



Office of Command Counsel Newsletter

August 2002, Volume 02-04

AMC Attorney Career Program Task Force to Look At Career Program Regulation...and More

The AMC Attorney Career Program Task Force announced during the CLE 2002 Program will kick off an initial meeting at HQ AMC on Thursday August 22. The Task force co-chairs are **Stephen Klatsky** and **Holly Saunders**. Members include **Susan Harbort**, CECOM, **Sharon Hill**, AMCOM, **Tom Jackson**, OSC, **K Krewer**, TACOM, **Les Mason**, ANAD and **Pat Sheldon**, SBCCOM.

The committee will work on creating a working draft revision to the primary regulation governing the AMC Attorney Career Program, AMCR 690-2, last revised in 1992.

The AMC legal community was canvassed for areas of inquiry. The following is an initial list:

Form 2693—revise, automate and require revisions when performance appraisals are issued.

Determine method for seeking additional information from applicants—resume or the like.

AMC Professional Responsibility Committee.

Revise Outside Practice/Employment Policy.

Define Placement Program.

Classification Authority.

“Member in good standing”—Automate certification process.

Training and Professional Development.

Recruitment and Placement.

Discipline process.

Conflict of Interests.

Once a working draft is designed it will be redistributed to each AMC legal office for review and comment. We thank those who took the time from their daily legal practice to prepare and forward comments on this important project.

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AMC Command Counsel Newsletter Attorney Index Updated

FAQs about Powers of Attorney

A revised and updated AMC Command Counsel Newsletter Index is included.

Part 1 is a Topic and Alphabetical Title of the Article (Encl 1).

Part 2 is Listed by Topic and Most Recent Article (Encl 2).

Thanks so much to **John Metcalf**, of the CECOM-Ft. Belvoir Branch and his staff. The service is an absolutely superb one benefiting all readers.

With the increased frequency and length of mobilization and TDY assignments civilian and military personnel often ask about and seek to execute a Power of Attorney.

The CECOM, Ft. Monmouth Legal Assistance Division has prepared a primer that addresses questions related to this important tool to manage ones financial and other matters.

The paper highlights an important common restriction: a marriage ceremony or will execution can not be accomplished by this document (at least in most states) (Encl 3)

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Check out the Newsletter on the Web at http://www.amc.army.mil/amc/command_counsel/

Letters to the Editor are accepted. Length must be no longer than 250 words. All submissions may be edited for clarity.

Acquisition Law Focus

A Primer on FACA

Many of our clients are not even aware that the Federal Advisory Committee Act (FACA) exists.

Those who are aware of FACA are never sure if the group they would like to assemble would run afoul of FACA.

In an effort to provide some general “user friendly” guidance in this area to our clients, **Denise Scott**, TACOM-ARDEC, DSN 880-6585, prepared a summary of FACA.

It is intended as a starting point so that the client has some guideposts when considering soliciting input from entities outside the Federal government.

If a plan is formulated with this guidance in mind the client is less likely to discover after much effort is already expended that the group they intend to use is subject to FACA.

What is the Federal Advisory Committee Act (FACA)? (see 5 U.S.C., App., and 41 CFR 102-3)

FACA governs the establishment, operation, and termination of advisory commit-

tees within the executive branch of the Federal Government. The Act and associated implementing regulations define what constitutes a Federal advisory committee and provide general procedures to follow for the operation of these advisory committees. In addition, the Act and regulations are designed to assure that the Congress and the public are kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees.

The paper addresses many important aspects of the law.

FACA Indicators

One key portion contains a list of FACA Indicators:

Is the Committee “established” or “utilized” by the agency?

Does the agency manage or control membership, composition, and define the agenda?

Does the agency fund the group?

Does the group provide advice and recommendations as a group? (Encl 4)

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12. Hatch Act
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Commercial Items: Applying the Definition to Services

Since the Federal Acquisition Streamlining Act (FASA) of 1994 (Section 8104, paragraph 2377 of Public Law 103-355) established a preference for the acquisition of commercial items, the process of considering commercial goods and services to meet the Government's requirements has become familiar to most of us in the acquisition community.

Application of Commercial Item Definition to Services

More recently, we find ourselves looking closely at the application of the commercial item definition to services. At first glance, almost all of the services we procure would seem to be commercial in nature.

If we apply the "of a type test", that is, services of a type offered and sold in the marketplace, to services for installation, maintenance,

repair, training, and other commonly acquired services, we could consider almost all of the services we buy to be commercial.

The Comp Gen Rules

The Comptroller General upheld this interpretation in the Aalco Forwarding, Inc. decision that an agency properly determined that household moving services for military personnel are commercial services "of a type" offered and sold in the commercial marketplace.

The decision cites that the agency "reasonably concluded, based on its market research, including reviews of numerous commercial contracts, that the moving services it seeks in reengineering its current program qualify as a commercial item because they are the type of services offered and sold competitively by the moving industry in substan-

tial quantities to commercial shippers, particularly in the national account contract market.

In this regard, it is apparent that the services used for the movement of the household goods of military personnel, i.e., packing, loading, hauling, storage and other accessorial services, and delivery, are not services that are unique or provided only to the government, but are essentially the same moving services provided in the commercial market, in that movers use the same trucks, warehouses, ocean or air carriers, crews, packing materials, and other equipment to perform both DOD's and the commercial market's household goods moving requirements.

CECOM's **Marla Flack**, DSN 992-5057, has prepared a very complete article on this important subject. (Encl 5)

Reverse Auction Contracting Technique

For nearly two years, the CECOM Acquisition Center has been at the forefront of an innovative contracting technique – the use of an on-line auction to procure supplies. With the blessing of the Department of Defense (DOD), CECOM began conducting on-line auctions in the spring of 2000.

On-Line Auctions

The on-line auction is an event conducted over the Internet in which multiple suppliers of goods have an opportunity to simultaneously bid to meet a buying organization's specified requirements.

This technique permits bidders to submit multiple bids over time to reduce their prices to be more competitive with other bidders. Since the prices are moving downward, this form of auction is referred to as a **"Reverse Auction."**

The Reverse Auctioning tool is an award-winning electronic commerce application that represents a significant departure from the static and

inflexible process typically used to purchase supplies.

After conducting numerous reverse auctions for various agencies over the past two years, it has become evident that the two basic benefits are savings and efficiency.

The Process

The process begins with an announcement of the requirements to be procured through the Interagency Business Opportunities Page (IBOP).

A screen is completed by the Contracting Office which describes the items to be procured and sets forth the rules of the auction; i.e., start time, duration, minimum bid, etc.

The qualified bidders can access a screen that permits them to submit their bids, and see other competitors' bids during the course of the auction. The bidders' identities, although known by the Contracting Officer, are not publicly disclosed during the course of the auction.

The Contracting Officer can monitor the auction,

which will be ended automatically at the predetermined closing time (including any provision for automatic extensions).

Part 15 rewrite Changed All

Until the rewrite of Part 15 of the Federal Acquisition Regulation (FAR) in 1997, the FAR prohibited the use of auction techniques in negotiated procurements.

When FAR Part 15, which governs the conduct of negotiated procurements, was rewritten, it encouraged a more open dialogue between the Government and offerors, and no longer included the prohibition against the use of auction techniques. This change to the FAR, coupled with the proliferation of the Internet, especially the more common use of commercial auction sites, such as e-Bay, opened the door to the use of the on-line auction technique in Government acquisition.

POC is CECOM's **Bob Russo**, DSN 992-9840. (Encl 6)

EEOC Issues Handbook for Administrative Judges

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing statutes which prohibit discrimination in federal employment. § 201 *et seq.*

The Commission's regulations, set forth at 29 C.F.R. Part 1614, provide the basic framework for the processing of federal sector complaints of discrimination. Pursuant to these regulations, EEOC Administrative Judges are authorized to conduct hearings and issue decisions. 29 C.F.R. § 1614.109.

The purpose of this handbook is to provide guidance to Administrative Judges concerning the processing of hearing requests and the conduct of hearings on individual and class complaints of discrimination.

This handbook supplements the Commission's regulations and the EEOC Management Directive 110, November 9, 1999 (EEO MD-110).

The Handbook is a useful tool for the practitioner as well as it provides a supplement to the EEOC Management Directive 110.

The document contains two major sections.

First, it is divided into 10 chapters.

CHAPTERS:

1. Initial Processing
2. Official Documents Issued by an Administrative Judge
3. Settlement and Alternative Dispute Resolution
4. Discovery
5. Summary Judgment
6. Sanctions
7. Hearing Process
8. Decisions
9. Attorney's Fees and Compensatory Damages
10. Class Complaints

Second, are important appendices that highlight the practice before the EEOC AJs.

APPENDICES:

- A. Order Directing Agency To Produce Complaint File
- B. Acknowledgment and Order
- C. Designation of Representative Form
- D. Consolidation Order
- E. Notice of Intent to Issue Decision Without A Hearing
- F. Order of Dismissal
- G. Order Entering Judgment
- H. Notice To The Parties
- I. Acknowledgment and Order for Class Certification (Encl 7)

Employment Law Focus

Inability to Maintain Regular Attendance

One of the most difficult and frustrating type of case is where there is an employee who has legitimate medical problems and is absent from the work site on an intermittent basis; i.e. in one month, out the next, back in for several weeks, etc. This type of case involves both reasonable accommodation and adverse action principles.

The MSPB has held, most recently in Combs v. Social Security Administration, 102 FMSR 5142 (Feb. 26, 2002) that an employee who is frequently absent, on approved leave, can be the subject of an adverse action. The Board, citing Cook v. DA, 18 MSPR 610 (1984) held that certain criteria must be met.

TACOM-ARDEC's **Joel Friedman**, DSN880-6588, provides a practice note on the case law behind and the management burden in these cases. (Encl 8)

Hostile Workplace, Discrete Acts and Continuing Violations-- The Supreme Court Rules

The U.S. Supreme Court ruled unanimously June 10 that the continuing violation doctrine does not apply to claims for discrete acts of employment discrimination, but decided 5-4 that the doctrine can apply in hostile environment claims (*National R.R. Passenger Corp. v. Morgan*, U.S., No. 00-1614, 6/10/02).

Rejecting a portion of a U.S. Court of Appeals for the Ninth Circuit decision that allowed Abner Morgan to include several years of alleged discriminatory actions by the National Railroad Passenger Corp. (Amtrak) in his Title VII of the 1964 Civil Rights Act complaint, despite the untimeliness of many of the ac-

tions, the court found the statutory definition of "unlawful employment practice" relates to discrete acts, and therefore could not be linked together under a continuing violation doctrine. The court's opinion by Justice Clarence Thomas rejected Morgan's argument that "practice" connotes an ongoing violation that can occur or recur over a period of time. Finding that 42 U.S. Code Section 2000e-2 details numerous discrete actions as part of the explanation of "[u]nlawful employment practices," the court said there was "simply no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of a timely filing." (Encl 9)

Employment Law Focus

OPM Director on Labor Management Relations

Attached, for your info, is a memo from the Director of OPM regarding Labor-management Relations. **Kay Coles James Cole** states that in addition to the need for labor and management to ensure that official time is authorized and used appropriately, there is an equally important responsibility of labor and management to work together to deliver the best possible service to the American people.

Ms. Cole goes on to state that labor and management have a mutual stake in achieving President Bush's bold strategy for improving the performance of Government and delivering better results for the American people.

While agencies are no longer required to form partnerships with their unions, they are strongly encouraged to establish cooperative labor-management relations. (Encl 10)

OPM Guidance on Reporting the Use of Official Time

The Office of Personnel Management is issuing this guidance to help departments and agencies report on the number of hours of official time that employees used to perform representational functions in FY 2002. Agencies are asked to complete this report and submit it to OPM no later than October 31, 2002.

From the Document:

"We have asked for as little official time data as possible because we are fast approaching the end of the fiscal year and we recognize that agencies may not be able to collect and report more than total hours of official time for FY 2002.

To help us draw conclusions from the information reported this year, OPM will

examine the official time data and any explanation of unusually high or low usage and correlate that with data we have already collected showing the number and size of bargaining units at each Federal agency. We will work closely with agencies and unions to establish a more comprehensive reporting framework for future years.

Your report should cover all agencies except non-appropriated fund instrumentalities and only those representational activities related to labor relations, such as those provided for by 5 U.S.C. Chapter 71 and collective bargaining agreements.

Agencies should not report activities under non-labor relations laws or regulations (e.g., civil rights laws or agency administrative grievance procedures. (Encl 11)

Hatch Act--Civilian & Military Personnel Political Activities

Even though the year 2002 elections are 5 months away, we are already seeing campaign activity, not only in some Congressional races, but also at the state and local level.

A Federal statute, the **Hatch Act**, governs civilian employees' participation in the political process.

While it is DoD policy to encourage DoD employees and members of the Armed Forces to carry out the obligations of citizenship to the maximum extent possible, there are some limitations, which vary depending on the individual's employment status.

The limitations for members of the **Senior Executive Service**, other Federal employees, and members of the **Armed Forces** are different.

This Ethics Advisory summarizes permissible and prohibited activities and should be regarded as a general guide.

The Office of Special Counsel is charged with enforcing the Hatch Act. Civilian employees should contact

it with specific questions. It has a Hatch Act Hotline, 1-(800) 854-2824.

Permissible Activities

DoD civilian employees (except career members of the Senior Executive Service may not engage in activities 10, 11, 12 and 13), in their personal capacities may:

1. Be candidates for public office in nonpartisan elections;
2. Register and vote as they choose;
3. Assist in voter registration drives;
4. Express opinions about candidates and issues;
5. Contribute money to political organizations;
6. Attend political fundraising functions;
7. Join and be an active member of a political party or club;
8. Sign nominating petitions;
9. Campaign for or against referendum questions, constitutional amendments, or municipal ordinances;

10. Campaign for or against candidates in partisan elections;

11. Make campaign speeches for candidates in partisan elections;

12. Distribute campaign literature in partisan elections; and

13. Hold office in political clubs or parties.

Prohibited Activities

You will have to read the enclosure for a complete list of the restrictions--less than several years ago.

Civilian DoD employees (including career members of the Senior Executive Service) **may not:**

1. Use official authority or influence for the purpose of interfering with or affecting the result of an election;

2. Collect political contributions unless both the collector and the donor are members of the same Federal labor organization or employee organization and the donor is not a subordinate.

POC is **Bob Garfield**, DSN 767-8003. (Encl 12)

Air Force Legal Information Service WebFLITE

Looking for some assistance to help answer the environmental legal challenge du jour?

Then check out the following web site provided by the Air Force at no cost to registered DOD attorneys and other legal professionals. Registration is simple and requires only minutes of your time.

Once at the home page, click on the icon for environmental, which will take you the environmental law home page.

Once there you'll have access to a host of helpful links including, environmental Primers, Theses, and media/environmental legislation specific categories.

Air Force Legal Information Service WebFLITE has an auto-registration system to allow Army legal profession-

als to register for no-fee WebFLITE accounts.

User identities will be verified by e-mail message to their military e-mail addresses as well as a message to their supervisors.

Passwords will be reset every 90 days to ensure that individuals are removed from the system when they are no longer eligible for no-fee access.

Non-Air Force users will be excluded from AF-only applications such as AFCIMS, AMJAMS, LEXIS, controlled DocuShare folders and the JAG Roster, and files set off-limits (e.g., JAX materials).

This auto-registration system is currently the best method consistent with DoD charter (DoDD 5160.64). For free account registration go to <http://register.jag.af.mil> and follow the prompts.

Categorical Exceptions

An excellent article on the new Army Categorical Exclusions (CXs) in Appendix B of the recently promulgated Army NEPA regulations (32 CFR 651) was published in the most recent edition of the Army's Environmental Law Bulletin.

The article, written by **MAJ Jeanette Stone**, compares the new CXs to the old ones in Appendix A of AR 200-2.

Practitioners familiar with the old CXs will find the article particularly useful in determining which new CX to use when completing NEPA actions that do not require the production of an Environmental Assessment or an Environmental Impact Statement.

The new regulations were published in the Federal Register, Volume 67, No. 61, Part II, pages 15290-15332, March 29, 2002

A copy of Major Stone's article is attached as a word file. The referenced Environmental Law Bulletin can be accessed on the Environmental Forum of the Army's JAGCNET. (Encl 13)

The LexisNexis Corner

NEW ENHANCEMENTS

LexisNexis is pleased to announce exciting, customer-inspired enhancements to the **LexisNexis™ Research Service** at www.lexis.com.

Innovative new search tools ... enriched content ... and ease-of-use enhancements are only the beginning. Now more than ever LexisNexis provides a dynamic, one-stop destination for all your essential information needs.

Experience and explore the new time-saving, productivity-increasing enhancements for yourself. Visit us online at <http://www.lexisnexis.com/corpcounsel/demo/>. Better yet, please call Corrin Gee at 202.857.8236 or e-mail at corrin.gee-alvarado@lexisnexis.com to arrange a demonstration.

Monthly Search Tips:

Enhancements to Patents on LexisNexis™!

Some exciting new enhancements were recently made to the LexisNexis patents making LexisNexis even more comprehensive

NEW FULL SHEPARD'S COVERAGE OF MSPB DECISIONS!

Full coverage of Merit Systems Protection Board (MSPB) decisions is now available in **Shepard's** citations. You may now enter a MSPB citation and get a list of all citing references with the editorial analysis expertise of **Shepard's**. Use **Shepard's** citations to begin your research or to validate decisions! And don't forget, **Shepard's** on [lexis.com](http://www.lexis.com)® is even easier to use than ever before!

Looking for a needle in a haystack...

When searching on a name in the person locator files, it's best to use the w/n connector to link first name to last name. . Example: Edgar /3 Poe, will retrieve all records including: Edgar Allen Poe, Edgar A. Poe, Poe, Edgar, Edgar Poe or Edgar Al Poe. The w/n connector allows you to include, but not mandate, middle names, hyphenated married names, etc., without excluding anything. Also,

consider using name derivatives and initials where appropriate: Bill! Or Will! Or William or W. to retrieve documents identifying the name William.

One word can make all the difference!!

More than you can handle?

Did you know that if you need to locate more than 1,000 people, LexisNexis™ can offer you the ease and accuracy of a Batch search! Batch searches are run in the person or property locator sources and can be used to locate or confirm data on people, addresses, and phone numbers. All you need to do is provide your LexisNexis account manager with an electronic format of the data you have. If you have the names, addresses, partial Social Security Numbers, etc. we can find the missing corresponding data.

If you would like more information or would like to set up a training session, please contact: **Corrin Gee** at (202) 857-8236 or **Rachel Hankins** at (202) 857-8258. (See More...at Enclosure 14)

Faces In The Firm

HELLO

AMCOM

Polly H. Chatham has been assigned to Acquisition Law Division, Branch A. She comes to us from private practice.

Mary B. Richards has been assigned to Acquisition Law Division, Branch B., comes to us also from private practice.

CPT Dennis Lee has been assigned to Acquisition Law Division, Branch B., comes to us from Ft. Hook, Texas.

CECOM

LTC Chip Boucher is the new SJA. He was previously assigned at the Army Litigation Division, where he was awarded a Meritorious Service Medal for his three years as Chief, Tort Litigation Branch.

CECOM DIVISION C

CECOM Alexandria Branch - **Sara McWilliams** - Sarah brings a wealth of contract law experience, coming to CECOM from the US Army Military District of Washington. Previously she served as an Attorney-Advisor for the Armed Services Board of Contract Appeals.

Fort Belvoir Branch - **Patricia Boone-Proctor** arrives from the Defense Supply Center, Richmond, where she worked as an Employee Relations Specialist. Previously she served as a Trial Attorney, Office of Corporation Counsel, Washington, DC.

TACOM

CPT Gary Bilski has been assigned. Gary is currently attending the basic Procurement Law course at the JAG school.

GOODBYE

HQ AMC

Diane Travers, who worked in the Business Operations Law Division for nearly 8 years, and several years before that at Vint Hill Famrs Station, resigned her position to spend more time with her family

Linda Fluke, secretary to the Command Counsel and a long time HQ AMC employee, primarily in the product/quality assurance area retired.

Lisa Simon, Chief, Information Technology and Intellectual Property Law Branch has accepted a position with the DOD Office of General Counsel.

AMCOM

Karolyn Voigt, Chief, Acquisition Law Division, Team A. retired May 3rd.

Hal Dilworth, Attorney Advisor of the Adversary Proceeding Division, retired July 3rd. **CPT Anthony Adolph**, Attorney Advisor Acquisition Law Division, Team A will be departing for the 2nd Infantry Division in Korea on August 7th.

Glenda Elrod, Paralegal Specialist of the General Law Division retired July 3rd.

CECOM

SJA COL Donna Wright PCS'd in July after being awarded a Meritorious Service Medal and is now the military Trial Judge at Fort Carson.

TACOM

The Business Law Division said goodbye to **CPT Phil Mitchell** in July. Phil is being promoted to Major, and he is currently attending the JAG Advanced Course in Charlottesville.

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1. Q. What is a Power of Attorney (POA)?

A. A POA is a document that authorizes someone else to act as your agent. For example, you might grant or give a POA to a friend, authorizing your friend to act as your agent to sell your car, ship your household goods, or obtain medical care for your child. The “grantor” of a POA is the person who makes the POA. The “agent” is the person authorized under the POA to act for the grantor.

2. Q. Are there different kinds of POAs?

A. Yes. The two main types are general and special POAs. A general POA allows your agent to do any and all things that you could legally do yourself. A general POA is essentially unlimited. A special (or limited) POA lists the particular act or acts that the agent is authorized to do and limits the agent’s authority to only those acts.

3. Q. When does a POA expire?

A. Theoretically, a POA can be made out for as long as the grantor wants. As a practical matter, however, a POA, especially a general POA, should almost never be made for an indefinite time period. Legal Assistance Offices usually make general POAs valid for no longer than two years. After that, the POA has to be renewed by the grantor.

4. Q. What are some of the things a special POA can do?

A. You can use a special POA to authorize your agent to do almost any legal action that you could do yourself. The following list is just a sample of the actions that could be included in a special POA.

- a. Buy or sell real estate.
- b. Purchase, register, or sell a car.
- c. Cash your paycheck or other checks or withdraw money from your bank account.
- d. Admit a child to the hospital for medical care.
- e. Ship or store furniture and household goods.
- f. Sign rental and utilities contracts.
- g. Sign an income tax return.
- h. Clear or accept quarters during a PCS move.
- i. Sign a lease.

These are just a few of the many things that can be done with a special POA. All you have to do is describe the particular actions that your agent is authorized to take on your behalf.

5. Q. Are there any things a POA cannot do?

A. Although a POA is valid for most purposes, in many states there are some items that cannot be accomplished with a POA, because these actions are so important and personal that they cannot be delegated to another. For example, a marriage ceremony or will execution cannot be done by a POA. There are also cases when a particular form of POA is required and no other form will be accepted. Banks, financial organizations and the Internal Revenue Service, for example, usually require their own forms to be used. This particular requirement is more in the nature of a business practice; in reality, the particular form used has no legal significance whatsoever.

6. Q. All this sounds like a good deal – why doesn't everyone have a POA?

A. A POA can be very useful if you have one in effect when you need it, but a POA can also be abused, so there are potential disadvantages to having a POA. You have to evaluate your own particular situation. A recently separated spouse, for example, might use a POA from the other spouse to clean out the grantor's bank account, go on a shopping spree, or sign up for a bunch of new credit cards. As you can see, a POA can be both very helpful and very dangerous. The important thing to remember is that you are going to be legally responsible for the acts of your agent. Therefore, you must exercise great care in selecting the person to be your agent.

7. Q. What steps can I take to prevent improper use of my POA?

A. There is no way to guarantee that your POA will not be misused, but here are some tips to help prevent abuse:

- a. Never have a POA unless you need one.
- b. If you feel you might need a POA, have one prepared, but don't sign it or give it to your agent until you need it.
- c. Always put an expiration date on your POA; never make a POA that lasts indefinitely.
- d. Make sure your expiration date is long enough for your agent to accomplish the job, but not longer than is needed. The duration will depend on the type of job to be accomplished and the risk of abuse. A medical care POA for a child, for example, poses almost no risk of abuse, so a very long duration would probably not be much of a problem. A general POA, however, poses a very significant risk, so a much shorter duration is usually more appropriate.

8. Q. Are there any special requirements for POAs?

A. A POA must be signed in front of a notary public. If you wish, it can be recorded at the county Registrar's Office in the location where the POA will be used. As a general rule, however, a POA is fully effective even without being recorded.

9. Q. Does every business or bank have to accept my POA?

A. No. Everyone is free to accept or reject a POA. Some businesses or banks require that the POA be recorded, while others do not. Some banks will accept only a special POA. The bottom line is that if you are relying on a POA to accomplish an important task, you should check with the business or bank beforehand to be sure that it will actually be accepted.

10. Q. Does a POA expire upon my death or mental incapacity?

A. A POA always expires on the death of the grantor (the person signing it) or on the death of the agent named in it. A POA also usually expires upon the grantor's becoming incompetent. However, a mentally competent grantor may include a clause in a POA that makes the POA effective even during the grantor's subsequent mental or physical incapacity. This type of POA is called a "durable" POA. In many states, durable POAs must be recorded if the grantor does become mentally incapacitated.

11. Q. How does my agent actually sign for me?

A. The agent should sign the grantor's name, then sign the agent's name, and then indicate the agent's authority to sign. For example, "John Grantor, by Mary Agent, with Power of Attorney."

12. Q. What if my agent abuses the POA?

A. Abuses do happen, which is why you need to be careful in choosing your agent and limiting their authority. Unfortunately, no matter how careful you are, abuses are still possible. You are liable to third parties for all of your agent's actions if the actions were authorized under the plain language of the POA and the third party reasonably relied on the POA. It doesn't matter whether the agent's actions were foolish or against your wishes; if the action was authorized under the plain language of the POA, then you have no recourse against the third party. You may sue your agent for reimbursement of any loss you incur as a result of the agent's misuse of the POA, but that is a time-consuming, difficult, and expensive process, and there is no guarantee that your agent will be capable of reimbursing you, even if you win your lawsuit.

Remember, each case is different. This summary gives you general information only. It is not intended as a substitute for talking with a lawyer. If you have any questions, or need a POA prepared, you may consult a Legal Assistance attorney at the Legal Services Branch by calling 732-532-4371.

THE FEDERAL ADVISORY COMMITTEE ACT

Many of our clients are not even aware that the Federal Advisory Committee Act (FACA) exists. Those who are aware of FACA are never sure if the group they would like to assemble would run afoul of FACA. In an effort to provide some general "user friendly" guidance in this area to our clients, I prepared a summary of FACA. It is intended as a starting point so that the client has some guideposts when considering soliciting input from entities outside the Federal government. If a plan is formulated with this guidance in mind the client is less likely to discover after much effort is already expended that the group they intend to use is subject to FACA.

I. What is the Federal Advisory Committee Act (FACA)? (see 5 U.S.C., App., and 41 CFR 102-3)

FACA governs the establishment, operation, and termination of advisory committees within the executive branch of the Federal Government. The Act and associated implementing regulations define what constitutes a Federal advisory committee and provide general procedures to follow for the operation of these advisory committees. In addition, the Act and regulations are designed to assure that the Congress and the public are kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees.

II. What is an advisory committee subject to the Act?

1. An advisory committee subject to the Act, means any committee, board, commission, council, conference, panel, task force, or other similar group, which is established by statute, or *established or utilized* by the President or *by an agency official*, for the *purpose of obtaining advice or recommendations* for the President or on issues or policies within the scope of an agency official's responsibilities. A committee is *utilized* within the meaning of the Act if a Federal office or agency exercises *actual management or control* over its operation.

- a. *Discretionary advisory committee* means any advisory committee that is established under the authority of an agency head or authorized by statute.
- b. *Non-discretionary advisory committee* means any advisory committee either required by statute or by Presidential directive. A *non-discretionary advisory committee* required by statute generally is identified specifically in a statute by name, purpose, or functions, and its establishment or termination is beyond the legal discretion of an agency head.

2. THIS DISCUSSION IS LIMITED TO *DISCRETIONARY* ADVISORY COMMITTEES.

III. How Are Discretionary Advisory Committees Established?

1. **Standard for establishment:** A discretionary advisory committee may be established only when it is essential to the conduct of agency business and when the information to be obtained is not already available through another advisory committee or source within the Federal Government.
2. **By Whom?** It is established by an agency under general authority in title 5 of the United States Code or under other general agency-authorizing statutes.
3. **Required Consultation:** Before establishing discretionary advisory committee and filing the required charter (see paragraph XX) the agency head must consult with the "Secretariat."

Committee Management Secretariat ("Secretariat"), means the organization established pursuant to section 7(a) of the Act, which is responsible for all matters relating to advisory committees, and carries out the responsibilities of the Administrator under the Act and Executive Order 12024 (3 CFR, 1977 Comp., p. 158).

a. *Required information: Consultations*
must, as a minimum, contain the following information:

- i) *Explanation of need.*
An explanation stating why the advisory committee is essential to the conduct of agency business and in the public interest;
- ii) *Lack of duplication of resources.* An explanation stating why the advisory committee's functions cannot be performed by the agency, another existing committee, or other means such as a public hearing; and
- iii) *Fairly balanced membership.* A description of the agency's plan to attain fairly balanced membership. The plan will ensure that, in the selection of members for the advisory committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the advisory committee. Advisory committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the functions and tasks to be performed.

1. **Charter:** No advisory committee may meet or take any action until a charter has been filed.

a. **Filing:** A charter must be filed with:

- i) The agency head;
- ii) The standing committees of the Senate and the House of Representatives having legislative jurisdiction of the agency, the date of filing with which constitutes the official date of establishment for the advisory committee;
- iii) The Library of Congress; and
- iv) The Secretariat.

a. **Purpose and contents.** An advisory committee charter is intended to provide a description of an advisory committee's mission, goals, and objectives. It also provides a basis for evaluating an advisory committee's progress and effectiveness. The charter must contain certain required information.

1. **Notice:** A notice to the public in the **Federal Register** is required.

a. **Procedure.** Upon receiving notice from the Secretariat that its review is complete, the agency must publish a notice in the **Federal Register** announcing that the advisory committee is being established. The notice must describe the nature and purpose of the advisory committee and affirm that the advisory committee is necessary and in the public interest.

b. **Time required for notices.** Must appear at least 15 calendar days before the charter is filed.

IV. What rules and policies govern a FACA committee?

- 1. *Advisory functions only.* The function of advisory committees is advisory only.
- 2. *Balanced membership.* An advisory committee must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed.

3. *Open meetings.* Advisory committee meetings must be open to the public (there are exceptions).
 - a. Each advisory committee meeting must be held at a reasonable time and in a manner or place reasonably accessible to the public.
 - b. A notice in the **Federal Register** must be published at least 15 calendar days prior to an advisory committee meeting

V. How and When is a Discretionary Advisory Committee Terminated?

An advisory committee must be terminated when:

- (1) The stated objectives of the committee have been accomplished;
- (2) The subject matter or work of the committee has become obsolete by the passing of time or the assumption of the committee's functions by another entity;
- (3) The agency determines that the cost of operation is excessive in relation to the benefits accruing to the Federal Government; and
- (4) Upon the expiration of a period not to exceed two years, unless renewed;

VI. What types of committees or groups are NOT covered by the Act?

(d) *Committees not actually managed or controlled by the executive branch.* Any committee or group created by non-Federal entities (such as a contractor or private organization), provided that these committees or groups are not actually managed or controlled by the executive branch;

(e) *Groups assembled to provide individual advice.* Any group that meets with a Federal official(s), including a public meeting, where advice is sought from the attendees on an individual basis and not from the group as a whole;

(f) *Groups assembled to exchange facts or information.* Any group that meets with a Federal official(s) for the purpose of exchanging facts or information;

g) *Intergovernmental committees.* Any committee composed wholly of full-time or permanent part-time officers or employees of the Federal Government and elected officers of State, local and tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities. However, the purpose of such a committee must be solely to exchange views, information, or advice relating to the management or implementation of Federal programs established pursuant to statute, that explicitly or inherently share intergovernmental responsibilities or administration (There are OMB guidelines);

(h) *Intragovernmental committees.* Any committee composed wholly of full-time or permanent part-time officers or employees of the Federal Government;

i) *Local civic groups*. Any local civic group whose primary function is that of rendering a public service with respect to a Federal program;

(j) *Groups established to advise State or local officials*. Any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

VII. Major FACA Indicators.

7. Is the Committee "established" or "utilized" by the agency?

- Does agency manage or control group's membership or determine its' composition?
- Does agency manage or control group's agenda?
- Does agency fund the group?

8. Does the group provide advice or recommendations *as a group*?

VII. What may the agency do and still NOT create a group subject to FACA?

7. Agency official may meet with a local citizens group.
8. Agency official may attend meetings where advice is offered to the government during the course of the meeting.
9. Agency official may participate in meetings as a member.
10. Agency may meet with contractors or licensees to discuss specific matters involving the contract or license. It may also meet to discuss its' efforts to ensure compliance with its' regulations.
11. Agency may meet with a group where the attendees are providing individual advice.

In conclusion, if you intend to solicit information or advice from a group outside the USG, it is in your best interests to consider these FACA guidelines up front. It is far easier to make some minor adjustments in the nature of the group and the manner in which you use the group than to subject yourself to FACA requirements.

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WHAT ARE COMMERCIAL SERVICES?

Since the Federal Acquisition Streamlining Act (FASA) of 1994 (Section 8104, paragraph 2377 of Public Law 103-355) established a preference for the acquisition of commercial items, the process of considering commercial goods and services to meet the Government's requirements has become familiar to most of us in the acquisition community. More recently, we find ourselves looking closely at the application of the commercial item definition to services. At first glance, almost all of the services we procure would seem to be commercial in nature. If we apply the "of a type test", that is, services of a type offered and sold in the marketplace, to services for installation, maintenance, repair, training, and other commonly acquired services, we could consider almost all of the services we buy to be commercial. The Comptroller General upheld this interpretation in the Aalco Forwarding, Inc. decision that an agency properly determined that household moving services for military personnel are commercial services "of a type" offered and sold in the commercial marketplace. The decision cites that the agency "reasonably concluded, based on its market research, including reviews of numerous commercial contracts, that the moving services it seeks in reengineering its current program qualify as a commercial item because they are the type of services offered and sold competitively by the moving industry in substantial quantities to commercial shippers, particularly in the national account contract market. In this regard, it is apparent that the services used for the movement of the household goods of military personnel, i.e., packing, loading, hauling, storage and other accessorial services, and delivery, are not services that are unique or provided only to the government, but are essentially the same moving services provided in the commercial market, in that movers use the same trucks, warehouses, ocean or air carriers, crews, packing materials, and other equipment to perform both DOD's and the commercial market's household goods moving requirements."¹

However, when such services are procured for support of an item not referred to in the commercial item definition, we may have a different situation. The FAR 2.101(b) definition of a commercial item includes installation services, maintenance services, repair services, training services, and other services, if such services are procured for support of an item referred to within the commercial item definition. This part of the definition applies whether or not such services are provided by the same source for the commercial item or at the same time the commercial item is acquired. Furthermore, for the services to be considered commercial, the source of the services must provide similar services to the general public within the same timeframe and under terms and conditions similar to those offered to the Federal Government.

FAR 2.101(b) further refines the definition of commercial services to include those services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. In this context, a catalog price means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or

¹ Aalco Forwarding, Inc., Comp. Gen Dec. B-277241.8; October 21, 1997

vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last made to a significant number of buyers constituting the general public. Market prices mean current prices that are established in the course of ordinary trade between buyers and sellers free to bargain, that can be substantiated through competition or from sources independent of the offeror(s). FAR 2.101(b) specifically excludes services that are sold based on hourly rates without an established catalog or market price for a specific service performed.

What about support services for equipment that does not meet the definition of a commercial item in FAR Part 2? Many fielded legacy systems are used only for Government purposes, and did not evolve from commercial or non-developmental item solutions. There may be no commercial applications for these types of systems if the systems are only used to support military requirements. In this instance, the services are not commercial in accordance with the FAR Part 2 definition, as discussed above. Furthermore, the supporting engineering and technical services may not be of a type offered and sold competitively in the commercial marketplace and the services are not based upon established catalog prices for specific services. It may also be possible that the Government may not possess sufficient technical data on the overall systems design to adequately describe the technical, logistical, or engineering support services that are required under a proposed contract to be procured as commercial services. In these cases, thorough market research will provide support for a determination that the services are not commercial in nature and are not available in the commercial market place.

FASA requires documentation of the Government's commerciality decision. Comprehensive market research must be conducted to ascertain whether any sources exist that can provide the required services, and if commercially equivalent services are available to fulfill the Government's needs. A commerciality decision is a determination of the availability of commercial items that will meet the Government's requirements. By memorandum dated 26 March 2001, the Acting Assistant Secretary of the Army (Acquisition, Logistics and Technology)² announced a policy that all services (with the exception of services under FAR Part 36) were presumed to be commercial and that FAR Part 12 policies and procedures would be used to buy these services. It further stated, "for those services where the results of market research indicate that the service is not commercial, the local Competition Advocate must approve the commercial determination." This is an Army policy requirement.

The Commerciality Determination provided to the Competition Advocate for approval must be sufficiently detailed in describing the timing and techniques used in conducting market research and the market research results which led to the Contracting Officer's determination that the required services are not commercial in nature and cannot be procured in accordance with standard commercial terms and conditions. The issue of whether or not the services are commercial becomes less clear when the services initially seem "of a type" that are commercial,

² Memorandum for Secretaries of the Military Departments, J.S. Gansler, 5 Jan 2001, with attached Clarification of FAR Part 12 for Consistency

but encompass specific requirements that are unusual and cannot be obtained through the commercial market place. An example of this would be services that are similar to commercially available services, such as installation of communications equipment, but because of military operating environments, unique security requirements may preclude use of commercial service arrangements. Consequently, in such instances, even though the services seem to be of a type that are commercially available, the unique military requirements preclude application of customary commercial practices and, therefore, such services would not be commercial in accordance with FAR 2.101(b). Market research must be tailored to focus on the exact requirements so that an accurate analysis can be performed to determine whether or not the required services are commercial. If the required services are commercially available, the services must be procured in accordance with the provisions of FAR Part 12. FAR 12.207 requires that contracts for commercial items be firm fixed price or fixed price with economic price adjustment (EPA); indefinite delivery contracts for commercial items may be firm fixed price or fixed price with EPA. Use of any other contract type is prohibited. This is not subject to any exception or waiver process.

In conclusion, comprehensive market research is the key to making the determination of whether the required services are commercial, whether commercially equivalent services are available, and if any sources exist that can provide the required services to fulfill the Government's needs.

The Point of Contact for this subject in the CECOM Legal Office is Ms. Marla Flack, (732) 532-5057, DSN 992-5057.

KATHRYN T. H. SZYMANSKI
Chief Counsel

REVERSE AUCTION CONTRACTING TECHNIQUE

For nearly two years, the CECOM Acquisition Center has been at the forefront of an innovative contracting technique – the use of an on-line auction to procure supplies. With the blessing of the Department of Defense (DOD), CECOM began conducting on-line auctions in the spring of 2000. DOD had written to the Senate Armed Services Committee that online auctions had the potential to save DOD significant resources in time, funding and labor. The on-line auction is an event conducted over the Internet in which multiple suppliers of goods have an opportunity to simultaneously bid to meet a buying organization's specified requirements. This technique permits bidders to submit multiple bids over time to reduce their prices to be more competitive with other bidders. Since the prices are moving downward, this form of auction is referred to as a "Reverse Auction."

The Reverse Auctioning tool is an award-winning electronic commerce application that represents a significant departure from the static and inflexible process typically used to purchase supplies. After conducting numerous reverse auctions for various agencies over the past two years, it has become evident that the two basic benefits are savings and efficiency. Before we discuss the reasons for these benefits, let's briefly review the process and the regulatory history.

The process begins with an announcement of the requirements to be procured through the Interagency Business Opportunities Page (IBOP). A screen is completed by the Contracting Office which describes the items to be procured and sets forth the rules of the auction; i.e., start time, duration, minimum bid, etc. The qualified bidders can access a screen that permits them to submit their bids, and see other competitors' bids during the course of the auction. The bidders' identities, although known by the Contracting Officer, are not publicly disclosed during the course of the auction. The Contracting Officer can monitor the auction, which will be ended automatically at the predetermined closing time (including any provision for automatic extensions).

Until the rewrite of Part 15 of the Federal Acquisition Regulation (FAR) in 1997, the FAR prohibited the use of auction techniques in negotiated procurements. When FAR Part 15, which governs the conduct of negotiated procurements, was rewritten, it encouraged a more open dialogue between the Government and offerors, and no longer included the prohibition against the use of auction techniques. This change to the FAR, coupled with the proliferation of the Internet, especially the more common use of commercial auction sites, such as e-Bay, opened the door to the use of the on-line auction technique in Government acquisition.

At present, there is no FAR guidance on the use of auction techniques and there have been very few General Accounting Office (GAO) cases that have discussed the subject. Although there is not any direct prohibition against the use of on-line auctions, neither the FAR nor the GAO have specifically approved of its use.

In February 2001, the DAR Council tasked the Contract Placement Committee (CPC) with considering the more than 40 public comments received in response to the request on reverse auctioning which had been issued in the Federal Register. They were to prepare a proposed FAR rule on reverse auctions. Although FAR Case 2001-010 was never formally published, the CPC suggested some changes to the FAR which would have recognized the reverse auction technique as an “innovative approach” to conduct simplified acquisitions and, more importantly, as an approved method of submitting “price proposals and conducting price discussions” in negotiated acquisitions. Unfortunately, these suggested changes were never adopted.

The GAO has denied two protests involving acquisitions that utilized reverse auctions. Both protests centered on the actual conduct of the auction. Although the protests were denied, the GAO did not rule on the propriety of the on-line reverse auction technique.

Although neither the FAR nor the GAO have affirmatively endorsed the on-line reverse auction technique, the positive benefits to the Government are irrefutable. The time required to conduct an acquisition using the on-line auction technique is significantly reduced compared to the traditional paper proposal process. More importantly, judging by the results to date, significant cost savings have been achieved, and are directly attributable to the use of the on-line auction. The CECOM Acquisition Center has reported savings of over 35% in some acquisitions. When utilized appropriately, on-line auctions have proven to be an efficient, cost-saving acquisition technique.

The Point of Contact for this subject in the CECOM Legal Office is Robert Russo, (732) 532-9840, DSN 992-9840.

KATHRYN T. H. SZYMANSKI
Chief Counsel

U.S. Equal Employment Opportunity Commission

Handbook for Administrative Judges

July 1, 2002

Handbook for Administrative Judges

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Practice Note

One of the most difficult and frustrating type of case is where there is an employee who has legitimate medical problems and is absent from the work site on an intermittent basis; i.e. in one moth, out the next, back in for several weeks, etc. This type of case involves both reasonable accommodation and adverse action principles.

The MSPB has held, most recently in *Combs v. Social Security Administration*, 102 FMSR 5142 (Feb. 26, 2002) that an employee who is frequently absent, on approved leave, can be the subject of an adverse action. The Board, citing *Cook v. DA*, 18 MSPR 610 (1984) held that certain criteria must be met. The Agency must establish:

1. The employee was absent for compelling reasons beyond his control so that agency approval or disapproval was immaterial because the employee could not be on the job,
2. the absences continued beyond a reasonable time, and the agency warned the employee that an adverse action could be taken unless the employee became available for duty on a regular, full-time or part-time basis, and
3. the position needed to be filled by an employee on a regular, full-time or part-time basis.

The charge brought against the employee in *Combs* was “Inability to Maintain Regular Attendance”. It has also been called “Excessive Use of Unscheduled Absences”.

Cook noted that if the absences were under the Agency’s control, such as approving leave for the employee to attend to his personal affairs, then the action would fail.

The Appellant in Combs would work for several months, sustain an injury, and then be out for a period of time. She would then return to work on a limited basis. This pattern repeated itself several times. The Board noted that from January 1995 until August 1997 the Appellant was absent from the workplace 53.1% of the time. The Board emphasized the negative impact that the Appellant's absence had on the office and on the other employees.

In bringing this type of action, one can expect that a disability discrimination claim would be asserted, and the appellant in Combs did in fact do so.

It is therefore recommended that the Agency ensure that it meets its burdens under the reasonable accommodation cases of the EEOC. The employee should be asked to provide medical information and have the physicians address reasonable accommodation. The Job Description should be given to the employee to provide to his physician. If there is a post physician he can assist in interpreting the medical information and providing his own professional opinion based on the information he reviews. If accommodation cannot be made and the three criteria above apply, the Agency can proceed with the removal.

Hostile Workplace Continuing Violation OK, But Not for Discrete Acts, High Court Rules

The U.S. Supreme Court ruled unanimously June 10 that the continuing violation doctrine does not apply to claims for discrete acts of employment discrimination, but decided 5-4 that the doctrine can apply in hostile environment claims (*National R.R. Passenger Corp. v. Morgan*, U.S., No. 00-1614, 6/10/02).

Rejecting a portion of a U.S. Court of Appeals for the Ninth Circuit decision that allowed Abner Morgan to include several years of alleged discriminatory actions by the National Railroad Passenger Corp. (Amtrak) in his Title VII of the 1964 Civil Rights Act complaint, despite the untimeliness of many of the actions, the court found the statutory definition of "unlawful employment practice" relates to discrete acts, and therefore could not be linked together under a continuing violation doctrine.

The court's opinion by Justice Clarence Thomas rejected Morgan's argument that "practice" connotes an ongoing violation that can occur or recur over a period of time. Finding that 42 U.S. Code Section 2000e-2 details numerous discrete actions as part of the explanation of "[u]nlawful employment practices," the court said there was "simply no indication that the term 'practice' converts related discrete acts into a single unlawful practice for the purposes of a timely filing."

Incidents Occurred Over Six Years

Morgan allegedly faced racially tinged experiences soon after he began work in 1990 and was terminated after only six months for refusing to meet with two managers. Morgan grieved and was reinstated after a 10-day suspension. Until his eventual termination in 1995, Morgan continued to have conflicts at Amtrak, once resulting in a meeting with his representative in Congress and in the intervention of Amtrak's inspector general. The conflicts included numerous disciplinary actions for absenteeism and tardiness, most of which were dismissed after grievances were filed. Morgan also alleged bias in managers' failure to assign him to training programs and in their orders to perform work outside of his electrician helper job description. Morgan took all of his complaints to Amtrak's EEO office.

Morgan filed his EEOC charge in February 1995, but the trial court ruled that claims based on conduct prior to May 1994 were untimely. The Ninth Circuit rejected the trial court's "reasonable knowledge approach," ruling that "this

court has never adopted a strict notice requirement as the litmus test for application of the continuing violation doctrine."

The Ninth Circuit ruled that to show a continuing violation, a plaintiff must demonstrate either a serial violation, a series of related acts one or more of which are within the limitations period, or a systemic violation, a systemic policy or practice of discrimination that operated in part within the limitations period (232 F.3d 1008, 84 FEP Cases 225 (9th Cir. 2000) (38 GERR 1314, 11/28/00)).

Biased Acts vs. Hostile Environment

The Supreme Court, however, found that "practice" relates to discrete acts. It explained that a similar interpretation of "practice" was applied in *Bazemore v. Friday*, 478 U.S. 385, 41 FEP Cases 92 (1986), where each paycheck was actionable as a new Title VII violation, and in *Delaware State Coll. v. Ricks*, 449 U.S. 250, 24 FEP Cases 827 (1980), where the court found the "mere continuity of employment" was not enough to create a continuing violation. The court explained that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." Each discrete act "starts a new clock for filing charges" and plaintiffs cannot string together related discrete acts that fall both inside and outside the filing period. A narrower majority of the court ruled that the holding did not apply to hostile environment cases. A hostile environment claim necessarily "involves repeated acts of conduct," the 5-4 majority said. The environment develops "over a series of days or perhaps years and, in direct contrast to discrete acts, a single act of harassment may not be actionable on its own."

"It does not matter, for purposes of the statute, that some of the component acts of the hostile work environment fall outside the statutory time period," the court said. "Provided that an act contributing to the claim occurs within the filing period, the entire period of the hostile environment may be considered by a court," the justices ruled.

Two-Year Back Pay Rule

The court noted that Title VII does not bar damages for portions of the hostile environment that fall outside the filing period. Because timeliness does not control recovery, the court said it was merely one in a series of provisions compelling parties to act within a specific time period, but did not function as a limitation on damages. "If Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of backpay," the court reasoned.

The court emphasized that employers are not left "defenseless" against hostile environment claims extending over long periods of time because they still have recourse to a laches defense.

Thomas was joined in Part II of the decision by Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen Breyer.

In a concurring opinion joined by Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony M. Kennedy, and Breyer, Justice Sandra Day O'Connor said the majority opinion left unclear a "discovery rule" question regarding when a plaintiff needs to file a charge. While the majority said the equitable doctrines of estoppel and tolling could alter when the time limits begin tolling, the concurrence emphasized that "some version of the discovery rule applies to discrete-act cases" and that the charge-filing period precludes recovery based on discrete actions that occurred after the employee had, or should have had, notice of the discriminatory act.

Dissent: Plaintiffs May Sleep on Their Rights

O'Connor was joined by Rehnquist, Scalia, and Kennedy in dissenting on the hostile work environment part of the decision.

"Although a hostile environment claim is, by its nature, a general atmosphere of discrimination not completely reducible to particular discriminatory acts, each day the worker is exposed to the hostile environment may still be treated as a separate 'occurrence,' and claims based on some of these occurrences forfeited," the dissent argued.

Treating hostile environment claims as a single occurrence contradicts the policies behind Section 2000e-5(e)(1) and creates statute of limitations problems when plaintiffs "sleep on [their] rights" for an extended period of time, the dissent stated.

While recognizing that the two-year limitation on back pay addresses some of these concerns, other liability may be assessed based on long-past occurrences, the dissent said. In addition, O'Connor said that limiting actions to the EEOC time periods would not serve as a damages cap and that two years of back pay would "sometimes be available even under my view."

Attorneys React to Ruling

Morgan's attorney, Pamela Y. Price of Price and Associates in Oakland, Calif., told BNA June 10 that she was disappointed with the ruling as it related to discrete claims and said it would force employees to file multiple charges with EEOC out of fear that the time limitations would jeopardize a claim.

"Employers may soon regret what they asked for because the ruling means employees and their attorneys will be forced to file multiple charges, each with its own \$300,000 cap, instead of waiting until there is a pattern and practice," Price said. The decision also appears to undermine internal EEO efforts, Price added, because an employee can no longer wait for the resolution of the EEO process before filing a charge because a lengthy investigation could mean that they missed the charge-filing deadline.

Roy T. Englert of Robbins, Russell, Englert, Orseck & Untereiner in Washington, D.C., who argued on behalf of Amtrak, told BNA that the decision still left open questions about the use of the term "continuing violation doctrine" and whether it resolved the circuit split involving hostile environment claims.

Ann Elizabeth Reesman of the Equal Employment Advisory Council in Washington, D.C., called the decision "a lawyer's case" and said many questions, especially when applied to hostile environment cases, would ultimately be resolved on evidentiary issues. "The court didn't open the door to everything that has happened over an entire career," Reesman said. "It really is not a broad ruling and I believe many defense attorneys will be able to interpret it narrowly." EEAC filed an amicus brief along with the U.S. Chamber of Commerce on behalf of Amtrak.

MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES

FROM: KAY COLES JAMES
Director

SUBJECT: Labor-Management Relations

I sent you a memorandum earlier this week in which I emphasized the shared obligation of labor and management to ensure that official time is authorized and used appropriately. Today I am issuing this memorandum to underscore the equally important responsibility of labor and management to work together to deliver the best possible service to the American people.

As you know, President Bush has identified a bold strategy for improving the performance of Government and delivering better results for the American people. I believe that management and the unions that represent Federal workers have a mutual stake in achieving the President's agenda. That is why I am encouraging agencies and their unions to work cooperatively on the critical challenges ahead.

I believe that cooperation between labor and management can enhance effectiveness and efficiency, cut down the number of employment-related disputes, and improve working conditions, all of which contribute to the kind of performance and results sought by the President. This will demand management and union leaders who trust each other, who are open and honest with each other, who respect the different interests that each party brings to the table and build on the interests they share.

When the President signed Executive Order 13203, there was speculation that it meant the end of labor-management cooperation and communication in the Federal Government. I think that is wrong. The President was motivated by his conviction that partnership is not something that should be mandated for every agency in every situation. But while agencies are no longer required to form partnerships with their unions, they are strongly encouraged to establish cooperative labor-management relations.

Much is being asked of Government today, and it has never been more important for labor and management to find common ground. I will be counting on that cooperative

spirit to bolster efforts to establish world-class human resources systems at the new Department of Homeland Security. We plan to work with unions, employee associations, and other stakeholder groups and seek their advice about how to design the best systems possible to support the men and women entrusted by the President to safeguard our nation. I am convinced that great things can be achieved for the Government and the citizens we serve when management and union leaders work together on issues that unite them rather than spend their time and energy on what divides them. That is a principle I will continue to support as OPM Director.

OPM is ready to assist you to ensure that your labor-management relations policies and practices help your agency achieve its mission. Please do not hesitate to contact me or OPM's Office of Labor and Employee Relations if we can help in any way.

**OFFICE OF PERSONNEL MANAGEMENT
GUIDANCE ON REPORTING OFFICIAL TIME
FY 2002**

The Office of Personnel Management is issuing this guidance to help departments and agencies report on the number of hours of official time that employees used to perform representational functions in FY 2002. Agencies are asked to complete this report and submit it to OPM no later than October 31, 2002.

We have asked for as little official time data as possible because we are fast approaching the end of the fiscal year and we recognize that agencies may not be able to collect and report more than total hours of official time for FY 2002. To help us draw conclusions from the information reported this year, OPM will examine the official time data and any explanation of unusually high or low usage and correlate that with data we have already collected showing the number and size of bargaining units at each Federal agency. We will work closely with agencies and unions to establish a more comprehensive reporting framework for future years.

1. *Scope of Report*

Your report should cover all agencies except non-appropriated fund instrumentalities and only those representational activities related to labor relations, such as those provided for by 5 U.S.C. Chapter 71 and collective bargaining agreements. Agencies should not report activities under non-labor relations laws or regulations (e.g., civil rights laws or agency administrative grievance procedures).

2. *Reporting Period*

Agencies shall provide the actual or best estimate of the number of hours of official time used by employees in FY 2002.

3. *Definitions and Terminology*

Official Time means all time regardless of agency nomenclature granted to an employee by the agency to perform representational functions under 5 U.S.C. Chapter 71 or by collective bargaining agreement when the employee would otherwise be in a duty status.

Representational Functions refers to activities undertaken by employees acting on behalf of the union or fulfilling the union's responsibility to represent bargaining unit employees in accordance with 5 U.S.C. Chapter 71 or a collective bargaining agreement.

4. *Completing the Report*

A. OPM expects to receive one consolidated report from each department or agency.

You can determine how your agency collects information from its components.

B. Each report shall provide:

- the name of the department or agency responsible for completing and submitting the information;
- the name of the activity, administration, or bureau if appropriate; and
- the name and telephone number of a contact person for management and for the labor organization that provided input.

C. Provide the actual or best estimate of the number of hours of official time used by employees in FY 2002 to perform representational functions. If actual data on official time is not available, you may estimate the hours of official time based on the best available data or use standard statistical sampling methods. If you provide an estimate or sample, please explain the methodology that was used.

D. Provide any information that may explain unusually high or low usage of official time during FY 2002.

E. OPM encourages each agency to work with their labor organizations to help determine or verify the information reported.

PLEASE COMPLETE YOUR REPORT BY OCTOBER 31, 2002 AND SEND IT TO:

U.S. Office of Personnel Management
Office of Labor and Employee Relations
1900 E. Street, NW, Room 7H28
Washington, DC 20415

If you have any questions, please contact Jeffrey Sumberg, Director, Office of Labor and Employee Relations, at (202) 606-2639 or at jsumberg@opm.gov.

PERMISSIBLE ACTIVITIES

DoD civilian employees (**except career members of the Senior Executive Service may not engage in activities 10, 11, 12 and 13**), in their personal capacities **may**:

1. Be candidates for public office in nonpartisan elections;
2. Register and vote as they choose;
3. Assist in voter registration drives;
4. Express opinions about candidates and issues;
5. Contribute money to political organizations;
6. Attend political fundraising functions;
7. Join and be an active member of a political party or club;
8. Sign nominating petitions;
9. Campaign for or against referendum questions, constitutional amendments, or municipal ordinances;
10. Campaign for or against candidates in partisan elections;
11. Make campaign speeches for candidates in partisan elections;
12. Distribute campaign literature in partisan elections; and
13. Hold office in political clubs or parties.

PROHIBITED ACTIVITIES

Civilian DoD employees (including career members of the Senior Executive Service) **may not**:

1. Use official authority or influence for the purpose of interfering with or affecting the result of an election;
2. Collect political contributions unless both the collector and the donor are members of the same Federal labor organization or employee organization and the donor is not a subordinate;
3. Knowingly solicit or discourage the political activity of any person who has business with DoD;

4. Engage in political activity while on duty;
5. Engage in political activity while in any Federal workplace;
6. Engage in political activity while wearing an official uniform or displaying official insignia identifying the office or position of the DoD employee;
7. Engage in political activity while using a Government owned or leased vehicle;
8. Solicit political contributions from the general public;
9. Be a candidate for public office in partisan elections;
10. Wear political buttons on duty; and
11. Contribute to the political campaign of another Federal Government employee who is in the DoD employee's chain of command or supervision or who is the employing authority.

SPECIAL RULES FOR EMPLOYEES WHO RESIDE IN VIRGINIA AND MARYLAND

There are special rules for employees residing in Maryland and Virginia municipalities or political subdivisions in the immediate vicinity of the District of Columbia who want to run for local political office. The list of designated municipalities and political subdivisions is quite long; therefore, if you want to engage in one of the following activities it is important that before you get started, you first discuss your intentions with the Office of Special Counsel. Employees residing in those locales **may**:

1. Run as an independent candidate for election to partisan political office in elections for local office in the municipality or political subdivision;
2. Solicit, accept, or receive a political contribution as, or on behalf of, an independent candidate for partisan political office in elections for local office in the municipality or political subdivision;
3. Accept or receive a political contribution on behalf of an individual who is a candidate for local partisan political office and who represents a political party;
4. Solicit, accept, or receive uncompensated voluntary services as an independent candidate, or on behalf of an independent candidate, for local partisan political office, in connection with the local elections of the municipality or political subdivision; and

5. Solicit, accept, or receive uncompensated volunteer services on behalf of an individual who is a candidate for local partisan political office and who represents a political party.

Because the Hatch Act has its own definitions--e.g., a "partisan political office" means any office for which any candidate is nominated or elected as representing a political party--I urge you to discuss any questions you might have with the Office of Special Counsel. The AMC Office of Command Counsel will give you our opinion (703) 617-8003, but because Office of Special Counsel has Hatch Act enforcement authority, only its opinion is binding on the United States Government.

For active duty military personnel the rules are more restrictive. They are set out in AR 600-20.

PERMITTED ACTIVITIES

A soldier on active duty **may**:

1. Register, vote, and express a personal opinion on political candidates and issues as a private citizen, but not as a representative of the Armed Forces;
2. Promote and encourage other soldiers to exercise their voting franchise so long as it does not constitute an attempt to influence or interfere with the outcome of an election;
3. Join a political club and attend its meetings when not in uniform;
4. Serve as an election official if such service is not as a representative of a partisan political party, does not interfere with military duties, is performed while out of uniform, and has the approval of the installation commander;
5. Sign a petition for specific legislative action or a petition to place a candidate's name on an official election ballot so long as the signing does not obligate the soldier to engage in partisan political activity and is done as a private citizen and not as a representative of the Armed Forces;
6. Write a letter to the editor of a newspaper expressing the soldier's personal views on public issues or political candidates, if such action is not part of an organized letter-writing campaign or concerted solicitation of votes for or against a political party or partisan political cause or candidate;
7. Make monetary contributions to a political organization, party or committee favoring a particular candidate or slate of candidates subject to statutory dollar limitations; and
8. Display a political sticker on the soldier's private vehicle.

PROHIBITED ACTIVITIES

A soldier on active duty **will not**:

1. Use official authority or influence to interfere with an election, affect the course or outcome of an election, solicit votes for a particular candidate or issue, or require or solicit political contributions from others;
2. Be a candidate for civil office in Federal, state, or local government except in circumstances permitted by AR 600-20, or engage in public or organized soliciting of others to become partisan candidates for nomination or election to civil office;
3. Participate in partisan political management or campaigns or make public speeches in the course thereof;
4. Make a campaign contribution to another member of the Armed Forces or to a civilian officer or employee of the United States for promoting a political objective or cause;
5. Solicit or receive a campaign contribution from another member of the Armed Forces or from a civilian officer or employee of the United States for promoting a political objective or cause;
6. Allow or cause to be published partisan political articles signed or written by the soldier that solicit votes for or against a partisan political party or candidate;
7. Serve in any official capacity or be listed as a sponsor of a partisan political club;
8. Speak before a partisan political gathering of any kind for promoting a partisan political party or candidate;
9. Participate in any radio, television or other program or group discussion as an advocate of a partisan political party or candidate;
10. Conduct a political opinion survey under the auspices of a partisan political group or distribute partisan political literature;
11. Use contemptuous words against certain officeholders such as the President, Vice President, Congress, Secretary of the Defense or the Army, state governors, and state legislatures.
12. Perform clerical or other duties for a partisan political committee during a campaign or on an election day;
13. Solicit or otherwise engage in fund raising activities in Federal offices or facilities including military reservations, for a partisan political cause or candidate;

14. March or ride in a partisan political parade;
15. Display a large political sign, banner, or poster (as distinguished from a bumper sticker) on the top or side of a private vehicle;
16. Participate in any organized effort to provide voters with transportation to the polls if the effort is organized by or associated with a partisan political party or candidate;
17. Sell tickets for, or otherwise actively promote political dinners and similar fundraising events; and
18. Attend partisan political events as an official representative of the Armed Forces.

For activities not expressly prohibited that may be contrary to the spirit and intent of the Department of Defense's policy for political activities for members of the Armed Forces, rules of reason and common sense apply. Any activity that could be viewed as associating the Department of the Army directly or indirectly with a partisan political cause or candidate will be avoided.

The policy does not preclude participation in local nonpartisan political campaigns, initiatives, or referendums so long as the soldier does not wear a uniform or use Government property or facilities, allow participation to interfere with or prejudice the soldier's performance of military duties, or engage in conduct that may imply that the Department of the Army has taken an official position or is otherwise involved in the local political campaign or issue.

For civilian and military personnel, the rules on political activity are a lot to digest at one time. I encourage you to read them carefully and not hesitate to ask any questions you might have.

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Categorical Exclusions Under 32 CFR Part 651
A Guide to the Changes
MAJ Jeanette Stone

1. Introduction. On 29 March 2002, the Office of the Deputy Assistant Secretary of the Army published 32 Code of Federal Regulations (CFR) Part 651, Environmental Analysis of Army Actions; Final Rule (hereafter “final rule”), in the Federal Register. The final rule is a revision of policy and procedures for implementing the National Environmental Policy Act of 1969 (NEPA) and the Council on Environmental Quality (CEQ) regulations, and supersedes the guidance found in Army Regulation (AR) 200-2, Environmental Effects of Army Actions, dated 23 December 1988. The revision of AR 200-2 based on the final rule is currently pending.

Of particular interest to those in the field are the myriad changes made in the area of Categorical Exclusions (CXs). Previously found in AR 200-2, Appendix A, these are now located in Appendix B of the final rule. Notably, they have been loosely regrouped under activity type (e.g., Administration/operation; Construction/demolition; Repair and maintenance; etc.), and the alphabetic and numeric system so familiar to everyone in the environmental community has been adjusted accordingly. Although this is initially disconcerting, once one becomes familiar with the reordering system, it is easier to use than its alphanumeric predecessors A-1 through A-29.

2. CX Changes in Final Rule. To aid in pinpointing the changes made, reference to the previous numbering system will be used throughout:

A-1. (Personnel and admin activities). This is now Section II (b)(5). No change; the text is taken verbatim from the previous version.

A-2. (Law and order activities). This is now Section II (b)(1). Little change. The word “routine” now qualifies “law and order activities,” the phrase “military police” has finally been changed to the always-intended “military police,” and, by the addition of a slash mark, it now appears that such law and order activities could be performed by military personnel other than military police. More substantively, civilian natural resources and environmental law officers have also been added under the umbrella of this CX. Finally, the phrase, “excluding formulation and/or enforcement of hunting and fishing policies or regulations that differ substantively from those in effect on surrounding non-Army lands” has been stricken from this CX, but can now be found (and is stated more helpfully in the affirmative) in Section II (d)(3) of the final rule, Implementation of hunting and fishing policies consistent with state and local regulations.

A-3. (Recreation and welfare activities). This is now Section II (b)(6). Little change, except that “routinely conducted” now qualifies “recreation and welfare activities.”

A-4. (Commissary and Post Exchange operations). Omitted from the final rule. Such activities, however, appear to be covered under Section II (b)(4), Activities and operations to be conducted in existing non-historic structures.

A-5. (Repair and maintenance of buildings, etc.). This is now Section II (g)(1) for buildings, airfields, grounds, equipment, and other facilities; Section II (g)(2), in turn, covers roads, including trails and firebreaks. The language excluding hazardous or contaminated materials has been removed from this CX; for guidance on such materials look to Section II (h), Hazardous materials/hazardous waste management and operations. More significantly, the revision of this CX has been expanded to specifically include the removal and disposal of asbestos-containing material and lead-based paint [note, though, that a REC is required whenever either is undertaken, as well as when any repair or maintenance is conducted on an historic structure]. Removal of dead, diseased, or damaged trees is also newly covered under this CX; further, the list of repair and maintenance activities covered specifically indicates that it is not exhaustive.

A-6. (Procurement of goods and services). This is now Section II (e)(1). With the addition of a parenthetical regarding “green” procurement, this CX is now a bit wordier, but essentially the same in terms of content.

A-7. (Construction). Construction activities are now found in Section II (c). The changes here are major ones, in that the previously vague “[c]onstruction that does not significantly alter land use” has been supplanted by highly specific guidance permitting construction of additions to existing structures seemingly without limitation (except as to the facility’s use for solid, medical, or hazardous waste; see Section II (h) for further guidance on this subject area). Even more significantly, new construction that does not involve the surface disturbance of more than five cumulative acres is also now categorically excluded under Section II (c)(1) -- again, provided that the facility’s use does not involve solid, medical, or hazardous waste. Note, though, that this CX cannot be used if the proposed action would affect wetlands, sensitive habitat, or in other special circumstances (see 32 CFR Part 651.29, Determining when to use a CX (screening criteria) and pages 10-11 of this document). Use of a REC under Section II (c)(1) is required.

A-8. (Simulated exercises without troops). This is now Section II (i)(1). It has been expanded to include not only simulated war games, but also on-post tactical and logistical exercises involving up to battalion-sized units, so long as no tracked vehicles are used. A REC is, however, required “to demonstrate coordination with installation range control and environmental office.”

A-9. (Administrative and classroom training). This is now Section II (i)(2). No change; the text is taken verbatim from the previous version.

A-10. (Storage of materials other than hazardous). Omitted from the final rule. Such activities may be covered under Section II (b)(4), Activities and operations to be conducted in existing non-historic structures (REC required).

A-11. (Operations by established laboratories). This is now Section II (h)(5). The language of this CX has been substantially revised, to include the addition of research and testing, and the omission of the qualifier “laboratories” – making this CX generally applicable to any research, testing, or operations conducted at an existing facility, provided that it is enclosed. Although the caveat regarding the necessity of compliance with Federal, state, and local standards (a slight change from the previous reference to “laws and regulations”) remains in place, the prohibition against using captured animals from the wild as research subjects has been removed. Finally, although a REC is no longer specifically required by this CX, it does state that if a given operation within an existing facility “will substantially increase the extent of potential environmental impacts *or is controversial*” (emphasis added) and the facility does not have an existing NEPA analysis, then an EA (and, potentially, an EIS) is required.

A-12. (Developmental and operational testing on a military reservation). Omitted from the final rule. To the extent that this CX had some utility (limited, as it was, by the caveat, “provided that the training and maintenance activities have been adequately assessed... in other Army environmental documents”), an element of what it excluded – the testing of a commercially available item – may be found in Section II (e)(5), Procurement, testing, use, and/or conversion of a commercially available product, or Section II (e)(7), Modification and adaptation of commercially available items and products for military application.

A-13. (Routine movement of personnel/routine handling of non-hazardous and hazardous materials). This is now found, in part, in Section II (h)(4). The preliminary “routine movement of personnel” – never further expounded upon after the semi-colon that followed it in the last version – has been omitted from this one, and the CX now focuses exclusively on the handling, transportation, and disposal of wastes, including asbestos, PCBs, lead-based paint, and unexploded ordnance, as well as hazardous waste that otherwise complies with regulatory agency requirements. In a cross-reference to Section II (c)(1), Construction of an addition to an existing structure/new construction if no more than 5.0 cumulative acres, Section II (h)(4) indicates that it is specifically not applicable to construction of new facilities.

A-14. (Reduction and realignment of civilian and/or military personnel). This is now Section II (b)(12). A seemingly small but actually significant change was made to the language of this CX in that, “Reduction and realignment of civilian and/or military personnel that fall below the thresholds for reportable actions as prescribed by statute *or AR 5-10*” has been revised to strike the italicized portion. That regulatory reference created difficulties in the stationing of military units because it effectively limited the use of a REC to stationing decisions involving less than 200 military

personnel or 50 civilian employees – a wholly arbitrary line inadvertently created by the last update of AR 5-10, Stationing, in March 2001.

A further change to this CX is the addition of explanatory language to make the point that (b)(12) *cannot* be used for related activities such as construction, renovation, or demolition activities that would otherwise require an EA or EIS to conduct – but that it *does* specifically include reorganizations and reassignments with no changes in force structure, unit redesignations, and routine administrative reorganizations and consolidations. With the omission of the problematic regulatory reference and the addition of the above language (as well as a parenthetical reference to the statute governing Base Realignment and Closure), this CX is far more clear and useful than its predecessor. A REC is, not surprisingly, still required.

A-15. (Conversion of commercial activities). This is now Section II (e)(3). The reference to DoD Directive 4100.15 has been updated, and AR 5-20 is now the authority cited for the contracting of services. The CX is now somewhat more limited, though, by the addition of qualifying language indicating that only those actions that do not change the actions or the missions of the organization, nor alter the existing land-use patterns, can be categorically excluded.

A-16. (Preparation of regulations, procedures, manuals, and other guidance). This is now Section II (b)(3). No change; the text is taken nearly verbatim from the old version, except for the addition of an explanatory parenthetical indicating that “environmentally evaluated” means “subject to previous NEPA review,” and the correction of a typographical error (“an” to “and”) from the prior regulation.

A-17. (Acquisition, installation, and operation of utility and communication systems). This is now Section II (e)(2). Little change from a textual perspective (i.e., the addition of “mobile antennas,” a few much-needed commas, and the disjunctive “or”), but there is a significant addition in the requirement of a REC that was *not* previously required under this CX.

A-18. (Activities that identify the state of the environment). This CX has been so thoroughly revised as to appear, at least initially, omitted. The essence of what it was meant to exclude, though, can, in part, be found in Section II (d)(4) of the final rule, which covers “studies, data collection, monitoring and information gathering that do not involve major surface disturbance.” After providing certain examples of its inclusiveness (specifically, topographic surveys, bird counts, wetland mapping, and other resource inventories), it, again, adds the requirement of a REC in order to use it. Also of note: wild animals suffered another loss under the final rule, as the language prohibiting their capture was, again, omitted from the new CX.

A second CX that might potentially be used under circumstances in which A-18 could have been is Section II (h)(3), “Sampling, surveying, well drilling and installation, analytical testing, site preparation, and intrusive testing to determine if hazardous

wastes, contaminants, pollutants, or special hazards are present.” As with Section II (d)(4), however, a REC is required for reliance upon this CX.

A-19. (Deployment of military units). This is now Section II (b)(7). Some change; specifically, a clarification of the point that this exclusion can be used only when the existing facilities will be used “for their intended purposes consistent with the scope and size of [the] existing mission.” More significantly, the requirement of a REC for this CX has been eliminated.

A-20. (Grants of easements for existing rights-of-way). The real estate activity exclusions have been so dramatically altered as to make a side-by-side comparison impossible. Some have been subsumed by broader successors, while others have simply disappeared. In the case of A-20, it at first glance appears to have been omitted from the final rule – except that easements generally have been incorporated into Section II (f)(1), Grants or acquisitions of leases, licenses, easements, and permits, a CX that corresponds somewhat to A-21 and which covers the use of real property and facilities where there is no significant change in land or facility use. A non-exhaustive list of examples is included in Section II (f)(1), and a REC is required for its use.

A-21. (Grants of leases, licenses, and permits). This correlates most closely to Section II (f)(1) (see discussion of A-20, above). Section II (f)(1) is more broadly based, however, in that it is not limited to the use of existing Army-controlled property for non-Army activities. Instead, its parameters extend to the leasing of civilian property, so long as there is no significant change in the land or facility use. Further, there is no requirement in Section II (f)(1) that the land at issue have been the subject of an existing and environmentally assessed land-use plan. A REC is still required under Section II (f)(1).

A-22. (Grants of consent agreements to use a Government-owned easement). The disposal of excess easement areas to the underlying fee owner can be found in Section II (f)(2); the granting of agreements to use an easement was subsumed by Section II (f)(1), as discussed above. A REC is also required under Section II (f)(2).

A-23. (Grants of licenses for the operation of [public utilities]). This is now Section II (f)(4). Although it has been completely reworded – it is now the “[t]ransfer of active installation utilities to a commercial or governmental utility provider” – conceptually, it is the same categorical exclusion and its revision only clarifies its meaning. A REC is required.

A-24. (Transfer of real property within the Army or to another agency). This is now Section II (f)(3). Some change, in that the language regarding “leases, licenses, permits, and easements” of excess and surplus property has been excised, and replaced with the far more concise and meaningful “reporting of property as excess and surplus to the GSA for disposal.” A REC, however, remains a requirement under this CX.

A-25. (Disposal of uncontaminated buildings and other improvements for removal off-site). This is arguably found in Section II (f)(6) – but it has been so vastly expanded that the two are nearly unrelated. The new CX covers the disposal of all real property, including facilities, so long as the reasonably foreseeable use will not change significantly. A REC is required.

A-26. (Studies that involve no resources other than manpower). Omitted from the new rule. The newly-added Section II (b)(8), Preparation of administrative or personnel-related studies, reports, or investigations, appears to be the closest match, although manpower is not specifically mentioned in it.

A-27. (Study and test activities within the procurement program for commercial items). This is now further broken down into three CXs: Section II (e)(5) Procurement, testing, use, and/or conversion of a commercially available product; Section II (e)(7), Modification and adaptation of commercially available items and products for military application; and Section II (e)(8), Adaptation of non-lethal munitions and restraints from law enforcement suppliers and industry. The first, Section II (e)(5), unlike A-27, has no REC requirement; Sections (e)(7) and (e)(8) do.

A-28. (Development of table organization and equipment documents). Omitted from the final rule. The closest corresponding CX is now Section II (b)(3), Preparation of regulations, procedures, manuals, and other guidance documents.

A-29. (Grants of leases, licenses, and permits to use DA property). This was subsumed by Section II (f)(1), Grants or acquisitions of leases, licenses, easements, and permits for use of real property or facilities. A REC is required under this CX.

3. New CXs. Many of the CXs in the final rule are, in fact, completely new. The following is a brief listing of those not previously mentioned in “CX Changes in Final Rule,” above.

Under Section II (b), Administration/operation activities:

(b)(2). (Emergency or disaster assistance provided to federal, state, or local entities REC required);

(b)(9). (Approval of asbestos or lead-based paint management plans) (REC required);

(b)(10). (Non-construction activities in support of other agencies/organizations involving community participation projects and law enforcement activities;

(b)(11). (Ceremonies, funerals, and concerts);

(b)(13). (Actions affecting Army property that fall under another federal agency’s list of categorical exclusions)(REC required);

(b)(14). (Relocation of personnel into existing federally-owned or commercially-leased space)(REC required);

Under Section II (c), Construction and demolition:

(c)(2). (Demolition of non-historic buildings, structures, and disposal of debris therefrom, including asbestos, PCBs, lead-based paint, and other special hazard items)(REC required);

(c)(3). (Road or trail construction and repair);

Under Section II (d), Cultural and natural resource management activities:

(d)(1). (Land regeneration activities using only native trees and vegetation, not including forestry operations)(REC required);

(d)(2). (Routine maintenance of streams and ditches or other rainwater conveyance structures)(REC required);

(d)(5). (Maintenance of archeological, historical, and endangered/threatened species avoidance markers, fencing, and signs);

Under Section II (e), Procurement and contract activities:

(e)(4). (Modification, product improvement, or design change that does not change the original impact of the material, structure, or item on the environment)(REC required);

(e)(6). (Acquisition or contracting for spares and spare parts);

Under Section II (f), Real estate activities:

(f)(5). (Acquisition of real property where the land use will not change substantially; or, where the land acquired will not exceed 40 acres and where the use will be similar to Army activities on adjacent land)(REC required);

Under Section II (g), Repair and maintenance activities:

(g)(3). (Routine repair and maintenance of equipment and vehicles, other than depot or unique military equipment maintenance);

Under Section II (h), Hazardous materials/hazardous waste management and operations:

(h)(1). (Use of gauging devices, analytical instruments, and other devices containing sealed radiological sources)(REC required);

(h)(2). (Immediate responses in accordance with emergency response plans);

(h)(6). (Reutilization, marketing, distribution, donation, and resale of items, equipment, or materiel);

Under Section II (i), Training and testing:

(i)(3). (Intermittent on-post training activities that involve no live fire or vehicles off established roads or trails);

Under Section II (j), Aircraft and airfield activities:

(j)(1). (Infrequent, temporary increases in air operations up to 50% of the typical installation aircraft operation rate)(REC required);

(j)(2). (Flying activities in compliance with Federal Aviation Administration Regulations and normal flight patterns and elevations);

(j)(3). (Installation, repair, or upgrade of airfield equipment); and,

(j)(4). (Army participation in established air shows).

4. Screening Criteria. Although no longer found in the same appendix as the CXs themselves, the use of any CX is still contingent upon meeting the relevant screening criteria. Those criteria, now found at Part 651.29, Determining when to use a CX (screening criteria), have been greatly expanded and may be summarized as follows:

- 1) The action has not been segmented;
- 2) No exceptional circumstances exist (of which there are fourteen); and,
- 3) One (or more) CX encompasses the proposed action.

In addition to the three enumerated criteria listed above, if the proposed action would otherwise adversely affect “environmentally sensitive” resources, a CX cannot be used unless the impact has been resolved through another environmental process. Environmentally sensitive resources include such things as listed, threatened, or endangered species; properties listed or eligible for listing on the National Register of Historic Places; wetlands; sole source aquifers; coastal zones; cultural resources; and a dozen other specifically referenced examples, including the

catch-all, “areas of critical environmental concern[,] or other areas of high environmental sensitivity.”

While the expansion of the screening criteria could be viewed as somewhat semantic in nature, as these considerations have presumably always been factors in the environmental assessment process, the fourteen listed exceptional circumstances constitute a significant addition to the screening criteria found in the old AR 200-2.

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