

DEPARTMENT OF DEFENSE**Office of the Secretary**

[DoD-2008-OS-0009; RIN 0790-AH77]

32 CFR Part 260**Vending Facility Program for the Blind on DoD-Controlled Federal Property****AGENCY:** Department of Defense.**ACTION:** Proposed rule.

SUMMARY: This proposed rule would reinstate Department of Defense regulations related to the vending facility program for the blind on DoD-controlled Federal property. This rule will not apply to military dining facilities that are subject to and defined in section 856 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

DATES: Comments must be received by March 17, 2009.

ADDRESSES: You may submit comments, identified by docket number and/or RIN number and title, by any of the following methods:

- *Federal Rulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

- *Mail:* Federal Docket Management System Office, 1160 Defense Pentagon, Washington, DC 20301-1160.

Instructions: All submissions received must include the agency name and docket number or Regulatory Information Number (RIN) for this **Federal Register** document. The general policy for comments and other submissions from members of the public is to make these submissions available for public viewing on the Internet at <http://www.regulations.gov> as they are received without change, including any personal identifiers or contact information.

FOR FURTHER INFORMATION CONTACT: Priscilla Pazzano, 703-602-4601.

SUPPLEMENTARY INFORMATION: This proposed rule would reinstate 32 CFR Part 260 which was removed from the Code of Federal Regulations in 2004 and excerpts from applicability military dining facilities that are subject to and defined in section 856 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364).

Executive Order 12866, "Regulatory Planning and Review"

It has been certified that proposed 32 CFR part 260 does not:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the

economy; a section of the economy; productivity; competition; jobs; the environment; public health or safety; or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another Agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in this Executive Order.

Section 202, Public Law 104-4, "Unfunded Mandates Reform Act"

It has been certified that proposed 32 CFR part 260 does not contain a Federal mandate that may result in the expenditure by State, local and tribal governments, in aggregate, or by the private sector, of \$100 million or more in any 1 year.

Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. 601)

It has been certified that proposed 32 CFR part 260 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it would not, if promulgated, have a significant economic impact on a substantial number of small entities. This proposed rule is consistent with the Randolph-Sheppard Act (20 U.S.C. 107), the implementing regulations of the U.S. Department of Education (34 CFR part 395), and Section 856 of the John Warner National Defense Authorization Act for Fiscal Year 2007.

Public Law 96-511, "Paperwork Reduction Act" (44 U.S.C. Chapter 35)

It has been certified that proposed 32 CFR part 260 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

Executive Order 13132, "Federalism"

It has been certified that proposed 32 CFR part 260 does not have federalism implications, as set forth in Executive Order 13132. This rule does not have substantial direct effects on:

(1) The States;

(2) The relationship between the National Government and the States; or

(3) The distribution of power and responsibilities among the various levels of Government.

List of Subjects in 32 CFR Part 260

Persons with disabilities, Blind, Vending.

Accordingly, 32 CFR part 260 would be added to read as follows:

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.

Authority: 20 U.S.C. 107.

§ 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 pursuant to Section 856 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364).

(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 Head 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 PDUUSD(P&R) where circumstances warrant.

(4) Ensure appropriate real property outgrants are accomplished in accordance with DoDI 4165.70¹ 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:

(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 and the PDUUSD(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 through the on-site official. When an application is not approved, the Head of the DoD Component 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 *et seq.*, 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 also contain appropriate provisions for reimbursement or direct payment for support services such as utilities and telephone service.

(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 after consultation with the PDUUSD(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 (d)(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 agency² 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

¹ Available from <http://www.dtic.mil/whs/directives/corres/html/416570.htm>.

² See the U.S. Department of Education Web site, Office of Special Education and Rehabilitative Services at <http://www.ed.gov>.

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 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 less 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 (d)(iv)(2)(i) and (d)(iv)(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.

(e) Vending machine income generated by the Department of Defense shall be shared with State licensing agencies as prescribed in paragraph (e)(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 (e)(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.

(f) 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 *et seq.* 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(e)(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.³

Dated: January 8, 2009.

Patricia L. Toppings,

*OSD Federal Register, Liaison Officer,
Department of Defense.*

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³ Available from <http://www.dtic.mil/whs/directives/corres/pdf/891001m.pdf>.