

PORT CODES, NAMES, AND DESCRIPTIONS OF PORTS SUBJECT TO HARBOR MAINTENANCE FEE—Continued

[Section 1402 of PL 99-662, as amended]

Port code, port name and state	Port descriptions and notations
Puget Sound Ports, WA *	Fee applies only at ports listed. Bellingham includes all of Bellingham Bay and tributary waters north of Chuchanut Bay on the east, and Portage Island on the west. Port Everett includes all of Port Dardner (an arm of Possession Sound) between Elliott Point on the south to, and including, the Snohomish River on the north. The port of Olympia includes all points on Budd Inlet extending from Cooper and Dofflemeyer Point on the north to, and including, the city of Olympia on the south. The fee applies to all points within the Inner Harbor of the Port of Seattle, including Salmon Bay, Lakes Union and Washington, the Lake Washington Ship Canal, and Kenmore Navigation Channel. Includes all points on Elliott Bay and tributary waters between West Point on the north and Duwamish Head on the south. Fee applies at all points within Tacoma Harbor including all of Commencement Bay and tributary waters between Browns Point on the east and Point Defiance on the west. Movements between these ports and any other U.S. points on Puget Sound or the Strait of Juan de Fuca east of Cape Flattery are intraport.
3005—Bellingham	
3006—Everett	
3026—Olympia	
3007—Port Angeles	
3001—Seattle	
3002—Tacoma	
Columbia River Ports, WA, OR	Includes all points on the Columbia River downstream of Bonneville Dam, and all points on the Willamette River downstream of River mile 21. Includes the Multnomah Channel, the Skipanon Channel, and Oregon Slough. Movements between points within this area are intraport.
2901—Astoria, OR	
2904—Portland, OR	
2909—Kalama, WA	
2905—Longview, WA	
2908—Vancouver, WA	
Wisconsin	
3602—Ashland	See Duluth/Superior Area Ports, MN.
Green Bay/Marinette Area Ports	Fee applies to all movements between points along the Sturgeon Bay and Lake Michigan Ship Canal. Fee also applies to Green Bay, Oconto, and Menominee/Marinette. Movements between points from Menominee and points along the Sturgeon Bay and Lake Michigan Ship Canal are intraport.
3703—Green Bay	
3702—Marinette	
Western Lake Michigan Ports	Includes the ports of Milwaukee, Racine, and Sheboygan, MN. All movements between these points are intraport.
3701—Milwaukee	
3708—Racine	
3707—Sheboygan	

* Indicates that a map of this area is available from the Users Fee Task Force, U.S. Customs Service, Room 4112, 1301 Constitution Ave. NW., Washington, DC 20229; tel. 202-566-8648.

Michael H. Lane,
Acting Commissioner of Customs.

Approved: January 15, 1992.

John P. Simpson,
Acting Assistant Secretary of the Treasury.
[FR Doc. 92-1436 Filed 1-21-92; 8:45 am]

BILLING CODE 4820-02-M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

21 CFR Part 1310

Records and Reports of Importation and Exportation of Certain Machines

AGENCY: Drug Enforcement Administration, (DEA).

ACTION: Final rule.

SUMMARY: This final rule amends the regulations implementing the Chemical Diversion and Trafficking Act of 1988 (CDTA) by requiring that regulated persons who import or export tableting or encapsulating machines maintain records and file reports.

EFFECTIVE DATE: February 21, 1992.

FOR FURTHER INFORMATION CONTACT: G. Thomas Gitchel, Chief, Liaison and Policy Section, Office of Diversion Control, Drug Enforcement Administration, Washington, DC 20537, telephone (202) 307-7297.

SUPPLEMENTARY INFORMATION: On May 20, 1991, a notice of proposed rulemaking was published in the *Federal Register* (56 FR 23037). The DEA proposed to amend 21 CFR 1310.05 and 1310.06 to include requirements that regulated persons who import or export tableting or encapsulating machines maintain records and file reports. This requirement was inadvertently omitted from the Notice of Proposed Rulemaking to implement the CDTA. The proposed rulemaking provided an opportunity for interested parties to submit comments or objections in writing before July 19, 1991.

One comment regarding procedural changes was received. Specifically, the comment noted that to be consistent with the Chemical Diversion and Trafficking Act and DEA regulations, the term 'report', rather than 'notify', should be used. DEA agrees, and the term 'report', rather than 'notify' will be used as appropriate. The comment further noted that the proposed regulation was worded in such a way that there might be confusion regarding where, when and how the reports should be made. As a result, changes were made in the format of the regulation in order to clarify the requirements. No changes were made to the specific requirements of the rule.

The Deputy Assistant Administrator, Office of Diversion Control, hereby certifies that this final rule will have no

significant impact upon entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601 et seq. This final rule is not a major rule for the purposes of Executive Order (E.O.) 12291 of February 17, 1981. Pursuant to sections 3(c)(3) and 3(e)(2)(c) of Executive Order 12291, this final rule has been reviewed by the Office of Management and Budget.

This action has been analyzed in accordance with the principles and criteria in E.O. 12612, and it has been determined that the proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 21 CFR Part 1310

Drug Enforcement Administration, Drug traffic control, Reporting and recordkeeping requirements.

For reasons set out above, 21 CFR part 1310 is amended as follows:

PART 1310—[AMENDED]

1. The authority citation for part 1310 continues to read as follows:

Authority: 21 U.S.C. 802, 830, 871(b).

2. Section 1310.05 is amended by adding new paragraph (c) as follows:

§ 1310.05 Reports.

(c) Each regulated person who imports or exports a tableting machine, as

defined in § 1310.01(i), or encapsulation machine, as defined in § 1310.01(j), shall file a report (not a 486) of such importation or exportation with the Administration at the following address on or before the date of importation or exportation: Drug Enforcement Administration, P.O. Box 28346, Washington, DC 20038. In order to facilitate the importation or exportation of any tableting machine or encapsulating machine and implement the purpose of the Act, regulated persons may wish to report to the Administration as far in advance as possible. A copy of the report may be transmitted directly to the Drug Enforcement Administration through electronic facsimile media. Any tableting machine or encapsulating machine may be imported or exported if that machine is needed for medical, commercial, scientific, or other legitimate uses. However, an importation or exportation of a tableting machine or encapsulating machine may not be completed with a person whose description or identifying characteristic has previously been furnished to the regulated person by the Administration unless the transaction is approved by the Administration.

3. Section 1310.06 is amended by revising paragraph (c) and adding new paragraphs (e), (f) and (g) as follows:

§ 1310.06 Contents of records and reports.

(c) Each report required by § 1310.05(a) shall include the information as specified by § 1310.06(a) and, where obtainable, the telephone number of the other party. A report submitted pursuant to § 1310.05(a)(1) or (a)(3) must also include a description of the circumstances leading the regulated person to make the report, such as the reason that the method of payment was uncommon or the loss unusual. If the report is for a loss or disappearance under § 1310.05(a)(3), the circumstances of such loss must be provided (in-transit, theft from premises, etc.).

(e) Each report of an importation of a tableting machine or an encapsulating machine required by § 1310.05(c) shall include the following information:

(1) The name, address, telephone number, telex number, and, where available, the facsimile number of the regulated person; the name, address, telephone number, telex number, and, where available, the facsimile number of the import broker or forwarding agent, if any;

(2) The description of each machine (including make, model, and serial

number) and the number of machines being received;

(3) The proposed import date, and the first U.S. Customs Port of Entry; and

(4) The name, address, telephone number, telex number, and, where available, the facsimile number of the consignor in the foreign country of exportation.

(f) Each report of an exportation of a tableting machine or an encapsulating machine required by § 1310.05(c) shall include the following information:

(1) The name, address, telephone number, telex number, and, where available, the facsimile number of the regulated person; the name, address, telephone number, telex number, and, where available, the facsimile number of the export broker, if any;

(2) The description of each machine (including make, model, and serial number) and the number of machines being shipped;

(3) The proposed export date, the U.S. Customs Port of exportation, and the foreign Port of Entry; and

(4) The name, address, telephone, telex, and, where available, the facsimile number of the consignee in the country where the shipment is destined; the name(s) and address(es) of any intermediate consignee(s).

(g) Declared exports of machines which are refused, rejected, or otherwise deemed undeliverable may be returned to the U.S. exporter of record. A brief written report outlining the circumstances must be sent to the Drug Enforcement Administration, P.O. Box 28346, Washington, DC 20038, following the return within a reasonable time. This provision does not apply to shipments that have cleared foreign customs, been delivered, and accepted by the foreign consignee. Returns to third parties in the United States will be regarded as imports.

Dated: December 17, 1991.

Gene R. Haislip,
Deputy Assistant Administrator, Office of
Diversion Control, Drug Enforcement
Administration.

[FR Doc. 92-1461 Filed 1-21-92; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF DEFENSE

Department of the Navy

32 CFR Part 725

Release of Official Information for Litigation

AGENCY: Department of the Navy, DOD.

ACTION: Interim rule and request for comments.

SUMMARY: This regulation assigns responsibilities to Department of the Navy (DON) personnel in responding to requests from members of the public for official DON information (testimonial, documentary, or otherwise) in connection with litigation. The publication of this DON instruction will assist members of the public in submitting such requests. It implements Department of Defense Directive 5405.2 of July 23, 1985, codified in 32 CFR part 97, regarding the release of official information in connection with litigation. It restates the requirements contained in Secretary of the Navy Instruction 5820.8A of August 27, 1991, and is intended to conform to that instruction in all respects.

DATES: Interim rule effective January 22, 1992; comments must be received on or before February 21, 1992.

ADDRESSES: Comments may be mailed to the following address: Department of the Navy, Office of the Judge Advocate General, 200 Stovall Street, Alexandria, VA 22332-2400.

FOR FURTHER INFORMATION CONTACT: Lieutenant Michael T. Palmer, Office of the Judge Advocate General, General Litigation Division, 200 Stovall Street, Alexandria, VA 22332-2400. Telephone: (703) 325-9870.

SUPPLEMENTARY INFORMATION:

(a) *Purpose of the regulation.* This regulation establishes policy, assigns responsibilities, and prescribes procedures for responding to requests for the release of official DON information, including testimony by DON personnel as witnesses, in connection with actual or contemplated litigation. It does not apply to requests unrelated to litigation or pursuant to the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a. In addition to providing an orderly means for obtaining information needed in litigation to members of the public, its provisions also protect the interests of the United States, including the safeguarding of classified and privileged information. This regulation ensures that responses to litigation requests are provided in a manner that does not prevent the accomplishment of the mission of the command or activity affected. It sets forth the proper content of a request received from a member of the public for release of official DON information in connection with litigation and indicates the factors to be considered in deciding whether to authorize the release of official DON

information or the testimony of DON concerning official information. The regulation also prescribes the conduct of DON personnel in response to a litigation request or demand.

(b) *Impact of the regulation.* The regulation is not a "major rule" as defined by Executive Order 12291. Therefore, no regulatory impact analysis has been prepared. The DON certifies that this regulation will not have an impact on a significant number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Therefore, no regulatory flexibility analysis has been prepared. The regulation has no collection of information requirements and does not require the approval of OMB under 44 U.S.C. 3501 et seq. This regulation is not subject to the relevant provisions of the National Environmental Policy Act of 1969 (42 U.S.C. 4321-4347), and does not contain reporting or record-keeping requirements under the criteria of the Paperwork Reduction Act of 1980 (Pub. L. 96-511).

List of Subjects in 32 CFR Part 725

Courts, Government employees.

For the reasons set out in the preamble it is proposed to revise title 32, part 725 of the Code of Federal Regulations to read as follows:

PART 725—RELEASE OF OFFICIAL INFORMATION FOR LITIGATION PURPOSES AND TESTIMONY BY DEPARTMENT OF THE NAVY PERSONNEL

- Sec.
- 725.1 Purpose.
 - 725.2 Policy.
 - 725.3 Authority to act.
 - 725.4 Definitions.
 - 725.5 Applicability.
 - 725.6 Authority to determine and respond.
 - 725.7 Contents of a proper request or demand.
 - 725.8 Considerations in determining to grant or deny a request.
 - 725.9 Action to grant or deny a request.
 - 725.10 Response to requests or demands in conflict with this instruction.
 - 725.11 Fees.

Authority: 5 U.S.C. 301; 10 U.S.C. 113, 5013; 31 U.S.C. 9701 and 32 CFR part 97.

§ 725.1 Purpose.

This instruction implements 32 CFR part 97 regarding the release of official Department of the Navy (DON) information and provision of testimony by DON personnel for litigation purposes, and prescribes conduct of DON personnel in response to a litigation request or demand. It restates the information contained in Secretary of the Navy Instruction 5820.8A of 27

August 1991¹, and is intended to conform in all respects with the requirements of that instruction.

§ 725.2 Policy.

(a) It is DON policy that official factual information, both testimonial and documentary, should be made reasonably available for use in Federal courts, state courts, foreign courts, and other governmental proceedings unless that information is classified, privileged, or otherwise protected from public disclosure.

(b) DON personnel, as defined in § 725.4(b), however, shall not provide such official information, testimony, or documents, submit to interview, or permit a view or visit, without the authorization required by this part.

(c) DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning official DON or Department of Defense (DOD) information, subjects, personnel, or activities, except on behalf of the United States or a party represented by the Department of Justice, or with the written special authorization required by this part.

(d) Section 725.2(b) and (c) constitute a regulatory general order, applicable to all DON personnel individually, and need no further implementation. A violation of those provisions is punishable under the Uniform Code of Military Justice for military personnel and is the basis for appropriate administrative procedures with respect to civilian employees. Moreover, violations of this instruction by DON personnel may, under certain circumstances, be actionable under 18 U.S.C. 207.

(e) Upon a showing by a requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the DON, DOD, or the United States, the General Counsel of the Navy, the Judge Advocate General of the Navy, or their respective delegates may, in their sole discretion, and pursuant to the guidance contained in this instruction, grant such written special authorization for DON personnel to appear and testify as expert or opinion witnesses at no expense to the United States.

§ 725.3 Authority to act.

(a) The General Counsel of the Navy, the Judge Advocate General of the Navy, and their respective delegates

[hereafter "determining authorities" described in § 725.4(a)], shall respond to litigation requests or demands for official DOD information or testimony by DON personnel as witnesses.

(b) If required by the scope of their respective delegations, determining authorities' responses may include: consultation and coordination with the Department of Justice or the appropriate United States Attorney as required; referral of matters proprietary to another DOD component to that component; determination whether official information originated by the Navy may be released in litigation; and determination whether DOD personnel assigned to or affiliated with the Navy may be interviewed, contacted, or used as witnesses concerning official DOD information or as expert or opinion witnesses. Following coordination with the appropriate commander, a response may further include whether installations, facilities, ships, or aircraft may be visited or inspected; what, if any, conditions will be imposed upon any release, interview, contact, testimony, visit, or inspection; what, if any, fees shall be charged or waived for access under the fee assessment considerations set forth in § 725.11; and what, if any, claims of privilege, pursuant to this instruction, may be invoked before any tribunal.

§ 725.4 Definitions.

(a) *Determining authority.* The cognizant DON or DOD official designated to grant or deny a litigation request. In all cases in which the United States is, or might reasonably become, a party, or in which expert testimony is requested, the Judge Advocate General or the General Counsel of the Navy, depending on the subject matter of the request, will act as determining authority. In all other cases, the responsibility to act as determining authority has been delegated to all officers exercising general court-martial convening authority, or to their subordinate commands, and to other commands and activities indicated in § 725.6.

(b) *DON personnel.* Active duty and former military personnel of the naval service including retirees; personnel of other DOD components serving with a DON component; Naval Academy midshipmen; present and former civilian employees of the DON including non-appropriated fund activity employees; non-U.S. nationals performing services overseas for the DON under provisions of status of forces agreements; and other specific individuals or entities hired through contractual agreements by or on

¹ Copies may be obtained, if needed, from the Naval Publications and Forms Directorate, Attn: Code 301, 5801 Tabor Avenue, Philadelphia, PA 19120-5099.

behalf of DON, or performing services under such agreements for DON (e.g., consultants, contractors and their employees and personnel).

(c) *Factual and expert or opinion testimony.* DON policy favors disclosure of factual information if disclosure does not violate the criteria stated in § 725.8. The distinction between factual matters, and expert or opinion matters (where DON policy favors non-disclosure), is not always clear. The considerations set forth below pertain.

(1) Naval personnel may merely be percipient witnesses to an incident, in which event their testimony would be purely factual. On the other hand, they may be involved with the matter only through an after-the-event investigation (e.g., JAGMAN investigation). Describing the manner in which they conducted their investigation and asking them to identify factual conclusions in their report would likewise constitute factual matters to which they might testify. In contrast, asking them to adopt or reaffirm their findings of fact, opinions, and recommendations, or asking them to form or express any other opinion—particularly one based upon matters submitted by counsel or going to the ultimate issue of causation or liability—would clearly constitute precluded testimony under the above policy.

(2) Naval personnel, by virtue of their training, often form opinions because they are required to do so in the course of their duties. If their opinions are formed prior to, or contemporaneously with, the matter in issue, and are routinely required of them in the course of the proper performance of their professional duties, they constitute essentially factual matters (i.e., the opinion they previously held). Opinions formed after the event in question, including responses to hypothetical questions, generally constitute the sort of opinion or expert testimony which this instruction is intended to severely restrict.

(3) Characterization of expected testimony by a requester as fact, opinion, or expert is not binding on the determining authority. When there is doubt as to whether or not expert or opinion (as opposed to factual) testimony is being sought, advice may be obtained informally from, or the request forwarded, to the Deputy Assistant Judge Advocate General (General Litigation) or the Associate General Counsel (Litigation) for resolution.

(d) *Litigation.* All pretrial, trial, and post-trial stages of all existing or reasonably anticipated judicial or administrative actions, hearings,

investigations, or similar proceedings before civilian courts, commissions, boards (including the Armed Services Board of Contract Appeals), or other tribunals, foreign and domestic. This term includes responses to discovery requests, depositions, and other pretrial proceedings, as well as responses to formal or informal requests by attorneys or others in situations involving, or reasonably anticipated to involve, civil or criminal litigation.

(e) *Official information.* All information of any kind, however stored, in the custody and control of the DOD and its components including the DON; relating to information in the custody and control of DOD or its components; or acquired by DOD personnel or its component personnel as part of their official duties or because of their official status within DOD or its components, while such personnel were employed by or on behalf of the DOD or on active duty with the United States Armed Forces (determining whether "official information" is sought, as opposed to non-DOD information, rests with the determining authority identified in § 725.6, rather than the requester).

(f) *Request or demand (legal process).* Subpoena, order, or other request by a federal, state, or foreign court of competent jurisdiction, by any administrative agency thereof, or by any party or other person (subject to the exceptions stated in § 725.5) for production, disclosure, or release of official DOD information or for appearance, deposition, or testimony of DON personnel as witnesses.

§ 725.5 Applicability.

(a) This instruction applies to all present and former civilian and military personnel of the DON whether employed by, or assigned to, DON temporarily or permanently. Affected personnel are defined more fully in § 725.4(b).

(b) This instruction applies only to situations involving existing or reasonably anticipated litigation, as defined in § 725.4(d), when DOD information or witnesses are sought, whether or not the United States, the DOD, or its components are parties thereto. It does not apply to formal or informal requests for information in other situations.

(c) This instruction provides guidance only for DON operation and activities of its present and former personnel in responding to litigation requests. It is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law or equity against the United States, DOD, or DON.

(d) This instruction is not intended to infringe upon or displace the responsibilities committed to the Department of Justice in conducting litigation on behalf of the United States.

(e) This instruction does not supersede or modify existing laws, DOD or DON regulations, directives, or instructions governing testimony of DON personnel or release of official DOD or DON information during grand jury proceedings.

(f) This instruction does not control release of official information in response to requests unrelated to litigation or under the Freedom of Information Act (FOIA), 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552a. This instruction does not preclude treating any written request for DON records as a request under the FOIA or Privacy Acts. Activities are encouraged to treat such requests for documents under the FOIA or the Privacy Act if they are invoked by the requestor either explicitly or by fair implication. See 32 CFR 701.3(a), 701.10(a). Activities are reminded that such treatment does not absolve them of the responsibility to respond in a timely fashion to legal process. In any event, if the official information requested pertains to a litigation matter which the United States is a present or potential party, the release authority should notify the delegate of the General Counsel or the Judge Advocate General, under § 725.6.

(g) This part does not apply to release of official information or testimony by DON personnel in the following situations:

(1) Before courts-martial convened by any DOD component, or in administrative proceedings conducted by, or on behalf of, such component;

(2) Under administrative proceedings conducted by, or on behalf of, the Equal Employment Opportunity Commission (EEOC) or the Merit Systems Protection Board (MSPB), the Federal Labor Relations Authority, the Federal Services Impasse Panel, or under a negotiated grievance procedure under a collective bargaining agreement to which the Government is a party;

(3) In response to requests by Federal Government counsel, or counsel representing the interests of the Federal Government, in litigation conducted, in whole or in part, on behalf of the United States (e.g., Medical Care Recovery Act claims, affirmative claims, or subpoenas issued by, or concurred in by, Government counsel when the United States is a party), but the regulation does apply to an action brought under the qui tam provisions of the False Claims Act in which a private party

brings an action in the name of the United States but in which the Department of Justice either has not yet determined to intervene in the litigation or has declined to intervene;

(4) As part of the assistance required by the Defense Industrial Personnel Security Clearance Review Program under DOD Directive 5220.6²;

(5) Release of copies of Manual of the Judge Advocate General (JAGMAN) investigations, to the next of kin (or their representatives) of deceased or incompetent naval personnel;

(6) Release of information by DON personnel to counsel retained on their behalf for purposes of litigation, unless that information is classified, privileged, or otherwise protected from disclosure (in the latter event, compliance with 32 CFR part 97 and this part is required);

(7) Cases involving garnishment orders for child support and/or alimony. The release of official information in these cases is governed by 5 CFR 581 and SECNAVINST 7200.16³, or;

(8) Release of information to Federal, state, and local prosecuting and law enforcement authorities, in conjunction with an investigation conducted by a DOD component or DON criminal investigative organization.

(h) This part does not preclude official comment on matters in litigation in appropriate cases.

(i) The DOD General Counsel may notify DOD components that DOD will assume primary responsibility for coordinating all litigation requests for demands for official DOD information or testimony of DOD personnel in litigation involving terrorism: espionage, nuclear weapons, and intelligence sources or means. Accordingly, determining officials who receive requests pertaining to such litigation shall notify the Associate General Counsel (Litigation) or the Deputy Assistant Judge Advocate General (International Law or General Litigation) who shall consult and coordinate with DOD General Counsel prior to any response to such requests.

(j) *Relationship with Federal Rules of Procedure.* The requirements imposed by this instruction are intended, among other things, to provide adequate notice to DON regarding the scope of proposed discovery. This will assure that certain DON information, which properly should be withheld, is not inadvertently released in response to a litigation request or demand, including a subpoena or other request for discovery issued under Federal rules of procedure. When the United States is a party to Federal litigation and the party

opponent uses discovery methods (e.g., request for interrogatories and admissions, depositions) set forth in Federal rules of procedure, the Judge Advocate General or General Counsel, in consultation with representatives of the Department of Justice or the cognizant United States Attorney, may determine whether the requirement for a separate written request in accordance with § 725.7 should be waived. Even if this requirement is waived, however, DON personnel who are subpoenaed to testify still will be required to obtain the written permission described in § 725.2.

§ 725.6 Authority to determine and respond.

(a) *Matters proprietary to DON.* If a litigation request or demand is made of DON personnel for official DON or DOD information or for testimony concerning such information, the individual to whom the request or demand is made will immediately notify the cognizant DON official designated in § 725.6(c) and (d), who will determine availability and respond to the request or demand.

(b) *Matters proprietary to another DOD component.* If a DON activity receives a litigation request or demand for official information originated by another DOD component or for non-DON personnel presently or formerly assigned to another DOD component, the DON activity will forward appropriate portions of the request or demand to the DOD component originating the information, to the components where the personnel are assigned, or to the components where the personnel were formerly assigned, for action under 32 CFR part 97. The forwarding DON activity will also notify the requester and court (if appropriate) or other authority of its transfer of the request or demand.

(c) *Litigation matters to which the United States is, or might reasonably become, a party.* Examples of such instances include suits under the Federal Tort Claims Act, Freedom of Information Act, Medical Care Recovery Act, Tucker Act, and suits against Government contractors where the contractor may interplead the United States or seek indemnification from the United States for any judgment paid, e.g., aviation contractors or asbestos matters. Generally, a suit in which the plaintiff is representing the interests of the United States under the Medical Care Recovery Act is not a litigation matter to which the United States is, or might reasonably become, a party. Determining authorities, if in doubt whether the United States is likely to become a party to the litigation, should seek guidance from representatives of

the Offices of the Judge Advocate General or General Counsel. The Judge Advocate General and the General Counsel have the authority to determine whether a litigation request should be forwarded to them, or retained by a determining authority, for resolution.

(1) Litigation requests regarding matters assigned to the Judge Advocate General of the Navy under Navy Regulations, art. 0331 (1990)⁴, shall be referred to the Deputy Assistant Judge Advocate General (DAJAG) for General Litigation, 200 Stovall Street, Alexandria, VA 22332-2400, who will respond for the Judge Advocate General or transmit the request to the appropriate Deputy Assistant Judge Advocate General for response.

(2) Litigation requests regarding matters assigned to the General Counsel of the Navy under Navy Regs., art. 0327 (1990)⁵, shall be referred to the cognizant Command Counsel under, and subject to, limitations set forth in § 725.6(d)(2). That Command Counsel may either respond or refer the matter for action to another office. Requests involving asbestos litigation shall be referred to the Office of Counsel, Naval Sea Systems Command Headquarters, Personnel and Labor Law Section (Code 00LD), Washington, DC 20362-5101. Matters not clearly within the purview of a particular command counsel shall be referred to Associate General Counsel (Litigation), who may either respond or refer the matter for action to another office.

(3) Matters involving the Armed Services Board of Contract Appeals shall be forwarded to these respective counsel except where the determination may involve the assertion of the deliberative process privilege before that Board. In such an event, the matter shall be forwarded for determination to the Associate General Counsel (Litigation).

(d) *Litigation matters in which the United States is not, and is reasonably not expected to become, a party.* (1) *Matters within the cognizance of the Judge Advocate General.* (i) *Fact witnesses.* Requests to interview, depose, or obtain testimony of any present or former DON personnel as defined in § 725.4(b) about purely factual matters shall be forwarded to the Navy or Marine Corps officer exercising general court-martial jurisdiction (OEGCMJ) in whose chain of command the prospective witness or requested documents lie. That determining authority will respond for

⁴ See footnote 1 to § 725.1.

⁵ See footnote 1 to § 725.1.

² See footnote 1 to § 725.1.

³ See footnote 1 to § 725.1.

the Judge Advocate General under criteria set forth in § 725.8.

(A) If the request pertains to personnel assigned to the Office of the Chief of Naval Operations, the Office of the Vice Chief of Naval Operations, or an Echelon 2 command located in the Washington, DC, area, it shall be forwarded to that office which will likewise respond for the Judge Advocate General under the criteria set forth in § 725.8.

(B) If a request pertains to Marine Corps personnel assigned to Headquarters Battalion, Headquarters Marine Corps, or to other Marine Corps commands located in the Washington, DC, area, it shall be forwarded to the Commandant of the Marine Corps (JAR), Headquarters, U.S. Marine Corps, Washington, DC 20380-0001, which will respond for the Judge Advocate General under criteria set forth in § 725.8.

(C) Nothing here shall prevent a determining authority from referring requests or demands to another determining authority better suited under the circumstances to determine the matter and respond, but the requester shall be notified of the referral. Further, each determining authority specified in this paragraph may further delegate his or her decisional authority to a principal staff member, staff judge advocate, or legal advisor.

(D) In the alternative, the requester may forward the request to the Deputy Assistant Judge Advocate General (General Litigation), who may refer the matter to another determining authority for response, and so notify the requester.

(ii) *Visits and views.* A request to visit a DON activity, ship, or unit, or to inspect material or spaces located there will be forwarded to one of the authorities stated in § 725.6(d)(1)(i), who will respond on behalf of the Judge Advocate General. Action taken by that authority will be coordinated with the commanding officer of the activity, ship, or unit at issue, or with his or her staff judge advocate (if applicable). The military mission of the unit shall normally take precedence over any visit or view. The commanding officer may independently prescribe reasonable conditions as to time, place, and circumstances to protect against compromise of classified or privileged material, intrusion into restricted spaces, and unauthorized photography.

(iii) *Documents.* 10 U.S.C. 7861 provides that the Secretary of the Navy has custody and charge of all DON books, records, and property. Under

DOD Directive 5530.1⁶, the Secretary of the Navy's sole delegate for service of process is the General Counsel of the Navy. See 32 CFR 257.5(c). All process for such documents shall be served upon the General Counsel at the Department of the Navy, Washington, DC, 20350-1000, who will refer the matter to the proper delegate for action. Matters referred to the Judge Advocate General will normally be provided to the determining authorities described in § 725.6(c) and (d). That authority will respond per criteria in § 725.8. Process not properly served on the General Counsel is insufficient to constitute a legal demand and shall be processed as a request by counsel. Requests for documents maintained by the National Personnel Records Center will be determined by the official provided in § 725.8(b)(2)(iii).

(iv) *Expert or opinion requests.* Any request for expert or opinion consultations, interviews, depositions, or testimony will be referred to the Deputy Assistant Judge Advocate General (General Litigation) who will respond for the Judge Advocate General, or transmit the request to the appropriate DAJAG for response. Matters not clearly within the purview of a particular Deputy Assistant Judge Advocate General will be retained by the Deputy Assistant Judge Advocate General (General Litigation), who may either respond or refer the matter to another determining authority for response.

(2) *Matters within the cognizance of the General Counsel of the Navy.* (i) *Matters not involving issues of Navy policy.* Such matters shall be forwarded for determination to the respective counsel for Naval Sea Systems Command, Naval Air Systems Command, Naval Supply Systems Command, Naval Facilities Engineering Command, Space and Naval Warfare Command, Office of the Navy Comptroller, Commandant of the Marine Corps, Office of the Chief of Naval Research, Military Sealift Command, Office of Civilian Personnel Policy, or to the Assistant General Counsel (Acquisition), depending upon who has cognizance over the information or personnel at issue.

(ii) *Matters involving issues of Navy policy.* Such matters shall be forwarded for determination to the General Counsel of the Navy via the Associate General Counsel (Litigation).

(iii) *Matters involving asbestos litigation.* Such matters shall be forwarded to the Office of Counsel,

Naval Sea Systems Command Headquarters, Personnel and Labor Law Section (Code 00LD), Washington, DC 20362-5101.

(3) *Matters not clearly within the cognizance of either the Judge Advocate General or the General Counsel.* Such matters may be sent to the Deputy Assistant Judge Advocate General (General Litigation) or the Associate General Counsel (Litigation), who will, in consultation with the other, determine the appropriate authority to respond to the request.

§ 725.7 Contents of a proper request or demand.

(a) *Routine requests.* If official information is sought, through testimony or otherwise, a detailed written request must be submitted to the appropriate determining authority far enough in advance to assure an informed and timely evaluation of the request, and prevention of adverse effects on the mission of the command or activity that must respond. The determining authority shall decide whether sufficient information has been provided by the requester. Absent independent information, the following data is necessary to assess a request.

(1) *Identification of parties, their counsel and the nature of the litigation.* (i) Caption of case, docket number, court.

(ii) Name, address, and telephone number of all counsel.

(iii) The date and time on which the documents, information, or testimony sought must be produced; the requested location for production; and, if applicable, the estimated length of time that attendance of the DON personnel will be required.

(2) *Identification of information or documents requested.* (i) A description, in as much detail as possible, of the documents, information, or testimony sought, including the current military service, status (active, separated, retired), social security number, if known, of the subject of the requested pay, medical, or service records;

(ii) The location of the records, including the name, address, and telephone number, if known, of the person from whom the documents, information, or testimony is sought; and

(iii) A statement of whether factual, opinion, or expert testimony is requested (see §§ 725.4(c) and 725.8(b)(3)(ii)).

(3) *Description of why the information is needed.* (i) A brief summary of the facts of the case and the present posture of the case.

⁶ See footnote 1 to § 725.1.

(ii) A statement of the relevance of the matters sought to the proceedings at issue.

(iii) If expert or opinion testimony is sought, an explanation of why exceptional need or unique circumstances exist justifying such testimony, including why it is not reasonably available from any other source.

(b) *Additional considerations.* The circumstances surrounding the underlying litigation, including whether the United States is a party, and the nature and expense of the requests made by a party may require additional information before a determination can be made. Providing the following information or stipulations in the original request may expedite review and eliminate the need for additional correspondence with the determining authority.

(1) A statement of the requester's willingness to pay in advance all reasonable expenses and costs of searching for and producing documents, information, or personnel, including travel expenses and accommodations (if applicable);

(2) In cases in which deposition testimony is sought, a statement of whether attendance at trial or later deposition testimony is anticipated and requested. A single deposition normally should suffice;

(3) An agreement to notify the determining authority at least 10 working days in advance of all interviews, depositions, or testimony. Additional time for notification may be required where the witness is a DON health care provider or where the witness is located overseas;

(4) An agreement to conduct the deposition at the location of the witness, unless the witness and his or her commanding officer or cognizant superior, as applicable, stipulate otherwise;

(5) In the case of former DON personnel, a brief description of the length and nature of their duties while in DON employment, and a statement of whether such duties involved, directly or indirectly, the information or matters as to which the person will testify;

(6) An agreement to provide free of charge to any witness a signed copy of any written statement he or she may make, or, in the case of an oral deposition, a copy of that deposition transcript, if taken by a stenographer, or a video tape copy, if taken solely by video tape, if not prohibited by applicable rules of court;

(7) An agreement that if the local rules of procedure controlling the litigation so provide, the witness will be given an

opportunity to read, sign, and correct the deposition at no cost to the witness or the Government;

(8) A statement of understanding that the United States reserves the right to have a representative present at any interview or deposition; and

(9) A statement that counsel for other parties to the case will be provided with a copy of all correspondence originated by the determining authority so they may have the opportunity to submit any related litigation requests and participate in any discovery.

(c) *Response to deficient requests.* A letter request that is deficient in providing necessary information may be returned to the requester by the determining authority with an explanation of the deficiencies and a statement that no further action will be taken until they are corrected. If a subpoena has been received for official information, counsel should promptly determine the appropriate action to take in response to the subpoena. See § 725.9(g).

(d) *Emergency requests.* Written requests are generally required by 32 CFR part 97.

(1) The determining authority, identified in § 725.6, has discretion to waive that requirement in the event of a bona fide emergency, under conditions set forth here, which were not anticipated in the course of proper pretrial planning and discovery. Oral requests and subsequent determinations should be reserved for instances where factual matters are sought, and compliance with the requirements of a proper written request would result in the effective denial of the request and cause an injustice in the outcome of the litigation for which the information is sought. No requester has a right to make an oral request and receive a determination. Whether to permit such an exceptional procedure is a decision within the sole discretion of the determining authority, unless overruled by the General Counsel or the Judge Advocate General, as appropriate.

(2) If the determining authority concludes that the request, or any portion of it, meets the emergency test, he or she will require the requester to agree to the conditions set forth in § 725.7(a). The determining authority will then orally advise the requester of the determination, and seek a written confirmation of the oral request. Thereafter, the determining authority will make a written record of the disposition of the oral request including the grant or denial, circumstances requiring the procedure, and conditions to which the requester agreed.

(3) The emergency procedure should not be utilized where the requester refuses to agree to the appropriate conditions set forth in § 725.7(a) or indicates unwillingness to abide by the limits of the oral grant, partial grant, or denial.

§ 725.8 Considerations in determining to grant or deny a request.

(a) *General considerations.* In deciding whether to authorize release of official information, or the testimony of DON personnel concerning official information (hereafter referred to as "the disclosure" under a request conforming with the requirements of § 725.7, the determining authority shall consider the following factors:

(1) The DON policy regarding disclosure in § 725.2;

(2) Whether the request or demand is unduly burdensome or otherwise inappropriate under applicable court rules;

(3) Whether disclosure, including release in camera (i.e., to the judge or court alone), is appropriate under procedural rules governing the case or matter in which the request or demand arose;

(4) Whether disclosure would violate or conflict with a statute, executive order, regulation, directive, instruction, or notice;

(5) Whether disclosure, in the absence of a court order or written consent, would violate 5 U.S.C. 552, 552a;

(6) Whether disclosure, including release in camera, is appropriate or necessary under the relevant substantive law concerning privilege (e.g., attorney-client, attorney work-product, or physician-patient in the case of civilian personnel);

(7) Whether disclosure, except when in camera (i.e., before the judge alone) and necessary to assert a claim of privilege, would reveal information properly classified under the DOD Information Security Program under DOD 5200.1-R⁷, withholding of unclassified technical data from public disclosure following OPNAVINST 5510.161; privileged Naval Aviation Safety Program information (OPNAVINST 3750.6Q (NOTAL))⁸, or other matters exempt from unrestricted disclosure under 5 U.S.C. 552, 552a;

(8) Whether disclosure would unduly interfere with ongoing law enforcement proceedings, violate constitutional rights, reveal the identity of an intelligence source or source of confidential information, conflict with

⁷ See footnote 1 to § 725.1.

⁸ See footnote 1 to § 725.1.

U.S. obligations under international agreement, or be otherwise inappropriate under the circumstances;

(9) Whether attendance of the requested witness at deposition or trial will unduly interfere with the military mission of the command; and

(10) Whether, in a criminal case, requiring disclosure by a defendant of detailed information about the relevance of documents or testimony as a condition for release would conflict with the defendant's constitutional rights.

(b) *Specific considerations.* (1) *Documents, interviews, depositions, testimony, and views (where the United States is, or may become, a party).* All requests pertaining to such matters shall be forwarded to the Judge Advocate General or the General Counsel, as appropriate under § 725.6(c).

(2) *Documents (where the United States is not, and is reasonably not expected to become a party).* (i) *Unclassified Navy and Marine Corps records.* Where parties or potential parties desire unclassified naval records in connection with a litigation matter, the subpoena duces tecum or court order will be served, under 32 CFR 257.5(c), upon the General Counsel of the Navy, along with a written request complying with § 725.7.

(A) If the determining authority to whom the matter is referred determines to comply with the order or subpoena, compliance will be effected by transmitting certified copies of records to the clerk of the court from which process issued. If, because of an unusual circumstance, an original record must be produced by a naval custodian, it will not be removed from the custody of the person producing it, but copies may be placed in evidence.

(B) Upon written request of one or more parties in interest or their respective attorneys, records which would be produced in response to a court order signed by a judge as set forth above may be furnished without a court order, but only upon a request complying with § 725.7 and only when such records are not in a "system of records" as defined by the Privacy Act (5 U.S.C. 552a). In determining whether a record not contained in a "system of records" will be furnished in response to a Freedom of Information Act (FOIA) request, SECNAVINST 5720.42E⁹ controls.

(C) Generally, a record in a Privacy Act "system of records" may not be released under a litigation request except with the written consent of the person to whom the record pertains or in

response to a court order signed by a judge. See SECNAVINST 5211.5C¹⁰ and 5 U.S.C. 552, 552a for further guidance.

(D) Whenever compliance with a court order or subpoena duces tecum for production of DON records is denied for any reason, the subpoena or court order and complete copies of the requested records will be forwarded to the appropriate Deputy Assistant Judge Advocate General (General Litigation) or the Associate General Counsel (Litigation) for action, and the parties to the suit notified in accordance with this part.

(ii) *Classified Navy and Marine Corps records.* Any consideration of release of classified information for litigation purposes, within the scope of this instruction, must be coordinated within the Office of the Chief of Naval Operations (OP-09N) per OPNAVINST 5510.1H.¹¹

(iii) *Records in the custody of the National Personnel Records Center.* Court orders or subpoenas duces tecum demanding information from, or production of, service or medical records of former Navy and Marine Corps personnel in the custody of the National Personnel Records Center will be served upon the Director, National Personnel Records Center, 9700 Page Boulevard, St. Louis, MO 63132. If records responsive to the request are identified and maintained at the National Personnel Records Center, that Center shall make appropriate certified (authenticated) copies of the information requested. These copies will then be forwarded, along with the request, in the case of Navy personnel, to Chief, Bureau of Naval Personnel (Pers-06), Washington, DC 20370-5000, or his delegate, who will respond. In the case of Marine Corps personnel, the copies and request will be sent to the Commandant of the Marine Corps (MMRB-10), Quantico, VA 22134-0001, who will respond. Those requests that do not constitute legal demands will be refused by the Director, National Personnel Records Center, and written guidance provided to the requester.

(iv) *Medical and other records of civilian employees.* Production of medical certificates or other medical reports concerning civilian employees is controlled by Federal Personnel Manual, chapter 294 and chapter 339.1-4.¹² Records of civilian employees, other than medical records, may be produced upon receipt of a court order and a request complying with § 725.7, provided no classified or for official use only

information, such as loyalty or security records, are involved. Disclosure of records relating to compensation benefits administered by the Office of Workers' Compensation Programs of the Department of Labor are governed by Secretary of the Navy Instruction 5211.5C (Privacy Act implementation) and Secretary of the Navy Instruction 5720.42E (Freedom of Information Act implementation), as appropriate. Where information is furnished per this subparagraph in response to a court order and proper request, certified copies rather than originals should be furnished. Where original records must be produced because of unusual circumstances, they may not be removed from the custody of the official producing them, but copies may be placed on the record.

(v) *JAGMAN investigations (other than to next of kin).* The Deputy Assistant Judge Advocate General having cognizance over the records at issue for litigation or prospective litigation purposes may release the records if a complete release will result. The Assistant Judge Advocate General (Civil Law) will make determinations concerning the release of the records specified in this subparagraph if a release of less than the complete requested record will result. A release to next of kin of incompetent or deceased DON personnel or their representatives is exempt from these requirements and this part.

(vi) *Affirmative claims files.* Affirmative claims files (including Medical Care Recovery Act files), except to the extent they contain copies of JAGMAN investigations prepared under the Manual of the Judge Advocate General, or classified or privileged information, may be released by the commanding officer of the Naval Legal Service Office having cognizance over the claim at issue, without compliance with this instruction, to: insurance companies to support claims; to civilian attorneys representing injured service persons, their dependents, and the Government's interests; and to other DOD components. When a request for production involves material related to claims in favor of the Government, either the cognizant Command Counsel or the Naval Legal Service Office having territorial responsibility for the area should be notified.

(vii) *Accounting for disclosures from "systems of records."* When compliance with a litigation request or demand for production of records is appropriate, or when release of records is otherwise authorized, and records contained in a "system of records," are released, the

⁹ See footnote 1 to § 725.1.

¹⁰ See footnote 1 to § 725.1.

¹¹ See footnote 1 to § 725.1.

¹² See footnote 1 to § 725.1.

releasing official will consult Secretary of the Navy Instruction 5211.5C regarding disclosure accounting requirements.

(viii) *Pay records.* Official pay records of active-duty, reserve, retired, or former Navy members should be requested from Director, Defense Finance and Accounting Service (DFAS), Cleveland Center, Anthony J. Celebrezze Federal Building, Cleveland, OH 44199-2055. Official pay records of active-duty, reserve, retired, or former Marines should be requested from Director, Defense Finance and Accounting Service, Kansas City Center (Code G), Kansas City, MO 64197-0001.

(3) *Interviews, depositions, and testimony (where the United States is not, and is reasonably not expected to become, a party).* (i) *Factual matters.* DON policy favors disclosure of factual matters when disclosure does not violate the criteria stated in this section. Distinguishing between factual matters and expert or opinion matters (where DON policy favors non-disclosure) requires careful analysis. Opinion matters are defined at § 725.4(c).

(ii) *Expert, opinion, or policy matters.* Such matters are to be determined, under the delegation in § 725.6, by the cognizant Deputy Assistant Judge Advocate General or by General Counsel. General considerations to identify expert or opinion testimony are in § 725.4(c). DON personnel shall not provide, with or without compensation, opinion or expert testimony concerning official information, subjects, or activities, except on behalf of the United States or a party represented by the Department of Justice. Upon a showing by the requester of exceptional need or unique circumstances, and that the anticipated testimony will not be adverse to the interests of the DOD or the United States, the appropriate DON official designated in § 725.6, may grant, in writing, special authorization for DON personnel to appear and testify at no expense to the United States. In determining whether exceptional need or unique circumstances exist, the determining official should consider whether such expert or opinion testimony is available to the requester from any other source. The burden of demonstrating such unavailability, if any, is solely upon the requester.

(iii) *Visits and views (where the United States is not, and is reasonably not expected to become, a party).* Such disclosures are normally factual in nature and should not be accompanied by interviews of personnel unless separately requested and granted. The authority of the commanding officer of the activity, ship, or unit at issue is not

limited by this part. Accordingly, he or she may prescribe appropriate conditions as to time, place, and circumstances (including proper restrictions on photography).

(iv) *Non-DOD information.* A request for disclosure under this part, particularly through the testimony of a witness, may involve both official information and non-DOD information (e.g., in the case of a person who has acquired additional and separate knowledge or expertise wholly apart from Government employment). Determining whether or not official information is at issue is within the purview of the determining authority, not the requester. A requester's contention that only non-DOD information is at issue is not dispositive. The requester must still comply with this instruction to support that contention. If non-DOD information is at issue in whole or in part, the determining authority shall so state in the written determination described in § 725.9. He or she shall make no other determination regarding that non-DOD information.

§ 725.9 Action to grant or deny a request.

(a) The process of determining whether to grant or deny a request is not an adversary proceeding. This part provides guidance for the operation of DON only and is not intended to, does not, and may not be relied upon to, create any right or benefit, substantive or procedural, enforceable at law against the United States, DOD, or DON.

(b) 32 CFR part 97 and this part apply to testimony by former naval personnel and former civilian employees of DON. A proper request must be made, under § 725.7, to obtain testimony by former personnel regarding official DOD information. However, this part is not intended to place unreasonable restraints upon the post-employment conduct of such personnel. Accordingly, requests for expert or opinion testimony by such personnel will normally be granted unless that testimony would constitute a violation of the U.S. Code (e.g., 18 U.S.C. 201 et seq.), conflict with pertinent regulations (e.g., Secretary of the Navy Instruction 5370.2H), or disclose properly classified or privileged information.

(c) A determination to grant or deny should be made as expeditiously as possible to provide the requester and the court with the matter at issue or with a statement of the reasons for denial. The decisional period should not exceed 10 working days from receipt of a complete request complying with the requirements of § 725.7, absent exceptional or particularly difficult

circumstances. The requester should also be informed promptly of the referral of any portion of the request to another authority for determination.

(d) Except as provided in § 725.7(d), a determination to grant or deny shall be in writing.

(e) The determination letter should respond solely to the specific disclosures requested, stating a specific determination on each particular request. When a request is denied in whole or in part, a statement of the reasons for denial should be provided to fully inform a court of the reasons underlying the determination if it is challenged.

(f) A copy of any denial, in whole or in part, of a request, should be forwarded to the cognizant Deputy Assistant Judge Advocate General or the Associate General Counsel (Litigation), as appropriate. Such notification is likewise appropriate when the litigation request has been treated under 5 U.S.C. 552, 552a and § 725.5(f). Telephonic notification is particularly appropriate where a judicial challenge or contempt action is anticipated.

(g) In cases in which a subpoena has been received and the requester refuses to pay fees or otherwise comply with the guidance and requirements imposed by this part, or if the determining authority declines to make some or all of the subpoenaed information available, or if the determining authority has had insufficient time to complete its determination as to how to respond to the request, the determining authority must promptly notify the General Litigation Division of the Office of the Judge Advocate General or the Navy Litigation Office of the Office of the General Counsel, which offices will determine, in consultation with the Department of Justice, the appropriate response to be made to the tribunal which issued the subpoena. Because the Federal Rules of Civil Procedure require that some objections to subpoenas must be made either within 10 days of service of the subpoena or on or before the time for compliance, whichever first occurs, and because this will require consultation with the Department of Justice, timely notice is essential.

§ 725.10 Response to requests or demands in conflict with this instruction.

(a) Except as otherwise provided in this paragraph, DON personnel, including former military personnel and civilian employees, shall not produce, disclose, release, comment upon, or testify concerning any official DOD information in response to a litigation

request or demand without prior written approval of the appropriate DON official designated in § 725.6. If a request has been made, and granted, in whole or in part, per 32 CFR part 97 and this part, DON personnel may only produce, disclose, release, comment upon, or testify concerning those matters specified in the request and properly approved by the determining authority designated in § 725.6. See *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

(b) If, after DON personnel have received a litigation request or demand and have in turn notified the appropriate determining authority described in § 725.6, a response to the request or demand is required before instructions from the responsible official have been received, the responsible authority designated in § 725.6 shall notify the Deputy Assistant Judge Advocate General or Associate General Counsel (Litigation) who has cognizance over the matter. That official will furnish the requester, the court, or other authority that the request or demand is being reviewed in accordance with this part and seek a stay of the request or demand pending a final determination.

(c) If a court of competent jurisdiction or other appropriate authority declines to stay the effect of the request or demand in response to action taken under § 725.10(b), or if such court or other authority orders that the request or demand must be complied with, notwithstanding the final decision of the appropriate DON official, the DON personnel upon whom the request or demand was made will, if time permits, notify the determining authority of such ruling or order. That authority will notify the Deputy Assistant Judge Advocate General or the Associate General Counsel (Litigation) having cognizance over the matter. After due consultation and coordination with the Department of Justice, as required by the Manual of the Judge Advocate General, that official will determine whether the individual is required to comply with the request or demand and will notify the requester, the court, or other authority accordingly. The witness shall, if directed by the appropriate DON official, respectfully decline to comply with the demand. Legal counsel for the command concerned should accompany and advise DON personnel during any court proceedings involving the foregoing circumstances.

(d) It is expected that all DON actions in the foregoing paragraphs will be taken only after active consultation with the appropriate component of the Department of Justice. Generally, DON

personnel will be instructed to decline to comply with a court order only if the Department of Justice commits to represent the DON personnel in question.

§ 725.11 Fees.

(a) *Generally.* Except as provided below, determining authorities shall charge reasonable fees and expenses to parties seeking official DON information or testimony under this instruction. Pursuant to 32 CFR 288.4, 288.10, these fees should include all costs of processing a request for information, including time and material expended. Travel for active duty members summoned as witnesses is governed by Joint Travel Regulations, Vol. I, Chap. 7, pt. E, and Navy Travel Instructions, Chap. 6, pt. E.¹³ Travel for civilian personnel summoned as witnesses is governed by the Joint Travel Regulations, Vol. II, Chap. 4, pt. E.¹⁴

(1) *When DON is a party.* No fees normally shall be charged when the DON is a party to the proceedings, and the activity holding the requested information or employing the witness shall bear the expense of complying with the request.

(2) *When another federal agency is a party.* No fees shall be charged to the requesting agency. Travel and per diem expenses may be paid by the requesting agency, or by the Navy activity to which the requested witness is assigned, subject to reimbursement from the requesting agency.

(3) *When neither DON nor another federal agency is a party.* Fees shall be charged to the requester for time taken from official duties by DON personnel who are authorized to be interviewed, give testimony, or escort persons on views and visits of installations. At the discretion of the cognizant command, DON personnel need not be made available during duty hours unless directed by subpoena. Time which DON personnel spend in court testifying, or waiting to testify on factual matters shall not be charged. Fees should be charged, however, for expert or opinion testimony based upon the witness's education, training, or experience. Testimony by a treating physician called to testify about his personal knowledge of a specific case is considered fact not expert testimony. Fees are payable to the Treasurer of the United States for deposit in the Treasury's miscellaneous receipts. Rates for uniformed personnel are published in NAVCOMPT Notice 7041 series.¹⁵ Pursuant to 32 CFR 288.4,

charges for civilian personnel should include the employee's hourly rate of pay, as well as allowances and benefits. Except as provided in § 725.11(b)(4), no funds may be expended for travel or per diem of active duty members when an agency of the Federal Government is not a party. The requesting party is responsible for travel arrangements and funding. Government funding of travel and per diem for civilian employees is authorized.

(b) *Special circumstances.* (1) *Refusal to pay fees.* In cases in which a subpoena has been received and the requester refuses to pay appropriate fees, it may become necessary to request the Department of Justice to take appropriate legal action before the court issuing the subpoena. Determining authorities should consult promptly with the OJAG General Litigation Division or the Navy Litigation Office of the General Counsel if this course of action appears necessary, because some objections to subpoenas must be made either within ten days of service of the subpoena or on or before the time for compliance, whichever first occurs, and because this will require timely consultation with the Department of Justice. If no subpoena has been issued, the determining authority must decide whether to deny the request or, if appropriate, waive the fees.

(2) *Waiver or reduction of fees.* The determining authority may waive or reduce fees pursuant to 32 CFR 288.4, 288.9, provided such waiver or reduction is in the best interest of the DON and the United States. Fee waivers and reductions shall not be routinely granted, or granted under circumstances which might create the appearance that DON favors one party over another.

(3) *Witness fees required by the court.* Witness fees required by the rules of the applicable court shall be paid directly to the witness by the requester. Such amounts are to defray the cost of travel and per diem. In a case where the Government has paid the cost of travel and per diem, the witness shall turn over to his or her supervisor any payment received from a private party to defray the cost of travel that, when added to amounts paid by the Government, exceed the actual cost of travel. The supervisor shall forward the amount turned over by the witness to the Office of the Comptroller of the Navy for appropriate action.

(4) *Exceptional cases.* If neither the DON, nor an agency of the Federal Government is a party, appropriated funds may be used to pay, without reimbursement, travel and per diem of DON personnel who are witnesses in

¹³ See footnote 1 to § 725.1.

¹⁴ See footnote 1 to § 725.1.

¹⁵ See footnote 1 to § 725.1.

criminal or civil proceedings, provided, the case is directly related to the Armed Services, or its members, and the Armed Services have a genuine and compelling interest in the outcome.

Dated: January 14, 1992.

Wayne T. Baucino,
Lieutenant, JAGC, U.S. Naval Reserve,
Alternate Federal Register Liaison Officer.
[FR Doc 92-1433 Filed 1-21-92; 8:45 am]
BILLING CODE 3910-AE-F

DEPARTMENT OF TRANSPORTATION

Saint Lawrence Seaway Development Corp.

33 CFR Part 402

Tariff of Tolls

AGENCY: Saint Lawrence Development Corporation, DOT.

ACTION: Final rule.

SUMMARY: The Saint Lawrence Seaway Development Corporation and the St. Lawrence Seaway Authority of Canada have jointly established and presently administer the St. Lawrence Seaway Tariff of Tolls. This Tariff sets forth the level of tolls assessed on all commodities and vessels transiting the facilities operated by the Corporation and the Authority. The Authority proposed and the Corporation agreed that the definition of "feed grains" will be revised to include meal from these grains for animal consumption, which will eliminate inequity in the treatment of this meal relative to competing products. The Authority also proposed and the Corporation agreed that the volume discount will be amended as follows: To allow the discount to be based upon commodities shipped from a particular origin, that is a particular country outside of North America and a particular port within North America; that the amount shipped must exceed the five navigation season average by 100,000 tons; and that cargoes subject to new downbound or upbound business refunds not be used in the calculations for volume discounts. This is intended to increase use of this discount and make it more practical.

EFFECTIVE DATE: January 22, 1992.

FOR FURTHER INFORMATION CONTACT: Marc C. Owen, Chief Counsel, Saint Lawrence Seaway Development Corporation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366-0091.

SUPPLEMENTARY INFORMATION: The definition of "feed grains" in section 402.3(g) is amended to include meal from the other types of feed grains for animal

consumption. These meal products have been subject to the higher bulk rate even though they compete with other feed grains in feed formulations. The amendment will eliminate this inequity. The volume discount in § 402.11 also is amended as follows: To allow the discount to be based upon commodities shipped from a particular origin, that is a particular country outside of North America and a particular port within North America; to provide that the amount shipped must exceed the five navigation season average by 100,000 tons; and to provide that cargoes subject to new downbound or upbound business refunds not be used in the calculations for volume discounts. The principal purpose of this amendment is to allow rebates under this section to be more effectively available to prospective beneficiaries of volume rebates. By being calculated on the basis of port as well as commodity, it is believed that eligible Seaway users will increase their shipments through the system. In addition, the present volume rebate method can result in increases in shipments from one port being negated by decreases from another port. It is believed that the amendment resolves this situation.

No comments were received in response to the September 19, 1991 (56 FR 47431), Notice of Proposed Rulemaking. An exchange of diplomatic notes between Canada and the United States approving this amendment occurred on December 20, 1991.

Regulatory Evaluation

This final rule involves a foreign affairs function of the United States, and therefore, Executive Order 12291 does not apply. This final rule has also been evaluated under the Department of Transportation's Regulatory Policies and Procedures and this final rule is not considered significant under those procedures and its economic impact is expected to be so minimal that a full economic evaluation is not warranted.

Regulatory Flexibility Act Determination

The Saint Lawrence Seaway Development Corporation certifies that this final rule will not only have a significant economic impact on a substantial number of small entities. The St. Lawrence Seaway Tariff of Tolls relates to the activities of commercial users of the Seaway, the vast majority of whom are foreign vessel operators. Therefore, any resulting costs will be borne by foreign vessels.

Environmental Impact

This final rule does not require an environmental impact statement under

the National Environmental Policy Act (49 U.S.C. 4321, *et seq.*) because it is not a major federal action significantly affecting the quality of human environment.

List of Subjects in 33 CFR Part 402

Vessels, Waterways.

Accordingly, the Saint Lawrence Seaway Development Corporation amends part 402—Tariff of Tolls (33 CFR part 402) as follows:

PART 402—[AMENDED]

1. The authority citation for 33 CFR part 402 continues to read as follows:

Authority: 68 Stat. 93, 33 U.S.C. 981-990.

2. In § 402.3, paragraph (g) is revised to read as follows:

§ 402.3 Interpretation.

(g) Feed grains means barley, corn, oats, flaxseed, rapeseed, soybeans, field crop seeds, grain screenings, and meal from these grains for animal consumption;

3. Section 402.11 is revised to read as follows:

§ 402.11 Volume discount.

(a) A volume discount shall be granted to carriers at the end of the 1991, 1992, and 1993 navigation seasons after payment of the full tolls specified in the schedule under the tariff in § 402.8 of this part if shipments of a commodity from a particular origin exceed the average amount of shipments from that origin for that commodity in the Seaway during the five navigation seasons immediately preceding the season in which the volume discount is applied by an amount of at least 100,000 tons. The volume discount shall be equal to a 20 percent reduction of the portion of the composite toll related to charges per metric ton of cargo paid for the shipments that surpass the average for the preceding five seasons. The volume discount shall be applied on a pro rata basis to all carriers of the particular commodity from that origin within one navigation season.

(b) For the purposes of this section, "origin" means the country at which the cargo is loaded, except if the cargo is loaded in North America, "origin" means the country at which the cargo is loaded.

(c) If the conditions in paragraphs (a) and (b) of this section are met, a volume discount shall be granted with respect to the following commodities:

- (1) Grain;
- (2) Other agricultural products;