this plan are:

a. To ensure an impartial, equitable, and thorough evaluation of all offerors' proposals in accordance with the evaluation criteria presented in the request for proposals (RFP).

b. To ensure that the contracting officer is provided technical evaluation findings of the SSAC in such a manner that selection of the offer most advantageous to the Government is ensured.

c. To document clearly and thoroughly all aspects of the evaluation and decision process to provide effective debriefings to unsuccessful offerors, to respond to legal challenges to the selection, and to ensure adherence to evaluation criteria.

2. This plan will be used to select a CE contractor for publication of the _____ newspaper (CE guide, magazine, or installation map) and will:

a. Give each SSAC member a clear understanding of his or her responsibilities as well as a complete overview of the evaluation process.

b. Establish a well-balanced evaluation structure, equitable and uniform scoring procedures, and a thorough and accurate appraisal of all considerations pertinent to the negotiated contracting process.

c. Provide the selecting official with meaningful findings that are clearly presented and founded on the collective, independent judgment of technical and managerial experts.

d. Ensure identification and selection of a contractor whose final proposal offers optimum satisfaction of the Government's technical and managerial requirements as expressed in the RFP.

e. Serve as part of the official record for the evaluation process.

*B. Organization and Staffing*

1. The SSAC will consist of the Chairperson and a minimum of four other voting committee members plus the non-voting advisors to the SSAC.

2. The SSAC committee members are:

| Name | Position |
|---|---|
| | Chairperson |
| | Member |
| | Member |
| | Member |
| | Member |
| | Legal Advisor [1] |
| | Contract Advisor [1] |

[1] Non-voting members.

*C. Responsibilities*

1. Selecting Official:

a. Approves the SSP.

b. Reviews the evaluation and findings of the SSAC.

c. Considers the SSAC's recommendation of award.

d. Selects the successful offeror.

2. Chairperson of the Source Selection Advisory Committee (C/SSAC):

a. Reviews the SSP.

b. Approves membership of the SSAC.

c. Analyzes the evaluation and findings of the SSAC and applies weights to the evaluation results.

d. Approves the SSAC report for submission to the selecting official.

3. Contracting Officer:

a. Is responsible for the proper and efficient conduct of the entire source selection process encompassing solicitation, evaluation, selection, and contract award.

b. Provides SSAC and the selecting official with guidance and instructions to conduct the evaluation and selection process.

c. Receives proposals submitted and makes them available to the SSAC, taking necessary precautions to ensure against premature or unauthorized disclosure of source selection information.

4. SSAC members shall:

a. Familiarize themselves with the RFP and SSP.

b. Provide a fair and impartial review and evaluation of each proposal against the solicitation requirements and evaluation criteria.

c. Provide written documentation substantiating their evaluations to include strengths, weaknesses, and any deficiencies of each proposal.

5. Legal advisor:

a. Reviews RFP and SSP for form and legality.

b. Advises the SSAC members of their duties and responsibilities, regarding procurement integrity issues and confidentiality requirements.

c. Participate in SSAC meetings and provide legal advice as required.

d. Provides legal review of all documents supporting the selection decision to ensure legal sufficiency and consistency with the evaluation criteria in the RFP and SSP.

e. Advises the selecting official on the legality of the selection decision.

*D. Administrative Instructions*

1. *Evaluation overview*. The advisory committee will operate with maximum flexibility. Collective discussion by evaluators at committee meetings of their evaluation findings is permitted in the interchange of viewpoints regarding strengths, weaknesses, and deficiencies noted in the proposals relating to evaluation items. Evaluators will not suggest or disclose numerical scores or other information regarding the relative standing of offerors outside of committee meetings.

2. *Evaluation procedure*. The evaluation of offers is based on good judgment and a thorough knowledge of the guidelines and criteria applicable to each evaluation factor.

a. Numerical scoring is merely reflective of the composite findings of the SSAC. The evaluation scoring system is used as a tool

to assist the Chairperson of the SSAC in determining the proposal most advantageous to the Government.

b. The most important documents supporting the contract award will be the findings, conclusions, and reports of the SSAC.

3. *Safeguarding data*. The sensitivity of the proceedings and documentation require stringent and special safeguards throughout the evaluation process:

a. Inadvertent release of information could be a source of considerable misunderstanding and embarrassment to the Government. It is imperative, therefore, for all members of the SSAC to avoid any unauthorized disclosures of information pertaining to this evaluation. Evaluation participants will observe the following rules:

(1) All offeror and evaluation materials will be secured when not in use (i.e., during breaks, lunch, and at the end of the day).

(2) All attempted communications by offeror's representatives shall be directed to the contracting officer. No communications between members of the SSAC or the selecting official and offerors regarding the contract award or evaluation is permitted except when called upon under the provisions of paragraph J.8.d, of appendix B to this part.

(3) Neither SSAC members or the selecting official shall disclose anything pertaining to the source selection process to any offeror except as authorized by the contracting officer.

(4) Neither SSAC members or the selecting official shall discuss the substantive issues of the evaluation with any unauthorized individual, even after award of the contract.

*E. Technical Evaluation Procedures*

1. *Evaluation process*. Proposals will be evaluated based on the following criteria as indicated in Section M of the solicitation: The evaluation worksheet (attachment 2 to this appendix) shall be used to score the technical factors. Using the technical evaluation worksheet, each member of the SSAC will independently review each proposal and assign an appropriate number of points to each factor being considered. Point scores for each factor will range from ''0'' to ''5'' based on the committee member's evaluation of the proposal. Upon completion of individual evaluations, the group will meet in committee with the Chairperson and arrive at a single numeric score for each factor in the proposal.

2. *Criteria*. An example of applicable evaluation criteria and their relative order of importance are listed below in paragraphs E.2. a. through d. of this appendix. Criteria and weights are provided as an example only. The SSAC must determine its own weighting factors tailored to meet the needs of the particular CE publication and describe the relative weights assigned in the RFP; e.g., ''Evaluation factors are listed in descending order of importance; criteria #1 is twice as important as criteria #2,'' etc.

a. *Technical and production capability*. Scores will range from ''0'' (unacceptable), to ''5'' (exhibits state-of-the-art, award winning, or clearly superior technical ability to produce the required newspaper, magazine, guide, or installation map). Factors to be considered for newspaper contracts include: level of automation; compatibility of automation with existing PAO automation (unless other automation is provided); printing capability; production equipment; physical plant (capabilities); and driving distance to the plant. Similar factors may be considered for magazines, guides and installation maps.

b. *Services and/or items offered*. Scores will range from ''0'' (unacceptable), to ''5'' (the offer of equipment, such as automation equipment; or services, such as editorial or photographic services as set forth in the contract solicitation that will greatly enhance the newspaper and/or its production). Factors to be considered for newspapers include: offer of automation equipment and the quality and amount of equipment offered; the quality and amount of services offered; the usefulness of the services and/or items to the public affairs office in enhancing the newspaper; the impact of the services and/or items on other parts of the contract. Similar factors may be considered for magazines, guides and installation maps. The offer of equipment or services not specifically related to producing the publication will not result in the assignment of a higher score.

c. *Past performance record*. Scores will range from ''0'' (no experience in newspaper, magazine, guide, or installation map publishing and/or unsatisfactory, previous performance), to ''5'' (long-term, highly successful experience publishing similar newspapers, magazines, guides, or installation maps). Factors to be considered include: demonstrated ability to successfully produce a CE or similar publication; demonstrated printing ability (types of printing, history of newspaper, magazine, guide, or installation map printing); demonstrated success in contract performance in a timely and responsive manner; demonstrated capability to sell advertising and successfully recoup publication costs.

d. *Management approach*. Scores will range from ''0'' (approach unacceptable), to ''5'' (proposal demonstrates a sound and innovative approach to interfacing with the PAO and managing the CE publication operation). Factors to be considered include: The offeror's proposed approach to:

(1) Interfacing with the PAO staff.

(2) Controlling the quality and timeliness of the finished product.

(3) Sale of ads of the type that enhance the publication's image in the community and with the readership at large.

(4) Ensuring that contractor's personnel are properly supervised and managed.

3. *Weighting factors.* Points will be assigned to the final score of each factor in a proposal as determined by multiplying the score assigned (e.g., ''0,'' ''1,'' ''2,'' ''3,'' ''4,'' or ''5'') by the relative weight of the individual criterion as indicated:

| Factor | Relative weight (percent) | Maximum points |
|---|---|---|
| CRITERION 1 ..... | 40 | 200 |
| CRITERION 2 ..... | 30 | 150 |
| CRITERION 3 ..... | 20 | 100 |
| CRITERION 4 ..... | 10 | 50 |
| | ..... | 500 |

(EXAMPLE ONLY):

| | |
|---|---|
| CRITERION 1: Score 5 (5 × 40), Total Points ..... | 200 |
| CRITERION 1: Score 4 (4 × 30), Total Points ..... | 120 |
| CRITERION 1: Score 3 (3 × 20), Total Points ..... | 60 |
| CRITERION 1: Score 2 (2 × 10), Total Points ..... | 20 |
| | 400 |

4. *Report of findings and recommendations.* After the SSAC has completed final evaluation of proposals and all weighting has been completed, the committee will prepare a written report of its findings and recommendations, setting forth the consensus of the committee and its composite scores (Sample at attachment 3 to this appendix). The Chairperson will sign the report to confirm its accuracy and his agreement with the recommendation. All copies of proposals and evaluation worksheets will be returned to the contracting officer.

ATTACHMENT 2 TO APPENDIX B TO PART 247—SAMPLE EVALUATION WORKSHEET

CONTRACTOR _____

EVALUATOR _____

DATE _____

EVALUATION CRITERIA AND SCORES (RANGE 0–5 POINTS FOR EACH)

1. Technical and production capability: _____
2. Services and items offered: _____
3. Past performance record: _____
4. Management approach: _____

NARRATIVE DISCUSSION:[1]

Strengths _____

Weaknesses _____

Deficiencies _____

ATTACHMENT 3 TO APPENDIX B TO PART 247—SAMPLE MEMORANDUM FOR SELECTING OFFICIAL

SUBJECT: Evaluation of Proposals

RFP No. _____

1. All proposals received in response to subject RFP have been evaluated by the Source Selection Advisory Committee (SSAC). The results and comments are listed below.

a. Offeror's proposals were rated as follows:

Offeror Name Numerical Score

b. Summary Narrative Comments.

(This section of the report shall be a summary of the individual strengths and weaknesses in each proposal, along with any deficiencies that are susceptible to being cured through written or oral discussions with the offeror, as noted by the SSC evaluators. This summary should be supported by detailed narratives contained on the individual evaluator's worksheets.)

2. Recommendation.

_____

Chairperson, SSAC

## APPENDIX C TO PART 247—MAILING OF DoD NEWSPAPERS, MAGAZINES, CE GUIDES, AND INSTALLATION MAPS; SALES AND DISTRIBUTION OF NON-DoD PUBLICATIONS

A. *Policy.* It is DoD policy that mailing costs shall be kept at a minimum consistent with timeliness and applicable postal regulations. (See DoD Instruction 4525.7[1] and DoD 4525.8–M.[2] Responsible officials shall consult with appropriate postal authorities to obtain resolution of specific problems.

B. *Definition.* DoD appropriated fund postage includes all means of paying postage using funds appropriated for the Department of Defense. These means include meter imprints and stamps, permit imprints, postage stamps, and other means authorized by the U.S. Postal Service.

C. *Use of appropriated fund postage.*

1. DoD appropriated fund postage shall be used only for:

---

([1] Discussions of strengths, weaknesses, and deficiencies should reference the specific evaluation factor involved to ensure that proposals are evaluated only against the criterion set forth in the RFP, to facilitate debriefings, and to provide an effective defense to any challenges regarding the legality of the selection process.)

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

[2] See footnote 1 to section A. of this appendix.

a. Mailing copies to satisfy mandatory distribution requirements.

b. Mailing copies to other public affairs offices for administrative purposes.

c. Mailing copies to headquarters in the chain of command.

d. Bulk mailings of DoD newspapers and magazines to subordinate units for distribution to members of the units.

e. Mailing information copies to other U.S. Government Agencies, Members of Congress, libraries, hospitals, schools, and depositories.

f. Mailing of an individual copy of a DoD newspaper, magazine, or CE publication in response to an unsolicited request from a private person, firm, or organization, if such response is in the best interest of the DoD Component or its subordinate levels of command.

g. Mailing copies of DoD newspapers, magazines, guides, or installation maps to incoming DoD personnel and their families to orient them to their new command, installation, and community.

2. DoD appropriated fund postage shall not be used for mailing:

a. To the general readership of DoD newspapers, magazines, guides, and installation maps, unless specifically excepted in this part.

b. By a CE publisher.

c. CE publications other than newspapers and magazines in bulk. (See paragraph C.1.d. of this section).

3. Generally, DoD newspapers, magazines, and CE publications shall be mailed as second class Requester Publication Rate, third-class bulk, or third- or fourth-class mail.

D. *Legal prohibitions.* Compliance with 18 U.S.C., 1302 and 1307 is mandatory. 18 USC Section 1302 prohibits the mailing of publications containing advertisements of any type of lottery or scheme that is based on lot or chance. 18 USC 1307 authorizes exceptions pertaining to authorized State lotteries, lotteries conducted by a not-for-profit organization or a governmental organization, or conducted as a promotional activity by a commercial organization and clearly occasional and ancillary to the primary business of that organization. An exception also pertains to any gaming conducted by an Indian tribe under 25 U.S.C. 2720. Lottery is defined as containing the following three elements:

1. Prize (whatever items of value are offered in the particular game).

2. Chance (random selection of numbers to produce a winning combination).

3. Consideration (requirement to pay a fee to play).

E. *Review of mailing and distribution effectiveness.*

1. Mailing and distribution lists shall be reviewed annually to determine distribution effectiveness and continuing need of each recipient to receive the publication.

2. Distribution techniques, target audiences, readers-per-copy ratios, and use of the U.S. Postal Service to ensure the most economical use of mail services consistent with timeliness shall be revalidated annually.

F. *Non-DoD publications.* A commander shall afford reputable distributors of other publications the opportunity to sell or give away publications at the activity he or she commands in accordance with DoD Directive 1325.6.[3] Such publications shall not be distributed through official channels. These publications may be made available through subscription paid for by the recipient or placed in specific general use areas designated by the commander, such as the foyers of open messes or exchanges. They will be placed only in stands or racks provided by the responsible publisher. The responsible publisher will maintain the stand or rack to present a neat and orderly appearance. Subscriptions paid for by a recipient may be home-delivered by the commercial distributor in installation residential areas.

## APPENDIX D TO PART 247—AFIS PRINT MEDIA DIRECTORATE

A. *General.* The Print Media Directorate (PMD), an element of AFIS, develops, publishes, and distributes a variety of print media products that support DoD-wide programs and policies for targeted audiences throughout the DoD community. Products include the following:

1. *American Forces Press Service,* news and feature articles, photographs, and art targeted principally to editors of DoD newspapers.

2. *DEFENSE* magazine, a bimonthly magazine featuring articles authored by senior military and civilian officials on DoD programs and policies. An annual almanac edition highlights DoD's organization and statistical information.

3. *Defense Billboard,* a monthly poster featuring topics of particular interest to junior Military Service members, but applicable to general DoD audiences.

4. Pamphlets, booklets, and other posters covering a variety of joint interest information topics.

5. PMD posts the *Press Service* on Military Service computer bulletin boards and internet world wide web sites. PAOs and editors may download text and art in a form readily usable for word processing or desktop publishing. All other PMD publications should be requisitioned through the Military Service's or organization's publications distribution system.

[3] See footnote 1 to section A. of this appendix.

6. Additional information may be obtained on the internet using the AFIS Uniform Resource Locator: *http://www.dtic.mil/defenselink/afis/*.

B. *Use of materials published by print media directorate*. With the exception of copyrighted matter, all materials published by PMD may be reproduced or adapted for use by DoD newspaper and magazine editors as appropriate. When PMD material is edited or revised, accuracy and conformance to DoD policy and accepted standards of good taste will be maintained. Due to the policy-oriented nature of *DEFENSE* magazine contents, particular care shall be taken to preserve the original context, tone, and meaning of any material adapted, revised, or edited from this publication.

C. *Eligible activities*. The following activities are eligible to receive the above listed PMD products:

1. All authorized DoD newspapers and magazines.
2. Headquarters of the DoD Components and their subordinate commands.
3. Proponent offices of DoD periodicals published by the DoD Components.
4. Armed Forces Radio and Television Service networks and outlets.
5. Isolated commands and detachments at which DoD newspapers are not readily available.

## APPENDIX E TO PART 247—DOD COMMAND NEWSPAPER AND MAGAZINE REVIEW SYSTEM

A. *Purpose*. The purpose of the DoD command newspaper and magazine review system is to assist commanders in establishing and maintaining cost-effective internal communications essential to mission accomplishment. The system also enables internal information managers to assess the cost and effective use of resources devoted to command newspapers and to provide requested reports.

B. *Policy*. DoD newspapers and magazines shall be reviewed and reported biennially. The review process is not intended to replace day-to-day quality assurance procedures or established critique programs.

C. *Review criteria*. Each newspaper and magazine shall be evaluated on the basis of mission essentiality, communication effectiveness, cost-effectiveness, and compliance with applicable regulations.

D. Reporting requirements.

1. The DoD Components (less the Military Departments) shall forward, by January 31 of each even numbered year, the information indicated at attachment 1 to this appendix for each newspaper published to: Director, American Forces Information Service, ATTN: Print Media Plans and Policy, 601 North Fairfax Street, Alexandria, VA 22314–2007.

2. No later than April 15 of each even-numbered year, the Secretary (or designee) of each Military Department shall forward to the address above a report of the Military Department's review of newspapers and magazines. This report shall include summary data on total number of newspapers and magazines, along with a listing of the information indicated at attachment 1 to this appendix.

3. One information copy of each issue of all DoD newspapers and magazines shall be forwarded on publication date to the address in paragraph H.1. of this appendix.

4. Information copies of CE contracts shall be forwarded to the address in paragraph H.1. of this appendix, upon request.

5. Administrative Instructions shall be issued by the Director, AFIS, for the annual review and reporting of newspapers and magazines.

*Attachment 1 to Appendix E to Part 247—Newspaper and Magazine Reporting Data*

As required by section H. of this appendix, the following information shall be provided biennially regarding newspapers and magazines:

A. Name of newspaper or magazine.

B. Publishing command and mailing address.

C. Printing arrangement:

1. Government equipment.
2. Government contract with commercial printer.
3. CE contract with commercial publisher (provide name, mailing address, and phone number of commercial publisher).

D. Frequency and number of issues per year.

E. Number of copies printed and estimated readership.

F. Paper size (metro, tabloid, or magazine format).

# PART 250—WITHHOLDING OF UNCLASSIFIED TECHNICAL DATA FROM PUBLIC DISCLOSURE

Sec.
250.1 Purpose.
250.2 Applicability and scope.
250.3 Definitions.
250.4 Policy.
250.5 Procedures.
250.6 Responsibilities.
250.7 Pertinent portions of Export Administration Regulations (EAR).
250.8 Pertinent portions of International Traffic in Arms Regulations (ITAR).
250.9 Notice to accompany the dissemination of export-controlled technical data.

AUTHORITY: Sec. 1217, Pub. L. 98–94, (10 U.S.C. 140c).

SOURCE: 49 FR 48041, Dec. 10, 1984, unless otherwise noted.

### § 250.1 Purpose.

This part establishes policy, prescribes procedures, and assigns responsibilities for the dissemination and withholding of technical data.

### § 250.2 Applicability and scope.

(a) This part applies to:

(1) All unclassified technical data with military or space application in the possession of, or under the control of, a DoD Component which may not be exported lawfully without an approval, authorization, or license under E.O. 12470 or the Arms Export Control Act. However, the application of this part is limited only to such technical data that disclose critical technology with military or space application. The release of other technical data shall be accomplished in accordance with DoD Instruction 5200.21 and DoD 5400.7–R.

(2) The Office of the Secretary of Defense (OSD) and activities support administratively by OSD, the Military Departments, the Organization of the Joint Chiefs of Staff, the Defense Agencies, and the Unified and Specified Commands (hereafter referred to collectively as ''DoD Components'').

(b) This part does not:

(1) Modify or supplant the regulations promulgated under E.O. 12470 or the Arms Export Control Act governing the export of technical data, that is, 15 CFR part 379 of the Export Administration Regulations (EAR) and 22 CFR part 125 of the International Traffic in Arms Regulations (ITAR).

(2) Introduce any additional controls on the dissemination of technical data by private enterprises or individuals beyond those specified by export control laws and regulations or in contracts or other mutual agreements, including certifications made pursuant to § 250.3(a). Accordingly, the mere fact that the Department of Defense may possess such data does not in itself provide a basis for control of such data pursuant to this part.

(3) Introduce any controls on the dissemination of scientific, educational, or other data that qualify for General License GTDA under 15 CFR 379.3 of the EAR (see § 250.7) or for general exemptions under 22 CFR 125.11 of the ITAR (see § 250.8).

(4) Alter the responsibilities of DoD Components to protect proprietary data of a private party in which the Department of Defense has ''limited rights'' or ''restricted rights'' (as defined in 32 CFR 9–201(c) and 9–601(j) of the DoD Acquisition Regulation, or which are authorized to be withheld from public disclosure under 5 U.S.C. 552(b)(4).

(5) Pertain to, or affect, the release of technical data by DoD Components to foreign governments, international organizations, or their respective representatives or contractors, pursuant to official agreements or formal arrangements with the U.S. Government, or pursuant to U.S. Government-licensed transactions involving such entities or individuals. In the absence of such U.S. Government-sanctioned relationships, however, this part does apply.

(6) Apply to classified technical data. After declassification, however, dissemination of such data that are within the scope of § 250.2(a)(1) is governed by this part.

### § 250.3 Definitions.

(a) *Qualified U.S. contractor*.[1] A private individual or enterprise (hereinafter described as a ''U.S. contractor'') that, in accordance with procedures established by the Under Secretary of Defense for Research and Engineering, certifies, as a condition of obtaining export-controlled technical data subject to this Directive from the Department of Defense, that:

(1) The individual who will act as recipient of the export-controlled technical data on behalf of the U.S. contractor is a U.S. citizen or a person admitted lawfully into the United States for permanent residence and is located in the United States.

[1] Canadian contractors may be qualified in accordance with this part for technical data that do not require a license for export to Canada under 22 CFR 125.12 of the ITAR and 15 CFR 379.4(d) and 379.5(e) of the EAR submitting an equivalent certification to the U.S. Department of Defense.

(2) Such data are needed to bid or perform on a contract with the Department of Defense, or other U.S. Government agency, or for other legitimate business purposes[2] in which the U.S. contractor is engaged, or plans to engage. The purpose for which the data are needed shall be described sufficiently in such certification to permit an evaluation of whether subsequent requests for data, pursuant to § 250.5(d)(2) are related properly to such business purpose.

(3) The U.S. contractor acknowledges its responsibilities under U.S. export control laws and regulations (including the obligation, under certain circumstances, to obtain an export license prior to the release of technical data within the United States) and agrees that it will not disseminate any export-controlled technical data subject to this part in a manner that would violate applicable export control laws and regulations.

(4) The U.S. contractor also agrees that, unless dissemination is permitted by § 250.5(h), it will not provide access to export-controlled technical data subject to this part to persons other than its employees or persons acting on its behalf, without the permission of the DoD Component that provided the technical data.

(5) To the best of its knowledge and belief, the U.S. contractor knows of no person employed by it, or acting on its behalf, who will have access to such data, who is debarred, suspended, or otherwise ineligible from performing on U.S. Government contracts; or has violated U.S. export control laws or a certification previously made to the Department of Defense under the provisions of this part.

(6) The U.S. contractor itself is not debarred, suspended, or otherwise determined ineligible by any agency of the U.S. Government to perform on U.S. Government contracts, has not been convicted of export control law violations, and has not been disqualified under the provisions of this part. When the certifications required by paragraphs (a) (5) and (6) of this section, cannot be made truthfully, the U.S. contractor may request the certification be accepted based on its description of extenuating circumstances.

(b) *Controlling DoD Office.* The DoD activity that sponsored the work that generated the technical data or received the technical data on behalf of the Department of Defense and therefore has the responsibility for determining the distribution of a document containing such technical data. In the case of joint sponsorship, the controlling office is determined by advance agreement and may be either a party, a group, or a committee representing the interested activities or DoD Components. (The controlling DoD office is identified on each export-controlled document in accordance with DoD Directive 5230.24.

(c) *Critical Technology.* Technologies that consist of (1) arrays of design and manufacturing know-how (including technical data); (2) keystone manufacturing, inspection, and test equipment; (3) keystone materials; and (4) goods accompanied by sophisticated operation, application, or maintenance know-how that would make a significant contribution to the military potential of any country or combination of countries and that may prove detrimental to the security of the United States (also referred to as militarily critical technology).

(d) *Other legitimate business purposes.* Include:

(1) Providing or seeking to provide equipment or technology to a foreign government with the approval of the U.S. Government (for example, through a licensed direct foreign military sale).

(2) Bidding, or preparing to bid, on a sale of surplus property.

(3) Selling or producing products for the commercial domestic marketplace or for the commercial foreign marketplace, providing that any required export license is obtained.

(4) Engaging in scientific research in a professional capacity.

(5) Acting as a subcontractor to a concern described in paragraphs (d) (1) through (4) of this section; or

(6) Selling technical data subject to this part in support of DoD contractors or in supporting of the competitive process for DoD contracts, provided

[2] This does not require a contract with or a grant from the U.S. Government.

such sales are limited solely to DoD contractors or potential DoD contractors who also are qualified U.S. contractors and provided such technical data are related to the purpose for which the qualified U.S. contractor is certified, or selling technical data to foreign contractors or governments overseas after receiving the required export license or approval by the U.S. Government.

(e) *Potential DoD contractor*. An individual or organization outside the Department of Defense declared eligible for DoD information services by a sponsoring DoD activity on the basis of participation in one of the following programs:

(1) The Department of the Army Qualitative Requirements Information Program.

(2) The Department of the Navy Industry Cooperative Research and Development Program.

(3) The Department of the Air Force Potential Contractor Program.

(4) The DoD Scientific and Technical Program; or

(5) Any similar program in use by other DoD Components.

(f) *Public disclosure*. Making technical data available without restricting its dissemination or use.

(g) *Technical data with military or space application, or technical data*. Any blueprints, drawings, plans, instructions, computer software and documentation, or other technical information that can be used or be adapted for use to design, engineer, produce, manufacture, operate, repair, overhaul, or reproduce any military or space equipment or technology concerning such equipment.

(h) *United States*. For the purpose of this part, the 50 States, the District of Columbia, and the territories and possessions of the United States.

### § 250.4 Policy.

(a) In accordance with 10 U.S.C. 140c, the Secretary of Defense may withhold from public disclosure, notwithstanding any other provision of law, any technical data with military or space application in the possession of, or under the control of, the Department of Defense, if such data may not be exported lawfully without an approval, authorization, or license under E.O. 12470 or the Arms Export Control Act. However, technical data may not be withheld under this section if regulations promulgated under either the Order or Act authorize the export of such data pursuant to a general, unrestricted license or exemption in such regulations. (Pertinent portions of such regulations are set forth in §§ 250.7 and 250.8).

(b) Because public disclosure of technical data subject to this part is tantamount to providing uncontrolled foreign access, withholding such data from public disclosure, unless approved, authorized, or licensed in accordance with export control laws, is necessary and in the national interest. Unclassified technical data that are not governed by this part, unless otherwise restricted, shall continue to be made available to the public as well as to state and local governments.

(c) Nothwithstanding the authority provided in paragraph (a), of this section, it is DoD policy to provide technical data governed by this part to individuals and enterprises that are determined to be currently qualified U.S. contractors, when such data relate to a legitimate business purpose for which the contractor is certified. However, when such data are for a purpose other than to permit the requester to bid or perform on a contract with the Department of Defense, or other U.S. Government agency, and the significance of such data for military purposes is such that release for purposes other than direct support of DoD activities may jeopardize an important U.S. technological or operational advantage, those data shall be withheld in such cases.

(d) This part may not be used by DoD Components as authority to deny access to technical data to the Congress, or to any Federal, State, or local governmental agency that requires such data for regulatory or other official governmental purposes. Any such dissemination will include a statement that the technical data are controlled by the Department of Defense in accordance with this part.

(e) The authority provided herein may not be used to withhold from public disclosure unclassified information

regarding DoD operations, policies, activities, or programs, including the costs and evaluations of performance and reliability of military and space equipment. When such information does contain technical data subject to this part, the technical data shall be excised from that which is disclosed publicly.

(f) This part may not be used as a basis for the release of ''limited rights'' or ''restricted rights'' data as defined in 32 CFR 9–201(c) and 9–601(j) of the DoD Acquisition Regulation or that are authorized to be withheld from public disclosure under the Freedom of Information Act (FOIA).

(g) This part may not be used to provide protection for technical data that should be classified in accordance with E.O. 12356 and DoD 5200.1–R.

(h) This part provides immediate authority to cite 5 U.S.C. 552(b)(3) as the basis for denials under the FOIA of technical data currently determined to be subject to the provisions of this part.

### § 250.5 Procedures.

All determinations to disseminate or withhold technical data subject to this part shall be consistent both with the policies set forth in § 250.4 of this part, and with the following procedures:

(a) Requests for technical data shall be processed in accordance with DoD Directive 5230.24 and DoD Instruction 5200.21. FOIA requests for technical data subject to this part shall be handled in accordance with the procedures established in DoD 5400.7–R. Such FOIA requests for technical data currently determined to be subject to the withholding authority effected by this part shall be denied under citing the third exemption to mandatory disclosure, and the requester shall be referred to the provisions of this part permitting access by qualified U.S. contractors.

(b) Upon receipt of a request for technical data in the possession of, or under the control of, the Department of Defense, the controlling DoD office shall determine whether such data are governed by this part. The determination shall be based on the following:

(1) The office's finding[3] that such data would require an approval, authorization, or license for export under E.O. 12470 or the Arms Export Control Act and that such data may not be exported pursuant to a general, unrestricted license (15 CFR 379.3, EAR) (see § 250.7) or exemption (22 CFR 125.11, ITAR) (see § 250.8).

(2) The office's judgment that the technical data under consideration disclose critical technology with military or space application. For purposes of making this determination, the Militarily Critical Technologies List (MCTL) shall be used as general guidance. The controlling DoD office may request assistance in making such a determination from the Office of the Under Secretary of Defense for Research and Engineering (OUSDR&E) in accordance with procedures established by that office.

(c) The controlling DoD office shall ensure that technical data determined to be governed by this part are marked in accordance with DoD Directive 5230.24.

(d) The controlling DoD office shall authorize release of technical data governed by this part to currently qualified U.S. contractors only, as defined in § 250.3(a) of this part, unless one of the following apply:

(1) The qualification of the U.S. contractor concerned has been temporarily revoked in accordance with § 250.5(e) of this part; or

(2) The requested data are judged to be unrelated to the purpose for which the qualified U.S. contractor is certified. When release of technical data is denied in accordance with this section, the controlling DoD office shall request additional information sufficient to explain the intended use of the requested data and, if appropriate, request a new certification (see § 250.3(a) above) describing the intended use of the requested data; or

(3) The technical data are being requested for a purpose other than to permit the requester to bid or perform on a contract with the Department of Defense or other U.S. Government

[3] May require consultation with the Department of State or the Department of Commerce, as appropriate.

agency, in which case the controlling DoD office shall withhold such data if it has been determined by the DoD Component focal point (see § 250.5(e)(5)) that the significance of such data for military purposes is such that release for purpose other than direct support of DoD-approved activities may jeopardize an important technological or operational military advantage of the United States.

(e) Upon receipt of credible and sufficient information that a qualified U.S. contractor has (1) violated U.S. export control law, (2) violated its certification, (3) made a certification in bad faith, or (4) made an omission or misstatement of material fact, the DoD Component shall revoke temporarily the U.S. contractor's qualification. Such revocations having the potential for compromising a U.S. Government investigation may be delayed. Immediately upon such revocation, the DoD Component shall notify the contractor and the OUSDR&E. Such contractor shall be given an opportunity to respond in writing to the information upon which the temporary revocation is based before being disqualified. Any U.S. contractor whose qualification has been revoked temporarily may be reinstated upon presentation of sufficient information showing that the basis for such revocation was in error or has been remedied.

(f) When the basis for a contractor's temporary revocation cannot be removed within 20 working days, the DoD Component shall recommend to the OUSDR&E that the contractor be disqualified.

(g) Charges for copying, certifying, and searching records rendered to requesters shall be levied in accordance with DoD Instruction 7230.7. Normally, only one copy of the same record or document will be provided to each requester. Any release to qualified U.S. contractors of technical data controlled by this part shall be accompanied by a notice to the recipient as set forth in § 250.9.

(h) Qualified U.S. contractors who receive technical data governed by this part may disseminate such data for purposes consistent with their certification without prior permission of the controlling DoD office or when such dissemination is:

(1) To any foreign recipient for which the data are approved, authorized, or licensed under E.O. 12470 or the Arms Export Control Act.

(2) To another currently qualified U.S. contractor (as defined in § 250.3(a) above, including existing or potential subcontractors, but only within the scope of the certified legitimate business purpose of such recipient.

(3) To the Departments of State and Commerce, for purposes of applying for appropriate approvals, authorizations, or licenses for export under the Arms Export Control Act or E.O. 12470. Any such application shall include a statement that the technical data for which such approval, authorization, or license is sought are controlled by the Department of Defense in accordance with this part.

(4) To Congress or any Federal, State, or local governmental agency for regulatory purposes, or otherwise as may be required by law or court order. Any such dissemination shall include a statement that the technical data are controlled by the Department of Defense in accordance with this part.

(i) A qualified U.S. contractor desiring to disseminate technical data subject to this part in a manner not permitted expressly by the terms of this part shall seek authority to do so from the controlling DoD office.

(j) Any requester denied technical data, or any qualified U.S. contractor denied permission to redisseminate such data, pursuant to this part, shall be provided promptly a written statement of reasons for that action, and advised of the right to make a written appeal of such determination to a specifically identified appellate authority within the DoD Component. Appeals of denials made under DoD 5400.7–R (reference (e)) shall be handled in accordance with procedures established therein. Other appeals shall be processed as directed by the OUSDR&E.

(k) Denials shall cite 10 U.S.C. 140c as implemented by this part, and, in the case of FOIA denials made in reliance on this statutory authority, 5 U.S.C. 552(b)(3). Implementing procedures

shall provide for resolution of any appeal within 20 working days.

**§ 250.6 Responsibilities.**

(a) The Under Secretary of Defense for Research and Engineering (USDR&E) shall have overall responsibility for the implementation of this Directive and shall designate an office to:

(1) Administer and monitor compliance with this Directive.

(2) Receive and disseminate notifications of temporary revocation in accordance with § 250.5(e) of this part.

(3) Receive recommendations for disqualification made in accordance with § 250.5(f) of this part, and act as initial disqualification authority.

(4) Provide, when necessary, technical assistance to DoD Components in assessing the significance of the military or space application of technical data that may be withheld from public disclosure under this Directive.

(5) Establish procedures to develop, collect, and disseminate certification statements and ensure their sufficiency, accuracy, and periodic renewal, and to make final determinations of qualification.

(6) Ensure that the requirements of this Directive are incorporated into the DoD Federal Acquisition Regulation Supplement for optional application to contracts involving technical data governed by this Directive.

(7) Develop, in conjunction with the General Counsel, Department of Defense, guidelines for responding to appeals.

(8) Develop procedures to ensure that DoD Components apply consistent criteria in authorizing exceptions under § 250.5(i) of this part.

(9) Establish procedures and appropriate mechanisms for the certification of qualified U.S. contractors, pursuant to § 250.6(a)(5) of this part, within 60 days of the effective date of this Directive. During this 60-day period, requests for technical data governed by this Directive shall be processed in accordance with procedures in effect before the promulgation of this Directive.

(10) Take such other actions that may be required to ensure consistent and appropriate implementation of this Directive within the Department of Defense.

(b) The Under Secretary of Defense for Policy shall:

(1) Develop and promulgate, as required, policy guidance to DoD Components for implementing this Directive.

(2) Develop procedures with the Departments of State and Commerce to ensure referral of export cases involving technical data governed by this Directive to the Department of Defense.

(c) The Assistant Secretary of Defense (Public Affairs) shall:

(1) Monitor the implementation of provisions of this Directive that pertain to DoD 5400.7–R.

(2) Provide such other assistance as may be necessary to ensure compliance with this Directive.

(d) The General Counsel, Department of Defense, shall:

(1) Assist in carrying out the provisions of this Directive by advising DoD Components with respect to the statutory and regulatory requirements governing the export of technical data.

(2) Advise the USDR&E regarding consistent and appropriate implementation of this Directive.

(e) The Heads of DoD Components shall:

(1) As the delegated authority, have the option to redelegate the authority to withhold technical data in accordance with this Directive.

(2) Disseminate and withhold from public disclosure technical data subject to this Directive in a manner consistent with the policies and procedures set forth herein.

(3) Designate a focal point to

(i) Ensure implementation of this Directive;

(ii) Identify classes of technical data the release of which is governed by § 250.5(d)(3) of this part;

(iii) Act on appeals relating to case-by-case denials of technical data;

(iv) Suspend a contractor's qualification pursuant to § 250.(e) of this part;

(v) Receive and evaluate requests for reinstatement of a contractor's qualification; and, when appropriate,

(vi) Recommend disqualification to the OUSDR&E.

(4) Promulgate and effect regulations to implement this Directive within 180 days.

(5) Disseminate technical data governed by this Directive in the manner prescribed herein, to the extent feasible, during the period after which certification procedures have been established under § 250.6(a)(9) of this part, but before DoD Components have issued implementing regulations under paragraph (e)(4) of this section. However, if such dissemination is not feasible, the DoD Component may process requests for such data in accordance with procedures in effect before the promulgation of this Directive.

## § 250.7 Pertinent portions of Export Administration Regulations (EAR).

The following pertinent section of the EAR is provided for the guidance of DoD personnel in determining the releasability technical data under the authority of this part.

EXPORT ADMINISTRATION REGULATIONS 15 CFR 379.3

*General License GTDA: Technical Data Available to All Destinations*

A General License designated GTDA is hereby established authorizing the export to all destinations of technical data described in § 379.3(a), (b), or (c), below:

(a) *Data Generally Available.* Data that have been made generally available to the public in any form, including

(1) Data released orally or visually at open conferences, lectures, trade show, or other media open to the public; and

(2) Publications that may be purchased without restrictions at a nominal cost, or obtained without costs, or are readily available at libraries open to the public.

The term ''nominal cost'' as used in § 379.3(a)(2), is intended to reflect realistically only the cost of preparing and distributing the publication and not the intrinsic value of the technical data. If the cost is as much as to prevent the technical data from being generally available to the public, General License GTDA would not be applicable.

(b) *Scientific or Educational Data.* (1) Dissemination of information not directly and significantly related to design, production, or utilization in industrial processes, including such dissemination by correspondence, attendance at, or participation in, meetings; or

(2) Instruction in academic institutions and academic laboratories, excluding information that involves research under contract related directly and significantly to design, production, or utilization in industrial processes.

(c) *Patent Applications.* Data contained in a patent application, prepared wholly from foreign-origin technical data where such application is being sent to the foreign inventor to be executed and returned to the United States for subsequent filing in the U.S. Patent and Trademark Office. (No validated export license from the Office of Export Administration is required for data contained in a patent application, or an amendment, modification, supplement, or division thereof for filing in a foreign country in accordance with the regulations of the Patent and Trademark Office 37 CFR part 5. See § 370.10(j).)

## § 250.8 Pertinent portions of International Traffic in Arms Regulations (ITAR).

The following pertinent section of the ITAR is provided for the guidance of DoD personnel in determining the releasibility of technical data under the authority of this part.

INTERNATIONAL TRAFFIC IN ARMS REGULATIONS 22 CFR 125.11

*General Exemptions*

(a) Except as provided in § 26.01, district directors of customs and postal authorities are authorized to permit the export without a license of unclassified technical data as follows:

(1) If it is in published[4] form and subject to public dissemination by being:

(i) Sold at newsstands and bookstores;

(ii) Available by subscription or purchase without restrictions to any person or available without cost to any person;

(iii) Granted second class mailing privileges by the U.S. Government; or

(iv) Freely available at public libraries.

(2) If it has been approved for public release by any U.S. Government department or agency having authority to classify information or material under Executive Order [12356], as amended, and other applicable Executive Orders, and does not disclose the details of design, production, or manufacturing of any arms, ammunition, or implements of war on the U.S. Munitions List.

(3) If the export is in furtherance of a manufacturing license or technical assistance agreement approved by the Department of State in accordance with part 124 of this chapter.

[4] The burden for obtaining appropriate U.S. Government approval for the publication of technical data falling within the definition in § 125.01, including such data as may be developed under other than U.S. Government contract, is on the person or company seeking publication.

(4) If the export is in furtherance of a contract with an agency of the U.S. Government or a contract between an agency of the U.S. Government and foreign persons, provided the contract calls for the export of relevant unclassified technical data, and such data are being exported only by the prime contractor. Such data shall not disclose the details of development, engineering, design, production, or manufacture of any arms, ammunition, or implements of war on the U.S. Munitions List. (This exemption does not permit the prime contractor to enter into subsidiary technical assistance or manufacturing license agreements, or any arrangement which calls for the exportation of technical data without compliance with part 124 of this subchapter.)

(5) If it relates to firearms not in excess of caliber .50 and ammunition for such weapons, except technical data containing advanced designs, processes, and munufacturing techniques.

(6) If it consists of technical data, other than design, development, or production information relating to equipment, the export of which has been previously authorized to the same recipient.

(7) If it consists of operations, maintenance and training manuals, and aids relating to equipment, the export of which has been authorized to the same recipient.[5]

(8) If it consists of additional copies of technical data previously approved for export to the same recipient; or if it consists of revised copies of technical data, provided it pertains to the identical Munitions List article, and the revisions are solely editorial and do not add to the content of technology previously approved for export to the same recipient.

(9) If it consists solely of technical data being reexported to the original source of import.

(10) If the export is by the prime contractor in direct support and within the technical and/or product limitations of a ''U.S. Government approved project'' and the prime contractor so certifies. The Office of Munitions Control, Department of State, will verify, upon request, those projects which are ''U.S. Government approved,'' and accord an exemption to the applicant who applies for such verification and exemption, where appropriate, under this subparagraph.[6]

(11) If the export is solely for the use of American citizen employees of U.S. firms provided the U.S. firm certifies its overseas employee is a U.S. citizen and has a ''need to know.''[7]

(12) If the export is directly related to classified information, the export of which has been previously authorized to the same recipient, and does not disclose the details of design, production, or manufacture of any arms, ammunition, or implements of war on the U.S. Munitions List.

(b) *Plant visits.* Except as restricted by the provisions of § 126.01 of this subchapter:

(1) No license shall be required for the oral and visual disclosure of unclassified technical data during the course of a plant visit by foreign nationals provided the data [are] disclosed in connection with a classified plant visit or the visit has the approval of a U.S. Government agency having authority for the classification of information or material under Executive Order [12356], as amended, and other applicable Executive Orders, and the requirements of section V, paragraph [41(d)] of the Industrial Security Manual are met.

(2) No license shall be required for the documentary disclosure of unclassified technical data during the course of a plant visit by foreign nationals provided the document does not contain technical data as defined in § 125.01 in excess of that released orally or visually during the visit, is within the terms of the approved visit request, and the person in the United States assures that the technical data will not be used, adopted for use, or disclosed to others for the purpose of manufacture or production without the prior approval of the Department of State in accordance with part 124 of this subchapter.

(3) No Department of State approval is required for the disclosure of oral and visual classified information during the course of a plant visit by foreign nationals provided the visit has been approved by the cognizant U.S. Defense agency and the requirements of

[5] Not applicable to technical data relating to Category VI(d) and Category XVI.

[6] Classified information may also be transmitted in direct support of and within the technical and/or product limitation of such verified U.S. Government approved projects without prior Department of State approval provided the U.S. party so certifies and complies with the requirements of the Department of Defense Industrial Security Manual relating to the transmission of such classified information (and any other requirements of cognizant U.S. Government departments or agencies).

[7] Classified information may also be exported to such certified American citizen employees without prior Department of State approval provided the U.S. party complies with the requirements of the Department of Defense Industrial Security Manual relating to the transmission of such classified information (and any other requirements of cognizant U.S. Government departments or agencies). Such technical data or information (classified or unclassified) shall not be released by oral, visual, or documentary means to any foreign person.

section V, paragraph [41(d)] of the Defense Industrial Security Manual are met.

### § 250.9 Notice to accompany the dissemination of export-controlled technical data.

(a) Export of information contained herein, which includes, in some circumstances, release to foreign nationals within the United States, without first obtaining approval or license from the Department of State for items controlled by the International Traffic in Arms Regulations (ITAR), or the Department of Commerce for items controlled by the Export Administration Regulations (EAR), may constitute a violation of law.

(b) Under 22 U.S.C. 2778 the penalty for unlawful export of items or information controlled under the ITAR is up to 2 years imprisonment, or a fine of $100,000, or both. Under 50 U.S.C., appendix 2410, the penalty for unlawful export of items or information controlled under the EAR is a fine of up to $1,000,000, or five times the value of the exports, whichever is greater; or for an individual, imprisonment of up to 10 years, or a fine of up to $250,000, or both.

(c) In accordance with your certification that establishes you as a ''qualified U.S. contractor,'' unauthorized dissemination of this information is prohibited and may result in disqualification as a qualified U.S. contractor, and may be considered in determining your eligibility for future contracts with the Department of Defense.

(d) The U.S. Government assumes no liability for direct patent infringement, or contributory patent infringement or misuse of technical data.

(e) The U.S. Government does not warrant the adequacy, accuracy, currency, or completeness of the technical data.

(f) The U.S. Government assumes no liability for loss, damage, or injury resulting from manufacture or use for any purpose of any product, article, system, or material involving reliance upon any or all technical data furnished in response to the request for technical data.

(g) If the technical data furnished by the Government will be used for commercial manufacturing or other profit potential, a license for such use may be necessary. Any payments made in support of the request for data do not include or involve any license rights.

(h) A copy of this notice shall be provided with any partial or complete reproduction of these data that are provided to qualified U.S. contractors.

## PART 251—NATIONAL LANGUAGE SERVICE CORPS (NLSC)

Sec.

251.1 Purpose.
251.2 Applicability.
251.3 Definitions.
251.4 Policy.
251.5 Responsibilities.
251.6 Procedures.

AUTHORITY: 5 U.S.C. 3109, 18 U.S.C. 202, 31 U.S.C. 1535, 50 U.S.C. 1913.

SOURCE: 80 FR 76635, Dec. 10, 2015, unless otherwise noted.

### § 251.1 Purpose.

This part:

(a) Implements the responsibilities of the Secretary of Defense in 50 U.S.C. 1913 by establishing the NLSC program.

(b) Establishes policy, assigns responsibilities, and provides procedures for the management of the NLSC program.

(c) Assigns responsibility to the National Security Education Board (NSEB) to oversee and coordinate the activities of the NLSC (as provided and determined by the Secretary of Defense pursuant to 50 U.S.C. 1903 and 1913 with policy and funding oversight provided by the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) in accordance with DoD Directive 5124.02, ''Under Secretary of Defense for Personnel and Readiness (USD(P&R))'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/512402p.pdf*).

### § 251.2 Applicability.

This part applies to Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the DoD (referred to collectively in this

part as ''the DoD Components'') and federal agencies.

### § 251.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purposes of this part.

*Consultant*. Defined in 5 CFR part 304.

*Excepted service*. Appointments in the excepted service are civil service appointments within the Federal Government that do not confer competitive status and are excepted from competitive service by or pursuant to statute, by the President, or by the Office of Personnel Management, and which are not in Senior Executive Service.

*Foreign language*. Any language other than English.

*Language proficiency*. The U.S. Government relies on the Interagency Language Roundtable (ILR) scale to determine language proficiency. According to the ILR scale:

(1) 0 is No Proficiency.

(2) 0+ is Memorized Proficiency.

(3) 1 is Elementary Proficiency.

(4) 1+ is Elementary Proficiency, Plus.

(5) 2 is Limited Working Proficiency.

(6) 2+ is Limited Working Proficiency, Plus.

(7) 3 is General Professional Proficiency.

(8) 3+ is General Professional Proficiency, Plus.

(9) 4 is Advanced Professional Proficiency.

(10) 4+ is Advanced Professional Proficiency, Plus.

(11) 5 is Functional Native Proficiency.

*Special government employee (SGE)*. Defined in 18 U.S.C. 202.

### § 251.4 Policy.

It is DoD policy that:

(a) The NLSC provides DoD, or other U.S. departments or agencies, with U.S. citizens with high levels of foreign language proficiency for short-term temporary assignments providing foreign language services.

(b) The NLSC is authorized to employ U.S. citizens as language consultants pursuant to 50 U.S.C. 1913, 5 U.S.C. 3109, and 5 CFR part 304.

(c) The NLSC is exempt from DoD Instruction 5160.71, ''DoD Language Testing Program'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/516071_2009_ch1.pdf*), such that the NLSC may use tests of the Defense Language Proficiency Testing System or may use and develop other tests to assess language proficiency for the purpose of employing NLSC members as language consultants.

(d) The NLSC will be available to support DoD or other U.S. departments or agencies pursuant to 50 U.S.C. 1913.

(e) The NLSC will:

(1) Collect personally identifiable information pursuant to 50 U.S.C. 1913 from individuals interested in applying for NLSC membership.

(2) Comply with DoD Instruction 8910.01, ''Information Collection and Reporting'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/891001p.pdf*), Volume 2 of DoD Manual 8910.01, ''DoD Information Collections Manual: Procedures for DoD Public Information Collections'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/891001m_vol2.pdf*), and 32 CFR part 310.

(f) Qualified and available members with requested language skills hired in accordance with 5 U.S.C. 3109 and 5 CFR part 304 and DoD Administrative Instruction 2, ''Employment of Experts and Consultants'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/ai002p.pdf*), will be temporarily assigned to government agencies pursuant to reimbursable agreements described in 31 U.S.C. 1535.

### § 251.5 Responsibilities.

(a) The USD(P&R):

(1) Provides overall policy guidance for carrying out the responsibilities and duties of the Secretary of Defense in accordance with DoD Directive 5124.02 and 50 U.S.C. 1913.

(2) Ensures appropriate resources are programmed for the administration and operation of the NLSC.

(b) Under the authority, direction, and control of the USD(P&R), the Assistant Secretary of Defense for Readiness (ASD(R)):

(1) Through the Deputy Assistant Secretary of Defense for Force Education:

(i) Develops processes and polices regarding the NLSC oversight and coordination by the NSEB in accordance with 50 U.S.C. 1903 and 1913.

(ii) Recommends and oversees the establishment and execution of policies, programs, and goals to ensure the NLSC supports the readiness of the Military Services.

(iii) Oversees, and monitors compliance with the NLSC programs and processes on behalf of the Secretary of Defense to include the procedures in § 251.6.

(iv) Ensures that functions needed to support the accomplishment of the NLSC mission are executed, including engagement with DoD Components, federal agencies, and State and local governments to identify language needs, assessment of language proficiency of its members, and skill sustainment training.

(v) Determines eligibility for NLSC membership.

(2) Hosts the annual program review identified in 50 U.S.C. 1913.

(3) Designates a program manager responsible for overseeing implementation of NLSC programs and processes.

(c) Under the authority, direction, and control of the USD(P&R), the Director, Department of Defense Human Resources Activity (DoDHRA):

(1) Implements procedures and instructions for the appointment of NLSC members in support of DoD or other U.S. departments or agencies.

(2) Authorizes and signs interagency agreements between the NLSC and organizations outside of the DoD, and delegates authority to sign such agreements as needed.

(3) Provides administrative support to the NLSC, including actions related to intra- and inter-agency agreements, the intra- and inter-agency transfer of funds, personnel actions, and travel requirements.

(4) Provides fiscal management and oversight to ensure all funds provided for the NLSC are separately and visibly accounted for in the DoD budget.

(d) DoD Components heads ensure that the use of NLSC members is considered during exercise and operational planning.

**§ 251.6 Procedures.**

(a) *NLSC purpose.* (1) The purpose of the NLSC is to identify and provide U.S. citizens with foreign language skills to support DoD or other U.S. departments or agencies, in need of foreign language services, for requirements of less than one year.

(2) The NLSC will provide capable, federally-hired individuals to rapidly respond to critical national needs and assist DoD and other U.S. departments and agencies with surge or emergency requirements.

(b) *NLSC membership criteria.* NLSC members must:

(1) Be a U.S. citizen.

(2) Be at least 18 years of age.

(3) Have satisfied Selective Service requirements.

(4) Be proficient in English and any other language.

(c) *NLSC member recruitment.* The NLSC program manager will oversee recruitment of members. NLSC maintains a registry of individuals who have applied or been accepted for membership and responds to requests for foreign language services by searching the registry to identify individuals who can provide support. NLSC collects applicant information through electronically available DD forms (located at the DoD Forms Management Program Web site at *http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm*) or comparable Web-based applications:

(1) *DD Form 2932.* Contains a brief set of screening questions and is used to determine basic eligibility for NLSC membership.

(2) *DD Form 2933.* A language screening tool to evaluate the applicant's skills with respect to specific tasks. DD Form 2933 is used in conjunction with the screening of language skills for entry into the NLSC.

(3) *DD Form 2934.* Provides an overall assessment of the applicant's foreign language ability. DD Form 2934 is also used in conjunction with the screening of detailed skills for entry into the NLSC.

(d) *NLSC member appointment as federal employees.* Where applicants meet NLSC membership criteria and are matched to foreign language services requirements, the NLSC program manager ensures actions are initiated to

temporarily hire applicants and members for forecasted and actual support requests.

(1) For federal hiring, members follow excepted service hiring policies in accordance with 5 U.S.C. 3109, 5 CFR part 304, and 32 CFR part 310, and are appointed as language consultants in advance of participating in a support request, in accordance with DoD Administrative Instruction 2.

(2) An NLSC member who is already employed by a U.S. Government agency or is under contract full-time to one agency must receive a release from the head of that agency or individual empowered to release the employee or contractor before being employed for service within the NLSC pursuant to 50 U.S.C. 1913 and must comply with applicable laws and regulations regarding compensation. Such requests will be coordinated by the NLSC with the department or agency head concerned.

(3) NLSC members will be appointed on an annual basis pursuant to 5 U.S.C. 3109, 5 CFR part 304, and 32 CFR part 310 to perform duties as language consultants. If serving less than 130 days in a consecutive 365-day period, they will be considered SGEs as defined in 18 U.S.C. 202. Concurrent appointments as an SGE may be held with other DoD Components or in another federal agency.

(4) The NLSC program manager will track the number of days each NLSC member performed services and the total amount paid to each NLSC member within the 365-day period after the NLSC member's appointment.

(e) *NLSC member activation*. Activation encompasses all aspects of matching and hiring NLSC members to perform short-term temporary assignments to provide foreign language services. Under NLSC program manager oversight:

(1) Customer requirements are matched with skills of NLSC members and support is requested from DoDHRA to process necessary agreements, funding documents, and personnel actions to provide foreign language services. In accordance with paragraph (d)(3) of this section, NLSC members are temporarily hired as DoD employees.

(2) NLSC members are prepared for activation. If members are to be mobilized out of their home area, travel order requests are initiated. During the assignment, action will be taken to coordinate with members and clients, and assess success with the requesting agency upon completion.

(3) If duty requires issuance of DoD identification (e.g., Common Access Card), such identification will be issued to and maintained by activated NSLC members in accordance with Volume 1 of DoD Manual 1000.13, ''DoD Identification (ID) Cards: ID Card Life-Cycle'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/100013_vol1.pdf*). Upon completion of the assignment, the identification will be retrieved in accordance with Volume 1 of DoD Manual 1000.13.

(4) Upon completion of assignments, DoDHRA will provide post-assignment support to members and reconcile funding to close project orders.

# PART 252—PROFESSIONAL U.S. SCOUTING ORGANIZATION OPERATIONS AT U.S. MILITARY INSTALLATIONS OVERSEAS

Sec.
252.1 Purpose.
252.2 Applicability.
252.3 Definitions.
252.4 Policy.
252.5 Responsibilities.
252.6 Procedures.

AUTHORITY: E.O. 12715, May 3, 1990, 55 FR 19051; 10 U.S.C. 2606, 2554, and 2555.

SOURCE: 81 FR 3961, Jan. 25, 2016, unless otherwise noted.

## § 252.1 Purpose.

This part updates policy and outlines fiscal and logistical support that the DoD may provide to qualified scouting organizations operating on U.S. military installations overseas.

## § 252.2 Applicability.

This part applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the combatant commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within

the DoD (referred to collectively in this part as ''the DoD Components'').

**§ 252.3 Definitions.**

These terms and their definitions are for the purposes of this part.

*DoD personnel and their families*. Members of the Military Services and their family members and DoD civilian employees and their family members.

*Military Services*. The Army, Navy, Air Force, and Marine Corps.

*Qualified scouting organization*. The Girl Scouts of the United States of America (GSUSA) and the Boy Scouts of America (BSA).

*Sponsored organization or sponsored council*. Scouting organizations or councils authorized to operate as scouting affiliates on military installations.

**§ 252.4 Policy.**

It is DoD policy to cooperate with and assist qualified scouting organizations in establishing and providing facilities and services, within available resources, at locations outside the United States to support DoD personnel and their families in accordance with 10 U.S.C. 2606, 2554, and 2555 and Executive Order 12715, ''Support of Overseas Scouting Activities for Military Dependents''.

**§ 252.5 Responsibilities.**

(a) The Under Secretary of Defense for Personnel and Readiness (USD(P&R)) oversees development and implementation of this part.

(b) The DoD Component heads implement this part and comply with its provisions.

(c) In addition to the responsibilities in paragraph (b) of this section and acting as the DoD Executive Agent for DoD support to the BSA and GSUSA local councils and organizations in areas outside of the United States in accordance with 32 CFR part 212, the Secretary of the Army:

(1) Makes policy determinations in coordination with the other Military Department Secretaries regarding topics including, but not limited to, support that:

(i) DoD installation commanders are authorized to provide to the scouting program and personnel.

(ii) The scouting organization provides to DoD.

(2) Ensures accountability for appropriated fund (APF) and non-appropriated fund (NAF) assets used in the support of qualified scouting organizations.

(3) Provides input for and works with the scouting organizations in establishing the extent and scope of the annual scouting programs in support of DoD personnel and their families within the parameters established in this part and available resources.

(4) Ensures that the cost of the support provided is shared by each of the Military Services in proportion to benefits derived by their members from scouting programs overseas.

**§ 252.6 Procedures.**

(a) *General guidance*. (1) Support provided by DoD and services provided by qualified scouting organizations is documented in a written agreement and signed by the appropriate regional combatant commander or designee. Installation-specific support and services are documented in a written agreement and signed by the installation commander or designee. This agreement replaces the need for qualified scouting organizations to submit individual articles of incorporation, written constitutions, charters, or articles of agreement to gain approval from the installation commander to operate on the installation as required by 32 CFR part 212.

(2) Overseas installation commanders may authorize DoD support for qualified scouting organizations outside the United States when:

(i) Support is permitted under international agreements with the host nation, if applicable.

(ii) Support is permitted pursuant to law and DoD issuances.

(iii) Such support is within the capabilities of their respective installations.

(iv) Providing such support will not impede fulfillment of the military mission.

(3) Committees composed of representatives of the Military Services will be formed to review annual qualified scouting organization budget requirements.

(4) Overseas scouting committees will provide the overseas scouting organizations with information on the scouting requirements of DoD personnel and will monitor and evaluate the scouting organizations' efforts to satisfy those requirements.

(5) Funds raised by the scouting organizations, as a non-Federal entity, cannot be commingled with NAF funds and will be made available for annual audits.

(6) Employees of a qualified scouting organization are not considered to be U.S. Government employees, or employees of an instrumentality of the United States for the purpose of benefits or entitlements.

(i) APF is not used to reimburse their salaries and benefits.

(ii) They are not entitled to participate in the NAF retirement fund.

(iii) Serving in those positions does not constitute NAF employment credit or produce rehire priority.

(7) These organizations generally are not covered under the terms of United States' Status of Forces or other relevant agreements with host nations.

(i) Questions regarding whether they are covered under such agreements should be referred to the legal office servicing the applicable command. Applicability of any relevant agreements would be addressed with the host nation only by the applicable command, and not the organization.

(ii) To the extent the organization is not covered under any relevant agreement, host nation laws apply. In all cases, the host nation will determine the scope and extent of the applicability of host nation laws to these employees.

(b) *Funding guidance.* (1) Any APF and NAF support provided will be programmed and approved on an annual basis by the DoD Components. NAF support is authorized for youth activities programs in accordance with DoD Instruction 1015.15, ''Establishment, Management, and Control of Nonappropriated Fund Instrumentalities and Financial Management of Supporting Resources'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/101515p.pdf*) and for qualified scouting organizations in accordance with paragraph (b)(5) of this section.

(2) APF may be used in conjunction with overseas scouting organizations. The following services may be provided on a non-reimbursable basis:

(i) Transportation of executive personnel (to include household goods and baggage) of qualified scouting organizations:

(A) When on invitational travel orders.

(B) To and from overseas assignments.

(C) While providing scouting support to DoD personnel and their families. Transportation of supplies of qualified scouting organizations necessary to provide such support may also be provided.

(ii) Office space where regular meetings can be conducted, and space for recreational activities.

(iii) Warehousing.

(iv) Utilities.

(v) Means of communication.

(3) DoD may provide the following additional support to scouting executives assigned overseas:

(i) Pursuant to section API 3.18 of DoD 4525.6–M, ''Department of Defense Postal Manual'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/452506m.pdf*), access to use Military Services postal services is authorized.

(ii) Pursuant to section 4.3.2.2.2 of Department of Defense Education Activity Regulation 1342.13, ''Eligibility Requirements for Education of Elementary and Secondary School-age Dependents in Overseas Areas'' (available at *http://www.dodea.edu/Offices/Regulations/index.cfm*), access to DoD Dependents Schools (overseas) may be provided on a space-available, tuition-paying basis.

(iii) Pursuant to 32 CFR part 230, use of military banking facilities operated under DoD contracts is authorized.

(iv) Pursuant to DoD Instruction 1015.10, ''Military Morale, Welfare, and Recreation (MWR) Programs'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/101510p.pdf*), the use of morale, welfare, and recreation programs may be provided.

(v) Pursuant to 32 CFR part 161, medical care in uniformed services facilities on a space-available basis at rates

specified in uniformed services instructions, with charges collected locally, is authorized.

(vi) Pursuant to Office of Management and Budget Circular A–45, ''Rental and Construction of Government Quarters'' (available at *http://www.whitehouse.gov/omb/circulars_a045*) and subparagraph 2.c(1)(e) of DoD 4165.63–M, ''DoD Housing Management'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/416563m.pdf*), when DoD-sponsored civilian personnel serving DoD military installations at foreign locations cannot obtain suitable housing in the vicinity of an installation, they and their families may occupy DoD housing on a rental basis. The Military Service determines the priority of such leasing actions. These civilians are required to pay the established rental rate in accordance with DoD 4165.63–M and Military Service guidance.

(vii) Pursuant to DoD Instruction 1330.17, ''DoD Commissary Program'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/133017p.pdf*), overseas installation commanders or Secretaries of the Military Departments may extend commissary access through official support agreements.

(viii) Pursuant to DoD Instruction 1330.21, ''Armed Services Exchange Regulations'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/133021p.pdf*), the Secretaries of the Military Departments may grant Armed Forces Exchange deviations with regard to authorized patron privileges for individuals or classes and groups of persons at specific installations when based on alleviating individual hardships.

(4) NAF may be used in conjunction with qualified scouting organizations to:

(i) Reimburse for salaries and benefits of employees of those organizations for periods during which their professional scouting employees perform services in overseas areas in direct support of DoD personnel and their families.

(ii) Reimburse travel to and from official meetings of the overseas scouting committee upon approval from the appropriate combatant commander.

(5) The total amount of NAF support for the scouting program must not exceed 70 percent of the total cost of the scouting program.

[81 FR 3961, Jan. 25, 2016, as amended at 81 FR 61615, Sept. 7, 2016]

# PART 257—ACCEPTANCE OF SERVICE OF PROCESS

Sec.
257.1 Purpose.
257.2 Applicability.
257.3 Definition.
257.4 Policy.
257.5 Responsibilities.

AUTHORITY: 5 U.S.C. 301, 133.

SOURCE: 49 FR 1490, Jan. 12, 1984, unless otherwise noted.

## § 257.1 Purpose.

This rule updates DoD policy governing acceptance of service of process served on the Secretary of Defense and the Secretaries of the Military Departments.

## § 257.2 Applicability.

This rule applies to the Office of the Secretary of Defense (OSD) and the Military Departments.

## § 257.3 Definition.

*Service of Process*. When applied to the filing of a court action against an officer or agency of the United States, service of process refers to the delivery or, when appropriate, receipt by mail, of a summons and complaint made in accordance with Rule 4, Federal Rules of Civil Procedure by serving the United States and by serving a copy of the summons and complaint by registered or certified mail to such officer or agency. It further signifies the delivery of a subpoena requiring a witness to appear and give testimony or of a subpoena requiring production of documents, or delivery of a subpoena for any other reason whether or not the matter involves the United States.

## § 257.4 Policy.

It is DoD policy to accept service of process directed to the Secretary of Defense or a Secretary of a Military Department in his official capacity. Acceptance of service of process will not

constitute an admission or waiver with respect to the jurisdiction or to the propriety of service.

### § 257.5 Responsibilities.

The following responsibilities may not be redelegated:

(a) The *General Counsel, Department of Defense*, shall accept service of process for the OSD.

(b) The *Secretary of the Army*, or his designee, the *Chief, Litigation Division*, Office of the Judge Advocate General, shall accept service of process for the Department of the Army.

(c) The *Secretary of the Navy*, or his designee, the *General Counsel*, shall accept service of process for the Department of the Navy.

(d) The *Secretary of the Air Force*, or his designee, the *Chief, General Litigation Division*, Office of the Judge Advocate General, shall accept service of process for the Department of the Air Force.

## PART 259—UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION FOR FEDERAL AND FEDERALLY-ASSISTED PROGRAMS

AUTHORITY: Section 213, Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91–646, 84 Stat. 1894, (42 U.S.C. 4601) as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987, Title IV of Pub. L. 100–17, 101 Stat. 246–256 (42 U.S.C. 4601 note).

### § 259.1 Uniform relocation assistance and real property acquisition.

Regulations and procedures for complying with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, Pub. L. 91–646, 84 Stat. 1894 42 U.S.C. 4601) as amended by the Surface Transportation and Uniform Relocation Assistance Act of 1987 (Title IV of Pub. L. 100–17, 101 Stat. 246–256, 42 U.S.C. 4601 note) are set forth in 49 CFR part 24.

[52 FR 48020, Dec. 17, 1987]

## PART 260—VENDING FACILITY PROGRAM FOR THE BLIND ON DOD-CONTROLLED FEDERAL PROPERTY

Sec.

260.1 Purpose.
260.2 Applicability.
260.3 Definitions.
260.4 Policy.
260.5 Responsibilities.
260.6 Procedures.
260.7 Information requirements.

SOURCE: 74 FR 62235, Nov. 27, 2009, unless otherwise noted.

### § 260.1 Purpose.

This part:

(a) Assigns responsibilities in compliance with 20 U.S.C. 107 *et seq.* and 34 CFR part 395 and establishes the following policies within the Department of Defense:

(1) Uniform policies for application of priority accorded the blind to operate vending facilities;

(2) Requirements for satisfactory vending facility sites on DoD-controlled property; and

(3) Vending machine income-sharing requirements on DoD-controlled property

(b) Prescribes requirements and operating procedures for the vending facility program for the blind on DoD-controlled property.

(c) Does NOT apply to full food services, mess attendant services, or services supporting the operation of a military dining facility.

### § 260.2 Applicability.

This part applies to:

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

(b) Vending facility sites on DoD-controlled property.

**§ 260.3 Definitions.**

*Blind licensee.* A blind person licensed by the State licensing agency to operate a vending facility on DoD-controlled property.

*Cafeteria.* A food dispensing facility capable of providing a broad variety of prepared foods and beverages (including hot meals) primarily through the use of a line where the customer serves himself or herself from displayed selections. A cafeteria may be fully automatic, or some limited waiter or waitress service may be available and provided within a cafeteria and table or booth seating facilities are always provided. The DoD Component food dispensing facilities that conduct cafeteria-type operations during part of their normal operating day and full table-service operations during the remainder of their normal operating day are not ''cafeterias'' if they engage primarily in full table service operations.

*Direct competition.* The presence and operation of a DoD Component vending machine or a vending facility on the same DoD-controlled property as a vending facility operated by a blind vendor. Vending machines or vending facilities operated in areas serving employees, the majority of whom normally do not have access (in terms of uninterrupted ease of approach and the amount of time required to patronize the vending facility) to the vending facility operated by a blind vendor, shall not be considered to be in direct competition with the vending facility operated by a blind vendor.

*DoD-controlled property.* Federal property that is owned, leased, or occupied by DoD.

*Federal employees.* Civilian appropriated fund and nonappropriated fund employees of the United States.

*Federal property.* Any building, land, or other real property owned, leased, or occupied by DoD in the United States.

*Individual location, installation, or facility.* A single building or a self-contained group of buildings. A self-contained group of buildings refers to two or more buildings that must be located in close proximity to each other and between which a majority of the Federal employees working in such buildings regularly move from one building to another in the normal course of their official business during a normal working day.

*License.* A written instrument issued by a State licensing agency to a blind person, authorizing that person to operate a vending facility on DoD-controlled property.

*Military dining facility.* A facility owned, operated, or leased and wholly controlled by DoD and used to provide dining services to members of the Armed Forces, including a cafeteria, military mess hall, military troop dining facility, or any similar dining facility operated for the purpose of providing meals to members of the Armed Forces.

*Normal working hours.* An 8-hour work period between the approximate hours of 0800 and 1800, Monday through Friday.

*On-site official.* The individual in command of an installation or separate facility or location. For the Pentagon Reservation only, the Washington Headquarters Services (WHS) Director of the Defense Facilities Directorate is designated as the on-site official.

*Permit.* The official approval given a State licensing agency by a department, agency, or instrumentality responsible for DoD-controlled property whereby the State licensing agency is authorized to establish a vending facility.

*Satisfactory site.* An area fully accessible to vending facility patrons and having sufficient electrical, plumbing, heating, and ventilation outlets for the location and operation of a vending facility in compliance with applicable health laws and building requirements. A ''satisfactory site'' shall have a minimum of 250 square feet available for sale of items and for storage of articles necessary for the operation of a vending facility.

*State.* A state, the District of Columbia, the Commonwealth of Puerto Rico, a territory, or possession of the United States.

*State licensing agency.* The State agency designated by the Secretary of Education, to issue licenses to blind persons for the operation of vending facilities on Federal and other property.

*Substantial alteration or renovation.* A permanent material change in the floor area of a building that would render it

appropriate for the location and operation of a vending facility by a blind vendor.

*United States*. The several States, the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possessions of the United States.

*Vending facility*. Automatic vending machines, cafeterias, snack bars, cart service, shelters, counters, and such other appropriate auxiliary equipment that may be operated by blind licensees and that are necessary for the sale of newspapers, periodicals, confections, tobacco products, foods, beverages, and other articles and services to be dispensed automatically or manually and that are prepared on or off the premises according to applicable health laws. Also includes facilities providing the vending or exchange of chances for any lottery authorized by State law and conducted by an agency of a State within such State.

*Vending machine*. For the purposes of assigning vending machine income, a coin or currency operated machine that dispenses articles or services except that those machines operated by the United States Postal Service for the sale of postage stamps or other postal products and services, machines providing services of a recreational nature, and telephones shall not be considered to be vending machines.

*Vending machine income*. (1) DoD Component receipts from the DoD Component vending machine operations on DoD-controlled property, where the machines are operated by any DoD Component activity, less costs incurred; or

(2) Commissions received by any DoD Component activity from a commercial vending firm that provides vending machines on DoD-controlled property.

(3) ''Costs incurred'' include costs of goods, including reasonable service and maintenance costs in accordance with customary business practices of commercial vending concerns, repair, cleaning, depreciation, supervisory and administrative personnel, normal accounting, and accounting for income-sharing.

*Vendor*. A blind licensee who is operating a vending facility on DoD-controlled property.

## § 260.4 Policy.

It is DoD policy that a DoD Component having accountability for real property shall extend priority on such property to the blind when implementing the Randolph-Sheppard Act, as set out in the following paragraphs:

(a) The blind shall be given priority in the establishment and operation of vending facilities.

(b) The blind shall be given priority in the award of contracts to operate cafeterias.

(c) In conjunction with acquisition or substantial alteration or renovation of a building, satisfactory sites shall be provided for operation of blind vending facilities.

(d) Specified income from vending machines operated on DoD-controlled property by a DoD Component either directly or by contract shall be given to State licensing agencies.

## § 260.5 Responsibilities.

(a) The Principal Deputy Under Secretary of Defense for Personnel and Readiness (PDUSD(P&R)), under the Under Secretary of Defense for Personnel and Readiness, shall establish policies and procedures and monitor the Vending Facility Program.

(b) The Heads of the DoD Components, in monitoring their respective programs, shall:

(1) Approve or disapprove State licensing agency applications for permits and the provision of satisfactory sites;

(2) Issue policies and procedures to designate and establish responsibilities of the on-site official;

(3) Suspend or terminate a permit to operate a vending facility after consulting with the PDUSD(P&R) where circumstances warrant.

(4) Ensure appropriate real property outgrants are accomplished in accordance with DoDI 4165.70, ''Real Property Management,''[1] and consistent with the Randolph-Sheppard Act (20 U.S.C. 107) and the implementing regulations (34 CFR part 395).

(5) The On-Site Official shall be the point of contact with State licensing agencies and shall:

[1] Available from *http://www.dtic.mil/whs/directives/corres/html/416570.htm.*

(i) Consult with State licensing agencies on articles and services to be provided;

(ii) Establish appropriate limitations on the location or operation of a vending facility upon finding that the granting of a priority under the Act would adversely affect the interests of the United States. The On-Site Official shall justify this limitation in writing through the Head of the DoD Component concerned and the PDUSD(P&R) to the Secretary of Education for determination of whether the limitation is warranted.

(iii) Notify State licensing agencies of acquisition or substantial alteration or renovation of property;

(iv) Negotiate with State licensing agencies on other matters and adhere to guidance provided in § 260.6 of this part.

**§ 260.6 Procedures.**

The DoD Components in control of the maintenance, operation, and protection of Federal property shall take necessary action to ensure the requirements set forth in this Section are implemented for these properties.

(a) The blind have a priority to operate vending facilities on DoD property, whenever feasible, in light of appropriate space and potential patronage. Implementation of this priority is not required when:

(1) The number of people using the property is or will be insufficient to support a vending facility; or

(2) The Secretary of Education determines that the limitation on the placement or operation of a vending facility is warranted pursuant to 260.5(b)(5)(ii), which is binding on the DoD Component. Notice of the Secretary of Education's determination will be published in the FEDERAL REGISTER.

(b) Applications for permits by the State licensing agency to operate vending facilities (except cafeterias) on DoD-controlled property must be submitted in writing to the Head of the DoD Component concerned through the on-site official. When an application is not approved, the Head of the DoD Component concerned shall advise the State licensing agency in writing and shall indicate the reasons for the disapproval. Permits shall describe the location of the vending facility and shall be subject to the following requirements:

(1) The permit shall be issued in the name of the State licensing agency.

(2) The permit shall be issued for an indefinite period of time subject to suspension or termination upon failure to comply with agreed-upon terms. It shall be subject to termination by either party on 60 days' written notice to the other party, in cases of:

(i) Inactivation of the installation or activity.

(ii) Loss of use of a building or other facility housing the vending facility.

(iii) Change in the DoD Component's requirements for service.

(iv) Inability of the State licensing agency to continue to operate the vending facility.

(3) The permit shall provide:

(i) No charge shall be made by the DoD Component to the State licensing agency for normal repair and maintenance of the building, cleaning areas adjacent to the designated vending facility boundaries, or trash removal from a designated collection point (not to include any hazardous waste).

(ii) The State licensing agency shall be responsible for cleaning and maintaining the vending facility appearance and its security within the designated boundaries of such facility and for all costs of every kind in conjunction with vending facility equipment, merchandise, and other products to be sold, except as provided in paragraph (b)(3)(v) of this section. Neither party shall be responsible for loss or damage to the other's property, unless caused by its acts or omissions. The State licensing agency shall also be responsible for the acts or omissions of the blind vendor, the vendor's employees, or agents.

(iii) Articles sold at such vending facilities may consist of newspapers, periodicals, publications, confections, tobacco products, foods, beverages, chances for any lottery authorized by State law and conducted by an agency of a State within such State, and other articles or services traditionally found in blind-operated vending facilities operated under 20 U.S.C. 107, as determined by the State licensing agency, in consultation with the on-site official, to be suitable for a particular location.

Articles and services may be automatically or manually dispensed.

(iv) Vending facilities shall be operated in compliance with applicable Federal, state, interstate and local laws and regulations, including those concerning health and sanitation, the environment, and building codes.

(v) Installation, modification, relocation, removal, and renovation of vending facilities shall be subject to the prior approval of the on-site official and the State licensing agency. The initiating party shall pay the costs of installation, modification, removal, relocation, or renovation. In any case of suspension or termination of a permit to operate a vending facility on the basis of noncompliance by either party, the costs of removal from the building shall be borne by the non-complying party.

(4) The permit shall state that no charge shall be made to the State Licensing Authority for the cost of normal cleaning, maintenance, and repair of the building structure in and adjacent to the vending facility areas, and no charge shall be made to the DoD for the cost of sanitation and the maintenance of vending facilities and vending machines in an orderly condition at all times, and the installation, maintenance, repair, replacement, servicing, and removal of vending facility equipment.

(5) In the event the blind licensee fails to provide satisfactory service or otherwise fails to comply with the requirements of the permit issued to the State licensing agency, the on-site official shall, after coordinating with the Head of the DoD Component, notify the State licensing agency of this deficiency in writing and request corrective action within a specified reasonable time. The notice shall indicate that failure to correct the deficiency shall result in temporary suspension or termination of the permit, as appropriate. Suspension or termination action shall be taken by the Head of the DoD Component concerned after consultation with the PDUSD(P&R).

(c) Any DoD Component-acquired (purchased, rented, leased, or constructed), substantially altered, or renovated building is required to have one or more satisfactory sites for a blind-operated vending facility, except as provided in paragraph (c)(1) of this section.

(1) A determination that a building contains a satisfactory site or sites is presumed if the State licensing agency and the on-site official consult and agree that the site or sites provided are satisfactory.

(i) The Heads of the DoD Components shall notify the appropriate State licensing agency[2] by certified or registered mail, return receipt requested, of buildings to be acquired or substantially altered or renovated. This notification shall be provided at least 60 days in advance of the intended acquisition date or the initiation of actual construction, alteration, or renovation. As a practical matter, the State licensing agency should be contacted early in the planning or design stage of a project. This notification shall:

(A) State that a satisfactory site(s) for the location and operation of a blind vending facility is (are) included in the plans for the building.

(B) Include a copy of a single line drawing indicating the proposed location of such site(s).

(C) Advise the State licensing agency that, subject to the approval of the DoD Component, it shall be offered the opportunity to select the location and type of vending facility to be operated by a blind vendor prior to completion of the final space layout of the building.

(ii) Advise that the State licensing agency must respond within 30 days to the DoD Component, acknowledging receipt of the correspondence from the DoD Component and indicating whether it is interested in establishing a vending facility and, if interested, signifying its agreement or alternate selection of a location and its selection of type of vending facility. A copy of the written notice to the State licensing agency and the State licensing agency's response, if any, shall be provided to the Secretary of Education.

(iii) If the State licensing agency's response to the DoD Component indicates it does not desire to establish and

[2] See the U.S. Department of Education Web site, Office of Special Education and Rehabilitative Services at *http://www.ed.gov*.

operate a vending facility and sets forth any specific basis other than the insufficiency of patrons to support a vending facility, or if the State licensing agency does not respond within 30 days, then a site meeting the anticipated needs of the DoD Component shall be incorporated. Each such site shall have a minimum of 250 square feet for sale of items and for storage of articles necessary for the operation of a vending facility.

(iv) If the State licensing agency indicates that the number of persons using the property is or will be insufficient to support a vending facility, then a satisfactory site to be operated under the auspices of the State licensing agency shall not be incorporated. The On-Site Official shall, through the Head of the DoD component, notify the Secretary of Education of the State licensing agency's response.

(2) The requirement to provide a satisfactory site shall not apply:

(i) When fewer than 100 Federal employees (as defined in §260.3 of this part) are located in the building during normal working hours; or

(ii) When the building contains fewer than 15,000 square feet to be used for Federal Government purposes and the Federal Government space is used to provide services to the general public.

(iii) The provisions of paragraphs (c)(2)(i) and (c)(2)(ii) of this section do not preclude arrangements under which blind vending facilities may be established in buildings of a size or with an employee population less than that specified. For example, if a building is to be constructed that will contain only 30 Federal employees, upon agreement of the on-site official and the State licensing agency, the DoD Component may decide to provide a satisfactory site for a blind vending facility.

(3) When a DoD Component is leasing all or part of a privately owned building in which the lessor or any of its tenants have an existing restaurant or other food facility in a part of the building not covered by the lease and operation of a vending facility would be in substantial direct competition with such restaurant or other food operation, the requirement to provide a satisfactory site does not apply.

(d) Vending machine income generated by the Department of Defense shall be shared with State licensing agencies as prescribed in paragraph (d)(1) of this section. The on-site official is responsible for collecting and accounting for such vending machine income (as defined in §260.3 of this part) and for ensuring compliance with the requirements of this paragraph.

(1) The vending machine income-sharing requirements are as follows:

(i) One hundred percent of the vending machine income from vending machines in direct competition with blind-operated vending facilities shall be provided to the State licensing agency.

(ii) Fifty percent of the vending machine income from vending machines not in direct competition with blind-operated vending facilities shall be provided to the State licensing agency.

(iii) Notwithstanding paragraph (d)(1)(ii) of this section, thirty percent of the vending machine income from vending machines not in direct competition with blind-operated vending facilities and located where at least fifty percent of the total hours worked on the premises occurs during other than normal working hours (as defined in §260.3 of this part) shall be provided to the State licensing agency.

(2) The determination of whether a vending machine is in direct competition with the blind-operated vending facility is the responsibility of the on-site official subject to the concurrence of the State licensing agency.

(3) These vending machine income-sharing requirements do not apply to:

(i) Income from vending machines operated by or for the military exchanges or ships' store systems; or

(ii) Income from vending machines, not in direct competition with a blind-operated vending facility, at any individual location, installation, or facility where the total of the vending machine income from all such machines at such location, installation, or facility does not exceed $3,000 annually.

(4) The payment to State licensing agencies under these income-sharing requirements must be made quarterly on a fiscal year basis.

(e) Pursuant to 34 CFR 395.37, whenever any State licensing agency for the

blind determines that any DoD activity is failing to comply with the provisions of 20 U.S.C. 107 and all informal attempts to resolve the issues have been unsuccessful, the State licensing agency may file a complaint with the Secretary of Education.

### § 260.7 Information requirements.

Within 90 days after the end of each fiscal year, the DoD Components shall forward to the PDUSD(P&R) the total number of applications for vending facility locations received from State licensing agencies, the number accepted, the number denied, the number still pending, the total amount of vending machine income collected (as defined in § 260.3 of this part, excluding income exempt from the income sharing requirements by § 260.6(d)(3) of this part), and the amount of such vending machine income disbursed to State licensing agencies in each State. These reporting requirements have been assigned Report Control Symbol DD–P&R(A)2210, according to DoD 8910.1–M, ''Department of Defense Procedures for Management of Information Requirements.''[3]

## PART 263—TRAFFIC AND VEHICLE CONTROL ON CERTAIN DEFENSE MAPPING AGENCY SITES

Sec.

263.1 Definitions.
263.2 Applicability.
263.3 Compliance.
263.4 Registration of vehicles.
263.5 Inspection of license and registration.
263.6 Speeding or reckless driving.
263.7 Emergency vehicles.
263.8 Signs.
263.9 Right-of-way in crosswalks.
263.10 Parking.
263.11 Penalties.

AUTHORITY: 63 Stat. 377 as amended, 18 U.S.C. 13, 40 U.S.C. 318 a through d, 50 U.S.C. 797, Delegations, 43 FR 56895, 46 FR 58306.

SOURCE: 48 FR 34952, Aug. 2, 1983, unless otherwise noted.

### § 263.1 Definitions.

As used in this part:

(a) *Brookmont site* means those grounds and facilities of the Defense Mapping Agency Hydrographic/Topographic Center (DMAHTC) and the Defense Mapping Agency Office of Distribution Services (DMAODS) located in Montgomery County, Maryland, over which the Federal Government has acquired exclusive or concurrent jurisdiction.

(b) *Uniformed guard* means a designated DMA government guard appointed to enforce vehicle and traffic regulations by the Director, DMAHTC.

### § 263.2 Applicability.

The provisions of this regulation apply to all areas in the Brookmont site and to all persons on or within the site. They supplement those penal provisions of Title 18, U.S. Code, relating to crimes and criminal procedures, which apply without regard to the place of the offense and those provisions of state law which are made federal criminal offenses by virtue of the Assimilative Crimes Act, 18 U.S.C. 13.

### § 263.3 Compliance.

(a) All persons entering the site shall comply with this regulation; with all official signs; and with the lawful directions or orders of a uniformed guard in connection with the control or regulation of traffic, parking or other conduct at the Brookmont site.

(b) At the request of a uniformed guard, a person must provide identification by exhibiting satisfactory credentials (such as driver's license).

(c) No person shall knowingly give any false or fictitious report concerning an accident or violation of this regulation to any person properly investigating an accident or alleged violation.

(d) All incidents resulting in injury to persons or damage to property must be reported to the Security Office immediately.

(e) No person involved in an accident shall leave the scene of that accident without first giving aid or assistance to the injured and making his or her identity known.

### § 263.4 Registration of vehicles.

(a) Newly assigned or employed individuals who intend to operate a privately-owned vehicle at the site shall

[3] Available from *http://www.dtic.mil/whs/directives/corres/pdf/891001m.pdf*.

register it with the Security Police Division within 24 hours after entry on duty.

(b) Temporary registration for a specified period of time will be permitted for temporarily hired, detailed, or assigned personnel; consultants; contractors; visiting dignitaries, etc.

### § 263.5 Inspection of license and registration.

No person may operate any motor vehicle on the site without a valid, current operator's license, nor may any person, if operating a motor vehicle on the site, refuse to exhibit for inspection, upon request of a uniformed guard, his operator's license or proof of registration of the vehicle under his control at time of operation.

### § 263.6 Speeding or reckless driving.

(a) No person shall drive a motor vehicle on the site at a speed greater than or in a manner other that what is reasonable and prudent for the particular location, given the conditions of traffic, weather, and road surface and having regard to the actual and potential hazards existing.

(b) Except when a special hazard exists that requires lower speed, the speed limit on the site is 15 m.p.h., unless another speed limit has been duly posted, and no person shall drive a motor vehicle on the site in excess of the speed limit.

### § 263.7 Emergency vehicles.

No person shall fail or refuse to yield the right-of-way to an emergency vehicle when operating with siren or flashing lights.

### § 263.8 Signs.

Every driver shall comply with all posted traffic signs.

### § 263.9 Right-of-way in crosswalks.

No person shall fail or refuse to yield the right-of-way to a pedestrian or bicyclist crossing a street in the marked crosswalk.

### § 263.10 Parking.

(a) No person, unless otherwise authorized by a posted traffic sign or directed by a uniformed guard, shall stand or park a motor vehicle:

(1) On a sidewalk, lawn, plants or shrubs.

(2) Within an intersection or within a crosswalk.

(3) Within 15 feet of a fire hydrant, 5 feet of a driveway or 30 feet of a stop sign or traffic control device.

(4) At any place which would result in the vehicle being double parked.

(5) At curbs painted yellow.

(6) In a direction facing on-coming traffic.

(7) In a manner which would obstruct traffic.

(8) In a parking space marked as not intended for his or her use.

(9) Where directed not to do so by a uniformed guard.

(10) Except in an area specifically designated for parking or standing.

(11) Except within a single space marked for such purposes, when parking or standing in an area with marked spaces.

(12) At any place in violation of any posted sign.

(13) In excess of 24 hours, unless permission has been granted by the Security Office.

(b) No person shall park bicycles, motorbikes or similar vehicles in areas not designated for that purpose.

(c) Visitors shall park in areas identified for that purpose by posted signs and shall register their vehicles at the front desk of Erskine Hall, Ruth Building or Fremont Building.

(d) No person, except visitors, shall park a motor vehicle on the Brookmont site without having a valid parking permit displayed on such motor vehicle in compliance with the instructions of the issuing authority.

### § 263.11 Penalties.

(a) Except with respect to the laws of the State of Maryland assimilated under 18 U.S.C. 13, whoever shall be found guilty of violating these regulations is subject to a fine of not more than $50 or imprisonment of not more than 30 days, or both in accordance with 40 U.S.C. 318c. Except as expressly provided in this part, nothing contained in these regulations shall be construed to abrogate any other Federal laws or regulations, or any State

and local laws and regulations applicable to the area in which the site is situated.

(b) In addition to the penalties described in subsection (a) of this section, parking privileges may be revoked by the issuing authority for violations of any of the provisions of this regulation.

(c) Any motor vehicle that is parked in violation of this regulation may be towed away or otherwise moved if a determination is made by a uniformed guard that it is a nuisance or hazard. A fee for the moving service and for the storage of the vehicle, if any, may be charged, and the vehicle is subject to a lien for that charge.

# PART 264—INTERNATIONAL INTERCHANGE OF PATENT RIGHTS AND TECHNICAL INFORMATION

Sec.
264.1 Purpose and cancellation.
264.2 Scope.
264.3 Background.
264.4 Policy.
264.5 Claims for compensation.

AUTHORITY: Secs. 601, 606, 75 Stat. 438, 440; 22 U.S.C. 2351, 2356.

SOURCE: 25 FR 14456, Dec. 31, 1960, unless otherwise noted.

## § 264.1 Purpose and cancellation.

The purpose of this part is to restate Department of Defense policy concerning the international interchange for defense purposes of patent rights and technical information. DoD Directive 2000.3, ''Technical Property Interchange Agreements'', dated April 15, 1954, is hereby superseded and cancelled. Delegation published at 19 FR 2523 is cancelled.

## § 264.2 Scope.

This part applies to the activities of all Department of Defense personnel involved in the international interchange for defense purposes of patent rights and technical information. The policy prescribed herein applies to unclassified as well as classified information, owned by the United States Government or privately owned, but does not apply to patents, patent applications, and technical information in the field of atomic energy.

## § 264.3 Background.

(a) Pursuant to the provisions of the Mutual Security Act of 1954, as amended, and of predecessor legislation superseded by that Act, the United States has entered into agreements for the Interchange of Patent Rights and Technical Information for Defense Purposes with Australia, Belgium, Denmark, France, the Federal Republic of Germany, Greece, Italy, Japan, The Netherlands, Norway, Portugal, Spain, Turkey, and the United Kingdom. The agreements, which are published in the Treaties and Other International Act Series, are basically similar in substance but are not identical. Under the agreements:

(1) Each government undertakes to facilitate the interchange of privately owned patent rights and of technical information through the medium of commercial relationships, to the extent permitted by the laws and security requirements of the contracting governments.

(2) When technical information is supplied by one government to the other for information only, the recipient government undertakes to treat the information as disclosed in confidence and to use its best endeavors to ensure that the information is not dealt with in any manner likely to prejudice the rights of the owner to obtain patent or similar statutory protection.

(3) When technical information supplied by one government to the other discloses an invention which is the subject of a patent or patent application held in secrecy in the country of origin, the recipient government undertakes to accord similar treatment to a corresponding patent application filed in that country.

(4) When privately owned technical information is released by one government to the other and the recipient government uses or disclosed the information, the owner shall, subject to the extent that the owner may be entitled thereto under the applicable law and subject to arrangements between the contracting governments regarding the assumption as between them of liability for compensation, receive prompt, just and effective compensation for

such use and for any damages resulting from such use or disclosure.

(5) Each government is entitled to use for defense purposes without cost any invention which the other government (including government corporations) owns or to which it has the right to grant a license to use, except to the extent that there may be liability to any private owner of an interest in the invention.

(b) Each of these agreements establishes a Technical Property Committee consisting of a representative of each contracting government, whose function it is to consider and make recommendations to the contracting governments on all matters relating to the subject of the agreement and to assist where appropriate in the negotiation of commercial or other agreements for the use of patent rights and technical information in the military assistance program.

(1) The Patent Advisor assigned to the Defense Staff of the U.S. Mission to the North Atlantic Treaty Organization and European Regional Organizations (USRO), Paris, France, is the United States representative to the Technical Property Committees in Europe. The J–4, Hq. United States Forces Japan, Tokyo, Japan is the United States representative to the United States-Japanese Technical Property Committee. A member of the Office of Assistant General Counsel, International Affairs, Office of the Secretary of Defense, is the United States representative to the United States-Australian Technical Property Committee. The appropriate representative should be consulted on all problems dealing with patent rights, technical information and related matters under the agreements.

(2) These representatives receive policy guidance from the Department of Defense. The Assistant Secretary of Defense for International Security Affairs is responsible within the Department of Defense for transmitting such policy guidance through appropriate channels. Guidance transmitted for the United States representative in Europe shall be forwarded to the Defense Advisor, USRO; guidance transmitted for the United States representative in Japan shall be transmitted to the Commanding General, United States Forces Japan.

(c) Department of Defense problems arising in the United States in connection with the interchange of patent rights and privately owned technical information should be referred to the patent activity of the appropriate Military Department.

[25 FR 14456, Dec. 31, 1960, as amended at 26 FR 1993, Mar. 8, 1961; 26 FR 6479, July 19, 1961]

### § 264.4 Policy.

It is the policy of the Department of Defense to encourage and facilitate international interchanges of patent rights and technical information to further the common defense of the United States and friendly nations. In achieving this purpose, the following principles shall be observed.

(a) Classified military information shall be released only through Government channels and only when consistent with the National Disclosure Policy, or when approved as an exception to that policy.

(b) In accordance with the Congressional policy prescribed by section 413(a) of the Mutual Security Act of 1954, as amended (22 U.S.C. 1933(a)), and pursuant to the bilateral agreements referred to in § 264.3, commercial relationships shall be utilized whenever appropriate and to the maximum extent feasible in order to encourage the participation of private enterprise in the Mutual Security Program, to relieve the Department of Defense of administrative burdens, and to reduce the costs to the United States of such interchanges.

(c) In accordance with section 414 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1934), the utilization of commercial channels for the exportation of unclassified privately owned technical information relating to articles designated as arms, ammunition, and implements of war in the United States Munitions List shall be subject to the regulations issued by the Secretary of State pursuant to section 414 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1934) (Title 22 CFR, chapter I, subchapter M). (The term ''technical data'' is used in those regulations to describe technical information relating to such articles).

(d) Technical information which might be privately owned may be released under paragraph (e) (1) or (2) of this section by Department of Defense Agencies to foreign governments if any one of the following conditions are met:

(1) The owner expressly consents to the proposed release;

(2) The United States, by contract or otherwise, has acquired or is entitled to acquire, the information under circumstances which permit the proposed release; or

(3) The Secretary of the Military Department concerned, or his designee, determines, under the authority of the Mutual Security Act of 1954, as amended, that:

(i) The exigencies of the requirement for release to further the common defense do not allow sufficient time to obtain the consent of the owner; or

(ii) The owner refuses consent and the best interests of the United States would be served by the release.

(e) In accordance with the provisions of the agreements referred to in § 264.3, the release to foreign governments by Department of Defense agencies of technical information which might be privately owned shall normally be in accord with the following two step procedure:

(1) Release for information only.

(2) Permission for manufacture, or use, for defense purposes.

(f)(1) All technical information, whether privately owned or government owned, released to a foreign government by Department of Defense Agencies shall be marked with the following restrictions:

1. This information is accepted for defense purposes only.

2. This information shall be accorded substantially the same degree of security protection as such information has in the United States.

3. This information shall not be disclosed to another country without the consent of the United States.

(2) When technical information which might be privately owned is released for information only, the restrictive marking shall also contain these additional notations:

4. This information is accepted upon the understanding that it might be privately owned.

5. This information is accepted solely for the purpose of information and shall accordingly be treated as disclosed in confidence. The recipient Government shall use its best endeavors to ensure that the information is not dealt with in any manner likely to prejudice the rights of the private owner thereof to obtain patent or other like statutory protection therefor.

6. The recipient Government shall obtain the consent of the United States if it desires that this information be made available for manufacture, or use, for defense purposes.

(g) When technical information which might be privately owned is released under the procedures set forth herein, the owner, if known, shall be furnished:

(1) Notice of the release;

(2) The identity of the recipient, if not contrary to security regulations;

(3) Notice that the recipient has been advised that the information might be privately owned; and

(4) Notice of the restrictions to which the release is subject.

### § 264.5 Claims for compensation.

(a) With respect to interchanges in furtherance of the purposes of the Mutual Security Act of 1954, as amended, section 506 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1758) provides the exclusive remedy for compensation for infringement within the United States of a patent issued by the United States and for damage resulting from the disclosure by the United States of privately owned technical information.

(b) The Secretaries of the Military Departments are hereby authorized to exercise the power and authority conferred by section 506 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1758) to enter into agreements with claimants in full settlement and compromise of any claim against the United States thereunder, subject to such rules and regulations, if any, as the Secretary of Defense may promulgate from time to time. The Secretaries of the Military Departments are authorized to make successive redelegations in writing of this power and authority to any officer, employee, board

or agent of their respective departments.

(c) Funds appropriated for military assistance pursuant to the Mutual Security Act of 1954, as amended, which have been made available to a Military Department may be used to settle claims under section 506 of the Mutual Security Act of 1954, as amended (22 U.S.C. 1758). In addition, in those cases where the provisions of 10 U.S.C. 2386 are applicable, funds appropriated for a Military Department available for making or procuring supplies may be used to settle such claims.

## PART 269—CIVIL MONETARY PENALTY INFLATION ADJUSTMENT

Sec.
269.1 Scope and purpose.
269.2 Definitions.
269.3 Civil monetary penalty inflation adjustment.
269.4 Cost of living adjustments of civil monetary penalties.
269.5 Application of increase to violations.

AUTHORITY: 28 U.S.C. 2461 note.

SOURCE: 61 FR 67945, Dec. 26, 1996, unless otherwise noted.

### § 269.1 Scope and purpose.

The purpose of this part is to establish a mechanism for the regular adjustment for inflation of civil monetary penalties under the jurisdiction of the Department of Defense. Applicable civil monetary penalties must be adjusted in conformity with the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the Debt Collection Improvement Act of 1996, Public Law 104–134, April 26, 1996, and further amended by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Public Law 114–74, November 2, 2015, in order to improve the deterrent effect of civil monetary penalties and to promote compliance with the law.

[81 FR 33391, May 26, 2016]

### § 269.2 Definitions.

(a) *Department*. The Department of Defense.

(b) *Civil monetary penalty*. Any penalty, fine, or other sanction that:

(1)(i) Is for a specific monetary amount as provided by Federal law; or

(ii) Has a maximum amount provided by Federal law; and

(2) Is assessed or enforced by the Department pursuant to Federal law; and

(3) Is assessed or enforced pursuant to an administrative proceeding or a civil action in the Federal Courts.

(c) *Consumer Price Index*. The index for all urban consumers published by the Department of Labor.

[61 FR 67945, Dec. 26, 1996, as amended at 81 FR 33391, May 26, 2016]

### § 269.3 Civil monetary penalty inflation adjustment.

The Department must, not later than July 1, 2016 and not later than January 15 of every year thereafter—

(a) By regulation, adjust each civil monetary penalty provided by law within the jurisdiction of the Department by the inflation adjustment described in § 269.4; and

(b) Publish each such update in the FEDERAL REGISTER.

[61 FR 67945, Dec. 26, 1996, as amended at 81 FR 33391, May 26, 2016]

### § 269.4 Cost of living adjustments of civil monetary penalties.

(a) The inflation adjustment under § 269.3 must be determined by increasing the maximum civil monetary penalty or the range of minimum and maximum civil monetary penalties, as applicable, for each civil monetary penalty by the cost-of-living adjustment. Any increase determined under this subsection shall be rounded to the nearest multiple of $1.

(b) For purposes of paragraph (a) of this section, the term ''cost-of-living adjustment'' means the percentage (if any) for each civil monetary penalty by which the Consumer Price Index for the month of October preceding the date of the adjustment (January 15), exceeds the Consumer Price Index for the month of October in the previous calendar year. For example, if the Consumer Price Index for October 2016 is 1.0 and the Consumer Price Index for October 2015 was 0.75, then all applicable penalties will need to be positively adjusted by 0.25 by January 15, 2017.

(c) *Limitation on initial adjustment*. The initial adjustment of civil monetary penalty pursuant to § 269.3 may not exceed 150 percent of such penalty.

(d) *Inflation adjustment*. Maximum civil monetary penalties within the jurisdiction of the Department are adjusted for inflation as follows:

TABLE 1 TO PARAGRAPH (d)

| United States code | Civil monetary penalty description | Maximum penalty amount as of 02/21/20 | New adjusted maximum penalty amount |
|---|---|---|---|
| National Defense Authorization Act for FY 2005, 10 U.S.C. 113, note. | Unauthorized Activities Directed at or Possession of Sunken Military Craft. | 134,807 | 136,400 |
| 10 U.S.C. 1094(c)(1) | Unlawful Provision of Health Care | 11,837 | 11,977 |
| 10 U.S.C. 1102(k) | Wrongful Disclosure—Medical Records: | | |
| | First Offense | 6,999 | 7,082 |
| | Subsequent Offense | 46,663 | 47,214 |
| 10 U.S.C. 2674(c)(2) | Violation of the Pentagon Reservation Operation and Parking of Motor Vehicles Rules and Regulations. | 1,928 | 1,951 |
| 31 U.S.C. 3802(a)(1) | Violation Involving False Claim | 11,665 | 11,803 |
| 31 U.S.C. 3802(a)(2) | Violation Involving False Statement | 11,665 | 11,803 |
| 42 U.S.C. 1320a–7a(a); 32 CFR 200.210(a)(1). | False claims | 20,866 | 21,112.64 |
| 42 U.S.C. 1320a–7a(a); 32 CFR 200.210(a)(1). | Claims submitted with a false certification of physician license. | 20,866 | 21,112.64 |
| 42 U.S.C. 1320a–7a(a); 32 CFR 200.210(a)(2). | Claims presented by excluded party | 20,866 | 21,112.64 |
| 42 U.S.C. 1320a–7a(a); 32 CFR 200.210(a)(2); (b)(2)(ii). | Employing or contracting with an excluded individual. | 20,866 | 21,112.64 |
| 42 U.S.C. 1320a–7a(a); 32 CFR 200.210(a)(1). | Pattern of claims for medically unnecessary services/supplies. | 20,866 | 21,112.64 |
| 42 U.S.C. 1320a–7a(a); 32 CFR 200.210(a)(2). | Ordering or prescribing while excluded | 20,866 | 21,112.64 |
| 42 U.S.C. 1320a–7a(a); 32 CFR 200.210(a)(5). | Known retention of an overpayment | 20,866 | 21,112.64 |
| 42 U.S.C. 1320a–7a(a); 32 CFR 200.210(a)(4). | Making or using a false record or statement that is material to a false or fraudulent claim. | 104,330 | 105,563.18 |
| 42 U.S.C. 1320a–7a(a); 32 CFR 200.210(a)(6). | Failure to grant timely access to OIG for audits, investigations, evaluations, or other statutory functions of OIG. | 31,300 | 31,669.97 |
| 42 U.S.C. 1320a–7a(a); 32 CFR 200.210(a)(3). | Making false statements, omissions, misrepresentations in an enrollment application. | 104,330 | 105,563.18 |
| 42 U.S.C. 1320a–7a(a); 32 CFR 200.310(a) | Unlawfully offering, paying, soliciting, or receiving remuneration to induce or in return for the referral of business in violation of 1128B(b) of the Social Security Act. | 104,330 | 105,563.18 |

[81 FR 33391, May 26, 2016, as amended at 82 FR 6249, Jan. 19, 2017; 83 FR 3078, Jan. 23, 2018; 84 FR 12099, Apr. 1, 2019; 85 FR 13049, Mar. 6, 2020; 86 FR 46600, Aug. 19, 2021]

### § 269.5 Application of increase to violations.

Any increase in a civil monetary penalty under this part must apply only to civil monetary penalties, including those whose associated violation predated such increase, which are assessed after the date the increase takes effect (*i.e.*, July 1, 2016).

[61 FR 67945, Dec. 26, 1996, as amended at 81 FR 33391, May 26, 2016]

# PART 273—DEFENSE MATERIEL DISPOSITION

## Subpart A—Disposal Guidance and Procedures

Sec.

273.1 Purpose.
273.2 Applicability.
273.3 Definitions.
273.4 Policy.
273.5 Responsibilities.
273.6 Procedures.
273.7 Excess DoD property and scrap disposal processing.
273.8 Donations, loans, and exchanges.
273.9 Through-life traceability of uniquely identified items.

### Subpart B—Reutilization, Transfer, and Sale of Property

273.10 Purpose.
273.11 Applicability.
273.12 Definitions.
273.13 Policy.
273.14 Responsibilities.
273.15 Procedures.

AUTHORITY: 10 U.S.C. 2194, 2208, 2557, 2572, 2576, 2576a, 2576b, 2577, 4683, 7306, 7545; 15 U.S.C. 3710(i); 22 U.S.C. 2151, 2321b, 2321j, 2751, and 2778 *et seq.;* 40 U.S.C. subtitle I and sections 101, 541 *et seq.*, and 701; 42 U.S.C. 3015 and 3020; and 42 U.S.C. Chapter 68.

SOURCE: 80 FR 68159, Nov. 3, 2015, unless otherwise noted.

## Subpart A—Disposal Guidance and Procedures

### § 273.1 Purpose.

(a) This part is composed of several subparts, each containing its own purpose. In accordance with the authority in DoD Directive 5134.12, ''Assistant Secretary of Defense for Logistics and Materiel Readiness (ASD(L&MR))'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/513412p.pdf*); DoD Instruction 4140.01, ''Supply Chain Materiel Management Policy'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/414001p.pdf*); and DoD Instruction 4160.28, ''DoD Demilitarization (DEMIL) Program'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/416028p.pdf*), this part:

(1) Prescribes uniform procedures for the disposition of DoD personal property.

(2) Establishes the sequence of processes for disposition of personal property of the DoD Components.

(b) This subpart:

(1) Implements the statutory authority and regulations under which DoD personal property disposal takes place, as well as the scope and applicability for the program.

(2) Defines the responsibilities of personnel and agencies involved in the Defense Materiel Disposition Program.

(3) Provides procedures for disposal of excess property and scrap.

(4) Provides procedures for property donations, loans, and exchanges.

### § 273.2 Applicability.

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

(b) If a procedural conflict exists, these references take precedence:

(1) 41 CFR chapters 101 and 102 (also known as the Federal Property Management Regulations and Federal Management Regulation (FPMR and FMR)).

(2) 40 U.S.C. subtitle I, also known as the Federal Property and Administrative Services Act.

### § 273.3 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this subpart.

*Abandonment and destruction (A/D)*. A method for handling property that:

(1) Is abandoned and a diligent effort to determine the owner is unsuccessful.

(2) Is uneconomical to repair or the estimated costs of the continued care and handling of the property exceeds the estimated proceeds of sale.

(3) Has an estimated cost of disposal by A/D that is less than the net sales cost.

*Accountability*. The obligation imposed by law, lawful order, or regulation, accepted by a person for keeping accurate records to ensure control of property, documents, or funds, with or without possession of the property. The person who is accountable is concerned with control while the person who has possession is responsible for custody, care, and safekeeping.

*Acquisition cost*. The amount paid for property, including transportation costs, net any trade and cash discounts. Also see standard price.

*Ammunition*. Generic term related mainly to articles of military application consisting of all kinds of bombs, grenades, rockets, mines, projectiles, and other similar devices or contrivances.

*Automatic identification technology (AIT).* A suite of technologies enabling the automatic capture of data, thereby enhancing the ability to identify, track, document, and control assets (*e.g.* materiel), deploying and redeploying forces, equipment, personnel, and sustainment cargo. AIT encompasses a variety of data storage or carrier technologies, such as linear bar codes, two-dimensional symbols (PDF417 and Data Matrix), magnetic strips, integrated circuit cards, optical laser discs (optical memory cards or compact discs), satellite tracking transponders, and radio frequency identification tags used for marking or ''tagging'' individual items, equipment, air pallets, or containers. Known commercially as automatic identification data capture.

*Batchlot.* The physical grouping of individual receipts of low-dollar-value property. The physical grouping consolidates multiple disposal turn-in documents (DTIDs) under a single cover DTID. The objective of batchlotting is to reduce the time and costs related to physical handling and administrative processes required for receiving items individually. The cover DTID establishes accountability in the accountable record and individual line items lose their identity.

*Bid.* A response to an offer to sell that, if accepted, would bind the bidder to the terms and conditions of the contract (including the bid price).

*Bidder.* Any entity that is responding to or has responded to an offer to sell.

*Care and handling.* Includes packing, storing, handling, and conserving excess, surplus, and foreign excess property. In the case of property that is dangerous to public health, safety, or the environment, this includes destroying or rendering such property harmless.

*Commercial off the shelf (COTS) software.* Software that is available through lease or purchase in the commercial market. Included in COTS are the operating system software that runs on the information technology equipment and other significant software purchased with a license that supports system or customer requirements.

*Commerce control list (CCL) items* (formerly known as strategic list item). Commodities, software, and technology subject to export controls in accordance with Export Administration Regulations (EAR) in 15 CFR parts 730 through 774. The EAR contains the CCL and is administered by the Bureau of Industry and Security, Department of Commerce (DOC).

*Component.* An item that is useful only when used in conjunction with an end item. Components are also commonly referred to as assemblies. For purposes of this definition an assembly and a component are the same. There are two types of components: Major components and minor components. A major component includes any assembled element which forms a portion of an end item without which the end item is inoperable. For example, for an automobile, components will include the engine, transmission, and battery. If you do not have all those items, the automobile will not function, or function as effectively. A minor component includes any assembled element of a major component. Components consist of parts. References in the CCL to components include both major components and minor components.

*Container.* Any portable device in which a materiel is stored, transported, disposed of, or otherwise handled, including those whose last content was a hazardous or an acutely hazardous material, waste, or substance.

*Continental United States (CONUS).* Territory, including the adjacent territorial waters, located within the North American continent between Canada and Mexico (comprises 48 States and the District of Columbia).

*Controlled substances.* (1) Any narcotic, depressant, stimulant, or hallucinogenic drug or any other drug or other substance or immediate precursor included in 21 U.S.C. 801. Exempted chemical preparations and mixtures and excluded substances are listed in 21 CFR part 1308.

(2) Any other drug or substance that the United States Attorney General determines to be subject to control in accordance with 21 CFR part 1308.

(3) Any other drug or substance that, by international treaty, convention, or

protocol, is to be controlled by the United States.

*Counterfeit*. A counterfeit part is one whose identity has been deliberately altered, misrepresented, or is offered as an unauthorized product substitution.

*Defective property*. An item, part, or component that does not meet military, Federal, or commercial specifications as required by military procurement contracts because of unserviceability, finite life, or product quality deficiency and is determined to be unsafe for use. Defective property may be dangerous to public health or safety by virtue of latent defects. These defects are identified by technical inspection methods; or condemned by maintenance or other authorized activities as a result of destructive and nondestructive test methods such as magnetic particle, liquid penetrant, or radiographic testing, which reveal defects not apparent from normal visual inspection methods.

*Defense Logistics Agency Disposition Services Automated Information System (DAISY)*. An automated property accounting management data system designed to process property through the necessary disposal steps and account for excess, surplus, and foreign excess personal property (FEPP) from receipt to final disposal.

*Demilitarization*. The act of eliminating the functional capabilities and inherent military design features from DoD personal property. Methods and degree range from removal and destruction of critical features to total destruction by cutting, crushing, shredding, melting, burning, etc. DEMIL is required to prevent property from being used for its originally intended purpose and to prevent the release of inherent design information that could be used against the United States. DEMIL applies to material in both serviceable and unserviceable condition.

*Disposal*. End-of-life tasks or actions for residual materials resulting from demilitarization or disposition operations.

*Disposition*. The process of reusing, recycling, converting, redistributing, transferring, donating, selling, demilitarizing, treating, destroying, or fulfilling other end of life tasks or actions for DoD property. Does not include real (real estate) property.

*Defense Logistics Agency (DLA) Disposition Services*. The organization provides DoD with worldwide reuse, recycling and disposal solutions that focus on efficiency, cost avoidance and compliance.

*DLA Disposition Services site*. The DLA Disposition Services office that has accountability for and control over disposable property. May be managed in part by a commercial contractor. The term is applicable whether the disposal facility is on a commercial site or a Government installation and applies to both Government and contractor employees performing the disposal mission.

*DoD Activity Address Code (DoDAAC)*. A 6-digit code assigned by the Defense Automatic Addressing Service to provide a standardized address code system for identifying activities and for use in transmission of supply and logistics information that supports the movement of property.

*DoD Item Unique Identification (IUID) Registry*. The DoD data repository that receives input from both industry and Government sources and provides storage of, and access to, data that identifies and describes tangible Government personal property.

*Donation*. The act of providing surplus personal property at no charge to a qualified donation recipient, as allocated by the General Services Administration (GSA).

*Donation recipient*. Any of the following entities that receive federal surplus personal property through State agencies for surplus property (SASP):

(1) A Service educational activity (SEA).

(2) A public agency that uses surplus personal property to carry out or promote one or more public purposes. (Public airports are an exception and are only considered donation recipients when they elect to receive surplus property through a SASP, but not when they elect to receive surplus property through the Federal Aviation Administration (FAA).)

(3) An eligible nonprofit tax-exempt educational or public health institution (including a provider of assistance

to homeless or impoverished families or individuals).

(4) A State or local government agency, or a nonprofit organization or institution, that receives funds appropriated for a program for older individuals.

*Educational institution*. An approved, accredited, or licensed public or nonprofit institution or facility, entity, or organization conducting educational programs, including research for any such programs, such as a childcare center, school, college, university, school for the mentally handicapped, school for the physically handicapped, or an educational radio or television station.

*Excess personal property*.

(1) *Domestic excess*. Government personal property that the United States and its territories and possessions, applicable to areas covered by GSA (*i.e.*, the 50 States, District of Columbia, Puerto Rico, American Samoa, Guam, Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the U.S. Virgin Islands), consider excess to the needs and mission requirements of the United States.

(2) *DoD Component excess*. Items of DoD Component owned property that are not required for their needs and the discharge of their responsibilities as determined by the head of the Service or Agency.

(3) *Foreign excess personal property (FEPP)*. U.S.-owned excess personal property that is located outside the zone of interior (ZI). This property becomes surplus and is eligible for donation and sale as described in § 273.7.

*Exchange*. Replace personal property by trade or trade-in with the supplier of the replacement property. To exchange non-excess, non-surplus personal property and apply the exchange allowance or proceeds of sale in whole or in part payment for the acquisition of similar property. For example, the replacement of a historical artifact with another historical artifact by trade; or to exchange an item of historical property or goods for services based on the fair market value of the artifact.

*Federal civilian agency (FCA)*. Any non-defense executive agency (*e.g.* DoS, Department of Homeland Security) or any establishment in the legislative or judicial branch of the U.S. Government (USG) (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his or her direction).

*FEPP*. See excess personal property.

*Firearm*. Any weapon (including a starter gun) that will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device. The term does not include an antique firearm.

*Flight safety critical air parts (FSCAP)*. Any aircraft part, assembly, or installation containing a critical characteristic whose failure, malfunction, or absence could cause a catastrophic failure resulting in loss or serious damage to the aircraft or an uncommanded engine shutdown, resulting in an unsafe condition.

*Foreign purchased property*. Property paid for by foreign countries, but where ownership is retained by the United States.

*Friendly foreign government*. For purposes of trade security controls (TSC), governments of countries other than those designated as restricted parties.

*Generating activity (''generator'')*. The activity that declares personal property excess to its needs, *e.g.* DoD installations, activities, contractors, or FCAs.

*Government-furnished material (GFM)*. Property provided by the U.S. Government for the purpose of being incorporated into or attached to a deliverable end item or that will be consumed or expended in performing a contract. Government-furnished materiel includes assemblies, components, parts, raw and process material, and small tools and supplies that may be consumed in normal use in performing a contract. Government-furnished materiel does not include material provided to contractors on a cash-sale basis nor does it include military property, which are government-owned components, contractor acquired property (as specified in the contract), government furnished equipment, or major end items being repaired by commercial

contractors for return to the government.

*GSAXcess®*. A totally web-enabled platform that eligible customers use to access functions of GSAXcess® for reporting, searching, and selecting property. This includes the entry site for the Federal Excess Personal Property Utilization Program and the Federal Surplus Personal Property Donation Program operated by the GSA.

*Historical artifact*. Items (including books, manuscripts, works of art, drawings, plans, and models) identified by a museum director or curator as significant to the history of that department, acquired from approved sources, and suitable for display in a military museum. Generally, such determinations are based on the item's association with an important person, event, or place; because of traditional association with an important person, event, or place; because of traditional association with a military organization; or because it is a representative example of military equipment or represents a significant technological contribution to military science or equipment.

*Hazardous material (HM)*. (1) In the United States, any material that is capable of posing an unreasonable risk to health, safety, and property during transportation. All HM appears in the HM Table at 49 CFR 172.101.

(2) Overseas, HM is defined in the applicable final governing standards or overseas environmental baseline guidance document, or host nation laws and regulations.

*Hazardous property (HP)*. (1) A composite term used to describe DoD excess property, surplus property, and FEPP, which may be hazardous to human health, human safety, or the environment. Various Federal, State, and local safety and environmental laws regulate the use and disposal of hazardous property.

(2) In more technical terms, HP includes property having one or more of the following characteristics:

(i) Has a flashpoint below 200 degrees Fahrenheit (93 degrees Celsius) closed cup, or is subject to spontaneous heating or is subject to polymerization with release of large amounts of energy when handled, stored, and shipped without adequate control.

(ii) Has a threshold limit value equal to or below 1,000 parts per million (ppm) for gases and vapors, below 500 milligram per cubic meter (mg/m$^3$) for fumes, and equal to or less than 30 million particles per cubic foot (mppcf) or 10 mg/m$^3$ for dusts (less than or equal to 2.0 fibers/cc greater than 5 micrometers in length for fibrous materials).

(iii) Causes 50 percent fatalities to test animals when a single oral dose is administered in doses of less than 500 mg per kilogram of test animal weight.

(iv) Is a flammable solid as defined in 49 CFR 173.124, or is an oxidizer as defined in 49 CFR 173.127, or is a strong oxidizing or reducing agent with a half cell potential in acid solution of greater than +1.0 volt as specified in Latimer's table on the oxidation-reduction potential.

(v) Causes first-degree burns to skin in short-time exposure, or is systematically toxic by skin contact.

(vi) May produce dust, gases, fumes, vapors, mists, or smoke with one or more of the above characteristics in the course of normal operations.

(vii) Produces sensitizing or irritating effects.

(viii) Is radioactive.

(ix) Has special characteristics which, in the opinion of the manufacturer, could cause harm to personnel if used or stored improperly.

(x) Is hazardous in accordance with Occupational Health and Safety Administration, 29 CFR part 1910.

(xi) Is hazardous in accordance with 29 CFR part 1910.

(xii) Is regulated by the EPA in accordance with 40 CFR parts 260 through 280.

*Hazardous waste (HW)*. An item that is regulated pursuant to 42 U.S.C. 6901 or by State regulation as an HW. HW is defined federally at 40 CFR part 261. Overseas, HW is defined in the applicable final governing standards or overseas environmental baseline guidance document, or host nation laws and regulations.

*Holding agency*. The Federal agency that is accountable for, and generally has possession of, the property involved.

*Hold harmless*. A promise to pay any costs or claims which may result from an agreement.

*Information technology*. Any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission or reception of data or information by the DoD Component. Includes computers, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related sources. Does not include any equipment that is acquired by a Federal contractor incidental to a Federal contract. Equipment is ''used'' by a DoD Component if the equipment is used by the DoD Component directly or is used by a contractor under a contract with the DoD Component that:

(1) Requires the use of such equipment.

(2) Requires the use to a significant extent of such equipment in the performance of a service or the furnishing of a product.

*Installation*. A military facility together with its buildings, building equipment, and subsidiary facilities such as piers, spurs, access roads, and beacons.

*International organizations*. For TSC purposes, this term includes: Columbo Plan Council for Technical Cooperation in South and Southeast Asia; European Atomic Energy Community; Indus Basin Development; International Atomic Energy; International Red Cross; NATO; Organization of American States; Pan American Health Organization; United Nations; UN Children's Fund; UN Development Program; UN Educational, Scientific, and Cultural Organization; UN High Commissioner for Refugees Programs; UN Relief and Works Agency for Palestine Refugees in the Near East; World Health Organization; and other international organizations approved by a U.S. diplomatic mission.

*Interrogation*. A communication between two or more ICPs, other DoD activities, and U.S. Government agencies to determine the current availability of an item or suitable substitute for a needed item before procurement or repair.

*Interservice*. Action by one Military Department or Defense Agency ICP to provide materiel and directly related services to another Military Department or Defense Agency ICP (either on a recurring or nonrecurring basis).

*Inventory adjustments*. Changes made in inventory quantities and values resulting from inventory recounts and validations.

*Inventory control point (ICP)*. An organizational unit or activity within the DoD supply system that is assigned the primary responsibility for the materiel management of a group of items either for a particular Military Department or for the DoD as a whole. In addition to materiel manager functions, an ICP may perform other logistics functions in support of a particular Military Department or for a particular end item (*e.g.*, centralized computation of retail requirements levels and engineering tasks associated with weapon system components).

*Item unique identification (IUID)*. A system of establishing globally widespread unique identifiers on items of supply within the DoD, which serves to distinguish a discrete entity or relationship from other like and unlike entities or relationships. AIT is used to capture and communicate IUID information.

*Line item*. A single line entry on a reporting form or sale document that indicates a quantity of property located at any one activity having the same description, condition code, and unit cost.

*Line item value* (for reporting and other accounting and approval purposes). Quantity of a line item multiplied by the standard price.

*Marketing*. The function of directing the flow of surplus and FEPP to the buyer, encompassing all related aspects of merchandising, market research, sale promotion, advertising, publicity, and selling.

*Material potentially presenting an explosive hazard (MPPEH)*. Material owned or controlled by the Department of Defense that, prior to determination of its explosives safety status, potentially contains explosives or munitions (*e.g.*, munitions containers and packaging material; munitions debris remaining after munitions use, demilitarization, or disposal; and range-related debris) or potentially contains a

high enough concentration of explosives that the material presents an explosive hazard (*e.g.*, equipment, drainage systems, holding tanks, piping, or ventilation ducts that were associated with munitions production, demilitarization, or disposal operations). Excluded from MPPEH are munitions within the DoD-established munitions management system and other items that may present explosion hazards (*e.g.*, gasoline cans and compressed gas cylinders) that are not munitions and are not intended for use as munitions.

*Metalworking machinery*. A category of plant equipment consisting of power driven nonportable machines in Federal Supply Classification Code (four digits) (FSC) 3411 through 3419 and 3441 through 3449, which are used or capable of use in the manufacture of supplies or equipment, or in the performance of services, or for any administrative or general plant purpose.

*Munitions list items (MLI)*. Any item contained on the U.S. Munitions List (USML) in 22 CFR part 121. Defense articles, associated technical data (including software), and defense services recorded or stored in any physical form, controlled for export and permanent import by 22 CFR parts 120 through 130. 22 CFR part 121, which contains the USML, is administered by the DoS Directorate of Defense Trade Controls.

*Museum, DoD or Service*. An appropriated fund entity that is a permanent activity with a historical collection, open to both the military and civilian public at regularly scheduled hours, and is in the care of a professional qualified staff that performs curatorial and related historical duties full time.

*Mutilation*. A process that renders materiel unfit for its originally intended purposes by cutting, tearing, scratching, crushing, breaking, punching, shearing, burning, neutralizing, etc.

*NAF property*. Property purchased with NAFs, by religious activities or nonappropriated morale welfare or recreational activities, post exchanges, ships stores, officer and noncommissioned officer clubs, and similar activities. Such property is not Federal property.

*Narcotics*. See controlled substances.

*National stock number (NSN)*. The 13-digit stock number replacing the 11-digit federal stock number. It consists of the 4-digit federal supply classification code and the 9-digit national item identification number. The national item identification number consists of a 2-digit National Codification Bureau number designating the central cataloging office (whether North Atlantic Treaty Organization or other friendly country) that assigned the number and a 7-digit (xxx-xxxx) nonsignificant number. Arrange the number as follows: 9999–00–999–9999.

*Nonappropriated fund (NAF)*. Funds generated by DoD military and civilian personnel and their dependents and used to augment funds appropriated by 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.

*Nonprofit institution*. An institution or organization, no part of the net earnings of which inures or may lawfully inure to the benefit of any private shareholder or individual, and which has been held to be tax exempt under the provisions of 26 U.S.C. 501, also known as the Internal Revenue Code of 1986.

*Nonsalable materiel*. Materiel that has no reutilization, transfer, donation, or sale value as determined by the DLA Disposition Services site, but is not otherwise restricted from disposal by U.S. law or Federal or military regulations.

*Obsolete combat materiel*. Military equipment once used in a primarily combat role that has been phased out of operational use; if replaced, the replacement items are of a more current design or capability.

*Ordnance*. Explosives, chemicals, pyrotechnics, and similar stores, *e.g.*, bombs, guns and ammunition, flares, smoke, or napalm.

*ppm*. Unit of concentration by volume of a specific substance.

*Personal property*. Property except real property. Excludes records of the Federal Government, battleships, cruisers, aircraft carriers, destroyers, and submarines.

*Pilferable materiel*. Materiel having a ready resale value or application to personal possession, which is especially subject to theft.

*Plant equipment*. Personal property of a capital nature (including equipment, machine tools, test equipment, furniture, vehicles, and accessory and auxiliary items) for use in manufacturing supplies, in performing services, or for any administrative or general plant purpose. It does not include special tooling or special test equipment.

*Precious metals*. Gold, silver, and the platinum group metals (platinum, palladium, iridium, rhodium, osmium, and ruthenium).

*Precious Metals Recovery Program (PMRP)*. A DoD program for identification, accumulation, recovery, and refinement of precious metals from excess and surplus end items, scrap, hypo solution, and other precious metal bearing materiel for authorized internal purposes or as GFM.

*Pre-receipt*. Documentation processed prior to physically transferring or turning the property into a DLA Disposition Services site.

*Privacy Act property*. Any document or other information about an individual maintained by the agency, whether collected or grouped, including but not limited to, information regarding education, financial transactions, medical history, criminal or employment history, or other personal information containing the name or other personal identification number, symbol, etc., assigned to such individual.

*Privately owned personal property*. Personal effects of DoD personnel (military or civilian) that are not, nor will ever become, Government property unless the owner (or heirs, next of kin, or legal representative of the owner) executes a written and signed release document unconditionally giving the U.S. Government all right, title, and interest in the privately owned property.

*Public agency*. Any State, political subdivision thereof, including any unit of local government or economic development district; or any department, agency, instrumentality thereof, including instrumentalities created by compact or other agreement between States or political subdivisions, multijurisdictional substate districts established by or under State law; or any Indian tribe, band, group, pueblo, or community located on a State reservation. (See § 273.8 regarding donations made through State agencies.)

*Qualified recycling programs (QRP)*. Organized operations that require concerted efforts to cost effectively divert or recover scrap or waste, as well as efforts to identify, segregate, and maintain the integrity of recyclable materiel to maintain or enhance its marketability. If administered by a DoD Component other than DLA, a QRP includes adherence to a control process providing accountability for all materials processed through program operations.

*Reclamation*. A cost avoidance or savings measure to recover useful (serviceable) end items, repair parts, components, or assemblies from one or more principal end items of equipment or assemblies (usually supply condition codes (SCCs) listed in DLM 4000.25–2 as SCC H for unserviceable (condemned) materiel, SCC P for unserviceable (reclamation) materiel, and SCC R for suspended (reclaimed items, awaiting condition determination) materiel) for the purpose of restoration to use through replacement or repair of one or more unserviceable, but repairable principal end items of equipment or assemblies (usually SCCs listed in DLM 4000.25–2 as SCC E for unserviceable (limited restoration) materiel, SCC F for unserviceable (reparable) materiel, and SCC G for unserviceable (incomplete) materiel). Reclamation is preferable prior to disposition (*e.g.*, DLA Disposition Services site turn-in), but end items or assemblies may be withdrawn from DLA Disposition Services sites for such reclamation purposes.

*Restricted parties*. Those countries or entities that the Department of State (DoS), DOC, or Treasury have determined to be prohibited or sanctioned for the purpose of export, sale, transfer, or resale of items controlled on the United States Munitions List (USML) or Commerce Control List. A consolidated list of prohibited entities or destinations for which transfers may be limited or barred, may be found at: *http://export.gov/ecr/eg_main_023148.asp*.

*Reutilization*. The act of re-issuing FEPP and excess property to DoD Components. Also includes qualified special programs (*e.g.*, Law Enforcement Agency (LEA), Humanitarian Assistance Program, Military Affiliate Radio System (MARS)) pursuant to applicable enabling statutes.

*Salvage*. Personal property that has some value in excess of its basic material content, but is in such condition that it has no reasonable prospect of use as a unit for the purpose for which it was originally intended, and its repair or rehabilitation for use as a unit is impracticable.

*Scrap*. Recyclable waste and discarded materials derived from items that have been rendered useless beyond repair, rehabilitation, or restoration such that the item's original identity, utility, form, fit and function have been destroyed. Items can be classified as scrap if processed by cutting, tearing, crushing, mangling, shredding, or melting. Intact or recognizable USML or CCL items, components, and parts are not scrap. 41 CFR 102–36.40 and 15 CFR 770.2 provide additional information on scrap.

*Screening*. The process of physically inspecting property or reviewing lists or reports of property to determine whether it is usable or needed.

*Sensitive items*. Materiel that requires a high degree of protection and control due to statutory requirements or regulations, such as narcotics and drug abuse items; precious metals; items of high value; items that are highly technical, or of a hazardous nature; non-nuclear missiles, rockets, and explosives; small arms, ammunition and explosives, and demolition material.

*Service educational activity (SEA)*. Any educational activity that meets specified criteria and is formally designated by the Department of Defense as being of special interest to the Military Services. Includes educational activities such as maritime academies or military, naval, or Air Force preparatory schools, junior colleges, and institutes; senior high school-hosted Junior Reserve Officer Training Corps; and nationally organized youth groups. The primary purpose of such entities is to offer courses of instruction devoted to the military arts and sciences.

*Small arms/light weapons*. Man-portable weapons made or modified to military specifications for use as lethal instruments of war that expel a shot, bullet, or projectile by action of an explosive. Small arms are broadly categorized as those weapons intended for use by individual members of armed or security forces. They include handguns; rifles and carbines; sub-machine guns; and light machine guns. Light weapons are broadly categorized as those weapons designed for use by two or three members of armed or security forces serving as a crew, although some may be used by a single person. They include heavy machine guns; hand-held under-barrel and mounted grenade launchers; portable anti-aircraft guns; portable anti-tank guns; recoilless rifles; man-portable launchers of missile and rocket systems; and mortars.

*Standard price*. The price customers are charged for a DoD managed item (excluding subsistence), which remains constant throughout a fiscal year. The standard price is based on various factors which include the latest acquisition price of the item plus surcharges or cost recovery elements for transportation, inventory loss, obsolescence, maintenance, depreciation, and supply operations.

*State agencies for surplus property (SASP)*. The agency designated under State law to receive Federal surplus personal property for distribution to eligible donation recipients within the States as provided for in 40 U.S.C. 549.

*State or local government*. A State, territory, or possession of the United States, the District of Columbia, American Samoa, Guam, Puerto Rico, Commonwealth of Northern Mariana Islands, the U.S. Virgin Islands, and any political subdivision or instrumentality thereof.

*Supply condition codes (SCC)*. Code used to classify materiel in terms of readiness for issue and use or to identify action underway to change the status of materiel. These codes are assigned by the Military Departments or Defense Agencies. DLA Disposition Services may change a SCC if there is an appearance of an improperly assigned code and the property is of a non-technical nature. If change is not

appropriate or property is of a technical nature, DLA Disposition Services sites may challenge a suspicious SCC.

*Surplus personal property*. Excess personal property no longer required by the Federal agencies, as determined by the Administrator of General Services. Applies to surplus personal property in the United States, American Samoa, Guam, Puerto Rico, the Commonwealth of the Northern Mariana Islands, and the U.S. Virgin Islands.

*Trade security controls (TSC)*. Policy and procedures, in accordance with DoD Instruction 2030.08, designed to prevent the sale or shipment of USG materiel to any person, organization, or country whose interests are unfriendly or hostile to those of the United States and to ensure that the disposal of DoD personal property is performed in compliance with U.S. export control laws and regulations, the International Traffic in Arms Regulations (ITAR) in 22 CFR parts 120 through 130, and the EAR in 15 CFR parts 730 through 774.

*Transfer*. The act of providing FEPP and excess personal property to Federal civilian agencies (FCAs) as stipulated in the FMR. Property is allocated by the GSA. When a line item is less than $10,000, an FCA may coordinate allocation to another FCA directly.

*Trash*. Post-consumer refuse, waste and food by-products such as litter, rubbish, cooked grease, bones, fats, and meat trimmings.

*Uniform Materiel Movement and Issue Priority System (UMMIPS)*. System to ensure that requirements are processed in accordance with the mission of the requiring activity and the urgency of need, and to establish maximum uniform order and materiel movement standard.

*Unique item identifier (UII)*. A set of data elements marked on an item that is globally unique and unambiguous. The term includes a concatenated UII or a DoD-recognized unique identification equivalent.

*Unsalable materiel*. Materiel for which sale or other disposal is prohibited by U.S. law or Federal or military regulations.

*Usable property*. Commercial and military type property other than scrap and waste.

*Veterans' organization*. An organization composed of honorably discharged soldiers, sailors, airmen, and marines, which is established as a veterans' organization and recognized as such by the U.S. Department of Veterans Affairs.

*Zone of interior (ZI)*. The United States and its territories and possessions, applicable to areas covered by GSA and where excess property is considered domestic excess. Includes the 50 States, District of Columbia, Puerto Rico, American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands.

### § 273.4 Policy.

It is DoD policy consistent with 41 CFR chapters 101 and 102 that excess DoD property must be screened and redistributed among the DoD Components, and reported as excess to the GSA. Pursuant to 40 U.S.C. 701, DoD will efficiently and economically dispose DoD FEPP.

### § 273.5 Responsibilities.

(a) The Assistant Secretary of Defense for Logistics and Materiel Readiness (ASD(L&MR)), under the authority, direction, and control of the USD(AT&L), and in accordance with DoD Directive 5134.12:

(1) Develops DoD materiel disposition policies, including policies for FEPP.

(2) Oversees the effective implementation of the DoD materiel disposition program.

(3) Approves policy changes as appropriate to support contingency operations.

(4) Approves national organizations for special interest consideration as SEAs, and approve categories of property considered appropriate, usable, and necessary for transfer to SEAs.

(b) The Director, Defense Logistics Agency (DLA), under the authority, direction, and control of the Under Secretary of Defense for Acquisition, Technology, and Logistics, through the Assistant Secretary of Defense for Logistics and Materiel Readiness (ASD(L&MR)), and in addition to the responsibilities in paragraph (c) of this section:

(1) Provides agency-level command and control and administers the worldwide Defense Materiel Disposition Program.

(2) Implements guidance issued by the ASD(L&MR) or other organizational elements of the OSD and establishes system concepts and requirements, resource management, program guidance, budgeting and funding, training and career development, management review and analysis, internal control measures, and crime prevention for the Defense Materiel Disposition Program.

(3) Chairs the Disposal Policy Working Group (DPWG).

(4) Provides direction to the DLA Disposition Services on implementing the worldwide defense materiel disposition program.

(5) Provides direction to the DLA inventory control points (ICPs) on the cataloging of items in the Federal Logistics Information System (FLIS) as outlined in DoD 4100.39–M, ''Federal Logistics Information System (FLIS) Procedures Manual-Glossary and Volumes 1–16'' (available at *http://www.dtic.mil/whs/directives/corres/html/410039m.html*). This is done to prevent the unauthorized disposition or release of items within DoD, other federal civilian agencies, or release into commerce.

(6) Promotes maximum reuse of FEPP, excess, and surplus property. Pursues all possible avenues to sponsor or endorse reuse of excess DoD property and preclude unnecessary purchases.

(7) Directs the DLA Disposition Services communications with the DoD Components regarding changes in service delivery processes or plans that will affect disposal support provided. In overseas locations, these communications will include geographic Combatant Commanders, U.S. Chiefs of Mission, and the in-country security assistance offices.

(8) Accommodates contingency operation requirements. Directs the DLA support team to determine any needed deviations from standard disposal processing guidance and communicates approved temporary changes to the Military Departments and DLA Disposition Services.

(9) Ensures maximum compatibility between documentation, procedures, codes, and formats used in materiel disposition systems and the Military Departments' supply systems.

(10) Programs, budgets, funds, accounts, allocates and controls personnel, spaces, and other resources for its respective activities.

(11) Annually provides to GSA a report of property transferred to non-federal recipients in accordance with 41 CFR 102–36.295.

(12) Assumes the worldwide disposal of all DoD HP except for those categories specifically designated to remain the responsibility of the Military Department or Defense Agency as described in DoD Manual 4160.21, Volume 4.

(13) Ensures property disposal training courses are available (*e.g.*, at DLA Training Center) for all personnel associated with the disposal program.

(14) Ensures DLA Disposition Services follows the DoD disposal hierarchy with landfill disposal as a last resort.

(c) The DoD Components Heads:

(1) Recommend Defense Materiel Disposition Program policy changes to the ASD(L&MR).

(2) Recommend Defense Materiel Disposition Program procedural changes to the Director, DLA, and provide information copies to the ASD(L&MR).

(3) Assist the Director, DLA, upon request, to resolve matters of mutual concern.

(4) Treat the disposal of DoD property as an integral part of DoD Supply Chain Management; ensure that disposal actions and costs are a part of each stage of the supply chain management of items and that disposal of property is a planned event at all levels of their organizations.

(5) Provide the Director, DLA, with mutually agreed-upon data necessary to administer the Defense Materiel Disposition Program.

(6) Participate in the DoD PMRP and promote maximum reutilization of FEPP, excess, and surplus property and fine precious metals for internal use or as GFM.

(7) Nominate to the ASD(L&MR) national organizations for special interest consideration as SEAs; approve schools (non-national organizations) as

SEAs; and recommend to the ASD(L&MR) categories of property considered appropriate, usable, and necessary for transfer to SEAs.

(8) Provide administrative and logistics support, including appropriate facilities, for the operations of tenant and related off-site DLA Disposition Services field activities under inter-Service support agreements (ISSAs).

(9) For property not explicitly identified in this part, follow Service-unique regulations to dispose of and maintain accountability of property. Ensure all accountable records associated with the disposal of FEPP, excess, and surplus property are established and updated to reflect supply status and ensure audit ability in accordance with DoD Instruction 5000.64, ''Accountability and Management of DoD Equipment and Other Accountable Property'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/500064p.pdf*). This requirement also applies to modified processes that may be developed for contingency operations.

(10) Ensure completion of property disposition (reutilization and marketing) training courses, as appropriate.

(11) Administer reclamation programs and accomplish reclamation from excess materiel.

(12) Establish and administer disposal accounts, as jointly agreed to by DLA and the Military Departments, to support the demilitarization (DEMIL) and reclamation functions performed by the Military Departments.

(13) Dispose of surplus merchant vessels or vessels of 1,500 gross tons or more, capable of conversion to merchant use, through the Federal Maritime Administration, U.S. Department of Transportation, by forwarding a ''Report of Excess Personal Property'' Standard Form 120 to GSA, in accordance with the procedures in 41 CFR chapters 101 and 102. For vessels explicitly excluded by 41 CFR chapters 101 and 102, follow procedures in DoD 4160.28–M, Volumes 1–3, ''Defense Demilitarization: Program Administration, Demilitarization Coding, Procedural Guidance'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/416028m_vol1.pdf*, *http://www.dtic.mil/whs/directives/corres/pdf/416028m_vol2.pdf*, *http://www.dtic.mil/whs/directives/corres/pdf/416028m_vol3.pdf*), *i.e.*, battleships, cruisers, aircraft carriers, destroyers, or submarines.

(14) Dispose of HP specifically designated as requiring DoD Component processing.

(15) Request DLA Disposition Services provide sales services, as needed, for recyclable marketable materials generated as a result of resource recovery programs through the DoD Component QRP in accordance with the procedures in § 273.7.

(16) Consider public donation if applicable before landfill disposal and monitor, with DLA Disposition Services Site personnel, all property sent to landfills to ensure no economically salable or recyclable property is discarded.

(17) Report, accurately identify on approved turn in documents, and turn in all authorized scrap generations to servicing DLA Disposition Services sites.

(18) Update the DoD IUID Registry upon the materiel disposition of uniquely identified items in accordance with the procedures in § 273.9.

(19) Improve disposal policies, training, and procedural implementation among the DoD Components and Federal civilian agencies through membership on the DPWG.

### § 273.6 Procedures.

(a) *Personal property disposition*. The general guidelines and procedures for property disposition are:

(1) 41 CFR chapters 101 and 102 implements 40 U.S.C. subtitle I and section 101 which established the Personal Property Disposition Program. 41 CFR chapter 101 and other laws and regulations apply to the disposition of FEPP, excess, and surplus property. In the event of conflicting guidance, 41 CFR chapters 101 and 102 takes precedence. 41 CFR chapter 102 is the successor regulation to 41 CFR chapter 101, the ''Federal Property Management Regulation''. It updates regulatory policies of 41 CFR chapter 101.

(2) All references to ''days'' are calendar days unless otherwise specified.

(3) The Department of Defense provides guidance for budgeting for the disposal of excess, surplus, and FEPP

property through DoD 7000.14–R, ''Department of Defense Financial Management Regulations (FMRs): Volume 12, 'Special Accounts Funds and Programs'; Chapter 7, 'Financial Liability for Government Property Lost, Damaged, Destroyed, or Stolen' '' (*http://comptroller.defense.gov/Portals/45/documents/fmr/Volume_12.pdf*), with updates via program budget decisions. The Service level billing is based on the services turn-in percentage of the Disposition Services workload. As an example, if the Army constitutes 40 percent of the workload the Army will pay 40 percent of the Disposition Services Service-level bill.

(i) Billings are addressed to each Military Department, Defense Agency, and FCA.

(ii) Billing for disposition of excess property depends on decisions made between DLA and the customer: the Military Department, Defense Agency, those sponsoring DoD-related organizations (*e.g.*, Civil Air Patrol, MARS) or FCA.

(b) *Scope and relevancy*. (1) In conjunction with DoD 4160.28–M Volumes 1–3, the provisions of this part apply to service providers, whether they are working at a government facility or at a commercial site, and to contractors to the extent it is stipulated in the performance work statement of the contracts. DoD 4160.28–M and 10 U.S.C. 2576 contain additional specific guidance for property identified as MLI or CCL items.

(2) The procedures in this subpart will be used to the extent possible in all contingency operations. As appropriate, the ASD(L&MR) will modify policy guidance to support the mission requirements and operational tempo of contingency operations.

(3) This subpart does not govern the disposal of the property described in paragraphs (b)(3)(i), (ii), and (iii) of this section. However, once property in these categories has been altered to remove the inherently sensitive characteristics, it may be processed through a DLA Disposition Services site using an appropriate FSC code for the remaining components.

(i) *Items under management control of the Defense Threat Reduction Agency in Federal Supply Group (FSG) 11*. These items include Department of Energy special design and quality controlled items and all DoD items designed specifically for use on or with nuclear weapons. These items are identified by manufacturers' codes 57991, 67991, 77991, and 87991 in the DLA Logistics Information Service FLIS. These items will be processed in accordance with Air Force Instruction 21–204, ''Nuclear Weapons Maintenance Procedures'' (available at *http://static.e-publishing.af.mil/production/1/af_a4_7/publication/afi21-204/afi21-204.pdf*).

(ii) *Cryptologic and cryptographic materiel*. This materiel must be processed in accordance with Committee on National Security Systems Instruction 4008, ''Program for the Management and Use of National Reserve Information Assurance Security Equipment'' (available at *https://www.cnss.gov/Assets/pdf/CNSSI-4008.pdf*).

(iii) *Naval Nuclear Propulsion Plant materiel*. This materiel must be processed in accordance with Office of the Chief of Naval Operations Instruction (OPNAVINST) N9210.3, ''Safeguarding of Naval Nuclear Propulsion Information (NNPI)'' (available at *http://doni.daps.dla.mil/Directives/09000%20General%20Ship%20Design%20and%20Support/09-200%20Propulsion%20Plants%20Support/N9210.3%20(Unclas%20Portion).pdf* and 45 Manual NAVSEA S9213–45-Man-000, ''Naval Nuclear Material Management Manual.''

(c) *Objectives*. The objectives of the Defense Materiel Disposition Program are to:

(1) Provide standardized disposition management guidance for DoD excess property and FEPP (including scrap) and HP, by using efficient internal and external processes. The expected outcome includes protecting national security interests, minimizing environmental mishaps, satisfying valid needs by extended use of property, permitting authorized donations, obtaining optimum monetary return to the U.S. Government, and minimizing abandonment or destruction (A/D) of property.

(2) Migrate from legacy transactions with 80 record position formats applicable to military standard system procedures (*e.g.*, Defense Logistics Manual (DLM) 4000.25–1, ''Military Standard

Requisitioning and Issue Procedures (MILSTRIP)'' (available at *http://www2.dla.mil/j-6/dlmso/elibrary/Manuals/DLM/MILSTRIP/MILSTRIP.pdf*) and DLM 4000.25–2, ''Military Standard Transaction Reporting and Accounting Procedures (MILSTRAP)'' (available at *http://www2.dla.mil/j-6/dlmso/elibrary/Manuals/DLM/MILSTRAP/MILSTRAP.pdf*) to variable length DLMS transactions as described in DLM 4000.25, ''Defense Logistics Management System (DLMS)'' (available at *http://www2.dla.mil/j-6/dlmso/elibrary/Manuals/DLM/DLM_4000.25_DLMS_Manual_Combined.pdf*) (American National Standards Institute Accredited Standards Committee (ANSI ASC) X12 or equivalent XML schema) to track items throughout the supply chain life cycle. Implementation must be consistent with DoD Directive 8320.02, ''Data Sharing in a Net Centric Department of Defense'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/832002p.pdf*).

(3) Ensure cost-effective disposal of precious metals bearing scrap and end items for the replenishment of valuable resources through the DoD PMRP.

(4) Ensure personal property and related subcomponents are not declared excess and disposed of prior to determining the need for economic recovery.

(5) Encourage Military Departments and Defense Agencies to:

(i) Comply with the spirit and intent of Executive Order 12862, ''Setting Customer Service Standards.''

(ii) Set results-oriented goals, such as delivering customer value that results in improvement of overall Military Department performance.

(iii) Serve the tax payer's interests by ensuring tax money is used wisely and by being responsive and reliable in all dealings with the public.

(d) *Foreign liaison*. (1) Authority for granting visits by foreign nationals representing foreign governments rests with the International Programs Division (J–347) at DLA. Prospective official foreign visitors should submit requests 30 days in advance through their embassy in accordance with procedures in DoD Directive 5230.20, ''Visits and Assignments of Foreign Nationals'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/523020p.pdf*). These requests may require a security clearance from the host Military Department. DLA processes the requests, and will provide written authority to primary-level field activity commanders or DLA Disposition Services site chiefs. Unclassified visits by foreign nationals can be approved for inspections prior to acquiring property through security assistance programs or other programs authorized by statute.

(2) A commander of a DoD activity may authorize foreign nationals and representatives of foreign governments or international organizations to visit a DLA Disposition Services site, except for those foreign nationals and representatives from foreign countries designated as restricted parties in the International Traffic in Arms Regulations (ITAR) in 22 CFR parts 120 through 130 and the EAR in 15 CFR parts 730 through 774.

(3) Visits by foreign nationals for public sales will be at the discretion of the host installation commander in accordance with U.S. export control laws and regulations, the ITAR in 22 CFR parts 120 through 130 and the EAR in 15 CFR parts 730 through 774.

(4) All requests for unclassified information, not previously approved for public release will be referred to the appropriate public affairs office. This includes requests submitted by representatives of foreign governments or representatives of international organizations.

(5) Requests from foreign nationals or representatives from foreign governments of restricted parties will be referred to the appropriate security office.

(6) Release of MLI technical data or CCL items technology will be in accordance with DoD 4100.39–M, DoD 4160.28–M Volumes 1–3, 10 U.S.C. 2576, 22 CFR parts 120 to 130, and 15 CFR parts 730 to 774, DoD Instruction 2040.02, and DoD Instruction 2030.08.

(e) *Training*. Personnel with Materiel Disposition Program responsibilities (DLA Disposition Services employees, ICP integrated materiel managers (IMMs), Reservists, etc.) as well as those DoD-related and non-DoD organizations disposing of excess, surplus,

FEPP, and scrap through the Department of Defense, require applicable training in defense materiel disposition policies, procedures, and related technical areas such as safety, environmental protection, DEMIL, TSC, accounting and accountability, administration, or management of those activities. Required training will be accomplished according to DoD 4160.28–M Volumes 1–3 and DoD Instruction 2030.08, and applicable DoD, DLA, and Military Department training issuances. In addition to formal training, the DLA Disposition Services Web site (*https://www.dispositionservices.dla.mil*) provides guidance on various topics related to materiel disposition.

(f) *DoD Components.* The DoD Components:

(1) Provide administrative and logistics support, including appropriate facilities for the segregation of material according to the established ISSAs.

(i) Establish disposal facilities at suitable locations, separate from host installation active stocks. These areas should permit proper materiel segregation and be convenient to road networks and railroad sidings.

(ii) Approve all facility improvement projects. Identify in the ISSA reimbursable and non-reimbursable host maintenance and repair support, not exceeding that prescribed by regulations of the host activity.

(iii) Fence or otherwise protect the disposal yard to ensure that materiel is safeguarded against theft or pilferage. Security matters identified in ISSAs are covered by security regulations of the DoD Components.

(iv) Provide information security support to DLA Disposition Services field activities through ISSAs, including the retrieval, secure storage, and subsequent determination of the appropriate disposition of classified property found in disposal assets.

(2) Properly containerize and ensure all property turned in to DLA Disposition Services sites is safe to handle and non-leaking to ensure environmental compliance during transport to the DLA Disposition Services site and storage during the disposal process. Drain all fluids from unserviceable vehicles prior to release to disposal and treat fluids according to environmental requirements in accordance with the procedures in Enclosure 3 of DoD Manual 4160.21, Volume 4, ''Defense Materiel Disposition Manual: Instructions for Hazardous Property and Other Special Processing Materiel''.

(3) Ensure HW storage facilities meet all applicable environmental standards and requirements, including 40 CFR parts 262, 264, and 265.

(4) Provide funds for disposal of HP failing reutilization, transfer, donation or sale (RTDS), or if the HP is not eligible for RTDS, that it is disposed of on a DLA disposal service contract. Funding for disposal by the Military Department or Defense Agency also applies in instances when non-regulated waste requires special handling for disposal via disposal service contract, or when special services are requested on the disposal service contract.

(5) Comply with the Defense DEMIL Program in accordance with DoD Instruction 4160.28 and DoD 4160.28–M Volumes 1–3.

(i) Provide proper instructions for DEMIL ''F'' property to the DLA Disposition Services site at the time of physical turn-in or immediately following electronic turn-in in accordance with procedures in Enclosure 5 of DoD Manual 4160.21, Volume 2 and Enclosure 3 of DoD Manual 4160.21, Volume 4 and the procedures on the Army's Integrated Logistics Support Center Web site *https://tulsa.tacom.army.mil/DEMIL*.

(ii) Ship small arms serialized weapons and serialized parts to the Anniston, Alabama, DEMIL Center, as identified on the DLA Disposition Services Web site (*https://www.dispositionservices.dla.mil*). Contact the Anniston center for shipment instructions. All activities generating serialized weapons and serialized weapons parts must report a ''ship'' transaction, using the appropriate DLA Disposition Services DEMIL Center DoDAAC, to the DoD Small Arms/Light Weapons Serialization Program registry.

(6) Implement DoD QRP, as directed by DoD Instruction 4715.4, ''Pollution Prevention'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/471504p.pdf*). Establish QRPs to cost effectively divert or recover scrap or waste from the waste streams, as well

as to identify, collect, properly segregate and maintain the integrity of recyclable materials in a way that will maintain or enhance their marketability. Indicate on the turn-in documents that QRP material is identified as such with funds to be deposited to the appropriate budget clearing account.

(7) Implement TSC measures in accordance with DoD Instruction 2030.08 for USML and CCL items and comply with applicable export control regulations and laws.

(g) *DLA Disposition Services.* The DLA Disposition Services will:

(1) Provide Military Departments and Defense Agencies with disposition solutions and best value support for the efficient and timely RTDS or disposal of excess, surplus, and FEPP property. This includes all required training and guidance on programs affecting disposition practices.

(2) Provide visibility and promote maximum reuse of DLA Disposition Services-managed inventory assets. Implement transfer and donation policies and procedures consistent with GSA regulations.

(3) Provide tailored disposal support to the DoD warfighter during contingency operations, as approved by the ASD(L&MR).

(i) Work with the Military Departments to receive and dispose of property in the most efficient manner. If standard accountability practices are not practical, alternative processes may be established on a temporary basis. However, as time or conditions permit, prescribed processes will be established and appropriate additions, deletions, and adjustments to the official accountable record will be completed.

(ii) Provide comprehensive disposal services supporting customer-unique needs based on mutually developed service agreements. DLA Disposition Services, along with DLA, will work with customers of all levels, *e.g.*, generators, major commands, and Services, to define expectations and establish service delivery strategies.

(4) Use the most appropriate sales method to obtain optimum return on investment for all DoD surplus property sold. Respond to inquiries, process disputes, protests, and claims pertaining to disposable property sales.

(5) Implement quality control programs for the Defense Materiel Disposition Program to assure optimum reutilization; proper DEMIL; use of environmentally sound disposal practices; implementation of TSC measures for MLI and CCL items.

(6) Implement TSC in accordance with DoD Instruction 2030.08 for USML and CCL items and comply with applicable export control regulations and laws.

(7) Monitor DLA Disposition Services site PMRP operations and provide support to DoD Components and participating federal agencies. Manage the recovery operations of the PMRP.

(8) Prepare and distribute reports for disposition.

(9) Serve as the office of primary responsibility for environmentally regulated and HP as detailed in DoD Manual 4160.21, Volume 4.

(10) Comply with and implement the provisions of DoD Instruction 4160.28, DoD 4160.28–M Volumes 1–3, and DoD Instruction 2030.08 in the execution of DLA Disposition Services worldwide. Coordinate procedural waivers or deviations for approval by the DoD DEMIL Program Office or DoD TSC Office in DLA–HQ (J–334). Forward policy waivers or deviations from the DoD DEMIL Program Office or DoD TSC Office to the USD(AT&L) or USD(P) respectively for approval.

(11) Monitor property accountability and approve adjustments or corrections to property accounts for assigned DLA Disposition Services sites.

(12) Comply with implementing guidance relative to relationships with Combatant Commanders as prescribed in DoD Directive 5105.22, ''Defense Logistics Agency (DLA)'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/510522p.pdf*).

(13) Support disposal of Military Assistance Program property and other foreign-owned property in accordance with DoD 5105.38–M and § 273.7 of this subpart.

(14) Provide reutilization, donation, and marketing assistance and disposal service to customers.

(15) Maintain liaison with generating activities to determine most efficient

method of acceptance (receipt in place vs. physical turn-in), determine mutually agreed-upon schedules for property receipts, and execute memorandums of understanding (MOUs) for receipt-in-place transactions.

(16) Process excess property, surplus property, FEPP, nonsalable materiel, and other authorized turn-ins from generating activities.

(17) Inspect and accumulate physical receipts of property; verify identity, by UII or IUID when applicable, and quantity. DLA Disposition Services sites need not verify quantities where units of issues are: lot, assortment, board foot, cubic foot, foot, inch, length, meter, square foot, square yard, and yard. These units of issue are impractical and economically unfeasible.

(18) Establish and maintain visibility of accountable property records for excess, surplus, and FEPP property.

(19) Provide or arrange adequate covered storage to protect received property from the elements, maintain its value and condition, and reduce handling. Store property to prevent contamination or mixing, ensure proper identification and segregation (bins or areas are prominently marked, labeled, tagged, or otherwise readily identifiable with the property locator record), and allow inspection.

(20) Fence or otherwise protect the disposal yard to ensure materiel is safeguarded against theft or pilferage. DLA Disposition Services are generally a tenant operation on a DoD installation that generates disposal property. The DLA Disposition Services must comply with the security matters identified in ISSAs established with the DoD Component regarding security regulations.

(21) Provide HW storage, as appropriate. Ensure HW storage facilities meet all applicable environmental standards and requirements, including those specified in 40 CFR part 264.

(22) Prepare ISSAs. Coordinate with the local installation to resolve matters of mutual concern.

(23) Provide information and assistance to those who are processing precious metals-bearing property into DoD PMRP.

(24) Ensure periodic inventories are conducted, accountable property records updated, and required inventory adjustment documents are prepared and processed.

(25) Implement reutilization, transfer, or donation (RTD) of surplus property. Promote maximum RTD of FEPP, excess property, and surplus property. Process authorized RTD requests. Ensure accountable records are updated in accordance with DoD Instruction 5000.64.

(26) Provide assistance to all authorized screeners, donees, and other interested persons.

(27) Facilitate the sale of property not reutilized, transferred, or donated, and appropriate for release into commerce.

(28) Deposit sale proceeds and other funds received, including storage charges and transfer monies to the appropriate accounts.

(29) Manage the DoD scrap recycling program (including precious metals recovery) and related financial records.

(30) Assist host installations in executing their QRPs in accordance with 10 U.S.C. 2577 and deliver sales revenues from eligible personal property to defray the costs incurred by operating and improving recycling programs, financing pollution abatement and environmental programs, funding energy conservation improvements, improving occupational, safety, and health programs, and funding morale, welfare, and recreation programs.

(31) Ensure DEMIL, including small arms serialized weapons and serialized parts is accomplished in accordance with DoD Instruction 4160.28 and DLA Disposition Services internal direction. Provide shipment locations and instructions to generating activities, as requested.

(32) Document handling and receipt of serialized weapons in accordance with the procedures in Defense Logistics Agency Instruction (DLAI) 1104, ''Control of Small Arms by Serial Number'' (available at *http://www.dla.mil/issuances/Documents_1/i1104.pdf*) for the control of small arms by serial number.

(33) Update the DoD IUID Registry upon the materiel disposition of uniquely identified items in accordance with the procedures in § 273.9.

(h) *ICP Manager*. The ICP Manager is responsible for the materiel management of a group of items either for a particular Military Department or for the DoD as a whole. For the Defense Materiel Disposition Program, the ICP manager will:

(1) Ensure managed items are properly cataloged in the FLIS, in accordance with DoD 4100.39–M. To prevent unauthorized disposition or release within DoD, other Federal civilian agencies, or release into commerce, include required data elements such as UII (when applicable), accurate codes for DEMIL, controlled inventory items, precious metals, shelf life items, and critical items (critical safety items (CSI) or flight safety critical aircraft parts), or other applicable data elements.

(2) Prepare complete instructions when property is assigned DEMIL Code ''F,'' in accordance with life-cycle management requirements in Enclosure 5 of DoD 4160.28–M Volume 2. Additionally, load the instruction in the DoD DEMIL ''F'' Instruction repository hosted by the Army's Integrated Logistics Support Center Web site at *https://tulsa.tacom.army.mil/*.

(3) Review DLA Disposition Services assets and orders, as appropriate, prior to initiating new purchases.

(4) Process other ICP interrogations or orders for requirements assigned a UMMIPS priority designator:

(i) Falling within Issue Priority Group 1 (Priorities 01–03).

(ii) In accordance with the procedures in DLM 4000.25–1.

(iii) Considering on-hand assets to the same extent as would be done to satisfy their own service orders.

(5) Prepare data, records for accountability, and provide disposition recommendations as prescribed here and in DoD Instruction 5000.64 in order to maintain backup material for audit review.

(6) Annually provide DLA Disposition Services with updates to points of contact on the DoD DEMIL program Web site *https://demil.osd.mil/* for operational matters, such as reutilization, donation, DEMIL, precious metals, HP, and CSIs.

(7) Arrange for DEMIL of those items not authorized for DLA Disposition Services site DEMIL processing.

(8) Submit available technical data needed to prepare specialized offers and reclamation requirements, when requested.

(9) Identify items requiring reclamation and advise Military Department and Defense Agency ICPs or IMMs of items with reclamation potential.

(10) Prepare and forward reclamation transactions for the interservice interchange of data for component parts with reclamation potential.

(11) Process reclamation notifications and data interchange transactions of other ICPs.

## § 273.7 Excess DoD property and scrap disposal processing.

(a) *General*. (1) Military Departments and Defense Agencies will declare DoD property excess and use the DoD intransit control system (ICS) as required by DoD Instruction 5000.64 and DLM 4000.25–2.

(2) Generating activities are encouraged to retain physical custody until disposition instructions are provided to reduce processing costs; *e.g.*, packaging, crating, handling, and transportation (PCH&T).

(3) Disposal of wholesale excess DoD property CONUS stocks from DLA Depot recycling control points (RCPs) is automated. This property does not require transport to a DLA Disposition Services site. Authorized excess DoD property is transferred between the RCP account and the DLA Disposition Services account (SC4402). The following FSGs, FSCs, SCCs, and DEMIL codes are ineligible for RCP:

(i) FSGs: 10, 11, 12, 13, 14, 18, 26, 68, 80, 87, 88, 89, 91 and 94.

(ii) FSCs: 2350, 3690, 4470, 4920, 4927, 6505, 6508, 6750, and 8120.

(iii) SCCs: H.

(iv) DEMIL Codes: G and P.

(b) *Property and scrap accepted and excluded*. (1) DLA Disposition Services must accept and dispose of all authorized DoD-generated excess, surplus, FEPP, scrap, and other personal property with the exclusions in paragraph (e) of this section.

(2) Property not disposed of through RTDS will be processed for disposal

under an HW contract, except as specified elsewhere. For example, HP will be processed on HW disposal service contracts. Other property will be downgraded to scrap, demilitarized, processed for A/D, or disposed of through a DLA Disposition Services service contract.

(3) DLA Disposition Services sites minimize processing delays as much as possible. In the event a site is unable to physically accept the property at the desired time and location due to workload, generating activities may retain the property for processing in-place, seek another DLA Disposition Services site, or hold the property until the DLA Disposition Services site is able to receive the property.

(4) DLA Disposition Services sites:

(i) Accept and process nonsalable materiel that has no reutilization, transfer, donation, or sale value but is not otherwise restricted from disposal by U.S. law or Federal or military regulations.

(ii) Ensure that disposition is by the most economical and practical method; for example, donation in lieu of A/D or through a service contract that meets minimum legal requirements for disposal of the specific types of property.

(5) DLA Disposition Services sites may not accept (either physically or on its account) and no reutilization or sale service will be given for:

(i) Radioactive waste, items, devices, or materiel (all materiel that is radioactive).

(ii) Property designated for disposal by the Military Departments as identified in DoD Manual 4160.21, Volume 4.

(iii) Classified material, except that which is addressed by paragraph (b)(5)(v) of this section.

(iv) Nuclear weapons-related materiel.

(v) Classified and unclassified information systems security material (cryptological (CRYPTO) or communications security (COMSEC)). Disposal of FSCs 5810 and 5811 are the responsibility of the Military Departments and may not be transferred to DLA Disposition Services in their original configuration as specified in DoD 4160.28–M Volumes 1–3.

(vi) Property containing information covered by 5 U.S.C. 552a, also known as the Privacy Act of 1974.

(6) DoD Components will manage the collection and disposal of installation refuse and trash. If refuse and trash, when properly segregated, possesses RTDS potential, disposition may be accomplished via DLA Disposition Services, recycling provisions of refuse collection contracts, in-house refuse operations, or QRPs as appropriate.

(7) The DLA Disposition Services site operating as a tenant on an installation will notify the host activity when unauthorized shipments are received at the DLA Disposition Services site (including off-site shipments) of radioactive items, classified material, nuclear weapons-related materiel, and classified and unclassified information systems security material (CRYPTO/COMSEC). The host activity will be responsible for retrieving and securing any radioactive items, classified items and unclassified information systems security material (CRYPTO/COMSEC) immediately upon request of the DLA Disposition Services site.

(8) DLA Disposition Services sites will not accept scrap accumulations that are contaminated or commingled with:

(i) MPPEH.

(ii) MLI that require DEMIL (DEMIL Codes C, D, E and F) and MLI that require mutilation (DEMIL Code B). MLI with DEMIL Code G and P are not authorized for acceptance by DLA Disposition Services in their original state.

(iii) CCL items that have not undergone mutilation to the point of scrap as defined in DoD Instruction 2030.08.

(iv) HP FSCs.

(9) Contaminated scrap should be turned in as HW.

(c) *Scrap segregation and identification.* (1) Separating material at the source simplifies scrap segregation and reduces handling. Commingling material may reduce or, in some instances, destroy the value of the scrap.

(2) Generating activities are responsible for initial identification and segregation. The major basic material or content will be used in the item nomenclature block of the DTID.

(3) Scrap will be segregated to ensure only authorized items are in a scrap pile.

(4) DLA Disposition Services sites will provide guidance and, where possible, containers for use by scrap generators at the source.

(5) The generating activity collecting the scrap or waste will maintain proper segregation of the material and determine a point at which no further material will be added. When scrap piles are being built by the DLA Disposition Services site, the same principles apply. Scrap generated from explosive and incendiary items and chemical ammunition is dangerous and will not be commingled with other types of property.

(d) *Documentation for disposal through DLA Disposition Services.* (1) Use DoD automated information systems to the extent practical to prepare documentation for excess, surplus, or scrap DoD property or FEPP. This method of submitting information is preferred, particularly for turn-in of HW. In addition to submitting the information through automated information systems, hard copies must be produced and maintained with the items during the disposal processes.

(2) The generator will provide to the DLA Disposition Services site an original and three hard copies of a DD Form 1348–1A, ''Issue Release/Receipt Document,'' or DD Form 1348–2, ''Issue Release/Receipt Document with Address Label'' (available at *http://www.dtic.mil/whs/directives/infomgt/forms/formsprogram.htm.*) The DTID must include a valid DoDAAC as authorized in Volume 6 of DLM 4000.25, ''Department of Defense Activity Address Code (DoDAAC) Directory (Activity Address Code Sequence)'' (available at *http://www2.dla.mil/j-6/dlmso/elibrary/Manuals/DLM/V6/Volume6.pdf*). All further references to DD Form 1348–1A, which also include DD Form 1348–2, will be referred to in this subpart as a DTID. Table 1 of this section provides guidance on preparation of the DD Form 1348 series documents. For scrap transfers, see paragraph (f) of this section.

TABLE 1—TRANSFERS OF USABLE PROPERTY TO DLA DISPOSITION SERVICES SITES (SINGLE LINE ITEM TURN INS) USING DD FORMS 1348–1A/2

| Field legend | Record position | Entry and instructions |
|---|---|---|
| Document Identifier (DI) | 1–3 | A5J/940R. Use information on the source document to perpetuate the archived DI. For locally determined excesses generated at a base, post, camp, or station, assign a DI code as determined by shipping activity procedures. |
| Routing Identifier | 4–6 | Enter the record indicator (RI) of the shipping activity or leave blank when the shipping activity is not assigned an RI. |
| Media and Status | 7 | Leave blank. |
| Stock or Part Number | 8–22 | See block 25. |
| Unit of Issue | 23–24 | Enter the unit of issue of the stock or part number being turned in. |
| Disposal Quantity | 25–29 | Enter the quantity being turned in to disposal activity. See block 26. |
| Document Number | 30–43 | See block 24. |
| Alpha Suffix | 44 | Leave blank (Exception: Use if DTID consists of multiple documents because the 5-digit quantity field (Record Positions 24–29) is insufficient.) See block 24. |
| Supplementary Address | 45–50 | Enter DoDAAC of predesignated consignee DLA Disposition Services Site. |

A DoDAAC is the key component for using the DLA Disposition Services property accounting disposal system to either turn in or order excess property to and from DLA Disposition Services. The code is required for all DoD activities, contractors, and FCAs to order, receive, ship, identify custody of government property, or reflect identification in a specified military standard logistics system. The code must be approved by the Military Departments, Defense Agencies, and FCA authoritative organization and be officially registered in the DoD activity address file. The DoDAAC system provides identification codes, plain text addresses, and selected data characteristics of organizational activities needed to order, mark, prepare shipping documents, bills, etc., and only recognizes active DoDAACs. FCAs are only authorized to turn excess property in to DLA Disposition Services for disposal if they have officially authorized an Economy Act Order for reimbursement of transaction billing charges.

| | | |
|---|---|---|
| Signal | 51 | This code is used to designate the bill-to and ship-to (or ship-from in the case of DI code FT_and FD_records) activities. Codes B, C, and L apply to HM/HW transfers. |

TABLE 1—TRANSFERS OF USABLE PROPERTY TO DLA DISPOSITION SERVICES SITES (SINGLE LINE ITEM TURN INS) USING DD FORMS 1348–1A/2—Continued

| Field legend | Record position | Entry and instructions |
|---|---|---|
| Fund | 52–53 | For HM and waste turn-ins, enter the fund code from Military Standard Billing System (MILSBILLS) designating the funds to be charged. For non-military activities who are not users of MILSBILLS, (*e.g.*, FCAs or NAFs) using an activity address code), enter ''XP.'' |
| Distribution | 54 | Use the information on the source document to perpetuate the archived data or leave blank. |
| Retention Quantity | 55–61 | Enter the quantity to be retained in inventory or leave quantity blank. |
| Precious Metals | 62 | Enter applicable code from Appendix AP2.23 of DLM 4000.25–1. |
| Automated Data Processing Equipment Identification. | 63 | Enter applicable code from AP2.24 of DLM 4000.25–1. |
| Disposal Authority | 64 | Enter applicable code from DLM 4000.25–1 Appendix AP2.21. (Mandatory) (FCAs use DAC ''F''—not shown in appendix.) |
| Demilitarization Code | 65 | Enter the Web-Enabled FLIS or Federal Logistics Data (FEDLOG) recorded DEMIL code of record. For LSNs, Navy item control numbers, or Army control numbers assign DEMIL code in accordance with current Volume 2 of DoD 4160.28–M (Mandatory). |
| Reclamation | 66 | Enter code ''Y'' if reclamation was performed prior to release to a DLA Disposition Services site. Enter ''R'' if reclamation is to be performed after turn in to DLA Disposition Services site. Enter code ''N'' if reclamation is not required. |
| Routing Identifier | 67–69 | Generate from disposal release order. |
| Identifier Ownership | 70 | Enter applicable code or leave blank. |
| SCC | 71 | Enter applicable code from DLM 4000.25–2. |
| Management | 72 | Enter information from source document to perpetuate archived data or leave blank. If block 71 (SCC) is Q and the management code is blank, DLA Disposition Services will mutilate the property upon receipt. |
| Criticality Code | 73 | Enter criticality code documented in FLIS for the items in accordance with DoD 4100.39–M which indicates when an item is technically critical, by reason of tolerance, fit, application, nuclear hardness properties, or other characteristics that affects the identification of the item. |
| Unit Price | 74–80 | Enter the unit price for the NSN or part number in record positions 8–22. |
| Block Entries | | |
| 1 | Enter the extended value of the transaction. | |
| 2 | Enter the shipping point identified by DoDAAC; if reduced printing is used, the clear address may be entered in addition to the DoDAAC. | |
| 3 | Enter the consignee DLA Disposition Services site by DoDAAC. This will be the predesignated DLA Disposition Services site and will be entered by the shipping activity; if reduced printing is used, the in the clear address may be entered in addition to the DoDAAC. | |
| 4 | Insert HM or HW, if applicable. | |
| 5 | Enter the date of document preparation, if required by the shipper. | |
| 6 | Enter the national motor freight classification, if required by the shipper. | |
| 7 | Enter the freight rate, if required by the shipper. | |
| 8 | Enter coded cargo data, if required by the shipper. | |
| 9 | Enter applicable controlled inventory item code (CIIC), which describes the security or pilferage classification of the shipment from DoD 4100.39–M. | |
| 10 | Enter the quantity actually received by the DLA Disposition Services site, if different from positions 25–29. | |
| 11 | Enter the number of units of issue in a package, if required by the shipper. | |
| 12 | Enter the unit weight applicable to the unit of issue, if required by the shipper. | |
| 13 | Enter the unit cube applicable to the unit of issue, if required by the shipper. | |
| 14 | Enter the uniform freight classification, if required by the shipper. | |
| 15 | Enter the FLIS or FEDLOG recorded shelf-life code in block 15, if appropriate; otherwise, leave blank. | |
| 16 | Enter in the clear freight classification nomenclature, if required by the shipper. | |
| 17 | Enter the item nomenclature. For non-NSN items, enter as much descriptive information as possible. Specified additive data or certification from the generating source for specific types of property should be entered. | |
| 18 | Enter type of container, if required by the shipper. | |
| 19 | Enter number of containers that makes up the shipment, if required by the shipper. | |
| 20 | Enter total weight of shipment, if required by the shipper. | |
| 21 | Enter total cube of shipment, if required by the shipper. | |

TABLE 1—TRANSFERS OF USABLE PROPERTY TO DLA DISPOSITION SERVICES SITES (SINGLE LINE ITEM TURN INS) USING DD FORMS 1348–1A/2—Continued

| Field legend | Record position | Entry and instructions |
|---|---|---|
| 22 | Received by (for DLA Disposition Services site) signature of person receiving the materiel. | |
| 23 | Date received (for DLA Disposition Services site) date materiel was received and signed for. | |
| 24 | Document number. Generate from source document. DTID consists of 6-digit DoDAAC + 1-digit last number of year, 3-digit Julian Date + 4-digit generator-assigned serial number. This cannot be the same document number that was used to receive the materiel. For locally determined excesses generated at base, post, camp, or station, assign a document number as determined by Service or agency procedures. Leave suffix code blank unless needed to indicate additional documents to show complete quantity. Generating activities and ordering activities and their contractors must have a valid DoDAAC, as defined in DoD 5105.38–M to use DLA Disposition Services. | |
| 25 | NSN—Enter the stock or part number being turned-in. For subsistence items, enter the type of pack in record position 21. If an NSN is not used, FSC, part number, noun or nomenclature, where appropriate, to build an LSN. | |
| 26 | Leave blank. Reserved for DLA Disposition Services Site use. | |
| 27 | This block may contain additional data including bar coding for internal DLA Disposition Services use, generator certifications (*e.g.*, inert certificate) or fund citation, FSCAP criticality code, etc. Enter data in this block as required by the shipping activity or the DLA Disposition Services Site receiving the materiel. When data is entered in this block, it will be clearly identified. For HM and waste turn ins, enter the DoDAAC of the bill to office, the contract line item number (CLIN) for the item, and the total cost of the disposal, (that is, CLIN cost times quantity in pounds equals cost of disposal). | |

(3) Generating activities may use the DLA Disposition Services web-based program electronic turn-in document (ETID) for submitting the required information electronically. ETID accommodates generators that do not have service-unique automated capabilities. ETID access and guidance are located on the DLA Disposition Services Web site. Generating activities requiring ETID access must apply for a user ID and password.

(4) In addition to the data required by DLM 4000.25–1, the DTID must clearly indicate:

(i) The reimbursable category (such as foreign purchased, NAF, FCA), including the reimbursement fund citation, or an appropriate indicator that reimbursement is required (*e.g.*, purchased with NAF or Disposal Authority Code ''F'' for FCAs). DTIDs without reimbursement data will be processed as non-reimbursable.

(ii) The value and a list of component parts removed from major end items or a copy of the limited technical inspection showing the nature and extent of repair required.

(iii) One of the SCCs listed in DLM 4000.25–2 as determined by the generator.

(5) DoD Components will turn in usable property with line item designations.

(i) To the extent possible, usable property will be turned in as individual line items with their assigned and valid NSN and UII (when applicable). Exceptions include property turned in as generator batchlots (see criteria in paragraph (g)(5)(ii) of this section); furniture turned in as a group on a single form; and locally purchased property without an NSN.

(ii) Property may be turned in without a valid NSN when the materiel cannot be identified to a valid NSN in FEDLOG (*e.g.*, locally purchased property). Prior to assigning an LSN, generating activities will match the part number or bar code number from the property against the DLA Logistics Information Service Universal Directory of Commercial Items Cross Reference Inquiry.

(iii) Generating activities will assign an LSN if a part number or barcode is not available; the property is lost, abandoned, or unclaimed privately owned personal property; or the property is confiscated or captured enemy materiel. In Block 25 of the DTID, annotate the FSC, NATO codification bureau code, if available, and identify the noun, nomenclature, or part number.

(iv) Due to national security concerns, the FSCs listed in Table 2 of this section that are clearly MLI or CCL items require a higher degree of documentation. When these items are not

assigned an NSN, the DTID must include the appropriate FSC; the valid part number and manufacturer's name; nomenclature that accurately describes the item; the end item application; and a clear text statement explaining why the NSN is not included (*e.g.*, locally purchased item, found on post, lost, abandoned, privately owned property). This information may be annotated directly on the DTID or securely attached to the DTID.

TABLE 2—FEDERAL STOCK CLASSES REQUIRING TURN-IN BY VALID NSN

| | | |
|---|---|---|
| *GROUP 10* | *GROUP 23* | *GROUP 58* |
| ALL FSCs | FSC 2305 | FSC 5810[2] |
| | FSC 2355 | FSC 5811[2] |
| *GROUP 11* | MLI or CCL items 2350 | FSC 5820 |
| ALL FSCs | | FSC 5821 |
| | *GROUP 28* | FSC 5825 |
| *GROUP 12* | FSC 2840 | FSC 5826 |
| ALL FSCs | FSC 2845 | FSC 5840 |
| | | FSC 5841 |
| *GROUP 13* | *GROUP 29* | FSC 5845 |
| ALL FSCs | FSC 2915 | FSC 5846 |
| | | FSC 5850 |
| *GROUP 14* | *GROUP 36* | FSC 5855 |
| ALL FSCs | FSC 3690 | FSC 5860 |
| *GROUP 15* | *GROUP 42* | *GROUP 59* |
| FSC 1560 | FSC 4230 | FSC 5963 |
| | | FSC 5985 |
| *GROUP 16* | *GROUP 44* | FSC 5998 |
| FSC 1670 | FSC 4470[1] | FSC 5999 |
| *GROUP 17* | *GROUP 49* | *GROUP 66* |
| FSC 1710 | FSC 4921 | FSC 6615 |
| FSC 1720 | FSC 4923 | |
| | FSC 4925 | *GROUP 69* |
| *GROUP 18* | FSC 4927 | FSC 6920 |
| FSC 1810 | FSC 4931 | FSC 6930 |
| FSC 1820 | FSC 4933 | FSC 6940 |
| FSC 1830 | FSC 4935 | |
| FSC 1840 | FSC 4960 | *GROUP 84* |
| | | FSC 8470 |
| *GROUP 19* | | FSC 8475 |
| FSC 1905 | | |

[1] Disposal of originally configured Navy assigned FSC 4470 items is the responsibility of the U.S. Navy.
[2] Disposal of FSC 5810/5811 equipment with a CIIC of 9 and that is classified (CIICs D, E, and F) or designated CCI is the responsibility of the owning Military Department and will not be received by DLA Disposition Services sites in its original configuration.

(v) The DTID for any property turned in by LSN without an assigned DEMIL code must include a required clear text DEMIL statement, based on information in DoD 4160.28–M Volumes 1–3. Generating activities may request assistance of a DLA Disposition Services site, DLA, or the integrated manager for the FSC to determine the appropriate statement. DLA Disposition Services sites will assist generating activities in developing the clear text DEMIL statement and assignment of the appropriate DEMIL code. If assistance is not requested or not used, DLA Disposition Services sites may reject the turn-in of materiel which does not meet established criteria.

(6) Scrap DTIDs will include:

(i) DI code.

(ii) Unit of issue (pounds or kilograms).

(iii) Quantity (total weight (estimated or actual)).

(iv) DTID number.

(v) Precious metals indicator code.

(vi) Disposal authority code.

(vii) Basic material content (Block 17).

(viii) Reimbursement data, if applicable.

(7) For HP documentation, see DoD Manual 4160.21, Volume 4.

(8) The generating activities will complete documentation for in-transit control of property (excluding scrap (SCC S)), waste, NAF, lost, abandoned, or unclaimed, privately owned, and FCA property) in accordance with DoD 4160.28–M Volume 3, for shipments or transfers to DLA Disposition Services sites of property with a total acquisition value of $800 or greater and all property designated as pilferable or sensitive identified by an NSN or part number. The ICS document tracks property from the time of release by generating activity (regardless whether the property is shipped to the DLA Disposition Services site or retained by the generating activity) until the DLA Disposition Services site accepts accountability. The generating activities will update the records to reflect the change in accountability and custody.

(9) DoD Components will identify defective items, parts, and components containing latent defects.

(i) *General information*—(A) *Category 1 (CAT 1) defective or counterfeit property*. (*1*) Is identified as military or Federal Government specification property intended for use in safety critical areas of systems, as determined by the user and reported to the item manager.

(*2*) Does not meet commercial specifications.

(*3*) If used, would create a public health or safety concern; RTDS as usable property is prohibited.

(*4*) Must be mutilated by the generating activity according to specific instructions provided by the item manager.

(B) *Category 2 (CAT 2) defective property*. (*1*) Does not meet military or Federal Government specifications, but may meet commercial specifications.

(*2*) Cannot be used for its intended military purpose and must not be redistributed within the Department of Defense, as directed by the item manager.

(*3*) May be used for commercial purposes and may be transferred, donated, or sold as usable property.

(*4*) If sold, requires special terms and conditions warning purchasers that the property is CAT 2 defective and is not acceptable for resale back to the Department of Defense.

(ii) *ICP requirements*. (A) ICPs will list defective property with the Government-Industry Data Exchange Program (GIDEP). GIDEP is located at *http://www.gidep.org/*.

(B) The DLA Disposition Services Safe Alert or Latent Defect (SALD) program contains additional disposal processing information for defective property and can be viewed at *http://www.dispositionservices.dla.mil/*.

(iii) *Sales requirements*. (A) If the property has been rejected as defective due to non-conformance with U.S. Government specifications, it may be authorized for sale with a statement as to the specific reason for its rejection. DLA Disposition Services will ensure that U.S. Government identification, such as contract numbers, specification numbers, NSN, and any other printing that would identify the item with the U.S. Government is removed or obliterated. A statement to this effect will be included in the sales offering, as a condition of sale. Terms or conditions in sale offerings will warn purchasers that the property is CAT 2 defective and is not acceptable for resale to the Department of Defense.

(B) Return copies of the DTID from the DLA Disposition Services site. Unless generating activities provide written notification to DLA Disposition Services sites that electronic receipt confirmations are acceptable, DLA Disposition Services sites will provide final receipt documentation for each DTID. Generating activities can use the DLA Disposition Services property accounting system to query transactions status.

(e) *Property custody determinations*—(1) *Physical custody retention*. (i) Generating activities should consider retaining physical custody of property declared as excess to reduce handling and preclude transportation costs.

(ii) An MOU will be established between the servicing DLA Disposition Services site and the generating activity. Custodial and accountability responsibilities will be identified in the MOU. DLA Disposition Services sites will not take accountability until the MOU is executed and signed at the approval levels identified in the MOU.

(iii) Inspection(s) will be completed by the DLA Disposition Services site, where appropriate. If not accomplished by the DLA Disposition Services site, a mutually agreeable disposal condition code will be assigned.

(iv) Generating activities are responsible for all expenses incurred before acceptance of accountability by a DLA Disposition Services site. At the point of DLA Disposition Services accountability acceptance (not in conditional acceptance time frame as described in paragraph (g)(2) of this section), expenses (*e.g.*, PCH&T of non-hazardous excess, surplus, and FEPP) are borne by DLA Disposition Services. Exceptions may be negotiated by a DoD Component or federal agency representative at a level commensurate with DLA Disposition Services Director (Senior Executive Service level).

(v) The DLA Disposition Services site will provide barcode labels to the generating activity to affix on the property. The labels will contain the DTID number, DEMIL code, and federal condition code. The label will be positioned to clearly indicate that the property accountability has passed to DLA Disposition Services (*e.g.*, ''on DLA Disposition Services Site Inventory''). Property should be consolidated and protected in a designated area. The activity with physical custody is responsible for the property's care and protection until it is disposed

of or moved to a DLA Disposition Services site.

(2) *Turn-ins*. When the generating activity decides to transport property to the DLA Disposition Services site, the care and custody of the property will be borne by the DLA Disposition Services site at the point of physical receipt.

(f) *Transferring usable property and scrap to a DLA Disposition Services site*. (1) Generating activities will comply with this part, DLM 4000.25–1, and their Service or agency retention and disposal policies and procedures when preparing property for transfer for disposal. The generating service will maintain accountable records of accountable property, in accordance with DoD Instruction 5000.64, until formally relieved of accountability by DLA Disposition Services.

(2) Generating activities will schedule all transfers (receipt in-place or physical) through advanced notification (*i.e.*, use of a listing or automated DTIDs.)

(3) Usable property will, to the extent possible, be transferred as individual line items with their assigned valid NSN and UII (when applicable). Exceptions include property turned in as generator batchlots, furniture turned in as a group on a ''tally-in'' form, and locally purchased property without an NSN.

(4) Scrap, properly identified with supply class by basic material content and segregated, must be transferred to a DLA Disposition Services site using a DTID.

(5) If the deficiency prohibits further DoD use, the materiel will remain in SCC Q, and owners will direct transfer of the materiel to DLA Disposition Services sites following the guidance in paragraph (d)(9) of this section. Improperly documented, unauthorized source, defective, non-repairable, and time-expired aviation CSI/FSCAP materiel that is not mutilated by the holding activity will be directed to the DLA Disposition Services site in SCC Q with management code S. All such materiel will be mutilated. The ICP/IMM should identify to the DLA Disposition Services any unique instructions for disposal requiring specific methods or information regarding hazardous material, waste, or property contained in the item. When transferring such aviation CSI/FSCAP to a DLA Disposition Services site, the generating activity DTID must clearly state in block 17 that the part is defective, non-reparable, time-expired, or otherwise deficient and that mutilation is required.

(6) Property capable of spilling or leaking may not be transferred to a DLA Disposition Services site in open, broken, or leaking containers. All property will be non-leaking and safe to handle.

(7) For physical transfers, generating activities will be responsible for movement of the property or scrap to the nearest DLA Disposition Services location.

(8) DEMIL instructions are to be provided by the ICP or IMM. DEMIL F items must have a valid and verifiable NSN. LSNs with DEMIL F are not valid. DLA Disposition Services sites will not accept DEMIL F property without the proper instructions.

(9) DTIDs that do not meet the requirements in paragraph (e) of this section will be rejected and returned to the Military Departments.

(10) To obtain DEMIL F instructions, please visit the Army's Integrated Logistics Support Center Web site at *https://tulsa.tacom.army.mil/DEMIL*.

(g) *Receipt of property and scrap*—(1) *During transfer*. (i) DLA Disposition Services sites are responsible for ensuring proper receipt, classification, processing, safeguarding, storing, and subsequent shipping of all property and scrap. This includes property to be accounted for as items and properly segregated scrap and waste with RTDS value, and materiel destined for disposal.

(ii) DLA Disposition Services sites will assist, when requested, in tracing property when an in-transit control follow-up has been received by the generating or shipping activity.

(iii) DLA Disposition Services sites will maintain close liaison with generating activities to ensure:

(A) Informational guidance on disposal transfers is given to generating activities.

(B) A DLA Disposition Services site's receiving capability and the volume of property to be transferred is taken into

consideration for turn-in scheduling. Property inspections will be performed in-place if more advantageous due to the characteristics of the property, as determined by DLA Disposition Services.

(C) Assistance is provided to generating activities, as needed, to assure proper segregation of scrap and HW material before transfer. If the weight generated, market conditions, or local trade practices warrant, further scrap segregation will be made.

(D) All property (except unsalable materiel that is precluded from sale by law), including scrap and refuse or trash with a RTDS value, is processed as set forth in this part and will not be disposed of by dumping in landfills. If the DLA Disposition Services site has knowledge of salable materiel being dumped in a sanitary fill, the DLA Disposition Services site chief will notify the installation commander regarding the matter.

(E) Property received is protected to prevent damage from unnecessary exposure to the elements. Property transferred as condemned may still be usable, and its preservation may benefit the Defense Materiel Disposal Program.

(*1*) Instances of improper handling of government property will be brought to the attention of the generating activity or installation commander for remedial action.

(*2*) Recurrent instances of improper care or handling will be documented for referral to DLA and the disposal focal points of the Military Departments and Defense Agencies.

(iv) The generating activity will assure all property and scrap is properly identified, including special handling requirements, and that automated information system or manually prepared documentation contains the required number of copies and appropriate information for property received in place or physically accepted.

(A) To the maximum extent possible, DLA Disposition Services sites will validate items during pre-receipt processes with documentation preparation and receipt processes with the physical transfer of the property.

(*1*) The generator's representative (if present) should assist with validation. Whether received in place or at a DLA Disposition Services site, a receipt copy of the DTID will be provided to the generator's representative at that time.

(*2*) If the turn-in is not accompanied by the generator's representative, the official receipt documentation will be provided in the most efficient method available; *e.g.*, through an electronic listing of items received, an actual copy of an annotated DTID or an electronic return of an annotated DTID through a web based document management system.

(*3*) For turn-ins accompanied by a generator representative, a conditional receipt copy will be provided at the time of delivery. DLA Disposition Services sites will initial in block 22 and date block 23 of the DTID. This copy constitutes conditional acceptance and becomes the official receipt unless property is rejected on a supply discrepancy report within 15 workdays.

(B) Validation will consist of verifying property description and quantity, and assuring an authorized and appropriate SCC was assigned by the generating activity. DLA Disposition Services sites and generating activities will work together to validate and verify requirements and obtain appropriate certifications, etc., when property is received in place versus physically transported to a DLA Disposition Services site. The MOU, discussed in § 273.6, will be used for securing and documenting these requirements.

(C) DLA Disposition Services site personnel may exercise discretionary authority to change and challenge SCCs (except for items in SCC Q, which will be downgraded to scrap and mutilated).

(D) For items in the general hardware, clothing, tools, furniture, and other nontechnical FSCs, DLA Disposition Services sites are authorized to use their best knowledge, judgment, and discretion to change and assign the appropriate SCC when determined, through physical inspection and examination, or where an obvious error in condition coding exists. DLA Disposition Services sites are responsible for any SCC changes they make and will document the change on the DTID.

(E) For specialized items such as avionics, or items that require test, measurement, or diagnostic to determine serviceability, DLA Disposition Services site should challenge the generating activity SCC assignment if it appears incorrect. Items in original pack and unopened containers that are coded condemned or unserviceable should be viewed with guarded skepticism and challenged back to the generating activity.

(v) Appropriate actions will be taken for discrepancies detected during prereceipt or receipt:

(A) If property is to be physically received and the generating activity's representative is present, accountability and physical custody of the property will normally remain with the generator until reconciled. DLA Disposition Services sites, at their discretion, may retain physical custody until reconciled.

(B) Discrepancies noted during the receiving process, which may be discovered after electronic or hard copy documentation is received, will be processed in accordance with DLAI 4140.55/AR 735–11–2/Secretary of the Navy Instruction (SECNAVINST) 4355.18A/Air Force Joint Manual (AFJM) 23–215, ''Reporting of Supply Discrepancies'' (available at *http://www.dla.mil/issuances/Documents_1/i4140.55%20(Joint%20Pub%20-%206%20Aug%202001).pdf*.

(C) DLA Disposition Services will barcode the property for identification purposes. Barcoding should include use of any UII or IUID in place when applicable.

(2) *Conditional and accountable acceptance distinction*. Conditional and accountable acceptances are separate actions.

(i) Conditional acceptance occurs when a generating activity representative accompanies a transfer. DLA Disposition Services sites will provide a conditional receipt copy at time of physical delivery. Conditional acceptance becomes official and final acceptance receipt unless property is officially rejected by the DLA Disposition Services site within 15 workdays.

(ii) Accountable acceptance becomes final when verification of accurate property description, valid condition code assignment, correct quantity, and UII (when applicable) is completed by the DLA Disposition Services site. Physical inspections will be conducted, as appropriate.

(iii) During the conditional acceptance processing, if the property is physically transferred to the DLA Disposition Services site and an inventory discrepancy surfaces, the DLA Disposition Services site will research and provide a report of the lost, damaged, or destroyed property in accordance with procedures in DoD 7000.14–R Volume 12, Chapter 7. If the property remains at the generating activity site for receipt-in-place and an inventory discrepancy surfaces, the generating activity will research and provide a report of the lost, damaged, or destroyed property in accordance with procedures in DoD 7000.14–R Volume 12, Chapter 7. The accountable organization will amend the accountable property records as appropriate upon completion of the property loss investigation.

(3) *Document acceptance*. DLA Disposition Services sites will use a full signature for receipts in block 22 of the DTID. The conditional acceptance date will be entered in block 23. DLA Disposition Services sites will also use this date for the accountable record receipt transaction.

(4) *Returning receipts*. DLA Disposition Services sites will return one hard copy on physical transfers, including generator-prepared batchlots, if required by the generating activity. DLA Disposition Services will make return receipts available to generators via a web based document management system. Generating activities may access this system via the DLA Disposition Services Web site and search, view, and download copies of turn-in documentation. DLA Disposition Services personnel should work with generating activities to encourage the use of a web-based document management system and eliminate hard copy return receipts.

(i) For property physically received by a DLA Disposition Services site, generating activities will be provided a receipt copy upon delivery.

(A) These receipts are considered conditional acceptance of accountability, pending completion of DLA

Disposition Services site inspection and verification of the turn-in. If no follow-up report is received by the generating activity within 15 workdays, the provisional copy becomes the official receipt document, and the DLA Disposition Services Site assumes full accountability.

(B) If the receipt is not recorded in a web based document management system within 30 days, the provisional copy becomes the official receipt copy and the DLA Disposition Services Site assumes full accountability.

(C) If a discrepancy is found, DLA Disposition Services sites may contact the generating activity and attempt resolution. If required, the guidance shown in paragraph (g)(2)(iii) of this section will be used for inventory discrepancies.

(D) When acceptance is not possible, a reject notice will be provided to the generating activity within 7 workdays. Return receipts are available to generators via a web based document management system.

(ii) For turn-ins made by commercial carrier, parcel post, etc., DLA Disposition Services sites will provide receipt copies no later than 5 workdays after delivery. These receipts are considered conditional acceptance of accountability pending completion of DLA Disposition Services site inspection and verification of the turn-in. If a discrepancy is found, DLA Disposition Services sites may contact and attempt resolution. When acceptance is not possible, a reject notice will be provided to the generating activity within 7 workdays.

(5) *DLA Disposition Services site batchlots.* (i) Consistent with the DoD ICS and in accordance with DLA Disposition Services operating guidance, DLA Disposition Services sites may batchlot property after receipt:

(A) Batchlot property with an extended line item value of $800 or less, in SCCs A—H.

(B) Batchlot property that does not contain pilferable or sensitive materiel.

(ii) Property assigned DEMIL code ''A'' in the critical or non-critical FSG/FSCs, excluding FSCs 5985, 5998, and 5999, is eligible for batchlotting.

(iii) DLA Disposition Services sites may batchlot property requiring the same type of special processing, *e.g.*, reimbursable property, same FSC.

(iv) DLA Disposition Services sites may batchlot clothing and textile products with infrared or spectral reflectance with a DEMIL code of ''E,'' but the batchlots require a certification on the DTID (see Figure 1 of this section).

Figure 1. Infrared/Spectral Reflectance Batchlots Certification

"I certify that the clothing and textile items within this batchlot do not contain any items that have been designated as chemical or biological protective clothing or masks."

| | |
|---|---|
| Signature | Date |
| Name (Print/Type) | Title |
| Activity/Unit | Grade/Rank |

(v) DLA Disposition Services sites will exclude from batchlotting:

(A) Chemical, biological, radiological, and nuclear (CBRN) property and clothing (FSG 83 and 84); lab equipment such as centrifuges, biological incubators, micromilling machines, biological safety cabinets and laboratory evaporators; (FSG 66), camouflage clothing and individual equipment.

(B) Low dollar property with high potential for RTDS.

(C) Property defined as a special case in Enclosure 3 of DoD Manual 4160.21, Volume 4 that requires special receipt and handling requirements that cannot be met at time of receipt.

(D) DEMIL required items identified in DoD 4160.28–M Volumes 1–3, DEMIL codes B, Q, and property in critical FSCs in DEMIL codes C, D, E, F, G, and P. Property in FSCs 5935, 5996, and 5999 will not be batchlotted regardless of DEMIL code.

(E) Property requiring inert certification.

(F) Small arms or light weapons.

(G) Lasers.

(H) Radioactive materiels (*e.g.*, gauges, meters, watches) not eligible for turn-in.

(I) Chemical, biological, radiological, nuclear—defense (CBRN–D) equipment—These items are DEMIL F and instructions have to be followed for disposition and are NOT turned in to DLA disposition.

(J) Items with a CIIC. Items determined to be pilferable or sensitive in accordance with Volume 6 of DLM 4000.25 and DLA Regulation 4145.11/AR 740.7/Navy Supply System Command Instruction (NAVSUPINST) 4440.146C/Marine Corps Order (MCO) 4450.11, ''Safeguarding of DLA Sensitive Inventory Items, Controlled Substances, and Pilferable Items of Supply'' (available at *http://www.dla.mil/issuances/Documents_1/r4145.11.pdf*).

(K) HP.

(L) Metalworking machinery and former industrial plant equipment.

(M) Grade 8 fasteners and machine bolts in FSCs 5305 and 5306. Do not batchlot these items if they appear on the SALD list.

(N) Property in SCC A with a total extended value, per DTID, of $50 or more, as shown in Table 3 of this section.

TABLE 3—FSCS IN SCC A > OR = $50 EXCLUDED FROM BATCHLOTTING

| FSC | Description |
|---|---|
| 2910 | Engine Fuel System Component, Non-Aircraft. |
| 2920 | Engine Electrical System Components, Non-Aircraft. |
| 2940 | Engine Air and Oil Filters, Strainers and Cleaners, Non-Aircraft. |
| 2990 | Miscellaneous Engine Accessories, Non-Aircraft. |
| 3030 | Belting, Drive Belts, Fan Belts, and Accessories. |
| 4730 | Fittings and Specialties; Hose, Pipe, and Tube. |
| 5660 | Fencing, Fences and Gates and Components. |
| 5895 | Miscellaneous Communication Equipment. |
| 5910 | Capacitors. |
| 5935 | Connectors, Electrical. |
| 5940 | Lugs, Terminals and Terminal Strips. |
| 5961 | Semi-Conductor Devices and Associated Hardware. |
| 6530 | Hospital Furniture, Equipment, Utensils and Supplies. |
| 6680 | Liquid/Gas Flow, Liquid level/Mechanical Motion Measuring Instruments. |
| 7105 | Household Furniture. |
| 7195 | Miscellaneous Furniture and Fixtures. |
| 9999 | Miscellaneous Items (cannot conceivably be classified anywhere else). |

(vi) Notwithstanding the information in paragraph (g)(5)(v) of this section, RTD customers may order individual items from a batchlot. DLA Disposition Services sites will honor these requests. Otherwise, items will not be removed from batchlots.

(vii) DLA Disposition Services sites are responsible for ensuring official receipt copies are returned accessible to generating activities (electronically or

hard copy). They must provide tracing assistance for any DTID receipt copy not received by the generating activity.

(h) *Identification, barcoding, and storage requirements.* (1) Usable property, transferred to a DLA Disposition Services site or received in original location, must be clearly identified with barcode labels. The labels will be affixed to property from time of receipt (physically or receipt-in-place) until final removal and will correspond with accountability records. For property stored at DLA Disposition Services sites, signs will be placed appropriately to identify property status (RTD, DEMIL, etc.) and to minimize confusion to customers.

(2) Scrap transferred to a DLA Disposition Services site or received in original location will be accumulated and segregated to prevent commingling basic material content.

(i) For use in providing the basic material content information, scrap will be identified using the standard waste and scrap classification code (SCL) contained in the DAISY codes and terms pocket reference located at the DLA Disposition Services Web page (*https://www.dispositionservices.dla.mil/publications/index.shtml*). The pocket reference is formatted alphabetically.

(ii) Barcoded labels are not required for scrap accumulations. However, both the generating activity and DLA Disposition Services accounting records must correspond with the scrap identifications and weights. DLA Disposition Services must use the SCL in its DAISY accounting records.

(iii) During storage, DLA Disposition Services will place appropriate signs to identify types of scrap and maximize visibility to customers.

(i) *Accounting for property at the DLA Disposition Services site.* (1) Correct accounting for all excess property, surplus property, and FEPP by both the Military Departments and DLA Disposition Services sites is critical. Noncompliance can result in property being misappropriated with potentially severe consequences. Proper accounting impacts resourcing (money, equipment, and personnel) decisions.

(2) Accountability records will be maintained in auditable condition, allow property to be traced from receipt to final disposition and cleared from the ICS, when appropriate. DLA Disposition Services' accountability system will incorporate the requirements of DoD Directive 8320.02, 15 CFR parts 730 through 799, and DLA Regulation 7500.1, ''Accountability and Responsibility for Government Property in the Possession of the Defense Logistics Agency,'' (DLA Regulation 7500.1 is available at: *http://www.dla.mil/issuances/*.

(3) If a contingency operation requires a deviation from standard accountability practices, Military Departments and DLA Disposition Services sites will maintain spreadsheets, listings, or the most appropriate method of temporary accountable records. When the contingency operation reaches a point where prescribed accountability practices can be resumed, the temporary documents will be used for establishing, updating, or adjusting official accountability records (both Military Departments and DLA Disposition Services sites) as applicable.

(4) DLA Disposition Services' property accountability records will be maintained in sufficient detail to support required sales proceeds reimbursements.

(i) Materiel with different fund citation appropriations may be combined in sale lots; however, DLA Disposition Services accountability systems will retain individual disbursement information to allow appropriate reimbursements to local or departmental accounts, as designated by DoD 7000.14–R, ''Department of Defense Financial Management Regulations (FMRs): Volume 11a, ''Reimbursable Operations, Policy and Procedures''; Chapter 5, ''Disposition of Proceeds from Department of Defense Sales of Surplus Personal Property'', (available at *http://comptroller.defense.gov/fmr/current/11a/Volume_11a.pdf*).

(ii) Non-reimbursable scrap may be physically combined with other scrap when considered advantageous; however, accountability records will be maintained to substantiate pro-rating of the proceeds.

(5) Usable and scrap determination and accounting are calculated as follows:

(i) When property not requiring DEMIL is assigned SCCs F, G, or H, the DLA Disposition Services site may determine property has scrap value only and classify and process as ''scrap upon receipt.''

(ii) Personal property assigned other SCCs, which the DLA Disposition Services site determines to only have basic materiel content value, may be downgraded to scrap after the end-of-screening date (ESD) and completion of any required DEMIL.

(iii) DLA Disposition Services sites will minimize changing or challenging SCCs and downgrades upon receipt.

(iv) When an item has been offered on a competitive sale and no bid has been received, or bids received are less than the scrap value of the item, the property may be downgraded to scrap and re-offered for sale as scrap. This includes property returned to a DLA Disposition Services site from a joint commercial sales partner that has been confirmed as mis-described or as containing only basic material content value. Similar items received within a 12-month period that have a history of being nonsalable may be downgraded to scrap at ESD.

(v) When a DLA Disposition Services site determines obsolete printed materials have no RTD potential and only scrap market value, these items will be downgraded to scrap upon receipt.

(vi) When end items are turned in as scrap and are reclaimed or disassembled for their usable components, the DLA Disposition Services site's records will be adjusted to reflect the acquisition cost (estimated, if not known) of the components removed.

(6) Scrap accounting is calculated by weight.

(i) Estimated weight may be used for receiving scrap if scales are not available or if weighing is impractical. Disposition of scrap for sale or demanufacturing must be weighed to provide accurate accounting and reconciliation with the DLA Disposition Services accountable record.

(ii) The acceptable degree of accuracy of estimation is 25 percent for property processed by the ton, and 10 percent for property processed by the pound. Overages and shortages discovered on release of property that exceed allowable tolerances will be adjusted.

(iii) High value scrap must be weighed at the time of receipt.

(j) *Calibration and maintenance of weigh scales.* (1) DoD activities, including DLA Disposition Services sites with scales used for receipts and disposition of scrap, will ensure weigh scales under their jurisdiction are maintained, repaired, and calibrated annually or more often if required by State or local laws.

(2) Activities with scales will maintain a log or record of visits by qualified inspectors showing the date of the visit and, where appropriate, action taken to correct the accuracy of the scales. A signed copy of the inspector's findings will be maintained. The activity is responsible for obtaining the services of a qualified scale inspector and requesting repair when needed.

(k) *Physical inventory accuracy.* (1) DLA Disposition Services sites will conduct physical inventories. At a minimum, a sample inventory will be conducted at each DLA Disposition Services site annually. Inventory accuracy of at least 90 percent will be maintained for all usable property, except DEMIL required property, HP, and pilferable or sensitive property. Discrepancies will be corrected in accordance with paragraph (l) of this section. If sample inventories for usable property are less than 90 percent accurate, a wall-to-wall inventory will be conducted.

(2) Physical inventories for DEMIL required property, HP, and pilferable or sensitive property will be conducted at least annually. Inventory accuracy of 100 percent will be maintained. If less than 100 percent accuracy, DLA Disposition Services site will report the discrepancies in accordance with procedures in DoD 7000.14–R.

(3) Usable property remaining on the DLA Disposition Services site account in excess of 6 months will be inventoried on a monthly basis and certified.

(4) Inventory discrepancies will be researched as part of the inventory process and corrections documented as inventory adjustments.

(5) DLA Disposition Services will provide the DLA Disposition Services sites

with direction for maintaining and reconciling scrap accumulations and accountable records. Reconciliation will be performed at least monthly.

(l) *Inventory discrepancies and adjustments*—(1) *Errors before acceptance*. Item identification, quantity, condition, or price data errors discovered before official acceptance of accountability will be resolved and corrected during receipt.

(2) *Errors after acceptance*. Discrepancies discovered after acceptance of accountability; that is, differences between recorded balances and quantities on hand, will be processed as inventory adjustments. Inventory adjustment procedures are contained in DoD 7000.14–R, Volume 12, Chapter 7.

(3) *Property not in DLA Disposition Services site custody*. (i) When property for which a DLA Disposition Services site has assumed accountability, but not physical custody, becomes lost, damaged, or destroyed, the custodial activity will investigate the discrepancy and provide its findings to the DLA Disposition Services site.

(ii) The DLA Disposition Services site will provide the custodial activity with requested item identification number, such as NSN, DTID number, or UII (when applicable) or copies of pertinent documentation for the lost, damaged, or destroyed item.

(A) If the custodial activity determines the discrepancy is due to a record keeping error, it will fully document the error and inform the DLA Disposition Services site to prepare an inventory adjustment.

(B) If the discrepancy is not due to a record keeping error, the custodial activity must prepare a DD Form 200, ''Financial Liability Investigation of Property Loss,'' in accordance with criteria contained in DoD 7000.14–R, Volume 12, Chapter 7.

(iii) Within 30 days after notification of the loss of the property, the custodial activity must provide the DLA Disposition Services site a completed copy of the DD Form 200 as supportive documentation for the DLA Disposition Services site to process an inventory adjustment.

(m) *Property disposition*—(1) *Packing, crating, and handling (PC&H)*. PC&H for DoD orders will be arranged by the DLA Disposition Services site in most cases. When property is received in place, the generating activity will prepare the property for shipment. DLA Disposition Services will submit payment for these services according to the established ISSA or by DLA Disposition Services military interdepartmental purchase request.

(2) *Transportation*. DLA Disposition Services will directly fund transportation costs associated with reutilized property on each transaction. However, these costs are recouped as part of the Service-level annual billings for all associated disposition costs incurred by the services including all transportation costs during the year. That is, individual DoD units do not pay for reutilization transportation on each individual transaction, but their Military Service is billed on an annual basis.

(n) *Audits*—(1) *Outside command involvement*. When it is necessary to obtain or confirm data on materiel transferred to or from disposal accounts, and this involves crossing command lines between DoD Components, the policy in DoD Instruction 7600.02, ''Audit Policies'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/760002p.pdf*) will apply.

(2) *Joint Service/DLA Directives used during audits*. The DoD Components will maintain a clear audit trail of the documentation for the disposition of property in accordance with their internal issuances for audits. The internal issuances that govern Army, Navy, and Air Force are:

(i) AR 36–2, ''Audit Services in the Department of the Army'' (available at *http://www.apd.army.mil/pdffiles/r36_2.pdf*).

(ii) SECNAVINST 7510.7F.

(iii) Air Force Policy Directive 65–3, ''Internal Auditing'' (available at *http://static.e-publishing.af.mil/production/1/saf_fm/publication/afpd65-3/afpd65-3.pdf*).

## § 273.8 Donations, loans, and exchanges.

(a) *Authority and scope*—(1) *FMR*. Provisions for donation of surplus personal property are provided in accordance with 41 CFR part 102–37.

(2) *Other regulations*. (i) 10 U.S.C. 2576a permits the Secretary of Defense to transfer certain property for use for

State and local law enforcement agencies. Notwithstanding 41 CFR chapters 101 and 102, donations may be made only as authorized by law; under separate statutes, the Secretaries of the Military Departments may donate certain excess materiel to authorized recipients; through GSA, the Department of Defense may donate surplus property to authorized donees. Donations are subordinate to federal agency needs, but take precedence over sale or A/D. This section also contains guidance and procedures pertaining to loans or exchanges, providing specific instructions to authorized donees.

(ii) 42 U.S.C. chapter 68 authorizes federal assistance to States, local government, and relief organizations based on a declaration of emergency or major disaster.

(iii) 10 U.S.C. 2557, 2572, 2576, and 5576a establishes the procedures for organizations participating in surplus personal property donation programs, specifically the organizations discussed in this section.

(3) *Agreements*. Technology transfer projects and 10 U.S.C. 2194 address educational partnership agreements.

(b) *Compliance with nondiscrimination statutes requirements*. (1) All of the donation programs covered by this section must comply with:

(i) 42 U.S.C. 2000a, also known as Title VI of the Civil Rights Act of 1964.

(ii) 20 U.S.C. 1681, also known as Title IX of the Education Amendments of 1972.

(iii) 29 U.S.C. 701 also known as the Rehabilitation Act of 1973.

(iv) 42 U.S.C. 6101 also known as the Age Discrimination Act of 1973.

(2) Any complaints alleging violations of these acts or inquiries concerning the applicability to the programs covered in this section will be handled by elevating issues through the appropriate chains of command and agency-to-agency dialog.

(c) *Donations of surplus personal property*—(1) *General*. (i) Surplus property is allocated by GSA considering the factors listed in 41 CFR chapters 101 and 102.

(ii) GSAXcess® is available for State agencies for surplus property (SASPs) and donees, when authorized, to search for and select property for donation. Screening is accomplished during the timeframes specified in § 273.15.

(iii) Upon allocation, GSAXcess® will generate the SF 123, ''Transfer Order Surplus Personal Property'' to the agency for approval and return. DoD orders for DLA Disposition Services assets with a UMMIPS Priority Designator within Issue Priority Group 1 (Priorities 01–03), and non-mission capable supply (NMCS) orders will be submitted to DLA Disposition Services as an exception. DLA Disposition Services will immediately fill these orders and notify the GSA area property officer for the Front End Data System record adjustment. Priorities 4–15 orders received during this timeframe will not be honored.

(2) *Accessing GSAXcess®*. GSAXcess® screening requires an access code from GSA. To learn about GSAXcess® and obtain access code information, see *https://gsaxcess.gov/*.

(3) *Release of Government liability*. On a case-by-case basis, ''hold harmless'' clauses to protect the United States may be used, depending on the types and quantities of property. Such provisions must be written in coordination with appropriate DoD Component legal counsel.

(4) *Reporting*. DLA will provide GSA a report of property transferred to nonfederal recipients. The report:

(i) Will be submitted to GSA through the GSA on-line Personal Property Reporting Tool within 90 calendar days after the close of each fiscal year. The Personal Property Reporting Tool is located at *https://gsa.inl.gov/property*. If for any reason the report is delayed, the organization who possesses the property should contact the GSA Personal Property Asset Management (MTA), 1800 F Street NW., Washington, DC 20405, with an explanation of the delay. The report must cover personal property disposed during the fiscal year in all areas within the 50 United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the U.S. Virgin Islands. Negative reports are required.

(ii) Must reference Interagency Report Control Number 0154–GSA–AN and contain:

(A) Name of the non-Federal recipient.

(B) Zip code of the recipient.

(C) Explanation as to the type of recipient (*e.g.*, contractor, grantee, cooperative, Stevenson-Wydler recipient, licensee, permittee).

(D) Appropriate 2-digit FSC group.

(E) Total original acquisition cost of all personal property furnished to each recipient.

(F) Appropriate comments as necessary.

(G) IUID or UII equivalent.

(5) *Donation restrictions.* (i) All surplus property (including property held by working capital funds established under 10 U.S.C. 2208 or in similar funds) is available for donation to eligible recipients, in accordance with authorizing laws, except for property in the categories in paragraphs (c)(5)(i)(A) through (M) of this section:

(A) Agricultural commodities, food, and cotton or woolen goods determined from time to time by the Secretary of Agriculture to be commodities requiring special handling with respect to price support or stabilization.

(B) Controlled substances.

(C) Foreign purchased property (as identified in DoD 5105.38–M).

(D) Naval vessels of the following categories: battleships, cruisers, aircraft carriers, destroyers, and submarines.

(E) NAF property.

(F) MLI, except in compliance with DoD Instruction 4160.28, DoD 4160.28–M Volumes 1–3, and DoD Instruction 2030.08.

(G) CCL items, except in compliance with 15 CFR parts 730 through 774 and DoD Instruction 2030.08.

(H) Property acquired with trust funds (*e.g.*, social security trust funds).

(I) Records of the Federal Government.

(J) Vessels of 1,500 gross tons or more, excluding specified Naval combat vessels, which the Maritime Administration determines to be merchant vessels or capable of conversion to merchant use (as defined in 41 CFR chapters 101 and 102).

(K) Items as may be specified from time to time by the GSA Office of Government-wide Policy.

(L) Property that requires reimbursement upon transfer (such as abandoned or other unclaimed property that is found on premises owned or leased by the Government).

(M) Hazardous waste.

(N) Other Hazardous property and hazardous materials not otherwise identified in the categories in paragraphs (c)(5)(i)(A) through (M) of this section that is not serviceable, for example supply condition codes (SCCs) listed in DLM 4000.25–2 as SCC E for unserviceable (limited restoration) materiel, SCC F for unserviceable (reparable) materiel, and SCC G for unserviceable (incomplete) materiel, SCC H for unserviceable (condemned) materiel, SCC P for unserviceable (reclamation) materiel.

(ii) Certain items require special processing for donations (in accordance with the requirements in DoD 5105.38–M. DoD Manual 4160.21, Volume 4 provides the procedures.

(6) *Returnable DoD property.* (i) As restrictions are imposed on certain commodities, the Department of Defense, through GSA, will request a return of these items and provide guidance.

(ii) Known restrictions require written certification and signature by the recipient at the time of removal.

(7) *Allocating surplus property.* GSA directly allocates property to:

(i) *FAA.* Public airports are managed through the FAA.

(A) The FAA Administrator has the responsibility for selecting property determined to be either:

(*1*) Essential, suitable, or desirable for the development, improvement, operation, or maintenance of a public airport, as defined in 49 U.S.C. 47102.

(*2*) Reasonably necessary to fulfill the immediate and foreseeable future needs of the grantee for the development, improvement, operation, or maintenance of a public airport.

(*3*) Needed to develop sources of revenue from non-aviation businesses at a public airport.

(B) Public airports will secure advance approval of donations by obtaining signatures of the applicable FAA

airport branch chief and by the GSA regional office on the order (SF 123).

(ii) United States Agency for International Development.

(iii) *SASPs*. (A) SASPs are responsible for determining eligibility of applicants; fairly and equitably distributing donated property to eligible donees within their State; assuring donees comply with donation terms and conditions; and when requested by donee, arranging for or providing shipment of property from the federal holding agency, *e.g.*, DLA Disposition Services sites, directly to the recipients.

(B) The SASP donates property to public and eligible nonprofit organizations. Types of eligible recipients are:

(*1*) Medical institutions, hospitals, clinics, and health centers.

(*2*) Drug abuse and alcohol centers.

(*3*) Providers of assistance to homeless individuals.

(*4*) Providers of assistance to impoverished families and individuals.

(*5*) Schools, colleges, and universities.

(*6*) Schools for the mentally and physically disabled.

(*7*) Child care centers.

(*8*) Radio and television stations licensed by the Federal Communications Commission as educational radio or television stations.

(*9*) Museums attended by the public.

(*10*) Libraries providing the resident public (community, district, State, or region) with free access.

(*11*) State and local government agencies, or nonprofit organizations or institutions. 42 U.S.C. 3015 and 3020 authorizes donations of surplus property to State and local government agencies, or nonprofit organizations or institutions that receive federal funding to conduct programs for older individuals.

(*12*) States and territories.

(*13*) *SEAs*. The Deputy Secretary of Defense is authorized to designate new SEAs. Table 4 of this section includes the list of approved SEAs. SEA nominations from the Military Departments or Defense Agencies should be forwarded to the Office of the Assistant Secretary of Defense for Logistics and Materiel Readiness, 3500 Defense Pentagon, Washington, DC 20301–3500

(*14*) Educational activities that are of special interest to the Military Services may receive surplus DoD property in accordance with 41 CFR chapter 101.

TABLE 4—SEA NATIONAL OFFICES

| | |
|---|---|
| American National Red Cross, 17th and D Streets NW., Washington, DC 20006. | Armed Services YMCA of the USA, 6225 Brandon Avenue, Suite 215, Springfield, VA 22150–2510. |
| Big Brothers/Big Sisters of America, 230 North 13th Street, Philadelphia, PA 19107. | Boys and Girls Clubs of America, 771 First Avenue, New York, NY 10017. |
| Boy Scouts of America, 1325 Walnut Hill Lane, Irving, TX 75038–3096. | Camp Fire, Inc., 4601 Madison Avenue, Kansas City, MO 64112–1278. |
| The Center for Excellence In Education, 7710 Old Springhouse Road, McLean, VA 22102. | Girl Scouts of America, 420 5th Avenue, New York, NY 10018–2702. |
| Little League Baseball, Inc., Williamsport, PA 17701 ... | National Association for Equal Opportunity In Higher Education, 2243 Wisconsin Avenue NW., Washington, DC 20007. |
| National Ski Patrol System, Inc., 133 South Van Gordon Street, Suite 100, Lakewood, CO 80228. | U.S. Naval Sea Cadet Corps, 2300 Wilson Boulevard, Arlington, VA 22201. |
| United Service Organizations, Inc., 601 Indiana Avenue, Washington, DC 20004. | United States Olympic Committee, 1 Olympic Plaza, Colorado Springs, CO 80909–5760. |
| National Director, Young Marines of the Marine Corps, P.O. Box 70735, Southwest Station, Washington, DC 20024–0735. | President—Board of Directors, Marine Cadets of America, USN & MC Reserve Center, Fort Nathan Hale Park, New Haven, CT 06512–3694. |
| Corporation for the Promotion of Rifle Practice and Firearms Safety, Erie Industrial Park, Building 650, P.O. Box 576, Port Clinton, OH 43452. | Marine Corps League, P.O. Box 3070, Merrifield, VA 22116. |

(C) High schools that host a Junior Reserve Officer Training Corps (JROTC) Unit or a National Defense Cadet Corps Unit, Naval Honor Schools, and State Maritime Academies should contact their sponsoring

Military Department regarding donations.

(D) SEAs must maintain separate records that include:

(*1*) Documentation verifying that the activity has been designated as eligible by the Department of Defense to receive surplus DoD property.

(*2*) A statement designating one or more donee representatives to act for the SEA in acquiring property.

(*3*) A listing of the types of property that are needed or have been authorized by the Department of Defense for use in the SEA program.

(8) *Identification of screeners.* (i) SASP personnel or donee personnel representing a SASP must have a valid screener-identification card (GSA Optional Form 92, screener's identification, or other suitable identification approved by GSA) before screening and selecting property at holding agencies. However, SASP or donee personnel do not need a screener ID card to inspect or remove property previously set aside or approved by GSA for transfer.

(ii) Screeners, having identified themselves and indicated the purpose of their visit, will sign the Visitor or Vehicle Register and be allowed to complete donation screening only.

(9) *Screening and ordering procedures for DLA Disposition Services property.* (i) Section 273.15(c) outlines the screening timeframes for ZI surplus and FEPP that has reached the surplus release date.

(ii) When a prospective donee contacts a DLA Disposition Services site or military installation regarding possible acquisition of surplus property, the individual or organization will be advised to contact the applicable SASP for determination of eligibility and procedures to be followed. The DLA Disposition Services sites will assist interested parties regarding availability of surplus property.

(iii) SASP contacts may be located on the GSA Web site at *http://www.gsa.gov/portal/content/100851*.

(iv) Prospective donees must go to GSAXcess® to gain access, shop, and select property.

(A) Once GSA allocates property, the SASP will receive an SF 123. The donee should then sign and return the SF 123 to the appropriate GSA office.

(B) GSA will then approve the SF 123 by signature, return the SF 123 to the SASP, and notify DLA Disposition Services with an electronic order.

(v) Procedures for return of surplus FEPP to the United States for ultimate donation are covered in Enclosure 4 of DoD Manual 4160.21, Volume 2.

(vi) DLA Disposition Services sites will require recipients of HM to sign a certification statement as shown in Figure 2 of this section.

Figure 2. Certification of HM Recipients

| |
|---|
| "I (we) hereby certify that the donee has knowledge and understanding of the hazardous nature of the property hereby donated and will comply with all applicable federal, State, and local laws, ordinances and regulations with respect to the care, handling, storage, shipment, and disposal of the HM. The donee agrees and certifies that the U.S. Government will not be liable for the personal injuries to, disabilities of or death of the donee or the donee's employees, or any other person arising from or incident to the donation of the HM or its final disposition. Additionally, the donee agrees and certifies to hold the U.S. |
| Government harmless from any and all debts, liabilities, judgments, costs, demands, suits, actions, or claims of any nature arising from or incident to the donation of the HM, its use, or final disposition." |
| _____ Signature  _____ Date |
| _____ Name (Print/Type)  _____ Title<br>_____ Activity/Unit  _____ Grade/Rank<br>_____ Phone Number |

(A) After allocation and approval, if the customer no longer wants or needs the property, the customer is required to notify the SASP, GSA, and the DLA Disposition Services site.

(B) GSA may reallocate the property if there is an existing request by another potential recipient. If the property is reallocated, cancellation of the existing request will be transmitted by GSA and another transmission to DLA Disposition Services is required.

(C) If the property is not reallocated, GSA must cancel the existing MRO.

(10) *Customer removal of ordered property*. (i) All transportation arrangements and costs are the responsibility of the SASP or designated donee. The DLA Disposition Services site may not act as agent packager or shipper. Until release, each holding activity is responsible for the care and handling of its property.

(ii) The SASP or designated donee will only pay for direct costs of care and handling incurred in the actual packing, crating, preparation for shipment, and loading. The price will be the actual or carefully estimated costs incurred by DoD traffic management activities for labor, material, or services used in donating the property.

(iii) Advance payment for care and handling costs will normally be required; however, State and local governmental units may be exempted from this requirement and authorized to make payment within 60 days from date of receipt of property. Advance payment may be required in any case where prompt payment after billing has been unsatisfactory.

(iv) Donees must schedule removal of property with the DLA Disposition Services site. Upon arrival, the individual must provide identification and must sign the DLA Disposition Services Visitor or Vehicle Register, indicating the purpose of the visit.

(v) The individual must provide an approved SF123 as authorization for removal.

(vi) DLA Disposition Services sites will release surplus property to authorized donees upon receipt of a properly completed and approved SF 123 or MRO.

(d) *Special donations (gifts), loans, and exchanges outside the FMR*—(1) *Compliance*. The DoD Components:

(i) Comply with the specific governing statute for the type of property and ensure the limitations of the governing statute are observed. In accordance with 10 U.S.C. 2572 and DoD issuances, the Secretary of a Military Department or the Secretary of the Treasury is permitted to donate, lend, or exchange, as applicable, without expense to the United States, books, manuscripts, works of art, historical artifacts, drawings, plans, models and condemned or obsolete combat materiel that are not needed by the Military Services.

(ii) Establish supplementary procedures governing loans, donations, and exchanges.

(iii) May donate, loan or exchange items as identified in paragraph (d)(1) of this section, if the special donation, loan, or exchange action occurs prior to transfer to DLA Disposition Services for disposition. It is not authorized after property has been officially declared excess and transferred to DLA Disposition Services.

(iv) May exchange assets for:

(A) Similar items;

(B) Conservation supplies, equipment, facilities, or systems;

(C) Search, salvage, or transportation services;

(D) Restoration, conservation or preservation services; or

(E) Educational programs when it directly benefits the historical collection of the DoD Components.

(v) May not make an exchange unless the monetary value of the property transferred or services provided to the United States under the exchange is not less than the value of the property transferred by the United States. The Secretary concerned may waive this limitation in the case of an exchange for property in which the Secretary determines the item to be received by the United States will significantly enhance the historical collection of the property administered by the Secretary.

(vi) Will not incur costs in connection with loans or gifts. However, the DoD Component concerned may, without cost to the recipient, DEMIL, prepare, and transport within the CONUS items authorized for donation to a recognized war veterans' association in accordance with DoD 4160.28–M Volumes 1–3 if the DoD Component determines this can be accomplished as a training mission, without additional expenditures for the unit involved.

(vii) Will maintain official records of all DoD materiel loaned including physical inventory, record reconciliation, and management reporting specified in the inventory management procedures in DoD Manual 4140.01, ''DoD Supply Chain Materiel Management Procedures'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/414001m/414001m_vol01.pdf*). Verify yearly that property is being used for approved purposes, is being maintained and protected according to the agreement, and that the recipient organization still desires to retain the property. The DoD Component may perform this annual check by any method that provides reasonable assurance the recipient organization is fulfilling its responsibilities. DoD Components may request assistance from qualified DoD organizations.

(2) *Organizations authorized to receive loans and donations*. (i) A municipal corporation.

(ii) A soldiers' monument association.

(iii) An incorporated museum or memorial that is operated by a historical society, a historical institution of a State or foreign nation, or a nonprofit military aviation heritage foundation or association incorporated in a State.

(iv) An incorporated museum that is operated and maintained for educational purposes only and the charter of which denies it the right to operate for profit.

(v) A post of the Veterans of Foreign Wars of the United States or the American Legion or a unit of any other recognized war veterans' association.

(vi) A local or national unit of any war veterans' association of a foreign

nation recognized by the national government of that nation (or by the government of one of the principal political subdivisions of that nation).

(vii) A post of the Sons of Veterans Reserve.

(3) *Requirements for veterans' organizations.* To qualify, veterans' organizations must be:

(i) Sponsored by a Military Department.

(ii) Evaluated based on its size, purpose, the type and scope of services it renders to veterans, and composed of honorably discharged American soldiers, sailors, airmen, marines, or coastguardsmen.

(4) *Requirements for museums.* To qualify, museums must:

(i) Meet State (or equivalent foreign national) criteria for not-for-profit museums.

(ii) Have an existing facility suitable for the display and protection of the type of property desired for loan or donation. If the requester has a facility under construction that will meet those requirements, interim eligibility may be granted.

(iii) Have a professional staff that can care for and accept responsibility for the loaned or donated property.

(iv) Have assets that, in the determination of the loaning or donating service, indicate the capability of the loaner and the borrower to provide the required care and security of historical property.

(5) *Eligibility determination.* The DoD Components will determine the eligibility of organizations for gifts and loans. The DoD Components may establish eligibility requirements dependent upon the unique nature of the specific historical item; however, the minimum requirements are:

(i) Limit donations, loans, or exchanges to property stipulated by 10 U.S.C. 2557, 2572, 2576, and 2576a. Except for relevant records for aircraft and associated engines and equipment (unless authorized under DoD 4160.28–M Volumes 1–3 and DoD Instruction 2030.08), government records may not be released.

(ii) Approve the loan, donation, or exchange; process requests for variations from the original agreement; and maintain official records of all donation, loan, and exchange agreements. The approval of exchanges may be delegated at the discretion of the Secretary concerned, and is encouraged for low-dollar transactions.

(iii) Establish controls for determining compliance by the recipient organization with the display, security, and usage criteria provided in the loan and donation agreements.

(iv) Provide disposition instructions to the recipient organization when loaned or donated property is no longer needed or authorized for continued use.

(v) Establish conditions for making donations, loans, or exchanges.

(vi) Establish a process (*e.g.*, a council or other means suitable to the loan and donation organization) to review and approve proposed exchanges incorporating legal and financial review independent of the museum involved. Personnel directly involved in museum operations will not act as sole approving authority for any exchange transactions.

(vii) Ensure that correspondence regarding loans, donations, or exchanges is signed by individuals authorized to obligate their organization.

(viii) Ensure appropriate DEMIL of the property as prescribed in DoD 4160.28–M Volumes 1–3 before release. If standard DEMIL criteria cannot be applied without destroying the display value, specific DEMIL actions (such as aircraft structural cuts) may be delayed. The recipient organization must agree to assume responsibility for the property DEMIL action, at no cost to the Government, when the item is no longer desired or authorized for display purposes. The recipient organization may also return the property to the Government via the donating Military Department for full DEMIL action.

(ix) Loan, donate, or exchange property on an ''as is, where is'' basis and ensure that the recipient organization agrees to pay all costs incident to preparation, handling, and movement of the property. Military Department contact points for the loan, donation, or exchange of property are at Table 5 of this section.

(A) Property may not be repaired, modified, or changed at government expense over and above normal preparation for handling and movement,

even if reimbursement is offered for services rendered.

(B) Property may not be moved at government expense to a recipient's location or to another location closer to the recipient to prevent or lessen the recipient organization's processing or transportation costs.

(C) No charge will be made for the property itself, but all physical processing of the property for the loan or donation will be the responsibility of the recipient organization. The recipient organization will pay all applicable charges before release of the property.

TABLE 5—MILITARY DEPARTMENT CONTACT POINTS FOR LOAN, DONATION, OR EXCHANGE OF PROPERTY

ARMY: (all commodities)
Commander
U.S. Army Tank Automotive and Armament Command
ATTN: AMSTA–IM–OER
Warren, MI 48397–5000
Email: *donations@cc.tacom.mil*
Telephone: 1–800–325–2920 extension 48469

NAVY:

Navy and Marine Corps aircraft, air launched missiles, aircraft engines, and aviation related property:
Commanding Officer
NAVSUP Weapon Systems Support
ATTN: Code-03432–06
700 Robbins Ave.
Philadelphia, PA 19111–5098

Obsolete or condemned Navy vessels for donation as memorials; Navy major caliber guns and ordnance; and shipboard materiel:
Commander
ATTN: NAVSEA–OOD, NC
Naval Sea Systems Command
2531 Jefferson Davis Highway
Arlington, VA 22242–5160

AIR FORCE:

Air Force aircraft, missiles or any other items authorized for donation for display purposes to a museum recipient:
NMUSAF/MUX
1100 Spaatz St.
Wright-Patterson AFB, OH 45433–7102

The USAF Museum operates a loan program only. Donations are not offered.

Any other Air Force item authorized for donation for display purposes (to recipients other than a museum):
HQ AFMC/A4RM
4375 Chidlaw Rd., Building 262
Wright-Patterson AFB, OH 45433–5006

MARINE CORPS:

Marine Corps assault amphibian vehicles (to recipients other than a museum):
Commandant of the Marine Corps
ATTN: LPC–2
HQ U.S. Marine Corps
3000 Marine Corps, Pentagon, RM 2E211
Washington, DC 20350

Marine Corps historical property (all other inquiries):
Commandant of the Marine Corps
ATTN: History and Museum Division (HD)
Marine Corps Historical Center
1254 Charles Morris Street SE
Washington Navy Yard, DC 20374–5040

U.S. Coast Guard

For U. S. Coast Guard historical assets contact COMDT (CG–09224) at mail stop 7031:
Commandant (CG–09224)
U. S. Coast Guard Headquarters, Douglas A. Munro Building
2703 Martin Luther King Jr. Ave. South East, Stop 7031
Washington, DC 20593–7031

For all other assets contact Commandant (CG–844) at mail stop 7618:
Commandant (CG–844)
U. S. Coast Guard Headquarters, Douglas A. Munro Building

TABLE 5—MILITARY DEPARTMENT CONTACT POINTS FOR LOAN, DONATION, OR EXCHANGE OF PROPERTY—Continued

| |
|---|
| 2703 Martin Luther King Jr. Avenue South East, Stop 7618<br>Washington, DC 20593–7618 |

(x) Record assets on property accountability records before they are loaned, donated, or exchanged.

(xi) Coordinate with the DoS before a donation, loan, or exchange is formalized with a foreign museum.

(xii) Ensure an official authorized to obligate the organization signs a certificate of assurance, as shown at Figure 3 of this section.

Figure 3. Sample Certificate of Assurance

For Military Department Use

hereinafter called "Applicant-Recipient" (name of applicant)

Hereby agrees that in compliance with section 2001a of Title 42, USC, section I of Title 40, U.S.C., as amended, and section 701 *et seq.* of Title 29, U.S.C., as amended, no person will, on the ground of race, color, national origin, sex, or handicap, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the Applicant-Recipient receives a donation from the _____ _____ and applicable Military Department.

Hereby

Gives assurance that it will immediately take any measures necessary to effectuate this agreement.

This agreement will continue in effect during the time the Applicant-Recipient retains ownership, possession, or control of the donated property. Further, the Applicant-Recipient agrees and assures that its successors or assigns will be required to give an assurance similar to this assurance as a condition precedent to acquiring any right, title, or interest in and to any of the property donated herein.

This assurance is given in consideration of and for the purpose of obtaining donation of federally owned property pursuant to [cite applicable statute] consisting of the following items:

[Quantity and description of donated property. Use additional sheet if space is not adequate]

The Applicant-Recipient recognizes and agrees that such Federal donation will be made in reliance on the representations and agreements made in this assurance, and that the United States will have the right to seek judicial enforcement of this assurance.

This assurance is binding on the Applicant-Recipient, its successors, transferees, and assignees, and the person or persons whose signature appears below are authorized to sign this assurance on behalf of the Applicant-Recipient.

By

President, Chairman of the Board, or comparable authorized official
Address:

(xiii) Ensure proper documentation is finalized in accordance with DoD 4160.28–M Volumes 1–3 before the release of any property to an authorized recipient.

(A) Use the standard loan agreement in the format prescribed by Figure 4 of

this section or a similar document providing the same data for accomplishing property loans.

Figure 4. Sample Standard Loan Agreement

For Military Department Use

By this agreement, made as of [insert date] between the United States of America, hereinafter called "the Government," represented by [insert name and title of government representative] and _____, called "the Borrower" incorporated and operating under the laws of the State of _____ and located at _____; and, pursuant to section 2572 of Title 10, U.S.C., the government hereby loans to _____ the following property: _____for the period commencing [insert date] and ending [insert date] with an option for annual renewal.

The Borrower has applied in writing by letter dated [insert date]for the loan of the above property, and hereby agrees to accept it on an "as is where is" basis, to be responsible for all arrangements and to assume and pay all costs, charges and expenses incident to the loan of this property, including the cost of preparation for transportation from _____ to _____, of disassembly, packing, crating, handling, transportation, and other actions incidental to the movement of the loaned property to the Borrower's location, [location of property (destination)].

The Borrower will obtain no interest in the loaned property by reason of this agreement and title will remain in the lender at all times.

The Borrower agrees to use the loaned property in a careful and prudent manner, not, without prior permission of the government, to modify it in any way which would alter the original form, design, or the historical significance of said property, to perform routine maintenance so as not reflect discredit on the government, and to display and protect it according to the instructions set forth in Table [#], incorporated herewith and made part of the loan agreement.

The Borrower agrees to accept physical custody of the property within [period of time], after execution of this agreement, to receipt to the government for said property on assuming custody of it to place it on exhibit within [period of time] , and to report annually to the Government on the condition and location of the property.

The Borrower agrees not to use the loaned property as security for any loan, not to sell, lease, rent, lend, or exchange the property for monetary gain or otherwise under any circumstances without the prior written approval of the lender.

The Borrower agrees to indemnify, hold harmless, and defend the Government from and against all claims, demands, action, liabilities, judgments, costs, and attorney's fees, arising out of claims on account of, or in any manner predicated upon personal injury,

death, or property damage caused by or resulting from possession or use of the loaned property.

The Borrower agrees to allow the authorized Department of Defense representatives access to the Borrower's records and facilities to assure accuracy of information provided by the Borrower and compliance with the terms of this loan agreement.

The Borrower agrees to return said property to the government on termination of this loan agreement or earlier, if it is determined that the property is not required, at no expense to the government.

The failure of the Borrower to observe any of the conditions set forth in the loan agreement and the Table (s) thereto will be sufficient cause of the Government to repossess the loaned property. Repossession of all or any part of the loaned property by the government will be made at no cost or expense to the government; the Borrower will defray all maintenance, freight, storage, crating, handling, transportation, and other charges attributable to such repossession.

The [insert "donee" or "borrower" as applicable depending upon the document type, i.e., conditional deed or gift of standard loan agreement, respectively] certifies they have read, understand and acknowledge that concealing a material fact and /or making a fraudulent statement in dealing with the Federal government may constitute a violation of section 1001 of Title 18, U.S.C.

Executed on behalf of the government this _____day of_____, 20_____,
at_____.

United States of America:

By

Title

Agency:

Address:
The Borrower, through its authorized representative hereby accepts delivery of the loaned property subject to the terms and conditions contained in the loan agreement set forth above.

Executed on behalf of the Borrower, this_____day of_____, 20_____,

| |
|---|
| At<br><br>Name of Borrower Organization<br><br>By<br><br>Title<br><br>Address: |

(B) Accomplish property donations made under this authority by use of the conditional deed of gift agreement in the format prescribed in Figure 5 of this section or a similar document providing the same data.

Figure 5. Sample Conditional Deed of Gift

For Military Department Use

This agreement made as of_____ between the UNITED STATES OF AMERICA (hereinafter called the "government" or the "donor") represented by_____(hereinafter called "the donee" operating under the laws of the State of_____ located at_____.

WITNESS:

The Secretary is authorized by section 2572 of Title 10 U.S.C. to transfer by gift or loan, without expense to the United States and on terms prescribed by the Secretary, any obsolete combat property not needed by the Department. The donee is eligible under the terms of section 2572 of Title 10 U.S.C.

The donee has applied in writing by letter dated [insert date] for a _____ and has agreed to assume and pay all costs, charges, and expenses incident to the donation including the cost of any required DEMIL and of preparation for transportation to_____.

The Government agrees (a) to release [item name] (b) to notify the donee of the available date sufficiently in advance thereof to enable the donee to make necessary arrangements for acceptance.

The donee agrees to accept it on an "as is where is" basis and be responsible for all arrangements and costs involved in its movement. The donee will, at no cost to the Government, arrange and pay for disassembly, packing, crating, handling, transportation, and other actions as necessary for the movement of the donated property to the donee's location.

The donee will use the donated property in a careful and prudent manner, and will maintain it and make such repairs to it as are necessary to keep it in a clean and safe condition so that its appearance and use will not discredit the donee. Display instructions are set forth in Table [#] and are incorporated and made part of this conditional deed of gift. The donee also agrees to not use the donated property as security for any loan, nor sell, lease, rent, exchange the property for monetary gain or otherwise, under any circumstances without the prior approval of the donor.

The donee will indemnify, hold harmless, and defend the government from and against all claims, demands, action, liabilities, judgments, costs, and attorney's fees, arising out of claimed on account of, or in any manner predicated upon personal injury, death, or property damage caused by or resulting from possession or use of the donated property.

The donee agrees to allow the authorized representatives of the government access to the donee's records and facilities to assure accuracy of information provided the donor and compliance with the terms of this conditional deed of gift.

Title is transferred on special condition that the [item name] will not be transferred or otherwise disposed of (including re-donation) without the written consent of the donor. If disposition by any method (including re-donation) without consent of the donor is attempted, title to the property is subject to forfeiture and the government may require return of the property by the donee or may repossess the property from whomever may have possession thereof and the donee will bear all expense of return and repossession as well as all storage costs.

Upon the failure of the donee to observe any of the conditions set forth in the conditional deed of gift and Table thereto, title to the donated property will revert to and vest in the donor. Repossession of all or any part of the donated property by the donor will be at no cost or expense to the donor, and the donee will pay all maintenance freight, transportation, and other charges attributable to such possession.

When the _____is no longer needed by the donee, disposition instructions will be requested from the donor. All costs of disposition will be borne by the donee.

The [insert "donee" or "borrower" as applicable depending upon the document type, i.e., conditional deed or gift of standard loan agreement, respectively] certifies they have read, understand and acknowledge that concealing a material fact or making a fraudulent statement in dealing with the Federal Government may constitute a violation of section 1001 of Title 18 U.S.C.

Subject to the conditions set forth above, title to the property will vest in the donee upon receipt of written acceptance hereof the above.

Executed on behalf of the government this_____day of_____, 20____, at_____.

United States of America

By

Title:
Agency:
Address:

The donee, through its authorized representative hereby accepts title to and delivery of the donated property subject to the conditions in the deed of gift set forth above.
Executed on behalf of the donee, this_____day of_____, 20_____, at _____.

| |
|---|
| Name of donee organization<br><br>By<br><br>Title:<br>Address |

(C) Accomplish property exchanges made under this authority by use of the exchange agreement in the format prescribed in Figure 6 of this section or a similar document providing the same data. Items may not be exchanged until a determination is made that the item is not needed for operational requirements by another Military Department. If the council or similar staff review process considers it unlikely the item in question will be needed by another Military Department, screening may be omitted. A museum of one Military Department may not acquire for the purpose of exchanging historical items being screened by another Military Department museum.

Figure 6. Sample Exchange Agreement

For Military Department Use

It is mutually agreed by and between the [Service Name] Museum, [insert address] (hereinafter "Museum") and [insert name] Museum, [insert address] (hereinafter "Exchanger"), as follows:

**Items to be exchanged by the museum**: The Museum will provide to the Exchanger the following items:

[insert description, stock number, serial number, etc]

**Items to be exchanged**:

[insert description, stock number, serial number, etc]

**Authority**: This exchange is made under the authority of section 2572 of Title 10 U.S.C.

**Delivery**:

The items to be received by or services provided to the Museum from the Exchanger will be delivered or provided at the Exchanger's sole expense to [insert location].
They will be delivered or provided in one shipment all at the same time unless the Museum agrees otherwise in writing. They will be delivered or provided within 90 days of the date this agreement is signed. Title to the items to be received by the Museum will pass to the Museum at the time and point of delivery only upon written acceptance by an authorized representative of the Museum.

The items to be exchanged by the Museum to the Exchanger are currently located at [insert location address]. They are provided on an "as is, where is, with all faults" basis and there are no warranties expressed or implied. The Museum specifically provides no warranty or other assurance as to the condition or serviceability of the property. All items offered in exchange by the Museum are subject to a radiation survey and the removal of radioactive components as well as equipment DEMIL prior to release.

They will not be released to the Exchanger until acceptance by the Museum according to the above paragraph.

Condition of items provided by the museum: The items to be exchanged by the Museum are offered to the Exchanger as is, where is, with all faults. The Museum provides no warranty or other assurance as to the condition or serviceability of the property.

Condition of items provided by exchange: The items to be exchanged are certified to be original and authentic by the exchanger, to be in good condition with no significant damage or deterioration, or other hidden faults which would jeopardize their long-term preservation or their use by the Museum for display or study.

Consummation of agreement: This agreement will be considered consummated upon delivery and acceptance by both parties of all items to be provided.

Release of liability: In consideration of this mutual exchange, the Exchanger agrees that it will hold the United States, its agencies, officers, employees, agents, and contractors harmless, indemnify, and defend them against any and all suits, actions, and claims of any kind whatsoever, including attorney fees, which may arise from or be the result of this exchange or the items.

Warranty of title: In the case of the items provided by the Exchanger, the Exchanger hereby warrants that it has title to the items and that there are no liens or encumbrances whatever against the said items. The Exchanger will provide to the Museum documentary proof of ownership in a manner and of a fashion satisfactory to the Director of the Museum prior to delivery.

Notices: All notices between the parties will be in writing and sent to the following addresses:

For the Museum: [insert Museum name and address]

For the Exchanger: [insert Museum name and address]

- The Exchanger will neither assign nor otherwise transfer this Agreement without the written prior agreement of the Director of the Museum.

In witness whereof, the parties or their authorized representatives have hereunto signed their names on the date indicated.

For the U.S. [insert Service museum name]

[insert signature, typed name]

Name and title date

Witnessed by

Name

Date

For the exchanger:

[insert signature, typed name]

Witnessed by

(xiv) Avoid stockpiling condemned or obsolete combat materiel in anticipation of future exchanges. Items that cannot be exchanged within a 2-year period should be processed for disposal.

(xv) Notify exchange recipients that the Department of Defense cannot certify aircraft, components, or parts as airworthy. Aircraft, components, or parts must be certified by the FAA as airworthy before being returned to flight usage. If available, logbooks and maintenance records for FSCAP must accompany the aircraft and FSCAP. If such documentation is not available, or if the aircraft or FSCAP have been crash-damaged or similarly compromised, the aircraft, components, or parts may not be exchanged, unless the FSCAP parts have been removed from the aircraft or component prior to the exchange. Waivers to this FSCAP documentation requirement may be considered on a case-by-case basis and are restricted to ''display only'' property (not parts); waivers will apply only to the exchange of the whole aircraft, aircraft engines, and aircraft components. The exchange agreement must explicitly cite the lack of documentation.

(xvi) Consider any adverse market impact that may result from the exchange of certain items. The Military Department should consult with outside organizations for market impact advice, as appropriate.

(xvii) Elect to donate property without conditions; for example, when the administrative costs to the Military Department to perform yearly checks would exceed the value of the property. Unconditional donations are restricted to books, manuscripts, works of art, drawings, plans and models, and historical artifacts valued at less than $10,000 that do not require DEMIL (see Figure 7 of this section).

Figure 7. Sample Unconditional Deed of Gift

For Military Department Use

**This agreement** is made between the United States of America (hereinafter called the "government" or the "donor") and the _____ (hereinafter called "the donee") operating under the laws of the State of _____located _____.

1. The government is authorized by section 2572 of Title 10, U.S.C. to transfer by gift or loan, not to exceed $10,000 of section 2572 of Title 10, U.S.C., without expense to the United States and on terms prescribed by the Secretary, any documents and historical artifacts, excluding any condemned and obsolete combat materiel not needed by the Department. The donee is eligible under the terms of section 2572 of Title 10, U.S.C.

2. The donee has applied in writing by letter dated [insert date] and has agreed to assume and pay all costs, charges, and expenses incident to the donation including the cost of any required demilitarization and of preparation for transportation.

3. The government agrees to release [insert item description] and to notify the donee of the available date sufficiently in advance thereof to enable the donee to make necessary arrangements for acceptance.

4. By this deed of gift the donor transfers title, conveys and assigns free and clear of all encumbrances, to the donee.

5. The donee agrees to accept it on an "as is where is" basis and be responsible for all arrangements and costs involved in its removal. The donee will, at no cost to the donor, arrange and pay for disassembly, packing, crating, handling, transportation, and other actions as necessary for the removal of the donated property to the donee's location.

6. The donor certifies that the donation is unsafe for operational use and is only suitable for static display. Any use of the donated property is fully and completely the responsibility of the donee.

7. The donee will indemnify, save harmless, and defend the donor from and against all claims, demands, action, liabilities, judgments, costs, and attorney's fees, arising out of claims on account of, or in any manner predicated upon personal injury, death, or property damage caused by or resulting from possession or use of the donated property.

8. Subject to the conditions set forth above, title to the property will vest in the donee upon receipt of written acceptance hereof from the donee.

Executed on behalf of the donor, this _____day of _____, 20_____.

At

United States of America

By

Title:

Agency

Address

The donee, through its authorized representative hereby accepts title to and delivery of the donated property subject to the conditions in the deed of gift set forth above.

Executed on behalf of the donee, this _____ day of _____, 20____, _____.

At

Name of donee organization

By

Title

Address State Agencies/Surplus Property. This will list the State Agencies in alphabetical order with contact information.

(6) *Military departments loans of bedding*. Consistent with 10 U.S.C. 2557, the Secretary of a Military Department may provide bedding in support of homeless shelters that are operated by entities other than the Department of Defense. Bedding may be provided to the extent that the Secretary determines the donation will not interfere with military requirements.

(7) *Army loans to veterans' organizations*. (i) The Department of the Army, in accordance with 10 U.S.C. 4683, may loan to recognized veterans' organizations (or local units of national veterans' organizations recognized by the U.S. Department of Veterans Affairs) obsolete or condemned rifles or cartridge belts for use by that unit for ceremonial purposes. Rifle loans to any one post, local unit, or municipality are limited by statute to not more than 10 rifles.

(ii) The Secretary of the Army, in accordance with 10 U.S.C. 4683 and Service-unique regulations prescribed by the Secretary, may conditionally lend or donate excess M–1 rifles (not more than 15), slings, and cartridge belts to any eligible organization for use by that organization for funeral ceremonies of a member or former member of the Military Services, and for other ceremonial purposes. If the loaned or donated properties under paragraph (d)(8)(i) of this section are to be used by the eligible organizations for funeral ceremonies of a member or former member of the Military Services, the Secretary may issue and deliver the rifles, together with the necessary accoutrements and blank ammunition, without charge.

(8) *Navy loans and donations*. (i) The Secretary of the Navy, in accordance with 10 U.S.C. 7545, may donate or loan

captured, condemned, or obsolete ordnance materiel, books, manuscripts, works of art, drawings, plans, models, trophies and flags, and other condemned or obsolete materiel, as well as materiel of historical interest. The Secretary of the Navy may donate this material to any State, territory, commonwealth, or possession of the United States and political subdivision or municipal corporation thereof, the District of Columbia, libraries, historical societies, and educational institutions whose graduates or students were in World War I or World War II.

(A) Loans and donations made under this authority will be subject to the same guidelines for donations in accordance with 10 U.S.C. 2572.

(B) If materiel to be loaned or donated is of historic interest, the application will be forwarded through the Navy Curator.

(C) Donations made under this authority must first be referred to the Congress.

(D) Donations and loans made under 10 U.S.C. 7545 will be made with a conditional deed of gift (see Figure 5 of this section for sample wording).

(ii) In accordance with 10 U.S.C. 7306, the Secretary of the Navy, with approval of Congress, may donate obsolete, condemned, or captured Navy ships, boats, and small landing craft to the States, territories, or possessions of the United States, and political subdivisions or municipal corporations thereof, the District of Columbia, or to associations or corporations whose charter or articles of agreement denies them the right to operate for profit. The Navy restricts the use of donated vessels for use in static display purposes only (*i.e.,* as memorials or museums).

(A) Applications for ships, boats, and small landing craft will be submitted to the Commander, Naval Sea Systems Command (NSEA 00DG), 2531 Jefferson Davis Highway, Arlington, VA 22240–5160.

(B) Before submission of an application, the applicant must locate obsolete, condemned, or captured Navy ships, boats, and small landing craft which are available for transfer.

(iii) Each application will contain:

(A) Type of vessel desired, or in the case of combatant vessels, the official Navy identification of the vessel desired.

(B) Statement of the proposed use to be made of the vessel and where it will be located.

(C) Statement describing and confirming availability of a berthing site and the facilities and personnel to maintain the vessel.

(D) Statement that the applicant agrees to maintain the vessel, at its own expense, in a condition satisfactory to the Department of the Navy, in accordance with instructions that the Department may issue, and that no expense will result to the United States as a consequence of such terms and conditions prescribed by the Department of the Navy.

(E) Statement that the applicant agrees to take delivery of the vessel ''as is, where is'' at its berthing site and to pay all charges incident to such delivery, including without limitation preparation of the vessel for removal or tow, towing, insurance, and berthing or other installation at the applicant's site.

(F) Statement of financial resources currently available to the applicant to pay the costs required to be assumed by a donee. The statement should include a summary of sources, annual income, and annual expenditures exclusive of the estimated costs attributable to the requested vessel to permit an evaluation of funds available for upkeep of the vessel. In the event the applicant will rely on commitments of donated services and materials for maintenance and use of the vessel, such commitments must be described in detail.

(G) Statement that the applicant agrees that it will return the vessel, if and when requested to do so by the Department of the Navy, during a national emergency, and will not, without the written consent of the Department, use the vessel other than as stated in the application or destroy, transfer, or otherwise dispose of the vessel.

(H) If the applicant asserts it is a corporation or association whose charter or articles of agreement denies it the

right to operate for profit, their application must also contain a copy of the organization's bylaws and either:

(*1*) A properly authenticated copy of the charter.

(*2*) Certificate of incorporation.

(*3*) Articles of agreement made either by:

(*i*) The Secretary of State or other appropriate officials of the State under the laws where the applicant is incorporated.

(*ii*) Organized or other appropriate public official having custody of such charter, certificate or articles.

(I) If the applicant is not incorporated, their application must also include the citation of the law and a certified copy of the association's charter stating it is empowered to hold property and to be bound by the acts of the proposed signatories to the donation agreement.

(J) If the applicant is not a State, territory, or possession of the United States, a political subdivision or municipal corporation thereof, or the District of Columbia, the application must also include a copy of a determination by the Internal Revenue Service that the applicant is exempt from tax under the Internal Revenue Code.

(K) A notarized copy of the resolution or other action of its governing board or membership authorizing the person signing the application to represent the organization and to sign on its behalf to acquire a vessel.

(L) A signed copy of the assurance of compliance.

(M) A statement that the vessel will be used as a static display only as a memorial or museum and no system aboard the vessel will be activated or permitted to be activated for the purpose of navigation or movement under its own power.

(N) A statement that the galley will not be activated for serving meals.

(iv) Upon receipt, the Navy will determine the eligibility of the applicant to receive a vessel by donation. If eligible, the formal application will be processed and notice of intention to donate presented to the Congress as required by 10 U.S.C. 7306, provided the applicant has presented evidence satisfactory to the government that the applicant has adequate financial means to accomplish all of the obligations required under a donation contract. The Navy will have authority to donate only after the application has been before the Congress for a period of 60 days of continuous session without adverse action by the Congress in accordance with 10 U.S.C. 7306.

(v) All vessels, boats, and service craft, donated in accordance with 10 U.S.C. 7306, will be used as static displays only for use as memorials and cannot be activated for the purpose of navigation or movement under its own power. Donations of vessels under any other authority of this section are subject to certain inspection and certification requirements. Applicants for vessels or service craft will be advised in writing by the office taking action on the applications that, should their request be approved and before operation of the vessel or service craft, one of the following stipulations will apply:

(A) The donee agrees that if the vessel is 65 feet in length or less, it may not be operated without a valid certificate of inspection issued by the U.S. Coast Guard, while carrying more than six passengers, as defined in 46 U.S.C. 2101(21)(B).

(B) The donee agrees that if the vessel is more than 65 feet in length, it may not be operated without a valid certificate of inspection issued by the U.S. Coast Guard.

(vi) In accordance with 10 U.S.C. 7546 and subject to the approval of the Navy Museum Curator, the nameplate or any small article of a negligible or sentimental value from a ship may be loaned or donated to any individual who sponsored that ship provided that such loan or donation will be at no expense to the Navy.

(9) *Donation of excess chapel property*. In accordance with 10 U.S.C. 2580, the Secretary of a Military Department may donate excess personal property to religious organizations (as described in 26 U.S.C. 501), for the purposes of assisting such organizations in restoring or replacing property of the organization that has been damaged or destroyed as a result of arson or terrorism. The property authorized for donation will be limited to ecclesiastical equipment, furnishings and supplies

that fall within FSC 9925, and furniture.

(10) *Disposition after use of special donations (gifts), loans, and exchanges.* (i) The requirements of the recipient organization are:

(A) For materiel no longer desired or authorized for continued use by a recipient organization, the Military Department will advise the recipient organization if it wants to repossess the property. Regardless of the determination made, care will be taken to ensure the recipient organization fulfills its responsibility to finalize the disposition action at no cost to the government. Repossession of the property will be governed by the property's historical significance, its potential for use in behalf of other requests, or its estimated sale value, if sold by the Department of Defense. Repossession of property will be documented; copies of the documentation will be retained by the donee and lender.

(B) Based on type of property, its location, etc., it is not always feasible to require the physical movement of the property to the nearest DLA Disposition Services site. In these cases, the owning Military Department may elect to work with DLA Disposition Services for receipt and sale in-place, when economically feasible.

(ii) Return of property donated to the Navy is subject to the approval of the Curator for the Department of the Navy. Any article, materiel, or equipment, including silver service, loaned or donated to the naval service by any State, group, or organization may be returned to the lender or donee in accordance with 10 U.S.C. 7546. When the owner cannot be located after a reasonable search, or if, after being offered the property, the owner states in writing that the return of the property is not desired, the property will be disposed of in the same manner as other surplus property.

(e) *Disaster assistance for States.* 42 U.S.C. chapter 68 allows for disaster assistance to States.

(1) 42 U.S.C. chapter 68, also known and referred to in this rule as ''The Stafford Act'' authorizes federal assistance to States, local governments, and relief organizations. Upon declaration by the President of an emergency or a major disaster, under, the Stafford Act, the State receiving the declaration is notified immediately and a notice of the declaration is published in the FEDERAL REGISTER by the Federal Emergency Management Agency (FEMA).

(2) Excess personal property may be loaned to State and local governments for use or distribution for emergency or major disaster assistance purposes. Such uses may include the restoration of public facilities that have been damaged as well as the essential rehabilitation of individuals in need of major disaster assistance. The availability of Federal assistance under the Stafford Act is subject to the time periods prescribed in FEMA regulations.

(f) *Academic institutions and non-profit organizations.* Educational partnership (or other) agreements may be established for the loan or donation of property.

(1) Under an educational partnership (or other) agreement, and consistent with 10 U.S.C. 2194, the Secretary of Defense authorized the director of each defense laboratory to enter into one or more educational partnership agreements with U.S. educational institutions for the purpose of encouraging and enhancing study in scientific disciplines at all levels of education. The educational institutions will be local educational agencies, colleges, universities, and any other nonprofit institutions that are dedicated to improving science, mathematics, and engineering education. The point of contact is the DoD Technology Transfer Program Manager, Suite 1401 Two Skyline Place, 5203 Leesburg Pike, Falls Church, VA 22041–3466.

(2) In accordance with 15 U.S.C. 3710(i), the director of a DoD laboratory may directly transfer (donate) laboratory (*e.g.*, scientific, research) equipment that is excess to the needs of that laboratory to public and private schools and nonprofit institutions in the U.S. zone of interior (ZI).

(3) Determinations of property suitable for donation will be made by the head of the laboratory. Property will be screened within the DoD laboratory and scientific community prior to release.

(4) Laboratories should be aware that some property might be environmentally regulated and, if exported, may require a U.S. DoS or Commerce export license, including certain circumstances where exports to foreign parties take place in the U.S. Moreover, some property may require DEMIL. Standard eligibility criteria must be ensured and a screening process for determining trade and security control risk are mandatory.

### § 273.9 Through-life traceability of uniquely identified items.

(a) *Authority and scope*—(1) *Property accountability*. The accountability of property will be enabled by IUID for identification, tracking, and management in accordance with DoD Instruction 5000.64 and DoD Directive 8320.03, ''Unique Identification (UID) Standards for a Net-Centric Department of Defense'' (*http://www.acq.osd.mil/dpap/UID/*(*attachments/832003p1–20070420.pdf*). DoD Component heads post changes to the property records for all transactions as required (*e.g.*, loan, loss, damage, disposal, inventory adjustments, item modification, transfer, sale) pursuant to DoD Instruction 5000.64.

(2) *IUID*. IUID provides a standards-based approach to establish a UII encoded in a machine-readable two-dimensional data matrix barcode that serves to distinguish a discrete item from other items. Qualifying items as defined by DoD Instruction 8320.04, ''Item Unique Identification (IUID) Standards for Tangible Personal Property'' (*http://www.dtic.mil/whs/*(*directives/corres/pdf/832004p.pdf*) will be marked with a two-dimensional Data Matrix barcode in accordance with Military Standard 130N, ''Department of Defense Standard Practice Identification Marking of U.S. Military Property'' (available at *http://www.acq.osd.mil/dpap/pdi/uid/docs/mil-std130N_ch1.pdf*) and registered in the IUID Registry.

(3) *Identification marking of U.S. military property*. Military Standard 130N provides the item marking criteria for development of specific marking requirements and methods for identification of items of military property produced, stocked, stored, and issued by or for the DoD. It also provides the criteria and data content for both free text and machine-readable information applications of item identification two-dimensional data matrix marking and includes the IUID requirements of DoD Instruction 8320.04.

(4) *Registration of UIIs*. Enclosure 3 of DoD Instruction 8320.04 provides procedures for the registration of UIIs in the DoD IUID Registry.

(b) *Updating the DoD IUID Registry*—(1) *Obtaining user access*. Authorized Government users may add items, update, and add events to existing items. Generating activities and DLA Disposal Services can register for access by following the instructions for the Business Partner Network Support Environment Registration System at *https://iuid.logisticsinformationservice.dla.mil/BRS*.

(2) *Life-cycle events for materiel disposition*. When an item leaves DoD inventory, its status, or life-cycle event, must be changed in the DoD IUID. A drop-down menu in the registry contains the possible life-cycle events: abandoned, consumed, destroyed by accident, destroyed by combat, donated, exchanged—repair, exchanged—sold, exchanged—warranty, expended—experimental/target, expended—normal use, leased, loaned, lost, reintroduced, retired, scrapped, sold—foreign government, sold—historic, sold—nongovernment, sold—other federal, sold—state/local, and stolen.

(3) *Updating procedures*. When an item that is marked with a UII enters the materiel disposition process through a transfer between Components or if the item leaves DoD inventory, an update to the IUID Registry is required. Procedures for performing required updates to the IUID Registry can be found in the IUID registry user manual available at *https://iuid.logisticsinformationservice.dla.mil*.

## Subpart B—Reutilization, Transfer, and Sale of Property

### § 273.10 Purpose.

(a) This part is composed of several subparts, each containing its own purpose. In accordance with the authority in DoD Directive 5134.12, ''Assistant Secretary of Defense for Logistics and

Materiel Readiness (ASD(L&MR)),'' DoD Instruction 4140.01, ''DoD Supply Chain Materiel Management Policy,'' and DoD Instruction 4160.28, ''DoD Demilitarization (DEMIL) Program,'' this part establishes the sequence of processes for the disposition of personal property of the DoD Components.

(b) This subpart:

(1) Implements policy for reutilization, transfer, excess property screening, and issue of surplus property and foreign excess personal property (FEPP), scrap released by qualified recycling programs (QRPs), and non-QRP scrap.

(2) Provides guidance for removing excess material through security assistance programs and foreign military sales (FMS).

(3) Provides detailed instructions for the sale of surplus property and FEPP, scrap released by QRPs, and non-QRP scrap.

### § 273.11 Applicability.

(a) This subpart applies to the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the Department of Defense (hereinafter referred to collectively as the ''DoD Components'').

(b) 41 CFR chapters 101 and 102, also known as the Federal Property Management Regulation and Federal Management Regulation (FPMR and FMR), and 40 U.S.C. subtitle I, also known as the Federal Property and Administrative Services, take precedence over this part if a procedural conflict exists.

### § 273.12 Definitions.

Unless otherwise noted, these terms and their definitions are for the purpose of this subpart:

*Abandonment and destruction (A/D).* A method for handling property that:

(1) Is abandoned and a diligent effort to determine the owner is unsuccessful.

(2) Is uneconomical to repair or the estimated costs of the continued care and handling of the property exceeds the estimated proceeds of sale.

(3) Has an estimated cost of disposal by A/D that is less than the net sales cost.

*Accountability.* The obligation imposed by law, lawful order, or regulation accepted by a person for keeping accurate records to ensure control of property, documents, or funds with or without possession of the property. The person who is accountable is concerned with control, while the person who has possession is responsible for custody, care, and safekeeping.

*Accountable officer.* The individual responsible for acquiring and maintaining DoD items of supply (physical property and records), approving property orders (including reutilization of excess property requests), and authenticating materiel release orders (MROs). Comparative terms are: Army Supply Support Accountable Officer, Navy Accountable Officer, Air Force Accountable Officer/Chief of Supply Materiel Support Division, Marine Corps Unit Supply Officer.

*Acquisition cost.* The amount paid for property, including transportation costs, net any trade and cash discounts. Also see standard price.

*Ammunition.* Generic term related mainly to articles of military application consisting of all kinds of bombs, grenades, rockets, mines, projectiles, and other similar devices or contrivances.

*Batchlot.* The physical grouping of individual receipts of low-dollar-value property. The physical grouping consolidates multiple disposal turn-in documents (DTIDs) under a single cover DTID. The objective of batchlotting is to reduce the time and costs related to physical handling and administrative processes required for receiving items individually. The cover DTID establishes accountability in the accountable record, and individual line items lose their identity.

*Bid.* A response to an offer to sell, that, if accepted, would bind the bidder to the terms and conditions of the contract (including the bid price).

*Bidder.* Any entity that is responding to or has responded to an offer to sell.

*Commerce control list (CCL) items (formerly known as strategic list item).* Commodities, software, and technology

subject to export controls in accordance with Export Administration Regulations (EAR) in 15 CFR parts 730 through 774. The EAR contains the CCL and is administered by the Bureau of Industry and Security, DOC.

*Component*. An item that is useful only when used in conjunction with an end item. Components are also commonly referred to as assemblies. For purposes of this definition an assembly and a component are the same. There are two types of ''components: Major components and minor components. A major component includes any assembled element which forms a portion of an end item without which the end item is inoperable. For example, for an automobile, components will include the engine, transmission, and battery. If you do not have all those items, the automobile will not function, or function as effectively. A minor component includes any assembled element of a major component. Components'' consist of parts. References in the CCL to components include both major components and minor components.

*Continental United States (CONUS)*. Territory, including the adjacent territorial waters, located within the North American continent between Canada and Mexico (comprises 48 States and the District of Columbia).

*Contractor inventory*. (1) Any property acquired by and in the possession of a contractor or subcontractor (including Government-furnished property) under a contract, terms of which vest title in the U.S. Government (USG) and in excess of the amounts needed to complete full performance under the entire contract.

(2) Any property for which the USG is obligated to or has an option to take over under any type of contract resulting from changes in the specifications or plans or termination of such contract (or subcontract) before completion of the work, for the convenience of or at the option of the USG.

*Defense Logistics Agency (DLA) Disposition Services*. The organization provides DoD with worldwide reuse, recycling and disposal solutions that focus on efficiency, cost avoidance and compliance.

*DLA Disposition Services site*. The DLA Disposition Services office that has accountability for and control over disposable property. May be managed in part by a commercial contractor. The term is applicable whether the disposal facility is on a commercial site or a Government installation and applies to both Government and contractor employees performing the disposal mission.

*Demilitarization (DEMIL) Code A*. DEMIL not required.

*DEMIL*. The act of eliminating the functional capabilities and inherent military design features from DoD personal property. Methods and degree range from removal and destruction of critical features to total destruction by cutting, crushing, shredding, melting, burning, etc. DEMIL is required to prevent property from being used for its originally intended purpose and to prevent the release of inherent design information that could be used against the United States. DEMIL applies to material in both serviceable and unserviceable condition.

*Disposal*. End-of-life tasks or actions for residual materials resulting from demilitarization or disposition operations.

*Disposition*. The process of reusing, recycling, converting, redistributing, transferring, donating, selling, demilitarizing, treating, destroying, or fulfilling other end of life tasks or actions for DoD property. Does not include real (real estate) property.

*Diversion*. Includes collection, separation, and processing of material for use as raw material in the manufacture of goods sold or distributed in commerce or the reuse of material as substitutes for goods made of virgin material.

*DoD Activity Address Code (DoDAAC)*. A 6-digit code assigned by the Defense Automatic Addressing System (DAAS) to provide a standardized address code system for identifying activities and for use in transmission of supply and logistics information that supports the movement of property.

*DoD Item Unique Identification (IUID) Registry*. The DoD data repository that receives input from both industry and Government sources and provides storage of, and access to, data that identifies and describes tangible Government personal property.

*Donation*. The act of providing surplus personal property at no charge to a qualified donation recipient, as allocated by the General Services Administration (GSA).

*Educational institution*. An approved, accredited, or licensed public or nonprofit institution or facility, entity, or organization conducting educational programs, including research for any such programs, such as a childcare center, school, college, university, school for the mentally handicapped, school for the physically handicapped, or an educational radio or television station.

*End of screening date*. The date when formal reutilization, transfer, and donation screening time expires.

*Estimated fair market value*. The selling agency's best estimate of what the property would be sold for if offered for public sale.

*Excess personal property*. (1) *Domestic excess*. Personal property that the United States and its territories and possessions, applicable to areas covered by GSA (*i.e.*, the 50 States, District of Columbia, Puerto Rico, American Samoa, Guam, Northern Mariana Islands, the Federated States of Micronesia, the Marshall Islands, Palau, and the U.S. Virgin Islands), consider excess to the needs and mission requirements of the United States.

(2) *DoD Component excess*. Items of DoD Component owned property that are not required for their needs and the discharge of their responsibilities as determined by the head of the Service or Agency.

(3) *Foreign excess personal property (FEPP)*. U.S.-owned excess personal property that is located outside the ZI. This property becomes surplus and is eligible for donation and sale as described in § 273.15(b).

*Federal civilian agency (FCA)*. Any non-defense executive agency (*e.g.* DoS, Department of Homeland Security) or any establishment in the legislative or judicial branch of the USG (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his or her direction).

*Federal condition code*. A two-digit code consisting of an alphabet supply condition code in the first digit, and a numeric or alphabet disposal condition code (DCC) in the second digit. A combination of the supply condition code and the DCC, which most accurately describes the materiel's physical condition.

(1) *Disposal condition code (DCC)*. Codes assigned by the DLA Disposition Services site based upon inspection of materiel at time of receipt.

(2) *Supply condition codes*. Codes used to classify materiel in terms of readiness for issue and use or to identify action underway to change the status of materiel. These codes are assigned by the DoD Components. DLA Disposition Services may change a supply condition code if the code was assigned improperly and the property is of a nontechnical nature. If change is not appropriate or property is of a technical nature, DLA Disposition Services sites may challenge a suspicious supply condition code.

*FEPP*. See excess personal property.

*Foreign military sales (FMS)*. A process through which eligible foreign governments and international organizations may purchase defense articles and services from the USG. A government-to-government agreement, documented in accordance with DoD 5105.38–M.

*Foreign purchased property*. Property paid for by foreign countries, but where ownership is retained by the United States.

*Generating activity (''generator'')*. The activity that declares personal property excess to its needs.

*Government furnished equipment*. An item of special tooling, special test equipment, or equipment, in the possession of, or directly acquired by, the Government and subsequently furnished to the contractor for the performance of a contract.

*Government furnished materiel*. Property provided by the U.S. Government for the purpose of being incorporated into or attached to a deliverable end item or that will be consumed or expended in performing a contract. Government-furnished materiel includes assemblies, components, parts, raw and process material, and small tools and supplies that may be consumed in normal use in performing a contract. Government-furnished materiel does not

include material provided to contractors on a cash-sale basis nor does it include military property, which are government-owned components, contractor acquired property, government furnished equipment, or major end items being repaired by commercial contractors for return to the government.

*GSAXcess®*. A totally web-enabled platform that eligible customers use to access functions of GSAXcess® for reporting, searching, and selecting property. This includes the entry site for the Federal Excess Personal Property Utilization Program and the Federal Surplus Personal Property Donation Program operated by the GSA.

*Hazardous property (HP)*. A composite term to describe DoD excess property, surplus property, and FEPP, which may be hazardous to human health, human safety, or the environment. Various Federal, State, and local safety and environmental laws regulate the use and disposal of HP. In more technical terms, HP includes property having one or more of the following characteristics:

(1) Has a flashpoint below 200 °F (93 °C) closed cup, or is subject to spontaneous heating or is subject to polymerization with release of large amounts of energy when handled, stored, and shipped without adequate control.

(2) Has a threshold limit value equal to or below 1,000 parts per million for gases and vapors, below 500 milligrams per cubic meter (mg/m$^3$) for fumes, and equal to or less than 30 million particles per cubic foot or 10 mg/m$^3$ for dusts (less than or equal to 2.0 fibers per cubic centimeter greater than 5 micrometers in length for fibrous materials).

(3) Causes 50 percent fatalities to test animals when a single oral dose is administered in doses of less than 500 mg per kilogram of test animal weight.

(4) Is a flammable solid as defined in 49 CFR 173.124, or is an oxidizer as defined in 49 CFR 173.127, or is a strong oxidizing or reducing agent with a half cell potential in acid solution of greater than +1.0 volt as specified in Latimer's table on the oxidation-reduction potential.

(5) Causes first-degree burns to skin in short-time exposure or is systematically toxic by skin contact.

(6) May produce dust, gases, fumes, vapors, mists, or smoke with one or more of the characteristics in the course of normal operations.

(7) Produces sensitizing or irritating effects.

(8) Is radioactive.

(9) Has special characteristics which, in the opinion of the manufacturer, could cause harm to personnel if used or stored improperly.

(10) Is hazardous in accordance with 29 CFR part 1910, also known as the Occupational Safety and Health Standards.

(11) Is hazardous in accordance with 49 CFR parts 171 through 179.

(12) Is regulated by the Environmental Protection Agency in accordance with 40 CFR parts 260 through 280.

*Hazardous waste (HW)*. An item that is regulated pursuant to 42 U.S.C. 6901 or by State regulation as an HW. HW is defined federally at 40 CFR part 261. Overseas, HW is defined in the applicable final governing standards or overseas environmental baseline guidance document, or host nation laws and regulations.

*Identical bid*. Bids for the same item of property having the same total price.

*Industrial scrap*. Consists of short ends, machinings, spoiled materials, and similar residue generated by an industrial-funded activity.

*Information technology*. Any equipment or interconnected system or subsystem of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission or reception of data or information by the DoD Component. Includes computers, ancillary equipment, software, firmware, and similar procedures, services (including support services), and related sources. Does not include any equipment that is acquired by a Federal contractor incidental to a Federal contract. Equipment is ''used'' by a DoD Component if the equipment is used by the DoD Component directly or is used by a contractor under a contract with the DoD Component that:

(1) Requires the use of such equipment.

(2) Requires the use to a significant extent of such equipment in the performance of a service or the furnishing of a product.

*Installation*. A military facility together with its buildings, building equipment, and subsidiary facilities such as piers, spurs, access roads, and beacons.

*International organizations*. For trade security control purposes, this term includes: Columbo Plan Council for Technical Cooperation in South and Southeast Asia; European Atomic Energy Community; Indus Basin Development; International Atomic Energy; International Red Cross; NATO; Organization of American States; Pan American Health Organization; United Nations (UN); UN Children's Fund; UN Development Program; UN Educational, Scientific, and Cultural Organization; UN High Commissioner for Refugees Programs; UN Relief and Works Agency for Palestine Refugees in the Near East; World Health Organization; and other international organizations approved by a U.S. diplomatic mission.

*Interservice*. Action by one Military Department or Defense Agency ICP to provide materiel and directly related services to another Military Department or Defense Agency ICP (either on a recurring or nonrecurring basis).

*Inventory adjustments*. Changes made in inventory quantities and values resulting from inventory recounts and validations.

*Inventory control point (ICP)*. An organizational unit or activity within the DoD supply system that is assigned the primary responsibility for the materiel management of a group of items either for a particular Military Department or for the DoD as a whole. In addition to materiel manager functions, an ICP may perform other logistics functions in support of a particular Military Department or for a particular end item (*e.g.*, centralized computation of retail requirements levels and engineering tasks associated with weapon system components).

*Item unique identification (IUID)*. A system of establishing globally widespread unique identifiers on items of supply within the DoD, which serves to distinguish a discrete entity or relationship from other like and unlike entities or relationships. Automatic identification technology is used to capture and communicate IUID information.

*Law enforcement agencies (LEAs)*. Government agencies whose primary function is the enforcement of applicable Federal, State, and local laws, and whose compensated law enforcement officers have powers of arrest and apprehension.

*Local screening*. The onsite review of excess, surplus, and FEPP for reutilization, transfer, and donation.

*MAP property*. U.S. security assistance property provided under 22 U.S.C.2151, also known as the Foreign Assistance Act, generally on a non-reimbursable basis.

*Marketing*. The function of directing the flow of surplus and FEPP to the buyer, encompassing all related aspects of merchandising, market research, sale promotion, advertising, publicity, and selling.

*Material potentially presenting an explosive hazard (MPPEH)*. Material owned or controlled by the Department of Defense that, prior to determination of its explosives safety status, potentially contains explosives or munitions (*e.g.*, munitions containers and packaging material; munitions debris remaining after munitions use, demilitarization, or disposal; and range-related debris) or potentially contains a high enough concentration of explosives that the material presents an explosive hazard (*e.g.*, equipment, drainage systems, holding tanks, piping, or ventilation ducts that were associated with munitions production, demilitarization, or disposal operations). Excluded from MPPEH are munitions within the DoD-established munitions management system and other items that may present explosion hazards (*e.g.*, gasoline cans and compressed gas cylinders) that are not munitions and are not intended for use as munitions.

*Munitions list item (MLI)*. Any item contained on the USML in 22 CFR part 121. Defense articles, associated technical data (including software), and defense services recorded or stored in any physical form, controlled by 22 CFR parts 120 through 130. 22 CFR part 121,

which contains the USML, is administered by the DoS Directorate of Defense Trade Controls.

*Museum, DoD or Service.* An appropriated fund entity that is a permanent activity with a historical collection, open to both the military and civilian public at regularly scheduled hours, and is in the care of a professional qualified staff that performs curatorial and related historical duties full time.

*Mutilation.* A process that renders materiel unfit for its originally intended purposes by cutting, tearing, scratching, crushing, breaking, punching, shearing, burning, neutralizing, etc.

*National stock number (NSN).* The 13-digit stock number replacing the 11-digit federal stock number. It consists of the 4-digit federal supply classification code and the 9-digit national item identification number. The national item identification number consists of a 2-digit National Codification Bureau number designating the central cataloging office (whether North Atlantic Treaty Organization or other friendly country) that assigned the number and a 7-digit (xxx-xxxx) nonsignificant number. Arrange the number as follows: 9999–00–999–9999.

*Nonappropriated funds (NAF).* Funds generated by DoD military and civilian personnel and their dependents and used to augment funds appropriated by 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.

*NAF property.* Property purchased with NAFs, by religious activities or nonappropriated morale welfare or recreational activities, post exchanges, ships stores, officer and noncommissioned officer clubs, and similar activities. Such property is not Federal property.

*Nonprofit institution.* An institution or organization, no part of the net earnings of which inures or may lawfully inure to the benefit of any private shareholder or individual, and which has been held to be tax exempt under the provisions of 26 U.S.C. 501, also known as the Internal Revenue Code of 1986.

*Personal property.* Property except real property. Excludes records of the Federal Government, battleships, cruisers, aircraft carriers, destroyers, and submarines.

*Precious metals recovery program (PMRP).* A DoD program for identification, accumulation, recovery, and refinement of precious metals (PM) from excess and surplus end items, scrap, hypo solution, and other PM bearing materiel for authorized internal purposes or as Government furnished materiel.

*Precious metals (PM).* Gold, silver, and the platinum group metals (platinum, palladium, iridium, rhodium, osmium, and ruthenium).

*Privately owned personal property.* Personal effects of DoD personnel (military or civilian) that are not, nor will ever become, government property unless the owner (or heirs, next of kin, or legal representative of the owner) executes a written and signed release document unconditionally giving the USG all right, title, and interest in the privately owned property.

*Qualified recycling programs (QRP).* Organized operations that require concerted efforts to cost effectively divert or recover scrap or waste, as well as efforts to identify, segregate, and maintain the integrity of recyclable material to maintain or enhance its marketability. If administered by a DoD Component, a QRP includes adherence to a control process providing accountability for all materials processed through program operations.

*Radioactive material.* Any material or combination of materials that spontaneously emits ionizing radiation and which is subject to regulation as radioactive or nuclear material under any Federal law or regulation.

*Reclamation.* A cost avoidance or savings measure to recover useful (serviceable) end items, repair parts, components, or assemblies from one or more principal end items of equipment or assemblies (usually Supply condition codes (SCCs), H, P, and R) for the purpose of restoration to use through replacement or repair of one or more unserviceable, but repairable principal end item of equipment or assemblies (usually SCCs E, F, and G). Reclamation is preferable prior to disposition

(*e.g.*, DLA Disposition Services site turn-in), but end items or assemblies may be withdrawn from DLA Disposition Services site for reclamation purposes.

*Responsibility criteria*. The situations outlined in 41 CFR chapter 102 that require some certifications from buyers; either that the buyer knows they need to take care of the property because of its characteristics, or because the buyer must meet certain professional or licensing criteria.

*Responsive bid*. A bid that meets all the terms, conditions, and specifications necessary.

*Restricted parties*. Those countries or entities that the Department of State (DoS), Department of Commerce (DOC), or Treasury have determined to be prohibited or sanctioned for the purpose of export, sale, transfer, or resale of items controlled on the United States Munitions List (USML) or CCL. A consolidated list of prohibited entities or destinations for which transfers may be limited or barred, may be found at: *http://export.gov/ecr/eg_main_023148.asp*.

*Reutilization*. The act of re-issuing FEPP and excess property to DoD Components. Also includes qualified special programs (*e.g.*, LEA, Humanitarian Assistance Program (HAP), Military Affiliate Radio System (MARS)) pursuant to applicable enabling statutes.

*Reutilization screening*. The act of reviewing, either by automated or physical means, available FEPP, excess or surplus personal property to meet known or anticipated requirements.

*Sales contract*. An agreement between two parties, binding upon both, to transfer title of specified property for a consideration.

*Sales contracting officer (SCO)*. An individual who has been duly appointed and granted the authority conferred by law according to the procedures in this part to sell surplus and FEPP by any of the authorized and prescribed methods of sale. Also referred to as the SAR.

*Scrap*. Recyclable waste and discarded materials derived from items that have been rendered useless beyond repair, rehabilitation, or restoration such that the item's original identity, utility, form, fit and function have been destroyed. Items can be classified as scrap if processed by cutting, tearing, crushing, mangling, shredding, or melting. Intact or recognizable USML or CCL items, components, and parts are not scrap. 41 CFR 102–36.40 provides additional information on scrap.

*Screening*. The process of physically inspecting property or reviewing lists or reports of property to determine whether it is usable or needed.

*Screening period*. The period in which excess and surplus personal property is made available for reutilization, transfer, or surplus donation to eligible recipients.

*Security assistance*. A group of programs, authorized by law, that allows the transfer of military articles and services to friendly foreign governments.

*Small arms and light weapons*. Man-portable weapons made or modified to military specifications for use as lethal instruments of war that expel a shot, bullet, or projectile by action of an explosive. Small arms are broadly categorized as those weapons intended for use by individual members of armed or security forces. They include handguns; rifles and carbines; sub-machine guns; and light machine guns. Light weapons are broadly categorized as those weapons designed for use by two or three members of armed or security forces serving as a crew, although some may be used by a single person. They include heavy machine guns; hand-held under-barrel and mounted grenade launchers; portable anti-aircraft guns; portable anti-tank guns; recoilless rifles; man-portable launchers of missile and rocket systems; and mortars.

*Solid waste*. Includes garbage, refuse, and other discarded materials, including solid waste materials resulting from industrial, commercial, and agricultural operations, and from community activities. Includes solids, liquid, semi-solid or contained gaseous material which is discarded and not otherwise excluded by statute or regulation. Mining and agricultural solid wastes, hazardous wastes (HW), sludge, construction and demolition wastes, and infectious wastes are not included in this category.

*Special programs*. Programs specified by legislative approval, such as FMS,

LEAs and fire fighters, identified on DLA Disposition Services Web site (*https://www.dispositionservices.dla.mil/rtd03/miscprograms.shtml*).

*State agency for surplus property (SASP)*. The agency designated under State law to receive Federal surplus personal property for distribution to eligible donation recipients within the States as provided for in 40 U.S.C. 549.

*State or local government*. A State, territory, or possession of the United States, the District of Columbia, and any political subdivision or instrumentality thereof.

*Transfer*. The act of providing FEPP and excess personal property to FCAs as stipulated in the FMR. Property is allocated by the GSA.

*Transfer order*. Document (SF 122 and SF 123) issued by DLA Disposition Services or the headquarters or regional office of GSA directing issue of excess personal property.

*Trade security control (TSCs)*. Policy and procedures, in accordance with DoD Instruction 2030.08, designed to prevent the sale or shipment of USG materiel to any person, organization, or country whose interests are unfriendly or hostile to those of the United States and to ensure that the disposal of DoD personal property is performed in compliance with U.S. export control laws and regulations, the International Traffic in Arms Regulations (ITAR) in 22 CFR parts 120 through 130, and the EAR in 15 CFR parts 730 through 774.

*Unique item identifier (UII)*. A set of data elements marked on an item that is globally unique and unambiguous. The term includes a concatenated UII or a DoD recognized unique identification equivalent.

*Usable property*. Commercial and military type property other than scrap and waste.

*Wash-post*. A methodology for transfer of accountability to the DLA Disposition Services site whereby the DLA Disposition Services site only accepts accountability at the time they also document a release from the account, through reutilization, transfer, donation, sales, or disposal.

*Zone of interior (ZI)*. The United States and its territories and possessions, applicable to areas covered by GSA and where excess property is considered domestic excess. Includes the 50 States, District of Columbia, Puerto Rico, American Samoa, Guam, Northern Mariana Islands, and the U.S. Virgin Islands.

### § 273.13 Policy.

It is DoD policy consistent with 41 CFR chapters 101 and 102 that excess DoD property must be screened and redistributed among the DoD Components, and reported as excess to the GSA. Pursuant to 40 U.S.C. 701, DoD will efficiently and economically dispose DoD FEPP.

### § 273.14 Responsibilities.

(a) The Assistant Secretary of Defense for Logistics and Materiel Readiness (ASD(L&MR)), under the authority, direction, and control of the USD(AT&L), and in accordance with DoD Directive 5134.12:

(1) Develops DoD materiel disposition policies, including policies for FEPP.

(2) Oversees the effective implementation of the DoD materiel disposition program.

(3) Approves changes to FEPP procedures as appropriate to support contingency operations.

(b) The Director, Defense Logistics Agency (DLA), under the authority, direction, and control of the Under Secretary of Defense for Acquisition, Technology, and Logistics, through the Assistant Secretary of Defense for Logistics and Materiel Readiness (ASD(L&MR)):

(1) Administers the worldwide Defense Materiel Disposition Program for the reutilization, transfer, screening, issue, and sale of FEPP, excess, and surplus personal property.

(2) Implements guidance issued by the ASD(L&MR) or other organizational elements of the OSD and establishes system concepts and requirements, resource management, program guidance, budgeting and funding, training and career development, management review and analysis, internal control measures, and crime prevention for the Defense Materiel Disposition Program.

(3) Annually provides to ASD(L&MR) a summary of sales proceeds from recycling transactions in accordance with 10 U.S.C. 2577.

(4) Ensures prompt processing of monthly sales proceeds under the QRP to DoD Components for reconciliation of sales proceeds and transactions.

(c) The DoD Component Heads:

(1) Implement the procedures prescribed in this subpart and ensure that supplemental guidance and procedures are in accordance with 41 CFR chapters 101 and 102.

(2) Reutilize, transfer, screen, issue and sell FEPP, excess and surplus personal property according to the procedures in § 273.15(a) and (c).

(3) Treat the disposal of DoD property as an integral part of DoD Supply Chain Management; ensure that disposal actions and costs are a part of ''end-to-end'' management of items and that disposal of property is a planned event at all levels of their organizations.

(4) Furnish the Director, DLA, with mutually agreed-upon data necessary to administer the Defense Materiel Disposition Program.

(5) Provide administrative and logistics support, including appropriate facilities, for the operations of tenant and related off-site DLA Disposition Services field activities under inter-Service support agreements (ISSAs).

(6) Dispose HP specifically designated as requiring Military Department processing.

(7) Request DLA Disposition Services provide sales services, as needed, for recyclable marketable materials generated as a result of resource recovery programs.

(8) Monitor, with DLA Disposition Services Site personnel, all property sent to landfills to ensure no economically salable property is discarded.

(9) Report, accurately identify on approved turn in documents, and turn in all authorized scrap generations to servicing DLA Disposition Services Sites.

(10) Authorize installation commanders, as appropriate, to sell directly recyclable and other QRP materials, or to consign them to the DLA Disposition Services for sale.

**§ 273.15 Procedures.**

(a) *Sale of surplus and FEPP, scrap generated from QRPS, and non-QRP scrap*—(1) *Authority and scope*—(i) *FPMR and FMR*. The provisions of this section are pursuant to 41 CFR chapters 101 and 102, also known as the FPMR and FMR, respectively.

(ii) *Additional guidance*. (A) Policy and procedures for the control of MLIs and Commerce Control List (CCL) items are contained in DoD Instruction 4160.28, DoD 4160.28–M Volumes 1–3, DoD Instruction 4140.62, ''Materiel Potentially Presenting an Explosive Hazard'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/414062p.pdf*), the International Traffic in Arms Regulations (ITAR) in 22 CFR parts 120 through 130, and the EAR in 15 CFR parts 730 through 774, and incorporated in the provisions of DoD Instruction 2030.08.

(B) 31 U.S.C. 3711–3720E provides an additional statutory requirement applicable to the sale of personal property.

(C) 48 CFR part 33 provide additional guidance on handling disputes from the sale of personal property.

(D) 48 CFR subpart 9.4 of the Federal Acquisition Regulation (FAR), current edition, provides direction on the debarment or suspension of individuals or entities.

(E) Sales of FEPP, although briefly addressed in the FMR, are managed by the agency head and must be in compliance with foreign policy of the United States and the terms and conditions of any applicable host-nation agreement. For additional information on processing FEPP, see Enclosure 4 to DoD Manual 4160.21, Volume 2.

(F) DoD Directive 3230.3, ''DoD Support for Commercial Space Launch Activities'' (available at *http://www.dtic.mil/whs/directives/corres/pdf/323003p.pdf*) allows the sale of dedicated expendable launch vehicle (ELV) equipment directly to commercial ELV vendors in consultation with the Secretary of Transportation.

(2) *Exclusions*. This subpart does not govern the sale of property that is regulated by the laws or agencies identified in paragraphs (a)(2)(i) through (iv) of this section. The information in

paragraphs (a)(2)(i) through (iv) is included for the DoD Components to reference when commodities in their possession become excess and disposal requires compliance with this part.

(i) The Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98 *et seq.*) provides for the acquisition, disposal (sale) and retention of stocks of certain strategic and critical materials and encourages the conservation and development of sources of such materials within the United States. These materials when acquired and stored constitute and are collectively known as the National Defense Stockpile (NDS) or the ''stockpile.''

(ii) The Department of Transportation Maritime Administration has jurisdiction over the disposal of vessels of 1,500 gross tons or more that the Secretary of Transportation determines to be merchant vessels or capable of conversion to merchant use, excluding specified combatant vessels.

(iii) Under the provisions of 10 U.S.C. 2576, the Secretary of Defense may sell designated items (such as pistols, revolvers, shotguns, rifles of a caliber not exceeding .30, ammunition for such firearms, and other appropriate equipment) to State and local law enforcement, firefighting, homeland security, and emergency management agencies, at fair market value if the designated items:

(A) Have been determined to be surplus property.

(B) Are certified as being necessary and suitable for the operation and exclusive use of such agency by the Governor (or such State official as he or she may designate) of the State in which such agency is located.

(C) Do not include used gas masks and any protective body armor.

(iv) DLA Disposition Services provides a sales service to the DoD pursuant to the exchange or sale according to the procedures in DoD Manual 4140.01 that implement the authority in 41 CFR part 102–39; however, general and specific provisions through this method of sale are not addressed in this subpart. More information may be obtained from the DLA Disposition Services Exchange Sale Web site at *http://www.dispositionservices.dla.mil/sales/typesale.shtml*.

(3) *Sales of surplus property, FEPP, scrap generated by QRPs, and other scrap.* (i) DLA Disposition Services is the primary agency for managing surplus and FEPP sales, to include sales of scrap released by Military Department QRPs and non-QRP scrap.

(ii) DoD Components are responsible for disposing of surplus property, FEPP, scrap released by QRPs, and other scrap through sales to the general public and State and local governments through execution of an awarded contract.

(iii) The Military Departments are authorized to sell eligible scrap released by their respective QRPs and non-excess property eligible for exchange or sale without the involvement of DLA Disposition Services in accordance with their internal operating guidance, DoD Manual 4140.01, and 41 CFR chapters 101 and 102.

(iv) DoD Components advertise excess and surplus personal property for sale only after all prescribed screening actions are taken, unless screening is not required. See DoD Manual 4160.21 Volume 4 for exempt items.

(v) Sales actions include planning, merchandising, pre-award reviews, bid evaluation and award, contract administration, proceeds receipt and disbursement, and releasing the property.

(vi) Information on surplus and FEPP sales can be obtained from the DLA Customer Contact Center, accessible 24 hours a day, 7 days a week on the DLA Disposition Services Government Sales Web site at *https://www.dispositionservices.dla.mil/sales/index.shtml*.

(vii) Within the CONUS, DLA Disposition Services has partnered with a commercial firm to sell usable, nonhazardous surplus demilitarization (DEMIL) Code A and safe to sell Q property that is not reutilized, transferred, or donated. The commercial venture partner schedules and holds sales of property released to it by DLA Disposition Services. DLA Disposition Services has partnered with a commercial firm to sell scrap property. The scrap venture partner schedules and holds sales of scrap property released to it by DLA Disposition Services.

(viii) DLA Disposition Services conducts the balance of surplus and FEPP

sales. This includes hazardous and chemical sales and DEMIL- and mutilation-required property and scrap sales in controlled property groups.

(A) DoD Components implement controls to mitigate security risks associated with the release or disposition of DEMIL Code B MLI and DEMIL Code Q CCL items that are sensitive for reasons of national security. Certain categories of DEMIL Q items that pose no risk to national security will be available for reutilization, transfer, or donation (RTD) and sales following normal procedures. However, only FEPP with DEMIL Code A (no export license requirements except to restricted parties) may be sold in foreign countries that are not restricted parties, in accordance with 15 CFR parts 730 through 774. DEMIL B and DEMIL Q items, including those posing no risk to national security are not permitted for sale.

(*1*) DEMIL B and sensitive DEMIL Q property can only be reutilized by authorized DoD Components, and approved Special Programs (FMS, law enforcement agencies (LEAs) and fire fighters).

(*2*) After DLA Disposition Services conducts initial screening, serviceable DEMIL B and sensitive DEMIL Q property will be transferred to a long term storage (LTS) facility and will remain available for reutilization screening by DoD and approved Special Programs customers.

(*3*) LTS property can be screened electronically on the DLA Disposition Services Web site at *https://www.DispositionServices.dla.mil/asset/govegeo1.html*. No physical screening is permitted at the LTS facility.

(B) DoD Components may offer for sale any property designated as unsafe for use as originally intended, with mutilation as a condition of sale. DoD Components incorporate the method and degree of mutilation into the sales offering, as required by an official notification of the safety defects. The sales offering must include a condition of sale stipulating that title of the property cannot pass from the Government to the purchaser until DoD representatives have certified and verified the mutilation has been satisfactorily accomplished and have documented this certification.

(C) SCC Q materiel with Management Code S (as defined in DLM 4000.25–1 is hazardous to public health, safety, or national security. If sold, it must require mutilation as a condition of sale. Property assigned SCC Q with Management Code O may be offered for sale without mutilation as a condition of sale, but the seller must ensure that all sales include a restrictive resale provision. In addition, any sales offerings must indicate that the restrictive resale provision is to be perpetuated to all future sales to deter reentry of the materiel to the DoD supply system.

(D) Hazardous property may be offered for sale with appropriate terms and conditions. Prior to award, DoD Components conduct a pre-award review to determine whether the prospective purchaser meets the responsibility criteria in 41 CFR chapter 102. The prospective purchaser must display the ability to comply with applicable laws and regulations before the DoD Components can make an award.

(E) Only FEPP with DEMIL Code A (no export control requirements except to restricted parties) may be offered for sale in foreign countries that are not restricted parties in accordance with 15 CFR parts 730 through 774 and with additional DoD guidance in DoD 4160.28–M Volumes 1–3. The sales offering must include terms and conditions relating to taxes and duties, import stipulations, and compliance with international and local laws and regulations. See Enclosure 4 to DoD Manual 4160.21, Volume 2 for additional information.

(F) Other types of sales offerings for property requiring special handling must include applicable terms and conditions.

(ix) All persons or organizations are entitled to purchase property offered by DLA Disposition Services except for:

(A) Anyone under contract to conduct a specific sale, their agents or employees, and immediate members of their households.

(B) DoD military and civilian personnel and military and civilian personnel of the United States Coast Guard (USCG) whose duties include

any functional or supervisory responsibilities for or within the Defense Materiel Disposition Program, their agents, employees, and immediate members of their households.

(C) Any persons or organizations intending to ship FEPP, excess and surplus personal property to restrictedparties. See *http://pmddtc.state.gov/embargoed_csuountries/index.html* or *https://demil.osd.mil/* or *http://treas.gov/offices/enforcement/ofac/programs* for additional information on shipments to restricted parties.

(D) Persons under 18 years of age.

(E) Individuals or firms who are ineligible to be awarded government contracts due to suspension or debarment. See the GSA Excluded Parties List at *http://epls.gov* or *https://demil.osd.mil/* or *http://treas.gov/offices/enforcement/ofac/sdn/* or *http://bis.doc.gov/complianceandenforcement/liststocheck.htm.*

(F) Persons or entities who wish to purchase MLI or CCL items who do not meet the requirements to receive an end user certificate (EUC) as specified in 22 U.S.C. 2778 *et seq.*, also known as the Arms Export Control Act, and the implementing regulations 22 CFR parts 120 through 130, also known as the International Traffic In Arms Regulations and 15 CFR parts 730 through 774, also known as the Export Administration Regulations. Information on demilitarized materiel is provided at *https://demil.osd.mil/*. A consolidated list of prohibited entities or destinations may be found at *http://export.gov/ecr/eg_main_023148.asp*.

(x) Disposable assets (FEPP, scrap, NAF property, disposable (MAP property, etc.) may not be sold directly or indirectly to restricted parties or any other areas designated by DoD 4160.28–M Volumes 1–3.

(xi) DoD Components will update the DoD IUID Registry when an item of personal property with a UII is declared FEPP, excess and surplus personal property and is subject to reutilization, transfer, or sale. The procedures required to update the DoD IUID Registry are in § 273.9.

(4) *Responsibilities in selling personal property*—(i) *Selling agencies.* Selling agencies:

(A) Determine whether to sell as the holding agency or request another agency to sell on behalf of the holding agency.

(B) Ensure the sale complies with the provisions of 40 U.S.C. 549, and any other applicable laws.

(C) Issue internal guidance for utilizing methods of sale stipulated in subchapter B of 41 CFR chapter 102, and promote uniformity of sales procedures.

(D) Obtain appropriate authorization to conduct sales of certain property or under certain conditions (*e.g.*, approval by the agency head to use the negotiation method of sale).

(E) Ensure that all sales are made after publicly advertising for bids, except as provided for negotiated sales in 41 CFR 102–38.100 through 102–38.125.

(F) Document the required terms and conditions of each sale, including but not limited to those terms and conditions specified in 41 CFR 102–38.75.

(G) Sell personal property upon such terms and conditions as the head of the agency deems appropriate to promote fairness, openness, and timeliness. Standard Government forms (*e.g.*, the Standard Form (SF) 114 series, ''Sale of Government Property'') are no longer mandatory, but may be used to document terms and conditions of the sale.

(H) Assure that only representatives designated in writing by the selling agency as selling agent representatives (SARs) are appointed to approve the sale and bind the United States in a written contractual sales agreement. The DLA Disposition Services equivalent of SARs are SCOs. The selling agency determines the requirements for approval (*e.g.*, select the monetary thresholds for awarding sales contracts).

(I) Adequately train SARs in regulatory requirements and limitations of authority. Ensure SARs are cognizant in identifying and referring matters relating to fraud, bribery, or criminal collusion to the proper authorities in accordance with 41CFR 102–38.50 and 102–38.225.

(J) Obtain approvals as necessary prior to award of the property (*e.g.*, an approval by the Attorney General of the United States to award property with a fair market value of $3 million

or more or if it involves a patent, process, technique, or invention) as specified in 41 CFR 102–38.325.

(K) Be accountable for the care, handling, and associated costs of the personal property prior to its removal by the buyer.

(L) Reconcile property and financial records to reflect the final disposition.

(M) Make the property available to FCAs when a bona fide need exists and when no like items are located elsewhere prior to transfer of title to the property, to the maximum extent practicable.

(N) Subject small quantities of low dollar value property in poor condition to the A/D Economy Formula (see Enclosure 3 to DoD Manual 4160.21, Volume 2). If there is no reasonable prospect of disposing of the property by sale (including a scrap sale), dispose of the property with the A/D processes.

(O) Ensure that the DoD IUID Registry is updated for DoD personal property items marked with a UII in accordance with § 273.6.

(ii) *Sales conducted by DLA Disposition Services*. As the major selling agency for the Department of Defense and an approved GSA Personal Property Sales Center, DLA Disposition Services must, in compliance with requirements in paragraph (a)(4)(i) of this section:

(A) Carefully consider all factors and determine the best method of sale for personal property utilizing identification, segregation, merchandising, advertising, bid evaluation, and award principles to protect the integrity of the sales process.

(B) Utilize any publicly accessible electronic media for providing information regarding upcoming sales, invitations for bid (including sales terms and conditions), acceptance of bids, and bid results.

(C) Provide direction to the DLA Disposition Services site through its internal operating procedures and automated systems.

(D) Verify that personal property items marked with a UII and offered for sale have been updated in the DoD IUID Registry.

(iii) *Authorized methods of sale*—(A) *General*. Sale of personal property is authorized in 41 CFR part 102–38 by the methods of sale identified in paragraphs (a)(4)(iii)(A)(*1*) through (*4*) of this section. (See § 273.12 for definitions.)

(*1*) Sealed bid.

(*2*) Spot bid.

(*3*) Auction.

(*4*) Negotiated sale. Criteria for negotiated sales include:

(*i*) The estimated fair market value is not in excess of $15,000 and the sale is considered to be in the best interest of the USG. Large quantities of materiel were not divided nor disposed through multiple sales in order to avoid these requirements.

(*ii*) For FEPP, the estimated fair market value is less than $250,000; sale is managed by DLA Disposition Services and authorized by DLA Disposition Services Director or designee.

(*iii*) Disposal is to a State, territory, possession, political subdivision thereof, or tax-supported agency therein, and the estimated fair market value of the property and other satisfactory terms of disposal are obtained by negotiation.

(*iv*) Bid prices after advertising are not reasonable and re-advertising would serve no useful purpose.

(*v*) Public exigency does not permit delay, such as that caused by the time required to advertise a sale (*e.g.*, disposal of perishable food or other property that may spoil or deteriorate rapidly).

(*vi*) The sale promotes public health, safety, or national security.

(*vii*) The sale is in the public interest in a national emergency declared by the President or Congress. This authority may be used only with specific lots of property or for categories determined by the GSA Administrator for a designated period but not more than 3 months.

(*viii*) Selling the property competitively (sealed bid) would have an adverse impact on the national economy, provided that the estimated fair market value of the property and other satisfactory terms of disposal can be obtained by negotiation (*e.g.*, sale of large quantities of an agricultural product that impacts domestic markets).

(*ix*) The sale is otherwise authorized by 41 CFR chapter 102 or other law.

(*5*) Negotiated fixed price.

(*i*) The head of the selling agency or designee must determine and document that this method of sale serves the best interest of the government.

(*ii*) This type of sale must include appropriate terms and conditions; must be publicized consistent with the nature and value of the property involved; and be awarded on a first-come, first-served basis.

(B) *Sales of surplus, foreign excess, and other categories of property.* Within the constraints of the FMR-authorized methods of sale in paragraphs (a)(4)(iii)(A)(*1*) through (*5*) of this section, the types of sales that may be conducted for surplus, foreign excess, and other categories of property sold in the DoD Defense Materiel Disposition Program are:

(*1*) One-time sales for disposal of property already generated. Actual deliveries may comprise several release transactions.

(*2*) Term sales for the disposal of property generated over a period of time and in quantities that can be reasonably estimated for a specific period of time or are offered with minimum and maximum quantity provisions.

(iv) *Negotiated sales reporting.* Negotiated sales reports are required by GSA within 60 calendar days after the close of each fiscal year. DoD Components include in the report a listing and description of all negotiated sales with an estimated fair market value in excess of $5,000. For each sale negotiated, the report must provide:

(A) A description of the property.

(B) The acquisition cost and date. If not known, an estimate of the acquisition cost, identified as such.

(C) The estimated fair market value, including the date of the estimate and name of the estimator.

(D) The name and address of purchaser.

(E) The date of sale.

(F) The gross and net sales proceeds.

(G) A justification for conducting the negotiated sale.

(v) *GSA or DoD-authorized retail method of sale.* Sales of small quantity, consumer-oriented property at negotiated, auction, or bid prices that are conducted on a first-come; first-served; and as-is, where-is basis are considered retail sales. Credit or debit cards are the only authorized payment methods. Property having a fair market value exceeding $15,000 is subject to the limitations applicable to negotiated sales of surplus personal property.

(A) Retail sales of surplus, FEPP, and abandoned privately owned property may be conducted whenever such a program can effectively and economically be used to supplement other methods of sale. Retail sales must be approved in writing at an agency level on a case-by-case basis, and the approval must specify the quantities and types of property and time period covered. These authorizations are limited to specific situations and types of property for which deviation can be fully justified. In addition:

(*1*) All items must undergo screening, as appropriate, before being offered for retail sale.

(*2*) Each item being sold must have a fair market value of less than $15,000.

(*3*) All property received as items, if offered for sale by retail, must be sold as items and not by weight or lot, with the exception of scrap authorized for retail sale.

(*4*) Prices established must reflect the estimated fair market value of the property and must be publicized to the extent consistent with the nature and value of the property.

(*5*) Retail sales are limited to the Federal Supply Classification Codes (FSCs), according to the DEMIL code assigned and GSA approval, which are in 41 CFR chapter 102.

(*6*) Property must be DEMIL Code A and have a DEMIL Integrity Code 1, 7, or 9.

(*7*) The retail selling price of the property, based on the condition, may not be set below the price it would bring from a commercial vendor.

(B) Approval in accordance with 41 CFR chapters 101 and 102 is required to sell scrap by the retail sale method.

(C) Only trained cashiers are authorized to collect and deposit proceeds received from a retail sale. Retail sales are open to the public and all USG personnel except:

(*1*) DoD military and civilian personnel and contractors and military and civilian personnel and contractors

of the USCG whose duties at the installation where the property is sold include any functional or supervisory responsibility for or within the DoD Materiel Disposition Program.

(*2*) An agent, employee, or immediate member of the household of personnel in paragraph (a)(4)(v)(C)(*1*) of this section.

(vi) *Market impact*. (A) DoD Components will give careful consideration to the adverse market impact that may result from the untimely sale of large quantities of certain surplus items. Where applicable, the selling agency or partner organizations consult with organizations associated with the commodity proposed for sale to obtain advice on the market impact.

(B) Property reporting and sale schedules are developed to ensure expeditious property disposal, maximum competition, maximum sale proceeds, good public relations, and uniform workload.

(C) The selling agency will provide advance notice of all proposed or scheduled competitive bid sales (except negotiated) of surplus usable property. This includes property:

(*1*) Located in the 50 United States, the District of Columbia, Puerto Rico, American Samoa, Guam, the Federated States of Micronesia, the Northern Mariana Islands, Palau, and the U.S. Virgin Islands.

(*2*) With a total acquisition cost of $250,000 or more per sale.

(*3*) With a minimum potential return of $5,000 per sale of scrap and recyclable material.

(5) *Advertising to promote free and open competition*. DoD Components will:

(i) Bring property offered for sale to the attention of the buying public by free publicity and paid advertising.

(ii) Make every effort to obtain maximum free publicity through sites such as a Government-wide point of entry, *https://www.fedbizopps.gov*.

(iii) Employ the amount of paid advertising commensurate with the type and value of property being sold.

(iv) Distribute sale offerings to prospective purchasers before the first day of the inspection period.

(6) *Pre-sale activities*—(i) *Preparation and distribution of sale offerings*—(A) Include in the offer to sell sale date and time, method of sale, description of the property being offered, selling agency, location of property, time and place for receipt of bids, acceptable forms of bid deposits and payments, and general and special terms and conditions of sale. DLA Disposition Services sale offerings are available on the DLA Disposition Services Web site (*www.dispositionservices.dla.mil*).

(B) Establish a sales offering file that contains information about the property offered for sale from initiation to bid opening (*e.g.*, sale catalog, withdrawals prior to bid opening, agreements with holding activities).

(C) Prepare sale offerings to provide prospective purchasers with general information and instructions.

(D) Include in each offering the specific conditions of sale, the contents of which are determined by the selling agency. The SF 114 series may be used to document the terms and conditions of a sale, but their use is not mandatory. Conditions of sale include, but are not limited to:

(*1*) Inspection results.

(*2*) Condition and location of property.

(*3*) Eligibility of bidders.

(*4*) Consideration of bids.

(*5*) Bid deposits and payments.

(*6*) Submission of bids.

(*7*) Bid price determination.

(*8*) Legal title of ownership.

(*9*) Delivery, loading, and removal of property.

(*10*) Default, returns, or refunds.

(*11*) Modifications, withdrawals, or late bids.

(*12*) Requirements to comply with applicable laws and regulations.

(*13*) Certificate of independent price determination.

(*14*) Covenant against contingent fees.

(*15*) Limitation of government liability.

(*16*) Award of contract.

(E) DEMIL-required MLI property may not be sold unless DEMIL has been accomplished or it is offered for sale with DEMIL as a condition of sale. Incorporate the method and degree of DEMIL into the sales offering.

(*1*) If DEMIL is a condition of sale, the sales offering must include a condition of sale stipulating that title of the

property will not pass from the government to the purchaser until the property has been satisfactorily DEMIL and has been certified and verified in accordance with DoD 4160.28–M Volumes 1–3.

(*2*) The sales offering must also include a requirement for the bidder to provide an EUC to the selling agency specifying the intended use and disposition of the property. The sales offering will also include an agreement by the buyer that they will obtain appropriate export authorizations from the Departments of Commerce or State prior to any export of the item. DLA Disposition Services uses DLA Form 1822, ''End-Use Certificate.'' The EUC must be processed through designated approval channels prior to award of the property to the prospective customer.

(*3*) The EUC for scrap mutilation residue must be incorporated into the sales offering for all MLI and CCL items property, including mutilation residue that may still be classified as DEMIL Code B or Q.

(ii) *Inspections.* Each sales offering will include an electronic or physical inspection period of at least 7 calendar days before the bid opening.

(iii) *Bid deposits.* The selling agency may incorporate a requirement for bidders to provide or post a bid deposit or a bid deposit bond in lieu of cash or other acceptable forms of deposit to protect the government's interest.

(iv) *PM bid deposits.* PM offerings will include a 20 percent bid deposit. A deposit bond may be used in lieu of cash or other acceptable form of deposit when permitted by the sales offering. If awarded, the bid deposit will be applied to the total contract price. Unsuccessful bid deposits will be returned. Bid deposit bonds will be returned to the bidder when no longer needed to secure the property.

(v) *Payments.* (A) Selling agencies will implement a payment policy, pursuant to 41 CFR chapter 102 that protects the government against fraud.

(B) Acceptable forms of payment include but are not limited to:

(*1*) Guaranteed negotiable instruments made payable to or endorsed to the U.S. Treasury in any form (*e.g.*, cashier's check, certified check, traveler's check, bank draft, or postal or telegraphic money order).

(*2*) Canadian postal money orders designed for payment in the United States must state specifically that they are payable in U.S. dollars in the United States.

(*3*) Electronic funds transfer. Special instructions are available through the DLA Disposition Services Web site and must be followed if this option is chosen.

(*4*) Credit or debit cards.

(*5*) Combinations of payment methods in paragraphs (a)(6)(v)(B)(*1*) through (*5*) of this section.

(*6*) Other acceptable forms of payment include:

(*i*) Uncertified personal or company check for amounts over $25.00 accompanied by an irrevocable commercial letter of credit issued by a U.S. bank, payable to the Treasurer of the United States or to the selling agency. The check may not exceed the amount of the letter of credit. Each letter of credit must be an original or clearly state on its face that reproductions of the original document may be considered as an original document, and clearly state that requests for payment will be honored at any time they are presented by the selling agency. Selling agents will reject letters of credit with an expiration date. In addition, the minimum criteria required for acceptance of letters of credit are to state clearly that it is a commercial letter of credit (it need not say it is irrevocable, but it cannot say it is revocable); be on bank stationery; state the maximum amount guaranteed; state the name and address of the company or individual submitting the bid; state the sales offering number and opening date; and be signed by the issuer (authorized signature of bank official).

(*ii*) Uncertified personal or company checks in the amount of $25.00 or less when submitted for ancillary charges (*e.g.*, debt payment, storage charge, liquidated damages, interest).

(*iii*) Any form of payment received from a NAF instrumentality or a State or local government.

(*7*) Acceptable country currencies and information on exchange rates used must be provided in the sales offering

and be incorporated into the sales offering. Generally, the exchange rate for receipt of monies or payments in designated currencies is established on the date of the deposit, which is generally the date of receipt.

(*8*) FEPP buyers must pay in U.S. dollars or the equivalent in foreign currency that is readily convertible into U.S. dollars. Where U.S. dollars are not available, the acceptance of foreign currency is authorized subject to these conditions:

(*i*) Payments exceeding the equivalent of $5,000 U.S. in individual sale transactions (that is, for the total of all items offered in a single sale, not for individual items included in a sale) may be accepted only after obtaining prior approval from the Defense Finance and Accounting Service (DFAS). When required, DFAS will submit the requests through the chain of command to DoS and Department of Treasury for approval. In countries where a considerable amount of FEPP may be available for sale and it may be necessary to accept foreign currency, the selling agency will request from DFAS an annual authorization, on a calendar year basis, to accept foreign currency.

(*ii*) Payments of up to the equivalent of $5,000 U.S. for individual transactions, at the rate of exchange applicable to the USG, may be accepted without further consultation if assurance has been obtained through the local DoS representative that such currency may be used in payment of any or all USG expenditures in the country whose currency is accepted. This provision is applicable only when annual authorizations have not been received; it is not feasible to sell for U.S. dollars or to ship the property to a country (other than the United States, except where property is a type authorized for return) where it may be sold for U.S. dollars or a freely convertible foreign currency; the currency is not that of a country whose assets in the United States are blocked by Department of Treasury regulations; the currency is that of a country with which the United States maintains diplomatic relations; and foreign currency accepted need not be the currency of the country of sale if the currency offered is otherwise acceptable to DoS and Department of Treasury and can be accepted pursuant to U.S. and host government agreements governing the sale of FEPP. In this connection, the sales offerings will indicate the foreign currencies that will be accepted for a particular sale.

(vi) *Transfer of title.* Selling agencies must document the transfer of title of the property from the government to the purchaser:

(A) By providing to the purchaser a bill of sale.

(B) By notification within a contract clause stipulating when the transfer is affected. For instance:

(*1*) Upon removal from the exact location specified in the sales offering.

(*2*) Upon certification and signature by the government that all required demilitarization has been accomplished in accordance with DoD Instruction 4160.28.

(C) By providing certifications required from the buyer prior to a transfer of title. An SF 97, ''Certificate of Release of a Motor Vehicle,'' (available at *http://www.gsa.gov/forms*) is required for the sale of vehicles. Selling agencies must provide internal guidance on how the transfer will occur and what documentation is required.

(vii) *Defaults.* If a purchaser breaches a contract by failure to make payment within the time allowed or by failure to remove the property as required, or breaches other contractual provisions, the purchaser is in default. The selling agency representative will give the purchaser a written notice of default and a period of time to cure the default.

(A) If the purchaser fails to cure the default, the selling agency is entitled to collect or retain liquidated damages as specified in the sales offer or contract.

(B) If a bid deposit was required and the bidder secured the deposit with a deposit bond, the selling agency must issue the notice of default to the bidder and the surety company.

(viii) *Disputes.* All sales offers will include the disputes clause contained in 48 CFR 52.233–1 of the FAR.

(7) *Bidder eligibility criteria.* (i) As a rule, selling agencies may accept bids from any person, representative, or

agent from any entity. To be considered eligible for award of a sales contract, the bidder must be of legal age and not be debarred, suspended, or indebted to the USG, or from a restricted party. Any exceptions must be authorized by the selling agency head, who has determined that there is a compelling reason to make the award. A list of parties excluded from federal procurement and non-procurement programs can be obtained on the GSA Excluded Parties List System Web site at *http://epls.gov* or the OSD DEMIL Web site at *https://demil.osd.mil/*.

(ii) Personal property may be sold to a federal employee whose agency does not prohibit the employees from purchasing such property. Unless allowed by a federal or agency regulation, employees having non-public information regarding property offered for sale may not participate in that sale. This applies to an immediate member of the employee's household.

(8) *Suspension and debarment of bidders*. (i) 41 CFR 102–38.170, 31 U.S.C. 6101 note, Executive Order 12549, ''Debarment and Suspension'' (February 18, 1986), and Executive Order 12689, ''Debarment and Suspension'' (August 16, 1989) provide the authority for the suspension or debarment of bidders or contractors purchasing personal property from the government. The selling agent must follow the procedures described in 48 CFR subpart 9.4 of the FAR to debar or suspend a person or entity from the purchase of personal property. The debarring official for DLA Disposition Services sales is the DLA Special Assistant for Contracting Integrity.

(ii) Appointed SARs and SCOs will:

(A) Prepare recommendations for suspension or debarment from the sale of Federal property and acquisition contracts.

(B) Forward them to their respective servicing legal offices.

(C) Prepare reports recommending suspension or debarment using the procedures described in 48 CFR subpart 209.4 of the Defense FAR Supplement, current edition, in all cases where purchasers are recommended for suspension or debarment.

(iii) In addition to applicable guidance in 48 CFR subpart 9.4 and 48 CFR 45.602–1, 52.233–1, and 14.407 of the FAR and 48 CFR subpart 209.4 of the Defense FAR Supplement, current edition, contractors who are suspended, debarred, or proposed for debarment are also excluded from conducting business with the government as agents or representatives of another contractor. Firms or individuals who submit bids on sale solicitations on behalf of suspended or debarred contractors, or who in any other manner conduct business with the government as agents or representatives of suspended or debarred contractors, may be treated as affiliates as described in 48 CFR 9.403 of the FAR, and may be suspended or debarred.

(iv) Parties who violate trade security control (TSC) policies may be recommended for debarment or suspension.

(9) *Indebted bidders and purchasers*. (i) No awards may be made to bidders indebted to the government. Selling agencies will coordinate with DFAS to determine if a bidder is indebted to DoD and maintain local listings containing bidder name, address, sales contract information, amount of indebtedness, and date indebted.

(ii) Circumstances where the SAR or SCO must initiate action include:

(A) At bid opening. Bidders can bid if they cure the debt prior to the opening.

(B) As the result of monies owed the contractor as a refund.

(C) As a result of monies received for bid deposit.

(D) As a result of failure to make payment for overages, ancillary charges, etc.

(E) As a result of affiliation with suspended bidder.

(iii) Checks received for debts will be deposited immediately and the bidder will not be notified until the check has cleared its bank. Cash or negotiable instruments will be deposited immediately.

(iv) SARs or SCOs will contact the bidder and advise that the monies have been deposited to offset the specific indebtedness.

(v) If a SAR or SCO suspects affiliation, the SAR or SCO will contact the bidder and advise that the monies have

been deposited according to the procedures in 31 U.S.C. 3711–3720E for the collection of debts owed to the United States.

(10) *Bid evaluation*—(i) *Responsive bids and responsible bidders.* (A) Only responsive bids (as defined in the § 273.12) may be considered for award.

(B) Bidders do not have to use authorized bid forms. The bid may be considered when the bidder agrees to all of the terms and conditions and acknowledges that the offer may result in a binding contract award.

(C) The selling agency must determine that the bidder is a responsible person or represents a responsible entity.

(ii) *Late bids.* The selling agency will consider late bids for award if the bid was delivered in a timely fashion to the address specified in the sales offering but did not reach the official designated to accept the bid by the bid opening time due to a government delay.

(iii) *Bid modification or withdrawal.* (A) A bidder may modify or withdraw its bid prior to the start of the bid opening. After the start of the sale, the bidder will not be allowed to modify or withdraw its bid.

(B) The selling agency representative may consider late bid modifications to an otherwise successful bid at any time, but only when it makes the terms of the bid more favorable to the government.

(iv) *Mistakes in bids prior to award.* (A) The administrative procedures for handling mistakes in bids (prior to or after award) are contained in 41 CFR 102–38.260, which utilizes the processes of 48 CFR 14.407 of the FAR for federal property sales.

(B) The selling agency head or designee may delegate the authority to make administrative decisions regarding mistakes in bid to a central authority or alternate. This delegation may not be re-delegated by the authority or alternate.

(C) A signed copy of the administrative determination must be included in the contract file and provided to the Government Accountability Office, when requested.

(v) *Bid rejections.* In the event a bid is rejected, the next most advantageous bid may be considered. If an entire sales offering is rejected, all items within that sale may be reoffered on another sale.

(vi) *Identical bids.* If there are multiple high bids of the same amount, the SAR or SCO must consider other factors of the sale (*e.g.*, payment arrangements, estimated removal time) that would make one offer more advantageous to the government. Otherwise, the SAR or SCO may use random tie breakers to avoid expense of reselling or reoffering the property.

(vii) *Suspected collusion.* The SAR or SCO must refer any suspicion of collusion to the agency's Office of the Inspector General or the Department of Justice (DOJ) through its legal counsel.

(viii) *Protests.* Protests by bidders regarding validity of determinations made on the sale of personal property may be submitted to the DLA Disposition Services Comptroller General or comptroller general for the selling agent.

(11) *Awarding sales contracts*—(i) *Selling agents.* SARs or SCOs will:

(A) Be appointed by agency heads or their designees to act as selling agents for the USG.

(B) Enter into and administer contracts for the sale of government property pursuant to the provisions of 40 U.S.C. 101 *et seq.* and other applicable statutes and regulations.

(C) Award and distribute contracts to responsible bidders whose bids conform to the sales offering and are the most advantageous to the government.

(D) Be authorized to reject bids in accordance with paragraph (a)(10)(v) of this section.

(E) Sign under the title of ''Sales Agency Representative'' or ''Sales Contracting Officer.''

(F) Sign all contracting documentation on behalf of the USG.

(G) Be responsible for the proper distribution of sales proceeds.

(ii) *Approvals required for sales and awards.* (A) Selling agencies will designate the dollar limitations of authority of their appointed SARs or SCOs. DLA Disposition Services SCOs may make awards of contracts on sales of usable property having a fair market value of less than $100,000. Except for

antitrust advice limitations, awards of scrap property do not require approval by higher authority.

(B) Selling agencies will notify the U.S. Attorney General whenever an award is proposed for personal property with an estimated fair market value of $3 million or more or if the sale involves a patent, process, technique, or invention per 41 CFR 102–38.325. Selling agencies will otherwise comply with all requirements of 41 CFR chapter 102 including but not limited to the prohibition to dispose any such item until confirmation from the U.S. Attorney General that the proposed transaction would not violate antitrust laws.

(C) The head of a selling agency or designee must approve all negotiated sales of personal property. Selling agencies must submit explanatory statements for each sale by negotiation of any personal property with an estimated fair market value in excess of $15,000 through GSA to the House and Senate Oversight Committee to obtain approval for the sale in accordance with 40 U.S.C. 549.

(iii) *Processing mistakes in bid after award, claims, disputes, and appeals.* Keeping the interests of the government in the forefront, SARs or SCOs will process these actions expeditiously and fairly, in accordance with established internal and external regulations and laws. SARs or SCOs will respond to each issue pertaining to mistakes in bids, claims, disputes, or appeals until it is resolved and provide a written final decision to the claimant or adjudicating agency, as appropriate, until the issue is closed. Retain any decisions made or actions taken in regard to these issues as official records, as required by agency or higher authority directives.

(12) *Notification process for dissemination of awards information.* (i) The selling agency may only disclose bid results after the award of any item or lot of property has been made. No information other than names may be disclosed regarding the bidder(s).

(ii) Bids are disclosed as they are submitted on spot bids or auctions.

(13) *Contract administration.* Selling agencies will prescribe contract administration procedures for the various methods of sale, to include procedures for:

(i) Disseminating award information.

(ii) Billing.

(iii) Default and liquidation.

(iv) Establishing contract folders, including file maintenance and disposition.

(A) Contract administration files will consist of a sale folder, financial folder, individual contract folder(s), and an unsuccessful bids folder for each sale.

(B) Selling agencies will develop procedures for maintaining, completing, reviewing, and auditing these files. All pertinent documentation, including EUC, licenses, pre-award reviews, etc., must be included in the files.

(C) Documentation found in these files may be subject to 5 U.S.C. 552, also known as the Freedom of Information Act. All Privacy Act, privileged, exempt, classified, For Official Use Only, or sensitive information must be obliterated prior to release to the public.

(v) Collection and distribution of sales proceeds.

(vi) Ensuring all requirements of the contract (*e.g.*, non-payment, required licenses) are met prior to releasing the property.

(vii) Making modifications to contracts resulting from changes to the original contract.

(viii) Handling public requests for information.

(ix) Timely review and closure of each contract.

(x) Timely review and closure of each sale.

(14) *Cashier functions and SAR or SCO responsibilities.* (i) Cashiers must be duly trained in the handling and processing of monies collected as payment on sales.

(ii) Cashiers must credit sales proceeds in accordance with chapter 5 of Volume 11A of DoD 7000.14–R, ''Department of Defense Financial Management Regulations (FMRs)'' (available at *http://comptroller.defense.gov/fmr/current/11a/11a_05.pdf*).

(15) *Inquiries regarding suspended or debarred bidders.* Refer all inquiries regarding suspended or debarred bidders to the office effecting the action.

(16) *Release requirements following sales.* (i) Removal of property is subject

to general and special conditions of sale and the loading table as set forth in the sale offering and resulting contract.

(ii) Prior to releasing sold property, assigned personnel will:

(A) Verify the sale items to be delivered or shipped to purchasers against the sale documents to prevent theft, fraud, or inappropriate release of property.

(B) When DLA Disposition Services is managing the sale and where an in-place receipt memorandum of understanding (MOU) has been executed, installation commanders will provide, by letter designation and upon request from DLA Disposition Services site, the names, telephone numbers, and titles of those non-DLA Disposition Services site personnel authorized to release property located at their activities. As changes occur, installation commanders will provide additions, deletions, and revisions in writing to DLA Disposition Services.

(C) Weigh property sold by weight at the time of delivery to the purchaser.

(D) Count or measure property sold by unit at the time of delivery.

(iii) Purchasers are required to pay, before delivery, the purchase price of item(s) to be removed, based upon the quantity or weight as set forth in the sale offering, except for term sales. If prepayment of an overage quantity is not practicable or possible, payment will be due upon issuance of a statement of account after release of property. Sales of property to State and local governments do not require payment prior to removal. The DLA Disposition Services contract with its sales partners does not require payment prior to delivery of property to State and local governments only.

(17) *Withdrawal from sale.* (i) Property that has been physically inspected, determined to be usable or needed, and thereby has survived screening is eligible for sale and may be requested to satisfy valid requirements within limitations specified in this paragraph. Generally, property past the screening cycle may not be withdrawn from sale. However, circumstances may require the withdrawal of property from sale to satisfy valid needs within the Department of Defense or FCAs. Donation recipients are not eligible to withdraw property from the sale unless they can provide DLA Disposition Services with documentation that an error was made by DLA Disposition Services and they should have been issued the property or the property was never available for electronic screening in GSA personal property database GSAXcess®.

(ii) In many instances, the property remains at a DLA Disposition Services site after the title has been transferred. This property is ineligible for withdrawal to satisfy DoD needs. If the DoD Component intends to pursue purchasing the property from the commercial partner, transactions must be handled between the partner and the DoD Component without intervention from the DLA Disposition Services.

(iii) Pursuant to 41 CFR chapter 102, due to the potential for adverse public relations, every effort will be made to keep withdrawals from sales to a minimum. These efforts will include searching for assets elsewhere in the disposal process. Exceptions to this policy will be implemented only when all efforts to otherwise satisfy a valid need have been exhausted and the withdrawal action is determined to be cost effective and in the best interest of the government. DoD Component heads will ensure that withdrawal authority is stringently controlled and applied.

(iv) Make requests to the selling agency by the most expeditious means. With the exception of ICP or IMM and NMCS orders, requests will provide full justification including a statement that the property is needed to satisfy a valid requirement.

(v) Withdrawals may not be processed subject to property inspection for acceptability. Inspect property before requesting withdrawal.

(vi) Orders submitted by ICPs or IMMs do not require justification statements before award.

(vii) With the exception of ICPs and IMMs, minimum written information required in the package for withdrawal requests includes:

(A) Detailed justification as to why the property is required, including how the property will be used; such as applicability of materiel to active weapons systems.

(B) Mission impact statement from a support, procurement, and funding standpoint if property is not withdrawn from sale (*e.g.*, the effect on operational readiness requirements within a specified period of time).

(C) A summary of efforts made to find assets meeting the requirement from other sources, including consideration of substitute items.

(viii) When the DLA Office of Investigations, TSC Assessment Office, determines that property was incorrectly described, and that TSC or DEMIL requirements are applicable, property will either be withdrawn or a provision made to accomplish TSC or DEMIL, as appropriate. The TSC Assessment Office may request withdrawal of property and suspend further action regarding the property until the matter is resolved in accordance with the procedures in DoD Instruction 2030.08.

(ix) As property moves through the sales cycle, constraints are placed on requests for withdrawals from sale.

(A) The area manager can approve requests for withdrawal during the period between the end of screening and the date the property is referred to DLA Disposition Services for sale cataloging or until a delivery order is signed by the commercial venture partner. The area manager can also approve withdrawals prior to bid opening for items on authorized local sales.

(B) DLA Disposition Services can approve withdrawal requests from date of referral until the property is awarded. DLA Disposition Services can also return requests for withdrawal after award that do not include the required written information.

(x) DLA approval, with DLA legal concurrence, is required on any withdrawal request after the award but before removal.

(xi) When title has passed to the purchaser, the requestor must work directly with the purchaser. This includes commercial venture property. The SAR or SCO will provide contract information when requested.

(18) *Reporting requirement.* (i) In accordance with 10 U.S.C. 2583, the Secretary of Defense will prepare an annual report identifying each public sale conducted (including property offered for sale and property awarded) by a DoD Component of military items that are controlled on the U.S. Munitions List pursuant to 22 U.S.C. 121 and assigned a DEMIL Code of B in accordance with DoD 4160.28–M Volumes 1–3. For each sale, the report will specify:

(A) The date of the sale.

(B) The DoD Component conducting the sale.

(C) The manner in which the sale was conducted (method of sale).

(D) Description of the military items that were sold or offered for sale.

(E) The purchaser of each item, if awarded.

(F) The stated end-use of each item sold.

(ii) The report is submitted not later than March 31 of each year. The Secretary of Defense is required to submit to the Committee on Armed Services of the House of Representatives and the Committee on Armed Services of the Senate the report required by this section for the preceding fiscal year. DLA Disposition Services includes shipments made during the reporting period to its business partner.

(19) *Special program sales*—(i) *Resource recovery and recycling program.* (A) All DoD installations worldwide will have recycling programs as required by DoD Instruction 4715.4 with goals for recycling as outlined in Executive Order 13514.

(*1*) Pursuant to 10 U.S.C. 2577 and 48 CFR subpart 209.4 of the DFARS, each installation worldwide will have or be associated with a QRP or recycling program available to the installation to appropriately dispose of all recyclable materials for all activities. This includes all DoD facilities not on a military installation, tenant, leased, and government owned-contractor operated (GOCO) space.

(*2*) Installations having several recycling programs will incorporate them into the single installation QRP if possible, however a separate recycling program may be established to appropriately dispose of recyclable materials that cannot be recycled through the QRP.

(*3*) Each DoD Component will designate a coordinator for each QRP and ensure the GOCO facilities participate in QRP.

(B) Recyclable material includes material diverted from the solid waste stream and the beneficial use of such material. It may be beneficial to use waste material as a substitute for a virgin material in a manufacturing process, as a fuel, or as a secondary material. Examples of material that can be recycled through QRP are provided in Table 1 of this section and those that cannot be recycled through QRP are provided in Table 2 of this section, both from the complete list in DoD Instruction 4715.4.

(C) Continually review each QRP to identify material appropriate for waste stream diversion, explore recycling methods, and identify potential markets. Additional recyclable material includes not only material generating profit, but material whose diversion from the waste stream generate a savings to the Department of Defense in disposal costs, or when diversion is required by State or local law or regulation. Material generated from non-appropriated or personal funds (*e.g.*, post consumer wastes from installation housing, and installation concessions) may be included.

TABLE 1—EXAMPLES OF MATERIAL THAT CAN BE RECYCLED THROUGH QRP

| EXAMPLES OF MATERIAL THAT CAN BE RECYCLED THROUGH QRP | |
|---|---|
| 1 | Typical recyclable material found in the municipal solid waste stream (glass, plastic, aluminum, newspaper, cardboard, etc.). |
| 2 | Scrap metal from non-defense working capital fund activities. |
| 3 | Expended small arms cartridge cases that are 50-caliber (12.7 mm) and smaller not suitable for reloading that have been mutilated or otherwise rendered unusable and gleanings made unusable for military firing e.g., crushed, shredded, annealed, or otherwise rendered unusable as originally intended prior to recycling in accordance with DoD Instruction 4715.4, except overseas. |
| 4 | Storage and beverage containers (metal, glass, and plastic). |
| 5 | Office paper (high-quality, bond, computer, mixed, telephone books, and FEDERAL REGISTERS). |
| 6 | Commissary store cardboard and exchange store wastes (cardboard), if the commissary or exchange chooses to use the QRP. |
| 7 | Scrap wood and unusable pallets. |
| 8 | Rags and textile wastes that have not been contaminated with hazardous material or HW. |
| 9 | Automotive and light truck-type tires. |
| 10 | Used motor oil. |
| 11 | Food wastes from dining facilities. |
| 12 | Office-type furniture that is broken or too costly to repair. |
| 13 | Donated privately owned personal property. |

TABLE 2—EXAMPLES OF MATERIAL THAT CANNOT BE RECYCLED THROUGH QRP

| EXAMPLES OF MATERIAL THAT CANNOT BE RECYCLED THROUGH QRP | |
|---|---|
| 1 | PM-bearing scrap. |
| 2 | Scrap metal generated from a defense working capital fund activity. |
| 3 | Items, such as MLI indicated in item 10 of this table, that must be demilitarized (DEMIL) at any time during their life cycle, except for small arms and light weapons brass and gleanings as described in item 3 of Table 1. |
| 4 | Hazardous materials and waste. |
| 5 | Material that can be reused by the government for their original purpose without special processing. These items may or may not be MLI or CCL items. |
| 6 | Repairable items (e.g., used vehicles, vehicle or machine parts). |
| 7 | Unopened containers of oil, paints, or solvents. |
| 8 | Fuels (uncontaminated and contaminated). |
| 9 | MLI or CCL items (Only DEMIL Code A items may be candidates for recycling.). |
| 10 | Printed circuit boards containing hazardous materials. |
| 11 | Items required to be mutilated prior to sale or release to the public. |
| 12 | Ammunition cans, unless certified as MPPEH Designated as Safe in accordance with DoD 4160.28–M Volumes 1–3 and DoDI 4140.62. |
| 13 | Usable pallets, unless DLA Disposition Services states otherwise. |

TABLE 2—EXAMPLES OF MATERIAL THAT CANNOT BE RECYCLED THROUGH QRP—Continued

| | |
|---|---|
| 14 ..... | Electrical and electronic components (These may be MLI or CCL items eligible only for Electronics Demanufacturing and DEMIL or mutilation.). |

(D) Installation commanders authorized by their DoD Component head, as appropriate, may sell directly recyclable and other QRP materials, or consign them to the DLA Disposition Services for sale. If selling directly, installations will:

(*1*) Maintain operational records for annual reporting requirements, review, and program evaluation purposes.

(*2*) Manage processes, reports, and proceeds distribution in accordance with 41 CFR chapters 101 and 102 and DoD 7000.14–R.

(E) Excluded material is identified in Attachment 2 to DoD Instruction 4715.4, which provides a guide of eligible and ineligible materials.

(F) Although scrap recyclable materials do not require formal screening, those purchased with appropriated funds, as surplus property under the FPMR and FMR, are available to meet RTD requirements.

(G) When sold directly by the installation, use proceeds to reimburse the installation level costs incurred in operating the recycling program. After reimbursement of the costs incurred by the installation for operations (*e.g.*, operation and maintenance and overhead), installation commanders may use the remaining proceeds as authorized by DoD Instruction 4715.4.

(ii) *Commercial Space Launch Act (CSLA)*. (A) The purpose of the CSLA, 51 U.S.C. Chapter 509, is to promote economic growth and entrepreneurial activity through the utilization of the space environment for peaceful purposes; encourage the private sector to provide launch vehicles and associated launch services; and to facilitate and encourage the acquisition (sale, lease, transaction in lieu of sale, or otherwise) by the private sector of launch property of the United States that is excess or otherwise not needed for public use, in consultation with Secretary of Transportation. Donation screening is not required prior to sale.

(B) The DoD Chief Information Officer (DoD CIO) has the primary responsibility for coordinating DoD issues or views with the Department of Treasury, other Executive department organizations, and the Congress on matters arising from private sector commercial space activities, particularly the operations of commercial ELVs and national security interests.

(C) The DLA Disposition Services is the primary office to conduct CSLA sales following the direction for pricing and disposition as specified in DoD Directive 3230.3 Sales will be by competitive bid to U.S. firms or persons having demonstrated action toward becoming a commercial launch provider. The DoD CIO and the Secretary of the U.S. Air Force (USAF) designated representative will support DLA Disposition Services, as necessary, in the sale or transfer of excess and surplus personal property to the private sector, including the identification of potential bidders and any special sales terms and conditions. The generating activity will assist, as necessary, in completing sales transactions.

(b) *Security assistance or FMS*—(1) *Statutory authority*. Authority for security assistance is provided primarily under 22 U.S.C. 2751 *et seq*. (also known as the Arms Export Control Act) and annual appropriation acts for foreign operations, export financing, and related programs.

(2) *Security assistance program requirements*. (i) Security assistance transfers are authorized under the premise that if these transfers are essential to the security and economic well-being of friendly governments and international organizations, they are equally vital to the security and economic well-being of the United States. Security assistance programs support U.S. national security and foreign policy objectives.

(ii) In coordination and cooperation with DOS, the Defense Security Cooperation Agency (DSCA) directs, administers, and provides overall procedural guidance for the execution of security cooperation and additional DoD programs in support of U.S. national

security and foreign policy objectives; and promotes stable security relationships with friends and allies through military assistance, in accordance with DoD 5105.38–M.

(3) *Foreign purchased property*. Disposal initiatives and actions will be in accordance with DoD 5105.38–M or guidance provided by security assistance implementing agencies on a case-by-case basis.

(4) *FMS disposal process summary*—(i) *Defense disposal services*. (A) FEPP, excess, and surplus personal property may be made available to foreign countries and international organizations designated as eligible to purchase property or services in accordance with 22 U.S.C. 2151, 2321b, 2321j, 2443, 2751, and 2778 *et seq*. Such defense articles may be made available for sale under the FMS Program. Transactions under this authority are reimbursable.

(B) FMS transactions are completed by use of letters of offer and acceptance and the procedures specified in DoD 5105.38–M.

(ii) *Grant transfer of excess defense articles (EDAs)*. 22 U.S.C. 2321j authorizes the U.S. Government to grant transfer of EDA to eligible foreign governments. For a transfer under this authority, DoD funds may not be used for packing, crating, handling, and transportation except under certain circumstances consistent with the guidance in 22 U.S.C. 2321j(e).

(iii) *FMS transportation*. (A) As a general rule, FMS customers are responsible for all transportation costs.

(*1*) The transportation costs can be written into the letters of agreement or the items can be shipped on a collect commercial basis. The implementing DoD Component or DLA Disposition Services will identify exceptions to this rule.

(*2*) Sensitive and some other FMS shipments may be made via the Defense Transportation System (DTS).

(*i*) Sensitive shipments not going through the DTS must be routed through a DoD-controlled port (Delivery Term Codes 8, B, or C). See Appendix E, paragraph H.1, Part II of the Defense Transportation Regulations 4500.9–R, ''Defense Transportation Regulations'', current edition (available at *http://www.transcom.mil/dtr/part-ii/dtr_part_ii_app_e.pdf*).

(*ii*) For these shipments, the implementing agency will provide separate instructions and funds citations. Transportation arrangements may be made by the supporting Transportation Office or DLA Disposition Services.

(B) Unless otherwise directed by the implementing agency or DLA Disposition Services FMS Office:

(*1*) Send small items collect via Federal Express or other parcel service to designated freight forwarder.

(*2*) Send less than truckload shipments collect via common carrier to designated freight forwarder.

(*3*) Prepare and send DD Form 1348–5, ''Notice of Availability/Shipment,'' for larger than truckload shipments to freight forwarder or other designated address. Upon receipt of DD Form 1348–5, the recipient will provide shipping instructions or advise of pick-up date. If shipping instructions are not received within 15 days after DD Form 1348–5 is issued, follow up with freight forwarder and notify DLA Disposition Services if they are the implementing agency.

(*4*) For sensitive Delivery Term Code 8 property, in accordance with Part II of the Defense Transportation Regulation 4500.9–R, and hazardous material property, the supporting transportation office must ensure that the property is released in accordance with all applicable regulatory requirements. The preferred option is to let the supporting transportation office accomplish notice of availability and property shipment processes.

(*5*) On rare occasions, property may be transferred on a no-fee basis. The implementing agency or DLA Disposition Services will provide appropriate instructions on a case-by-case basis.

(C) In accordance with 22 U.S.C. 2403, construction equipment, including but not limited to tractors, scrapers, loaders, graders, bulldozers, dump trucks, generators, and compressors are not considered EDA for purposes of this section.

(iv) *FMS eligibility*. Eligibility for FMS is listed in Table C4.T2 of DoD 5105.38–M. Eligibility to receive excess property as a grant pursuant to 22

U.S.C. 2151, 2321, 2751, 2778 *et seq.* is established by the DOS and provided to DSCA. DoD Components will follow the latest guidance from DSCA showing which countries are eligible under the various authorities.

(v) *Controlled assets.* (A) Foreign countries and international organizations may screen and request DLA Disposition Services assets during DLA Disposition Services reutilization screening periods.

(B) 10 U.S.C. 2562 prohibits the sale or transfer of fire equipment to foreign countries and international organizations until RTD has been accomplished. Fire equipment remaining after these periods may be made available to security assistance customers with a certification to DSCA that the property is not defective and has completed all required excess property processes.

(C) DSCA will provide guidance for the transfer of items.

(D) Pricing of FMS is governed by DoD 7000.14–R.

(c) *Reutilization or transfer, excess screening, and issue (includes donation of DLA Disposition Services assets)*—(1) *Authority and scope.* (i) The provisions of this section are based on the guidelines of 41 CFR chapters 101 and 102.

(ii) The scope of this section includes the RTD screening, ordering, issuing, and shipment of DoD FEPP, excess, and surplus personal property.

(A) These procedures apply to the Military Departments, FCAs, donees, eligible foreign governments and international agencies, and any other activities authorized to screen and order FEPP, excess, and surplus personal property.

(B) See § 273.8 for additional guidance on the DoD HAP, LEAs, DoD or Service museums, National Guard units, Senior Reserve Officer Training Corps (ROTC) units, morale, welfare, recreational activities (MWRAs), the MARS, Civil Air Patrol (CAP), and DoD contractors.

(C) See § 273.8 and paragraph (b) of this section for additional information on foreign governments and international organizations.

(2) *General.* (i) DoD policy, in accordance with 41 CFR chapters 101 and 102, is to reutilize DoD excess property and FEPP to the maximum extent feasible to fill existing needs before initiating new procurement or repair. All DoD activities will shop for available excess assets and review referrals for assets to satisfy valid needs. DLA Disposition Services provide asset referrals via front end screening to ICPs daily. See individual Military Department guidance regarding eligibility and authority to withdraw excess property from DLA Disposition Services.

(ii) Customers can electronically request specific NSNs for orders, whether DLA Disposition Services assets are available at the time the need arises. When an asset becomes available in the DLA Disposition Services inventory, an electronic notification will be sent to the customer for initiating an official order. See paragraph (c)(3)(vii) of this section for procedures on the automated want lists.

(iii) The UII mark, if applicable, will not be removed from a personal property item offered for RTD.

(3) *Screening for personal property*—(i) *Screening.* (A) DoD reutilization is accomplished electronically via MILSTRIP and DLA Transaction Services, through the DLA Disposition Services Web site.

(B) At the end of the DoD exclusive internal screening cycle, DoD excess property (excluding FEPP, scrap and HW) is transmitted to the GSAXcess®, and GSA assumes control of federal agency transfer and donation screening. The property remains in DLA Disposition Services accounts and can be viewed on their Web site.

(C) GSA federal screening is accomplished through the GSAXcess® platform that is a customer interface to the Federal Disposal System (FEDS). DoD personnel may shop in GSAXcess® at any time and search and select property from DoD and other FCAs. Transportation costs for other FCA property are borne by the DoD screener. DLA Disposition Services makes shipping arrangements for DoD orders in GSAXcess® and includes the transportation costs in the cost of the item.

(D) Enclosure 7 to DoD Manual 4160.21, Volume 2 and Enclosure 3 to DoD Manual 4160.21, Volume 4 provides additional information on screening for excess personal property by category.

(E) All references to days are calendar days unless otherwise specified.

(F) With electronic screening, physical tagging of property at a DLA Disposition Services site to place a ''hold'' until an order has been submitted is no longer authorized.

(G) DLA Disposition Services provides reasonable access to authorized personnel for inspection and removal of excess personal property.

(ii) *CONUS screening timeline for excess personal property*—(A) *Accumulation period*. DLA Disposition Services accumulates property throughout the week as it is inspected and added to the inventory system. As property is added to the inventory system, it is visible for ordering by DoD customers only. This accumulation period ends each Friday, prior to the start of the official 42 day screening timeline.

(B) *DoD and Special Programs screening Cycle (14 days)*. DoD and the Special Programs identified in § 273.8 have exclusive ordering authority during the first 14 days of the screening timeline. DoD reutilization requirements have priority during this cycle, and property will not be issued to Special Programs until the end of this cycle.

(C) *FCA and donees screening cycle (21 days)*. FCAs and GSA-authorized donees screen property in GSAXcess® during the following 21 days. FCA requirements have priority during this cycle, and property will not be issued to donees until the end of this cycle. During this cycle, DoD will search and select property in GSAXcess® rather than submit MILSTRIP orders, with the exception of priority designator (PD) 01–03 and NMCS requisitions. DoD customers will submit PD 01–03 and NMCS requisitions to DLA Disposition Services, who will immediately fill these orders and notify GSA to make the record adjustment in GSAXcess®.

(D) *GSA allocation to donees (5 days)*. The following 5 days are set aside for GSA to allocate assets to fill donee requests. During this allocation period, no GSAXcess® ordering can be made.

(E) *Final reutilization/transfer/donation (RTD2) screening (2 days)*. The final 2 days of screening are available to all RTD customers for any remaining property on a first come, first served basis.

(F) Table 3 of this section summarizes the priority of issue and the timelines associated with screening and issue of property.

TABLE 3—SUMMARY OF SCREENING AND ISSUE TIMELINES IN ORDER OF ISSUE PRIORITY

| RTD Method | Eligibility | Screening period | Issuing period |
|---|---|---|---|
| Reutilization | DoD | Days 1–14 | Days 1–42. |
| Reutilization | Special Programs | Days 1–14 | Days 15–42. |
| Transfer | All Federal Agencies | Days 15–35 | Days 15–42. |
| Donation | Authorized GSA Donees | Days 15–35 | Days 36–42. |
| RTD2 | All RTD Customers | Days 41–42 | Days 41–42. |
| Sale | General Public | N/A | N/A. |

(iii) *FEPP screening timeline*. (A) Screening timeline and procedures for FEPP will generally follow those listed in paragraph (c)(3)(ii) of this section.

(B) During contingency operations, the ASD (L&MR) may approve expedited screening timelines and changes to issue priorities.

(iv) *DoD screening methods*. (A) DoD reutilization screening is accomplished electronically via MILSTRIP and DLA Transaction Services through the DLA Disposition Services Web site. If the electronic method is unsuccessful, please fax the following on agency letterhead: Name, phone number, point of contact, internet provider (IP) address, and two signatures of authorized individuals to DLA Disposition Services Reutilization Office at fax commercial 269–961–7348 or DSN 661–7348.

(B) Local screening at the DLA Disposition Services sites is on-site (visual) viewing of excess property. Physical inspection of property may not be possible for assets at depot recycling control points (RCPs), receipts in-place, or remote locations.

(v) *GSAXcess® screening*. (A) Users must obtain an access code from GSA to screen through GSAXcess®. To learn about GSAXcess® and obtain access

code information, see: *http://apps.fss.gsa.gov/Manuals/Feds_Users_guide*.

(B) DoD customers must obtain access from GSAXcess® to search and select property. The DoD Accountable (Supply) Property Officer must provide GSA a letter (on official letterhead) or email (from a ''.mil'' address) requesting access for their representatives and include addresses, phone numbers, email addresses, and DoDAAC of those authorized to select property from GSAXcess®. Customers may select items once the access is granted.

(C) DoD customers who only want to search for available property in GSAXcess® can also register for search only access at *www.gsaxcess.gov*.

(vi) *Screening exceptions*. Generally, property cannot be screened before it is entered on DLA Disposition Services site's accountable records. However, instances where screening prior to entry may be justified include:

(A) Property needed to fulfill emergency orders, (*e.g.*, PD 01–03, NMCS, disaster relief) and which may be processed as a ''wash-post'' transaction. The DLA Disposition Services site must be able to fully justify these actions and ensure a signed receipt copy of the DTID is returned to the generating activity.

(B) Backlog situations where usable property is in danger of being damaged by the elements due to a lack of adequate storage and an authorized customer is on location.

(vii) *Automated want lists*. (A) Customers may use the automated pre-receipt information to flag desired NSNs. Use of this tool does not guarantee the items will become available. If notified that the item is in the excess inventory, customers must use standard MILSTRIP order procedures. For more guidance, see *https://www.dispositionservices.dla.mil/rtd03/index.shtml*.

(B) Customers may submit automated searches for recurring NSNs through the DoD Property Search Web site at *https://www.dispositionservices.dla.mil/rtd03/index.shtml*. Results are emailed to the customer.

(C) Customers may also submit a ''Want List'' in GSAXcess®, which can help them locate excess property from civilian agencies.

(viii) *Specialized screening for ICPs*. (A) DLA Disposition Services will electronically report to designated ICPs those assets with valid NSNs meeting dollar value and condition code criteria established by each DoD Component. The notification will be sent electronically to the recorded DoD wholesale manager (ICP or IMM) concurrently with recording the excess in the DLA Disposition Services system for accounting for excess property in DoD. Component IMMs may view the NSNs they requested during the first 5 days of the accumulation period before the items become available to other DoD activities. The ICPs must send their request to: DLA Disposition Services, Hart-Dole-Inouye Federal Center, 74 North Washington Avenue, Suite 2429, Battle Creek, Michigan 49037.

(B) The DoD ICP or IMM will screen these notifications to determine if needs exist. DLA Disposition Services site excesses will be reutilized to satisfy known or projected buy and repair needs.

(C) Orders for property during the internal screening periods will be prepared according to MILSTRIP and submitted to DLA Disposition Services.

(ix) *Issues to and turn-ins by special programs and activities*—(A) *DoD HAP*. (*1*) The DoD HAP is authorized to dispose excess property through DoD DLA Disposition Services site channels.

(*2*) Providing non-lethal DoD excess personal property for humanitarian purposes is authorized pursuant to 10 U.S.C. 2557. Preparation and transportation of this property is carried out in accordance with 10 U.S.C. 2661. HAP allows DoD to make available, prepare, and transport non-lethal, excess DoD property for distribution by DOS for humanitarian reasons. The program is managed by the DSCA Office of Humanitarian Assistance and Demining.

(*3*) In most instances, property issues will be from DLA Disposition Services inventories. The most commonly requested types of property are medical equipment, field gear, tools, clothing, rations, light vehicles, construction, and engineering equipment. DLA Disposition Services sites will issue all property destined for the HAP, with the exception of drugs and biologicals (Federal Supply Classification Code

(FSC) 6505), which may be issued directly by the Military Departments. HAP orders and issues will be documented on DD Form 1348–1A ''Issue Release/Receipt Document.''

(B) *LEAs.* In accordance with 10 U.S.C. 2576a, DLA has established an office to permit civil police authority to acquire excess DoD property, and the Web site *https://www.dispositionservices.dla.mil/rtd03/leso/index.shtml* provides information to assist with the process. LEAs can contact DLA Disposition Services at: DLA Disposition Services, Hart-Dole-Inouye Federal Center, 74 North Washington Avenue, Suite 2429, Battle Creek, Michigan 49037, Toll free: 1–877–DLA–CALL, DSN: 661–7766, Commercial/FTS 269–961–7766.

(*1*) 10 U.S.C. 2576a authorizes the Secretary of Defense, in consultation with the Director, Office of National Drug Control Policy, and DOJ, to transfer excess DoD property, including small arms, light weapons, and ammunition, to federal and State LEAs, including counterdrug and counterterrorism activities. The federal program is known as the 1033 Program. The DLA Disposition Services has managerial responsibilities in support of such transfers and will establish business relationships with participating States by memorandum of agreement (MOA).

(*2*) LEAs will return sensitive or controlled DEMIL-required property originally ordered from DLA Disposition Services when no longer needed. DEMIL-required equipment that is the responsibility of the LEA must be demilitarized in accordance with DoD 4160.28–M Volumes 1–3. Due to constant changes and development of new technology, Table 4 of this section is only a partial list of NSNs that may contain radioactive components as identified for Army Navy (AN) night vision equipment codes in DoD 4160.28–M, Volume 2. These NSNs and many others should not be transferred to DLA Disposition Services sites. The turn-in activity will verify with the DLA Disposition Services site whether equipment contains radioactive components before turning in any night vision equipment.

TABLE 4—NSNS WITH RADIOACTIVE COMPONENTS

| NSN No. | Radioactive component |
|---|---|
| 5855–00–053–3142 | AN/TVS–4 (prototype) |
| 5855–00–087–2942 | AN/PVS–1 |
| 5855–00–087–2947 | AN/PVS–2 |
| 5855–00–087–2974 | AN/PVS–1 |
| 5855–00–087–3114 | AN/TVS–2 |
| 5855–00–113–5680 | MX–8201 |
| 5855–00–156–4992 | AN/PVS–3A |
| 5855–00–156–4993 | MX–8201A |
| 5855–00–179–3708 | AN/PVS–2A |
| 5855–00–179–3709 | MX–7833 |
| 5855–00–400–2619 | MX–7833A |
| 5855–00–484–8638 | AN/TVS–2B |
| 5855–00–688–9956 | AN/TVS–4 |
| 5855–00–688–9957 | AN/TVS–4 |
| 5855–00–760–3869 | AN/PVS–2B |
| 5855–00–760–3870 | AN/TVS–4A |
| 5855–00–791–3358 | AN/TVS–2A |
| 5855–00–832–9223 | MX–7833 |
| 5855–00–832–9341 | AN/PVS–3 |
| 5855–00–906–0994 | AN/TVS–4 |
| 5855–00–911–1370 | AN/TVS–2 |
| 5855–01–093–3080 | AN/PAS–7A |
| 5855–00–087–3144 | AN/TVS–2 |

(C) *DoD or service museums.* (*1*) Legal authority is provided by 10 U.S.C. 2572, which allows the loan, gift, or exchange of specified historic or obsolete or condemned military property. Approval authority for museum acquisitions from DLA Disposition Services sites expressly for the purpose of exchange must be granted by the activity having staff supervision over the museum. Approval authority includes:

(*i*) U.S. Army: Chief of Military History (DAMH–MD), 1099 14th Street NW., Washington, DC 20005–3402.

(*ii*) U.S. Navy: Curator for the Navy, Naval Historical Center, Building 108, Washington Navy Yard, Washington, DC 20374–0571.

(*iii*) U.S. Air Force: Director, National Museum of the United States Air Force, HQAFMC, 1100 Spaatz Street, Wright-Patterson AFB, Ohio 45433–7102.

(*iv*) U.S. Marine Corps: Marine Corps History Division, 3079 Moreel Avenue, Quantico, Virginia 22134.

(*v*) U.S. Coast Guard: Coast Guard Historian, Commandant (CG–09224), U.S. Coast Guard Headquarters, Douglas A. Munro Building, 2703 Martin Luther King Jr., Avenue, South East Stop 7031, Washington, DC 20593–7031.

(*2*) The DoD or Military Department museums will use standard DoD processes to dispose excess property using DoDAACs.

(*3*) The DoD and Military Department museums may obtain property from DLA Disposition Services sites for use, display, or exchange. With the exception of historical artifacts, stockpiling of property obtained from DLA Disposition Services sources for future exchange is prohibited.

(*4*) The normal ordering procedures apply. The DD Form 1348–1A, in addition to routine information, will include:

(*i*) The museum's individual DoDAAC or the DoDAAC of the Service headquarters with central responsibility for historical property.

(*ii*) A statement if the property is to be used for display, exchange, or use (*e.g.*, property needed to maintain the museums' buildings and grounds, for day-to-day housekeeping operations, or to maintain displays).

(*iii*) Only DEMIL Code ''A'' property is requested. Examples of DEMIL Code A items suitable for housekeeping purposes by DoD museums may include: Federal Supply Classification Groups (FSGs) 52—hand tools; 53—hardware; 55—lumber; 56—construction materials; 61—electric wire; 62—lighting fixtures; 71—furniture; 72—furnishings; 75—office supplies; 79—cleaning equipment; 80—brushes and paints. Orders of property for exchange will reflect the DoDAAC of the DoD Military Department museums. An exception to this procedure applies to M151 series, M561, and M792 (Gamma Goat) vehicles. Although coded as DEMIL Code A, exchange of the vehicles is prohibited.

(*5*) DLA Disposition Services sites will:

(*i*) Ensure DEMIL Code A property ordered by a museum for exchange purposes has no current challenges to that code. This applies to all items whether recorded in the DLA Logistic Information Service Federal Logistics Information System Master Item File or not, including scrap and captured military items. Excluded are the M151 series vehicles, hazardous property, and MLI and CCL items, which are not authorized for museum exchanges.

(*ii*) Ensure authorized property ordered by museums for exchange is released to the ordering museum personnel only. Identification of the individual is required. These personnel must be military or civilian employees of the museum, not volunteers or members of the museums' private supporting organizations.

(*6*) The DoD operating activities and Military Departments will:

(*i*) Maintain accountable records according to appropriate DoD and Service regulations of all items withdrawn from DLA Disposition Services sites, to include all materiel transactions, receipts from the DLA Disposition Services site, and transfer and exchange documents.

(*ii*) Provide to DLA Disposition Services a list of all the DoD museums and Service museums authorized to negotiate with DLA Disposition Services sites, including the name of the institution, address, telephone number, and the DoDAAC of the museum.

(D) *National Guard units.* (*1*) National Guard Units will use the standard DoD processes to dispose excess DoD property through the use of DoDAACs.

(*2*) Issues of excess DoD property and FEPP to National Guard units must be approved by the National Guard Bureau or the U.S. Property and Fiscal Officer (USP&FO), or their authorized representative, for the State in which the National Guard unit is located. Requests received from National Guard units that do not contain the signature of the USP&FO, their authorized representative, or the National Guard Bureau, will not be honored.

(E) *Senior ROTC units.* (*1*) Senior ROTCs will use standard DoD processes to dispose excess DoD property using DoDAACs.

(*2*) Military Departments' Senior ROTC units may obtain excess DoD property and FEPP from DLA Disposition Services sites to support supplemental proficiency training programs. Orders to DLA Disposition Services sites must be approved by the installation commander or designee, normally responsible for providing logistical support to the instructors group. Property will be issued to the accountable officer of the school concerned.

(F) *USCG.* As a recognized military service and a branch of the U.S. Armed Forces, and due to the association of the USCG to the U.S. Navy, DLA Disposition Services will accept USCG (DHS) excess property, USCG excess

DoD property and FEPP for disposal. The principles outlined in paragraph (c)(3)(i) through (viii) of this section apply.

(*1*) USCG excess DoD property may be transferred to the nearest DLA Disposition Services site after internal USCG screening. Physical retention of the property by the USCG is preferred, especially if size or economics prevent physical transfer.

(*2*) Property physically turned in to the DLA Disposition Services site does not qualify for reimbursement.

(*3*) After the USCG completes all RTD screening for aircraft and vessels, DLA Disposition Services may provide sales services through an in-place MOU that outlines all USCG and DLA Disposition Services responsibilities.

(*4*) USCG aircraft may be transferred to the Aerospace Maintenance and Regeneration Group (AMARG), Davis-Monthan Air Force Base, Arizona, according to the ISSA between the USCG and the USAF.

(*5*) USCG orders must include a citation as to the USCG directive authorizing the unit to obtain the property listed on the order. In addition, the fund citation for transportation must be included on the DTID. Individual floating and shore units of the USCG may be delegated authority to order excess DoD property without Commandant, USCG approval. Indicate the delegating authority on all orders. The DLA Disposition Services site need not validate the authenticity of the authority, but only the fact that such authorization appears on the order.

(G) *U.S. Army Corps of Engineers (COE) civil works property*. (*1*) Based on the association of Civil Works with the U.S. Army, the COE will use Department of the Army DoDAACs to transfer personal property through DLA Disposition Services for disposal, including hazardous property through a service contract.

(*2*) COE civil works activities may order property through DLA Disposition Services as a DoD activity, using an assigned Army DoDAAC or as an FCA, using an address activity code through GSAXcess®.

(H) *MAP Property and Property for FMS*. DoD Directive 5105.22 and paragraph (b) of this section provide additional procedures for MAP property or for property that can be purchased by eligible organizations through FMS.

(*1*) Following the country decision to dispose through DLA Disposition Services, the country and Security Assistance Office will determine, in coordination with DLA Disposition Services, the proper disposal method (*e.g.*, DEMIL or mutilation requirements, security classification, reimbursement decisions).

(*2*) DLA Disposition Services, in coordination with the country and Security Assistance Office will make provision for in-country U.S. personnel, with assistance from local personnel, as appropriate, to act as DLA Disposition Services agent where turn-in by the generating activity and physical handling by the DLA Disposition Services site is impractical. In addition to MILSTRIP documentation requirements of DLM 4000.25–1, the generating activity will include the following data on the electronic turn-in document or DTID for MAP items.

(*i*) Country.

(*ii*) DTID number, to include at a minimum, in the first position, a service code (B, D, K, P, or T); in the second position, a country or activity code in accordance with DoD Directive 5230.20, and in the third position, the Julian date.

(*iii*) Identification of MAP Address Directory Security Assistance Offices initiating turn-in.

(*iv*) MAP account fund citation.

(*3*) Screen disposable MAP property for reutilization, FMS, and transfer to fill known federal needs. Process disposable MAP property surviving reutilization, FMS screening, and other transfers to sale.

(*4*) Process MAP property used for any purpose other than to meet approved DoD needs for RTD or sale on a reimbursable basis.

(*5*) The allocation of weapons, ammunition, flyable aircraft (rotary and fixed-wing) and selected property will be accomplished by DLA, as coordinated with the Office of Deputy Assistant Secretary of Defense for Supply Chain Integration.

(*6*) All other excess DoD property will be processed through DLA Disposition

Services on a first-come, first-served basis.

(I) *DoD contractors and contractor inventory*. (*1*) The disposal of DoD contractor inventory is generally the contractor's responsibility in accordance with 48 CFR 45.602–1 of the Federal Acquisition Regulation, unless the contract specifies that excess DoD property be returned to the government, as a result of a determination by the CO at contract expiration that DLA Disposition Services disposal would be in the best interests of the government. Property physically turned in to the DLA Disposition Services site does not qualify for reimbursement to the generating activity.

(*2*) If property is purchased and retained by a DoD contractor, net proceeds from the sale of the property will be deposited into the generating activity's suspense account.

(*3*) DLM 4000.25–1 permits the Military Department or Defense Agency management control activity (MCA) to withdraw or authorize the withdrawal of specified excess DoD property from DLA Disposition Services sites for use as government-furnished material or government-furnished equipment to support contractual requirements.

(*4*) Orders will be completed in accordance with Chapter 11 of DLM 4000.25–1 and include the DoDAAC assigned to the contractor. These orders must be processed by the MCA having cognizance of the applicable contract.

(*5*) Property ordered must be authorized and listed in the DoD contract(s) for which the property will be used, recorded in the ICP's MCA responsible for the contract, and the use of the ordered property approved by the CO or CO's representative (COR) for such contract(s). Each electronic or manual order (DD Form 1348–1A) must contain the signature and title of the CO or COR authorizing the withdrawal of excess DoD property from the disposal system. Each order must also contain the certification: ''For use under Contract No(s)._____.'' The certification should be signed by an authorized official and should indicate his or her official title.

(*6*) DLA Disposition Services sites cannot guarantee the property withdrawn meets minimum specifications and standards in terms of quality, condition, and safety.

(J) *NAF activities*. (*1*) Includes expense items and NAF resale goods procured by NAF activities such as military exchanges and MWRAs or Services, but excludes commissary store trust fund account equipment.

(*2*) DLA Disposition Services will not process property typically reclaimed from customers by the military exchanges such as used batteries, tires, oils, etc., as a part of their normal business. The NAF must process property in accordance with the guidance shown under Army and Air Force Exchange Service in DoD Manual 4160.21, Volume 4 for disposal of these assets.

(*3*) Acceptable types of property will be processed for federal screening only and are not eligible for donation. They are eligible for reutilization or transfer provided the generating NAF activities waive reimbursement or negotiate reimbursement with the ordering activity.

(*i*) The generating activity will provide a statement on the DTID that the property was purchased with NAF to obtain appropriate reimbursement. If the DTID does not contain this citation, the property will be processed as normal excess DoD property.

(*ii*) In addition to standard entries, documentation will contain the unit cost (in lieu of the Federal Logistics Data acquisition cost) recorded in the financial and accounting records of the NAF activity. DLA Disposition Services sites will use this value for inventory, reporting, reutilization, transfer, and sale purposes.

(*iii*) Reimbursement will be completed between the generating activity and the order for property reutilized or transferred. Sales proceeds will be deposited in accordance with Volume 11a, chapter 5 of DoD 7000.14–R (unless otherwise directed or superseded).

(*4*) DoD MWRAs or Services may order excess DoD property and FEPP through the MWRAs/Services that have a DoDAAC on file with the DAAS. Requests for small arms or light weapons must be ordered by servicing accountable officers only and be approved by the designated DoD focal point as identified in Table 4 of this subpart. See

DoD Manual 4160.21 Volume 4 for guidelines on reutilization of small arms and light weapons.

(*5*) NAF property ordered by or through a servicing accountable officer will be used and accounted for the same as all procurements, according to applicable Military Department or Defense Agency procedures.

(*6*) Orders received by DLA Disposition Services sites directly from an MWRA or Military Department accountable officer will be for administrative and other purposes from which individuals will realize no direct benefits.

(*7*) Orders will contain the MWRA or Service account number, the signature of the MWRA or Service Accountable Officer, and a statement that the property obtained without reimbursement will be identified separately in accounting records from property for which reimbursement was made. The order will include the statement that, when such property is obtained without reimbursement is no longer needed, it will be turned in to the nearest DLA Disposition Services site and that no part of the proceeds from sale or other disposition will be returned to the MWRAs or Services. Perpetuate this information from the order in follow-on documentation.

(*8*) If the property is not reutilized, transferred, or sold, DLA Disposition Services will notify the NAF activity that accountability will revert to the NAF activity and further disposal processing will be the responsibility of the NAF activity. If the DLA Disposition Services site has taken physical custody, the NAF activity will be responsible for retrieving the property.

(K) *MARS*. (*1*) MARS is an appropriated fund activity that operates under the jurisdiction of the Military Departments and is an integral part of the DoD communication system. MARS units will use standard DoD processes to dispose excess DoD property using DoDAACs.

(*2*) The Military Departments responsible for MARS are authorized to order excess DoD property and FEPP through their respective accountable officers. The following ordering stipulations apply:

(*i*) Designation of accountable officers and representatives authorized to screen and obtain excess DoD property and FEPP at DLA Disposition Services sites is described in this section.

(*ii*) The property ordered is for immediate use by a MARS member or member station for its intended purpose; property may not be acquired for storage. When property requested is to be used for reclamation, written approval for such action must be obtained in advance from the Military Department MARS chief in coordination with the accountable officer. Property ordered for reclamation is limited to materiel in DCC X or S.

(*iii*) Excess DoD property and FEPP ordered from a DLA Disposition Services site for MARS may be shipped to a DoD activity or picked up at a DLA Disposition Services site by personnel who are appropriately identified and approved. Property ordered for reclamation is designated for local pickup only at the DLA Disposition Services site. Maintain accountability of residue in accordance with Military Department directives.

(*3*) The accountable officer will maintain accountability for all property acquired and issued to MARS members and MARS member stations. The property remains government property.

(*4*) When the property is no longer needed for use by the MARS, the accountable officer arranges for the equipment to be turned in to the nearest DLA Disposition Services site, if economically feasible. If it is not economically feasible to turn in the property, the accountable officer will employ A/D procedures according to Enclosure 4 of DoD Manual 4160.21, Volume 2.

(*5*) The respective Military Department may limit MARS orders to selected FSCs.

(*6*) The release of property to MARS activities is governed by the following procedures:

(*i*) *Army MARS*. In CONUS, the authority to order and obtain excess DoD property and FEPP to fill valid requirements is vested in the accountable MARS Program Manager (MPM) appointed by the Chief, Army MARS. Outside the CONUS, the authority to order and obtain excess DoD property

and FEPP for the Army MARS program is vested in the 5th Signal Command MARS Director (Europe); 1st Signal Brigade U.S. Army Information System Command (USAISC) (Korea); USAISC Japan; and USAISC Western Command (Hawaii). The MPM who is the accountable officer appointed by the Chief, Army MARS will originate and sign all orders. Process orders through the applicable accountable officer for MARS equipment.

(*ii*) *Navy/Marine Corps MARS (NAVMARCORMARS)*. In CONUS, the authority to originate orders for excess DoD property and FEPP to fill valid requirements in the NAVMARCORMARS program is vested in the Chief, NAVMARCORMARS; Deputy Chief, NAVMARCORMARS; Directors of the 1st, 2nd, 3rd, 4th, 5th, and 7th MARS Regions; and the Officer in Charge, Headquarters Radio Station. All orders must be signed by the Chief, NAVMARCORMARS, or the Deputy Chief, NAVMARCORMARS. Process orders through the applicable accountable officer. Outside the CONUS, the authority to originate orders comes from Chief, NAVMARCORMARS; the Deputy Chief, NAVMARCORMARS; or a regional director or a specific designee of the Chief, NAVMARCORMARS. Process orders through the applicable accountable officer.

(*iii*) *USAF MARS*. The Office of the Chief, USAF MARS, and staff, active duty Installation MARS Directors (IMDs), and active MARS affiliates are authorized to screen and identify property for USAF MARS use. MARS affiliates are identified by a valid AF Form 3666, ''Military Affiliate Radio System Station License and Identification Card,'' signed by the Chief, USAF MARS. The IMD is appointed in writing by the installation commander or a designated representative; this appointment constitutes authority for screening and identification of property. Orders for property for MARS reutilization must be approved by the Chief, USAF MARS, or designated representative; this approval authority cannot be delegated. All approved orders will be processed through the USAF MARS Accountable Property Officer or designated alternate, who will initiate and sign a DD Form 1348–1A to authorize release of identified property. Authority to sign release documents will not be delegated. The accountable officer maintains current and valid identification of their MARS members to prevent unauthorized screening by MARS members or former members.

(L) *CAP*. (*1*) The CAP is the official auxiliary of the USAF and is eligible to receive excess DoD property and FEPP without reimbursement subject to the approval of the Headquarters USAF, CAP (HQ CAP–USAF). Title to the property is transferred to the CAP upon the condition that the property be used by the CAP to support valid mission requirements. Authority for the CAP members to screen and obtain excess DoD property will be in writing and signed by an authorized official of the CAP–USAF. HQ CAP–USAF retains the authority to approve and control the types and amounts of items obtained by the CAP.

(*2*) The CAP will remain accountable for all property acquired from the DoD disposal system and will maintain and safeguard the property from loss or damage. The CAP and its members are strictly prohibited from selling, donating, or bartering property previously obtained from the DoD disposal system under any circumstances.

(*3*) The CAP is not eligible to screen or receive AMARG aircraft reported by the Military Departments and other governmental agencies. If flyable non-AMARG category ''A'' aircraft made available for screening by an owning Military Department are selected for issue and approved by the HQ CAP–USAF to fulfill valid CAP mission needs, the following procedures apply:

(*i*) *Flyable aircraft*. The head of the owning Military Department will issue the aircraft to the accounts specified by the HQ CAP–USAF, ensuring that data plates and all available historical and modification records accompany the aircraft. The aircraft will be issued to the CAP upon condition that it be used by the CAP to support valid mission requirements. Prior to issuance, the appropriate CAP corporate officer (wing commander or higher) will execute a conditional gift agreement that specifies that the aircraft (parts, etc.)

be issued and delivered to AMARG when it becomes excess to CAP's mission needs. When the aircraft is no longer needed by the CAP, or as otherwise directed by the HQ CAP–USAF, the CAP will make arrangements through the HQ CAP–USAF for issue and delivery of the aircraft, data plates, and historical and modification records to AMARG.

(*ii*) *Reclamation of parts.* If the HQ CAP–USAF elects to allow the CAP to use the aircraft for parts reclamation, the HQ CAP–USAF will contact the owning Military Department to make arrangements concerning reclamation of parts by the CAP. If the CAP declines to reclaim parts and components from the aircraft, the CAP will arrange through the HQ CAP–USAF for issue and delivery of the aircraft, data plates, and historical and modification records to AMARG.

(*iii*) *CAP aircraft.* All CAP aircraft delivered to AMARG will be reported to the GSA for use by FCAs and authorized donees. The CAP and its members are strictly prohibited from selling, donating, or bartering aircraft obtained from a Military Department under any circumstances.

(*4*) The CAP units will use assigned DoDAACs beginning in ''FG'' to transfer and order excess personal property.

(*5*) CAP members will identify themselves for pickup of property as stated in this section.

(M) *Federal Civilian Agencies (FCAs).* (*1*) These organizations include any non-defense executive agency or any member of the legislative or judicial branch of the government.

(*2*) The processes discussed in this section apply to FCAs transferring to and ordering excess DoD property from DLA Disposition Services sites.

(*3*) FCAs that want to use DLA Disposition Services for disposition management instead of GSA are required to review and follow instructions provided on the DLA Disposition Services Web site and to:

(*i*) Comply with 31 U.S.C. 1535 (also known as the Economy Act).

(*ii*) Initiate an Economy Act Order with DLA Disposition Services Comptroller for establishing financial transactions. Final acceptance of the Economy Act Order constitutes authority for FCAs to use DLA Disposition Services. The Economy Act Order must be renewed on October 1 of each year. DLA Disposition Services transaction activity billing (TAB) rates, sales rates, and actual disposal rates are used for billing FCAs. TAB rates are available on the DLA Disposition Services Web site. DLA Disposition Services will bill and the FCA will pay all costs for services rendered. Billing documentation will include contract line item number, administrative, and services costs, and will be processed quarterly.

(*iii*) Ensure all laws and regulations are properly met prior to initiating a transfer transaction. Use DoD Instruction 4160.28; 41 CFR chapters 101 and 102; 48 CFR subpart 9.4 and 48 CFR 45.602–1, 52.233–1, and 14.407 of the FAR, current edition; and 5 U.S.C. 552, Volume 11a, Chapter 5 of DoD 7000.14–R, and Office of Management and Budget Circular A–76, ''Performance of Commercial Activities'' (available at *http://www.whitehouse.gov/omb/circulars_a076_a76_incl_tech_correction*) as governing documents.

(*iv*) Comply with DLM 4000.25–1, since in-transit control requirements are not applicable to FCA turn-ins.

(*v*) Comply with § 273.7(d), (e), and (f) for transferring excess DoD property, using DD Form 1348–1A or DD Form 1348–2, ''Issue Release/Receipt Document with Address Label,'' as DTIDs. Schedule turn-ins with the DLA Disposition Services site and assume responsibility for delivering usable and scrap property to DLA Disposition Services sites. Non-hazardous property may be received in-place using the standard DoD receipt in-place processes. Hazardous property cannot be physically accepted at the DLA Disposition Services site and will be processed in-place only, in accordance with paragraphs (c)(3)(viii)(M)(*3*)(*vi*) and (*vii*) of this section. Property will normally be turned in as individual line items; however, batchlotting by FSC of non-hazardous items with a combined acquisition value of up to $800 is permitted. Identify the transaction by using their officially assigned FCA activity address code (AAC). The first position of the AAC begins with 1 through 9. Annotate ''XP'' funding code in

blocks 52 and 53 and a disposal authority code of ''F'' in position 64 of the DTID. Annotate the DLA Disposition Services Economy Act Order Assigned Number in block 27. Include appropriate hazardous property documents containing the required information found in Volume 4 of DoD 4160.21–M. Ensure that no radioactive material, waste, or other excluded hazardous property is turned in to the DLA Disposition Services site. Cover costs associated with substantiated sale contracts claims, if negligence or fault is established. Contact the appropriate DLA Disposition Services site for procedures to use when inventory discrepancies surface for property that the FCA is designated the custodian. The FCA will research and provide a report of the lost, damaged, or destroyed property. Procedures are contained in accordance with Volume 12, Chapter 7 of DoD 7000.14–R.

(*vi*) Work with DLA Disposition Services to obtain HW disposal contract support, pursuant to the provisions of the FAR; for hazardous property, FCAs will define disposal service requirements for HW disposal and provide a yearly estimate of HW streams that may be generated and placed on DLA Disposition Services disposal service contracts; cover costs associated with substantiated contracts claims, if negligence or fault is established; maintain physical custody of hazardous property; provide a designated FCA representative to act as a CO's technical representative during pickup of hazardous property, and identify who will be trained and authorized to release the property for shipment, including signing shipping documents according to the procedures provided in 49 CFR part 172, subpart H.

(*vii*) Comply with the following liability provisions. Should any DLA HW disposal contractors' actions on behalf of the FCA result in a notice of potential liability to DLA or the FCA under 42 U.S.C. 9601 *et seq*. (also known as the Comprehensive Environmental Response, Compensation and Liability Act), 42 U.S.C. 6901 *et seq*. (also known as the Resource Conservation and Recovery Act), or any other provision of federal or State law, immediate notification will be provided to DLA Disposition Services or the FCA. The FCA retains ultimate liability for hazardous property; FCAs will be responsible for environmental response costs attributable to their generated hazardous property. FCA is considered the generator for reporting purposes in accordance with 42 U.S.C. 6901 *et seq*. and 9601 *et seq.;* According to the terms of DLA Disposition Services HW disposal contracts, DLA Disposition Services disposal contractors are responsible for spills or leaks during the performance of their contracts, which result from the actions of the contractors' agents or employees; At no time will the DLA Disposition Services site dispose FCA excess DoD property or any provision of a HW contract for FCA property be interpreted or construed to require that funds be obligated or paid in violation of 31 U.S.C. 1341 or any other provisions of law.

(*4*) FCAs will:

(*i*) Work with DLA Disposition Services for DEMIL-required disposal support in accordance with the provisions of DoD Instruction 4160.28.

(*ii*) Reimburse DLA Disposition Services for A/D-related services.

(*iii*) Continue to turn in PM-bearing property at no charge in support of the DoD PMRP according to the procedures in Enclosure 5 to DoD Manual 4160.21, Volume 2. These transactions are accomplished through an ISSA.

(*iv*) Pay for all services rendered, according to established requirements and fees.

(*5*) Two months prior to the Economy Act Order's expiration, the FCA will notify the DLA Disposition Services Comptroller whether continued services are desired.

(*i*) If the Economy Act Order has not been re-established, DLA Disposition Services will continue to receive property for 60 days.

(*ii*) FCAs will continue payments until all property that was received within the fiscal year has been processed, even if the Economy Act Order has expired.

(*iii*) FCAs will pay at the rates established or re-established and maintain internal procedures to track DTIDs against billings for reconciliation.

(*6*) The policies in 41 CFR chapter 101 will be implemented when:

(*i*) An official Economy Act Order is finalized and the DLA Disposition Services Finance Office ensures that an officially assigned FCA AAC is in the DLA Disposition Services Accounting System. (This will indicate to DLA Disposition Services sites that receipt of excess property from the requesting FCA is authorized.)

(*ii*) A provisional copy or signed copy of a DD Form 1348–1A is the instant at which accountability for the FCA property (non-hazardous or hazardous) is transferred to a DLA Disposition Services site.

(*7*) If at any time any issue requires resolution, a team approach will be used at the turn-in activity and DLA Disposition Services site level. Disputes that cannot be resolved will be elevated to the next corresponding level of the FCA and the DLA Disposition Services. If necessary, alternative dispute resolution will be used.

(*8*) DLA Disposition Services sites will:

(*i*) Reserve the right to refuse any turn-in due to workload or resource constraints if support would seriously impair the DLA mission for the DoD.

(*ii*) Receive and screen FCA property using the same method used for excess DoD property, except property will not be made available to those special program organizations who, because of enabling legislation, may only obtain excess DoD property; *e.g.*, HAP, law enforcement support offices, and SEAs.

(*9*) Sales proceeds, if any, will be deposited into the U.S. Treasury as miscellaneous receipts, unless otherwise specified by law. No reimbursement of proceeds will be made to the FCA. Contract claims resulting from the sale of federal property may be the responsibility of the FCA.

(*10*) For hazardous property, DLA Disposition Services will notify FCAs of any:

(*i*) New procedures pertaining to the disposal process or funding changes. HW contracts may be modified by mutual written consent of the parties. Modifications requiring resource changes may be given with enough advance notification for revisions or adjustments to be made during the budget formulation process and the hazardous disposal service contract process.

(*ii*) Proposed changes to administrative support costs at least 60 days in advance of a change.

(*11*) DLA Disposition Services will ensure DEMIL-required property and property that may require export controls are processed appropriately. Property requiring DEMIL may be shipped to an alternate location either by DLA Disposition Services or by an FCA. These charges are included in the TAB rates.

(*12*) FCAs desiring to order excess DoD property from DLA Disposition Services sites will follow the GSA procedures for acquiring property through GSAXcess®. Once excess DoD property is physically obtained from DLA Disposition Services, the property belongs to and must be disposed by the FCA. This includes property that is DEMIL or mutilation required. Turn-in of previously ordered property from the DLA Disposition Services will be accepted from only those FCAs that have established an Economy Act Order.

(*13*) FCAs may continue to participate in the DoD PMRP at no charge, in accordance with Enclosure 5 to DoD Manual 4160.21, Volume 2. These transactions are accomplished via an ISSA between DLA Disposition Services and FCAs.

(O) *U.S. Postal Service (USPS).* (*1*) USPS is not authorized to dispose excess DoD property through DLA Disposition Services without an FCA intragovernmental agreement.

(*2*) If such an agreement is executed:

(*i*) Items of a strictly postal nature, such as a carrier satchel embossed ''U.S. Mail,'' postal scales, or other equipment so similar in nature or design to official USPS equipment as to cause confusion may not be turned in to DLA Disposition Services sites, sold, or disposed to the general public until the USPS has been notified of the intended disposition and offered an opportunity to inspect the equipment. DLA Disposition Services sites will notify local post office inspectors of the existence of this property and arrange for its inspection if the USPS wants to prevent it from falling into the hands of unauthorized persons.

(*ii*) DoD purchased or owned postal equipment with official postal identification markings may be transferred to the USPS through DLA Disposition Services site processing, under the standard transfer policies in 41 CFR chapter 101. If transferred from DoD Components without going through an official DLA Disposition Services site, the DoD activity will negotiate with USPS for fair market reimbursement.

(*iii*) Property not transferred that contains markings that would tend to confuse this property with official USPS equipment will have the markings removed before release for DLA Disposition Services site processing.

(*iv*) Excess DoD postal equipment loaned to DoD Components by the USPS will be returned to the USPS.

(P) *American National Red Cross*. Property that was processed or donated by the American National Red Cross to a Military Department and becomes excess DoD property may not be disposed without notice to and consultation with the American National Red Cross. This property will be returned without reimbursement to the American National Red Cross upon request, if that organization pays packing and shipping costs.

(Q) *DoD Computers for Learning (CFL)*. The DoD CFL program implements Executive Order 12999, ''Educational Technology: Ensuring Opportunity for All Children in the Next Century'' and enables DoD to transfer excess IT equipment to pre-kindergarten through grade 12 schools and educational nonprofit organizations through a DLA Disposition Services web-based program. The DLA Disposition Services program replaces the DoD Computers for School, Educational Institution Partnership Program that was overseen by the Defense Information Systems Agency.

(*1*) Eligible educational organizations serve pre-kindergarten through grade 12 students and are public, private, or parochial schools or educational nonprofits classified as tax-exempt under section 501c of the United States tax code. Schools and educational nonprofits must be located within the United States and its territories.

(*i*) Schools must register in the DLA Disposition Services web-based CFL program and complete all point of contact and profile information.

(*ii*) Schools must ensure that IT equipment transferred will be used for student and faculty training to augment existing IT equipment, to strengthen their infrastructure, or for other academic-related programs.

(*iii*) All costs incurred in connection with the transfer of equipment through the CFL will be the responsibility of the school and include: Expenses in connection with the school's inspection of the IT equipment at DoD sites; cost of packing, crating, marking, and loading the equipment on the carrier's conveyance for transportation; and cost of transportation from DoD sites.

(*2*) DoD IT equipment FSG 70 with a DEMIL Code of A and DEMIL Code of Q with an Integrity Code of 6 that is located in CONUS and has been accepted to a DLA Disposition Services site's accountability records is eligible for transfer within DoD CFL once DoD screening is complete and the inventory is not requisitioned by DoD.

(*3*) IT equipment is available on an ''as-is'' basis, without warranties from DoD as to the condition of the equipment. Eligible equipment includes mainframes, minicomputers, microcomputers, modems, disk drives, printers, and items that are defined within the FSG 70 and are appropriate for use in CFL.

(*4*) After the DoD excess screening is completed, providing there are no DoD requests, DLA Disposition Services will:

(*i*) Make provisions for schools to receive information concerning DoD IT equipment that is available for transfer.

(*ii*) Notify the schools of available equipment that matches the profile submitted by the school.

(*iii*) ''Freeze'' the equipment when the school verifies a need so that other schools cannot be offered the same equipment.

(*iv*) Review, approve, and notify generating activities to transfer to a school by generating a MRO from DLA Disposition Services system for accounting for excess surplus property in DoD to decrement quantity and preclude transmission to the FEDS.

(*v*) While holding for transfer to schools, the following applies: 7-day accumulation (DoD can order anytime) and 14-day DoD screening (DoD can order anytime).

(*vi*) On day 14, if still available, DLA Disposition Services will freeze the property and create a MILSTRIP initiating a transfer to school transaction. DLA Disposition Services will send MILSTRIP to the generating activity, who will arrange for the school to remove the item. Schools authorized a transfer are responsible for arranging the pickup or shipping of IT equipment.

(*vii*) The IT equipment not designated to schools during the DoD CFL timeframe will be transmitted to GSAXcess® for FCAs and donees.

(*viii*) Generating activities can specify a school for intended transfer once DLA Disposition Services has accountability of the equipment, through the DLA Disposition Services web-based CFL program. From the DLA Disposition Services Home Page, the user may click on Property Search for Military, Federal, State, and Special Programs, then click on ''Computers for Learning.'' The CFL Program enables the generating activity to view the IT equipment that was turned in under their DoDAAC and then designate that equipment to approved schools. The generating activity has 7 days to make this selection; otherwise, the equipment can be viewed by any eligible educational activity.

(*ix*) Equipment not identified by a generating activity for a specific school will be made available to schools and educational non-profit organizations that are approved within CFL.

(*x*) The authorized school is responsible for coordinating with the generating activity for the removal of equipment.

(*xi*) The authorized school has 14 days after receipt of authorization to remove the equipment.

(*xii*) If the school does not remove the equipment within the 14 days, the generating activity will notify the DLA Disposition Services site of the non-removal.

(*xiii*) Upon receipt of notification, the DLA Disposition Services site will notify DLA Disposition Services to cancel the order.

(R) *Firefighter Transfer Program.* The DoD has authorized the U.S. Department of Agriculture Forestry Service (USDA FS) to manage DoD firefighting property transfers provided for in accordance with 10 U.S.C. 2576b. Title to all Firefighter Property Transfer Program property will pass to the State upon:

(*1*) The State taking possession of the equipment (such as removing or having the equipment removed from a DLA Disposition Services site).

(*2*) The State receiving a DD 1348, ''DoD Single Line Item Requisition System Document (Manual),'' or SF 97 or both for the equipment. The DD Form 1348 or SF 97 will indicate which property requires DEMIL (DEMIL Codes C, D, and F).

(*3*) The USDA FS will track all equipment requiring DEMIL until final disposition and require the State to ensure that such equipment is either transferred to another DoD agency authorized to receive it or is returned to a DLA Disposition Services site when no longer required. USDA FS will require the State coordinate any such transfers and returns with the Distribution Reutilization Policy Directorate at DLA prior to the transfer. The recipients are responsible for funding shipment or removal.

(x) *Expedited processing (EP).* (A) EP is the approved reduction of screening timeframes. In the zone of interior (ZI), EP may be used on a case-by-case basis. Situations where EP may be considered include backlog situations, potential deterioration from outside storage, or other compelling reasons.

(B) GSA is the approving authority for EP for non-DEMIL required property within the ZI. DLA Disposition Services is the approving authority for DEMIL-required property within the ZI.

(C) Current automation technology allows items going through EP to be visible on the DLA Disposition Services Web site and GSAXcess®.

(D) In contingency operations the supported Combatant Command has the authority to accelerate screening timelines based on mission requirements and operational tempo.

(xi) *Screener identification and authorization*. (A) Individuals visiting DLA Disposition Services sites to view, order, or remove property or for any other reason are required to provide proper identification as authorized representatives of a valid recipient activity.

(*1*) Upon arrival at the DLA Disposition Services site, the individuals will sign the vehicle or visitor register indicating the vehicle registration number and the purpose of their visit.

(*2*) Visitors representing donation recipients will only be allowed to complete the tasks identified under ''purpose of visit'' on the vehicle or visitor register.

(*3*) All screeners will specify the DoDAAC or AAC for which they are inspecting.

(B) DoD screeners will further identify themselves as authorized representatives of a DoD Component by means of a current employee or Military personnel identification issued by the DoD activity.

(C) FCA screeners will present current employee identification as valid authorization. This also applies to screeners representing mixed-ownership USG corporations.

(D) Non-federal screeners will present an authorization on the letterhead of the sponsoring activity, identifying the bearer and indicating the nature of the authorization. This letter of authorization will be updated at least annually or as changes occur.

(E) All SEA screeners will present a valid driver's license or other State-approved picture identification or the letter of authorization.

(F) DLA Disposition Services sites will refer problems in identifying screeners to the activity commander. For FCA and donation screeners, refer to the proper GSA regional office.

(xii) *Screening for property at DLA Disposition Services sites*. (A) DLA Disposition Services sites will assist customers interested in obtaining property by referring them to the DLA Disposition Services Web site or by providing guidance for physical inspection and location of property. Assistance may also include use of a customer-designated personal computer to screen assets worldwide and establish a predefined customer want list.

(B) When a prospective donation recipient contacts a DLA Disposition Services site or military installation regarding possible acquisition of surplus property, the individual or organization will be advised to contact the applicable SASP for determination of eligibility and procedures.

(4) *Orders for FEPP, excess, and surplus property from DLA Disposition Services and GSA*—(i) *General*. (A) DoD activities, FCAs, and other authorized activities are permitted to order DoD FEPP, excess, and surplus personal property based on the property status at the time the authorized screener identifies its availability from the DLA Disposition Services Web site. This property may be ordered through DLA Disposition Services or GSA.

(B) DLM 4000.25–1 requires orders for property on the DLA Disposition Services site's accountable records to be prepared on DD Forms 1348–1A or 1348–2. The use of the DLA Disposition Services Web site allows orders to be processed without hard copies of DD Forms 1348–1A or 1348–2. A separate order is required for each line item on a DLA Disposition Services site's inventory (except batchlots that are grouped together). The shopper will furnish the appropriate information either electronically or by hard copy.

(C) Orders for property in the GSA screening cycle will be submitted through GSAXcess®. Customers are required to complete and submit the SF 122 ''Transfer Order Excess Personal Property'' to GSA. GSA will then transmit the order to DLA Disposition Services.

(D) DoD activities (other than MWRAs or Services, which are covered in § 273.6) must request Military Department or Defense Agency excess and FEPP through servicing accountable officers or their designated representatives.

(E) See § 273.6 for special guidance affecting USCG ordering.

(F) U.S. Army accountable supply officers should check with their finance accounting office prior to requesting items from DLA Disposition Services.

Often, Army customers are billed internally for the items they have ordered from DLA Disposition Services.

(G) The following principles apply to acquiring property from these sources, including Federal regulations, which apply to the Department of Defense, special programs and activities, FCAs, and donees when acquiring excess or surplus personal property:

(*1*) There must be an authorized requirement.

(*2*) The cost of acquiring and maintaining the excess personal property (including packaging, shipping, pickup, and necessary repairs) does not exceed the cost of purchasing and maintaining new materiel and does not exceed the value of property requested.

(*3*) The sources of spare parts or repair and maintenance services to support the acquired item are readily accessible.

(*4*) The supply of excess parts acquired must not exceed the life expectancy of the equipment supported.

(*5*) The excess personal property will fulfill the required need with reasonable certainty without sacrificing mission or schedule.

(*6*) Excess personal property must NOT be acquired with the intent to sell or trade for other assets.

(*7*) DoD activities will request only that property that is authorized by the parent HQ or command. Activities may not request quantities of property exceeding authorized retention limits.

(H) The special screening programs will request only property that is authorized by the program or activity accountable officer or program manager, whichever is applicable. If the special screening programs want DLA Disposition Services site to verify the FSC has been authorized before release, the accountable officer or program manager must provide a current authorized FSC list to the DLA Disposition Services site. The removal agent must sign any certification required, acknowledging understanding of rules of disposal, prior to removal of the property.

(I) The Military Department accountable officer who designates DoD individuals to sign orders on their behalf must provide DLA Disposition Services sites with an electronic letter of authorization, identifying those individuals. The template for the letter is on the DLA Disposition Services Web site. It will include the full name, activity, DoDAAC, telephone number, address, and signature of the individuals authorized to sign and authenticate MROs. These individuals may be different from those who are the initial shoppers or those picking up the property.

(ii) *Emergency requests.* (A) Telephone requests during non-duty hours may be made by contacting the DLA Disposition Services staff duty officer (SDO) (DSN 661–4233; Commercial, 269–961–4233). Under these circumstances, the SDO will record the request and will contact the DLA Disposition Services program manager to initiate proper action.

(B) If a DoD activity has an emergency need for a surplus DoD item in the possession of a SASP, it may be requested from that SASP. The acquiring DoD activity must pay any costs of care, handling, and transportation that were incurred by the SASP in acquiring this property.

(C) For requests for property to fill training aid and target need orders, see ''Training Aids and Target Requirements'' in paragraph 147 of Enclosure 3 of DoD Manual 4160.21, Volume 4.

(iii) *Late orders.* (A) If a DoD order is received after the screening timeline has expired, the customer will provide justification as to the true necessity for the property requested, indicating why other comparable property in the DLA Disposition Services inventory does not satisfy the need. See paragraph (a) of this section for more guidance if the property needs to be withdrawn from sale.

(B) Orders for property received during the GSAXcess® screening period must be submitted according to GSA ordering procedures.

(iv) *Requests for small arms and light weapons.* Small arms and light weapons (see § 273.12) will be processed according to the guidance in DoD Manual 4160.21, Volume 4. Table 5 of this section contains a list of Military Department and Defense Agency designated control points authorized to initiate orders or through which orders must be routed for review and approval before issue can be effected.

TABLE 5—DOD DESIGNATED CONTROL POINTS FOR SMALL ARMS AND LIGHT WEAPONS ORDERING, REVIEWING, AND APPROVING

| Service/Agency | Control point |
|---|---|
| Army | Director of Armament and Logistics Activity, Chemical Acquisition, ATTN: AMSTA–AC–ASI, Rock Island, IL 61299–7630, Telephone: DSN 793–7531, Commercial: (309) 782–7531. |
| Air Force | WR–ALC/GHGAM, 460 Richard Ray Blvd. Suite 221, Robins AFB, GA 31098–1640, Telephone: DSN 497–2877, Commercial: (478) 327–2877. |
| Marine Corps | Commandant of the Marine Corps, ATTN: LPC, Headquarters, U.S. Marine Corps, 3000 Marine Corps, Pentagon, RM 2E211, Washington, DC 20350, Telephone: DSN 225–8900, Commercial: (703) 695–8900. |
| Coast Guard | Commandant, ATTN: CG–7211, Commandant (CG–7211), U. S. Coast Guard HQ, Douglas A. Munro Bldg., 2703 Martin Luther King Jr. Ave, SE, Stop 7331, Washington, DC 20593–7331, (202) 372–2030. |
| National Security Agency | National Security Agency, Item Accounting Branch, ATTN: L112, Fort George Meade, MD 20755 6000. |
| Defense Intelligence Agency | Defense Intelligence Agency, ATTN: RLE 2, Washington, DC 20340 3205. |
| Defense Threat Reduction Agency. | Headquarters, Defense Threat Reduction Agency, 8725 John J. Kingman Road MSC 6201, Fort Belvoir, VA 22060–6201, ATTN: BDLL, Telephone: DSN 427–0785, Commercial (703) 767–0785. |

(5) *Condition of property ordered.* Orders authorized by DLA Disposition Services or GSA regional offices will be processed as expeditiously as possible and according to the Uniform Materiel Movement and Issue Priority System priority on the requisition.

(i) DLA Disposition Services sites will determine the property requested is in as good a condition as it was during screening.

(ii) If the ordered property has materially deteriorated from screening or receipt to inspection for shipment, the DLA Disposition Services site will advise the customer before shipment. The shipment will be suspended pending agreement by the customer that the property will be accepted in its present condition.

(iii) Once ordered, and pending receipt of an approved transfer document or removal of the property, no parts may be removed without prior approval of DLA Disposition Services (for DoD orders) or GSA (for transfers and donations), and agreement by the customer that the property will be accepted in its altered condition.

(6) *Reimbursement requirements.* (i) The generating activity will identify reimbursement requirements on the DTID when transferring property to the DLA Disposition Services site. Although not specifically a DLA Disposition Services responsibility, DLA Disposition Services sites may contact the generating activity when they suspect the generator may be eligible for reimbursement but has not noted it on the DTID.

(ii) Issue of declared Military Department or Defense Agency FEPP, excess and surplus personal property to DoD users will be on a non-reimbursable basis except when the customer is prohibited by law from acquiring FEPP, excess and surplus property without reimbursement or where reimbursement is required by annotations on the receipt DTID. Issues to the USPS require fair-market value reimbursement.

(iii) The requester will transfer funds to the generating activity without DLA Disposition Services site involvement.

(iv) The DLA Disposition Services site will provide the name of the property requiring reimbursement when it is requested by the DoD or an FCA. The requesting activity and the generating activity must agree on the appropriate amount of funds, and how they will be transferred. When this is accomplished, the generating activity must give the DLA Disposition Services site a letter indicating what property is to be transferred and to whom. The DLA Disposition Services site will file a copy of this letter with the issue document to create an audit trail.

(v) Issues of DoD FEPP, excess, and surplus personal property, other than foreign purchased property and other property identified as reimbursable, will be at no cost to FCAs and to SASPs.

(A) Property purchased with working capital funds is not eligible for reimbursement in the transfer or donation program. GSA may direct transfers be

made with reimbursement at fair market value.

(B) Public law may prohibit FCAs from obtaining certain property.

(C) FCAs, for the purpose of issue of excess property, include federal executive agencies other than the DoD; wholly owned government corporations; the Senate; the House of Representatives; the Architect of the Capitol and any activities under their direction; the municipal government of the District of Columbia; or non-federal agencies for whom GSA procures.

(vi) Foreign purchased property reimbursements will be at the acquisition value.

(vii) For special programs and activities, DLA Disposition Services sales to special account fund citations may be required in accordance with Volume 11a, Chapter 5 of DoD 7000.14–R. For DLA Disposition Services to provide timely and accurate reimbursements, the transportation account code address in DLA Transaction Services must be correct and current.

(A) In accordance with DoD 4160.28–M Volumes 1–3, all DoD MLI and Commerce Control List (CCL) personal property, whether located within or outside the United States, will be transferred in accordance with 22 CFR parts 120 through 130 and 15 CFR parts 730 through 774.

(*1*) DoD MLI or CCL personal property will not be transferred to any foreign person or entity without DoS or DOC approval, authorization, license, license exception, exemption, or other authorization for the transfer.

(*2*) Such property will not be transferred to prohibited or sanctioned entities identified by the Departments of State, Commerce, and Treasury. A consolidated list of prohibited entities by these Departments may be found at *http://export.gov/ecr/eg_main_023148.asp*.

(*3*) Property will not be transferred to persons or entities from countries proscribed from trade under regulations maintained by the Office of Foreign Assets Control. The agency (*e.g.*, GSA or USAF CAP Program Manager) approving the transaction must determine recipient eligibility prior to issuing the requisition to DLA Disposition Services.

(*4*) If the agency approving the requisition cannot determine that a U.S. person or entity is involved with the property transaction, the recipient must obtain and provide the appropriate license or approval to the agency approving the transaction.

(*5*) Approving agencies must be involved in any subsequent re-transfer requests by the recipient. The recipient must request the agency's permission prior to taking any disposition action. If the approving agency authorizes the potential transfer, the recipient must then comply with 22 CFR parts 120 through 130, also known as the International Traffic in Arms Regulations (ITAR), or 15 CFR parts 730 through 780, also known as the Export Administration Regulations (EAR), as appropriate.

(B) For USML and CCL property, DLA Disposition Services sites will require recipients to sign a statement acknowledging their responsibility to comply with U.S. export laws and regarding regulations. The statement must be signed prior to the release of the property according to the DEMIL procedures in DoD 4160.28–M Volumes 1–3. If property is destined for export, the recipient must get appropriate export authorizations from the DoS or DOC in accordance with DoD Instruction 2030.08.

(C) DLA Disposition Services sites may issue DEMIL-required property to approved special programs or GSA eligibility-approved FCAs without DEMIL being accomplished.

(*1*) Prior to release from DoD control, DLA Disposition Services sites must obtain a written agreement (see Appendixes 1 and 2 of this section) from the requesting special program or FCA.

(*2*) This agreement acknowledges that the recipient will DEMIL the USML property in accordance with DoD 4160.28–M Volumes 1–3, when the property is no longer needed.

(*3*) The agreement further states that if the property is to be re-transferred, the recipient must obtain approval from its program manager (approving agency) and in coordination with the DoD DEMIL program manager prior to further disposition or before releasing

the USML property outside their control. The representative of the recipient is required to sign the DEMIL agreement before release of any USML property.

(*4*) If the recipient requests DLA Disposition Services to perform final disposition, an MOA must be executed or in place with DLA Disposition Services for such services.

(*5*) The DLA Disposition Services site will provide a completed copy of the certification to the GSA and retain a copy with the issue documentation.

(D) DLA Disposition Services sites may transfer CCL (DEMIL Code Q) and non-DEMIL-required USML (DEMIL Code B) property that may have import and export controls to approved special programs or FCAs. Prior to release of such CCL and non-DEMIL-required USML property, the requesting special program or FCA must provide written notification to the DLA Disposition Services site (see Appendixes 3 and 4 of this section). This notification confirms recipient's understanding that export or import of the CCL or non-DEMIL-required USML property is regulated by the USG and in many cases cannot be transferred (exported, imported, sold, etc.) to a foreign person, entity or foreign country without valid USG license or other authorization.

(viii) GSA reviews and approves each order, each in its respective screening cycle (transfer or donation).

(7) *Shipment or pick-up elections by customers*—(i) *Criteria for non-RCP property*. (A) DLA Disposition Services will make arrangements for shipment of non-RCP property from Military Department orders unless notified by the DoD Component of the intent to physically pick up the property. DLA Disposition Services has been authorized to use ground services for the movement of reutilization property. The DLA Disposition Services Transportation Office will notify DLA Disposition Services sites of the authorized carrier.

(B) The DoD Component and special programs have 14 calendar days (15 days from the date on the order) to remove the non-RCP property ordered during the DoD screening cycles.

(C) Transfer (FCA) and donee (State agency) customers are always required to make their own pickup and shipment arrangements for non-RCP property orders and have 21 calendar days to remove non-RCP property ordered during the GSAXcess® screening cycle.

(D) Standard transportation or preferred pick up of the property requested by DoD customers who are allocated property by GSA apply.

(*1*) If DoD transfers customers order from the GSAXcess®, they also have 21 days to remove the non-RCP property.

(*2*) Customers required to pick up or arrange direct pickup must do so within the allotted standard removal time period unless it is extended by the DLA Disposition Services site chief. An example of justification for extended removal time would be as a result of a natural disaster (flood, snow, etc.). DLA Disposition Services site personnel may refuse MILSTRIPs or walk-in removals for customers who fail to pick up their property within the removal period and request cancellation of the order.

(ii) *Criteria for RCP property*. (A) DLA Disposition Services will arrange for shipment of RCP property from Military Department and special program orders.

(B) FCAs will designate the method of transportation for RCP property ordered using one of the following options:

(*1*) The FCA arrange with carriers of their choice to remove the property from a designated staging area at the depot; or

(*2*) The FCAs requests the DLA Disposition Services RCP Office to use an approved carrier under the DoD blanket purchase agreement awarded carrier for Domestic Express Small Package Service under the GSA Multiple Award Schedule for shipments of 150 pounds or less at *http://private.amc.af.mil/a4/domexpress/spsindex.html*. Use of this option for the smaller shipments requires a one-time notification to DLA Disposition Services of the preferred carrier and account number in the format.

(C) FCAs must arrange with the carriers of their choice for shipments in excess of 150 pounds.

(D) Donee (State agency) customers are always required to make their own pickup or shipment arrangements for

RCP property orders from designated staging areas.

(8) *Packing, crating, and handling.* See § 273.7.

(9) *Shipment and removals (transportation).*—(i) *DoD and designated DoD-supported customers.* (A) Prudence in transportation services benefits the Military Departments, Defense Agencies, MARS, CAP, National Aeronautics and Space Administration (Space Shuttle Support), National Guard Units, Reserve Units, DoD contractor when approved by the CO, Senior ROTC, and MWRA/Services when ordered through the Military Department accountable officer and DLA Disposition Services.

(B) In cases where the cost of the transportation exceeds the acquisition value of the property, DLA Disposition Services sites will evaluate the commodity and its actual value; make a judgment as to its true condition and the priority of the order.

(*1*) The DLA Disposition Services site will contact the customer and provide the property's estimated value and transportation cost to ship the property.

(*2*) If a lower cost transportation mode is available, meets the requirements of the order, and the customer and DLA Disposition Services site agree, the DLA Disposition Services site will arrange for the alternate shipment mode. If it would not be cost effective to ship the property as requested, the customer will be asked to cancel the order.

(*3*) If the customer reconfirms the need for the property, the following certification information will be provided to a DLA Disposition Services site along with the customer reconfirmation statement found in Appendix 5 of this section. DoD activities must prepare, sign, and submit a justification statement for property where the transportation costs exceed 50 percent of the acquisition value of the property. The justification statement will be signed by the Property Book Officer or designated representative and will state:

(*i*) The purpose for which the item is to be used and whether the item is mission-essential to the operation of the requestor's activity.

(*ii*) Any additional information deemed necessary to show criticality of the requisition. The statement should be included with the DD Form 1348. Failure to provide a statement may result in the requisition being canceled.

(C) If the customer determines the shipment is not needed, the customer will initiate cancellation action according to the procedures in DLM 4000.25–1.

(D) The shipper will finance parcel post shipments between DoD agencies without reimbursement.

(ii) *Other customers (excluding transfer and donation customers).* (A) LEAs are responsible for removing or making arrangements for shipments.

(B) MWRAs not ordering property through a military accountable supply officer, DoD museums, academic institutions, and non-profit organizations for educational purposes, Senior ROTC units and FCAs must pay for transportation costs and must provide a fund citation prior to shipment or pick up of the property.

(C) Only one carrier is authorized per agency, and once the agency has designated a carrier, 30 days notice is required to change a carrier.

(D) FMS customers are responsible for most transportation costs associated with the movement of ordered property.

(*1*) The DLA Disposition Services FMS Office will identify exceptions to this rule. Transportation of sensitive and other critical FMS shipments will be coordinated between the DLA Disposition Services FMS Office, the purchasing country, and other DoD agencies, as required. For these shipments, the DLA Disposition Services FMS Office will provide separate instructions and fund citations.

(*2*) Transportation arrangements will be made by the DLA Disposition Services site or by the supporting transportation office.

(E) HAP orders are shipped by DLA Disposition Services by surface to the central point using the most cost-effective mode (and must remain within the assigned theater). At no time will HAP property be shipped by air unless directed by DLA Disposition Services.

(10) *Shipment or denial notifications.* (i) DLA Disposition Services sites will use

the guidance in DLM 4000.25–1 to prepare materiel release confirmations in response to MROs received from DLA Disposition Services.

(ii) When shipments are complete, DLA Disposition Services sites will furnish a copy of the shipping document to the customer. This document confirms shipment. The customer will notify the DLA Disposition Services site if the property is not received within a reasonable period of time. FCAs will only be provided a copy of the SF 122, with annotation of the transportation data, when arrangements for DLA Disposition Services sites to ship the property have been made in advance.

(iii) DLA Disposition Services sites will:

(A) Advise the customer if the property requested is no longer available or of acceptable condition.

(B) Document non-availability by a materiel release denial prepared in accordance with DLM 4000.25–1, if item(s) for an MRO are not available.

(C) Issue a letter for all other non-availability notifications, with a copy to GSA if they approved the order. The letter will contain the following data at a minimum:

(*1*) NSN.

(*2*) Order number.

(*3*) Quantity not available.

(11) *Customer removal of ordered property*—(i) *Identification requirements.* When a customer (DoD election to pick up property ordered from the DLA Disposition Services site or an FCA or donee) makes removal arrangements, the individuals removing the property must be properly identified. Coordinate with DLA Disposition Services prior to arrival to complete and transmit documents for identification.

(A) Upon arrival at the DLA Disposition Services site, the individuals will identify themselves, sign a DLA Disposition Services visitor and vehicle register and indicate on the register the DoDAAC represented (for DoD activities) or AAC represented (for non-DoD activities), and the purpose of the visit.

(B) Visitor and vehicle registers will be readily accessible (see paragraph (c) of this section).

(ii) *Documentation requirements.* (A) Customers will:

(*1*) Present an approved and authenticated DD Form 1348–1A, SF 122, or 123 ''Transfer Order Surplus Personal Property,'' as appropriate, for specific property. The accountable officer or authorized individual(s) listed in the previously provided authentication letter must sign the DD Form 1348–1A, SF 122, or SF 123.

(*2*) Provide designated carrier or removal agents with a copy of DD Form 1348–1A or SFs 122 or 123, as appropriate, indicating removal authority.

(*i*) DoD customers must have a hard copy of the electronically transmitted letter of authorization prior to removal, and an email response from DLA Disposition Services with verification of personnel authorized to remove property.

(*ii*) Transfer and donation customers must provide a completed letter of authorization to remove property to the DLA Disposition Services site prior to removal for verification purposes.

(B) DLA Disposition Services sites will:

(*1*) Ensure the visitor and vehicle register for each direct issue includes:

(*i*) Name of the individual receiving the property.

(*ii*) DoDAAC or AAC or physical location address.

(*iii*) Activity of the individual receiving the property.

(*2*) Ensure each customer is issued a badge when signing in.

(*3*) Ensure that DD Form 1348–1A or SF 122 or 123 is complete according to MILSTRIP and disposal requirements and is signed by the applicable accountable officer or authorized representative.

(*4*) For DoD walk-in customers, ensure a current letter is on file at the DLA Disposition Services site identifying the accountable officer and authorized individual(s) signing and approving the order.

(*5*) Fill the order.

(*6*) Provide any appropriate disclaimers or certifications of usage or disposal to the customer for signature prior to releasing the property.

(*7*) Furnish a copy of the completed shipping document to the respective accountable officer (record positions 30–35 of DD Form 1348–1A).

(*8*) If being removed by anyone other than the customer, verify that the carrier has valid documentation (a copy of DD Form 1348–1A or SFs 122 or 123, as appropriate) indicating removal authority. Arrange for completion of any disclaimers or certifications of usage or disposal with the customer, prior to releasing the property to the carrier.

(*9*) In case of doubt as to the validity of pickup representatives, DLA Disposition Services sites should contact the accountable officer who prepared the order for DoD activities, or DLA Disposition Services for activities authorized to order as DoD special programs, or the GSA regional office for other FCAs or donees.

APPENDIX 1 TO § 273.15

DEMIL AGREEMENT FOR DEMIL-REQUIRED USML PROPERTY TO FCAS (DEMIL CODES C, D, E, OR F)

Figure 1. DEMIL Agreement for DEMIL-Required USML Property to FCAs
(Attach to the DD Form 1348-1A, Release Document)

| |
|---|
| A COPY OF THIS AGREEMENT MUST BE COMPLETED, SIGNED, AND DATED FOR EACH INDIVIDUAL DEMIL-REQUIRED LINE ITEM REQUESTED BY AN FCA RECIPIENT AND COORDINATED WITH GSA AND THE DOD DEMILITARIZATION PROGRAM OFFICE BEFORE REMOVAL OF SUCH PROPERTY FROM A DLA DISPOSITION SERVICES SITE. |
| DD Form 1348-1 Release Document Number: |
| NSN: |
| Quantity: |
| Noun Item Description: |
| DEMIL Code: |
| DEMIL Integrity Code: |
| DLA Disposition Services Site Location: |
| Federal Civilian Agency: |
| Complete Address: |
| Telephone Number: |
| E-mail Address: |
| The recipient agrees by date and signature at the bottom of this form that, upon completion of utilization property will be returned to DLA Disposition Services for required demilitarization as prescribed by the current edition of DoD 4160.28-M, Volume 1, "Defense Demilitarization: Program Administration," on a reimbursable basis.<br><br>Recipient will request disposition instructions from DLA Disposition Services with copy to the DoD DEMIL Program Office at ddpo@osd.mil. DEMIL will be accomplished based on the assigned DEMIL Code for such property.<br><br>All transfers of DEMIL-required USML are subject to a condition that prohibits further disposition including re-transfer, re-donations, trade, barter, exchange, lease, sale, import or export without prior written approval. If the recipient receives approval for further disposition of USML property from the GSA, in coordination with the DoD DEMIL Program Office, the DEMIL requirement will be perpetuated on the appropriate documentation. |
| For additional information relating to export/import, recipients may contact the DoD DEMIL Program Office for assistance (see https://www.demil.osd.mil/).<br><br>Once the approval has been received, the recipient further acknowledges and agrees that before any export or re-export of this property is attempted, they must contact the Directorate of Defense Trade Controls, Department of State (see http://www.pmddtc.state.gov/) to obtain the necessary export licensing approval or authorization. |

| |
|---|
| _____<br>Typed Name and Title of Accountable Official<br><br>_____<br>Signature Date |

APPENDIX 2 TO § 273.15

DEMIL AGREEMENT FOR DEMIL-REQUIRED USML PROPERTY TO SPECIAL PROGRAMS (DEMIL CODES C, D, E, OR F)

Figure 2. DEMIL Agreement for DEMIL-Required USML Property to Special Programs
(Attach to the DD Form 1348-1A, Release Document)

| |
|---|
| A COPY OF THIS AGREEMENT SHALL BE COMPLETED, SIGNED, AND DATED FOR EACH INDIVIDUAL DEMIL-REQUIRED LINE ITEM REQUESTED BY AN APPROVED SPECIAL PROGRAM RECIPIENT AND COORDINATED WITH THE DOD DEMILITARIZATION PROGRAM OFFICE BEFORE REMOVAL OF SUCH PROPERTY FROM A DLA DISPOSITION SERVICES SITE. |
| DD Form 1348-1 Release Document Number: |
| NSN: |
| Quantity: |
| Noun Item Description: |
| DEMIL Code: |
| DLA Disposition Services Site Location: |
| Federal Civilian Agency: |
| Complete Address: |
| Telephone Number: |
| E-mail Address: |
| The recipient agrees by date and signature at the bottom of this form that, upon completion of utilization property will be returned to DLA Disposition Services for required demilitarization as prescribed by the current edition of DoD 4160.28-M, Volume 1, "Defense Demilitarization: Program Administration," on a reimbursable basis.<br><br>Recipient shall request disposition instructions from DLA Disposition Services with copy to the DoD DEMIL Program Office. DEMIL will be accomplished based on the assigned DEMIL Code for such property. |

Figure 2. DEMIL Agreement for DEMIL-Required USML Property to Special Programs, Continued

Recipient shall request disposition instructions from DLA Disposition Services with copy to the DoD DEMIL Program Office at ddpo@osd.mil. DEMIL will be accomplished based on the assigned DEMIL Code for such property.

All transfers of DEMIL-required USML are subject to a condition that prohibits further disposition including re-transfer, re-donations, trade, barter, exchange, lease, sale, import or export without prior written approval. If the recipient receives approval for further disposition of USML property from the Special Program, in coordination with the DoD DEMIL Program Office, the DEMIL requirement will be perpetuated on the appropriate documentation.

For additional information relating to export/import, recipients may contact the DoD DEMIL Program Office for assistance (see https://www.demil.osd.mil/).

Once the approval has been received, the recipient further acknowledges and agrees that before any export or re-export of this property is attempted, they must contact the Directorate of Defense Trade Controls, Department of State (see http://www.pmddtc.state.gov/) to obtain any necessary export licensing approval or authorization.

_____

Typed Name and Title of Accountable Official

_____

Signature Date

APPENDIX 3 TO § 273.15

NOTIFICATION FOR CCL AND NON-DEMIL-REQUIRED USML PROPERTY TO FCAS (DEMIL CODES B AND Q)

Figure 3. Notification for CCL and Non-DEMIL-Required USML Property to FCAs
(Attach to the DD Form 1348-1A, Release Document)

A COPY OF THIS AGREEMENT IS TO BE COMPLETED, SIGNED, AND DATED FOR EACH INDIVIDUAL CCL AND NON-DEMIL-REQUIRED USML LINE ITEM REQUESTED BY AN APPROVED FCA BEFORE THE REMOVAL OF SUCH PROPERTY FROM A DLA DISPOSITION SERVICES SITE.

DD Form 1348-1 Release Document Number: _____
NSN: _____
Quantity: _____
Noun Item Description: _____
DEMIL Code: _____
DLA Disposition Services Site Location: _____
Federal Civilian Agency: _____
Complete Address: _____
Telephone Number: _____
E-mail Address: _____

Recipient is notified that the use, disposition, import, export, and re-export of Commerce Control List (CCL) or non-DEMIL-required USML property is subject to provisions of DoD Instruction 2030.08, "Implementation of Trade Security Controls (TSC) for Transfers of DoD U.S. Munitions List (USML) and CCL Personal Property to Parties Outside of DoD." CCL or non-DEMIL-required USML personal property released to parties outside DoD control are subject to applicable U.S. laws and regulations, including the Arms Export Control Act (parts 2778 et seq. of Title 22, U.S.C.) and the Export Administration Act of l979 (parts 1701 et seq of Title 50, U.S.C.); International Traffic in Arms Regulations (parts 120 et seq. of Title 22 CFR); Export Administration Regulations (parts 730-799 of Title 15, CFR), and the Espionage Act (parts 793 et seq. of Title 18 U.S.C.), which, among other things, prohibits:

- The making of false statements and concealment of any material information regarding the use or disposition, import, export, or re-export of the property; and
- Any use or disposition, import, export, or re-export of the property that is not authorized in accordance with the provisions of the cited laws and regulations.

Figure 3. Notification for CCL and Non-DEMIL-Required USML Property to Special ProgramsFCAs, Continued

For additional information relating to export/import, recipients may contact the DoD DEMIL Program Office for assistance (http://www.demil.osd.mil/).

Once the approval has been received, the recipient further acknowledges and agrees that before any export or re-export of this property is attempted, they must contact the Directorate of Defense Trade Controls, Department of State (http://www.pmddtc.state.gov/), or the Bureau of Industry and Security at the Department of Commerce (http://www.bis.doc.gov/) to obtain the necessary export licensing authorization.

_____

Typed Name and Title of Accountable Official

_____ _____

Signature Date

APPENDIX 4 TO § 273.15

NOTIFICATION FOR CCL AND NON-DEMIL-REQUIRED USML PROPERTY TO SPECIAL PROGRAMS (DEMIL CODES B AND Q)

Figure 4. Notification for CCL and Non-DEMIL-Required USML Property to Special Programs
(Attach to the DD Form 1348-1A, Release Document)

A COPY OF THIS AGREEMENT IS TO BE COMPLETED, SIGNED, AND DATED FOR EACH INDIVIDUAL CCL AND NON-DEMIL-REQUIRED USML LINE ITEM REQUESTED BY AN APPROVED SPECIAL PROGRAM BEFORE THE REMOVAL OF SUCH PROPERTY FROM A DLA DISPOSITION SERVICES SITE.

DD Form 1348-1 Release Document Number: _____
NSN: _____
Quantity: _____
Noun Item Description: _____
DEMIL Code: _____
DLA Disposition Services Site Location:_____
Special Program Recipient: _____
Complete Address: _____
Telephone Number: _____
E-mail Address: _____

Recipient is notified that the use, disposition, import, export, and re-export of Commerce Control List (CCL) or non-DEMIL-required USML property is subject to provisions of DoD Directive 2030.8, "Implementation of Trade Security Controls (TSC) for Transfers of DoD U.S. Munitions List (USML) and CCL Personal Property to Parties Outside DoD Control." CCL or non-DEMIL-required USML personal property released to parties outside DoD control are subject to applicable U.S. laws and regulations, including the Arms Export Control Act (parts 2778 et seq. of Title 22, U.S.C.) and the Export Administration Act of 1979 (parts 1701 et seq. of Title 50, U.S.C.); International Traffic in Arms Regulations (parts 120 et seq. of Title 22, CFR); Export Administration Regulations (parts 730-799 of Title 15, CFR), and the Espionage Act (parts 793 et seq. of Title 18, U.S.C.), which, among other things, prohibits:

- The making of false statements and concealment of any material information regarding the use or disposition, import, export, or re-export of the property; and
- Any use or disposition, import, export, or re-export of the property that is not authorized in accordance with the provisions of the cited laws and regulations.

The recipient acknowledges that all subsequent dispositions of the items are prohibited without prior written approval of the program manager. The program manager will coordinate with the DoD Demilitarization Office or TSC Program Office, for guidance, as appropriate.

Figure 4. Notification for CCL and Non-DEMIL-Required USML Property to Special Programs, Continued

For additional information relating to export/import, recipients may contact the DoD DEMIL Program Office for assistance (https://www.demil.osd.mil/).

Once the approval has been received, the recipient further acknowledges and agrees that before any export or re-export of this property is attempted, they must contact the Directorate of Defense Trade Controls, Department of State (http://www.pmddtc.state.gov/) to obtain the necessary export licensing authorization.

_____
Typed Name and Title of Accountable Official

_____ _____
Signature Date

APPENDIX 5 TO § 273.15

CUSTOMER RECONFIRMATION

Figure 5. Customer Reconfirmation

| I understand that the shipment of Order No. _____ is not cost effective to the Department of Defense; however, the requested property is still required as mission essential. | |
|---|---|
| | |
| Signature | Date |
| | |
| Name (Type/Print) | Title |
| | |
| Activity/Unit | Grade/Rank |
| | |
| Phone Number | |

# PART 274—REGULATIONS GOVERNING COMPETITIVE BIDDING ON U.S. GOVERNMENT GUARANTEED MILITARY EXPORT LOAN AGREEMENTS

Sec.
274.1 Purpose.
274.2 Definitions.
274.3 Public notice.
274.4 U.S. guaranty.
274.5 Notice of intent to bid.
274.6 Submission of bids.
274.7 Acceptance of bids.
274.8 Bids-revocations-rejections-postponements.
274.9 Delegation of authority to the Secretary of the Treasury.
274.10 Reservations.

AUTHORITY: Sec. 24, Foreign Military Sales Act (22 U.S.C. 2764) and Executive Order 11501 (34 FR 20169).

SOURCE: 38 FR 858, Jan. 5, 1973, unless otherwise noted.

## § 274.1 Purpose.

The purpose of this memorandum is to prescribe regulations under which the Secretary of Defense or his designee may, from time to time, by public notice, offer financial institutions the opportunity to bid on the interest rates for the subject agreements. The bids made will be subject to the terms, conditions, and procedures herein set forth, except as they may be supplemented in the public notice or notices issued by the Secretary of Defense or his designee in connection with particular offerings.

## § 274.2 Definitions.

(a) The terms *public notice*, *notices*, or *announcement* mean the public notice of invitation to bid and any supplementary or amendatory notices or announcements with respect thereto, including, but not limited to, any statement released to the press by the Secretary of Defense or his designee and notices sent to those who have filed notices of intent to bid or who have filed bids.

(b) The term *Loan Agreement* means the proposed agreement between the foreign government and the private U.S. lender as described in the particular notice of Invitation to Bid.

## § 274.3 Public notice.

(a) Bids hereunder will be invited through a public notice issued by the Secretary of Defense or his designee which will prescribe the amount of the loan for which bids are invited, the repayment schedule, the conditions under which bidders may specify the rate of interest, and the date and closing hour for receipt of bids.

(b) Accompanying the notice will be the form of the Loan Agreement which the successful bidder must execute with the borrower, except for those terms which will be subject to bidding.

## § 274.4 U.S. guaranty.

Under section 24 of the Foreign Military Sales Act (22 U.S.C. 2764), any individual, corporation, partnership, or other juridical entity (excluding U.S. Government agencies) will be guaranteed against political and credit risks of nonpayment arising out of their financing of credit sales of defense articles and defense services to friendly countries and international organizations. Section 24 explicitly provides that guarantees thereunder are backed by the full faith and credit of the United States. Fees in the amount of one-fourth of 1 percent of the amount of credits agreed upon shall be charged for such guaranties.

## § 274.5 Notice of intent to bid.

Any individual or organization, syndicates, or other group which intends to submit a bid, must, when required by the notice, give written notice of such intent on the appropriate form at the place and within the time specified in the public notice. Such notice, which shall be given to the Federal Reserve Bank of New York, 33 Liberty Street, New York, NY 10045, will not constitute a commitment to bid.

## § 274.6 Submission of bids.

(a) *General*. Bids will be received only at the place specified and not later than the time designated in the public notice. Bids shall be irrevocable.

(b) *Interest rates*. Bids must be expressed in terms of rates of interest not to exceed three decimals, for example, 5.125 percent.

(c) *Group bids*. A syndicate or other group submitting a bid must act through a representative who must be a member of the group. The representative must warrant to the Secretary of Defense or his designee, that he has all necessary power and authority to act for each member and to bind the members jointly and severally. In addition to whatever other data may be required by the Secretary of Defense or his designee, in the case of a syndicate, the representative must file, within 1 hour after the time for opening bids, at the place specified in the public notice for receipt of bids a final statement of the composition of the syndicate membership and the amount of each member's underwriting participation.

### § 274.7 Acceptance of bids.

(a) *Opening bids*. Bids will be opened at the time and place specified in the public notice.

(b) *Acceptance of successful bid*. The Secretary of Defense or his designee will notify any successful bidder of acceptance in the manner and form specified in the public notice.

### § 274.8 Bids-revocations-rejections-postponements.

The Secretary of Defense or his designee in his discretion, may (a) revoke the public notice of invitation to bid at any time before opening bids, (b) return all bids unopened either at or prior to the time specified for their opening, (c) reject any or all bids, (d) postpone the time for presentation and opening of bids, and (e) waive any immaterial or obvious defect in any bid. Any action the Secretary of Defense or his designee may take in these respects shall be final. In the event of a postponement, known bidders will be advised thereof and their bids returned unopened.

### § 274.9 Delegation of authority to the Secretary of the Treasury.

There is hereby delegated to the Secretary or Acting Secretary of the Treasury the authority, in the name of and title of the Secretary of the Treasury, to invite bids under this memorandum, to issue, modify and revoke public notices, notices, and announcements concerning such bids, to prescribe additional terms and conditions with respect thereto, consistent with this memorandum, to receive, return, open, reject, and accept bids, and to take such other actions as may be necessary and proper to execute this delegation of authority to implement this memorandum, excluding, however, the issuance of guaranties under § 274.4.

### § 274.10 Reservations.

The Secretary of Defense reserves the right, at any time, or from time to time, to amend, repeal, supplement, revise or withdraw all or any of the provisions of this memorandum.

## PART 275—RIGHT TO FINANCIAL PRIVACY ACT

Sec.
275.1 Purpose.
275.2 Definitions.
275.3 Authorization.
275.4 Formal written request.
275.5 Certification.
275.6 Cost reimbursement.

AUTHORITY: 12 U.S.C. 3401, *et seq*.

SOURCE: 84 FR 24708, May 29, 2019, unless otherwise noted.

### § 275.1 Purpose.

The purpose of this part is to authorize DoD Components to request financial records from a financial institution pursuant to the formal written request procedure authorized by section 1108 of the Act and to set forth the conditions under which such requests may be made.

### § 275.2 Definitions.

The terms used in this part have the same meaning as similar terms used in the Right to Financial Privacy Act of 1978, Title XI of Public Law 95–630.

*Act* means the Right to Financial Privacy Act of 1978.

*DoD Components* means the law enforcement activities of the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff, the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the

Department of Defense (hereafter referred to as the ''DoD Components'').

**§ 275.3 Authorization.**

The DoD Components are authorized to request financial records of any customer from a financial institution pursuant to a formal written request under the Act only if:

(a) No administrative summons or subpoena authority reasonably appears to be available to the DoD Component to obtain financial records for the purpose for which the records are sought;

(b) There is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry and will further that inquiry;

(c) The request is issued by a supervisory official of a grade designated by the head of the DoD Component. Officials so designated shall not delegate this authority to others;

(d) The request adheres to the requirements set forth in § 275.4; and

(e) The notice requirements required by section 1108(4) of the Act, or the requirements pertaining to the delay of notice in section 1109 of the Act, and described in paragraphs (e)(1) through (5) of this section are satisfied, except in situations (*e.g.*, section 1113(g)) where no notice is required.

(1) The notice requirements are satisfied when a copy of the request has been served on the customer or mailed to the customer's last known address on or before the date on which the request was made to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry: ''Records or information concerning your transactions held by the financial institution named in the attached request are being sought by the Department of Defense [or the specific DoD Component] in accordance with the Right to Financial Privacy Act of 1978 for the following purpose:''

(2)(i) Within ten days of service or within fourteen days of mailing of a subpoena, summons, or formal written request, a customer may file a motion to quash an administrative summons or judicial subpoena, or an application to enjoin a Government authority from obtaining financial records pursuant to a formal written request, with copies served upon the Government authority. A motion to quash a judicial subpoena shall be filed in the court that issued the subpoena. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States District Court. Such motion or application shall contain an affidavit or sworn statement stating:

(A) That the applicant is a customer of the financial institution from which financial records pertaining to said customer have been sought; and

(B) The applicant's reasons for believing that the financial records sought are not relevant to the legitimate law enforcement inquiry stated by the Government authority in its notice, or that there has not been substantial compliance within the provisions of the Act.

(ii) Service shall be made upon a Government authority by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received a request.

(3) If a customer desires that such records or information not be made available, the customer must:

(i) Fill out the accompanying motion paper and sworn statement or write one of the customer's own, stating that he or she is the customer whose records are being requested by the Government and either giving the reasons the customer believes that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

(ii) File the motion and statement by mailing or delivering them to the clerk at an appropriate United States District Court.

(iii) Serve the Government authority requesting the records by mailing or delivering a copy of the motion and statement to the Government authority.

(iv) Be prepared to go to court and present the customer's position in further detail.

(v) The customer does not need to have a lawyer, although he or she may wish to employ a lawyer to represent the customer and protect the customer's rights.

(4) If the customer does not follow the procedures in paragraphs (e)(2) and (3) of this section, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of the notice, the records or information requested therein may be made available. The records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event the customer will be notified after the transfer.

(5) Also, the records or information requested therein may be made available if ten days have expired from the date of service or fourteen days from the date of mailing of the notice and within such time period the customer has not filed a sworn statement and an application to enjoin the Government authority in an appropriate court, or the customer challenge provisions.

### §275.4 Formal written request.

(a) The formal written request must be in the form of a letter or memorandum to an appropriate official of the financial institution from which financial records are requested. The request shall be signed by the issuing official, and shall set forth that official's name, title, business address, and business phone number. The request shall also contain the following:

(1) The identity of the customer or customers to whom the records pertain;

(2) A reasonable description of the records sought; and

(3) Such additional information which may be appropriate—*e.g.*, the date when the opportunity for the customer to challenge the formal written request expires, the date on which the DoD Component expects to present a certificate of compliance with the applicable provisions of the Act, the name and title of the individual (if known) to whom disclosure is to be made.

(b) In cases where customer notice is delayed by court order, a copy of the court order must be attached to the formal written request.

### §275.5 Certification.

Before obtaining the requested records pursuant to a formal written request described in §275.4, an official of a rank designated by the head of the requesting DoD Component shall certify in writing to the financial institution that the DoD Component has complied with the applicable provisions of the Act.

### §275.6 Cost reimbursement.

Cost reimbursement to financial institutions for providing financial records will be made consistent with 12 CFR part 219, subpart A.

## PART 277—IMPLEMENTATION OF THE PROGRAM FRAUD CIVIL REMEDIES ACT

Sec.
277.1 Purpose.
277.2 Applicability.
277.3 Policy.
277.4 Responsibilities.
APPENDIX TO PART 277—PROGRAM FRAUD CIVIL REMEDIES

AUTHORITY: 31 U.S.C. 3807.

SOURCE: 53 FR 39262, Oct. 6, 1988, unless otherwise noted.

### §277.1 Purpose.

This part establishes uniform policies, assigns responsibilities, and prescribes procedures for implementation of Pub. L. 99–509.

### §277.2 Applicability.

This part applies to the Office of the Secretary of Defense (OSD); the Military Departments; the Office of the Inspector General, Department of Defense (OIG, DoD); the Defense Agencies; and the DoD Field Activities (hereafter referred to collectively as ''DoD Components'').

### §277.3 Policy.

It is DoD policy to redress fraud in DoD programs and operations through the nonexclusive use of Pub. L. 99–509. All DoD Components shall comply with the requirements of this part in using this new remedy. Changes or modifications to this part by implementing organizations are prohibited. Implementing regulations are authorized

only to the extent necessary to effectively carry out the requirements of this part.

### § 277.4 Responsibilities.

(a) The *Inspector General, Department of Defense* (IG, DoD), shall establish procedures for carrying out the duties and responsibilities of the ''investigating official'' as outlined in the appendix of this part.

(b) The *General Counsel, Department of Defense* (GC, DoD), shall:

(1) Establish procedures for carrying out the duties and responsibilities of the authority head, Department of Defense, which have been delegated to the GC, DoD, as set forth in appendix of this part.

(2) Establish procedures for carrying out the duties and responsibilities for appointment and support of presiding officers, as set forth in appendix of this part; and

(3) Review and approve the regulations and instructions required by this section to be submitted for approval by the GC, DoD.

(c) The *Secretaries of the Military Departments* shall:

(1) Establish procedures for carrying out the duties and responsibilities of the ''authority head'' and of the ''reviewing officials'' for their respective Departments, and for obtaining and supporting presiding officers from other Agencies as specified in Office of Personnel Management (OPM) regulations; (see appendix of this part).

(2) Make all regulations or instructions promulgated subject to the approval of the GC, DoD; and

(3) Delegate duties as appropriate.

(d) The *General Counsel of the National Security Agency* (GC, NSA) and the *General Counsel of the Defense Logistics Agency* (GC, DLA) shall be responsible for establishing procedures for carrying out the duties and responsibilities of the reviewing officials that have been delegated to them, as stated in appendix of this part. All Regulations or Instructions promulgated pursuant to this part shall be submitted to the GC, DoD.

## APPENDIX TO PART 277—PROGRAM FRAUD CIVIL REMEDIES

### *A. Scope and Purpose*

1. The Department of Defense has the authority to impose civil penalties and assessments against persons who make, submit or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents.

2. This appendix:

a. Establishes administrative policies and procedures for imposing civil penalties and assessments against persons who make, submit, or present, or cause to be made, submitted, or presented, false, fictitious, or fraudulent claims or written statements to authorities or to their agents;

b. Specifies the hearing and appeal rights of persons subject to allegations of liability for such penalties and assessments.

3. The uniform policies and procedures established by this enclosure are binding on the authorities and authority heads in the Department of Defense and Military Departments. Additional administrative regulations necessary to carry out the requirements of the PFCRA and this part may be written by the authority heads. Any such regulations shall be consistent with the provisions of this appendix.

### *B. Definitions*

#### 1. Adequate Evidence

Information sufficient to support the reasonable belief that a particular act or omission has occurred.

#### 2. Authority

a. The Department of Defense, which includes OSD, Organization of the Joint Chiefs of Staff (OJCS), Unified and Specified Commands, Defense Agencies, and DoD Field Activities.

b. The Department of the Army.

c. The Department of the Navy.

d. The Department of the Air Force.

#### 3. Authority Head

a. For the Department of Defense, the Deputy Secretary of the Department of Defense or an official or employee of the Department of Defense or the Military Departments designated in writing by the Deputy Secretary of Defense.

b. For the respective Military Departments, the Secretary of the Military Department or an official or employee of the Military Department designated in regulations promulgated by the Secretary to act on behalf of the Secretary.

4. Benefit

In the context of statements, anything of value, including but not limited to any advantage, preference, privilege, license, permit, favorable decision, ruling status, or loan guarantee.

5. Claim

Any request, demand, or submission made as follows:

a. To the authority for property, services, or money (including money representing grants, loans, insurance, or benefits);

b. To a recipient of property, services, or money from the authority or to a party to a contract with the authority:

(1) For property or services if the United States:

(a) Provided such property or services;

(b) Provided any portion of the funds for the purchase of such property or services; or

(c) Will reimburse such recipient or party for the purchase of such property or services; or

(2) For the payment of money (including money representing grants, loans, insurance, or benefits) if the United States:

(a) Provided any portion of the money requested or demanded; or

(b) Will reimburse such recipient or party for any portion of the money paid on such request or demand; or

(3) Made to the authority that has the effect of decreasing an obligation to pay or account for property, services, or money.

6. Complaint

The administrative complaint served by the reviewing official on the defendant under section G., below.

7. Defendant

Any person alleged in a complaint under section G., below, to be liable for a civil penalty or assessment under Section C., below.

8. DoD Criminal Investigative Organizations

The U.S. Army Criminal Investigative Command, Naval Security and Investigative Command, U.S. Air Force Office of Special Investigations, and the Defense Criminal Investigative Service.

9. Government

The U.S. Government.

10. Individual

A natural person.

11. Initial Decision

The Written decision of the presiding officer required by section J. or KK., below. This includes a revised initial decision issued following a remand or a motion of reconsideration.

12. Investigating Official

a. The IG, DoD; or

b. An officer or employee of the OIG designated by the IG;

c. Who, if a member of the Armed Forces of the United States on active duty, is serving in Grade 0–7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for Grade GS–16 under the General Schedule.

13. Knows or Has Reason To Know

A person who, with respect to a claim or statement:

a. Has actual knowledge that the claim or statement is false, fictitious, or fraudulent;

b. Acts in deliberate ignorance of the truth or falsity of the claim or statement; or

c. Acts in reckless disregard of the truth or falsity of the claim or statement.

14. Makes

Includes the terms presents, submits, and causes to be made, presented, or submitted. As the context requires, making or made shall likewise include the corresponding forms of such terms.

15. Person

Any individual, partnership, corporation, association or private organization, and includes the plural of that term.

16. Preponderance of the Evidence

The evidence necessary to support a presiding officer's decision that a violation of the PFCRA has occurred. Evidence that leads to the belief that what is sought to be proved is more likely true than not true.

17. Presiding Officer

An officer or employee of the Department of Defense or an employee detailed to the Department of Defense from another agency who:

a. Is selected under 5 U.S.C., chapter 33, pursuant to the competitive examination process applicable to administrative law judges;

b. Is appointed by the authority head of DoD to conduct hearings under this part for cases arising in the Department of Defense or the Military Departments;

c. Is assigned to cases in rotation so far as practicable;

d. May not perform duties inconsistent with the duties and responsibilities of a presiding officer;

e. Is entitled to pay prescribed by the Office of Personnel Management (OPM) independently of ratings and recommendations made by the authority and in accordance with 5 U.S.C., chapters 51 and 53, subchapter III;

f. Is not subject to a performance appraisal pursuant to 5 U.S.C., chapter 43; and

g. May be removed, suspended, furloughed, or reduced in grade or pay only for good cause established and determined by the Merit Systems Protection Board (MSPB) on the record after opportunity for hearing by such Board.

18. Representative

An Attorney-at-law duly licensed in any State, commonwealth, territory, the District of Columbia, or foreign country, who enters his or her appearance in writing to represent a party in a proceeding under this part, or an officer, director, or employee of a defendant or of its affiliate.

19. Reviewing Official

a. In all cases arising in the Department of Defense and any of the Military Departments, the reviewing official shall be an officer or employee of an authority as follows:

(1) Who is designated by the authority head to make the determination required under section E., below, of this enclosure;

(2) Who, if a member of the Armed Forces of the United States on active duty, is serving in Grade 0–7 or above or, if a civilian employee, is serving in a position for which the rate of basic pay is not less than the minimum rate of basic pay for Grade GS–16 under the General Schedule; and

(3) Who is as follows:

(a) Not subject to supervision by, or required to report to, the investigating official;

(b) Not employed in the organizational unit of the authority in which the investigating official is employed; and

(c) Not an official designated to make suspension or debarment decisions.

b. The General Counsel, Defense Logistics Agency (GC, DLA), shall be the reviewing official for all cases involving a claim or statement made to the DLA or any other part of the Department of Defense other than a Military Department or the National Security Agency (NSA). The General Counsel, National Security Agency (GC, NSA), shall be the reviewing official for all cases involving claims or statements made to that Agency. The General Counsel, Defense Logistics Agency (GC, DLA), and GC, NSA, may redelegate their authority to act as reviewing officials to any individual(s) meeting the criteria set out in subparagraph (1) of this section.

c. The authority head of each Military Department shall select a reviewing official, who shall review all cases involving a claim or statement that was made to their Department.

20. Statement

Any written representation, certification, affirmation, document, record, accounting, or bookkeeping entry made:

a. With respect to a claim or to obtain the approval or payment of a claim (including relating to eligibility to make a claim); or

b. With respect to (including relating to eligibility for):

(1) A contract with, or a bid or proposal for a contract with; or

(2) A grant, loan, or benefit from the authority, or any State, political subdivision of a State, or other party; if the U.S. Government provides any portion of the money or property under such contract or for such grant, loan, or benefit, or if the U.S. Government will reimburse such State, political subdivision, or party for any portion of the money or property under such contract or for such grant, loan, or benefit.

*C. Basis for Civil Penalties and Assessments*

1. Claims

a. Any person who makes a claim that the person knows or has reason to know:

(1) Is false, fictitious, or fraudulent;

(2) Includes or is supported by a written statement that asserts a material fact that is false, fictitious, or fraudulent;

(3) Includes or is supported by any written statement that:

(a) Omits a material fact;

(b) Is false, fictitious, or fraudulent as a result of such omission; and

(c) Is a statement in which the person making such statement has a duty to include such material fact; or

(4) Is for payment for the provision of property or services that the person had not provided as claimed, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each such claim.

b. Each voucher, invoice, claim form, or other individual request or demand for property, services, or money constitutes a separate claim.

c. A claim shall be considered made to an authority, recipient, or party when such claim is received by an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority, recipient, or party.

d. Each claim for property, services, or money is subject to a civil penalty regardless of whether such property, service, or money is actually delivered or paid.

e. If the Government has made any payment (including transferred property or provided services) on a claim, a person subject to a civil penalty under subparagraph a.(1) of this section shall also be subject to an assessment of not more than twice the amount

of such claim or that portion thereof that is determined to be in violation of subparagraph a.(1) of this section. Such assessment shall be in lieu of damages sustained by the Government because of such claim.

2. Statements

a. Any person who makes a written statement that:

(1) The person knows or has reason to know the following:

(a) Asserts a material fact that is false, fictitious, or fraudulent; or

(b) Is false, fictitious, or fraudulent because it omits a material fact that the person making the statement has a duty to include in such statement; and

(2) Contains or is accompanied by an express certification or affirmation of the truthfulness and accuracy of the contents of the statement, shall be subject, in addition to any other remedy that may be prescribed by law, to a civil penalty of not more than $5,000 for each statement.

b. Each written representation, certification, or affirmation constitutes a separate statement.

c. A statement shall be considered made to an authority when such statement is received by an agent, fiscal intermediary, or other entity, including any State or political subdivision thereof, acting for or on behalf of such authority.

3. No proof of specific intent to defraud is required to establish liability under this section.

4. In any case in which it is determined that more than one person is liable for making a claim or statement under this section, each such person may be held jointly and severally liable for a civil penalty with respect to such claims or statements.

5. In any case in which it is determined that more than one person is liable for making a claim under this section on which the Government has made payment (including transferred property or provided services) an assessment may be imposed against any such person or jointly and severally against any combination of such persons.

*D. Investigation*

1. If the investigating official concludes that a subpoena pursuant to the authority conferred by 31 U.S.C. 3804(a) is warranted, then:

a. The subpoena so issued shall notify the person to whom it is addressed of the authority under which the subpoena is issued and shall identify the records or documents sought;

b. The investigating official may designate a person to act on his or her behalf to receive the documents sought; and

c. The person receiving such subpoena shall be required to tender to the investigating official, or to the person designated to receive the documents, a certification that the documents sought have been produced, or that such documents are not available and the reasons therefor, or that such documents, suitably identified, have been withheld based upon the assertion of an identified privilege.

2. If the investigating official concludes that an action under the PFCRA may be warranted, the investigating official shall submit a report containing the findings and conclusions of such investigation to the appropriate reviewing official(s). In instances where the false claim or false statement involves more than one authority within the Department of Defense, or where the investigating official finds that more than one case has arisen from the same set of facts, the investigating official may, at his or her sole discretion, refer the case(s) to the reviewing official of one of the affected authorities. That reviewing official shall consolidate the claims and statements and act for all. Nothing in this subsection confers any right in any party to the consolidation or severance of any case(s), although presiding officers may, at their sole discretion, entertain motions to consolidate or sever.

3. Nothing in this section shall preclude or limit an investigating official's discretion to refer allegations directly to the Department of Justice for suit under 18 U.S.C. 287 or 31 U.S.C. 3729 and 3730, False Claims Act, or other civil relief, or to preclude or limit such official's discretion to defer or postpone a report or referral to the reviewing official to avoid interference with a criminal investigation or prosecution.

4. Nothing in this section modifies any responsibility of an investigating official to report violations of criminal law to the Attorney General.

5. Nothing in this section shall preclude or limit the investigating official's authority to obtain the assistance of any investigative units of the Department of Defense, including those of the Military Departments. In this regard, appropriate investigation may be conducted by the Defense criminal investigative organizations and other investigative elements of the Military Departments and Defense Agencies.

*E. Review by the Reviewing Official*

1. If, based on the report of the investigating official under subsection D.2., above, the reviewing official determines that there is adequate evidence to believe that a person is liable under section C., above, the reviewing official shall transmit to the Attorney General or his or her designated point of coordination within the Department of Justice a written notice of the reviewing official's intention to issue a complaint under section G., below.

2. Such notice shall include the following:

a. A statement of the reviewing official's reasons for issuing a complaint;

b. A statement specifying the evidence that supports the allegations of liability;

c. A description of the claims or statements upon which the allegations of liability are based;

d. An estimate of the amount of money or the value of property, services, or other benefits requested or demanded in violation of section C., above.

e. A statement of any exculpatory or mitigating circumstances that may relate to the claims or statements known by the reviewing official or the investigating official; and

f. A statement that there is a reasonable prospect of collecting an appropriate amount of penalties and assessments.

*F. Prerequisites for Issuing a Complaint*

1. The reviewing official may issue a complaint under section G., below, only if:

a. The Attorney General or an Assistant Attorney General designated by the Attorney General approves the issuance of a complaint in a written statement described in 31 U.S.C. 3803(b)(1); and

b. In the case of allegations of liability under subsection C.1., above, with respect to a claim, the reviewing official determines that, with respect to such claim or a group of related claims submitted at the same time such claim is submitted (as defined in subsection 2. of this section), the amount of money or the value of property or services demanded or requested in violation of subsection C.1., above, does not exceed $150,000.00;

2. For the purposes of this section, a related group of claims submitted at the same time shall include only those claims arising from the same transaction (e.g., grant, loan, application, or contract) that are submitted simultaneously as part of a single request, demand, or submission.

3. Nothing in this section shall be construed to limit the reviewing official's authority to join in a single complaint against a person's claims that are unrelated or were not submitted simultaneously, regardless of the amount of money or the value of property or services demanded or requested.

4. In any case that involves claims or statements made to more than one entity within the Department of Defense or the Military Departments, or the reviewing officials having responsibility for each such entity, as stated in subsection D.2., above, shall have concurrent jurisdiction to make the required determinations under this section. In any such case, the responsible reviewing officials shall coordinate with each other prior to making any determination under this section. Where more than one case arises from the same set of facts, such cases shall be consolidated to the degree practicable, although the reviewing official shall have absolute discretion to make such determination. The requirements of this paragraph do not confer any procedural or substantive rights upon individuals, associations, corporations, or other persons or entities who might become defendants under the PFCRA.

*G. Complaint*

1. On or after the date the Attorney General or an Assistant Attorney General designated by the Attorney General approves the issuance of a complaint in accordance with 31 U.S.C. 3803(b)(1), the reviewing official may serve a complaint on the defendant, as provided in section H., below.

2. The complaint shall state the following:

a. The allegations of liability against the defendant, including the statutory basis for liability, an identification of the claims or statements that are the basis for the alleged liability, and the reasons why liability allegedly arises from such claims or statements;

b. The maximum amount of penalties and assessments for which the defendant may be held liable;

c. Instructions for filing an answer to a request including a specific statement of the defendant's right to request a hearing, by filing an answer and to be represented by a representative; and

d. That failure to file an answer within 30 days of service of the complaint shall result in the imposition of penalties and assessments without right to appeal, consistent with the provisions of section J., below.

3. At the same time the reviewing official serves the complaint, he or she shall notify the defendant with a copy of this part and any applicable implementing regulations.

*H. Service of Complaint*

1. Service of a complaint must be made by certified or registered mail or by delivery in any manner authorized by Rule 4(d) of the Federal Rules of Civil Procedure. Service is complete upon receipt.

2. Proof of service, stating the name and address of the person on whom the complaint was served, and the manner and date of service may be made by the following:

a. Affidavit of the individual serving the complaint by delivery;

b. A United States Postal Service return receipt card acknowledging receipt; or

c. Written acknowledgement of receipt by the defendant or his or her representative.

*I. Answer*

1. The defendant may request a hearing by filing an answer with the reviewing official within 30 days of service of the complaint. An answer shall be deemed to be a request for hearing.

2. In the answer, the defendant:

a. Shall admit or deny each of the allegations of liability made in the complaint;

b. Shall state any defense on which the defendant intends to rely;

c. May state any reasons why the defendant contends that the penalties and assessments should be less than the statutory maximum; and

d. Shall state the name, address, and telephone number of the person authorized by the defendant to act as defendant's representative, if any.

3. If the defendant is unable to file an answer meeting the requirements of paragraph 2.b of this section within the time provided, the defendant may, before the expiration of 30 days from service of the complaint, file with the reviewing official a general answer denying liability and requesting a hearing, and a request for an extension of time within which to file an answer meeting the requirements of subsection 2. of this section. The reviewing official shall, in such event, file promptly with the presiding officer the complaint, the general answer denying liability, and the request for an extension of time as provided in section K., below. For good cause shown, the presiding officer may grant the defendant additional time within which to file an answer meeting the requirements of subsection 2. of this section.

4. The 30-day limitation for filing an answer may be tolled for a reasonable period of time by written agreement of the parties and approval of the authority head to allow time for settlement.

*J. Default Upon Failure To File an Answer*

1. If the defendant does not file an answer within the time prescribed in subsection I.1., above, and there is no approved written agreement as in subsection I.4, above, tolling the time prescribed, the reviewing official may then refer the complaint to the presiding officer.

2. Upon referral of the complaint pursuant to this section, the presiding officer shall promptly serve on defendant, in the manner prescribed in section H., above, a notice that an initial decision will be issued under this section.

3. Upon referral of the complaint pursuant to this section, the presiding officer shall assume the facts alleged in the complaint to be true and, if such facts establish liability under section C., above, the presiding officer shall issue an initial decision imposing penalties and assessments under the statute.

4. Except as otherwise provided in this section, by failing to file a timely answer, the defendant waives any right to further review of the penalties and assessments imposed under subsection 3. of this section, and the initial decision shall become final and binding upon the parties 30 days after it is issued.

5. If, before such an initial decision becomes final, the defendant files a motion with the presiding officer seeking to reopen on the grounds that good cause prevented the defendant from filing an answer, the initial decision shall be stayed pending the presiding officer's decision on the motion.

6. If, on a motion brought under subsection J.5., above, the defendant can demonstrate good cause excusing the failure to file a timely answer, the presiding officer shall withdraw the initial decision in subsection 3. of this section if such a decision has been issued, and shall grant the defendant an opportunity to answer the complaint.

7. A decision of the presiding officer denying a defendant's motion under subsections 5. and 6. of this section is not subject to reconsideration under section LL., below.

8. The defendant may appeal to the authority head the decision denying a motion to reopen by filing a notice of appeal with the authority head within 15 days after the presiding officer denies the motion. The timely filing of a notice of appeal shall stay the initial decision until the authority head decides the issue.

9. If the defendant files a timely notice of appeal with the authority head, the presiding officer shall forward the record of the proceeding to the authority head.

10. The authority head shall decide expeditiously whether good cause excused the defendant's failure to file a timely answer based solely on the record before the presiding officer.

11. If the authority head decides that good cause excused the defendant's failure to file a timely answer, the authority head shall remand the case to the presiding officer with instructions to grant the defendant an opportunity to answer.

12. If the authority head decides that the defendant's failure to file a timely answer is not excused, the authority head shall approve the initial decision of the presiding officer, which shall become final and binding upon the parties 30 days after the authority head issues such decision.

*K. Referral of Complaint and Answer to the Presiding Officer*

1. Upon receipt of an answer, the reviewing official shall file the complaint and answer with the presiding officer.

2. To allow time for settlement, referral of complaint and answer to the presiding officer may be delayed for a reasonable period of time if there is a written agreement of the parties, approved by the authority head, in favor of such delay.

*L. Notice of Hearing*

1. When the presiding officer receives the complaint and answer, the presiding officer shall promptly serve a notice of hearing upon the defendant in the manner prescribed by section H., above. At the same time, the

presiding officer shall send a copy of such notice to the representative for the Government.

2. Such notice shall include:

a. The tentative time and place, and the nature of the hearing;

b. The legal authority and jurisdiction under which the hearing is to be held;

c. The matters of fact and law to be asserted;

d. A description of the procedures for the conduct of the hearing;

e. The name, address, and telephone number of the representative of the Government, the defendant, and other parties, if any; and

f. Such other matters as the presiding officer deems appropriate.

*M. Parties to the Hearing*

The parties to the hearing shall be the defendant and the authority. The reviewing official of each authority shall, with the concurrence of the DoD Component head, designate attorneys within that authority to represent the authority in hearings conducted under this part. Attorneys appointed as authority representatives shall remain under the supervision of their DoD Component.

*N. Separation of Functions*

1. The investigating official and the reviewing official, for any particular case or factually related case, may not do the following:

a. Participate in the hearing as the presiding officer;

b. Participate or advise in the initial decision or the review of the initial decision by the authority head, except as a witness or a representative in a public proceeding; or

c. Make the collecting of penalties and assessments under 31 U.S.C. 3806.

2. The presiding officer shall not be responsible to, or subject to the supervision or direction of, the investigating official or the reviewing official.

3. Except as provided in subsection 1. of this section, the representative for the Government may be employed anywhere in the authority, including in the offices of either the investigating official or the reviewing official.

*O. Ex parte Contacts*

No party or person (except employees of the presiding officer's office) shall communicate in any way with the presiding officer on any matter at issue in a case unless on notice and there is an opportunity for all parties to participate. This provision does not prohibit a person or party from inquiring about the status of a case or asking routine questions concerning administrative functions or procedures.

*P. Disqualification of Presiding Officer and Reviewing Official*

1. A reviewing official or presiding officer in a particular case may disqualify himself or herself at any time.

2. A party may file a motion for disqualification of the presiding officer or the reviewing official. Such motion, to be filed with the presiding officer, shall be accompanied by an affidavit alleging personal bias or other reason for disqualification.

3. Such motion and affidavit shall be filed promptly upon the party's discovery of reasons requiring disqualification or such objections shall be deemed waived.

4. Such affidavit shall state specific facts that support the party's belief that personal bias or other reason for disqualification exists and the time and circumstances of the party's discovery of such facts. It shall be accompanied by a certificate of the representative of record that it is made in good faith.

5. Upon the filing of such a motion and affidavit, the presiding officer shall proceed no further in the case until he or she resolves the matter of disqualification by taking one of the following actions:

a. If the presiding officer determines that a reviewing official is disqualified, the presiding officer shall dismiss the complaint without prejudice;

b. If the presiding officer disqualifies himself or herself, the case shall be reassigned promptly to another presiding officer;

c. The presiding officer may deny a motion to disqualify. In such event, the authority head may determine the matter only as part of his or her review of the initial decision upon appeal, if any.

*Q. Rights of Parties*

Except as otherwise limited by this enclosure, all parties may:

1. Be accompanied, represented, and advised by a representative;

2. Participate in any conference held by the presiding officer;

3. Conduct discovery;

4. Agree to stipulations of fact or law, which shall be made part of the record;

5. Present evidence relevant to the issues at the hearing;

6. Present and cross-examine witnesses;

7. Present oral arguments at the hearing, as permitted by the presiding officer; and

8. Submit written briefs and proposed findings of fact and conclusions of law after the hearing.

*R. Authority of the Presiding Officer*

1. The presiding officer shall conduct a fair and impartial hearing, avoid delay, maintain order, and assure that a record of the proceeding is made.

2. The presiding officer has the authority to do the following:

a. Set and change the date, time, and place of the hearing upon reasonable notice to the parties;

b. Continue or recess the hearing in whole or in part for a reasonable period of time;

c. Hold conferences to identify or simplify the issues, or to consider other matters that may aid in the expeditious disposition of the proceeding;

d. Administer oaths and affirmations;

e. Issue subpoenas requiring the attendance of witnesses and the production of documents at depositions or at hearings;

f. Rule on motions and other procedural matters;

g. Regulate the scope and timing of discovery;

h. Regulate the course of the hearing and the conduct of representatives and parties;

i. Examine witnesses;

j. Receive, rule on, exclude, or limit evidence;

k. Upon motion of a party, take official notice of facts;

l. Upon motion of a party, decide cases, in whole or in part by summary judgment where there is no disputed issue of material fact;

m. Conduct any conference, argument, or hearing on motions in person or by telephone; and

n. Exercise such other authority as is necessary to carry out the responsibilities of the presiding officer under this Directive.

3. The presiding officer does not have the authority to find Federal statutes or regulations invalid.

*S. Prehearing Conferences*

1. The presiding officer may schedule prehearing conferences as appropriate.

2. Upon the motion of any party, the presiding officer shall schedule at least one prehearing conference at a reasonable time in advance of the hearing.

3. The presiding officer may use prehearing conferences to discuss the following:

a. Simplification of the issues;

b. The necessity or desirability of amendments to the pleadings, including the need for a more definite statement;

c. Stipulations and admissions of fact or as to the contents and authenticity of documents;

d. Whether the parties can agree to submission of the case on a stipulated record;

e. Whether a party chooses to waive appearance at an oral hearing and to submit only documentary evidence (subject to the objections of other parties) and written argument;

f. Limitation of the number of witnesses;

g. Scheduling dates for the exchange of witness lists and of proposed exhibits;

h. Discovery;

i. The time and place for the hearing; and

j. Such other matters as may tend to expedite the fair and just disposition of the proceedings.

4. The presiding officer may issue an order containing all matters agreed upon by the parties or ordered by the presiding officer at a prehearing conference.

*T. Disclosure of Documents*

1. Upon written request to the reviewing official, the defendant may review any relevant and material documents, transcripts, records, and other materials that relate to the allegations set out in the complaint and upon which the findings and conclusions of the investigating official under subsection D.2., above, are based, unless such documents are subject to a privilege under Federal law. Upon payment of fees for duplication, the defendant may obtain copies of such documents.

2. Upon written request to the reviewing official, the defendant also may obtain a copy of all exculpatory information in the possession of the reviewing official or investigating official relating to the allegations in the complaint, even if it is contained in a document that would otherwise be privileged. If the document would otherwise be privileged, only that portion containing exculpatory information must be disclosed, except if disclosure would violate Rule 6(e) of the Federal Rules of Criminal Procedure.

3. The notice sent to the Attorney General from the reviewing official as described in section E., above, is not discoverable under any circumstances.

4. The defendant may file a motion to compel disclosure of the documents subject to the provisions of this section at any time after service of the complaint.

*U. Discovery*

1. The following types of discovery are authorized:

a. Requests for production of documents for inspection and copying;

b. Requests for admissions of the authenticity of any relevant document or of the truth of any relevant fact;

c. Written interrogatories; and

d. Depositions.

2. For the purpose of this section and sections V. and W., below, the term ''documents'' includes information, documents, reports, answers, records, accounts, papers, and other data and documentary evidence contained in a form contemplated by the definition of ''document'' set forth in the Federal Rules of Civil Procedure, Rule 34. Nothing contained herein shall be interpreted to require the creation of a document.

3. Unless mutually agreed to by the parties, discovery is available only as ordered by the presiding officer. The presiding officer shall regulate the timing of discovery.

4. Motions for discovery may be filed with the presiding officer by the party seeking discovery.

a. Such a motion shall be accompanied by a copy of the requested discovery, or in the case of depositions, a summary of the scope of the proposed deposition.

b. Within 10 days of service, a party may file an opposition to the motion and/or a motion for protective order as provided in section X., below.

c. The presiding officer may grant a motion of discovery only if he finds that the discovery sought:

(1) Is necessary for the expeditious, fair, and reasonable consideration of the issue;

(2) Is not unduly costly or burdensome;

(3) Will not unduly delay the proceeding; and

(4) Does not seek privileged information.

d. The burden of showing that discovery should be allowed is on the party seeking discovery.

e. The presiding officer may grant discovery subject to a protective order under section X., below.

5. Depositions

a. If a motion for deposition is granted, the presiding officer shall issue a subpoena for the deponent, which may require the deponent to produce documents. The subpoena shall specify the time and place at which the deposition will be held. The presiding officer may order that parties produce deponents and/or documents without the need for subpoena.

b. The party seeking to depose shall serve the subpoena in the manner prescribed in section H., above.

c. The deponent may file with the presiding officer a motion to quash the subpoena or a motion for a protective order within 10 days of service.

d. The party seeking to depose shall provide for the taking of a verbatim transcript of the deposition, which it shall make available to all parties for inspection and copying.

6. Each party shall bear its own costs of discovery.

*V. Exchange of Witness Lists, Statements, and Exhibits*

1. At least 15 days before the hearing or at such other time as may be ordered by the presiding officer, the parties shall exchange witness lists, copies of prior statements of proposed witnesses, and copies of proposed hearing exhibits, including copies of any written statements that the party intends to offer in lieu of live testimony in accordance with subsection GG.2., below. At the time the above documents are exchanged, any party that intends to rely upon the transcript of deposition testimony in lieu of live testimony at the hearing, if permitted by the presiding officer, shall provide each party with a copy of the specific pages of the transcript it intends to introduce into evidence.

2. If a party objects, the presiding officer shall not admit into evidence the testimony of any witness whose name does not appear on the witness list or any exhibit not provided to the opposing party as provided above unless the presiding officer finds good cause for the failure or that there is no prejudice to the objecting party.

3. Unless another party objects within the time set by the presiding officer, documents exchanged in accordance with subsection 1. of this section shall be admitted into evidence at the hearing. Later challenges to admissibility at the hearing shall be permitted only upon a showing of good cause for the lateness.

*W. Subpoenas for Attendance at Hearing*

1. A party wishing to procure the appearance and testimony of any individual at the hearing may request that the presiding officer issue a subpoena.

2. A subpoena requiring the attendance and testimony of an individual may also require the individual to produce documents at the hearing.

3. A party seeking a subpoena shall file a written request therefor not less than 15 days before the date fixed for the hearing, unless otherwise allowed by the presiding officer for good cause shown. Such request shall specify any documents to be produced and shall designate the witnesses and describe the address and location thereof with sufficient particularity to permit such witnesses to be found.

4. The subpoena shall specify the time and place at which the witness is to appear and any documents the witness is to produce.

5. The party seeking the subpoena shall serve it in the manner prescribed in section H., above. A subpoena on a party or upon an individual under the control of a party may be served by first class mail.

6. A party or a representative of the individual to whom the subpoena is directed may file with the presiding officer a motion to quash the subpoena with 10 days after service or on or before the time specified in the subpoena for compliance if it is less than 10 days after service.

*X. Protective Order*

1. A party or a prospective witness or deponent may file a motion for a protective order with respect to discovery sought by an opposing party or with respect to the hearing, seeking to limit the availability or disclosure of evidence.

2. In issuing a protective order, the presiding officer may make any order that justice requires to protect a party or person from annoyance, embarrassment, oppression,

or undue burden or expense including one or more of the following:

a. That the discovery not be had;

b. That the discovery may be had only on specified terms and conditions, including a designation of the time or place;

c. That the discovery may be had only through a method of discovery other than that requested;

d. That classified information not be released unless prior notice and arrangements reasonably acceptable to the representative of the authority are made in coordination with the Defense Investigative Service, and the presiding officer agrees to the use;

e. That certain matters not be inquired into or that the scope of discovery be limited to certain matters;

f. That discovery be conducted with no person except persons designated by the presiding officer;

g. That the contents of discovery or evidence be sealed;

h. That the defendant comply with 32 CFR part 97 concerning official witnesses;

i. That a deposition after being sealed be opened only upon order of the presiding officer;

j. That a trade secret or other confidential research, development, commercial information, or facts pertaining to any criminal investigation, proceeding, or other administrative investigation not be disclosed or be disclosed only in a designated way; or

k. That the parties simultaneously file specified documents of information enclosed in sealed envelopes to be opened as directed by the presiding officer.

*Y. Fees*

The party requesting a subpoena shall pay the cost of the witness fees and mileage of any witness subpoenaed in the amounts that would be payable to a witness in a proceeding in the United States District Court. A check for witness fees and mileage shall accompany the subpoena when served, except that when a subpoena is issued on behalf of the authority a check for witness fees and mileage need not accompany the subpoena.

*Z. Form, Filing, and Service of Papers*

1. Form

a. Documents filed with the presiding officer shall include an original and two copies.

b. Every pleading and paper filed in the proceeding shall contain a caption setting forth the title of the action, the case number assigned by the presiding officer, and a designation of the paper (e.g., motion to quash subpoena).

c. Every pleading and paper shall be signed by, and shall contain the address and telephone number of, the party or the person on whose behalf the paper was filed, or his or her representative.

d. Papers are considered filed when they are mailed. Date of mailing may be established by a certificate from the party or its representative or by proof that the document was sent by certified or registered mail.

2. *Service.* A party filing a document with the presiding officer shall, at the time of filing, serve a copy of such document on every other party. Service upon any party of any document other than those required to be served as prescribed in section H., above, shall be made by delivering a copy or by placing a copy of the document in the United States mail, postage prepaid and addressed to the party's last known address. When a party is represented by a representative, service shall be made upon such representative in lieu of the actual party.

3. *Proof of service.* A certificate of the individual serving the document by personal delivery or by mail, setting forth the manner of service, shall be proof of service.

*AA. Computation of Time*

1. In computing any period of time under this part or in an order issued thereunder, the time begins with the day following the act, event, or default, and includes the last day of the period, unless it is a Saturday, Sunday, or legal holiday observed by the Federal Government, in which event it includes the next business day.

2. When the period of time allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays observed by the Federal Government shall be excluded from the computation.

3. Where a document has been served or issued by placing it in the mail, an additional 5 days will be added to the time permitted for any response.

*BB. Motions*

1. Any application to the presiding officer for an order or ruling shall be by motion. Motions shall state the relief sought, the authority relied upon, the facts alleged, and shall be filed with the presiding officer and served on all other parties.

2. Except for motions made during a prehearing conference or at the hearing, all motions shall be in writing. The presiding officer may require the oral motions be put in writing.

3. Within 15 days after a written motion is served, or such other time as may be fixed by the presiding officer, any party may file a response to such motion.

4. The presiding officer may not grant a written motion before the time for filing responses thereto has expired, except upon consent of the parties or following a hearing on the motion, but may overrule or deny such motion without awaiting a response.

5. The presiding officer shall make a reasonable effort to dispose of all outstanding

motions prior to the beginning of the hearing.

6. Failure by a party to raise defenses or objections or to make requests that must be made prior to the beginning of the hearing shall constitute waiver thereof, but the presiding officer may grant relief from the waiver for good cause shown.

*CC. Sanctions*

1. The presiding officer may sanction a person, including any party or representative, for the following:

a. Failing to comply with an order, rule, or procedure governing the proceeding;

b. Failing to prosecute or defend an action; or

c. Engaging in other misconduct that interferes with the speedy, orderly, or fair conduct of the hearing.

2. Any such sanction, including but not limited to those listed in subsections 3., 4., and 5. of this section, shall reasonably relate to the severity and nature of the failure or misconduct.

3. When a party fails to comply with an order, including an order for taking a deposition, the production of evidence within the party's control, or a request for admission, the presiding officer may:

a. Draw an inference in favor of the requesting party with regard to the information sought;

b. In the case of requests for admission, deem each matter of which an admission is requested to be admitted;

c. Prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, testimony relating to the information sought; and

d. Strike any part of the pleadings or other submission of the party failing to comply with such request.

4. If a party fails to prosecute or defend an action under this part commenced by service of a notice of hearing, the presiding officer may dismiss the action or may issue an initial decision imposing penalties and assessments.

5. The presiding officer may refuse to consider any motion, request, response, brief, or other document that is not filed in a timely fashion.

*DD. The Hearing and Burden of Proof*

1. The presiding officer shall conduct a hearing on the record in order to determine whether the defendant is liable for a civil penalty or assessment under section C., above, and, if so, the appropriate amount of any such civil penalty or assessment considering any aggravating or mitigating factors.

2. The authority shall prove defendant's liability and any aggravating factors by a preponderance of the evidence.

3. The defendant shall prove any affirmative defenses and any mitigating factors by a preponderance of the evidence.

4. The hearing shall be open to the public unless otherwise ordered by the presiding officer for good cause shown.

*EE. Determining the Amount of Penalties and Assessments*

In determining an appropriate amount of civil penalties and assessments, the presiding officer and the authority head, upon appeal, should evaluate any circumstances that mitigate or aggravate the violation and should articulate in their opinions the reasons that support the penalties and assessments they impose.

*FF. Location of Hearing*

1. The hearing may be held as follows:

a. In any judicial district of the United States in which the defendant resides or transacts business;

b. In any judicial district of the United States in which the claim or statement at issue was made; or

c. In such other place, including foreign countries, as may be agreed upon by the defendant and the presiding officer.

2. Each party shall have the opportunity to petition the presiding officer with respect to the location of the hearing.

3. The hearing shall be held at the place and at the time ordered by the presiding officer.

*GG. Witnesses*

1. Except as provided in subsection 2. of this section, testimony at the hearing shall be given orally by witnesses under oath or affirmation.

2. At the discretion of the presiding officer, testimony may be admitted in the form of a written or videotaped statement or deposition. Any such written or videotaped statement must be provided to all other parties along with the last known address of such witness, in a manner which allows sufficient time for other parties to subpoena such witness for deposition or cross-examination at the hearing. Prior written or videotaped statements of witnesses proposed to testify at the hearings and deposition transcripts shall be exchanged as provided in subsection V.1., above.

3. The presiding officer shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

a. Make the interrogation and presentation effective for the ascertainment of the truth;

b. Avoid needless consumption of time; and

c. Protect witnesses from harassment or undue embarrassment.

4. The presiding officer shall permit the parties to conduct such cross-examination as

may be required for a full and true disclosure of the facts.

5. At the discretion of the presiding officer, a witness may be cross-examined on matters relevant to the proceeding without regard to the scope of his or her direct examination.

6. Upon motion of any party, the presiding officer shall order witnesses excluded so that they cannot hear the testimony of other witnesses. This rule does not authorize exclusion of the following:

a. A party who is an individual;

b. In the case of a party that is not an individual, an officer or employee of the party appearing for the party as its representative, or designated by the party's representative; or

c. An individual whose presence is shown by a party to be essential to the presentation of its case, including an individual employed by the Government engaged in assisting the representative for the Government.

*HH. Evidence*

1. The presiding officer shall determine the admissibility of evidence.

2. Except as provided herein, the presiding officer shall not be bound by the Federal Rules of Evidence. However, the presiding officer may apply the Federal Rules of Evidence where appropriate; e.g., to exclude unreliable evidence.

3. The presiding officer shall exclude irrelevant and immaterial evidence.

4. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or by consideration of undue delay or needless presentation of cumulative evidence.

5. Evidence shall be excluded if it is privileged under Federal law and the holder of the privilege asserts it.

6. Evidence concerning offers of compromise or settlement shall be inadmissible to the extent provided in Rule 408 of the Federal Rules of Evidence.

7. The presiding officer shall permit the parties to introduce rebuttal witnesses and evidence.

8. All documents and other evidence offered or taken for the record shall be open to examination by all parties, unless otherwise ordered by the presiding officer pursuant to section X., above.

*II. The Record and Finding*

1. The hearing will be recorded and transcribed. Transcripts may be obtained following the hearing from the presiding officer at a cost not to exceed the actual cost of duplication.

2. The transcript of testimony, exhibits, and other evidence admitted at the hearing, and all papers and requests filed in the proceeding constitute the record for the decision by the presiding officer and the authority head.

3. The record may be inspected and copied (upon payment of a reasonable fee) by anyone, unless otherwise ordered by the presiding officer.

4. Funding for the hearing and record, except for the cost of the presiding officer, shall be the responsibility of the authority in which the case arose.

*JJ. Post-hearing Briefs*

The presiding officer may require or permit the parties to file post-hearing briefs. The presiding officer shall fix the time for filing any such briefs, not to exceed 60 days from the date the parties receive the transcript of the hearing or, if applicable, the stipulated record. Such briefs may be accompanied by proposed findings of fact and conclusions of law. The presiding officer may permit the parties to file reply briefs.

*KK. Initial Decision*

1. The presiding officer shall issue an initial decision based only on the record that shall contain findings of fact, conclusions of law, and the amount of any penalties and assessments imposed.

2. The findings of fact shall include a finding on each of the following issues:

a. Whether the claims or statements identified in the complaint, or any portions thereof, violate section C., above; and

b. If the person is liable for penalties or assessments, the appropriate amount of any such penalties or assessments.

3. The presiding officer shall promptly serve the initial decision on all parties within 90 days after the time for submission of post-hearing briefs and reply briefs (if permitted) has expired. The presiding officer shall at the same time serve all parties with a statement describing the right of any defendant determined to be liable for a civil penalty or assessment to file a motion for reconsideration with the presiding officer or a notice of appeal with the authority head. If the presiding officer fails to meet the deadline contained in this subsection, he or she shall notify the parties of the reason for the delay and shall set a new deadline.

4. Unless the initial decision of the presiding officer is timely appealed to the authority head, or a motion for reconsideration of the initial decision is timely filed, the initial decision of the presiding officer shall be final and binding on the parties 30 days after it is issued by the presiding officer.

*LL. Reconsideration of Initial Decision*

1. Except as provided in subsection 4. of this section, any party may file a motion for reconsideration of the initial decision within 20 days of service of the initial decision in the manner set forth in section H., above, for

service of the complaint. Service shall be proved in the manner provided in subsection H.2., above.

2. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Such motion shall be accompanied by a supporting brief.

3. Responses to such motions shall be allowed only upon request of the presiding officer; however, the presiding officer shall not issue a revised initial determination without affording both parties an opportunity to be heard on the motion for reconsideration.

4. No party may file a motion for reconsideration of an initial decision that has been revised in response to a previous motion for reconsideration.

5. The presiding officer may dispose of a motion for reconsideration by denying it or by issuing a revised initial decision.

6. If the presiding officer denies a motion for reconsideration, the initial decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after the presiding officer denies the motion, unless the initial decision is timely appealed to the authority head in accordance with section MM., below.

7. If the presiding officer issues a revised initial decision, that decision shall constitute the final decision of the authority head and shall be final and binding on the parties 30 days after it is issued, unless it is timely appealed to the authority head in accordance with section MM., below.

*MM. Appeal to Authority Head*

1. Any defendant who has filed a timely answer and who is determined in an initial decision to be liable for a civil penalty or assessment may appeal such decision to the authority head by filing a notice of appeal with the authority head in accordance with this section.

2. A notice of appeal:

a. May be filed at any time within 30 days after the presiding officer issues an initial or a revised initial decision. If another party files a motion for reconsideration under section LL., above, consideration of the appeal shall be stayed automatically pending resolution of the motion for reconsideration, until the time period for filing a motion for reconsideration under section LL., above, has expired or the motion is resolved;

b. If a motion for reconsideration is timely filed, a notice of appeal may be filed within 30 days after the presiding officer denies the motion or issues a revised initial decision, whichever applies;

c. The authority head may extend the initial 30-day period for an additional 30 days if the defendant files with the authority head a request for an extension within the initial 30-day period and shows good cause.

3. If the defendant files a timely notice of appeal with the authority head, the presiding officer shall forward the record of the proceeding to the authority head when:

a. The time for filing a motion for reconsideration expires without the filing of such a motion, or

b. The motion for reconsideration is denied. Issuance of a revised initial decision upon motion for reconsideration shall require filing of a new notice of appeal.

4. A notice of appeal shall be accompanied by a written brief specifying exceptions to the initial decision and reasons supporting the exceptions.

5. The representative for the Government may file a brief in opposition to the exceptions within 30 days of receiving the notice of appeal and accompanying brief.

6. There is no right to appear personally before the authority head, although the authority head may at his or her discretion require the parties to appear for an oral hearing on appeal.

7. There is no right to appeal any interlocutory ruling by the presiding officer.

8. In reviewing the initial decision, the authority head shall not consider any objection that was not raised before the presiding officer, unless a demonstration is made of extraordinary circumstances causing the failure to raise the objection.

9. If any party demonstrates to the satisfaction of the authority head that additional evidence not presented at such hearing is material and that there were reasonable grounds for the failure to present such evidence at such hearing, the authority head shall remand the matter to the presiding officer for consideration of such additional evidence.

10. The authority head may affirm, reduce, reverse, compromise, remand, or settle any penalty or assessment determined by the presiding officer in any initial decision.

11. The authority head shall promptly serve each party to the appeal with a copy of the decision of the authority head and a statement describing the right of any person determined to be liable for a penalty or assessment to seek judicial review.

12. Unless a petition for review is filed as provided in 32 U.S.C. 3805 after a defendant has exhausted all administrative remedies under this part and within 60 days after the date on which the authority head serves the defendant with a copy of the authority head's decision, a determination that a defendant is liable under section C., above, is final and is not subject to judicial review.

13. The authority heads (or their designees) may designate an officer or employee of the authority, who is serving in the grade of GS–17 or above under the General Schedule, or in the Senior Executive Service, to carry out these appellate responsibilities; however, the

authority to compromise, settle, or otherwise discretionarily dispose of the case on appeal provided pursuant to subsection MM.10, hereof, may not be so redelegated pursuant to this subsection.

*NN. Stays Ordered by the Department of Justice*

If at any time, the Attorney General or an Assistant Attorney General designated by the Attorney General transmits to the authority head a written finding that continuation of the administrative process described in this Directive with respect to a claim or statement may adversely affect any pending or potential criminal or civil action related to such claim or statement, the authority head shall stay the process immediately. The authority head may order the process resumed only upon receipt of the written authorization of the Attorney General.

*OO. Stay Pending Appeal*

1. An initial decision is stayed automatically pending disposition of a motion for reconsideration or of an appeal to the authority head.
2. No administrative stay is available following a final decision of the authority head.

*PP. Judicial Review.*

31 U.S.C. 3805 authorizes judicial review by an appropriate United States District Court of a final decision of the authority head imposing penalties or assessment under this part and specifies the procedures for such review.

*QQ. Collection of Civil Penalties and Assessments*

31 U.S.C. 3806 and 3808(b) authorize actions for collection of civil penalties and assessments imposed under this part and specify the procedures for such actions.

*RR. Right to Administrative Offset*

The amount of any penalty or assessment that has become final, or for which a judgment has been entered under section QQ., above, or any amount agreed upon in a compromise or settlement under section TT., below, may be collected by administrative offset under 31 U.S.C. 3716, except that an administrative offset may not be made under this section against a refund of an overpayment of Federal taxes then or later owing by the United States to the defendant.

*SS. Deposit in Treasury of United States*

All amounts collected pursuant to this part shall be deposited as miscellaneous receipts in the Treasury of the United States, except as provided in 31 U.S.C. 3806(g).

*TT. Compromise or Settlement*

1. Parties may make offers of compromise or settlement at any time.
2. The reviewing official has the exclusive authority to compromise or settle a case under this part at any time after the date on which the reviewing official is permitted to issue a complaint and before the date on which the presiding officer issues an initial decision.
3. The authority head has exclusive authority to compromise or settle a case under this Directive at any time after the date on which the presiding officer issues an initial decision, except during the pendency of any review under section PP., above, or during the pendency of any action to collect penalties as assessments under section QQ., above.
4. The Attorney General has exclusive authority to compromise or settle a case under this part during the pendency of any review under section PP., above, of any action to recover penalties and assessments under 31 U.S.C. 3806.
5. The investigating official may recommend settlement terms to the reviewing official or the Attorney General, as appropriate. The reviewing official may recommend settlement terms to the Attorney General, as appropriate.
6. Any compromise or settlement must be in writing.

*UU. Limitations*

1. The notice of hearing with respect to a claim or settlement must be served in the manner specified in section H., above, within 6 years after the date on which such claim or statement is made.
2. If the defendant fails to file a timely answer, service of a notice under subsection J.2., above, shall be deemed a notice of hearing for purposes of this section.
3. If at any time during the course of proceedings brought pursuant to this section, the authority head receives or discovers any specific information concerning bribery, gratuities, conflict of interest, or other corruption or similar activity in relation to a false claim or statement, the authority head shall immediately report such information to the Attorney General and to the Inspector General, Department of Defense.

*VV. Delegations*

The General Counsel for the Department of Defense is designated to carry out the responsibilities of the authority head of the Department of Defense for the issuance of additional implementing regulations that are necessary to implement PFCRA and this part to decide cases upon appeal, and to hire or designate employees of the Department of Defense to decide cases on appeal. The General Counsel, Department of Defense, is also

designated to appoint presiding officers for the Department of Defense, and may assist in the appointment of presiding officers on detail from other Agencies for all authorities within the Department of Defense.

# PART 281—SETTLING PERSONNEL AND GENERAL CLAIMS AND PROCESSING ADVANCE DECISION REQUESTS

Sec.
281.1 Purpose.
281.2 Applicability and scope.
281.3 Definitions.
281.4 Policy.
281.5 Responsibilities.
APPENDIX TO PART 281—CLAIMS DESCRIPTION.

AUTHORITY: 10 U.S.C. 2575, 2771, 4712, 9712; 24 U.S.C. 420; 31 U.S.C. 3529, 3702; 32 U.S.C. 714; 37 U.S.C. 554.

SOURCE: 71 FR 57426, Sept. 29, 2006, unless otherwise noted.

## § 281.1 Purpose.

This part establishes policy and assigns responsibilities for settling personnel and general claims (under 31 U.S.C. 3702; 10 U.S.C. 2575, 2771, 4712, and 9712; 24 U.S.C. 420; 37 U.S.C. 554, and 32 U.S.C. 714) and for processing requests for an advance decision under 31 U.S.C. 3529.

## § 281.2 Applicability and scope.

This part applies to:

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

(b) The Coast Guard, when it is not operating as a Service in the Navy under agreement with the Department of Homeland Security, and the Commissioned Corps of the Public Health Service (PHS) and the National Oceanic and Atmospheric Administration (NOAA), under agreements with the Departments of Health and Human Services and Commerce (hereafter referred to collectively as ''the non-DoD Components'').

## § 281.3 Definitions.

*Armed Forces.* The Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.

*Claim.* A demand for money or property under 31 U.S.C. 3702; 10 U.S.C. 2575, 2771, 4712, and 9712; 24 U.S.C. 420; 37 U.S.C. 554, and 32 U.S.C. 714.

*Secretary concerned.* The Secretary of the Army, addressing matters concerning the Army. The Secretary of the Navy, addressing matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a Service in the Navy. The Secretary of the Air Force, addressing matters concerning the Air Force. The Secretary of Homeland Security, addressing matters concerning the Coast Guard when it is not operating as a Service in the Navy. The Secretary of Health and Human Services, addressing matters concerning the PHS. The Secretary of Commerce, addressing matters concerning the NOAA.

*Settlement.* A claim and the amount due that is administratively determined to be valid.

*Uniformed Services.* The Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, and the Commissioned Corps of the PHS and the NOAA.

## § 281.4 Policy.

It is DoD policy that:

(a) The claim settlement and advance decision authorities that, by statute or delegation, are vested in the Department of Defense or the Secretary of Defense shall be exercised by the officials designated in this part. The appendix to this part describes the claims included under these functional authorities.

(b) Claims shall be settled and advance decisions shall be rendered in accordance with pertinent statutes and regulations, and after consideration of other relevant authorities.

## § 281.5 Responsibilities.

(a) The *General Counsel of the Department of Defense* shall:

(1) Settle claims that the Secretary of Defense is authorized to settle under 31 U.S.C. 3702; 10 U.S.C. 2575, 2771, 4712, and 9712; 24 U.S.C. 420; 37 U.S.C. 554, and 32 U.S.C. 714.

(2) Consider, and grant or deny, a request under 31 U.S.C. 3702 to waive the time limit for submitting certain claims.

(3) Render advance decisions under 31 U.S.C. 3529 that the Secretary of Defense is authorized to render, and oversee the submission of requests for an advance decision arising from the activity of a DoD Component that are addressed to officials outside the Department of Defense.

(4) Develop overall claim settlement and advance decision policies; and promulgate procedures for settling claims, processing requests for an advance decision (including overseeing the submission of requests for an advance decision arising from the activity of a DoD Component that are addressed to officials outside the Department of Defense), and rendering advance decisions. Procedures for settling claims shall include an initial determination process and a process to appeal an initial determination.

(b) The *Heads of the DoD Components* shall:

(1) Establish procedures within their organization for processing claims and for submitting requests for an advance decision arising from it's activity in accordance with this part and responsibilities promulgated under paragraph (a)(4) of this section.

(2) Pay claims under 10 U.S.C. 2771 and 32 U.S.C. 714, if applicable.

(3) Ensure compliance with this part and policies and responsibilities promulgated under (a)(4) of this section.

(c) The *Heads of the Non-DoD Components*, concerning claims arising from that Component's activity under 31 U.S.C. 3702, 10 U.S.C. 2575, 10 U.S.C. 2771 or 37 U.S.C. 554, shall:

(1) Establish procedures within their organization for processing claims and for submitting requests for an advance decision in accordance with this part and responsibilities promulgated under paragraph (a)(4) of this section.

(2) Pay claims under 10 U.S.C. 2771, if applicable.

### APPENDIX TO PART 281—CLAIMS DESCRIPTION

The Secretary of Defense is authorized to perform the claim settlement and advance decision functions for claims under the following statutes:

(a) 31 U.S.C. 3702, concerning claims in general when there is no other settlement authority specifically provided for by law.[1]

(b) 10 U.S.C. 2575, concerning the disposition of unclaimed personal property on a military installation.

(c) 10 U.S.C. 2771, concerning the final settlement of accounts of deceased members of the armed forces (but not the National Guard).[2]

(d) 24 U.S.C. 420, 10 U.S.C. 4712, and 10 U.S.C. 9712, concerning the disposition of the effects of a deceased person who was subject to military law at a place or command under the jurisdiction of the Army or Air Force or of deceased residents of the Armed Forces Retirement Home.

(e) 37 U.S.C. 554, concerning the sale of personal property of members of the Uniformed Services who are in a missing status.

(f) 32 U.S.C. 714, concerning the final settlement of accounts of deceased members of the National Guard.[2]

## PART 282—PROCEDURES FOR SETTLING PERSONNEL AND GENERAL CLAIMS AND PROCESSING ADVANCE DECISION REQUESTS

Sec.
282.1 Purpose.
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APPENDIX A TO PART 282—GUIDANCE
APPENDIX B TO PART 282—CLAIMS DESCRIPTION
APPENDIX C TO PART 282—SUBMITTING A CLAIM

[1] This includes claims involving Uniformed Services members' pay, allowances, travel, transportation, payment for unused accrued leave, retired pay, and survivor benefits, and claims for refunds by carriers for amounts collected from them for loss or damage to property they transported at Government expense; also included are other claims arising from the activity of a DoD Component. However, the Director of the Office of Personnel Management performs these functions for claims involving civilian employees' compensation and leave; and the Administrator of General Services performs these functions for claims involving civilian employees' travel, transportation, and relocation expenses.

[2] Claims under this statute are actually settled under the authority in 31 U.S.C. 3702 because there is no specific settlement authority in the statute.

APPENDIX D TO PART 282—PROCESSING A CLAIM
APPENDIX E TO PART 282—APPEALS
APPENDIX F TO PART 282—REQUESTS FOR AN ADVANCE DECISION

AUTHORITY: 5 U.S.C. 552; 10 U.S.C. 2575; 10 U.S.C. 2771; 10 U.S.C. 4712; 10 U.S.C. 9712; 24 U.S.C. 420; 31 U.S.C. 3529; 31 U.S.C. 3702; 32 U.S.C. 714; and 37 U.S.C. 554.

SOURCE: 69 FR 38843, June 29, 2004, unless otherwise noted.

### § 282.1 Purpose.

This part implements policy under 32 CFR part 281 and prescribes procedures for processing and settling personnel and general claims under 31 U.S.C. 3702, 10 U.S.C. 2575, 10 U.S.C. 2771, 24 U.S.C. 420, 10 U.S.C. 4712, 10 U.S.C. 9712, 37 U.S.C. 554, 32 U.S.C. 714 and for processing requests for an advance decision under 31 U.S.C. 3529.

### § 282.2 Applicability and scope.

This part applies to:

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

(b) The Coast Guard, when it is not operating as a Service in the Navy under agreement with the Department of Homeland Security, and the Commissioned Corps of the Public Health Service (PHS) and the National Oceanic and Atmospheric Administration (NOAA), under agreements with the Departments of Health and Human Services and Commerce (hereafter referred to collectively as ''the non-DoD Components'').

### § 282.3 Definitions.

(a) *Armed Forces*. The Army, the Navy, the Air Force, the Marine Corps, and the Coast Guard.

(b) *Claim*. A demand for money or property under one of the following statutes: 31 U.S.C. 3702, 10 U.S.C. 2575, 10 U.S.C. 2771, 24 U.S.C. 420, 10 U.S.C. 4712, 10 U.S.C. 9712, 37 U.S.C. 554, or 32 U.S.C. 714.

(c) *Committee*. The person or persons invested, by order of a proper court, with the guardianship of a minor or incompetent person and /or the estate of a minor or incompetent person.

(d) *Component Concerned*. The agency/activity (as well as the official designated by the Head of the agency/activity) required to perform the function or take the action indicated or from whose activity a claim arose.

(e) *Final Action*. A finding by the appropriate official under this part concerning a claim from which there is no right to appeal or request reconsideration, or concerning which the time limit prescribed in this part for submitting an appeal or request for reconsideration has expired without such a submission.

(f) *Member*. A member or former member of the Uniformed Services.

(g) *Secretary Concerned*. The Secretary of the Army, addressing matters concerning the Army. The Secretary of the Navy, addressing matters concerning the Navy, the Marine Corps, and the Coast Guard when it is operating as a Service in the Navy. The Secretary of the Air Force, addressing matters concerning the Air Force. The Secretary of Homeland Security, addressing matters concerning the Coast Guard when it is not operating as a Service in the Navy. The Secretary of Health and Human Services, addressing matters concerning the PHS. The Secretary of Commerce, addressing matters concerning the NOAA.

(h) *Settlement*. A claim and the amount due that is administratively determined to be valid.

(i) *Uniformed Services*. The Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, and the Commissioned Corps of the PHS and the NOAA.

### § 282.4 Policy.

It is DoD policy that:

(a) Claims shall be settled and advance decisions rendered in accordance with all pertinent statutes and regulations, and after consideration of other relevant authorities.

(b) This part applies to certain claim settlement and advance decision functions that, by statute or delegation,

are vested in the Department of Defense or the Secretary of Defense. Appendix B to this part describes the claims included under these functional authorities.

**§ 282.5 Responsibilities.**

(a) The *General Counsel of the Department of Defense* (GC, DoD), or designee, shall:

(1) Upon the request of the Director, Defense Office of Hearings and Appeals (DOHA), consult on, or render legal opinions concerning, questions of law that arise in the course of the performance of the Director's responsibilities under paragraph (b) of this section.

(2) Render advance decisions under 31 U.S.C. 3529 and oversee the submission of requests for an advance decision arising from the activity of a DoD Component that are addressed to the Director of the Office of Personnel Management or the Administrator General Services in accordance with this part.

(b) The *Director, Defense Office of Hearings and Appeals* (DOHA), or designee, under the GC, DoD (as the *Director, Defense Legal Services Agency*), shall:

(1) Consider, and grant or deny, a request by the Secretary concerned under 31 U.S.C. 3702(e) to waive the time limit for submitting certain claims in accordance with 32 CFR part 281 and this part.

(2) Consider appeals from an initial determination, and affirm, modify, reverse, or remand the initial determination in accordance with 32 CFR part 281, this part, and relevant DoD Office of General Counsel opinions.

(c) The *Heads of the DoD Components*, or designees, shall:

(1) Process claims under 31 U.S.C. 3702, 10 U.S.C. 2575, 10 U.S.C. 2771, 24 U.S.C. 420, 10 U.S.C. 4712, 10 U.S.C. 9712, 37 U.S.C. 554, and 32 U.S.C. 714 in accordance with this part.

(2) Ensure that requests for an advance decision that originate in their organizations are prepared and submitted in accordance with this part.

(3) Pay claims as provided in a final action in accordance with this part.

(d) The *Heads of the Non-DoD Components*, or designees, shall:

(1) Process claims under 31 U.S.C. 3702, 10 U.S.C. 2575, 10 U.S.C. 2771, or 37 U.S.C. 554 in accordance with this part.

(2) Ensure that requests for an advance decision that originate in their organizations are prepared and submitted in accordance with this part.

(3) Pay claims as provided in a final action in accordance with this part.

## APPENDIX A TO PART 282—GUIDANCE

(a) *Submitting a claim.* The procedures a claimant must follow to submit a claim are at Appendix C to this part.

(b) *Processing a claim.* The procedures a DoD Component must follow in processing a claim are at Appendix D to this part.[1]

(c) *Appeals.* The procedures for appealing initial determinations are at Appendix E to this part.

(d) *Disposition of claims upon settlement in general.* (1) The appropriate official for the Component concerned shall pay a claim in accordance with the final action concerning the claim.

(2) Where state law requires, a committee must be appointed for a minor or incompetent person in accordance with State law before payment may be made.

(e) *Requests for an advance decision.* Procedures for requesting an advance decision under 31 U.S.C. 3529 concerning the propriety of a payment or voucher certification related to claims addressed in this part are at Appendix F to this part.

(f) *Publication.* In accordance with 5 U.S.C. 552, the Director, DOHA, or designee, shall make redacted copies of responses to requests for reconsideration and advance decisions by the GC, DoD, or designee, available for public inspection and copying at DOHA's public reading room and on the worldwide web.

## APPENDIX B TO PART 282—CLAIMS DESCRIPTION

The Secretary of Defense is authorized to perform the claims settlement and advance decision functions for claims under the following statutes:

(a) 31 U.S.C. 3702 concerning claims in general when there is no other settlement authority specifically provided for by law.[1]

[1] Contact the appropriate non-DoD Component for the procedures it follows in processing a claim.

[1] This includes claims involving Uniformed Services members' pay, allowances, travel, transportation, payment for unused accrued leave, retired pay, and survivor benefits, and claims for refund by carriers for amounts collected from them for loss or damage to

*Continued*

(b) 10 U.S.C. 2575 concerning the disposition of unclaimed personal property on a military installation.

(c) 10 U.S.C. 2771 concerning the final settlement of accounts of deceased members of the Armed Forces (but not the National Guard).[2]

(d) 24 U.S.C. 420, 10 U.S.C. 4712, and 10 U.S.C. 9712 concerning the disposition of the effects of a deceased person who was subject to military law at a place or Command under the jurisdiction of the Army or the Air Force or of a deceased resident of the Armed Forces Retirement Home.

(e) 37 U.S.C. 554 concerning the sale of personal property of members of the Uniformed Services who are in a missing status.

(f) 32 U.S.C. 714 concerning the final settlement of accounts of deceased members of the National Guard.[3]

## APPENDIX C TO PART 282—SUBMITTING A CLAIM

(a) *Who May Submit a Claim.* Any person (''claimant'') may submit a claim who has a demand for money or property against the Government under 31 U.S.C. 3702, 10 U.S.C. 2575, 10 U.S.C. 2771, 24 U.S.C. 420, 10 U.S.C. 4712, 10 U.S.C. 9712, 37 U.S.C. 554, or 32 U.S.C. 714.

(b) *Where to Submit a Claim.* A claimant must submit a claim to the Component concerned in accordance with guidance provided by that Component. A claim that is submitted somewhere other than to the Component concerned does not stop the running of the time limit in paragraph (f) of this Appendix. It is the claimant's responsibility to submit a claim properly.

(c) *Format of a Claim.* A claimant must submit a claim in the format prescribed by the Component concerned. It must be written and be signed by the claimant (in the case of a claim on behalf of a minor or incompetent person, there are additional requirements explained at paragraph (e) of this Appendix) or by the claimant's authorized agent or attorney (there are additional requirements explained at paragraph (d) of this Appendix). In addition, it should:

(1) Provide the claimant's mailing address.

(2) Provide the claimant's telephone number.

(3) State the amount claimed.

(4) State the reasons why the Government owes the claimant that amount.

(5) Have attached copies of documents referred to in the claim.

(6) Include or have attached statements (that are attested to be true and correct to the best of the individual's knowledge and belief) of the claimant or other persons in support of the claim.

(d) *Claim Submitted by Agent or Attorney.* In addition to the requirements in paragraph (c) of this Appendix, a claim submitted by the claimant's agent or attorney must include or have attached a duly executed power of attorney or other documentary evidence of the agent's or attorney's right to act for the claimant.

(e) *Claim Submitted on Behalf of a Minor or Incompetent Person.* In addition to the requirements in paragraph (c) of this Appendix:

(1) If a guardian or committee has not been appointed, a claim submitted on behalf of a minor or incompetent person must:

(i) State the claimant's relationship to the minor or incompetent person.

(ii) Provide the name and address of the person having care and custody of the minor or incompetent person.

(iii) Include an affirmation that any moneys received shall be applied to the use and benefit of the minor or incompetent person, and that the appointment of a guardian or committee is not contemplated.

(2) If a guardian or committee has been appointed, a claim on behalf of a minor or incompetent person must include or have attached a certificate of the court showing the appointment and qualification of the guardian or committee.

(f) *When to Submit a Claim.* A claimant must submit a claim so that it is received by the Component concerned within the time limit allowed by statute.

(1) Claimants must submit claims within these statutory time limits:[1]

(i) Claims on account of Treasury checks under 31 U.S.C. 3702(c) must be received within 1 year after the date of issuance.

(ii) Claims under 31 U.S.C. 3702 (b), 10 U.S.C. 2771 and 32 U.S.C. 714 must be received within 6 years of the date the claim accrued.

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property they transported at Government expense; also included are other claims arising from the activity of a DoD Component. However, the Director of the Office of Personnel Management performs these functions for claims involving civilian employees' compensation and leave; and the Administrator of General Services performs these functions for claims involving civilian employees' travel, transportation, and relocation expenses.

[2] Claims under this statute are actually settled under the authority in 31 U.S.C. 3702 because there is no specific settlement authority in the statute.

[3] Claims under this statute are actually settled under the authority in 31 U.S.C. 3702 because there is no specific settlement authority in the statute.

[1] Under Section 501 *et seq.* of title 50 Appendix, United States Code, periods of active military service are not included in calculating whether a claim has been received within these statutory time limits.

(A claim accrues on the date when everything necessary to give rise to the claim has occurred.) The time limit for claims of members of the Armed Forces that accrue during war or within 5 years before war begins, is 6 years from the date the claim accrued or 5 years after peace is established, whichever is later.

(iii) Claims under 10 U.S.C. 2575(d)(3) must be received within 5 years after the date of the disposal of the property to which the claim relates.

(iv) Claims under 24 U.S.C. 420(d)(1), 10 U.S.C. 4712, and 10 U.S.C. 9712 must be received within 6 years after the death of the deceased resident.

(v) Claims under 37 U.S.C. 554(h) must be received before the end of the 5-year period from the date the net proceeds from the sale of the missing person's personal property are covered into the Treasury.

(2) The time limits set by statute may not be extended or waived.[2] Although the issue of timeliness normally shall be raised upon initial submission (as explained at Appendix D to this part, paragraph (b)), the issue may be raised at any point during the claim settlement process.

(g) *Claimant Must Prove the Claim.* The claimant must prove, by clear and convincing evidence, on the written record that the United States is liable to the claimant for the amount claimed. All relevant evidence to prove the claim should be presented when a claim is first submitted. In the absence of compelling circumstances, evidence that is presented at later stages of the administrative process will not be considered.

## APPENDIX D TO PART 282—PROCESSING A CLAIM

(a) *Initial Component Processing.* Upon receipt of a claim, the Component concerned must:

(1) Date stamp the claim on the date received.

(2) Determine whether the claim was received within the required time limit (time limits are summarized at Appendix C to this part, paragraph (f)) and follow the procedures in paragraph (b) of this Appendix if the claim was not timely.

(3) Investigate the claim.

(4) Decide whether the claimant provided clear and convincing evidence that proves all or part of the claim.

(5) Issue an initial determination that grants the claim to the extent proved or denies the claim, as appropriate. The initial determination must state how much of the claim is granted and how much is denied, and must explain the reasons for the determination.

(6) Notify the claimant of the initial determination. The Component must send the claimant a copy of the initial determination and a notice that explains:

(i) The action the Component shall take on the claim, if the initial determination is or becomes a final action (the finality of an initial determination is explained at paragraph (c) of this Appendix); and

(ii) The procedures the claimant must follow to appeal an initial determination that denies all or part of the claim (those appeal procedures are explained at Appendix E to this part), if applicable.

(b) *Untimely Claims.* When the Component concerned determines that a claim was not received within the statutory time limit, the Component must make an initial determination of untimely receipt. (The statutory time limits are explained in Appendix C to this part, paragraph (f).)

(1) The initial determination must cite the applicable statute and explain the reasons for the finding of untimely receipt. The Component must send the initial determination to the claimant with a notice that:

(i) States the claim was not received within the statutory time limit and, therefore, may not be considered, unless that finding is reversed on appeal, and explains how the claimant may appeal the finding (those appeal procedures are explained at Appendix E to this part); and either

(ii) If the claim does not qualify under 31 U.S.C. 3702(e), states that the statutory time limit may not be extended or waived; or

(iii) If the claim does qualify under 31 U.S.C. 3702(e), states that the claim may be further considered only if the time limit is waived, and explains how the claimant may apply for a waiver. (Paragraph (d) of this Appendix explains which claims qualify and the procedures for applying for a waiver).

(2) Except in cases where a claimant has applied under paragraph (d) of this Appendix to request a waiver of the time limit, the Component must return the claim to the claimant when the initial determination becomes a final action with a notice that the finding in the initial determination is final and, therefore, the claim may not be considered. If the claim qualifies under 31 U.S.C. 3702(e), the notice must also state that the claimant may resubmit the claim with an application under paragraph (d) of this Appendix.

(c) *Finality of an Initial Determination.* An initial determination that grants all of a claim is a final action when it is issued. Otherwise, an initial determination (including one of untimely receipt) is a final action if the Component concerned does not receive

[2] There is an exception for certain claims described in 31 U.S.C. 3702(e). In those cases, the Secretary of Defense may waive the time limits in paragraph (f)(1)(ii) of this Appendix. Appendix D of this part, paragraph (d), explains which claims qualify and the procedures that apply.

an appeal within 30 days of the date of the initial determination (plus any extension of up to 30 additional days granted by the Component concerned for good cause shown).

(d) *Waiver of Certain Time Limits.* When the Component concerned determines that a claim was not received within the statutory time limit in 31 U.S.C. 3702(b) or (c), the claimant may request a waiver of the time limit. Waiver is permitted only for those claims that satisfy the requirements of 31 U.S.C. 3702(e).[1] This provision confers no right or entitlement on a claimant. It is solely within the discretion of the Secretary of Defense whether to grant such a waiver in a particular case.

(1) The claim must contain the information and documents that are generally required for claims (those requirements are explained at Appendix C to this part, paragraph (c)).

(2) The Component concerned must investigate the claim and make an initial determination concerning the merits of the claim.

(3) If the initial determination grants all or part of the claim, and if the Secretary concerned agrees with the determination, the Secretary may request or recommend that the time limit be waived.[2] Requests and recommendations must be in writing and signed by the Secretary concerned. (This authority may not be delegated below the level of an Assistant Secretary.)

(i) The Secretary concerned shall forward the request or recommendation to the following address: Defense Office of Hearings and Appeals, Claims Division, P.O. Box 3656, Arlington, VA 22203–1995.

(ii) The entire record concerning the claim, including the initial determination, must be attached to the request.

(4) The Director, DOHA, must review the request and the written record and must:

(i) Grant the request and waive the statutory time limit, if the Director finds that all or part of the claim has been proven. The Director may also modify the finding concerning the amount of the claim that has been proven.

(ii) Deny the request, if the Director finds that no part of the claim has been proven.

(iii) Notify the Secretary concerned and the claimant of the decision and the reasons for the findings.

(5) In the event the Director, DOHA, denies the request, or grants the request but modifies the finding concerning the amount of the claim proven, the Secretary concerned or the claimant may request reconsideration (the procedures are explained at Appendix E to this part). The Director's decision is a final action if the Director does not receive a request for reconsideration within 30 days of the date of the Director's decision (plus any extension of up to 30 additional days granted by the Director for good cause shown).

## APPENDIX E TO PART 282—APPEALS

(a) *Who May Appeal.* A claimant may appeal if an initial determination denies all or part of a claim or finds that the claim was not received by the Component concerned within the time limit required by statute; however, the decision of the Secretary concerned not to request or recommend waiver of the time limit is not appealable except to the Secretary concerned, if the Secretary as a matter of discretion provides for such appeals.

(b) *When and Where to Submit an Appeal.* A claimant's appeal must be received by the Component concerned within 30 days of the date of the initial determination. The Component may extend this period for up to an additional 30 days for good cause shown. No appeal may be accepted after this time has expired. An appeal sent directly to the DOHA is not properly submitted.

(c) *Content of an Appeal.* No specific format is required; however, the appeal must be written and be signed by the claimant, the claimant's authorized agent, or the claimant's attorney. It also should:

(1) Provide the claimant's mailing address;

(2) Provide the claimant's telephone number;

(3) State the amount claimed on appeal, or that the appeal is from a finding of untimely receipt, whichever applies;

(4) Identify specific:

(i) Errors or omissions of material and relevant fact;

(ii) Legal considerations that were overlooked or misapplied; and

(iii) Conclusions that were arbitrary, capricious, or an abuse of discretion;

(5) Present evidence of the correct or additional facts alleged;

(6) Explain the reasons the findings or conclusions should be reversed or modified;

(7) Have attached copies of documents referred to in the appeal; and

[1] When this part was issued, 31 U.S.C. 3702(e) allowed time limit waivers only for claims up to $25,000 for Uniformed Service member's pay, allowances, travel, transportation, payments for unused accrued leave, retired pay, and survivors benefits. Since 31 U.S.C. 3702(e) could be amended at any time to modify these restrictions, always consult the current provisions of that Section to determine which claims are included.

[2] 31 U.S.C. 3702(e) currently requires a Secretarial request only in the case of a claim by or with respect to a member of the Uniformed Services who is not under the jurisdiction of the Secretary of a Military Department. As a matter of policy, the Department of Defense currently requires a Secretarial recommendation in all other cases.

(8) Include or have attached statements (that are attested to be true and correct to the best of the individual's knowledge and belief) by the claimant or other persons in support of the appeal.

(d) *Component's Review*. The Component concerned must review a claimant's appeal, and affirm, modify, or reverse the initial determination.

(1) If the appeal concerns the denial of all or part of the claim and the Component grants the entire claim, or grants the claim to the extent requested in the appeal, the Component must notify the claimant in writing and explain the action the Component shall take on the claim. This is a final action.

(2) If the appeal concerns the untimely receipt of the claim and the Component determines that the claim was received within the time limit required by statute, the Component must notify the claimant in writing and process the claim on the merits.

(3) In all other cases, the Component must forward the appeal to the DOHA in accordance with paragraph (e) of this Appendix. If the appeal concerns an initial determination of untimely receipt, the Component should not investigate, or issue an initial determination concerning, the merits of the claim before forwarding the appeal. The Component must prepare a recommendation and administrative report (as explained in paragraph (f) of this Appendix). The Component must send a copy of the administrative report to the claimant, with a notice that the claimant may submit a rebuttal to the Component (as explained in paragraph (g) of this Appendix).

(e) *Submission of Appeal to DOHA*. No earlier than 31 days after the date of the administrative report, or the day after the claimant's rebuttal period, as extended, expires, the Component must send the entire record along with the recommendation and the administrative report required by paragraph (f) of this Appendix to the following address: Defense Office of Hearings and Appeals, Claims Division, P.O. Box 3656, Arlington, Virginia 22203–1995.

The record sent to the DOHA shall include specific identification of any major policy issue(s) and a statement as to whether the amount in controversy exceeds $100,000 either in the instant claim or in the aggregate for directly related claims. If the amount in controversy exceeds $100,000, a full description of the financial impact shall be provided.

(f) *Recommendation and Administrative Report*. The recommendation and administrative report required by paragraph (d) of this Appendix must include the following:

(1) The name of the claimant;

(2) The Component's file reference number;

(3) The Component's recommendation (and the reasons for it) for the disposition of the claim;

(4) Relevant and material documents (such as correspondence, business records, and witness statements), as attachments; and

(5) Complete copies of regulations, instructions, memorandums of understanding, tariffs and/or tenders, solicitations, contracts, or rules cited by the claimant or the Component, if a copy has not been previously provided, or is not available readily via electronic means.

(g) *Claimant's Rebuttal*. A claimant may submit a written rebuttal, signed by the claimant or the claimant's agent or attorney, in response to the recommendation and administrative report. The rebuttal must be submitted to the Component within 30 days of the date of the recommendation and administrative report. The Component may grant an extension of up to an additional 30 days for good cause shown. The rebuttal should include:

(1) An explanation of the points and reasons for disagreeing with the report;

(2) The Component's file reference number;

(3) Any documents referred to in the rebuttal; and

(4) Statements (that are attested to be true and correct to the best of the individual's knowledge and belief) by the claimant or other persons in support of the rebuttal.

(h) *Action by the Component*. The Component must:

(1) Date stamp the claimant's rebuttal on the date it is received;

(2) Send the entire record to the DOHA, but no earlier than 31 days after the date of the report, or the day after the claimant's rebuttal period, as extended, expires (as explained in paragraph (e) of this Appendix).

(i) *DOHA Appeal Decision*. Except as provided in paragraph (p) of this Appendix, the DOHA must base its decision on the written record, including the recommendation and administrative report and any rebuttal by the claimant. The DOHA shall coordinate its decision in advance with the GC, DoD when the appeal decision affects:

(1) Major policy issues;

(2) Involves a claim that is quasi-contractual in nature and arises from the activity of a DoD Component, but the claim was not settled under usual acquisition procedures; or

(3) When the amounts in controversy exceed $100,000, either for the instant claim or in the aggregate for directly related claims. The written decision must:

(i) Affirm, modify, reverse, or remand the Component's determination (and, if the issue is untimely receipt and there is a finding that the claim was timely received, may either consider and decide the claim on the merits or return the claim to the Component

concerned for investigation and initial determination on the merits);

(ii) State the amount of the claim that is granted and the amount that is denied and/or state that the claim was or was not received within the statutory time limit, as appropriate; and

(iii) Explain the reasons for the decision.

(j) *Processing After the Appeal Decision.* After issuing an appeal decision, the DOHA must:

(1) Send the claimant the decision and notify the claimant of:

(i) The appropriate Component action on the claim as a consequence of the decision, if it is or becomes a final action (as explained in paragraph (k) of this Appendix); and

(ii) The procedures under this appendix to request reconsideration (as explained in paragraphs (l) through (n) of this Appendix), if the decision does not grant the claim to the extent requested, or does not contain a finding of timely receipt, as the case may be.

(2) Notify the Component concerned of the decision, and of the appropriate Component action on the claim as a consequence of the decision.

(k) *Finality of a DOHA Appeal Decision.* An appeal decision that finds that the claim was timely received is a final action when issued. Otherwise, an appeal decision is a final action if the DOHA does not receive a request for reconsideration within 30 days of the date of the appeal decision (plus any extension of up to 30 additional days granted by the DOHA for good cause shown).

NOTE: In the case of a DOHA appeal decision issued before the effective date of this part that denied all or part of the claim, a request for reconsideration by the GC, DoD may be submitted within 60 days of the effective date of this part. The GC, DoD shall consider such requests and affirm, modify, reverse, or remand the DOHA appeal decision. Requests for reconsideration by the GC, DoD received more than 60 days after the effective date of this part shall not be accepted. Requests must be submitted to the address in paragraph (e) of this appendix. The provisions of paragraph (n) of this appendix apply.

(l) *Who May Request Reconsideration.* A claimant or the Component concerned, or both, may request reconsideration of a DOHA appeal decision.

(m) *When and Where to Submit a Request for Reconsideration.* The DOHA must receive a request for reconsideration within 30 days of the date of the appeal decision.[1] The DOHA may extend this period for up to an additional 30 days for good cause shown. No request for reconsideration may be accepted after this time has expired. A request for reconsideration must be sent to the DOHA at the address in paragraph (e) of this Appendix.

(n) *Content of a Request for Reconsideration.* The requirements of paragraph (c) of this Appendix, concerning the contents of an appeal, apply to requests for reconsideration.

(o) *DOHA's Review of a Request for Reconsideration.* (1) No earlier than 31 days after the date of the appeal decision, or the day after the last period for submitting a request, as extended, expires, the DOHA must:

(i) Consider a request or requests for reconsideration;

(ii) Affirm, modify, reverse, or remand the appeal decision (and, if the issue is untimely receipt and there is a finding that the claim was timely received, may either consider and decide the claim on the merits or return the claim to the Component concerned for investigation and initial determination on the merits);

(iii) Prepare a response that explains the reasons for the finding; and

(iv) Send the response to the claimant and the Component concerned and notify both of the appropriate action on the claim.

(2) The response is a final action. It is precedent in the consideration of all claims covered by this part unless otherwise stated in the document.

(p) *Consideration of Appeals and Requests for Reconsideration.* When considering an appeal or request for reconsideration, the DOHA may:

(1) Take administrative notice of matters that are generally known or are capable of confirmation by resort to sources whose accuracy cannot reasonably be questioned.

(2) Remand a matter to the Component with instructions to provide additional information.

## APPENDIX F TO PART 282—REQUESTS FOR AN ADVANCE DECISION

(a) *Who May Request an Advance Decision.* A disbursing or certifying official or the Head of a Component may request an advance decision on a question involving:

(1) A payment the disbursing official or Head of the Component shall make; or

(2) A voucher presented to a certifying official for certification.

(b) *Who May Render an Advance Decision.* The following officials are authorized to render an advance decision concerning the matters indicated:

(1) The Secretary of Defense for requests involving claims under:

(i) 31 U.S.C. 3702 for Uniformed Services members' pay, allowances, travel, transportation, retired pay, and survivor benefits,

[1] With respect to appeal decisions issued before the effective date of this part, the request for reconsideration by the GC, DoD must be received by the DOHA within 60 days of the effective date of this part as explained in paragraph (k) of this Appendix.

and by carriers for amounts collected from them for loss or damage to property they transported at Government expense.

(ii) 31 U.S.C. 3702 that are not described in paragraph (b)(1)(i) of this Appendix and that arise from the activity of a DoD Component, when there is no other settlement authority specifically provided by law.

(iii) 10 U.S.C. 2575, 10 U.S.C. 2771, 24 U.S.C. 420, 10 U.S.C. 4712, 10 U.S.C. 9712, 37 U.S.C. 554, and 32 U.S.C. 714. Appendix B to this part describes these claims.

(2) The Director of the Office of Personnel Management for requests involving claims for civilian employees' compensation and leave.

(3) The Administrator of General Services for requests involving claims for civilian employees' travel, transportation, and relocation expenses.

(c) *Where to Submit a Request.* All requests described in paragraph (b)(1) of this Appendix and all other requests arising from the activity of a DoD Component (even if addressed to an official outside the Department of Defense) must be sent through the General Counsel of the Component concerned to the following address: General Counsel, Department of Defense, 1600 Defense Pentagon, Washington, DC 20301–1600.

(d) *Content of a Request.* Requests for an advance decision must:

(1) Specifically request an advance decision pursuant to 31 U.S.C. 3529;

(2) Describe all the relevant facts;

(3) Explain the reasons (both factual and legal) the requester considers the proposed payment to be questionable;

(4) Have attached vouchers, if any, and copies of all other relevant documents relating to the proposed payment;

(5) Have attached a legal memorandum from the General Counsel of the Component concerned that discusses the legality of the proposed payment under the circumstances presented in the request; and

(6) Comply with any other requirements established by the Director of the Office of Personnel Management or the Administrator of General Services.

(e) *Advance Decisions.* The GC, DoD must take action under paragraphs (e)(1), (e)(2), or (e)(3) of this Appendix, whichever applies.

(1) If the request is described in paragraph (b)(1) of this Appendix, the GC, DoD must review the request and issue an advance decision, unless the GC, DoD elects to proceed under paragraph (e)(3) of this Appendix.

(i) The GC, DoD must send the decision, through the General Counsel of the Component concerned, to the requester, and must send a copy of the decision to the Director, DOHA for publication according to Appendix A to this part, paragraph (f).

(ii) The decision is controlling in the case; the reliance of certifying and disbursing officials on it in their disposition of the case is evidence that those officials have exercised due diligence in the performance of their duties.

(iii) An advance decision is precedent in similar claims under this part unless otherwise stated in the decision.

(2) If the request is not described in paragraph (b)(1) of this Appendix, the GC, DoD must review the request and either:

(i) Forward the request to the appropriate advance decision authority and notify the requester of that action; or

(ii) Return the request, through the General Counsel of the Component concerned, to the requester, with a memorandum explaining that under existing legal authorities a request for an advance decision is not necessary. After considering the memorandum, the requester may resubmit the request, through the General Counsel of the Component concerned, to the GC, DoD. The GC, DoD must forward the request to the appropriate advance decision authority, and notify the requester of that action.

(3) If the request is described in paragraph (b)(1) of this Appendix, and the claim is for not more than $250, the GC, DoD may refer the request to the General Counsel, Defense Finance and Accounting Service (DFAS). The General Counsel, DFAS, shall review the request and issue an advance decision.

(i) The General Counsel, DFAS, must send the decision, through the General Counsel of the Component concerned, to the requester, and must send a copy of the decision to the GC, DoD.

(ii) The decision is controlling in the case; the reliance of certifying and disbursing officials on it in their disposition of the case is evidence that those officials have exercised due diligence in the performance of their duties.

(iii) An advance decision issued by the General Counsel, DFAS, under this paragraph is not precedent in similar claims under this part.

## PART 283—WAIVER OF DEBTS RESULTING FROM ERRONEOUS PAYMENTS OF PAY AND ALLOWANCES

Sec.
283.1 Purpose.
283.2 Applicability and scope.
283.3 Definitions.
283.4 Policy.
283.5 Responsibilities.

AUTHORITY: 10 U.S.C. 2575, 2771, 4712, 9712; 24 U.S.C. 420; 31 U.S.C. 3529, 3702; 32 U.S.C. 714; 37 U.S.C. 554.

SOURCE: 71 FR 57427, Sept. 29, 2006, unless otherwise noted.

### § 283.1 Purpose.

This part establishes policy and assigns responsibilities for considering applications for the waiver of debts resulting from erroneous payments of pay and allowances (including travel and transportation allowances) to or on behalf of members of the Uniformed Services and civilian DoD employees under 10 U.S.C. 2774, 32 U.S.C. 716, 5 U.S.C. 5584.

### § 283.2 Applicability and scope.

This part applies to:

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

(b) The Coast Guard, when it is not operating as a Service in the Navy under the agreement with the Department of Homeland Security, and the Commissioned Corps of the Public Health Service (PHS) and the National Oceanic and Atmospheric Administration (NOAA) under agreements with the Departments of Health and Human Services and Commerce (hereafter referred to collectively as the ''non-DoD Components'').

### § 283.3 Definitions.

*Debt*. An amount an individual owes the Government as the result of erroneous payments of pay and allowances (including travel and transportation allowances) to or on behalf of members of the Uniformed Services or civilian DoD employees.

*Erroneous Payment*. A payment that is not in strict conformity with applicable laws or regulations.

*Uniformed Services*. The Army, the Navy, the Air Force, the Marine Corps, the Coast Guard, and the Commissioned Corps of the PHS and the NOAA.

*Waiver Application*. A request that the United States relinquishes its claim against an individual for a debt resulting from erroneous payments of pay or allowances (including travel and transportation allowances) under 10 U.S.C. 2774, 32 U.S.C. 716, or 5 U.S.C. 5584.

### § 283.4 Policy.

It is DoD policy that:

(a) The officials designated in this part exercise waiver authority that, by statute or delegation, is vested in the Department of Defense.

(b) Waiver applications shall be processed in accordance with all pertinent statutes and regulations, and after consideration of other relevant authorities.

### § 283.5 Responsibilities.

(a) The *General Counsel of the Department of Defense* shall:

(1) If the aggregate amount of the debt is more than $1,500, deny or grant all or part of a waiver application.

(2) Decide appeals in accordance with procedures promulgated under paragraph (a)(3) of this section.

(3) Develop overall waiver policies and promulgate procedures for considering waiver applications, including an initial determination process and a process to appeal an initial determination.

(b) The *Heads of the DoD Components* shall:

(1) Consistent with responsibilities promulgated under paragraph (a)(3) of this section, establish procedures within the DoD Component for the submission of waiver applications relating to debts resulting from the DoD Component's activity, which shall be referred to the appropriate official for consideration as set forth in paragraphs (a), (d), (e), or (f) of this section.

(3) Ensure compliance with this part and policies and procedures promulgated under paragraph (a)(3) of this section.

(c) The *Heads of the Non-DoD Components* concerning debts resulting from that Component's activity shall:

(1) If the aggregate amount of the debt is $1,500 or less, deny or grant all or part of a waiver application pursuant to 10 U.S.C. 2774.

(2) If the aggregate amount of the debt is more than $1,500:

(i) Deny a waiver application in its entirety; or

(ii) Refer a waiver application for consideration with a recommendation

that all or part of the application be granted, in accordance with procedures promulgated under paragraph (a)(3) of this section.

(d) The *Under Secretary of Defense (Comptroller)/Chief Financial Officer* concerning debts (except those described in paragraphs (e) and (f) of this section) resulting from DoD Component activity shall:

(1) If the aggregate amount of the debt is $1,500 or less, deny or grant all or part of a waiver application pursuant to enclosure 2 of DoD Directive 5118.3.[1]

(2) If the aggregate amount of the debt is more than $1,500:

(i) Deny a waiver application in its entirety; or

(ii) Refer a waiver application for consideration with a recommendation that all or part of the application be granted, in accordance with procedures promulgated under paragraph (a)(3) of this section.

(e) The *Director, Department of Defense Education Activity*, under the *Under Secretary of Defense for Personnel and Readiness* concerning debts of civilian employees resulting from that Component's activity shall:

(1) If the aggregate amount of the debt is $1,500 or less, deny or grant all or part of a waiver application pursuant to enclosure 2 of DoD Directive 1342.6.[2]

(2) If the aggregate amount of the debt is more than $1,500:

(i) Deny a waiver application in its entirety; or

(ii) Refer a waiver application for consideration with a recommendation that all or part of the application be granted, in accordance with procedures promulgated under paragraph (a)(3) of this section.

(f) The *Director, National Security Agency*, under the *Under Secretary of Defense for Intelligence* concerning debts resulting from that Component's activity shall:

(1) If the aggregate amount of the debt is $1,500 or less, deny or grant all or part of a waiver application.

(2) If the aggregate amount of the debt is more than $1,500:

(i) Deny a waiver application in its entirety; or

(ii) Refer a waiver application for consideration with a recommendation that all or part of the application be granted, in accordance with procedures promulgated under paragraph (a)(3) of this section.

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

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

# PART 284—WAIVER PROCEDURES FOR DEBTS RESULTING FROM ERRONEOUS PAYMENTS OF PAY AND ALLOWANCES

Sec.
284.1 Purpose.
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APPENDIX A TO PART 284—OVERVIEW OF WAIVER APPLICATION PROCESS.
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APPENDIX C TO PART 284—SUBMITTING A WAIVER APPLICATION.
APPENDIX D TO PART 284—PROCESSING A WAIVER APPLICATION WHEN THE DEBT IS $1,500 OR LESS.
APPENDIX E TO PART 284—PROCESSING A WAIVER APPLICATION WHEN THE DEBT IS MORE THAN $1,500.
APPENDIX F TO PART 284—APPEALS.

AUTHORITY: 10 U.S.C. 2575, 2771, 4712, 9712; 24 U.S.C. 420; 31 U.S.C. 3529, 3702; 32 U.S.C. 714; 37 U.S.C. 554.

SOURCE: 71 FR 59375, Oct. 10, 2006, unless otherwise noted.

## § 284.1 Purpose.

This part implements policy under 32 CFR part 283 and prescribes procedures for considering waiver applications under 10 U.S.C. 2774, 32 U.S.C. 716, and 5 U.S.C. 5584.

## § 284.2 Applicability and scope.

This part applies to:

(a) The Office of the Secretary of Defense, the Military Departments, the Chairman of the Joint Chiefs of Staff, the Combatant Commands, the Office of Inspector General of the Department of Defense, the Defense Agencies, the Department of Defense Field Activities, and all other organizational entities within the Department of Defense

(hereafter referred to collectively as the ''DoD Components'').

(b) The Coast Guard, when it is not operating as a Service in the Navy under agreement with the Department of Homeland Security, the Commissioned Corps of the Public Health Service (PHS) and the National Oceanic and Atmospheric Administration (NOAA) under agreements with the Departments of Health and Human Services and Commerce, respectively (hereafter referred to collectively as the ''non-DoD Components'').

(c) Certain functions for considering waiver applications that, by statute or delegation, are vested in the Department of Defense or the Secretary of Defense.

### § 284.3 Definitions.

*Committee*. The person or persons invested, by order of a proper court, with the guardianship of a minor or incompetent person and/or the estate of a minor or incompetent person.

*Component concerned*. The agency/activity (as well as the official designated by the Head of the agency/activity) required to perform the function or take the action indicated or that notifies the individual of the debt that is the subject of a waiver application.

*Debt*. An amount an individual owes the Government as the result of erroneous payments of pay and allowances (including travel and transportation allowances) to or on behalf of members of the Uniformed Services or civilian DoD employees.

*Employee*. A person who is or was an officer or employee as defined in 5 U.S.C. 2104 and 2105.

*Erroneous payment*. A payment that is not in compliance with applicable laws or regulations.

*Final action*. A finding by the appropriate official under this part concerning a waiver application from which there is no right to appeal or request reconsideration, or for which the time limit prescribed in this part for submitting an appeal or request for reconsideration has expired without such a submission.

*Member*. A member or former member of the Uniformed Services.

*Waiver application*. A request that the United States relinquish its claim against an individual for a debt resulting from erroneous payments of pay or allowances (including travel and transportation allowances) under 10 U.S.C. 2774, 32 U.S.C. 716, and 5 U.S.C. 5584.

### § 284.4 Policy.

It is DoD policy under 32 CFR part 283 that waiver applications for debts resulting from erroneous payments of pay and allowances (hereafter referred to as ''waiver applications'') be processed according to all pertinent statutes, regulations, and other relevant authorities.

### § 284.5 Responsibilities.

(a) The *General Counsel of the Department of Defense* (GC, DoD) or designee shall consult on, or render opinions concerning, questions of law or equity that arise in the course of the performance of the Director, Defense Office of Hearings and Appeals' (DOHA) responsibilities under paragraph (b) of this section when requested by the Director.

(b) The *Director, Defense Office of Hearings and Appeals* or designee, under the GC, DoD (as the Director, Defense Legal Services Agency), shall:

(1) Deny or grant all or part of a waiver application, if the aggregate amount of the debt is more than $1,500.

(2) Consider an appeal of an initial determination and affirm, modify, reverse, or remand the initial determination, according to this part and relevant GC, DoD opinions.

(3) Process waiver applications and appeals according to this part.

(c) The Heads of the DoD Components or designee shall process waiver applications according to this part.

(d) The *Heads of the Non-DoD Components* or designee concerning debts of Uniformed Services personnel resulting from the Component's activity; the *Director, Department of Defense Education Activity* (DoDEA) or designee, concerning debts of civilian employees resulting from that Component's activity; the *Director, National Security Agency* (NSA) or designee, concerning debts resulting from that Component's activity; and the *Director, Defense Finance*

*and Accounting Service* (DFAS) or designee, under the Under Secretary of Defense (Comptroller)/Chief Financial Officer (USD(C)/CFO), concerning debts resulting from all other DoD Components' activities shall:

(1) Deny or grant all or part of a waiver application, if the aggregate amount of the debt is $1,500 or less.

(2) If the aggregate amount of the debt is more than $1,500:

(i) Deny a waiver application in its entirety, or

(ii) Refer a waiver application for consideration with a recommendation that part or all of the application be granted, according to this part.

(3) Process waiver applications, when the aggregate amount of the debt is more than $1,500, and appeals according to this part.

(4) Resolve a debt according to the final action that results from the waiver application process provided for in this part.

## APPENDIX A TO PART 284—OVERVIEW OF WAIVER APPLICATION PROCESS

### A. STANDARDS FOR WAIVER DETERMINATIONS

The standards that must be applied in determining whether all or part of a waiver application should be granted or denied are at Appendix B to this part.

### B. SUBMITTING A WAIVER APPLICATION

The DoD Components shall ensure, if applicable, the submission and filing of waiver applications/appeals satisfy the requirements of 5 U.S.C. 552a. The procedures an applicant must follow to submit a waiver application are at Appendix C to this part.

### C. PROCESSING A WAIVER APPLICATION WHEN THE DEBT IS $1,500 OR LESS

The procedures a DoD Component must follow in processing a waiver application when the debt is $1,500 or less are at Appendix D to this part.[1]

### D. PROCESSING A WAIVER APPLICATION WHEN THE DEBT IS MORE THAN $1,500

The procedures a DoD Component must follow in processing a waiver application when the debt is more than $1,500 are at Appendix E to this part.

[1] Contact the appropriate non-DoD Component for the procedures it follows in processing a waiver application.

### E. APPEALS

The DoD Components shall ensure, if applicable, the submission and filing of waiver applications/appeals satisfy the requirements of 5 U.S.C. 552 and 552a. The procedures for appealing initial determinations are at Appendix F to this part.

### F. REFUND OF REPAID DEBTS THAT ARE SUBSEQUENTLY WAIVED

When a final action waives all or part of a debt that has been repaid, the waiver application shall be interpreted as an application for a refund and the Component concerned shall, to the extent of the waiver, refund the amount repaid.

### G. PUBLICATION

The Director, DOHA or designee shall make redacted copies of responses to requests for reconsideration available for public inspection and copying at the DOHA's public reading room and on the worldwide web according to 5 U.S.C. 552 and 552a.

## APPENDIX B TO PART 284—STANDARDS FOR WAIVER DETERMINATIONS

### A. STANDARDS

1. Generally, persons who receive a payment erroneously from the Government acquire no right to the money. They are bound in equity and good conscience to make restitution. If a benefit is bestowed by mistake, no matter how careless the act of the Government may have been, the recipient must make restitution. In theory, restitution results in no loss to the recipient because the recipient received something for nothing. However, 10 U.S.C. 2774, 32 U.S.C. 716, and 5 U.S.C. 5584 provide authority to waive, under certain conditions debts individuals owe the Government that are the result of erroneous payments of pay and allowances (including travel and transportation allowances). A waiver is not a matter of right. It is available to provide relief as a matter of equity, if the circumstances warrant.

2. Debts may be waived only when collection would be against equity and good conscience and would not be in the best interests of the United States. There must be no indication the erroneous payment was solely or partially the result of the fraud, misrepresentation, fault, or lack of good faith of the applicant.

3. The fact that an erroneous payment is solely the result of administrative error or mistake on the part of the Government is not sufficient basis in and of itself for granting a waiver.

4. A waiver usually is not appropriate when a recipient knows, or reasonably should know, that a payment is erroneous. The recipient has a duty to notify an appropriate

official and to set aside the funds for eventual repayment to the Government, even if the Government fails to act after such notification.

5. A waiver generally is not appropriate when a recipient of a significant unexplained increase in pay or allowances, or of any other unexplained payment of pay or allowances, does not attempt to obtain a reasonable explanation from an appropriate official. The recipient has a duty to ascertain the reason for the payment and to set aside the funds in the event that repayment should be necessary.

6. A waiver may be inappropriate in cases where a recipient questions a payment (which ultimately is determined to be erroneous) and is mistakenly advised by an appropriate official that the payment is proper, if under the circumstances the recipient knew or reasonably should have known that the advice was erroneous.

7. Financial hardship is not a factor for consideration in determining whether a waiver is appropriate.

8. Waiver determinations under these standards depend on the facts in each case.

## APPENDIX C TO PART 284—SUBMITTING A WAIVER APPLICATION

### A. WHO MAY APPLY FOR WAIVER

Any person (''applicant'') from whom collection is sought for a debt resulting from erroneous payments of pay or allowances (including travel and transportation allowances) may submit a waiver application under 10 U.S.C. 2774, 32 U.S.C. 716, and 5 U.S.C. 5584. Additionally, an authorized official of the Component concerned, or the Director, DOHA or designee may initiate a waiver application during the processing of a claim under 32 CFR part 281.

### B. WHERE TO SUBMIT A WAIVER APPLICATION

An applicant must submit a waiver application to the Component concerned according to the guidance provided by that Component. A waiver application submitted somewhere other than to the Component concerned does not stop the calculation of the time limit as discussed in paragraph F to this Appendix. It is the applicant's responsibility to submit the waiver application properly.

### C. FORMAT OF A WAIVER APPLICATION

An applicant must submit a waiver application in the format prescribed by the Component concerned. It must be written and signed by the applicant (in the case of an application on behalf of a minor or incompetent person, there are additional requirements explained at paragraph E to this Appendix) or by the applicant's authorized agent or attorney (there are additional requirements explained at paragraph D to this Appendix). In addition, the waiver application should include:

1. The applicant's mailing address.
2. The applicant's telephone number.
3. The applicant's social security number when required by the Component concerned.
4. The amount for which waiver is requested.
5. An explanation why a waiver should be granted under the standards explained at Appendix B to this part.
6. Copies of documents referred to in the application.
7. Statements (that are attested to be true and correct to the best of the individual's knowledge and belief) of the applicant or other persons in support of the application.

### D. WAIVER APPLICATION SUBMITTED BY AGENT OR ATTORNEY

In addition to the requirements in paragraph C to this Appendix, a waiver application submitted by the applicant's agent or attorney must include or have attached a duly executed power of attorney or other documentary evidence of the agent's or attorney's right to act for the applicant.

### E. WAIVER APPLICATION SUBMITTED ON BEHALF OF A MINOR OR INCOMPETENT PERSON

In addition to the requirements in paragraph C to this Appendix:

1. If a guardian or committee has not been appointed, a waiver application submitted on behalf of a minor or incompetent person must:

i. State the applicant's relationship to the minor or incompetent person.

ii. Provide the name and address of the person having care and custody of the minor or incompetent person.

iii. Include an affirmation that any moneys received shall be applied to the use and benefit of the minor or incompetent person, and that the appointment of a guardian or committee is not contemplated.

2. If a guardian or committee has been appointed, a waiver application on behalf of a minor or incompetent person must include or have attached a certificate of the court showing the appointment and qualification of the guardian or committee.

### F. WHEN TO SUBMIT A WAIVER APPLICATION

An applicant must submit a waiver application so that it is received by the Component concerned within three years after the erroneous payment is discovered. The date of discovery is the date it is definitely determined by an appropriate official that an erroneous payment has been made. The time limit is set by 10 U.S.C. 2774, 32 U.S.C. 716, and 5 U.S.C. 5584, whichever applies. It may not be extended or waived. Although the

issue of timeliness is usually raised on initial submission (as explained in paragraph B to Appendix D in this part), the issue may be raised at any point during the waiver application consideration process.

## APPENDIX D TO PART 284—PROCESSING A WAIVER APPLICATION WHEN THE DEBT IS $1,500 OR LESS

### A. INITIAL COMPONENT PROCESSING

Upon receipt of a waiver application, the Component concerned must:

1. Date stamp the application on the date received.

2. Determine whether the application was received within three years after the discovery of the erroneous payment. If the application was not timely, follow the procedures in paragraph B to this Appendix.

3. Investigate the circumstances relating to the erroneous payment.

4. Refer the application to the appropriate determining official (see paragraph C to this Appendix) for consideration and an initial determination.

### B. UNTIMELY WAIVER APPLICATIONS

When the Component concerned determines that a waiver application was not received within three years after the erroneous payment was discovered, the Component must send the applicant a notice of untimely receipt.

1. The notice must:

i. Cite the applicable statute and explain the reasons for the finding of untimely receipt.

ii. State that the application was not received within the statutory time limit and may not be considered unless that finding is reversed on appeal.

iii. Explain that the applicant may submit a rebuttal to the finding of untimely receipt (as explained in paragraph B.2.).

iv. State that the statutory time limit may not be extended or waived.

2. An applicant may submit a written rebuttal, signed by the applicant or the applicant's agent or attorney, to a notice of untimely receipt. The Component concerned must receive the rebuttal within 30 days of the date of the notice and may grant an extension of up to an additional 30 days for good cause shown. The rebuttal should:

i. Explain the points of, and reasons for, disagreement with the notice.

ii. Have any documents referred to in the rebuttal attached.

iii. Include or have attached statements (that are attested to be true and correct to the best of the individual's knowledge and belief) by the applicant or other persons in support of the rebuttal.

3. If the applicant does not submit a rebuttal within the time permitted, the notice of untimely receipt is a final action and the Component must return the application to the applicant with a notice that the finding is final and the application may not be considered.

4. If the applicant submits a timely rebuttal, the Component must consider the rebuttal.

i. If the Component finds that the application was received within the required time limit, the Component must reverse its finding of untimely receipt, notify the applicant in writing, and process the application on its merits.

ii. If the Component does not reverse the finding of untimely receipt, the Component must forward the record, including the application, notice of untimely receipt, and rebuttal, to the appropriate determining official (*see* paragraph C.1. to this Appendix) for an initial determination on the issue of untimely receipt. The Component does not need to investigate the merits of the application before forwarding the record.

5. After making an initial determination on the issue of untimely receipt, the determining official must follow the procedures in paragraph D to this Appendix. In addition, if the determining official finds that the application was timely, the official may:

i. Return the application to the Component concerned for processing on its merits according to this part, or

ii. Consider the application and make an initial determination on its merits according to paragraph C.2. to this Appendix.

### C. INITIAL DETERMINATIONS

The standards in Appendix B to this part must be applied when considering the merits of a waiver application. After making an initial determination, the determining official must follow the procedures at paragraph D to this Appendix.

1. The officials listed and referred to in this part as determining officials shall consider waiver applications and take the appropriate action described in paragraph C.2. to this Appendix. These officials are identified as follows:

i. The Head of a non-DoD Component or designee for debts of Uniformed Services personnel resulting from that Component's activity.

ii. The Director, DoDEA or designee for debts of civilian employees resulting from that Component's activity.

iii. The Director, NSA or designee for debts resulting from that Component's activity.

iv. The Director, DFAS or designee for debts resulting from the DoD Component activity not included in paragraphs C.1.ii. and C.1.iii. to this Appendix.

2. The officials listed in paragraph C.1. to this Appendix may make an initial determination for the following:

i. Whether or not a waiver application was received within three years after the discovery of the erroneous payment.

ii. Deny a waiver application in its entirety.

iii. Grant all or part of a waiver application.

D. PROCESSING AFTER AN INITIAL DETERMINATION

After making an initial determination, the determining official must:

1. Notify the applicant. The notification must explain:

i. The determination and the reasons for it.

ii. The appropriate Component action to resolve the debt as a consequence of the determination if it is or becomes a final action (the finality of an initial determination is explained at paragraph E to this Appendix).

iii. The appeal process (as explained in Appendix F to this part) if the determination does not grant the entire application or does not contain a finding of timely receipt.

2. Notify the Component concerned if the determining official is not an official of the Component concerned when and if the determination is a final action. The notice must explain:

i. The determination and its reasons.

ii. The appropriate Component action to resolve the debt as a consequence of the determination.

E. WHEN AN INITIAL DETERMINATION IS FINAL

A final action is an initial determination that grants the entire waiver application or finds that the application was timely received. Also, an initial determination (including one of untimely receipt) is a final action if the determining official does not receive an appeal within 30 days of the date of the initial determination (plus any extension of up to 30 additional days granted by the determining official for good cause shown).

## APPENDIX E TO PART 284—PROCESSING A WAIVER APPLICATION WHEN THE DEBT IS MORE THAN $1,500

A. INITIAL COMPONENT PROCESSING

Upon receipt of a waiver application, the Component concerned must:

1. Date stamp the application on the date received.

2. Determine whether the application was received within three years after the discovery of the erroneous payment. If the application was not timely, follow the procedures in paragraph B in this part.

3. Investigate the circumstances relating to the erroneous payment.

4. Refer the waiver application to the appropriate determining official (*see* paragraph C to this Appendix) who after applying the standards in Appendix B in this part may either:

i. Deny the application in its entirety, if appropriate, and follow the procedures in Appendix D to this part, or

ii. Refer the application with a recommendation that part or all of the application be granted to the DOHA for consideration and an initial determination under paragraph C to this Appendix. The determining official must send the entire record and prepare and submit a recommendation and administrative report (as explained in paragraphs D and E to this Appendix) with the application.

B. UNTIMELY WAIVER APPLICATIONS

When the Component concerned determines that a waiver application was not received within three years after the erroneous payment was discovered, the Component must send the applicant a notice of untimely receipt.

1. The notice must:

i. Cite the applicable statute and explain the reasons for the finding of untimely receipt.

ii. State that the application was not received within the statutory time limit and may not be considered unless that finding is reversed on appeal.

iii. Explain that the applicant may submit a rebuttal to the finding of untimely receipt (as explained in paragraph B.2. to this Appendix.).

iv. State that the statutory time limit may not be extended or waived.

2. An applicant may submit a written rebuttal, signed by the applicant or the applicant's agent or attorney, to a notice of untimely receipt. The Component concerned must receive the rebuttal within 30 days of the date of the notice and may grant an extension of up to an additional 30 days for good cause shown. The rebuttal should:

i. Explain the points of, and reasons for, disagreement with the notice.

ii. Have any documents referred to in the rebuttal attached.

iii. Include or have attached statements (that are attested to be true and correct to the best of the individual's knowledge and belief) by the applicant or other persons in support of the rebuttal.

3. If the applicant does not submit a rebuttal within the time permitted, the notice of untimely receipt is a final action and the Component must return the application to the applicant with a notice that the finding is final and the application may not be considered.

4. If the applicant submits a timely rebuttal, the Component must consider the rebuttal:

i. If the Component finds that the application was received within the required time

limit, the Component must reverse its finding of untimely receipt, notify the applicant in writing, and process the application on its merits.

ii. If the Component does not reverse the finding of untimely receipt, the Component must forward the record, including the application, notice of untimely receipt, and rebuttal, to the appropriate determining official (*see* paragraph C.1. of Appendix D to this part) for an initial determination on the issue of untimely receipt. The Component does not need to investigate the merits of the application before forwarding the record.

5. After making an initial determination on the issue of untimely receipt, the determining official must follow the procedures in Appendix D to this part. In addition, if the determining official finds that the application was timely, the official may:

i. Return the application to the Component concerned for processing on the merits according to this part, or

ii. Make a recommendation to the DOHA to grant all or part of the application as described in paragraph D to this Appendix.

C. INITIAL DETERMINATIONS

The standards in Appendix B to this part must be applied when considering the merits of a waiver application. After making an initial determination, the DOHA must follow the procedures at paragraph F to this Appendix and may take the following actions regarding waiver applications referred under paragraph A.4.ii. or B.5.ii. to this Appendix:

1. Make an initial determination denying a waiver application in its entirety; or

2. Make an initial determination granting all or part of a waiver application.

D. RECOMMENDATION TO THE DOHA TO GRANT ALL OR PART OF AN APPLICATION

Referrals to the DOHA must include the entire record along with the recommendation and administrative report described in paragraph E to this Appendix. The record and the report must be sent to: Defense Office of Hearings and Appeals, Claims Division, P.O. Box 3656, Arlington, VA 22203–1995.

E. RECOMMENDATION AND ADMINISTRATIVE REPORT

The recommendation and administrative report required by paragraph D to this Appendix must describe the recommended action (and its reasons) and the following:

1. The names and mailing addresses of each employee, member, or other person from whom collection is sought, or a statement that the person cannot reasonably be located.

2. The aggregate amount of the debt, including an itemization showing the elements of the aggregate amount.

3. The date the erroneous payment was discovered.

4. The date the recipient was notified of the error and a statement of the erroneous amounts paid before and after receipt of such notice.

5. A summary of the facts and circumstances describing how the erroneous payment occurred; the recipient's knowledge of the erroneous nature of the payment; the steps taken by the recipient to bring the matter to the attention of the appropriate official; and the Component's response, if any.

6. A finding of whether there is any indication of fraud, misrepresentation, fault, or lack of good faith on the part of the applicant and the reasons for such a finding.

7. Legible copies or the originals of supporting documents, such as leave and earnings statements, notifications of personnel actions, travel authorizations and vouchers, and military orders.

8. Statements (that are attested to be true and correct to the best of the individual's knowledge and belief) of the applicant or other persons in support of the application.

F. PROCESSING AFTER AN INITIAL DETERMINATION

After making an initial determination, the DOHA must:

1. Notify the applicant if all or part of the waiver application is denied. The notification must explain:

i. The determination and the reasons for it.

ii. The appropriate Component action to resolve the debt as a consequence of the determination if it is or becomes a final action (the finality of an initial determination is explained at paragraph G to this Appendix).

iii. The appeal process (as explained in Appendix F to this part) if the determination does not grant the entire application or does not contain a finding of timely receipt.

2. Notify the Component concerned when and if the determination is a final action. The notice must explain:

i. The determination and its the reasons.

ii. The appropriate Component action to resolve the debt as a consequence of the determination.

G. WHEN AN INITIAL DETERMINATION IS FINAL

A final action is an initial determination that grants the entire waiver application or finds that the application was timely received. Also, an initial determination (including one of untimely receipt) is a final action if the determining official does not receive an appeal within 30 days of the date of the initial determination (plus any extension of up to 30 additional days granted by the determining official for good cause shown).

## APPENDIX F TO PART 284—APPEALS

### A. WHO MAY APPEAL

An applicant may appeal if an initial determination denies all or part of a waiver application or finds that the application was not received by the Component concerned within the time limit required by statute.

### B. WHEN AND WHERE TO SUBMIT AN APPEAL

1. When the determining official is not in the DOHA, the determining official must receive an applicant's appeal within 30 days of the date of the initial determination. The determining official may extend this period for up to an additional 30 days for good cause shown. No appeal may be accepted after this time has expired. The appeal shall be processed under the procedures in paragraphs C through K to this Appendix.

2. When the determining official is in the DOHA, the DOHA must receive an applicant's appeal within 30 days of the date of the initial determination. The DOHA may extend this period for up to an additional 30 days for good cause shown. No appeal may be accepted after this time has expired. The appeal shall be considered to be a request for reconsideration and shall be processed under the procedures in paragraphs L through Q of this Appendix.

### C. CONTENT OF AN APPEAL

No specific format for an appeal is required however it must be written and signed by the applicant, the applicant's authorized agent, or the applicant's attorney. In addition, it should:

1. Provide the applicant's mailing address.

2. Provide the applicant's telephone number.

3. Provide the applicant's social security number when required by the Component concerned.

4. Identify specific:

i. Errors or omissions of material and relevant facts.

ii. Legal or equitable (under the standards in Appendix B to this part) considerations that were overlooked or misapplied.

iii. Conclusions that were arbitrary, capricious, or an abuse of discretion.

5. Present evidence of the correct or additional facts alleged.

6. Explain the reasons why the findings or conclusions should be reversed or modified.

7. Have attached copies of documents referred to in the appeal.

8. Include or have attached statements (that are attested to be true and correct to the best of the individual's knowledge and belief) by the applicant or other persons in support of the appeal.

### D. DETERMINING OFFICIAL'S REVIEW

The determining official must review an applicant's appeal, and affirm, modify, or reverse the initial determination.

1. When the determining official grants the entire waiver appeal or grants the application to the extent requested in the appeal after review of an appeal in a case involving a debt in the aggregate amount of $1,500 or less, the determining official must notify the applicant in writing and the Component concerned if the determining official is not an official of the Component concerned. The notice must explain the appropriate action to resolve the debt. This is a final action.

2. When the determining official finds that the application was received within the time limit required by statute after review of an appeal concerning the untimely receipt of the waiver application, the determining official must notify the applicant in writing and take the appropriate action under paragraph B.5. of Appendix D to this part or paragraph B.5. of Appendix E to this part, as appropriate.

3. In all other cases, the determining official must forward the appeal to the DOHA according to paragraph E. of this Appendix. The determining official must prepare a recommendation and administrative report (as explained in paragraph F to this Appendix) and send a copy of the administrative report to the applicant with a notice that the applicant may submit a rebuttal to the determining official (as explained in paragraph G to this Appendix).

4. The determining official must date stamp the applicant's rebuttal on the date it is received.

### E. SUBMISSION OF APPEAL TO THE DOHA

The determining official must send the entire record along with the recommendation and administrative report required by paragraph F to this Appendix no earlier than 31 days after the date of the administrative report or the day after the applicant's rebuttal period, as extended, expires, to the following address: Defense Office of Hearings and Appeals, Claims Division, P.O. Box 3656, Arlington, Virginia 22203–1995.

### F. RECOMMENDATION AND ADMINISTRATIVE REPORT

The recommendation and administrative report required by paragraph D.3. to this Appendix must describe the recommended action (and its reasons) and include:

1. The names and mailing addresses of each employee, member, or other person from whom collection is sought, or a statement that the person cannot reasonably be located.

2. The aggregate amount of the debt, including an itemization showing the elements of the aggregate amount.

3. The date the erroneous payment was discovered.

4. The date the recipient was notified of the error and a statement of the erroneous amounts paid before and after receipt of such notice.

5. A summary of the facts and circumstances describing how the erroneous payment occurred; the recipient's knowledge of the erroneous nature of the payment; the steps taken by the recipient to bring the matter to the attention of the appropriate official; and the Component's response;

6. A finding of whether there is any indication of fraud, misrepresentation, fault, or lack of good faith on the part of the applicant and the reasons for such a finding.

7. Legible copies or the originals of supporting documents, such as leave and earnings statements, notifications of personnel actions, travel authorizations and vouchers, and military orders.

8. Statements (that are attested to be true and correct to the best of the individual's knowledge and belief) of the applicant or other persons in support of the application.

G. APPLICANT'S REBUTTAL

An applicant may submit a written rebuttal, signed by the applicant or the applicant's agent or attorney, in response to the recommendation and administrative report. The rebuttal must be received by the determining official within 30 days of the date of the recommendation and administrative report. The determining official may grant an extension of up to an additional 30 days for good cause shown. The rebuttal should include:

1. An explanation of the points and reasons for disagreeing with the report.

2. The file reference number.

3. Any documents referred to in the rebuttal.

4. Statements (that are attested to be true and correct to the best of the individual's knowledge and belief) by the applicant or other persons in support of the rebuttal.

H. DOHA APPEAL DECISION

Except as provided in paragraph P to this Appendix, the DOHA must base its decision on the written record, including the recommendation and administrative report and any rebuttal by the applicant. The written decision must:

1. Affirm, modify, reverse, or remand the initial determination and decide the application on its merits or return the application to the Component concerned for investigation and processing for an initial determination on the merits according to Appendix D to this part.

2. State the amount of the waiver application that is granted and the amount denied and/or that the application was or was not received within the statutory time limit, as appropriate.

3. Explain the reasons for the decision.

I. PROCESSING AFTER THE APPEAL DECISION

After issuing an appeal decision, the DOHA must:

1. Send the applicant the decision and notify the applicant of:

i. The appropriate Component action to resolve the debt as a consequence of the decision if it is or becomes a final action (as explained in paragraph J to this Appendix).

ii. The procedures under this Appendix to request reconsideration (as explained in paragraphs K through M to this Appendix), if the decision does not grant the waiver application to the extent requested, or does not contain a finding of timely receipt, when applicable.

2. Notify the Component concerned of the decision and the appropriate Component action to resolve the debt as a consequence of the decision.

J. FINALITY OF A DOHA APPEAL DECISION

An appeal decision that grants the waiver application to the extent requested on appeal, or that finds that the application was timely received, when applicable, is a final action when issued. An appeal decision is a final action if the DOHA does not receive a request for reconsideration within 30 days of the date of the appeal decision (plus any extension of up to 30 additional days granted by the DOHA for good cause shown).

NOTE: In the case of a DOHA appeal decision issued before the effective date of this part that denied all or part of the waiver application, a request for reconsideration by the GC, DoD may be submitted within 60 days of the effective date of this part. The GC DoD shall consider such requests and affirm, modify, reverse, or remand the DOHA appeal decision. Requests for reconsideration by the GC, DoD received more than 60 days after the effective date of this part shall not be accepted. Requests must be submitted to the address in paragraph E.5. to this appendix. The provisions of paragraph M to this appendix apply.

K. WHO MAY REQUEST RECONSIDERATION

An applicant may request reconsideration of a DOHA appeal decision.

L. WHEN AND WHERE TO SUBMIT A REQUEST FOR RECONSIDERATION

The DOHA must receive a request for reconsideration within 30 days of the date of the appeal decision.[2] The DOHA may extend

[2]Request for reconsideration by the GC, DoD must be received by the DOHA within 60

*Continued*

this period for up to an additional 30 days for good cause shown. No request for reconsideration may be accepted after this time has expired. A request for reconsideration must be sent to the DOHA at the address in paragraph E to this Appendix.

M. CONTENT OF A REQUEST FOR RECONSIDERATION

The requirements of paragraph C to this Appendix for the content of an appeal apply to a request for reconsideration.

N. DOHA'S REVIEW OF A REQUEST FOR RECONSIDERATION

No earlier than 31 days after the date of the appeal decision or the day after the last period for submitting a request, as extended, expires, the DOHA must:

1. Consider a request for reconsideration.

2. Affirm, modify, or reverse the appeal decision.

3. Prepare a response that explains the reasons for the finding.

4. Send the response to the applicant and the Component concerned and notify them of the appropriate action on the debt.

O. FINALITY OF A DOHA RECONSIDERATION DECISION

The response is a final action. It is precedent in the consideration of all waiver applications covered by this part unless otherwise stated in the document.

P. CONSIDERATION OF APPEALS AND REQUESTS FOR RECONSIDERATION

When considering an appeal or request for reconsideration, the DOHA may:

1. Take administrative notice of matters that are generally known or are capable of confirmation by resort to sources whose accuracy cannot reasonably be questioned.

2. Remand a matter to the Component with instructions to provide additional information.

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days of the effective date of this Instruction as explained in paragraph J of this appendix for appeal decisions issued before the effective date of this Instruction.

# SUBCHAPTER N—FREEDOM OF INFORMATION ACT PROGRAM

## PART 286—DOD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM

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AUTHORITY: 5 U.S.C. 552.

SOURCE: 82 FR 1197, Jan. 5, 2017, unless otherwise noted.

## Subpart A—General Provisions

### § 286.1 Purpose.

This part contains the rules that the public follows in requesting information from the Department of Defense (DoD) in accordance with the FOIA, as amended, 5 U.S.C. 552, and how those requests will be processed by the DoD. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (''OMB Guidelines''). Requests made by individuals for records about themselves under the Privacy Act of 1974, as amended, 5 U.S.C. 552a, are processed in accordance with 32 Code of Federal Regulations (CFR) part 310. Additionally, the Directorate for Oversight and Compliance maintains a DoD FOIA Handbook for the public to use in obtaining information from the DoD. This handbook contains information about specific procedures particular to the DoD with respect to the public requesting DoD records. This handbook includes descriptions of DoD Components and the types of records maintained by different DoD Components. It is available at *http://open.defense.gov/Transparency/FOIA/FOIAHandbook.aspx*.

### § 286.2 Applicability.

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

## Subpart B—FOIA Requests

### § 286.3 General information.

(a) The DoD has a decentralized system for responding to FOIA requests, with each DoD Component designating at least one FOIA Requester Service Center (RSC) to process records from that component. All DoD RSCs have the capability to receive requests electronically either through email or a web portal. To make a request for records, a requester should write directly to the DoD Component that maintains the records being sought. A request will receive the quickest possible response if it is addressed to the RSC of the DoD Component that maintains the records sought. Addresses and contact information for the RSCs are available at *http://www.foia.gov/report-makerequest.html*. This Web site has the contact information for the following DoD Components: The OSD and the Office of the Chairman of the Joint Chiefs

of Staff and the Joint Staff, Department of the Army, Department of the Navy, Department of the Air Force, Armed Services Board of Contract Appeals, Defense Commissary Agency, Defense Contract Audit Agency, Defense Contract Management Agency, Defense Finance and Accounting Service, Defense Health Agency, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, Defense Security Service, Defense Technical Information Center, Defense Threat Reduction Agency, Joint Personnel Recovery Agency, DoD Education Activity, National Geospatial-Intelligence Agency, National Guard Bureau, National Reconnaissance Office, National Security Agency/Central Security Service, Office of the Inspector General of the Department of Defense, United States Africa Command, United States Central Command, United States European Command, United States Northern Command, United States Pacific Command, United States Special Operations Command, United States Strategic Command, and United States Transportation Command.

(b) The OSD/Joint Staff FOIA RSC also processes FOIA requests for the Criminal Investigation Task Force, Defense Acquisition University, Defense Advanced Research Projects Agency, Defense Equal Opportunity Management Institute, Defense Legal Services Agency, Defense Microelectronics Activity, Defense Media Activity, Defense POW/MIA Accounting Agency, Defense Security Cooperation Agency, Defense Technology Security Administration, Defense Travel Management Office, DoD Human Resources Activity, DoD Test Resource Management Center, Joint Improvised-Threat Defeat Agency, Missile Defense Agency, National Defense University, Office of Economic Adjustment, Pentagon Force Protection Agency, Uniform Services University of the Health Sciences, Washington Headquarters Services and White House Military Office.

(c) A requester who is making a request for records about himself or herself, regardless of whether the records are in a Privacy Act system of records, must comply with the verification of identity requirements as determined by the DoD Component in accordance with 32 CFR part 310.

### § 286.4 FOIA Public Liaisons and the Office of Government Information Services.

(a) Each DoD Component has at least one FOIA Public Liaison. FOIA Public Liaisons are responsible for working with requesters that have any concerns about the service received from a FOIA RSC, reducing delays in the processing of FOIA requests, increasing transparency and understanding of the status of requests, and assisting in the resolution of disputes. Contact information for DoD Component FOIA Public Liaisons is available at *http://www.foia.gov/report-makerequest.html*.

(b) Engaging in dispute resolution services provided by OGIS. Mediation is a voluntary process. If a requester seeks dispute resolution services from the Office of Government Information services (OGIS), the DoD will actively engage as a partner to the process in an attempt to resolve the dispute.

### § 286.5 Description of records sought.

(a) Requesters must reasonably describe the records sought and provide sufficient detail to enable personnel to locate those records with a reasonable amount of effort. To the extent possible, requesters should include specific information that may assist personnel in identifying the requested records, such as the date, title or name, author, recipient, subject matter of the record, case number, file designation, or reference number. Before submitting their requests, requesters may contact the DoD Component's FOIA RSC or FOIA Public Liaison to discuss the records they are seeking and to receive assistance in describing the records. If after receiving a request the DoD Component determines that it does not reasonably describe the records sought, the DoD Component shall inform the requester what additional information is needed or why the request is otherwise insufficient. Requesters who are attempting to reformulate or modify such a request may discuss their request with the DoD Component's FOIA contact or FOIA Public Liaison. Requesters are encouraged to make every

effort to reasonably describe the requested records in order to avoid any delays in the processing of their requests.

(b) Requesters may specify the preferred form or format (including electronic formats) for the requested records. DoD Components will accommodate the request if the record is readily reproducible in that form or format.

(c) Requesters must provide contact information, such as a telephone number, email address, and/or mailing address, to assist the DoD Component in communicating and providing released records.

### § 286.6 Preservation of records.

Each DoD Component shall preserve all correspondence pertaining to the requests that it receives under this part, as well as copies of all requested records, until disposition or destruction is authorized pursuant to title 44 of the United States Code or the General Records Schedule 4.2 of the National Archives and Records Administration (NARA). Records shall not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

## Subpart C—FOIA Request Processing

### § 286.7 General provisions.

(a) *Responsibilities*. The DoD Component receiving a FOIA request for a record that it maintains is responsible for making a determination on the request and responding to the FOIA requester. In determining which records are responsive to a request, a DoD Component ordinarily will include only records in its possession as of the date that it begins its search. If any other date is used, the DoD Component shall inform the requester of that date. A record that is excluded from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), is not considered responsive to a request.

(b) *Authority to deny requests*. DoD Components will designate one or more Initial Denial Authorities (IDA) with the authority to deny any requests for records that are maintained by that agency.

(c) *Re-routing of misdirected requests*. DoD Components receiving a misdirected FOIA request for records clearly originating with another DoD Component (*e.g.* the Air Force receives a FOIA request for a Navy contract) will route the FOIA request to the appropriate DoD Component and inform them of the date the FOIA request was initially received. Additionally, it will advise the FOIA requester of the routing of the request. This routing requirement only applies to those FOIA requests directed to a DoD Component that seek documents for which the DoD is responsible. If it is known that responsibility for the requested records rests with a non-DoD Federal agency (*e.g.*, Department of State), then the DoD Component need only advise the FOIA requester to submit the FOIA request to the proper Federal agency. DoD Components will not route misdirected FOIA requests to a Defense Criminal Investigation Organization or Intelligence Community component without first contacting the other component or agency for guidance.

(d) *Consultation, referral, and coordination*. When reviewing records located in response to a request, the DoD Component may determine that another DoD Component or Federal agency also should determine whether the record is exempt from disclosure under the FOIA. As to any such record, the DoD Component shall proceed in one of the following ways:

(1) *Consultation*. When records originating with a DoD Component that is initially processing a request contain information of interest to another DoD Component or other Federal agency, the DoD Component initially processing the request should typically consult with all interested DoD Components or other Federal agencies prior to making a release determination. The DoD Component initially processing the request, under these circumstances, will ultimately respond to the requester and release any responsive material. The consulted DoD Component will notify the sending DoD Component or other Federal agency when the consultation is received and the consultation tracking number.

(2) *Referral*. (i) When the DoD Component initially processing the request

believes that a different DoD Component or other Federal agency is best able to determine whether to disclose the record, the DoD Component typically should refer the responsibility for responding to the request regarding that record to that agency. Ordinarily, the agency that originated the record will be presumed to be best able to make the disclosure determination. Under these circumstances, the DoD Component or other Federal agency receiving the referral will ultimately make a release determination on the records and respond to the requester.

(ii) Whenever a DoD Component refers a record to another DoD Component or Federal agency, it will document the referral, refer a copy of the referred record, and notify the requester of the referral, informing the requester of the name and FOIA address of the DoD Component or Federal agency to which the record was referred.

(3) *Coordination*. The standard referral procedure is not appropriate where disclosure of the identity of the DoD Component or agency to which the referral would be made could harm an interest protected by an applicable exemption, such as the exemptions that protect personal privacy or national security interests. Under these circumstances, the consultation process is the appropriate means for coordination. See § 286.7(d)(1). For example, if a non-law enforcement agency responding to a request for records on a living third party locates within its files records originating with a law enforcement agency, and if the existence of that law enforcement interest in the third party was not publicly known, then to disclose that law enforcement interest could cause an unwarranted invasion of the personal privacy of the third party. Similarly, if a DoD Component locates within its files material originating with an Intelligence Community agency, and the involvement of that agency in the matter is classified and not publicly acknowledged, then to disclose or give attribution to the involvement of that Intelligence Community agency could cause national security harms. In such instances, in order to avoid harm to an interest protected by an applicable exemption, the DoD Component that received the request should coordinate with the originating DoD Component or agency to seek its views the disclosure of the record. The release determination for the record should then be conveyed to the requester by the DoD Component that originally received the request.

(4) *Timing of responses to consultations and referrals*. All consultations and referrals received by the DoD Component will be processed according to the date that the FOIA request was initially received by a Federal agency.

(5) *Agreements regarding consultations and referrals*. DoD Components may establish written agreements with other DoD Components or other Federal agencies to eliminate the need for consultations or referrals with respect to particular types of records, providing these agreements do not conflict with this rule, or another law, rule, or regulation.

[82 FR 1197, Jan. 5, 2017, as amended at 83 FR 5197, Feb. 6, 2018]

### § 286.8 Timing of responses to requests.

(a) *In general*. DoD Components ordinarily will respond to requests on a first-in/first-out basis according to their order of receipt. In instances involving misdirected requests that are re-routed pursuant to § 286.7(c), the response time will commence on the date that the request is received by the appropriate DoD Component's FOIA RSC, but in any event not later than 10 working days after the request is first received by any DoD Component's FOIA RSC that is designated to receive requests.

(b) *Multitrack processing*. All DoD Components must designate a specific track for requests that are granted expedited processing in accordance with the standards set forth in the FOIA and paragraph (e) of this section. DoD Components may also designate additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work or time needed to process the request. Among the factors a DoD Component may consider are the number of records requested, the number of pages involved in processing the request and the need for consultations or

referrals. DoD Components should advise requesters of the track into which their request falls and, when appropriate, shall offer the requesters an opportunity to narrow or modify their request so that it can be placed in a different processing track.

(c) *Unusual circumstances.* Whenever the statutory time limit for processing a request cannot be met because of ''unusual circumstances,'' as defined in the FOIA, and the DoD Component extends the time limit on that basis, the DoD Component must, before expiration of the 20-day period to respond, notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request can be expected to be completed. See 5 U.S.C. 552(a)(6)(B). Where the extension exceeds 10 working days, the DoD Component shall, in accordance with the FOIA, provide the requester with an opportunity to modify the request or arrange an alternative time period for processing the original or modified request. Furthermore, the requester will be advised that the DoD Component FOIA Public Liaison is available for this purpose and of their right to seek dispute resolution services from OGIS.

(d) *Aggregating requests.* For the purposes of satisfying unusual circumstances under the FOIA, DoD Components may aggregate requests in cases where it reasonably appears that multiple requests, submitted either by a requester or by a group of requesters acting in concert, constitute a single request that would otherwise involve unusual circumstances. DoD Components will not aggregate multiple requests that involve unrelated matters.

(e) *Expedited processing.* (1) The FOIA establishes two reasons for expediting the processing of initial FOIA requests: Compelling need and other cases determined by the agency. See 5 U.S.C. 552(a)(6)(E). Administrative appeals may be expedited for the same reasons. The DoD Components must make expedited processing determinations within 10 calendar days after receipt of a request that meets the criterion of reasonably describing the requested records in § 286.5(a). Once the DoD Component decides to grant expedited processing, the request is processed as soon as practicable. Adverse actions by DoD Components on requests for expedited processing, or a failure to respond to those requests in a timely manner, are subject to judicial review.

(i) *Compelling need.* Expedited processing is granted to a requester upon a specific request for such and when the requester demonstrates a compelling need for the information. A compelling need exists when:

(A) The failure to obtain requested records on an expedited basis could reasonably be expected to pose an imminent threat to the life or physical safety of an individual, or

(B) The information is urgently needed by an individual primarily engaged in disseminating information in order to inform the public concerning actual or alleged government activity.

(ii) *DoD additional expedited processing circumstances.* If the DoD Component decides to expedite the request for either of the following reasons, the request will be processed in the expedited track behind those requests qualifying for expedited processing as a compelling need.

(A) *Imminent loss of due process rights.* Expedited processing is granted to a requester if loss of substantial due process rights is imminent.

(B) *Humanitarian need.* Expedited processing is granted when the failure to obtain the requested information on an expedited basis could reasonably be expected to harm substantial humanitarian interests.

(2) A request for expedited processing may be made at any time. Requests for expedited processing must be submitted to the DoD Component that maintains the records. When making a request for expedited processing of an administrative appeal, the request should be submitted to the DoD Component's appellate authority.

(3) A requester who seeks expedited processing must submit a statement, certified to be true and correct, explaining in detail the basis for making the request for expedited processing. For requesters seeking expedited processing under paragraph (e)(1)(i)(B) of this section, a requester who is not a full-time member of the news media must establish that the requester is a

person whose primary professional activity or occupation is information dissemination, and not an incidental or secondary activity, though it need not be the requester's sole occupation. Such a requester also must establish a particular urgency to inform the public about the government activity involved in the request—one that extends beyond the public's right to know about government activity generally. The existence of numerous articles published on a given subject can be helpful in establishing the requirement that there be an ''urgency to inform'' the public on the topic. Requests for expedited processing under paragraph (e)(1)(ii)(A) of this section must include a description of the due process rights that would be lost. This statement must be with the request for expedited processing for it to be considered and responded to within the 10 calendar days required for decisions on expedited access.

(4) A DoD Component shall notify the requester within 10 calendar days of the receipt of a request for expedited processing of its decision whether to grant or deny expedited processing. If expedited processing is granted, the request shall be placed in the processing track for expedited requests, and processed as soon as practicable. If a request for expedited processing is denied, any appeal of that decision shall be acted upon expeditiously.

**§ 286.9 Responses to requests.**

(a) *In general.* DoD FOIA RSCs will, to the extent practicable, communicate with requesters having access to the Internet using electronic means, such as email or web portal.

(b) *Acknowledgments of requests.* DoD Components will acknowledge requests in writing and assign individualized tracking numbers. DoD Components will include these tracking numbers and any tracking numbers used by FOIA requesters in all correspondence.

(c) *Estimated dates of completion and interim responses.* Upon request, the DoD Component will provide an estimated date by which the DoD Component expects to provide a response to the requester. If a request involves a voluminous amount of material or searches in multiple locations, the DoD Component may provide interim responses, releasing the records on a rolling basis.

(d) *Grants of requests.* Once a DoD Component makes a determination to grant a request in full or in part, it shall notify the requester in writing. The DoD Component also shall inform the requester:

(1) Of any fees charged under § 286.12; and

(2) That they may contact the DoD Component FOIA Public Liaison for further assistance.

(e) *Adverse determinations of requests.* A DoD Component making an adverse determination denying a request in any respect will notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the information requested is not a record subject to the FOIA; the requested record does not exist, cannot be located, or has been destroyed; or the requested record is not readily reproducible in the form or format sought by the requester. Adverse determinations also include denials involving fees or fee waiver matters or denials of requests for expedited processing.

(f) *Content of denial.* The denial will include:

(1) The name and title or position of the IDA;

(2) A brief statement of the reasons for the denial, including any FOIA exemption applied by the DoD Component in denying the request;

(3) An estimate of the volume of any records or information withheld, such as the number of pages or some other reasonable form of estimation, although such an estimate is not required if the volume is otherwise indicated by deletions marked on records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable exemption;

(4) For any information denied under Exemption 1, the applicable section or sections of the appropriate Executive order on classification that establishing continued classification of the information;

(5) For any information denied under Exemption 3, the specific statute relied upon to deny the information along with a short description of the statute;

(6) A statement that the requester must appeal no later than 90 days after the date of the denial and along with instructions on how to appeal to the DoD Component appellate authority. The instructions will include the appellate authority's duty title, the mailing address for the appeal, and instructions on how the requester can appeal electronically; and

(7) A statement advising the requester of their right to seek dispute resolution services from the DoD Component FOIA Public Liaison or OGIS.

(g) *Markings on released documents.* Records disclosed in part will be marked clearly to show the amount of information deleted and the exemption under which the deletion was made unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted also will be indicated on the record, if technically feasible.

(h) *Use of record exclusions.* (1) In the event that a DoD Component identifies records that may be subject to exclusion from the requirements of the FOIA pursuant to 5 U.S.C. 552(c), the DoD Component should confer with the Directorate for Oversight and Compliance, which will confer with the Department of Justice, Office of Information Policy (OIP), to obtain approval to apply the exclusion.

(2) A DoD Component invoking an exclusion shall maintain an administrative record of the process of invocation and approval of the exclusion by OIP.

## § 286.10 Confidential Commercial Information.

(a) *Definitions.*

(1) *Confidential commercial information* means commercial or financial information obtained by the DoD Component from a submitter that may be protected from disclosure under Exemption 4 of the FOIA, 5 U.S.C. 552(b)(4).

(2) *Submitter* means any person or entity, including a corporation, State, or foreign government, but not including another Federal Government entity, that provides confidential commercial information, either directly or indirectly to the Federal Government.

(b) *Designation of confidential commercial information.* A submitter of confidential commercial information must use good faith efforts to designate by appropriate markings, at the time of submission, any portion of its submission that it considers to be protected from disclosure under Exemption 4. These designations shall expire 10 years after the date of submission unless the submitter requests and provides justification for a longer designation period.

(c) *When notice to submitters is required.* (1) The DoD Component shall promptly provide written notice to the submitter of confidential commercial information whenever records containing such information are requested under the FOIA if the DoD Component determines that it may be required to disclose the records, provided:

(i) The requested information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or

(ii) The DoD Component has a reason to believe that the requested information may be protected from disclosure under Exemption 4, but has not yet determined whether the information is protected from disclosure.

(2) The notice shall include a copy of the requested records or portions of records containing the information. In cases involving a voluminous number of submitters, the DoD Component may post or publish a notice in a place or manner reasonably likely to inform the submitters of the proposed disclosure, instead of sending individual notifications.

(d) *Exceptions to submitter notice requirements.* The notice requirements of this section shall not apply if:

(1) The DoD Component determines that the information is exempt under the FOIA, and therefore will not be disclosed;

(2) The information has been lawfully published or has been officially made available to the public;

(3) Disclosure of the information is required by a statute other than the

FOIA or by a regulation issued in accordance with the requirements of Executive Order 12600 of June 23, 1987; or

(4) The designation made by the submitter under paragraph (b) of this section appears obviously frivolous. In such case, the agency shall give the submitter written notice of any final decision to disclose the information within a reasonable number of days prior to a specified disclosure date.

(e) *Opportunity to object to disclosure.* (1) The DoD Component shall specify a reasonable time period within which the submitter must respond to the notice referenced in paragraph (c) of this section.

(2) If a submitter has any objections to disclosure, it should provide the DoD Component a detailed written statement that specifies all grounds for withholding the particular information under any exemption of the FOIA. In order to rely on Exemption 4 as basis for nondisclosure, the submitter must explain why the information constitutes a trade secret or commercial or financial information that is confidential.

(3) A submitter who fails to respond within the time period specified in the notice shall be considered to have no objection to disclosure of the information. The DoD Component is not required to consider any information received after the date of any disclosure decision. Any information provided by a submitter under this section may itself be subject to disclosure under the FOIA.

(f) *Analysis of objections.* The DoD Component shall consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose the requested information.

(g) *Notice of intent to disclose.* Whenever the DoD Component decides to disclose information over the objection of a submitter, the DoD Component shall provide the submitter written notice, which shall include:

(1) A statement of the reasons why each of the submitter's disclosure objections was not sustained;

(2) A description of the information to be disclosed or copies of the records as the DoD Component intends to release them; and

(3) A specified disclosure date, which shall be a reasonable time after the notice.

(h) *Notice of FOIA lawsuit.* Whenever a requester files a lawsuit seeking to compel the disclosure of confidential commercial information, the DoD Component shall promptly notify the submitter.

(i) *Requester notification.* The DoD Component shall notify a requester whenever it provides the submitter with notice and an opportunity to object to disclosure; whenever it notifies the submitter of its intent to disclose the requested information over the submitter's objections; and whenever a submitter files a lawsuit to prevent the disclosure of the information.

## Subpart D—Appeals

### § 286.11 Processing of appeals.

(a) *Requirements for making an appeal.* A requester may appeal any adverse determinations to the DoD Component's appellate authority. Examples of adverse determinations are provided in § 286.9(e). Appeals can be submitted by mail or online in accordance with the requirements provided in the DoD Component's final response. Requesters that are not provided with appeal requirements should contact the FOIA RSC processing their request to obtain the requirements. The requester must make the appeal in writing and to be considered timely it must be postmarked, or in the case of electronic submissions, transmitted, within 90 calendar days after the date of the response. The appeal should clearly identify the determination that is being appealed and the assigned request number. To facilitate handling, the requester should mark both the appeal letter and envelope, or subject line of the electronic transmission, ''Freedom of Information Act Appeal.''

(b) *Adjudication of appeals.* (1) The Heads of the following DoD Components will serve as, or appoint an appropriate official to serve as, the component's appellate authority: Department of the Army, Department of the Navy, Department of the Air Force, Defense Commissary Agency, Defense

Contract Audit Agency, Defense Contract Management Agency, Defense Finance and Accounting Service, Defense Health Agency, Defense Information Systems Agency, Defense Intelligence Agency, Defense Logistics Agency, Defense Security Service, Defense Threat Reduction Agency, National Geospatial-Intelligence Agency, National Reconnaissance Office, National Security Agency/Central Security Service, and the Office of the Inspector General of the Department of Defense.

(2) The Deputy Chief Management Officer (DCMO) will serve as the appellate authority for the OSD and the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, Armed Services of Contract Appeals, Defense Technical Information Center, Joint Personnel Recovery Agency, DoD Education Activity, National Guard Bureau, United States Africa Command, United States Central Command, United States European Command, United States Northern Command, United States Pacific Command, United States Special Operations Command, United States Strategic Command, and United States Transportation Command. The DCMO may delegate this authority to an appropriate official of the DCMO staff.

(3) An appeal will normally not be adjudicated if the request becomes a matter of FOIA litigation. This decision should be made after consultation with the Department of Justice attorney responsible for the litigation.

(c) *Decisions on appeals.* A decision on an appeal must be made in writing and signed by the appellate authority. A decision that upholds a DoD Component's determination in whole or in part will contain a statement that identifies the reasons for the affirmance, including any FOIA exemptions applied. The decision will provide the requester with notification of the statutory right to file a lawsuit. If a decision is remanded or modified on appeal, the requester will be notified of that determination in writing. The DoD Component will thereafter further process the request in accordance with that appeal determination and respond directly to the requester.

(d) *When an appeal is required.* A requester generally must first submit a timely administrative appeal before seeking review by a court of a DoD Component's adverse determination.

## Subpart E—Fees

### § 286.12 Schedule of fees.

(a) *In general.* DoD Components shall charge for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines. For purposes of assessing fees, the FOIA establishes three categories of requesters: Commercial; noncommercial scientific or educational institutions or news media; and all other requesters. Different fees are assessed depending on the category. Requesters may seek a fee waiver. DoD Components shall consider such requests in accordance with the requirements in paragraph (m) of this section. In order to resolve any fee issues that arise under this section, a DoD Component may contact a requester for additional information. DoD Components shall ensure that searches, review, and duplication are conducted in the most efficient and least expensive manner. Requesters must pay fees by check or money order made payable to the Treasury of the United States.

(b) *Definitions.* For purposes of this section:

(1) *Commercial use request* is a request that asks for information for a use or purpose that furthers a commercial, trade, or profit interest, which can include furthering those interests through litigation. A DoD Component's decision to place a requester in the commercial use category will be made on a case-by-case basis based on the requester's intended use of the information. DoD Components will notify requesters of their placement in this category.

(2) *Direct costs* are those expenses that a DoD Component incurs in searching for and, in the case of commercial use requests, reviewing records in order to respond to a FOIA request. DoD direct costs for human activity are at Table 1.

TABLE 1—FOIA HOURLY PROCESSING FEES

| Type | Grade | Hourly rate |
|---|---|---|
| Administrative | E–9/GS–8 and below | $24 |
| Professional | Contractor/O–1 to O–6/W–1 to W–5/GS–9 to GS–15 | 48 |
| Executive | O–7 and above and Senior Executive Service | 110 |

(3) *Duplication* is reproducing a copy of a record, or of the information contained in it, necessary to respond to a FOIA request.

(4) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with his or her role at the educational institution. DoD Components may seek verification from the requester that the request is in furtherance of scholarly research and will advise requesters of their placement in this category.

(5) *Noncommercial scientific institution* is an institution that is not operated on a ''commercial'' basis, as defined in paragraph (b)(1) of this section and that is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use. DoD Components will advise requesters of their placement in this category.

(6) *Representative of the news media* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn raw materials into a distinct work, and distributes that work to an audience. The term ''news'' means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations that broadcast ''news'' to the public at large and publishers of periodicals that disseminate ''news'' and make their products available through a variety of means to the general public, including news organizations that disseminate solely on the Internet. A request for records supporting the news-dissemination function of the requester shall not be considered to be for a commercial use. ''Freelance'' journalists who demonstrate a solid basis for expecting publication through a news media entity shall be considered as a representative of the news media. A publishing contract would provide the clearest evidence that publication is expected; however, DoD Components shall also consider a requester's past publication record in making this determination. DoD Components will advise requesters of their placement in this category.

(7) *Review* is the examination of a record located in response to a request in order to determine whether any portion of it is exempt from disclosure. Review time includes processing any record for disclosure, such as doing all that is necessary to prepare the record for disclosure, including the process of redacting the record and marking the appropriate exemptions. Review costs are properly charged even if a record ultimately is not disclosed. Review time also includes time spent both obtaining and considering any formal objection to disclosure made by a confidential commercial information submitter under § 286.11, but it does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(8) *Search* is the process of looking for and retrieving records or information responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(c) *Fee category*. Fees are assessed based on the category determined to be appropriate for the requester's category. The fee category of a requester that is an attorney or any other agent representing a client is determined by the fee category of the attorney's client. If the fee category of the client is

not clear, then the DoD Components should ask the requester for clarification. If an attorney does not provide enough information to determine the fee category of the client, then the DoD Component may assign commercial fee category to the requester.

(d) *Charging fees*. In responding to FOIA requests, DoD Components will charge the following fees unless a waiver or reduction of fees has been granted under paragraph (m) of this section. Because the fee amounts provided below already account for the direct costs associated with a given fee type, DoD Components should not add any additional costs to charges calculated under this section.

(1) *Search*. (i) Requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media are not subject to search fees. Search fees shall be charged for all other requesters, subject to the restrictions of paragraph (e) of this section. DoD Components may properly charge for time spent searching even if they do not locate any responsive records or if they determine that the records are entirely exempt from disclosure.

(ii) For each quarter hour spent by personnel searching for requested records, including electronic searches that do not require new programming, the fees shall be charged as listed at Table 1.

(iii) Requesters will be charged the direct costs associated with conducting any search that requires the creation of a new computer program to locate the requested records. These costs will not include the time it takes to run the program and extract data. Requesters will be notified of the costs associated with creating such a program and must agree to pay the associated costs before the costs may be incurred.

(iv) For requests that require the retrieval of records stored by a DoD Component at a Federal records center operated by NARA, additional costs will be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(2) *Duplication*. Duplication fees will be charged to all requesters, subject to the restrictions of paragraph (e) of this section. DoD Components will honor a requester's preference for receiving a record in a particular form or format where it is readily reproducible by the DoD Component in the form or format requested. Where photocopies are supplied, DoD Components will provide one copy per request at $.15 per page. For copies of records produced on tapes, disks, or other media, or other forms of duplication, DoD Components will charge the direct costs of producing the copy, including operator time in accordance with Table 1. DoD Components will charge record reproduction fees at the hourly rates in Table 1 if the creation of the electronic copies requires unique security procedures incurring considerable operator time, costing more than printing paper copies.

(3) *Review*. Review fees will be charged to requesters who make commercial use requests. Review fees shall be assessed in connection with the initial review of the record, *i.e.*, the review conducted by a DoD Component to determine whether an exemption applies to a particular record or portion of a record. No charge will be made for review at the administrative appeal stage of exemptions applied at the initial review stage. However, if a particular exemption is deemed to no longer apply, any costs associated with a DoD Component's re-review of the records in order to consider the use of other exemptions may be assessed as review fees. Review fees will be charged at the same rates as those charged for a search under paragraph (d)(1)(ii) of this section.

(e) *Restrictions on charging fees*. (1) When a DoD Component determines that a requester is an educational institution, non-commercial scientific institution, or representative of the news media, and the records are not sought for commercial use, no search fees will be charged.

(2) If a DoD Component fails to comply with the time limits in which to respond to a request it may not charge search fees, or, in the instances of requests from requesters described in paragraph (e)(1) of this section, may not charge duplication fees except as described in (e)(2)(i) through (iii).

(i) When a DoD Component determines that unusual circumstances, as

those terms are defined by the FOIA, apply to the processing of the request, and provides timely written notice to the requester, then the DoD Component is granted an additional ten days until the fee restriction in paragraph (e)(2) of this section applies.

(ii) When a DoD Component determines that unusual circumstances apply and more than 5,000 pages are necessary to respond to the request, provides timely written notice to the requester, and has discussed with the requester (or made three good faith attempts to do so) on how the requester can effectively limit the scope of the request, the fee restriction in paragraph (e)(2) of this section does not apply.

(iii) If a court has determined that exceptional circumstances exist, as defined by the FOIA, a failure to comply with the time limits shall be excused for the length of time provided by the court order.

(3) No search or review fees will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(4) Except for requesters seeking records for a commercial use, DoD Components shall provide without charge:

(i) The first 100 pages of duplication (or the cost equivalent for other media); and

(ii) The first two hours of search.

(5) No fee will be charged when the total fee, after deducting the 100 free pages (or its cost equivalent) and the first two hours of search, is equal to or less than $25.

(f) *Notice of anticipated fees in excess of $25.00.* (1) When a DoD Component determines or estimates that the fees to be assessed in accordance with this section will exceed $25.00, the DoD Component shall notify the requester of the actual or estimated amount of the fees, including a breakdown of the fees for search, review or duplication, unless the requester has indicated a willingness to pay fees as high as those anticipated. If only a portion of the fee can be estimated readily, the DoD Component will advise the requester accordingly. If the requester is a noncommercial use requester, the notice shall specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge, and will advise the requester whether those entitlements have been provided.

(2) When a requester is notified that the actual or estimated fees are in excess of $25.00, the request will not be considered received and further work will not be completed until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a noncommercial use requester who has not yet been provided with the requester's statutory entitlements, designates that the requester seeks only that which can be provided by the statutory entitlements. The requester must provide the commitment or designation in writing, and must, when applicable, designate an exact dollar amount the requester is willing to pay. DoD Components are not required to accept payments in installments.

(3) If the requester has indicated a willingness to pay some designated amount of fees, but the DoD Component estimates that the total fee will exceed that amount, the DoD Component will toll the processing of the request when it notifies the requester of the estimated fees in excess of the amount the requester has indicated a willingness to pay. The DoD Component will inquire whether the requester wishes to revise the amount of fees the requester is willing to pay or modify the request. Once the requester responds, the time to respond will resume from where it was at the date of the notification.

(4) DoD Components will make available their FOIA Public Liaison or other FOIA professional to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(g) *Charges for other services.* Although not required to provide special services, if a DoD Component chooses to do so as a matter of administrative discretion, the direct costs of providing the service shall be charged. Examples of such services include certifying that records are true copies, providing multiple copies of the same document, or

sending records by means other than first class mail.

(h) *Charging interest.* DoD Components may charge interest on any unpaid bill starting on the 31st day following the date of billing the requester. Interest charges shall be assessed at the rate provided in 31 U.S.C. 3717 and will accrue from the billing date until payment is received by the DoD Component. DoD Components shall follow the provisions of the Debt Collection Act of 1982 (Pub. L. 97–365, 96 Stat. 1749), as amended, and its administrative procedures, including the use of consumer reporting agencies, collection agencies, and offset.

(i) *Aggregating requests.* When a DoD Component reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a single request into a series of requests for the purpose of avoiding fees, the DoD Component may aggregate those requests and charge accordingly. DoD Components may presume that multiple requests of this type made within a 30-day period have been made in order to avoid fees. For requests separated by a longer period, DoD Components will aggregate them only where there is a reasonable basis for determining that aggregation is warranted in view of all the circumstances involved. Multiple requests involving unrelated matters shall not be aggregated.

(j) *Advance payments.* (1) For requests other than those described in paragraphs (k)(2) or (3) of this section, a DoD Component shall not require the requester to make an advance payment before work is commenced or continued on a request.

(2) When a DoD Component determines or estimates that a total fee to be charged under this section will exceed $250.00, it may require that the requester make an advance payment up to the amount of the entire anticipated fee before beginning to process the request. A DoD Component may elect to process the request prior to collecting fees when it receives a satisfactory assurance of full payment from a requester with a history of prompt payment.

(3) Where a requester has previously failed to pay a properly charged FOIA fee to any agency within 30 calendar days of the billing date, a DoD Component may require that the requester pay the full amount due, plus any applicable interest on that prior request, and the DoD Component may require that the requester make an advance payment of the full amount of any anticipated fee before the DoD Component begins to process a new request or continues to process a pending request or any pending appeal. Where a DoD Component has a reasonable basis to believe that a requester has misrepresented the requester's identity in order to avoid paying outstanding fees, it may require that the requester provide proof of identity.

(4) In cases in which a DoD Component requires advance payment, the request shall not be considered received and further work will not be completed until the required payment is received. If the requester does not pay the advance payment within 30 calendar days after the date of the DoD Component's fee determination, the request will be closed.

(k) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the DoD Component shall inform the requester of the contact information for that program.

(l) *Requirements for waiver or reduction of fees.* (1) Requesters may seek a waiver of fees by submitting a written application specifically demonstrating how disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

(2) A DoD Component will furnish records responsive to a request without charge or at a reduced rate when it determines, based on all available information, that the following three factors are satisfied:

(i) Disclosure of the requested information would shed light on the operations or activities of the government. The subject of the request must concern identifiable operations or activities of the Federal Government with a connection that is direct and clear, not remote or attenuated.

(ii) Disclosure of the requested information would be likely to contribute significantly to public understanding of those operations or activities. This factor is satisfied when the following criteria are met:

(A) Disclosure of the requested records must be meaningfully informative about government operations or activities. The disclosure of information that already is in the public domain, in either the same or a substantially identical form, would not be meaningfully informative if nothing new would be added to the public's understanding.

(B) The disclosure must contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area as well as the requester's ability and intention to effectively convey information to the public shall be considered. DoD Components will presume that a representative of the news media satisfies this criterion.

(iii) The disclosure must not be primarily in the commercial interest of the requester. To determine whether disclosure of the requested information is primarily in the commercial interest of the requester, DoD Components shall consider the following criteria:

(A) DoD Components will identify whether the requester has any commercial interest that would be furthered by the requested disclosure. A commercial interest includes any commercial, trade, or profit interest. Requesters will be given an opportunity to provide explanatory information regarding this consideration.

(B) If there is an identified commercial interest, the DoD Component will determine whether that is the primary interest furthered by the request. A waiver or reduction of fees is justified when the requirements of paragraphs (m)(2)(i) and (ii) of this section are satisfied and any commercial interest is not the primary interest furthered by the request. DoD Components ordinarily will presume that when a news media requester has satisfied the factors in paragraphs (m)(2)(i) and (ii) of this section, the request is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(3) Where only some of the records to be released satisfy the requirements for a waiver of fees, a waiver shall be granted for those records.

(4) Requests for a waiver or reduction of fees should be made when the request is first submitted to the DoD Component and should address the criteria referenced in paragraphs (l)(1) and (2) of this section. A requester may submit a fee waiver request at a later time so long as the underlying record request is pending or on administrative appeal. When a requester who has committed to pay fees subsequently asks for a waiver of those fees and that waiver is denied, the requester is required to pay any costs incurred up to the date the fee waiver request was received.

(m) *Tracking of costs.* DoD Components will track processing costs for each FOIA request on DD Form 2086, ''Record of Freedom of Information (FOI) Processing Cost,'' or by using DD Form 2086–2, ''Freedom of Information (FOI) Consultation and Request Summary''.

### § 286.13 Fees for technical data.

(a) Technical data shall be released to a requester after all reasonable costs of search, review, and duplication are paid by the requester as authorized by 10 U.S.C. 2328.

(b) Technical data means information (regardless of the form or method of the recording) of a scientific or technical nature (including computer software documentation) relating to the supplies procured by the DoD. This includes information in the form of blueprints, drawings, photographs, plans, instructions or documentation. This

term does not include computer software or financial, administrative, cost or pricing, or management data or other information incidental to contract administration. Examples of technical data include research and engineering data, engineering drawings, and associated lists, specifications, standards, process sheets, manuals, technical reports, catalog item identification, and computer software documentation.

(1) All reasonable costs as used in this sense are the full costs to the Federal Government of rendering the service, or fair market value of the service, whichever is higher. Fair market value shall be determined in accordance with commercial rates in the local geographical area. In the absence of a known market value, charges shall be based on recovery of full costs to the Federal Government. The full costs shall include all direct and indirect costs to conduct the search and to duplicate the records responsive to the request. Costs will be tracked on DD Form 2086–1, ''Record of Freedom of Information (FOI) Processing Cost for Technical Data'' (available at *http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd2086-1.pdf*).

(2) The DoD Components will retain the fees received by the release of technical data under the FOIA, and will merge it with and make it available for the same purpose and the same time period as the appropriation from which the costs were incurred in complying with the FOIA request.

(3) Table 2 will be used to determine document production fees.

TABLE 2—FOIA DOCUMENT PRODUCTION FEES—TECHNICAL DATA

| Type | Cost |
|---|---|
| Aerial Photographs, Specifications, Permits, Charts, Diagrams, Technical Drawings, Blueprints, and Other Technical Documents (per page or copy) | $2.50 |
| Engineering Data: | |
| Aperture Cards, per card | 3.00 |
| Silver Duplicate Negative | 3.50 |
| When Keypunched and Verified | 1.00 |
| Diazo Duplicate Negative | 3.50 |
| When Keypunched and Verified | 3.00 |
| 35 mm Roll Film, per frame | 1.00 |
| 16 mm Roll Film, per frame | 0.65 |
| Paper Prints (engineering drawings), each (per square foot) | 0.30 |

TABLE 2—FOIA DOCUMENT PRODUCTION FEES—TECHNICAL DATA—Continued

| Type | Cost |
|---|---|
| Paper Reprints of Microfilm Images, each | 0.10 |
| Other Technical Data Records: | |
| Paper Copy (standard size paper up to 8½ x 14, photocopier or printer) | 0.15 |
| CD/DVD | 5.00 |
| Microfiche Produced, each | 3.50 |
| Certification and Validation with Seal, each document | 50.00 |

(c) The DoD Components will waive the payment of costs required in paragraph (a) of this section that are greater than the costs that would be required for release of this same information under §286.12 if:

(1) The FOIA request is made by a U.S. citizen or a U.S. corporation, and such citizen or corporation certifies that the technical data requested is required to enable it to submit an offer, or to determine whether it is capable of submitting an offer, to provide the product to which the technical data relates to the United States or a U.S. contractor. However, the DoD Components may require the citizen or corporation to pay a deposit in an amount equal to but not more than the cost of complying with the FOIA request, which will be refunded upon submission of an offer by the citizen or corporation;

(2) The release of technical data is requested in order to comply with the terms of an international agreement; or

(3) The DoD Component determines, in accordance with paragraph (m) of §286.12, that such a waiver is in the interest of the United States.

## PART 286h—RELEASE OF ACQUISITION-RELATED INFORMATION

Sec.
286h.1 Purpose.
286h.2 Applicability and scope.
286h.3 Policy.
286h.4 Responsibilities.

AUTHORITY: Pub. L. 101–189.

SOURCE: 55 FR 28614, July 12, 1990, unless otherwise noted.

### § 286h.1 Purpose.

This part sets forth Department of Defense (DoD) policy for the release of acquisition-related information.

### § 286h.2 Applicability and scope.

(a) This part applies to the Office of the Secretary of Defense (OSD), the Military Departments, the Chairman, Joint Chiefs of Staff and Joint Staff (CJCS), the Unified and Specified Commands, and the Defense Agencies (hereafter referred to collectively as ''DoD Components'').

(b) This part is issued pursuant to section 822 of Public Law 101–189, which requires the Department of Defense to prescribe a single uniform regulation for dissemination of, and access to, acquisition information.

### § 286h.3 Policy.

(a) *General*. It is the Department of Defense's policy to make the maximum amount of acquisition-related information available to the public, and to respond promptly to specific requests from the public for such information, except for the information identified in paragraph (b) of this section, for which release is restricted.

(b) *Information for which release is restricted*. The information identified below may be released only as set forth herein.

(1) *Release subject to statutory restrictions*. This information may be released only in accordance with the applicable statutory requirements. Once the statutory requirements have been satisfied, the information may be released unless it falls within one of the categories described in the following paragraphs, in which case the policies governing release of information within those categories shall be followed.

(2) *Classified information*. (i) Any information or material, regardless of its physical form or characteristics, that is owned by, produced by or for, or under the control of the United States Government, and which, for national security purposes, must be protected against unauthorized disclosure and is so designated or marked with the appropriate classification.

(ii) Release, access, and dissemination of classified information shall be made through existing security channels in accordance with DoD 5220.22–R;[1] DoD 5220.22–M;[2] and DoD 5200.1–R,[3] which are implementing publications for safeguarding classified information release, access, and dissemination to United States and foreign concerns.

(3) *Contractor bid or proposal information*. (i) This is information prepared by or on behalf of an offeror and submitted to the Government as a part of or in support of the offeror's bid or proposal to enter into a contract with the Government, the disclosure of which would place the offeror at a competitive disadvantage or jeopardize the integrity or the successful completion of the procurement. Contractor bid or proposal information includes cost or pricing data, profit data, overhead and direct labor rates, and manufacturing processes and techniques. Contractor bid or proposal information does not include information that is available to the public.

(ii)(A) *Sealed bids*. (*1*) Prior to bid opening, no release or disclosure of contractor bid information shall be made to anyone other than those who are involved in the evaluation of the bids or to other individuals authorized by the Head of the DoD Component, or his or her designee.

(*2*) After contract award, contractor bid information may be released or disclosed by those authorized by the Head of the DoD Component, or his or her designee, to make such release or disclosure, if the information to be released or disclosed is not subject to a restrictive legend authorized by Federal Acquisition Regulation (FAR) 52.215–12 or release is not otherwise restricted by law.

(*3*) *Negotiated procurements*. Prior to contract award, no release or disclosure of contractor proposal information shall be made to anyone other than those who are involved in the evaluation of the proposals or the source selection or to other individuals authorized by the Head of the DoD

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

[2] Copies may be obtained, at cost, from the Government Printing Office, ATTN: Superintendent of Documents, Washington, DC 20402.

[3] See footnote 1 to § 286h.3(b)(2)(ii).

Component, or his or her designee. DoD Components shall adopt procedures in accordance with FAR 15.413 to protect against release or disclosure of contractor proposal information. After contract award, contractor proposal information may be released or disclosed by those authorized by the Head of the DoD Component, or his or her designee, to make such release or disclosure, if the information to be released or disclosed is not subject to a restrictive legend authorized by FAR 15.509 or FAR 52.215–12 or release is not otherwise restricted by law.

(4) *Source selection information.* (i) This is information prepared or developed for use by the Government in connection with the selection of a bid or proposal for the award of a contract. Only the following information, including copies or extracts thereof, is source selection information:

(A) Bid prices submitted in response to a Government solicitation for sealed bids or lists of such bid prices (applicable prior to bid opening only);

(B) Proposed costs or prices submitted in response to a Government solicitation prior to award of the contract, a list of proposed costs or prices;

(C) Source selection plans;

(D) Technical evaluation plans;

(E) Technical evaluations of competing proposals;

(F) Cost or price evaluations of competing proposals;

(G) Competitive range determinations;

(H) Rankings of competitors;

(I) The reports and evaluations or source selection boards, advisory councils, or the source selection authority (SSA); and

(J) Any other information which:

(*1*) If disclosed, would give an offeror a competitive advantage or jeopardize the integrity or successful completion of the procurement; and

(*2*) Is marked with the legend ''Source Selection Information.''

(ii) *Release of or access to source selection information (SSI)—(A) Access to SSI.* The SSA (including the contracting officer when the contracting officer is the SSA) shall restrict access to source selection information to only those Government employees directly involved in the source selection process or to those individuals who have been authorized by the Head of the DoD Component, or his or her designee, to have access to such information. If the contracting officer or the SSA have not been appointed, the Head of the DoD Component, or his or her designee, shall assure access to such information is properly restricted. Employees supervising or managing employees directly involved in the source selection process are not themselves by virtue of their positions directly involved in the source selection process.

(B) *Release of SSI—(1) Prior to contract award.* Source selection information shall not be released prior to contract award unless the Head of the DoD Component, or his or her designee, determines that release is in the public interest and would not jeopardize the integrity or successful completion of the procurement. The information to be released shall only be released by the contracting officer. The contracting officer shall make release in a manner that does not provide any potential offeror with a competitive advantage.

(*2*) *After contract award.* The need to protect source selection information generally ends with contract award. The contracting officer may release, or authorize the release of, any source selection information related to that contract award except: Source selection information specifically developed or prepared for use with more than one solicitation when there is a continuing need to protect that information; unless otherwise permitted by law, source selection information containing contractor data or extracts thereof which are protected by law; information which would reveal the relative merits or technical standing of the competitors or the evaluation scoring; and any pre-decisional or other information not subject to release under the Freedom of Information Act. Debriefings to unsuccessful offerors shall be conducted in accordance with FAR 15.1003 and Defense Federal Acquisition Regulation Supplement (DFARS) 215.1003(a).

(5) *Planning, programming, and budgetary information.* (i) Planning, Programming, and Budgeting System (PPBS) documents and supporting data bases are not to be disclosed outside the Department of Defense (DoD) and

other governmental agencies directly involved in the defense planning and resource allocation process (e.g., the Office of Management and Budget). PPBS papers and associated data set forth the details of proposed programs and plans. Access to this material by those not directly involved in the PPBS process undermines the confidentiality necessary for the Secretary and Deputy Secretary to obtain candid advice on the content of the defense program. Also, access to PPBS information by private firms seeking contracts with the Department may pose ethical, even criminal, problems for those involved and reduce effective competition in the contract awards process.

(ii)(A) Requests for exceptions to this limitation may be granted on a case-by-case basis to meet compelling needs, after coordination with the Office of General Counsel, by the Head of the OSD office responsible for the PPBS phase to which the document or data base pertains; the Under Secretary of Defense (Policy) for the planning phase; the Assistant Secretary of Defense (Program Analysis and Evaluation) for programming; and the Comptroller, DoD for budgeting. A list of the current major documents and data bases for each PPBS phase is in paragraph (B)(5)(11)(C) of this section; all other PPBS materials are also controlled under this policy.

(B) Disclosure of PPBS information to Congress and the General Accounting Office (GAO) is covered by statute and other procedures.

(C) Major PPBS Documents and Data Bases by Phase.

Planning Phase

(*1*) Defense Planning Guidance.

Programming Phase

(*2*) Fiscal Guidance (when separate from Defense Planning Guidance);

(*3*) Program Objective Memoranda (POM);

(*4*) POM Defense Program (formerly FYDP) documents (POM Defense Program, Procurement Annex, RDT&E Annex);

(*5*) Program Review Proposals;

(*6*) Issue Papers (aka, Major Issue Papers, Tier II Issue Papers, Cover Briefs);

(*7*) Proposed Military Department Program Reductions (or Program Offsets);

(*8*) Tentative Issue Decision Memoranda;

(*9*) Program Decision Memoranda;

Budgeting Phase

(*10*) Defense Program (formerly FYDP) documents for September and President's Budget Estimate submissions including Defense Program Procurement, RDT&E and Construction Annexes;

(*11*) Classified P–1, R–1 and C–1;

(*12*) Program Budget Decisions/Defense Management Review Decisions;

(*13*) Reports Generated by the Automated Budget Review System (BRS);

(*14*) DD Form 1414 Base for Programming;

(*15*) DD Form 1416 Report of Programs;

(*16*) Contract Award Reports;

(*17*) Congressional Data Sheets.

(iii) Contractor requests for information contained in the National Military Strategy Document (including annexes) and the Chairman's Program Assessment Document (including annexes and comments) shall be forwarded to the CJCS who shall determine on a case-by-case basis what information, if any, is releasable to the contractor.

(6) *Documents that disclose the Government's negotiating position*. Documents that would disclose the government's negotiating position (such as pre-negotiation business clearances and positions and government cost estimates) or would adversely impact the government negotiating strategy shall not be released.

(7) *Drafts and working papers*. Drafts and working papers that would otherwise be releasable under paragraph 286h.3(a) shall not be released where their release would inhibit the development of agency positions, jeopardize the free exchange of information that is part of the deliberative process, or compromise the decision-making process.

(c) *Freedom of Information Act*. Where a request for information, the release of which is restricted under paragraph 286h.3(b) is made under the Freedom of Information Act, the request shall be forwarded to the appropriate official

for disposition in accordance with DoD 5400.7–R.[4] Requests for contractor bid or proposal information pursuant to the Freedom of Information Act shall be subject to subparagraph 5–207 a. of DoD 5400.7–R, which requires notice to a non-United States Government source of a record.

**§ 286h.4 Responsibilities.**

(a) The Under Secretary of Defense (Acquisition) shall be responsible for establishing uniform policies and procedures for the release of acquisition-related information.

(b) The Under Secretary of Defense (Policy), Assistant Secretary of Defense (Program Analysis and Evaluation) and Comptroller, DoD are responsible for adjudicating requests for access to Planning, Programming and Budgeting information pertaining to their respective phases of the PPB system.

(c) The Head of each DoD Component shall assure that procedures for the release of acquisition-related information are consistent with the policy contained in this Directive and shall not impose any additional restrictions on release of such information. These procedures shall specifically identify the individuals authorized to release and transmit acquisition-related information.

[4] See footnote 1 to § 286h.3(b)(2)(ii).

# SUBCHAPTER O—PRIVACY PROGRAM

## PART 310—PROTECTION OF PRIVACY AND ACCESS TO AND AMENDEMENT OF INDIVIDUAL RECORDS UNDER THE PRIVACY ACT OF 1974

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310.29 Office of the Secretary of Defense (OSD) exemptions.

APPENDIX A TO PART 310—DOD BLANKET ROUTINE USES


AUTHORITY: 5 U.S.C. 552a.

SOURCE: 84 FR 14730, Apr. 11, 2019, unless otherwise noted.

## Subpart A—General Provisions

### § 310.1 Purpose.

This part contains the rules that the Department of Defense (Department or DoD) follows under the Privacy Act of 1974, 5 U.S.C. 552a. These rules should be read together with the Privacy Act. The rules in this part apply to all records in Privacy Act systems of records maintained by the Department. They describe the procedures by which individuals may request access to records about themselves, request amendment or correction of those records, and request an accounting of disclosures of those records by the Department to other entities outside the Department. In addition, the Department processes all Privacy Act requests for access to records under the Freedom of Information Act (FOIA), 5 U.S.C. 552, following the rules contained in 32 CFR part 286, giving individuals the benefit of both statutes.

### § 310.2 Definitions.

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

*Individual* means a citizen of the United States or an alien lawfully admitted for permanent residence, as defined in the Privacy Act.

*Maintain* includes maintain, collect, use or disseminate, as defined in the Privacy Act.

*Record* means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, or symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph, as defined in the Privacy Act.

*Request for access* to a record means a request made under subsection (d)(1) of the Privacy Act.

*Request for amendment or correction* of a record means a request made under subsection (d)(2) of the Privacy Act.

*Request for an accounting* means a request made under subsection (c)(3) of the Privacy Act.

*Requester* means an individual who makes a request for access, a request for amendment or correction, or a request for an accounting under the Privacy Act.

*System of records* means any group of records under the control of the Department of Defense from which information is retrieved by the name of the individual or by some other identifying number, symbol, or other identifying particular assigned to the individual as defined in the Privacy Act.

## Subpart B—Requests for Access and Amendment to Records

### §310.3 Requesting access to records.

(a) Individuals may request access to records in a system of records or request to be notified if a system of records contains records pertaining to them by writing to or appearing in person before the DoD Component that maintains the record. Written requests should be sent to the address listed in the record access procedures of the system of records notice (SORN) containing the record requested. If the name of the system of records or the address for the DoD Component that has the record is unknown, the individual may look up the SORN or the contact information for the DoD Component Privacy Office at *http://www.defense.gov/privacy*.

(b) For access to the Official Personnel Files of federal civilian employees, which are maintained in the custody of the Department under the authority of the Office of Personnel Management (OPM) SORN OPM/GOVT–1, individuals must contact their DoD Component FOIA Requester Service Center. Contact information for DoD Component FOIA Requester Service Centers can be found at *https://www.foia.gov/report-makerequest.html*.

(c) Requesters should provide their full name, current address and email address, and when requested in the access procedures of the applicable SORN, date of birth, place of birth, and telephone number, to assist the DoD Component in responding to the request and providing released records to the requester. The requester must sign the request and have it notarized or submit the request under 28 U.S.C. 1746, a law that permits unsworn statements to be made under penalty of perjury as a substitute for notarization. To assist with the identification and location of requested records, when requested in the access procedures of the applicable SORN, the requester may also, at his or her option, include his or her DoD Identification Number (DoD ID Number) or Social Security Number (SSN). Providing a DoD ID Number or SSN should be appropriate for the type of record being sought.

(d) When making a request for access to records as the parent or guardian for an individual who is a minor or for an individual who is determined by a court to be incompetent, the parent/guardian must establish:

(1) The identity of the individual who is the subject of the record;

(2) The parent/guardian's own identity;

(3) That the requester is the parent or guardian of that individual, which may be proven by providing a copy of the individual's birth certificate showing parentage or a court order establishing the guardianship; and

(4) That the parent or guardian is acting on behalf of the individual in making the request.

(e) Members of the Military Services and married persons are not considered minors, regardless of age.

### § 310.4 Access exemptions.

DoD may deny an individual access to certain information about the individual that resides in a DoD Component's system of records when an exemption from the Privacy Act is claimed for the system of records and codified in the Code of Federal Regulations as described in § 310.12. When an exemption pursuant to subsection (j) or (k) of the Privacy Act exists, it will be listed in the SORN for the particular system in which the individual's information is located. Records compiled in reasonable anticipation of a civil action or proceeding may be withheld pursuant to subsection (d)(5) of the Privacy Act.

### § 310.5 Responses to requests for access to records.

(a) Upon receipt of a request, a component will send an acknowledgment letter to the requester within 10 days (excluding Saturdays, Sundays, and legal public holidays) which shall confirm the requester's agreement to pay duplication fees, if any, and provide an assigned case file number for reference purposes.

(b) In some cases, the DoD Component initially receiving the request may refer the request to another DoD Component or agency. The DoD Component that initially received the request will send the requester a notice of referral that will identify each DoD Component or agency to which the request has been referred, as well as which part of the request has been referred.

(c) Access to protected health information, including medical records, is governed by the Privacy Act and DoD 6025.18–R, ''DoD Health Information Privacy Regulation'' (available at *http://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dodm/602518r.pdf*).

(d) When a DoD Component makes a determination to grant a request for access in whole or in part, the DoD Component shall notify the requester in writing or simply provide the requested record. The response to the request may be made in lieu of the acknowledgment of receipt provided the response will be made within 10 days (excluding Saturdays, Sundays, and legal public holidays). The DoD Component shall inform the requester of any fee charged for duplication of the record(s). If the request is made in person, the individual may receive the records directly in a manner not unreasonably disruptive of the DoD Component's operations, upon payment of any applicable fee. If the individual is accompanied by another person, the individual may be required to authorize in writing any discussion of the records in the presence of the other person.

(e) A DoD Component denying a request for access in any respect shall notify the requester of that determination in writing.

(1) The notice of denial consists of:

(i) A determination to withhold any requested record in whole or in part;

(ii) A determination that a requested record does not exist or cannot be located; or

(iii) A determination that what has been requested is not a record subject to the Privacy Act.

(2) The denial notification letter shall be signed by the head of the DoD Component, or the DoD Component head's designee, and shall include:

(i) The date of the denial;

(ii) A brief statement of the reason(s) for the denial, including any Privacy Act exemption(s) applied by the DoD Component in denying the request; and

(iii) A statement that the denial can be appealed within 60 calendar days in accordance with § 310.6. The statement will include the position title and the address of the appellate authority.

### § 310.6 Appeals from denials of requests for access to records.

(a) If the requester is dissatisfied with a DoD Component's response, the requester can appeal an adverse determination denying the request to the appellate authority listed in the notification of denial letter. The appeal must be made in writing, and it must be postmarked within 60 calendar days of the date of the letter denying the initial request for records. The letter of appeal should include a copy of the DoD Component's determination (including the assigned request number, if known). For the quickest possible handling, the appeal letter and the envelope should be marked: ''Privacy Act Appeal.''

(b) The appellant will be notified of the decision on his or her appeal in writing. If the decision affirms the adverse determination in whole or in part, the notification will include a brief statement of the reason(s) for the affirmation, including any exemptions applied, and will inform the appellant of the Privacy Act provisions for judicial review of the appellate authority's decision. If the adverse determination is reversed or modified, in whole or in part, the appellant will be notified in writing of this decision and the request will be reprocessed in accordance with that appeal decision.

(c) In order to seek a judicial review of a denial of a request for access to records, a requester must first file an appeal under this section.

(d) An appeal ordinarily will not be acted on if the request becomes a matter of litigation.

### §310.7 Requests for amendment or correction of records.

(a) If the record is not subject to amendment and correction as stated in paragraph (b) of this section, an individual may make a request for amendment or correction of a DoD Component's record about that individual by writing directly to the DoD Component that maintains the record as identified in the published SORN applicable to the record. The request should identify each particular record in question, state the amendment or correction that is sought, and state why the record is not accurate, relevant, timely, or complete without the correction. The individual will also need to verify identity in the same manner as described in §§310.3(c) through (d). Factual documentation that is helpful to the DoD Component privacy officials should be submitted with the request. If it is believed that the same record exists in more than one system of records, this should be stated in the request, and the request should be addressed to each DoD Component that maintains a system of records containing the record as noted in this paragraph.

(b) Certain records are not subject to amendment or correction under the Privacy Act:

(1) Proceedings and determinations of courts-martial, military tribunal, or Military Boards of Correction are not generally subject to amendment or correction under the Privacy Act.

(2) Records in systems of records that have been exempted from amendment and correction under the Privacy Act, 5 U.S.C. 552a(j) or (k) are not subject to amendment or correction.

(3) The amendment process is not intended to permit the alteration of records presented in the course of judicial or quasi-judicial proceedings such as the adjudication process for personnel security clearances or contesting grades in academic records. Any amendments or changes to these records normally are made through the specific procedures established for the amendment of such records.

(4) Nothing in the amendment process is intended or designed to permit a collateral attack upon what has already been the subject of a judicial or quasi-judicial determination. However, while the individual may not attack the accuracy of the judicial or quasi-judicial determination under this part, he or she may challenge the accuracy of the recording of that action.

(c) An individual requesting amendment or correction of records will receive a written acknowledgment of receipt of the request within 10 days (excluding Saturdays, Sundays, and legal public holidays), as required by the Privacy Act. The response to the request may be made in lieu of the acknowledgment of receipt provided the response is made within 10 days (excluding Saturdays, Sundays, and legal public holidays). The response to the request must be made promptly and indicate whether the request is granted or denied.

(d) If the request for amendment or correction is granted in whole or in part, the response to the individual will receive a description or copy of the amendment or correction made and, if a copy of the amended or corrected record is not included in the response, notification of the right to obtain a copy of the corrected or amended record in disclosable form.

(e) If the request for amendment or correction is denied in whole or in part,

the response to the individual will include a signed letter stating:

(1) The reason(s) for the denial; and

(2) The procedure for appeal of the denial under paragraph (f) of this section, including the name, position title and business address of the official who will act on the appeal.

(f) An individual may appeal the denial of a request for amendment or correction to the individual's record to the appellate authority at the address listed in the notification of denial letter, in the same manner as for a denial of a request for access to records (see § 310.6). The appeal determination shall be made within 30 working days (excluding Saturdays, Sundays, and legal public holidays) from the date of the appeal, unless the period is extended for good cause. If the appeal is denied in whole or in part, the individual will be advised of the right to file a Statement of Disagreement as described in paragraph (g) of this section, and of the right under the Privacy Act for judicial review of the decision.

(g) If an appeal under this section is denied in whole or in part, the individual has the right to file a Statement of Disagreement that states the reason(s) for disagreeing with the DoD Component's denial of the request for amendment or correction. Statements of Disagreement must be concise, must clearly identify each part of any record that is disputed, and should generally be no longer than one typed page. The Statement of Disagreement must be sent to the DoD Component holding the respective record. The Statement of Disagreement will be filed or notated in the system of records, and an annotation to the record itself will indicate the existence and location of the Statement of Disagreement.

(h) Notifications of amendment/correction or statements of disagreement will be made to all persons, organizations, and agencies to which the record was previously disclosed if an accounting of that disclosure was made in accordance with subsection (c) of the Privacy Act and § 310.9. If an individual has filed a Statement of Disagreement, a copy of the statement will be appended to the disputed record whenever the record is disclosed, and a concise statement of the reason(s) for denying the request to amend or correct the record may also be appended.

### § 310.8 Civil remedies.

In addition to the right to judicial review after a denied appeal for access to or amendment of a record, the requester has the right to bring a civil action against the Department if the Department:

(a) Fails to maintain a record concerning the individual with such accuracy, relevance, timeliness and completeness as is necessary to assure fairness in any determination relating to the qualifications, character, rights, opportunities of, or benefits to the individual that may be made on the basis of such record, and consequently a determination is made which is adverse to the individual; or

(b) Fails to comply with any other provision of the Privacy Act or this rule, in such a way as to have an adverse effect on the individual.

### § 310.9 Requests for an accounting of record disclosures.

(a) An individual may make a request for an accounting of any disclosure that has been made by the Department to another person, organization, or agency of any record about the individual maintained in a system of records.

(b) This accounting contains the date, nature, and purpose of each disclosure, as well as the name and address of the person, organization, or agency to which the disclosure was made. Records of disclosure accountings are maintained for five years after the disclosure or for the life of the record, whichever is longer.

(c) The request for an accounting should identify each particular record in question and should be made by writing directly to the DoD Component that maintains the record, following the procedures in § 310.3.

(d) DoD Components are not required to provide disclosure accountings when related to:

(1) Disclosures for which accountings are not required to be kept—in other words, disclosures that are made to employees within the Department who

have a need for the record in the performance of their duties and disclosures that are made under the Freedom of Information Act;

(2) Disclosures made to law enforcement agencies for authorized law enforcement activities in response to written request from the head of the agency or instrumentality of those law enforcement agencies specifying the law enforcement activities for which the disclosures are sought; or

(3) Disclosures made from systems of records that have been exempted from accounting requirements.

(e) An individual may appeal a denial of a request for a disclosure accounting to the address listed in the notification of denial letter, in the same manner as a denial of a request for access to records, following the procedures in § 310.6.

### § 310.10 Fees.

(a) When an individual makes a Privacy Act request for a copy of a record in a system of records, the request shall be considered an agreement to pay all applicable fees.

(b) There is no minimum fee for duplication, and there is no automatic charge for processing a request. Fees for duplication of records will be charged in the same manner as requests for records under the Freedom of Information Act.

(c) Normally, fees are waived automatically if the direct costs of a given request are less than the cost of processing the fee. Decisions to waive or reduce fees that exceed the waiver threshold are made on a case-by-case basis.

### § 310.11 Other rights and services.

Nothing in this part shall be construed to entitle any person, as of right, to any service or to the disclosure of any record to which such person is not entitled under the Privacy Act.

## Subpart C—Exemption Rules

### § 310.12 Types of exemptions.

(a) *Exemptions*. There are three types of exemptions permitted by the Privacy Act:

(1) An access exemption that exempts records complied in reasonable anticipation of a civil action or proceeding from the access provisions of the Act, pursuant to subsection (d)(5) of the Privacy Act;

(2) General exemptions that authorize the exemption of a system of records from all but certain specifically identified provisions of the Act, pursuant to subsection (j) of the Privacy Act; and

(3) Specific exemptions that allow a system of records to be exempted only from certain designated provisions of the Act, pursuant to subsection (k) of the Privacy Act. Nothing in the Privacy Act permits exemption of any system of records from all provisions of the Act.

(b) *Civil Action or Proceeding*. In accordance with 5 U.S.C. 552a(d)(5), an individual is not entitled to access information that is compiled in reasonable anticipation of a civil action or proceeding. The term ''civil action or proceeding'' is intended to include court proceedings, preliminary judicial steps, and quasi-judicial administrative hearings or proceedings (*i.e.*, adversarial proceedings that are subject to rules of evidence). Any information prepared in anticipation of such actions or proceedings, including information prepared to advise DoD officials of the possible legal or other consequences of a given course of action, is protected. The exemption is similar to the attorney work-product privilege except that it applies even when the information is prepared by non-attorneys. The exemption does not apply to information compiled in anticipation of criminal actions or proceedings.

(c) *Exempt Records Systems*. Pursuant to 5 U.S.C. 552a(k)(1), all systems of records maintained by DoD will be exempt from the access provisions of 5 U.S.C. 552a(d) and the notification of access procedures of 5 U.S.C. 522a(e)(4)(H) to the extent that the system contains any information properly classified under Executive Order 13526, and is required by the Executive Order to be kept secret in the interest of national defense or foreign policy. This exemption, which may be applicable to parts of all DoD systems of records, is necessary because certain record systems not otherwise specifically designated for exemptions herein may

contain isolated items of information which have been properly classified.

(d) *Exempt records in non-exempt systems.* Exempt records temporarily in the custody of another DoD Component are considered the property of the originating DoD Component. Access to these records is controlled by the system notices and rules of the originating DoD Component. Exempt records that have been incorporated into a nonexempt system of records are still exempt but only to the extent to which the provisions of the Act for which an exemption has been claimed are identified. An exemption claimed for the system of records from which the record is obtained remains in effect when the purposes underlying the exemption for the record are still valid and necessary to protect the contents of the record. If a record is accidentally misfiled into a system of records, the system notice and rules for the system in which it should actually be filed shall govern.

### § 310.13 Exemptions for DoD-wide systems.

(a) *Use of DoD-wide exemptions.* DoD-wide exemptions for DoD-wide systems of records are established pursuant to 5 U.S.C. 552a(j) and (k) of the Privacy Act.

(b) *Promises of confidentiality.* (1) Only the identity of and information furnished by sources that have been given an express promise of confidentiality may be protected from disclosure under this section, consistent with (k)(2), (k)(5), and (k)(7) of the Privacy Act, as applicable. However, the identity of sources who were given implied promises of confidentiality in inquiries conducted before September 27, 1975, also may be protected from disclosure.

(2) Ensure promises of confidentiality are not automatically given but are used sparingly. Establish appropriate procedures and identify fully categories of individuals who may make such promises. Promises of confidentiality shall be made only when they are essential to obtain the information sought (see 5 CFR part 736).

(c) *Access to records for which DOD-wide exemptions are claimed.* Deny the individual access only to those portions of the records for which the claimed exemption applies.

(d) *Exempt records.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent that such provisions have been identified and an exemption claimed for the record and the purposes underlying the exemption for the record pertain to the record.

(e) *DoD-wide exemptions.* The following exemptions are applicable to all components of the Department of Defense for the following system(s) of records:

(1) *System identifier and name.* DUSDI 01–DoD ''Department of Defense (DoD) Insider Threat Management and Analysis Center (DITMAC) and DoD Component Insider Threat Records System.''

(i) *Exemption.* This system of records is exempted from subsections (c)(3) and (4); (d)(1), (2), (3) and (4); (e)(1), (2), (3), (4)(G)(H) and (I), (5) and (8); and (g) of the Privacy Act.

(ii) *Authority.* 5 U.S.C. 552a(j)(2) and (k)(1), (2), (4), (5), (6), and (7).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsection (c)(3).* To provide the subject with an accounting of disclosures of records in this system could inform that individual of the existence, nature, or scope of an actual or potential law enforcement or counterintelligence investigation, and thereby seriously impede law enforcement or counterintelligence efforts by permitting the record subject and other persons to whom he might disclose the records to avoid criminal penalties, civil remedies, or counterintelligence measures. Access to the accounting of disclosures could also interfere with a civil or administrative action or investigation which may impede those actions or investigations. Access also could reveal the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations.

(B) *Subsection (c)(4).* This subsection is inapplicable to the extent that an exemption is being claimed for subsection (d).

(C) *Subsection (d)(1).* Disclosure of records in the system could reveal the

identity of confidential sources and result in an unwarranted invasion of the privacy of others. Disclosure may also reveal information relating to actual or potential criminal investigations. Disclosure of classified national security information would cause damage to the national security of the United States. Disclosure could also interfere with a civil or administrative action or investigation; reveal the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations; and reveal the confidentiality and integrity of Federal testing materials and evaluation materials used for military promotions when furnished by a confidential source.

(D) *Subsection (d)(2)*. Amendment of the records could interfere with ongoing criminal or civil law enforcement proceedings and impose an impossible administrative burden by requiring investigations to be continuously reinvestigated.

(E) *Subsections (d)(3) and (4)*. These subsections are inapplicable to the extent exemption is claimed from subsections (d)(1) and (2).

(F) *Subsection (e)(1)*. It is often impossible to determine in advance if investigatory records contained in this system are accurate, relevant, timely and complete, but, in the interests of effective law enforcement and counterintelligence, it is necessary to retain this information to aid in establishing patterns of activity and provide investigative leads.

(G) *Subsection (e)(2)*. To collect information from the subject individual could serve notice that he or she is the subject of a criminal investigation and thereby present a serious impediment to such investigations.

(H) *Subsection (e)(3)*. To inform individuals as required by this subsection could reveal the existence of a criminal investigation and compromise investigative efforts.

(I) *Subsection (e)(4)(G), (H), and (I)*. These subsections are inapplicable to the extent exemption is claimed from subsections (d)(1) and (2).

(J) *Subsection (e)(5)*. It is often impossible to determine in advance if investigatory records contained in this system are accurate, relevant, timely and complete, but, in the interests of effective law enforcement, it is necessary to retain this information to aid in establishing patterns of activity and provide investigative leads.

(K) *Subsection (e)(8)*. To serve notice could give persons sufficient warning to evade investigative efforts.

(L) *Subsection (g)*. This subsection is inapplicable to the extent that the system is exempt from other specific subsections of the Privacy Act.

(iv) *Exempt records from other systems*. In addition, in the course of carrying out analysis for insider threats, exempt records from other systems of records may in turn become part of the case records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained into this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the original primary system of which they are a part.

(2) *System identifier and name*. DUSDI 02–DoD ''Personnel Vetting Records System.''

(i) *Exemption*. This system of records is exempted from subsections 5 U.S.C. 552a(c)(3), (d)(1), (d)(2), (d)(3), (d)(4), and (e)(1) of the Privacy Act.

(ii) *Authority*. 5 U.S.C. 552a(k)(1), (k)(2), (k)(3), (k)(5), (k)(6), and (k)(7).

(iii) *Exemption from the particular subsections*. Exemption from the particular subsections is justified for the following reasons:

(A) *Subsections (c)(3), (d)(1), and (d)(2)—(1) Exemption (k)(1)*. Personnel investigations and vetting records may contain information properly classified pursuant to Executive Order. Application of exemption (k)(1) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could disclose classified information that could be detrimental to national security.

(*2*) *Exemption (k)(2)*. Personnel investigations and vetting records may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) for such records may be necessary because access to, amendment

of, or release of the accounting of disclosures of such records could: Inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or counterintelligence investigation, and thereby seriously impede law enforcement or counterintelligence efforts by permitting the record subject and other persons to whom he might disclose the records to avoid criminal penalties, civil remedies, or counterintelligence measures; interfere with a civil or administrative action or investigation which may impede those actions or investigations; and result in an unwarranted invasion of the privacy of others. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(*3*) *Exemption (k)(3)*. Personnel investigations and vetting records may contain information pertaining to providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056. Application of exemption (k)(3) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could compromise the safety of the individuals protected pursuant to 18 U.S.C. 3056 and compromise protective services provided to the President and other individuals. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(*4*) *Exemption (k)(5)*. Personnel investigations and vetting records may contain investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information. In some cases, such records may contain information pertaining to the identity of a source who furnished information to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). Application of exemption (k)(5) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could identify these confidential sources who might not have otherwise come forward to assist the Government, could hinder the Government's ability to obtain information from future confidential sources, and result in an unwarranted invasion of the privacy of others. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(*5*) *Exemption (k)(6)*. Personnel investigations and vetting records may contain information relating to testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service. Application of exemption (k)(6) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could compromise the objectivity and fairness of the testing or examination process. Amendment of such records could also impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(*6*) *Exemption (k)(7)*. Personnel investigations and vetting records may contain evaluation material used to determine potential for promotion in the armed services. In some cases, such records may contain information pertaining to the identity of a source who furnished information to the Government under an express promise that the source's identity would be held in confidence (or prior to the effective date of the Privacy Act, under an implied promise). Application of exemption (k)(7) for such records may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could identify these confidential sources who might not have otherwise come forward to assist the Government, hinder the Government's ability to obtain information from future confidential sources, and result in an unwarranted invasion of the privacy of others. Amendment of such records could also impose a highly impracticable administrative burden

by requiring investigations to be continuously reinvestigated.

(B) *Subsections (d)(3) and (4).* These subsections are inapplicable to the extent an exemption is claimed from (d)(1) and (2). Moreover, applying the amendment appeal procedures toward background investigation and vetting records could impose a highly impracticable administrative burden by requiring investigations to be continuously reinvestigated.

(C) *Subsection (e)(1).* In the collection of information for authorized vetting purposes, it is not always possible to conclusively determine the relevance and necessity of particular information in the early stages of the investigation or adjudication. In some instances, it will be only after the collected information is evaluated in light of other information that its relevance and necessity for effective investigation and adjudication can be assessed. Collection of such information permits more informed decision-making by the Department when making required suitability, eligibility, fitness, and credentialing determinations. Accordingly, application of exemptions (k)(1), (k)(2),(k)(3), (k)(5), (k)(6), and (k)(7) may be necessary.

(iv) *Exempt records from other systems.* In addition, in the course of carrying out personnel vetting, including records checks for continuous vetting, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained into this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the original primary system of which they are a part.

(3) *System identifier and name.* DoD–0004, ''Defense Repository for Common Enterprise Data (DRCED).''

(i) *Exemptions.* This system of records is exempt from subsections 5 U.S.C. 552a(c)(3), (d)(1), (d)(2), (d)(3), and (d)(4) of the Privacy Act.

(ii) *Authority.* 5 U.S.C. 552a(k)(1).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsection (c)(3) (accounting of disclosures).* Because common enterprise records may contain information properly classified pursuant to executive order, the disclosure accountings of such records may also contain information properly classified pursuant to executive order, the disclosure of which may cause damage to national security.

(B) *Subsections (d)(1), (2), (3), and (4) (record subject's right to access and amend records).* Access to and amendment of records by the record subject could disclose information properly classified pursuant to executive order. Disclosure of classified records to an individual may cause damage to national security.

(iv) *Exempt records from other systems.* In addition, in the course of carrying out the overall purpose for this system, exempt records from other system of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

(4) *System identifier and name.* DoD–0005, ''Defense Training Records.''

(i) *Exemptions.* This system of records is exempt from 5 U.S.C. 552a(c)(3) and (d)(1), (2), (3), and (4).

(ii) *Authority.* 5 U.S.C. 552a(k)(1) and (6).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections is justified for the following reasons:

(A) *Subsections (c)(3), (d)(1), and (d)(2)—(1) Exemption (k)(1).* Training records in this system of records may contain information concerning DoD personnel or training materials that is properly classified pursuant to executive order. Application of exemption (k)(1) for such records may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information. Disclosure of classified records

to an individual may cause damage to national security.

(*2*) *Exemption (k)(6)*. Training records in this system of records may contain information relating to testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service. Application of exemption (k)(6) for such records may be necessary when access to and amendment of the records, or release of the accounting of disclosure for such records, may compromise the objectivity and fairness of the testing or examination process. Amendment of such records could also impose a highly impracticable administrative burden by requiring testing and examinations to be continuously re-administered.

(B) *Subsections (d)(3) and (4)*. These subsections are inapplicable to the extent an exemption is claimed from subsection (d)(2). Moreover, applying the amendment appeal procedures to training and examination materials could impose a highly impractical administrative burden by requiring testing and examinations to be continuously re-administered.

(iv) *Exempt records from other systems*. In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

(5) *System identifier and name*. DoD–0006, ''Military Justice and Civilian Criminal Case Records.''

(i) *Exemptions*. This system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1); (e)(2); (e)(3); (e)(4)(G), (H), and (I); (e)(5); (e)(8); (f); and (g) of the Privacy Act to the extent the records are subject to exemption pursuant to 5 U.S.C. 552a(j)(2). This system of records is exempt from 5 U.S.C. 552a(c)(3); (d)(1), (2), (3), and (4); (e)(1); (e)(4)(G), (H), and (I); and (f) of the Privacy Act to the extent the records are subject to exemption pursuant to 5 U.S.C. 552a(k)(1) and (k)(2).

(ii) *Authority*. 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2).

(iii) *Exemption from the particular subsections*. Exemption from the particular subsections is justified for the following reasons:

(A) *Subsection (c)(3), (d)(1), and (d)(2)—(1) Exemption (j)(2)*. Records in this system of records may contain investigatory material compiled for criminal law enforcement purposes to include information identifying criminal offenders and alleged offenders, information compiled for the purpose of criminal investigation, or reports compiled during criminal law enforcement proceedings. Application of exemption (j)(2) may be necessary because access to, amendment of, or release of the accounting of disclosures of such records could inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records to avoid criminal penalties or disciplinary measures; reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD's ability to obtain information from future confidential sources and result in an unwarranted invasion of the privacy of others.

(*2*) *Exemption (k)(1)*. Records in this system of records may contain information that is properly classified pursuant to executive order. Application of exemption (k)(1) may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information. Disclosure of classified records to an individual may cause damage to national security.

(*3*) *Exemption (k)(2)*. Records in this system of records may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) may be necessary because access

to, amendment of, or release of the accounting of disclosures of such records could inform the record subject of an investigation of the existence, nature, or scope of an actual or potential law enforcement or disciplinary investigation, and thereby seriously impede law enforcement or prosecutorial efforts by permitting the record subject and other persons to whom he might disclose the records or the accounting of records to avoid criminal penalties, civil remedies, or disciplinary measures; interfere with a civil or administrative action or investigation which may impede those actions or investigations; reveal confidential sources who might not have otherwise come forward to assist in an investigation and thereby hinder DoD's ability to obtain information from future confidential sources; and result in an unwarranted invasion of the privacy of others.

(B) *Subsection (c)(4), (d)(3) and (4).* These subsections are inapplicable to the extent that an exemption is being claimed from subsections (d)(1) and (2).

(C) *Subsection (e)(1).* In the collection of information for investigatory or law enforcement purposes, it is not always possible to conclusively determine the relevance and necessity of particular information in the early stages of the investigation or adjudication. In some instances, it will be only after the collected information is evaluated in light of other information that its relevance and necessity for effective investigation and adjudication can be assessed. Collection of such information permits more informed decision-making by the Department when making required disciplinary and prosecutorial determinations. Additionally, records within this system may be properly classified pursuant to executive order. Accordingly, application of exemptions (j)(2), (k)(1) and (k)(2) may be necessary.

(D) *Subsection (e)(2).* To collect information from the subject individual could serve notice that he or she is the subject of a criminal investigation and thereby present a serious impediment to such investigations. Collection of information only from the individual accused of criminal activity or misconduct could also subvert discovery of relevant evidence and subvert the course of justice. Accordingly, application of exemption (j)(2) may be necessary.

(E) *Subsection (e)(3).* To inform individuals as required by this subsection could reveal the existence of a criminal investigation and compromise investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(F) *Subsections (e)(4)(G) and (H).* These subsections are inapplicable to the extent an exemption is claimed from subsections (d)(1) and (2).

(G) *Subsection (e)(4)(I).* To the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect the privacy and physical safety of witnesses and informants. Accordingly, application of exemptions (j)(2), (k)(1), and (k)(2) may be necessary.

(H) *Subsection (e)(5).* It is often impossible to determine in advance if investigatory records contained in this system are accurate, relevant, timely and complete, but, in the interests of effective law enforcement, it is necessary to retain this information to maintain an accurate record of the investigatory activity to preserve the integrity of the investigation and satisfy various Constitutional and evidentiary requirements, such as mandatory disclosure of potentially exculpatory information in the investigative file to a defendant. It is also necessary to retain this information to aid in establishing patterns of activity and provide investigative leads. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined through judicial processes. Accordingly, application of exemption (j)(2) may be necessary.

(I) *Subsection (e)(8).* To serve notice could give persons sufficient warning to evade investigative efforts. Accordingly, application of exemption (j)(2) may be necessary.

(J) *Subsection (f).* The agency's rules are inapplicable to those portions of

the system that are exempt. Accordingly, application of exemptions (j)(2), (k)(1), and (k)(2) may be necessary.

(K) *Subsection (g).* This subsection is inapplicable to the extent that the system is exempt from other specific subsections of the Privacy Act.

(iv) *Exempt records from other systems.* In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

(6) *System identifier and name.* DoD 0007, ''Defense Reasonable Accommodation and Assistive Technology Records.''

(i) *Exemptions.* This system of records is exempt from 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(4)(G), (H), and (I); and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1).

(iii) *Exemption from the particular subsections.* Exemption from the particular subsections pursuant to exemption (k)(1) is justified for the following reasons:

(A) *Subsections (c)(3), (c)(4), (d)(1), and (d)(2).* Records in this system of records may contain information concerning individuals that is properly classified pursuant to executive order. Application of exemption (k)(1) for such records may be necessary because access to and amendment of the records, or release of the accounting of disclosures for such records, could reveal classified information. Disclosure of classified records to an individual may cause damage to national security. Accordingly, application of exemption (k)(1) may be necessary.

(B) *Subsections (d)(3) and (4).* Subsections (d)(3) and (4) are inapplicable to the extent an exemption is claimed from (d)(2).

(C) *Subsections (e)(4)(G) and (H) and Subsection (f).* Subsections (e)(4)(G) and (H) and subsection (f) are inapplicable to the extent exemption is claimed from the access and amendment provisions of subsection (d). Because portions of this system are exempt from the individual access and amendment provisions of subsection (d) for the reasons noted in paragraphs (e)(6)(iii)(A) and (B) of this section, DoD is not required to establish requirements, rules, or procedures with respect to such access or amendment provisions. Providing notice to individuals with respect to the existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access, view, and seek to amend records pertaining to themselves in the system would potentially undermine national security and the confidentiality of classified information. Accordingly, application of exemption (k)(1) may be necessary.

(D) *Subsection (e)(4)(I).* To the extent that subsection (e)(4)(I) is construed to require more detailed disclosure than the broad information currently published in the system notice concerning categories of sources of records in the system, an exemption from this provision is necessary to protect national security and the confidentiality of sources and methods, and other classified information.

(iv) *Exempt records from other systems.* In the course of carrying out the overall purpose for this system, exempt records from other systems of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

(7)–(8) [Reserved]

(9) *System identifier and name.* DoD–0003, ''Mobilization Deployment Management Information System (MDMIS).''

(i) *Exemptions.* This system of records is exempt from subsections 5 U.S.C. 552a(c)(3), (d)(1), (d)(2), (d)(3), and (d)(4) of the Privacy Act.

(ii) *Authority*. 5 U.S.C. 552a(k)(1).

(iii) *Exemption from the particular subsections*. Exemption from the particular subsections is justified for the following reasons:

(A) *Subsection (c)(3) (accounting of disclosures)*. Because records in this system may contain information properly classified pursuant to executive order, the disclosure accountings of such records may also contain information properly classified pursuant to executive order, the disclosure of which may cause damage to national security.

(B) *Subsections (d)(1), (2), (3), and (4) (record subject's right to access and amend records)*. Access to and amendment of records by the record subject could disclose information properly classified pursuant to executive order. Disclosure of classified records to an individual may cause damage to national security.

(iv) *Exempt records from other systems*. In addition, in the course of carrying out the overall purpose for this system, exempt records from other system of records may in turn become part of the records maintained in this system. To the extent that copies of exempt records from those other systems of records are maintained in this system, the DoD claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the prior system(s) of which they are a part, provided the reason for the exemption remains valid and necessary.

[84 FR 14730, Apr. 11, 2019, as amended at 86 FR 38561, July 22, 2021; 86 FR 52072, Sept. 20, 2021; 86 FR 72524, Dec. 22, 2021; 87 FR 28775, May 11, 2022; 87 FR 30417, May 19, 2022]

### § 310.14 Department of the Air Force exemptions.

(a) All systems of records maintained by the Department of the Air Force shall be exempt from the requirements of 5 U.S.C. 552a(d) pursuant to 5 U.S.C. 552a(k)(1) to the extent that the system contains any information properly classified under Executive Order 12958 and that is required by Executive Order to be kept classified in the interest of national defense or foreign policy. This exemption is applicable to parts of all systems of records including those not otherwise specifically designated for exemptions herein, which contain isolated items of properly classified information.

(b) An individual is not entitled to have access to any information compiled in reasonable anticipation of a civil action or proceeding (5 U.S.C. 552a(d)(5)).

(c) No system of records within Department of the Air Force shall be considered exempt under subsection (j) or (k) of the Privacy Act until the exemption rule for the system of records has been published as a final rule in the FEDERAL REGISTER.

(d) Consistent with the legislative purpose of the Privacy Act of 1974, the Department of the Air Force will grant access to non-exempt material in the records being maintained. Disclosure will be governed by the Department of the Air Force's Privacy Instruction, but will be limited to the extent that identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential violation will not be alerted to the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered, the privacy of third parties will not be violated; and that the disclosure would not otherwise impede effective law enforcement. Whenever possible, information of the above nature will be deleted from the requested documents and the balance made available. The controlling principle behind this limited access is to allow disclosures except those indicated above. The decisions to release information from these systems will be made on *a case-by-case basis*.

(e) *General exemptions*. The following systems of records claim an exemption under 5 U.S.C. 552a(j)(2), with the exception of F090 AF IG B, Inspector General Records and F051 AF JA F, Courts-Martial and Article 15 Records. They claim both the (j)(2) and (k)(2) exemption, and are listed under this part:

(1) *System identifier and name*. F071 AF OSI A, Counter Intelligence Operations and Collection Records.

(2) *System identifier and name*. F071 AF OSI C, Criminal Records.

(3) *System identifier and name*. F071 AF OSI D, Investigative Support Records.

(4) *System identifier and name.* F031 AF SP E, Security Forces Management Information System (SFMIS).

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if information is compiled and maintained by a component of the agency which performs as its principle function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from the following subsections of 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), and (I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) To protect ongoing investigations and to protect from access criminal investigation information contained in this record system, so as not to jeopardize any subsequent judicial or administrative process taken as a result of information contained in the file.

(B) From subsection (c)(3) because the release of the disclosure accounting, for disclosures pursuant to the routine uses published for this system, would permit the subject criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(C) From subsection (c)(4) because an exemption is being claimed for subsection this subsection will not be applicable.

(D) From subsection (d) because access the records contained in this system would inform the subject of an investigation of existence of that investigation, provide subject of the investigation with information that might enable him to avoid detection, and would present a serious impediment to law enforcement.

(E) From subsection (e)(4)(H) because system of records is exempt from individual access pursuant to subsection (j) of the Privacy Act of 1974.

(F) From subsection (f) because this system of records has been exempted from access provisions of subsection (d).

(5) *System identifier and name.* F031 AF SF A, Correction and Rehabilitation Records.

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if information is compiled and maintained by a component of the agency which performs as its principle function any activity pertaining to the enforcement of criminal laws. Portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from the following subsections of 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(3), (e)(4)(G), (H) and (I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting, for disclosures pursuant to the routine uses published for this system, would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), this subsection will not be applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(E) From subsections (e)(4)(G) and (H) because this system of records is exempt from individual access pursuant to subsections (j)(2) of the Privacy Act of 1974.

(F) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal

and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(G) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(H) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(I) From subsection (f) because this system of records has been exempted from the access provisions of subsection (d).

(J) From subsection (g) because this system of records compiled for law enforcement purposes and has been exempted from the access provisions of subsections (d) and (f).

(6) *System identifier and name.* F090 AF IG B, Inspector General Records.

(i) *Exemption.* (A) Parts of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principle function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from the following subsections of 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (H), and (I), (e)(5), (e)(8), (f), and (g).

(B) Investigative material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (e)(6)(i)(B). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(j)(2) and (k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of accounting of disclosure would inform a subject that he or she is under investigation. This information would provide considerable advantage to the subject in providing him or her with knowledge concerning the nature of the investigation and the coordinated investigative efforts and techniques employed by the cooperating agencies. This would greatly impede the Air Force IG's criminal law enforcement.

(B) From subsection (c)(4) and (d), because notification would alert a subject to the fact that an open investigation on that individual is taking place, and might weaken the ongoing investigation, reveal investigative techniques, and place confidential informants in jeopardy.

(C) From subsection (e)(1) because the nature of the criminal and/or civil investigative function creates unique problems in prescribing a specific parameter in a particular case with respect to what information is relevant or necessary. Also, information may be received which may relate to a case under the investigative jurisdiction of another agency. The maintenance of this information may be necessary to provide leads for appropriate law enforcement purposes and to establish patterns of activity that may relate to the jurisdiction of other cooperating agencies.

(D) From subsection (e)(2) because collecting information to the fullest extent possible directly from the subject individual may or may not be practical in a criminal and/or civil investigation.

(E) From subsection (e)(3) because supplying an individual with a form containing a Privacy Act Statement would tend to inhibit cooperation by many individuals involved in a criminal and/or civil investigation. The effect would be somewhat adverse to established investigative methods and techniques.

(F) From subsections (e)(4)(G), (H), and (I) because this system of records is exempt from the access provisions of subsection (d) and (f).

(G) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(H) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to law enforcement by revealing investigative techniques, procedures, and existence of confidential investigations.

(I) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an ongoing investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to that individual, and record amendment procedures for this record system.

(J) From subsection (g) because this system of records should be exempt to the extent that the civil remedies relate to provisions of 5 U.S.C. 552a from which this rule exempts the system.

(7) *System identifier and name.* F051 AF JA F, Courts-Martial and Article 15 Records.

(i) *Exemption.* (A) Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principle function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from the following subsection of 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (H) and (I), (e)(5), (e)(8), (f), and (g).

(B) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (e)(7)(i)(B). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(j)(2) and (k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting, for disclosures pursuant to the routine uses published for this system, would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), this subsection will not be applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal investigation the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (H) because this system of records is exempt from individual access pursuant to subsections (j) and (k) of the Privacy Act of 1974.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(K) From subsection (f) because this system of records has been exempted from the access provisions of subsection (d).

(L) From subsection (g) because this system of records is compiled for law enforcement purposes and has been exempted from the access provisions of subsections (d) and (f).

(8) *System identifier and name.* F071 JTF A, Computer Network Crime Case System.

(i) *Exemption.* (A) Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency, which performs as its principle function any activity pertaining to the enforcement of criminal laws. Any portion of this system of records which falls within the provisions of 5 U.S.C. 552a(j)(2) may be exempt from the following subsections of 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (H), and (I), (e)(5), (e)(8), (f), and (g).

(B) Investigatory material compiled for law enforcement purposes, other

than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (e)(8)(i)(B). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions. Any portion of this system of records which falls within the provisions of 5 U.S.C. 552a(k)(2) may be exempt from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(j)(2) and (k)(2).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of accounting of disclosure would inform a subject that he or she is under investigation. This information would provide considerable advantage to the subject in providing him or her with knowledge concerning the nature of the investigation and the coordinated investigative efforts and techniques employed by the cooperating agencies. This would greatly impede criminal law enforcement.

(B) From subsection (c)(4) and (d), because notification would alert a subject to the fact that an open investigation on that individual is taking place, and might weaken the ongoing investigation, reveal investigative techniques, and place confidential informants in jeopardy.

(C) From subsection (e)(1) because the nature of the criminal and/or civil investigative function creates unique problems in prescribing a specific parameter in a particular case with respect to what information is relevant or necessary. Also, information may be received which may relate to a case under the investigative jurisdiction of another agency. The maintenance of this information may be necessary to provide leads for appropriate law enforcement purposes and to establish patterns of activity that may relate to the jurisdiction of other cooperating agencies.

(D) From subsection (e)(2) because collecting information to the fullest extent possible directly from the subject individual may or may not be practical in a criminal and/or civil investigation.

(E) From subsection (e)(3) because supplying an individual with a form containing a Privacy Act Statement would tend to inhibit cooperation by many individuals involved in a criminal and/or civil investigation. The effect would be somewhat adverse to established investigative methods and techniques.

(F) From subsections (e)(4)(G), (H), and (I) because this system of records is exempt from the access provisions of subsection (d).

(G) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(H) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to law enforcement by revealing investigative techniques, procedures, and existence of confidential investigations.

(I) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a

criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to that individual, and record amendment procedures for this record system.

(J) From subsection (g) because this system of records should be exempt to the extent that the civil remedies relate to provisions of 5 U.S.C. 552a from which this rule exempts the system.

(f) *Specific exemptions*. The following systems of records are subject to the specific exemptions shown:

(1) *System identifier and name*. F036 USAFA K, Admissions Records.

(i) *Exemption*. Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source. Therefore, portions of this system of records (Liaison Officer Evaluation and Selection Panel Candidate Evaluation) may be exempt pursuant to 5 U.S.C. 552a(k)(7) from the following subsections of 5 U.S.C. 552a(d), (e)(4)(H), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(7).

(iii) *Reasons*. To ensure the frankness of information used to determine whether cadets are qualified for graduation and commissioning as officers in the Air Force.

(2) *System identifier and name*. F036 AFPC N, Air Force Personnel Test 851, Test Answer Sheets.

(i) *Exemption*. Testing or examination material used solely to determine individual qualifications for appointment or promotion in the federal or military service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(6) from the following subsections of 5 U.S.C. 552a(c)(3); (d); (e)(4)(G), (H), and (I); and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(6).

(iii) *Reasons*. To protect the objectivity of the promotion testing system by keeping the test questions and answers in confidence.

(3) *System identifier and name*. F036 USAFA A, Cadet Personnel Management System.

(i) *Exemption*. Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(7) from the following subsections of 5 U.S.C. 552a(d), (e)(4)(H), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(7).

(iii) *Reasons*. To maintain the candor and integrity of comments needed to evaluate an Air Force Academy cadet for commissioning in the Air Force.

(4) *System identifier and name*. F036 AETC I, Cadet Records.

(i) *Exemption*. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(5) (Detachment Professional Officer Course Selection Rating Sheets; Air Force Reserve Officer Training Corps Form 0–24—Disenrollment Review; Memoranda for Record and Staff Papers with Staff Advice, Opinions, or Suggestions) may be exempt from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(4)(G) and (H), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(5).

(iii) *Reasons*. To protect the identity of a confidential source who furnishes information necessary to make determinations about the qualifications, eligibility, and suitability of cadets for graduation and commissioning in the Air Force.

(5) *System identifier and name*. F044 AF SG Q, Family Advocacy Program Records.

(i) *Exemption*. (A) Investigative material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2),

may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (f)(5)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Investigative material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) and (k)(5) from the following subsections of 5 U.S.C. 552a(c)(3) and (d).

(ii) *Authority*. 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons*. From subsections (c)(3) and (d) because the exemption is needed to encourage those who know of exceptional medical or educational conditions or family maltreatments to come forward by protecting their identities and to protect such sources from embarrassment or recriminations, as well as to protect their right to privacy. It is essential that the identities of all individuals who furnish information under an express promise of confidentiality be protected. Granting individuals access to information relating to criminal and civil law enforcement, as well as the release of certain disclosure accounting, could interfere with ongoing investigations and the orderly administration of justice, in that it could result in the concealment, alteration, destruction, or fabrication of information; could hamper the identification of offenders or alleged offenders and the disposition of charges; and could jeopardize the safety and well being of parents and their children. Exempted portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal employment and Federal contracts, and that was obtained by providing an express or implied promise to the source that his or her identity would not be revealed to the subject of the record.

(6) *System identifier and name*. F036 AF PC A, Effectiveness/Performance Reporting System.

(i) *Exemption*. Evaluation material used to determine potential for promotion in the Military Services (Brigadier General Selectee Effectiveness Reports and Colonel and Lieutenant Colonel Promotion Recommendations with close out dates on or before January 31, 1991) may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(7) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(4)(H), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(7).

(iii) *Reasons*. (A) From subsection (c)(3) because making the disclosure accounting available to the individual may compromise express promises of confidentiality by revealing details about the report and identify other record sources, which may result in circumvention of the access exemption.

(B) From subsection (d) because individual disclosure compromises express promises of confidentiality conferred to protect the integrity of the promotion rating system.

(C) From subsection (e)(4)(H) because of and to the extent that portions of this record system are exempt from the individual access provisions of subsection (d).

(D) From subsection (f) because of and to the extent that portions of this record system are exempt from the individual access provisions of subsection (d).

(7) *System identifier and name*. F036 AFDP A, Files on General Officers and Colonels Assigned to General Officer Positions.

(i) *Exemption*. Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(7) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(4)(G), (H), and (I); and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(7).

(iii) *Reasons*. To protect the integrity of information used in the Reserve Initial Brigadier General Screening Board, the release of which would compromise the selection process.

(8) *System identification and name*. F036 AF PC O, General Officer Personnel Data System.

(i) *Exemption*. Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source. Therefore, portions of this system of records (Air Force General Officer Promotion and Effectiveness Reports with close out dates on or before January 31, 1991) may be exempt pursuant to 5 U.S.C. 552a(k)(7) may be exempt from following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(4)(H), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(7).

(iii) *Reasons*. (A) From subsection (c)(3) because making the disclosure accounting available to the individual may compromise express promises of confidentiality by revealing details about the report and identify other record sources, which may result in circumvention of the access exemption.

(B) From subsection (d) because individual disclosure compromises express promises of confidentiality conferred to protect the integrity of the promotion rating system.

(C) From subsection (e)(4)(H) because of and to the extent that portions of this record system are exempt from the individual access provisions of subsection (d).

(D) From subsection (f) because of and to the extent that portions of this record system are exempt from the individual access provisions of subsection (d).

(9) *System identifier and name*. F036 AFPC K, Historical Airman Promotion Master Test File.

(i) *Exemption*. Testing or examination material used solely to determine individual qualifications for appointment or promotion in the federal or military service, if the disclosure would compromise the objectivity or fairness of the test or examination process may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(6) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(6).

(iii) *Reasons*. To protect the integrity, objectivity, and equity of the promotion testing system by keeping test questions and answers in confidence.

(iv) [Reserved]

(10) *System identifier and name*. F071 AF OSI F, Investigative Applicant Processing Records.

(i) *Exemption*. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(5).

(iii) *Reasons*. To protect those who gave information in confidence during Air Force Office of Special Investigations applicant inquiries. Fear of harassment could cause sources not to make frank and open responses about applicant qualifications. This could compromise the integrity of the Air Force Office of Special Investigations personnel program that relies on selecting only qualified people.

(11) *System identifier and name.* F036 USAFA B, Master Cadet Personnel Record (Active/Historical).

(i) *Exemption.* Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(7) from the following subsections of 5 U.S.C. 552a(d), (e)(4)(H), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(7).

(iii) *Reasons.* To maintain the candor and integrity of comments needed to evaluate a cadet for commissioning in the Air Force.

(12) *System identifier and name.* F031 497IG A, Sensitive Compartmented Information Personnel Records.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (f)(12)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) and (k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* To protect the identity of sources to which proper promises of confidentiality have been made during investigations. Without these promises, sources will often be unwilling to provide information essential in adjudicating access in a fair and impartial manner.

(13) *System identifier and name.* F071 AF OSI B, Security and Related Investigative Records.

(i) *Exemption.* Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* To protect the identity of those who give information in confidence for personnel security and related investigations. Fear of harassment could cause sources to refuse to give this information in the frank and open way needed to pinpoint those areas in an investigation that should be expanded to resolve charges of questionable conduct.

(14) *System identifier and name.* F031 497IG B, Special Security Case Files.

(i) *Exemption.* Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* To protect the identity of those who give information in confidence for personnel security and related investigations. Fear of harassment could cause sources to refuse to give this information in the frank and open way needed to pinpoint those areas in an investigation that should be expanded to resolve charges of questionable conduct.

(15) *System identifier and name.* F031 AF SP N, Special Security Files.

(i) *Exemption.* Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* To protect the identity of those who give information in confidence for personnel security and related investigations. Fear of harassment could cause them to refuse to give this information in the frank and open way needed to pinpoint areas in an investigation that should be expanded to resolve charges of questionable conduct.

(16) *System identifier and name.* F036 AF PC P, Applications for Appointment and Extended Active Duty Files.

(i) *Exemption.* Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsection of 5 U.S.C. 552a(d).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* To protect the identity of confidential sources who furnish information necessary to make determinations about the qualifications, eligibility, and suitability of health care professionals who apply for Reserve of the Air Force appointment or interservice transfer to the Air Force.

(17) *System identifier and name.* F036 AF DPG, Military Equal Opportunity and Treatment.

(i) *Exemption.* Investigative material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (f)(17)(i). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 522a(k)(2) from the following subsections of 5 U.S.C. 552a(d), (e)(4)(H), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (d) because access to the records contained in this system would inform the subject of an investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection, and would present a serious impediment to law enforcement. In addition, granting individuals access to information collected while an Equal Opportunity and Treatment clarification/investigation is in progress conflicts with the just, thorough, and timely completion of the complaint, and could possibly enable individuals to interfere, obstruct, or mislead those clarifying/investigating the complaint.

(B) From subsection (e)(4)(H) because this system of records is exempt from individual access pursuant to subsection (k) of the Privacy Act of 1974.

(C) From subsection (f) because this system of records has been exempted from the access provisions of subsection (d).

(18) *System identifier and name.* F051 AF JA I, Commander Directed Inquiries.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (f)(18)(i). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions. Any portion of this system of records which falls within the provisions of 5 U.S.C. 552a(k)(2) may be exempt from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (d) and (f) because providing access to investigative records and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for investigative purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants.

(19) [Reserved]

(20) *System identifier and name.* F033 AF A, Information Requests—Freedom of Information Act.

(i) *Exemption.* During the processing of a Freedom of Information Act request, exempt materials from 'other' systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those other systems of records are entered into this system, the Department of the Air Force hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record, and the purposes underlying

the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, and to preserve the confidentiality and integrity of Federal evaluation materials. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(21) *System identifier and name.* F033 AF B, Privacy Act Request Files.

(i) *Exemption.* During the processing of a Privacy Act request, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this system, the Department of the Air Force hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record, and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, and to preserve the confidentiality and integrity of Federal evaluation materials. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(22) *System identifier and name.* F051 AFJA E, Judge Advocate General's Professional Conduct Files.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law, as a result of the maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (f)(22)(i). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions. Any portion of this system of records which falls within the provisions of 5 U.S.C. 552a(k)(2) may be exempt from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (d) and (f) because providing access to investigative records and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously

interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for investigative purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants.

(23) *System identifier and name.* F033 USSC A, Information Technology and Control Records.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law, as a result of the maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (f)(23)(i). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions. Any portion of this system of records which falls within the provisions of 5 U.S.C. 552a(k)(2) may be exempt from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (d) and (f) because providing access to investigative records and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is

compiled for investigative purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants.

(24) *System identifier and name.* F036 AETC X, College Scholarship Program.

(i) *Exemption.* Investigatory material compiled solely for the purpose of determining suitability but only to the extent that disclosure would reveal the identity of a confidential source. Therefore, portions of this system may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), and (e)(1).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) and (d) and when access to accounting disclosures and access to or amendment of records would cause the identity of a confidential sources to be revealed. Disclosure of the source's identity not only will result in the Department breaching the promise of confidentiality made to the source but it will impair the Department's future ability to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information. Unless sources can be assured that a promise of confidentiality will be honored, they will be less likely to provide information considered essential to the Department in making the required determinations.

(B) From (e)(1) because in the collection of information for investigatory purposes, it is not always possible to determine the relevance and necessity of particular information in the early stages of the investigation. In some cases, it is only after the information is evaluated in light of other information that its relevance and necessity becomes clear. Such information permits more informed decision-making by the Department when making required suitability, eligibility, and qualification determinations.

(25) *System identifier and name.* F032 AFCESA C, Civil Engineer System-Explosive Ordnance Records.

(i) *Exemption.* Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3056, may be exempt pursuant to 5 U.S.C. 552a(k)(3) may be exempt from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(3).

(iii) *Reasons.* (A) From subsection (c)(3) because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (d) and (f) because providing access to investigative records and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in

light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for investigative purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants.

(26) *System identifier and name.* F051 AF JAA, Freedom of Information Appeal Records.

(i) *Exemption.* During the processing of a Privacy Act request, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this system, the Department of the Air Force hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record, and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, and to preserve the confidentiality and integrity of Federal evaluation materials. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

EFFECTIVE DATE NOTE: At 87 FR 37999, June 27, 2022, § 310.14 was amended by removing and reserving paragraphs (f)(12), (14), and (15), effective Sept. 6, 2022.

### § 310.15 Department of the Army exemptions.

(a) *Special exemption.* 5 U.S.C. 552a(d)(5)—Denies individual access to any information compiled in reasonable anticipation of a civil action or proceeding.

(b) *General and specific exemptions.* The Secretary of the Army may exempt Army systems of records from certain requirements of the Privacy Act of 1974. The two kinds of exemptions that require Secretary of the Army enactment are general and specific exemptions. The general exemption authorizes the exemption of a system of records from most requirements of the Act; the specific exemptions authorize the exemption of a system of record from only a few.

(c) *General exemptions.* Only Army activities actually engaged in the enforcement of criminal laws as their principal function may claim the general exemption. See 5 U.S.C. 552a(j)(2). To qualify for this exemption, a system must consist of:

(1) Information compiled to identify individual criminal offenders and alleged offenders, which consists only of identifying data and arrest records; type and disposition of charges; sentencing, confinement, and release records; and parole and probation status;

(2) Information compiled for the purpose of criminal investigation including reports of informants and investigators, and associated with an identifiable individual; or

(3) Reports identifiable to an individual, compiled at any stage of the process of enforcement of the criminal laws, from arrest or indictment through release from supervision.

(d) *Specific exemptions.* The Secretary of the Army has exempted all properly classified information and systems of

records that have the following kinds of information listed in this section, from certain parts of the Privacy Act. The Privacy Act exemption reference appears in parentheses after each category.

(1) Classified information in every Army system of records. Before denying any individual access to classified information, the Access and Amendment Refusal Authority must make sure that it was properly classified under the standards of Executive Orders 11652, 12065, or 12958 and that it must remain so in the interest of national defense of foreign policy (5 U.S.C. 552a(k)(1)).

(2) Investigatory material compiled for law enforcement purposes (other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if this information has been used to deny someone a right, privilege or benefit to which the individual is entitled by Federal law, or for which an individual would otherwise be eligible as a result of the maintenance of the information, it must be released, unless doing so would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (d)(2). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(3) Records maintained in connection with providing protective services to the President of the United States or other individuals protected pursuant to Title 18 U.S.C., section 3056 (5 U.S.C. 552a(k)(3)).

(4) Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlements of individuals, except for census records which may be disclosed under Title 13 U.S.C., section 8 (5 U.S.C. 552a(k)(4)).

(5) Investigatory material compiled solely to determine suitability, eligibility, or qualifications for Federal service, Federal contracts, or access to classified information. This information may be withheld only to the extent that disclosure would reveal the identity of a confidential source (5 U.S.C. 552a(k)(5)).

(6) Testing or examination material used solely to determine if a person is qualified for appointment or promotion in the Federal service. This information may be withheld only if disclosure would compromise the objectivity or fairness of the examination process (5 U.S.C. 552a(k)(6)).

(7) Evaluation material used solely to determine promotion potential in the Armed Forces. Information may be withheld, but only to the extent that disclosure would reveal the identity of a confidential source (5 U.S.C. 552a(k)(7)).

(e) *Procedures*. When a system manager seeks an exemption for a system of records, the following information will be furnished to the Chief Information Officer, 107 Army Pentagon, Room 3E608, Washington, DC 20310–0107; applicable system notice, exemptions sought, and justification. After appropriate staffing and approval by the Secretary of the Army, a proposed rule will be published in the FEDERAL REGISTER, followed by a final rule 60 days later. No exemption may be invoked until these steps have been completed.

(f) The Army system of records notices for a particular type of record will state whether the Secretary of the Army has authorized a particular general and specific exemption to a certain type of record. The Army system of records notices are published on the Defense Privacy and Civil Liberties Division's website: *http://dpcld.defense.gov/Privacy/DODComponentArticleList/tabid/6799/Category/278/department-of-the-army.aspx*.

(g) *Exempt Army records*. The following records may be exempt from certain parts of the Privacy Act:

(1) *System identifier and name*. A0020–1 SAIG, Inspector General Records.

(i) *Exemption*. (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the

extent that disclosure would reveal the identity of a confidential source.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) and (k)(5) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d) because access to such records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violations of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information is retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(2) *System identifier and name*. A0 025–400–2 0AA, Army Records Information Management System (ARIMS).

(i) *Exemption*. During the course of records management, declassification and claims research, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this system, the Department of the Army hereby claims the same exemptions for the records from those ''other'' systems.

(ii) *Authority*. 5 U.S.C. 552a (j)(2) and (k)(1) through (k)(7).

(iii) *Reasons*. Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided to the President and others are not compromised, to protect records used solely as statistical records, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records may be exempt from specific provisions of 5 U.S.C. 552a.

(3) *System identifier and name.* A0025–55 OAA, Freedom of Information Act Program Files.

(i) *Exemption.* During the processing of Freedom of Information Act (FOIA) requests, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this system, the Department of the Army claims the same exemptions for the records from those ''other'' systems.

(ii) *Authority.* 5 U.S.C. 552a(j)(2) and (k)(1) through (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided to the President and others are not compromised, to protect records used solely as statistical records, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records may be exempt from specific provisions of 5 U.S.C. 552a.

(4) *System identifier and name.* A0027–1 DAJA, General Legal Files.

(i) *Exemption.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(E) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(F) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(1) through (k)(7) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1), (k)(2), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d) because access to such records contained in this system would inform the subject of a criminal investigation of the existence

of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violations of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information is retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(5) *System identifier and name.* A0027–10a DAJA, Military Justice Files.

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal investigation the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be

withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(6) *System identifier and name.* A0027–10b DAJA, Courts-Martial Records and Reviews.

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(7) *System identifier and name.* A0040–5b DASG, Army Public Health Data Repository (APHDR).

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) and (k)(4) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(4).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violations of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information is retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted

from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(8) *System identifier and name.* A0190–5 OPMG, Vehicle Registration System.

(i) *Exemption.* Parts of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its primary function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d) making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from access provisions of subsection (d) making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment reporting on investigations and

impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(9) *System identifier and name.* A0190–9 OPMG, Absentee Case Files.

(i) *Exemption.* Parts of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from access provisions of subsection (d), making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in

a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(10) *System identifier and name.* A0190–14 OPMG, Registration and Permit Files.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), is exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violations of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information is retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(11) *System identifier and name.* A0190–45 OPMG, Military Police Reporting Program Records (MPRP).

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of the system may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from access provisions of subsection (d), making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(12) *System identifier and name.* A0190–45a OPMG, Local Criminal Intelligence Files.

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of the system of records

may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(8), (f), and (g).

(ii) *Authority*. 5 U.S.C. 552a(j)(2).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from access provisions of subsection (d), making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(13) *System identifier and name*. A0190–45b OPMG, Serious Incident Reporting Files.

(i) *Exemption*. Parts of this system may be exempt pursuant to 5 U.S.C.

552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of the system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(8), (f), and (g).

(ii) *Authority*. 5 U.S.C. 552a(j)(2).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from access provisions of subsection (d), making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and

have been exempted from the access provisions of subsections (d) and (f).

(14) *System identifier and name.* A0190–47 DAPM–ACC, Army Corrections System and Parole Board Records.

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of the system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal or other law enforcement investigation, the requirement that information be collected to the greatest extent possible from the subject individual would alert the subject as to the nature or existence of the investigation and thereby present a serious impediment to effective law enforcement.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because an exemption is being claimed for subsection (d), making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(15) *System identifier and name.* A0195–2a USACIDC, Source Register.

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from access provisions of subsection (d), making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal

investigative techniques and procedures.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(16) *System identifier and name.* A0195–2b USACIDC, Criminal Investigation and Crime Laboratory Files.

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsections (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal or other law enforcement investigation, the requirement that information be collected to the greatest extent possible from the subject individual would alert the subject as to the nature or existence of the investigation and thereby present a serious impediment to effective law enforcement.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from access provisions of subsection (d), making these subsections not applicable.

(H) From subsections (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(J) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to criminal law enforcement by

revealing investigative techniques, procedures, and the existence of confidential investigations.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(17) *System identifier and name.* A0195–2c USACIDC DoD, DoD Criminal Investigation Task Force (CITF) Files.

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency, which performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal or other law enforcement investigation, the requirement that information be collected to the greatest extent possible from the subject individual would alert the subject as to the nature or existence of the investigation and thereby present a serious impediment to effective law enforcement.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from access provisions of subsection (d), making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(J) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to criminal law enforcement by revealing investigative techniques, procedures, and the existence of confidential investigations.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(18) *System identifier and name.* A0195–2d USACIDC DoD, Defense Criminal Investigation DNA Database and Sample Repository; CODIS Records.

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency that performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability

of trained investigators and intelligence analysts to exercise their judgment reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(19) *System identifier and name.* A0195–6 USACIDC, Criminal Investigation Accreditation and Polygraph Examiner Evaluation Files.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(D) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2), (k)(5), or (k)(7) from subsections 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2), (k)(5), and (k)(7).

(iii) *Reasons.* (A) From subsections (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d), because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(20) *System identifier and name.* A02107 DAMO, Expelled or Barred Person Files.

(i) *Exemption*. Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency, which performs as its principal function any activity pertaining to the enforcement of criminal laws. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(8), (f) and (g).

(ii) *Authority*. 5 U.S.C. 552a(j)(2).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(E) From subsection (e)(2) because in a criminal investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(J) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(K) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(21) *System identifier and name*. A0340–21 OAA, Privacy Case Files.

(i) *Exemption*. During the processing of a Privacy Act request (which may include access requests, amendment requests, and requests for review for initial denials of such requests), exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this system, the Department of the Army hereby claims the same exemptions.

(ii) *Authority*. 5 U.S.C. 552a(j)(2), and (k)(1) through (k)(7).

(iii) *Reasons*. Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided to the President and others are not compromised, to protect records used solely as statistical records, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, and to preserve the confidentiality and integrity of Federal evaluation materials. The exemption rule for the original records will identify the specific reasons why the records may be exempt from specific provisions of 5 U.S.C. 552a.

(22) *System identifier and name*. A0351–12 DAPE, Applicants/Students, U.S. Military Academy Prep School.

(i) *Exemption*. (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(C) It is imperative that the confidential nature of evaluation material on individuals, furnished to the U.S. Military Academy Preparatory School under an express promise of confidentiality, be maintained to ensure the candid presentation of information necessary in determinations involving admission to or retention at the United States Military Academy and suitability for commissioned military service.

(D) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(5) and (k)(7) subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(5) and (k)(7).

(iii) *Reasons*. (A) From subsections (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d), because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have

been exempted from the access provisions of subsection (d).

(23) *System identifier and name.* A0351–17a USMA, U.S. Military Academy Candidate Files.

(i) *Exemption.* (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(C) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(D) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(5), (k)(6) or (k)(7) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(5), (k)(6) and (k)(7).

(iii) *Reasons.* (A) From subsections (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d), because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(24) *System identifier and name.* A0351–17b USMA, U.S. Military Academy Management System Records.

(i) *Exemption.* (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(C) It is imperative that the confidential nature of evaluation and investigatory material on candidates, cadets, and graduates, furnished to the United States Military Academy under a promise of confidentiality be maintained to ensure the candid presentation of information necessary in determinations involving admissions to the Military Academy and suitability

for commissioned service and future promotion.

(D) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(5) or (k)(7) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(5) and (k)(7).

(iii) *Reasons*. (A) From subsections (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d), because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(25) *System identifier and name*. A0380–67 DAMI, Personnel Security Clearance Information Files.

(i) *Exemption*. (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(1), (k)(2), or (k)(5) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(1), (k)(2), or (k)(5).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d), because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would

present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(26) *System identifier and name.* A0381–20b DAMI, Foreign Intelligence/Counterintelligence/Information Operations/Security Files.

(i) *Exemption.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(1), (k)(2) and (k)(5) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(E) To the extent that copies of exempt records from external systems of records are entered into A0381–10b DAMI, the Army hereby claims the same exemptions for those records as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), and (k)(1) through (k)(7).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d), because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(G) For records that are copies of exempt records from external systems of records, such records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided to the President and others are not compromised, to protect records used solely as statistical records, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(27) *System identifier and name.* A0381–100a DAMI, Intelligence/Counterintelligence Source Files.

(i) *Exemption.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(1), (k)(2), or (k)(5) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1), (k)(2), and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d), because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(28) *System identifier and name.* A0381–100b DAMI, Technical Surveillance Index.

(i) *Exemption.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(1), (k)(2), or (k)(5) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1), (k)(2) or (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d), because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(29) *System identifier and name.* A0600–20 DCSG–1, Sexual Assault (SADMS) and Sexual Harassment (SHARP) Program Records.

(i) *Exemption.* This system of records is a compilation of information from other Department of Defense/Army systems of records. To the extent that copies of exempt records from those other systems of records are entered

into this system of records, the Army G–1 hereby claims the same exemptions for the records from those other systems.

(ii) *Authority*. 5 U.S.C. 552a(j)(2), and (k)(1) through (k)(7).

(iii) *Reasons*. Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided to the President and others are not compromised, to protect records used solely as statistical records, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records may be exempt from specific provisions of 5 U.S.C. 552a.

(30) *System identifier and name*. A0601–141 DASG, Applications for Appointment to Army Medical Department.

(i) *Exemption*. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Therefore, portions of the system of records may be exempt pursuant to 5 U.S.C. 552(a)(k)(5) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(5).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d), because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(31) *System identifier and name*. A0601–210a USAREC, Enlisted Eligibility Files.

(i) *Exemption*. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5

U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(5) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(5).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d), because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(32) *System identifier and name*. A0608–18 DASG, Army Family Advocacy Program Files.

(i) *Exemption*. (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Investigative material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Therefore, portions of the system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) or (k)(5) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d) because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an

active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because the requirements in those subsections are inapplicable to the extent that portions of this system of records may be exempt from subsection (d), concerning individual access.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(33) *System identifier and name.* A0614–115 DAMI, Department of the Army Operational Support Activities.

(i) *Exemption.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(1), (k)(2), or (k)(5) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1), (k)(2), and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d), because access to the records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations, information is often obtained concerning the violation of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information be retained since it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because portions of this system of records have been exempted from the access provisions of subsection (d), making these subsections not applicable.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(34) *System identifier and name.* A0025–2 PMG (DFBA) DoD, Defense Biometrics Identification Records System.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Exempt materials from other sources listed above may become part of the case records in this system of records. To the extent that copies of exempt records from other sources listed above are entered into these case records, the Department of the Army hereby claims the same exemptions, (j)(2) and (k)(2), for the records as claimed by the source systems, specifically to the extent that copies of exempt records may become part of these records from JUSTICE/FBI–019 Terrorist Screening Records System, the Department of the Army hereby claims the same exemptions for the records as claimed at their source (JUSTICE/FBI–019, Terrorist Screening Records System).

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(j)(2) and (k)(2) from subsections 5 U.S.C. 552a(c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (e)(4)(H), (e)(4)(I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2) and(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or matter under investigation to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (c)(4) because an exemption is being claimed for subsection (d), making this subsection not applicable.

(C) From subsection (d) because access to such records contained in this system would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(D) From subsection (e)(1) because the nature of the criminal and/or civil investigative function creates unique problems in prescribing a specific parameter in a particular case with respect to what information is relevant or necessary. Also, information may be received which may relate to a case under the investigative jurisdiction of another agency. The maintenance of this information may be necessary to provide leads for appropriate law enforcement purposes and to establish patterns of activity that may relate to the jurisdiction of other cooperating agencies.

(E) From subsection (e)(2) because in a criminal investigation, the requirement that information be collected to the greatest extent possible from the subject individual would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(F) From subsection (e)(3) because the requirement that individuals supplying information be provided with a form stating the requirements of subsection (e)(3) would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation, reveal the identity of confidential sources of information and endanger the life and physical safety of confidential informants.

(G) From subsections (e)(4)(G) and (e)(4)(H) because the requirements in those subsections are inapplicable to the extent that portions of this system of records may be exempt from subsection (d), concerning individual access.

(H) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal

and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(I) From subsection (e)(5) because in the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(J) From subsection (e)(8) because the individual notice requirements of subsection (e)(8) could present a serious impediment to law enforcement as this could interfere with the ability to issue search authorizations and could reveal investigative techniques and procedures.

(K) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsection (d).

(L) From subsection (g) because portions of this system of records are compiled for law enforcement purposes and have been exempted from the access provisions of subsections (d) and (f).

(35) *System identifier and name.* A0600–20 SAMR, Soldiers Equal Opportunity Investigative Files.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), is exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, such material shall be provided to the individual, except to the extent that disclosure would reveal the identity of a confidential source. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) from subsections 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit the subject of a criminal investigation or other investigation conducted for law enforcement purposes to obtain valuable information concerning the nature of that investigation which will present a serious impediment to law enforcement.

(B) From subsection (d) because access to such records contained in this system would inform the subject of a criminal investigation or other investigation conducted for law enforcement purposes, of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) From subsection (e)(1) because in the course of criminal investigations or other law enforcement investigations, information is often obtained concerning the violations of laws or civil obligations of others not relating to an active case or matter. In the interests of effective law enforcement, it is necessary that this valuable information is retained because it can aid in establishing patterns of activity and provide valuable leads for other agencies and future cases that may be brought.

(D) From subsections (e)(4)(G) and (e)(4)(H) because the requirements in those subsections are inapplicable to the extent that portions of this system of records may be exempted from subsection (d), concerning individual access.

(E) From subsection (e)(4)(I) because the identity of specific sources must be withheld to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) From subsection (f) because portions of this system of records have been exempted from the access provisions of subsections (d).

(G) For records that are copies of exempt records from external systems of

records, such records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record that is now contained in this system of records. In general, the exemptions were claimed to properly protect classified information relating to national defense and foreign policy; to avoid interference during the conduct of criminal, civil, or administrative actions or investigations; to ensure protective services provided to the President and others are not compromised; to protect records used solely as statistical records; to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations; to preserve the confidentiality and integrity of Federal testing materials; and to safeguard evaluation materials used for military promotions when provided by a confidential source. The exemption rule for the original records will identify the specific reasons the records are exempt from specific provisions of 5 U.S.C. 552a.

(h) *Exempt OPM records.* Three Office of Personnel Management systems of records apply to Army employees, except for non-appropriated fund employees. These systems, the specific exemptions determined to be necessary and proper, the records exempted, provisions of the Privacy Act from which exempt, and justification are set forth below:

(1) Personnel Investigations Records (OPM/CENTRAL–9).

(i) *Exemption.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(C) Records maintained in connection with providing protective services to the President of the United States or other individuals pursuant to Title 18 U.S.C. 3056 may be exempt pursuant to 5 U.S.C. 552a(k)(3).

(D) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(E) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(F) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(G) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(1), (k)(2), (k)(3), (k)(5), (k)(6), or (k)(7) from subsections 5 U.S.C. 552a(c)(3) and (d).

(ii) *Reasons.* (A) Personnel investigations may obtain from another Federal agency, properly classified information which pertains to national defense and foreign policy. Application of exemption (k)(1) may be necessary to preclude the data subject's access to an amendment of such classified information under 5 U.S.C. 552a(d) in order to protect such information.

(B) Personnel investigations may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2), e.g., investigations into the administration of the merit system. Application of exemption (k)(2) may be necessary to preclude the data subject's access to or amendment of

such records, under 552a(c)(3) and (d) because otherwise, it would inform the subject of a criminal investigation of the existence of that investigation, provide the subject of the investigation with information that might enable him to avoid detection or apprehension, and would present a serious impediment to law enforcement.

(C) Personnel investigations may obtain from another Federal agency, information that relates to providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18. Application of exemption (k)(3) may be necessary to preclude the data subject's access to or amendment of such records under 5 U.S.C. 552a(d) to ensure protective services provided to the President and others are not compromised.

(D) All information about individuals in these records that meets the criteria stated in 5 U.S.C. 552a(k)(5) is exempt from the requirements of 5 U.S.C. 552a(c)(3) and (d) in order to protect the identity of confidential sources incident to determinations of suitability, eligibility, or qualifications for Federal employment, military service, contract, and security clearance determinations.

(E) All material and information in the records that meets the criteria stated in 5 U.S.C. 552a(k)(6) is exempt from the requirements of 5 U.S.C. 552a(d), relating to access to and amendment of records by the data subject in order to preserve the confidentiality and integrity of Federal testing materials.

(F) All material and information in the records that meets the criteria stated in 5 U.S.C. 552a(k)(7) is exempt from the requirements of 5 U.S.C. 552a(d), relating to access to and amendment of records by the data subject in order to safeguard evaluation materials used for military promotions when furnished by a confidential source.

(2) Recruiting, Examining, and Placement Records (OPM/GOVT–5).

(i) *Exemption.* (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(5), or (k)(6) from subsections 5 U.S.C. 552a(c)(3) and (d).

(ii) *Reasons.* (A) All information about individuals in these records that meets the criteria stated in 5 U.S.C. 552a(k)(5) is exempt from the requirements of 5 U.S.C. 552a(c)(3) and (d) in order to protect the identity of confidential sources incident to determinations of suitability, eligibility, or qualifications for Federal employment, military service, contract, and security clearance determinations. These exemptions are also claimed because this system contains investigative material compiled solely for the purpose of determining the appropriateness of a request for approval of an objection to an eligible individual's qualification for employment in the Federal service.

(B) All material and information in these records that meets the criteria stated in 5 U.S.C. 552a(k)(6) are exempt from the requirements of 5 U.S.C. 552a(d), relating to access and amendment of records by the subject, in order to preserve the confidentiality and integrity of Federal testing materials.

(3) Personnel Research Test Validation Records (OPM/GOVT–6).

(i) *Exemption.* Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process. Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(6) from subsections 5 U.S.C. 552a(d).

(ii) *Reasons.* All material and information in these records that meets the

criteria stated in 5 U.S.C. 552a(k)(6) is exempt from the requirements of 5 U.S.C. 552a(d), relating to access to an amendment of the records by the data subject, in order to preserve the confidentiality and integrity of Federal testing materials.

(iii) Twelve Exceptions to the ''No Disclosure without Consent'' rule of the Privacy Act.

(A) 5 U.S.C. 552a(b)(1)—To DoD officers and employees who have a need for the record in the performance of their official duties. This is the ''official need to know'' concept.

(B) 5 U.S.C. 552a(b)(2)—FOIA requires release of the information pursuant to 5 U.S.C. 552.

(C) 5 U.S.C. 552a(b)(3)—For an authorized Routine Use, *i.e.* the ''Routine Use Exception.'' The Routine Use must be listed in the applicable system of records notice published in the FEDERAL REGISTER and the purpose of the disclosure must be compatible with the purpose for the published Routine Use.

(D) 5 U.S.C. 552a(b)(4)—To the Bureau of the Census to plan or carry out a census or survey, or related activity pursuant to Title 13 of the U.S. Code.

(E) 5 U.S.C. 552a(b)(5)—To a recipient who has provided the Department of the Army or DoD with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable.

(F) 5 U.S.C. 552a(b)(6)—To the National Archives and Records Administration as a record that has sufficient historical or other value to warrant its continued preservation by the U.S. Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value.

NOTE 1 TO PARAGRAPH (h)(3)(iii)(F). Records transferred to the Federal Records Centers for storage remain under the control of the Department of the Army and no accounting for disclosure is required under the Privacy Act.

(G) 5 U.S.C. 552a(b)(7)—To another agency or instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law enforcement activity, if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the Department of the Army or DoD specifying the particular portion desired and the law enforcement activity for which the record is sought.

(H) 5 U.S.C. 552a(b)(8)—To a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure, notification is transmitted to the last known address of such individual.

(I) 5 U.S.C. 552a(b)(9)—To either House of Congress, or, to the extent the matter is within its jurisdiction, any committee or subcommittee thereof, or any joint committee of Congress or subcommittee of any such joint committee. Requests from a Congressional member acting on behalf of a constituent are not included in this exception, but may be covered by a routine use exception to the Privacy Act (See applicable Army system of records notice).

(J) 5 U.S.C. 552a(b)(10)—To the Comptroller General or authorized representatives, in the course of the performance of the duties of the Government Accountability Office.

(K) 5 U.S.C. 552a(b)(11)—Pursuant to the order of a court of competent jurisdiction. The order must be signed by a judge.

(L) 5 U.S.C. 552a(b)(12)—To a consumer reporting agency in accordance with section 3711(e) of Title 31 of the U.S. Code. The name, address, SSN, and other information identifying the individual; amount, status, and history of the claim; and the agency or program under which the case arose may be disclosed. However, before doing so, agencies must complete a series of steps designed to validate the debt and to offer the individual an opportunity to repay it.

### § 310.16 Department of the Navy exemptions.

(a) All systems of records maintained by the DON shall be exempt from the requirements of the access provision of the Privacy Act (5 U.S.C. 552a(d)) under the (k)(1) exemption, to the extent that the system contains information properly classified under E.O. 12958 and that

is required by that E.O. to be kept secret in the interest of national defense or foreign policy. This exemption is applicable to parts of all systems of records including those not otherwise specifically designated for exemptions herein that contain isolated items of properly classified information.

(1) *System identifier and name.* N01070–9, White House Support Program.

(i) *Exemption.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(C) Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3506, may be exempt pursuant to 5 U.S.C. 552a(k)(3).

(D) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(E) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1), (k)(2), (k)(3), and (k)(5).

(iii) *Reasons.* Exempted portions of this system contain information that has been properly classified under E.O. 12958, and which is required to be kept secret in the interest of national defense or foreign policy. Exempted portions of this system may also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for access to classified information, and which was obtained by providing an express or implied promise to the source that his or her identity would not be revealed to the subject of the record. Exempted portions of this system may also contain information collected and maintained in connection with providing protective services to the President and other individuals protected pursuant to 18 U.S.C. 3056. Exempted portions of this system may also contain investigative records compiled for law enforcement purposes, the disclosure of which could reveal the identity of sources who provide information under an express or implied promise of confidentiality, compromise investigative techniques and procedures, jeopardize the life or physical safety of law-enforcement personnel, or otherwise interfere with enforcement proceedings or adjudications.

(2) *System identifier and name.* N01131–1, Officer Selection and Appointment System.

(i) *Exemption.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(D) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(E) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(1), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons*. Granting individuals access to portions of this system of records could result in the disclosure of classified material, or the identification of sources who provided information to the government under an express or implied promise of confidentiality. Material will be screened to permit access to unclassified material and to information that does not disclose the identity of a confidential source.

(3) *System identifier and name*. N01133–2, Recruiting Enlisted Selection System.

(i) *Exemption*. (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(D) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(E) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(1), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons*. Granting individuals access to portions of this system of records could result in the disclosure of classified material, or the identification of sources who provided information to the government under an express or implied promise of confidentiality. Material will be screened to permit access to unclassified material and to information that does not disclose the identity of a confidential source.

(4) *System identifier and name*. N01640–1, Individual Correctional Records.

(i) *Exemption*. (A) Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principle function any activity pertaining to the enforcement of criminal laws.

(B) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G) through (I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority*. 5 U.S.C. 552a(j)(2).

(iii) *Reason*. (A) Granting individuals access to portions of these records pertaining to or consisting of, but not limited to, disciplinary reports, criminal investigations, and related statements of witnesses, and such other related matter in conjunction with the enforcement of criminal laws, could interfere with the orderly investigations, with the orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in the concealment, destruction, or fabrication of evidence, and jeopardize the safety and well-being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by these components and could result in the invasion of the privacy of individuals only incidentally related to an investigation. The exemption of the individual's right of access to portions of these records, and the reasons therefore, necessitate the exemption of this system of records from the requirement of the other cited provisions.

(B) [Reserved]

(5) *System identifier and name.* N01754–3, Navy Child Development Services Program.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3) and (d).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) Exemption is needed in order to encourage persons having knowledge of abusive or neglectful acts toward children to report such information, and to protect such sources from embarrassment or recrimination, as well as to protect their right to privacy. It is essential that the identities of all individuals who furnish information under an express promise of confidentiality be protected. Additionally, granting individuals access to information relating to criminal and civil law enforcement, as well as the release of certain disclosure accountings, could interfere with ongoing investigations and the orderly administration of justice, in that it could result in the concealment, alteration, destruction, or fabrication of information; could hamper the identification of offenders and the disposition of charges; and could jeopardize the safety and well being of parents and their children.

(B) [Reserved]

(6) *System identifier and name.* N03834–1, Special Intelligence Personnel Access File.

(i) *Exemption.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4) (G) through (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1) and (k)(5).

(iii) *Reasons.* (A) Exempted portions of this system contain information that has been properly classified under E.O. 12356, and that is required to be kept secret in the interest of national defense or foreign policy.

(B) Exempted portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for access to classified information and was obtained by providing an express or implied assurance to the source that his or her identity would not be revealed to the subject of the record.

(7) *System identifier and name.* N04060–1, Navy and Marine Corps Exchange Sales and Security Files.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(4)(G) through (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* Granting individuals access to information collected and maintained by these activities relating to the enforcement of criminal laws could interfere with orderly investigations, with orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in the concealment, destruction, or fabrication of evidence, and could also

reveal and render ineffectual investigative techniques, sources, and methods used by these activities.

(8) [Reserved]

(9) *System identifier and name.* N05041–1, Inspector General (IG) Records.

(i) *Exemption.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(C) Portions of this system of records may be exempt from the provisions of 5 U.S.C. 552a(c)(3); (d); (e)(1); (e)(4)(G), (H), and (I); and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1) and (k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would permit individuals to obtain valuable information concerning the nature of the investigation and would present a serious impediment to the orderly conduct of any investigative activities. Such accounting could result in the release of properly classified information which would compromise the national defense or disrupt foreign policy.

(B) From subsections (d) and (f) because access to the records would inform individuals of the existence and nature of the investigation; provide information that might result in the concealment, destruction, or fabrication of evidence; possibly jeopardize the safety and well-being of informants, witnesses and their families; likely reveal and render ineffectual investigatory techniques and methods and sources of information; and possibly result in the invasion of the personal privacy of third parties. Access could result in the release of properly classified information which could compromise the national defense or disrupt foreign policy. Amendment of the records would interfere with the ongoing investigation and impose an impossible administrative burden by requiring investigations to be continually reinvestigated.

(C) From subsection (e)(1) because in the course of the investigation it is not always possible, at least in the early stages of the inquiry, to determine relevance and or necessity as such determinations may only occur after the information has been evaluated. Information may be obtained concerning the actual or potential violation of laws or regulations other than those relating to the ongoing investigation. Such information should be retained as it can aid in establishing patterns of improper activity and can provide valuable leads in the conduct of other investigations.

(D) From subsection (e)(4)(G) and (H) because this system of records is exempt from individual access pursuant to subsections (k)(1) and (k)(2) of the Privacy Act of 1974.

(E) From subsection (e)(4)(I) because it is necessary to protect the confidentiality of sources and to protect the privacy and physical safety of witnesses. Although the system is exempt from this requirement, the DON has published a notice in broad, generic terms in the belief that this is all that subsection (e)(4)(I) of the Act requires.

(10) *System identifier and name.* N05300–3, Faculty Professional Files.

(i) *Exemptions.* (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(4)(G) and (H), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* Exempted portions of this system contain information considered relevant and necessary to make a release determination as to qualifications, eligibility, or suitability for Federal employment, and was obtained by

providing an express or implied promise to the source that his or her identity would not be revealed to the subject of the record.

(11) *System identifier and name.* N05354–1, Equal Opportunity Information Management System.

(i) *Exemptions.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(4)(G) through (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1) and (k)(5).

(iii) *Reasons.* Granting access to information in this system of records could result in the disclosure of classified material, or reveal the identity of a source who furnished information to the Government under an express or implied promise of confidentiality. Material will be screened to permit access to unclassified material and to information that will not disclose the identity of a confidential source.

(12) [Reserved]

(13) *System identifier and name.* N05520–4, NCIS Investigative Files System.

(i) *Exemptions.* (A) Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws.

(B) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (c)(4), (d), (e)(2), (e)(3), (e)(4)(G) through (I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) Granting individuals access to information collected and maintained by this activity relating to the enforcement of criminal laws could interfere with the orderly investigations, with the orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in the concealment, destruction, or fabrication of evidence, and jeopardize the safety and well-being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by these components and could result in the invasion of the privacy of individuals only incidentally related to an investigation. The exemption of the individual's right of access to portions of these records, and the reasons therefore, necessitate the exemption of this system of records from the requirement of the other cited provisions.

(B) [Reserved]

(iv) *Exemptions.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3506, may be exempt pursuant to 5 U.S.C. 552a(k)(3).

(C) Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

(D) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(E) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6),

if the disclosure would compromise the objectivity or fairness of the test or examination process.

(F) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

(v) *Authority*. 5 U.S.C. 552a(k)(1), (k)(3), (k)(4), (k)(5) and (k)(6).

(vi) *Reasons*. (A) The release of disclosure accountings would permit the subject of an investigation to obtain valuable information concerning the nature of that investigation, and the information contained, or the identity of witnesses or informants, would therefore present a serious impediment to law enforcement. In addition, disclosure of the accounting would amount to notice to the individual of the existence of a record.

(B) Access to the records contained in this system would inform the subject of the existence of material compiled for law enforcement purposes, the premature release of which could prevent the successful completion of investigation, and lead to the improper influencing of witnesses, the destruction of records, or the fabrication of testimony. Exempt portions of this system also contain information that has been properly classified under E.O. 12958, and that is required to be kept secret in the interest of national defense or foreign policy.

(C) Exempt portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal civilian employment, military service, Federal contracts, or access to classified information, and was obtained by providing an express or implied assurance to the source that his or her identity would not be revealed to the subject of the record.

(D) The notice of this system of records published in the FEDERAL REGISTER sets forth the basic statutory or related authority for maintenance of the system.

(E) The categories of sources of records in this system have been published in the FEDERAL REGISTER in broad generic terms. The identity of specific sources, however, must be withheld in order to protect the confidentiality of the source, of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(F) This system of records is exempted from procedures for notice to an individual as to the existence of records pertaining to him/her dealing with an actual or potential civil or regulatory investigation, because such notice to an individual would be detrimental to the successful conduct and/or completion of an investigation, pending or future. Mere notice of the fact of an investigation could inform the subject or others that their activities are under, or may become the subject of, an investigation. This could enable the subjects to avoid detection, to influence witnesses improperly, to destroy records, or to fabricate testimony.

(G) Exempt portions of this system containing screening board reports.

(H) Screening board reports set forth the results of oral examination of applicants for a position as a special agent with the Naval Investigation Service Command. Disclosure of these records would reveal the areas pursued in the course of the examination and thus adversely affect the result of the selection process. Equally important, the records contain the candid views of the members composing the board. Release of the records could affect the willingness of the members to provide candid opinions and thus diminish the effectiveness of a program which is essential to maintaining the high standards of the Special Agent Corps., *i.e.*, those records constituting examination material used solely to determine individual qualifications for appointment in the Federal Service.

(14) *System identifier and name*. N05520–5, Personnel Security Program Management Records System.

(i) *Exemptions*. (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be

exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Portions of this system of records are exempt from the following subsections of 5 U.S.C. 552a: (d)(1–5).

(ii) *Authority*. 5 U.S.C. 552a(k)(1) and (k)(5).

(iii) *Reasons*. (A) Granting individuals access to information collected and maintained in this system of records could result in the disclosure of classified material; and jeopardize the safety of informants, and their families. Further, the integrity of the system must be ensured so that complete and accurate records of all adjudications are maintained. Amendment could cause alteration of the record of adjudication.

(B) [Reserved]

(15) *System identifier and name*. N05580–1, Security Incident System.

(i) *Exemption*. (A) Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws.

(B) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3), (c)(4), (d), (e)(2), and (e)(4)(G) through (I), (e)(5), (e)(8), (f) and (g).

(ii) *Authority*. 5 U.S.C. 552a(j)(2).

(iii) *Reasons*. (A) Granting individuals access to information collected and maintained by this component relating to the enforcement of criminal laws could interfere with orderly administration of justice, and possibly enable suspects to avoid detection or apprehension. Disclosure of this information could result in concealment, destruction, or fabrication of evidence, and jeopardize the safety and well being of informants, witnesses and their families, and of law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component, and could result in the invasion of privacy of individuals only incidentally related to an investigation. The exemption of the individual's right of access to his or her records, and the reason therefore, necessitate the exemption of this system of records from the requirements of other cited provisions.

(B) [Reserved]

(16) [Reserved]

(17) *System identifier and name*. N05800–1, Legal Office Litigation/Correspondence Files.

(i) *Exemptions*. (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(E) Evaluation material used to determine potential for promotion in the Military Services may be exempt pursuant to 5 U.S.C. 552a(k)(7), but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(F) Portions of this system of records are exempt from the following subsections of the Privacy Act: (d), (e)(1), and (f)(2), (3), and (4).

(ii) *Authority*. 5 U.S.C. 552a(k)(1), (k)(2), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons.* (A) Subsection (d) because granting individuals access to information relating to the preparation and conduct of litigation would impair the development and implementation of legal strategy. Accordingly, such records are exempt under the attorney-client privilege. Disclosure might also compromise on-going investigations and reveal confidential informants. Additionally, granting access to the record subject would seriously impair the Navy's ability to negotiate settlements or pursue other civil remedies. Amendment is inappropriate because the litigation files contain official records including transcripts, court orders, investigatory materials, evidentiary materials such as exhibits, decisional memorandum and other case-related papers. Administrative due process could not be achieved by the ''ex parte'' correction of such materials.

(B) Subsection (e)(1) because it is not possible in all instances to determine relevancy or necessity of specific information in the early stages of case development. What appeared relevant and necessary when collected, ultimately may be deemed unnecessary upon assessment in the context of devising legal strategy. Information collected during civil litigation investigations which is not used during subject case is often retained to provide leads in other cases or to establish patterns of activity.

(C) Subsections (f)(2), (3), and (4) because this record system is exempt from the individual access provisions of subsection (d).

(18) *System identifier and name.* N01000–5, Naval Clemency and Parole Board Files.

(i) *Exemption.* (A) Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principal function any activity pertaining to the enforcement of criminal laws.

(B) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(4), (d), (e)(4)(G), and (f).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) Granting individuals access to records maintained by this Board could interfere with internal processes by which Board personnel are able to formulate decisions and policies with regard to clemency and parole in cases involving naval prisoners and other persons under the jurisdiction of the Board. Material will be screened to permit access to all material except such records or documents as reflecting items of opinion, conclusion, or recommendation expressed by individual board members or by the board as a whole.

(B) The exemption of the individual's right to access to portions of these records, and the reasons therefore, necessitate the partial exemption of this system of records from the requirements of the other cited provisions.

(19) *System identifier and name.* N01752–1, Family Advocacy Program System.

(i) *Exemptions.* (A) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Portions of this system of records are exempt from the following subsections of the Privacy Act: (c)(3) and (d).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* (A) Exemption is needed in order to encourage persons having knowledge of abusive or neglectful acts toward children to report such information, and to protect such sources

from embarrassment or recriminations, as well as to protect their right to privacy. It is essential that the identities of all individuals who furnish information under an express promise of confidentiality be protected. Additionally, granting individuals access to information relating to criminal and civil law enforcement, as well as the release of certain disclosure accounting, could interfere with ongoing investigations and the orderly administration of justice, in that it could result in the concealment, alteration, destruction, or fabrication of information; could hamper the identification of offenders or alleged offenders and the disposition of charges; and could jeopardize the safety and well-being of parents and their children.

(B) Exempted portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal employment and Federal contracts, and that was obtained by providing an express or implied promise to the source that his or her identity would not be revealed to the subject of the record.

(20) *System identifier and name.* N12930–1, Human Resources Group Personnel Records.

(i) *Exemptions.* (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(C) Portions of this system of records are exempt from the following subsections of the Privacy Act: (d), (e)(4)(G) and (H), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(5) and (k)(6).

(iii) *Reasons.* (A) Exempted portions of this system contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal employment, and was obtained by providing express or implied promise to the source that his or her identity would not be revealed to the subject of the record.

(B) Exempted portions of this system also contain test or examination material used solely to determine individual qualifications for appointment or promotion in the Federal Service, the disclosure of which would comprise the objectivity or fairness of the testing or examination process.

(21) *System identifier and name.* N05813–4, Trial/Government Counsel Files.

(i) *Exemption.* Parts of this system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principle function any activity pertaining to the enforcement of criminal laws. Portions of this system of records that may be exempt pursuant to subsection 5 U.S.C. 552a(j)(2) are (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(5), (e)(4)(G), (H), and (I), (e)(8), (f), and (g).

(ii) *Exemption.* Information specifically authorized to be classified under E.O. 12958, as implemented by DOD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(iii) *Exemption.* Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source. Portions of this system of records that may be exempt pursuant to subsections 5 U.S.C. 552a(k)(1) and (k)(2) are (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f).

(iv) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2).

(v) *Reasons.* (A) From subsection (c)(3) because release of accounting of disclosure could place the subject of an investigation on notice that he/she is

under investigation and provide him/her with significant information concerning the nature of the investigation, resulting in a serious impediment to law enforcement investigations.

(B) From subsections (c)(4), (d), (e)(4)(G), and (e)(4)(H) because granting individuals access to information collected and maintained for purposes relating to the enforcement of laws could interfere with proper investigations and orderly administration of justice. Granting individuals access to information relating to the preparation and conduct of criminal prosecution would impair the development and implementation of legal strategy. Amendment is inappropriate because the trial/Government counsel files contain official records including transcripts, court orders, and investigatory materials such as exhibits, decisional memorandum and other case-related papers. Disclosure of this information could result in the concealment, alteration or destruction of evidence, the identification of offenders or alleged offenders, nature and disposition of charges; and jeopardize the safety and well-being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render in effective investigation techniques, sources, and methods used by law enforcement personnel, and could result in the invasion of privacy of individuals only incidentally related to an investigation.

(C) From subsection (e)(1) because it is not always possible in all instances to determine relevancy or necessity of specific information in the early stages of case development. Information collected during criminal investigations and prosecutions and not used during the subject case is often retained to provide leads in other cases.

(D) From subsection (e)(2) because in criminal or other law enforcement investigations, the requirement that information be collected to the greatest extent practicable from the subject individual would alert the subject as to the nature or existence of an investigation, presenting a serious impediment to law enforcement investigations.

(E) From subsection (e)(3) because compliance would constitute a serious impediment to law enforcement in that it could compromise the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(F) From subsection (e)(4)(I) because the identity of specific sources must be withheld in order to protect the confidentiality of the sources of criminal and other law enforcement information. This exemption is further necessary to protect the privacy and physical safety of witnesses and informants.

(G) From subsection (e)(5) because in the collection of information for law enforcement purposes it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light and the accuracy of such information can only be determined in a court of law. The restrictions of subsection (e)(5) would restrict the ability of trained investigators and intelligence analysts to exercise their judgment in reporting on investigations and impede the development of intelligence necessary for effective law enforcement.

(H) From subsection (e)(8) because compliance would provide an impediment to law enforcement by interfering with the ability to issue warrants or subpoenas and by revealing investigative techniques, procedures, or evidence.

(I) From subsection (f) and (g) because this record system is exempt from the individual access provisions of subsection (d).

(J) Consistent with the legislative purpose of the Privacy Act of 1974, the DON will grant access to nonexempt material in the records being maintained. Disclosure will be governed by the DON's Privacy Regulation, but will be limited to the extent that the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal violation will not be alerted to the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered, the privacy of third parties will not be violated; and that the disclosure would

not otherwise impede effective law enforcement. Whenever possible, information of the above nature will be deleted from the requested documents and the balance made available. The controlling principle behind this limited access is to allow disclosures except those indicated above. The decisions to release information from these systems will be made on a case-by-case basis.

(22) *System identifier and name.* NM05211–1, Privacy Act Request Files and Tracking System.

(i) *Exemption.* During the processing of a Privacy Act request (which may include access requests, amendment requests, and requests for review for initial denials of such requests), exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this system, the DON hereby claims the same exemptions for the records from those ''other'' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reason.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, and to preserve the confidentiality and integrity of Federal evaluation materials. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(23) *System identifier and name.* NM05720–1, FOIA Request/Appeal Files and Tracking System.

(i) *Exemption.* During the processing of a Freedom of Information Act request, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this system, the DON hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reason.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, and to preserve the confidentiality and integrity of Federal evaluation materials. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(24) *System identifier and name.* N05800–2, Professional Responsibility Files.

(i) *Exemptions.* Investigatory material compiled for law enforcement purposes, may be exempt pursuant to 5 U.S.C. 552(k)(2). However, if an individual is denied any right, privilege, or benefit

for which he would otherwise be entitled by Federal law or which he would otherwise be eligible, as a result of maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source. Any portion of this record system which falls within the provisions of 5 U.S.C. 552a(k)(2) may be exempt from the following subsections of 5 U.S.C 552a: (c)(3), (d)(1) through (5), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I).

(ii) *Authority*. 5 U.S.C. 552a(k)(2)

(ii) *Reason*. The reason for asserting this exemption (k)(2) is to ensure the integrity of the litigation process.

(25) *System identifier and name*. NM03800–1, Naval Global Maritime, Foreign, Counterterrorism and Counter Intelligence Operation Records.

(i) *Exemptions*. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5) but only to the extent that such material would reveal the identity of a confidential source. An exemption rule for this system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2) and (3)(c) and (e) and is published as 32 CFR part 701.

(ii) *Authority*. 5 U.S.C. 552a(k)(5).

(iii) *Reason*. The reason for asserting this exemption is ensure the integrity of the security and investigative material compiled for law enforcement purposes by the Department of the Navy and the Department of Defense.

[84 FR 14730, Apr. 11, 2019, as amended at 86 FR 31431, June 14, 2021]

### § 310.17 Exemptions for specific Marine Corps record systems.

(a) [Reserved]

(1) *System identifier and name*. MIN00001, Personnel and Security Eligibility and Access Information System.

(i) *Exemption*. (A) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3506, may be exempt pursuant to 5 U.S.C. 552a(k)(3).

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) Portions of this system of records are exempt for the following subsections of the Privacy Act: (c)(3), (d), (e)(1), (e)(4)(G) through (I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(2), (k)(3), and (k)(5), as applicable.

(iii) *Reasons*. (A) Exempt portions of this system contain information that has been properly classified under E.O. 12958, and that is required to be kept secret in the interest of national defense or foreign policy.

(B) Exempt portions of this system also contain information considered relevant and necessary to make a determination as to qualifications, eligibility, or suitability for Federal civilian employment, military service, Federal contracts, or access to classified, compartmented, or otherwise sensitive information, and was obtained by providing an expressed or implied assurance to the source that his or her identity would not be revealed to the subject of the record.

(C) Exempt portions of this system further contain information that identifies sources whose confidentiality must be protected to ensure that the privacy and physical safety of these witnesses and informants are protected.

EFFECTIVE DATE NOTE: At 87 FR 37999, June 27, 2022, § 310.17 was removed and reserved, effective Sept. 6, 2022.

**§ 310.18 Defense Contract Audit Agency (DCAA) exemptions.**

(a) *General information.* There are two types of exemptions, general and specific. The general exemption authorizes the exemption of a system of records from all but a few requirements of the Privacy Act. The specific exemption authorizes exemption of a system of records or portion thereof, from only a few specific requirements. If a new system of records originates for which an exemption is proposed, or an additional or new exemption for an existing system of records is proposed, the exemption shall be submitted with the system of records notice. No exemption of a system of records shall be considered automatic for all records in the system. The systems manager shall review each requested record and apply the exemptions only when this will serve significant and legitimate Government purposes.

(b) *Specific exemptions.* (1) *System identifier and name.* RDCAA 900.1, DCAA Internal Review Case Files.

(i) *Exemption.* Any portions of this system of records which fall under the provisions of 5 U.S.C. 552a(k)(2) and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G), (H), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because disclosures from this system could interfere with the just, thorough and timely resolution of the complaint or inquiry, and possibly enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying or fabricating evidence or documents.

(B) From subsection (d) because disclosures from this system could interfere with the just, thorough and timely resolution of the complaint or inquiry, and possibly enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying or fabricating evidence or documents. Disclosures could also subject sources and witnesses to harassment or intimidation which jeopardize the safety and well-being of themselves and their families.

(C) From subsection (e)(1) because the nature of the investigation functions creates unique problems in prescribing specific parameters in a particular case as to what information is relevant or necessary. Due to close liaison and working relationships with other Federal, state, local, foreign country law enforcement agencies, and other governmental agencies, information may be received which may relate to a case under the investigative jurisdiction of another government agency. It is necessary to maintain this information in order to provide leads for appropriate law enforcement purposes and to establish patterns of activity which may relate to the jurisdiction of other cooperating agencies.

(D) From subsection (e)(4)(G) through (H) because this system of records is exempt from the access provisions of subsection (d).

(E) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to that individual, and record amendment procedures for this record system.

(2) [Reserved]

**§ 310.19 Defense Information Systems Agency (DISA) exemptions.**

(a) Section 5 U.S.C. 552a(3)(j) and (3)(k) authorize an agency head to exempt certain systems of records or parts of certain systems of records from some of the requirements of the act. This part reserves to the Director, DISA, as head of an agency, the right to create exemptions pursuant to the exemption provisions of the act. All systems of records maintained by DISA shall be exempt from the requirements of 5 U.S.C. 552a(d) pursuant to 5 U.S.C. 552a(k)(1) to the extent that the system contains any information properly classified under Executive Order 11652, ''Classification and Declassification of

National Security Information and Material,'' dated March 8, 1972 (37 FR 10053, May 19, 1972) and which is required by the executive order to be kept secret in the interest of national defense or foreign policy. This exemption, which may be applicable to parts of all systems of records, is necessary because certain record systems not otherwise specifically designated for exemptions may contain isolated information which has been properly classified.

(1) *System identifier and name*. K890.23, DISA Inspector General Investigative Tracker (DIGit).

(i) *Exemption*. Any portion of this record system which falls within the provisions of 5 U.S.C. 552a(j)(2), (k)(2)and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I).

(ii) *Authority*. 5 U.S.C. 552a(j)(2), (k)(2), and (k)(5).

(iii) *Reasons*. To ensure the integrity of the privacy and civil liberties process. The execution requires that information be provided in a free and open manner without fear of retribution or harassment in order to facilitate a just, thorough, and timely resolution of the complaint or inquiry. Disclosures from this system can enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying, or fabricating evidence or documents. In addition, disclosures can subject sources and witnesses to harassment or intimidation which may cause individuals not to seek redress for wrongs through privacy and civil liberties channels for fear of retribution or harassment.

(2) [Reserved]

### § 310.20 Defense Intelligence Agency (DIA) exemptions.

(a) All systems of records maintained by the Director Intelligence Agency shall be exempt from the requirements of 5 U.S.C. 552a(d) pursuant to 5 U.S.C. 552a(k)(1) to the extent that the system contains any information properly classified under Executive order to be kept secret in the interest of national defense or foreign policy. This exemption, which may be applicable to parts of all systems of records, is necessary because certain record systems not specifically designated for exemption may contain isolated information which has been properly classified.

(b) The Director, Defense Intelligence Agency, designated the systems of records listed below for exemptions under the specified provisions of the Privacy Act of 1974, as amended (Pub. L. 93–579).

(1) *System identification and name:* LDIA 0271, Investigations and Complaints.

(i) *Exemption*. Any portion of this record system which falls within the provisions of 5 U.S.C. 552a(k)(2) and (5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (e)(4)(I).

(ii) *Authority*. 5 U.S.C. 552a(k) (2) and (5).

(iii) *Reasons*. The reasons for asserting these exemptions are to ensure the integrity of the Inspector General process within the Agency. The execution requires that information be provided in a free and open manner without fear of retribution or harassment in order to facilitate a just, thorough and timely resolution of the complaint or inquiry. Disclosures from this system can enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying or fabricating evidence or documents. Also, disclosures can subject sources and witnesses to harassment or intimidation which may cause individuals not to seek redress for wrongs through Inspector General channels for fear of retribution or harassment.

(2) *System identifier and name*. LDIA 13–0001, Conflict Management Programs.

(i) *Exemption*. Any portion of this record system which falls within the provisions of 5 U.S.C. 552a(k)(2) and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I)

(ii) *Authority*. 5 U.S.C. 552a (k)(2) and (k)(5)

(iii) *Reasons*. Claiming these exemptions ensures the integrity of the conflict management process. The execution requires that information be provided in a free and open manner without fear of retribution or harassment

in order to facilitate a just, thorough, and timely resolution of the complaint or inquiry. Disclosures from this system can enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying, or fabricating evidence or documents. In addition, disclosures can subject sources and witnesses to harassment or intimidation which may cause individuals to not seek redress for wrongs through available channels for fear of retribution or harassment.

(3) *System identifier and name.* LDIA 0660, Security and Counterintelligence Files.

(i) *Exemption.* Any portion of this record system which falls within the provisions of 5 U.S.C. 552a(k)(2), (k)(5) and (k)(6) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), and (e)(4)(I).

(ii) *Authority.* 5 U.S.C. 552a(k)(2), (k)(5) and (k)(6).

(iii) *Reasons.* The reasons for asserting these exemptions are to ensure the integrity of the adjudication process used by the Agency to determine the suitability, eligibility or qualification for Federal service with the Agency and to make determinations concerning the questions of access to classified materials and activities. The proper execution of this function requires that the Agency have the ability to obtain candid and necessary information in order to fully develop or resolve pertinent information developed in the process. Potential sources, out of fear or retaliation, exposure or other action, may be unwilling to provide needed information or may not be sufficiently frank to be a value in personnel screening, thereby seriously interfering with the proper conduct and adjudication of such matters; and protects information used for medical, psychological evaluations, security questionnaires and polygraph testing.

(4) [Reserved]

(5) [Reserved]

(6) *System identifier and name.* LDIA 10–0002, Foreign Intelligence and Counterintelligence Operation Records.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (b)(6)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) The specific sections of 5 U.S.C. 552a from which the system is to be exempted are 5 U.S.C. 552a (c)(3) and (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (H), and (I), (e)(5), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because to grant access to an accounting of disclosures as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prospective interest by DIA or other agencies. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (c)(4), (d), and (f) because providing access to this information could result in the concealment, destruction or fabrication of evidence and jeopardize the safety and well being of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information could also reveal and render ineffectual investigative techniques, sources, and methods used by this component and could result in the invasion of privacy of individuals only incidentally related to an investigation. Investigatory material is exempt to the extent that the disclosure of such material would reveal the identity of a source who furnished the information to the Government under an express promise that the identity of the source would be held in confidence,

or prior to September 27, 1975 under an implied promise that the identity of the source would be held in confidence. This exemption will protect the identities of certain sources that would be otherwise unwilling to provide information to the Government. The exemption of the individual's right of access to his/her records and the reasons therefore necessitate the exemptions of this system of records from the requirements of the other cited provisions.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsection (e)(2) because collecting information to the fullest extent possible directly from the subject individual may or may not be practical in a criminal investigation.

(E) From subsection (e)(3) because supplying an individual with a form containing a Privacy Act Statement would tend to inhibit cooperation by many individuals involved in a criminal investigation. The effect would be somewhat adverse to established investigative methods and techniques.

(F) From subsections (e)(4)(G), (H), and (I) because it will provide protection against notification of investigatory material which might alert a subject to the fact that an investigation of that individual is taking place, and the disclosure of which would weaken the on-going investigation, reveal investigatory techniques, and place confidential informants in jeopardy who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise). In addition, this system of records is exempt from the access provisions of subsection (d).

(G) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(H) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to the individual and record amendment procedures for this record system.

(I) From subsection (g) because this system of records should be exempt to the extent that the civil remedies relate to provisions of 5 U.S.C. 552a from which this rule exempts the system.

(7) *System identifier and name.* LDIA 0900, Accounts Receivable, Indebtedness and Claims.

(i) *Exemption.* During the course of accounts receivable, indebtedness or claims actions, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this system, the DIA hereby claims the same exemptions for the records from those ''other'' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(k)(2) through (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed

in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(8) *System identifier and name.* LDIA 0010, Information Requests-Freedom of Information Act (FOIA) and Privacy Act.

(i) *Exemption.* During the course of information requests-FOIA and Privacy Act actions, exempt records/material from other systems of records may become part of this system of records. For such records/material, DIA hereby claims the same exemptions as is claimed for the systems from which such records/material are derived.

(ii) *Authority.* 5 U.S.C. 552a(k)(2) through (k)(7).

(iii) *Reasons.* Records in a system of records are only exempted from pertinent provisions of 5 U.S.C. 552a to the extent such provisions are identified and an exemption claimed. In general, exemptions claimed protect properly classified information relating to national defense and foreign policy; avoid interference during the conduct of criminal, civil, or administrative actions or investigations; ensure protective services provided the President and others are not compromised; protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations; preserve the confidentiality and integrity of Federal testing materials; and safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule(s) for the systems of records from which the records/materials was derived will identify the specific reasons why the records/materials are exempt from provisions of 5 U.S.C. 552a.

(9) *System identifier and name.* LDIA 12–0002, Privacy and Civil Liberties Case Management System.

(i) *Exemption.* Any portion of this record system which falls within the provisions of 5 U.S.C. 552a(k)(2) and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I).

(ii) *Authority.* 5 U.S.C. 552a(k)(2)and (k)(5).

(iii) *Reasons.* The reasons for asserting these exemptions is to ensure the integrity of the privacy and civil liberties process. The execution requires that information be provided in a free and open manner without fear of retribution or harassment in order to facilitate a just, thorough, and timely resolution of the complaint or inquiry. Disclosures from this system can enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying, or fabricating evidence or documents. In addition, disclosures can subject sources and witnesses to harassment or intimidation which may cause individuals not to seek redress for wrongs through privacy and civil liberties channels for fear of retribution or harassment.

(10) *System identifier and name.* LDIA 0209, Litigation Case Files.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or which he would otherwise be eligible, as a result of maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source. This exemption provides limited protection of investigative reports maintained in a system of records used in personnel or administrative actions. Investigatory material compiled solely

for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Any portion of this record system which falls within the provisions of 5 U.S.C. 552a(k)(2) and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d)(1)(2)(3)(4)(5), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I). Exempt materials from other systems of records may in turn become part of the case records in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this case record, the Defense Intelligence Agency hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary systems of records, which they are a part.

(ii) *Authority*. 5 U.S.C. 552a(j)(2), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons*. The reason for asserting these exemptions (k)(2) and (k)(5) is to ensure the integrity of the litigation process.

(11) *System identifier and name*. LDIA 10–0004 Occupational, Safety, Health, and Environmental Management Records.

(i) *Exemption*. Any portion of this record system which falls within the provisions of 5 U.S.C. 552a(k)(2) (k)(4) and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3); (d)(1), (d)(2), (d)(3), (d)(4), (d)(5); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); (f)(1), (f)(2), (f)(2), (f)(3), (f)(4), (f)(5).

(ii) *Authority*. 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons*. The reasons for asserting these exemptions are to ensure the integrity of an investigative or administrative process and to protect statistical records. The execution requires that information be provided in a free and open manner without fear of retribution or harassment in order to facilitate a just, thorough, and timely resolution during an investigation or administrative action. Disclosures from this system can enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying, or fabricating evidence or documents. In addition, disclosures can subject sources and witnesses to harassment or intimidation which may cause individuals to not to seek redress for concerns about occupational safety, health, environmental issues and accident reporting. Information is used to comply regulatory reporting requirements.

[84 FR 14730, Apr. 11, 2019, as amended at 86 FR 31431, June 14, 2021]

### § 310.21 Defense Logistics Agency (DLA) exemptions.

(a) The Director, DLA or designee may claim an exemption from any provision of the Privacy Act from which an exemption is allowed.

(b) An individual is not entitled to access information that is compiled in reasonable anticipation of a civil action or proceeding. The term ''civil action or proceeding'' is intended to include court proceedings, preliminary judicial steps, and quasi-judicial administrative hearings or proceedings (*i.e.*, adversarial proceedings that are subject to rules of evidence). Any information prepared in anticipation of such actions or proceedings, to include information prepared to advise DLA officials of the possible legal or other consequences of a given course of action, is protected. The exemption is similar to the attorney work-product privilege except that it applies even when the information is prepared by non-attorneys. The exemption does not apply to information compiled in anticipation of criminal actions or proceedings.

(c) *Exempt Records Systems*. All systems of records maintained by the Defense Logistics Agency will be exempt from the access provisions of 5 U.S.C. 552a(d) and the notification of access procedures of 5 U.S.C. 522a(e)(4)(H) pursuant to 5 U.S.C. 552a(k)(1) to the extent that the system contains any information properly classified under Executive Order 13526 and which is required by the Executive Order to be kept secret in the interest of national defense or foreign policy. This exemption, which may be applicable to parts

of all DLA systems of records, is necessary because certain record systems not otherwise specifically designated for exemptions herein may contain isolated items of information which have been properly classified.

(1) *System identifier and name.* S170.04 (Specific exemption), Debarment and Suspension Files.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). If an individual, however, is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible as a result of the maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(1)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) The specific sections of 5 U.S.C. 552a from which the system is exempt are 5 U.S.C. 552a(c)(3), (d)(1) through (d)(4), (e)(1), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* (A) From 5 U.S.C. 552a(c)(3), as granting access to the accounting for each disclosure, as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of an investigation or prosecutive interest by DLA or other agencies. This seriously could compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or making witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From 5 U.S.C. 552a(d)(1) through (4) and (f), as providing access to records of a civil investigation, and the right to contest the contents of those records and force changes to be made to the information contained therein, would seriously interfere with and thwart the orderly and unbiased conduct of an investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would: Allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach to satisfy any Government claim arising from the investigation or proceeding.

(C) From 5 U.S.C. 552a(e)(1), as it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From 5 U.S.C. 552a(e)(4)(G) and (H), as there is no necessity for such publication since the system of records would be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments and corrections to the information in the system.

(E) From 5 U.S.C. 552a(e)(4)(I), as to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. DLA, nevertheless, will continue to publish such a notice in broad generic terms as is its current practice.

(2) *System identifier and name.* S500.10 (Specific exemption), Personnel Security Files.

(i) *Exemption*. (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Therefore, portions of this system may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), and (e)(1).

(ii) *Authority*. 5 U.S.C. 552a(k)(5).

(iii) *Reasons*. (A) From 5 U.S.C. 552a(c)(3) and (d), when access to accounting disclosures and access to or amendment of records would cause the identity of a confidential source to be revealed. Disclosure of the source's identity not only will result in the Department breaching the promise of confidentiality made to the source but it would impair the Department's future ability to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information. Unless sources may be assured that a promise of confidentiality will be honored, they will be less likely to provide information considered essential to the Department in making the required determinations.

(B) From 5 U.S.C. 552a(e)(1), as in the collection of information for investigatory purposes, it is not always possible to determine the relevance and necessity of particular information in the early stages of the investigation. In some cases, it is only after the information is evaluated in light of other information that its relevance and necessity becomes clear. Such information permits more informed decision making by the Department when making required suitability, eligibility, and qualification determinations.

(3) *System identifier and name*. S500.20 (Specific exemption), Defense Logistics Agency (DLA) Criminal Incident Reporting System (DCIRS).

(i) *Exemption*. (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). If an individual, however, is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(3)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) The specific sections of 5 U.S.C. 552a from which the system is to be exempted are 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), (I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(2).

(iii) *Reasons*. (A) From subsection (c)(3), as to grant access to an accounting of disclosures as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prosecutive interest by DLA or other agencies. This could seriously compromise case preparation by: Prematurely revealing its existence and nature; compromising or interfering with witnesses or making witnesses reluctant to cooperate; and leading to suppression, alteration, or destruction of evidence.

(B) From 5 U.S.C. 552a(d) and (f), as providing access to this information could result in the concealment, destruction or fabrication of evidence and jeopardize the safety and wellbeing of informants, witnesses and their families, and law enforcement personnel and their families. Disclosure of this information also could reveal and render ineffectual investigative techniques, sources, and methods used by this component and could result in the invasion of privacy of individuals only incidentally related to an investigation. Investigatory material is exempt to the extent that the disclosure of such material would reveal the identity of a source who furnished the information to the Government under an express promise that the identity of the source would be held in confidence, or prior to September 27, 1975, under an

implied promise that the identity of the source would be held in confidence. This exemption will protect the identities of certain sources that would be otherwise unwilling to provide information to the Government. The exemption of the individual's right of access to his/her records and the reasons therefore necessitate the exemptions of this system of records from the requirements of the other cited provisions.

(C) From 5 U.S.C. 552a(e)(1), as it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From 5 U.S.C. 552a(e)(4)(G), (H), and (I), as it will provide protection against notification of investigatory material which might alert a subject to the fact that an investigation of that individual is taking place, and the disclosure of which would weaken the ongoing investigation, reveal investigatory techniques, and place in jeopardy confidential informants who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise).

(4) *System identifier and name.* S500.30 (Specific exemption), Incident Investigation/Police Inquiry Files.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). If an individual, however, is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information, except to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(4)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) The specific sections of 5 U.S.C. 552a from which the system is exempt are 5 U.S.C. 552a(c)(3), (d)(1) through (d)(4), (e)(1), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* (A) From 5 U.S.C. 552a(c)(3), because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prosecutive interest by DLA or other agencies. This could seriously compromise case preparation by: Prematurely revealing its existence and nature; compromising or interfering with witnesses or making witnesses reluctant to cooperate; and leading to suppression, alteration, or destruction of evidence.

(B) From 5 U.S.C. 552a(d)(1) through (d)(4), and (f), as providing access to records of a civil or administrative investigation, and the right to contest the contents of those records and force changes to be made to the information contained therein, would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would: Provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach to satisfy any Government claim arising from the investigation or proceeding.

(C) From 5 U.S.C. 552a(e)(1), as it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From 5 U.S.C. 552a(e)(4)(G) and (H), as this system of records is compiled for law enforcement purposes and is exempt from the access provisions of 5 U.S.C. 552a(d) and (f).

(E) From 5 U.S.C. 552a(e)(4)(I), because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. DLA, nevertheless, will continue to publish such a notice in broad generic terms as is its current practice.

(5) *System identifier and name.* S500.60 (Specific exemption), Defense Logistics Agency Enterprise Hotline Program Records.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). If an individual, however, is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information, except to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(5)(i)(A): When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) The specific sections of 5 U.S.C. 552a from which the system is exempt are 5 U.S.C. 552a(c)(3), (d)(1) through (4), (e)(1), (e)(4)(G), (H), (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3), as to grant access to an accounting of disclosures as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prosecutive interest by DLA or other agencies. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or making witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From 5 U.S.C. 552a(d)(1) through (4) and (f), as providing access to records of a civil or administrative investigation, and the right to contest the contents of those records and force changes to be made to the information contained therein, would interfere seriously with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow: Interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach to satisfy any Government claim arising from the investigation or proceeding.

(C) From 5 U.S.C. 552a(e)(1), as it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From 5 U.S.C. 552a(e)(4)(G) and (H), as this system of records is compiled for law enforcement purposes and is exempt from the access provisions of 5 U.S.C. 552a(d) and (f).

(E) From 5 U.S.C. 552a(e)(4)(I), as to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. DLA will, nevertheless, continue to publish such a notice in broad generic terms as is its current practice.

(6) *System identifier and name.* S510.30 (Specific/General Exemption), Freedom of Information Act/Privacy Act Requests and Administrative Appeal Records.

(i) *Exemption.* During the processing of a Freedom of Information Act/Privacy Act request (which may include access requests, amendment requests, and requests for review for initial denials of such requests), exempt materials from other systems of records may, in turn, become part of the case record in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this system, the Defense Logistics Agency claims the same exemptions for the records from those ''other'' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1) through (7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy; to avoid interference during the conduct of criminal, civil, or administrative actions or investigations; to ensure protective services provided the President and others are not compromised; to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations; to preserve the confidentiality and integrity of Federal testing materials; and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(7) *System identifier and name.* S240.28 DoD (Specific exemption), Case Adjudication Tracking System (CATS).

(i) *Exemption.* (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Therefore, portions of this system may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d)(1)(2)(3)(4), and (e)(1).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* (A) From 5 U.S.C. 552a(c)(3) and (d)(1)(2)(3)(4), when access to accounting disclosures and access to or amendment of records would cause the identity of a confidential source to be revealed. Disclosure of the confidential source's identity not only will result in the Department breaching the express promise of confidentiality made to the source but it would impair the Department's future ability to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information. Unless sources may be assured that a promise of confidentiality will be honored, they will be less likely to provide information considered essential to the Department in making the required determinations.

(B) From 5 U.S.C. 552a(e)(1), as in the collection of information for investigatory purposes, it is not always possible

to determine the relevance and necessity of particular information in the early stages of the investigation. In some cases, it is only after the information is evaluated in light of other information that its relevance and necessity becomes clear. Such information permits more informed decision making by the Department when making required suitability, eligibility, and qualification determinations.

[84 FR 14730, Apr. 11, 2019; 84 FR 16210, Apr. 18, 2019]

### § 310.22 Defense Security Service (DSS) exemptions.

(a) *General.* The Director of the Defense Security Service establishes the following exemptions of records systems (or portions thereof) from the provisions of these rules, and other indicated portions of Public Law 93–579, in this section. They may be exercised only by the Director, Defense Security Service and the Chief of the Office of FOI and Privacy. Exemptions will be exercised only when necessary for a specific, significant and legitimate reason connected with the purpose of a records system, and not simply because they are authorized by statute. Personal records releasable under the provisions of 5 U.S.C. 552 will not be withheld from subject individuals based on these exemptions.

(b) All systems of records maintained by DSS shall be exempt from the requirements of 5 U.S.C. 552a(d) pursuant to 5 U.S.C. 552a(k)(1) to the extent that the system contains any information properly classified under Executive Order 12958 and which is required by the Executive Order to be withheld in the interest of national defense of foreign policy. This exemption, which may be applicable to parts of all systems of records, is necessary because certain record systems not otherwise specifically designated for exemptions herein may contain items of information that have been properly classified.

(1) *System identifier and name.* V1–01, Privacy and Freedom of Information Request Records.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3506, may be exempt pursuant to 5 U.S.C. 552a(k)(3).

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be, exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) Any portion of this system that falls under the provisions of 5 U.S.C. 552a(k)(2), (k)(3), (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a(c)(3); (d); (e)(1); (e)(4)(G), (H) and (I); and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2), (k)(3), (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because it will enable DSS to conduct certain investigations and relay law enforcement information without compromise of the information, protection of investigative techniques and efforts employed, and identities of confidential sources who might not otherwise come forward and who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise);

(B) From subsections (e)(1), (e)(4)(G), (H), and (I) because it will provide protection against notification of investigatory material including certain reciprocal investigations and counterintelligence information, which might alert a subject to the fact that an investigation of that individual is taking place, and the disclosure of which would weaken the on-going investigation, reveal investigatory techniques, and place confidential informants in jeopardy who furnished information under an express promise that the

sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise);

(C) From subsections (d) and (f) because requiring DSS to grant access to records and agency rules for access and amendment of records would unfairly impede the agency's investigation of allegations of unlawful activities. To require DSS to confirm or deny the existence of a record pertaining to a requesting individual may in itself provide an answer to that individual relating to an on-going investigation. The investigation of possible unlawful activities would be jeopardized by agency rules requiring verification of record, disclosure of the record to the subject, and record amendment procedures.

(2) *System identifier and name.* V5–01, Investigative Files System.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3506, may be exempt pursuant to 5 U.S.C. 552a(k)(3).

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) Any portion of this system that falls under the provisions of 5 U.S.C. 552a(k)(2), (k)(3), or (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a(c)(3); (d); (e)(1); (e)(4)(G), (H), and (I); and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2), (k)(3), or (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because it will enable DSS to conduct certain investigations and relay law enforcement information without compromise of the information, protection of investigative techniques and efforts employed, and identities of confidential sources who might not otherwise come forward and who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise).

(B) From subsections (e)(1), (e)(4)(G), (H), and (I) because it will provide protection against notification of investigatory material including certain reciprocal investigations and counterintelligence information, which might alert a subject to the fact that an investigation of that individual is taking place, and the disclosure of which would weaken the on-going investigation, reveal investigatory techniques, and place confidential informants in jeopardy who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise).

(C) From subsections (d) and (f) because requiring DSS to grant access to records and agency rules for access and amendment of records would unfairly impede the agency's investigation of allegations of unlawful activities. To require DSS to confirm or deny the existence of a record pertaining to a requesting individual may in itself provide an answer to that individual relating to an on-going investigation. The investigation of possible unlawful activities would be jeopardized by agency rules requiring verification of record, disclosure of the record to the subject, and record amendment procedures.

(3) *System identifier and name.* V5–02, Defense Clearance and Investigations Index (DCII).

(i) *Exemption.* Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the

extent that disclosure would reveal the identity of a confidential source. Any portion of this system that falls under the provisions of 5 U.S.C. 552a(k)(2) may be exempt from the following subsections of 5 U.S.C. 552a(c)(3); (d); (e)(1); (e)(4)(G), (H), and (I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(2).

(iii) *Reasons*. (A) From subsection (c)(3) because it will enable DSS to conduct certain investigations and relay law enforcement information without compromise of the information, protection of investigative techniques and efforts employed, and identities of confidential sources who might not otherwise come forward and who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise).

(B) From subsections (e)(1), (e)(4)(G), (H), and (I) because it will provide protection against notification of investigatory material including certain reciprocal investigations and counterintelligence information, which might alert a subject to the fact that an investigation of that individual is taking place, and the disclosure of which would weaken the on-going investigation, reveal investigatory techniques, and place confidential informants in jeopardy who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise).

(C) From subsections (d) and (f) because requiring DSS to grant access to records and agency rules for access and amendment of records would unfairly impede the agency's investigation of allegations of unlawful activities. To require DSS to confirm or deny the existence of a record pertaining to a requesting individual may in itself provide an answer to that individual relating to an on-going investigation. The investigation of possible unlawful activities would be jeopardized by agency rules requiring verification of record, disclosure of the record to the subject, and record amendment procedures.

(4) *System identifier and name*. V5–03, Case Control Management System (CCMS).

(i) *Exemption*. (A) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source. Any portion of this system that falls under the provisions of 5 U.S.C. 552a(k)(2) or (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3); (d); (e)(1); (e)(4)(G), (H), and (I); and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons*. (A) From subsection (c)(3) because it will enable DSS to conduct certain investigations and relay law enforcement information without compromise of the information, protection of investigative techniques and efforts employed, and identities of confidential sources who might not otherwise come forward and who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise).

(B) From subsections (e)(1), (e)(4)(G), (H), and (I) because it will provide protection against notification of investigatory material including certain reciprocal investigations and counterintelligence information, which might alert a subject to the fact that an investigation of that individual is taking place, and the disclosure of which would weaken the on-going investigation, reveal investigatory techniques, and place confidential informants in jeopardy who furnished information under an express promise that the

sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise).

(C) From subsections (d) and (f) because requiring DSS to grant access to records and agency rules for access and amendment of records would unfairly impede the agency's investigation of allegations of unlawful activities. To require DSS to confirm or deny the existence of a record pertaining to a requesting individual may in itself provide an answer to that individual relating to an on-going investigation. The investigation of possible unlawful activities would be jeopardized by agency rules requiring verification of record, disclosure of the record to the subject, and record amendment procedures.

(5) *System identifier and name.* V5–04, Counterintelligence Issues Database (CII–DB).

(i) *Exemption.* (A) Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(B) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(C) Records maintained in connection with providing protective services to the President and other individuals under 18 U.S.C. 3506, may be exempt pursuant to 5 U.S.C. 552a(k)(3).

(D) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(E) Any portion of this system that falls within the provisions of 5 U.S.C. 552a(k)(1), (k)(2), (k)(3) and (k)(5) may be exempt from the following subsections (c)(3); (d)(1) through (d)(5); (e)(1); (e)(4)(G), (H), and (I); and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(1), (k)(2), (k)(3) and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because giving the individual access to the disclosure accounting could alert the subject of an investigation to the existence and nature of the investigation and reveal investigative or prosecutive interest by other agencies, particularly in a joint-investigation situation. This would seriously impede or compromise the investigation and case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate with the investigators; lead to suppression, alteration, fabrication, or destruction of evidence; and endanger the physical safety of confidential sources, witnesses, law enforcement personnel and their families.

(B) From subsection (d) because the application of these provisions could impede or compromise an investigation or prosecution if the subject of an investigation had access to the records or were able to use such rules to learn of the existence of an investigation before it would be completed. In addition, the mere notice of the fact of an investigation could inform the subject and others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony.

(C) From subsection (e)(1) because during an investigation it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear. In other cases, what may appear to be a relevant and necessary piece of information may become irrelevant in light of further investigation. In addition, during the course of an investigation, the investigator may obtain information that related primarily to matters under the investigative jurisdiction of another agency, and that information may not

be reasonably segregated. In the interest of effective law enforcement, DSS investigators should retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for Federal and other law enforcement agencies.

(D) From subsections (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f) because this system is exempt from subsection (d) of the Act, concerning access to records. These requirements are inapplicable to the extent that these records will be exempt from these subsections. However, DSS has published information concerning its notification and access procedures, and the records source categories because under certain circumstances, DSS could decide it is appropriate for an individual to have access to all or a portion of his/her records in this system of records.

(6) [Reserved]

**§ 310.23 Defense Threat Reduction Agency (DTRA) exemptions.**

(a) *Exemption for classified material.* All systems of records maintained by the Defense Threat Reduction Agency shall be exempt under section (k)(1) of 5 U.S.C. 552a, to the extent that the systems contain any information properly classified under E.O. 12598 and that is required by that E.O. to be kept secret in the interest of national defense or foreign policy. This exemption is applicable to parts of all systems of records including those not otherwise specifically designated for exemptions herein which contain isolated items of properly classified information.

(1) *System identifier and name.* HDTRA 007, Security Operations.

(i) *Exemption.* Portions of this system of records may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d)(1) through (d)(4), (e)(1), (e)(4)(G), (H), (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because it will enable DTRA to safeguard certain investigations and relay law enforcement information without compromise of the information, and protect the identities of confidential sources who might not otherwise come forward and who have furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise.)

(B) From subsection (d)(1) through (d)(4) and (f) because providing access to records of a civil investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with, and thwart the orderly and unbiased conduct of security investigations. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1), (e)(4)(G), (H), (I) because it will provide protection against notification of investigatory material including certain reciprocal investigations and counterintelligence information, which might alert a subject to the fact that an investigation of that individual is taking place, and the disclosure of which would weaken the on-going investigation, reveal investigatory techniques, and place confidential informants in jeopardy who furnished information; under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise.)

(2) *System identifier and name.* HDTRA 011, Inspector General Investigation Files.

(i) *Exemption.* Portions of this system of records may be exempt from the provisions of 5 U.S.C. 552a(c)(3); (d)(1) through (4); (e)(1); (e)(4)(G), (H), and (I); and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because it will enable DTRA to conduct certain investigations and relay law enforcement information without compromise of the information, protection of investigative techniques and efforts employed, and identities of confidential sources who

might not otherwise come forward and who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise.)

(B) From subsection (d)(1) through (d)(4) and (f) because providing access to records of a civil investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1), (e)(4)(G), (H), and (I) because it will provide protection against notification of investigatory material including certain reciprocal investigations and counterintelligence information, which might alert a subject to the fact that an investigation of that individual is taking place, and the disclosure of which would weaken the on-going investigation, reveal investigatory techniques, and place confidential informants in jeopardy who furnished information under an express promise that the sources' identity would be held in confidence (or prior to the effective date of the Act, under an implied promise).

(3) *System identifier and name.* HDTRA 021, Freedom of Information Act and Privacy Act Request Case Files.

(i) *Exemption.* During the processing of a Freedom of Information Act or Privacy Act request exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this system, the Defense Threat Reduction Agency claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6) and (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

### § 310.24 National Geospatial-Intelligence Agency (NGA) exemptions.

(a) *Exempt systems of record.* All systems of records maintained by the NGA and its components shall be exempt from the requirements of 5 U.S.C. 552a(d) pursuant to 5 U.S.C. 552a(k)(1) to the extent that the system contains any information properly classified under Executive Order 12958 and that is required by Executive Order to be withheld in the interest of national defense or foreign policy. This exemption is applicable to parts of all systems of records, including those not otherwise specifically designated for exemptions herein, which contain isolated items of properly classified information.

(1) *System identifier and name.* B0210–07, Inspector General Investigative and Complaint Files.

(i) *Exemption.* (A) Investigative material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Investigative material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) and/or (k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prosecutable interest by the NGA or other agencies. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (d) and (f) because providing access to investigative records and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for investigative purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NGA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(F) Consistent with the legislative purpose of the Privacy Act of 1974, NGA will grant access to nonexempt material in the records being maintained. Disclosure will be governed by NGA's Privacy Regulation, but will be limited to the extent that the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal or civil violation will not be alerted to the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered; the privacy of third parties will not be violated; and that the disclosure would not otherwise impede effective law enforcement. Whenever possible,

information of the above nature will be deleted from the requested documents and the balance made available. The controlling principle behind this limited access is to allow disclosures except those indicated in this paragraph. The decisions to release information from these systems will be made on a case-by-case basis.

(2) *System identifier and name.* NGA–004, NGA Threat Mitigation Records.

(i) *Exemption.* (A) Exempt materials from JUSTICE/FBI—019 Terrorist Screening Records System may become part of the case records in this system of records. To the extent that copies of exempt records from JUSTICE/FBI—019, Terrorist Screening Records System are entered into these Threat Mitigation case records, NGA hereby claims the same exemptions (j)(2) and (k)(2), for the records as claimed in JUSTICE/FBI—019, Terrorist Screening Records system of records of which they are a part.

(B) Information specifically authorized to be classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(C) Investigative material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2) and (k)(5).

(iii) *Reasons.* (A) Pursuant to 5 U.S.C. 552a(j)(2), (k)(2), and (k)(5) NGA is claiming the following exemptions for certain records within the Threat Mitigation Records system: 5 U.S.C. 552a(c)(3) and (4); (d)(1), (2), (3), and (4); (e)(1), (2), (3), (4)(G) through (I), (5), and (8); (f), and (g). Additionally, pursuant to 5 U.S.C. 552a(k)(1) and (k)(2), NGA has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made.

(B) In addition to records under the control of NGA, the Threat Mitigation system of records may include records originating from systems of records of other law enforcement and intelligence agencies which may be exempt from certain provisions of the Privacy Act. However, NGA does not assert exemption to any provisions of the Privacy Act with respect to information submitted by or on behalf of individuals.

(C) To the extent the Threat Mitigation system contains records originating from other systems of records, NGA will rely on the exemptions claimed for those records in the originating system of records. Exemptions for certain records within the Threat Mitigation system from particular subsections of the Privacy Act are justified for the following reasons:

(*1*) From subsection (c)(3) (Accounting for Disclosures) because giving a record subject access to the accounting of disclosures from records concerning him or her could reveal investigative interest on the part of the recipient agency that obtained the record pursuant to a routine use. Disclosure of the accounting could therefore present a serious impediment to law enforcement efforts on the part of the recipient agency because the individual who is the subject of the record would learn of third agency investigative interests and could take steps to evade detection or apprehension. Disclosure of the accounting also could reveal the details of watch list matching measures under the Threat Mitigation system, as well as capabilities and vulnerabilities of the watch list matching process, the release of which could permit an individual to evade future detection and thereby impede efforts to ensure security.

(*2*) From subsection (c)(4) because portions of this system are exempt from the access and amendment provisions of subsection (d).

(*3*) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the

part of Department of Homeland Security or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security sensitive information that could be detrimental to national security.

(*4*) From subsection (e)(1) because it is not always possible for NGA or other agencies to know in advance what information is both relevant and necessary for it to complete an identity comparison between individuals and a known or suspected terrorist. In addition, because NGA and other agencies may not always know what information about an encounter with a known or suspected terrorist will be relevant to law enforcement for the purpose of conducting an operational response.

(*5*) From subsection (e)(2) because application of this provision could present a serious impediment to counterterrorism, law enforcement, or intelligence efforts in that it would put the subject of an investigation, study or analysis on notice of that fact, thereby permitting the subject to engage in conduct designed to frustrate or impede that activity. The nature of counterterrorism, law enforcement, or intelligence investigations is such that vital information about an individual frequently can be obtained only from other persons who are familiar with such individual and his/her activities. In such investigations, it is not feasible to rely upon information furnished by the individual concerning his own activities.

(*6*) From subsection (e)(3), to the extent that this subsection is interpreted to require NGA to provide notice to an individual if NGA or another agency receives or collects information about that individual during an investigation or from a third party. Should the subsection be so interpreted, exemption from this provision is necessary to avoid impeding counterterrorism, law enforcement, or intelligence efforts by putting the subject of an investigation, study or analysis on notice of that fact, thereby permitting the subject to engage in conduct intended to frustrate or impede that activity.

(*7*) From subsections (e)(4)(G) and (H) and (I) (Agency Requirements) and (f) (Agency Rules), because this system is exempt from the access provisions of 5 U.S.C. 552a(d).

(*8*) From subsection (e)(5) because many of the records in this system coming from other system of records are derived from other agency record systems and therefore it is not possible for NGA to ensure their compliance with this provision, however, NGA has implemented internal quality assurance procedures to ensure that data used in the matching process is as thorough, accurate, and current as possible. In addition, in the collection of information for law enforcement, counterterrorism, and intelligence purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light. The restrictions imposed by (e)(5) would limit the ability of those agencies' trained investigators and intelligence analysts to exercise their judgment in conducting investigations and impede the development of intelligence necessary for effective law enforcement and counterterrorism efforts. However, NGA has implemented internal quality assurance procedures to ensure that the data used in the matching process is as thorough, accurate, and current as possible.

(*9*) From subsection (e)(8) because to require individual notice of disclosure of information due to compulsory legal process would pose an impossible administrative burden on NGA and other agencies and could alert the subjects of counterterrorism, law enforcement, or intelligence investigations to the fact of those investigations when not previously known.

(*10*) From subsection (f) (Agency Rules) because portions of this system

are exempt from the access and amendment provisions of subsection (d).

(*11*) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act.

(3) *System identifier and name.* NGA–003, National Geospatial-Intelligence Agency Enterprise Workforce System.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (a)(3)(i). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(ii) *Authority.* 5 U.S.C. 552a (k)(2).

(iii) *Reasons.* Pursuant to 5 U.S.C. 552a(k)(2), the Director of NGA has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(A) From subsection (c)(3) and (c)(4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of NGA as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(B) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of NGA or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(C) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(D) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(E) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(F) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt

from the individual access provisions of subsection (d) for the reasons noted above, and therefore NGA is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(G) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude NGA personnel from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(H) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with NGA's ability to cooperate with law enforcement who would obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(I) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

(4) *System identifier and name.* NGA–008, National Geospatial-Intelligence Agency Polygraph Records System.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (a)(4)(i). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* Pursuant to 5 U.S.C. 552a(k)(2), the Director of NGA has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(A) From subsection (c)(3) and (c)(4) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of NGA as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process.

(B) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of NGA or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment

to such information could disclose security-sensitive information that could be detrimental to homeland security.

(C) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(D) From subsection (e)(2) (Collection of Information from Individuals) because requiring that information be collected from the subject of an investigation would alert the subject to the nature or existence of the investigation, thereby interfering with that investigation and related law enforcement activities.

(E) From subsection (e)(3) (Notice to Subjects) because providing such detailed information could impede law enforcement by compromising the existence of a confidential investigation or reveal the identity of witnesses or confidential informants.

(F) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore NGA is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

(G) From subsection (e)(5) (Collection of Information) because with the collection of information for law enforcement purposes, it is impossible to determine in advance what information is accurate, relevant, timely, and complete. Compliance with subsection (e)(5) would preclude NGA personnel from using their investigative training and exercise of good judgment to both conduct and report on investigations.

(H) From subsection (e)(8) (Notice on Individuals) because compliance would interfere with NGA's ability to cooperate with law enforcement who would obtain, serve, and issue subpoenas, warrants, and other law enforcement mechanisms that may be filed under seal and could result in disclosure of investigative techniques, procedures, and evidence.

(I) From subsection (g)(1) (Civil Remedies) to the extent that the system is exempt from other specific subsections of the Privacy Act.

(5) *System identifier and name.* NGA–010, National Geospatial-Intelligence Agency Security Financial Disclosure Reporting Records System.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source. When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions. Investigative material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* Pursuant to 5 U.S.C. 552a(k)(2), and (k)(5) the Director of NGA has exempted this system from the following provisions of the Privacy Act, subject to the limitation set forth in 5 U.S.C. 552a(c)(3); (d); (e)(1),

(e)(4)(G), (e)(4)(H), (e)(4)(I); and (f). Exemptions from these particular subsections are justified, on a case-by-case basis to be determined at the time a request is made, for the following reasons:

(A) From subsection (c)(3) (Accounting for Disclosures) because release of the accounting of disclosures could alert the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of NGA as well as the recipient agency. Disclosure of the accounting would therefore present a serious impediment to law enforcement efforts and/or efforts to preserve national security. Disclosure of the accounting would also permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension, which would undermine the entire investigative process. Analyst case notes will be kept separate from the individual's data submission. Those case notes will contain investigative case leads and summaries, sensitive processes, evidence gathered from external sources and potential referrals to law enforcement agencies.

(B) From subsection (d) (Access to Records) because access to the records contained in this system of records could inform the subject of an investigation of an actual or potential criminal, civil, or regulatory violation to the existence of that investigation and reveal investigative interest on the part of NGA or another agency. Access to the records could permit the individual who is the subject of a record to impede the investigation, to tamper with witnesses or evidence, and to avoid detection or apprehension. Amendment of the records could interfere with ongoing investigations and law enforcement activities and would impose an unreasonable administrative burden by requiring investigations to be continually reinvestigated. In addition, permitting access and amendment to such information could disclose security-sensitive information that could be detrimental to homeland security.

(C) From subsection (e)(1) (Relevancy and Necessity of Information) because in the course of investigations into potential violations of Federal law, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to a specific investigation. In the interests of effective law enforcement, it is appropriate to retain all information that may aid in establishing patterns of unlawful activity.

(D) From subsections (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) and (f) (Agency Rules), because portions of this system are exempt from the individual access provisions of subsection (d) for the reasons noted above, and therefore NGA is not required to establish requirements, rules, or procedures with respect to such access. Providing notice to individuals with respect to existence of records pertaining to them in the system of records or otherwise setting up procedures pursuant to which individuals may access and view records pertaining to themselves in the system would undermine investigative efforts and reveal the identities of witnesses, and potential witnesses, and confidential informants.

### § 310.25 National Guard Bureau (NGB) exemptions.

(a) *General information*. There are two types of exemptions, general and specific. The general exemption authorizes the exemption of a SOR from all but a few requirements of 5 U.S.C. 552a. The specific exemption authorizes exemption of a SOR or portion thereof, from only a few specific requirements. If a new SOR originates for which an exemption is proposed, or an additional or new exemption for an existing SOR is proposed, the exemption shall be submitted with the SORN. No exemption of a SOR shall be considered automatic for all records in the system. The System Manager shall review each requested records and apply the exemptions only when this will serve significant and legitimate purpose of the Federal Government.

(b) *Exemption for classified material*. All SOR maintained by the NGB shall be exempt under section (k)(1) of 5 U.S.C. 552a to the extent that the systems contain any information properly

classified under Executive Order 13526 and that is required by that Executive Order to be kept secret in the interest of national defense or foreign policy. This exemption is applicable to parts of all systems of records including those not otherwise specifically designated for exemptions herein which contain isolated items of properly classified information.

(c) *Exemption for anticipation of a civil action or proceeding.* All systems of records maintained by the NGB shall be exempt under section (d)(5) of 5 U.S.C. 552a, to the extent that the record is compiled in reasonable anticipation of a civil action or proceeding.

(d) *General exemptions.* No SOR within the NGB shall be considered exempt under subsection (j) or (k) of 5 U.S.C. 552a until the exemption rule for the SOR has been published as a final rule in the FR.

(e) *Specific exemptions.*

(1) *System identifier and name.* INGB 001, Freedom of Information Act (5 U.S.C.) and Privacy Act (5 U.S.C. 552a) Case Files.

(i) *Exemption.* During the course of a 5 U.S.C. 552 or 5 U.S.C. 552a action, exempt materials from other systems of records may, in turn, become part of the case records in this system. To the extent that copies of exempt records from those other systems of records are entered into this 5 U.S.C. 552 or 5 U.S.C. 552a case record, the NGB hereby claims the same exemptions for the records from those other systems that are entered into this system, as claimed for the original primary SOR which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this SOR. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(2) *System identifier and name.* INGB 005, Special Investigation Reports and Files.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (e)(2)(i). When claimed, this exemption allows limited protection of investigative reports maintained in a SOR used in personnel or administrative actions. Any portion of this SOR which falls within the provisions of 5 U.S.C. 552a(k)(2) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) of 5 U.S.C. 552a because to grant access to the accounting for each disclosure as required by 5 U.S.C. 552a, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead

to suppression, alteration, or destruction of evidence.

(B) From subsections (d) and (f) of 5 U.S.C. 552a because providing access to investigative records and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under 5 U.S.C. 552a would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) of 5 U.S.C. 552a because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) of 5 U.S.C. 552a because this SOR is compiled for investigative purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) of 5 U.S.C. 552a because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants.

### § 310.26 National Reconnaissance Office (NRO) exemptions.

(a) All systems of records maintained by the NRO shall be exempt from the requirements of 5 U.S.C. 552a(d) pursuant to 5 U.S.C. 552a(k)(1) to the extent that the system contains any information properly classified under Executive Order 12958 and which is required by the Executive Order to be withheld in the interest of national defense of foreign policy. This exemption, which may be applicable to parts of all systems of records, is necessary because certain record systems not otherwise specifically designated for exemptions herein may contain items of information that have been properly classified.

(b) No system of records within the NRO shall be considered exempt under subsection (j) or (k) of the Privacy Act until the exemption and the exemption rule for the system of records has been published as a final rule in the FEDERAL REGISTER.

(c) An individual is not entitled to have access to any information compiled in reasonable anticipation of a civil action or proceeding (5 U.S.C. 552a(d)(5)).

(d) Proposals to exempt a system of records will be forwarded to the Defense Privacy Office, consistent with the requirements of this part, for review and action.

(1) *System identifier and name.* QNRO–23, Counterintelligence Issue Files.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) and/or (k)(5) from the following subsections of 5 U.S.C.

552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons*. (A) From subsection (c)(3) because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the identity of the recipient, could alert the subject to the existence of the investigation or prosecutable interest by NRO or other agencies. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (d)(1) through (d)(4), and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for law enforcement purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NRO will, nevertheless, continue to publish such a notice in broad generic terms as is its current practice.

(F) Consistent with the legislative purpose of the Privacy Act of 1974, the NRO will grant access to nonexempt material in the records being maintained. Disclosure will be governed by NRO's Privacy Regulation, but will be limited to the extent that the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal violation will not be alerted to the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered, the privacy of third parties will not be violated; and that the disclosure would not otherwise impede effective law enforcement. Whenever possible, information of the above nature will be deleted from the requested documents and the balance made available. The controlling principle behind this limited access is to allow disclosures except those indicated above. The decisions to release information from these systems will be made on a case-by-case basis.

(2) *System identifier and name*. QNRO–10, Inspector General Investigative Files.

(i) *Exemption*. This system may be exempt pursuant to 5 U.S.C. 552a(j)(2) if the information is compiled and maintained by a component of the agency which performs as its principle function any activity pertaining to the enforcement of criminal laws. Any portion of this system which falls within the provisions of 5 U.S.C. 552a(j)(2) may be exempt from the following subsections of 5 U.S.C. 552a (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (H), and (I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority*. 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of accounting of disclosure would inform a subject that he or she is under investigation. This information would provide considerable advantage to the subject in providing him or her with knowledge concerning the nature of the investigation and the coordinated investigative efforts and techniques employed by the cooperating agencies. This would greatly impede the NRO IG's criminal law enforcement.

(B) From subsection (c)(4) and (d), because notification would alert a subject to the fact that an open investigation on that individual is taking place, and might weaken the on-going investigation, reveal investigative techniques, and place confidential informants in jeopardy.

(C) From subsection (e)(1) because the nature of the criminal and/or civil investigative function creates unique problems in prescribing a specific parameter in a particular case with respect to what information is relevant or necessary. Also, due to NRO IG's close liaison and working relationships with other Federal, state, local and foreign country law enforcement agencies, information may be received which may relate to a case under the investigative jurisdiction of another agency. The maintenance of this information may be necessary to provide leads for appropriate law enforcement purposes and to establish patterns of activity, which may relate to the jurisdiction of other cooperating agencies.

(D) From subsection (e)(2) because collecting information to the fullest extent possible directly from the subject individual may or may not be practical in a criminal and/or civil investigation.

(E) From subsection (e)(3) because supplying an individual with a form containing a Privacy Act Statement would tend to inhibit cooperation by many individuals involved in a criminal and/or civil investigation. The effect would be somewhat adverse to established investigative methods and techniques.

(F) From subsection (e)(4) (G) through (I) because this system of records is exempt from the access provisions of subsection (d).

(G) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(H) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to law enforcement by revealing investigative techniques, procedures, and existence of confidential investigations.

(I) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to that individual, and record amendment procedures for this record system.

(J) From subsection (g) because this system of records should be exempt to the extent that the civil remedies relate to provisions of 5 U.S.C. 552a from which this rule exempts the system.

(iv) *Exemption.* (A) Investigative material compiled for law enforcement purposes, other than material within the scope of subsection (j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure

would reveal the identity of a confidential source.

(B) Investigative material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) and/or (k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f).

(v) *Authority*. 5 U.S.C. 552a(k)(2) and (k)(5).

(vi) *Reasons*. (A) From subsection (c)(3) because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prosecutable interest by the NRO or other agencies. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (d) and (f) because providing access to investigative records and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for investigative purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NRO will, nevertheless, continue to publish such a notice in broad generic terms as is its current practice.

(F) Consistent with the legislative purpose of the Privacy Act of 1974, the NRO will grant access to nonexempt material in the records being maintained. Disclosure will be governed by NRO's Privacy Regulation, but will be limited to the extent that the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal or civil violation will not be alerted to the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered, the privacy of third parties will not be violated; and that the disclosure would not otherwise impede effective law enforcement. Whenever possible, information of the above nature will be deleted from the requested documents and the balance made available. The controlling principle behind this limited access is to allow disclosures except those indicated above. The decisions to release information from these systems will be made on a case-by-case basis.

(3) *System identifier and name*. QNRO–15, Facility Security Files.

(i) *Exemption*. (A) Investigative material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Investigative material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) and/or (k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons*. (A) From subsection (c)(3) because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prosecutable interest by the NRO or other agencies. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (d)(1) through (d)(4), and (f) because providing access to investigative records and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for investigative purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NRO will, nevertheless, continue to publish such a notice in broad generic terms as is its current practice.

(F) Consistent with the legislative purpose of the Privacy Act of 1974, the NRO will grant access to nonexempt material in the records being maintained. Disclosure will be governed by NRO's Privacy Regulation, but will be limited to the extent that the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal or civil violation will not be alerted to the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered; the privacy of third parties will not be violated; and that the disclosure would not otherwise impede effective law enforcement. Whenever possible, information of the above nature will be deleted from the requested documents and the balance made available. The

controlling principle behind this limited access is to allow disclosures except those indicated above. The decisions to release information from these systems will be made on a case-by-case basis.

(4) *System identifier and name.* QNRO–19, Customer Security Services Personnel Security Files.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) and/or (k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prosecutable interest by the NRO or other agencies. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (d)(1) through (d)(4), and (f) because providing access to investigatory records and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for investigatory purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NRO will, nevertheless, continue to publish such a notice in broad generic terms as is its current practice.

(F) Consistent with the legislative purpose of the Privacy Act of 1974, the NRO will grant access to nonexempt material in the records being maintained. Disclosure will be governed by NRO's Privacy Regulation, but will be limited to the extent that the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal or civil violation will not be alerted to

the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered; the privacy of third parties will not be violated; and that the disclosure would not otherwise impede effective law enforcement. Whenever possible, information of the above nature will be deleted from the requested documents and the balance made available. The controlling principle behind this limited access is to allow disclosures except those indicated in this paragraph. The decisions to release information from these systems will be made on a case-by-case basis.

(5) *System identifier and name.* NRO–21, Personnel Security Files.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Therefore, portions of this system of records may be exempt pursuant to 5 U.S.C. 552a(k)(2) and/or (k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H) and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation or prosecutable interest by the NRO or other agencies. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (d)(1) through (d)(4), and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for law enforcement purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NRO will, nevertheless, continue to publish such a notice in broad generic terms as is its current practice.

(F) Consistent with the legislative purpose of the Privacy Act of 1974, the

NRO will grant access to nonexempt material in the records being maintained. Disclosure will be governed by NRO's Privacy Regulation, but will be limited to the extent that the identity of confidential sources will not be compromised; subjects of an investigation of an actual or potential criminal violation will not be alerted to the investigation; the physical safety of witnesses, informants and law enforcement personnel will not be endangered; the privacy of third parties will not be violated; and that the disclosure would not otherwise impede effective law enforcement. Whenever possible, information of the above nature will be deleted from the requested documents and the balance made available. The controlling principle behind this limited access is to allow disclosures except those indicated above. The decisions to release information from these systems will be made on a case-by-case basis.

(6) *System identifier and name.* QNRO–4, Freedom of Information Act and Privacy Act Files.

(i) *Exemption.* During the processing of a Freedom of Information Act/Privacy Act request, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this system, the NRO hereby claims the same exemptions for the records from those ''other'' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, and to preserve the confidentiality and integrity of Federal evaluation materials. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(7) *System identifier and name.* QNRO–27, Legal Records.

(i) *Exemption.* Any portion of this system of records which falls within the provisions of 5 U.S.C. 552a(k)(2) and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f).

(ii) *Authority.* 5 U.S.C. 552a (k)(2) and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because to grant access to the accounting for each disclosure as required by the Privacy Act, including the date, nature, and purpose of each disclosure and the identity of the recipient, could alert the subject to the existence of the investigation. This could seriously compromise case preparation by prematurely revealing its existence and nature; compromise or interfere with witnesses or make witnesses reluctant to cooperate; and lead to suppression, alteration, or destruction of evidence.

(B) From subsections (d) and (f) because providing access to investigative records and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition

of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for investigative purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants.

[84 FR 14730, Apr. 11, 2019; 84 FR 16210, Apr. 18, 2019]

### § 310.27 National Security Agency (NSA) exemptions.

(a) *General exemption*. The general exemption established by 5 U.S.C. 552a(j)(2) may be claimed to protect investigative records created and maintained by law enforcement activities of the NSA.

(b) *Specific exemptions*. The specific exemptions permit certain categories of records to be exempt from certain specific provisions of the Privacy Act.

(1) *Exemption (k)(1)*. Information properly classified under Executive Order 12958 and that is required by Executive Order to be kept secret in the interest of national defense or foreign policy.

(2) *Exemption (k)(2)*. Investigatory information compiled for law-enforcement purposes by non-law enforcement activities and which is not within the scope of § 310.51(a). If an individual is denied any right, privilege or benefit that he or she is otherwise entitled by federal law or for which he or she would otherwise be eligible as a result of the maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source. This subsection when claimed allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(3) *Exemption (k)(3)*. Records maintained in connection with providing protective services to the President and other individuals identified under 18 U.S.C. 3506.

(4) *Exemption (k)(4)*. Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8.

(5) *Exemption (k)(5)*. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information, but only to the extent such material would reveal the identity of a confidential source. This provision allows protection of confidential sources used in background investigations, employment inquiries, and similar inquiries that are for personnel screening to determine suitability, eligibility, or qualifications.

(6) *Exemption (k)(6)*. Testing or examination material used solely to determine individual qualifications for appointment or promotion in the federal or military service, if the disclosure would compromise the objectivity or fairness of the test or examination process.

(7) *Exemption (k)(7)*. Evaluation material used to determine potential for promotion in the Military Services, but only to the extent that the disclosure of such material would reveal the identity of a confidential source.

(c) All systems of records maintained by the NSA/CSS and its components shall be exempt from the requirements of 5 U.S.C. 552a(d) pursuant to 5 U.S.C. 552a(k)(1) to the extent that the system contains any information properly classified under Executive Order 12958 and that is required by Executive Order to be kept secret in the interest of national defense or foreign policy. This

exemption is applicable to parts of all systems of records including those not otherwise specifically designated for exemptions herein, which contain isolated items of properly classified information.

(1) *System identifier and name.* GNSA 01, Access, Authority and Release of Information File.

(i) *Exemption.* (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Therefore, portions of this system may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), and (e)(1).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) and (d) when access to accounting disclosures and access to or amendment of records would cause the identity of a confidential sources to be revealed. Disclosure of the source's identity not only will result in the Department breaching the promise of confidentiality made to the source but it will impair the Department's future ability to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information. Unless sources can be assured that a promise of confidentiality will be honored, they will be less likely to provide information considered essential to the Department in making the required determinations.

(B) From (e)(1) because in the collection of information for investigatory purposes, it is not always possible to determine the relevance and necessity of particular information in the early stages of the investigation. In some cases, it is only after the information is evaluated in light of other information that its relevance and necessity becomes clear. Such information permits more informed decision-making by the Department when making required suitability, eligibility, and qualification determinations.

(2) *System identifier and name.* GNSA 02, Applicants.

(i) *Exemption.* (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Therefore, portions of this system may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), and (e)(1).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) and (d) when access to accounting disclosures and access to or amendment of records would cause the identity of a confidential source to be revealed. Disclosure of the source's identity not only will result in the Department breaching the promise of confidentiality made to the source but it will impair the Department's future ability to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information. Unless sources can be assured that a promise of confidentiality will be honored, they will be less likely to provide information considered essential to the Department in making the required determinations.

(B) From (e)(1) because in the collection of information for investigatory purposes, it is not always possible to determine the relevance and necessity of particular information in the early stages of the investigation. In some cases, it is only after the information is evaluated in light of other information that its relevance and necessity becomes clear. Such information permits more informed decision-making by the Department when making required suitability, eligibility, and qualification determinations.

(3) *System identifier and name.* GNSA 03, Correspondence, Cases, Complaints, Visitors, Requests.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(3)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(2), (k)(4), and (k)(5) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2), (k)(4), and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because there is no necessity for such publication since the system of records will be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments to and corrections of the information in the system.

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NSA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(4) *System identifier and name.* GNSA 04, Military Reserve Personnel Data Base.

(i) *Exemption.* (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or

qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Therefore, portions of this system may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), and (e)(1).

(ii) *Authority*. 5 U.S.C. 552a(k)(5).

(iii) *Reasons*. (A) From subsection (c)(3) and (d) when access to accounting disclosures and access to or amendment of records would cause the identity of a confidential sources to be revealed. Disclosure of the source's identity not only will result in the Department breaching the promise of confidentiality made to the source but it will impair the Department's future ability to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information. Unless sources can be assured that a promise of confidentiality will be honored, they will be less likely to provide information considered essential to the Department in making the required determinations.

(B) From (e)(1) because in the collection of information for investigatory purposes, it is not always possible to determine the relevance and necessity of particular information in the early stages of the investigation. In some cases, it is only after the information is evaluated in light of other information that its relevance and necessity becomes clear. Such information permits more informed decision-making by the Department when making required suitability, eligibility, and qualification determinations.

(5) *System identifier and name*. GNSA 05, Equal Employment Opportunity Data.

(i) *Exemption*. (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(5)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

(C) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(2) and (k)(4) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(2) and (k)(4).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets

that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because there is no necessity for such publication since the system of records will be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments to and corrections of the information in the system.

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NSA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(6) *System identifier and name.* GNSA 06, Health, Medical and Safety Files.

(i) *Exemption.* (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(C) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(5) and (k)(6) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(5) and (k)(6).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because there is no necessity for such publication since the system of records will be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments to and corrections of the information in the system.

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NSA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(7) *System identifier and name.* GNSA 08, Payroll and Claims.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(7)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(2) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because there is no necessity for such publication since the system of records will be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments to and corrections of the information in the system.

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NSA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(8) *System identifier and name.* GNSA 09, Personnel File.

(i) *Exemption.* (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent

that such material would reveal the identity of a confidential source.

(B) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(C) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(5) and (k)(6) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(5) and (k)(6).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because there is no necessity for such publication since the system of records will be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments to and corrections of the information in the system.

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NSA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(9) *System identifier and name*. GNSA 10, Personnel Security File.

(i) *Exemption*. (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(9)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) Testing or examination material used solely to determine individual

qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(D) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(2), (k)(5), and (k)(6) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(2), (k)(5), and (k)(6).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because there is no necessity for such publication since the system of records will be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments to and corrections of the information in the system.

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NSA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(10) *System identifier and name*. GNSA 12, Training.

(i) *Exemption*. (A) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process.

(C) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(5) and (k)(6) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority*. 5 U.S.C. 552a(k)(5), and (k)(6).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because there is no necessity for such publication since the system of records will be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments to and corrections of the information in the system.

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NSA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(11) *System identifier and name.* GNSA 29 (General Exemption), NSA/CSS Office of Inspector General Investigations and Complaints.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if any individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information except to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(11)(i). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions. Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(ii) *Authority.* 5 U.S.C. 552a(k)(2) through (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) and (d) when access to accounting disclosures and access to or amendment of records would cause the identity of a confidential source to be revealed. Disclosure of the source's identity not only will result in the Department breaching the promise of confidentiality made to the source but it will impair the Department's future ability to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information. Unless sources can be assured that a promise of confidentiality will be honored, they will be less likely to provide information considered essential to the Department in making the required determinations.

(B) From (e)(1) because in the collection of information for investigatory purposes, it is not always possible to determine the relevance and necessity of particular information in the early stages of the investigation. In some cases, it is only after the information is evaluated in light of other information that its relevance and necessity

becomes clear. Such information permits more informed decision-making by the Department when making required suitability, eligibility, and qualification determinations

(12) *System identifier and name.* GNSA 14, Library Patron File Control System.

(i) *Exemption.* (A) Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

(B) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(4) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(4).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because there is no necessity for such publication since the system of records will be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments to and corrections of the information in the system.

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NSA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(13) *System identifier and name.* GNSA 15, Computer Users Control System.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(13)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(2) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because there is no necessity for such publication since the system of records will be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments to and corrections of the information in the system.

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NSA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(14) *System identifier and name.* GNSA 17, Employee Assistance Service (EAS) Case Record System.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(14)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(2), (k)(4), and (k)(5) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2), (k)(4), and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that

they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because there is no necessity for such publication since the system of records will be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments to and corrections of the information in the system.

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NSA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(15) *System identifier and name.* GNSA 18, Operations Files.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(15)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(C) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(2) and (k)(5) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with

and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because there is no necessity for such publication since the system of records will be exempt from the underlying duties to provide notification about and access to information in the system and to make amendments and corrections to the information in the system.

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants. NSA will, nevertheless, continue to publish such a notice in broad generic terms, as is its current practice.

(16) *System identifier and name.* GNSA 20, NSA Police Operational Files.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(16)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

(C) Investigatory material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(D) All portions of this system of records which fall within the scope of 5 U.S.C. 552a(k)(2), (k)(4), and (k)(5) may be exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I) and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2), (k)(4), and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject

with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for investigative purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants.

(17) [Reserved]

(18) *System identifier and name.* GNSA 25, NSA/CSS Operations Travel Records.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(18)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

(ii) *Authority.* 5 U.S.C. 552a(k)(2)(k)(4).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for investigative purposes

and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants.

(19) *System identifier and name.* GNSA 26, NSA/CSS Accounts Receivable, Indebtedness and Claims.

(i) *Exemption.* (A) Investigatory material compiled for law enforcement purposes, other than material within the scope of subsection 5 U.S.C. 552a(j)(2), may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of the information, the individual will be provided access to the information exempt to the extent that disclosure would reveal the identity of a confidential source.

NOTE 1 TO PARAGRAPH (c)(19)(i)(A). When claimed, this exemption allows limited protection of investigative reports maintained in a system of records used in personnel or administrative actions.

(B) Records maintained solely for statistical research or program evaluation purposes and which are not used to make decisions on the rights, benefits, or entitlement of an individual except for census records which may be disclosed under 13 U.S.C. 8, may be exempt pursuant to 5 U.S.C. 552a(k)(4).

(ii) *Authority.* 5 U.S.C. 552a(k)(2)(k)(4).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of the disclosure accounting would place the subject of an investigation on notice that they are under investigation and provide them with significant information concerning the nature of the investigation, thus resulting in a serious impediment to law enforcement investigations.

(B) From subsections (d) and (f) because providing access to records of a civil or administrative investigation and the right to contest the contents of those records and force changes to be made to the information contained therein would seriously interfere with and thwart the orderly and unbiased conduct of the investigation and impede case preparation. Providing access rights normally afforded under the Privacy Act would provide the subject with valuable information that would allow interference with or compromise of witnesses or render witnesses reluctant to cooperate; lead to suppression, alteration, or destruction of evidence; enable individuals to conceal their wrongdoing or mislead the course of the investigation; and result in the secreting of or other disposition of assets that would make them difficult or impossible to reach in order to satisfy any Government claim growing out of the investigation or proceeding.

(C) From subsection (e)(1) because it is not always possible to detect the relevance or necessity of each piece of information in the early stages of an investigation. In some cases, it is only after the information is evaluated in light of other evidence that its relevance and necessity will be clear.

(D) From subsections (e)(4)(G) and (H) because this system of records is compiled for investigative purposes and is exempt from the access provisions of subsections (d) and (f).

(E) From subsection (e)(4)(I) because to the extent that this provision is construed to require more detailed disclosure than the broad, generic information currently published in the system notice, an exemption from this provision is necessary to protect the confidentiality of sources of information and to protect privacy and physical safety of witnesses and informants.

(20) *System identifier and name.* GNSA 28 (General Exemption), Freedom of Information Act, Privacy Act and Mandatory Declassification Review Records.

(i) *Exemption.* During the processing of letters and other correspondence to the National Security Agency/Central Security Service, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this system, the National Security Agency/

Central Security Service hereby claims the same exemptions for the records from those ''other'' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority*. 5 U.S.C. 552a(k)(2) through (k)(7).

(iii) *Reasons*. During the course of a FOIA/Privacy Act and/or MDR action, exempt materials from other system of records may become part of the case records in this system of records. To the extent that copies of exempt records from those other systems of records are entered into these case records, NSA/CSS hereby claims the same exemptions for the records as claimed in the original primary system of records of which they are a part. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

### § 310.28 Office of the Inspector General (OIG) exemptions.

(a) *Exemption for classified records*. Any record in a system of records maintained by the Office of the Inspector General which falls within the provisions of 5 U.S.C. 552a(k)(1) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G) through (I) and (f) to the extent that a record system contains any record properly classified under Executive Order 12958 and that the record is required to be kept classified in the interest of national defense or foreign policy. This specific exemption rule, claimed by the Inspector General under authority of 5 U.S.C. 552a(k)(1), is applicable to all systems of records maintained, including those individually designated for an exemption herein as well as those not otherwise specifically designated for an exemption, which may contain isolated items of properly classified information.

(b) The Inspector General of the Department of Defense claims an exemption for the following record systems under the provisions of 5 U.S.C. 552a(j) and (k)(1)–(k)(7) from certain indicated subsections of the Privacy Act of 1974. The exemptions may be invoked and exercised on a case-by-case basis by the Deputy Inspector General for Investigations or the Director, Communications and Congressional Liaison Office, and the Chief, Freedom of Information/Privacy Act Office, which serve as the Systems Program Managers. Exemptions will be exercised only when necessary for a specific, significant and legitimate reason connected with the purpose of the records system.

(c) No personal records releasable under the provisions of The Freedom of Information Act (5 U.S.C. 552) will be withheld from the subject individual based on these exemptions.

(1) *System identifier and name*. CIG–04, Case Control System.

(i) *Exemption*. Any portion of this system which falls within the provisions of 5 U.S.C. 552a(j)(2) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G), (H), (I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority*. 5 U.S.C. 552a(j)(2).

(iii) *Reasons*. (A) From subsection (c)(3) because the release of accounting of disclosure would inform a subject that he or she is under investigation. This information would provide considerable advantage to the subject in providing him or her with knowledge concerning the nature of the investigation and the coordinated investigative efforts and techniques employed by the cooperating agencies. This would greatly impede OIG's criminal law enforcement.

(B) From subsection (c)(4) and (d), because notification would alert a subject to the fact that an open investigation on that individual is taking place, and might weaken the on-going investigation, reveal investigatory techniques, and place confidential informants in jeopardy.

(C) From subsection (e)(1) because the nature of the criminal and/or civil investigative function creates unique problems in prescribing a specific parameter in a particular case with respect to what information is relevant or necessary. Also, due to OIG's close liaison and working relationships with other Federal, state, local and foreign country law enforcement agencies, information may be received which may relate to a case under the investigative jurisdiction of another agency. The maintenance of this information may

be necessary to provide leads for appropriate law enforcement purposes and to establish patterns of activity which may relate to the jurisdiction of other cooperating agencies.

(D) From subsection (e)(2) because collecting information to the fullest extent possible directly from the subject individual may or may not be practical in a criminal and/or civil investigation.

(E) From subsection (e)(3) because supplying an individual with a form containing a Privacy Act Statement would tend to inhibit cooperation by many individuals involved in a criminal and/or civil investigation. The effect would be somewhat adverse to established investigative methods and techniques.

(F) From subsection (e)(4) (G) through (I) because this system of records is exempt from the access provisions of subsection (d).

(G) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(H) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to law enforcement by revealing investigative techniques, procedures, and existence of confidential investigations.

(I) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to that individual, and record amendment procedures for this record system.

(J) For comparability with the exemption claimed from subsection (f), the civil remedies provisions of subsection (g) must be suspended for this record system. Because of the nature of criminal investigations, standards of accuracy, relevance, timeliness, and completeness cannot apply to this record system. Information gathered in an investigation is often fragmentary and leads relating to an individual in the context of one investigation may instead pertain to a second investigation.

(2) *System identifier and name.* CIG–06, Investigative Files.

(i) *Exemption.* Any portion of this system which falls within the provisions of 5 U.S.C. 552a(j)(2) may be exempt from the following subsections of 5 U.S.C. 552a (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4) (G), (H), (I), (e)(5), (e)(8), (f), and (g).

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because the release of accounting of disclosure would inform a subject that he or she is under investigation. This information would provide considerable advantage to the subject in providing him or her with knowledge concerning the nature of the investigation and the coordinated investigative efforts and techniques employed by the cooperating agencies. This would greatly impede OIG's criminal law enforcement.

(B) From subsection (c)(4) and (d), because notification would alert a subject to the fact that an open investigation on that individual is taking place, and might weaken the on-going investigation, reveal investigatory techniques, and place confidential informants in jeopardy.

(C) From subsection (e)(1) because the nature of the criminal and/or civil investigative function creates unique problems in prescribing a specific parameter in a particular case with respect to what information is relevant or necessary. Also, due to OIG's close liaison and working relationships with other Federal, state, local and foreign

country law enforcement agencies, information may be received which may relate to a case under the investigative jurisdiction of another agency. The maintenance of this information may be necessary to provide leads for appropriate law enforcement purposes and to establish patterns of activity which may relate to the jurisdiction of other cooperating agencies.

(D) From subsection (e)(2) because collecting information to the fullest extent possible directly from the subject individual may or may not be practical in a criminal and/or civil investigation.

(E) From subsection (e)(3) because supplying an individual with a form containing a Privacy Act Statement would tend to inhibit cooperation by many individuals involved in a criminal and/or civil investigation. The effect would be somewhat adverse to established investigative methods and techniques.

(F) From subsection (e)(4) (G) through (I) because this system of records is exempt from the access provisions of subsection (d).

(G) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(H) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to law enforcement by revealing investigative techniques, procedures, and existence of confidential investigations.

(I) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to that individual, and record amendment procedures for this record system.

(J) For comparability with the exemption claimed from subsection (f), the civil remedies provisions of subsection (g) must be suspended for this record system. Because of the nature of criminal investigations, standards of accuracy, relevance, timeliness, and completeness cannot apply to this record system. Information gathered in an investigation is often fragmentary and leads relating to an individual in the context of one investigation may instead pertain to a second investigation.

(3) *System identifier and name.* CIG–15, Departmental Inquiries Case System.

(i) *Exemption.* Investigatory material compiled for law enforcement purposes may be exempt pursuant to 5 U.S.C. 552a(k)(2). However, if an individual is denied any right, privilege, or benefit for which he would otherwise be entitled by Federal law or for which he would otherwise be eligible, as a result of the maintenance of such information, the individual will be provided access to such information except to the extent that disclosure would reveal the identity of a confidential source. Any portions of this system which fall under the provisions of 5 U.S.C. 552a(k)(2) may be exempt from the following subsection of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I).

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsection (c)(3) because disclosures from this system could interfere with the just, thorough and timely resolution of the compliant or inquiry, and possibly enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying or fabricating evidence or documents.

(B) From subsection (d) because disclosures from this system could interfere with the just thorough and timely resolution of the compliant or inquiry,

and possibly enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying or fabricating evidence or documents. Disclosures could also subject sources and witnesses to harassment or intimidation which jeopardize the safety and well-being of themselves and their families.

(C) From subsection (e)(1) because the nature of the investigation function creates unique problems in prescribing specific parameters in a particular case as to what information is relevant or necessary. Due to close liaison and working relationships with other Federal, state, local and foreign country law enforcement agencies, information may be received which may relate to a case under the investigative jurisdiction of another government agency. It is necessary to maintain this information in order to provide leads for appropriate law enforcement purposes and to establish patterns of activity which may relate to the jurisdiction of other cooperating agencies.

(D) From subsection (e)(4) (G) through (H) because this system of records is exempt from the access provisions of subsection (d).

(E) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to that individual, and record amendment procedures for this record system.

(4) *System identifier and name.* CIG–16, DOD Hotline Program Case Files.

(i) *Exemption.* Any portions of this system of records which fall under the provisions of 5 U.S.C. 552a(k)(2) and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G), (H), and (f).

(ii) *Authority.* 5 U.S.C. 552a(k)(2) and (k)(5).

(iii) *Reasons.* (A) From subsection (c)(3) because disclosures from this system could interfere with the just, thorough and timely resolution of the complaint or inquiry, and possibly enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying or fabricating evidence or documents.

(B) From subsection (d) because disclosures from this system could interfere with the just, thorough and timely resolution of the complaint or inquiry, and possibly enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying or fabricating evidence or documents. Disclosures could also subject sources and witnesses to harassment or intimidation which jeopardize the safety and well-being of themselves and their families.

(C) From subsection (e)(1) because the nature of the investigation functions creates unique problems in prescribing specific parameters in a particular case as to what information is relevant or necessary. Due to close liaison and working relationships with other Federal, state, local, and foreign country law enforcement agencies, information may be received which may relate to a case under the investigative jurisdiction of another government agency. It is necessary to maintain this information in order to provide leads for appropriate law enforcement purposes and to establish patterns of activity which may relate to the jurisdiction of other cooperating agencies.

(D) From subsection (e)(4)(G) through (H) because this system of records is exempt from the access provisions of subsection (d).

(E) From subsection (f) because the agency's rules are inapplicable to those portions of the system that are exempt and would place the burden on the agency of either confirming or denying the existence of a record pertaining to a requesting individual might in itself provide an answer to that individual relating to an on-going investigation. The conduct of a successful investigation leading to the indictment of a criminal offender precludes the applicability of established agency rules relating to verification of record, disclosure of the record to that individual,

and record amendment procedures for this record system.

(5) *System identifier and name.* CIG 01, Privacy Act and Freedom of Information Act Case Files.

(i) *Exemption.* During the processing of a Freedom of Information Act (FOIA) and Privacy Act (PA) request, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this system, the Inspector General, DoD, claims the same exemptions for the records from those ''other'' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(6) *System identifier and name.* CIG–21, Congressional Correspondence Tracking System.

(i) *Exemption.* During the processing of a Congressional inquiry, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those ''other'' systems of records are entered into this system, the Inspector General, DoD, claims the same exemptions for the records from those ''other'' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(7) *System identifier and name.* CIG 23, Public Affairs Files.

(i) *Exemption.* During the course of processing a General Counsel action, exempt materials from other systems of records may in turn become part of the case records in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into the Public Affairs Files, the Office of the Inspector General hereby claims the same exemptions for the records from those 'other'

systems that are entered into this system, as claimed for the original primary systems of records which they are a part.

(ii) *Authority*. 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons*. Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent (A) such provisions have been identified and an exemption claimed for the original record and (B) the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(8) *System identifier and name*. CIG–29, Privacy and Civil Liberties Complaint Reporting System.

(i) *Exemption*. Any portion of this record system which falls within the provisions of 5 U.S.C. 552a (j)(2), (k)(2) and (k)(5) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I).

(ii) *Authority*. 5 U.S.C. 552a(j)(2), (k)(2), and (k)(5).

(iii) *Reasons*. To ensure the integrity of the privacy and civil liberties process. The execution requires that information be provided in a free and open manner without fear of retribution or harassment in order to facilitate a just, thorough, and timely resolution of the complaint or inquiry. Disclosures from this system can enable individuals to conceal their wrongdoing or mislead the course of the investigation by concealing, destroying, or fabricating evidence or documents. In addition, disclosures can subject sources and witnesses to harassment or intimidation which may cause individuals not to seek redress for wrongs through privacy and civil liberties channels for fear of retribution or harassment. There is a clear need to protect national security information from inadvertent disclosure.

(9) *System identifier and name*. CIG–26, Case Control System–Investigative.

(i) *Exemption*. Any portion of this system which falls within the provisions of 5 U.S.C. 552a(j)(2) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (c)(4), (d), (e)(1), (e)(2), (e)(3), (e)(4)(G) through (I), (e)(5), (e)(8), and (g), as applicable. In addition, any portion of this system which falls within the provisions of 5 U.S.C. 552a(k)(1) or (k)(2) may be exempt from the following subsections of 5 U.S.C. 552a: (c)(3), (d), (e)(1), (e)(4)(G) through (I), as applicable. Exempted records from other systems of records may in-turn become part of the case record in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this system, the DoD OIG claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary system of which they are a part. Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(ii) *Authority*. 5 U.S.C. 552a(j)(2), (k)(1), and (k)(2).

(iii) *Reasons*. (A) From subsections (c)(3) and (c)(4) because making available to a record subject the accounting of disclosure of investigations concerning him or her would specifically reveal an investigative interest in the

individual. Revealing this information would reasonably be expected to compromise open or closed administrative or criminal investigation efforts to a known or suspected offender by notifying the record subject that he or she is under investigation. This information could also prompt the record subject to take measures to impede the investigation, *e.g.*, destroy evidence, intimidate potential witnesses, or flee the area to avoid or impede the investigation.

(B) From subsection (d), because these provisions concern individual access to and amendment of certain records contained in this system. Granting access to information that is properly classified pursuant to executive order may cause damage to national security. Additionally, compliance with these provisions could alert the subject of an investigation of the fact and nature of the investigation and/or the investigative interest of law enforcement agencies. It can also compromise sensitive information related to national security; interfere with the overall law enforcement process by leading to the destruction of evidence, improper influencing of witnesses, fabrication of testimony, and/or flight of the subject; could identify a confidential source or disclose information which would constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigation or constitute a potential danger to the health or safety of law enforcement personnel, confidential informants, and witnesses. Amendment of open or active investigations would interfere with ongoing law enforcement investigations and analysis activities, and impose an excessive administrative burden by requiring investigations, analyses, and reports to be continuously reinvestigated and revised.

(C) From subsection (e)(1) because it is not always possible to determine what information is relevant and necessary at an early stage in a given investigation, and because DoD OIG and other agencies may not always know what information about a known or suspected offender may be relevant to law enforcement for the purpose of conducting an operational response. The nature of the criminal and/or administrative law enforcement investigative functions creates unique problems in prescribing a specific parameter and a particular case with respect to what information is relevant or necessary. Also, due to the DoD OIG's close liaison and working relationships with other Federal, State, local and foreign country criminal and administrative law enforcement agencies, information may be received which may relate to a case under the investigative jurisdiction of another agency. The maintenance of this information may be necessary to provide leads for appropriate criminal and administrative law enforcement purposes and to establish patterns of activity which may relate to the jurisdiction of other cooperating agencies.

(D) From subsection (e)(2) because it is not always in the best interest of law enforcement to collect information to the greatest extent practicable directly from an investigative subject. Requiring the collection of information to the greatest extent practicable directly from an investigative subject would present a serious impediment to law enforcement in that the subject of the investigation would be placed on notice of the existence of the investigation and would therefore be able to avoid detection.

(E) From subsection (e)(3) because supplying an individual with a form containing a Privacy Act Statement would tend to inhibit cooperation by many individuals involved in a criminal investigation. The effect would be somewhat adverse to established investigative methods and techniques.

(F) From subsections (e)(4)(G) through (I) because this system of records is exempt from the access provisions of subsection (d).

(G) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the investigative process. It is the nature of criminal law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and complete. With the passage

of time, seemingly irrelevant or untimely information may acquire new significance as further investigation brings new details to light.

(H) From subsection (e)(8) because the notice requirements of this provision could present a serious impediment to criminal law enforcement investigations by revealing investigative techniques, procedures, and existence of sensitive information and/or confidential sources.

(I) To the extent that exemptions have been established from other provisions of the Privacy Act, the civil remedies provisions of subsection (g) are inapplicable. The nature of criminal law enforcement investigations and the utilization of authorized exemptions should not increase the Department's exposure to civil litigation under the Privacy Act.

[84 FR 14730, Apr. 11, 2019; 84 FR 16210, Apr. 18, 2019, as amended at 85 FR 60715, Sept. 28, 2020]

### § 310.29 Office of the Secretary of Defense (OSD) exemptions.

(a) *General information.* The Secretary of Defense designates those Office of the Secretary of Defense (OSD) systems of records which will be exempt from certain provisions of the Privacy Act. There are two types of exemptions, general and specific. The general exemption authorizes the exemption of a system of records from all but a few requirements of the Act. The specific exemption authorizes exemption of a system of records or portion thereof, from only a few specific requirements. If an OSD Component originates a new system of records for which it proposes an exemption, or if it proposes an additional or new exemption for an existing system of records, it shall submit the recommended exemption with the records system notice as outlined in § 311.6. No exemption of a system of records shall be considered automatic for all records in the system. The systems manager shall review each requested record and apply the exemptions only when this will serve significant and legitimate Government purpose.

(b) *General exemptions.* The general exemption provided by 5 U.S.C. 552a(j)(2) may be invoked for protection of systems of records maintained by law enforcement activities. Certain functional records of such activities are not subject to access provisions of the Privacy Act of 1974. Records identifying criminal offenders and alleged offenders consisting of identifying data and notations of arrests, the type and disposition of criminal charges, sentencing, confinement, release, parole, and probation status of individuals are protected from disclosure. Other records and reports compiled during criminal investigations, as well as any other records developed at any stage of the criminal law enforcement process from arrest to indictment through the final release from parole supervision are excluded from release.

(1) *System identifier and name.* DWHS P42.0, DPS Incident Reporting and Investigations Case Files.

(i) *Exemption.* Portions of this system that fall within 5 U.S.C. 552a(j)(2) are exempt from the following provisions of 5 U.S.C. 552a, Sections (c)(3) and (4); (d)(1) through (d)(5); (e)(1) through (e)(3); (e)(5); (f)(1) through (f)(5); (g)(1) through (g)(5); and (h) of the Act.

(ii) *Authority.* 5 U.S.C. 552a(j)(2).

(iii) *Reasons.* The Defense Protective Service is the law enforcement body for the jurisdiction of the Pentagon and immediate environs. The nature of certain records created and maintained by the DPS requires exemption from access provisions of the Privacy Act of 1974. The general exemption, 5 U.S.C. 552a(j)(2), is invoked to protect ongoing investigations and to protect from access, criminal investigation information contained in this record system, so as not to jeopardize any subsequent judicial or administrative process taken as a result of information contained in the file.

(2)–(15) [Reserved]

(16) *System identifier and name.* DWHS E06, Enterprise Correspondence Control System (ECCS).

(i) *Exemption.* During the staffing and coordination of actions to, from, and within components in conduct of daily business, exempt materials from other systems of records may in turn become part of the case record in this document control system. To the extent that copies of exempt records from those ''other'' systems of records are

entered into this system, the Office of the Secretary of Defense hereby claims the same exemptions for the records from those ''other'' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority*. 5 U.S.C. 552a (j)(2) and (k)(1) through (k)(7).

(iii) *Reasons*. Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(c) *Specific exemptions:* All systems of records maintained by any OSD Component shall be exempt from the requirements of 5 U.S.C. 552a(d) pursuant to subsection (k)(1) of that section to the extent that the system contains any information properly classified under Executive Order 11265, 'National Security Information,' dated June 28, 552a(d) pursuant to subsection (k)(1) of that section to the extent that the system contains any information properly classified under E.O. 11265, 'National Security Information,' dated June 28, 1979, as amended, and required by the Executive Order to be kept classified in the interest of national defense or foreign policy. This exemption, which may be applicable to parts of all systems of records, is necessary because certain record systems not otherwise specifically designated for exemptions may contain isolated information which has been properly classified. The Secretary of Defense has designated the following OSD system of records described below specifically exempted from the appropriate provisions of the Privacy Act pursuant to the designated authority contained therein:

(1) [Reserved]

(2) *System identifier and name*. DWHS P28, The Office of the Secretary of Defense Clearance File.

(i) *Exemption*. This system of records is exempt from subsections (c)(3) and (d) of 5 U.S.C. 552a, which would require the disclosure of investigatory material compiled solely for the purpose of determining access to classified information but only to the extent that disclosure of such material would reveal the identity of a source who furnished information to the Government under an expressed promise that the identity of the source would be held in confidence or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. A determination will be made at the time of the request for a record concerning the specific information which would reveal the identity of the source.

(ii) *Authority*. 5 U.S.C. 552a(k)(5).

(iii) *Reasons*. This exemption is required to protect the confidentiality of the sources of information compiled for the purpose of determining access to classified information. This confidentiality helps maintain the Government's continued access to information from persons who would otherwise refuse to give it.

(3) *System identifier and name*. DGC 04, Industrial Personnel Security Clearance Case Files.

(i) *Exemption*. All portions of this system which fall under 5 U.S.C. 552a(k)(5) are exempt from the following provisions of title 5 U.S.C. 552a: (c)(3); (d).

(ii) *Authority*. 5 U.S.C. 552a(k)(5).

(iii) *Reasons*. This system of records is exempt from subsections (c)(3) and (d) of section 552a of 5 U.S.C. which would require the disclosure of investigatory material compiled solely for the purpose of determining access to

classified information, but only to the extent that the disclosure of such material would reveal the identity of a source who furnished information to the Government under an expressed promise that the identity of the source would be held in confidence, or prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. A determination will be made at the time of the request for a record concerning whether specific information would reveal the identity of a source. This exemption is required in order to protect the confidentiality of the sources of information compiled for the purpose of determining access to classified information. This confidentiality helps maintain the Government's continued access to information from persons who would otherwise refuse to give it.

(4)–(5) [Reserved]

(6) *System identifier and name.* DODDS 02.0, Educator Application Files.

(i) *Exemption.* All portions of this system which fall within 5 U.S.C. 552a(k)(5) may be exempt from the following provisions of 5 U.S.C. 552a: (c)(3); (d).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* It is imperative that the confidential nature of evaluation and investigatory material on teacher application files furnished the Department of Defense Dependent Schools (DoDDS) under promises of confidentiality be exempt from disclosure to the individual to insure the candid presentation of information necessary to make determinations involving applicants suitability for DoDDS teaching positions.

(7) [Reserved]

(8) *System identifier and name.* DWHS P29, Personnel Security Adjudications File.

(i) *Exemption.* Portions of this system of records that fall within the provisions of 5 U.S.C. 552a(k)(5) may be exempt from the following subsections (d)(1) through (d)(5).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* From (d)(1) through (d)(5) because the agency is required to protect the confidentiality of sources who furnished information to the Government under an expressed promise of confidentiality or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. This confidentiality is needed to maintain the Government's continued access to information from persons who otherwise might refuse to give it. This exemption is limited to disclosures that would reveal the identity of a confidential source. At the time of the request for a record, a determination will be made concerning whether a right, privilege, or benefit is denied or specific information would reveal the identity of a source.

(9) *System identifier and name.* JS004SECDIV, Joint Staff Security Clearance Files.

(i) *Exemption.* Portions of this system of records are exempt pursuant to the provisions of 5 U.S.C. 552a(k)(5) from subsections 5 U.S.C. 552a(d)(1) through (d)(5).

(ii) *Authority.* 5 U.S.C. 552a(k)(5).

(iii) *Reasons.* From subsections (d)(1) through (d)(5) because the agency is required to protect the confidentiality of sources who furnished information to the Government under an expressed promise of confidentiality or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. This confidentiality is needed to maintain the Government's continued access to information from persons who otherwise might refuse to give it. This exemption is limited to disclosures that would reveal the identity of a confidential source. At the time of the request for a record, a determination will be made concerning whether a right, privilege, or benefit is denied or specific information would reveal the identity of a source.

(10) *System identifier and name.* DFMP 26, Vietnamese Commando Compensation Files.

(i) *Exemption.* Information classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) *Authority.* 5 U.S.C. 552a(k)(1).

(iii) *Reasons.* From subsection 5 U.S.C. 552a(d) because granting access to information that is properly classified pursuant to E.O. 12958, as implemented by DoD 5200.1–R, may cause damage to the national security.

(11) *System identifier and name.* DUSP 11, POW/Missing Personnel Office Files.

(i) *Exemption.* Information classified under E.O. 12958, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) *Authority.* 5 U.S.C. 552a(k)(1).

(iii) *Reasons.* From subsection 5 U.S.C. 552a(d) because granting access to information that is properly classified pursuant to E.O. 12958, as implemented by DoD 5200.1–R, may cause damage to the national security.

(12) *System identifier and name.* DFOISR 05, Freedom of Information Act Case Files.

(i) *Exemption.* During the processing of a Freedom of Information Act request, exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this system, the Office of the Secretary of Defense claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(13) *System identifier and name.* DFOISR 10, Privacy Act Case Files.

(i) *Exemption.* During the processing of a Privacy Act request (which may include access requests, amendment requests, and requests for review for initial denials of such requests), exempt materials from other systems of records may in turn become part of the case record in this system. To the extent that copies of exempt records from those 'other' systems of records are entered into this system, the Office of the Secretary of Defense hereby claims the same exemptions for the records from those 'other' systems that are entered into this system, as claimed for the original primary system of which they are a part.

(ii) *Authority.* 5 U.S.C. 552a(j)(2), (k)(1), (k)(2), (k)(3), (k)(4), (k)(5), (k)(6), and (k)(7).

(iii) *Reasons.* Records are only exempt from pertinent provisions of 5 U.S.C. 552a to the extent such provisions have been identified and an exemption claimed for the original record and the purposes underlying the exemption for the original record still pertain to the record which is now contained in this system of records. In general, the exemptions were claimed in order to protect properly classified information relating to national defense and foreign policy, to avoid interference during the conduct of criminal, civil, or administrative actions or investigations, to ensure protective services provided the President and others are not compromised, to protect the identity of confidential sources incident to Federal employment, military service, contract, and security clearance determinations, to preserve the confidentiality and integrity of Federal testing materials, and to safeguard evaluation materials used for military promotions when furnished by a confidential source. The exemption rule for the original records will identify the specific reasons why the records are exempt from specific provisions of 5 U.S.C. 552a.

(14) *System identifier and name*. DHRA 02, PERSEREC Research Files.

(i) *Exemption*. (A) Investigative material compiled solely for the purpose of determining suitability, eligibility, or qualifications for federal civilian employment, military service, federal contracts, or access to classified information may be exempt pursuant to 5 U.S.C. 552a(k)(5), but only to the extent that such material would reveal the identity of a confidential source.

(B) Therefore, portions of this system may be exempt pursuant to 5 U.S.C. 552a(k)(5) from the following subsections of 5 U.S.C. 552a(c)(3), (d), and (e)(1).

(ii) *Authority*. 5 U.S.C. 552a(k)(5).

(iii) *Reasons*. (A) From subsection (c)(3) and (d) when access to accounting disclosures and access to or amendment of records would cause the identity of a confidential source to be revealed. Disclosure of the source's identity not only will result in the Department breaching the promise of confidentiality made to the source, but it will impair the Department's future ability to compile investigatory material for the purpose of determining suitability, eligibility, or qualifications for Federal civilian employment, Federal contracts, or access to classified information. Unless sources can be assured that a promise of confidentiality will be honored, they will be less likely to provide information considered essential to the Department in making the required determinations.

(B) From (e)(1) because in the collection of information for investigatory purposes, it is not always possible to determine the relevance and necessity of particular information in the early stages of the investigation. In some cases, it is only after the information is evaluated in light of other information that its relevance and necessity becomes clear. Such information permits more informed decision making by the Department when making required suitability, eligibility, and qualification determinations.

(15) [Reserved]

(16) *System identifier and name*. DMDC 15 DoD, Armed Services Military Accession Testing.

(i) *Exemption*. Testing or examination material used solely to determine individual qualifications for appointment or promotion in the Federal service or military service may be exempt pursuant to 5 U.S.C. 552a(k)(6), if the disclosure would compromise the objectivity or fairness of the test or examination process. Therefore, portions of the system of records may be exempt pursuant to 5 U.S.C. 552a(d).

(ii) *Authority*. 5 U.S.C. 552a(k)(6).

(iii) *Reasons*. (A) An exemption is required for those portions of the Skill Qualification Test system pertaining to individual item responses and scoring keys to preclude compromise of the test and to ensure fairness and objectivity of the evaluation system.

(B) From subsection (d)(1) when access to those portions of the Skill Qualification Test records would reveal the individual item responses and scoring keys. Disclosure of the individual item responses and scoring keys will compromise the objectivity and fairness of the test as well as the validity of future tests resulting in the Department being unable to use the testing battery as an individual assessment tool.

(17)–(18) [Reserved]

(19) *System identifier and name*. DA&M 01, Civil Liberties Program Case Management System.

(i) *Exemption*. Records contained in this System of Records may be exempted from the requirements of subsections (c)(3); (d)(1), (2), (3), and (4); (e)(1) and (e)(4)(G), (H), and (I); and (f) of the Privacy Act pursuant to 5 U.S.C. 552a(k)(1). Records may be exempted from these subsections or, additionally, from the requirements of subsections (c)(4); (e)(2), (3), and (8) of the Privacy Act of 1974 consistent with any exemptions claimed under 5 U.S.C. 552a (j)(2) or (k)(1), (k)(2), or (k)(5) by the originator of the record, provided the reason for the exemption remains valid and necessary. An exemption rule for this system has been promulgated in accordance with the requirements of 5 U.S.C. 553(b)(1), (2), and (3), (c) and (e) and is published at 32 CFR part 311.

(ii) *Authority*. 5 U.S.C. 552a (j)(2), (k)(1), (k)(2), or (k)(5).

(iii) *Reasons*. (A) From subsections (c)(3) (accounting of disclosures) because an accounting of disclosures from records concerning the record

subject would specifically reveal an intelligence or investigative interest on the part of the Department of Defense and could result in release of properly classified national security or foreign policy information.

(B) From subsections (d)(1), (2), (3) and (4) (record subject's right to access and amend records) because affording access and amendment rights could alert the record subject to the investigative interest of law enforcement agencies or compromise sensitive information classified in the interest of national security. In the absence of a national security basis for exemption, records in this system may be exempted from access and amendment to the extent necessary to honor promises of confidentiality to persons providing information concerning a candidate for position. Inability to maintain such confidentiality would restrict the free flow of information vital to a determination of a candidate's qualifications and suitability.

(C) From subsection (e)(1) (maintain only relevant and necessary records) because in the collection of information for investigatory purposes, it is not always possible to determine the relevance and necessity of particular information in the early stages of the investigation. It is only after the information is evaluated in light of other information that its relevance and necessity becomes clear. In the absence of a national security basis for exemption under subjection (k)(1), records in this system may be exempted from the relevance requirement pursuant to subjection (k)(5) because it is not possible to determine in advance what exact information may assist in determining the qualifications and suitability of a candidate for position. Seemingly irrelevant details, when combined with other data, can provide a useful composite for determining whether a candidate should be appointed.

(D) From subsections (e)(4)(G) and (H) (publication of procedures for notifying subject of the existence of records about them and how they may access records and contest contents) because the system is exempted from subsection (d) provisions regarding access and amendment, and from the subsection (f) requirement to promulgate agency rules. Nevertheless, the Office of the Secretary of Defense has published notice concerning notification, access, and contest procedures because it may, in certain circumstances, determine it appropriate to provide subjects access to all or a portion of the records about them in this system of records.

(E) From subsection (e)(4)(I) (identifying sources of records in the system of records) because identifying sources could result in disclosure of properly classified national defense or foreign policy information, intelligence sources and methods, and investigatory techniques and procedures. Notwithstanding its proposed exemption from this requirement the Office of the Secretary of Defense identifies record sources in broad categories sufficient to provide general notice of the origins of the information it maintains in this system of records.

(F) From subsection (f) (agency rules for notifying subjects to the existence of records about them, for accessing and amending records, and for assessing fees) because the system is exempt from subsection (d) provisions regarding access and amendment of records by record subjects. Nevertheless, the Office of the Secretary of Defense has published agency rules concerning notification of a subject in response to his request if any system of records named by the subject contains a record pertaining to him and procedures by which the subject may access or amend the records. Notwithstanding exemption, the Office of the Secretary of Defense may determine it appropriate to satisfy a record subject's access request.

(20) [Reserved]

(21) *System identifier and name.* DWHS E05, Mandatory Declassification Review Files.

(i) *Exemption.* Information classified under E.O. 13526, as implemented by DoD 5200.1–R, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) *Authority.* 5 U.S.C. 552a(k)(1).

(iii) *Reasons.* From subsection 5 U.S.C. 552a(d) because granting access to information that is properly classified pursuant to E.O. 13526, as implemented by DoD 5200.1–R, may cause damage to the national security.

(22) *System identifier and name.* DPFPA 05, Computer Aided Dispatch and Records Management System (CAD/RMS).

(i) *Exemption.* Portions of this system that fall within 5 U.S.C. 552a(j)(2) and/or (k)(2) are exempt from the following provisions of 5 U.S.C. 552a, section (c)(3) and (4); (d); (e)(1) through (e)(3); (e)(4)(G) through (I); (e)(5); (e)(8); (f) and (g) of the Act, as applicable.

(ii) *Authority.* 5 U.S.C. 552a(j)(2) and (k)(2).

(iii) *Reasons.* (A) From subsections (c)(3) and (4) because making available to a record subject the accounting of disclosure from records concerning him or her would specifically reveal any investigative interest in the individual. Revealing this information could reasonably be expected to compromise ongoing efforts to investigate a known or suspected offender by notifying the record subject that he or she is under investigation. This information could also permit the record subject to take measures to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid or impede the investigation.

(B) From subsection (d) because these provisions concern individual access to and amendment of certain records contained in this system, including law enforcement and investigatory records. Compliance with these provisions could alert the subject of an investigation of the fact and nature of the investigation, and/or the investigative interest of law enforcement agencies; compromise sensitive information related to national security; interfere with the overall law enforcement process by leading to the destruction of evidence, improper influencing of witnesses, fabrication of testimony, and/or flight of the subject; could identify a confidential source or disclose information which would constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or constitute a potential danger to the health or safety of law enforcement personnel, confidential informants, and witnesses. Amendment of these records would interfere with ongoing law enforcement investigations and analysis activities and impose an excessive administrative burden by requiring investigations, analyses, and reports to be continuously reinvestigated and revised.

(C) From subsections (e)(1) through (e)(3) because it is not always possible to determine what information is relevant and necessary at an early stage in a given investigation. Also, because DoD and other agencies may not always know what information about a known or suspected offender may be relevant to law enforcement for the purpose of conducting an operational response.

(D) From subsections (e)(4)(G) through (I) (Agency Requirements) because portions of this system are exempt from the access and amendment provisions of subsection (d).

(E) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the criminal investigative process. It is the nature of criminal law enforcement for investigations to uncover the commission of illegal acts at diverse stages. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significant as further investigation brings new details to light.

(F) From subsection (e)(8) because the requirement to serve notice on an individual when a record is disclosed under compulsory legal process could unfairly hamper law enforcement processes. It is the nature of law enforcement that there are instances where compliance with these provisions could alert the subject of an investigation of the fact and nature of the investigation, and/or the investigative interest of intelligence or law enforcement agencies; compromise sensitive information related to national security; interfere with the overall law enforcement process by leading to the destruction of evidence, improper influencing of witnesses, fabrication of testimony, and/or flight of the subject; reveal a sensitive investigative or intelligence technique; or constitute a potential danger to the health or safety of law

enforcement personnel, confidential informants, and witnesses.

(G) From subsection (f) because requiring the Agency to grant access to records and establishing agency rules for amendment of records would compromise the existence of any criminal, civil, or administrative enforcement activity. To require the confirmation or denial of the existence of a record pertaining to a requesting individual may in itself provide an answer to that individual relating to the existence of an on-going investigation. The investigation of possible unlawful activities would be jeopardized by agency rules requiring verification of the record, disclosure of the record to the subject, and record amendment procedures.

(H) From subsection (g) for compatibility with the exemption claimed from subsection (f), the civil remedies provisions of subsection (g) must be suspended for this record system. Because of the nature of criminal investigations, standards of accuracy, relevance, timeliness and completeness cannot apply to this record system. Information gathered in criminal investigations if often fragmentary and leads relating to an individual in the context of one investigation may instead pertain to a second investigation.

(23) [Reserved]

(24) *System identifier and name.* DPFPA 06, Internal Affairs Records System.

(i) *Exemption.* Portions of this system that fall within 5 U.S.C. 552a(j)(2) and/or (k)(2) are exempt from the following provisions of 5 U.S.C. 552a, section (c)(3) and (4); (d); (e)(1) through (e)(3); (e)(4)(G) through (I); (e)(5); (f) and (g) of the Act, as applicable.

(ii) *Authority.* 5 U.S.C. 552a(j)(2) and (k)(2).

(iii) *Reasons.* (A) From subsections (c)(3) and (4) because making available to a record subject the accounting of disclosure of investigations concerning him or her would specifically reveal an investigative interest in the individual. Revealing this information would reasonably be expected to compromise open or closed administrative or civil investigation efforts to a known or suspected offender by notifying the record subject that he or she is under investigation. This information could also permit the record subject to take measures to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid or impede the investigation.

(B) From subsection (d) because these provisions concern individual access to and amendment of open or closed investigation records contained in this system, including law enforcement and investigatory records. Compliance with these provisions would provide the subject of an investigation of the fact and nature of the investigation, and/or the investigative interest of the Pentagon Force Protection Agency; compromise sensitive information related to national security; interfere with the overall law enforcement process by leading to the destruction of evidence, improper influencing of witnesses, fabrication of testimony, and/or flight of the subject; could identify a confidential informant or disclose information which would constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or constitute a potential danger to the health or safety of law enforcement personnel, confidential informants, and witnesses. Amendment of investigative records would interfere with open or closed administrative or civil law enforcement investigations and analysis activities and impose an excessive administrative burden by requiring investigations, analyses, and reports to be continuously reinvestigated and revised.

(C) From subsections (e)(1) through (e)(3) because it is not always possible to determine what information is relevant and necessary in open or closed investigations.

(D) From subsections (e)(4)(G) through (I) (Agency Requirements) because portions of this system are exempt from the access and amendment provisions of subsection (d).

(E) From subsection (e)(5) because the requirement that investigative records be maintained with attention to accuracy, relevance, timeliness, and completeness would unfairly hamper the criminal, administrative, or civil investigative process. It is the nature of Internal Affairs investigations to uncover the commission of illegal acts

and administrative violations. It is frequently impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significant as further investigation brings new details to light.

(F) From subsection (f) because requiring the Agency to grant access to records and establishing agency rules for amendment of records would compromise the existence of any criminal, civil, or administrative enforcement activity. To require the confirmation or denial of the existence of a record pertaining to a requesting individual may in itself provide an answer to that individual relating to the existence of an on-going investigation. The investigation of possible unlawful activities would be jeopardized by agency rules requiring verification of the record, disclosure of the record to the subject, and record amendment procedures.

(G) From subsection (g) for compatibility with the exemption claimed from subsection (f), the civil remedies provisions of subsection (g) must be suspended for this record system. Because of the nature of criminal, administrative and civil investigations, standards of accuracy, relevance, timeliness and completeness cannot apply to open or closed investigations in this record system. Information gathered in criminal investigations is often fragmentary and leads relating to an individual in the context of one investigation may instead pertain to a second investigation.

(25) *System identifier and name.* DPFPA 07, Counterintelligence Management Information System (CIMIS).

(i) *Exemption.* Portions of this system that fall within 5 U.S.C. 552a (k)(2) are exempt from the following provisions of 5 U.S.C. 552a, section (c)(3); (d); (e)(1); (e)(4)(G) through (I); and (f) of the Act, as applicable.

(ii) *Authority.* 5 U.S.C. 552a(k)(2).

(iii) *Reasons.* (A) From subsections (c)(3) because making available to a record subject the accounting of disclosure from records concerning him or her would specifically reveal any investigative interest in the individual. Revealing this information could reasonably be expected to compromise ongoing efforts to investigate a known or suspected offender by notifying the record subject that he or she is under investigation. This information could also permit the record subject to take measures to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid or impede the investigation.

(B) From subsection (d) because these provisions concern individual access to and amendment of certain records contained in this system, including counterintelligence, law enforcement, and investigatory records. Compliance with these provisions could alert the subject of an investigation of the fact and nature of the investigation, and/or the investigative interest of agencies; compromise sensitive information related to national security; interfere with the overall counterintelligence and investigative process by leading to the destruction of evidence, improper influencing of witnesses, fabrication of testimony, and/or flight of the subject; could identify a confidential source or disclose information which would constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigation or constitute a potential danger to the health or safety of law enforcement personnel, confidential informants, and witnesses. Amendment of these records would interfere with ongoing counterintelligence investigations and analysis activities and impose an excessive administrative burden by requiring investigations, analyses, and reports to be continuously reinvestigated and revised.

(C) From subsection (e)(1) because it is not always possible to determine what information is relevant and necessary at an early stage in a given investigation. Also, because Pentagon Force Protection Agency and other agencies may not always know what information about a known or suspected offender may be relevant to for the purpose of conducting an operational response.

(D) From subsections (e)(4)(G) through (I) (Agency Requirements) because portions of this system are exempt from the access and amendment provisions of subsection (d).

(E) From subsection (f) because requiring the Agency to grant access to records and establishing agency rules for amendment of records would compromise the existence of any criminal, civil, or administrative enforcement activity. To require the confirmation or denial of the existence of a record pertaining to a requesting individual may in itself provide an answer to that individual relating to the existence of an on-going investigation. Counterintelligence investigations would be jeopardized by agency rules requiring verification of the record, disclosure of the record to the subject, and record amendment procedures.

(26) *System identifier and name.* DMDC 16 DoD, Identity Management Engine for Security and Analysis (IMESA).

(i) *Exemption.* To the extent that copies of exempt records from JUSTICE/FBI–001, National Crime Information Center (NCIC) are entered into the Interoperability Layer Service records, the OSD hereby claims the same exemptions, (j)(2) and (k)(3), for the records as claimed in JUSTICE/FBI–001, National Crime Information Center (NCIC). Pursuant to 5 U.S.C. 552a portions of this system that fall within (j)(2) and (k)(3) are exempt from the following provisions of 5 U.S.C. 552a, section (c)(3) and (4); (d); (e)(1) through (3); (e)(4)(G) through (I); (e)(5) and (8); (f); and (g) (as applicable) of the Act.

(ii) *Authority.* 5 U.S.C. 552a(j)(2) and (k)(3).

(iii) *Reasons.* (A) From subsection (c)(3) because making available to a record subject the accounting of disclosure from records concerning him or her would specifically reveal any investigative interest in the individual. Revealing this information could reasonably be expected to compromise ongoing efforts to investigate a known or suspected terrorist by notifying the record subject that he or she is under investigation. This information could also permit the record subject to take measures to impede the investigation, e.g., destroy evidence, intimidate potential witnesses, or flee the area to avoid or impede the investigation.

(B) From subsection (c)(4) because portions of this system are exempt from the access and amendment provisions of subsection (d).

(C) From subsection (d) because these provisions concern individual access to and amendment of certain records contained in this system, including law enforcement, counterterrorism, investigatory, and intelligence records. Compliance with these provisions could alert the subject of an investigation of the fact and nature of the investigation, and/or the investigative interest of intelligence or law enforcement agencies; compromise sensitive information related to national security; interfere with the overall law enforcement process by leading to the destruction of evidence, improper influencing of witnesses, fabrication of testimony, and/or flight of the subject; could identify a confidential source or disclose information which would constitute an unwarranted invasion of another's personal privacy; reveal a sensitive investigative or intelligence technique; or constitute a potential danger to the health or safety of law enforcement personnel, confidential informants, and witnesses. Amendment of these records would interfere with ongoing counterterrorism, law enforcement, or intelligence investigations and analysis activities and impose an impossible administrative burden by requiring investigations, analyses, and reports to be continuously reinvestigated and revised.

(D) From subsection (e)(1) because it is not always possible to determine what information is relevant and necessary to complete an identity comparison between the individual seeking access and a known or suspected terrorist. Also, because DoD and other agencies may not always know what information about an encounter with a known or suspected terrorist will be relevant to law enforcement for the purpose of conducting an operational response.

(E) From subsection (e)(2) because application of this provision could present a serious impediment to counterterrorism, law enforcement, or intelligence efforts in that it would put the subject of an investigation, study, or analysis on notice of that fact, thereby permitting the subject to engage in conduct designed to frustrate or impede that activity. The nature of counterterrorism, law enforcement, or

intelligence investigations is such that vital information about an individual frequently can be obtained only from other persons who are familiar with such individual and his/her activities. In such investigations, it is not feasible to rely upon information furnished by the individual concerning his own activities.

(F) From subsection (e)(3) to the extent that this subsection is interpreted to require DoD to provide notice to an individual if DoD or another agency receives or collects information about that individual during an investigation or from a third party. Should this subsection be so interpreted, exemption from this provision is necessary to avoid impeding counterterrorism, law enforcement, or intelligence efforts by putting the subject of an investigation, study, or analysis on notice of that fact, thereby permitting the subject to engage in conduct intended to frustrate or impede the activity.

(G) From subsection (e)(4)(G), (e)(4)(H), and (e)(4)(I) (Agency Requirements) because portions of this system are exempt from the access and amendment provisions of subsection (d).

(H) From subsection (e)(5) because the requirement that records be maintained with attention to accuracy, relevance, timeliness, and completeness could unfairly hamper law enforcement processes. It is the nature of law enforcement to uncover the commission of illegal acts at diverse stages. It is often impossible to determine initially what information is accurate, relevant, timely, and least of all complete. With the passage of time, seemingly irrelevant or untimely information may acquire new significance as further details are brought to light.

(I) From subsection (e)(8) because the requirement to serve notice on an individual when a record is disclosed under compulsory legal process could unfairly hamper law enforcement processes. It is the nature of law enforcement that there are instances where compliance with these provisions could alert the subject of an investigation of the fact and nature of the investigation, and/or the investigative interest of intelligence or law enforcement agencies; compromise sensitive information related to national security; interfere with the overall law enforcement process by leading to the destruction of evidence, improper influencing of witnesses, fabrication of testimony, and/or flight of the subject; reveal a sensitive investigative or intelligence technique; or constitute a potential danger to the health or safety of law enforcement personnel, confidential informants, and witnesses.

(J) From subsection (f) because requiring the Agency to grant access to records and establishing agency rules for amendment of records would unfairly impede the agency's law enforcement mission. To require the confirmation or denial of the existence of a record pertaining to a requesting individual may in itself provide an answer to that individual relating to the existence of an on-going investigation. The investigation of possible unlawful activities would be jeopardized by agency rules requiring verification of the record, disclosure of the record to the subject, and record amendment procedures.

(K) From subsection (g) to the extent that the system is exempt from other specific subsections of the Privacy Act.

(27) [Reserved]

(28) *System identifier and name.* DMDC 18 DoD, Synchronized Predeployment and Operational Tracker Enterprise Suite (SPOT–ES) Records.

(i) *Exemption.* Information classified under E.O. 13526, as implemented by DoD Instruction (DoDI) 5200.01 and DoD Manual (DoDM) 5200.01, Volumes 1 and 3, may be exempt pursuant to 5 U.S.C. 552a(k)(1).

(ii) *Authority.* 5 U.S.C. 552a(k)(1).

(iii) *Reasons.* From subsection 5 U.S.C. 552a(d) because granting access to information that is properly classified pursuant to E.O. 13526, as implemented by DoD Instruction 5200.01 and DoD Manual 5200.01, Volumes 1 and 3, may cause damage to the national security.

[84 FR 14730, Apr. 11, 2019, as amended at 86 FR 26672, May 17, 2021; 86 FR 31431, June 14, 2021]

EFFECTIVE DATE NOTE: At 87 FR 37999, June 27, 2022, § 310.29 was amended by removing and reserving paragraphs (c)(2) and (8), effective Sept. 6, 2022.

## APPENDIX A TO PART 310—DOD BLANKET ROUTINE USES

### A. ROUTINE USE—LAW ENFORCEMENT

If a system of records maintained by a DoD Component to carry out its functions indicates a violation or potential violation of law, whether civil, criminal, or regulatory in nature, and whether arising by general statute or by regulation, rule, or order issued pursuant thereto, the relevant records in the system of records may be referred, as a routine use, to the agency concerned, whether Federal, State, local, or foreign, charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute, rule, regulation, or order issued pursuant thereto.

### B. ROUTINE USE—DISCLOSURE WHEN REQUESTING INFORMATION

A record from a system of records maintained by a Component may be disclosed as a routine use to a Federal, State, or local agency maintaining civil, criminal, or other relevant enforcement information or other pertinent information, such as current licenses, if necessary to obtain information relevant to a Component decision concerning the hiring or retention of an employee, the issuance of a security clearance, the letting of a contract, or the issuance of a license, grant, or other benefit.

### C. ROUTINE USE—DISCLOSURE OF REQUESTED INFORMATION

A record from a system of records maintained by a Component may be disclosed to a Federal agency, in response to its request, in connection with the hiring or retention of an employee, the issuance of a security clearance, the reporting of an investigation of an employee, the letting of a contract, or the issuance of a license, grant, or other benefit by the requesting agency, to the extent that the information is relevant and necessary to the requesting agency's decision on the matter.

### D. ROUTINE USE—CONGRESSIONAL INQUIRIES

Disclosure from a system of records maintained by a Component may be made to a congressional office from the record of an individual in response to an inquiry from the congressional office made at the request of that individual.

### E. ROUTINE USE—PRIVATE RELIEF LEGISLATION

Relevant information contained in all systems of records of the Department of Defense published on or before August 22, 1975, may be disclosed to the Office of Management and Budget (OMB) in connection with the review of private relief legislation as set forth in OMB Circular A–19 at any stage of the legislative coordination and clearance process as set forth in that circular.

### F. ROUTINE USE—DISCLOSURES REQUIRED BY INTERNATIONAL AGREEMENTS

A record from a system of records maintained by a Component may be disclosed to foreign law enforcement, security, investigatory, or administrative authorities to comply with requirements imposed by, or to claim rights conferred in, international agreements and arrangements, including those regulating the stationing and status in foreign countries of Department of Defense military and civilian personnel.

### G. ROUTINE USE—DISCLOSURE TO STATE AND LOCAL TAXING AUTHORITIES

Any information normally contained in Internal Revenue Service (IRS) Form W–2 which is maintained in a record from a system of records maintained by a Component may be disclosed to State and local taxing authorities with which the Secretary of the Treasury has entered into agreements under 5 U.S.C., sections 5516, 5517, 5520, and only to those State and local taxing authorities for which an employee or military member is or was subject to tax regardless of whether tax is or was withheld. This routine use is in accordance with Treasury Fiscal Requirements Manual Bulletin No. 76–07.

### H. ROUTINE USE—DISCLOSURE TO THE OFFICE OF PERSONNEL MANAGEMENT

A record from a system of records subject to the Privacy Act and maintained by a Component may be disclosed to the Office of Personnel Management (OPM) concerning information on pay and leave, benefits, retirement reductions, and any other information necessary for the OPM to carry out its legally authorized government-wide personnel management functions and studies.

### I. ROUTINE USE—DISCLOSURE TO THE DEPARTMENT OF JUSTICE FOR LITIGATION

A record from a system of records maintained by a Component may be disclosed as a routine use to any component of the Department of Justice for the purpose of representing the Department of Defense, or any officer, employee or member of the Department in pending or potential litigation to which the record is pertinent.

### J. ROUTINE USE—DISCLOSURE TO MILITARY BANKING FACILITIES

Information as to current military addresses and assignments may be provided to military banking facilities who provide banking services overseas and who are reimbursed by the Government for certain checking and loan losses. For personnel separated, discharged, or retired from the Armed

Forces, information as to last known residential or home of record address may be provided to the military banking facility upon certification by a banking facility officer that the facility has a returned or dishonored check negotiated by the individual or the individual has defaulted on a loan and that if restitution is not made by the individual, the U.S. Government will be liable for the losses the facility may incur.

K. ROUTINE USE—DISCLOSURE OF INFORMATION TO THE GENERAL SERVICES ADMINISTRATION

A record from a system of records maintained by a Component may be disclosed as a routine use to the General Services Administration (GSA) for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

L. ROUTINE USE—DISCLOSURE OF INFORMATION TO THE NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

A record from a system of records maintained by a Component may be disclosed as a routine use to the National Archives and Records Administration (NARA) for the purpose of records management inspections conducted under authority of 44 U.S.C. 2904 and 2906.

M. ROUTINE USE—DISCLOSURE TO THE MERIT SYSTEMS PROTECTION BOARD

A record from a system of records maintained by a Component may be disclosed as a routine use to the Merit Systems Protection Board, including the Office of the Special Counsel, for the purpose of litigation, including administrative proceedings, appeals, special studies of the civil service and other merit systems, review of OPM or Component rules and regulations, investigation of alleged or possible prohibited personnel practices, including administrative proceedings involving any individual subject of a DoD investigation, and such other functions, promulgated in 5 U.S.C. 1205 and 1206 or as may be authorized by law.

N. ROUTINE USE—COUNTERINTELLIGENCE PURPOSES

A record from a system of records maintained by a Component may be disclosed as a routine use outside the DoD or the U.S. Government for the purpose of counterintelligence activities authorized by U.S. law or Executive order or for the purpose of enforcing laws that protect the national security of the United States.

[86 FR 64368, Nov. 18, 2021]

# PART 339—DOD GUIDANCE DOCUMENTS

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AUTHORITY: 5 U.S.C. 552a.

## § 339.1 General.

(a) This part provides policies and procedures governing all phases of issuing, modifying, or rescinding guidance documents within DoD.

(b) Subject to the qualifications and exemptions contained in this part, these policies and procedures apply to all guidance documents intended to have future effect on the behavior of regulated parties issued by all components of the Department, including regional and district offices.

(c) For purposes of this part, the term *guidance document* includes any statement of agency policy or interpretation concerning a statute, regulation, or technical matter within the jurisdiction of the Department that is intended to have general applicability and future effect on the behavior of regulated parties, but which is not intended to have the force or effect of law in its own right and is not otherwise required by statute to satisfy the rulemaking procedures specified in 5 U.S.C. 553 or 5 U.S.C. 556. The term is not confined to formal written documents; guidance may come in a variety of forms, including, but not limited to, letters, memoranda, circulars, bulletins, advisories, and may include video, audio, and Web-based formats. See OMB Memorandum M–20–02, ''Guidance Implementing Executive Order 13891, Titled ''Promoting the Rule of Law Through Improved Agency

Guidance Documents,'' '' dated October 31, 2019.

(d) This part does not apply to:

(1) Agency statements of specific applicability, including advisory or legal opinions directed to particular parties about circumstance-specific questions (*e.g.*, case or investigatory letters responding to complaints, warning letters), notices regarding particular locations or facilities (*e.g.*, guidance pertaining to the use, operation, or control of a government facility or property), and correspondence with individual persons or entities (*e.g.*, congressional correspondence), except documents ostensibly directed to a particular party but designed to guide the conduct of the broader regulated public;

(2) Agency statements that do not set forth a policy on a statutory, regulatory, or technical issue or an interpretation of a statute or regulation, including speeches and individual presentations, editorials, media interviews, press materials, or congressional testimony that do not set forth for the first time a new regulatory policy;

(3) Rules promulgated pursuant to notice and comment under 5 U.S.C. 553, or similar statutory provisions;

(4) Rules exempt from rulemaking requirements under 5 U.S.C. 553(a);

(5) Rules of agency organization, procedure, or practice;

(6) Decisions of agency adjudications under 5 U.S.C. 554, or similar statutory provisions;

(7) Internal guidance directed solely to the issuing agency or other agencies (or personnel of such agencies) that is not intended to have substantial future effect on the behavior of regulated parties or the public;

(8) Internal guidance that is made public only because release is required under the Freedom of Information Act or agency disclosure policies;

(9) Legal briefs, other court filings, or positions taken in litigation or enforcement actions;

(10) Legal opinions by the Office of Legal Counsel at the Department of Justice.

(11) Internal executive branch legal advice or legal advisory opinions addressed to executive branch officials;

(12) Guidance pertaining to military or foreign affairs functions, or to a national security or homeland security function of the United States (other than guidance documents involving procurement or the import or export of non-defense articles and services);

(13) Grant solicitations and awards; or

(14) Contract solicitations and awards.

**§ 339.2 Initial review process.**

(a) Prior to submitting guidance documents for departmental review, Components seeking to issue, modify, or rescind a guidance document should submit a draft copy of that document, along with the component's designation request (see § 339.5 of this part) and good faith cost estimate (see § 339.3 of this part), to their Federal Register Liaison Officer.

(b) Before such a guidance document can be cleared for departmental review, the appropriate DoD or OSD Federal Register Liaison Officer will review it to ensure that it satisfies the following requirements:

(1) For significant guidance (see § 339.7 of this part), FEDERAL REGISTER required formatting.

(2) The guidance document complies with all relevant statutes and regulations (including any statutory deadlines for agency action);

(3) The guidance document identifies or includes:

(i) The term ''guidance'' or its functional equivalent;

(ii) The issuing component of the Department;

(iii) A unique identifier, including, at a minimum, the date of issuance and title of the document and its Z–RIN (a regulation identifier number), if applicable;

(iv) The activity or entities to which the guidance applies;

(v) Citations to applicable statutes and regulations;

(vi) A statement noting whether the guidance is intended to revise or replace any previously issued guidance and, if so, sufficient information to identify the previously issued guidance; and

(vii) A short summary of the subject matter covered in the guidance document at the top of the document.

(4) The guidance document avoids using mandatory language, such as ''shall,'' ''must,'' ''required,'' or ''requirement,'' unless the language is describing an established statutory or regulatory requirement or is addressed to DoD staff and will not foreclose the Department's consideration of positions advanced by affected private parties or is intended to have a substantial future effect on the behavior of regulated parties;

(5) The guidance document is written in plain and understandable English;

(6) All guidance documents include the following disclaimer prominently: ''The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or departmental policies.''

### § 339.3 Good faith cost estimates.

Even though not legally binding, some agency guidance may result in a substantial economic impact. For example, the issuance of departmental guidance may induce private parties to alter their conduct to conform to recommended standards or practices, thereby incurring costs beyond the costs of complying with existing statutes and regulations. While it may be difficult to predict with precision the economic impact of voluntary guidance, the proposing component of the Department must, to the extent practicable, make a good faith effort to estimate the likely economic cost impact of the guidance document to determine whether the document might be significant. When the component is assessing or explaining whether it believes a guidance document is significant, it will, at a minimum, provide the same level of analysis that would be required for a major determination under the Congressional Review Act (5 U.S.C. chapter 8). When it is determined that a guidance document will be economically significant (see § 339.7(a)(1) of this part), the component must conduct and publish a Regulatory Impact Analysis of the sort that would accompany an economically significant rulemaking (see requirements in E.O. 12866, E.O. 13563, and OMB Circular A–4), to the extent reasonably possible.

### § 339.4 Departmental review and submission to OIRA.

(a) After the appropriate FRLO completes his or her initial review, a guidance document will be internally coordinated within the proposing component and formally coordinated throughout the Department with other components who have equities. Mandatory coordinators on all guidance documents are the Chief Management Officer, Department of Defense and the component's General Counsel.

(b) The proposing component will adjudicate DoD and OSD Component comments and return a final guidance document package to the appropriate DoD or OSD Federal Register Liaison Officer for submission to the Office of Management and Budget (OMB), Office of Information and Regulations Affairs (OIRA) for a significance determination.

(c) Guidance documents deemed by OIRA to be ''significant'' (see § 339.7 of this part) must be reviewed and approved by the Department's Regulatory Policy Officer before OIRA formally reviews them.

### § 339.5 Designation procedures.

(a) The proposing component will prepare a designation request for guidance documents. Designation requests must include the following information:

(1) A summary of the guidance document; and

(2) The component's recommended designation of ''not significant,'' ''significant,'' or ''economically significant,'' as well as a justification for that designation.

(b) The appropriate DoD or OSD Federal Register Liaison Officer will seek a significance determination from OIRA for guidance documents in the same manner as for rulemakings. OIRA review will occur prior to the publishing of guidance documents, and with sufficient time to allow OIRA to review the designation request and the guidance document to determine if it meets the definition of ''significant'' or

''economically significant'' under Executive Order 13891.

(c) Prior to being published, guidance documents determined to be ''significant'' or ''economically significant'' are subject to formal review and interagency coordination by OIRA. The OIRA review, to include interagency coordination, is to be consistent with Executive Order 12866.

(d) Significant guidance documents (see § 339.7 of this part) must be reviewed and approved by the Department's Regulatory Policy Officer before OIRA formally reviews them.

(e) Once the OMB/OIRA has cleared a guidance document for publication, the appropriate DoD or OSD Federal Register Liaison Officer will coordinate the guidance document with the Defense Office of Prepublication and Security Review (DOPSR). The FRLO will notify the component of DOPSR's approval and that the guidance document can be approved for FEDERAL REGISTER publication or signed for placement on the central website.

### § 339.6 Non-significant guidance documents.

(a) If the guidance document is determined to be non-significant within the meaning of § 339.7 of this part, the appropriate DoD or OSD Federal Register Liaison Officer will advise the proposing component to proceed with issuance of the guidance.

(b) For each such guidance document, the proposing component should forward it to the appropriate authority for approval. OSD PSAs or equivalents can delegate in writing the authority to approve non-significant guidance documents to subordinate officials at or above the level of a General/Flag Officer, Senior Executive Service member, or equivalent. The proposing component should include a statement in the action memorandum to the approving authority that the guidance document has been reviewed and cleared as non-significant by OIRA.

(c) After the approving authority signs the non-significant guidance document, it should be forwarded to the DoD Regulatory Program staff for publication on the department's guidance document website located at *https://open.defense.gov/Regulatory-Program/Guidance-Documents/*.

### § 339.7 Significant guidance documents.

(a) The term ''significant guidance document'' means a guidance document that will be disseminated to regulated entities or the general public and that may reasonably be anticipated:

(1) To lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the U.S. economy, a sector of the U.S. economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities (a guidance document is economically significant if it meets the criteria in this paragraph);

(2) To create serious inconsistency or otherwise interfere with an action taken or planned by another Federal agency;

(3) To alter materially the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) To raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866, as further amended.

(b) The term ''significant guidance document'' does not include the categories of documents excluded by § 339.1(d) or any other category of guidance documents exempted in writing in consultation with OIRA.

(c) Significant guidance documents, to include economically significant guidance documents, must be reviewed by OIRA under E.O. 12866 before issuance; and must demonstrate compliance with the applicable requirements for regulations or rules, including significant regulatory actions, set forth in E.O. 12866, E.O. 13563, E.O. 13609, E.O. 13771, and E.O. 13777.

(d) Each proposed DoD guidance document determined by OIRA to be significant must be approved by an OSD Principal Staff Assistant or equivalent appointed by the President.

(e) Significant guidance documents have to be published for notice and comment in accordance with § 339.8 of this part before they can be issued.

**§ 339.8 Notice-and-comment procedures.**

(a) Except as provided in paragraph (b) of this section, all proposed DoD guidance documents determined to be a ''significant guidance document'' within the meaning of § 339.7 shall be subject to the following notice and comment procedures. After receiving clearance from OIRA to publish a proposed significant guidance document, the proposing component shall publish a notice in the FEDERAL REGISTER announcing that a draft of the proposed guidance document is publicly available on *Regulations.gov*, shall invite public comment on the draft document for a minimum of 30 days. After the comment period ends, the proposing component shall prepare and post a public response to major concerns raised in the comments, as appropriate, in the docket on *Regulations.gov*. Then the component will prepare a final notice that will be coordinated within the department and submitted to OIRA for review, interagency coordination, and clearance for publishing in the FEDERAL REGISTER. Both the proposed and final notices shall be approved by the DoD RPO before OIRA review, and by an OSD Principal Staff Assistant or equivalent appointed by the President after OIRA clearance and DOPSR approval.

(b) The notice and comment requirements of paragraph (a) of this section will not apply to any significant guidance document or categories of significant guidance documents for which the proposing component finds, in consultation with their component OGC and OIRA, good cause that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest (and incorporates the finding of good cause and a brief statement of reasons therefor in the guidance issued).

**§ 339.9 Public access to effective guidance documents.**

(a) The DoD Regulatory Policy Team shall:

(1) Ensure all final guidance documents in effect are identified by a unique identifier which includes, at a minimum, the document's title and date of issuance or revision and its Z–RIN, if applicable, are published and maintained on a central website located at *https://open.defense.gov/Regulatory-Program/Guidance-Documents/* in a single, searchable, indexed database, and available to the public;

(2) Note on its website that guidance documents do not bind the public, except as authorized by law or as incorporated into a contract;

(3) Announce on its website a means for the public to comment electronically on any guidance documents that are subject to the notice and comment procedures; and

(4) Receive complaints from the public that a component of the Department is not following the requirements of OMB's Memorandum M–20–02, ''Guidance Implementing Executive Order 13891, Titled ''Promoting the Rule of Law Through Improved Agency Guidance Documents'','' dated October 31, 2019, or is improperly treating a guidance document as a binding requirement.

(b) Each component responsible for issuing guidance documents shall:

(1) Submit final guidance documents to the DoD Regulatory Policy Team at the email address *osd.mc-alex.ocmo.mbx.guidance-documents@mail.mil* for posting to the Department's central website.

(2) Address complaints from the public that they are not following the requirements of OMB's Memorandum M–20–02, ''Guidance Implementing Executive Order 13891, Titled ''Promoting the Rule of Law Through Improved Agency Guidance Documents'','' dated October 31, 2019, or are improperly treating a guidance document as a binding requirement.

**§ 339.10 Petitions for guidance.**

(a) Any person may petition the Department to withdraw or modify a particular guidance document by sending a written request to the DoD Regulatory Program staff at email address *osd.mc-alex.ocmo.mbx.guidance-documents@mail.mil*. Please use the words ''GUIDANCE: [Insert the title of the guidance document]'' in the subject line of the email message. The DoD Regulatory Program staff will provide the request to the issuing component of the guidance document for response.

(b) The issuing component should respond to all requests within 90 days after receipt of the request, or as timely as possible given any constraints of the request. For recordkeeping purposes, the issuing component will provide a copy of their response to the DoD Regulatory Program staff at email address *osd.mcalex.ocmo.mbx.guidance-documents@mail.mil.*

### § 339.11 Rescinded guidance.

(a) All effective guidance documents must appear on the central website. If the guidance document does not appear on the central website, the guidance is rescinded and without effect.

(b) No component may cite, use, or rely on guidance documents that are rescinded, except to establish historical facts.

### § 339.12 Exigent circumstances.

In emergency situations or when the proposing component is required by statutory deadline, court order, or executive order to act more quickly than normal review procedures allow, the proposing component shall coordinate with OGC and the appropriate DoD or OSD Federal Register Liaison Officer to notify OIRA as soon as possible and, to the extent practicable, shall comply with the requirements of this part at the earliest opportunity.

### § 339.13 Reports to Congress and GAO.

Upon the issuance of a final guidance document, the appropriate Federal Register Liaison Officer will submit a report to Congress and GAO in accordance with the procedures described in 5 U.S.C. 801 (the ''Congressional Review Act''). If the CRA procedures are not followed, the guidance document can be nullified.

### § 339.14 Use of guidance documents.

Guidance documents cannot create binding requirements that do not already exist by statute or regulation. Accordingly, noncompliance with guidance documents cannot be used as a basis for proving violations of applicable law. Guidance documents can do no more, with respect to prohibition of conduct, than articulate the Department's understanding of how a statute or regulation applies to particular circumstances.

## SUBCHAPTER P—OBTAINING DOD INFORMATION [RESERVED]

# FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

Table of CFR Titles and Chapters
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For changes to this volume of the CFR prior to this listing, consult the annual edition of the monthly List of CFR Sections Affected (LSA). The LSA is available at *www.govinfo.gov*. For changes to this volume of the CFR prior to 2001, see the ''List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, and 1986–2000'' published in 11 separate volumes. The ''List of CFR Sections Affected 1986–2000'' is available at *www.govinfo.gov*.

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