

[6210-01]

[Regulation Z; FC-0146]

PART 226—TRUTH IN LENDING**Official Staff Interpretations**

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Correction.

SUMMARY: This document corrects an error in Official Staff Interpretation FC-0146.

FOR FURTHER INFORMATION CONTACT:

Anne Geary, Chief Staff Attorney, Division of Consumer Affairs, Board of Governors of the Federal Reserve System, Washington, D.C. 20551, 202-452-3946.

In FR Doc. 78-5163 appearing at page 8117 of the issue for Tuesday, February 28, 1978, the last word in the seventeenth line of column three should have read "funds."

Board of Governors of the Federal Reserve System, April 5, 1978.

THEODORE E. ALLISON,
Secretary of the Board.

[FR Doc. 78-9541 Filed 4-10-78; 8:45 am]

[3510-24]

Title 13—Business Credit and Assistance**CHAPTER III—ECONOMIC DEVELOPMENT ADMINISTRATION, DEPARTMENT OF COMMERCE****PART 309—GENERAL REQUIREMENTS FOR ASSISTANCE****Restrictions on the Use of Lead-based Paint on Projects Assisted by EDA**

AGENCY: Economic Development Administration (EDA), Department of Commerce.

ACTION: Final rule.

SUMMARY: This rule contains a restriction on the use of lead-based paint on projects involving residential structures. EDA is adding this regulation to comply with legislation which requires Federal agencies to assure that Federal funds are not used on projects which could prove hazardous to children. The intended effect of this regulation is to assure that paint which is used on residential buildings assisted by the Agency meets certain standards of safety.

DATES: Effective date: April 11, 1978. Comments by: May 11, 1978.

ADDRESS: Send comments to: Assistant Secretary for Economic Development, U.S. Department of Commerce, Room 7800B, Washington, D.C. 20230.

FOR FURTHER INFORMATION CONTACT:

Information on this regulation only: James F. Marten, U.S. Department of Commerce, Room 7009, Washington, D.C. 20230, 202-377-5441.

SUPPLEMENTARY INFORMATION: The Department of Housing and Urban Development (HUD) is responsible for implementation of the Lead-based Paint Poisoning Prevention Act (see 42 U.S.C. 4831). Under the authority of that Act, HUD has published regulations at 24 CFR Part 35, Subpart F, which require other Federal agencies to publish regulations which assure that the standards relating to the use of lead-based paint are observed in the extension of assistance for the construction or rehabilitation of residential structures. While EDA does not normally extend assistance for "residential structures", it does occasionally approve projects involving hotels and healthcare facilities which are within the definition of "residential structures" as set forth in this document at § 309.29(c)(2). Consequently, EDA is publishing this regulation to comply with Subpart F of 24 CFR Part 35.

Because this regulation relates to grant and loan programs, it is exempt from the notice and comment procedures described in section 553 of the Administrative Procedure Act (5 U.S.C. 553). However, in the spirit of the public policy set forth in that Act, interested persons may submit written suggestions regarding this regulation to the Assistant Secretary for Economic Development at the above address.

NOTE.—EDA has determined that this regulation does not constitute a major proposal requiring preparation of an economic impact statement under Executive Order 11821, as amended by Executive Order 11949, and OMB Circular A-107.

Accordingly, 13 CFR Part 309 is amended as follows:

By adding a new § 309.29 to read as follows:

§ 309.29 Use of lead-based paints on residential structures.

(a) As required by the Lead-based Paint Poisoning Prevention Act (see 42 U.S.C. 4831), recipients of financial assistance to construct or rehabilitate residential structures shall assure that paint used on the project on applicable surfaces does not contain lead in excess of the percentages set forth in paragraphs (a)(1) and (a)(2) of this section. In determining compliance with these standards, the lead content of the paint will be measured on the basis of total nonvolatile content of the paint or on the basis of an equivalent measure of lead in the dried film of paint already applied.

(1) For paint manufactured on or before June 22, 1977, paint may not

contain lead in excess of five-tenths of 1 percent lead by weight.

(2) For paint manufactured after June 22, 1977, paint may not contain lead in excess of 6 one-hundredths of 1 percent lead by weight.

(b) As a condition to receiving assistance under the Act, recipients shall assure that the restriction against the use of lead-based paint is included in all contracts and subcontracts involving the use of Federal funds.

(c) Definitions. (1) "Applicable surfaces" means all interior surfaces and those exterior surfaces which are readily accessible to children under 7 years of age.

(2) "Residential structures" means houses, apartments, or other structures intended for human habitation, including institutional structures where persons reside, which are accessible to children under 7 years of age, such as day care centers, intermediate and extended care facilities, and certain community facilities.

(Sec. 701, Pub. L. 89-136, 79 Stat. 570 (42 U.S.C. 3211); Department of Commerce Organization Order 10-4 (September 30, 1975), as amended (40 FR 57602, as amended at 40 FR 58878 and 41 FR 35548).)

Dated: April 5, 1978.

ROBERT T. HALL,
Assistant Secretary
for Economic Development.

[FR Doc. 78-9511 Filed 4-10-78; 8:45 am]

[3810-70]

Title 32—National Defense**CHAPTER I—OFFICE OF THE SECRETARY OF DEFENSE****Subchapter B—Personnel; Military and Civilian (DOD Directive 6000.61)****PART 61—MEDICAL MALPRACTICE CLAIMS AGAINST MILITARY AND CIVILIAN PERSONNEL OF THE ARMED FORCES**

AGENCY: Office of the Secretary of Defense.

ACTION: Final rule.

SUMMARY: The Department of Defense (DOD) is codifying certain of its operational, organizational, and procedural rules which are currently in use by DOD. This part delegates authority to the Secretaries of the Military Departments to provide relief to health care personnel of the Department of Defense from personal tort liability in connection with their authorized activities, and establishes certain procedures.

EFFECTIVE DATE: August 24, 1977.

FOR FURTHER INFORMATION CONTACT:

Mr. Tom G. Morgan, Office Assistant General Counsel (Fiscal Mat-

ters), Room 3D961, Pentagon, Washington, D.C. 20301, telephone 202-697-7228.

MAURICE W. ROCHE,
Director, Correspondence and
Directives, Washington Head-
quarters Services, Department
of Defense.

APRIL 6, 1978.

Accordingly, 32 CFR Chapter I is amended by adding a new Part 61 reading as follows:

- Sec.
61.1 Purpose.
61.2 Applicability.
61.3 Delegation of authority.
61.4 Procedures.

AUTHORITY: Pub. L. 94-464, sec. 1(a), 90 Stat. 1985, Title 10, U.S.C., sec. 1089(f), Title 10 U.S.C., sec. 2733 and 5 U.S.C. 301.

§ 61.1 Purpose.

This Directive (a) delegates authority, with the power to redelegate, to the Secretaries of the Military Departments to provide relief to health care personnel of the Department of Defense from personal tort liability in connection with their authorized activities, and (b) establishes procedures to be followed in providing such relief.

§ 61.2 Applicability.

The provisions of this Directive apply to the Office of the Secretary of Defense, the Military Departments, and all other Department of Defense Components.

§ 61.3 Delegation of authority.

(a) The authority vested in the Secretary of Defense by Title 10, U.S.C., section 1089(f) hold harmless or provide liability insurance for Department of Defense health care personnel is hereby delegated to (1) the Secretary of each Military Department for military members and civilian employees of his Department, and (2) the Secretary of the Army for civilian employees of the Office of the Secretary of Defense and Department of Defense Components other than the Military Departments (see DOD Directive 5515.9).¹

(b) The authority delegated above may be redelegated as appropriate and necessary to carry out the provisions of Title 10, U.S.C., section 1089(f).

§ 61.4 Procedures.

(a) In all cases under Title 10, U.S.C., section 1089, medical personnel shall be required to (1) promptly for-

ward all process served upon them or attested true copies thereof to the appropriate official designated by the Secretary of the Military Department concerned; (2) furnish such other information and documents as the Attorney General may request; and (3) comply with the directions of the Attorney General relative to the final disposition of a claim for damages.

(b) The procedures set forth in Title 10, U.S.C., section 2733 and regulations issued pursuant thereto shall be utilized in determining costs, settlements, or judgments under Title 10, U.S.C., section 1089(f).

[FR Doc. 78-9533 Filed 4-10-78; 8:45 am]

[3810-70]

[DOD Directive 1344.3]

PART 81—PATERNITY CLAIMS AND ADOPTION PROCEEDINGS INVOLVING MEMBERS AND FORMER MEMBERS OF THE ARMED FORCES

AGENCY: Office of the Secretary of Defense.

ACTION: Final rule.

SUMMARY: This rule revises and standardizes the procedures for the handling of (a) paternity claims against members and former members of the Armed Forces, and (b) requests from civilian courts concerning the availability of members and former members of the Armed Forces to appear at an adoption hearing where it is alleged that such member is the father of an illegitimate child.

EFFECTIVE DATE: February 1, 1978.

FOR FURTHER INFORMATION CONTACT:

Lt. Col. J. A. Badami, USA, JAGC, Assistant Director, Personnel Administration, OASD (MRA&L) (MPP) Room 3C980, Pentagon, Washington, D.C. 20301, 202-695-0625 or 697-9525.

SUPPLEMENTARY INFORMATION: On January 5, 1967, there was published in the FEDERAL REGISTER a final rule adoption effective November 19, 1966 which established policy applicable to the Military Departments on paternity claims against members of the Armed Forces on active duty, not on active duty, and former members. In FR Doc. 77-18990 appearing in the FEDERAL REGISTER on July 5, 1977 the Offices of the Secretary of Defense published a proposed revision to this part. The one comment that was received suggested that "illegitimate child" be changed to "out-of-wedlock child" or "child born out of wedlock." The suggestion was not adopted because the term "illegitimate child" is more clearly understood and defined.

Accordingly, 32 CFR Part 81 as proposed at 42 FR 34340, July 5, 1977 is formally adopted to read as set forth below:

MAURICE W. ROCHE,
Director, Correspondence and
Directives, Washington Head-
quarters Services, Department
of Defense.

APRIL 5, 1978.

- Sec.
81.1 Reissuance and purpose.
81.2 Applicability.
81.3 Policy.

AUTHORITY: Sec. 301, 80 Stat. 379; (5 U.S.C. 301).

§ 81.1 Reissuance and purpose.

This part reissued DoD Directive 1344.3, "Paternity Claims and Adoption Proceedings Involving Members and Former Members of the Armed Forces," to standardize procedures for the handling of:

(a) Paternity claims against members and former members of the Armed Forces, and

(b) Requests from civilian courts concerning the availability of members and former members of the Armed Forces to appear at an adoption hearing where it is alleged that such member is the father of an illegitimate child.

§ 81.2 Applicability.

The provisions of this part apply to the Military Departments.

§ 81.3 Policy.

(a) *Members on active duty.* (1) Allegations of paternity against members of the Armed Forces who are on active duty will be transmitted to the individual concerned by the appropriate military authorities.

(2) If there exists a judicial order or decree of paternity or child support duly rendered by a United States or foreign court of competent jurisdiction against such a member, the commanding officer in the appropriate Military Departments will advise the member of his moral and legal obligations as well as his legal rights in the matter. See 42 U.S.C. 659. The member will be encouraged to render the necessary financial support to the child and take any other action considered proper under the circumstances.

(3) Communications from a judge of a civilian court, including a court summons or a judicial order, concerning the availability of personnel to appear at an adoption hearing, where it is alleged that an active duty member is the father of an illegitimate child, shall receive a reply that:

(i) Due to military requirements, the member cannot be granted leave to attend any court hearing until (date), or

¹Filed as part of original. Copies may be obtained, if needed, from the U.S. Naval Publications and Forms Center, 5801 Tabor Avenue, Philadelphia, Pa. 19120 Attention: Code 301.

(ii) A request by the member for leave to attend an adoption court hearing on (date), if made, would be approved, or

(iii) The member has stated in a sworn written statement (forward a copy with response) that he is not the natural parent of the child, or

(iv) Due to the member's unavailability caused by a specific reason, a completely responsive answer cannot be made.

(4) The member should be informed of the inquiry and the response and urged to obtain legal assistance for guidance (including an explanation of sections of the Soldiers' and Sailor's Civil Relief Act, 50 U.S.C. Appendix, Section 501 et seq., if appropriate).

(b) *Members not on active duty.* (1) Allegations of paternity against members of the Armed Forces who are not on active duty shall be forwarded to the individual concerned in such manner as to ensure that the allegations are delivered to the addressee only. Military channels will be used when practicable.

(2) Communications from a judge of a civilian court, including a court summons or judicial order, concerning the availability of personnel to appear at an adoption hearing, where it is alleged that the member not on active duty is the father of an illegitimate child shall receive a reply that such person is not on active duty. A copy of the communication and the reply will be forwarded to the named individual.

(3) When requested by a court, the last known address of inactive members may be furnished under the same conditions as set forth for former members under § 81.3(c)(2) (i) and (ii).

(c) *Former members.* (1) In all cases of allegations of paternity against former members of the Armed Forces or communication from a judge of a civilian court, including a judicial summons or court order, concerning the adoption of an illegitimate child of former members of the Armed Forces who have been separated from the Military Services, i.e., those members now holding no military status whatsoever, the claimant or requester will be (i) informed of the date of discharge, and (ii) advised that the individual concerned is no longer a member of the Armed Forces in any capacity, and that the Military Departments assume no responsibility for the whereabouts of individuals no longer under their jurisdiction. The correspondence and all accompanying documentation shall be returned to the claimant or requester.

(2) In addition, the last known address of the former member will be furnished to the requester:

(i) If the request is supported by a certified copy of either:

(A) A judicial order or decree of paternity or support duly rendered

against a former member by a United States or foreign court of competent jurisdiction; or

(B) A document which establishes that the former member has made an official admission or statement acknowledging paternity or responsibility for support of a child before a court of competent jurisdiction, administrative or executive agency, or official authorized to receive it; or

(C) A court summons, judicial order, or similar document of a court within the United States in a case concerning the adoption of an illegitimate child; wherein the former serviceman is alleged to be the father.

(ii) If the claimant, with the corroboration of a physician's affidavit, alleges and explains an unusual medical situation which makes it essential to obtain information from the alleged father to protect the physical health of either the prospective mother or the unborn child.

[FR Doc. 78-9534 Filed 4-10-78; 8:45 am]

[3810-70]

SUBCHAPTER E—DEFENSE CONTRACTING

[DOD Directive 5000.35]

PART 160—DEFENSE ACQUISITION REGULATORY SYSTEM

AGENCY: Office of the Secretary of Defense.

ACTION: Final rule.

SUMMARY: The Department of Defense is codifying certain of its operational, organizational, and procedural rules which are currently in use by DOD. This Part establishes policy and procedures for the management and operation of the Department of Defense acquisition regulatory system.

EFFECTIVE DATE: March 8, 1978.

FOR FURTHER INFORMATION CONTACT:

Mr. Dale R. Babione, Director, Contracts System Acquisition, Office of the Deputy Under Secretary of Defense (Acquisition Policy), Office of the Under Secretary of Defense for Research and Engineering, Washington, D.C. 20301, telephone 202-697-8177.

MAURICE W. ROCHE,
Director, Correspondence and Directives, Washington Headquarters Services, Department of Defense.

APRIL 6, 1978.

Accordingly, 32 CFR Chapter I is amended by adding a new Part 160 reading as follows:

Sec.

160.1 Purpose.

160.2 Applicability.

Sec.

160.3 Definitions.

160.4 Policy and procedures.

AUTHORITY: 5 U.S.C. 301; 10 U.S.C. 137.

§ 160.1 Purpose.

This part establishes policy and procedures for the management and operation of the Department of Defense acquisition regulatory system.

§ 160.2 Applicability.

The provisions of this Part apply to the Office of the Secretary of Defense, the Organization of the Joint Chiefs of Staff, the Military Departments and the Defense Agencies. These provisions also apply to other Federal agencies that are directed by the Office of Federal Procurement Policy (OFPP), Office of Management and Budget, to comply with the provisions of this part.

§ 160.3 Definitions.

(a) *Acquisition.* Any relationship entered into to acquire property or services for the direct benefit or use of the Department of Defense to include the management and business functions and disciplines involved in establishing and continuing the relationship.

(b) *Contracts.* A function including tasks, skills and activities essential in conducting contractual relationships in the acquisition of property and services by the Department of Defense. The term "contracts" shall replace the term "procurement" as used in the context of an acquisition function throughout the Department.

(c) *Procurement.* The term "procurement" shall not be used to identify functions of the Department of Defense to acquire property and services except as relates to the budgetary process.

§ 160.4 Policy and procedures.

(a) *Defense Acquisition Regulatory System.* The Defense Acquisition Regulatory System (DARS) is a system of policies and regulations to guide managers in the conduct of DOD acquisition activities and also to provide the detailed functional regulations required to govern DOD contractual actions in accordance with applicable laws and the need for efficiency. The DARS focuses on the business management needs at the operating levels and on the Government's actions at the interface with the marketplace in the acquisition of services and material. Attention shall be given to the unique business demands in the area of major system acquisitions consistent with policies set forth in 32 CFR 213, DOD Directive 5000.2¹ and OMB Circular A-109.

¹ Filed as part of original. Copies may be obtained, if needed, from the U.S. Naval Footnotes continued on next page

(1) The DARS shall be managed as a system of integrated, coordinated policies and regulations, responsive to the needs of the Department of Defense and to the provisions of the Federal Procurement Regulatory System. Where feasible, the DARS will achieve uniform policies with the Federal Procurement Regulation.

(2) The Deputy Under Secretary of Defense for Research and Engineering (Acquisition Policy), OUSD/R&E, is responsible for the DARS and for the development and implementation of the necessary policy and procedures of the regulatory system.

(b) *DARS Regulations.* DARS policy and procedures shall be published in the Defense Acquisition Regulation (DAR) and in DOD Directives, Instructions, Circulars and Manuals as appropriate to the action. The DAR replaces the Armed Services Procurement Regulation (ASPR), and all laws, policy and procedures applicable to the ASPR apply equally to the DAR except as those policies and procedures not directed by law are changed by the provisions of this part. Effective with the issue of this part, the ASPR is redesignated as the DAR and all policies and procedures continue in force.

(c) *Defense Acquisition Regulatory Council.* The Defense Acquisition Regulatory Council (DARC) is established to support the Council Director in the management of the DARS and in the development and implementation of required policy and procedures. The DARC includes all functions formerly performed by the Armed Services Procurement Regulation Committee.

(1) *Council Membership.* The DARC membership shall include a Policy and a Legal representative from each of the Military Departments and from the Defense Logistics Agency (DLA). Each Military Department Policy member shall be appointed by the Assistant Secretary having responsibility for the acquisition function in the Department. The Legal representative shall be appointed by the Department General Counsel. The DLA members shall be appointed by the Director, DLA. Each appointment to the Council shall be made for a minimum term of 2 years and a maximum of 4 years as a principal full-time assignment approved by the Deputy Under Secretary of Defense (Acquisition Policy). Members appointed to the DARC shall have extensive acquisition experience in order to deal with the matters to come before the Council. Policy members shall be authorized to develop and state the final positions of their respective organizations on all

matters before the Council. Each member shall have a TOP SECRET security clearance.

(2) *Council Director.* The Director (Contracts and System Acquisition), OUSD/R&E, shall appoint the Council Director. Such appointment shall be subject to the approval of the Deputy Under Secretary of Defense (Acquisition Policy).

(3) *Council Executive Secretary.* The Executive Secretary, DARC, shall be appointed by and serve under the direction of the Council Director.

(d) *Operation of the DARC.* The Council shall operate under the direction of the Council Director to develop and implement acquisition policy and procedures.

(1) Council activities shall be conducted according to rules and procedures established by the Council Director within the policy guidance issued by the Director (Contracts and System Acquisition), OUSD/R&E.

(2) The DARC shall consider all matters determined by the Council Director to be within the scope of the Council's responsibilities.

(3) Substantive changes to DARS policy and procedures may be proposed by submitting appropriate recommendations to include specific regulatory language to the Director (Contracts and System Acquisition), through the following officials. Proposed routine administrative changes may be submitted directly to the Council Director.

(i) *DOD Organizations.* The Military Departments, the Defense Agencies and the Office of the Joint Chiefs of Staff shall submit recommendations through a designated senior official responsible for acquisition policy matters. OSD staffs shall submit recommendations through the staff principals.

(ii) *Federal Agencies.* Other Federal agencies, required by OFFP to conduct acquisition functions in accordance with DARS policy, shall submit proposed changes through a senior agency official designated by the agency head to represent the agency on all matters involving the DARS. The designated official shall be authorized to communicate directly with the DARC and to give final coordination for the agency.

(iii) *Private Sector.* Private sector entities with an interest in DARS policy will submit proposed changes directly. Industry associations will designate an individual to the Council Director and establish procedures for the individual to represent the association in commenting on DARS policy actions prior to final action by the Council. The procedures will provide for the completion of industry actions with the Council on a schedule not to exceed 60 days.

(4) The Council Director is authorized to establish working groups to

support the Council in dealing with issues in specialized areas. The Council Director will request the participation of representatives with the required expertise from OSD staff elements, Military Departments and Defense Agencies. Working groups will be assigned specific tasks by the Council Director to be completed on a schedule established with the task assignment.

(5) The Council Director is authorized to designate a Military Department of DLA to be the lead agency in developing a specific policy or procedure for the DARS. The Council Director shall make the assignment through the Policy member of the designated lead agency. The lead agency shall develop the proposed language for the DARS, complete the coordination requested by the Council Director, document nonconcurrences together with the position of the lead agency, and submit the completed action to the Council Director through the lead agency's Policy member. The procedure for accomplishing the task shall be determined by the lead agency. DOD activities shall provide support as requested by the lead agency.

(6) The Council Director shall establish schedules for the completion of each case before the Council based on the needs and urgency of the individual cases. Schedules shall require completion of the Council's action in a period not to exceed 120 days independent of industry coordination, except in specific cases where the Council Director determines an extended schedule is required. In such cases, the schedule will be approved by the Deputy Under Secretary of Defense (Acquisition Policy) or his designated representative.

(7) On matters of major policy or issues where a consensus of the Policy members has not been achieved after a reasonable period of debate, the Council Director shall present the Departmental and Agency positions to the Deputy Under Secretary (Acquisition Policy), or his designated representative for resolution after consultation with the appropriate senior officials of the Military Departments and DLA. The decision of the Deputy Under Secretary of Defense (Acquisition Policy), or his designated representative shall be implemented without further coordination.

(8) The Council Director shall require summary minutes of Council meetings to be maintained as a permanent record by the Executive Secretary. Minutes will clearly document the positions of the participating organizations on matters before the Council. The positions stated by other organizations shall be documented when in disagreement with the final decision.

(9) The Council Director shall report periodically to the Deputy Under Sec-

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retary of Defense (Acquisition Policy) on specific activities of the Council.

(e) *Supplementing Instructions.* Additional policies and procedures essential to the operation of the DARS shall be issued by the Under Secretary of Defense for Research and Engineering.

[FR Doc. 78-9540 Filed 4-10-78; 8:45 am]

[8320-01]

Title 38—Pensions, Bonuses, and Veterans' Relief

CHAPTER I—VETERANS ADMINISTRATION

PART 3—ADJUDICATION

Subpart A—Pension, Compensation and Dependency and Indemnity Compensation

CHARACTER OF DISCHARGE

AGENCY: Veteran Administration.

ACTION: Final regulations.

SUMMARY: The Veterans Administration is issuing regulations to implement a new law enacted October 8, 1977. The effect of the new law is five fold. First, benefits cannot continue to be paid or granted based solely on an upgraded honorable or general discharge issued by a service department discharge review board under one of the special discharge upgrade programs announced by Presidents Ford and Carter. However, this prohibition does not apply if the service department discharge review board concerned determines that the discharge would have been upgraded as a result of an individual case review under uniform published standards which are historically consistent with criteria for determining honorable service, and do not contain any criterion for automatically granting or denying an upgraded discharge. Second, a service person who received a discharge from service under other than honorable conditions on the basis of unauthorized absence for a continuous period of at least 180 days is barred from receiving Veterans Administration benefits unless there were compelling circumstances warranting the prolonged absence. No overpayments will be created when benefits currently being paid are terminated as a result of either of the foregoing provisions. Third, the decision of a discharge review board on or after October 8, 1977 may no longer remove a statutory bar to benefit entitlement. Fourth, persons who honorably completed a period of service equal to the period of their initial obligation when they were not discharged or released at that time because of an intervening reenlistment

which terminated under dishonorable conditions are made eligible for benefits based on the period of initial obligation. Fifth, former service persons with administrative discharges under other than honorable conditions are entitled to health-care treatment for their service-connected illnesses and injuries unless a statutory bar to benefits applies.

EFFECTIVE DATE: October 8, 1977.

FOR FURTHER INFORMATION CONTACT:

T. H. Spindle (211B), 202-389-3005.

SUPPLEMENTARY INFORMATION: On pages 2737 through 2740 of the *FEDERAL REGISTER* of January 19, 1978, there was published notice of proposed regulations to implement Pub. L. 95-126 (91 Stat. 1106).

Interested persons were given 30 days to submit comments, suggestions, or objections to the proposed regulations. We received 13 letters that contained a number of suggestions and objections to the proposed regulations. In addition, the letters contained a number of suggestions or objections that are either unrelated to Pub. L. 95-126 implementation, or deal with procedural matters, such as Veterans Administration interreaction with the various service departments in implementing Pub. L. 95-126, or would require legislation to implement. Only those comments concerning regulatory development needed to implement Pub. L. 95-126 are dealt with here. Suggestions for rulemaking that are beyond the scope of the proposed rule will be considered separately.

One commentator suggested that we not use the term "other than honorable discharge" since this could be construed to include a general discharge. He suggested, instead, use of the term "discharge under other than honorable conditions". We agree since a general discharge is under honorable conditions. The final rule reflects this change in terminology. This commentator also made a number of non-substantive drafting suggestions which we like. They make the rules easier to understand. Changes in § 3.12 (g) and (h) and § 3.13 (b) and (c) implement his suggestions. In addition, this commentator pointed out that Pub. L. 95-126 does not require the Veterans Administration to determine whether a discharge under other than honorable conditions was issued under dishonorable conditions before determining eligibility for health care. The commentator is correct. Section 3.360 is, therefore, amended to delete any reference to a character of discharge determination. The title of § 3.360 has also been changed. The new title is more in agreement with statutory language.

In the proposed § 3.12(c)(6) implementing the 180-day AWOL bar we said that the bar was for consideration

in any case in which a person was discharged under other than honorable conditions and during the period of service so terminated, the person was AWOL for a continuous period of at least 180 days. Commentators observed that the 180-day AWOL bar should be for consideration only when a discharge under other than honorable conditions was issued on the basis of a continuous unauthorized absence of at least 180 days. We agree. The final regulation incorporates this change.

Another issue raised by many commentators concerns the factors to consider in determining whether compelling circumstances exist. Several commentators thought the proposed § 3.12(c)(6)(ii) entirely too liberal and suggested that we adopt a narrower definition of what would constitute compelling circumstances for going AWOL. Others thought § 3.12(c)(6)(ii) was not broad enough. They believed that compelling circumstances should be found to exist when AWOL resulted from such things as alcoholism, drug abuse, incarceration in a civilian penal institution, etc. We find that adoption of any of these suggestions would be inconsistent with the intent of the law.

We think one suggestion concerning the compelling circumstance factors has merit. The commentator believes compelling circumstances should be held to exist if there is a valid legal defense which would have precluded a conviction for the 180-day or more continuous period of AWOL. We agree that compelling circumstances can occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense against the Uniform Code of Military Justice. This factor has been included in the final rule.

In determining whether compelling circumstances exist our proposed rule stated that the length and character of service exclusive of the period of prolonged AWOL should be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation. Several commentators felt this factor was unrelated to whether compelling circumstances exist. We think otherwise for a number of reasons. First, under § 3.12(d)(4) a discharge under other than honorable conditions issued for a minor offense is not considered to have been issued under dishonorable conditions if service was otherwise honest, faithful, and meritorious. We believe that if compelling circumstances are found to exist, the AWOL period can be considered analogous to a minor offense and, therefore, service exclusive of the AWOL period should be honest, faithful and meritorious. Second, Veterans Administration benefits have historically been

considered by Congress as a reward for honest, faithful, and meritorious service. In addition, minimum periods of entitling service have been established for such benefits as a loan guaranty, non-service-connected disability pension, and educational assistance. Third, a compelling circumstance reason for going AWOL is somewhat suspect in the case of a person whose period of actual service was characterized by frequent episodes of misconduct.

It has also been suggested that when a discharge review board decisional document reflects that a discharge was upgraded as a result of a factual finding that the absence was excused as a matter of law, such factual determination made by the discharge review board shall be res judicata on the Veterans Administration. We do not concur in this proposition. Pub. L. 95-126 states that compelling circumstances must be demonstrated to the satisfaction of the Administrator. This requires an independent determination by the Veterans Administration on the question of compelling circumstances.

Another suggested change which we are unable to support is that any period of time that a service person was absent beyond the period of service obligation should be disregarded in calculating the 180-day continuous AWOL period. An individual is AWOL until he or she returns to military control. Therefore, we must count periods of AWOL extending beyond termination date of service obligation in determining whether the 180-day AWOL bar is for consideration.

The commentator felt that our proposed regulations were defective because they failed to include the following:

That all former servicemembers who have clemency discharges will have their eligibility for benefits determined according to the same standards applied to former servicemembers who have other than honorable discharges; that all former servicemembers who have had a clemency discharge upgraded to a general discharge by a board for correction of military records shall be eligible for benefits; and that all former servicemembers who have had a clemency discharge upgraded to a general discharge by a discharge review board shall be eligible for benefits unless a bar exists and, where appropriate, no compelling circumstances exist.

We believe that the regulations do include or provide for these rules. There is no other authority for the Veterans Administration to determine whether a discharge under other than honorable conditions was issued under conditions other than dishonorable except § 3.12 (by use of the term "clemency" we assume the commenta-

tor is referring to an other than honorable discharge upgrade under one of the special discharge review programs). All Veterans Administration character of discharge determinations are made pursuant to § 3.12. A decision of a board for correction of records can remove any bar to Veterans Administration benefit entitlement. This is stated in § 3.12(e). An honorable or general discharge issued by a discharge review board sets aside any bar to benefit entitlement imposed by § 3.12(d) when the conditions stated in paragraphs (g) and (h) of § 3.12 are met.

It was also suggested that § 3.12 (i) and (j) should be amended to authorize payment in cases subject to Pub. L. 95-126 in which claims processing was stopped shortly before enactment. Claims processing of these cases was halted because the length of time needed to process the cases meant that payment would be made after October 8, 1977. We believe our action was in accordance with the law and its intent, and, therefore, cannot agree to this proposal. We lack the legal authority to extend the April 7, 1978 deadline which we were also asked to do.

We agree with the commentator who thought the reference in the proposed § 3.12(c)(6) to § 3.12(c)(2) is misleading. He said it implied that an upgraded discharge issued by a board for correction of military records under 10 U.S.C. 1552 could not remove the bar to Veterans Administration benefit entitlement imposed as a result of discharge by reason of the sentence of a general court-martial. Consequently, we have amended § 3.12(c)(6) to specifically state that only a decision of a board for correction of records under 10 U.S.C. 1552 can remove the bar to benefit entitlement imposed when discharge was by reason of a sentence of a general court-martial.

Another commentator suggested that in § 3.12(c)(6)(ii), first sentence, we change the words "may be given" to "are entitled to" and delete the word "may" when next appearing. The final rule includes this change.

The amendments to §§ 3.12, 3.13 and 3.360 are set forth below.

Approved: April 5, 1978.

By direction of the Administrator.

RUFUS H. WILSON,
Deputy Administrator.

1. In § 3.12, paragraphs (c)(6), (g), (h), (i) and (j) are added and paragraphs (c)(5) and (f) are revised so that the revised and added material reads as follows:

§ 3.12 Character of discharge.

(c) Benefits are not payable where the veteran was discharged or released under one of the following conditions:

(5) As an alien during a period of hostilities, where it is affirmatively shown that the veteran requested his or her release. See § 3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence. This bar applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (h) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Veterans Administration benefits. The term "established basic eligibility to receive Veterans Administration benefits" means either a Veterans Administration determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (h) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Veterans Administration benefits. The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence.

(i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.

(ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat

wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.

(iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

(38 U.S.C. 3103(a).)

(f) An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed in paragraph (h) (1), (2) and (3) of this section by a discharge review board established under 10 U.S.C. 1553 set aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(g) An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553 sets aside any bar to benefits imposed under paragraph (d) of this section when the following conditions are met:

(1) The discharge is upgraded as a result of an individual case review, and

(2) The discharge is upgraded under uniform published standards and procedures generally applicable to all persons administratively discharged or released from active military, naval or air service under conditions other than honorable; and such standards are historically consistent with criteria for determining honorable service and do not include any criterion for automatically granting or denying an upgraded discharge.

However, an honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553 does not set aside any bar to benefits imposed under paragraph (c) of this section.

(h) An honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed by paragraph (c) or (d) of this section:

(1) The President's directive of January 19, 1977, initiating further action with respect to Presidential Proclamation 4313 of September 16, 1974, or

(2) The Department of Defense's special discharge review program effective April 5, 1977, or

(3) Any discharge review program implemented after April 5, 1977, and

not made applicable to all persons administratively discharged or released from active military, naval, or air service under other than honorable conditions.

However, if a discharge review board established under 10 U.S.C. 1553 determines on an individual case basis, in the case of a person who was issued an honorable or general discharge under any such program after October 8, 1977, that an upgraded discharge would be awarded under standards conforming to paragraph (g) (1) and (2) of this section, that determination removes any bar to benefits imposed by paragraph (d) of this section.

(i) No overpayments shall be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (h) of this section which would not be awarded under the standards set forth in paragraph (g) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable discharge was not issued under conditions other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been upgraded under the standards set forth in paragraph (g) of this section, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

(j) No overpayment shall be created as a result of payments made after October 8, 1977, in cases in which the bar contained in paragraph (c)(6) of this section is for application. Accounts in payment status on or after October 8, 1977, shall be terminated at the end of the month in which it is determined that compelling circumstances do not exist, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment, or April 7, 1978, whichever is the earliest.

2. In § 3.13, paragraph (b) is revised and paragraph (c) is added so that the revised and added material reads as follows:

§ 3.13 Discharge to change status.

(b) Except as provided in paragraph (c) of this section, the entire period of service under the circumstances stated in paragraph (a) of this section constitutes one period of service and entitlement will be determined by the character of the final termination of such

period of active service except that, for death pension purposes, § 3.3(d)(3) is controlling as to basic entitlement when the conditions prescribed therein are met.

(c) Despite the fact that no unconditional discharge may have been issued, a person shall be considered to have been unconditionally discharged or released from active military, naval or air service when the following conditions are met:

(1) The person served in the active military, naval or air service for the period of time the person was obligated to serve at the time of entry into service;

(2) The person was not discharged or released from such service at the time of completing that period of obligation due to an intervening enlistment or reenlistment; and

(3) The person would have been eligible for a discharge or release under conditions other than dishonorable at that time except for the intervening enlistment or reenlistment.

3. Section 3.360 is added to read as follows:

§ 3.360 Service-connected health-care eligibility of certain persons administratively discharged under other than honorable condition.

(a) *General.* The health-care and related benefits authorized by chapter 17 of title 38, United States Code shall be provided to certain former service persons with administrative discharges under other than honorable conditions for any disability incurred or aggravated during active military, naval, or air service in line of duty.

(b) *Discharge categorization.* With certain exceptions such benefits shall be furnished for any disability incurred or aggravated during a period of service terminated by a discharge under other than honorable conditions. Specifically, they may not be furnished for any disability incurred or aggravated during a period of service terminated by a bad conduct discharge or when one of the bars listed in § 3.12(c) applies.

(c) *Eligibility criteria.* In making determinations of health-care eligibility the same criteria will be used as is now applicable to determinations of service incurrence and in line of duty when there is no character of discharge bar.

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