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## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### 32 CFR Part 235

[DOD-2005-OS-0149]

RIN 0790-AH86

#### Sale or Rental of Sexually Explicit Material on DoD Property (DoD Instruction 4105.70)

**AGENCY:** Department of Defense.

**ACTION:** Final rule.

**SUMMARY:** This rule prohibits the sale or rental of sexually explicit material on property under DoD jurisdiction. It establishes responsibilities for monitoring compliance, establishes a review board to determine whether a material offered for sale or rental is sexually explicit as consistent with the definition in 10 U.S.C. 2489a, and delineates review board procedures. This updated rule includes administrative changes and one new policy allowing materials which have been determined by the Board to be sexually explicit to be submitted for reconsideration every 5 years.

**DATES:** *Effective Date:* December 15, 2006.

**FOR FURTHER INFORMATION CONTACT:** Commander F. Stich, 703-602-4601.

**SUPPLEMENTARY INFORMATION:** On December 19, 2005 (70 FR 75091) the Department of Defense published the proposed rule for public comment. Twenty-eight comments were posted, 14 of which merited a response:

1. Comment posted 1/12/06:

*General Comment:* I don't think the DoD should be selling or renting sexually explicit material other than artistic publications such as Playboy.

*DoD response:* The Part, which implements 10 U.S.C. 2489a, prohibits the sale or rental of sexually explicit material on property under DoD jurisdiction, as well as the sale or rental of sexually explicit material by DoD military and civilian personnel acting in an official capacity.

2. Comment posted 2/2/06:

*General Comment:* In addition to appointing senior representative to the

Resale Activities Board of Review, there should also be a consumer group composed of enlisted members and officers to help analyze material for decency.

*DoD response:* Forming the suggested consumer group is unnecessary. The Resale Activities Board of Review includes civilian representatives from the Army, Navy, and Air Force who are capable of identifying sexually explicit material.

3. Comment posted 2/6/06:

*General Comment:* I think that the proposed rule to prohibit sexually explicit material being sold on the property of the Department of Defense and by those employed by the Department of Defense is a bit too restricting. I can understand prohibiting it on government property, however, prohibiting those employed by the Department of Defense has gone too far. It is not the government's job to regulate what people do with their private lives. It's like telling people that they can't smoke if they want to work for that person.

*DoD response:* The Part does not prohibit DoD personnel from possessing sexually explicit material. It prohibits the sale or rental of sexually explicit material on property under DoD jurisdiction, and it prohibits the sale or rental of sexually explicit material by DoD military and civilian personnel when acting in an official capacity.

4. Comment posted 2/6/06:

*General Comment:* It seems that if magazines and videos containing sexually explicit materials are to be restricted but books containing sexually explicit materials are not, then a double standard is being created. In essence sexually explicit materials are acceptable in one format but not in another. Either all sexually explicit materials should be allowed or it all should be banned.

*DoD response:* The Part is consistent with 10 U.S.C. 2489a, which does not include books in the definition of "sexually explicit material."

5. Comment posted 2/6/06:

*General Comment:* I think the military should be able to possess whatever types of media they choose, as long as it does not violate the law.

*DoD response:* The Part does not regulate possession of sexually explicit material by DoD military and civilian employees. It prohibits the sale or rental of sexually explicit material on property under the DoD jurisdiction, and it prohibits the sale or rental of sexually explicit material by DoD military and civilian employees acting in an official capacity.

6. Comment posted 2/6/06:

*General Comment:* I don't see how the barring of sale or rental of pornographic materials is going to help anything. If the issue is pornography on property owned by the Dept. of Defense, then possession of it should be banned entirely.

*DoD response:* The Part does not regulate the possession of sexually explicit material by DoD military and civilian employees. It prohibits the sale or rental of sexually explicit material on property under DoD jurisdiction, and by DoD civilian and military employees when acting in an official capacity.

7. Comment posted 2/6/06:

*General Comment:* I believe that this proposed rule is too restrictive based on the fact that all DoD property is included. While explicit materials should be restricted from certain areas under DoD's property, such as work areas, other property, such as personal living areas, should not be included.

*DoD response:* The Part does not prohibit the possession of sexually explicit material by DoD military and civilian employees. It prohibits the sale or rental of sexually explicit material on property under DoD jurisdiction, and by DoD military and civilian employees when acting in an official capacity.

8. Comment posted 2/6/06:

*General Comment:* I think this regulation needs some clarification. I would also like to know why the government has banned trade of sexually explicit material in the armed forces.

*DoD response:* The Part implements 10 U.S.C. 2489a, which prohibits the sale or rental of sexually explicit material on property under DoD jurisdiction, and by DoD military and civilian employees when acting in an official capacity.

9. Comment posted 2/6/06:

*General Comment:* The Department of Defense should not restrict the rights of military personnel more so than the general public. If military people want to look at pornographic material that is available in the open market, they should be allowed to do so.

*DoD response:* The Part does not prohibit the possession of sexually explicit material by DoD civilian or military employees. It prohibits the sale or rental of sexually explicit material on property under DoD jurisdiction, and by DoD military and civilian employees when acting in an official capacity.

10. Comment posted 2/6/06:

*General Comment:* What is rationale behind not allowing members of the armed forces to view these materials?

*DoD response:* The Part does not prohibit the possession or viewing of sexually explicit material by DoD employees. It prohibits the sale or rental of sexually explicit material by the Department of Defense on property under its jurisdiction and by DoD military and civilian employees when acting in an official capacity.

11. Comment posted 2/6/06:

*General Comment:* Although I think this regulation is a necessary one, I am curious as to why the definitional sections are just now being added years after the actual regulation was enacted.

*DoD response:* The definitions section is not new. The previous Part contained definitions, as does the reissued Part.

12. Comment posted 2/6/06:

*General Comment:* I don't want regulations on what I look at.

*DoD response:* The Part does not prohibit the possession or viewing of sexually explicit material by DoD civilian and military personnel. It prohibits the sale or rental of sexually explicit material on property under its jurisdiction and by DoD military and civilian employees when acting in an official capacity.

13. Comment posted 2/6/06:

*General Comment:* This seems to border on the side of the restriction of the freedom of press despite the fact that it is not regulating the actual production of the materials. Perhaps more along the lines of censorship?

*DoD response:* The Part does not censor free speech, because it does not prohibit the possession of sexually explicit material by DoD military and civilian personnel. It prohibits the sale or rental of sexually explicit material by the Department of Defense on property under its jurisdiction, and by DoD civilian and military employees when acting in an official capacity.

14. Comment posted 2/23/06:

I write because of my concern with proposed regulation 32 CFR 235. My primary concern is that the regulation violates, if not the First Amendment itself, at least the spirit of it.

The first problem is that this regulation does discriminate based on viewpoint. It *only* applies to materials that contain nudity designed to elicit a sexual response, *i.e.* that represent nudity or sex as being pleasurable. That is a viewpoint.

The second problem is that there is no reference to any serious artistic, literary, or political value that sexually explicit materials may have. Even if the "dominant theme" of such materials is the depiction of nudity designed to elicit a sexual response, those materials

might still have eminent worth because of other important, but "lesser" themes. Such materials could easily also very intentionally represent nudity in a titillating way to explore the very reasons it is titillating. The reality is that if materials have nudity, no matter how tasteful or artistic, it will probably be found to be sexually explicit.

The second problem is that "dominant theme" is unworkably ambiguous. One could easily apply this standard to a movie that has only ten minutes of nudity, because the "power" of this segment far outweighs the rest of the film.

The final problem is that this regulation is grossly paternalistic. The Department of Defense should ban the sale of sexually explicit material that is actually obscene. But members of the armed forces are adults, and should be treated as such. Even if these regulations do not reach serious, worthwhile but sexually explicit materials, they still reach some rather innocuous forms of pornography. I simply do not see the value in the government censoring such material from the men and women of the Armed Forces. If they are mature enough to serve our country, they are mature enough to decide whether to view these sorts of sexually explicit materials.

Accordingly, I would urge that the regulations be revised and restricted to exclude materials with redeeming social value and to reach only "hard-core" pornography.

*DoD response:* The Part does not censor free speech, because it does not prohibit the possession of sexually explicit material by DoD civilian and military employees. It prohibits the sale or rental of sexually explicit material on property under DoD jurisdiction, and by DoD military and civilian employees when acting in an official capacity. In *PMG International Division, L.L.C. v. Rumsfeld*, 303 F.3d 1163 (9th Cir. 2002), the U.S. Court of Appeals affirmed the decision of the U.S. District Court for the Northern District of California, and held that the Military Honor and Decency Act (the Act), 10 U.S.C. 2489a, merely regulated government speech, and that plaintiffs had no right under the First Amendment to compel the government to offer sexually explicit materials at military exchanges. The Appellate court also concluded that military exchanges were nonpublic fora and that the Act was a viewpoint-neutral, reasonable regulation of speech. See also, *General Media Communication, Inc., et al. v. Perry*, 1997 U.S. App. LEXIS 40571.

## Certifications

### *Executive Order 12866*

This regulatory action is not a significant regulatory action, as defined by Executive Order 12866.

### *Regulatory Flexibility Act of 1980 (5 U.S.C. 605(b))*

This regulatory action will not have a significant adverse impact on a substantial number of small entities.

### *Unfunded Mandates Act of 1995 (Sec. 202, Pub. L. 104-4)*

This regulatory action does not contain a Federal mandate that will result in the expenditure by State, local, and tribal governments, in aggregate, or by the private sector of \$100 million or more in any one year.

### *Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35)*

This regulatory action will not impose any additional reporting or recordkeeping requirements under the Paperwork Reduction Act.

### *Federalism (Executive Order 13132)*

This regulatory action does not have Federalism implications, as set forth in Executive Order 13132. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.

### *Public Law 96-354, "Regulatory Flexibility Act" (5 U.S.C. Chapter 6)*

This rule is not subject to the Regulatory Flexibility Act because it would not, if promulgated, have a significant economic impact on a substantial number of small entities as defined by 5 U.S.C. 601. The production of sexually explicit material is not the typical product of small business concerns as defined under section 3 of the Small Business Act. Furthermore, military exchanges represent only a small segment of the retail sector since access is restricted to military personnel and other authorized patrons.

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

This rule does not involve a Federal mandate that may result in the expenditure by State, local and tribal governments, in the aggregate, or by the private sector, of \$100 million or more and such rulemaking will not significantly or uniquely affect small governments.

**List of Subjects in 32 CFR Part 235**

Business and industry, Concessions, Government contracts, Military personnel.

■ Accordingly, title 32 of the Code of Federal Regulations is amended by revising part 235 to read as follows:

**PART 235—SALE OR RENTAL OF SEXUALLY EXPLICIT MATERIAL ON DOD PROPERTY**

Sec.

- 235.1 Purpose.
- 235.2 Applicability and scope.
- 235.3 Definitions.
- 235.4 Policy.
- 235.5 Responsibilities.
- 235.6 Procedures.
- 235.7 Information requirements.

**Authority:** 10 U.S.C. 2489a.

**§ 235.1 Purpose.**

This part implements 10 U.S.C. 2489a, consistent with DoD Instruction 1330.09,<sup>1</sup> by providing guidance about restrictions on the sale or rental of sexually explicit materials on property under the jurisdiction of the Department of Defense or by members of the Armed Forces or DoD civilian officers or employees, acting in their official capacities.

**§ 235.2 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 as the "DoD Components").

(b) Shall not confer rights on any person.

**§ 235.3 Definitions.**

For the purpose of this part, the following definitions apply:

*Dominant theme.* A theme of any material that is superior in power, influence, and importance to all other themes in the material combined.

*Lascivious.* Lewd and intended or designed to elicit a sexual response.

*Material.* An audio recording, a film or video recording, or a periodical with visual depictions, produced in any medium.

*Property under the jurisdiction of the Department of Defense.* Commissaries, facilities operated by the Army and Air Force Exchange Service, the Navy

Exchange Service Command, the Navy Resale and Services Support Office, Marine Corps Exchanges, and ship stores.

*Sexually explicit material.* Material, the dominant theme of which is the depiction or description of nudity, including sexual or excretory activities or organs, in a lascivious way.

**§ 235.4 Policy.**

It is DoD policy that:

(a) No sexually explicit material may be offered for sale or rental on property under the DoD jurisdiction, and no member of the Armed Forces or DoD civilian officer or employee, acting in his or her official capacity, shall offer for sale or rental any sexually explicit material.

(b) Material shall not be deemed sexually explicit because of any message or point of view expressed therein.

**§ 235.5 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) Monitor and ensure compliance with this part.

(2) Establish a Resale Activities Board of Review (the "Board") and approve senior representatives from the Army and Air Force Exchange Service, the Navy Exchange Service Command, and the Marine Corps Exchange Service; and approve a senior representative from each of the Military Departments, if designated by the Military Department concerned, to serve as board members on the Resale Activities Board.

(3) Appoint a Chair of the Board.

(4) Monitor the activities of the Board and ensure that the Board discharges its responsibilities as set forth in § 235.6.

(b) The Secretaries of the Military Departments shall ensure that their respective component DoD resale activities comply with this Part and may designate a senior representative to serve on the Board.

(c) The Secretary of the Army and the Secretary of the Air Force shall each appoint one senior representative from the Army and Air Force Exchange Service to serve on the Board.

(d) The Secretary of the Navy shall appoint a senior representative from the Navy Exchange Service Command and a senior representative from the Marine Corps Exchange Service to serve on the Board.

**§ 235.6 Procedures.**

(a) The Board shall periodically review material offered or to be offered for sale or rental on property under DoD

jurisdiction and determine whether any such material is sexually explicit in accordance with this part.

(b) If the Board determines that any material offered for sale or rental on property under DoD jurisdiction is sexually explicit, such material shall be withdrawn from all retail outlets where it is sold or rented and returned to distributors or suppliers, and shall not be purchased absent further action by the Board.

(c) The Board shall convene as necessary to determine whether any material offered or to be offered for sale or rental on property under DoD jurisdiction is sexually explicit. The Board members shall, to the extent practicable, maintain and update relevant information about material offered or to be offered for sale or rental on property under DoD jurisdiction.

(d) If any purchasing agent or manager of a retail outlet has reason to believe that material offered or to be offered for sale or rental on property under DoD jurisdiction may be sexually explicit as defined herein, and such material is not addressed by the Board's guidance issued pursuant to paragraph (e) of this section, he or she shall request a determination from the Board about such material prior to purchase or as soon as possible.

(e) At the conclusion of each review and, as necessary, the Board shall issue guidance to purchasing agents and managers of retail outlets about the purchase, withdrawal, and return of sexually explicit material. The Board may also provide guidance to purchasing agents and managers of retail outlets about material that it has determined is not sexually explicit. Purchasing agents and managers of retail outlets shall continue to follow their usual purchasing and stocking practices unless instructed otherwise by the Board.

(f) Material which has been determined by the Board to be sexually explicit may be submitted for reconsideration every 5 years. If substantive changes in the publication standards occur earlier, the purchasing agent or manager of a retail outlet under DoD jurisdiction may request a review.

**§ 235.7 Information requirements.**

The Chair of the Board shall submit to the PDUSD(P&R) an annual report documenting the activities, decisions, and membership of the Board. Negative reports are required. The annual report shall be due on October 1st of each year and is not subject to the licensing

<sup>1</sup> Copies may be obtained at <http://www.dtic.mil/whs/directives/>.

internal information requirements of DoD 8910.1–M.<sup>2</sup>

Dated: November 8, 2006.

**L.M. Bynum,**

*Alternate OSD Federal Register Liaison Officer, DoD.*

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Parts 1, 2, and 97

[WT Docket No. 04–140; FCC 06–149]

#### Amateur Service Rules

**AGENCY:** Federal Communications Commission.

**ACTION:** Final rule.

**SUMMARY:** In this document, the Commission amends its Amateur Radio Service rules to revise the frequency segments of the 80 meter and 40 meter amateur service High Frequency (HF) bands on which amateur stations are authorized to transmit voice communications; authorize amateur stations to transmit certain emission types on additional amateur service bands or frequency segments; revise the procedures for the amateur service vanity call sign system; eliminate unnecessary restrictions imposed on manufacturers of certain types of equipment that may be used at amateur stations; and make other conforming amendments to the amateur service rules.

**DATES:** Effective December 15, 2006.

**FOR FURTHER INFORMATION CONTACT:** William T. Cross, Wireless Telecommunications Bureau at (202) 418–0620, or TTY (202) 418–7233.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Report and Order*, in WT Docket No. 04–140; FCC 06–149, adopted October 4, 2006, and released October 10, 2006. The complete text of this document is available for inspection and copying during normal business hours in the FCC's Reference Information Center, 445 12th Street, SW., Room CY–A257, Washington, DC. Alternative formats (Braille, large print, electronic files, audio format) are available for people with disabilities by sending an e-mail to [FCC504@fcc.gov](mailto:FCC504@fcc.gov) or, calling the Consumer and Government Affairs Bureau at (202) 418–0530 (voice), (202) 418–0432 (TTY). The Order also may be

downloaded from the Commission's Web site at <http://www.fcc.gov/>.

1. In this *Report and Order* the Commission adopts changes to its part 97 rules to conform the amateur service rules to the international Radio Regulations. The overall effect of this action is to further the public interest by allowing amateur service licensees to use the spectrum more efficiently, and by allowing amateur service stations to operate with fewer restrictions. The changes adopted in this *Report and Order* were proposed in the *Notice of Proposed Rulemaking* at 69 FR 51028, August 17, 2004. Over 150 comments on the proposed rule changes were received and changes to the proposed rules based on these comments are included in this *Report and Order*.

2. Specifically, the Commission (1) revises the operating privileges of amateur radio operators to allow more spectrum in four currently-authorized amateur service HF bands to be used for voice communications; (2) permits auxiliary stations to transmit on additional amateur service bands; (3) permits amateur stations to transmit spread spectrum communications on the 1.25 meter (m) band; (4) permits amateur stations to retransmit communications from the International Space Station; (5) permits amateur service licensees to designate the amateur radio club to receive their call sign in memoriam; (6) prohibits an applicant from filing more than one application for a specific vanity call sign; (7) eliminates certain restrictions on equipment manufacturers that are no longer necessary; (8) permits amateur radio stations operating in Alaska and surrounding waters more flexibility in providing emergency communications; and (9) removes certain restrictions in the amateur service license examination system that are no longer necessary. The effect of these revisions are to provide licensees with greater flexibility in the utilization of amateur service frequencies, promote efficient use of the Amateur Radio Service spectrum by authorizing communications that include both analog and digital emission types to be transmitted on currently-authorized amateur service spectrum, and eliminate unnecessary requirements that may limit the flexibility of the amateur service license examination system.

#### I. Procedural Matters

##### A. Paperwork Reduction Act Analysis

3. This document does not contain any new or modified information collection requirements subject to the Paperwork Reduction Act of 1995

(PRA), Public Law 104–13. Therefore, it does not contain any new or modified “information collection burden for small business concerns with fewer than 25 employees,” pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4).

##### B. Report to Congress

4. The Commission will send a copy of the *Report and Order*, including this Final Regulatory Flexibility Certification, in a report to be sent to Congress and the Congressional Budget Office pursuant to the Congressional Review Act. In addition, the Commission will send a copy of the *Report and Order*, including the Final Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA and the Final Regulatory Flexibility Certification will also be published in the **Federal Register**.

##### C. Final Regulatory Flexibility Certification

5. In this *Report and Order*, we amend the rules that specify how an individual who has qualified for an amateur service operator license can use an amateur radio station consistent with the basis and furthering the purpose of the amateur service. The amended rules apply exclusively to individuals who are licensees in the amateur radio service. Given the definition of a “small entity,” none of these individuals are small entities as the term is used in the RFA. In addition, the amended rules reflected in this *Report and Order* potentially could affect manufactures of amateur radio equipment. Based on requests that the Commission has received for certification of amplifiers under part 97 of the Rules, we estimate that there are between five and ten manufactures of amateur radio amplifiers and that by the relevant SBA standard none of these manufactures are small entities. We also note that the rule changes will apply to amateur radio licensees and control operators of amateur radio stations and will not have a necessary impact on manufactures of amplifiers that may be used at amateur radio stations. Therefore, we certify that the rules reflected in this *Report and Order* will not have a significant economic impact on a substantial number of small entities.

##### D. Ordering Clauses

6. Pursuant to sections 4(i), 303(f), 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(f), 303(r) and 332, that parts 1, 2, and 97 of the Commission's Rules are amended as specified below.

<sup>2</sup> Copies may be obtained at <http://www.dtic.mil/whs/directives/>.