

• Ways to minimize the burden of collection of information on those who are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology; e.g., permitting electronic submission of responses.

**Off-Exchange Agricultural Trade Options, OMB Control Number 3038-0048—Extension**

In April 1998, the CFTC removed the prohibition on off-exchange trade

options on the enumerated agricultural commodities subject to a number of regulatory requirements 63 FR 18821 (Apr. 16, 1998). Thereafter, the Commission streamlined the regulatory and paperwork burdens in order to increase the utility of agricultural trade options while maintaining basic customer protections. 64 FR 68011 (Dec. 6, 1999). Based on its experience in administering this program, the Commission has determined that its estimates of the burden of this

collection of information remains unchanged based on the number of firms and individuals that may apply for registration. Responses to the collection of information are mandatory pursuant to Section 4c(b) of the Commodity Exchange Act.

The Commission estimates the burden of this collection of information as follows:

**ESTIMATED ANNUAL REPORTING BURDEN**

17 CFR	Annual number of respondents	Frequency of response	Total annual responses	Hours per response	Total hours
17 CFR Part 32 .....	360	On occasion .....	411	5.59	2,301

There are no capital costs or operating and maintenance costs associated with this collection.

Dated: December 22, 2008.

**David Stawick,**

*Secretary of the Commission.*

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**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**Manual for Courts-Martial; Proposed Amendments**

**AGENCY:** Joint Service Committee on Military Justice (JSC).

**ACTION:** Notice of public response to proposed amendments to the Manual for Courts-Martial, United States (2008 ed.) (MCM).

**SUMMARY:** The JSC is forwarding final proposed amendments to the MCM to the Department of Defense. The proposed changes constitute the 2008 annual review required by the MCM and DoD Directive 5500.17, "Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice," May 3, 2003. The proposed changes concern the rules of procedure and evidence and the punitive articles applicable in trials by courts-martial. These proposed changes have not been coordinated within the Department of Defense under DoD Directive 5500.1, "Preparation, Processing and Coordinating Legislation, Executive Orders, Proclamations, Views Letters Testimony," June 15, 2007, and do not constitute the official position of the Department of Defense, the Military

Departments, or any other Government agency.

**ADDRESSES:** Comments and materials received from the public are available for inspection or copying at the Air Force Legal Operations Agency, Military Justice Division, 112 Luke Avenue, Room 202, Bolling Air Force Base, District of Columbia between 9 a.m. and 4 p.m., Monday through Friday, except Federal Holidays.

**FOR FURTHER INFORMATION CONTACT:** Lieutenant Colonel Tom Wand, Executive Secretary, Joint Service Committee on Military Justice, 112 Luke Avenue, Suite 343, Bolling Air Force Base, District of Columbia 20032, (202) 767-1539, (202) 404-8755 fax.

**SUPPLEMENTARY INFORMATION:**

**Background**

On 19 September 2008, the JSC published a Notice of Proposed Amendments to the Manual for Courts-Martial and a Notice of Public Meeting to receive comments on these proposals. The public meeting was held on October 30, 2008. One individual representing an organization spoke at the public meeting to announce that the organization would be submitting written comments. One individual and one organization submitted comments through the **Federal Register** electronic bulletin board.

**Discussion of Comments and Changes**

The JSC considered the public comments and, coupled with the United States Court of Appeals for the Armed Forces recently hearing arguments on issues of child pornography with decisions pending, decided to withdraw the proposed addition of a paragraph addressing child pornography under

Article 134 in Part IV of the MCM. The child pornography proposal will continue to be considered as part of the 2009 annual review. The JSC is satisfied the other proposed amendments are appropriate to implement without modification. The JSC will forward the public comments and proposed amendments to the Department of Defense.

The public comments regarding the proposed changes follow:

a. Recommended adding, "or knowingly, wrongfully, and purposefully facilitated such conduct" to the element of the proposed Article 134 offense of possessing, receiving or viewing child pornography. Since the proposed paragraph is being withdrawn from the 2008 annual review, this comment will be considered in the 2009 annual review.

b. Recommended deleting or redrafting the explanation of the child pornography paragraph requiring awareness of the contraband nature of the visual depictions in the offenses of possessing, receiving, viewing, distributing, or producing child pornography. Since the proposed paragraph is being withdrawn from the 2008 annual review, this comment will be considered in the 2009 annual review.

c. Recommended deleting the affirmative defense that all of the persons engaging in sexually explicit conduct in a visual depiction were in fact persons at least 18 years old. Since the proposed paragraph is being withdrawn from the 2008 annual review, this comment will be considered in the 2009 annual review.

d. Noted the high maximum fines for civilians at summary and special courts-

martial. The JSC considered that civilians are not subject to all the forms of punishment applicable to servicemembers. The JSC also considered that maximums must take into account the highest paid civilians, including contractors, and that maximums are potential only, and not necessarily appropriate to every case or accused. In addition, the JSC considered that an accused has a right to decline trial by a summary court-martial.

e. Noted no difference between the proposed Part IV, paragraph 44, Article 119, Manslaughter, paragraph b.(2)(d), and what appears in the MCM (2008 ed.). While this is correct, the problem arose in the July 24, 2008 Executive Order 13468 amending the MCM. This was explained in the proposed additions to *Appendix 23, Analysis of Punitive Articles*.

f. Suggested that Staff Judge Advocate Recommendations be required to address whether corrective action should be taken in response to R.C.M. 1105 submissions. The proposed rule makes clear that such is required. The reason for restating the rule was explained in the proposed addition to *Appendix 21, Analysis of Rules for Courts-Martial*.

g. Raised several concerns regarding the adequacy of the rulemaking process itself. The JSC considered these concerns and determined that the rulemaking process is adequate, satisfies statutory requirements, and provides meaningful opportunity for public participation. However, the JSC particularly noted a concern that the **Federal Register** notice invited members to suggest changes to the MCM in accordance with a format purportedly described in an internal operating procedure. The reference should have been to a format described in DoD Directive 5500.17, "Role and Responsibilities of the Joint Service Committee (JSC) on Military Justice," May 3, 2003, Enclosure 2, paragraph E2.4.6, which is included in *Appendix 26* of the MCM.

#### **Proposed Amendments After Period for Public Comment**

The proposed recommended amendments to the MCM to be forwarded through the DoD for action by Executive Order of the President of the United States are as follows:

*Section 1.* Part II of the Manual for Courts-Martial, United States, is amended as follows:

(a) R.C.M. 1003(b)(3) is amended to read as follows:

"(3) *Fine.* Any court-martial may adjudge a fine in lieu of or in addition to forfeitures. In the case of a member

of the armed forces, summary and special courts-martial may not adjudge any fine or combination of fine and forfeitures in excess of the total amount of forfeitures that may be adjudged in that case. In the case of a person serving with or accompanying an armed force in the field, a summary court-martial may not adjudge a fine in excess of two-thirds of one month of the highest rate of enlisted pay, and a special court-martial may not adjudge a fine in excess of two-thirds of one year of the highest rate of officer pay. In order to enforce collection, a fine may be accompanied by a provision in the sentence that, in the event the fine is not paid, the person fined shall, in addition to any period of confinement adjudged, be further confined until a fixed period considered an equivalent punishment to the fine has expired. The total period of confinement so adjudged shall not exceed the jurisdictional limitations of the courts-martial;"

(b) R.C.M. 1003(c) is amended by renumbering subparagraph (4) as subparagraph (5) and adding a new subparagraph (4) as follows:

"(4) *Based on status as a person serving with or accompanying an armed force in the field.* In the case of a person serving with or accompanying an armed force in the field, no court-martial may adjudge forfeiture of pay and allowances, reduction in pay grade, hard labor without confinement, or a punitive separation."

(c) R.C.M. 1106(d) is amended to read as follows:

"(d) *Form and content of recommendation.*

(1) The purpose of the recommendation of the staff judge advocate or legal officer is to assist the convening authority to decide what action to take on the sentence in the exercise of command prerogative. The staff judge advocate or legal officer shall use the record of trial in the preparation of the recommendation, and may also use the personnel records of the accused or other matters in advising the convening authority whether clemency is warranted.

(2) *Form.* The recommendation of the staff judge advocate or legal officer shall be a concise written communication.

(3) *Required contents.* The staff judge advocate or legal advisor shall provide the convening authority with a copy of the report of results of trial, setting forth the findings, sentence, and confinement credit to be applied, a copy or summary of the pretrial agreement, if any, any recommendation for clemency by the sentencing authority made in conjunction with the announced

sentence, and the staff judge advocate's concise recommendation.

(4) *Legal errors.* The staff judge advocate or legal officer is not required to examine the record for legal errors. However, when the recommendation is prepared by a staff judge advocate, the staff judge advocate shall state whether, in the staff judge advocate's opinion, corrective action on the findings or sentence should be taken when an allegation of legal error is raised in matters submitted under R.C.M. 1105 or when otherwise deemed appropriate by the staff judge advocate. The response may consist of a statement of agreement or disagreement with the matter raised by the accused. An analysis or rationale for the staff judge advocate's statement, if any, concerning legal error is not required.

(5) *Optional matters.* The recommendation of the staff judge advocate or legal officer may include, in addition to matters included under subsection (d)(3) and (4) of this rule, any additional matters deemed appropriate by the staff judge advocate or legal officer. Such matter may include matters outside the record.

(6) *Effect of error.* In case of error in the recommendation not otherwise waived under subsection (f)(6) of this rule, appropriate corrective action shall be taken by appellate authorities without returning the case for further action by a convening authority."

(d) R.C.M. 1113(d)(2)(A)(iii) is amended to read as follows:

"(iii) Periods during which the accused is in custody of civilian or foreign authorities after the convening authority, pursuant to Article 57a(b)(1), has postponed the service of a sentence to confinement."

(e) R.C.M. 1113(d)(2)(c) is amended by deleting the last two sentences, and replacing them with the following:

"No member of the armed forces, or person serving with or accompanying an armed force in the field, may be placed in confinement in immediate association with enemy prisoners or with other foreign nationals not subject to the code. The Secretary concerned may prescribe regulations governing the place and conditions of confinement."

*Section 2.* Part IV of the Manual for Courts-Martial, United States, is amended as follows:

(a) Paragraph 32, Article 108, Military Property of the United States—sale, loss, damage, destruction, or wrongful disposition, paragraph c.(1) is amended to read as follows:

"(1) *Military Property.* Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States.

Military property is a term of art, and should not be confused with government property. The terms are not interchangeable. While all military property is government property, all government property is not military property. An item of government property is not military property unless the item in question meets the definition provided above. It is immaterial whether the property sold, disposed, destroyed, lost, or damaged had been issued to the accused, to someone else, or even issued at all. If it is proved by either direct or circumstantial evidence that items of individual issue were issued to the accused, it may be inferred, depending on all the evidence, that the damage, destruction, or loss proved was due to the neglect of the accused. Retail merchandise of service exchange stores is not military property under this article."

(b) Paragraph 44, Article 119—Manslaughter, paragraph b.(2)(d) is amended to read as follows:

"(d) That this act or omission of the accused constituted culpable negligence, or occurred while the accused was perpetrating or attempting to perpetrate an offense directly affecting the person other than burglary, sodomy, rape, rape of a child, aggravated sexual assault, aggravated sexual assault of a child, aggravated sexual contact, aggravated sexual abuse of a child, aggravated sexual contact with a child, robbery, or aggravated arson."

(c) Paragraph 46, Article 121—Larceny and wrongful appropriation, the Note following paragraph b.(1)(d) is amended to read as follows:

**Note:** "If the property is alleged to be military property, as defined in paragraph 46.c.(1)(h), add the following element"

(d) Paragraph 46, Article 121—Larceny and wrongful appropriation, is amended by re-lettering paragraph 46.c.(1)(h) as paragraph 46.c.(1)(i), and adding a new paragraph 46.c.(1)(h) as follows:

"(h) *Military Property.* Military property is all property, real or personal, owned, held, or used by one of the armed forces of the United States. Military property is a term of art, and should not be confused with government property. The terms are not interchangeable. While all military property is government property, all government property is not military property. An item of government property is not military property unless the item in question meets the definition provided above. Retail merchandise of service exchange stores

is not military property under this article."

*Section. 3.* These amendments shall take effect on [30 days after signature].

(a) Nothing in these amendments shall be construed to make punishable any act done or omitted prior to [30 days after signature] that was not punishable when done or omitted.

(b) Nothing in these amendments shall be construed to invalidate any nonjudicial punishment proceedings, restraint, investigation, referral of charges, trial in which arraignment occurred, or other action begun prior to [30 days after signature], and any such nonjudicial punishment, restraint, investigation, referral of charges, trial, or other action may proceed in the same manner and with the same effect as if these amendments had not been prescribed.

#### **The White House, Changes to the Discussion Accompanying the Manual for Courts-Martial, United States**

(a) Paragraph (4) of the Discussion immediately after R.C.M. 202(a) is amended to read as follows:

"(4) *Limitations on jurisdiction over civilians.* Court-martial jurisdiction over civilians under the code is limited by judicial decisions. The exercise of jurisdiction under Article 2(a)(11) in peace time has been held unconstitutional by the Supreme Court of the United States. Before initiating court-martial proceedings against a civilian, relevant statutes, decisions, service regulations, and policy memoranda should be carefully examined."

(b) The first paragraph of the Discussion following R.C.M. 1003(b)(3) is amended to read as follows: "A fine is in the nature of a judgment and, when ordered executed, makes the accused immediately liable to the United States for the entire amount of money specified in the sentence. A fine normally should not be adjudged against a member of the armed forces unless the accused was unjustly enriched as a result of the offense of which convicted. In the case of a civilian subject to military law, a fine, rather than a forfeiture, is the proper monetary penalty to be adjudged, regardless of whether unjust enrichment is present."

#### **Changes to Appendix 21, Analysis of Rules for Courts-Martial**

(a) Add the following to the Analysis accompanying R.C.M. 1106(d):

"200 *Amendment:* Subsection (d) is restated in its entirety to clarify that subsections (d)(4), (d)(5) and (d)(6) were

not intended to be eliminated by the 2008 Amendment.

2008 *Amendment:* Subsections (d)(1) and (d)(3) were modified to simplify the requirements of the staff judge advocate's or legal officer's recommendation."

#### **Changes to Appendix 23, Analysis of Punitive Articles**

(a) Add the following to the Analysis accompanying Paragraph 44, Article 119—Manslaughter:

"b. *Elements.*

200 *Amendment:* Paragraph (4) of the elements is corrected to properly reflect the 2007 Amendment, which corrected wording was not included in the 2008 Amendment.

2008 *Amendment:* Notes were included to add an element if the person killed was a child under the age of 16 years.

e. *Maximum punishment.*

2008 *Amendment:* The maximum confinement for voluntary manslaughter when the person killed was a child under the age of 16 years was increased to 20 years. The maximum confinement for involuntary manslaughter when the person killed was a child under the age of 16 years was increased to 15 years."

Dated: December 19, 2008.

**Patricia L. Toppings,**

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

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## **DEPARTMENT OF DEFENSE**

### **Office of the Secretary**

#### **Renewal of Department of Defense Federal Advisory Committees**

**AGENCY:** Department of Defense.

**ACTION:** Renewal of Federal Advisory Committee.

**SUMMARY:** Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102-3.65, the Department of Defense gives notice that it is renewing the charter for the Department of Defense Medicare-Eligible Retiree Health Care Board of Actuaries (hereafter referred to as the Board).

The Board is a non-discretionary federal advisory committee established under the provisions of 10 U.S.C. 1114, to advise and assist the Secretary of Defense on actuarial matters associated with the Department of Defense Medicare-Eligible Retiree Health Care