

CHAPTER 20

ADMINISTRATIVE LAW IN OPERATIONS

REFERENCES

I. ETHICS COUNSELOR FUNDAMENTALS.

1. 5 U.S.C. App. § 101 et. seq., Ethics in Government Act of 1978.
2. STANDARDS OF ETHICAL CONDUCT FOR THE EXECUTIVE BRANCH 5 C.F.R. 2635, et seq.
3. Executive Order 12674, "Principles of Ethical Conduct for Government Officers and Employees," April 12, 1989, as amended. (2001) § 5 C.F.R. 2635.
4. U.S. DEP'T OF DEF., DIR. 5500.07-R, JOINT ETHICS REGULATION (JER) (2011).

II. GIFTS.

5. 10 U.S.C. § 2601, General Gift Funds.
6. 10 U.S.C. § 2608, Acceptance of Contributions for Defense Programs, Projects, and Activities.
7. 5 U.S.C. § 7342, Receipt and Disposition of Foreign Gifts and Decorations.
8. 5 U.S.C. § 7351, Gifts to Superiors.
9. STANDARDS OF ETHICAL CONDUCT FOR THE EXECUTIVE BRANCH 5 C.F.R. 2635, et. seq.
10. U.S. DEP'T OF DEF., DIR. 5500.07-R, JOINT ETHICS REGULATION (JER) (2011).
11. U.S. DEP'T OF DEF., DIR. 1005.13, GIFTS AND DECORATIONS FROM FOREIGN GOVERNMENTS (19 Feb. 2002) (c1, 6 Dec. 2002).
12. U.S. DEP'T OF DEF., REG. 7000.14-R, FINANCIAL MANAGEMENT REGULATION, vol. 12, ch. 3 (July 2010).
13. U.S. DEP'T OF ARMY, REG. 1-100, GIFTS AND DONATIONS (15 Nov. 1983).
14. U.S. DEP'T OF ARMY, REG. 1-101, GIFTS FOR DISTRIBUTION TO INDIVIDUALS (1 May 1981).
15. U.S. DEP'T OF ARMY, REG. 215-1, MORALE, WELFARE AND RECREATION ACTIVITIES AND NON-APPROPRIATED FUND INSTRUMENTALITIES (24 Sept. 2010)
16. U.S. DEP'T OF ARMY, REG. 600-8-22, MILITARY AWARDS, ch. 9 (RAR 002, Rapid Action Revision (RAR) 28 June 2013).
17. U.S. DEP'T OF ARMY, DIR. 2007-01, SECRETARY OF THE ARMY POLICY FOR TRAVEL BY DEPARTMENT OF THE ARMY OFFICIALS (25 Jan. 2007).
18. U.S. DEP'T OF AIR FORCE, INSTR. 51-601, GIFTS TO THE DEPARTMENT OF THE AIR FORCE (26 Nov. 2003) (supp. 1 Dec. 2003).
19. U.S. DEP'T OF AIR FORCE, INSTR. 51-901, GIFTS FROM FOREIGN GOVERNMENTS (16 Feb. 2005).
20. U.S. DEP'T OF AIR FORCE, INSTR. 34-201, USE OF NONAPPROPRIATED FUNDS (NAFs) (17 June 2002).
21. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY, INSTR. 4001.2J, ACCEPTANCE OF GIFTS (12 Aug. 2009).
22. OPNAVINST 4001.1F, ACCEPTANCE OF GIFTS (2 Jul. 2010)
23. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY, INSTR. 1650.1H, NAVY AND MARINE CORPS AWARDS MANUAL (22 Aug. 2006).
24. U.S. MARINE CORPS, ORDER P5800.16A, MARINE CORPS MANUAL FOR LEGAL ADMINISTRATION (31 Aug. 1999) (c1-5, 28 Nov. 2005)

III. FINANCIAL DISCLOSURES IN A COMBAT ZONE

25. 5 C.F.R. § 2634.101 TO 805 (1 JUL. 2011).
26. 5 C.F.R. § 2634.901 TO 909 (1 JUL. 2011).
27. U.S. DEP'T OF DEF., DIR. 5500.07-R, JOINT ETHICS REGULATION (JER) (2011).

28. Helpful Resources for Public Financial Disclosure Filers: www.oge.gov/Financial-Disclosure/Public-Financial-Disclosure-278/Helpful-Resources/Helpful-Resources-for-Public-Financial-Disclosure/
29. Helpful Resources for Confidential Financial Disclosure Filers: www.oge.gov/Financial-Disclosure/Confidential-Financial-Disclosure-450/Helpful-Resources/Helpful-Resources-for-Confidential-Financial-Disclosure/
30. FDM: [HTTPS://WWW.FDM.ARMY.MIL](https://www.fdm.army.mil)

IV. MORALE, WELFARE AND RECREATION (MWR)

31. U.S. DEP'T OF DEF., INSTR. 1015.10, MILITARY MORALE, WELFARE AND RECREATION (MWR) Programs (July 6, 2009)(incorporating Change 1, 6 May 2011).
32. U.S. DEP'T OF ARMY, Reg. 215-1, Morale, Welfare and Recreation Activities and Non-Appropriated Fund Instrumentalities (24 Sep. 2010).
33. U.S. DEP'T OF ARMY, Reg. 700-135, Soldier Support in the Field (20 Feb. 2009).
34. U.S. DEP'T OF NAVY, Sec'y of the Navy, Instr. 1700.12A, Operation of Morale, Welfare and Recreation (MWR) Activities (15 July 2005).
35. U.S. DEP'T OF AIR FORCE, Instr. 34-262, Services Programs and Use Eligibility (27 June 2002).
36. U.S. MARINE CORPS, ORDER P1700.27B, Marine Corps Community Services Policy Manual (9 Mar. 2007).

V. COMMAND INVESTIGATIONS

37. U.S. DEP'T OF DEF., INSTR. 6055.07, MISHAP NOTIFICATION, INVESTIGATION, REPORTING, AND RECORD KEEPING (6 Jun. 2011).
38. U.S. DEP'T OF DEF., INSTR. 2310.05, ACCOUNTING FOR MISSING PERSONS—BOARDS OF INQUIRY (31 Jan. 2000, incorporating change 1, 14 March 2008).
39. U.S. DEP'T OF DEF., INSTR. 3002.03, DoD PERSONNEL RECOVERY – REINTEGRATION OF RECOVERED PERSONNEL (15 Jul. 2013).
40. U.S. DEP'T OF DEF., INSTR. 1300.06, CONSCIENTIOUS OBJECTORS (5 May 2007).
41. U.S. DEP'T OF ARMY, REG. 15-6, PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (2 Oct. 2006).
42. U.S. DEP'T OF ARMY, REG. 385-10, THE ARMY SAFETY PROGRAM (27 Nov. 2013).
43. U.S. DEP'T OF ARMY, REG. 638-34, ARMY FATAL INCIDENT FAMILY BRIEF PROGRAM (19 Feb. 2015).
44. U.S. DEP'T OF ARMY, REG. 600-8-1, ARMY CASUALTY PROGRAM (30 Apr. 2007)
45. ARMY DIRECTIVE 2009-02, THE ARMY CASUALTY PROGRAM (DOVER MEDIA ACCESS AND FAMILY TRAVEL) (3 Apr. 2009) [this directive supplements AR 600-8-1].
46. U.S. DEP'T OF ARMY, REG. 600-8-4, LINE OF DUTY POLICY, PROCEDURES, AND INVESTIGATIONS (4 Sep. 2008).
47. U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006).
48. U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (10 May 2013, incorporating RAR, 22 Aug. 2013).
49. U.S. DEP'T OF ARMY, REG. 380-5, DEPARTMENT OF THE ARMY INFORMATION SECURITY PROGRAM (29 Sept. 2000).
50. U.S. DEP'T OF ARMY DIR. 2010-01, CONDUCT OF AR 15-6 INVESTIGATIONS INTO SUSPECTED SUICIDES AND REQUIREMENTS FOR SUICIDE INCIDENT FAMILY BRIEFS (26 Mar. 2010).
51. U.S. DEP'T OF ARMY DIR. 2010-02, GUIDANCE FOR REPORTING REQUIREMENTS AND REDACTING INVESTIGATION REPORTS OF DEATHS AND FATALITIES (26 Mar. 2010).
52. U.S. DEP'T OF AIR FORCE, INSTR. 51-503, AEROSPACE ACCIDENT INVESTIGATIONS (26 May 2010).
53. U.S. DEP'T OF AIR FORCE, INSTR. 91-204, SAFETY INVESTIGATIONS REPORTS (12 Feb. 2014).
54. U.S. DEP'T OF AIR FORCE, INSTR. 31-401, INFORMATION SECURITY PROGRAM MANAGEMENT (1 Nov. 2005, incorporating change 1, 19 Aug. 2009, and Air Force Guidance Memorandum, 18 Sep. 2013).

55. U.S. DEP'T OF AIR FORCE, INSTR. 36-2910, LINE OF DUTY (MISCONDUCT) DETERMINATION (4 Oct. 2002, incorporating change 2, 5 Apr. 2010).
56. U.S. DEP'T OF AIR FORCE, MANUAL 23-220, REPORTS OF SURVEY FOR AIR FORCE PROPERTY (1 Jul. 1996).
57. U.S. DEP'T OF AIR FORCE, INSTR. 36-3204, PROCEDURES FOR APPLYING AS A CONSCIENTIOUS OBJECTOR (15 Jul. 1994).
58. U.S. DEP'T OF AIR FORCE, INSTR. 90-301, INSPECTOR GENERAL COMPLAINTS RESOLUTION (23 Aug. 2011, incorporating change 1, 6 Jun. 2012).
59. The Air Force Commander-Directed Investigation Guide (26 Apr. 2010).
60. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR. 3750.6-R, NAVAL AVIATION SAFETY PROGRAM (dated 1 Mar. 2001, incorporating change 4, 8 Apr. 2009).
61. U.S. DEP'T OF NAVY, OPNAV (CNO) INSTR. 5100.19E, NAVY SAFETY AND OCCUPATIONAL HEALTH (SOH) PROGRAM MANUAL FOR FORCES AFLOAT (30 May 2007).
62. U.S. DEP'T OF NAVY, OPNAV (CNO) INSTR. 5100.23G, NAVY SAFETY AND OCCUPATIONAL HEALTH (SOH) PROGRAM MANUAL (30 Dec. 2005, incorporating change 1, 21 Jul 2011).
63. U.S. DEP'T OF NAVY, OPNAV INSTR. 5102.1D AND U.S. MARINE CORPS, ORDER P5102.1B, NAVY AND MARINE CORPS MISHAP AND SAFETY INVESTIGATION REPORTING AND RECORD KEEPING MANUAL (7 Jan. 2005, incorporating change 2, 5 Oct. 2010).
64. JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN), Chapter 2 (26 June 2012).

VI. FREEDOM OF INFORMATION ACT (FOIA)

65. 5 U.S.C. § 552, THE FREEDOM OF INFORMATION ACT, as amended by PUBLIC LAW NO. 124-231, 110 STAT. 3048.
66. U.S. DEP'T OF DEF, REG. 5400.7-R, DoD FREEDOM OF INFORMATION ACT PROGRAM (14 Sep. 1998, as amended).
67. U.S. DEP'T OF DEF., DIR. 5400.07, DoD FREEDOM OF INFORMATION ACT (FOIA) PROGRAM (2 Jan. 2008, certified current through 2 Jan. 2015).
68. U.S. DEP'T OF ARMY, REG. 25-55, THE DEPARTMENT OF THE ARMY FREEDOM OF INFORMATION ACT PROGRAM (1 Nov. 1997) (does not include 1996 amendments to the Freedom of Information Act).
69. U.S. AIR FORCE MANUAL, DOD 5400.7-R_AFMAN 33-302, FREEDOM OF INFORMATION ACT PROGRAM (21 Oct. 2010)(w/Ch. 1, 24 Apr. 2012).
70. U.S. DEP'T OF NAVY, SEC'Y OF THE NAVY INSTR 5720.42F, DEPARTMENT OF THE NAVY FREEDOM OF INFORMATION ACT PROGRAM (FOIA)(6 Jan. 1999); U.S. MARINE CORPS ORDER 5720.63, Publication in the Federal Register, Indexing, and Public Inspection of Marine Corps Directives (22 August 1983) (w/Ch. 1, 2 Aug. 1991).
71. U.S. Coast Guard: COMMANDANT'S INSTRUCTION M5260.3, THE COAST GUARD FREEDOM OF INFORMATION ACT (FOIA) AND PRIVACY ACTS MANUAL (14 Jun. 96) (w/Ch. 5, 6 Apr 2005).
72. U.S Department of Justice, FOIA Reference Guide, updated 29 Jan. 2015 (available at <http://www.justice.gov/oip/foia-guide.html>).

VII. FINANCIAL LIABILITY INVESTIGATIONS

73. U.S. DEP'T OF ARMY, REG. 600-4, REMISSION OR CANCELLATION OF INDEBTEDNESS (7 Dec. 2007, incorporating rapid action revision, 29 Apr. 2009).
74. U.S. DEP'T OF ARMY, REG. 735-5, POLICIES AND PROCEDURES FOR PROPERTY ACCOUNTABILITY (10 May 2013, incorporating RAR, 22 Aug. 2013).
75. U.S. DEP'T OF ARMY, PAM. 735-5, FINANCIAL LIABILITY OFFICER'S GUIDE (9 Apr. 2007).
76. U.S. DEP'T OF AIR FORCE, MANUAL 23-220, REPORTS OF SURVEY OF AIR FORCE PROPERTY (1 July 1996).
77. JAGINST 5800.7F, MANUAL OF THE JUDGE ADVOCATE GENERAL (JAGMAN), Chapter 2 (26 June 2012).
78. U.S. MARINE CORPS, ORDER 5530.14A, MARINE CORPS PHYSICAL SECURITY PROGRAM, Ch. 8 & 10, APP. L & M, (5 Jun. 2009).

VIII. CONSCIENTIOUS OBJECTORS

79. U.S. DEP'T OF DEF, INSTR. 1300.06, CONSCIENTIOUS OBJECTORS (31 May 2007).
80. U.S. DEP'T OF ARMY, REG. 600-43, CONSCIENTIOUS OBJECTION (21 Aug. 2006).

IX. FAMILY PRESENTATIONS

81. U.S. DEP'T OF DEF, INSTR. 1300.18, DEPARTMENT OF DEFENSE (DoD) PERSONNEL CASUALTY MATTERS, POLICIES, AND PROCEDURES (8 Jan. 2008, incorporating change 1, 14 Aug. 2009).
82. DEP'T OF ARMY, REG. 638-34, ARMY FATAL INCIDENT FAMILY BRIEF PROGRAM (19 Feb. 2015).

I. ETHICS COUNSELOR FUNDAMENTALS

A. 14 Basic Principles of ethical conduct

1. Public Service is a public trust, requiring employees to place loyalty to the Constitution, the laws, and ethical principles above private gain.
2. Employees shall not hold financial interests that conflict with the conscientious performance of duty.
3. Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.
4. An employee shall not, except as [provided for by regulation], solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.
5. Employees shall put forth honest effort in the performance of their duties.
6. Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.
7. Employees shall not use public office for private gain.
8. Employees shall act impartially and not give preferential treatment to any private organization or individual.
9. Employees shall protect and conserve Federal property and shall not use it for other than authorized activities.
10. Employees shall not engage in outside employment or activities, including seeking or negotiating for employment, that conflict with official Government duties and responsibilities.
11. Employees shall disclose waste, fraud, abuse, and corruption to appropriate authorities.
12. Employees shall satisfy in good faith their obligations as citizens, including all just financial obligations, especially those—such as Federal, State, or local taxes—that are imposed by law.
13. Employees shall adhere to all laws and regulations that provide equal opportunity for all Americans regardless of race, color, religion, sex, national origin, age, or handicap.
14. Employees shall endeavor to avoid any actions creating the appearance that they are violating the law or ethical standards. Whether particular circumstances create an appearance that the law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

B. Key Definitions under the JER.

1. DoD Employee (JER § 1-209). The JER applies the Executive Branch Standards of Conduct rules to "DoD Employees." The definition essentially includes everyone in DoD:
 - a. Any DoD Civilian officer or employee (including special Government employees) of any DoD Component (including any nonappropriated fund activity).

- b. Any active duty Regular or Reserve military officer, including warrant officers.
- c. Any active duty enlisted member of the Army, Navy, Air Force, or Marine Corps.
- d. Any Reserve or National Guard member on active duty under orders issued pursuant to Title 10, United States Code.
- e. Any Reserve or National Guard member while performing official duties or functions under the authority of either Title 10 or 32, United States Code, or while engaged in any activity related to the performance of such duties or functions, including any time the member uses his Reserve or National Guard of the United States title or position, or any authority derived therefrom. [Changed from a status to an action analysis.]
- f. Foreign national employees if consistent with labor agreements and international treaties and agreement, and host country laws, e.g., local national employees in Germany and Japan are not subject to JER; but Korean national employees are.
- g. Employees from outside the U.S. Government, who are working in DoD under authority of the Intergovernmental Personnel Act, are not included in the definition of “DoD employee.” However, personnel assigned to DoD (appointed or detailed) are covered by the Ethics in Government Act, Standards of Ethical Conduct for Employees of the Executive Branch, and the Conflict of Interest laws.

2. Designated Agency Ethics Official (DAEO) (JER § 1-207): A DoD employee appointed, in writing, by the head of a DoD Agency to administer the provisions of the Ethics in Government Act of 1978 and the JER. (See also JER §§ 1-203, 1-206). DAEO is responsible for the implementation and administration of the component's ethics program.

3. Ethics Counselor (EC) (JER § 1-212).

a. A DoD employee (must be attorney) appointed in writing by DAEO or designee to assist generally in implementing and administering the command's or organization's ethics program and to provide ethics advice to DoD employees in accordance with the JER. It is vital that DoD employees understand that communications to an EC are not protected by any attorney-client privilege while communications received in a legal assistance capacity usually are. Attorneys who serve as ECs must advise individuals being counseled as to the status of that privilege prior to any communications. ECs advise and assist on issues, such as: acceptance of gifts and gratuities; business visitors (e.g., product demonstrations and capabilities briefings); ethics training; participation in or dealings with private and professional associations, such as AUSA; review of public (OGE 278) and confidential (OGE 450) financial disclosure reports, and resolving conflicts of interests; post-Government employment restrictions; and use of Government resources and time.

b. The Ethics Counselor as “Ethics Magistrate:” 5 C.F.R. § 2635.107 gives the EC authority to make factual determinations and render decisions on matters falling under the OGE Rules. Advice may be oral, but written is preferred often and sometimes required (see below under specific duties). EC's advice generally precludes disciplinary action against an employee who follows EC's advice. *De facto* but not *de jure* immunity under 5 C.F.R. § 2635.107(b).

4. Agency Designee (JER § 1-202): The first supervisor who is a commissioned military officer or a Civilian above GS/GM-11 in the chain of command or supervision of the DoD employee concerned. Except in remote locations, the Agency Designee may act only after consultation with his local Ethics Counselor. For any military officer in grade O7 or above who is in command and any Civilian Presidential appointee confirmed by the Senate, the Agency Designee is his Ethics Counselor.

C. Authority and Appointment of Ethics Counselors.

1. *Army*: Secretary of the Army appointed General Counsel (GC) as DAEO; GC appointed the Deputy General Counsel (Ethics & Fiscal) as Alternate DAEO; DAEO appointed Deputy DAEOs and delegated authority: Principal Deputy General Counsel; Deputy General Counsel (Ethics & Fiscal); TJAG; DJAG, The Assistant Judge Advocate General for Military Law and Operations, Chief, Administrative Law Division, Chief Counsel, USACE; Command Counsel, USAMC. Deputy DAEOs appointed senior ECs and delegated authority. Senior ECs appoint ECs and delegate authority .

2. *Air Force*: Secretary of the Air Force appointed the Air Force General Counsel Office (SAD/GC) as the DAEO; GC appointed the Deputy General Counsel, Fiscal, Ethics, Administrative Law as Alternate DAEO; GC

appointed Deputy GCA as Deputy DAEO; GC appointed other Associate GCs as Ethics Officials; GC appointed MAJCOM and Field Operating Agency (FOA) Staff Judge Advocates as Ethics Counselors (with authority to re-delegate to installation staff judge advocates).

3. *Navy*: Secretary of the Navy appointed GC as DAEO and TJAG as the Alternate DAEO; DAEO appointed Deputy DAEOs: Principal Deputy General Counsel; Deputy General Counsel; Deputy Judge Advocate General; Director, Judge Advocate Division, HQ Marine Corps; Counsel, Commandant of the Marine Corps; Assistant General Counsel (Ethics). DAEO also appointed EC's: Associate General Counsels; Assistant General Counsels; SJAs to Flag Officers; Counsel in Charge of OGC Field and Branch Offices. (*See* General Counsel memorandum, dated 25 January 1996, for entire list.)

D. Required Reports.

1. OGE Form 450 - Confidential Financial Disclosure Reports (**or the DoD version of OGE Optional Form 450-A, Confidential Certificate of No New Interests**) (Due 15 February). See below chapter on Financial Disclosures for combat zone extensions.

2. OGE 278 - Public Financial Disclosure Reports (Due 15 May). See below chapter on Financial Disclosures for combat zone extensions.

3. Gifts of Travel - (31 U.S.C. 1353). (Due within 30 days of travel) (Agency submits semi-annual reports to OGE through OTJAG Adlaw NLT 31 May & 30 Nov).

4. Annual Ethics Training Plan. (5 C.F.R. § 2638.702) (Chapter 11, JER § 11-302). Due December each year. (Note: In the Air Force, only the Air Force General Counsel's Office is required to have a written training plan. For all other Air Force legal offices, it is recommended that they have a written training plan, but it is not required. See HQ USAF/JAG Ethics Update pamphlet, December 2000, page 13.) (Note: In the Navy, the AGC(E) prepares the written Annual Agency Ethics Training Plan.)

5. Annual Ethics Program Survey. (5 C.F.R. § 2638.602(a)). (Due Feb each year).

6. Enforcement of the Joint Ethics Regulation - (Chapter 10, JER). (As needed for serious criminal misconduct. Matters referred to DOJ or U.S. Attorney are reported on OGE Form 202, "Notification of Conflict of Interest Referral," July 1998. See Appendix C, JER).

E. Resources

1. GAO Principle of Federal Appropriations Law (Redbook) for Fiscal Law Related Issues, <http://www.gao.gov/>.

2. OGE Material see: <http://www.usoge.gov/>.

3. DoD SOCO website: http://www.defenselink.mil/dodgc/defense_ethics/.

4. Your MACOM/MAJCOM/higher command EC.

5. Navy JAG (Code 13); Navy Assistant General Counsel (Ethics); AF/JAG General Law Division; Army SOCO.

6. Army Ethics website: <http://www.jagcnet.army.mil/>. Ethics Forum and SOC Database.

7. Navy Ethics website: <http://www.ethics.navy.mil>.

8. AFMC website: <http://www.afmc-pub.wpafb.af.mil/HQ-AFMC/JA/lo/lojaf>.

9. Milsuite: <https://www.milsuite.mil/book/groups/jagconnect-army-administrative-law>.

II. GIFTS

A. **Definition of a Gift.** The term "gift" is broadly defined and includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value. It includes services as well as training, transportation, local travel, lodging, and meals. The following are considered to be "non-gifts" and may be accepted without limitation (however, see paragraph 4(c)(3) below):

1. Coffee, donuts, and similar modest items of food and refreshments when offered other than as a meal.
2. Greeting cards and items of little intrinsic value such as personalized plaques, certificates, trophies, intended solely for presentation.
3. Rewards and prizes in contests open to the public. Contest must be "open to the public" and employee's entry into the contest must not be part of his/her official duties.
4. Commercial discounts available to the general public or to all Government or military personnel so long as the discount does not apply solely to subgroups based on rank, position or organization.
5. Loans from banks and other financial institutions (entities in the business of loaning money) on terms generally available to the public;
6. Anything paid for by the Government or secured by the Government under Government contract.
7. Anything for which the employee pays market value (i.e., retail cost employee would incur to purchase the gift).

B. Sources and Recipients of Gifts. To analyze whether a gift to a DoD organization or a DoD employee may be accepted, the source of the gift and the intended recipient of the gift must be considered.

1. *Gifts to DoD and the Army.*

- a. Gifts to the Services are governed by statute and implementing regulations. The two primary gift statutes that authorize the Army to accept gifts are 10 U.S.C. §§ 2601 & 2608. For the Army, AR 1-100 implements § 2601 and allows acceptance of gifts to be used for a school, hospital, library, museum, cemetery, or other similar institution. A local commander can accept unconditional gifts valued up to \$1,000. Conditional gifts or gifts valued over \$1,000 may be accepted only by the Secretary of the Army. The point of contact for such gifts is Mr. George Cannizzaro, Army Gift Program Coordinator, Office of the Administrative Assistant to the Secretary of the Army, (703) 697-3067. In addition, AR 1-101 addresses gifts (specifically limited to gifts that promote health, comfort, convenience and morale, i.e., reading materials and writing paper) given to the Army for distribution to individuals. This regulation requires the donor to pay transportation costs and prohibits Army endorsement of the donor. The Air Force does not limit § 2601 to institutions similar to those listed in the statute, and has more detailed delegations of gift acceptance authority than the Army. *See* AFI 51-601, Gifts to the Department of the Air Force. *See also* SECNAVINST 4001.2J, Acceptance of Gifts.

- b. The broadest gift acceptance authority for the Army is 10 U.S.C. § 2608. It applies to all of DoD. The Army has not implemented it by regulation. Department of Defense has implemented this section in the Financial Management Regulation, DoD 7000.14-R, Volume 12, Chapter 3. The statute allows DoD to accept money or property from any person, and services from a foreign government or international organization for use in any DoD program. The Department of Defense has delegated authority to accept gifts of property to Service Secretaries for use by their organizations. All donations of assets must be reported quarterly to the Defense Finance and Accounting Service (DFAS), Indianapolis, 8899 East 56th Street, ATTN: Trust Fund Accounting Division, Column 203L, Indianapolis, Indiana 46249-1500 (*see* DoD 7000.14-R, Volume 12, Chapter 3). All gifts of money must be processed through the DoD Comptroller. Additionally, all gifts of money must be reported to the Trust Fund Accounting Division (DFAS) and deposited in the Defense Cooperation Account (DCA). The monetary contributions cannot be expended until re-appropriated by Congress. The Air Force has implemented this statute in AFI 51-601, Gifts to the Department of the Air Force, Chapter 4.

- c. The accepting authority may pay all necessary expenses in connection with the conveyance or transfer of a contribution. However, a contribution should not be accepted if acceptance would result in substantial expenditures, administrative efforts, or maintenance disproportionate to the value or benefit of the contribution.

- d. Department of Defense personnel shall not solicit, fundraise for or otherwise request or encourage the offer of a contribution.

- e. Army commanders have more local gift acceptance authority if the command accepts the gift for its Non-Appropriated Fund Instrumentalities (NAFI). Army Regulation 215-1, paragraph 13-14, authorizes MWR Directors to accept gifts to MWR up to \$15,000; garrison commanders up to \$50,000; IMCOM regional directors up to \$100,000; and, United States Army Family and Morale, Welfare, and Recreation Command (USAFMWRC) up to \$250,000. However, Commander, U.S. Army Installation Management Command, in a memorandum dated 1

August 2008, increased these gift acceptance limits (policy updated as of 30 May 2012). The MWR Directors/fund managers may accept gifts up to \$50,000 when delegated by the garrison commander; garrison commanders up to \$100,000 (except United Way contributions which may be accepted in any amount); IMCOM regional directors up to \$250,000; and, USAFMWRC up to \$250,000. All gifts over \$250,000 must be submitted to the USAFMWRC for processing to the Secretary of the Army for approval. Military personnel may not solicit gifts for the NAFI, but may make the NAFI's needs known in response to inquiries from prospective donors. *See also* AFI 34-201 and SECNAVINST 4001.2H.

2. *Gifts to Individuals.*

a. The Joint Ethics Regulation (JER), DoD 5500.07-R, is applicable to all DoD employees including enlisted personnel. The JER may not be supplemented. **Chapter 2 of the JER generally governs the acceptance of gifts by individuals in their personal capacities.** (The JER and The Judge Advocate General's Legal Center and School's Ethics Counselor's Deskbook may be found at the DoD SOCO website under the Ethics Resource Library: http://www.defenselink.mil/dodgc/defense_ethics/).

b. **Gift acceptance analysis is contingent upon the status of the gift giver as well as the source of funds used to purchase the gift.** Different rules apply depending upon whether the gift is from a foreign government, an outside or prohibited source, or fellow Soldiers or DoD/DA Civilians (i.e., between Federal employees). The Ethics Counselor should be consulted in advance of the gift-giving occasion if possible under the circumstances, or if not possible, then shortly after gift acceptance to ensure receipt of the gift complies with the JER.

3. *Gifts to an Individual from Foreign Governments.*

a. **There must be an initial determination as to whether the gift was to an individual or to a unit.** If it is a gift to the unit, the gift may be carried on the property book of the unit welfare fund subject to the procedures of AR 1-100. If the gift is to an individual, the United States Constitution prohibits Federal employees from accepting gifts from a foreign government or its representatives unless authorized by Congress. A gift from a foreign government includes a gift from a national, state, or local governmental entity. **Congress has authorized Federal employees to accept a gift (or combination of gifts) of "minimal value." A gift of "minimal value" is defined as a gift having a retail value in the United States at the time of receipt of \$375 or less.** "Minimal value" is established by the U.S. General Services Administration (GSA) and is adjusted every three years based on the Consumer Price Index. Current minimal value is set at \$375.

b. A Federal employee may personally accept a gift from a representative of a foreign government if the gift has a retail value in the United States of \$375 or less in U.S. dollars. Fair market value can be determined by comparison to like items sold at AAFES, estimates from the Claims Office, or formal appraisals (which may be funded by the command). It is the recipient's burden to establish the value of the gift. **For purposes of determining the \$375 limit, employees must aggregate the value of gifts at the same presentation from the same source.** If more than one gift is provided from the same level of government at one presentation, the gift values from that source are aggregated. If there are multiple gifts from various levels of government at one presentation, each distinct level of the foreign government (separate sovereigns) has a \$375 limit. If the aggregate value of multiple gifts from a single source during the same presentation exceeds the minimal value, all gifts from that source are considered to be a single gift to DoD and not the individual under DoDD 1005.13 which supersedes JER provision 2-300.b.2. Do not aggregate the value of gifts provided by a single source if provided at a different presentation, even if on the same day. Keep in mind that a gift from the spouse of a foreign official is deemed to be a gift from the foreign official/government. A gift to a spouse or Family member of a Federal employee is deemed to be a gift to the employee. These rules apply to foreign gifts received in foreign countries or in the United States. **To determine what is a "gift," look to 5 U.S.C. § 7342 and the DoD Directive on foreign gifts, DoDD 1005.13. Do not use the gift definitions contained in the Standards of Conduct rules found in the JER.** For the Army's rules on acceptance of foreign awards and decorations, see AR 600-8-22, Chapter 9; Air Force rules are at AFI 51-901; Navy/USMC, see SECNAVINST 1650.1G, Chapter 7.

c. The source of funds used to purchase a gift must be considered when analyzing a gift received by a Federal employee based on a personal relationship with a representative of a foreign government, to include members of the foreign military. If the gift from a foreign government representative was purchased with a foreign official's personal funds, then the gift may require analysis as a gift from an outside source or as a gift between employees as discussed in paragraph B5 below. If the gift was purchased with the official funds of the foreign

government, despite the personal relationship between the giver and recipient, the gift must undergo analysis as a gift from a foreign government. For example, if a foreign employee gives a Federal employee a gift as an act of personal friendship and the foreign employee paid for the cost of the gift with personal funds, then the foreign gift rules do not apply. However, the rules regarding gifts from outside sources or gifts between employees may apply.

d. If a gift is valued under the \$375 limit, the gift does not need to be reported on public or confidential financial disclosure reports. Employees should maintain a memorandum for record concerning the receipt of a foreign gift.

e. Gifts exceeding the “minimal value” may be accepted when the gift is in the nature of an educational scholarship or medical treatment or when it appears that refusal is likely to cause offense or embarrassment or adversely affect foreign relations. Such gifts must be accepted on behalf of the United States. These gifts become the property of the United States upon receipt and must be reported to and deposited with the agency for official use or disposal (return to donor or forward to GSA). For Army, within sixty days of receipt, report to and deposit gifts with Mr. George Cannizzaro, Army Gift Program Coordinator, Office of the Administrative Assistant to the Secretary of the Army, (703) 697-3067, the same POC as for Gifts to the Army. For Air Force, report gifts in accordance with AFI 51-901. For Navy and USMC, report to and deposit gifts in accordance with SECNAVINST 1650.1H, Chapter 7.

f. If the agency or unit would like to request to retain the gift, the report can be forwarded without the gift and include a request that the gift be retained on permanent display at the employee’s agency or unit. Prior to making the request, the gift should be listed on the unit or agency’s property books as U.S. Government property. If the request is disapproved, the gift must be forwarded to the GSA for proper disposition. If an employee wishes to personally retain a gift worth more than the “minimal value,” in some circumstances, the recipient may purchase the gift from GSA for its full U.S. retail value.

g. It is always appropriate to accept a gift from a foreign government, even one valued at more than \$375, when refusal could embarrass the United States or could adversely affect foreign relations. In such cases, the employee should accept the gift on behalf of the United States and then report the gift as discussed above.

4. *Gifts to Individuals from an Outside Source.*

a. Government employees may not, directly or indirectly, solicit or accept a gift: (1) from a prohibited source (someone who has an interest in the performance of official Army missions) or who seeks to do business with the Army; or (2) given because of the employee’s official position (the gift would not have been offered but for the status, authority or duties associated with the employee’s Federal position).

b. “Indirect gifts” are gifts imputed to the Federal employee based upon a relationship with the recipient of the gift. Such gifts include gifts (1) given with the employee’s knowledge and acquiescence to a parent, sibling, spouse, child, or dependent relative or (2) given to any other person, including a charity, on the basis of designation, recommendation, or other specification by the employee.

c. Determining whether a gift from an outside source can be accepted:

(1) First, determine whether the gift is actually a gift. The term “gift” does not include modest items of food and refreshments that are not offered as part of a meal. For example, coffee and donuts are not gifts if they are intended by the provider to be a snack. The following are also not considered gifts: greeting cards; plaques; trophies; prizes in contests open to the public; commercial discounts open to all; anything paid for by the Government; anything for which fair market value is paid; and other similar items.

(2) Second, several exceptions allow acceptance of otherwise prohibited gifts. The most common exception allows acceptance of unsolicited gifts with a market value of \$20 or less per source, per occasion. The cumulative value from any single source may not exceed \$50 during a calendar year (does not apply to gifts of cash or investment interests). Employees may decline gifts to keep aggregate value at \$20 or less, but may not pay differential over \$20 on a single occasion or \$50 per calendar year to bring the value of the gift within permissible limits (i.e., no “buy down”). Other exceptions that allow the acceptance of gifts include: gifts based upon a bona fide personal relationship (such as family or personal friendship); certain broadly-available discounts and awards; free attendance at certain widely-attended gatherings; and gifts of food or entertainment in foreign areas. The last exception allows an employee to accept food, refreshments, or entertainment while in a foreign area when offered at a meal or a meeting when: (a) the value does not exceed the Department of State per diem rate (in U.S. dollars) for the locale; (b) foreign officials are in attendance; (c) attendance at the meal or meeting is part of the official duties of

the employee and will further a U.S. mission; and (d) the gift is paid for by a person other than a foreign government.

(3) Third, if the above analysis allows acceptance, employees must nonetheless refuse gifts if acceptance would undermine Government integrity (e.g., gifts accepted on too frequent a basis) or creates an appearance of an ethical violation. Employees may never use their official position to solicit a gift and may never accept any gift in exchange for official action (illegal *quid pro quo*). It is never inappropriate and frequently prudent to decline a gift offered by an outside source or given because of one's official position.

d. The JER now allows service members, who have sustained injuries or illness while serving in designated combat zones, and their Family members to accept unsolicited gifts from non-Federal entities (does not include gifts from foreign governments and their agents). The following limitations apply: the gifts cannot have been given in return for influencing performance of an official act; the gift(s) cannot have been solicited or coerced; and the gifts cannot have been accepted in violation of any other statute, including 18 U.S.C. 201(b) (bribes) and 209 ("dual compensation"). For gifts with an aggregate market value in excess of "minimal value" (currently \$375) per source per occasion, or with an aggregate market value exceeding \$1000 received from any one source in a calendar year, an agency ethics official must make a written determination that the gift(s) is/are not offered in a manner that specifically discriminates among Soldiers or Family members merely on the basis of type of official responsibility or of favoring those of higher rank or rate of pay; the donor does not have interests that may be affected substantially by the performance or non-performance of the Soldier or Family member's official duties; and acceptance would not cause a reasonable person with knowledge of the relevant facts to question the integrity of DoD programs or operations. For more information, see JER 3-400 to 3-500. This exception is retroactive to September 11, 2001.

5. *Gifts to Individuals from Other Federal Employees.*

a. An employee shall not, directly or indirectly: (1) give a gift, make a donation toward a gift, or solicit a contribution for a gift to an official superior, or (2) accept a gift from a lower-paid employee, unless the donor and recipient are personal friends who are not in a superior-subordinate relationship.

b. There are two exceptions to the general prohibition. Unsolicited gifts may be given to and an official superior may accept a gift from a subordinate given on (1) special infrequent occasions (e.g., marriage, PCS, retirement, etc.), and (2) an occasional basis (e.g., birthdays and holidays).

(1) Special Infrequent Occasions. A subordinate may voluntarily give or donate toward a gift for a superior on a special infrequent occasion such as an event of personal significance (e.g., marriage, illness, or birth of a child (does not include promotion)) or upon an occasion that terminates the official superior-subordinate relationship (e.g., transfer, resignation, or retirement). **Gifts are limited to \$300 in value per donating group. No member of a donating group may be a member of another donating group.** If one employee contributes to two or more donating groups, the value of the gifts, from the groups with a common contributor, are aggregated for the purposes of the \$300 limit. A recipient may not "buy down" a gift. The most junior ranking member of the group should be the one to solicit other members for donations. The person collecting may not solicit fellow senior employees for more than \$10 though an employee may voluntarily contribute more (contractor employees may not be solicited). All donations must be voluntary and employees must be free to give less than the amount requested or nothing at all. Gifts may not exceed \$300. The "Perry Exception" which once allowed gifts to exceed \$300 when the superior-subordinate relationship ended (e.g., retirement, resignation, transfer outside of the chain of command), if the gift was appropriate to the occasion and uniquely linked to the departing employee's position or tour of duty, is NOT valid. All gifts from a group given at the end of the senior-subordinate relationship may not exceed \$300 without exception.

(2) Occasional Basis. Unsolicited gifts may be given on an occasional basis (not routine) including traditional gift-giving occasions, such as birthdays and holidays. This includes gifts with an aggregate value of \$10 or less per occasion, food and refreshment shared within office, meals at an employee's home, and customary host/hostess gifts (e.g., flowers and wine).

C. Handling Improper Gifts to Individuals. If a gift has been improperly accepted, the employee may pay the donor its fair market value or return the gift. With approval, perishable items may be donated to charity, shared within the office, or destroyed. The Ethics Counselor should be consulted as necessary.

III. FINANCIAL DISCLOSURES IN A COMBAT ZONE

A. **Conflicts of Interest.** The purpose of financial disclosure reports is to identify and avoid potential conflicts of interest. When potential conflicts are identified, action must be taken to avoid a conflict from arising. Typically, the filer's duties will be adjusted so that official actions that may trigger a conflict will be avoided. This adjustment is recorded in a disqualification statement.

B. Army is the Executive Agent to operate Financial Disclosure Management (FDM), <https://www.fdm.army.mil>, for DoD personnel to electronically file, review, and manage the OGE 278, Public Financial Disclosure Report, and the OGE 450, Confidential Financial Disclosure Report.

1. Army policy requires those Army personnel who are required to file to do so online in FDM. Army personnel deployed to a combat zone (CZ) on the due date of the report may obtain an extension to file.

a. For OGE 278 filers, there is a statutory CZ extension that runs 180 days from last day in the CZ, if in the CZ on 15 May (or later) for incumbent/annual OGE 278.

b. In accordance with 5 U.S.C. App. § 101(g)(2)(A), an individual serving with or in support of the Armed Forces automatically qualifies for a 180-day extension if serving in a combat zone on the applicable due date. When applicable, this extension replaces all other extensions. This extension dates from the later of the last day of: (1) the individual's service in the combat zone or (2) the last day of the individual's hospitalization resulting from that service.

2. For OGE 450 filers in a CZ on the due date, 5 C.F.R. Sec. 2634.903, provides a discretionary extension for up to 90 days after the filer departs the CZ. The agency reviewing official may, for good cause, grant to any employee or class of employees a filing extension or several extensions totaling not more than 90 days.

3. The agency reviewing officer may also grant an extension for certain service during a period of national emergency. In the case of an active duty military officer or enlisted member of the Armed Forces, a Reserve or National Guard member on active duty under orders issued pursuant to title 10 or title 32 of the United States Code, a commissioned officer of the Uniformed Services (as defined in 10 U.S.C. 101), or any other employee, who is deployed or sent to a CZ or required to perform services away from his permanent duty station in support of the Armed Forces or other governmental entities following a declaration by the President of a national emergency, the agency reviewing official may grant such individual a filing extension to last no longer than 90 days after the last day of: (a) the individual's service in the CZ or away from his permanent duty station; or (b) the individual's hospitalization as a result of injury received or disease contracted while serving during the national emergency.

C. Filers desiring to file while deployed may use FDM. For additional information on FDM visit the FDM website, <https://www.fdm.army.mil>, or contact the FDM Webmaster, email: FDMWebmaster2@conus.army.mil.

D. Redeployment briefings should remind those filers with CZ extensions of the limits on the extension and the need to file at their home station. Encourage them to consult their local Ethics Counselor

IV. MWR OPERATIONS

A. **General.**

1. MWR activities during mobilization, contingency and wartime operations are "necessary to maintain physical fitness and to alleviate combat stress by temporarily diverting Soldier's focus from combat situations" (AR 215-1, para. 9-1).

2. This section focuses on the responsibilities of command and staff to provide MWR support, describes permissible MWR activities, and discusses the resources available to implement MWR support and activities.

B. **Responsibilities.**

1. For the Army, IMCOM G-9 is the key policy-making organization for all MWR operations. In deployed environments, the theater Army Service Component Command G-1/AG and Corps G-1 are the primary coordinating bodies with IMCOM G-9 for developing MWR programs. Consult Department of the Army Field Manual 1-0, Human Resources Support, for detailed guidance on MWR responsibilities for battalion, brigade, division, corps, theater, and installation/garrison operations.

2. Unit commanders are responsible for designating a unit athletic and recreation (A&R) officer or NCO. The A&R officer/NCO assists the commander in acquiring, assembling, and shipping their own initial 30-day supply of A&R and library book kits (obtained from installation MWR libraries), as well as operating athletic activities, recreation programs, unit lounges and AAFES Imprest Fund Activities (AIFA).

C. Training.

1. Commanders may designate Soldiers to execute MWR operations. Civilian MWR specialists may also be available to assist. These specialists train the Unit A&R officers/NCOs.

2. Training covers recreation programming, operation of unit lounges and establishment/maintenance of corps/division/brigade packages and unit A&R kits. Local AAFES managers provide AIFA materials and training for coordinators and specialists.

D. Kits and Other Supplies.

1. MWR A&R kit equipment tailored to unit needs are procured and maintained locally.

2. Items that can be deployed with the unit to support unit self-directed recreation activities include, but are not limited to: music listening equipment, cards, board games, and balls and athletic equipment available through normal Army supply channels. USAFMWRC also provides unit kits for extended operations.

E. Funding.

1. MWR support is mission-funded during war and other conditions (e.g., mobilization/contingency operations). See AR 215-1, para. 9-1.

2. All MWR kits are authorized appropriated fund (APF) expenditures (AR 215-1, para. 9-4a). All categories of MWR activities shall be mission-funded with APFs per FM 12-6, chapter 7. See AR 215-1, para. 9-6.

F. Authorized MWR Activities in Contingency and Combat Operations.

1. *USO/Armed Forces Entertainment (AFE)*. Unit Commanders may request, through the senior Army component commander in the area of responsibility or the Joint Task Force Commander, civilian entertainment. Requests are forwarded to the AFE.

2. *Military Clubs*. Existing military clubs in theater will continue operations if conditions warrant. New clubs may be established in secure areas (e.g., rest areas and R&R areas) after an MWR program is established. Services will include food, beverages (alcohol if theater commander approves), entertainment and other recreation, and check cashing and currency conversion.

3. *Unit Lounges*. Unit lounges may be established in active theaters or areas of operation during mobilization, contingency operations, and wartime. Theater commanders may authorize "unit lounges," which are recreation centers that provide food and beverages as well as activities normally offered in clubs. SOPs provided by the parent installation will be used in the absence of theater guidelines.

4. *Rest Centers (in secure areas), pursuant to AR 215-1, para. 9-5.*

a. *General*. Rest centers in theater or corps areas, established by commanders, give Soldiers a short respite from combat or combat support duties. Rotation, including transportation, is normally less than one week. Soldiers will receive as many services as the commander can logistically secure and support. Assets to establish and operate a rest area come from unit resources.

b. *DoD Rest and Recuperation (R&R) Centers*. Centers are established based on theater needs. Theater commanders may designate resorts and other suitable facilities located at a reasonable distance from combat areas, outside the theater of operation, as R&R destination sites. After obtaining DoD approval, the theater executes the program.

c. *Armed Forces Recreation Centers (AFRC)*. Both within and outside the theater of operation, AFRCs may be designated R&R centers. IMCOM G-9 equips AFRCs to support R&R requirements to include billeting, food and beverages, and Western-style recreational opportunities.

5. *Army Recreation Machine Program (ARMP) or "Slot machines."* ARMP may continue service within authorized theaters of operation if resources are available. If Civilian employees are evacuated from the area, local

commanders may assume operations for machines and operations once a modified ARMP SOP is provided by IMCOM G-9.

6. *Tactical Field Exchanges (TFE)*. TFEs are established to provide AAFES-type merchandise (class VI). Initial establishment of TFEs is normally accomplished by military personnel; AAFES is responsible for training military personnel to operate the facilities. Once the theater is stabilized, or mission, enemy, terrain, troops, time, civilians (METT-TC) allows, AAFES Civilian personnel may be brought into the theater to operate AAFES facilities as far forward as the brigade support area if the tactical situation permits. However, the use of AAFES personnel in theater is based on availability of volunteers. The provision of equipment and facilities is a responsibility shared between AAFES and the Army. AAFES is responsible for training military personnel to operate the facilities. Mobile TFE will support Soldiers in forward areas and a fixed TFE facility will support Soldiers in secure areas. Commanders may establish AIFA with borrowed military labor after weighing the effects of the Soldier's diversion from his primary duty position on the unit's mission against the added convenience provided by operating an AIFA. TFE facilities are managed by a TFE officer (TFEO), who is a commissioned, warrant, or non-commissioned officer. (See AR 700-135, Para. 2-5.)

7. *American Red Cross (ARC)*. All requests for ARC personnel to accompany U.S. forces into a theater of operations during war or operations other than war (OOTW) must be forwarded to IMCOM G-9. IMCOM G-9 is responsible for coordinating and securing support for ARC personnel to support military operations, and managing and monitoring military support to ARC, including funding travel. Once in the theater of operations, ARC support is coordinated through the theater G-1.

G. Redeployment/Demobilization.

1. *General*. Upon redeployment/demobilization, NAF accounts will be closed, NAFIs disestablished as necessary, and MWR equipment accounted for. MWR equipment issued to units in theater will revert to the theater MWR.

2. *Funds*. Unit funds revert to the theater NAFI upon unit redeployment. Theater NAFI funds revert to IMCOM G-9 or remain in theater if there is an established and continuing installation MWR fund.

H. **Lessons Learned**. As required, after-action MWR reports are forwarded to Commander, IMCOM, ATTN: G-9 MWR (Lessons Learned), 2405 Gun Shed Road Fort Sam Houston, TX 78234-1223.

V. COMMAND INVESTIGATIONS

A. Introduction.

1. Each Service has specific procedures for various types of administrative investigations. In the absence of more specific regulatory guidance, the Army uses AR 15-6, Procedures for Investigating Officers and Boards of Officers. AR 15-6 contains the basic rules for Army regulatory boards. If an investigation is appointed under a specific regulation, that regulation will control the proceedings. Often, that specific regulation will have a provision that makes AR 15-6 applicable to the proceedings. Consequently, you may have to look to both the specific regulation involved and to AR 15-6 for the proper board procedures. If the two regulations conflict on a particular point, the provisions of the specific regulation authorizing the board will override the provisions of AR 15-6.

2. Some of the more likely types of investigations that Army judge advocates (JA) may encounter during deployments include: accident investigations, which may require both a Safety Accident Investigation and a Legal Accident Investigation under AR 385-10 and AR 600-34 (if death results, a family brief may be triggered under AR 600-34); Hostile death Investigations required by AR 600-8-1; Suicide death investigations required by AR 600-63; Line of Duty Investigations under AR 600-8-4; Conscientious Objector Investigations under AR 600-43; and Boards of Inquiry for missing persons under AR 600-8-1.

3. The Air Force has no single regulation or instruction governing non-IG investigations. Some types of investigations may be specifically authorized by instruction (e.g., AFI 36-3208, Administrative Separation of Airmen). In any event, the ability to initiate a command-directed investigation flows from the commander's inherent authority.

4. In the Navy and Marine Corps, the main reference for administrative investigations is JAGINST 5800.7F (June 2012), The Manual of the Judge Advocate General, also known as the "JAGMAN." It divides administrative investigations into more specific types than does AR 15-6, to include litigation report investigations, courts and boards of inquiry, and command investigations.

5. Investigations in all services follow similar basic concepts. In the joint environment, the goal is to prepare an investigation that meets the substantive standards of all the Services involved. Detailed analysis of Air Force and Navy Investigation requirements is beyond the scope of this chapter. Reference to those Services' policies is for clarification only. Legal advisors should turn to the appropriate Service authorities for detailed guidance.

6. There is currently no joint publication governing investigations. In the event an investigation is required in a joint environment, JAs should determine which Service's regulation is most applicable and then recommend an investigation pursuant to that regulation. When determining which Service's regulation is most applicable consider the possible uses of the investigation, whether a particular Service requires a certain investigation, which Service has the most at stake in the outcome of the investigation, any local or command guidance regarding joint investigations, and other matters that would contribute to an informed decision. Since investigations in all services follow similar basic concepts and will result in a thorough investigation if conducted properly, the regulation ultimately used is not as important as is choosing and following a particular authorized regulation. **Under no circumstances should regulations be combined to create a "hybrid" investigation.** Pick a single service regulation and follow it. The Services are shown great deference in regards to administrative matters as long as regulations are followed correctly.

B. Command Investigations, Generally.

1. *Function and Purpose.* The primary purpose of an investigation or board of officers is to look into and report on the matters that the appointing authority has designated for inquiry. The report will include findings of fact and recommendations. Often, when criminal misconduct is suspected, it may be more appropriate to conduct an RCM 303 preliminary inquiry ("Commander's Inquiry") or to have either the Military Police (MP), Criminal Investigation Division (CID), or other appropriate law enforcement authorities conduct the investigation.

2. *Methods.* An administrative fact-finding procedure under AR 15-6 may be designated an investigation or a board of officers. The proceedings may be informal or formal. Proceedings that involve a single officer using the informal procedures are designated investigations. Proceedings that involve more than one Investigating Officer (IO) using formal or informal procedures, or a single investigating officer using formal procedures, are normally designated boards of officers. The Navy term for informal investigations is "command investigation" (CI). The Air Force term is "Command Directed Investigations" (CDI).

3. *Uses.* No Service requires, as a blanket rule, that an investigation be conducted before taking adverse administrative action. But, if inquiry is made under AR 15-6 or other general investigative authority, the findings and recommendations may be used in any administrative action against an individual. An adverse administrative action does not include actions taken pursuant to the Uniform Code of Military Justice (UCMJ) or the Manual for Courts-Martial (MCM).

4. *Types of Investigations.* The appointing authority must determine, based on the seriousness and complexity of the issues and the purpose of the inquiry, whether to designate an investigation or a board of officers to conduct the inquiry.

a. *Investigation.* Conducted by a single IO using informal procedures. An investigation designated under AR 15-6 can be used to investigate almost any matter. However, an assistant investigating officer can be appointed if circumstances require (to assist in interviews, gathering of evidence, or expert analysis).

b. *Board of Officers.* When multiple fact-finders are appointed, whether formal or informal procedures are used, they will be designated as a board of officers. Multiple fact-finders using informal procedures may be appropriate for investigations into large-scale events or investigations where there are a large number of witnesses and other evidence to collect and consider. A single fact-finder will also be designated a board when formal procedures are used.

c. *Informal Procedures.* An informal investigation or board may use whatever method it finds most efficient and effective for acquiring information. For example, the board may divide witnesses, issues or evidentiary aspects of the inquiry among its members for individual investigation and development, holding no collective meeting until ready to review all of the information collected. Evidence may be taken telephonically, by mail, video teleconference or in whatever way the board deems appropriate. A respondent shall not be designated when informal procedures are used, and no one is entitled to the rights of a respondent. Before beginning an informal investigation, an IO reviews all written materials provided by the appointing authority and consults with a servicing

staff judge advocate (SJA) or command judge advocate (CJA) to obtain appropriate legal guidance *before beginning the investigation*. Some of the most important services a JA can perform include assisting the IO in developing an investigative plan and providing advice during the conduct of the investigation such as what the evidence establishes, what areas might be fruitful to pursue, and the necessity for rights warnings.

d. *Formal Procedures*. This type of board meets in full session to take evidence. Definite rules of procedure will govern the proceedings. Depending on the subject matter under investigation, these procedural rules are found in AR 15-6 (Chapter 5), the specific regulation governing the investigation, or both. The Air Force presents guidance for formal investigations in AFI 51-602, Boards of Officers. The Navy's guidance appears in JAGINST 5830.1, Procedures Applicable to Courts of Inquiry and Administrative Fact-Finding Bodies that Require a Hearing.

5. *Due Process*. When a respondent is designated, a hearing must be held. A respondent may be designated when the appointing authority desires to provide (or other regulations require) a hearing for a person with a direct interest in the proceeding. AR 15-6 bestows important rights to a respondent, such as the right to be present at board sessions, representation by counsel, and the opportunity to present witnesses and cross-examine Government witnesses. The mere fact that an adverse finding may be made or adverse action recommended against a person, however, does not mean that he or she should be designated a respondent. If a respondent is designated, formal procedures must be used. For example, a board of officers considering an enlisted Soldier for separation under AR 635-200 must use formal procedures. Due to the considerable administrative burden of using formal procedures, they are rarely used as a general investigative tool unless required by other regulations. Proper conduct of formal investigations depends on the purpose of the investigation, and is beyond the scope of this chapter.

C. Friendly Fire.

1. DoDI 6055.7 requires that for all incidents falling within the definition of Friendly Fire, the Combatant Commander will convene a legal investigation (an AR 15-6 investigation in the Army, a command investigation in the Navy, or a command directed investigation in the Air Force) to determine the facts of the incident and guide further actions. In practice, Combatant Commanders typically delegate this authority to the GCMCA of the unit involved. Regardless of who appoints the investigation, the Combatant Commander must approve all friendly fire investigations.

2. Friendly fire is defined in DoDI 6055.7 as a circumstance in which members of a U.S. or friendly military force are mistakenly or accidentally **killed or injured** in action by U.S. or friendly forces actively engaged with an enemy or who are directing fire at a hostile force or what is thought to be a hostile force.

3. In addition to the legal investigation, commanders must also convene a safety investigation.

4. In May 2007, the Army Vice Chief of Staff published detailed guidance regarding the reporting and investigation requirements for all incidents of friendly fire. Units must follow these procedures for all friendly fire incidents, whether resulting in death or injury, as soon as personnel on the ground *suspect* that a friendly fire incident has occurred.

a. The unit must provide immediate telephonic notice through the Casualty Assistance Center to the Army Casualty and Mortuary Affairs Operation Center (CMAOC). For time sensitive assistance contact the CMAOC Operations Center at 1-800-325-3317 COMM: 502-613-9025. DSN: 983-9025. OCONUS dial country code 001 or OCONUS DSN code (312).

b. Generate an initial casualty report IAW AR 600-8-1, approved by a field grade officer, through command channels to the Combatant Commander.

c. Initiate an AR 15-6 investigation (Appointed by GCMCA; approved by Combatant Commander).

d. Contact the Combat Readiness Center (COMM: (334) 255-2660/3410, DSN: 558) and initiate safety investigation based upon CRC guidance.

e. Contact the local Criminal Investigation Division. They will provide forensics assistance to the AR 15-6 Officer or conduct investigation if criminal action or negligence is suspected or substantiated.

f. Submit supplemental casualty report when there is a substantial change to the initial report (i.e., when inflicting force is discovered).

g. Once approved by the Combatant Commander, submit the AR 15-6 proceedings to the CMAOC.

h. Continue coordination with the CMAOC to provide an AR 600-34 family presentation for fatality cases.

5. The 2013 CENTCOM friendly fire reporting, investigation, and dissemination policy requires units to report suspected friendly fire incidents within **2 hours**. Judge advocates must remain aware of local command and/or installation policies regarding reporting and investigation requirements.

D. Authority to Appoint an Investigation.

1. *Formal.* After consultation with the servicing JA or legal advisor, the following individuals may appoint a formal board of officers in the Army:

a. Any General Court-Martial Convening Authority (GCMCA) or Special Court-Martial Convening Authority (SPCMCA), including those who exercise that authority for administrative purposes only.

b. Any General Officer.

c. Any commander or principal staff officer in the grade of colonel or above at the installation, activity or unit level.

d. Any State Adjutant General.

e. A Department of the Army Civilian supervisor permanently assigned to a position graded as a GS/GM-14 or above and who is assigned as the head of an Army agency or activity or as a division or department chief.

f. In the Air Force, the appointment authority for boards of officers varies with the regulatory authority for convening the board. In the Navy, an officer in command may convene a board. The GCMCA takes charge in case of a “major incident.”

2. *Informal.* Informal investigations or boards may be appointed by:

a. Any officer authorized to appoint a formal board or investigation.

b. A commander at any level. In the Air Force, the commander must be on “G” series orders granting UCMJ authority over the command. In the Navy, a commanding officer or an officer in charge may convene a CI.

c. In the Army, a principal staff officer or supervisor in the grade of major or above.

3. *Selection of Members.*

a. In the Army, if the appointing authority is a General Officer. He or she may delegate the selection of board members to members of his or her staff.

b. However, in investigations under AR 15-6, only a GCMCA may appoint an investigation or board for incidents resulting in property damage of \$1 million or more, the loss/destruction of an Army aircraft or missile, or an injury/illness resulting in or likely to result in death or permanent total disability.

c. For investigations of a death or deaths involving a deployed force(s), from what is believed to be hostile fire, the GCMCA may delegate, in writing, appointing/approval authority to a subordinate commander exercising special court-martial convening authority. If evidence is discovered during the investigation, however, that indicates that the death(s) may have been the result of fratricide/friendly fire, the investigating officer will immediately suspend the investigation and inform the appointing authority and legal advisor. At this time, the general court-martial convening authority will appoint a new investigation into the fratricide/friendly fire incident. Any evidence from the hostile fire investigation may be provided to the investigating officer or board conducting the fratricide/friendly fire investigation. The general court-martial convening authority may also appoint the same investigating officer if the investigating officer is still best qualified to perform the duty.

E. Choosing the AR 15-6 IO.

1. The AR 15-6 IO must be the best qualified by reason of age, education, training, experience, length of service and temperament. In the Army, the IO must be a commissioned or warrant officer, or a Civilian GS-13 or above and senior to any likely subjects of the investigation. In the Naval services, most CIs are conducted by a

commissioned officer. However, a warrant officer, senior enlisted person, or Civilian employee may be used when the convening authority deems it appropriate. The Air Force specifies no minimum grade for CDI investigators.

2. Both the Army and the Air Force require the IO to consult with a JA for guidance before beginning an informal investigation. The Naval services only require such consultation when the investigation is intended as a litigation report, or when directed by the appointing authority. This consultation offers a good opportunity to provide a written investigative guide to the IO. An Army AR 15-6 Informal Investigating Officer's Guide is included here as an appendix. The Naval Justice School has a similar publication, the JAGMAN Investigations Handbook. The Air Force publishes the Air Force Commander-Directed Investigations Guide.

F. Methods of Appointment.

1. Informal Army investigations and boards may be appointed either orally or in writing. Air Force CDIs and Navy CIs must be appointed in writing. Formal boards must be appointed in writing but, when necessary, may be appointed orally and later confirmed in writing. Whether oral or written, the appointment should clearly specify the purpose and scope of the investigation or board, and the nature of the findings and recommendations required. The appointing memorandum should specify the governing regulation and provide any special instructions.

2. If the board or investigation is appointed in writing, the appointing authority should use a Memorandum of Appointment. Note that the Memorandum of Appointment should include certain information: the specific regulation or directive under which the board is appointed; the purpose of the board; the scope of the board's investigatory power; and the nature of the required findings and recommendations. The scope of the board's power is very important because a board has no power beyond that vested in it by the appointing authority. A deficiency in the memorandum may nullify the proceedings for lack of jurisdiction. If this occurs, consult AR 15-6, para. 2-3c. It may be possible for the appointing authority to ratify the board's action.

3. The Memorandum of Appointment also names the parties to the board and designates their roles in the board proceeding. If the board were appointed specifically to investigate one or more known respondents, the respondent(s) also would be named in the Memorandum of Appointment.

G. Conducting the Informal Investigation.

1. The IO, with the assistance of the JA advisor, should formulate an investigation plan that takes into account both legal concerns and tactical effectiveness. Each investigation will be different, but the following factors should be considered:

- a. Purpose of the investigation. Need to carefully consider the guidance of the Memorandum of Appointment with regard to purpose and timeline.
- b. Facts known.
- c. Potential witnesses.
- d. Securing physical and documentary evidence.
- e. Possible criminal implications (including need for Article 31, UCMJ warnings).
- f. Civilian witness considerations (e.g., securing non-military witness information and giving appropriate rights to collective bargaining unit members).
- g. Regulations and statutes involved.
- h. Order of witness interviews.
- i. Chronology.

2. Continued meetings between the IO and the legal advisor will allow for proper adjustments to the investigative plan as the investigation progresses, as well as proper ongoing coordination with the appointing authority.

H. Findings and Recommendations.

1. *Report Structure.* Army informal investigations normally begin with DA Form 1574, which provides a "fill in the box" guide to procedures followed during the investigation. Navy CI and Air Force CDI reports begin with narrative information from the IO.

a. Navy CI reports of investigation begin with a preliminary statement. It tells how all reasonably available evidence was collected or is forthcoming; whether each directive of the convening authority has been met; what, if any, difficulties were encountered; and any other information necessary for a complete understanding of the case.

b. Air Force CDI reports of investigation begin with a discussion of the authority and scope of the investigation. They continue with an introduction providing background, a description of the allegations, and a “bottom line up front” conclusion regarding whether or not the allegations were substantiated.

2. The report of investigation contains two final products: the findings and the recommendations.

a. *Findings.* A finding is a clear, concise statement of fact readily deduced from evidence in the record. Findings may include negative findings (i.e., that an event did not occur). Findings should refer to specific supporting evidence with citations to the record of investigation. Findings must be supported by a preponderance of the evidence. The IO may consider factors such as demeanor, imputed knowledge, and ability to recall. Finally, findings must also address the issues raised in the appointment memorandum.

b. *Recommendations.* Recommendations must be consistent with the findings, and must thus be supported by the record of investigation. Air Force CDIs and Navy CIs will not contain recommendations unless specifically requested by the convening authority.

I. Legal Review.

1. AR 15-6 requires legal review of Army investigations if: adverse administrative action may result; the report will be relied upon by higher headquarters; death or serious bodily injury resulted; or any case involving serious or complex matters. The Air Force requires legal review of CDIs that are not simply “diagnostic” to ensure compliance with applicable regulations and law. The Navy neither requires nor precludes legal review. As a practical matter, most investigations should receive a legal review whether required by regulation or not.

2. There is no general prohibition against the advisor to the investigating officer also conducting the legal review. However, it is recommended that a different attorney conduct the legal review for complex cases, high profile cases, or cases in which the legal advisor’s involvement in the case prevents him or her from conducting an independent legal review. In the Army, the legal review focuses on: whether the proceedings complied with legal requirements; what affects any errors would have; whether sufficient evidence supports the findings; and whether the recommendations are consistent with the findings.

J. Appointing Authority Action.

1. After reviewing the report of investigation, the appointing authority has four options.

- a. Approve the report as is;
- b. Disapprove the report as is;
- c. Return the report for additional investigation, either with the same IO or a new one; or
- d. Except or Substitute findings and recommendations.

2. The record must support any substituted findings and recommendations. Unless otherwise provided in other regulations, the appointing authority is not bound by the IO’s findings or recommendations. The appointing authority may also consider information outside the report of investigation in making personnel, disciplinary or other decisions.

K. Maintaining and Releasing the Investigation.

1. The release authority for AR 15-6 investigations is the appointing authority. No part of a report should be released (unless specifically authorized by law or regulation such as a valid Freedom of Information Act (FOIA) request) without the approval of the appointing authority.

2. Investigations must be retained by the approving authority for five years, and then destroyed or shipped for permanent storage IAW the Army Records Information Management System (ARIMS) and Record Retention Schedule – Army (RRS-A) (See www.arims.army.mil. & AR 25-400-2, The Army Records Information Management System (ARMIS), 2 Oct. 2007).

VI. FREEDOM OF INFORMATION ACT (FOIA) (5 USC § 552)

A. Deployed units should anticipate requests under the FOIA for records they maintain. The FOIA is a release statute. As such, it is presumed that if a proper FOIA request is received the requested records will be released.

B. Unit judge advocates must be prepared to respond to FOIA requests in a timely manner. The FOIA requires DoD to respond to FOIA requests within 20 working days of receipt of a proper request. This requires units to search, review, duplicated, and if necessary redact requested records rather quickly. Judge advocates must have general knowledge regarding the FOIA and the appropriate regulations.

C. Records requested must ordinarily be released unless they are exempted or excluded from release by one of nine exemptions or three exclusions. Even though an exemption may apply, however, current governmental policy encourages the discretionary release of exempted information. **In March 2009, Attorney General Holder, implementing guidance from President Obama, established the “reasonably foreseeable harm” standard regarding the utilization of FOIA exemptions to withhold information pursuant to a valid FOIA request.** Under the reasonably foreseeable harm standard, before withholding a record the agency must reasonably foresee that disclosure would harm an interest protected by one of the exemptions or disclosure must be prohibited by law. Mere speculation or abstract fears are not a sufficient basis for withholding. Instead, the agency must reasonably foresee that disclosure would cause harm. Under this new standard, discretionary releases are strongly encouraged even when an exemption may apply. The new standard, however, has the most impact on Exemption 5 discussed below.

D. A principle concept of the FOIA is **the rule of segregability**. If a FOIA request is received and a responsive record found, units must segregate (redact) exempted information from non-exempt information and release non-exempt information to the requestor. Units may withhold release; however, they may not deny a request. Within DoD the authority to deny a FOIA request rests solely with designated Initial Denial Authorities (IDA). The Army’s 33 IDAs are designated in paragraph 5-200d of AR 25-55. While units are responsible for addressing the initial FOIA request, redacted information must be forwarded to an appropriate IDA for final decision to deny the redacted information. The type of record requested determines who the IDA will be for the particular record. For example, TJAG is the IDA for most administrative investigations, the Surgeon General is the IDA for medical records, and the Provost Marshal General is the IDA for CID records. When operating as part of a Combatant Command, however, units must utilize the Combatant Command’s FOIA regulations and IDAs in accordance with their guidance. For example, the CENTCOM Chief of Staff is the initial denial authority for CENTCOM records. At times, it may require some analysis to determine the correct IDA.

E. The most common FOIA request received by deployed units is a request for investigations and related material. Below are the most frequently relied upon FOIA exemptions applicable to such records (NOT an exhaustive list).

1. **Exemption 1: Classified Information.** This exemption permits the withholding of records that are *substantively and procedurally* properly classified IAW Executive Order 13526, (Classified National Security Information, 75 Fed. Reg. 707 (Jan. 5, 2010)). Classified documents responsive to a valid FOIA request must undergo a declassification review to ensure they are substantively and procedurally properly classified at the time of the FOIA request. Documents that have undergone a declassification review within two years prior to the FOIA request need not undergo another declassification review. Executive Order 13526 only authorizes Top Secret, Secret, and Confidential security classifications. All other security markings (i.e., FOUO) are insufficient to protect a document from release utilizing Exemption 1; however, if used correctly, they should signal that another FOIA exemption likely applies. Also, post-request classification is authorized as long as the criteria of E.O. 13526 are followed. The “reasonably foreseeable harm” standard has no impact on Exemption 1 material since classified information must be withheld from release pursuant to law. A discretionary release of classified information is not appropriate.

2. **Exemption 2: Internal Personnel Rules and Practices.** This exemption permits the withholding of records that deal with matters that are related **solely to the internal personnel rules and practices of the agency**. In March 2011, the Supreme Court ruled in *Milner v. Dep’t of the Navy*, and significantly limited the 30 year precedent of using Exemption 2 to withhold what was previously withheld as trivial internal matters in which there was little or no public interest and significant internal matters the release of which will allow the requester to circumvent an agency regulation or frustrate an agency function or mission (previously referred to as “Low 2” and “High 2”). Since *Milner*, Exemption 2 is limited to internal personnel and human resources documents. The

Supreme Court looked at the plain language of the statute and held that Exemption 2 encompasses only records relating to issues of employee relations and human resources. The Court noted that the Government has other tools at hand to shield national security information and other sensitive materials, specifically looking to Exemption 1, 3 and 7 as alternatives to withhold information where Exemption 2 had previously been invoked.

3. **Exemption 3: Other Federal Withholding Statutes.** This exemption permits the withholding of information that Congress exempted from disclosure via a federal statute. In order for a federal statute to qualify as an Exemption 3 statute, the statute must either require that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or establish particular criteria for withholding or refer to particular types of matters to be withheld. For example, 10 U.S.C. § 130b, allows withholding of information on personnel of overseas, sensitive, or routinely deployable units. This statute establishes particular criteria for withholding (information on personnel of overseas, sensitive, or routinely deployable units). NOTE: While the language of 10 U.S.C. § 130b suggests there is discretion on whether to withhold or release this information, it is DoD policy that personal information about service-members are not released [See Exemption 6 below]. This requires the redaction of personally identifiable information about DoD personnel, to include names, from most investigations. [Do not redact the name of the requester if included in the investigation]. If material is to be withheld by an Exemption 3 statute, the protection afforded by that statute should be applied, therefore, a discretionary release is not appropriate. Additionally, 10 U.S.C. § 130e responded to the ruling in *Milner* (Exemption 2), allowing for certain information to be withheld to protect security vulnerabilities related to DoD critical infrastructure.

4. **Exemption 5: Privileged Memoranda & Internal Agency Communication.** This exemption permits the withholding of records that are inter-agency or intra-agency memorandums or letters that would not be available by law to a party in litigation with the agency. Exemption 5 incorporates most common law discovery privileges. Legal advice and investigation legal reviews can be routinely withheld under exemption 5 utilizing the attorney-client privilege and/or the attorney work-product privilege. Recommendations not approved by the approval authority should be withheld under the deliberative process privilege. Once approved however, recommendations become final agency decisions, no longer qualifying for protection under the deliberative process privilege. Exemption 5 is greatly impacted by the “reasonably foreseeable harm” standard. Since the interest protected by Exemption 5 is a governmental interest and not a private interest, it is ripe for discretionary release. Before Exemption 5 can be invoked, an agency must be able to articulate an actual harm that will result if the records are released. In addition to the age of the record and the sensitivity of the content, the nature of the decision at issue, the status of the decision, and the personnel involved, are all factors that should be analyzed in determining whether a discretionary release is appropriate.

5. **Exemption 6: Protection of Personal Privacy.** This exemption permits the withholding of personal information about an individual the disclosure of which would constitute a clearly unwarranted invasion of personal privacy. When determining whether withholding is appropriate, the individuals’ privacy interest in the information must be balanced with the public’s interest in disclosure. Since 9/11 members of DoD, both Civilian and military, have a heightened privacy interest in their personal information that most often outweighs the public’s interest in disclosure. As such, most personal information about members of DoD should be redacted from records before they are released. IAW DoD policy, “release of information on DoD personnel will be limited to the names, official titles, organizations, and telephone numbers for personnel only at the office director level or above, provided a determination is made that disclosure does not raise security or privacy concerns” (Memorandum, Office of the Secretary of Defense, Subject: Withholding of Information that Personally Identifies DoD Personnel, 1 Sep. 2005). As a matter of practice, personal information about enlisted personnel and officers below the rank of brigadier general should not be released IAW the DoD policy. If release of the information would constitute a clearly unwarranted invasion of personal privacy, subsequent release of that information would be deemed to cause reasonably foreseeable harm to the personal privacy of the individual involved. As a result, Exemption 6 information is not suitable for discretionary release under the “reasonably foreseeable harm” standard.

6. **Exemption 7: Law Enforcement Records.** This exemption permits the withholding of records or information *compiled for law enforcement purposes* if the disclosure could reasonably be expected to result in any of six specified harms. The two most common harms cited involving the release of an investigation is that release “could reasonably be expected to interfere with enforcement proceedings” (7.A.) or “release could reasonably be expected to constitute an unwarranted invasion of personal privacy” (7.C.). Use of Exemption 7 is limited to investigations that involve the enforcement of a statute or regulation (law enforcement) and lasts only so long as the potential harm exists. For example, the first harm mentioned above could be cited to prevent the release of an

unfinished investigation or during the pendency of a resultant adverse administrative action but could not be used once that adverse administrative action has been completed. Since a specific harm must be identified prior to the applicability of the exemption itself, Exemption 7.A. and 7.B. information should not be the subject of a discretionary release under the new standard.

VII. FINANCIAL LIABILITY INVESTIGATIONS

A. Introduction.

1. Financial Liability Investigations of Property Loss (FLIPL), formerly known as Reports of Survey, serve multiple purposes. They document circumstances surrounding loss, damage, destruction, or theft (LDDT) to government property; serve as a voucher for adjusting property records; and document a charge of financial liability, or provide for relief of financial liability. Imposition of liability is a purely administrative process that is designed to promote a high degree of care for Army property through deterrence.

2. ***It is not a punitive program.*** Commanders should consider other administrative, nonjudicial, or judicial sanctions if damage or loss of property involves acts of misconduct.

3. The investigation is completed on DD Form 200 and guided by DA Form 7531, Checklist and Tracking Document for Financial Liability Investigations of Property Loss.

B. Alternatives to Financial Liability Investigations.

1. Statement of Charges/Cash Collection Voucher (consolidated on DD Form 362) when liability is admitted and the charge does not exceed one month's base pay.

2. Cash sales of hand tools and organizational clothing and individual equipment.

3. Unit-level commanders may adjust losses of durable hand tools up to \$100 per incident, if no negligence or misconduct is involved.

4. Abandonment orders may be used in combat, large-scale field exercises simulating combat, military advisor activities, or to meet other military requirements.

5. If the commander determines that no negligence was involved in the damage to the property, no financial liability investigation is required as long as the approving authority concurs.

C. The Financial Liability Investigation System.

1. *Initiating a Financial Liability Investigation.*

a. Active Army commanders will initiate the investigation within 15 calendar days of discovering the loss or damage.

b. Mandatory financial liability investigations:

(1) When an individual refuses to admit liability by signing a statement of charges, cash collection voucher or other accountability document, and negligence or misconduct is suspected.

(2) Anytime a higher authority or other DA regulations directs a financial liability investigation.

(3) The LDDT involves a controlled item.

(4) When property is lost by an outgoing accountable officer, unless voluntary reimbursement is made for the full value of the loss.

(5) When the amount of loss or damage exceeds an individual's monthly base pay, even if liability is admitted.

(6) When damage to government quarters or furnishings exceeds one month's base pay.

(7) When the loss involves certain bulk petroleum products.

(8) When the loss results from fire, theft, or natural disaster.

(9) Additional circumstances as outlined in AR 735-5.

c. Joint Financial Liability Investigations.

(1) Absent a loan agreement stating otherwise, the regulation of the Service that owns the property (property is located on that service's property account) is the appropriate regulation to apply.

(2) The Army and Air Force have a reciprocal agreement outlined in paragraph 14-36 of AR 735-5 that explains the process for processing financial liability investigations that find Air Force personnel liable for the loss, damage, or destruction of Army property. Upon completion of the investigation, it should be forwarded to the appropriate Air Force approval authority for final action and possible collection.

(3) For all other situations where non-Army personnel are found to be liable for the loss, damage, or destruction of Army property, the procedures of AR 735-5, paragraph 14-35 should be followed. Upon completion of the investigation, the respondent will be formally notified and requested to make payment in full. If after 60 days, the respondent fails to pay, the investigation should be sent to the respondent's servicing finance office for processing.

(4) Financial liability investigations that find contractors liable should be investigated by the contracting office and processed IAW the applicable contract.

2. *Processing Times.*

a. In the Active Army, financial liability investigations will normally be processed within 75 days.

b. Financial liability investigations in the National Guard and U.S. Army Reserves will normally be processed within 240 days.

3. *Approving Authority.*

a. In accordance with AR 735-5, officers in the grade of O5 may approve a FLIPL with a total loss value up to \$5,000 if delegated in writing by the O6 commander and the item(s) is not classified as communications security (COMSEC), sensitive item, or equipment that contains personal identification information. Commanders in the grade of O6 or GS-15 supervisors may approve a FLIPL with a total loss value up to \$100,000 if the item is not classified as a controlled item. For losses of \$100,000 or greater, or losses involving a controlled item, the approval authority is the first GO or SES Civilian in the rating chain. The approving authority does not have to be a court-martial convening authority.

b. If negligence or willful misconduct is clearly established from the facts and circumstances known at the time the LDDT is discovered, the approving authority may recommend liability without appointing an IO. The approving authority is then responsible for ensuring that the value of loss is properly computed and that the individual against whom liability is recommended is properly notified and given an opportunity to respond.

4. *Appointing Authority.* The appointing authority is an officer or Civilian employee designated by the approving authority with responsibility for appointing financial liability investigation investigating officers. The approving authority may designate, in writing, a Lieutenant Colonel (O5) (or major in a lieutenant colonel billet) or DoD Civilian employee in the grade of GS-13 (or a GS-12 in a GS-13 billet) or above as an appointing authority. When a GO or SES is the approving authority (FLIPL involving controlled item or \$100,000 or greater) the appointing authority will be the first O6 in the rating chain.

5. *Financial Liability Officer (IO).*

a. The IO will be senior to the person subject to possible financial liability, "except when impractical due to military exigencies."

b. The IO can be an Army commissioned officer; warrant officer; or noncommissioned officer in the rank of Sergeant First Class (E7) or higher; a Civilian employee GS-07 or above; a commissioned officer of another service; or a Wage Leader (WL) or Wage Supervisor (WS) employee. In joint activities, DoD commissioned or warrant officers, or noncommissioned officers in the grade of E-7 or above, qualify for appointment as IOs. (See AR 735-5, table 13-1, for the grade equivalency between military personnel and Civilian employees.)

c. The investigation is the IO's primary duty.

d. The IO must get an appropriate briefing before beginning the investigation. This briefing does not have to be from a JA but can be from another appropriate official, often the S4 (Supply/Logistics)

D. Legal Considerations for Imposing Liability. Individuals may be held financially liable for the LDDT of Government property if they were negligent or have committed willful misconduct, and their negligence or willful misconduct is the proximate cause of that LDDT. In order to be held financially liable, the respondent must have: (1) been responsible for the property; (2) been negligent or committed willful misconduct; and (3) that negligence or willful misconduct must be the proximate cause of the loss.

1. *Responsibility for property.* The type of responsibility a person has for property determines the obligations incurred by that person for the property

a. *Command responsibility.*

(1) The commander has an obligation to ensure proper use, care, custody and safekeeping of government property within his or her command.

(2) Command responsibility is inherent in command and cannot be delegated. It is evidenced by assignment to command at *any* level.

b. *Direct responsibility.*

(1) An obligation of a person to ensure the proper use, care, custody and safekeeping of all government property for which the person is receipted.

(2) Direct responsibility is closely related to supervisory responsibility, which is discussed below.

c. *Personal responsibility:* the obligation of an individual for the proper use, care and safekeeping of government property in his or her possession, with or without a receipt.

d. *Supervisory responsibility.*

(1) The obligation of a supervisor for the proper use, care and safekeeping of government property issued to, or used by, subordinates. It is inherent in all supervisory positions and is not contingent upon signed receipts or responsibility statements.

(2) If supervisory responsibility is involved, consider the following additional factors:

(a) The nature and complexity of the activity and how that affected the ability to maintain close supervision.

(b) The adequacy of supervisory measures used to monitor the activity of subordinates.

(c) The extent supervisory duties were hampered by other duties or the lack of qualified assistants.

e. *Custodial responsibility.*

(1) The obligation of an individual to exercise reasonable and prudent actions in properly caring for and ensuring proper custody and safekeeping of property in storage, awaiting issue or turn-in. Custodial responsibility results from assignment as a supply sergeant, supply custodian, supply clerk, or warehouse person.

(2) When unable to enforce security, they must report the problem to their immediate supervisor.

2. **Negligence or Culpability. Before a person can be held liable, the facts must show that he or she, through negligence or willful misconduct, violated a particular duty involving the care of the property.**

a. *Simple negligence:* The failure to act as a reasonably prudent person would have acted under similar circumstances. A reasonably prudent person is an average person, not a perfect person. Consider also the person's age, experience, and special qualifications; the type of responsibility involved; the type and nature of the property (more complex or sensitive property normally requires a greater degree of care.)

b. *Gross negligence:* An extreme departure from the course of action expected of a reasonably prudent person, all circumstances being considered, and accompanied by a reckless, deliberate or wanton disregard for the foreseeable consequences of the act.

c. *Willful misconduct:* Any intentional wrongful or unlawful act.

3. **Proximate cause:** The cause which, in a natural and continuous sequence, unbroken by a new cause, produces the loss or damage, and without which the loss or damage would not have occurred. It is the primary

moving cause, or the predominate cause, from which the loss follows as a natural, direct and immediate consequence, and without which the loss would not have occurred.

4. Loss. Before a person may be held liable, the facts must show that a loss to the Government occurred. There are two types of losses that can result in financial liability.

a. *Actual loss.* Physical loss, damage or destruction of the property.

b. *Loss of accountability.* Due to the circumstances of the loss, it is impossible to determine if there has been actual physical loss, damage or destruction because it is impossible to account for the property.

E. **Determining the Amount of Loss.**

1. If possible, determine the actual cost of repair or actual value at the time of the loss. The preferred method is a qualified technician's two-step appraisal of fair market value. The first step involves a determination of the item's condition. The second step is to determine the commercial value of the item, given its condition.

2. If other means of valuation are not possible, consider depreciation. Compute the value according to AR 735-5, Appendix B.

F. **Limits on Financial Liability.**

1. The general rule is that an individual will not be charged more than one month's base pay.

a. Charge is based upon the Soldier's base pay at the time of the loss.

b. For ARNG and USAR personnel, base pay is the amount they would receive if they were on active duty.

c. As exceptions to the general rule, the following personnel are liable for the full amount (less depreciation) of the loss:

(1) Soldiers who lose personal arms or equipment ("personal arms and equipment" is defined at the end of AR 735-5).

(2) Persons losing public funds.

(3) Accountable officers.

(4) Persons assigned government quarters are liable for the full amount of the loss to the quarters, furnishings or equipment as a result of specific finding of gross negligence or willful misconduct.

(5) States and territories of the United States.

(6) Contractors and contractor employees.

(7) Nonappropriated fund activities.

2. *Involuntary Withholding of Current Pay.*

a. Members of the Armed Forces may have charges involuntarily withheld. (See 37 U.S.C. § 1007.)

b. Involuntary withholding for Civilian employees. (See 5 U.S.C. § 5512, DoD FMR Volume 8, DFAS-IN 37-1.)

c. No involuntary withholding for the loss of NATO property. (See DAJA-AL 1978/2184.)

G. **Rights of Individual for Whom Financial Liability is Recommended.**

1. The financial liability investigation form (DD Form 200) contains a limited rights notice. However, to adequately inform an individual of his or her rights, see AR 735-5, para 13-42 and figures 13-15.

2. If financial liability is recommended, the IO must take the following actions:

a. Give the person an opportunity to examine the report of investigation.

b. Ensure that the person is aware of his/her rights.

c. Fully consider and attach any statement the individual desires to submit.

d. Carefully consider any new or added evidence and note that the added evidence has been considered.

e. Explain the consequences of a finding of gross negligence for an investigation involving government quarters, furnishings and equipment.

H. Duties of the Approving Authority.

1. If the IO recommends liability, a JA must review the adequacy of the evidence and the propriety of the findings and recommendations before the approving authority takes action.

2. The approving authority is not bound by the IO's or JA's recommendations.

3. If the approving authority decides to assess financial liability contrary to the recommendations of the IO or JA, that decision and its rationale must be in writing.

4. If considering new evidence, the approving authority must notify the individual and provide an opportunity to rebut.

5. Ensure that the individual was advised of his or her rights.

6. May reduce the assessed liability, in whole or in part, if "warranted by the circumstances" (per para. 13-40d, AR 735-5). This gives approving authorities significant latitude to reduce or eliminate liability even if the legal standard for assessing liability is met.

7. Initiate collection action by sending documentation to the servicing finance office.

I. Relief from Financial Liability Investigations.

1. Appeals.

a. The appeal authority is the next higher commander above the approving authority (*see* AR 735-5, para. 13-52, for delegation authority).

b. The respondent has 30 days to appeal unless he or she shows good cause for an extension.

c. The appeal is submitted to the approving authority for reconsideration before action by the appeal authority.

d. If the approving authority denies reconsideration, the following actions are required:

(1) Prepare a memorandum giving the basis for denying the requested relief.

(2) The approving authority must personally sign the denial.

(3) Forward the action to the appeal authority within 15 days.

e. Action by the appeal authority is final.

2. Re-opening Financial Liability Investigations.

a. Authority to reopen rests with the approval authority.

b. Not an appeal, but may occur as part of an appeal. Re-opening is proper when:

(1) A response is submitted to the IO from the person charged subsequent to the approving authority having assessed liability.

(2) A subordinate headquarters recommends reopening based upon new evidence.

(3) The property is recovered.

(4) The approving authority becomes aware that an injustice has been perpetrated against the government or an individual.

3. Remission of Indebtedness (See AR 735-5; AR 600-4).

a. Available to both Officers and Enlisted Soldiers. Note that the applicable provisions in AR 735-5 indicate that only Enlisted Soldiers may apply for remission of indebtedness, but this is because these provisions cite an outdated version of AR 600-4. AR 600-4 no longer limits such applications to the Enlisted ranks.

b. Only to avoid extreme hardship.

c. Only unpaid portions can be remitted. Suspend collection action long enough for the Soldier to submit his request for remission of the debt.

4. Army Board for the Correction of Military Records (ABCMR) (*See* AR 15-185).

5. Civilian employees may avail themselves of grievance/arbitration procedures (*See* paragraph AR 735-5, para. 13-45).

J. SJA Review.

1. *For the Approving Authority*: adequacy of evidence and propriety of findings and recommendations.

2. *For the Appeal Authority*: evidence is adequate and findings are proper.

3. *Caveat*: the same attorney cannot perform both legal reviews (*See* paragraph 13-52b(1)).

4. CONCLUSION: Commanders must ensure that the financial liability investigation process is fair and uniform in its treatment of agency members. Liability of individuals responsible for property (whether based on command, supervisory, direct, custodial, or personal responsibility) should be fully considered. Legal advisors should get involved early in the process to help commanders and IOs focus their investigations, and to ensure that individual rights are addressed before imposition of liability.

VIII. CONSCIENTIOUS OBJECTORS

A. Introduction.

1. Definition. **Members of the Armed Forces who have “a firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and belief” may apply for Conscientious Objector (CO) status.** Supreme Court decisions have expanded “religious training and belief” to include any moral or ethical belief system held with the strength of conventional religious convictions. *See Welsh v. U.S.*, 398 U.S. 333 (1970).

2. Classification.

a. *Class I-O*: A service member who, by reason of conscientious objection, sincerely objects to participation of any kind in war in any form.

b. *Class I-A-O*: A service member who, by reason of conscientious objection, sincerely objects to participation as a combatant in war in any form, but whose convictions permit military service in a noncombatant status.

3. What is NOT a category of CO status:

a. Objection based on a CO claim that existed, but was not presented, prior to notice of induction, enlistment or appointment (however, claims arising out of experiences before entering military service, that did not become fixed until after entry, will be considered).

b. Objection based solely upon policy, pragmatism or expediency.

c. Objection to a certain war.

d. Objection based upon insincere beliefs.

e. Objection based solely on a claim already denied by the Selective Service System.

B. Burden of Proof and Standards.

1. The applicant for CO status must prove by “*clear and convincing*” evidence that:

a. the basis of the claim satisfies the definition and criteria for CO; and

b. the claimant's belief is honest, sincere and deeply held.

2. An applicant for CO status must choose either 1-O (war in any form) or 1-A-O (noncombatant). An applicant choosing 1-O will not be granted 1-A-O as a compromise.

3. The unit will not use the CO process to eliminate those who do not qualify as COs. Nor will the unit use the CO process in lieu of adverse administrative separation procedures for unsatisfactory performance, substandard duty or misconduct.

C. Application Procedures.

1. Form. Military personnel seeking either a discharge (1-O) or noncombatant duties (1-A-O) must submit an application on a DA Form 4187 (Personnel Action) to their immediate commander. The individual will include all of the personal information required by Appendix B, AR 600-43.

2. Suspense.

a. *Active Duty Suspense*: Active Army units will process the application and forward it to HQDA within 90 days from the date submitted.

b. *Reserve Component Suspense*: Reserve Army units will process the application and forward it HQDA within 180 days from the date submitted.

3. Immediate Commander Responsibilities.

a. Counsel Soldier.

b. Coordinate interview with Chaplain.

c. Coordinate interview with psychiatrist or medical officer.

d. Forward completed interviews, application and recommendation to SPCMCA.

4. SPCMCA Responsibilities.

a. Appoint IO in the grade of O-3 or higher.

b. Ensure IO conducts a proper investigation.

5. IO Responsibilities.

a. Conduct a hearing at which the applicant may appear and present evidence.

b. Prepare a written report, and forward it to the GCMCA.

6. GCMCA Responsibilities.

a. Army GCMCAs may approve 1-A-O status. Once approved, the servicemember is eligible only for deployment to areas where duties normally do not involve handling weapons.

b. Additionally, Army GCMCAs must forward to HQDA any applications for 1-O status and any applications for 1-A-O status upon which he or she recommends disapproval. Approval authorities for other services vary.

D. Use, Assignment and Training of CO Applicants.

1. Persons who have submitted a CO application will be retained in their units and assigned duties providing minimum practicable conflict with their asserted beliefs, pending a final decision on their application.

2. An Active Army Soldier who receives **individual** orders for reassignment, or who has departed the unit in compliance with **individual** reassignment orders, may not apply for CO status until arriving at the new duty station. This policy does not apply to Soldiers who are TDY en route for a period in excess of 8 weeks. These Soldiers may apply at their TDY duty station.

3. On the other hand, an Active Army Soldier who is assigned or attached to a unit that has unit reassignment order instructions (i.e., the unit is deploying) may submit an application for CO status. The unit must process the application as operational and mission requirements permit. The Soldier must continue to prepare for deployment, and will deploy with the unit unless his or her application has been approved. If the Soldier's

application has been forwarded to the DA Conscientious Objector Review Board (DACORB), the GCMCA **may** excuse the Soldier from deployment. Contact the DACORB and determine the status of the application before the GCMCA excuses the Soldier. A public phone number for DACORB was not publicly available at time of publication, the email army.arbainquiry@mail.mil covers all ARBA inquiries, including the DA Conscientious Objector Review Board.

4. In the case of RC Soldiers not on active duty, the submission of an application after publication of orders to report for AD or ADT will not serve as a basis to delay reporting (*see* AR 600-43, para. 2-10). If the Soldier applies for CO status before AD or ADT orders are issued, and the Soldier's application cannot be processed before the Soldier's reporting date, the Soldier must comply with the orders (the application must, however, be sent to the proper Active Army GCMCA for processing). Members of the IRR may submit CO applications at their mobilization stations. Submission will not preclude further assignment or deployment during processing of the application.

IX. FAMILY PRESENTATIONS

A. Congressional Requirement.

1. Pub. L. 102-484, div. A, title X, § 1072, Oct. 23, 1992, 106 Stat. 2508 (10 U.S.C. § 113, note).
2. Requires the Service Secretaries to ensure that fatality reports and records pertaining to members of the Armed Forces who die in the line of duty are made available to Family members.
3. Within a reasonable period of time after the Family members are notified of the death, but not more than 30 days after the date of notification, the Secretary must:
 - a. in any case under investigation, inform the Family members of the names of the agencies conducting the investigation and of the existence of any reports by such agencies that have been or will be issued; and
 - b. furnish, if the Family members desire, a copy of any completed investigative report to the extent such reports may be furnished consistent with the Privacy Act and the Freedom of Information Act.

B. Army Implementation.

1. Resources:
 - a. AR 638-34, Army Fatal Incident Family Brief Program (19 February 2015).
 - b. Army Dir. 2010-01, Conduct of AR 15-6 Investigations Into Suspected Suicides and Requirements for Suicide Incident Family Briefs (26 March 2010).
 - c. Army Dir. 2010-02, Guidance for Reporting Requirements and Redacting Investigation Reports of Deaths and Fatalities (26 March 2010).
2. Key Definitions.
 - a. *Fatal Incident Brief* is a comprehensive term that includes all categories of Army Chief of Staff mandated offers of a Family brief to a deceased active duty Soldier's PNOK that died as a result of: training and operational accidents, friendly fire/suspected friendly fire, confirmed suicides, or high interest case.
 - b. *Fatal Accident Brief* is one of two subsets of Fatal Incident; term that includes mandatory offer of Family brief to PNOK of deceased active duty Soldier who died as a result of: training and operational accident, such as a government helicopter crash or government vehicle rollover, friendly fire/suspected friendly fire or high interest case.
 - c. *Suicide Incident Brief* is one of two subsets of Fatal Incident; term that includes mandatory offer of Family to PNOK of deceased active duty Soldier whose manner of death was "suicide" as listed on either a death certificate, autopsy report or other source document.
 - d. *Primary Next of Kin PNOK*. The legal next of kin. That person of any age most closely related to the individual according to the line of succession as defined in AR 600-8-1. Seniority, as determined by age, will control when the persons are of equal relationship.

e. *Family member:*

(1) Spouse.

(2) Unmarried child of a sponsor, including an adopted child, step child, foster child or ward, who either: (a) has not passed his or her 21st birthday; (b) is incapable of self-support because of a mental or physical incapacity that existed before that birthday and is (or was at the time of the member's or former member's death) in fact dependent on the sponsor for over one-half of his or her support; or (c) has not passed his or her 23rd birthday, is enrolled in a full-time course of study in an institution of higher learning and is in fact dependent on the sponsor for over one-half of his or her support.

(3) A parent or parent-in-law of a sponsor who is in fact dependent on the sponsor for one-half of his or her support and residing in the sponsor's household.

3. *Presentations will be Offered to Family Members for:* operational, training and/or friendly fire incidents, and confirmed Soldier suicides investigated under the provisions of AR 15-6, AR 385-10, DODI 6055.07, and AR 638-34 for the following circumstances:

a. Class A military training and/or operational accidents resulting in the death of a Soldier.

b. Death of a Soldier where there is anticipated litigation for or against the Government or a Government contractor.

c. All Soldier death cases where the Armed Forces Medical Examiner (AFME), or civilian equivalent, has determined the manner of death to be suicide.

d. In general, fatal accidents that are hostile, but do not occur as a result of engagement with the enemy.

e. Special interest cases as determined by The Adjutant General (TAG).

C. Preparing the Presentation to the PNOK.

1. Once the investigation is complete, the TAG will notify the AR 15-6 approval authority of the requirement to conduct a presentation. Once the approval authority has taken final action on the investigation, the investigation has been redacted, and the O-6 briefer has been identified, the CMAOC will prepare the statement of offer (SOO) of presentation letter to PNOK for a Army Fatal Incident Family Brief and the brigade-level commander will prepare the SOO for a confirmed Suicide Family Brief. The CAO will then provide the SOO to the PNOK to make their election to accept or decline the offer.

2. Briefing Team.

a. At a minimum, the briefing team must consist of the briefer (O6 or higher), the Family's CAO, a chaplain (unless the NOK requests no chaplain), other SMEs, and for fatal training, operational, and/or friendly fire accidents, a CMAOC representative where directed by TAG.

b. The briefer must consider including the SJA/legal advisor or PAO representative when it is apparent that a Family has invited (or may invite) the local media, or if a Family legal representative will attend the presentation.

(1) The CAO must work with the PNOK to obtain a list of people the PNOK intends to invite to the presentation to enable the presentation team to determine the Family's intent to invite media or legal representation.

(2) **NOTE:** The Army is prohibited from putting conditions or limitations upon those whom the Family wishes to invite to the presentation.

(3) The briefer must also consider including an interpreter if the PNOK or other attending Family members do not understand English.

D. Conducting the Family Presentation.

1. The briefer's primary responsibility is to meet personally with the PNOK and deliver a thorough, open explanation of the releasable facts and circumstances surrounding the accident. At a minimum, the briefer must provide the following:

a. An explanation of the unit's mission, highlighting the Soldier's significant contributions to the mission and the Army.

b. An accurate account of the facts and circumstances leading up to the accident; the sequence of events that caused the accident; and a very clear explanation of primary and contributing factors causing the accident, as determined by the collateral investigation.

c. Actions taken at the unit level to correct any deficiencies.

2. The most favored choice for the presentation is the PNOK's home.

3. Style of Presentation.

a. *Dialogue with no notes, but with maps and diagrams of training areas.* This works best for a briefer who is intimately familiar with the accident and investigation.

b. *Bullet briefing charts.* These work well as they tend to help the briefer stay focused. Charts must be reviewed and approved in advance by the SJA.

c. *Simple notes and an executive summary.* Written materials must be reviewed and approved by the SJA, and copies should be left with the PNOK, if requested.

4. If a Family presentation must proceed with a legal representative present, but without Army legal advice, the briefer must inform the PNOK that the presentation is strictly intended to provide information to the Family. If the attorney has a list of questions for the Family to ask, the briefer must offer to take the questions back to the servicing SJA to obtain complete answers. The SJA may then follow up directly with the PNOK.

E. **Completion of Family Presentation.** Within ten working days of the presentation, the briefer must submit an AAR through the AR 15-6 investigation appointing authority and command channels to the CMAOC.

F. **SJA Requirements.**

1. The SJA is required to review the presentation to ensure that it contains no admission of liability; no waiver of any defense; no offer of compensation; or any other statement that might jeopardize the Army's litigation posture. This may include a review of briefing charts, notes and executive summaries.

2. The SJA or designee should be prepared to attend the presentation if requested by the briefer if the situation dictates (Family has invited or may invite a Family legal representative to attend).

3. The SJA must prepare a letter to accompany the redacted version of the report delivered to the Family explaining, in general terms, the reasons for the redactions.

G. **Release of the Legal Accident Investigation.** The legal accident investigation will be released in the following order:

1. PNOK and other Family members designated by the PNOK.

2. Interested offices within DOD and DA

3. Members of Congress, upon request, IAW AR 1-20

4. Members of the public and media, upon request, IAQ AR 360-1

H. **Navy and Marine Corps, JAGMAN, paras. 0233 & 0234.** Generally requires the Casualty Assistance Calls Officer to deliver the report of investigation to the next of kin, unless there is a reason for another individual to be assigned (e.g., technical subject-matter, personal friendship, etc.).

I. **Air Force, AFI 51-503, CH 10 (26 May 2010).**

1. Results of Accident Investigation Boards (AIB) must be briefed to the next of kin of deceased persons and seriously injured personnel.

2. Usually, the board president serves as the briefing officer. The briefing serves to:
 - a. Personally express the condolences of the Department of the Air Force.
 - b. Personally deliver a copy of the AIB report.
 - c. Provide a basic briefing on the investigation results, including the cause or factors contributing to the accident, and to answer questions.

APPENDIX

**ARMY REGULATION 15-6
INVESTIGATION GUIDE
FOR
INFORMAL INVESTIGATIONS**

INTRODUCTION

1. PURPOSE:

a. This guide is intended to assist investigating officers, who have been appointed under the provisions of Army Regulation (AR) 15-6, in conducting timely, thorough, and legally sufficient investigations. It is designed specifically for informal investigations, but some provisions are also applicable to formal investigations. It may also be used by legal advisors responsible for advising investigating officers. A brief checklist is included at the end of the guide as an enclosure. The checklist is designed as a quick reference to be consulted during each stage of the investigation. The questions in the checklist will ensure that the investigating officer has covered all the basic elements necessary for a sound investigation.

b. Investigating officers are encouraged to use this guide for general guidance regarding informal investigations. Investigating officers must consult their legal advisor for detailed guidance and assistance before commencing with the investigation.

c. This guide is based upon the 2 October 2006 version of AR 15-6.

2. DUTIES OF AN INVESTIGATING OFFICER:

The primary duties of an investigating officer are:

a. to ascertain and consider the evidence on all sides of an issue;

b. to be thorough and impartial;

c. to make findings and recommendations warranted by the facts and comply with the instructions of the appointing authority; and

d. to report the findings and recommendations to the appointing authority.

3. AUTHORITY:

a. AR 15-6 sets forth procedures for the conduct of informal and formal investigations. Only informal investigations will be discussed here. Informal investigations are those that most often have a single investigating officer who conducts interviews and collects evidence. In contrast, formal investigations normally involve due process hearings for a designated respondent. Formal procedures are required whenever a respondent is specifically designated by the appointing authority.

b. Informal procedures are not intended to provide a hearing for persons who may have an interest in the subject of the investigation. Since no respondents are designated in informal procedures, no one is entitled to the rights of a respondent, such as notice of the proceedings, an opportunity to participate, representation by counsel, or the right to call and cross-examine witnesses. The investigating officer may, however, make any relevant findings or recommendations concerning individuals, even where those findings or recommendations are adverse to the individual or individuals concerned. If the appropriate authority decides to take action against an individual based upon an AR 15-6 investigation, that individual will then be afforded certain due process rights before adverse action is taken.

c. AR 15-6 is used as the basis for many investigations requiring the detailed gathering and analyzing of facts, and the making of recommendations based on those facts. AR 15-6 procedures may be used on their own, such as in an investigation to determine facts and circumstances, or the procedures may be incorporated by reference into directives governing specific types of investigations, such as financial liability investigations and line of duty investigations. If such directives contain guidance that is more specific than that set forth in AR 15-6, the more specific guidance will control. For example, AR 15-6 does not contain time limits for completion of investigations; however, if another directive that incorporates AR 15-6 procedures contain time limits, that requirement will apply.

d. Only commissioned officers, warrant officers, or DA Civilian employees paid under the General Schedule, Level 13 (GS 13), or above may be investigating officers. The investigating officer must, with very few exceptions, also be senior to any person that is part of the investigation if the investigation may require the investigating officer to make adverse findings or recommendations against that person. Since the results of any investigation may have a significant impact on policies, procedures, or careers of government personnel, the appointing authority must purposely select the best qualified person for the duty based on their **education, training, experience, length of service, and temperament**. If during the investigation, the investigating officer begins to suspect that adverse

findings will be made against someone senior to the investigating officer, the investigating officer must contact the legal advisor immediately.

PRELIMINARY MATTERS

1. **Appointing authority.**

a. Under AR 15-6, the following persons may appoint investigating officers for informal investigations: any general court-martial convening authority, including those who have such authority for administrative purposes only; any general officer; a commander at any level; a principal staff officer or supervisor in the grade of major or above; any state adjutant general; and a DA Civilian supervisor paid under the Executive Schedule, SES, or GS/GM 14 or above, provided the supervisor is the head of an agency or activity or the chief of a division or department.

b. Only a general court-martial convening authority may appoint an investigation for incidents resulting in property damage of \$1M or more; loss or destruction of Army aircraft or missile; injury or illness likely to result in death or permanent total disability; death of one or more persons; or death of one or more persons by fratricide/friendly fire. If the investigating officer is conducting an investigation that involves one of these situations, and the investigation was not appointed by a general court-martial convening authority, the investigating officer must contact the legal advisor immediately. Errors in appointing authority nullify the investigation unless later ratified by an appropriate appointing authority.

c. For investigations of a death or deaths involving a deployed force(s), from what is believed to be hostile fire, the general court-martial convening authority may delegate, in writing, appointing/approval authority to a subordinate commander exercising special court-martial convening authority. If appointing/approval authority has been delegated and evidence is discovered during the investigation that indicates that the death(s) may have been the result of fratricide/friendly fire, the investigating officer **will immediately suspend the investigation and inform the appointing authority and legal advisor**. At this time the general court-martial convening authority will appoint a new investigation into the fratricide/friendly fire incident. Any evidence from the hostile fire investigation may be provided to the investigating officer or board conducting the fratricide/friendly fire investigation. The general court-martial convening authority may also appoint the same investigating officer if the investigating officer is still best qualified to perform the duty.

2. **Appointment procedures.** Informal investigation appointments may be made orally or in writing. If written, the appointment orders are usually issued as a memorandum signed by the appointing authority or by a subordinate with the appropriate authority line. Whether oral or written, the appointment should specify clearly the purpose and scope of the investigation and the nature of the findings and recommendations required. If the orders are unclear, the investigating officer should seek clarification. The primary purpose of an investigation is to report on matters that the appointing authority has designated for inquiry. The appointment orders may also contain specific guidance from the appointing authority, which, even though not required by AR 15-6, nevertheless must be followed. For example, AR 15-6 does not require that witness statements be sworn for informal investigations; however, if the appointing authority requires this, all witness statements must be sworn.

3. **Obtaining assistance.** The servicing Judge Advocate office can provide assistance to an investigating officer at the beginning of and at any time during the investigation. Investigating officers must always seek legal advice as soon as possible after they are informed of this duty and as often as needed while conducting the investigation. In serious or complex investigations for which a legal review is mandatory, this requirement to first meet with the legal advisor should be included in the appointment letter. Early coordination with the legal advisor will allow problems to be resolved before they are identified in the mandatory legal review. The legal advisor can assist an investigating officer in framing the issues, identifying the information required, planning the investigation, and interpreting and analyzing the information obtained. The attorney's role, however, is to provide legal advice and assistance, not to conduct the investigation or substitute his or her judgment for that of the investigating officer. NOTE: Complex and sensitive cases include those involving a death or serious bodily injury, those in which findings and recommendations may result in adverse administrative action, and those that will be relied upon in actions by higher headquarters.

4. **Administrative matters.** As soon as the investigating officer receives appointing orders, he or she should begin a chronology showing the date, time, and a short description of everything done in connection with the investigation. The chronology should begin with the date orders are received, whether verbal or written.

Investigating officers should also record the reason for any unusual delays in processing the case, such as the absence of witnesses due to a field training exercise. The chronology must be part of the final case file.

5. **Concurrent investigations.** An informal investigation may be conducted before, concurrently with, or after an investigation into the same or related matters by another command or agency. Appointing authorities and investigating officers must ensure that investigations do not hinder or interfere with criminal investigations or investigations directed by higher headquarters. In cases of concurrent investigations, investigating officers should coordinate with the other command or agency and other investigating officers to avoid duplication of investigative effort wherever possible. Information from other investigations may be incorporated into the AR 15-6 investigation and considered by the investigating officer but safety investigation information may not be shareable and severely limited to AR 15-6 investigating officers (AR 385-10). Likewise, a 15-6 investigating officer may be asked to share information with a concurrent investigation. The legal advisor should be consulted for guidance. Also, an investigating officer should immediately coordinate with the legal advisor if he or she discovers evidence of serious criminal misconduct. Criminal investigations by MPI or CID may take precedence.

CONDUCTING THE INVESTIGATION

1. Developing an investigative plan.

a. The investigating officer's primary duty is to gather evidence and make findings of fact and appropriate recommendations to the appointing authority. Before obtaining information, however, the investigating officer should develop an investigative plan that consists of: (1) an understanding of the facts required to reach a conclusion; and (2) a strategy for obtaining evidence. This should include a list of potential witnesses and a plan for when each witness will be interviewed. The order in which witnesses are interviewed may be important. An effective, efficient method is to interview principal witnesses last. This best prepares the investigating officer to ask all relevant questions and minimizes the need to re-interview critical witnesses. As the investigation proceeds, it may be necessary to review and modify the investigative plan.

b. The investigating officer should begin the investigation by identifying the information already available, and determining what additional information will be required before findings and recommendations may be made to the appointing authority. An important part of this is establishing the appropriate standards, rules, or procedures that govern the circumstances under investigation. The legal advisor or other functional expert can assist the investigating officer in determining the information that will be required.

2. Obtaining documentary and physical evidence.

a. The investigating officer may need to collect documentary and physical evidence such as applicable regulations, existing witness statements, accident or police reports, and photographs. This information, if gathered early, can save much valuable time and effort. Accordingly, the investigating officer should obtain this information at the beginning of the investigation. In some cases, the information will not be readily available, so the request should be made early so the investigating officer may continue to work on other aspects of the investigation while the request is being processed. The investigating officer should, if possible and appropriate, personally inspect the location of the events being investigated and take photographs if they will assist the appointing authority.

b. Investigating officers are limited to what physical evidence (i.e., photos, clothing, vehicles, house) they may examine (potentially a search) or take custody of (potentially a seizure) for purpose of their investigation. The investigating officer must first attempt to obtain the rightful owner's permission to examine or take custody of privately-owned items. The investigating officer's authority to search and seize privately-owned property is limited by the U.S. Constitution and Army regulation. Deliberately circumventing these limits may impact the investigation and the investigating officer. **Consult with your legal advisor if you need to examine or take custody of privately-owned property.**

c. A recurring problem that must be avoided is lack of documentation in investigations with findings of no fault, no loss, or no wrongdoing. It is just as important to support these findings with evidence as it is to document adverse findings. All too frequently an investigating officer who makes a finding of no fault, no loss, or no wrongdoing, closes the investigation with little or no documentation. This is incorrect and likely makes the investigation legally insufficient. Every conclusion the investigating officer makes must be supported by evidence. The report of investigation must include sufficient documentation to convince the appointing authority and others who may review the investigation that the finding of no fault, no loss, or no wrongdoing is supported by the evidence.

3. **Obtaining witness testimony.**

a. In most cases, witness testimony will be required. Clearly, the best interviews occur face-to-face; but, if necessary, interviews may be conducted by telephone or mail. Because of the preference for face-to-face interviews, telephone and mail interviews should be used only in unusual circumstances. Information obtained telephonically or by Video Teleconference or otherwise should be documented in a memorandum for record.

b. DA Form 2823.

(1) Statements should be taken on DA Form 2823. Although there is a box for the witness's social security number on the November 2006 version of DA 2823, there is no valid reason to require that information in an overwhelming majority of situations for privacy reasons. If a situation arises where a social security number is relevant and material to the investigation and thus must be collected, the information obtained must be properly safeguarded. Also, home addresses and phone numbers should not be recorded on the DA Form 2823 unless absolutely necessary.

(2) Legible handwritten statements and/or questions and answers are ordinarily sufficient. If the witness testimony involves technical terms that are not generally known outside the witness's field of expertise, the witness should be asked to define the terms the first time they are used.

c. Although AR 15-6 does not require that statements be sworn for informal investigations, the appointing authority, or other applicable regulation, may require sworn statements, or the investigating officer may, at his or her own discretion, ask for sworn statements, even where not specifically required. Under Article 136, UCMJ, military officers are authorized to administer the oath required to provide a sworn statement; 5 U.S.C. 303 provides this authority for Civilian employees. (Statements taken out of the presence of the investigating officer may be sworn before an official authorized to administer oaths at the witness's location.) Additionally, the statements must be properly sworn—that is proper raising of the hand, appropriate witnesses, etc.

d. Military personnel and Federal Civilian employees. Commanders and supervisors have the authority to order military personnel and to direct Federal employees to appear and testify. Some Civilian employees are members of unions, and may be subject to collective bargaining agreements that may impose conditions or limits on interviews of collective bargaining unit members. Prior to interviewing Civilian employees, the Investigating Officer should discuss potential limitations with the legal advisor.

e. Non-military affiliated civilians. Investigating officers do not have the authority to subpoena witnesses. Civilian witnesses who are not Federal employees may agree to appear, however, and, if necessary, be issued invitational travel orders. This authority should be used only if the information cannot be otherwise obtained (via telephone, Email, etc.) and only after coordinating with the legal advisor or appointing authority.

4. **Rights Advisement.**

a. All Soldiers suspected of criminal misconduct must first be advised of their rights. A DA Form 3881 should be used to record that the witness understands his or her rights and elects to waive those rights and make a statement or elects to invoke those rights and remain silent. It may be necessary to provide the rights warning at the outset of the interview. In some cases, however, an investigating officer will become aware of the witness's involvement in criminal activity only after the interview has started and incriminating evidence is uncovered. In such case, rights warnings must be provided as soon as the investigating officer suspects that a witness may have been involved in criminal activity. If a witness elects to assert his or her rights and requests an attorney, all questioning must cease immediately. Questioning may only resume in the presence of the witness's attorney, if the witness consents to being interviewed. The investigating officer should immediately consult with the legal advisor whenever a witness invokes the right to remain silent.

b. Note that these rights apply only to information that might be used to incriminate the witness. They cannot be invoked to avoid questioning on matters that do not involve violations of criminal law. Finally, these rights may be asserted only by the individual who would be accused of the crime. The rights cannot be asserted to avoid incriminating other individuals. The following example highlights this distinction.

c. **Example:** A witness who is suspected of stealing government property must be advised of his or her rights prior to being interviewed. However, if a witness merely is being interviewed concerning lost or destroyed government property in connection with a financial liability investigation, a rights warning would not be necessary unless evidence is developed that leads the investigating officer to believe the individual has committed a criminal

offense. If it is clear that the witness did not steal the property but has information about who did, the witness may not assert rights on behalf of the other individual.

5. **Scheduling witness interviews.** The investigating officer will need to determine which witnesses should be interviewed and in what order. Often, information provided by one witness can raise issues that should be discussed with another. Organizing the witness interviews will save time and effort that would otherwise be spent "backtracking" to re-interview prior witnesses concerning information provided by subsequent witnesses. While re-interviewing may be unavoidable in some circumstances, it should be kept to a minimum. The following suggests an approach to organizing witness interviews, but it is not mandatory.

a. When planning who to interview, identify the people who are likely to provide the best information. When conducting the interviews, start with witnesses that will provide all relevant background information and frame the issues. This will allow the later interviews of principal witnesses to be as complete as possible, avoiding the "backtracking" described above.

b. Concentrate on those witnesses who would have the most direct knowledge about the events in question. Without unnecessarily disclosing the evidence obtained, attempt to seek information that would support or refute information already obtained from others. In closing an interview, it is appropriate to ask if the witness knows of any other persons who might have useful information or any other information the witness believes may be relevant and material to the inquiry. It is also often prudent to ask one final open-ended question of each witness: "is there anything else you think I should know or anything else you want to say?"

c. Any information that is relevant and material should be collected regardless of the source. However, investigating officers should collect the best information available from the most direct source.

d. It may be necessary or advisable to interview experts having specialized understanding of the subject matter of the investigation.

e. At some point, there will be no more witnesses available with relevant and material information. It is not necessary to interview every member of a unit, for example, if only a few people have information relevant to the inquiry. Also, all relevant witnesses do not need to be interviewed if the facts are clearly established and not in dispute. However, the investigating officer must be careful not to prematurely terminate an investigation because a few witnesses give consistent testimony.

6. **Conducting witness interviews.** Before conducting witness interviews, investigating officers may consult Inspector General officials or law enforcement personnel such as Military Police officers or Criminal Investigation Division agents for guidance on interview techniques. The key for the investigating officer is to gather all the evidence necessary to answer the appointment order's charge. If the investigating officer doesn't gather proper evidence, the investigating officer's job becomes infinitely more complicated. The following suggestions may be helpful:

a. Prepare for the interview. While there is no need to develop scripts for the witness interviews, investigating officers may wish to review the information required and prepare a list of questions or key issues to be covered. This will prevent the investigating officer from missing issues and will maximize the use of the officer's and witness's time. Generally, it is helpful to begin with open-ended questions such as "Can you tell me what happened?" After a general outline of events is developed, follow up with narrow, probing questions, such as "Did you see SGT X leave the bar before or after SGT Y?" Weaknesses or inconsistencies in testimony can generally be better explored once the general sequence of events has been provided.

b. Ensure the witness's privacy. Investigating officers should conduct the interview in a place that will be free from interruptions and will permit the witness to speak candidly without fear of being overheard. Witnesses should not be subjected to improper questions, unnecessarily harsh and insulting treatment, or unnecessary inquiry into private affairs.

c. Focus on relevant and material information. Unless precluded for some reason, the investigating officer should begin the interview by telling the witness about the subject matter of the investigation. Generally, any evidence that is relevant and material to the investigation is permissible. The investigating officer should not permit the witness to get off track on other issues, no matter how important the subject may be to the witness. Information should be relevant and material to the matter being investigated. Relevancy depends on the circumstances in each case. Compare the following examples:

(1) Example 1: In an investigation of a loss of government property, the witness's opinions concerning the company commander's leadership style normally would not be relevant.

(2) Example 2: In an investigation of alleged sexual harassment in the unit, information on the commander's leadership style might be relevant.

(3) Example 3: In an investigation of allegations that a commander has abused command authority, the witness's observation of the commander's leadership style would be highly relevant.

d. Let the witness testify in his or her own words. Investigating officers must avoid coaching the witness or suggesting the existence or non-existence of material facts. After the testimony is completed, the investigating officer should assist the witness in preparing a written statement that includes all relevant information, and presents the testimony in a clear and logical fashion. Written testimony also should reflect the witness's own words and be natural. Stilted "police blotter" language is not helpful and detracts from the substance of the testimony. A tape recorder may be used, but the witness should be advised of its use (and the legal advisor should be consulted before interviews are recorded) Additionally, the tape should be safeguarded, even after the investigation is completed.

e. Protect the interview process. In appropriate cases, an investigating officer may direct witnesses not to discuss their statement or testimony with other witnesses or with persons who have no official interest in the proceedings until the investigation is complete. This precaution is recommended to eliminate possible influence on testimony of witnesses still to be heard. Witnesses, however, are not precluded from discussing matters with counsel.⁷ **Rules of Evidence:** Because an AR 15-6 investigation is an administrative and not a judicial action, the rules of evidence normally used in court proceedings do not apply. Therefore, the evidence that may be used is limited by only a few rules. The investigating officer should consult the legal advisor if he or she has any questions concerning the applicability of any of these rules.

a. The information must be relevant and material to the matter or matters under investigation. Irrelevant information must not be included in the investigation.

b. Information obtained in violation of an individual's Article 31, UCMJ, or 5th Amendment rights *may* be used in administrative proceedings unless obtained by unlawful coercion or inducement likely to affect the truthfulness of the statement.

c. Evidence of the results, taking, or refusal of a polygraph examination will not be considered without the consent of the person involved in such test.

d. Privileged communications between husband and wife, priest and penitent, attorney and client may not be considered, and present or former inspector general personnel will not be required to disclose the contents of inspector general reports, investigations, inspections, action requests, or other memoranda without appropriate approval.

e. "Off-the-record" statements will not be considered for their substance but can be relied upon to help find additional evidence.

f. An involuntary statement by a member of the Armed Forces regarding the origin, incurrence, or aggravation of a disease or injury may not be admitted.

8. **Standard of Proof.** Since an investigation is not a criminal proceeding, there is no requirement that facts and findings be proven beyond a reasonable doubt. Instead, unless another specific directive states otherwise, AR 15-6 provides that findings must be supported by "a greater weight of evidence than supports a contrary conclusion." That is, findings should be based on evidence which, after considering all evidence presented, points to a particular conclusion as being more credible and probable than any other conclusion. This is also known as the preponderance of the evidence.

CONCLUDING THE INVESTIGATION

1. **Preparing Findings and Recommendations.** After all the evidence is collected, the investigating officer must review it and make findings. The investigating officer should consider the evidence thoroughly and impartially, and make findings of fact and recommendations that are supported by the facts and comply with the instructions of the appointing authority.

a. **Facts:** To the extent possible, the investigating officer should fix dates, places, persons, and events, definitely and accurately. The investigating officer should be able to answer questions such as: What occurred? When did it occur? How did it occur? Why did it occur? Who was involved, and to what extent?

b. **Findings:** A finding is a clear and concise statement that can be deduced from the evidence in the record. In developing findings, investigating officers are permitted to rely on the facts and any reasonable inferences that may be drawn from those facts. In stating findings, investigating officers should refer to the exhibit or exhibits relied upon in making each finding. Findings (including findings of no fault, no loss, or no wrongdoing) must be supported by the documented evidence that must become part of the report. Exhibits should be numbered in the order they are discussed in the findings.

c. **Recommendations:** Recommendations should take the form of proposed courses of action consistent with the findings, such as disciplinary action, imposition of financial liability, or corrective action. Recommendations must be supported by the facts and consistent with the findings. Each recommendation should cite the specific findings that support the recommendation.

d. Facts, findings, and recommendations may be provided in a separate memorandum attached to the DA 1574. In that event, the DA 1574 should be appropriately annotated to accurately identify the memorandum.

2. **Preparing the Submission to the Appointing Authority.** After developing the findings and recommendations, the investigating officer should complete DA Form 1574 and assemble the packet.

a. All administrative documents, such as the memorandum of appointment, rights warning statements, Privacy Act statements, and chronology, will be marked as enclosures.

b. Every item of evidence offered or received by the investigating officer (with index) will be marked as exhibits.

c. Care should be taken to organize the investigation in a logical, coherent, useful manner.

3. **LEGAL REVIEW:**

a. AR 15-6 does not require that all informal investigations receive a legal review. The appointing authority, however, must get a legal review of all cases involving serious or complex matters, such as where the incident being investigated has resulted in death or serious bodily injury, or where the findings and recommendations may result in adverse administrative action, or will be relied on in actions by higher headquarters. Nonetheless, appointing authorities are encouraged to obtain legal review of all investigations and most do seek out such legal reviews. Other specific directives may also require a legal review. Generally, the legal review will determine:

(1) whether the investigation complies with requirements in the appointing order and other legal requirements;

(2) the effects of any errors in the investigation;

(3) whether the findings (including findings of no fault, no loss, or no wrongdoing) and recommendations are supported by sufficient evidence; and

(4) whether the recommendations are consistent with the findings.

b. If a legal review is requested or required, it is required before the appointing authority approves the findings and recommendations. After receiving a completed AR 15-6 investigation, the appointing authority may approve, disapprove, or modify the findings and recommendations, or may direct further action, such as the taking of additional evidence, or making additional findings.

CHECKLIST FOR INVESTIGATING OFFICERS

1. **Preliminary Matters:**

a. Has an appropriate level appointing authority appointed a proper investigating officer based on seniority, availability, experience, and expertise?

b. Does the appointment memorandum clearly state the purpose and scope of the investigation, the points of contact for assistance (if appropriate), and the nature of the findings and recommendations required?

- c. Has the initial legal briefing been accomplished?

2. Investigative Plan.

- a. Does the investigative plan outline the background information that must be gathered, identify the witnesses who must be interviewed, and order the interviews in the most effective manner?
- b. Does the plan identify witnesses no longer in the command and address alternative ways of interviewing them?
- c. Does the plan identify information not immediately available and outline steps to quickly obtain the information?

3. Conducting the Investigation.

- a. Is the chronology being maintained in sufficient detail to identify causes for unusual delays?
- b. Is the information collected (witness statements, MFR's of phone conversations, photographs, etc.) being retained and organized?
- c. Is routine coordination with the legal advisor being accomplished?
- d. Is all evidence relevant and material to an issue being investigated?

4. Preparing Findings and Recommendations.

- a. Is the evidence assembled in a logical, coherent, and useful fashion?
- b. Are the findings (including findings of no fault, no loss, or no wrongdoing) supported by the evidence? Does each finding cite the exhibits that support it?
- c. Are the recommendations supported by the findings?
- d. Are the findings and recommendations responsive to the tasking in the appointment memorandum?
- e. Did the investigation address all the issues (including systemic breakdowns; failures in supervision, oversight, or leadership; program weaknesses; accountability for errors; and other relevant areas of inquiry) raised directly or indirectly by the appointment?

5. Final Action.

- a. Was an appropriate legal review conducted?
- b. Is the investigation being turned in on time?