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INTRODUCTION

The *Illinois Register* is the official state document for publishing public notice of rulemaking activity initiated by State governmental agencies. The table of contents is arranged categorically by rulemaking activity and alphabetically by agency within each category.

Rulemaking activity consists of proposed or adopted new rules; amendments to or repealers of existing rules; and rules promulgated by emergency or peremptory action. Executive Orders and Proclamations issued by the Governor; notices of public information required by State Statute; and activities (meeting agendas; Statements of Objection or Recommendation, etc.) of the Joint Committee on Administrative Rules (JCAR), a legislative oversight committee which monitors the rulemaking activities of State Agencies; is also published in the Register.

The Register is a weekly update of the Illinois Administrative Code (a compilation of the rules adopted by State agencies). The most recent edition of the Code, along with the Register, comprise the most current accounting of State agencies' rulemakings.

The *Illinois Register* is the property of the State of Illinois, granted by the authority of the Illinois Administrative Procedure Act [5 ILCS 100/1-1, et seq.].

ILLINOIS REGISTER PUBLICATION SCHEDULE FOR 2017

Issue#	Rules Due Date	Date of Issue
1	December 27, 2016	January 6, 2017
2	January 3, 2017	January 13, 2017
3	January 9, 2017	January 20, 2017
4	January 17, 2017	January 27, 2017
5	January 23, 2017	February 3, 2017
6	January 30, 2017	February 10, 2017
7	February 6, 2017	February 17, 2017
8	February 14, 2017	February 24, 2017
9	February 21, 2017	March 3, 2017
10	February 27, 2017	March 10, 2017
11	March 6, 2017	March 17, 2017
12	March 13, 2017	March 24, 2017
13	March 20, 2017	March 31, 2017
14	March 27, 2017	April 7, 2017
15	April 3, 2017	April 14, 2017
16	April 10, 2017	April 21, 2017
17	April 17, 2017	April 28, 2017
18	April 24, 2017	May 5, 2017
19	May 1, 2017	May 12, 2017
20	May 8, 2017	May 19, 2017

21	May 15, 2017	May 26, 2017
22	May 22, 2017	June 2, 2017
23	May 30, 2017	June 9, 2017
24	June 5, 2017	June 16, 2017
25	June 12, 2017	June 23, 2017
26	June 19, 2017	June 30, 2017
27	June 26, 2017	July 7, 2017
28	July 3, 2017	July 14, 2017
29	July 10, 2017	July 21, 2017
30	July 17, 2017	July 28, 2017
31	July 24, 2017	August 4, 2017
32	July 31, 2017	August 11, 2017
33	August 7, 2017	August 18, 2017
34	August 14, 2017	August 25, 2017
35	August 21, 2017	September 1, 2017
36	August 28, 2017	September 8, 2017
37	September 5, 2017	September 15, 2017
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39	September 18, 2017	September 29, 2017
40	September 25, 2017	October 6, 2017
41	October 2, 2017	October 13, 2017
42	October 10, 2017	October 20, 2017
43	October 16, 2017	October 27, 2017
44	October 23, 2017	November 3, 2017
45	October 30, 2017	November 13, 2017
46	November 6, 2017	November 17, 2017
47	November 13, 2017	November 27, 2017
48	November 20, 2017	December 1, 2017
49	November 27, 2017	December 8, 2017
50	December 4, 2017	December 15, 2017
51	December 11, 2017	December 26, 2017
52	December 18, 2017	December 29, 2017

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOTICE OF PROPOSED REPEALER

1) Heading of the Part: Licensing of Industrial Hygienists

2) Code Citation: 35 Ill. Adm. Code 184

3)

Section Numbers:	Proposed Actions:
184.100	Repealed
184.101	Repealed
184.102	Repealed
184.103	Repealed
184.104	Repealed
184.105	Repealed
184.106	Repealed
184.200	Repealed
184.201	Repealed
184.202	Repealed
184.203	Repealed
184.204	Repealed
184.205	Repealed
184.206	Repealed
184.207	Repealed
184.300	Repealed
184.301	Repealed
184.302	Repealed
184.400	Repealed
184.401	Repealed
184.402	Repealed
184.403	Repealed
184.500	Repealed
184.501	Repealed
184.502	Repealed
184.503	Repealed
184.504	Repealed
184.505	Repealed
184.506	Repealed
184.600	Repealed

4) Statutory Authority: Implementing and authorized by the Industrial Hygiene Licensing Act [225 ILCS 52].

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOTICE OF PROPOSED REPEALER

5) A Complete Description of the Subjects and Issues Involved: In response to Executive Order 2016-13, the Illinois EPA proposes to repeal 35 Ill. Adm. Code 184. See 40 Ill. Reg. 14812 (October 28, 2016). The statutory authority for Part 184 was repealed by P.A. 98-78 on July 15, 2013.

6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None

7) Will this proposed repealer replace an emergency rule currently in effect? No

8) Does this repealer contain an automatic repeal date? No

9) Does this repealer contain incorporations by reference? No

10) Are there any other rulemakings pending on this Part? No

11) Statement of Statewide Policy Objective: It does not create or expand a State mandate under the State Mandates Act [30 ILCS 805].

12) Time, Place and Manner in which interested persons may comment on this proposed rulemaking: Persons who wish to submit comments on the proposed rules may submit them in writing by no later than 45 days after publication of this Notice to:

Sara Terranova
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield IL 62794-9276

217/782-5544
sara.terranova@illinois.gov

13) Initial Regulatory Flexibility Analysis:

A) Types of small businesses, small municipalities and not-for-profit corporations affected: Part 184 provides licensing requirements for industrial hygienists which may affect small business.

B) Reporting, bookkeeping or other procedures required for compliance: None

C) Types of professional skills necessary for compliance: None

14) Regulatory Agenda on which this rulemaking was summarized: The repeal of 35 Ill. Adm. Code 184 is a response to Executive Order 2016-13, 40 Ill. Reg. 14812 (October 28, 2016). The Agency did not anticipate this repealer before preparing the January 2017 Regulatory Agenda.

The full text of the Proposed Repealer begins on the next page:

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOTICE OF PROPOSED REPEALER

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE A: GENERAL PROVISIONS
CHAPTER II: ENVIRONMENTAL PROTECTION AGENCY

PART 184
LICENSING OF INDUSTRIAL HYGIENISTS (REPEALED)

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184.103 Disclaimer
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184.105 Industrial Hygiene Examining Board
184.106 Address for Submittals to Agency

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ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOTICE OF PROPOSED REPEALER

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184.506 Record Required

SUBPART F: RECIPROCITY

Section
184.600 Evaluation of Licensing by Other States and Reciprocal Licensure

AUTHORITY: Implementing and authorized by the Industrial Hygiene Licensing Act [225 ILCS 52].

SOURCE: Adopted at 18 Ill. Reg. 16906, effective November 15, 1994; repealed at 41 Ill. Reg. _____, effective _____.

SUBPART A: GENERAL

Section 184.100 Purpose

This part sets forth the procedures to be used by the Illinois Environmental Protection Agency in administering a system for the licensing and sanctioning, where necessary, of industrial

hygienists, as defined in Section 184.102 of this Subpart.

Section 184.101 Applicability

The rules of this Part shall be applicable to the licensing of all industrial hygienists who seek to represent themselves as Illinois Licensed Industrial Hygienists.

Section 184.102 Definitions

As used in this Part, the following terms shall have the meanings set forth below:

"Act" means the Illinois Industrial Hygiene Licensing Act [225 ILCS 52].

"Agency" means the Illinois Environmental Protection Agency. (Section 10 of the Act)

"American Board of Industrial Hygiene (ABIH)" means the Pennsylvania non-profit corporation which certifies industrial hygienists in the United States of America.

"Board" means the Industrial Hygiene Examining Board. (Section 10 of the Act)

"Certified Industrial Hygienist (CIH)" means an individual who has been granted a certificate as a Certified Industrial Hygienist by the American Board of Industrial Hygiene, and whose certificate has not been suspended or revoked for cause. (Section 10 of the Act)

"Director" means the Director of the Illinois Environmental Protection Agency.

"Fund" means the Industrial Hygienists Regulatory and Enforcement Fund created by Section 30 of the Act.

"IEPA-OCS" means the Illinois Environmental Protection Agency office which has primary responsibility for managing the industrial hygienists licensing program.

"Industrial hygiene" means providing services in which the sciences are applied with the aid of quantitative measurement techniques in the control of physical, chemical, and biological factors that cause illness, injury, impaired health, or

inefficiency among employees and the public. (Section 10 of the Act)

"Industrial hygiene profession" means the providing of services by a Licensed Industrial Hygienist in which the mathematical and natural sciences are applied with quantitative measurement techniques in the anticipation, recognition, evaluation, and control of physical, chemical, and biological stresses that cause or may cause illness, injury, impaired health and well-being, or significant discomfort and inefficiency among workers and the public. (Section 10 of the Act)

"Industrial Hygienist-in-training" means an individual who has been granted a certificate as an Industrial Hygienist-in-training by the American Board of Industrial Hygiene. (Section 10 of the Act)

"Licensed Industrial Hygienist (LIH)" means an individual who has satisfied all the requirements of the Industrial Hygienist Licensure Act and these rules, who has been granted a license by the Agency, and whose license has not expired or been suspended or revoked.

"Person" means any natural person, and shall not include any corporation, trust or other non-natural entity.

"Professional experience" means the practice, research, teaching, or administration of industrial hygiene activities. Teaching or research as a student is not considered to be professional experience.

Section 184.103 Disclaimer

The Agency and the State of Illinois do not endorse or guarantee the quality of work or conduct by an applicant who has been licensed.

Section 184.104 Severability

If any Section, subsection, sentence or clause of this Part is judged invalid, such adjudication shall not affect the validity of this Part as a whole or any Section, subsection, sentence, or clause thereof not judged invalid.

Section 184.105 Industrial Hygiene Examining Board

a) *The Director shall appoint an Industrial Hygiene Examining Board consisting of*

5 persons who shall serve in an advisory capacity to the Director. The Board shall be composed of 4 Certified or Licensed Industrial Hygienists, one of whom shall serve as the chairperson, and one member of the public who is not regulated under the Act or a similar Act and who represents consumer interests.

b) *Members* shall be Illinois residents and *shall serve for a term of 4 years and until their successors are appointed and qualified, except for the initial appointments. Of the initial appointments one member shall be appointed for one year, one shall be appointed to serve 2 years, one shall be appointed to serve 3 years, and 2 shall be appointed to serve for 4 years, and until their successors are appointed and qualified. No member shall be reappointed if that reappointment would cause that person's service on the Board to be longer than 8 successive years. Appointments to fill vacancies for the unexpired portion of a vacated term shall be made in the same manner as original appointments. Initial terms shall begin January 31, 1994.*

c) *The Director may terminate the appointment of any member for cause.*

d) *The Director shall consider the recommendation of the Board on all matters and questions relating to the Act and these rules.*

e) *The Board is charged with the duties and responsibilities of recommending to the Director the adoption of all policies, procedures, and rules which may be required or deemed advisable in order to perform the duties and functions conferred on the Board, the Director, and the Agency to carry out the provisions of the Act.* (Section 35 of the Act)

Section 184.106 Address for Submittals to Agency

All materials submitted to the Agency by applicants and Licensed Industrial Hygienists pursuant to this Part shall be addressed to:

Illinois EPA
Office of Chemical Safety
Health & Safety Unit
2200 Churchill Road
Post Office Box 19276
Springfield, Illinois 62794-9276

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOTICE OF PROPOSED REPEALER

SUBPART B: REQUIREMENTS FOR LICENSE

Section 184.200 Application Requirements

a) The Industrial Hygienist License Application form shall be available from the Agency by mailing a written request to IEPA-OCS with a self-addressed stamped envelope.

b) Any person who seeks a license as a Licensed Industrial Hygienist shall submit a complete application to the Agency in which the applicant provides all of the following:

1) A statement that the applicant has not been convicted of a felony in the State of Illinois, any other state, or in any Federal Court; or, if the applicant has been convicted of a felony, the felony convictions are adequately described, as required in Section 184.201 of this Subpart;

2) Verification of experience from immediate supervisors for each industrial hygiene employment period claimed toward meeting the professional experience requirements specified in subsection (b)(3) below. When the applicant had no supervisor, the applicant shall submit verifications from clients; at least one verification from a client shall be provided for each year of experience claimed. Each verification shall be provided on the Agency Professional Experience Verification form.

3) Official transcripts shall be required for coursework claimed for credit and shall be submitted directly to the Agency by the college or university. The verifications required by subsection (b)(2), above, and transcripts shall demonstrate that the applicant has either:

A) *A bachelors degree in a physical or biological science or industrial hygiene from an undergraduate program approved by the Agency and at least 5 years of professional experience* (Section 25 of the Act); or

B) *A masters degree in industrial hygiene from a graduate program approved by the Agency and at least 4 years of professional experience* (Section 25 of the Act); or

C) *A doctorate degree in industrial hygiene from a graduate program approved by the Agency and at least 3 years of professional experience.* (Section 25 of the Act).

4) A copy of the ABIH notification stating that the applicant has passed the examination(s) required for qualification as a Certified Industrial Hygienist, or a copy of the Certified Industrial Hygienist certificate granted by ABIH.

5) The required fee payable to the Fund, as provided in Section 184.400 of this Part.

c) Applicants who did not register with the Agency by November 18, 1993 shall not be licensed before July 1, 1994.

d) Any applicant may be required to submit supplementary information in the event that an incomplete application is received by the Agency, or the Agency determines that any information provided in an application requires clarification.

e) No applicant may apply for licensure prior to having passed the examination authorized by the Agency.

Section 184.201 Felony Convictions of Applicants

Any applicant who has been convicted of a felony in the State of Illinois, any other State, or any Federal Court, shall, along with the application, provide a written description of the felony charge for which the applicant was convicted, how long ago the conviction occurred, the jurisdiction in which the applicant was convicted, the number of the case in which the conviction was entered, and any mitigating factors which the applicant believes are relevant to the consideration of the Agency.

Section 184.202 Agency-Approved Programs

a) Any applicant who has completed a bachelors degree at an Agency-approved institution (as provided in Section 184.203 of this Subpart) in chemistry, physics, chemical engineering, mechanical engineering, sanitary engineering, environmental engineering, biology, or industrial hygiene shall have completed an Agency-approved undergraduate program. The Agency may accept other bachelors degrees provided the degree program included at least 60 semester

credit hours in courses in physical or biological science, mathematics, engineering, and technology, with at least 15 of those hours at the junior, senior, or graduate level. An applicant who has a bachelors degree in a discipline not specifically mentioned in this subsection may be eligible to apply for a license on the basis of additional academic coursework from an Agency-approved institution or by completion of an Agency-approved graduate program.

b) Any applicant who has completed a masters or doctorate degree at an Agency-approved institution (as provided in Section 184.203 of this Subpart) in the field of industrial hygiene shall have completed an Agency-approved graduate program.

Section 184.203 Agency-Approved Institutions

Any institution of post-secondary education granting degrees shall be considered to be an Agency-approved institution provided that it is accredited by the Council on Post Secondary Accreditation or any successor organization, or the institution may be considered on the basis of its accreditation status in the education system which has jurisdiction.

Section 184.204 Agency-Authorized Examination

The examination authorized by the Agency for the purpose of application for licensure shall be examination(s) required by the ABIH for qualification as a Certified Industrial Hygienist.

Section 184.205 Examination Review and Administration

a) The Agency shall review ABIH examination subjects at least annually to evaluate their continuing appropriateness for the licensing of industrial hygienists.

b) The Agency-authorized examination shall be administered by the ABIH, which shall be the designated testing service for purposes of Section 30 of the Act.

Section 184.206 Professional Experience Requirements

Applicants for licensure shall have achieved the years of professional experience required by Section 184.200 of this Subpart by having spent more than 50% of their total work time (more than 20 hours per week) in professional activities related to industrial hygiene during each year claimed for credit.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOTICE OF PROPOSED REPEALER

Section 184.207 Application Statement

Any person submitting an application pursuant to this Part shall make the following statement:

> I certify that the information submitted in this application is, to the best of my knowledge and belief, true, accurate and complete. I am aware that any license granted to me by the Illinois Environmental Protection Agency may be subject to suspension or revocation if any information submitted in this application is determined to be false or misleading.

SUBPART C: LICENSE VALIDITY AND RENEWAL

Section 184.300 Validity of License

Any license or renewal license issued under this Part shall be valid for a period of 2 years, with the expiration date being 2 years from the day the license was issued, except as specified in Subsection 184.301(c) of this Subpart.

Section 184.301 License Renewal

a) The Industrial Hygienist License Application form shall be used for renewal application and shall be available from the Agency by submitting a written request to IEPA-OCS with a self-addressed stamped envelope.

b) Any person who seeks renewal of an unexpired license issued under this Part shall, no later than 30 days before the expiration of the currently effective license, submit a complete application to the Agency, in which the applicant must provide all of the following:

   1) A statement that the applicant has not had a license issued under this Part suspended or revoked;

   2) A statement that the applicant has not been convicted of any felony not previously reported to the Agency on an application or renewal form; and

   3) The required fee payable to the Fund, as provided in Section 184.400 of this Part.

c) A license shall remain valid for 90 days beyond its expiration date if a complete

renewal application and the fee required pursuant to Section 184.400 of this Part is submitted no later than 30 days before the expiration date.

d) Any person who seeks renewal of an expired license shall submit a complete renewal application to the Agency as provided in subsection b, above, along with the renewal fee specified by subsection 184.400(c) of this Part.

e) Any applicant who has entered inactive status in accordance with Section 184.302 of this Subpart may remove himself or herself from inactive status and seek renewal of his or her license under subsection (a) and (b) of this Section irrespective of whether his or her license has expired during the period of inactive status.

Section 184.302 Inactive Status

Any person with a valid unexpired license issued under this Part may enter inactive status by notifying IEPA-OCS in writing by certified mail, provided that the person is not the subject of a pending investigation or proceeding pursuant to Subpart E of this Part. During the period of inactive status, the person shall not use the title Licensed Industrial Hygienist. A person on inactive status may return to active status by either:

a) Notifying IEPA-OCS by certified mail of the return to active status if the expiration date has not passed for the license that was valid at the time inactive status was elected, or

b) Submitting a complete renewal application to the Agency, as provided in subsection 184.301(b) of this Subpart, except that the fee required for a resumption of active status and renewal shall be $50.

SUBPART D: FEES

Section 184.400 Application/Renewal Fees

a) All fees payable under this Part shall be made payable to the Industrial Hygienists Regulatory and Enforcement Fund.

b) As provided in Section 50 of the Act, all persons required to be licensed when the Act was approved on August 20, 1993, were to have registered with the Agency and submitted a registration fee of $100 by November 18, 1993. Persons who

registered by November 18, 1993, shall be sent an Industrial Hygienist License Application form by the Agency. After January 1, 1994, the Agency will begin issuing licenses to qualified, registered applicants who have satisfied all the requirements of Section 184.200 of this Part. Persons submitting applications who did not register by November 18, 1993, shall not be issued licenses before July 1, 1994.

c) The application fee for an initial license or for renewal of an expired license shall be $200, except that the application fee for applicants who registered by November 18, 1993, shall be $100 for their initial term of licensure. The application fee includes the issuance of a wallet license certificate.

d) The fee for the renewal of an unexpired license shall be $50, provided that the application for renewal is submitted no less than 30 days before the expiration date of the license. Any application for renewal submitted before the expiration date of the applicant's license, but less than 30 days before the expiration date, shall be subject to an additional $50 fee.

Section 184.401 Record Fee

Applicants and Licensed Industrial Hygienists who wish to pursue judicial review of a final administrative decision of the Agency under Subpart E of this Part shall send the Agency a written request for a certified copy of the record identifying the final administrative decision of the Agency of which the applicant or Licensed Industrial Hygienist is seeking review. Written requests for copies of records shall be sent to IEPA-OCS. Following receipt of the written request, the Agency shall notify the applicant or Licensed Industrial Hygienist of the number of pages of the relevant record. The applicant or Licensed Industrial Hygienist shall then submit a record fee of 20 cents for each page of the record to the Agency.

Section 184.402 Other Fees

a) Any Licensed Industrial Hygienist who wishes to obtain a wall certificate shall send a written request to IEPA-OCS, along with a $15 fee for each certificate requested.

b) Any Licensed Industrial Hygienist who wishes to obtain a duplicate license certificate, replacement license certificate, or new license certificate reflecting a legally-recognized name change shall send a written request to IEPA-OCS specifying whether a duplicate or replacement certificate or certificate reflecting a

legally-recognized name change is desired. If an additional certificate is requested by a Licensed Industrial Hygienist, the fee shall be $15 each.

c) Any person wishing to obtain a roster of current, suspended and revoked licenses, or a roster of expired and inactive licenses shall send a written request to IEPA-OCS along with a $15 fee for each roster requested.

Section 184.403 Nonrefundability of Fees

All fees received by the Agency from applicants or Licensed Industrial Hygienists under this Part shall be non-refundable.

SUBPART E: DENIAL, REFUSAL TO RENEW, SUSPENSION, AND REVOCATION OF LICENSES

Section 184.500 Investigation

The Agency may refuse to issue, refuse to renew, or seek the suspension or revocation of any license issued under the Act and this Part. The Agency may, upon its own motion or upon the written complaint of any person setting forth charges which, if proven, would constitute grounds for refusal to issue or renew, suspension or revocation as provided by Section 184.503 of this Subpart, investigate the actions of any person applying for or holding a license.

Section 184.501 Notice

The Agency, prior to denying, refusing to renew, suspending or revoking a license, shall notify the applicant or Licensed Industrial Hygienist in writing of the intent of the Agency to deny, refuse to renew, suspend or revoke a license, and the nature of any charges made by any third party against the applicant or Licensed Industrial Hygienist, and shall afford the applicant or Licensed Industrial Hygienist an opportunity to be heard in person or by counsel. The Agency shall also notify the Board of the issuance of a notification of intent to refuse to renew, suspend or revoke a license.

Section 184.502 Procedure

When the Agency has given notice of its intent to deny, refuse to renew, suspend or revoke any license, and of any charges made by any third party against an applicant or Licensed Industrial Hygienist, the procedures set forth at 35 Ill. Adm. Code 168, Procedures For Contested Case

Hearings, shall apply to the conduct of any Agency hearings and the making of final administrative decisions.

Section 184.503 Grounds for Denial, Refusal to Renew, Suspension and Revocation

a) The Agency may deny, refuse to renew, suspend or revoke any license for any one or any combination of the following causes:

1) The practice of any fraud or deceit in obtaining or attempting to obtain a license;

2) Negligence or misconduct in the practice of industrial hygiene which endangered the health or safety of the public, an employee, or the environment;

3) Repeated violations of federal, state or local laws, regulations, standards, or ordinances regarding health and safety;

4) Conviction in Illinois or another state of any crime which is a felony under the laws of Illinois or that other state or conviction of a felony in a federal court;

5) Being declared to be a person under a legal disability by a court of competent jurisdiction; or

6) Revocation or suspension of Certified Industrial Hygienist status by the ABIH for cause.

b) The Agency may issue, renew or refuse to suspend or revoke a license notwithstanding the applicability of any of the factors set forth in subsection (a), above, if mitigating factors exist such that a license should be issued. Mitigating factors may include, but shall not be limited to, the following:

1) The severity of the misconduct;

2) How recently the misconduct took place; and

3) The degree of control exerted over worker and public health and safety at a site by the applicant or Licensed Industrial Hygienist at the time any

misconduct described in subsection (a), above, was committed.

c) Relative to all original and renewal applications and in all hearings before the Agency conducted under this Part, a person seeking licensure shall have the burden of demonstrating that he or she is entitled to the license.

Section 184.504 Sanctions

a) If a license is suspended, it shall be considered invalid for a period of time not less than 30 days, but no more than one year, as determined by the Agency. If a license expires during suspension, the suspended industrial hygienist may not reapply for license until the suspension period has elapsed. At the end of the suspension period, the suspended license, if not expired, shall be considered valid.

b) If a license is revoked it shall be considered void. If a license is revoked, the former Licensed Industrial Hygienist may not reapply for a license for a period of not less than six months but not more than three years, as determined by the Agency. If an applicant seeks to obtain a license after the revocation period has elapsed, the applicant must comply with all requirements of Subparts B and D of this Part as if originally applying for a license.

Section 184.505 Appeal

Within 35 days after receipt of a written notice of denial, refusal to renew, suspension or revocation from the Director, the applicant, suspended industrial hygienist, or former Licensed Industrial Hygienist may appeal the sanction to the Circuit Court of Sangamon County. The revocation or suspension of a license shall be stayed pending a final decision on an appeal. All judicial review conducted pursuant to this Part shall be in accordance with the Administrative Review Law [735 ILCS 5/Art. III].

Section 184.506 Record Required

No applicant or Licensed Industrial Hygienist may seek judicial review of a final administrative decision of the Agency under this Part unless that applicant or Licensed Industrial Hygienist has obtained a certified copy of the Agency record, paid the Agency the record fee required by Section 184.401 of this Part and filed the certified copy with the Circuit Court for Sangamon County.

SUBPART F: RECIPROCITY

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOTICE OF PROPOSED REPEALER

Section 184.600 Evaluation of Licensing by Other States and Reciprocal Licensure

a) The Agency will monitor the establishment of systems for the licensing of industrial hygienists in other states, and will evaluate whether the qualifications for granting a license prescribed by any other state are compatible with those prescribed by the Act and this Part.

b) The Agency will evaluate the qualifications for the licensing of industrial hygienists prescribed by any other state on the basis of the following factors:

1) whether the examination requirements prescribed by that state are compatible with those specified in Sections 184.200, 184.204 and 184.205 of this Part;

2) whether the experience requirements prescribed by that State are compatible with those specified in Sections 184.200 and 184.206 of this Part;

3) whether the educational requirements prescribed by that state are compatible with those specified in Sections 184.200 and 184.203 of this Part;

4) whether the felony disclosure requirements prescribed by that state are compatible with those specified in Sections 184.200 and 184.201 of this Part; and

5) whether application, licensing and disciplinary records from that other state are available for review by the Agency.

c) The Agency may make a determination that another State's program for the licensing of industrial hygienists is compatible with that provided for by the Act and this Part by one of the following two methods:

1) The Agency may enter into an agreement with the licensing authority in another state providing for standards and procedures for the reciprocal licensing of industrial hygienists; or

2) The Agency may, on a case-by-case basis, review the qualifications

required for licensure by another state pursuant to a written request made by an applicant for reciprocal licensure. The Agency may require written confirmation from the licensing authority in another state if a case-by-case review is undertaken.

d) The Industrial Hygienist Reciprocal Licensure Application form shall be available from the Agency by mailing a written request to IEPA-OCS with a self-addressed stamped envelope. Applicants for reciprocal licensure shall make any written request to the Agency for case-by-case review of their state's licensing qualifications as a part of their Industrial Hygienist Reciprocal Licensure Application. The Industrial Application form shall include the same application certification statement provided in Section 184.207 of this Part. Applicants for reciprocal licensure may be required to submit supplementary information to the Agency, as provided in Section 184.200 of this Part.

e) Applicants for reciprocal licensure and Licensed Industrial Hygienists who have obtained that status in Illinois on the basis of reciprocity shall be subject to and entitled to the same procedural rights provided in Subpart E of this Part.

f) Applicants for reciprocal licensure and renewal reciprocal licensure shall be required to pay the same fees required for all other applicants, as provided in Subpart D of this Part. In addition, applicants seeking to be initially licensed on the basis of reciprocity shall pay $100 as a reciprocity fee.

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOTICE OF PROPOSED RULES

1) Heading of the Part: Medication Takeback Program

2) Code Citation: 35 Ill. Adm. Code 889

3)

Section Numbers:	Proposed Actions:
889.100	New Section
889.105	New Section
889.110	New Section
889.115	New Section
889.200	New Section
889.205	New Section
889.210	New Section
889.215	New Section
889.220	New Section

4) Statutory Authority: Implementing and authorized by Section 22.55(l) of the Illinois Environmental Protection Act. [415 ILCS 5/22.55(l)].

5) A Complete Description of the Subjects and Issues Involved: Section 22.55(l) of the Illinois Environmental Protection Act (Act) requires the Illinois Environmental Protection Agency (Agency) to establish a medication take-back program to ensure that there are pharmaceutical product disposal options available for residents across the State. There are currently over one hundred local law enforcement entities and pharmacies that collect unused pharmaceutical products across the State. In addition, federal law mandates that certain unused pharmaceutical products be disposed of through a manufacturer-funded takeback program. Section 889 of Title 35 of the Illinois Administrative Code has been crafted to account for these existing collection opportunities and to afford other entities the opportunity to request for Illinois EPA-sponsored disposal of collected pharmaceutical products, subject to available appropriation.

6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None

7) Will this proposed rule replace an emergency rule currently in effect? No

8) Does this rulemaking contain an automatic repeal date? No

9) Does this proposed rulemaking contain incorporations by reference? No

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOTICE OF PROPOSED RULES

10) Are there any other rulemakings pending on this Part? No

11) Statement of Statewide Policy Objective: This rulemaking will comply with the directive to the Agency set forth in Section 22.55(l) of the Act. It does not create or expand a State mandate under the State Mandates Act [30 ILCS 805].

12) Time, Place and Manner in which interested persons may comment on this proposed rulemaking: Persons who wish to submit comments on the proposed rules may submit them in writing by no later than 45 days after publication of this Notice to:

Sara Terranova
Illinois Environmental Protection Agency
Division of Legal Counsel
1021 North Grand Avenue East
P.O. Box 19276
Springfield IL 62794-9276

217/782-5544
Sara.Terranova@illinois.gov

13) Initial Regulatory Flexibility Analysis:

A) Types of small businesses, small municipalities and not-for-profit corporations affected: This rule will not have a direct effect on small businesses, small municipalities, or not for profit corporations, unless any such entity obtains Illinois EPA assistance under these rules for the disposal of collected pharmaceutical products.

B) Reporting, bookkeeping or other procedures required for compliance: This rule will require any person obtaining assistance under these rules to maintain books and records reflecting the volume of pharmaceutical products collected. This information is necessary to enable the Illinois EPA to report to the amount of pharmaceutical products annually collected as part of the medication takeback program, in accordance with Section 22.55(l) of the Act.

C) Types of professional skills necessary for compliance: None

14) Regulatory Agenda on which this rulemaking was summarized: January 2017

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOTICE OF PROPOSED RULES

The full text of the Proposed Rules begins on the next page:

ILLINOIS ENVIRONMENTAL PROTECTION AGENCY

NOTICE OF PROPOSED RULES

TITLE 35: ENVIRONMENTAL PROTECTION
SUBTITLE G: WASTE DISPOSAL
CHAPTER II: ENVIRONMENTAL PROTECTION AGENCY

PART 889
MEDICATION TAKEBACK PROGRAM

SUBPART A: GENERAL

Section
889.100 Purpose and Applicability
889.105 Definitions
889.110 Compliance with Applicable Law
889.115 Severability

SUBPART B: APPLICATION, SELECTION AND OPERATION
Section
889.200 Application
889.205 Agency Action
889.210 Operating Requirements
889.215 Records
889.220 Termination

AUTHORITY: Implementing and authorized by Section 22.55(l) of the Environmental Protection Act [415 ILCS 5/22.55(l)].

SOURCE: Adopted at 41 Ill. Reg. _____, effective _____.

SUBPART A: GENERAL

Section 889.100 Purpose and Applicability

a) The purpose of this Part is to establish a medication takeback program, pursuant to Section 22.55(l) of the Act, *to ensure that there are pharmaceutical product disposal options regularly available for residents across the State.* [415 ILCS 5/22.55(l)]

b) This Part applies to any person that accepts pharmaceutical products at a household waste drop-off point in accordance with Section 22.55(c) of the Act

that the Agency has selected to arrange for the disposal of accepted pharmaceutical products.

c) Nothing in this Part shall prevent any person from accepting pharmaceutical products at a household waste drop-off point in accordance with Section 22.55(c) of the Act or any other location and arranging for the disposal of accepted pharmaceutical products in accordance with applicable State and federal law.

Section 889.105 Definitions

Except as stated in this Section, or unless a different meaning of a word or term is clear from the context, the definitions of words or terms in this Part shall be the same as that applied to the same words or terms in Title I or Title V of the Environmental Protection Act.

"Act" means the Environmental Protection Act [415 ILCS 5].

"Agency" means the Illinois Environmental Protection Agency. [415 ILCS 5/3.105]

"Controlled substance" means a controlled substance as defined in the Illinois Controlled Substances Act [720 ILCS 570]. [415 ILCS 5/22.55(b)]

"Household waste" means waste generated from a single residence or multiple residences. [415 ILCS 5/22.55(b)]

"Household waste drop-off point" means the portion of a site or facility used solely for the receipt and temporary storage of household waste. [415 ILCS 5/22.55(b)]

"Medication takeback location" means a household waste drop-off point that accepts pharmaceutical products for which the Agency has agreed to make disposal arrangements.

"Operator" means a person responsible for the operation and maintenance of a household waste drop-off point at which pharmaceutical products are accepted.

"Owner" means a person who has an interest, directly or indirectly, in land, including a leasehold interest, on which a person operates or maintains a medication takeback who operates or maintains that medication takeback location.

"Pharmaceutical product" means a medicine or a product containing medicine. A pharmaceutical product may be sold by prescription or over the counter. "Pharmaceutical product" does not include medicine or a product that contains a radioactive component. [415 ILCS 5/22.55(b)]

"Person" means individual, trust, firm, joint stock company, joint venture, consortium, commercial entity, corporation (including a government corporation), partnership, association, state, municipality, commission, political subdivision of a state, or any interstate body, including the United States government and each department, agency and instrumentality of the United States. [415 ILCS 5/58.2]

Section 889.110 Compliance with Applicable Law

Any person subject to this Part must comply with all applicable State and federal laws and regulations, including but not limited to State and federal laws and regulations that govern the collection and disposal of controlled substances and other pharmaceutical products or State and federal regulations that require pharmaceutical product manufacturers to provide a product stewardship program or product takeback program as part of a managed risk evaluation and mitigation strategy.

Section 889.115 Severability

If any Section, subsection, sentence or clause of this Part is judged invalid, that adjudication shall not affect the validity of this Part as a whole or any Section, subsection, sentence or clause of this Part not judged invalid.

SUBPART B: APPLICATION, SELECTION AND OPERATION

Section 889.200 Application

a) Any person seeking to have the Agency arrange for the disposal of pharmaceutical products accepted at a medication takeback location must submit to the Agency an application requesting that the Agency arrange for the disposal.

b) Applications must be on the forms prescribed by the Agency. The application must include:

1) The name and address of the medication takeback location;

2) The name and address of the operator of the medication takeback location;

3) The name and telephone number of the operator of the medication takeback location;

4) The name and address of the owner of the site on which the medication takeback location is located;

5) The geographic area served by the medication takeback location;

6) The population of the geographic area served by the medication takeback location;

7) The names and locations of other known entities that collect pharmaceutical products within a 25 mile radius of the medication takeback location;

8) The dates and times that pharmaceutical products will be accepted at the medication takeback location;

9) The volume of pharmaceutical products accepted at the medication takeback location during the preceding calendar year, if applicable; and

10) The requested duration of Agency-sponsored disposal.

Section 889.205 Agency Action

a) Subject to appropriation, the Agency may provide for the disposal of pharmaceutical products accepted at one or more medication takeback locations selected pursuant to subsection (b).

b) Subject to appropriation, the Agency will review applications submitted in accordance with this Section and select applicants for whom the Agency will provide for the disposal of accepted pharmaceutical products. In making its selection, the Agency will consider site-specific factors, including but not limited to:

1) The geographic location of the medication takeback location;

2) The geographic area served by the medication takeback location;

3) The population of the area served by the medication takeback location;

4) The volume of pharmaceutical products accepted at the medication takeback location point during the previous calendar year, if applicable; and

5) The estimated cost to the Agency of accepting and disposing the pharmaceutical products collected at the medication takeback location.

c) The Agency will inform selected applicants, in writing, of the Agency's decision. Written notifications made under this subsection (c) will include, but not be limited to, the following information:

1) The date on which the Agency will first arrange for the disposal of accepted pharmaceutical products;

2) The duration of the Agency's disposal arrangement;

3) The volume of pharmaceutical products accepted at the medication takeback location for which the Agency will make disposal arrangements; and

4) The Agency-provided method of disposal for the accepted pharmaceutical products.

d) The Agency shall post on its website a list of all selected medication takeback locations. The Agency shall also post on its website the location of other known sites that accept pharmaceutical products for disposal.

Section 889.210 Operating Requirements

a) Medication takeback locations must be located at a site or facility where pharmaceutical products are lawfully sold, distributed or dispensed. This subsection (a*) does not apply to household waste drop-off points operated by a*

government or by an association or other organization of government. [415 ILCS 5/22.55(c)(2)(A)]

b) *The location of acceptance* of pharmaceutical products at the medication takeback location *must be clearly identified*. [415 ILCS 5/22.55(c)(3)]

c) Pharmaceutical products that are accepted at medication takeback locations may only be accepted in accordance with the Act, this Part, and other applicable law. Pharmaceutical products accepted at the medication takeback location *must be accepted only from private individuals*. Pharmaceutical products *must not be accepted from other persons, including, but not limited to, owners and operators of rented or leased residences where the household waste was generated, commercial haulers, and other commercial, industrial, agricultural and government operations or entities*. [415 ILCS 5/22.55(c)(4)]

d) Pharmaceutical products accepted at the medication takeback location *must be managed separately* from all other household waste accepted at the medication takeback location *prior to its packaging for off-site transfer*. [415 ILCS 5/22.55(c)(5)]

e) Security of Accepted Pharmaceutical Products

1) Pharmaceutical products must be accepted and managed *in a manner that protects against releases of the* pharmaceutical products, *prevents nuisances, and otherwise protects human health and the environment.* [415 ILCS 5/22.55(c)(7)]

2) Accepted pharmaceutical products must be properly secured *to prevent unauthorized public access to the* pharmaceutical products, *including, but not limited to, preventing access to the pharmaceutical products during the non-business hours of the site or facility on which the household waste drop-off point is located.* [415 ILCS 5/22.55(c)(7)]

3) Accepted pharmaceutical products must not be stored *for longer than 90 days after receipt, except as otherwise approved by the Agency in writing*. [415 ILCS 5/22.55(c)(6)]

f) A copy of the sign developed by the Agency in accordance with Section 22.55(j) of the Act must be clearly posted at the medication takeback location.

Section 889.215 Records

a) The operator of any medication takeback location must maintain records that identify the volume of pharmaceutical products accepted for Agency arranged disposal.

b) Records maintained pursuant to subsection (a) must be kept on-site and made available to the Agency for inspection and copying during normal business hours. These records must be maintained for a minimum of three calendar years after the date of acceptance.

Section 889.220 Termination

a) Operator Notification

1) Any operator of a medication takeback location that ceases to accept pharmaceutical products for Agency arranged disposal must submit a written notification to the Agency within 30 days after the date the collection terminates.

2) At a minimum, the written notification required by subsection (a)(1) must state:

A) the date acceptance of pharmaceutical products for Agency arranged disposal was terminated;

B) the volume of pharmaceutical products accepted for Agency arranged disposal prior to collection termination.

b) The Agency may terminate disposal arrangements made pursuant to this Part for any reason, including but not limited to the operation of a medication takeback location in violation of Section 22.55(c) of the Act. The Agency shall provide written notice of termination to the operator of the medication takeback location.

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

1) Heading of the Part: Sales Finance Agency Act

2) Code Citation: 38 Ill. Adm. Code 160

3)

Section Numbers:	Proposed Actions:
160.500	Repealed
160.505	Repealed
160.510	Repealed
160.515	Repealed
160.520	Repealed
160.525	Repealed
160.530	Repealed
160.535	Repealed
160.540	Repealed
160.545	Repealed
160.550	Repealed
160.555	Repealed
160.560	Repealed
160.565	Repealed
160.570	Repealed
160.575	Repealed
160.580	Repealed
160.APPENDIX A	Repealed
160.APPENDIX B	Repealed

4) Statutory Authority: Implementing and authorized by Section 8(9) of the Sales Finance Agency Act [205 ILCS 660/8(9)].

5) A Complete Description of the Subjects and Issues Involved: Pursuant to Executive Order 2016-13, issued by Governor Rauner on October 17, 2016, IDFPR is repealing the Sections listed above under the "Cutting the Red Tape Initiative" to make certain that our regulatory standards are up to date; use plain language where appropriate; provide continuity across the balance of our Title 38 administrative rules; are not unduly burdensome to businesses or social service providers or recipients and are statutorily authorized.

6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

7) Will this proposed rulemaking replace any emergency rule currently in effect? No

8) Does this rulemaking contain an automatic repeal date? No

9) Does this proposed rulemaking contain incorporations by reference? No

10) Are there any other rulemakings pending on this Part? No

11) Statement of Statewide Policy Objectives: This rulemaking will not require a local government to establish, expand or modify its activities in such a way as to necessitate additional expenditures from local revenues.

12) Time, Place and Manner in which interested persons may comment on this proposed rulemaking: Persons who wish to comment on this proposed rulemaking may submit written comments no later than 45 days after the publication of this Notice to:

Department of Financial and Professional Regulation
Attention: Craig Cellini
320 West Washington, 3rd Floor
Springfield IL 62786

217/785-0813
fax: 217/557-4451

All written comments received within 45 days after this issue of the *Illinois Register* will be considered.

13) Initial Regulatory Flexibility Analysis:

A) Types of small businesses, small municipalities and not-for-profit corporations affected: Not applicable

B) Reporting, bookkeeping or other procedures required for compliance: Not applicable

C) Types of professional skills necessary for compliance: Not applicable

14) Regulatory Agenda on which this rulemaking was summarized: These amendments were not included on either of the 2 most recent agendas because: IDFPR could not have

anticipated the signing of Executive Order 2016-13, issued by Governor Rauner on October 17, 2016.

The full text of the Proposed Amendments begins on the next page:

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

TITLE 38: FINANCIAL INSTITUTIONS
CHAPTER I: DEPARTMENT OF FINANCIAL INSTITUTIONS

PART 160
SALES FINANCE AGENCY ACT

SUBPART A: GENERAL PROVISIONS

Section
160.1 Application for License/Controlling Person
160.5 Definitions
160.10 Minimum Requirements for Office Records
160.20 Transaction Register
160.30 Individual Account Cards
160.40 File of Original Papers
160.50 Cash Book
160.55 Permanent File
160.60 Alphabetical Record of Buyers, Co-Purchasers and Obligors
160.70 Payments
160.80 Delinquency Charges (Default Charges)
160.90 Cancellation and Return of Documents
160.100 Extensions – Renewals – Rebates
160.110 Hypothecation of Security Instruments
160.120 Legal Forms
160.130 Judgments
160.140 Sale of Security
160.150 Trouble File
160.160 Lien Charges
160.170 Insurance
160.180 Office and Office Hours
160.190 Advertising
160.200 Business Source and Affiliates
160.210 Examination Remittances
160.220 Credit Practices
160.230 General
160.240 Hearing Procedures
160.250 Servicing of Accounts by Contract
160.260 Off-site Records
160.270 Revocation or Suspension of License

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

SUBPART B: HIGH RISK HOME LOANS

160.500 Definitions (Repealed)
160.505 Applicability of Rule (Repealed)
160.510 Good Faith Requirements (Repealed)
160.515 Fraudulent or Deceptive Practices (Repealed)
160.520 Prohibited Refinances (Repealed)
160.525 Negative Amortization (Repealed)
160.530 Negative Equity (Repealed)
160.535 Balloon Payments (Repealed)
160.540 Financing of Certain Points and Fees (Repealed)
160.545 Financing of Single Premium Insurance Products (Repealed)
160.550 Lending Without Due Regard to Ability to Repay (Repealed)
160.555 Verification of Ability to Repay (Repealed)
160.560 Payments to Contractors (Repealed)
160.565 Counseling Prior to Perfecting Foreclosure (Repealed)
160.570 Mortgage Awareness Program (Repealed)
160.575 Offer of Mortgage Awareness Program (Repealed)
160.580 Third Party Review (Repealed)

160.APPENDIX A Estimated Monthly Income and Expenses Worksheet (Repealed)
160.APPENDIX B Mortgage Ratio Worksheet (Repealed)

AUTHORITY: Implementing and authorized by Section 8(9) of the Sales Finance Agency Act [205 ILCS 660/8(9)].

SOURCE: Filed September 21, 1970; amended at 5 Ill. Reg. 1358, effective February 3, 1981; codified at 7 Ill. Reg. 11728; amended at 9 Ill. Reg. 1370, effective January 17, 1985; amended at 12 Ill. Reg. 17844, effective October 24, 1988; amended at 19 Ill. Reg. 49, effective December 22, 1994; emergency amendment at 22 Ill. Reg. 1543, effective January 2, 1998; amended at 22 Ill. Reg. 13699, effective July 14, 1998; amended at 25 Ill. Reg. 6261, effective May 17, 2001; amended at 26 Ill. Reg. 14248, effective October 1, 2002; amended at 41 Ill. Reg. _____, effective _____.

SUBPART B: HIGH RISK HOME LOANS

Section 160.500 Definitions (Repealed)

~~"Approved Credit Counselor" means a credit counselor as approved by the Director of the Department of Financial Institutions.~~

~~"Good faith" means honesty in fact in the conduct of the transaction.~~

~~"Home equity loan" means any loan secured by the borrower's primary residence where the proceeds are not used as purchase money for the residence.~~

~~"Points and fees" means:~~

~~all items required to be disclosed as points and fees under 12 CFR 226.32 (2000, no subsequent amendments or editions included);~~

~~the premium of any single premium credit life, credit disability, credit unemployment, or any other life or health insurance that is financed directly or indirectly into the loan;~~

~~all compensation paid directly or indirectly to a mortgage broker, including a broker that originates a loan in its own name in a table funded transaction, not otherwise included in 12 CFR 226.4.~~

~~"Subject loan" is the term used to describe any loan to which this Subpart applies pursuant to Section 160.505.~~

~~"Total loan amount" is the same as the term used in 12 CFR 226.32, and shall be calculated in accordance with the Federal Reserve Board's Official Staff Commentary to that regulation.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.505 Applicability of Rule (Repealed)

~~This Subpart shall apply to a home equity loan in which:~~

~~a)~~ ~~At the time of origination, the APR exceeds by more than 6 percentage points in the case of a first lien mortgage, or by more than 8 percentage points in the case of a junior mortgage, the yield on U.S. Treasury securities having comparable periods of maturity to the loan maturity as of the fifteenth day of the month immediately preceding the month in which the application for the loan is received~~

~~by the lender; or~~

~~b) The total points and fees payable by the consumer at or before closing will exceed the greater of 5% of the total loan amount or $800. The $800 figure shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index.~~

~~However, this Subpart shall not apply to a loan that is made primarily for a business purpose unrelated to the residential real property securing the loan or to an open-end credit plan subject to 12 CFR 226 (2000, no subsequent amendments or editions included).~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.510 Good Faith Requirements (Repealed)

~~a) Any disclosure or action required by this Subpart shall be made in good faith.~~

~~b) No lender shall accept a fee or charge for a subject loan application unless the licensee is able to demonstrate to the Director that, if its subject loan requirements are met, there is a reasonable likelihood that a loan commitment will be issued for such loan for the amount, term, rate, charges and other conditions set forth in the loan application and the applicable disclosures and documents required and that the loan has a reasonable likelihood of being repaid by the applicant.~~

~~c) A lender who has accepted an application for a subject loan shall make a good faith effort to process the application within the time specified in the loan application.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.515 Fraudulent or Deceptive Practices (Repealed)

~~a) No lender shall employ fraudulent or deceptive acts or practices in the making of a subject loan, including deceptive marketing and sales efforts.~~

~~b) No lender shall make a subject loan that includes a penalty provision for prepayment made:~~

~~1) after the expiration of the 36 month period following the date the loan was~~

~~made; or~~

~~2)~~ ~~that is more than:~~

~~A)~~ ~~3% of the total loan amount, if the prepayment is made within the first 12 month period following the date the loan was made; or~~

~~B)~~ ~~2% of the total loan amount, if the prepayment is made within the second 12 month period after the date the loan was made; or~~

~~C)~~ ~~1% of the total loan amount, if the prepayment is made within the third 12 month period following the date the loan was made.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.520 Prohibited Refinances (Repealed)

~~No lender shall refinance any subject loan, where such refinancing charges additional points and fees, within a 12 month period after the original loan agreement was signed, unless the refinancing results in a financial benefit to the borrower.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.525 Negative Amortization (Repealed)

~~No lender shall make a subject loan, other than a loan secured only by a reverse mortgage, with terms under which the outstanding balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of the interest due, unless the negative amortization is the consequence of a temporary forbearance sought by the borrower.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.530 Negative Equity (Repealed)

~~No lender shall make a subject loan where the loan amount exceeds the value of the property securing the loan, plus reasonable closing costs not to exceed 5% of the total loan amount.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.535 Balloon Payments (Repealed)

~~No lender shall make a subject loan that contains a scheduled final payment that is more than twice as large as the average of earlier scheduled monthly payments unless such balloon payment becomes due and payable at least 15 years after the loan's origination. This prohibition does not apply when the payment schedule is adjusted to account for the seasonal or irregular income of the borrower or if the purpose of the loan is a "bridge" loan connected with the acquisition or construction of a dwelling intended to become the borrower's principal dwelling.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.540 Financing of Certain Points and Fees (Repealed)

~~No lender shall make a subject loan that finances points and fees in excess of 6% of the total loan amount.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.545 Financing of Single Premium Insurance Products (Repealed)

~~No lender shall make a subject loan, which finances a single premium credit life, credit disability, credit unemployment, or any other life or health insurance, directly or indirectly. Insurance previously calculated and paid on a monthly basis shall not be considered to be financed by the lender.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.550 Lending Without Due Regard to Ability to Repay (Repealed)

~~No lender shall make a subject loan if the lender does not believe at the time the loan is consummated that the borrower or borrowers will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status and other financial resources (other than the borrower's equity in the dwelling that secures repayment of the loan). A borrower shall be presumed to be able to repay the loan if, at the time the loan is consummated, or at the time of the first rate adjustment in the case of a lower introductory interest rate, the borrower's scheduled monthly payments on the loan (including principal, interest, taxes, insurance and assessments), combined with the scheduled payments for all other disclosed debts, do not exceed 50% of the borrower's monthly gross income.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.555 Verification of Ability to Repay (Repealed)

~~No lender shall make a subject loan prior to verifying the borrower's ability to repay the loan. Such verification shall require, at a minimum, the following:~~

~~a) The borrower prepares and submits to the lender a personal income and expense statement in a form prescribed by the Director.~~

~~b) Income is verified by means of tax returns, pay stubs, accounting statements or other prudent means.~~

~~c) A credit report is obtained regarding the borrower.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.560 Payments to Contractors (Repealed)

~~No lender shall make a payment of any proceeds of a subject loan to a contractor under a home improvement contract other than:~~

~~a) by instrument payable to the borrower or jointly to the borrower and the contractor; or~~

~~b) at the election of the borrower, by a third party escrow agent in accordance with the terms established in a written agreement signed by the borrower, the lender, and the contractor before the date of payment.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.565 Counseling Prior to Perfecting Foreclosure (Repealed)

~~a) In the event that a subject loan becomes delinquent by more than 30 days, the lender shall send a notice advising the borrower of the availability of consumer credit counseling.~~

~~b) The notice required under subsection (a) shall, at a minimum, include the~~

~~following language notice:~~

~~"YOUR LOAN IS OR WAS MORE THAN 30 DAYS PAST DUE. YOU MAY BE EXPERIENCING FINANCIAL DIFFICULTY. IT MAY BE IN YOUR BEST INTEREST TO SEEK APPROVED CONSUMER CREDIT COUNSELING. A LIST OF APPROVED CREDIT COUNSELORS MAY BE OBTAINED FROM THE DEPARTMENT OF FINANCIAL INSTITUTIONS AT 1-888-298-8089."~~

~~c) If, within 15 days after mailing the notice provided for under subsection (b), a lender or its agent is notified in writing by an approved consumer credit counselor that the borrower is seeking approved consumer credit counseling, then the lender and its agent shall not institute legal action under Part 15 of Article XV of the Code of Civil Procedure for 30 days from the date of that notice. Only one such 30-day period of forbearance is allowed under this Section per subject loan.~~

~~d) If within the 30-day period provided under subsection (c) the lender or its agent, the approved consumer credit counselor, and the borrower agree to a debt management plan, then the lender and its agent shall not institute legal action under Part 15 of Article XV of the Code of Civil Procedure for so long as the debt management plan is complied with by the borrower.~~

~~1) The agreed debt management plan must be in writing and signed by the lender or its agent, the approved consumer credit counselor, and the borrower. The lender or its agent, the approved consumer credit counselor, and the borrower may modify the debt management plan.~~

~~2) Upon written notice to the lender or its agent, the borrower may change approved consumer credit counselors.~~

~~e) If the borrower fails to comply with the agreed debt management plan, then nothing in this Subpart shall be construed to impair the legal right of the lender or its agent to enforce contracts or mortgage agreements.~~

~~f) This Section applies only to subject loans as defined by Section 160.500.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.570 Mortgage Awareness Program (Repealed)

~~a) The Mortgage Awareness Program is a counseling and educational program that is provided by the Director.~~

~~b) The minimum requirements for the core curriculum of the Mortgage Awareness Program shall include:~~

~~1) Explanation of the amount financed;~~

~~2) Explanation of the finance charge;~~

~~3) Explanation of the annual percentage rate;~~

~~4) Explanation of the total payments;~~

~~5) Explanation of the loan costs, including broker's fees, finance charges, points, origination fees and all other charges and fees;~~

~~6) Explanation of any right of rescission;~~

~~7) Explanation of foreclosure procedures;~~

~~8) Explanation of the debt ratio, including total debt to income ratio, loan debt to income ratio, and loan debt to value of residence;~~

~~9) Explanation of adjustable rate mortgage;~~

~~10) Explanation of balloon payments;~~

~~11) Explanation of credit options;~~

~~12) Explanation of each item that appears on the good faith estimate;~~

~~13) Explanation of pre-payment penalties.~~

~~c) Counseling session attendees must also complete a personal income and expense statement, as well as a balance sheet, on forms provided by the Director.~~

~~d) Prior to issuing a certificate of completion, counselors shall privately meet and~~

~~discuss with each attendee that attendee's income and expense statement and balance sheet, as well as the terms of any loan the attendee currently has or is contemplating.~~

~~e) Counseling session attendees must also be provided with a brochure that contains information covered by the Mortgage Awareness Program.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.575 Offer of Mortgage Awareness Program (Repealed)

~~a) Any lender, prior to making a subject loan, shall inform the borrower in writing of the right to participate in the Mortgage Awareness Program.~~

~~b) No lender shall offer less favorable loan terms to a borrower due to a borrower's participation in a Mortgage Awareness Program.~~

~~c) The borrower may waive participation in the program, provided that such waiver occurs no less than 2 business days after the day that the borrower receives the written notice required by subsection (a) and that such waiver is in writing in a form approved by the Director.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.580 Third Party Review (Repealed)

~~In the case of each subject loan, upon approval of the loan application, the lender shall advise the borrower in writing of the opportunity to seek independent review of the loan terms in order to determine affordability of the loan. When and if the General Assembly appropriates adequate funding to the Department of Financial Institutions specifically for this program:~~

~~a) Every borrower who chooses to participate in the independent review provided in this Section shall submit information requested on the worksheets outlined in Appendix A and B.~~

~~b) The Department shall provide the borrower with a review of the worksheets and inform the borrower of the amount the borrower has available for a monthly mortgage payment based upon the borrower's budget. The Department shall also provide a projection of the payments required under the terms of the loan based~~

~~upon a review of loan information pertaining to balloon payments, adjustable interest rates and other items disclosed by the loan documents affecting the amount of payment.~~

~~c)~~ ~~The borrower shall receive a copy of the completed forms and shall sign the forms acknowledging receipt. A copy of the written and signed forms shall be submitted to the lender prior to the closing of the loan and shall become a part of the permanent file for the loan.~~

~~If, based upon the review, the borrower determines that the loan is not in his or her best economic interest, the reviewer shall so note this in the completed forms sent to the lender. This determination shall enable the borrower to withdraw from the contemplated loan with no financial penalty.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

Section 160.APPENDIX A Estimated Monthly Income and Expenses Worksheet (Repealed)

~~ESTIMATED MONTHLY INCOME:~~

~~1.~~	~~Paycheck (Net/"Take Home")~~	~~$~~ _____	
~~2.~~	~~Interest/Dividends~~	_____	
~~3.~~	~~Social Security/Pension~~	_____	
~~4.~~	~~Alimony/Child Support~~	_____	
~~5.~~	~~Other~~	_____	
~~6.~~	~~Total Estimated Monthly Income (Add Lines 1 through 5)~~		~~$~~ _____

~~ESTIMATED MONTHLY EXPENSES:~~

~~7.~~	~~Mortgages/Rent~~	~~$~~ _____
~~8.~~	~~Homeowner's/Renter's Insurance~~	_____
~~9.~~	~~Real Estate Taxes~~	_____
~~10.~~	~~Water & Sewer~~	_____
~~11.~~	~~House Repairs~~	_____
~~12.~~	~~Groceries~~	_____
~~13.~~	~~Telephone~~	_____
~~14.~~	~~Gas (House)~~	_____
~~15.~~	~~Electric~~	_____
~~16.~~	~~Credit Cards~~	_____
~~17.~~	~~Car Payment(s)~~	_____
~~18.~~	~~Car Insurance~~	_____
~~19.~~	~~Licenses (Car)~~	_____
~~20.~~	~~Gas (Car)~~	_____
~~21.~~	~~Car Repairs/Maintenance~~	_____
~~22.~~	~~Clothing~~	_____
~~23.~~	~~Medical/Dental~~	_____
~~24.~~	~~Medical Insurance~~	_____
~~25.~~	~~Prescriptions~~	_____
~~26.~~	~~Loan Payments (Not included in Lines 2 or 17)~~	_____
~~27.~~	~~Tuition~~	_____
~~28.~~	~~Contribution~~	_____

~~29.~~	~~Cellular Telephone~~	_____	
~~30.~~	~~Pager~~	_____	
~~31.~~	~~Recreation/Vacation~~	_____	
~~32.~~	~~Other Insurance (Life, etc.)~~	_____	
~~33.~~	~~Income Taxes~~	_____	
~~34.~~	~~Alimony/Child Support~~	_____	
~~35.~~	~~Transportation~~	_____	
~~36.~~	~~Miscellaneous~~	_____	
~~37.~~	~~Other~~	_____	
~~38.~~	~~Total Estimated Monthly Expenses (Add Lines 7 through 37)~~		~~$~~ _____
~~39.~~	~~*Excess/Deficit (Subtract Line 38 from Line 6)~~		~~$~~ _____

~~*If line 38 is greater than Line 6, your estimated monthly expenses exceed your estimated monthly income.~~

_____
~~Borrower's Signature~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 160.APPENDIX B Mortgage Ratio Worksheet (Repealed)

~~Part I~~

~~LOAN-TO-VALUE RATIO~~

~~1. Mortgage Amount(s)~~ ~~$~~ _____

~~2. Appraised Value~~ ~~$~~ _____

~~3. Line 1 divided by Line 2~~

~~Note: This is the Percentage of the purchase price appraised value of your home that will be allocated to your total mortgage. A percentage rate over 80% may result in you incurring additional costs.~~

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

~~Part II~~

~~INCOME RATIO~~

~~MONTHLY HOUSING EXPENSES:~~

~~1.~~	~~Principal and Interest Payment~~	~~$~~ _____	
~~2.~~	~~Homeowner's Insurance~~	_____	
~~3.~~	~~Real Estate Tax~~	_____	
~~4.~~	~~Mortgage Insurance Premium~~	_____	
~~5.~~	~~Homeowner's Assoc. Fee~~	_____	
~~6.~~	~~Ground Rents~~	_____	
~~7.~~	~~Payments on Existing or Proposed 2nd Mortgage~~	_____	
~~8.~~	~~Total Housing Expense (Add Lines 1 through 7)~~	~~$~~ _____	
~~9.~~	~~Gross Salary~~	~~$~~ _____	
~~10~~	~~Dividends/Interest~~	_____	
~~11.~~	~~Social Security/Pension~~	_____	
~~12.~~	~~Alimony/Child Support~~	_____	
~~13.~~	~~Other~~	_____	
~~14.~~	~~Total Gross Income~~		~~$~~ _____
~~15.~~	~~Divide Line 8 by Line 14~~		_____

~~Note: This is the percentage of your gross monthly income that will be allocated to your mortgage expenses.~~

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~~Part III~~

~~LONG-TERM DEBT RATIO~~

~~MONTHLY EXPENSES:~~

~~1.~~	~~Total Housing Expenses (Part II, Line 8)~~	~~$~~ _____	
~~2.~~	~~Credit Cards~~	_____	
~~3.~~	~~Car Payments~~	_____	
~~4.~~	~~Loans (Not Included on Line 1 or Line 3)~~	_____	
~~5.~~	~~Alimony/Child Support~~	_____	
~~6.~~	~~Total Expenses (Lines 1 through 5)~~		~~$~~ _____

~~MONTHLY INCOME:~~

~~7.~~	~~Total Gross Income (Part II, Line 14)~~	~~$~~ _____
~~8.~~	~~Divided Line 6 by Line 7~~	_____

~~Note: This is the percentage of your gross monthly income that will be allocated to your mortgage expenses and other debt that you pay on a monthly basis.~~

_____
~~Borrower's Signature~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

1) Heading of the Part: Illinois Credit Union Act

2) Code Citation: 38 Ill. Adm. Code 190

3)

Section Numbers:	Proposed Actions:
190.500	Repealed
190.505	Repealed
190.510	Repealed
190.515	Repealed
190.520	Repealed
190.525	Repealed
190.530	Repealed
190.535	Repealed
190.540	Repealed
190.545	Repealed
190.550	Repealed
190.555	Repealed
190.560	Repealed
190.565	Repealed
190.570	Repealed
190.575	Repealed
190.580	Repealed
190.APPENDIX A	Repealed
190.APPENDIX B	Repealed

4) Statutory Authority: Implementing and authorized by the Illinois Credit Union Act [205 ILCS 305].

5) A Complete Description of the Subjects and Issues Involved: Pursuant to Executive Order 2016-13, issued by Governor Rauner on October 17, 2016, IDFPR is repealing the Sections listed above, under the "Cutting the Red Tape Initiative" to make certain that our regulatory standards are up to date; use plain language where appropriate; provide continuity across the balance of our Title 38 administrative rules; are not unduly burdensome to businesses or social service providers or recipients and are statutorily authorized.

6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None

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7) Will this proposed rulemaking replace any emergency rule currently in effect? No

8) Does this rulemaking contain an automatic repeal date? No

9) Does this proposed rulemaking contain incorporations by reference? No

10) Are there any other rulemakings pending on this Part? No

11) Statement of Statewide Policy Objective: This rulemaking will not require a local government to establish, expand or modify its activities in such a way as to necessitate additional expenditures from local revenues.

12) Time, Place and Manner in which interested persons may comment on this proposed rulemaking: Persons who wish to comment on this proposed rulemaking may submit written comments no later than 45 days after the publication of this Notice to:

Department of Financial and Professional Regulation
Attention: Craig Cellini
320 West Washington, 3rd Floor
Springfield IL 62786

217/785-0813
fax: 217/557-4451

All written comments received within 45 days after this issue of the *Illinois Register* will be considered.

13) Initial Regulatory Flexibility Analysis:

A) Types of small businesses, small municipalities and not-for-profit corporations affected: Not applicable

B) Reporting, bookkeeping or other procedures required for compliance: Not applicable

C) Types of professional skills necessary for compliance: Not applicable

14) Regulatory Agenda on which this Rulemaking was Summarized: These amendments were not included on either of the 2 most recent agendas because: IDFPR could not have

anticipated the signing of Executive Order 2016-13, issued by Governor Rauner on October 17, 2016

The full text of the Proposed Amendments begins on the next page:

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

TITLE 38: FINANCIAL INSTITUTIONS
CHAPTER I: DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

PART 190
ILLINOIS CREDIT UNION ACT

SUBPART A: GENERAL PROVISIONS

Section
190.2 Definitions
190.5 Credit Union Service Organizations
190.10 Field of Membership Procedures
190.15 Civil Penalty
190.20 Hearings
190.25 Regulatory Examination Consistency and Due Process
190.30 Cease and Desist Procedures
190.40 Removal or Suspension Procedures
190.50 Fees
190.60 General Accounting Procedures
190.70 Loan Loss Accounting Procedures
190.80 Use of Electronic Data Processing
190.90 Fixed Asset Investments
190.100 Classes of Share and Special Purpose Share Accounts
190.110 Share Drafts
190.120 Bond and Insurance Requirements
190.130 Verification of Share and Loan Accounts
190.140 Real Estate Lending
190.150 Reverse Mortgage (Repealed)
190.160 Lending Limits – Consumer Loans
190.165 Business Loans
190.170 Group Purchasing
190.180 Investments
190.185 Investment in "Other Financial Institutions"
190.190 Liquidation
190.200 Conversion of Charter
190.210 Reimbursement for Financial Records
190.220 Registration of Out of State Credit Unions

SUBPART B: HIGH RISK HOME LOANS

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

Section
190.500 Definitions (Repealed)
190.505 Applicability of Rule (Repealed)
190.510 Good Faith Requirements (Repealed)
190.515 Fraudulent or Deceptive Practices (Repealed)
190.520 Prohibited Refinances (Repealed)
190.525 Negative Amortization (Repealed)
190.530 Negative Equity (Repealed)
190.535 Balloon Payments (Repealed)
190.540 Financing of Certain Points and Fees (Repealed)
190.545 Financing of Single Premium Insurance Products (Repealed)
190.550 Lending Without Due Regard to Ability to Repay (Repealed)
190.555 Verification of Ability to Repay (Repealed)
190.560 Payments to Contractors (Repealed)
190.565 Counseling Prior to Perfecting Foreclosure (Repealed)
190.570 Mortgage Awareness Program (Repealed)
190.575 Offer of Mortgage Awareness Program (Repealed)
190.580 Third Party Review (Repealed)

SUBPART C: PAYDAY LOANS

Section
190.600 Definitions
190.601 Purpose and Scope
190.605 Applicability of Rule
190.610 Issuance of Payday Loans by Credit Unions

190.APPENDIX A Estimated Monthly Income and Expenses Worksheet (Repealed)
190.APPENDIX B Mortgage Ratio Worksheet (Repealed)

AUTHORITY: Implementing and authorized by the Illinois Credit Union Act [205 ILCS 305].

SOURCE: Adopted at 4 Ill. Reg. 20, p. 17, effective May 7, 1980; amended at 6 Ill. Reg. 11154, effective September 7, 1982; amended and codified at 7 Ill. Reg. 14973, effective October 26, 1983; emergency amendment at 9 Ill. Reg. 14378, effective September 11, 1985, for a maximum of 150 days; amended at 9 Ill. Reg. 16231, effective October 10, 1985; amended at 10 Ill. Reg. 14667, effective August 27, 1986; amended at 12 Ill. Reg. 10464, effective June 7, 1988; amended at 12 Ill. Reg. 17383, effective October 24, 1988; amended at 13 Ill. Reg. 3793,

effective March 10, 1989; amended at 13 Ill. Reg. 15998, effective October 2, 1989; emergency amendment at 16 Ill. Reg. 12781, effective July 29, 1992, for a maximum of 150 days; amended at 16 Ill. Reg. 17073, effective October 26, 1992; amended at 19 Ill. Reg. 2826, effective February 24, 1995; amended at 20 Ill. Reg. 5803, effective April 8, 1996; emergency amendment at 20 Ill. Reg. 13093, effective September 27, 1996, for a maximum of 150 days; emergency expired February 17, 1997; amended at 22 Ill. Reg. 17317, effective September 15, 1998; emergency amendment at 23 Ill. Reg. 3086, effective February 23, 1999, for a maximum of 150 days; emergency expired July 22, 1999; amended at 23 Ill. Reg. 12614, effective October 4, 1999; amended at 23 Ill. Reg. 14031, effective November 12, 1999; amended at 25 Ill. Reg. 6244, effective May 17, 2001; amended at 25 Ill. Reg. 13278, effective October 19, 2001; amended at 26 Ill. Reg. 17999, effective December 9, 2002; amended at 28 Ill. Reg. 11699, effective July 29, 2004; amended at 29 Ill. Reg. 10579, effective July 8, 2005; amended at 30 Ill. Reg. 18919, effective December 4, 2006; amended at 32 Ill. Reg. 1377, effective January 16, 2008; amended at 34 Ill. Reg. 10500, effective July 12, 2010; amended at 37 Ill. Reg. 12450, effective July 16, 2013; amended at 38 Ill. Reg. 19910, effective October 17, 2014; amended at 41 Ill. Reg. 4764, effective May 1, 2017; amended at 41 Ill. Reg. _____, effective _____.

SUBPART B: HIGH RISK HOME LOANS

Section 190.500 Definitions (Repealed)

~~"Approved credit counselor" means a credit counselor approved by the Secretary.~~

~~"Good faith" means honesty in fact in the conduct of the transaction.~~

~~"Home equity loan" means any loan secured by the borrower's primary residence, when the proceeds are not used as purchase money for the residence.~~

~~"Points and fees" means:~~

~~all items required to be disclosed as points and fees under 12 CFR 226.32(2013, with no later editions or amendments);~~

~~the premium of any single premium credit life, credit disability, credit unemployment, or any other life or health insurance that is financed directly or indirectly into the loan;~~

~~all compensation paid directly or indirectly to a mortgage broker,~~

~~including a broker that originates a loan in its own name in a table funded transaction, not otherwise included in 12 CFR 226.4 (2013, with no later editions or amendments).~~

~~"Subject loan" is the term used to describe any loan to which this Subpart applies, pursuant to Section 190.505.~~

~~"Total loan amount" has the same meaning as ascribed in 12 CFR 226.32 (2013, with no later editions or amendments) and shall be calculated in accordance with the Federal Reserve Board's Official Staff Commentary to that regulation.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.505 Applicability of Rule (Repealed)

~~a) This Subpart shall apply to a home equity loan in which:~~

~~1) At the time of origination, the APR exceeds by more than 6 percentage points in the case of a first lien mortgage, or by more than 8 percentage points in the case of a junior mortgage, the yield on U.S. Treasury securities having comparable periods of maturity to the loan maturity as of the 15th day of the month immediately preceding the month in which the application for the loan is received by the lender; or~~

~~2) The total points and fees payable by the consumer at or before closing will exceed the greater of 5% of the total loan amount or $800. The $800 figure shall be adjusted annually on January 1 by the annual percentage change in the Consumer Price Index.~~

~~b) However, this Subpart shall not apply to a loan that is made primarily for a business purpose unrelated to the residential real property securing the loan or to an open-end credit plan subject to 12 CFR 226 (2013, with no later editions or amendments).~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.510 Good Faith Requirements (Repealed)

~~a) Any disclosure or action required by this Subpart shall be made in good faith.~~

~~b) No lender shall accept a fee or charge for a subject loan application unless the licensee is able to demonstrate to the Secretary that, if its subject loan requirements are met, there is a reasonable likelihood that a loan commitment will be issued for the loan for the amount, term, rate, charges and other conditions set forth in the loan application and the applicable disclosures and documents required and that the loan has a reasonable likelihood of being repaid by the applicant.~~

~~c) A lender who has accepted an application for a subject loan shall make a good faith effort to process the application within the time specified in the loan application.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.515 Fraudulent or Deceptive Practices (Repealed)

~~a) No lender shall employ fraudulent or deceptive acts or practices in the making of a subject loan, including deceptive marketing and sales efforts.~~

~~b) No lender shall make a subject loan that includes a penalty provision for prepayment made:~~

~~1) after the expiration of the 36 month period following the date the loan was made; or~~

~~2) that is more than:~~

~~A) 3% of the total loan amount, if the prepayment is made within the first 12 month period following the date the loan was made; or~~

~~B) 2% of the total loan amount, if the prepayment is made within the second 12 month period after the date the loan was made; or~~

~~C) 1% of the total loan amount, if the prepayment is made within the third 12 month period following the date the loan was made.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.520 Prohibited Refinances (Repealed)

~~No lender shall refinance any subject loan, where such refinancing charges additional points and fees, within a 12 month period after the original loan agreement was signed, unless the refinancing results in a financial benefit to the borrower.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.525 Negative Amortization (Repealed)

~~No lender shall make a subject loan, other than a loan secured only by a reverse mortgage, with terms under which the outstanding balance will increase at any time over the course of the loan because the regular periodic payments do not cover the full amount of the interest due, unless the negative amortization is the consequence of a temporary forbearance sought by the borrower.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.530 Negative Equity (Repealed)

~~No lender shall make a subject loan where the loan amount exceeds the value of the property securing the loan, plus reasonable closing costs not to exceed 5% of the total loan amount.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.535 Balloon Payments (Repealed)

~~No lender shall make a subject loan that contains a scheduled final payment that is more than twice as large as the average of earlier scheduled monthly payments unless such balloon payment becomes due and payable at least 15 years after the loan's origination. This prohibition does not apply when the payment schedule is adjusted to account for the seasonal or irregular income of the borrower or if the purpose of the loan is a "bridge" loan connected with the acquisition or construction of a dwelling intended to become the borrower's principal dwelling.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.540 Financing of Certain Points and Fees (Repealed)

~~No lender shall make a subject loan that finances points and fees in excess of 6% of the total loan amount.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.545 Financing of Single Premium Insurance Products (Repealed)

~~No lender shall make a subject loan, which finances a single premium credit life, credit disability, credit unemployment, or any other life or health insurance, directly or indirectly. Insurance previously calculated and paid on a monthly basis shall not be considered to be financed by the lender.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.550 Lending Without Due Regard to Ability to Repay (Repealed)

~~No lender shall make a subject loan if the lender does not believe at the time the loan is consummated that the borrower or borrowers will be able to make the scheduled payments to repay the obligation based upon a consideration of their current and expected income, current obligations, employment status and other financial resources (other than the borrower's equity in the dwelling that secures repayment of the loan). A borrower shall be presumed to be able to repay the loan if, at the time the loan is consummated, or at the time of the first rate adjustment in the case of a lower introductory interest rate, the borrower's scheduled monthly payments on the loan (including principal, interest, taxes, insurance and assessments), combined with the scheduled payments for all other disclosed debts, do not exceed 50% of the borrower's monthly gross income.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.555 Verification of Ability to Repay (Repealed)

~~No lender shall make a subject loan prior to verifying the borrower's ability to repay the loan. The verification shall require, at a minimum, the following:~~

~~a) The borrower prepares and submits to the lender a personal income and expense statement in a form prescribed by the Secretary.~~

~~b) Income is verified by means of tax returns, pay stubs, accounting statements or other prudent means.~~

~~c) A credit report is obtained regarding the borrower.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.560 Payments to Contractors (Repealed)

~~No lender shall make a payment of any proceeds of a subject loan to a contractor under a home improvement contract other than:~~

~~a) by instrument payable to the borrower or jointly to the borrower and the contractor; or~~

~~b) at the election of the borrower, by a third party escrow agent in accordance with the terms established in a written agreement signed by the borrower, the lender, and the contractor before the date of payment.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.565 Counseling Prior to Perfecting Foreclosure (Repealed)

~~a) In the event that a subject loan becomes delinquent by more than 30 days, the lender shall send a notice advising the borrower of the availability of consumer credit counseling.~~

~~b) The notice required under subsection (a) shall, at a minimum, include the following language notice:~~

~~"YOUR LOAN IS OR WAS MORE THAN 30 DAYS PAST DUE. YOU MAY BE EXPERIENCING FINANCIAL DIFFICULTY. IT MAY BE IN YOUR BEST INTEREST TO SEEK APPROVED CONSUMER CREDIT COUNSELING. A LIST OF APPROVED CREDIT COUNSELORS MAY BE OBTAINED FROM THE DIVISION OF FINANCIAL INSTITUTIONS AT 1-888-298-8089."~~

~~c) If, within 15 days after mailing the notice provided for under subsection (b), a lender or its agent is notified in writing by an approved consumer credit counselor that the borrower is seeking approved consumer credit counseling, then the lender and its agent shall not institute legal action under Part 15 of Article XV of the Code of Civil Procedure for 30 days from the date of that notice. Only one such 30-day period of forbearance is allowed under this Section per subject loan.~~

~~d) If within the 30-day period provided under subsection (c) the lender or its agent, the approved consumer credit counselor, and the borrower agree to a debt management plan, then the lender and its agent shall not institute legal action under Part 15 of Article XV of the Code of Civil Procedure for so long as the debt management plan is complied with by the borrower.~~

~~1) The agreed debt management plan must be in writing and signed by the lender or its agent, the approved consumer credit counselor, and the borrower. The lender or its agent, the approved consumer credit counselor, and the borrower may modify the debt management plan.~~

~~2) Upon written notice to the lender or its agent, the borrower may change approved consumer credit counselors.~~

~~e) If the borrower fails to comply with the agreed debt management plan, then nothing in this Subpart shall be construed to impair the legal right of the lender or its agent to enforce contracts or mortgage agreements.~~

~~f) This Section applies only to subject loans as defined by Section 190.500.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.570 Mortgage Awareness Program (Repealed)

~~a) The Mortgage Awareness Program is a counseling and educational program that is provided by the Secretary.~~

~~b) The minimum requirements for the core curriculum of the Mortgage Awareness Program shall include an explanation of:~~

~~1) the amount financed;~~

~~2) the finance charge;~~

~~3) the annual percentage rate;~~

~~4) the total payments;~~

~~5) the loan costs, including broker's fees, finance charges, points, origination fees and all other charges and fees;~~

~~6) any right of rescission;~~

~~7) foreclosure procedures;~~

~~8) the debt ratio, including total debt to income ratio, loan debt to income ratio, and loan debt to value of residence;~~

~~9) adjustable rate mortgage;~~

~~10) balloon payments;~~

~~11) credit options;~~

~~12) each item that appears on the good faith estimate;~~

~~13) pre-payment penalties.~~

~~c) Counseling session attendees must also complete a personal income and expense statement, as well as a balance sheet, on forms provided by the Secretary.~~

~~d) Prior to issuing a certificate of completion, counselors shall privately meet and discuss with each attendee that attendee's income and expense statement and balance sheet, as well as the terms of any loan the attendee currently has or is contemplating.~~

~~e) Counseling session attendees must also be provided with a brochure that contains information covered by the Mortgage Awareness Program.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.575 Offer of Mortgage Awareness Program (Repealed)

~~a) Any lender, prior to making a subject loan, shall inform the borrower in writing of the right to participate in the Mortgage Awareness Program.~~

~~b) No lender shall offer less favorable loan terms to a borrower due to a borrower's~~

~~participation in a Mortgage Awareness Program.~~

~~c)~~ ~~The borrower may waive participation in the program, provided that the waiver occurs no less than 2 business days after the day that the borrower receives the written notice required by subsection (a) and that the waiver is in writing in a form approved by the Secretary.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.580 Third Party Review (Repealed)

~~In the case of each subject loan, upon approval of the loan application, the lender shall advise the borrower in writing of the opportunity to seek independent review of the loan terms in order to determine affordability of the loan. When and if the General Assembly appropriates adequate funding to the Division of Financial Institutions specifically for this program:~~

~~a)~~ ~~Every borrower who chooses to participate in the independent review provided in this Subpart shall submit information requested on the worksheets outlined in Appendix A and B.~~

~~b)~~ ~~The Division shall provide the borrower with a review of the worksheets and inform the borrower of the amount the borrower has available for a monthly mortgage payment based upon the borrower's budget. The Division shall also provide a projection of the payments required under the terms of the loan based upon a review of loan information pertaining to balloon payments, adjustable interest rates and other items disclosed by the loan documents affecting the amount of payment.~~

~~c)~~ ~~The borrower shall receive a copy of the completed forms and shall sign the forms acknowledging receipt. A copy of the written and signed forms shall be submitted to the lender prior to the closing of the loan and shall become a part of the permanent file for the loan.~~

~~If, based upon the review, the borrower determines that the loan is not in his or her best economic interest, the reviewer shall so note this in the completed forms sent to the lender. This determination shall enable the borrower to withdraw from the contemplated loan with no financial penalty.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.APPENDIX A Estimated Monthly Income and Expenses Worksheet (Repealed)

~~ESTIMATED MONTHLY INCOME:~~

~~1.~~	~~Paycheck (Net/"Take Home")~~	~~$~~ _____	
~~2.~~	~~Interest/Dividends~~	_____	
~~3.~~	~~Social Security/Pension~~	_____	
~~4.~~	~~Alimony/Child Support~~	_____	
~~5.~~	~~Other~~	_____	
~~6.~~	~~Total Estimated Monthly Income (Add Lines 1 through 5)~~		~~$~~ _____

~~ESTIMATED MONTHLY EXPENSES:~~

~~7.~~	~~Mortgages/Rent~~	~~$~~ _____
~~8.~~	~~Homeowner's/Renter's Insurance~~	_____
~~9.~~	~~Real Estate Taxes~~	_____
~~10.~~	~~Water & Sewer~~	_____
~~11.~~	~~House Repairs~~	_____
~~12.~~	~~Groceries~~	_____
~~13.~~	~~Telephone~~	_____
~~14.~~	~~Gas (House)~~	_____
~~15.~~	~~Electric~~	_____
~~16.~~	~~Credit Cards~~	_____
~~17.~~	~~Car Payments~~	_____
~~18.~~	~~Car Insurance~~	_____
~~19.~~	~~Licenses (Car)~~	_____
~~20.~~	~~Gas (Car)~~	_____
~~21.~~	~~Car Repairs/Maintenance~~	_____
~~22.~~	~~Clothing~~	_____
~~23.~~	~~Medical/Dental~~	_____
~~24.~~	~~Medical Insurance~~	_____
~~25.~~	~~Prescriptions~~	_____
~~26.~~	~~Loan Payments (Not included in Line 2 or 17)~~	_____
~~27.~~	~~Tuition~~	_____

~~28.~~	~~Contribution~~	_____	
~~29.~~	~~Cellular Telephone~~	_____	
~~30.~~	~~Pager~~	_____	
~~31.~~	~~Recreation/Vacation~~	_____	
~~32.~~	~~Other Insurance (Life, etc.)~~	_____	
~~33.~~	~~Income Taxes~~	_____	
~~34.~~	~~Alimony/Child Support~~	_____	
~~35.~~	~~Transportation~~	_____	
~~36.~~	~~Miscellaneous~~	_____	
~~37.~~	~~Other~~	_____	
~~38.~~	~~Total Estimated Monthly Expenses (Add Lines 7 through 37)~~		~~$~~ _____
~~39.~~	~~*Excess/Deficit (Subtract Line 38 from Line 6)~~		~~$~~ _____

~~*If Line 38 is greater than Line 6, your estimated monthly expenses exceed your estimated monthly income.~~

_____

~~Borrower's Signature~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 190.APPENDIX B Mortgage Ratio Worksheet (Repealed)

~~Part I~~

~~LOAN-TO-VALUE RATIO~~

~~1. Mortgage Amount(s)~~ ~~$~~ _____

~~2. Appraised Value~~ ~~$~~ _____

~~3. Line 1 divided by Line 2~~ _____

~~Note: This is the Percentage of the purchase price appraised value of your home that will be allocated to your total mortgage. A percentage rate over 80% may result in you incurring additional costs.~~

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

~~Part II~~

~~INCOME RATIO~~

~~MONTHLY HOUSING EXPENSES:~~

~~1.~~	~~Principal and Interest Payment~~	~~$~~ _____	
~~2.~~	~~Homeowner's Insurance~~	_____	
~~3.~~	~~Real Estate Tax~~	_____	
~~4.~~	~~Mortgage Insurance Premium~~	_____	
~~5.~~	~~Homeowner's Assoc. Fee~~	_____	
~~6.~~	~~Ground Rents~~	_____	
~~7.~~	~~Payments on Existing or Proposed 2nd Mortgage~~	_____	
~~8.~~	~~Total Housing Expense (Add Lines 1 through 7)~~	~~$~~ _____	
~~9.~~	~~Gross Salary~~	~~$~~ _____	
~~10.~~	~~Dividend/Interest~~	_____	
~~11.~~	~~Social Security/Pension~~	_____	
~~12.~~	~~Alimony/Child Support~~	_____	
~~13.~~	~~Other~~	_____	
~~14.~~	~~Total Gross Income~~		~~$~~ _____
~~15.~~	~~Divide Line 8 by Line 14~~		_____

~~Note: This is the percentage of your gross monthly income that will be allocated to your mortgage expenses.~~

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~~Part III~~

~~LONG-TERM DEBT RATIO~~

~~MONTHLY EXPENSES:~~

~~1.~~	~~Total Housing Expenses (Part II, Line 8)~~	~~$~~ _____	
~~2.~~	~~Credit Cards~~	_____	
~~3.~~	~~Car Payments~~	_____	
~~4.~~	~~Loans (Not Included on Line 1 or Line 3)~~	_____	
~~5.~~	~~Alimony/Child Support~~	_____	
~~6.~~	~~Total Expenses (Lines 1 through 5)~~		~~$~~ _____

~~MONTHLY INCOME:~~

~~7.~~	~~Total Gross Income (Part II, Line 14)~~	~~$~~ _____
~~8.~~	~~Divided Line 6 by Line 7~~	_____

~~Note: This is the percentage of your gross monthly income that will be allocated to your mortgage expenses and other debt that you pay on a monthly basis.~~

_____
~~Borrower's Signature~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

1) Heading of the Part: Residential Mortgage License Act of 1987

2) Code Citation: 38 Ill. Adm. Code 1050

3)

Section Numbers:	Proposed Actions:
1050.320	Repealed
1050.490	Amendment
1050.710	Repealed
1050.720	Repealed
1050.730	Repealed
1050.740	Repealed
1050.750	Repealed
1050.810	Amendment
1050.820	Amendment
1050.860	Amendment
1050.1010	Amendment
1050.1110	Amendment
1050.1176	Amendment
1050.1230	Repealed
1050.1305	Repealed
1050.1320	Amendment
1050.2100	Repealed
1050.2110	Repealed
1050.2112	Repealed
1050.2115	Repealed
1050.2120	Repealed
1050.2125	Repealed
1050.2130	Repealed
1050.2135	Repealed
1050.2140	Repealed
1050.2145	Repealed
1050.2150	Repealed
1050.2155	Repealed
1050.2160	Repealed
1050.2165	Repealed
1050.2170	Repealed
1050.2175	Repealed
1050.2180	Repealed
1050.2185	Repealed

1050.2190	Repealed
1050.2195	Repealed
1050.2200	Repealed
1050.2210	Repealed
1050.2220	Repealed
1050.2230	Repealed
1050.2240	Repealed
1050.2250	Repealed
1050.2260	Repealed
1050.2270	Repealed
1050.APPENDIX A	Repealed
1050.APPENDIX B	Repealed

4) Statutory Authority: Implementing and authorized by the Residential Mortgage License Act of 1987 [205 ILCS 635/4-1(g)].

5) A Complete Description of the Subjects and Issues Involved: This rulemaking will:

- Repeal Section 1050.320 (Application for Renewal of an Illinois Residential Mortgage License) to remove a conflict with the 30 day timely renewal application deadline in Section 2-6 of the Act.

- Amend Section 1050.490 (Bonding Requirements) to remove the submission by licensees of paper surety bonds and facilitate use of the new electronic surety bond feature that Illinois has adopted through the NMLS.

- Repeal Sections 1050.710-1050.750 (Foreclosure Rate) as Public Act 99-0015 amended the regulations' underlying Act Section 4-8 to now instead address Loan Delinquency data and its implementation.

- Amend Sections 1050.810-1050.820 & 1050.860 (Transfer of Servicing & Payoff Notices) to repeal consumer notice provisions preempted by the federal Consumer Financial Protection Bureau (CFPB) in its amendments to federal Regulation Z, effective 1/1/2014, and also changes a deadline for payoff statements to conform to this CFPB rulemaking.

- Amend Section 1050.1010 (Loan Brokerage Agreement) including to update and add references to the CFPB's adopted TILA-RESPA Integrated Disclosure (TRID) Loan

Estimate form replacing the Good Faith Estimate form in most residential mortgage transactions.

- Amend Section 1050.1110 (Borrower Information Document) to update and add references to the CFPB's adopted TRID Loan Estimate form replacing the Good Faith Estimate form in most residential mortgage transactions. Also updates and adds reference to the CFPB's "Your Home Loan Toolkit" that has replaced the settlement cost booklet.

- Amend Section 1050.1176 (Record Retention) to permit servicers to eliminate the paper record-keeping requirement and retain their records in electronic or digital format as is currently permitted for all other licensees.

- Repeal Section 1050.1230 (Changes Affecting Loans in Process) to reflect new CFPB-required notifications to consumers of loan term changes in TRID process.

- Repeal Section 1050.1305 (Approval Notice) to reflect new CFPB-required notifications to consumers of loan term changes in TRID process.

- Amend Section 1050.1320 (Charges to Seller) to update and add a reference to the CFPB's adopted TRID Loan Estimate form replacing the Good Faith Estimate form in most residential mortgage transactions.

- Repeal Subparts R (Registration of Loan Originators) & S (Provisional Registration of Loan Originators) to reflect that both Subparts have been superseded by Section 7-1A, et seq. of Article VII (Mortgage Loan Originator License Required) of the Act.

6) Published studies or reports, and sources of underlying data, that were used to compose this rulemaking: None

7) Will this proposed rulemaking replace any emergency rule currently in effect? No

8) Does this rulemaking contain an automatic repeal date? No

9) Does this rulemaking contain incorporations by reference? No

10) Are there any other rulemakings pending on this Part? No

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11) Statement of Statewide Policy Objective: This rulemaking will not require a local government to establish, expand or modify its activities in such a way as to necessitate additional expenditures from local revenues.

12) Time, Place and Manner in which interested persons may comment on this rulemaking: Persons who wish to comment on this proposed rulemaking may submit written comments no later than 45 days after the publication of this Notice to:

Department of Financial and Professional Regulation
Attention: Craig Cellini
320 West Washington, 3rd Floor
Springfield IL 62786

217/785-0813
fax: 217/557-4451

All written comments received within 45 days after this issue of the *Illinois Register* will be considered.

13) Initial Regulatory Flexibility Analysis:

A) Types of small businesses, small municipalities and not-for-profit corporations affected: None

B) Reporting, bookkeeping or other procedures required for compliance: Please review the following proposed amendments.

C) Types of professional skills necessary for compliance: Please review the following proposed amendments.

14) Regulatory Agenda on which this rulemaking was summarized: This rule was not included on either of the 2 most recent agendas because the Division of Banking did not anticipate the need to amend this Part.

The full text of the Proposed Amendments begins on the next page:

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

TITLE 38: FINANCIAL INSTITUTIONS
CHAPTER II: DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

PART 1050
RESIDENTIAL MORTGAGE LICENSE ACT OF 1987

SUBPART A: DEFINITIONS

Section
1050.100 High Risk Home Loan Definitions; Applicability
1050.110 Definitions
1050.115 Administrative Decision (Repealed)
1050.120 Assisting (Repealed)
1050.125 Commissioner (Repealed)
1050.130 Control (Repealed)
1050.132 Conviction or Convicted (Repealed)
1050.135 Document (Repealed)
1050.140 Employee (Repealed)
1050.145 First Tier Subsidiary (Repealed)
1050.150 Hearing Officer (Repealed)
1050.155 High Risk Home Loan (Repealed)
1050.157 Licensee (Repealed)
1050.160 Material (Repealed)
1050.165 Other Regulatory Agencies (Repealed)
1050.170 Party (Repealed)
1050.175 Principal Place of Business (Repealed)
1050.180 Repurchase a Loan (Repealed)
1050.185 State (Repealed)
1050.190 Servicer (Repealed)
1050.195 Points and Fees (Repealed)
1050.197 Total Loan Amount (Repealed)
1050.198 Approved Credit Counselor (Repealed)
1050.199 Home Equity Loan (Repealed)

SUBPART B: FEES

Section
1050.210 Fees
1050.220 License Fees (Repealed)

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

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1050.230 Amended License Fees – Corporate Changes (Repealed)
1050.240 Duplicate Original License Fees (Repealed)
1050.245 Loan Originator Registration Application Fee (Repealed)
1050.246 Loan Originator Registration Transfer Fee (Repealed)
1050.247 Loan Originator Registration Reactivation Fee (Repealed)
1050.248 Duplicate Loan Originator Certificate of Registration or Pocket Card Fee (Repealed)
1050.250 Examination Fees (Repealed)
1050.255 Direct Expenses of Out-of-State Examinations (Repealed)
1050.260 Additional Full-Service Office Fees (Repealed)
1050.270 Hearing Fees (Repealed)
1050.280 Late Fees (Repealed)
1050.290 Manner of Payment (Repealed)

SUBPART C: LICENSING

Section
1050.310 Application for an Illinois Residential Mortgage License
1050.320 Application for Renewal of an Illinois Residential Mortgage License (Repealed)
1050.330 Waiver of License Fee
1050.340 Full-Service Office
1050.350 Additional Full-Service Office
1050.360 Continuing Education Requirements for Certain Employees (Repealed)
1050.370 Licensing of Mortgage Loan Originators

SUBPART D: OPERATIONS AND SUPERVISION

Section
1050.410 Net Worth
1050.420 Line of Credit (Repealed)
1050.425 Examination
1050.430 Late Audit Reports
1050.440 Escrow
1050.450 Audit Workpapers
1050.460 Selection of Independent Auditor (Repealed)
1050.470 Proceedings Affecting a License
1050.475 Change in Business Activities
1050.480 Change of Ownership, Control or Name or Address of Licensee
1050.490 Bonding Requirements

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SUBPART E: ANNUAL REPORT OF MORTGAGE ACTIVITY, MORTGAGE BROKERAGE ACTIVITY, PURCHASING ACTIVITY, AND MORTGAGE SERVICING ACTIVITY

Section
1050.610 Filing Requirements
1050.620 Reporting Forms
1050.630 Annual Report of Mortgage Activity
1050.640 Annual Report of Brokerage Activity
1050.650 Annual Report of Servicing Activity
1050.655 Annual Report of Purchasing Activity
1050.660 Verification

SUBPART F: FORECLOSURE RATE

Section
1050.710 Computation of National Residential Mortgage Foreclosure Rate (Repealed)
1050.720 Computation of Illinois Residential Mortgage Foreclosure Rate (Repealed)
1050.730 Excess Foreclosure Rate (Repealed)
1050.740 Foreclosure Rate Hearing (Repealed)
1050.750 Director's Authority – Unusually High Rate (Repealed)

SUBPART G: SERVICING

Section
1050.810 New Loans
1050.820 Transfer of Servicing
1050.830 Real Property Tax and Hazard Insurance Payments
1050.840 Payment Processing
1050.850 Toll-Free Telephone Arrangement
1050.860 Payoff of Outstanding Mortgage Loan
1050.870 Compliance with Other Laws

SUBPART H: ADVERTISING

Section
1050.910 General Prohibition
1050.920 Definition of Advertisement

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

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1050.930 Compliance with Other Laws
1050.940 Requirements
1050.950 Misleading and Deceptive Advertising Prohibition

SUBPART I: LOAN BROKERAGE PRACTICES

Section
1050.1010 Loan Brokerage Agreement
1050.1020 Loan Brokerage Disclosure Statement
1050.1030 Prohibited Practice

SUBPART J: LOAN APPLICATION PRACTICES

Section
1050.1100 High Risk Home Loan Application Practices; Applicability
1050.1110 Borrower Information Document
1050.1120 Description of Required Documentation
1050.1130 Maintenance of Records (Repealed)
1050.1140 Loan Application Procedures
1050.1150 Copies of Signed Documents
1050.1160 Confirmation of Statements
1050.1170 Cancellation of Application
1050.1175 Loan Log
1050.1176 Record Retention
1050.1177 Required Loan Application File Documents
1050.1180 Ability to Repay
1050.1185 Verification of Ability to Pay Loan
1050.1186 Fraudulent or Deceptive Practices
1050.1187 Prepayment Penalty

SUBPART K: GENERAL LENDING PRACTICES

Section
1050.1200 High Risk Home Loan Lending Practices; Applicability
1050.1210 Notice to Joint Borrowers
1050.1220 Inaccuracy of Disclosed Information
1050.1230 Changes Affecting Loans in Process (Repealed)
1050.1240 Prohibition of Unauthorized Lenders
1050.1250 Good Faith Requirements

1050.1260 Pre-paid Insurance Products and Warranties
1050.1270 Refinancing Prohibited in Certain Cases
1050.1272 Balloon Payments
1050.1275 Financing of Certain Points and Fees
1050.1276 Payments to Contractors
1050.1277 Negative Amortization
1050.1278 Negative Equity
1050.1280 Counseling Prior to Perfecting Foreclosure Proceedings

SUBPART L: COMMITMENT AND CLOSING PRACTICES

Section
1050.1305 Approval Notice (Repealed)
1050.1310 Inconsistent Conditions Prohibited
1050.1315 Avoidance of Commitment
1050.1320 Charges to Seller
1050.1325 Intentional Delay
1050.1330 No Duplication to Borrower of Seller's Costs
1050.1335 Fees and Charges
1050.1340 Refunds on Failure to Close
1050.1345 Representative at Closing
1050.1350 Compliance with Other Laws
1050.1355 Failure to Close – Disclosure
1050.1360 Escrow Account Agreements at Closing

SUBPART M: EXEMPTION GUIDELINES

Section
1050.1410 General
1050.1420 Interpretative Guidelines

SUBPART N: ADMINISTRATIVE HEARING PROCEDURES

Section
1050.1510 Applicability
1050.1520 Definitions (Repealed)
1050.1530 Filing
1050.1540 Form of Documents
1050.1550 Computation of Time

1050.1560 Appearances
1050.1570 Request for Hearing
1050.1580 Notice of Hearing
1050.1590 Service of the Notice of Hearing
1050.1595 Bill of Particulars or Motion for More Definite Statement
1050.1600 Motion and Answer
1050.1610 Consolidation and Severance of Matters – Additional Parties
1050.1620 Intervention
1050.1630 Postponement or Continuance of Hearing
1050.1640 Authority of Hearing Officer
1050.1650 Bias or Disqualification of Hearing Officer
1050.1660 Prehearing Conferences
1050.1670 Discovery
1050.1680 Subpoenas
1050.1690 Conduct of Hearing
1050.1700 Default
1050.1710 Evidence
1050.1720 Hostile Witnesses
1050.1730 Record of Proceedings
1050.1740 Briefs
1050.1750 Hearing Officer's Recommendation
1050.1760 Order of the Director
1050.1770 Rehearings and Reopening of Hearings
1050.1790 Costs of Hearing

SUBPART O: MORTGAGE AWARENESS PROGRAM

Section
1050.1800 Applicability
1050.1810 General
1050.1820 Guidelines
1050.1830 Offer of Mortgage Awareness Program

SUBPART P: DEFAULT AND FORECLOSURE RATES ON CONVENTIONAL LOANS

Section
1050.1900 Applicability
1050.1910 Report of Default and Foreclosure Rates on Conventional Loans
1050.1920 Director's Review and Analysis

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SUBPART Q: THIRD PARTY REVIEW OF HIGH RISK HOME LOANS

Section
1050.2000 Applicability
1050.2010 Third Party Review of High Risk Home Loans

SUBPART R: REGISTRATION OF LOAN ORIGINATORS

Section
1050.2100 Mortgage Loan Originators; Applicability (Repealed)
1050.2110 Application for Registration (Repealed)
1050.2112 Evaluation of Applications (Repealed)
1050.2115 Examination (Repealed)
1050.2120 Continuing Education Requirements for Loan Originators (Repealed)
1050.2125 Certificate of Registration Issuance (Repealed)
1050.2130 Roster of Registered Loan Originators (Repealed)
1050.2135 Pocket Card (Repealed)
1050.2140 Certificate of Registration Renewal (Repealed)
1050.2145 Certificate of Registration Transfer Application or Inactive Notice (Repealed)
1050.2150 Inactive Registration Status; Reactivation (Repealed)
1050.2155 Temporary Permits (Repealed)
1050.2160 Confidential Information (Repealed)
1050.2165 Averments (Repealed)
1050.2170 Suspension or Revocation of Registration, Refusal to Renew, Fines (Repealed)
1050.2175 Loan Originator Hearings; Fees and Costs (Repealed)
1050.2180 Criminal Proceedings (Repealed)
1050.2185 Violations of Tax Acts (Repealed)
1050.2190 Disciplinary Action for Educational Loan Defaults (Repealed)
1050.2195 Nonpayment of Child Support (Repealed)

SUBPART S: PROVISIONAL REGISTRATION OF LOAN ORIGINATORS

Section
1050.2200 Purpose (Repealed)
1050.2210 Definitions (Repealed)
1050.2220 Registration Required (Repealed)
1050.2230 Exemptions (Repealed)

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

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1050.2240 Application for Provisional Certificate of Registration; Contents; Amendment (Repealed)
1050.2250 Issuance of Provisional Certificate of Registration; Effective Date; Conditions (Repealed)
1050.2260 Loan Origination Practices (Repealed)
1050.2270 Enforcement (Repealed)

1050.APPENDIX A Estimated Monthly Income and Expenses Worksheet (Repealed)
1050.APPENDIX B Mortgage Ratio Worksheet (Repealed)

AUTHORITY: Implementing and authorized by the Residential Mortgage License Act of 1987 [205 ILCS 635/4-1(g)].

SOURCE: Filed January 18, 1974; amended at 2 Ill. Reg. 2, p. 1, effective January 16, 1978; codified at 8 Ill. Reg. 4524; amended at 9 Ill. Reg. 17393, effective October 24, 1985; Part repealed by emergency rule at 12 Ill. Reg. 3041, and new Part adopted by emergency rule at 12 Ill. Reg. 3079, effective January 13, 1988, for a maximum of 150 days; Part repealed at 12 Ill. Reg. 8683, and new Part adopted at 12 Ill. Reg. 8685, effective May 10, 1988; emergency amendment at 12 Ill. Reg. 9721, effective May 18, 1988, for a maximum of 150 days; amended at 13 Ill. Reg. 17056, effective October 20, 1989; amended at 15 Ill. Reg. 8580, effective May 28, 1991; emergency amendment at 16 Ill. Reg. 2915, effective February 10, 1992, for a maximum of 150 days; amended at 16 Ill. Reg. 10463, effective June 23, 1992; emergency amendment at 16 Ill. Reg. 12634, effective August 1, 1992, for a maximum of 150 days; amended at 16 Ill. Reg. 20179, effective December 9, 1992; amended at 17 Ill. Reg. 3513, effective March 2, 1993; transferred from Chapter III, 38 Ill. Adm. Code 450 (Commissioner of Savings and Loan Associations) to Chapter VIII, 38 Ill. Adm. Code 1050 (Commissioner of Savings and Residential Finance) pursuant to Savings Bank Act [205 ILCS 205] at 17 Ill. Reg. 4475; emergency amendment at 19 Ill. Reg. 11080, effective July 13, 1995, for a maximum of 150 days; emergency expired December 11, 1995; amended at 19 Ill. Reg. 15465, effective October 31, 1995; amended at 20 Ill. Reg. 388, effective January 1, 1996; recodified from Chapter VIII, Commissioner of Savings and Residential Finance, to Chapter II, Office of Banks and Real Estate, pursuant to PA 89-508, at 20 Ill. Reg. 12645; amended at 21 Ill. Reg. 10972, effective August 1, 1997; amended at 22 Ill. Reg. 230, effective December 19, 1997; amended at 24 Ill. Reg. 64, effective January 1, 2000; emergency amendment at 24 Ill. Reg. 19322, effective December 15, 2000, for a maximum of 150 days; emergency repealed at 25 Ill. Reg. 3696, effective January 30, 2001 in response to an objection of the Joint Committee on Administrative Rules at 25 Ill. Reg. 1857; amended at 25 Ill. Reg. 6174, effective May 17, 2001; emergency amendment at 27 Ill. Reg. 10783, effective July 1, 2003, for a maximum of 150 days; emergency expired November 27, 2003; amended at 28 Ill. Reg. 797, effective December 29, 2003;

emergency amendment at 28 Ill. Reg. 7137, effective April 30, 2004, for a maximum of 150 days; amended at 28 Ill. Reg. 10352, effective June 29, 2004; amended at 28 Ill. Reg. 13351, effective September 21, 2004; amended at 29 Ill. Reg. 14808, effective September 26, 2005; amended at 29 Ill. Reg. 19187, effective November 10, 2005; amended at 34 Ill. Reg. 17339, effective October 29, 2010; amended at 36 Ill. Reg. 250, effective January 1, 2012; amended at 38 Ill. Reg. 2019, effective December 27, 2013; amended at 41 Ill. Reg. _____, effective _____.

SUBPART C: LICENSING

Section 1050.320 Application for Renewal of an Illinois Residential Mortgage License (Repealed)

~~Each applicant for a renewal of an Illinois Residential Mortgage License shall file a renewal application on a form prescribed by the Director. The completed renewal application shall be received by the Director no later than 60 days prior to the licensee's annual renewal date and shall be accompanied by an investigation fee, as set forth in Section 1050.210 of this Part. Upon completion of the investigation that the findings set forth in Section 2-2 of the Act have been met, the Director shall issue a renewal license.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

SUBPART D: OPERATIONS AND SUPERVISION

Section 1050.490 Bonding Requirements

a) In lieu of a paper surety bond, each~~Each~~ licensee shall file and maintain an electronic surety~~a~~ bond in the Nationwide Multistate Licensing System and Registry in conformance with Section 3-1 of the Act. The amount of the bond shall be~~ in the amount of~~ not less than $25,000 and in an amount~~$20,000, except that minimum bond amounts shall be determined annually by the Director,~~ according to the scale in subsection (b)~~, upon implementation of the Nationwide Mortgage Licensing System. For the purposes of this Section, the form of the indemnity bond shall be defined as a licensure, surety or any other form of bond that is individually submitted to the Director for consideration as an approved bond~~.

b) Each Mortgage Loan Originator must be covered by the electronic~~a~~ surety bond filed and maintained by his or her employing licensee pursuant to subsection (a).

Registered exempt companies shall file and maintain electronic surety bonds in the same manner as subsection (a) for the purpose of covering their Mortgage Loan Originator employees~~through employment with a licensed mortgage broker or mortgage banker or registered exempt company~~. Licensed mortgage brokers and mortgage bankers and exempt company registrants must file and maintain an electronic~~a~~ surety bond that provides coverage for each sponsored Mortgage Loan Originator in an amount that reflects the dollar amount of Illinois mortgage loans applied for or originated by its Mortgage Loan Originators during the preceding calendar year. The surety bond amount will be set for each licensed mortgage broker and mortgage banker and registered exempt company ~~and adjusted as necessary annually by the Director~~ in accordance with the following scale, based upon Illinois residential mortgage loans brokered, funded, originated, serviced or purchased, as the case may be, during the preceding calendar year:

Loans	**Bond Amount**
$0 - $5,000,000	$25,000
$5,000,001 - $20,000,000	$50,000
$20,000,001 - $50,000,000	$75,000
$50,000,001 - $100,000,000	$100,000
Over $100,000,000	$150,000

The Director may require licensed mortgage brokers and mortgage bankers and registered exempt companies to file reports of Illinois mortgage loan volumes with the Director or Nationwide Multistate~~Mortgage~~ Licensing System and Registry for purposes of determining that the bond is in an amount that complies with the scale in this subsection (b)~~the annual minimum bond amount~~. Based upon these reports, the Director may cause licensed mortgage brokers and mortgage bankers and registered exempt companies to adjust the amount of the bonds to an amount that complies with the scale in subsection (b).

c) Each electronic surety bond required pursuant to Section 3-1 of the Act and this Section shall be for a perpetual term.~~:~~

~~1) concurrent with the term of the license or registration, commencing with licenses or registrations issued by the Department with an expiration date of December 31, 2010; and~~

~~2) concurrent with the license or registration for new or renewed bonds~~

~~thereafter.~~

(Source: Amended at 41 Ill. Reg. _____, effective _____)

SUBPART F: FORECLOSURE RATE

Section 1050.710 Computation of National Residential Mortgage Foreclosure Rate (Repealed)

~~On March 1 of each year, or as soon as possible thereafter, the Director shall calculate the National Residential Mortgage Foreclosure Rate on government-insured residential mortgage loans in accordance with the terms of Section 4-8 of the Act. The calculation shall be made based on documentation obtained from the Department of Housing and Urban Development and from the Veterans Administration.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.720 Computation of Illinois Residential Mortgage Foreclosure Rate (Repealed)

~~a) The Illinois Residential Mortgage Rate shall be that rate determined annually by the Director in accordance with Section 4-8(a) of the Residential Mortgage License Act [705 ILCS 635/4-8(a)].~~

~~b) Each licensee shall compute its Illinois Residential Mortgage Foreclosure Rate on mortgage loans on a form prescribed by the Director. The form shall be filed by March 1 of each year.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.730 Excess Foreclosure Rate (Repealed)

~~Whenever a licensee's Illinois Residential Mortgage Foreclosure Rate for a particular year exceeds the calculated National Residential Mortgage Foreclosure Rate for the same year, the Director shall conduct an examination of that licensee and shall hold public hearings in accordance with Section 4-8(d) of the Act.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

Section 1050.740 Foreclosure Rate Hearing (Repealed)

~~a) Authority. The Director shall hold public hearings concerning a licensee that is subject to examination pursuant to Section 1050.730 of this Subpart. The hearing shall be held in accordance with Section 4-8(c) of the Act.~~

~~b) Notice. Written notice of the time, place, date and subject of the hearing shall be posted in both the Springfield and Chicago offices of the Division at least 10 days prior to the hearing. The Director may distribute such notice to other interested persons upon request.~~

~~c) Testimony. Testimony at the public hearings shall be taken in accordance with Section 4-8(c) of the Act. Testimony may be either oral or written. If oral, the party proposing to testify must complete a witness slip that shall be provided at the hearing. If written, the proposed testimony must be received by the Director prior to the hearing. Notwithstanding the foregoing, testimony shall be permitted at the hearing only if the party proposing to testify has completed, and the Director has received, either a written letter of complaint or a consumer complaint form as prescribed by the Director.~~

~~d) Hearings. Hearings held under this Section shall be for informational purposes only and shall not be subject to Subpart N of this Part.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.750 Director's Authority − Unusually High Rate (Repealed)

~~The Director may take any action permitted to be taken by Sections 1050.730 and 1050.740 of this Subpart or at any other Section of this Part whenever the Director determines that a licensee's foreclosure rate on government-insured mortgage loans in a particular area, as deemed by the Director on a case-by-case basis, is higher than a rate deemed appropriate by the Director in that particular area. The Director shall determine the appropriate rate for a particular area by calculating the average of the foreclosure rates on government-insured mortgage loans in the same area for the same period of time based on information filed with the Director pursuant to the Act. A licensee's rate that exceeds the average shall be considered unusually high.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

SUBPART G: SERVICING

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

Section 1050.810 New Loans

~~a)~~Payment instructions shall be issued in time to reasonably assure receipt by the customer at least 15 days before the first payment is due and shall include, but not be limited to the following:

a~~1~~) The name, address and telephone number of the entity to whom payments are to be made and the name of the person to whom inquiries should be directed. Such phone numbers shall be toll free to the customer;

b~~2~~) The exact amount of the monthly payment and a plain English explanation of the method of calculation; and

c~~3~~) A clear and conspicuous statement as to monthly date of each payment, regardless of interval between due date and assessment of any late-payment penalty.

~~b)Accompanying the payment instructions on a new residential mortgage loan shall be a clear and conspicuous statement alerting the customer that if servicing on the loan is transferred, notice to that effect will come from both the current and new servicer. The statement shall offer a toll free telephone arrangement for the customer to verify a notice of transfer of servicing.~~

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1050.820 Transfer of Servicing

a) No licensee shall sell or transfer servicing to, or accept or purchase servicing from, any entity other than a licensee or an entity exempt from licensing pursuant to Section 1-4(d) of the Act unless specifically authorized by the Director.

b) Any licensee who is a party to an arrangement for large transfers of servicing shall make certain that sufficient staff and facilities are dedicated to the transfers to prevent inconvenience to mortgagors.

~~c) Notice to Mortgagor of Transfer. Whenever the servicing of a residential mortgage loan is transferred or sold by a licensee, or purchased or accepted by a licensee, each licensee who is a party to the arrangement shall issue to the mortgagor, simultaneous with the transfer, a notice that shall include at a minimum:~~

~~1)~~ ~~where and to whom to address questions relating to the mortgage, and a toll-free telephone arrangement of the licensee that purchased or accepted the mortgage for doing so;~~

~~2)~~ ~~the name and address to whom payments are to be submitted for at least the next three months;~~

~~3)~~ ~~the amount of each payment required for the next three months. However, there shall be no violation of this requirement when the licensee is unable to predict accurately precise amounts for each of the next three months. Examples of such situations may include a residential mortgage loan contract calling for a potential rate change during the relevant period, or the scheduled annual analysis of an escrow (impound) account for payment of a real property taxes and/or hazard insurance.~~

~~4)~~ ~~the effective date of the transfer;~~

~~5~~) ~~reassurance that the transfer of servicing does not affect the terms and conditions of the mortgage;~~

~~6)~~ ~~the name and address of the primary regulatory authority having jurisdiction over the residential lending activities of the entity to whom payments are to be sent.~~

c~~d~~) ~~Additional~~ Responsibilities of Transferring Licensee. Responsibilities~~In addition to the notice to mortgagor described in subsection (c), responsibilities~~ of a licensee who transfers or sells servicing on a residential mortgage loan shall ~~include but not be limited to~~:

1) Promptly providing the insurance carrier or agent with a notice of transfer identifying both the policy number and loan number when servicing includes payment of hazard insurance premiums;

2) Promptly notifying the tax-bill service or taxing authority of the transfer when servicing includes payment of real property taxes;

3) Forward to the buying or accepting servicer:

A) Escrow (impound) balances;

B) Correspondence, bills, receipts and documents relating to the transferred loans;

C) Mortgage payments daily, for a period of at least 60 days.

d~~e~~) In addition to the notice described in subsection (b)~~(c)~~, responsibilities of a licensee buying or accepting transfer of servicing of a residential mortgage loan shall include but not be limited to:

1) Promptly furnishing to the customer payment identification materials required by the licensee for efficient processing of customer remittances. Examples of such items are payment coupon books and preprinted envelopes;

2) Promptly responding to each mortgagor's questions regarding payoffs, assumptions, statements of account and general servicing procedures;

3) Practicing forbearance with the mortgagor when sorting out transfer-related problems, including but not limited to delinquency and assessment of late charges.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1050.860 Payoff of Outstanding Mortgage Loan

a) When a check or other negotiable instrument received in final payment is deposited in a financial institution, the licensee's refund policy shall conform to Section 4-213 of the Uniform Commercial Code [810 ILCS 5/4-213] time requirements on making such funds available for withdrawal by the licensee.

b) Payoff Letter. Within 7~~10~~ business days of receipt of a written request from an entity authorized by the borrower, a licensee shall furnish a written notice of the total amount required to pay in full on an outstanding mortgage loan, as of a specified date. Such payoff letter shall itemize and explain all charges included in the total figure stated.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

SUBPART I: LOAN BROKERAGE PRACTICES

Section 1050.1010 Loan Brokerage Agreement

Before a mortgage loan applicant (also referred to in this Section as "borrower" or "customer") signs a completed residential mortgage loan application or gives the licensee any consideration, whichever comes first, a loan brokerage agreement shall be required and shall be in writing and signed by both the mortgage loan applicant and a licensee whose services to the customer shall be loan brokering as defined at Section 1-4(o) of the Act.

a) The loan brokerage agreement shall carry a clear and conspicuous statement that, upon request, a copy of the agreement shall be made available to the borrower or the borrower's attorney for review prior to signing.

b) Both the licensee's authorized representative and the borrower shall sign and date the loan brokerage agreement ~~at the same time~~, and a copy of the executed agreement shall be given to the customer ~~at the time of signing~~.

c) The loan brokerage agreement shall contain an explicit description of the services the licensee agrees to perform for the borrower and an accounting of estimated loan costs and fees paid to the licensee that may be provided through reference to, or be taken from, a good faith estimate or TILA-RESPA Integrated Loan Estimate. The loan brokerage agreement shall include an accounting of all consideration and remuneration to be exchanged in connection with those services. In the same section of the agreement shall be language, of prominence equal to or greater than the estimate, listing the types of situations or conditions that could materially affect the amounts indicated as a result of details that could not be known by the licensee at the time of signing the loan brokerage agreement. Examples of such situations or conditions include, but are not limited to, an appraised value different from that estimated by the borrower or credit obligations that the borrower fails to report.

d) The loan brokerage agreement shall carry a clear and conspicuous statement as to the conditions under which the borrower is obligated to pay the licensee.

e) The loan brokerage agreement shall provide that, if the licensee makes false or misleading statements in the agreement, the borrower may, upon written notice:

1) void the agreement;

2) recover monies paid to the broker for which no services have been performed; and

3) recover actual costs, including attorney fees for enforcing the borrower's rights under the loan brokerage agreement.

f) The loan brokerage agreement shall incorporate by reference the Loan Brokerage Disclosure Statement described in Section 1050.1020.

g) Except for a Rate-Lock Fee Agreement in accordance with Section 1050.1335, the loan brokerage agreement shall be the only agreement between the borrower and licensee with respect to a single loan; provider, however, that the licensee also shall provide to the customer any disclosure statement necessary to comply with Federal and State requirements, including, but not limited to, the Consumer Protection Credit Act (15 USC 1601), Equal Credit Opportunity Act (Title VII), and Truth in Lending Act (Title I) and Consumer Fraud and Deceptive Business Practices Act [815 ILCS 505].

h) The loan brokerage agreement shall contain the name and Unique Identifier in the Nationwide Multistate~~Mortgage~~ Licensing System and Registry of any licensee and Mortgage Loan Originator assisting the licensee in performing services for the borrower.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

SUBPART J: LOAN APPLICATION PRACTICES

Section 1050.1110 Borrower Information Document

Borrower Information Document. Before a mortgage loan applicant, also referred to in this Subpart as "borrower" or "customer", signs a completed residential mortgage loan application or gives the licensee any consideration, whichever comes first, the licensee shall give the customer a Borrower Information Document. The document may be incorporated into or appended to the material as is necessary for compliance with relative Federal requirements, including but not limited to Regulation Z (12 CFR 226). Except for the explicit wording required by subsection (a) of this Section, the following format is for illustrative purposes only; however, all of the following information shall be included in the document:

a) Regulatory Disclosure Statement: The following statement: "This document is being provided to you pursuant to the Residential Mortgage License Act of 1987 and Rules promulgated thereunder (38 Ill. Adm. Code 1050). The purpose of this document is to set forth those exhibits and materials you should receive or be receiving in connection with your residential mortgage loan application with (name of licensee), holder of License (license number) and regulated by the State of Illinois, Division of Banking, under the aforesaid Act".

b) Significant information: Significant information on the types of situations that could affect the processing of the loan but that may not be known by the licensee at the time the application was taken. Examples of such situations include, but are not limited to:

1) An appraisal value different from that estimated by the borrower;

2) Credit obligations the borrower fails to report;

3) A change in the borrower's financial circumstances that would result in his or her ineligibility for the loan; or

4) A material change or discontinuation of a loan program by an investor or other entity, such as the U.S. Department of Housing and Urban Development, the Veterans' Administration or a private investor.

c) "Your Home Loan Toolkit~~Settlement Cost Booklet~~": If the mortgage relates to the purchase of the security real estate, a "Your Home Loan Toolkit" as required by the federal Consumer Financial Protection Bureau that describes the home buying process~~"Settlement Cost Booklet" as required by Federal law (Real Estate Settlement Procedures Act (12 USC 2601 et seq.)) that describes the settlement process~~.

d) Information~~Good Faith Estimate~~ of Costs:

1) For any residential mortgage loan, regardless of whether it represents a position of first or junior lien against the security real estate, a good faith estimate or TILA-RESPA Integrated Loan Estimate of the costs that will be paid in connection with the financing as outlined in Regulation Z (12 CFR 226).

2) If the mortgage relates to the purchase of the security real estate, a good faith estimate or TILA-RESPA Integrated Loan Estimate of the amount and nature of charges discussed at Section 1050.1320(b) of this Part.

e) Loan Application: A copy of the loan application or equivalent form that will have to be signed and delivered to the lender in order to obtain the loan.

f) Mortgage Escrow Account Act, Related Document: If the mortgage is not FHA-insured or VA-guaranteed and relates to the purchase of owner-occupied, single-family security real estate, unless there is a certainty that the lender will not require maintenance on an escrow account for payment of taxes, a copy of the Mortgage Escrow Account Act [765~~205~~ ILCS 910], along with a copy of the document to be executed by the applicant at closing with respect to use of a pledged time deposit account in lieu of an escrow account pursuant to that Act.

g) "Consumer Handbook on Adjustable Rate Mortgages": If the mortgage is an adjustable rate mortgage representing a first-lien position with respect to the security real estate, the "Consumer Handbook on Adjustable Rate Mortgages", as required by Federal regulations (12 CFR 535.33), that describes the special features of adjustable rate mortgages.

h) Documents upon Request: Upon request by the applicant, the following information shall be provided:

1) A sample of the form of note and mortgage that will be executed if the loan applied for is approved;

~~2) A sample copy of the commitment letter;~~

2~~3~~) A general description of underwriting standards that will be considered in evaluating the application.

i) Dated Customer Acknowledgment: A provision for an applicant to acknowledge receipt of each of the above-listed disclosures, showing the date of receipt.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1050.1176 Record Retention

a) Record Retention. Pursuant to Section 2-4(c) of the Act, each licensee shall retain all records prepared or received in the course of its residential mortgage business for 36 months.

1) For records pertaining to the activities of loan brokering or originating, the 36 month period shall begin on the date of the loan closing or other termination date of the loan process.

2) For records pertaining to buying/selling loans on the secondary market, the 36 month period shall begin on the date the loan was sold.

3) For records pertaining to the servicing of loans, the 36 month period shall begin on the date the loan was paid off or on the date the servicing rights were sold.

b) Format of Retention. Records pertaining to the activities of loan brokering, loan originating, or buying/selling loans on the secondary market may be retained for the 36 month period:

1) In hard copy or paper-based form; or

2) In electronic or digital form. The electronic or digital form must be capable of legible hard copy reproduction and the licensee must accurately and authentically preserve any alterations, erasures or similar indications of changes on the documents. The licensee must also retain documentation that explains the process used to convert hard copy or paper-based documents to electronic or digital formats and specifies the date of conversion, the method of conversion, and the disposition of the original hard copy or paper-based document.

~~c) Format of Retention – Servicing. Records pertaining to the activity of loan servicing must be retained for the 36 month period in hard copy or paper-based form.~~

(Source: Amended at 41 Ill. Reg. _____, effective _____)

SUBPART K: GENERAL LENDING PRACTICES

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

Section 1050.1230 Changes Affecting Loans in Process (Repealed)

~~a) If it is determined that a borrower does not qualify for the loan amount, terms or program for which he or she applied and the costs of another recommended program would materially differ from the costs itemized on the good faith estimate, the licensee immediately shall provide to the customer a written and, when possible, a verbal, plain-English explanation of any program the licensee recommends as one for which the borrower may be qualified. The explanation shall include, but not be limited to, detailed information on costs to the borrower.~~

~~b) When any notice is received from a secondary market underwriter, an investor, the Federal Housing Administration or the Veteran's Administration that materially affects a loan in process, the licensee processing the loan application shall so notify the customer in writing and, when possible, verbally, immediately upon receipt of the notice. Examples include, but are not limited to, future or immediate change of rules or requirements, discontinuation of a specific loan program, failure by the borrower to qualify, and alternatives, if any, available to the borrower.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

SUBPART L: COMMITMENT AND CLOSING PRACTICES

Section 1050.1305 Approval Notice (Repealed)

~~Immediately upon approval of a residential mortgage loan application, the licensee shall deliver to the applicant, also referred to in this Section as "borrower" or "customer", either personally or via first class United States mail or private delivery service, a written loan approval notice stating the terms and condition of the residential mortgage loan agreed to by the licensee and borrower. The approval notice shall state the following:~~

~~a) The exact expiration date of the loan commitment;~~

~~b) All economic terms of the loan and their duration; and~~

~~c) Whether the economic terms are fixed or, if subject to change, a plain English explanation of the time when, circumstances under, and extent to which they may be changed.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.1320 Charges to Seller

a) Except for FHA-insured or VA-guaranteed residential mortgage loans, no licensee shall:

1) impose any charges upon a seller under a borrower's purchase contract;

2) condition any commitment for a residential mortgage loan upon the agreement of the seller to pay such charges; or

3) incur any charges on behalf of the seller, unless specifically authorized by that seller to do so.

b) With respect to FHA-insured or VA-guaranteed residential mortgage loans, the licensee shall provide, at time of application, a written good faith estimate or TILA-RESPA Integrated Loan Estimate Disclosure of the amounts and nature of charges to be paid that are disallowed by the applicable Federal agency for payment by the buyer. A clear and conspicuous statement shall disclose that such charges are disallowed by the applicable Federal agency for payment by the borrower. Examples of such charges may include, but are not limited to, tax service fee, assignment fee, underwriter fee.

c) For purposes of this Section, "seller" refers to the vendor of real estate that is the subject of the residential mortgage loan.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

SUBPART R: REGISTRATION OF LOAN ORIGINATORS

Section 1050.2100 Mortgage Loan Originators; Applicability (Repealed)

~~Pursuant to the implementation of the federal Secure and Fair Employment for Mortgage Licensing Act (SAFE Act) (12 USC 51 et seq.), this Subpart does not apply to mortgage loan originators licensed pursuant to Section 7-1A of the Illinois Residential Mortgage License Act of 1987.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2110 Application for Registration (Repealed)

~~a) Each applicant for registration as a Loan Originator shall file with the Division a completed, signed application, on forms supplied by the Division, that includes:~~

~~1) a clear copy of a state identification card containing a current photo;~~

~~2) a complete work history for the 3 years immediately preceding the date of application;~~

~~3) the name, address, phone number and license number of the licensee that the applicant is or will be employed as a Loan Originator and the start date of employment or prospective employment;~~

~~4) verification of fingerprint processing from the Illinois Department of State Police, or its designated agent for fingerprint processing, that complies with the form and manner for requesting and furnishing criminal history record information prescribed by the Department of State Police. These fingerprints shall be verified with the Department of State Police and Federal Bureau of Investigation criminal history record databases;~~

~~5) proof of passage of the examination or qualification for an exemption specified in Section 1050.2115;~~

~~6) verification that the applicant has not been convicted of any criminal offense, including a misdemeanor or felony, or has not been subject to any adverse judgment involving financial crimes or a criminal or civil act involving monies, breach of trust, moral turpitude, or misfeasance or malfeasance, or a detailed explanation describing fully all convictions and adverse judgements;~~

~~7) A statement that the applicant is in compliance with Sections 1050.2165, 1050.2185, 1050.2190, and 1050.2195.~~

~~8) certification from the employing licensee of the name of the Loan Originator, office location where employed, and employment hire date, which shall be electronically submitted to the Division's website;~~

~~9) the required fees set forth in Section 1050.245 of this Part.~~

~~b) If an applicant has held or holds any professional license in another jurisdiction, certification of that registration must be submitted to the Division directly from the state or territory in which the applicant was licensed stating whether the file on the applicant contains any record of disciplinary actions taken or pending.~~

~~c) The Director shall consider an application for registration withdrawn if it does not contain all of the information required under subsection (a) and if the information is not submitted to the Director within 15 business days after the Director requests the information.~~

~~d) If any information changes after the filing of the initial application, the applicant shall provide updated information in writing within 30 calendar days to the Division. Failure to provide updated material may result in a fine of $50 per violation for the initial failure and $100 per violation for each additional failure.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2112 Evaluation of Applications (Repealed)

~~a) Evaluations of Applications – Criminal History~~

~~1) Criminal history record information is defined as information collected by criminal justice agencies as defined in the Illinois Uniform Conviction Information Act [20 ILCS 2635] regarding individuals, consisting of identifiable descriptions and notation of arrests, detention, indictments, information, or other formal criminal charges, and any disposition arising therefrom, sentencing, correctional supervision and release. The individual records must contain both information sufficient to identify the subject of the record and notations regarding any formal criminal justice transaction involving the identified individual.~~

~~2) In determining whether an applicant for a Loan Originator Certificate of Registration is fit for registration because of criminal history record information, the Division shall consider the following standards:~~

~~A) Whether the crime was a felony;~~

~~B) An applicant shall not be considered fit for registration if the applicant has been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign or military court at any time preceding the date of application, if the felony involved an act of fraud, dishonesty or a breach of trust, forgery or money laundering;~~

~~C) For felonies not subject to subsection (a)(2)(B), an applicant shall not be considered fit for registration if the applicant has been convicted of, or pled guilty or nolo contendere to, a felony in a domestic, foreign or military court during the 7-year period preceding the date of the application for registration;~~

~~D) Whether, in the case of a misdemeanor related to finances or moral turpitude, more than 5 years have elapsed since the date of completion of imposed sentence;~~

~~E) Whether the conviction was from a city ordinance violation or conviction for which a jail sentence was not imposed; and~~

~~F) For crimes not subject to subsection (a)(2)(B) or (C), whether the applicant has been sufficiently rehabilitated to warrant public trust. The Division shall consider the following factors in considering whether an applicant has been presumed to be rehabilitated:~~

~~i) Completion of probation;~~

~~ii) Completion of parole supervision;~~

~~iii) In the case of a felony not subject to parole supervision, if more than 10 years have elapsed after final discharge or release from any term of imprisonment without any subsequent conviction; or~~

~~iv) In the case of a misdemeanor related to finances and moral turpitude, if more than 5 years have elapsed after final discharge or release from any term of imprisonment without any subsequent conviction.~~

~~3) For crimes not subject to subsection (a)(2)(B) or (C), any one of the following factors may outweigh the presumption of rehabilitation:~~

~~A) Lack of compliance with terms of punishment (i.e., failure to pay fines or make restitution, violation of the terms of probation or parole);~~

~~B) Unwillingness to undergo, or lack of cooperation in, medical or psychiatric treatment/counseling;~~

~~C) Falsification of an application for registration with the Division; and~~

~~D) Failure to furnish to the Division additional information or failure to appear for a conference with the Division in relation to the applicant's application for registration.~~

~~4) The following criminal history records shall not be considered in connection with an application for registration:~~

~~A) Juvenile adjudications;~~

~~B) Records of arrest not followed by a conviction;~~

~~C) Convictions overturned by a higher court; and~~

~~D) Convictions that have been the subject of a pardon or expungement.~~

~~b) Evaluation of Applications – Civil Judgment and Credit History~~
~~In determining whether an applicant for a Loan Originator Certificate of Registration is fit for registration because of civil judgments identified in the applicant's credit history or otherwise that involve finances, breach of trust, moral turpitude, or misfeasance or malfeasance, the Division shall consider the totality of the circumstances of any outstanding and unpaid civil judgments against the applicant and any civil judgments where satisfaction of the judgment has occurred 5 years or less before the date of application.~~

~~c) Evaluation of Applications – Disciplinary Actions taken by Regulatory Agencies~~

~~In determining whether an applicant for a Loan Originator Certificate of Registration is fit for registration because of a disciplinary action taken by a regulatory agency, the Division shall consider the following standards:~~

~~1) An applicant shall not be considered fit for registration if the applicant has ever had a Mortgage Loan Originator license, or an equivalent Loan Originator registration, revoked in any governmental jurisdiction, except that a subsequent formal vacation of a revocation shall not be deemed a revocation.~~

~~2) Whether a professional license or registration held by the applicant that is financially related, including but not limited to residential mortgage, banking, securities, insurance, real estate, and appraisal, has been disciplined by a state or Federal regulator.~~

~~3) Whether the applicant has been barred, removed, and/or prohibited by the Office of the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the U.S. Department of Housing and Urban Development or the Illinois Department of Financial and Professional Regulation, or appears on a list maintained by the Office of Foreign Asset Control of the United States Department of the Treasury.~~

~~d) Determination and Hearing~~
~~The applicant/registrant may be given an opportunity to appear at a Division conference regarding the matter. If the applicant is afforded an opportunity to appear at a Division conference, the applicant/registrant will be notified in writing by the Division. Failure to appear at the conference shall result in denial or refusal to issue or renew an applicant's/registrant's Loan Originator Certificate of Registration. If the applicant chooses not to attend the conference or was not afforded the opportunity of a conference, he/she may request a formal hearing regarding such determination prior to final action by the Division in accordance with 38 Ill. Adm. Code 1050.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2115 Examination (Repealed)

~~a)~~ ~~Each applicant for an initial Loan Originator Certificate of Registration shall pass a written examination approved by the Director to determine the applicant's competency to be a Loan Originator. The Director may prepare, charge a nonrefundable fee for, and conduct examinations. The Director may also designate an independent testing service to perform these activities on behalf of the Director. In addition, any person who desires to take the written examination shall apply in writing on forms approved by the Director. The examination shall be comprehensive and shall evaluate the applicant's knowledge of residential mortgage financing, including but not limited to:~~

~~1)~~ ~~Residential mortgage financing fundamentals, including, but not limited to, industry overview, mortgage products and life cycle, and qualification calculations and principles; and~~

~~2)~~ ~~Legal, regulatory, and ethical requirements including Federal, State, and local requirements and ethical responsibility.~~

~~b)~~ ~~Notwithstanding anything to the contrary required by subsection (a), each applicant who is able to verify possession of a professional certification approved by the Director that requires at least 18 hours of continuing education every three years shall be exempt from the residential mortgage financing fundamentals portion of the examination and shall be required to take only the legal, regulatory, and ethical requirements portion of the examination.~~

~~c)~~ ~~Exception for Solicitors~~

~~1)~~ ~~Notwithstanding anything to the contrary required by subsection (a) of this Section and subject to the Director's approval, an applicant for a Loan Originator Certificate of Registration shall not be required to pass an examination if the applicant avers, and does in fact, limit his or her activity as a Loan Originator, pursuant to Section 1-4(hh) of the Act, to soliciting residential mortgage loan applications, which includes collecting from prospective borrowers personal or financial information for the sole purpose of conveying this information to a licensee and its registered Loan Originator or an exempt entity and its employee performing exempt loan originator services.~~

~~2) The Director may approve the registration of a Loan Originator applicant to solicit residential mortgage loans as provided in this Part under a classification of "no examination required", provided that:~~

~~A) the employing licensee or licensee pursuant to Section 1-4(d)(6) of the Act expressly, in writing on a form approved by the Director, assumes full and direct legal responsibility for the solicitation activity performed on behalf of or in the name of the licensee or that benefits or is intended to benefit the licensee;~~

~~B) the Loan Originator will perform no activities for which an examination under this Part is required, subject to discipline by the Director of the Loan Originator and his or her employing licensee or licensee pursuant to Section 1-4(d)(6) of the Act; and~~

~~C) otherwise meets the requirements of this Part and the Act and does not undermine the purposes of this Part and the Act.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2120 Continuing Education Requirements for Loan Originators (Repealed)

~~a) Each calendar year, a Loan Originator shall complete a minimum of 6 hours of continuing education in residential mortgage financing and related topics, as approved by the Director. The employing licensee shall be responsible for ensuring compliance with these requirements for each Loan Originator it employs.~~

~~b) Any Loan Originator who possesses a professional certification approved by the Director shall be exempt from the continuing education requirements of this Section. For a professional certification to be eligible for approval, it must require at a minimum 18 hours of continuing education related to residential mortgage lending every 3 years.~~

~~c) A Loan Originator who is admitted to practice law pursuant to the Illinois Supreme Court rule shall be exempt from the continuing education requirements of this Section.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

Section 1050.2125 Certificate of Registration Issuance (Repealed)

~~a) The Director shall issue a Certificate of Registration for the applicant to the employing licensee (or issue and hold until requested by the employing licensee) or at the Director's discretion may issue a Certificate of Registration to the applicant if he or she meets the following conditions:~~

~~1) The applicant has met the requirements of Sections 1050.2110, 1050.2115, and 1050.2165;~~

~~2) An investigation has been conducted as required by Section 1050.2110;~~

~~3) The applicant complies with the Act, this Part, and other applicable law;~~

~~4) The applicant has not been convicted of any criminal offense or subject to any adverse judgment described in Section 1050.2110(a)(2), unless the Director finds that the applicant is rehabilitated and is currently honest, truthful, and of good reputation;~~

~~5) The applicant's character and general fitness command the confidence of the public and warrant the belief that the applicant's employment by a licensee will be conducted honestly and fairly in compliance with the Act, this Part, and other applicable law; and~~

~~6) If the Director has previously denied the applicant a license or registration under the Act or this Part, a period of 24 months must pass from the date of that denial and the taking of a new application for the applicant's Certificate of Registration.~~

~~b) The Director shall issue the Certificate of Registration subject to the following conditions:~~

~~1) Each Loan Originator's Certificate of Registration shall be mailed to the employing licensee and maintained by the employing licensee at its main office, or to the applicant if the Director so chooses under subsection (a). The Director may institute an electronic registration system and retain all certificates within that system. If the Loan Originator is not employed by a licensee at the time the Certificate of Registration is issued, the Director shall retain the Certificate of Registration.~~

~~2) Each Loan Originator and employing licensee shall provide written notification to the Director within 15 calendar days after obtaining information that the Loan Originator employed by the licensee is convicted of any criminal offense; is subject to any adverse judgment in any jurisdiction involving financial crimes or criminal or civil acts involving monies, breach of trust, moral turpitude, misfeasance or malfeasance; or has been convicted in any jurisdiction of a crime that is a felony in that jurisdiction. The notification shall describe fully all convictions and adverse judgments.~~

~~3) If a Loan Originator's employment with a licensee ceases for any reason, the employing licensee shall return the Certificate of Registration to the Director within 10 calendar days after the date the employment ceases. If applicable, the employing licensee also shall provide a report pursuant to Section 6-2(4) of the Act and comply with Section 1050.2135. Licensees may be subject to discipline for filing a frivolous, false, or misleading report under Section 6-2(4) of the Act.~~

~~4) Pending the transfer of a Loan Originator's Certificate of Registration to another licensee and written confirmation from the Director, a licensee may employ a Loan Originator as an exclusive employee on a temporary basis for a period not to exceed 45 calendar days.~~

~~5) No licensee shall employ a person or entity to perform the duties of a Loan Originator, except a person with a current Loan Originator Certificate of Registration or Temporary Permit issued under Section 1050.2155.~~

~~6) A Certificate of Registration and the authority granted by that certificate are granted only to the Loan Originator. The Certificate of Registration and authority shall not in any manner be assigned or transferred to or used by any other person or entity.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2130 Roster of Registered Loan Originators (Repealed)

~~The Director shall establish and maintain a public roster of all persons with active Loan Originator Certificates of Registration and Temporary Permits. The Director may charge costs of reproduction for copies of the roster.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2135 Pocket Card (Repealed)

~~a) Upon issuance of a Loan Originator Certificate of Registration, the Director shall issue a pocket card to the licensee for each Loan Originator employed by the licensee. The pocket card shall be in a form prescribed by the Director and shall specify the period for which the Loan Originator is registered, as stated on the Loan Originator's Certificate of Registration. The licensee shall deliver the pocket card to the Loan Originator and the Loan Originator shall carry the pocket card when engaging in activities that are subject to licensure or registration under the Act and shall display the card on demand to the Director, law enforcement and regulatory officials, employing licensees, authorized representatives of the borrower, including the borrower's attorney, and borrowers or consumers.~~

~~b) At the end of the Loan Originator's employment, the employing licensee shall retrieve a Loan Originator's pocket card and shall return it and the Loan Originator's Certificate of Registration to the Director. If the employing licensee is unable to retrieve the pocket card, the employing licensee shall notify the Director in writing when the Loan Originator's Certificate of Registration is submitted to the Director.~~

~~c) When the employing licensee is unable to retrieve the Loan Originator's pocket card, the subsequent employer, when so informed by the Director, shall retrieve the pocket card and return the pocket card to the Director prior to employing the Loan Originator.~~

~~d) After the Loan Originator's pocket card is returned to the Director, the Director shall issue a new pocket card to the subsequent employing licensee for the Loan Originator.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2140 Certificate of Registration Renewal (Repealed)

~~a) Certificates of Registration shall be renewed on or before the date of expiration of the current Certificate of Registration. Each Loan Originator shall be responsible for renewal of his or her Certificate of Registration. Failure of the Loan Originator to receive renewal forms shall not relieve the Loan Originator of this responsibility. Failure to timely renew the Certificate of Registration shall render the Certificate of Registration inactive unless the Director approves otherwise in writing.~~

~~b) A Certificate of Registration may be renewed if the Director finds the following conditions are met:~~

~~1) The renewal application is complete, including payment of the non-refundable renewal fee in a form authorized by the Director;~~

~~2) The renewal applicant has verified that he or she has complied with Section 1050.2120;~~

~~3) The renewal applicant has complied with Section 1050.2125; and~~

~~4) The renewal applicant's current Certificate of Registration is not suspended or revoked.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2145 Certificate of Registration Transfer Application or Inactive Notice (Repealed)

~~A Loan Originator may apply to the Director for the transfer of his or her Certificate of Registration to another licensee. Application for transfer shall be in a form approved by the Director and shall include the fee set forth in Section 1050.210.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2150 Inactive Registration Status; Reactivation (Repealed)

~~a) A Loan Originator's Certificate of Registration shall be considered on Inactive Registration Status at any time a Loan Originator is not employed by a licensee.~~

~~b) Inactive Registration Status commences when the employing licensee or the Loan Originator returns the Certificate of Registration to the Director or when the subsequent employing licensee fails to provide sufficient information to the Director to permit transfer of the Certificate of Registration.~~

~~c) The Director may grant and create a category or categories of inactive or inoperative status.~~

~~d) A Loan Originator who receives a Temporary Permit as an employee of a licensee pursuant to Section 1050.2155 is not deemed on Inactive Registration Status.~~

~~e) When a Loan Originator has been on Inactive Registration Status for more than 90 calendar days, prior to resuming active status, the Loan Originator shall pay to the Director a Loan Originator Registration Reactivation Fee in the amount set forth in Section 1050.210.~~

~~f) A Loan Originator's Inactive Registration Status expires on the date of expiration of the underlying Loan Originator's Certificate of Registration. If a Loan Originator's period of inactivity exceeds the expiration date on his or her Certificate of Registration, a Loan Originator shall submit a new application for a Certificate of Registration with a fee in the amount set forth in Section 1050.210.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2155 Temporary Permits (Repealed)

~~a) If a timely and complete application for transfer of a Certificate of Registration has been filed, a subsequent employing licensee may request and the Director may grant a Temporary Permit allowing a Loan Originator employed by the employing licensee to engage in the performance of the activities of a Loan Originator. A Temporary Permit shall be valid for a period of 45 calendar days from date granted, unless extended for an additional 45 calendar days by the Director for administrative convenience.~~

~~b) The Loan Originator may work only for the employing licensee stated on the Temporary Permit. The licensee shall be responsible for all activities performed by the Loan Originator operating under the Temporary Permit. Upon receipt of a Temporary Permit application, the Director shall notify the Loan Originator's prior employing licensee in writing that a Temporary Permit has been requested~~

~~for the Loan Originator. Within 10 calendar days after receipt of the Director's notice, the prior employing licensee shall return the Loan Originator's Certificate of Registration to the Director and comply with Section 1050.2135.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2160 Confidential Information (Repealed)

~~a) Pursuant to Section 4-2(e) of the Act and this Section, examination and work papers and any other designated information, including all information relating to an examination of a licensee for Loan Originator activities or an investigation of a Loan Originator, are the property of the Director and shall not be disclosed except as provided in Section 4-2(e) of the Act and this Section. In addition, except as provided in this Section, the Director may not disclose the following Loan Originator or applicant information: social security numbers, employer identification numbers, financial account numbers, the identity of the institution where financial accounts are maintained, personal financial information, and criminal background information.~~

~~b) The Director shall not disclose confidential information as provided in this Section to anyone other than the Loan Originator, the Loan Originator's employing licensee, law enforcement officials or regulatory agencies deemed by the Director to have a legitimate or appropriate regulatory interest, or to a party presenting a lawful subpoena. Any information shared by the Director shall be used only in connection with an official investigation, proceeding or action, or in connection with a lawful subpoena presented to the Director.~~

~~c) No licensee or person in possession of confidential information as provided in this Section may disclose that information for any reason or under any circumstances not specified in Section 4-2(e) of the Act or this Section without the prior authorization of the Director. If any licensee or person knowingly and willfully furnishes confidential supervisory information or other confidential information in violation of Section 4-2(e) of the Act or this Section, the Director may impose a civil monetary penalty up to $1,000 for the violation against the licensee or person.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2165 Averments (Repealed)

~~Each application for a Loan Originator Certificate of Registration shall be accompanied by the following averments stating that the applicant:~~

~~a) Will not obtain a Certificate of Registration through any false or fraudulent representation of a material fact or any omission of a material fact required by State law, or make any misrepresentation in any registration or license application.~~

~~b) Will not make a false or misleading statement of a material fact, omit a required statement or make a false promise regarding a material fact, through advertising or other means, or engage in a course of misrepresentation.~~

~~c) Will not engage in conduct that constitutes or dishonest dealings.~~

~~d) Has not been convicted of any criminal offense; has not been subject to any adverse judgment in any jurisdiction involving financial crimes or criminal or civil act involving monies, breach of trust, moral turpitude, misfeasance or malfeasance; or has not been convicted in any jurisdiction of a crime that is a felony in that jurisdiction, which matter has not been previously disclosed to the Director in an initial or renewal application for a Certificate of Registration. The applicant will notify in writing the Director and his or her employing licensee within 10 calendar days after any change in status as averred under this subsection and shall describe fully all such convictions and adverse judgments.~~

~~e) Will not knowingly make, propose, or solicit fraudulent, false, or misleading statements on any mortgage document or on any document related to a mortgage, including a mortgage application, real estate appraisal, or real estate settlement or closing document. For purposes of this subsection, "fraudulent, false, or misleading statement" does not include an inadvertent mathematical error, an inadvertent transposition of a number, a typographical error, or any other bona fide error.~~

~~f) Will not knowingly instruct, solicit, propose, or cause a person to sign a borrower's signature not their own on a mortgage related document, or solicit, accept or execute any contract or other document related to the residential mortgage transaction that contains any blanks to be filled in after signing or initialing the contract or other document, except for forms authorizing the verification of application information.~~

~~g) Will not discourage any applicant from seeking or participating in housing or financial counseling either before or after the consummation of a loan transaction, or fail to provide information on counseling resources upon request.~~

~~h) Will not charge for any ancillary products or services, not essential to the basic loan transaction for which the consumer has applied, without the applicant's knowledge and written authorization.~~

~~i) Will not charge for any ancillary products or services not actually provided in the transaction.~~

~~j) Will not include any loan terms or features that could have a material financial impact on the applicant without clearly explaining their function and implications.~~

~~k) Will give reasonable consideration to a borrower's ability to repay the debt and, if applicable, comply with Section 15 of the High Risk Home Loan Act.~~

~~l) Will not take an application for a loan that carries a higher cost, due to credit risk and/or credit score, than the applicant is qualified for based on the underwriting guidelines utilized by the Loan Originator's employing licensee.~~

~~m) Will not engage in any discrimination in loan origination activities as provided in applicable State and Federal statutes and regulations, including but not limited to the Equal Opportunity Credit Act (15 USC 1691).~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2170 Suspension or Revocation of Registration, Refusal to Renew, Fines (Repealed)

~~a) In addition to any other action authorized by the Act, this Part, or other applicable law, the Director may do the following:~~

~~1) Suspend, revoke, reprimand, or place on probation a Loan Originator or refuse to renew or otherwise discipline a Certificate of Registration if the Director finds that the Loan Originator has violated the Act, this Part, or other applicable law or has been convicted of a criminal offense.~~

~~2) Impose a fine of not more than $1,000 for each day for each violation of the Act or this Part that is committed. If the Loan Originator engages in a pattern of repeated violations, the Division may impose a fine of not more than $2,000 for each day for each violation committed. In determining the amount of a fine to be imposed pursuant to the Act and this Part, the Director shall consider all of the following:~~

~~A) The seriousness of the violation;~~

~~B) The Loan Originator's good faith efforts to prevent the violation; and~~

~~C) The Loan Originator's history of violations and compliance with orders.~~

~~b) In addition to any other action authorized by the Act, this Part, or other applicable law, the Director may investigate alleged violations of the Act, this Part, or other applicable law or complaints concerning any such violation. The Director may seek a court order to enjoin the violation.~~

~~c) In addition to any other action authorized by the Act, this Part, or other applicable law, if the Director determines that a Loan Originator is engaged in or is believed to be engaged in activities that may constitute a violation of the Act, this Part, or other applicable law, the Director may issue a cease and desist order to compel the Loan Originator to comply with the Act, this Part, or other applicable law or, upon a showing that an emergency exists, may suspend any Certificate of Registration for a period not exceeding 180 calendar days, pending investigation.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2175 Loan Originator Hearings; Fees and Costs (Repealed)

~~a) A hearing can be requested and will be conducted by the procedure described in Subpart N.~~

~~b) The Director shall receive and there shall be paid to the Director a fee of $250 for each party that requests a hearing pursuant to this Subpart R, unless waived by the Director. In determining whether to waive the fee, the Director shall consider the financial hardship imposed on the party.~~

~~c) In addition to filing fees set forth in subsection (b), each party to the hearing shall be required to pay its pro rata share of expenses, including, but not limited to, hearing officer expenses, witness and mileage fees, transcript costs and such other incidental costs as may be authorized by the hearing officer or by the Director, unless waived by the Director. In determining whether to waive the costs or a portion of the costs, the Director shall consider the financial hardship on the party.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2180 Criminal Proceedings (Repealed)

~~In addition to any other action authorized by the Act, this Part, or other applicable law, the Director may request any law enforcement body with proper jurisdiction to initiate criminal proceedings by presenting evidence of criminal activity engaged in by any person or entity.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2185 Violations of Tax Acts (Repealed)

~~The Director shall refuse to issue or renew, or shall suspend or revoke, the Certificate of Registration of any applicant or Loan Originator who fails to file a return, pay the tax, penalty, or interest shown in a filed return, or pay any final assessment of tax, penalty, or interest, as required by any other tax Act administered by the Department of Revenue, Internal Revenue Service, or any other tax agency, until such time as the requirements of any such tax Act are satisfied as determined by the appropriate taxing agency.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2190 Disciplinary Action for Educational Loan Defaults (Repealed)

~~The Director shall deny a Certificate of Registration or renewal to an applicant or Loan Originator who has defaulted on an educational loan or scholarship provided or guaranteed by the Illinois Student Assistance Commission (ISAC) or any governmental agency of this State as determined by ISAC; provided, however, that the Director may issue a Certificate of Registration or renewal if the applicant or Loan Originator has established and maintains a satisfactory repayment record as determined by ISAC or other appropriate governmental agency.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2195 Nonpayment of Child Support (Repealed)

~~In cases in which the Illinois Department of Healthcare and Family Services (HFS) has determined under Article X of the Illinois Public Aid Code [305 ILCS 5/Art. X] that a Loan Originator or applicant is more than 30 calendar days delinquent in the payment of child support and has subsequently certified the delinquency to the Director, the Director shall refuse to issue or renew or may revoke or suspend that person's Certificate of Registration or may take other disciplinary action against that person based solely on the certification of delinquency by HFS. Redetermination of the delinquency by the Director shall not be required. The Director shall not renew any license if HFS has certified the Loan Originator to be more than 30 calendar days delinquent in the payment of child support unless the Loan Originator has arranged for payment of past and current child support obligations in a manner satisfactory to HFS. The Director may impose conditions, restrictions, or disciplinary action upon that renewal.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

SUBPART S: PROVISIONAL REGISTRATION OF LOAN ORIGINATORS

Section 1050.2200 Purpose (Repealed)

~~a) Section 7-1 of the Act requires that a Loan Originator register with the Director pursuant to administrative rules adopted by the Director. This Subpart S provides for provisional registration of Loan Originators from July 1, 2004 through December 31, 2004. During this period of provisional registration, provided the Director issues a Provisional Certificate of Registration, the Loan Originator shall be in compliance with the registration requirement of Section 7-1 of the Act. All Provisional Certificates of Registration shall expire on December 31, 2004, subject to the conditions of this Subpart.~~

~~b) During the period of provisional registration, a Loan Originator may apply for a regular initial, and annually renewable, Certificate of Registration. The procedure and requirements for this application will be set forth in general administrative rules adopted by the Director. Loan Originators who fail to submit a timely and complete application for a regular initial Certificate of Registration shall not be permitted to act as a Loan Originator after December 31, 2004.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2210 Definitions (Repealed)

~~In addition to the definitions included in the Act and Section 1050.110, the following definitions apply to this Subpart S.~~

~~"Applicant" means a natural person that is applying for a Provisional Certificate of Registration under this Subpart S.~~

~~"Loan Originator" has the meaning given to the term in Section 1-4(hh) of the Act [205 ILCS 635/1-4(hh)].~~

~~"Person" means a natural person.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2220 Registration Required (Repealed)

~~Pursuant to Section 7-1 of the Act, no person shall act or assume to act as a Loan Originator after June 30, 2004 unless registered with the Director under this Subpart S. After June 30, 2004, no person or entity shall employ any person to act or assume to act as a Loan Originator unless the person is registered under this Subpart.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2230 Exemptions (Repealed)

~~The registration requirements of this Subpart do not apply to persons who act or assume to act as a Loan Originator exclusively as an employee of an exempt entity as defined in Section 1-4(d)(1) and (d)(1.5) of the Act; provided that the exempt entity assumes full and direct legal responsibility for the activities of the Loan Originator or the Loan Originator is subject to the examination and regulation of a federal depository institution regulator.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2240 Application for Provisional Certificate of Registration; Contents; Amendment (Repealed)

~~a) No person shall be registered as a Loan Originator unless the person submits to the Director a complete application for a Provisional Certificate of Registration as set forth in this Section. The application shall contain:~~

~~1) The name, home address, U.S. Postal Service mailing address, work address, e-mail address if available, date of birth, Social Security Number, and phone number of the applicant.~~

~~2) The name, business address, Residential Mortgage License Number, Tax Identification Number, contact name, telephone number, and e-mail address of the applicant's current or prospective employer.~~

~~3) A nonrefundable application fee payable to the Director in the amount of $125 in the form of a certified check, money order, credit card charge, or other form authorized by the Director. Payment of this nonrefundable application fee shall be deemed to be payment of the nonrefundable application fee required for application for a regular initial Certificate of Registration but only if the applicant submits a complete application for a regular initial Certificate of Registration on or before December 1, 2004.~~

~~b) The Applicant shall amend her or his application for Provisional Certificate of Registration whenever a change occurs that renders the information contained in the application not accurate in any material respect. The amendment shall be filed in writing within 5 business days after the change.~~

~~c) The Director shall review the application in a timely manner and notify the applicant in writing of any material deficiencies. The Director may suspend processing of any application if the applicant fails to rectify deficiencies within 10 days after the Director's notice of the deficiencies.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2250 Issuance of Provisional Certificate of Registration; Effective Date; Conditions (Repealed)

~~a) If the Director finds that the application for Provisional Certificate of Registration is complete, the Director shall issue a Provisional Certificate of Registration to the applicant's licensee employer as evidence of registration. If the applicant is not~~

~~currently employed by a licensee, the Director shall retain the Provisional Certificate of Registration for later delivery to a licensee employer.~~

~~b)~~ ~~The Provisional Certificate of Registration shall be in the form specified by the Director.~~

~~c)~~ ~~The Provisional Certificate of Registration shall be for the use of the applicant only and shall not be assigned, transferred, or used by any other person or entity.~~

~~d)~~ ~~The Provisional Certificate of Registration shall be effective from the date issued and shall in all cases expire on December 31, 2004, unless the expiration date is extended in writing by the Director; provided that the Provisional Certificate of Registration shall become ineffective immediately if the Provisional Certificate of Registration is suspended or revoked or if a regular initial Certificate of Registration is issued or denied by the Director.~~

~~e)~~ ~~The holder of the Provisional Certificate of Registration shall amend the documents and information on file with the Director whenever a change occurs that renders any of the documents or information not accurate in any material respect. The amendment shall be filed with the Director in writing within 10 days after the change.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2260 Loan Origination Practices (Repealed)

~~a)~~ ~~A Loan Originator shall act in compliance with applicable requirements and standards of the Act, this Part, and any other law affecting the origination of residential mortgage loans.~~

~~b)~~ ~~Each residential mortgage loan application file shall contain a separate document that sets forth the name, address, registration number, and employer of the Loan Originator that acted as the Loan Originator for the loan and the name of the borrower and purchaser and the address of the property purchased.~~

~~c)~~ ~~The Loan Originator's Provisional Certificate of Registration shall be displayed on demand to the Director, law enforcement and regulatory officials, employing licensees, consumers, and their representatives.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.2270 Enforcement (Repealed)

~~a) In addition to any other action authorized by the Act, this Part, or other applicable law, the Director may revoke or suspend the Loan Originator's Provisional Certificate of Registration for violation of the Act, this Part, or other applicable law.~~

~~b) In addition to any other action authorized by the Act, this Part, or other applicable law, the Director may revoke or suspend the Loan Originator's Provisional Certificate of Registration for submitting false or misleading information on the application for a Provisional Certificate of Registration.~~

~~c) In addition to any other action authorized by the Act, this Part, or other applicable law, if the Director determines that a Loan Originator is engaged in or is believed to be engaged in activities that may constitute a violation of the Act, this Part, or other applicable law, the Director may issue a cease and desist order to compel the Loan Originator to comply with the Act, this Part, or other applicable law or, upon a showing that an emergency exists, may suspend any Provisional Certificate of Registration for a period not exceeding 180 days, pending investigation.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.APPENDIX A Estimated Monthly Income and Expenses Worksheet (Repealed)

~~ESTIMATED MONTHLY INCOME:~~

~~1. Paychecks (Net/Take Home)~~	~~$~~ _____	
~~2. Interest/Dividends~~	_____	
~~3. Social Security/Pension~~	_____	
~~4. Alimony/Child Support~~	_____	
~~5. Other~~	_____	
~~6. Total Estimated Monthly Income (Add Lines 1 through 5)~~		~~$~~ _____

~~ESTIMATED MONTHLY EXPENSES:~~

~~7. Mortgages/Rent~~	~~$~~ _____
~~8. Homeowner's/Renter's Insurance~~	_____
~~9. Real Estate Taxes~~	_____
~~10. Water & Sewer~~	_____
~~11. House Repairs~~	_____
~~12. Groceries~~	_____
~~13. Telephone~~	_____
~~14. Gas (House)~~	_____
~~15. Electric~~	_____
~~16. Credit Cards~~	_____
~~17. Car Payments~~	_____
~~18. Car Insurance~~	_____
~~19. Licenses (Car)~~	_____
~~20. Gas (Car)~~	_____
~~21. Car Repairs/Maintenance~~	_____
~~22. Clothing~~	_____
~~23. Medical/Dental~~	_____
~~24. Medical Insurance~~	_____

	_____	
~~25. Prescriptions~~	_____	
~~26. Loan Payments (Not included in Line 7 or 17)~~	_____	
~~27. Tuition~~	_____	
~~28. Contributions~~	_____	
~~29. Cellular Telephone~~	_____	
~~30. Pager~~	_____	
~~31. Recreation/Vacation~~	_____	
~~32. Other Insurance (Life, etc.)~~	_____	
~~33. Income Taxes~~	_____	
~~34. Alimony/Child Support~~	_____	
~~35. Transportation~~	_____	
~~36. Miscellaneous~~	_____	
~~37. Other~~	_____	
~~38. Total Estimated Monthly Expenses (Add Lines 7 through 37)~~		~~$~~_____
~~39. *Excess/Deficit (Subtract Line 38 from Line 6)~~		~~$~~_____

~~* If Line 38 is greater than Line 6, your estimated monthly expenses exceed your estimated monthly income.~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

Section 1050.APPENDIX B Mortgage Ratio Worksheet (Repealed)

~~Part I~~

~~LOAN-TO-VALUE RATIO~~

~~1.Mortgage Amounts~~ ~~$~~_____

~~2.Appraised Value~~ ~~$~~_____

~~3.Line 1 divided by Line 2~~ ~~$~~_____

~~Note: This is the percentage of the purchase price/appraised value of your home that will be allocated to your total mortgage. A percentage rate over 80% may result in you incurring additional costs.~~

_____

~~Borrower's Signature~~

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

~~Part II~~

~~INCOME RATIO~~

~~MONTHLY HOUSING EXPENSES:~~

~~1.Principal and Interest Payment~~	~~$~~_____	
~~2.Homeowner's Insurance~~	_____	
~~3.Real Estate Tax~~	_____	
~~4.Mortgage Insurance Premium~~	_____	
~~5.Homeowner's Association Fee~~	_____	
~~6.Ground Rents~~	_____	
~~7.Payments on Existing or Proposed 2nd Mortgage~~	_____	
~~8.Total Housing Expense (Add Lines 1 through 7)~~		~~$~~_____

~~MONTHLY GROSS INCOME:~~

~~9.Gross Salary~~	~~$~~ _____	
~~10.Dividends/Interest~~	_____	
~~11.Social Security/Pension~~	_____	
~~12.Alimony/Child Support~~	_____	
~~13.Other~~	_____	
~~14.Total Gross Income~~		~~$~~ _____
~~15.Divide Line 8 by Line 14~~		_____

~~Note: This is the percentage of your gross monthly income that will be allocated to your mortgage expenses.~~

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

~~Part III~~

~~LONG-TERM DEBT RATIO~~

~~MONTHLY EXPENSES:~~

~~1.Total Housing Expense (Part II, Line 8)~~	~~$~~ _____	
~~2.Credit Cards~~	_____	
~~3.Car Payments~~	_____	
~~4.Loans (Not Included on Line 1 or 3)~~	_____	
~~5.Alimony/Child Support~~	_____	
~~6.Total Expenses (Lines 1 through 5)~~		~~$~~ _____

~~MONTHLY INCOME:~~

~~7.Total Gross Income (Part II, Line 14)~~	~~$~~ _____
~~8.Divide Line 6 by Line 7~~	_____

~~Note: This is the percentage of your gross monthly income that will be allocated to your mortgage expenses and other debt that you pay on a monthly basis.~~

_____
~~Borrower's Signature~~

(Source: Repealed at 41 Ill. Reg. _____, effective _____)

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

1) Heading of the Part: Funeral Directors and Embalmers Licensing Code

2) Code Citation: 68 Ill. Adm. Code 1250

3)

Section Numbers:	Proposed Actions:
1250.110	Amendment
1250.120	Amendment
1250.130	Amendment
1250.135	Amendment
1250.140	Amendment
1250.150	Amendment
1250.155	Amendment
1250.160	Amendment
1250.165	Amendment
1250.170	Amendment
1250.180	Amendment
1250.200	Amendment
1250.205	Amendment
1250.207	New Section
1250.210	Amendment
1250.220	Amendment
1250.230	New Section

4) Statutory Authority: Implementing the Funeral Directors and Embalmers Licensing Code [225 ILCS 41] and authorized by Section 2105-15 of the Civil Administrative Code of Illinois [20 ILCS 2105/2105-15].

5) A Complete Description of the Subjects and Issues Involved: This proposed rulemaking which amends the rules for funeral directors and embalmers regarding internship requirements, is intended to better outline the process while maintaining consistency within current practice and procedure. Specifically, a provision addressing late intern case reports was added as this is a current issue routinely faced by the Department. Additionally, the timing requirements for repeat intern applicants were clarified to prevent interns from circumventing the Funeral Directors and Embalmers Licensing Code ("Code") requirement that states "No license of a funeral director and embalmer intern shall be renewed more than twice." [225 ILCS 41/10-35]. Section 135 of the proposed rules regarding an application for a funeral director and embalmer license was amended to better explain the current application process and to require a statement of the place of practice, ownership, names and license numbers of all funeral directors and embalmers

and funeral directors associated with the applicant as set forth in Section 15-80 of the Act.

Section 170 was amended to ensure that the preparation rooms include running water and electricity. The preparation room exemption for branch operations was clarified. The solicitation requirements currently in Section 205 of the rules were placed into a new Section 207 to highlight the significance of these rules and ease reader understanding.

The continuing education ("CE") sponsor and program requirements currently in Section 220 were placed into a new Section 230 to highlight the significance of these rules and ease reader understanding. Additionally, CE format requirements were set so that the Department may address technological developments with the transmission of CE. Also, a provision increasing the amount of categorized hours (but not the total number of hours) beginning in 2019 was removed as it was found to be overly burdensome and difficult for licensees to follow.

The proposed rule also eliminates the current $50 fee for issuing replacement licenses if they get lost or destroyed since we do not print those out anymore and therefore are no longer charging this fee. Technical changes, clean up, deletion of duplicative language, organizational changes, and consistency changes pursuant to other IDFPR-Division of Professional Regulation administrative rules are made to ease in understanding for the public, licensees, and applicants.

6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: None

7) Will this rulemaking replace any emergency rule currently in effect? No

8) Does this rulemaking contain an automatic repeal date? No

9) Does this proposed rulemaking contain incorporations by reference? No

10) Are there any other rulemakings pending on this Part? No

11) Statement of Statewide Policy Objective: This rulemaking has no impact on local governments.

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

12) Time, Place and Manner in which interested persons may comment on this proposed rulemaking: Persons who wish to comment on this proposed rulemaking may submit written comments no later than 45 days after the publication of this Notice.

Department of Financial and Professional Regulation
Attention: Craig Cellini
320 West Washington, 3rd Floor
Springfield IL 62786

217/785-0813
fax: 217/557-4451

All written comments received within 45 days after this issue of the *Illinois Register* will be considered.

13) Initial Regulatory Flexibility Analysis:

A) Types of small businesses, small municipalities and not-for-profit corporations affected: Funeral Directors and embalmers regulated under the Act may be affected.

B) Reporting, bookkeeping or other procedures required for compliance: None

C) Types of professional skills necessary for compliance: Mortuary science skills are required for licensure.

14) Regulatory Agenda on which this rulemaking was summarized: January 2017

The full text of the Proposed Amendments begins on the next page:

DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION

NOTICE OF PROPOSED AMENDMENTS

TITLE 68: PROFESSIONS AND OCCUPATIONS
CHAPTER VII: DEPARTMENT OF FINANCIAL AND PROFESSIONAL REGULATION
SUBCHAPTER b: PROFESSIONS AND OCCUPATIONS

PART 1250
FUNERAL DIRECTORS AND EMBALMERS LICENSING CODE

Section

1250.110 Approved Programs of Mortuary Science
1250.120 Application for Internship
1250.130 ~~Requirements for~~ Internship Requirements
1250.135 Application for Funeral Director and Embalmer Licensure
1250.140 Examination
1250.150 Endorsement~~Reciprocity~~
1250.155 Inactive Status
1250.160 Restoration
1250.165 Fees
1250.170 Preparation Room Requirements~~ for a Preparation Room~~
1250.180 Representative of Licensee at Final Disposition at Cemetery
1250.190 Violations (Repealed)
1250.200 Renewals
1250.205 Advertising
1250.207 Solicitation
1250.210 Granting Variances
1250.220 Continuing Education
1250.230 Continuing Education Sponsors and Courses

AUTHORITY: Implementing the Funeral Directors and Embalmers Licensing Code [225 ILCS 41] and authorized by Section 2105-15 of the Civil Administrative Code of Illinois [20 ILCS 2105/2105-15].

SOURCE: Rules and Regulations for the Administration of the Illinois Funeral Directors and Embalmers Act, effective March 19, 1975; amended at 4 Ill. Reg. 30, p. 1238, effective July 10, 1980; codified at 5 Ill. Reg. 11034; Part repealed and new Part adopted at 6 Ill. Reg. 4203, effective April 26, 1982; emergency amendment at 7 Ill. Reg. 7675, effective June 14, 1983, for a maximum of 150 days; emergency rule expired November 11, 1983; amended at 9 Ill. Reg. 4529, effective March 27, 1985; transferred from Chapter I, 68 Ill. Adm. Code 250 (Department of Registration and Education) to Chapter VII, 68 Ill. Adm. Code 1250 (Department of Professional Regulation) pursuant to P.A. 85-225, effective January 1, 1988, at 12 Ill. Reg. 2931;

amended at 13 Ill. Reg. 14061, effective August 29, 1989; amended at 15 Ill. Reg. 8238, effective May 16, 1991; amended at 17 Ill. Reg. 19132, effective October 22, 1993; amended at 23 Ill. Reg. 2296, effective January 22, 1999; amended at 24 Ill. Reg. 550, effective December 31, 1999; amended at 27 Ill. Reg. 7791, effective April 21, 2003; amended at 28 Ill. Reg. 4911, effective March 3, 2004; amended at 29 Ill. Reg. 13999, effective August 30, 2005; amended at 37 Ill. Reg. 4838, effective April 1, 2013; amended at 41 Ill. Reg. _____, effective _____.

Section 1250.110 Approved Programs of Mortuary Science

a) The Department of Financial and Professional Regulation-Division of Professional Regulation (Division) may~~shall~~ approve a program of mortuary science ~~as reputable and in good standing~~ if it meets the following ~~minimum criteria~~:

1) Is~~The educational institution is~~ legally recognized and authorized, by the jurisdiction in which it is located, to provide courses in mortuary science;~~.~~

2) Has a faculty with~~that comprises a~~ sufficient ~~number of full-time and part-time~~ instructors to ensure~~make certain~~ that the educational obligations to students~~the student~~ are fulfilled. The faculty must demonstrate~~have demonstrated~~ competence in their areas of teaching as evidenced by appropriate degrees from recognized professional colleges or institutions;~~.~~

3) Maintains permanent student records that summarize the credentials for admission, attendance, grades and other records of performance; and

4)~~3)~~ Has one of the following courses of study:

A) A minimum of~~course of study of at least~~ 12 months with at least the following curriculum:

i) Anatomy;

ii) Restorative Art;

iii) Microbiology;

iv) Embalming;

v) Sociology;

vi) Psychology;

vii) Chemistry;

viii) Funeral Directing;

ix) Mortuary Law;

x) Clinical Embalming;

xi) Funeral Merchandising; and

xii) Pathology.

B) That results~~A course of study resulting~~ in an associate~~associate's~~ degree in mortuary science or an equivalent associate~~associate's~~ degree (i.e., applied science), consisting of courses in liberal arts and sciences and~~as well as~~ the curriculum set forth~~described~~ in subsection (a)(4)~~(3)~~(A); or~~.~~

C) That results~~A course of study resulting~~ in a baccalaureate degree in mortuary science.

~~4) Maintains permanent student records that summarize the credentials for admission, attendance, grades and other records of performance.~~

b) In determining whether a program of mortuary science should be approved, the Division may consider~~shall take into consideration but not be bound by~~ accreditation by the American Board of Funeral Service Education, Inc.

c) All~~The Division has determined that all mortuary science~~ programs of mortuary science accredited by the American Board of Funeral Service Education, Inc. as of January 1, 2003 are~~, meet the minimum criteria set forth in subsection (a), and are, therefore,~~ approved.

~~d) Program Evaluation~~

d)~~1)~~ An applicant from an unapproved~~a~~ program of mortuary science ~~that has not been evaluated~~ shall ~~be requested by the Division to~~ provide documentation concerning the criteria in this Section and thereafter the Division shall evaluate the program of mortuary science for approval.

~~2) Once the Division has received the documentation or after 6 months have elapsed from the date of application, whichever comes first, the Division will evaluate the program based on all documentation received from the school and any additional information the Division has received that it deems to be reliable.~~

e) Withdrawal of Approval

1) The Director of the Department of Financial and Professional Regulation-Division of Professional Regulation (Director) may withdraw, suspend or place on probation the approval of a program of mortuary science when the program's quality is~~of the program has been~~ materially affected by any of the following~~ causes~~:

A) Gross or repeated violations of any provision of the Funeral Directors and Embalmers Licensing Code (the Code) [225 ILCS 41];

~~B) Gross or repeated violations of this Part;~~

B)~~C)~~ Fraud or dishonesty in providing information for~~furnishing documentation for evaluation of~~ the program of mortuary science's evaluation~~science~~; or

C)~~D)~~ Failure to ~~continue to~~ meet the requirements~~established criteria~~ for an approved program of mortuary science as set out in this Section.

2) A~~The officials in charge of a~~ program of mortuary science~~whose approval is being reconsidered by the Division~~ shall be given written notice prior to any action by the Division and those officials may either submit written comments or request a hearing before the Division as set forth in ~~accordance with~~ 68 Ill. Adm. Code 1110.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.120 Application for Internship

a) An applicant for a ~~license as a~~ funeral director and embalmer intern license shall submit the following~~file an application on forms supplied by the Division. The application shall include~~:

1) A signed and completed application on forms provided by the Division;

2) The required fee, as set forth in Section 1250.165;

3) A Certificate of Health attesting that the applicant has been immunized against diphtheria, hepatitis B and tetanus;

4) A completed and signed certification of acceptance for an internship in Illinois, by a licensed and active funeral director and embalmer in good standing, stating that the applicant will study and train under the funeral director and embalmer's supervision; and

5)~~1)~~ One of the following:

A) An official transcript showing proof of successful completion of at least 30 semester ~~(45 quarter)~~ hours or 45 quarter hours of college credit, not including remedial courses, from an accredited college or university that ~~shall~~ include at least 20 semester ~~(30 quarter)~~ hours or 30 quarter hours of ~~courses in~~ liberal arts, physical, biological, or applied sciences; and certification of graduation from a course of study of at least 12 months in an approved program of mortuary science;

B) Certification of ~~graduation with~~ an associate~~associate's~~ degree in mortuary science or an equivalent associate~~associate's~~ degree (i.e., applied science) from an approved program of mortuary science; or

C) Certification of a baccalaureate degree in mortuary science from an approved program of mortuary science;

~~2) Certificate of Health, attesting that the applicant has been immunized against diphtheria, hepatitis B and tetanus, signed by a physician currently licensed to practice medicine in all of its branches;~~

~~3) Certification of acceptance, completed and signed by a licensed funeral director and embalmer whose license is active and in good standing, stating that the applicant will be studying and training under his or her supervision; and~~

~~4) The required fee set forth in Section 1250.165.~~

b) The~~Upon receipt of the documents listed in subsection (a) and review of the application, the~~ Division shall issue a funeral director and embalmer intern license or notify the applicant, in writing, of the basis~~reason~~ for ~~the~~ denial~~ of the application~~.

~~c) The provisions of this Section shall apply to all applicants upon adoption without regard to where an applicant is in the application process.~~

~~d) All qualified applicants will be issued a funeral director and embalmer intern license.~~

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.130 ~~Requirements for~~ Internship Requirements

a) A licensed funeral director and embalmer who agrees to sponsor an intern shall be responsible for teaching the intern the practical aspects of the profession, for demonstrating actual procedures and for directing and supervising the procedures performed~~done~~ by the intern.

b) The intern shall be given primary responsibility for:

1) Assisting or participating in the arrangement of at least 24 funerals, including completing the necessary documentation~~paperwork~~;

2) Assisting in the arrangement of a selection room, including buying, pricing, providing a description of each casket and other pertinent information;

3) Assisting in the preparation and embalming of at least 24 deceased human bodies, including cosmetic application, dressing and casketing. If possible, at least one of the bodies should have been autopsied; and

4) Removals~~Making removals~~ of deceased human bodies.

c) The intern shall submit ~~to the Division, on forms provided by the Division,~~ a case report, on forms provided by the Division, for each of the required 24 funerals and 24 body preparations set forth in~~that are required in accordance with~~ subsection (b).

1) 12~~Twelve~~ case reports shall be submitted every 3 months during the 12-month internship~~year of the apprenticeship~~.

2) If the intern has not completed a total of 12 cases in the 3-month period or submitted case reports more than a quarter late, the intern~~, he or she~~ shall submit the case reports for the cases completed and state the reason why the intern~~he or she~~ was unable to complete all 12 cases or why case reports were late (e.g., lack of available cases, illness, change of ownership).

3) All case reports shall be signed by the intern and the licensed funeral director and embalmer sponsor.

d) The Division has~~shall have~~ the authority to investigate ~~to determine compliance with this Section~~ and ~~to~~ question the sponsor and the intern to determine compliance with this Section~~whether the intern has been properly instructed and has performed the required procedures~~.

e) An intern may complete the internship~~serve his or her training period~~ under more than one licensed funeral director and embalmer and must complete a~~in the State of Illinois. A~~ change of sponsor~~employment~~ application, on forms provided by the Division,~~ must be requested and properly executed, then returned to the Division~~ within one month of the~~following the date of~~ change~~ of sponsorship~~.

f) Upon completion of the 12 months~~required year~~ of internship, the sponsor shall complete an affidavit, on forms provided~~supplied~~ by the Division, stating that the intern has satisfactorily completed the appropriate procedures under the sponsor's~~his or her~~ direction and supervision.

~~g) Interns shall satisfactorily complete the prescribed one year of training as evidenced by the documentation required by subsection (c), and pass the National Board examination prior to licensure. For the purpose of determining completion of the prescribed one year of internship, the internship shall commence on the date of the issuance of the intern license.~~

g)~~h)~~ If ~~the license of~~ a funeral director and embalmer intern licensee~~cannot be renewed in accordance with Section 10-35 of the Code and the intern~~ has not yet completed the 12-month~~received a year of~~ internship or passed the examination within two sequential renewals, the intern shall~~, he or she may~~ reapply to the Division under the Code and this Part~~ in effect at the time of reapplication~~. No credit will be allowed for any examinations the intern~~he or she may have~~ previously passed or for any internship the intern~~he or she may have~~ previously earned. An intern who has renewed twice shall not reapply for an intern license until passing the examination set forth in Section 1250.140.

h)~~i)~~ If, at the time of application for a funeral director and embalmer license, more than 5 years have lapsed since the completion of the intern's 12-month internship, the applicant shall be required to complete additional education or case reports as determined by the Division~~The provisions of this Section shall apply to all applicants upon adoption without regard to where an applicant is in the application process~~.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.135 Application for Funeral Director and Embalmer Licensure

a) An applicant for a ~~license as a~~ funeral director and embalmer license~~, pursuant to Section 10-10 of the Code,~~ shall submit~~file an application on forms supplied by the Division. The application shall include~~ the following:

1) A signed and completed application on forms provided by the Division;

2) The required fee set forth in Section 1250.165;

3)~~1)~~ Certification of completion of a 12-month internship within the past 5 years, signed by the licensed funeral director and embalmer sponsor. For the purpose of determining completion, the internship shall commence on

the date of the issuance of the intern license;~~under whose supervision the internship was performed.~~

4)~~2)~~ A Certificate of Health, attesting that the applicant has been immunized against diphtheria, hepatitis B and tetanus;~~, signed by a physician currently licensed to practice medicine in all of its branches.~~

5)~~3)~~ Verification of successful completion of the International Conference of Funeral Service Examining Boards, Inc. (the Conference) National Board examination as set forth in~~, pursuant to~~ Section 1250.140, to be forwarded by the ~~National~~ Conference directly to the Division; and~~.~~

6) a statement of the place of practice, ownership, names and license numbers of all funeral directors and embalmers and funeral directors associated with the applicant as set forth in Section 15-80 of the Code, as applicable.

~~4) Applicants not having been issued Illinois funeral director and embalmer intern licenses or who have been issued one that has been expired for more than 5 years shall submit the following:~~

~~A) Official transcripts showing proof of successful completion of at least 30 semester (45 quarter) hours of college credit, not including remedial courses, that shall include at least 20 semester (30 quarter) hours of courses in liberal arts, physical, biological, and/or applied sciences; and certification of graduation from a course of study of at least 12 months in an approved program of mortuary science;~~

~~B) Certification of graduation with an associate's degree in mortuary science from an approved program of mortuary science or an equivalent associate's degree (i.e., applied science); or~~

~~C) Certification of a baccalaureate degree in mortuary science from an approved program of mortuary science.~~

~~6) The fee specified in Section 1250.165.~~

b) The~~Upon receipt of the documents listed in subsection (a) and review of the~~

~~application, the~~ Division shall issue a funeral director and embalmer license ~~authorizing the applicant to engage in the practice of funeral directing and embalming~~ or notify the applicant, in writing, of the basis~~reason~~ for ~~the~~ denial ~~of the application~~.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.140 Examination

a) The examination for a funeral director and embalmer license shall be the examination administered by the ~~International~~ Conference ~~of Funeral Service Examining Boards, Inc.~~ and shall cover:

1) Part I (Funeral Service Science):

A) Embalming;

B) Restorative Art;

C) Microbiology;

D) Pathology;

E) Chemistry; and

F) Anatomy.

2) Part II (Funeral Service Arts):

A) Sociology of Funeral Service;

B) Psychology and Counseling;

C) Funeral Directing and Professional Relationships;

D) Business Law;

E) Funeral Service Law;

F) Funeral Merchandising; and

G) Accounting.

3) The Division shall receive verification of the successful completion of the International Conference of Funeral Service Examining Boards, Inc. examination. The passing score shall be the passing score established by the Conferencetesting entity. Verification shall be received directly from the International Conference of Funeral Service Examining Boards, Inc.

b) An examination fee shall be paid to the Conferencedesignated testing service for each examination or any part retaken. Failure to appear for the examination on the scheduled date, at the time and place specified, shall result in forfeiture of the examination fee.

c) The provisions of this Section shall apply to all applicants upon adoption without regard to where an applicant is in the application process.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.150 Endorsement Reciprocity

a) An applicant who is currently licensed as a funeral director and embalmer under the laws of another jurisdictionstate or territory of the United States or of a foreign country or province shall submit the followingfile an application with the Division together with:

1) A signed and completed application, on forms provided by the Division;

2) The required fee set forth in Section 1250.165;

3)1) One of the following:

A) An official transcript showing proof of successful completion of at least 30 semester (45 quarter) hours or 45 quarter hours of college credit, not including remedial courses, from an accredited college or university which shall include at least 20 semester (30 quarter) hours or 30 quarter hours of courses in liberal arts, physical, biological and/or applied sciences; and certification of graduation

from a course of study of at least 12 months in an approved program of mortuary science;

B) Certification of ~~graduation with~~ an associate~~associate's~~ degree in mortuary science or an equivalent associate~~associate's~~ degree (i.e., applied science) from an approved program of mortuary science; or

C) Certification of a baccalaureate degree in mortuary science from an approved program of mortuary science;

4)~~2)~~ Affidavits stating that the applicant has been actively engaged in the practice of funeral directing and embalming for at least 12 months of the last 5 years prior to application in Illinois~~1 year~~, completed by two actively licensed funeral directors and embalmers~~2 persons~~ with personal knowledge of that~~such~~ experience; and

5)~~3)~~ A certification by the jurisdiction~~state or territory~~ of original ~~and current~~ licensure, stating:

A) The time during which the applicant was licensed in that jurisdiction;

B) Whether ~~the file on~~ the applicant has been the subject of any~~contains any record of~~ disciplinary actions ~~taken~~ or any disciplinary actions are pending; and

C) A brief description of the examination and~~, the applicant's~~ grades received.~~and a statement that the state grants reciprocity to funeral directors and embalmers licensed in Illinois; and~~

~~4) The fee set forth in Section 1250.165.~~

b) ~~The Division shall examine each reciprocity application to determine whether the requirements for licensure in the jurisdiction in which the applicant is licensed were at the date of application substantially equivalent to the requirements in force in this State.~~ The Division may~~shall either~~ issue a license by endorsement~~reciprocity to the applicant~~ or notify the applicant~~him or her~~, in writing, of the basis~~reasons~~ for the denial~~ of the application~~.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.155 Inactive Status

a) A~~Any~~ licensed funeral director and embalmer or ~~any~~ licensed funeral director ~~who notifies the Division in writing, on forms prescribed by the Division,~~ may elect to place a~~his or her~~ license on inactive status and shall be excused from paying~~the payment of~~ renewal fees if the licensee notifies the Division in writing, on forms provided by the Division. The license shall remain on inactive status until the licensee~~he or she~~ notifies the Division in writing of the desire to resume active status.

~~b) Any licensee seeking restoration from inactive status shall do so in accordance with Section 1250.160.~~

b)~~c)~~ Practice on a license that has lapsed or been placed in inactive status shall constitute unlicensed practice in~~is practicing without a license and a~~ violation of the Code.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.160 Restoration

a) A ~~licensed~~ funeral director and embalmer seeking restoration of a license after it has expired or been placed on inactive status for more than 5 years shall submit~~file an application, on forms supplied by the Division, together with~~ the following:

1) A signed and completed application, on forms provided by the Division;

2)~~1)~~ The required fee set forth~~restoration fees specified~~ in Section 1250.165;~~. When restoring a license from inactive status, a person is required to pay the current renewal fee set forth in Section 1250.165.~~

3)~~2)~~ Proof of completion of the ~~required number of~~ continuing education (CE) ~~hours~~ for the immediately preceding~~one~~ prerenewal period as set forth~~specified~~ in Section 1250.220; however, the CE must include 3 hours of hands on embalming and 3 hours of Occupational Safety and Health

Administration compliance. Acceptable proof of completion shall be in the form of certificates of attendance provided by licensed CE~~approved~~ sponsors; and ~~of continuing education programs.~~

4)~~3)~~ One of the following:

A) Sworn evidence of active practice in another jurisdiction, including:~~. The evidence shall include~~

i) a statement from the appropriate board or licensing authority in the other jurisdiction that the licensee was authorized to practice during the term of the active practice or;~~,~~

ii) if the profession is not licensed in the other jurisdiction, a statement from the licensee's employer;

B) An affidavit attesting to military service as provided in Sections 5-15 and 10-35 of the Code. If application is made within 2 years after honorable discharge, and if all other provisions of Sections 5-15 and 10-35 of the Code are satisfied, the applicant will not be required to pay a restoration fee or any lapsed renewal fees; or

C) Evidence of ~~other~~ education or experience acceptable to the Division, within the 5 years preceding restoration, of the licensee's fitness and competence in funeral directing and embalming, including~~. This evidence shall include~~, but not be limited to:

i) Verification of successful completion of the ~~International~~ Conference ~~of Funeral Service Examining Boards, Inc.~~ examination, as set forth in~~pursuant to~~ Section 1250.140, to be forwarded by the ~~International~~ Conference directly to the Division; or

ii) Proof of completion of 6 credit hours ~~of course work~~ at an approved program of mortuary science, ~~which shall be~~ in addition to any CE~~continuing education~~ hours. Funeral director and embalmers seeking restoration shall complete 3 hours related to funeral directing and 3 hours related to

embalming.

b) A licensee seeking restoration of a license that has expired or been on inactive status for less than 5 years, or has been placed in nonrenewed status for failure to comply with CE requirements, shall submit~~file an application on forms provided by the Division, together with~~ the following:

1) A signed and completed application on forms provided by the Division;

2)~~1)~~ The required~~restoration~~ fees set forth~~specified~~ in Section 1250.165;~~.~~ ~~When restoring a license from inactive status, a person is required to pay the current renewal fee set forth in Section 1250.165.~~

3)~~2)~~ Proof~~Any licensee restoring a license shall be required to submit proof~~ of completion of the required ~~number of~~ CE set forth~~hours for one prerenewal period as specified~~ in Section 1250.220. Acceptable proof of completion shall be in the form of certificates of attendance provided by licensed CE sponsors~~ of approved continuing education programs~~.

c) A~~Any~~ person seeking restoration of a license within 2 years after honorable discharge from military service pursuant to Section 5-15 of the Code will be required to pay only the current renewal fee and will not be required to submit proof of completing~~meeting~~ the CE~~continuing education~~ requirements.

d) When ~~the accuracy of~~ any submitted documentation~~, or the relevance or sufficiency of the course work or experience,~~ is questioned by the Division ~~because of lack of information, discrepancies or conflicts in information given, or a need for clarification~~, the licensee seeking restoration may be required~~of a license will be requested~~ to provide additional~~such~~ information~~ as may be necessary to explain the relevance or sufficiency, clarify information or clear up any discrepancies or conflicts in information~~.

e) Persons holding~~to whom~~ a funeral director license and an embalmer license ~~were~~ issued prior to June 1, 1991 shall ~~be required to~~ restore both the funeral director license and the embalmer license~~licenses~~. Persons holding~~to whom~~ a funeral director license ~~was~~ issued prior to June 1, 1991 may~~will be allowed to~~ restore that funeral director license.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.165 Fees

~~The following fees shall be paid to the Department and are not refundable:~~

a) All fees paid pursuant to the Code and this Section shall be made out to the Department of Financial and Professional Regulation and are nonrefundable.

b)~~a)~~ Application Fees

1) The application fee for ~~application for a license as~~ a funeral director and embalmer license is $100.~~ In addition, applicants for an examination shall be required to pay, either to the Department or to the designated testing service, a fee covering the cost of determining an applicant's eligibility and providing the examination. Failure to appear for the examination on the scheduled date, at the time and place specified, after the applicant's application for examination has been received and acknowledged by the Division or the designated testing service, shall result in the forfeiture of the examination fee.~~

2) The application fee for a ~~license as a~~ funeral director and embalmer license by endorsement~~certified or licensed under the laws of another jurisdiction~~ is $200.

3) The application fee for a ~~license as a~~ funeral director and embalmer intern license is $50.

4) The application fee for a CE~~continuing education~~ sponsor license~~listed in Section 1250.220(c)(1)(L)~~ is $500.

c)~~b)~~ Renewal Fees

1) The renewal fee for ~~the renewal of a license as~~ a funeral director and embalmer license or a funeral director and embalmer intern license is~~shall be calculated at the rate of~~ $50 per year.

2) The renewal fee for ~~the renewal of a license as~~ a funeral director license is~~shall be calculated at the rate of~~ $25 per year.

3) The renewal fee for a CE~~the renewal of a continuing education~~ sponsor license is~~shall be calculated at the rate of~~ $125 per year. If a CE sponsor allows the license to lapse, the CE sponsor shall be required to submit $500 to restore the license.

c) General Fees

1) The restoration fee for an expired~~the restoration of a~~ funeral director and embalmer~~embalmers~~ license ~~other than from inactive status~~ is $50 plus ~~payment of~~ all lapsed renewal fees, not to exceed $300.

2) The restoration fee for an expired~~the restoration of a~~ funeral director license ~~other than from inactive status~~ is $50 plus ~~payment of~~ all lapsed renewal fees, not to exceed $175.

3) ~~The fee for the issuance of a duplicate license, for the issuance of a replacement license for a license that has been lost or destroyed, or for the issuance of a license with a change of name or address, other than during the renewal period, is $20.~~ No fee is required for name and address changes on Division records when no duplicate license is issued.

4) The fee for a certification of a licensee's record for any purpose is $20.

5) The fee to have the scoring of an examination administered by the Division reviewed and verified is $20 plus any fee charge by the Conference~~testing service~~.

6) The fee for a wall certificate showing licensure shall be the actual cost of producing the certificate.

7) The fee for a roster of licensees~~persons licensed as funeral directors, funeral directors and embalmers, or funeral director and embalmer interns in this State~~ shall be the actual cost of producing the roster.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.170 Preparation Room Requirements ~~for a Preparation Room~~

a) In accordance with Section 15-55 of the Code~~Act~~, each fixed place of practice or establishment devoted to the care and preparation for burial or for transportation of deceased human bodies shall maintain a preparation room properly equipped with necessary drainage, running water, electricity and ventilation facilities and containing instruments and supplies necessary for the preparation and embalming of deceased human bodies. Each branch operation of an Illinois funeral business need not have its own preparation room as long as the business has at least one preparation room at one of its Illinois locations, so long as each business is owned by the same entity.

b) The care and preparation for burial of all deceased bodies, regardless of cause of demise, shall be entirely private and no one shall be allowed in the ~~embalming or~~ preparation room until the body is fully prepared and dressed, except licensed funeral directors, licensed funeral directors and embalmers, licensed interns, their assistants, bona fide students of mortuary science, the medical examiner, the coroner, their representatives and representatives of the ~~Department of Financial and Professional Regulation-Division of Professional Regulation (~~Division~~)~~ or, except when it is determined to be necessary by the funeral director, ~~or the~~ medical examiner or ~~the~~ coroner.

c) A notice of privacy shall be affixed to or adjacent to the preparation room.

d) Preparation rooms shall be maintained in a sanitary condition with necessary drainage and proper ventilation as set forth in ~~accordance with the provisions of~~ the Code.

e) Preparation rooms shall be ~~made~~ available to ~~representatives of~~ the Division for inspection to determine compliance with the Code and this Part.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.180 Representative of Licensee at Final Disposition at Cemetery

a) As set forth~~used~~ in Section 15-75(b)(36)(D) of the Code, "representative" means a person:

1) employed or contracted by the licensed funeral director and embalmer or licensed funeral director who has been engaged to provide funeral or embalming services; or

2) employed by the same funeral establishment that employs the licensed funeral director and embalmer or licensed funeral director who has been engaged to provide funeral or embalming services.

b) "Representative" includes another licensed funeral director and embalmer, a licensed funeral director, a licensed funeral director and embalmer intern, or an unlicensed employee or contractor.

c) "Representative" does not include a person employed or contracted by the cemetery at which final disposition is made, except when the funeral establishment and the cemetery have the same owners.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.200 Renewals

a) Every license issued under the Code shall expire on May 31 of each odd-numbered year.~~ The holder of a license may renew it during the month preceding its expiration date by paying the required fee.~~

~~b) All funeral director licensees and funeral director and embalmer licensees shall be required to comply with the continuing education requirements set forth in Section 1250.220 of this Part.~~

b)~~c)~~ Each~~It is the responsibility of each~~ licensee must~~to~~ notify the Division of any change of address. Failure to be notified of~~receive a~~ renewal ~~form from the Division~~ shall not constitute an excuse for failure ~~to pay the renewal fee and~~ to renew one's license.

c)~~d)~~ *No license of a funeral director and embalmer intern shall be renewed more than twice* (Section 10-35 of the Code).

d)~~e)~~ Practicing or attempting to practice while a license is expired~~non-renewed~~ shall constitute~~be considered~~ unlicensed practice and shall be grounds for discipline as set forth in ~~accordance with~~ Section 15-75 of the Code.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.205 Advertising

a) Funeral director and funeral director and embalmer licensees~~Persons licensed to practice funeral directing and embalming in the State of Illinois~~ may advertise in any medium. All advertising shall be~~ or other form of public communication in a manner that is~~ truthful and ~~is~~ not be fraudulent, deceptive, inherently misleading or ~~proven to be~~ misleading in practice. Advertising~~Such advertising~~ shall contain all information necessary to communicate~~make the communication not misleading and shall not contain any false or misleading statement or otherwise operate to deceive. The form of such communication shall be designed to communicate~~ the information contained in that advertising~~therein~~ to the public in an accurate,~~a~~ direct, dignified and readily comprehensive manner.

b) A person may not, in any advertisement by newspaper, periodical, internet web page, telephone book listing, direct mail, or electronic mail advertisement, represent that the person conducts the business of a funeral director and embalmer or provides any funeral or embalmer service, unless the advertisement includes a name of at least one licensed individual and the address of one funeral establishment or place of business at which the person or entity conducts business or provides services.

c)~~b)~~ Advertising~~Information that~~ may include, but is not limited to, the following information~~be contained in such advertising includes~~:

1) Licensee's ~~name, address,~~ business hours~~ and telephone number~~;

2) Schools attended;

3) Announcement of the opening of, change of, or return to practice;

4) Announcement of additions to or deletions from professional staff;

5) Availability of pre-need arrangements;

6) Professional society memberships;

7) Credit arrangements;

8) Foreign language ability;

9) Fees for professional services and merchandise that~~which~~ must include a statement that fees may be adjusted due to unforeseen circumstances;

10) Description of the establishment in which the licensee practices, e.g., accessibility to the handicapped, chapel facilities on the premises, convenience of parking; or~~and~~

11) Other information about the licensee, the licensee's practice, or the types of practice relevant to seeking~~in which the licensee will accept employment, which a reasonable person might regard as relevant in determining whether to seek~~ the licensee's services.

d)~~c)~~ Television or radio advertisements~~If an advertisement is communicated to the public over television or radio, it~~ shall be prerecorded and approved for broadcast by the licensee, and a recording and/or videotape of the advertisement~~actual transmission, including videotape,~~ shall be retained by the licensee for ~~a period of~~ at least 5 years.

e)~~d)~~ Untruthful~~Information that may be untruthful~~, fraudulent, deceptive, inherently misleading, or ~~has proven to be~~ misleading in practice advertising~~,~~ includes, but is not limited to, advertising ~~that which~~:

1) Containing~~Contains~~ a misrepresentation of fact or omitting~~omits~~ a material fact required to prevent deception;

2) Taking~~Takes~~ advantage of a prospective~~the potential~~ client's fears, anxieties, vanities or other emotions;

3) Containing~~Contains~~ testimonials and/or exaggerations pertaining to the quality of funeral services;

4) Describing~~Describes as available~~ products or services that are not permitted by State or federal~~the~~ laws ~~of this State and/or applicable Federal laws~~; and

5) Describing~~Advertises~~ professional services that the licensee is not licensed to provide~~render~~.

~~e) The solicitation of funeral services at the residence of a client or prospective client, or any health care institution in which the client or prospective client is confined, which is uninvited and which has not been previously agreed to by the client or prospective client, is prohibited. A licensee, or his or her representative, may initiate contact with a client, or prospective client, in the following manner:~~

~~1) Through general advertising;~~

~~2) By direct mail;~~

~~3) By telephone; or~~

~~4) As an invitee of a charitable, social, civic, religious, fraternal or employee or trade organization.~~

~~f) A licensee or his or her representative shall not initiate contact with a client or prospective client if:~~

~~1) The licensee, or his or her representative, reasonably should know that the physical, emotional or mental state of the person solicited is such that the person could not exercise reasonable judgment;~~

~~2) The person solicited has made known a desire not to receive the communication; or~~

~~3) The solicitation involves coercion, duress or harassment.~~

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.207 Solicitation

a) The solicitation of funeral services at the residence of a client or prospective client, or at any health care institution in which the client or prospective client is confined, that is uninvited and has not been previously agreed to by the client or prospective client is prohibited. A licensee, or a licensee's representative, may initiate contact with a client or prospective client, in the following manner:

1) General advertising;

2) Direct mail;

3) Telephone; or

4) As an invitee of a charitable, social, civic, religious, fraternal, employee or trade organization.

b) A licensee, or a licensee's representative, shall not initiate contact with a client or prospective client if:

1) The licensee, or licensee's representative, reasonably should know that the physical, emotional or mental state of the person solicited is such that the person could not exercise reasonable judgment;

2) The person solicited has made known a desire not to receive the communication; or

3) The solicitation involves coercion, duress or harassment.

(Source: Added at 41 Ill. Reg. _____, effective _____)

Section 1250.210 Granting Variances

a) The Director may grant variances from this Part in individual cases in which the Director~~where he or she~~ finds that:

1) The provision from which the variance is granted is not statutorily mandated;

2) No party will be injured by the granting of the variance;

3) The rules from which the variance is granted would, in the particular case, be unreasonable or unnecessarily burdensome.

b) The Director shall notify the Board of the granting of the variance, and the reasons for the variance, at the next meeting of the Board.

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.220 Continuing Education

a) Continuing Education Hour Requirements

1) Every funeral director and embalmer renewal applicant shall complete 24 CE hours ~~of continuing education (CE)~~ relevant to the practice of funeral directing and embalming during each prerenewal period. The~~For the 2015 and 2017 renewals, the~~ 24 CE hours shall include a minimum of 6 interactive CE hours related to the practice of funeral directing and a minimum of 6 interactive CE hours related to the practice of embalming. ~~Beginning with the 2019 renewal, the 24 hours shall include a minimum of 9 hours related to the practice of funeral directing and a minimum of 9 hours related to the practice of embalming.~~ No more than 6 CE hours may consist of insurance courses.

2) Every funeral director renewal applicant shall complete 12 CE hours ~~of CE~~ relevant to the practice of funeral directing ~~or embalming~~ during each prerenewal period. No more than 3 CE hours may consist of insurance courses.

3) The Division shall conduct random audits to verify CE compliance ~~with this Section. The prerenewal period is the 24 months preceding the expiration date of the license~~.

4) A renewal applicant is not required to comply with CE requirements for the first renewal following the original issuance of the license.

~~5) A licensee who has been actively licensed as a funeral director or embalmer for at least 40 years shall be exempt from the continuing education requirements of this Section.~~

5)~~6)~~ Funeral directors and embalmers licensed in Illinois but residing and practicing in other states must comply with the CE requirements set forth in this Section.

b) Activities for which CE credit may be earned are as follows:

1) Verified attendance at a CE course or participation in a program given by a licensed CE~~by a~~ sponsor ~~as set forth in subsection (c)(1) of this Section~~.

2) A maximum of 6 CE hours for funeral directors or 12 CE hours for funeral directors and embalmers per prerenewal period for:

A) Personal preparation of an educational presentation pertaining to funeral directing and/or embalming that is orally delivered before recognized funeral directing and embalming organizations;

B) Writing and publishing~~of~~ articles regarding~~pertaining to~~ funeral directing or embalming ~~and having them published~~ in nationally recognized funeral directing and embalming journals;

C) Writing a chapter in a book pertaining to funeral directing or embalming; or~~and~~

D) Completing~~Completion of~~ self-study courses taken through an accredited college or university or an approved CE sponsor. The self-study courses shall include an examination that~~meet the following requirements~~:

i) Tests the licensee's~~Self-study courses designed for CE credit must include an examination that tests the~~ skills ~~of the licensee~~ and is of sufficient depth that answers are not readily apparent and have not been provided to the licensee by the CE sponsor or anyone else.

ii) Is crafted~~Sponsors have the obligation to craft examinations in ways~~ to prevent licensees~~candidates~~ from obtaining unearned credit.

3) A licensee who serves as an instructor, speaker or discussion leader of an approved CE course will be allowed CE course credit for actual presentation time, plus actual preparation time of up to 2 hours for each hour of presentation. Preparation time shall not be allowed for repetitious presentations of the same course and will only be allowed for additional study or research. In no case shall credit for actual time of presentation and preparation be given for more than 6 CE hours for funeral directors or 12 CE hours for funeral directors and embalmers during any prerenewal~~renewal~~ period.

~~4)~~ ~~The CE hours used to satisfy the CE requirements for renewal of a funeral director or funeral director and embalmer license held in another jurisdiction shall be applied to fulfillment of the CE requirements for renewal of their Illinois funeral director or funeral director and embalmer license.~~

4)~~5)~~ A maximum of 24 CE hours ~~of CE credit~~ shall be accepted~~given~~ for CE courses completed at an accredited college or university. One semester hour shall equal 8 CE hours. One quarter hour shall equal 6 CE hours.

5)~~6)~~ A CE hour means a minimum of 50 minutes of ~~actual continuing education spent by a licensee in~~ actual attendance at, and completion of, an approved CE course~~activity~~. One-half CE credits (equal to 25 minutes) are permitted after the first credit has been earned.

6) A CE course~~program~~ shall not be presented during a dinner or social function. The dinner or social function must be concluded before the CE course~~program~~ commences or be held after the CE course~~program~~ is completed. If the CE course~~program~~ is held after the dinner or social function commences, no alcohol may be served.~~ If the program involves one or more hours of education, credit may be issued in one-half hour increments.~~

7) Credit will not be given for activities that are not included in this subsection (b).

c) CE Format

1) Interactive CE

A) Interactive CE means classroom courses or CE that uses interactive learning methodologies that simulate the classroom learning process by employing computer software, other technology or administrative systems that provide significant, ongoing, interactive feedback to the learner regarding his or her learning process.

B) A minimum of 12 CE hours per renewal period shall be interactive.

2) Non-Interactive CE
Non-interactive CE does not employ interactive features. Examples include videos, books and audiotapes.

d) Certification of Compliance with Continuing Education Requirements

1) Each licensee shall certify, on the renewal application, full compliance with the CE requirements set forth in this Section.

2) The Division may require additional evidence of compliance in the context of the Division's random audit.

e) Continuing Education Earned in Other Jurisdictions
If a licensee has earned CE hours in another jurisdiction not given by an approved CE sponsor for which the licensee will be claiming credit toward full compliance in Illinois, the licensee shall submit an individual program approval request form, along with a $25 processing fee, prior to participation in the CE course or within 90 days prior to expiration of the license. The Division shall review and recommend approval or disapproval of the program using the criteria set forth in Section 1250.230(c).

f) Exemptions

1) Licensees who properly received the 40-year exemption by January 1, 2016, as set forth in Section 5-15 of the Code, are exempt from CE requirements.

2) A licensee may request an exemption from the CE requirements if:

A) The licensee is on full-time active duty in the military service of the United States, or is a licensee who is called to temporary active duty in the military service or state militia for a period of time exceeding 120 consecutive days during the prerenewal period, when that activity restricts participation in CE; or

B) The licensee demonstrates to the satisfaction of the Division that meeting these requirements would constitute undue hardship by reason of disability, illness or other clearly mitigating

circumstances. The supporting documentation shall include a sworn statement by the licensee, a statement from a physician, or medical records that show the disability, illness or circumstance prevented the licensee's participation in CE during a substantial part of the prerenewal period. If good cause has been shown, the Division shall waive disciplinary action and extend the time within which the licensee shall comply. In cases of noncompliance by reason of advanced age or serious health conditions lasting a substantial part of the prerenewal period, disciplinary action shall not be waived for more than one prerenewal period.

3) Any licensee who, prior to the expiration date of the license, submits a request for exemption under this Section shall be deemed to be in good standing until the Division's decision on the request has been made.

4) Any licensee who submits a request for exemption that is denied may then request the license be placed on inactive status. The licensee shall comply with CE requirements prior to restoration of the license from inactive status, in accordance with Section 1250.160.

~~e) CE Sponsors and Programs~~

~~1) Sponsor, as used in this Section, pursuant to Sections 5-15 and 10-35 of the Code, shall mean the following:~~

~~A) An accredited college or university, or State agency;~~

~~B) Illinois Funeral Directors Association;~~

~~C) Funeral Directors Services Association of Greater Chicago;~~

~~D) Cook County Association of Funeral Home Owners, Inc.;~~

~~E) Illinois Selected Morticians Association;~~

~~F) National Funeral Directors Association;~~

~~G) Illinois Cemetery and Funeral Home Association;~~

~~H) Selected Independent Funeral Homes;~~

~~I) An Illinois school of mortuary science;~~

~~J) International Order of the Golden Rule;~~

~~K) National Funeral Directors and Morticians Association; or~~

~~L) Any other person, firm, or association that has been approved and authorized by the Division to coordinate and present CE courses and programs in conjunction with this Section.~~

~~2) Application~~
~~A continuing education sponsor application shall be filed with the Division to be approved as a continuing education sponsor. The application shall include:~~

~~A) A copy of the Certificate of Attendance the sponsor will use, which shall contain the following information:~~

~~i) The CE sponsor license number, name and address;~~

~~ii) Name and license number of the participant;~~

~~iii) Number of hours awarded; and~~

~~B) The required fee set forth in Section 1250.165.~~

~~3) Requirements~~

~~A) A CE sponsor shall provide CE courses and programs that are organized programs of formal learning that contribute directly to a licensee's knowledge and ability to perform duties as a licensee. The CE course must meet the following minimum requirements:~~

~~i) Be developed and presented by persons with education, training and/or practical experience in the subject matter to be presented;~~

~~ii) Include a student evaluation of both instructor and the course;~~

~~iii) Specify the course objectives and content and the number of CE hours to be earned. The information shall be specified in all promotional materials; and~~

~~iv) All sponsors shall verify attendance at each CE course or program. A record of attendance shall be kept for no less than 5 years. Sponsors shall give each successful participant a record of completion at the end of the course or program. All records shall comply with the criteria set forth in subsection (c)(2)(A).~~

~~B) CE sponsors shall be required to renew their license May 31 of odd numbered years. The first renewal shall be May 31, 2015.~~

~~C) After September 30, 2013, CE programs must be given by a sponsor who has been approved by the Division to provide continuing education. CE sponsors must submit an application and the required fee and meet the current requirements set forth in this Part and the Act within six months after adoption of these amendments in order to continue providing continuing education.~~

~~C) If an approved CE sponsor does not renew the license at the time of renewal, the CE sponsor must reapply and submit the appropriate documents and pay the initial application fee.~~

~~4) All courses and programs shall:~~

~~A) Contain materials that contribute to the advancement, extension and enhancement of professional skills and knowledge in the practice of funeral directing or embalming. The course content shall be designed to focus on such advancement and enhancement of professional skills and knowledge;~~

~~B) Specify the course objectives, course content and teaching methods to be used;~~

~~C) Be developed and presented by persons with education and/or experience in the subject matter of the program;~~

~~D) Specify the number of CE hours that may be applied to fulfilling the Illinois CE requirements for license renewal; and~~

~~E) Include some mechanism whereby participants evaluate the overall quality and content of the program.~~

~~5) All programs given by sponsors should be open to all licensed funeral directors and funeral directors and embalmers and not be limited to the members of a single organization or group.~~

~~6) Certificate of Attendance or Participation. It shall be the responsibility of the sponsor to provide each participant in an approved program or course with a certificate of attendance or participation that shall contain the following information:~~

~~A) The name and address of the sponsor;~~

~~B) The name and license number of the participant;~~

~~C) A brief statement of the subject matter;~~

~~D) The number of CE hours awarded in each program;~~

~~E) The date and place of the program; and~~

~~F) The signature of the sponsor.~~

~~7) The certificate of attendance shall be distributed following the educational program or otherwise be provided to the attendee by the sponsor, by such means as mailing the certificate or summary of attendance.~~

~~8) The sponsor shall maintain course materials and attendance records containing all information in subsection (c)(6) for not less than 5 years, except for the signature of the sponsor.~~

~~9) The sponsor shall be responsible for assuring that no participant shall~~

~~receive CE credit for time not actually spent attending the program.~~

~~10)~~ ~~If it is determined after a hearing before the Board that a sponsor has failed to comply with the foregoing requirements, the Division shall thereafter refuse to accept for CE credit attendance at any of that sponsor's CE activities until the Division receives assurances of compliance with this Section.~~

~~11)~~ ~~Notwithstanding any other provision of this Section, the Division or Board may evaluate any sponsor of any continuing education program at any time.~~

~~12)~~ ~~The Division shall maintain a list of all approved continuing education sponsors in addition to those identified under subsection (c)(1)(A) through (K).~~

~~d)~~ ~~Certification of Compliance with CE Requirements~~

~~1)~~ ~~Each renewal applicant shall certify, on the renewal application, full compliance with the CE requirements set forth in subsection (a).~~

~~2)~~ ~~The Division may require additional evidence demonstrating compliance with the CE requirements. It is the responsibility of each renewal applicant to retain or otherwise produce evidence of compliance. The additional evidence will be required in the context of the Division's random audit.~~

~~3)~~ ~~When there appears to be a lack of compliance with CE requirements, an applicant will be notified, at which time the Division may recommend that steps be taken to begin formal disciplinary proceedings as required by Section 10-65 of the Illinois Administrative Procedure Act [5 ILCS 100/10-65].~~

~~e)~~ ~~Exemptions~~

~~1)~~ ~~A licensee may be exempt from the continuing education requirements of this Section if one of the following situations occur. If an exemption is claimed, it is required that the renewal fee and any documentation needed to support the exemption be submitted for renewal of a license.~~

~~A)~~ ~~A licensee who is on full-time active duty in the military service of the United States, or is a licensee who is called to temporary active duty in the military service or Armed Forces of the United States for a period of time exceeding 120 consecutive days during the renewal period, when that activity restricts participation in a continuing education program.~~

~~B)~~ ~~A licensee who demonstrates to the satisfaction of the Division that meeting these requirements would work an undue hardship by reason of disability, illness or other clearly mitigating circumstances. The supporting documentation shall be in the form of a sworn statement by the licensee, a statement from a physician, or medical records that show the disability, illness or circumstance prevented the licensee's participation in the continuing education program during a substantial part of the renewal period. If the Division finds from the evidence that good cause has been shown for non-compliance, the Division shall waive enforcement, extend the time within which the licensee shall comply, or establish a particular program or schedule of continuing education, including home study, for the renewal period in which the undue hardship existed. In the cases of non-compliance by reason of advanced age or serious health conditions lasting a substantial part of the renewal period, enforcement shall not be waived for more than one renewal period.~~

~~2)~~ ~~Any licensee who, prior to the expiration date of the license, submits a request for an exemption under this Section shall be deemed to be in good standing until the Division's final decision on the request has been made.~~

~~3)~~ ~~Any licensee who submits a request for an exemption that is denied may then request his or her license be placed on inactive status. The licensee shall comply with the continuing education requirements prior to restoration of the license from inactive status in accordance with Section 1250.160.~~

(Source: Amended at 41 Ill. Reg. _____, effective _____)

Section 1250.230 Continuing Education Sponsors and Courses

a) CE sponsor, as set forth in Sections 5-15 and 10-35 of the Code, shall mean the following:

1) An accredited college or university or a State agency;

2) Illinois Funeral Directors Association;

3) Funeral Directors Services Association of Greater Chicago;

4) Cook County Association of Funeral Home Owners, Inc.;

5) Illinois Selected Morticians Association;

6) National Funeral Directors Association;

7) Illinois Cemetery and Funeral Home Association;

8) Selected Independent Funeral Homes;

9) An Illinois school of mortuary science;

10) International Order of the Golden Rule;

11) National Funeral Directors and Morticians Association; or

12) Any other person or entity licensed as a CE sponsor under subsection (b).

b) A person or entity seeking to provide CE shall submit:

1) A signed and completed application on forms provided by the Division;

2) The required fee set forth in Section 1250.165; and

3) A copy of the certificate of attendance the CE sponsor will issue, which shall contain the information set forth in subsection (d).

c) All CE courses shall:

1) Contain materials that contribute to the advancement, extension and enhancement of professional skills and knowledge in the practice of funeral directing or embalming. The course content shall be designed to focus on advancement and enhancement of professional skills and knowledge;

2) Be developed and presented by persons with education and/or practical experience in the presented subject matter;

3) Include a student evaluation of both instructor and the course;

4) Specify the course objectives and content, teaching method to be used, and number of Illinois CE hours earned in all relevant materials;

5) Verify attendance; and

6) Be open to all licensed funeral directors and funeral directors and embalmers and not be limited to the members of a single organization or group.

d) Certificate of Attendance

1) Each licensed CE sponsor shall provide each participant with a certificate of attendance containing the following:

A) The CE sponsor's license number, name, address and signature;

B) The participant's name and license number;

C) A brief statement of the subject matter;

D) The number of CE hours awarded and the CE topic (i.e., funeral directing, embalming, insurance, OSHA compliance, etc.);

E) The date and place of the course; and

F) The method of delivery of the course (i.e., classroom, webinar, video, book, audiotape, etc.).

2) CE sponsors shall provide all participants with a certificate of attendance upon the successful completion of a CE course.

e) The CE sponsor shall maintain course materials and attendance records containing all information in subsection (d)(1) for not less than 7 years, except for the signature of the sponsor.

f) The CE sponsor shall ensure that participants only receive CE credit for time actually spent attending the CE course.

g) The Division may evaluate a CE sponsor at any time. If the Division determines that a CE sponsor failed to comply with this Part, the Division shall thereafter refuse to accept that CE sponsor's CE for credit until the Division receives proof of compliance.

(Source: Added at 41 Ill. Reg. _____, effective _____)

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF PROPOSED RULES

1) Heading of the Part: Illinois Manual for Courts-Martial and Nonjudicial Punishment

2) Code Citation: 95 Ill. Adm. Code 400

3)

Section Numbers:	Proposed Actions:
400.100	New Section
400.105	New Section
400.110	New Section
400.115	New Section
400.120	New Section
400.125	New Section
400.130	New Section
400.200	New Section
400.205	New Section
400.210	New Section
400.215	New Section
400.220	New Section
400.225	New Section
400.230	New Section
400.300	New Section
400.305	New Section
400.400	New Section
400.405	New Section
400.410	New Section
400.415	New Section
400.420	New Section
400.425	New Section
400.500	New Section
400.505	New Section
400.510	New Section
400.515	New Section
400.520	New Section
400.525	New Section
400.530	New Section
400.535	New Section
400.540	New Section
400.545	New Section
400.600	New Section
400.605	New Section

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF PROPOSED RULES

400.610	New Section
400.615	New Section
400.620	New Section
400.625	New Section
400.630	New Section
400.635	New Section
400.640	New Section
400.645	New Section
400.650	New Section
400.655	New Section
400.660	New Section
400.665	New Section
400.670	New Section
400.675	New Section
400.680	New Section
400.685	New Section
400.690	New Section
400.695	New Section
400.700	New Section
400.705	New Section
400.710	New Section
400.715	New Section
400.720	New Section
400.725	New Section
400.730	New Section
400.735	New Section
400.800	New Section
400.805	New Section
400.810	New Section
400.815	New Section
400.820	New Section
400.825	New Section
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400.840	New Section
400.845	New Section
400.850	New Section
400.855	New Section
400.860	New Section

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF PROPOSED RULES

400.865	New Section
400.870	New Section
400.875	New Section
400.880	New Section
400.900	New Section
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400.1000	New Section
400.1005	New Section
400.1010	New Section
400.1015	New Section
400.1020	New Section
400.1025	New Section
400.1030	New Section
400.1035	New Section
400.1040	New Section
400.1045	New Section
400.1050	New Section
400.1055	New Section
400.1060	New Section
400.1065	New Section
400.1070	New Section
400.1075	New Section
400.1080	New Section
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400.1090	New Section
400.1095	New Section
400.1100	New Section
400.1200	New Section
400.1205	New Section
400.1210	New Section
400.1215	New Section
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400.1320	New Section

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400.1325	New Section
400.1330	New Section
400.1335	New Section
400.1340	New Section
400.1345	New Section
400.APPENDIX A	New Section

4) Statutory Authority: 20 ILCS 1807

5) A Complete Description of the Subjects and Issues Involved: This rulemaking is a manual on how Illinois National Guard Judge Advocates are to process courts-martial cases and non-judicial punishments under the Illinois Code of Military Justice.

6) Published studies or reports, and sources of underlying data, used to compose this rulemaking: Patterned after the Federal Manual for Courts-Martial

7) Will this proposed rulemaking replace an emergency rule currently in effect? Yes (3)

Emergency rule creating Subpart K; effective March 2, 2017; published at 41 Ill. Reg. 3214

Emergency rule creating the rest of this Part; effective May 8, 2017; published at 41 Ill. Reg. 5459.

An emergency rule effective March 2, 2017 (published in the March 17, 2017 *Illinois Register;* 41 Ill. Reg. 3214) created this Part. That emergency rule created only a Subpart L that included Sections 400.2000 through 400.2050 and Appendix A (Nonjudicial Punishment). This proposed rulemaking replaces that emergency rule, but, in this proposed, the Nonjudical Punishment rules are located in Subpart K (Sections 400.1200 through 400.1230 and Appendix A).

8) Does this rule contain an automatic repeal date? No

9) Does this rule contain incorporations by reference? Yes

10) Are there any other rulemakings pending on this Part? No

11) Statement of Statewide Policy Objective: To provide a consistent set of rules by which to administer Courts-Martials in the Illinois National Guard

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12) Time, Place and Manner in which interested persons may comment on this proposed rule:

Illinois Department of Military Affairs
Office of the Staff Judge Advocate
Col. Robert C. Roth / Lt. Col. David D. Gorman
1301 N. MacArthur Blvd.
Springfield IL 62702

217/761-3366
email: robert.c.roth.mil@mail.mil
david.d.gorman.mil@mail.mil

13) Initial Regulatory Flexibility Analysis:

A) Types of small businesses, small municipalities and not-for-profit corporations affected: None

B) Reporting, bookkeeping or other procedures required for compliance: None

C) Types of professional skills necessary for compliance: None

14) Regulatory Agenda on which this rule was summarized: This rulemaking was not included on either of the 2 most recent agendas because this rule wasn't anticipated at the time the regulatory agenda was due.

The full text of the Proposed Rules begins on the next page:

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CHAPTER II: DEPARTMENT OF MILITARY AFFAIRS

PART 400
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400.APPENDIX A Table of Maximum Punishments

AUTHORITY: Implementing and authorized by the Illinois Code of Military Justice [20 ILCS 1807].

SOURCE: Adopted by emergency rulemaking at 41 Ill. Reg. 3214, effective March 2, 2017, for a maximum of 150 days; emergency amendment at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days; adopted at 41 Ill. Reg. _____, effective _____.

SUBPART A: GENERAL PROVISIONS

Section 400.100 Introduction

a) This Part, the Illinois Manual for Courts-Martial, referenced in this Part as the Manual, shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay. The purpose of military law is to promote justice, to maintain good order and discipline, to promote efficiency and effectiveness in the military, and to strengthen the security of the United States and the State of Illinois. This Manual prescribes the policies and procedures pertaining to the administration of military justice and implements the Illinois Code of Military Justice [20 ILCS 1807] (the Code), applicable

portions of the federal Uniform Code of Military Justice (UCMJ), and the Manual for Courts-Martial, United States (2012) (MCM).

b) To the extent allowed by Illinois law and as prescribed by the Code, this Manual reflects the MCM. Hence, this Manual must be construed so as to make it uniform, so far as practical, with the MCM. This Manual will be interpreted to include procedures and forms (e.g., DD Form 458, Charge Sheet) contained in the MCM and not contained in this Manual that may be needed from time-to-time in the administration of justice.

c) Insofar as any reference to the United States, President, or other federal official exists in the MCM, that reference encompasses the State, the Governor or State official, as appropriate.

d) Code Section 36 vests the Adjutant General of Illinois with the authority to make or adopt rules and regulations (this Manual) in conformity with the Code that, as nearly as practicable, must conform with the rules and regulations governing the U.S. armed forces. If this Manual differs from the rules and regulations governing the U.S. armed forces, this Manual shall apply.

e) There is no substitute for strong and effective military leadership. Commanders, officers, and non-commissioned officers should not attempt to replace leadership with military justice and punitive measures, except as a last resort and as punishment for offenses that have been committed. Proper leadership, guidance and counseling can be effective in preserving good order and discipline within the State military forces (SMF) and should reduce the need for use of the military justice system.

Section 400.105 Definitions and Referenced Materials

a) Definitions. Except as modified in this Manual, the definitions and rules of construction in RCM 103, as incorporated by reference in subsection (b), apply to courts-martial under the Code and this Manual.

"Accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused. (Code Section 1(a)(1))

"AGR" means Active Guard Reserve.

"ANG" means the Illinois Air National Guard.

"Appropriate Nonpunitive Administrative Measures" means such actions as reprimands, administrative reduction in rank, administrative separation from SMF, etc.).

"ARNG" means the Illinois Army National Guard.

"Cadet" or "Candidate" means a person who is enrolled in or attending a State military academy, a regional training institute, or any other formal education program for the purpose of becoming a commissioned officer in the State military forces. (Code Section 1(a)(2))

"Classified Information" means:

> *any information or material that has been determined by an official of the United States or any state pursuant to law, an Executive Order, or regulation to require protection against unauthorized disclosure for* reasons *of national or State security; and*
>
> *any restricted data, as defined in section* 2014*(y) of the Atomic Energy Act of 1954 (42 USC 2014(y)).* (Code Section 1(a)(3))

"Code" means the Illinois Code of Military Justice [20 ILCS 1807].

"Commander" or *"Commanding Officer",* for purposes of this Part, means a commissioned or warrant officer who, by virtue of his or her or grade and assignment, exercises primary command authority over a military unit or organization recognized as a command. This term includes active duty and SMF commanders, whether in a Title 10 (U.S. Military) or Title 32 (National Guard) status, of installations or schools when a member's SMF commander is not also at the installation or school. This term *shall include officers in charge only when* they are *administering nonjudicial punishment* under Subpart K. (Code Section 1(a)(5))

"Convening Authority" includes, in addition to the person who convened the court, a commissioned officer commanding for the time being or a successor in command to the convening authority. (Code Section 1(a)(6))

"Day" means a calendar day beginning at 0000 hours (12:00 a.m.) and ending at 2359 hours, 59 seconds (11:59, 59 seconds p.m.). Any punishment authorized by this Manual that is measured in terms of days shall, when served in a status other than annual field training, be construed to mean succeeding duty days. (Code Section 1(a)(7))

"Declination to Prosecute" or "Declination to Further Prosecute" is a written statement that, in the opinion of the appropriate civil authority:

there is insufficient evidence to prove guilt beyond a reasonable doubt; or

the offense does not otherwise merit prosecution or further prosecution and states the basis for that opinion.

"Department" or "DMA" means the Illinois Department of Military Affairs.

"Derivative Evidence" means facts, information or physical objects that tend to prove an issue in a court-martial, but that are excluded from consideration by the trier of fact because they were learned directly from information illegally obtained.

"Duty Status Other Than State Active Duty" or "OTAD" *means any other type of military duty or training pursuant to a written order issued under* 32 USC, *or traditional Inactive Duty Training periods pursuant to 32 USC 502(a).* (Code Section 1(a)(8)) It does not include "active duty" under 10 USC, i.e., "full-time duty in the active military service of the United States".

"Enlisted Member" means a person in an enlisted grade.

"ETS" means expiration of term of service.

"Government" means the U.S. Government or the State of Illinois or, in a trial setting, the trial counsel or the prosecution, as the context indicates.

"IDT" means inactive duty training.

"Judge Advocate" means a commissioned officer of the organized State military forces who is a member in good standing of the bar of the highest court of a state, and is:

> *certified or designated as a judge advocate in the Judge Advocate General's Corps of the Army, Air Force, Navy or Marine Corps, or designated as a law specialist as an officer of the Coast Guard, or a reserve or National Guard component of one of these; or*
>
> *certified as a non-federally recognized judge advocate by the senior judge advocate of the commander of the force in the SMF of which the accused is a member, as competent to perform such military justice duties required by the Code. If there is no such judge advocate available, then certification may be made by such senior judge advocate of the commander of another force in the SMF, as the convening authority directs.* (Code Section 1(a)(10))

"MCM" means the Manual for Courts-Martial, United States referenced in subsection (b).

"Manual" means this Part, the Illinois Manual for Courts-Martial and Nonjudicial Punishment.

"Member" means a member of the State Military Force.

"Members of His or Her Command" refers to the assigned members of the unit or organization commanded, and to other members who are on temporary duty with, or otherwise attached to, the unit or organization. Attachment orders are not necessary if the commander exercises the usual responsibilities and attributes of command over the member.

"Military Court" means a court-martial or a court of inquiry. (Code Section 1(a)(12))

"Military Judge" means an official of a general or special court-martial detailed in accordance with Code Section 26. (Code Section 1(a)(13))

"Military Offenses" means those offenses proscribed under Code Section 1(a)(14), the Code and Subpart J of this Manual.

"National Guard Bureau" or "NGB" means the channel of communications on all matters pertaining the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States between Department of the Army, the Department of the Air Force, and the several states. (10 USC 10501(b))

"National Security" means the national defense and foreign relations of the United States. (Code Section 1(a)(15))

"NGIL-JA" means the Illinois National Guard Office of the Staff Judge Advocate.

"Nonjudicial Punishment" or "NJP" means action under Code Section 15 and Subpart K of this Manual.

"Officer" means a commissioned or warrant officer. (Code Section 1(a)(16))

"Officer in Charge" means a member of the Navy, the Marine Corps, or the Coast Guard designated as the officer in charge by the appropriate authority. (Code Section 1(a)(17))

"Principal Assistant" means a commissioned officer of the State military forces serving in a position immediately subordinate to the convening authority who would assume command in the event of the commander's death, prolonged absence, or disability, or to the vice-commander of the organization. However, in the case of the Air National Guard, the principal assistant may include an officer who is not "air rated" (as defined in the applicable service regulation pertaining to commanders) and is serving in a position immediately subordinate to the convening authority. Any delegation of authority to a "principal assistant" shall be in writing, unless exigencies prevent such written delegation. Verbal authorization shall be reduced to writing as soon as possible.

"Record", when used in connection with the proceedings of a court-martial, means:

> *an official written transcript, written summary, or other writing relating to the proceedings; or*

an official audiotape, videotape, digital image or file, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced. (Code Section 1(a)(18))

"Senior Force Judge Advocate" means the senior judge advocate of the commander of the same force of the SMF as the accused and who is that commander's chief legal advisor. (Code Section 1(a)(22))

"SMF" means the State military forces subject to the Illinois Code of Military Justice.

"State", when not capitalized, means *one of the several states, the District of Columbia, the Commonwealth of Puerto Rico, Guam or the U.S. Virgin Islands.* (Code Section 1(a)(20)) When capitalized "State" means the State of Illinois.

"State Active Duty" means active duty in the SMF under an order of the Governor or the Adjutant General, or otherwise issued by authority of State law and paid by State funds.

"State Military Forces" or "SMF" means the Illinois *National Guard and any other military force organized under the Constitution and laws of* Illinois. This includes *the Illinois State Guard when*:

organized by the Governor as Commander-in-Chief under the Military Code of Illinois and the Illinois State Guard Act;

not in a status subjecting those forces *to* the *exclusive jurisdiction of* the UCMJ; and

traveling *to and from duty*. *(Code Section 1(a)(23))*

"Superior Commissioned Officer" means a commissioned officer superior in rank or command. (Code Section 1(a)(24))

"Uniform Code of Military Justice" or "UCMJ" means 10 USC 801 et seq.

b) Referenced Materials

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

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1) The Constitution of the State of Illinois; Article XII (Militia)

2) Illinois Statutes:

Appellate Court Act [705 ILCS 25]

Code of Civil Procedure of 1963 [735 ILCS 5]

Code of Criminal Procedure [725 ILCS 5]

Criminal Code of 2012 [720 ILCS 5]

Firearm Owners Identification Card Act (FOID Act) [430 ILCS 65]

Freedom of Information Act [5 ILCS 140] (FOIA)

Illinois Code of Military Justice [20 ILCS 1807] (the Code)

Military Code of Illinois [20 ILCS 1805]

State Finance Act [30 ILCS 105]

State Guard Act [20 ILCS 1815]

3) Illinois Materials:

Illinois Rules of Evidence (http://www.illinoiscourts.gov/SupremeCourt/Evidence/Evidence.asp)

4) Federal Statutes:

Armed Forces (10 USC)

Atomic Energy Act of 1954 (42 USC 2014)

Controlled Substances Act (21 USC 812).

Criminal laws of the United States (18 USC and other non-military federal criminal laws)

National Guard (32 USC)

Uniform Code of Military Justice (10 USC 801 et seq.) (UCMJ)

3) Incorporations by Reference

A) The following materials are incorporated by reference:

Federal Rules of Evidence, United States Supreme Court (2017), www.rulesofevidence.org.

Manual for Courts-Martial, United States (2012 Edition) (MCM) (jsc.defense.gov/Portals/99/Documents/MCM2012.pdf)

Part II: Rules for Courts-Martial (2012 Edition) (RCM)

Part III: Military Rules of Evidence (2012 Edition)

Appendix 3: Department of Defense Directive 5525.7 (Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes)

B) This subsection (b)(3) incorporates no later amendments or editions.

Section 400.110 Persons Subject to the Code; Jurisdiction

a) General Statement. No person may be punished under the Code for any offense provided for in the Code, unless there is jurisdiction over the person and jurisdiction over the offense.

b) Jurisdiction Over the Person. There is jurisdiction over the person if, at both the time the offense was committed and the time of trial, that person:

1) *is a member of the SMF*; and

2) is, for a *day or a portion of a day, in State Active Duty status or OTAD, and at no other times*. (Code Section 2(a))

c) Jurisdiction Over the Offense. Subject matter jurisdiction is established if the person:

1) commits a military offense as defined in Code Section 1(a)(14); or

2) commits an offense not in Code Section 1(a)(14) (non-military offense) that is in violation of either the Code or the criminal law of the state in which it was committed, or that of the United States; and

A) the appropriate civil authority has provided the NGIL-JA a declination to prosecute; or

B) a civil court of competent jurisdiction has dismissed the charge, and the appropriate civil authority has provided the NGIL-JA a declination to further prosecute, provided jeopardy has not attached.

d) Persons Assigned and Attached to Other Commands. For jurisdiction issues based on assignment or attachment, each service component shall refer to the current service component guidance, including regulations and policy directives. Prior to the initiation of any military justice action, the judge advocate will ensure that the commander will resolve any military justice authority issue regarding assigned or attached personnel.

Section 400.115 Jurisdiction to Try Certain Personnel

a) Jurisdiction Over the Person

1) The following persons are subject to jurisdiction under the Code:

A) a member of the SMF when in State active duty or OTAD, but at no other times;

B) a person in custody of the SMF before trial or serving a sentence imposed by a court-martial;

C) a person who has voluntarily enlisted in the SMF and who has the capacity to understand the significance of enlisting in the SMF. The enlistment shall be valid for purposes of jurisdiction and a change of status from civilian to member of the SMF. This form of jurisdiction shall be effective upon the taking of the oath of enlistment; and

D) notwithstanding any other provision of law, a person serving in the SMF who:

i) submitted voluntarily to military authority;

ii) met the mental competence and minimum age qualifications of 10 USC 504 and 505 at the time of voluntary submission to military authority;

iii) received military pay or allowances; and

iv) performed military duties.

2) A person remains subject to this Manual until the person's active status has been terminated in accordance with the law of the armed forces (10 USC) and the Military Code of Illinois [20 ILCS 1805] or the State Guard Act [20 ILCS 1815] and any of the applicable regulations of the National Guard Bureau or of that person's active component service, unless termination of status has been effectuated through the person's fraudulent activity. If a person is charged and found guilty at court-martial of fraudulently obtaining discharge, Code Section 3 applies and the person may thereafter be charged for all offenses that were committed under the Code prior to the discharge, subject to the statute of limitations provided for in Code Section 43.

3) The Adjutant General may, without the member's consent, order a member of the SMF to State Active Duty for the purposes of implementing any proceedings initiated under the Code.

4) *No person who has deserted from the* SMF *may be relieved from amenability to the jurisdiction of* the *Code by virtue of a separation from any later period of service*. (Code Section 3(b))

b) Subject Matter Jurisdiction

1) Military Offenses. Offenses of a military nature contained in Code Section 1(a)(14) may be the subject of administrative measures, nonjudicial punishment, or courts-martial jurisdiction, except as provided in subsection (b)(2). Offenses of a military nature are derived from the UCMJ and, to the extent not inconsistent with the Code, this Manual reflects each element of the offense as described in the UCMJ, with the following clarifications:

A) Insofar as an element refers to the United States, the element also will refer to the State of Illinois.

B) Insofar as an element refers to individuals in the service of the United States or federal officials, the element also will include individuals in the service of the SMF or State officials as provided Code Sections 1(a)(14) and 88.

C) Insofar as an element refers to the property of the United States, the element also will include property of the State of Illinois.

2) Non-military Offenses

A) A non-military offense is an offense that *violates the Code and the criminal law of the United States, a state or a local jurisdiction.* (Code Section 2(b)) Non-military offenses may be disposed of by nonjudicial punishment or courts-martial, provided jurisdiction exists under the Code and this Manual. Non-military offenses may be subject to prosecution under U.S., state or local jurisdiction (see Code Sections 133, 134 and/or 149).

B) *A proper civilian court has primary jurisdiction when an act or omission violates both the Code and the criminal law* of the United States or of the state where the offense occurred. In such cases, *a State court-martial* or NJP proceeding *may be initiated only after*

the civilian authority has declined to prosecute or has dismissed charges, provided jeopardy has not attached, as provided in Section 400.835. (Code Sections 2(b) and 44) However, nothing in this Manual precludes a commander from taking administrative action even if the civilian authority exercises jurisdiction. Administrative remedies shall not be considered double jeopardy.

C) An SMF member who is subject to jurisdiction under the Code may be ordered to duty involuntarily for any purposes under this Manual or the Code.

D) Coordination with the Attorney General or other appropriate prosecutorial authorities is essential to ensure that judge advocates prosecute with the cooperation of the local State's Attorney. A commander shall refer all suspected civilian offenses to a judge advocate who shall coordinate with the proper authorities when appropriate.

Section 400.120 Territorial Applicability of the Code

a) Territorial jurisdiction exists so long as there is personal jurisdiction under Code Section 2. This Manual applies wherever and whenever the Code applies. *Courts-martial, courts of inquiry,* and nonjudicial punishment proceedings *may be convened* and conducted, and punishment may be imposed, while in the State and *while those units are serving outside the State with the same jurisdiction and powers as if the proceedings were held* within *the State*. (Code Section 5(b))

b) Courts-martial may be conducted anywhere and in any facility as mission requirements and military exigencies dictate, in the judgment of the appropriate senior force judge advocate.

Section 400.125 Judge Advocates

a) Judge advocates must adhere to the State bar licensing requirements pursuant to Code Sections 1(a)(10), 26, 27 and 38.

b) The senior force judge advocate of each force of the SMF is responsible for the supervision of the administration of military justice in that force. (See Code Section 6.)

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Section 400.130 Military Judges

a) *The Governor or the Adjutant General shall appoint at least one judge advocate officer from the active rolls of the Illinois National Guard who has been previously certified and qualified for duty as a military judge by the Judge Advocate General of the judge advocate officer's respective armed force under UCMJ Article 26(b) to serve as a military judge under the Code*.

b) *The military judge shall hold the rank of Major or above.* (Code Section 6(a)) The military judge not only rules on all legal issues, motions and items provided for in the Code and during courts-martial, but, in order to effectuate this intent and process, the military judge has the responsibilities provided in RCM 801.

SUBPART B: APPREHENSION AND RESTRAINT

Section 400.200 Apprehension

a) *Apprehension is the taking of a person into custody.* (Code Section 7(a))

b) *Any person* subject to the Code who is *authorized by* the *Code to apprehend persons subject to* the *Code may do so only* after consultation with the NGIL-JA and only after having *probable cause that an offense has been committed and that the person apprehended committed it*. (Code Section 7(b))

c) Civilians Authorized to Apprehend Deserters. Under Code Section 7, any civilian officer having authority to apprehend offenders under laws of the United States, or of a state, may do so when apprehension is of a deserter from SMF. Upon receipt of DD Form 553 (Deserter/Absentee Wanted by the Armed Forces), civilians authorized to apprehend shall do so and detain that deserter until appropriate military authorities take custody.

d) How an Apprehension May Be Made

1) General. An apprehension is made by clearly notifying the person to be apprehended that the person is in custody. This notice should be given orally or in writing, but may be implied by the circumstances.

2) Warrants. Neither warrants nor any other authorization shall be required for an apprehension under this Manual, except as required by the U.S. Constitution as applied to members of the armed forces.

3) Use of Force. Any person authorized under this Manual to make apprehension may use such force and means as reasonably necessary under the circumstances to effect the apprehension.

Section 400.205 Imposition of Restraint

a) Types of Pretrial Restraint. Pretrial restraint is moral or physical restraint on a person's liberty that is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest or confinement.

1) Conditions on Liberty. Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. These conditions may be imposed in conjunction with other forms of restraint or separately.

2) Restriction in Lieu of Arrest. Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits. A restricted person shall, unless otherwise directed, perform full military duties while restricted.

3) Arrest. *Arrest is the restraint of a person by* oral or written *order not imposed as punishment, directing* the person *to remain within specified limits*. (Code Section 9(a)) A person in the status of arrest shall not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

4) Confinement. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. No person may be ordered into pretrial confinement, except

upon determination of probable cause that the person committed an offense under the Code and with the concurrence of the NGIL-JA.

A) *An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to* the *Code. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of the commanding officer's command or subject to the commanding officer's authority into arrest or confinement.* (Code Section 9(b))

B) *A commissioned officer, a warrant officer, or a civilian subject to* the *Code or to trial* under the *Code may be ordered into arrest or confinement only by a commanding officer to whose authority the person is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order the persons into arrest or confinement may not be delegated*. (Code Section 9(c))

b) *No person subject to* the *Code may be* placed in any sort of pretrial restraint, *except*:

1) *for probable cause*, as described in subsection (c), has been determined *after coordination with a judge advocate officer*; and

2) when holding the person without restraint is *impractical or not possible* (Code Section 9(d)).

c) Probable cause for pretrial restraint exists when there is a reasonable belief that:

1) An offense triable by courts-martial has been committed;

2) The person to be restrained committed it; and

3) The restraint order is reasonably required by the circumstances.

d) Each person ordered to pretrial restraint shall be promptly informed of:

1) The nature of the offenses for which the person is held;

2) The right to remain silent and that any statement made by the person may be used against the person; and

3) The right to retain civilian counsel at no expense to the State of Illinois and the right to request free assignment of trial defense counsel through Illinois National Guard trial defense services.

e) *This* Section *does not limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority* is *notified*. (Code Section 9(d))

Section 400.210 Confinement of Persons Charged with Offenses

a) *Any person subject to* the *Code charged with an offense under* the *Code may be ordered into arrest or confinement, as circumstances require. When any person subject to* the *Code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform the person of the specific wrong of which the person is accused and diligent steps shall be taken to try the person or to dismiss the charges and release the person.* (Code Section 10)

b) Requirements for Confinement. The commander shall direct the prisoner's release from pretrial confinement unless the commander believes, upon probable cause, that reasonable grounds exist that:

1) An offense triable by a court-martial has been committed;

2) The prisoner committed it;

3) Confinement is necessary because it is foreseeable that:

A) The prisoner will not appear at trial, pretrial hearing, or investigation; or

B) The prisoner will engage in serious criminal misconduct; and

4) Less severe forms of restraint are inadequate.

c) A person should not be confined as a mere matter of convenience or expedience. Some of the factors that should be considered under this subsection (c) are:

1) The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;

2) The weight of the evidence against the accused;

3) The accused's ties to the locale, including family, off-duty employment, financial resources, and length of residence;

4) The accused's character and mental condition;

5) The accused's service record, including any record of previous misconduct;

6) The accused's record of appearance at or flight from other pretrial investigations, trials and similar proceedings; and

7) The likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty.

d) Although the Illinois Military Rules of Evidence (Subpart F) are not applicable at this stage, the commander should judge the reliability of the information available. Before relying on the reports of others, the commander must have a reasonable belief that the information is believable and has a factual basis. The information may be received orally or in writing. Information need not be received under oath, but an oath may add to its reliability. A commander may examine the prisoner's personnel records and police records and may consider the recommendations of others.

e) Less serious forms of restraint must always be considered before pretrial confinement is approved.

f) Review of Confinement. No later than 48-hours after confinement is ordered, that confinement shall be reviewed by a military judge as a "neutral and detached officer" under RCM 305.

Section 400.215 Place of Confinement; Reports and Receiving of Prisoners

a) *If a person subject to* the *Code is confined before, during or after trial, confinement shall be in a county jail,* an Illinois *Department of Corrections* (DOC) *facility, or in a military confinement facility*. (Code Section 11(a))

b) *No person, sheriff or* DOC personnel *authorized to receive prisoners* under *subsection (a) may refuse to receive or keep any prisoner committed to the person's charge by a commissioned* SMF *officer* who *furnishes a statement, signed* by that *officer, of the offense charged or conviction obtained against the prisoner, unless otherwise authorized by law*. (Code Section 11(b))

c) *Every person authorized to receive prisoners pursuant to subsection (a) to whose charge a prisoner is committed shall, within 24 hours after that commitment, or as soon as the person is relieved from guard, report to the commanding officer of the prisoner the name of the prisoner, the offense charged against the prisoner, and the name of the person who ordered or authorized the commitment.* (Code Section 11(c))

d) Transportation from Confinement to Proceedings Under the Code. When a person is subject to pretrial restraint under the Code and this Manual, the person's constitutional right to appear at proceedings must be protected. Towards that end, a person confined under this Manual must be transported to and from courts of inquiry, arraignment, pretrial hearings, motions arguments, court-martial, sentencing, and any other legal proceeding at which the person has a right to attend, unless circumstances are such that the SMF is manifestly unable to provide for that attendance, or unless the person flees from proceedings. Transportation shall occur in the following manner:

1) The peace officers, correctional officers, agents, employees or service members tasked with transportation of prisoners at the county jail, a DOC facility, or military confinement facility at which the person is confined shall transport the person subject to the Code to and from any legal proceeding the person has a right to attend, unless circumstances are reasonably such that the peace officers, correctional officers, agents, employees or service members are manifestly unable to transport the person;

2) If the peace officers, correctional officers, agents, employees or service members are manifestly unable to transport the confined person, military

police shall transport the person to and from legal proceedings the person has a right to attend, unless circumstances are reasonably such that the military police officers are manifestly unable to transport the person; and

3) If the military police are manifestly unable to transport the person, the SMF may contract with a prisoner transportation service company to provide appropriate transportation services to and from any legal proceedings the person has a right to attend.

Section 400.220 Confinement with Enemy Prisoners Prohibited

No member of the SMF *may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces*. (Code Section 12)

Section 400.225 Punishment Prohibited Before Trial

No person, while being held for trial or awaiting a verdict, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against the person, nor shall the arrest or confinement imposed upon that person be any more rigorous than the circumstances required to insure the person's presence, but the person may be subjected to minor punishment during that period for infractions of discipline. (Code Section 13)

Section 400.230 Delivery of Offenders to Civil Authorities

a) *A person subject* to the *Code accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial or confinement*. (Code Section 14(a))

b) *When delivery under* this Section *is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender, after having answered to the civil authorities for the offense, shall, upon the request of competent military authority, be returned to the place of original custody for the completion of the person's sentence*. (Code Section 14(b))

c) The Adjutant General may authorize the delivery of a person pending court-martial proceedings under the Code to civil authorities for separate, unrelated offenses as alleged by the civil authority when presented with a warrant or similar court order for that person's arrest or delivery. The civil authority responsible for

obtaining the warrant or similar court order must provide or arrange delivery to the appropriate receiving agency and pay or arrange payment for any costs incurred during the course of that delivery.

d) The Adjutant General shall authorize the delivery of a person pending court-martial proceedings under the Code to civil authorities for non-military offenses that have been charged by the civil authorities and that arise from the same allegations of misconduct that caused the person's pending court-martial proceedings under the Code. In this instance, Code Section 2(b) shall apply.

e) If a commanding officer receives a warrant or other court order demanding delivery of a person to civil authorities, that warrant or other court order must be forwarded to the Staff Judge Advocate and the Adjutant General immediately and within no more than 24 hours.

f) If a commanding officer receives a warrant or other court order demanding delivery of a person to civil authorities at a time when the person is present on a duty status and not under arrest or confinement under the Code, the commanding officer will order the person detained and will immediately, and within no more than 24 hours, notify the Staff Judge Advocate and the Adjutant General for confirmation and authority to deliver the person to civil authorities.

g) Nothing in this Manual limits the authority of federal or State law enforcement officials to apprehend persons, whether or not subject to trial by court-martial, to the extent permitted by applicable statutes and other laws.

SUBPART C: PRELIMINARY INQUIRY, INVESTIGATIONS AND DISPOSITION OF OFFENSES

Section 400.300 Preliminary Inquiry Into Reported Offenses

a) Any person may report an offense subject to trial by court-martial. Ordinarily, any military authority that receives a report of an offense shall forward as soon as practicable the report and any accompanying information to the immediate commander of the suspect. Competent authority superior to that commander may direct otherwise.

b) Upon receipt of information that an SFM member is accused or suspected of committing an offense triable by court-martial, the immediate commander shall

make or cause to be made a preliminary inquiry into the charges or suspected offenses.

c) The preliminary inquiry may be informal, but should include an examination of the charges and an investigative report or other summary of evidence. The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to the aggravation, extenuation or mitigation of the conduct that the person is accused or suspect of committing.

d) If a person is accused or suspected of misconduct of a serious or complex nature, the commander should seek the assistance of civilian law enforcement personnel or military police in conducting any inquiry or further investigation.

e) The commanding officer should always consult with his or her judge advocate for appropriate legal guidance when notified of a potential offense, and use that legal guidance in directing the preliminary inquiry into the charges and offenses.

Section 400.305 Initial Disposition

a) Who May Dispose of Offenses. Subject to applicable military justice policies promulgated by proper authority, each commander has discretion to dispose of offenses by members of that command. Ordinarily, the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense.

b) A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

SUBPART D: COURTS-MARTIAL JURISDICTION AND COMPOSITION

Section 400.400 Courts-Martial Classified

The 3 kinds of courts-martial in the SMF *are*:

a) *general courts-martial, consisting of:*

1) *a military judge and not* fewer *than 5 members; or*

2) *only a military judge, if, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge, and the military judge approves;*

b) *special courts-martial, consisting of:*

1) *a military judge and not* fewer *than 3 members;* or

2) *only a military judge, if one has been detailed to the court and the accused, under the same conditions prescribed in* subsection (a)(2), *so requests; and*

c) *summary courts-martial consisting of one commissioned officer*. (Code Section 16)

Section 400.405 Jurisdiction of Courts-Martial

a) General. *Each component of the* SMF *has court-martial jurisdiction over all members of the particular component who are subject to* the *Code*. *Additionally, the Army and Air National Guard* SMF *have court-martial jurisdiction over all members subject* to the Code. (Code Section 17)

b) General Courts-Martial. *Subject to* subsection (a), *general courts-martial have jurisdiction to try persons subject to the Code for any offense made punishable by* the *Code, and may, under such limitations as the Governor may prescribe, adjudge any punishment not forbidden by* the Code. (Code Section 18)

c) Special Courts-Martial**.** *Subject to* subsection (a), *special courts-martial have jurisdiction to try persons subject to* the *Code for any offense made punishable by* the Code, *and may, under such limitations as the Governor may prescribe, adjudge any punishment not forbidden by* the *Code except dishonorable discharge, dismissal, confinement for more than one year, forfeiture of pay exceeding ⅔ pay per month, or forfeiture of pay for more than one year*. (Code Section 19)

d) Summary Courts-Martial

1) *Subject to* subsection (a), *summary courts-martial have jurisdiction to try persons subject to* the *Code, except officers, cadets and candidates, for any offense made punishable by* the *Code under such limitations as the Governor may prescribe*. (Code Section 20(a))

2) *No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if that person objects. If objection to trial by summary court-martial is made by an accused, trial by special or general court-martial may be ordered, as may be appropriate. Summary courts-martial may, under such limitations as the Governor may prescribe, adjudge any punishment not forbidden by the Code except dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, restriction to specified limits for more than 2 months, or forfeiture of more than ⅔ of one month's pay*. (Code Section 20(b))

Section 400.410 Who May Convene a Court-Martial

a) General Courts-Martial

1) *General courts-martial may be convened by:*

A) *The Governor; or*

B) *The Adjutant General.* (Code Section 22)

2) Any superior commander can withhold convening authority from a subordinate commander but shall not delegate his or her own authority. When authority is withheld, that action should be in clearly defined writing or permanent directive. The original letter withholding convening authority should be filed at Joint Force Headquarters, Office of the Staff Judge Advocate, 1301 N. MacArthur Blvd, Springfield IL 62702. A copy should also be kept by the judge advocate serving the commander whose authority has been withheld. Any such withholding remains in effect when a new commander is appointed to or assumes either command, until or unless expressly revoked by the superior commander. Any such action should be addressed by duty title and not by name.

b) Special Courts-Martial

1) *Special courts-martial may be convened by:*

A) *any person who may convene a general court-martial;*

B) *the Commander of the Illinois Army National Guard,* for *members of the Illinois Army National Guard, when empowered by the Adjutant General; or*

C) *the Commander of the Illinois Air National Guard,* for *members of the Illinois Air National Guard, when empowered by the Adjutant General.* (Code Section 23(a))

2) *If any officer listed in* subsection (b)(1) *is an accuser, the court shall be convened by superior competent authority and may, in any case, be convened by* that *superior authority if considered desirable by* that *authority*. (Code Section 23(b))

c) Summary Courts-Martial

1) *Summary courts-martial may be convened by:*

A) *any person who may convene a general or special court-martial;*

B) *the commanding officer or officer in charge of any other command when empowered by the Adjutant General*. (Code Section 24(a))

2) *When only one commissioned officer is present with a command or detachment, that officer shall be the summary court-martial of that command or detachment and shall hear and determine all summary court-martial cases. Summary courts-martial may, however, be convened in any case by superior competent authority if considered desirable by* that *authority*. (Code Section 24(b))

Section 400.415 Courts-Martial Composition

a) Members of a Court-Martial

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF PROPOSED RULES

1) *Any* SMF *commissioned officer is eligible to serve on all courts-martial for the trial of any persons subject to* the *Code.* (Code Section 25(a))

2) *Any* SMF *warrant officer is eligible to serve on general and special courts-martial for the trial of any person subject to* the *Code, other than a commissioned officer*. (Code Section 25(b))

3) *Any enlisted member of the* SMF *who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member subject to* the *Code, but that member shall serve as a member of a court only if, before the conclusion of a session called by the military judge under* Code Section 39(a) *prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial unless the membership includes at least ⅓ enlisted members, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If* enlisted *members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained. In this* subsection (a), *"unit" means any regularly organized body of the* SMF *not larger than a company, a squadron or a body corresponding to a company or squadron.* (Code Section 25(c))

4) *When it can be avoided, no person subject to* the *Code may be tried by a court-martial any member of which is junior to the accused in rank or grade.* (Code Section 25(d))

5) *When convening a court-martial, the convening authority shall detail as members* of the court-martial *such* SMF *members as, in the convening authority's opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No* SMF *member is eligible to serve as a member of a general or special court-martial when that member is the accuser or a witness, or has acted as investigating officer or as counsel in the same case.* (Code Section 25(e))

6) *Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating. The convening authority may delegate the authority under this* subsection (a)(6) *to a judge advocate or to any other principal assistant*. (Code Section 25(f))

7) Any delegation of authority to a judge advocate or principal assistant for purposes of excusal of members must be in writing, unless exigencies prevent written delegation. Verbal authorization shall be reduced to writing as soon as possible.

8) Duties. The members of a court-martial shall determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge. Each member has an equal voice and vote in deliberating upon and deciding all matters, except as otherwise specifically provided in this Manual. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material, except that the president of a special court-martial without a military judge may use these materials in open session.

9) President

A) Qualifications. The president of a court-martial shall be the detailed member senior in rank then serving.

B) Duties. The president shall have the same duties as the other members and shall also:

i) Preside over closed sessions of the members of the court-martial during their deliberations;

ii) Speak for the members of the court-martial when announcing the decision of the members or requesting instructions from the military judge; and

iii) In a special court-martial without a military judge, perform the duties assigned by this Manual to the military judge, except as otherwise expressly provided.

b) Military Judges

1) Qualifications to serve as a military judge are described in Code Sections 6 and 26. In addition to the mandatory qualifications delineated in Code Sections 6 and 26, the following factors may be considered when certifying an officer as a military judge:

A) Appropriate judicial decorum, civility and temperament;

B) Civilian judicial experience;

C) Military judicial experience;

D) Military legal experience;

E) Designation as judge advocate;

F) Reputation;

G) Familiarity with the Code and this Manual;

H) Completion of the active component Military Judges Course;

I) Knowledge of general criminal law and procedures;

J) Education, training and experience;

K) Familiarity with the customs, procedures and organization of the service branch of the accused; and

L) Any other relevant factors.

2) *In addition to the requirements noted* in Code Section 6(a), *a military judge shall be*:

A) *an active commissioned officer of an organized* SMF;

B) *a member in good standing of the bar of the highest court of a state or a member of the bar of a federal court for at least 5 years;* and

C) *certified as qualified for duty as a military judge by the senior force judge advocate* that is in the *same force as the accused*. (Code Section 26(b))

3) *When a military judge is not a member of the bar of the highest court of the state,* he or she *shall be deemed admitted pro hac vice, subject to filing a certificate with the senior force judge advocate in the same force as the accused, setting forth the qualifications* listed *in* subsection (b)(1). (Code Section 26(c))

4) *The military judge of a general or special court-martial shall be designated by the senior force judge advocate* in *the same force as the accused, or a designee, for detail by the convening authority. Neither the convening authority nor any staff member of the convening authority shall prepare or review any report concerning the effectiveness, fitness or efficiency of the military judge* that *relates to performance of duty as a military judge*. (Code Section 26(d))

5) *No person is eligible to act as military judge in a case if that person is the accuser or a witness, or has acted as investigating officer or a counsel in the same case*. (Code Section 26(e))

6) *The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor vote with the members of the court.* (Code Section 26(f))

c) Absent and Additional Members

1) *No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.* (Code Section 29(a))

2) *Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below 5 members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than the applicable minimum number of 5. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.* (Code Section 29(b))

3) *Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below 3 members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not* fewer *than 3 members. The trial shall proceed with the new members present as if no evidence had been introduced previously at the trial, unless a verbatim record of the evidence previously introduced before the members of the court, or a stipulation to that record, is read to the court in the presence of the military judge, the accused and counsel for both sides.* (Code Section 29(c))

4) *If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of* Code Section 16(1)(B) or (2)(B), *after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced, or a stipulation to that record is read in court in the presence of the new military judge, the accused, and counsel for both sides*. (Code Section 29(d))

Section 400.420 Trial Counsel and Defense Counsel

a) Detail of trial counsel and defense counsel shall be pursuant to Code Section 27. *Except as provided in* subsection (b), *trial counsel or defense counsel detailed for a general or special court-martial must be:*

1) *a judge advocate as defined* in Code Section 1(a)(10); and

2) *in the case of trial counsel, a member in good standing of the bar of the highest court of the state where the court-martial is held*. (Code Section 27(b))

b) *When a defense counsel is not a member of the bar of the highest court of* the *state, the defense counsel shall be deemed admitted pro hac vice, subject to filing a certificate with the military judge setting forth the qualifications that:*

1) the *counsel is:*

A) *a commissioned officer of the armed forces of the United States or a component thereof;*

B) *a member in good standing of the bar of the highest court of a state; and*

C) *certified as a judge advocate in the Judge Advocate General's Corps of the Army, Air Force, Navy or Marine Corps*; or

2) the counsel is *a judge advocate as defined in Code Section 1(a)(10)*. (Code Section 27(c))

c) Trial counsel or assistant trial counsel cannot be a person who was a convening authority, accuser or investigating officer. However, the trial counsel and assistant trial counsel could have provided advice to the convening authority, the accuser or the investigator.

d) The defense counsel shall not be in the chain of command of the court-martial members, president of the court-martial, or convening authority.

e) A trial or defense counsel from one military component may be assigned to a court-martial in a different component and then detailed by the convening authority.

f) Upon appointment of defense counsel, the convening authority will provide sufficient resources to ensure effective assistance of counsel. Defense counsel may be placed in an appropriate duty or training status in order to provide defense services.

g) Trial counsel will be placed in an appropriate duty or training status in order to provide prosecutorial services.

h) The accused has a right to retain civilian counsel to represent him or her at his or her own expense and at no cost to the State or the United States. Civilian counsel must comply with the requirements of Code Section 27.

Section 400.425 Reporters and Court Interpreters

The convening authority of a general or special court-martial or court of inquiry shall detail or employ qualified court reporters who shall record the proceedings of, and testimony taken before that court and may detail or employ interpreters who shall interpret for the court. (Code Section 28)

SUBPART E: PRETRIAL PROCEDURES

Section 400.500 Charges and Specifications

a) *Charges and specifications shall be signed by a person subject to the Code under oath before a commissioned officer authorized by* Code Section *136*(a) *to administer oaths and shall state that*:

1) *the signer has personal knowledge of, or has investigated, the matters set forth* in the charges and specifications; *and*

2) the charges and specifications *are true in fact to the best of the signer's knowledge and belief*. (Code Section 30(a))

b) *Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made in the interest of justice and discipline. The person accused shall be informed of the charges as soon as practicable.* (Code Section 30(b))

c) If a person subject to the Code commits a non-military offense, and that offense is an offense under both the law of the state where committed and under the law of another state, then the charges and specifications shall be drafted as violations of the law of the state where the offense was committed.

Section 400.505 Compulsory Self-Incrimination Prohibited

a) *No person subject to* the *Code may compel any person to incriminate* himself or herself, or *to answer any question the answer to which may tend to incriminate* that person. (Code Section 31(a))

b) *No person subject to* the *Code may interrogate or request any statement from an accused or a person suspected of an offense without first informing that person of the nature of the accusation and advising that person that the person does not have to make any statement regarding the offense of which the person is accused or suspected and that any statement made by the person may be used as evidence against the person in a trial by court-martial*. (Code Section 31(b))

c) *No person subject to* the *Code may compel any person to make a statement or produce evidence before any military court if the statement or evidence is not material to the issue and may tend to degrade* that *person*. (Code Section 31(c))

d) *No statement obtained from any person in violation of this* Section *or through* the *use of coercion, unlawful influence, or unlawful inducement may be received in evidence against* that *person in a trial by court-martial*. (Code Section 31(d))

Section 400.510 Pretrial Investigation

a) *No charge or specification may be referred to a general or special court-martial for trial until a thorough and impartial investigation of all matters set forth* in the charge or specification *has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation* of *the disposition* that *should be made of the case in the interest of justice and discipline*. (Code Section 32(a))

b) Who May Direct Investigation. Unless prohibited by applicable law or regulation, an investigation may be directed under the Code by any court-martial convening authority (see Section 400.410). That authority may also give procedural instructions not inconsistent with this Manual.

c) Investigating Officer. The commander directing an investigation under this Manual shall detail a judge advocate officer who is not the accuser to be the investigating officer. The investigating officer shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity.

d) Scope of Investigation. The investigating officer shall inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation of the disposition of the charges.

e) *The accused shall be advised of the charges against* him or her *and of the right to be represented by counsel at the investigation* (see Section 400.805). *At* the *investigation, full opportunity shall be given to the accused to cross-examine witnesses, if they are available, and to present anything the accused may desire* on *the accused's own behalf, either in defense or mitigation. The investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides. A copy shall be given to the accused*. (Code Section 32(b))

f) *If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination and presentation prescribed in subsection* (e), *no further investigation of that charge is necessary under this* Section *unless it is demanded by the accused after the accused is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in the accused's own behalf*. (Code Section 32(c))

g) *If evidence adduced in an investigation under this* Section *indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense* and make appropriate conclusions and recommendations as to disposition *without the accused having first been charged with the offense, if the accused is*:

1) *present at the investigation;*

2) *informed of the nature of each uncharged offense investigated; and*

3) *afforded the opportunities for representation, cross-examination and presentation prescribed in subsection* (e). (Code Section 32(d))

h) Witnesses. In general, any witness whose testimony would be relevant and not cumulative shall be produced if reasonably available. If not reasonably available,

the investigating officer may consider alternatives to testimony (see RCM 405g(4), incorporated by reference in Section 400.105).

i) Evidence. Subject to Section 400.700, evidence, including documents or physical evidence that is under the control of the government and that is relevant and not cumulative shall be produced if reasonably available. This evidence includes evidence requested by the accused if the request is timely. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay and effect on military operations of obtaining the evidence. If the evidence is not reasonably available, the investigating officer may consider alternatives to evidence as provided in RCM 405g(5), incorporated by reference in Section 400.105.

j) Procedure for Presentation of Evidence, Objections, Access by Spectators, and Presence of the Accused. The provisions of RCM 405(h), incorporated by reference in Section 400.105, shall apply.

k) Illinois Military Rules of Evidence. Subpart F, other than Sections 400.610, 400.615, 400.620, 400.625, 400.695 and 400.700, shall not apply in pretrial investigations under this Manual.

l) Report of Investigation. The provisions of RCM 405(j), incorporated by reference in Section 400.105, shall apply.

m) Waiver. The accused may waive an investigation under this Manual. In addition, failure to make a timely objection under this Manual, including an objection to the report, shall constitute a waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

n) *The requirements of this* Section *are binding on all persons administering* the *Code, but failure to follow them does not constitute jurisdictional error*. (Code Section 32(e))

Section 400.515 Forwarding and Disposition of Charges

a) Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Subpart K may dispose of charges. A superior competent

authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.

b) When a commander with authority to dispose of charges receives charges, that commander shall promptly determine what disposition will be made in the interest of justice and discipline, unless the authority to do so has been limited or withheld by superior competent authority. A commander may dispose of charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial the commander is empowered to convene.

c) *When a person is held for trial by general court-martial, the commanding officer shall, within 15 days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the person exercising general court-martial jurisdiction. If that is not practicable, the commanding officer shall report in writing to that person the reasons for delay*. (Code Section 33)

d) When charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.

e) Disposition by Summary Court-Martial Convening Authority. When in receipt of charges, a commander exercising summary court-martial jurisdiction may:

1) Dismiss any charges;

2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

3) Forward any charges to a superior commander for disposition;

4) Refer charges to a summary court-martial for trial.

f) Disposition by Special Court-Martial Convening Authority. When in receipt of charges, a commander exercising special court-martial jurisdiction may:

1) Dismiss any charges;

2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

3) Forward any charges to a superior commander for disposition;

4) Refer charges to a summary court-martial for trial; or

5) Unless otherwise directed by competent authority, direct a pretrial investigation under Code Section 32 and, if appropriate, refer any charges to a special court-martial for trial or forward the report of investigation with the charges to a superior commander for disposition.

Section 400.520 Advice of Judge Advocate and Referral for Trial

a) The convening authority shall refer the charges to the senior force judge advocate or designee for consideration and advice pursuant to Code Section 34. The judge advocate shall be provided with a complete copy of all documents, records or other evidence in the possession of the State and review all charges, together with the investigation and allied papers referenced in Code Section 33, as part of his or her legal review.

b) *Before any charge* or specification *may be referred for trial by general or special court-martial, the convening authority shall refer it to a judge advocate for consideration and advice*.

1) *The convening authority may not refer a specification under a charge to a general or special court-martial for trial unless the convening authority has been advised in writing by a judge advocate that:*

A) *the specification alleges an offense under* the *Code*;

B) *the specification is warranted by the evidence indicated in the report of investigation under* Code Section 32*, if there is such a report; and*

C) *a court-martial would have jurisdiction over the accused and the offense.* (Code Section 34(a))

2) The judge advocate shall also make to the convening authority a *recommendation of the action to be taken by the convening authority*. (Code Section 34(b)(2))

c) *The advice of the judge advocate under subsection* (b) *with respect to a specification under a charge shall include a written and signed statement by the judge advocate expressing conclusions with respect to each matter set forth in subsection* (b)(1). (Code Section 34(b)(1))

d) A copy of the advice of the judge advocate shall be referred to the accused if charges are referred to a general or special court-martial.

e) *If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made*. (Code Section 34(c))

Section 400.525 Action by Commander Exercising General Court-Martial Jurisdiction

a) Disposition. When in receipt of charges, a commander exercising general court-martial jurisdiction may:

1) Dismiss any charges;

2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

3) Forward any charges to a superior commander for disposition;

4) Refer charges to a summary court-martial;

5) Unless otherwise directed by competent authority, direct a pretrial investigation pursuant to Section 400.510, after which additional action under this Section may be taken; or

6) Refer charges to a special or general court-martial.

b) National Security Matters. When in receipt of charges the trial of which the commander exercising general court-martial jurisdiction finds would probably be

inimical to the prosecution of war or harmful to national security, that commander, unless otherwise directed by competent authority, shall determine whether trial is warranted. If trial is warranted, he or she shall determine whether the security considerations involved are paramount to trial. As the commander finds appropriate, the commander may dismiss the charges, authorize trial of them, or forward them to superior authority.

Section 400.530 Referral of Charges

a) General. Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial.

b) Any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor unless the power to do so has been withheld by superior competent authority.

c) An accuser may not refer charges to a general or special court-martial.

d) Basis for Referral. If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed, the accused committed that offense, and the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with subsection (e). The convening authority or judge advocate shall not be required, before charges are referred, to resolve legal issues, including objections to evidence, that may arise at trial.

e) General and Special Courts-Martial (see Code Section 34(a)). The convening authority may not refer a specification under a charge to a general or special court-martial unless:

1) There has been substantial compliance with the pretrial investigation requirements of Section 400.510; and

2) The convening authority has received the advice of the staff judge advocate required under Section 400.520. These requirements may be waived by the accused.

f) How Charges Shall be Referred

1) Order; Instructions. Referral shall be by the personal order of the convening authority. The convening authority shall include proper instructions in the order prescribed by RCM 601(e) (Discussion).

2) Joinder of Offenses. In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious offenses or minor offenses (see Section 400.1200) or both, regardless of whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements have been met concerning the additional charges. After arraignment of the accused upon the charges, no additional charges may be referred to the same trial without consent of the accused.

3) Joinder of Accused. Allegations against 2 or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The accused may be charged in one or more specifications, together or separately, and every accused need not be charged in each specification. Related allegations against 2 or more accused that may be proved by substantially the same evidence may be referred to a common trial.

g) Superior Convening Authorities. Except as otherwise provided in this Section, a superior convening authority may cause charges, whether or not referred, to be transmitted to the convening authority for further consideration, including, if appropriate, referral.

Section 400.535 Service of Charges

The trial counsel shall serve or caused to be served upon the accused a copy of the charges referred to trial. *No person may, against the person's objection, be brought to trial before a general court-martial within a period of 60 days after the service of charges upon the accused,*

or in a special court-martial, within a period of 45 days after the service of charges upon the accused. (Code Section 35) In computing periods, the date of service of charges and the date of trial are excluded; holidays and Sundays are included.

Section 400.540 Changes to Charges and Specifications

a) Minor Changes Defined. Minor changes in charges and specifications are any except those that add a party, offenses or a substantial matter not fairly included in those previously preferred, or that are likely to mislead the accused as to the offenses charged.

b) Minor Changes Before Arraignment. Any person forwarding, acting upon, or prosecuting charges on behalf of the State, except an investigating officer appointed under Section 400.510 may make minor changes to charges or specifications before arraignment.

c) Minor Changes After Arraignment. After arraignment, the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced.

d) Major Changes. Changes or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification affected is preferred anew.

Section 400.545 Withdrawal of Charges

a) Withdrawal. The convening authority or superior competent authority may, for any reason, cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced.

b) Referral of Withdrawn Charges. Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason (see RCM 604(b) (Discussion)). Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.

SUBPART F: THE ILLINOIS MILITARY RULES OF EVIDENCE

Section 400.600 General

a) Introduction

1) This Subpart F is applicable only to courts-martial. It is not applicable to nonjudicial punishment, administrative boards, promotion boards, medical retention boards, retention boards, or investigations and/or actions pertaining to nonpunitive or administrative punishment.

2) This Subpart is also maintained in a publication titled Illinois Military Rules of Evidence that is organized to coincide with the federal Military Rules of Evidence (MCM Part III). In this Subpart, the parenthetical cross-reference at the end of a body of text labeled Il. Mil. R. Evid. reflects the numbering system applied to these policies in that publication.

b) Scope of Rules

1) This Subpart applies to general and special court-martial proceedings.

2) In the absence of guidance in this Manual, courts-martial will apply Illinois State Rules of Evidence except as provided in subsection (b)(3). The reviewing courts may look to general military case law in applying these rules of evidence, with particular emphasis on military offenses.

3) Cases Arising in a State Other Than Illinois. In any court-martial arising out of conduct in a state other than Illinois, evidence derived from an investigation conducted in that State is not inadmissible under this Subpart, provided that the evidence was lawfully obtained and would be admissible under the laws of that state. (Il. Mil. R. Evid. 101)

c) Purpose. This Subpart shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. (Il. Mil. R. Evid. 102)

d) Rulings on the Evidence

1) Effect of Erroneous Ruling. Error may not be predicated upon a ruling that admits or excludes evidence unless the ruling materially prejudices a substantial right of a party and:

A) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

B) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. Once the military judge makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. The standard provided in this subsection (d)(1)(B) does not apply to errors involving requirements imposed by the Constitution of the United States or the Constitution of the State of Illinois as applied to members of the armed forces unless the error arises under this Subpart and this subsection (d)(1)(B) provides a standard that is more advantageous to the accused than the constitutional standard.

2) Record of Offer and Ruling. The military judge may add any other or further statement that shows the character of the evidence, the form in which it was offered, the objection made, and the ruling. The military judge may direct the making of an offer in question and answer form.

3) Hearing of Members. In a court-martial composed of a military judge and members, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members.

4) Plain Error. Nothing in this subsection (d) precludes taking notice of plain errors that materially prejudice substantial rights that were not brought to the attention of the military judge. (Il. Mil. R. Evid. 104)

e) Preliminary Questions

1) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations, the military judge is not bound by the rules of evidence, except those with respect to privileges.

2) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except when this Manual provides expressly to the contrary.

3) Hearing of Members. Except in cases tried before a special court-martial without a military judge, hearings on the admissibility of statements of an accused under Sections 400.610 through 400.630 shall, in all cases, be conducted out of the hearing of the members. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

4) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination with regard to other issues in the case.

5) Weight and Credibility. This subsection (e) does not limit the right of a party to introduce before the members evidence relevant to weight or credibility. (Il. Mil. R. Evid. 104)

f) Limited Admissibility
When evidence that is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly. (Il. Mil. R. Evid 105)

g) Remainder of, or Related, Writings or Recorded Statements

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement that, in fairness, should be considered contemporaneously with it. (Il. Mil. R. Evid. 106)

Section 400.605 Judicial Notice

a) Judicial Notice of Adjudicative Facts

1) Scope of Section. This Section governs only judicial notice of adjudicative facts.

2) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

A) generally known universally, locally, or in the area pertinent to the event; or

B) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

3) When Discretionary. The military judge may take judicial notice, whether requested or not. The parties shall be informed in open court when, without being requested, the military judge takes judicial notice of an adjudicative fact essential to establishing an element of the case.

4) When Mandatory. The military judge shall take judicial notice if requested by a party and supplied with the necessary information.

5) Opportunity To Be Heard. A party is entitled, upon timely request, to an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

6) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

7) Instructing Members. The military judge shall instruct the members that they may, but are not required to, accept as conclusive any matter judicially noticed. (Il. Mil. R. Evid. 201)

b) Judicial Notice of Law

1) Domestic Law. The military judge may take judicial notice of State and federal law. If the law is a fact that is of consequence to the determination of the action, the procedural requirements of subsections (a)(1) through (6) apply.

2) Foreign Law. A party who intends to raise an issue concerning the law of a foreign country must give reasonable written notice. The military judge, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under this Subpart. This determination is a ruling on a question of law. (Il. Mil. R. Evid. 201A)

Section 400.610 Self-Incrimination

a) Privilege Concerning Compulsory Self-Incrimination

1) General. The privileges against self-incrimination provided by the Fifth Amendment to the U.S. Constitution and Code Section 31 are applicable only to evidence of a testimonial or communicative nature. The privilege most beneficial to the individuals asserting the privilege shall be applied.

2) Standing

A) In General. The privilege of a witness to refuse to respond to a question the answer to which may tend to incriminate the witness is a personal one that the witness may exercise or waive at the discretion of the witness.

B) Judicial Advice. If a witness who is apparently uninformed of the privileges under this Section appears likely to incriminate himself or herself, the military judge should advise the witness of the right to decline to make any answer that might tend to incriminate the witness and that any self-incriminating answer the witness might

make can later be used as evidence against the witness. Counsel for any party or for the witness may request the military judge to so advise a witness provided that such a request is made out of the hearing of the witness and, except in a special court-martial without a military judge, the members. Failure to so advise a witness does not make the testimony of the witness inadmissible.

3) Exercise of the Privilege. If a witness states that the answer to a question may tend to incriminate him or her, the witness may not be required to answer unless facts and circumstances are such that no answer the witness might make to the question could have the effect of tending to incriminate the witness or that the witness has, with respect to the question, waived the privilege against self-incrimination. A witness may not assert the privilege if the witness is not subject to criminal penalty as a result of an answer by reason of immunity, running of the statute of limitations, or similar reason.

A) Immunity Generally. The minimum grant of immunity adequate to overcome the privilege is that which, under the proper authority, provides that neither the testimony of the witness nor any evidence obtained from that testimony may be used against the witness at any subsequent trial other than in a prosecution for perjury, false swearing, the making of a false official statement, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

B) Notification of Immunity or Leniency. When a prosecution witness before a court-martial has been granted immunity or leniency in exchange for testimony, the grant shall be reduced to writing and shall be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this subsection (a)(3)(B), the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required.

4) Waiver by a Witness. A witness who answers a question without having asserted the privilege against self-incrimination and thereby admits a self-incriminating fact may be required to disclose all information relevant to

that fact except when there is a real danger of further self-incrimination. This limited waiver of the privilege applies only at the trial in which the answer is given, does not extend to a rehearing or new or other trial, and is subject to Section 400.705(h)(2).

5) Waiver by the Accused. When an accused testifies voluntarily as a witness, the accused waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for 2 or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified. This waiver is subject to Section 400.705(h)(2).

6) Effect of Claiming the Privilege

A) Generally. The fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government.

B) On Cross-Examination. If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.

C) Pretrial. The fact that the accused, during official questioning and in exercise of rights under the Fifth Amendment to the U.S. Constitution or Code Section 31, remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated is inadmissible against the accused.

7) Instructions. When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may

give the instruction when the instruction is necessary in the interests of justice. (Il. Mil. R. Evid. 301)

b) Waiver of the Privilege Against Self-Incrimination

1) General Rule. After receiving applicable warnings under Section 400.625, a person may waive the rights described in that Section and in subsection (a) of this Section and make a statement. The waiver must be made freely, knowingly and intelligently. A written waiver is not required. The accused or suspect must acknowledge affirmatively that he or she understands the rights involved, affirmatively decline the right to counsel, and affirmatively consent to making a statement.

2) Counsel

A) If the right to counsel is applicable and the accused or suspect does not decline affirmatively the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel.

B) If an accused or suspect interrogated requests counsel, any subsequent waiver of the right to counsel obtained during custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that:

i) the accused or suspect initiated the communication leading to the waiver; or

ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver. (Il. Mil. R. Evid. 305A)

Section 400.615 Privilege Concerning Mental Examination of an Accused

a) General Rule. The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under Code Section 76a and any derivative evidence obtained through use of such a statement from being received

into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Section 400.625 at the examination.

b) Exceptions

1) There is no privilege under this Section when the accused first introduces into evidence such statements or derivative evidence.

2) An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence, but that testimony may not extend to statements of the accused except as provided in subsection (b)(1).

c) Release of Evidence. If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to Code Section 76a. If the defense offers statements made by the accused at that examination, the military judge may, upon motion, order the disclosure of those statements made by the accused and contained in the report as may be necessary in the interests of justice.

d) Noncompliance by the Accused. The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under Code Section 76a from presenting any expert medical testimony on any issue that would have been the subject of the mental examination.

e) Procedure. The privilege in this Section may be claimed by the accused only under the procedure set forth in Section 400.620(a) through (g) for an objection or a motion to suppress. (Il. Mil. R. Evid. 302)

Section 400.620 Confessions; Admissions; Statements

a) Definitions. As used in this Section:

1) "Confession" means an acknowledgment of guilt.

2) "Admission" means a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory.

3) "Involuntary" means "involuntary" if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the U.S. Constitution or Code Section 31, or through the use of coercion, unlawful influence or unlawful inducement.

b) General Rule. Except as provided in subsection (c), an involuntary statement or any derivative evidence from an involuntary statement may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this Section.

c) Exceptions

1) If the statement is involuntary only in terms of noncompliance with the requirements of Section 400.625(c) or (f), or the requirements concerning counsel under Section 400.610(b) and Section 400.625(d) and (e), this Section does not prohibit use of the statement to impeach by contradiction in the court testimony of the accused or the use of that statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

2) Evidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made.

3) Derivative Evidence. Evidence that is challenged under this subsection (c) as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

d) Procedure

1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused that are relevant to the case, known to the trial counsel, and within the control of the armed forces.

2) Motions and Objections

A) Motions to suppress or objections under this subsection (d)(2) or Section 400.615 or 400.625 to statements that have been disclosed shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

B) If the prosecution intends to offer against the accused a statement made by the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interests of justice.

C) If evidence is disclosed as derivative evidence under this subsection (d) prior to arraignment, any motion to suppress or objection under this subsection (d) or Section 400.615 or 400.625 shall be made in accordance with the procedure for challenging a statement under subsection (d)(2)(A). If that evidence has not been so disclosed prior to arraignment, the requirements of subsection (d)(2)(B) apply.

3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement, the military judge may make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

4) Rulings. A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at trial, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. When factual issues are involved in ruling upon the motion or objection, the military judge shall state essential findings of fact on the record.

5) Effect of Guilty Plea. Except as otherwise expressly provided in Code Section 45, a plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this subsection (d) with respect to that offense, regardless of whether raised prior to plea.

e) Burden of Proof. When an appropriate motion or objection has been made by the defense under subsection (d)(2), the prosecution has the burden of establishing the admissibility of the evidence. When a specific motion or objection has been required under subsection (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

1) In General. The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. When trial is by a special court-martial without a military judge, a determination by the president of the court that a statement was made voluntarily is subject to objection by any member of the court. When such an objection is made, it shall be resolved by a majority vote of the members. The court-martial shall be closed, and the members shall vote orally, beginning with the member junior in rank.

2) Weight of the Evidence. If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence with respect to the voluntariness of the statement and shall instruct the members to give such weight to the statement as it deserves under all the circumstances. When trial is by military judge without members, the military judge shall determine the appropriate weight to give the statement.

3) Derivative Evidence. Evidence that is challenged under this subsection (e) as derivative evidence may be admitted against the accused if the military

judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

f) Defense Evidence. The defense may present evidence relevant to the admissibility of evidence to which there has been an objection or motion to suppress under this Section. An accused may testify for the limited purpose of denying that the accused made the statement or that the statement was made voluntarily. Prior to the introduction of that testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subsection (f). When the accused testifies under this subsection (f), the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or making of a false official statement.

g) Corroboration. An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

1) Quantum of Evidence Needed. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as

corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

2) Procedure. The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced, but the military judge may admit evidence subject to later corroboration.

h) Miscellaneous

1) Degrading Questions. No person may be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade that person.

2) Oral Statements. A voluntary oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing cannot be made available.

3) Statements by One of Several Accused. When 2 or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accused may not be received in evidence unless all references inculpating an accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination. (Il. Mil. R. Evid. 306)

4) Completeness. If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.

5) Certain Admissions by Silence. A person's failure to deny an accusation of wrongdoing concerning an offense for which, at the time of the alleged failure, the person was under official investigation or was in confinement, arrest or custody does not support an inference of an admission of the truth of the accusation.

6) Refusal to Obey Order to Submit Body Substance. If an accused refuses a lawful order to submit for chemical analysis a sample of his or her blood,

breath, urine or other body substance, evidence of that refusal may be admitted into evidence on:

A) A charge of violating an order to submit that sample; or

B) Any other charge on which the results of the chemical analysis would have been admissible. (Il. Mil. R. Evid. 304)

Section 400.625 Warnings About Rights

a) General. A statement obtained in violation of this Section is involuntary and shall be treated under Section 400.620.

b) Definitions. As used in this Section:

1) "Person Subject to the Code" means a person acting as a knowing agent of a military unit or of a person subject to the Code.

2) "Interrogation" means any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of that questioning.

c) Warnings Concerning the Accusation, Right to Remain Silent, and Use of Statements. *A person subject to the Code* who is required to give warnings under Code Section 31 *may not interrogate or request any statement from an accused or a person suspected of an offense without first*:

1) *informing the accused or suspect of the nature of the accusation;*

2) *advising the accused or suspect that the accused or suspect has the right to remain silent;* and

3) *advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.* (Code Section 31(b))

d) Counsel Rights and Warnings

1) General. When evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the U.S. Constitution either is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel as provided in subsection (d)(2), to have counsel present at the interrogation, and to be warned of these rights prior to the interrogation if:

A) The interrogation is conducted by a person subject to the Code who is required to give warnings under Code Section 31 and the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way; or

B) The interrogation is conducted by a person subject to the Code acting in a law enforcement capacity, or the agent of such a person, the interrogation is conducted subsequent to the preferral of charges, and the interrogation concerns the offenses or matters that were the subject of the preferral of the charges.

2) Counsel. When a person entitled to counsel under this subsection (d) requests counsel, a judge advocate or an individual certified in accordance with Code Section 27(b) shall be provided by the State at no expense to the person and without regard to the person's indigency or lack of indigency before the interrogation may proceed. In addition to counsel supplied by the State, the person may retain civilian counsel at no expense to the State. Unless otherwise provided by regulations of the Adjutant General, an accused or suspect does not have a right under this subsection (d) to have military counsel of his or her own selection.

e) Presence of Counsel

1) Custodial Interrogation. Absent a valid waiver of counsel under Section 400.610(b), when an accused or person suspected of an offense is subjected to custodial interrogation under circumstances described in subsection (d)(1)(A), and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed.

2) Post-Preferral Interrogation. Absent a valid waiver of counsel under Section 400.610(b), when an accused or person suspected of an offense is subjected to interrogation under circumstances described in subsection (d)(1)(B), and the accused or suspect either requests counsel or has an appointed or retained counsel, counsel must be present before any subsequent interrogation concerning that offense may proceed.

f) Exercise of Rights

1) The Privilege Against Self-Incrimination. If a person chooses to exercise the privilege against self-incrimination under this Section, questioning must cease immediately.

2) The Right to Counsel. If a person subjected to interrogation under the circumstances described in subsection (d)(1) chooses to exercise the right to counsel, questioning must cease until counsel is present. (Il. Mil. R. Evid. 305)

Section 400.630 Standards for Nonmilitary Interrogations

a) General. When a person subject to the Code is interrogated by an official or agent of the United States, State of Illinois or any state, the person's entitlement to warnings about rights and the validity of any waiver of applicable rights will be determined by the principles of law generally recognized in the State of Illinois.

b) Warnings under Code Section 31 and the Fifth and Sixth Amendments to the U.S. Constitution are not required during an interrogation conducted outside of the U.S., including its possessions, by officials of a foreign government or their agents, unless the interrogation is conducted, instigated or participated in by SMF or U.S. military forces or their agents, or by officials or agents of U.S. federal, state or local jurisdictions. A statement obtained from a foreign interrogation is admissible unless the statement is obtained through the use of coercion, unlawful influence, or unlawful inducement (see MCM Appendix 22). An interrogation is not "participated in" by military personnel or their agents or by federal or state officials or agents merely because those officials or agents were present at an interrogation conducted in a foreign nation by officials of a foreign government or their agents, or because such a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign interrogation. (Il. Mil. R. Evid. 305B)

Section 400.635 Evidence Obtained from Unlawful Searches and Seizures

a) General. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

1) Objection. The accused makes a timely motion to suppress or an objection to the evidence under this Section; and

2) Adequate Interest. The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the U.S. Constitution as applied to members of the armed forces.

b) Exceptions

1) Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

2) Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if the unlawful search or seizure had not been made.

3) Evidence that was obtained as a result of an unlawful search or seizure may be used if:

A) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the authorization under Section 400.650(b)(4) or from a search warrant or arrest warrant issued by a competent civilian authority;

B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

c) Nature of Search or Seizure. A search or seizure is "unlawful" if it was conducted, instigated or participated in by:

1) Military Personnel. Military personnel or their agents and was in violation of the U.S. Constitution as applied to members of the armed forces, an Act of Congress applicable to trials by court-martial that requires exclusion of evidence obtained in violation of that Act or Sections 400.640 through 400.655 of this Manual;

2) Other Officials. Other officials or agents of the U.S. federal government or its possessions, and state or local government and was in violation of the U.S. Constitution, or is unlawful under the principles of law generally applied in the trial of criminal cases in the U.S. district courts involving a similar search or seizure; or

3) Officials of a Foreign Government. Officials of a foreign government or their agents and was obtained as a result of a foreign search or seizure that subjected the accused to gross and brutal maltreatment. A search or seizure is not "participated in" merely because a person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

d) Motions to Suppress and Objections

1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, that it intends to offer into evidence against the accused at trial.

2) Motion or Objection

A) When evidence has been disclosed under subsection (d)(1), any motion to suppress or objection under this subsection (d) shall be made by the defense prior to submission of a plea. In the absence of such a motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

B) If the prosecution intends to offer evidence seized from the person or property of the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

C) If evidence is disclosed as derivative evidence under this subsection (d) prior to arraignment, any motion to suppress or objection under this subsection (d) shall be made in accordance with the procedure for challenging evidence under subsection (d)(2)(A). If the evidence has not been so disclosed prior to arraignment, the requirements of subsection (d)(2)(B) apply.

3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

4) Rulings. A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. When factual issues are involved in ruling upon the motion or objection, the military judge shall state essential findings of fact on the record.

e) Burden of Proof

1) General. When an appropriate motion or objection has been made by the defense under subsection (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize or apprehend, a search warrant, or an arrest warrant.

2) Derivative Evidence. Evidence that is challenged under this Section as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence ultimately would have been obtained by lawful means even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize or apprehend, a search warrant, or an arrest warrant. Notwithstanding other provisions of this subsection (e)(2), an apprehension made in a dwelling in a manner that violates Code Section 7 does not preclude the admission into evidence of a statement of an individual apprehended provided that:

A) the apprehension was based on probable cause;

B) the statement was made subsequent to the apprehension at a location outside the dwelling; and

C) the statement was otherwise in compliance with this Section.

3) Specific Motions or Objections. When a specific motion or objection has been required under subsection (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

f) Defense Evidence. The defense may present evidence relevant to the admissibility of evidence as to which there has been an appropriate motion or objection under this Section. An accused may testify for the limited purpose of contesting the legality of the search or seizure giving rise to the challenged

evidence. Prior to the introduction of that testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subsection (f). When the accused testifies under this subsection (f), the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

g) Scope of Motion and Objections Challenging Probable Cause

1) General. If the defense challenges evidence seized pursuant to a search warrant or search authorization on the grounds that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to, or otherwise known by, the authorizing officer, except as provided in subsection (g)(2).

2) False Statements. If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion shall be granted unless the search is otherwise lawful under this Section.

h) Objections to Evidence Seized Unlawfully. If a defense motion or objection under this Section is sustained in whole or in part, the members may not be informed of that fact except that the military judge must instruct the members to disregard evidence.

i) Effect of Guilty Plea. Except as otherwise expressly provided in Code Section 45, a plea of guilty to an offense that results in a finding of guilty waives all issues

under the Fourth Amendment to the U.S. Constitution, this Section, and Sections 400.640, 400.645, 400.650(a) and (b), and 400.655 with respect to the offense, whether or not raised prior to plea. **(**Il. Mil. R. Evid. 311)

Section 400.640 Body Views and Intrusions

a) General. Evidence obtained from body views and intrusions conducted in accordance with this Section is admissible at trial when relevant and not otherwise inadmissible under this Section.

b) Visual Examination of the Body

1) Consensual. Visual examination of the unclothed body may be made with the consent of the individual subject to the inspection in accordance with Section 400.650(a)(5).

2) Involuntary

A) An involuntary display of the unclothed body, including a visual examination of body cavities, may be required only if conducted in reasonable fashion and authorized under one or more of:

i) Section 400.645, Section 400.650(a)(2) and (3) if there is a reasonable suspicion that weapons, contraband or evidence of crime is concealed on the body of the person to be searched;

ii) Section 400.650(a)(8) if reasonably necessary to maintain the security of the jail or similar facility or its personnel;

iii) Section 400.650(a)(7) and (9) and Section 400.650(b).

B) An examination of the unclothed body under this subsection (b) should be conducted whenever practicable by a person of the same sex as that of the person being examined; provided, however, that failure to comply with this requirement does not make an examination an unlawful search within the meaning of Section 400.635.

c) Intrusion Into Body Cavities. A reasonable nonconsensual physical intrusion into the mouth, nose and ears may be made when a visual examination of the body under subsection (b) is permissible. Nonconsensual intrusions into other body cavities may be made:

1) For Purposes of Seizure. When there is a clear indication that weapons, contraband or other evidence of crime is present, to remove weapons, contraband or evidence of crime discovered under subsection (b) and (c)(2) or under Section 400.655(d)(4)(C) if the intrusion is made in a reasonable fashion by a person with appropriate medical qualifications; or

2) For Purposes of Search. To search for weapons, contraband or evidence of crime if authorized by a search warrant or search authorization under Section 400.650(b) and conducted by a person with appropriate medical qualifications. Notwithstanding this subsection (c)(2), a search under Section 400.650(a)(8) may be made without a search warrant or authorization if such search is based on a reasonable suspicion that the individual is concealing weapons, contraband or evidence of crime.

d) Extraction of Body Fluids. Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a search authorization under Section 400.650(b) and conducted by a person with appropriate medical qualifications. Nonconsensual extraction of body fluids may be made without a warrant or authorization, notwithstanding Section 400.650(b)(7) only when there is clear indication that evidence of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of the evidence. Involuntary extraction of body fluids under this subsection (d) must be done in a reasonable fashion by a person with appropriate medical qualifications.

e) Other Intrusive Searches. Nonconsensual intrusive searches of the body made to locate or obtain weapons, contraband or evidence of crime and not within the scope of subsection (b) or (c) may be made only with a warrant or search authorization under Section 400.650(b) and only if the search is conducted in a reasonable fashion by a person with appropriate medical qualifications and does not endanger the health of the person to be searched. Compelling a person to ingest substances for the purposes of locating the weapon, contraband or evidence or to compel the bodily elimination of that property is a search within the meaning of this subsection (e). However, a person who is neither a suspect nor an accused

may not be compelled to submit to an intrusive search of the body for the sole purpose of obtaining evidence of crime.

f) Intrusions for Valid Medical Purposes. Nothing in this Section shall be deemed to interfere with the lawful authority of the SMF to take whatever action may be necessary to preserve the health of an SMF member. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Section 400.650(a).

g) Medical Qualifications. The Adjutant General may prescribe appropriate medical qualifications for persons who conduct searches and seizures under this Section. (Il. Mil. R. Evid. 312)

Section 400.645 Inspections and Inventories in the Armed Forces

a) For purposes of this Section:

1) "Inspection" means an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the unit, organization, installation, vessel, aircraft or vehicle. Inspections must be conducted in a reasonable fashion and, if applicable, must comply with Section 400.640. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected.

2) "Inventory" means a reasonable examination, accounting or other control measure used to account for or control property, assets or other resources. It is administrative and not prosecutorial in nature and, if applicable, the inventory must comply with Section 400.640. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this Section.

b) An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this Section.

c) Evidence obtained from lawful inspections and inventories in the SMF is admissible at trial when relevant and not otherwise inadmissible under this Section. An unlawful weapon, contraband or other evidence of a crime discovered during a lawful inspection or inventory may be seized and is admissible in accordance with this Section.

d) An inspection may include, but is not limited to:

1) an examination to determine and to ensure that the command is:

A) properly equipped;

B) functioning properly;

C) maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness; and

D) personnel are present, fit and ready for duty;

2) an order to produce body fluids, such as urine; and

3) an examination to locate and confiscate unlawful weapons and other contraband, provided subsection (b) is not violated. The prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this subsection (d)(3) if a purpose of an examination is to locate weapons or contraband and if:

A) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled;

B) specific individuals are selected for examination; or

C) persons examined are subjected to substantially different intrusions during the same examination. (Il. Mil. R. Evid. 313)

Section 400.650 Searches

a) Searches Not Requiring Probable Cause

1) General Rule. Evidence obtained from reasonable searches not requiring probable cause conducted pursuant to this subsection (a) is admissible at trial when relevant and not otherwise in admissible under this Section or the U.S. Constitution as applicable to the armed forces.

2) Border Searches. Border searches for customs or immigration purposes may be conducted when authorized by Act of Congress.

3) Searches Upon Entry or Exit from Illinois National Guard Installations, Aircraft and Vessels Abroad. In addition to the authority to conduct inspections under Section 400.645, the Adjutant General or any commander to whom he or she delegates authority, may authorize appropriate personnel to search persons or the property of those persons upon entry to or exit from the installation, enclave, aircraft or vessel to ensure the security, military fitness, or good order and discipline of the command. These searches may not be conducted at a time or in a manner contrary to an express provision of a treaty or agreement to which the United States is a party. Failure to comply with a treaty or agreement, however, does not render a search unlawful within the meaning of Section 400.645. A search made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceedings is not authorized by this Section.

4) Searches of Government Property. Government property may be searched under this Section unless the person to whom the property is issued or assigned has a reasonable expectation of privacy in the government property at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use, but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.

5) Consent Searches

A) General Rule. Searches may be conducted of any person or property with lawful consent.

B) Who May Consent. A person may consent to a search of his or her person or property, or both, unless control over that property has been given to another. A person may grant consent to search property when the person exercises control over that property.

C) Scope of Consent. Consent may be limited in any way by the person granting consent, including limitations in terms of time, place or property and may be withdrawn at any time.

D) Voluntariness. To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate that knowledge as a prerequisite to establishing a voluntary consent. Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.

E) Burden of Proof. Consent must be shown by clear and convincing evidence. The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of consent, but it does not affect the burden of proof.

6) Searches Incident to a Lawful Stop

A) Stops. A person authorized to apprehend under Code Section 7 and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

B) Frisks. When a lawful stop is performed, the person stopped may be frisked for weapons when that person is reasonably believed to be armed and presently dangerous. Contraband or evidence located in the process of a lawful frisk may be seized.

C) Motor Vehicles. When a person lawfully stopped is the driver or a passenger in a motor vehicle, the passenger compartment of the vehicle may be searched for weapons if the official who made the stop has a reasonable belief that the person stopped is dangerous and that the person stopped may gain immediate control of a weapon.

7) Searches Incident to a Lawful Apprehension. A person who has been lawfully apprehended may be searched.

A) Search for Weapons and Destructible Evidence. A search may be conducted for weapons or destructible evidence, in the area within the immediate control of a person who has been apprehended. The area within the person's "immediate control" is the area the individual searching could reasonably believe that the person apprehended could reach with a sudden movement to obtain the property; provided, that the passenger compartment of an automobile, and containers within the passenger compartment, may be searched as a contemporaneous incident of the apprehension of an occupant of the automobile, regardless whether the person apprehended has been removed from the vehicle.

B) Examination for Other Persons

i) When an apprehension takes place at a location in which other persons might be present who might endanger those conducting the apprehension and others in the area of the apprehension, a reasonable examination may be made of the general area in which the other persons might be located. A reasonable examination under this subsection (a)(7)(B) is permitted if the apprehending officials have a reasonable suspicion based on specific and articulable facts

that the area to be examined harbors an individual posing a danger to those in the area of the apprehension.

ii) Apprehending officials may, incident to apprehension, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of apprehension from which an attack could be immediately launched.

8) Searches Within Jails, Confinement Facilities, or Similar Facilities. Searches within jails, confinement facilities, or similar facilities may be authorized by persons with authority over the institution.

9) Emergency Searches to Save Life or for Related Purposes. In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of medical aid, or to prevent immediate or ongoing personal injury.

10) Searches of Open Fields or Woodlands. A search of open fields or woodlands is not an unlawful search within the meaning of Section 400.635.

11) Other Searches. A search of a type not otherwise included in this Section and not requiring probable cause under subsection (b) may be conducted when permissible under the U.S. Constitution as applied to members of the armed forces. (Il. Mil. R. Evid. 314)

b) Probable Cause Searches

1) General Rule. Evidence obtained from searches requiring probable cause conducted in accordance with this subsection (b) is admissible at trial when relevant and not otherwise inadmissible under this Section.

2) Definitions. As used in this subsection (b):

A) "Authorization to Search" means an express permission, written or oral, issued by competent military authority to search a person or

an area for specified property or evidence or for a specific person and to seize that property, evidence or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

B) "Search Warrant" means an express permission to search and seize issued by competent civilian authority.

3) Scope of Authorization. A search authorization may be issued under this subsection (b) for a search of:

A) Persons. The person of anyone subject to military law or the law of war wherever found;

B) Military Property. Military property of the United States or the Illinois National Guard, or nonappropriated fund activities of U.S. armed forces, wherever located;

C) Persons and Property Within Military Control. Persons or property situated on or in a military installation, encampment, vessel, aircraft, vehicle, or any other location under military control, wherever located.

4) Power to Authorize. Authorization to search pursuant to this subsection (b) may be granted by an impartial individual in the following categories:

A) Commander. A commander or other person serving in a position designated by the Adjutant General as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war; or

B) Military Judge. A military judge or magistrate if authorized under regulations prescribed by the Adjutant General. An otherwise impartial authorizing official does not lose the character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search

authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when these previous authorization is similar in intent or function to a pretrial authorization made pursuant to the laws of the jurisdiction where the search is to be conducted.

5) Power to Search. Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this subsection (b) or a search would otherwise be proper under subsection (b)(7).

6) Basis for Search Authorizations

A) Probable Cause Requirement. A search authorization issued under this subsection (b) must be based upon probable cause.

B) Probable Cause Determination. Probable cause to search exists when there is a reasonable belief that the person, property or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this subsection (b)(6)(B) shall be based upon any or all of the following:

i) Written statements communicated to the authorizing officer;

ii) Oral statements communicated to the authorizing official in person, via telephone or by other appropriate means of communication; or

iii) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion.

7) Exigencies. A search warrant or search authorization is not required under this subsection (b) for a search based on probable cause when:

A) Insufficient Time. There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction or concealment of the property or evidence sought;

B) Lack of Communications. There is a reasonable military operational necessity that is reasonably believed to prohibit or prevent communication with a person empowered to grant a search warrant or authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction or concealment of the property or evidence sought;

C) Search of Operable Vehicle. An operable vehicle is to be searched, except in the circumstances in which a search warrant or authorization is required by the U.S. Constitution, the Code or this Manual; or

D) Not Required by the Constitution. A search warrant or authorization is not otherwise required by the U.S. Constitution as applied to members of the armed forces. For purpose of this subsection (b)(7), a vehicle is "operable" unless a reasonable person would have known at the time of search that the vehicle was not functional for purposes of transportation.

8) Execution

A) Notice. If the person whose property is to be searched is present during a search conducted pursuant to a search authorization granted under this subsection (b), the person conducting the search should, when possible, notify the property holder of the act of authorization and the general substance of the authorization. The notice may be made prior to or contemporaneously with the search. Failure to provide notice does not make a search unlawful within the meaning of Section 400.635.

B) Inventory. Under regulations prescribed by the appropriate authority, and with such exceptions as may be authorized by the U.S. Secretary of Defense, an inventory of the property seized shall be made at the time of a seizure under this subsection (b) or as soon as practicable thereafter. At an appropriate time, a copy of the inventory shall be given to a person from whose possession or premises the property was taken. Failure to make an inventory, furnish a copy of the inventory, or otherwise comply with this subsection (b)(8)(B) does not render a search or seizure unlawful within the meaning of Section 400.635.

C) Foreign Searches. Execution of a search authorization outside the United States and within the jurisdiction of a foreign nation should be in conformity with existing agreements between the United States and the foreign nation. Noncompliance with such an agreement does not make an otherwise lawful search unlawful.

D) Search Warrants. Any civilian or military criminal investigator authorized to request search warrants pursuant to applicable law or regulation is authorized to serve and execute search warrants. The execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the U.S. Constitution or an applicable Act of Congress. (Il. Mil. R. Evid. 315)

Section 400.655 Seizures

a) General Rule. Evidence obtained from seizures conducted in accordance with this Section is admissible at trial if the evidence was not obtained as a result of an unlawful search and if the evidence is relevant and not otherwise inadmissible under this Section.

b) Seizure of Property. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband or evidence of crime, or might be used to resist apprehension or to escape.

c) Apprehension. Apprehension is governed by Code Section 7.

d) Seizure of Property or Evidence

1) Abandoned Property. Abandoned property may be seized without probable cause and without a search warrant or search authorization. The seizure may be made by any person.

2) Consent. Property or evidence may be seized with consent consistent with the requirements applicable to consensual searches under Section 400.650(a).

3) Government Property. Government property may be seized without probable cause and without a search warrant or search authorization by any person listed in subsection (e), unless the person to whom the property is issued or assigned has a reasonable expectation of privacy, as provided in Section 400.650(a)(4), at the time of the seizure.

4) Other Property. Property or evidence not included in subsections (d)(1) through (3) may be seized for use in evidence by any person listed in subsection (e) if:

A) Authorization. The person is authorized to seize the property or evidence by a search warrant or a search authorization under Section 400.650(b);

B) Exigent Circumstances. The person has probable cause to seize the property or evidence and, under Section 400.650(b)(7), a search warrant or search authorization is not required; or

C) Plain View. The person, while in the course of otherwise lawful activity, observes in a reasonable fashion property or evidence that the person has probable cause to seize.

5) Temporary Detention. Nothing in this Section shall prohibit temporary detention of property on less than probable cause when authorized under the U.S. Constitution.

e) Power to Seize. Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police or shore patrol, or individual designated by proper authority to perform guard or

police duties, or any agent of any such person, may seize property pursuant to this Section.

f) Other Seizures. A seizure of a type not otherwise included in this Section may be made when permissible under the U.S. and Illinois Constitutions, as applied to members of the armed forces. (Il. Mil. R. Evid. 316)

Section 400.660 Eyewitness Identification

a) Eyewitness identification in courts-martial shall be conducted in accordance with Section 107A-2 of the Illinois Code of Criminal Procedure (CCP).

b) When the Section 107A-2 uses the following terms, for the purposes of this Manual those terms shall have meanings ascribed in this subsection (b).

1) CCP Section 107A-2(b) requires law enforcement to adopt written guidelines for determining when simultaneous or sequential lineups shall be conducted. For purposes of this Manual, the NGIL-JA, in coordination with civilian law enforcement, will develop those guidelines.

2) References in CCP Section 107A-2(i) to "State's Attorney" shall be considered under this Manual to be references to the "government's counsel".

3) References in CCP Section 107A-2 to "the court" shall be read as "military judge".

Section 400.665 Relevant Evidence

a) Definition. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (Il. Mil. R. Evid. 401)

b) General Admissibility of Relevant Evidence

1) All relevant evidence is admissible, except as otherwise provided by law.

2) Evidence that is not relevant is not admissible. (Il. Mil. R. Evid. 402)

c) Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (Il. Mil. R. Evid. 403)

Section 400.670 Character Evidence; Crimes or Other Acts

a) Character Evidence

1) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with that person's character on a particular occasion, except:

A) Character of the Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut that evidence;

B) Subject to the Limitations Imposed by Section 115-7 of the Code of Illinois Criminal Procedure:

i) evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut that allegation; or

ii) evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide or battery case to rebut evidence that the alleged victim was the first aggressor.

C) Evidence of the character of a witness, as provided in Section 400.705(g), (h) and (i).

2) Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity with that character, except as provided by Sections 115-7.3, 115-7.4 and 115-20 of the Code of Criminal Procedure. The evidence may be admissible for

other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

3) When the prosecution intends to offer evidence under subsection (a)(2), it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial or during trial if the military judge excuses pretrial notice on good cause shown. (Il. Mil. R. Evidence 404)

b) Admissible Methods of Proving Character

1) Definitions. For purposes of this subsection (b), the following definitions apply.

A) "Community", in the SMF, means post, camp, base, ship, station, unit or other military organization, regardless of size.

B) "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. (Il. Mil. R. Evid. 405)

2) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.

3) In cases in which character or a trait of character of a person is an essential element of the charge, claim or defense, proof may also be made of specific instances of that person's conduct.

4) In criminal homicide or battery cases, when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor, proof may also be made of specific instances of the alleged victim's prior conduct.

5) The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subsection (b)(5), the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the

accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other written statement, it would otherwise be admissible under this Subpart. (Il. Mil. R. Evid. 405)

Section 400.675 Habit and Routine Practice

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. (Il. Mil. R. Evid. 406)

Section 400.680 Subsequent Remedial Measures

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This Section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as:

a) proving ownership, control or feasibility of precautionary measures, if controverted; or

b) impeachment. (Il. Mil. R. Evid. 407)

Section 400.685 Compromise Offers; Offers of Reimbursement; Pleas

a) Compromise

1) Prohibited Uses of Evidence. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of, a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

A) Furnishing, offering or promising to furnish, or accepting, offering or promising to accept, a valuable consideration in compromising or attempting to compromise the claim; and

B) Conduct or statements made in the compromise negotiations regarding the claim.

2) Permitted Uses of Evidence

A) This Section:

i) does not require the exclusion of evidence otherwise discoverable merely because it is presented in the course of settlement negotiations; and

ii) does not require exclusion if the evidence is offered for purposes not prohibited by subsection (a)(1).

B) Examples of permissible purposes include proving a witness' bias or prejudice; negating an assertion of undue delay; establishing bad faith and proving an effort to obstruct a criminal investigation or prosecution. (Il. Mil. R. Evid. 408)

b) Offers to Pay Medical and Similar Expenses
In addition to the provisions of Section 8-1901 of the Code of Civil Procedure, evidence of furnishing, promising to pay, or offering to pay medical, hospital or similar expenses resulting from an injury is not admissible to prove liability for the injury. (Il. Mil. R. Evid. 409)

c) Pleas, Plea Discussions and Related Statements

1) Definitions

A) "Statement Made in the Course of Plea Discussions" means a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial.

B) "On the Record" means the written statement submitted by the accused in furtherance of a request for disposition.

2) Except as otherwise provided in this Section, evidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:

A) a plea of guilty that was later withdrawn;

B) a plea of nolo contendere;

C) any statement made in the course of any judicial inquiry regarding either of the pleas is subsections (c)(2)(A) and (B); or

D) any statement made in the course of plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the government that do not result in a plea of guilty or that result in a plea of guilty later withdrawn. However, such a statement is admissible:

i) in any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement should, in fairness, be considered contemporaneously; or

ii) in a court-martial proceeding for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel. (Il. Mil. R. Evid. 410)

Section 400.690 Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. The military judge may admit this evidence for another purpose, such as proving witness bias or prejudice or proving agency, ownership or control or bias or prejudice of a witness. (Il. Mil. R. Evid. 411)

Section 400.695 Admissibility of Prior Sexual Activity and Offenses

a) Admissibility

1) When an accused is charged with *predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, or criminal transmission of HIV, and in prosecutions for battery/aggravated battery* that involve *sexual penetration or sexual conduct*, evidence of *the prior sexual activity or the reputation of the alleged victim or corroborating witness is inadmissible except*:

   A) *as evidence concerning the past sexual conduct of the alleged victim or corroborating witness under Section 115-7.3 of* the *Code* of Criminal Procedure *with the accused when* the *evidence is offered by the accused upon the issue of whether the alleged victim or corroborating witness consented to the sexual conduct with respect to which the offense is alleged; or*

   B) *when constitutionally required to be admitted.*

2) *No evidence admissible under this Section shall be introduced unless ruled admissible by the* military *judge after an offer of proof has been made at a hearing to be held in camera in order to determine whether the defense has evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. The offer of proof shall include reasonably specific information as to the date, time and place of the past sexual conduct between the alleged victim or corroborating witness and the* accused.

3) *Unless the* military judge *finds that reasonably specific information as to* the *date, time or place, or some combination thereof, has been offered as to prior sexual activity with the* accused, *counsel for the* accused *shall be ordered to refrain from inquiring into prior sexual activity between the alleged victim or corroborating witness and the* accused.

4) *The* military judge *shall not admit evidence under this* Section *unless* he or she *determines at the hearing that the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice.*

5) *The evidence shall be admissible at trial to the extent an order made by the* military judge *specifies the evidence that may be admitted and the*

areas with respect to which the alleged victim or corroborating witness may be examined or cross-examined. [725 ILCS 5/115-7]

6) The military judge *may not order mental examination of a sex victim. Except when explicitly authorized by* the *Code of Criminal Procedure or by the Rules of the Supreme Court of Illinois, no* military judge *may require or order a witness who is the victim of an alleged sex offense to submit to or undergo either a psychiatric or psychological examination.* [725 ILCS 5/115-7.1]

7) Pursuant to Section 115-7.2 of the Code of Criminal Procedure, *in a prosecution for an illegal sexual act perpetrated upon a victim, testimony by an expert, qualified by the* military judge *relating to any recognized and accepted form of post-traumatic stress syndrome shall be admissible as evidence*. [725 ILCS 5/115-7.2] (Il. Mil. R. Evid. 412)

b) Similar Offenses

1) Evidence in Certain Cases. In a court-martial for an offense set forth in Section 115-7.3 of the Code of Criminal Procedure, or that of an identical or closely related offense under the law of the state where the offense occurred, evidence of the defendant's commission of another offense or offenses set forth in Section 115-7.3 is admissible, as provided in Section 115-7.3.

2) Evidence in Domestic Violence Cases. In a court-martial for an offense related to domestic violence as set forth in Section 115-7.4 of the Code of Criminal Procedure, to include that of a related offense under the law of the state where the offense occurred, evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, as provided in Section 115-7.4.

3) Evidence of Prior Convictions. In a criminal case for the type of offenses set forth in Section 115-20 of the Code of Criminal Procedure, evidence of the defendant's conviction for an offense set forth in that Section is admissible when the victim is the same person who was the victim of the previous offense that resulted in the conviction of the defendant, as provided in Section 115-20.

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF PROPOSED RULES

Section 400.700 Privilege

a) General

1) A person may not claim a privilege with respect to any matter except as required by or provided for in:

A) The U.S. Constitution as applied to members of the armed forces;

B) An Act of Congress applicable to trials by courts-martial;

C) This Manual; or

D) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of those principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Code or this Manual.

2) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

A) Refuse to be a witness;

B) Refuse to disclose any matter;

C) Refuse to produce any object or writing; or

D) Prevent another from being a witness or disclosing any matter or producing any object or writing.

3) The term "person" includes an appropriate representative of the federal government, a state or political subdivision thereof, or any other entity claiming to be the holder of a privilege. Including any other provision of this Section, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity. (Il. Mil. R. Evid. 501)

b) Lawyer-Client Privilege

1) Definitions. As used in this Section:

A) "Client" means a person, public officer, corporation, association, organization or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

B) "Confidential Communication" or "Communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

C) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law, or a member of the armed forces detailed, assigned or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding. The term "lawyer" does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist as defined in Code Section 1, unless the member:

i) is detailed, assigned or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding;

ii) is authorized by the armed forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces; or

iii) is authorized to practice law and render professional legal services during off-duty employment.

D) "Representative" means a lawyer or a person employed by or assigned to assist a lawyer in providing professional legal services.

2) General Rule of Privilege. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications made for the purpose of facilitating the rendition of professional legal services:

A) to the client;

B) between the client or the client's representative and the lawyer or the lawyer's representative;

C) between the lawyer and the lawyer's representative;

D) by the client or the client's lawyer to a lawyer representing another in a matter of common interest;

E) between representatives of the client or between the client and a representative of the client; or

F) between lawyers representing the client.

3) Who May Claim the Privilege. The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence. The lawyer or the lawyer's representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

4) Exceptions. There is no privilege under this Section in the following circumstances:

A) Crime or Fraud: If the communication clearly contemplated the future commission of a fraud or crime, or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

B) Claimants Through Same Deceased Client: As to a communication relevant to an issue between parties who claim, through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

C) Breach of Duty by Lawyer or Client: As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

D) Document Attested to by Lawyer: As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

E) Joint Clients: As to a communication relevant to a matter of common interest between 2 or more clients, if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients. (Il. Mil. R. Evid. 502)

c) Communications to Clergy

1) Definitions. As used in this subsection (c):

A) "Clergyman" means a minister, priest, rabbi, chaplain or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

B) "Clergyman's Assistant" means a person employed by or assigned to assist a clergyman in his or her capacity as a spiritual advisor.

C) "Confidential Communication" or "Communication" means a communication made to a clergyman in the clergyman's capacity as a spiritual adviser, or to a clergyman's assistant in the assistant's official capacity, that is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

2) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant if that communication is made either as a formal act of religion or as a matter of conscience.

3) Who May Claim the Privilege. The privilege may be claimed by the person, by the guardian or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary. (Il. Mil. R. Evid. 503)

d) Husband-Wife Privilege

1) Definitions. As used in this subsection (d):

A) "Confidential Communication" or "Communication" means a confidential communication made privately by any person to the spouse of the person and is not intended to be disclosed to third persons other than those reasonably necessary for transmission of the communication.

B) "A Child of Either" includes not only a biological child, adopted child, or ward of one of the spouses, but also includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this subsection (d) only, a child is:

i) an individual under the age of 18; or

ii) an individual over the age of 18 with a mental disability that results in the individual functioning at the capacity of a person under the age of 18.

C) "Temporary Physical Custody" includes instances in which a parent entrusts his or her child to another. There is no minimum amount of time necessary to establish temporary physical custody,

nor must there be a written agreement. Rather, the focus is on the parent's agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances in which a parent entrusts another with the care of his or her child for recurring care or during absences due to temporary duty or deployments.

2) Spousal Incapacity. A person has a privilege to refuse to testify against his or her spouse.

3) Confidential Communication Made During Marriage

A) General Rule of Privilege. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

B) Who May Claim the Privilege. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused, regardless of whether the spouse who made the communication objects to its disclosure.

4) Exceptions

A) Spousal Incapacity Only. There is no privilege under subsection (d)(2) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

B) Spousal Incapacity and Confidential Communications. There is no privilege under subsection (d)(2) or (3):

i) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child

of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

ii) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and:

- with respect to the privilege in subsection (d)(2), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or

- with respect to the privilege in subsection (d)(3), the relationship was a sham at the time of the communication;

iii) In proceedings in which a spouse is charged, in accordance with Code Section 133 or 134:

- with importing the other spouse as an alien for prostitution or other immoral purposes in violation of 8 USC 1328;

- with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of 18 USC 2421 through 2424; or

- with violation of other similar statutes under which the privilege may not be claimed in the trial of criminal cases in the United States district courts; or

iv) When both parties have been substantial participants in illegal activity, communications between the spouses during the marriage regarding the illegal activity in which they have jointly participated. (Il. Mil. R. Evid. 504)

e) Classified Information

1) Definitions. As used in this subsection (e):

A) "Classified Information" means:

i) any information or material that has been determined by the U.S. government, pursuant to an executive order, statute or regulations, to require protection against unauthorized disclosure for reasons of national security; and

ii) any restricted data, as defined in Section 2014(6) of the federal Atomic Energy Act of 1954.

B) "National Security" means the national defense and foreign relations of the United States.

2) General Rule of Privilege. Classified information is privileged from disclosure if disclosure would be detrimental to the national security. As with other rules of privilege, this rule applies to all stages of the proceedings.

3) Who May Claim the Privilege. The privilege may be claimed by the head of the concerned executive or military department or government agency based on a finding that the information is properly classified and that disclosure would be detrimental to the national security. A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his or her behalf. The authority of the witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

4) Action Prior to Referral of Charges. Prior to referral of charges, the convening authority shall respond in writing to a request by the accused for classified information if the privilege in this subsection (e) is claimed for that information. The convening authority may:

A) Delete specified items of classified information from documents made available to the accused;

B) Substitute a portion or summary of the information for the classified documents;

C) Substitute a statement admitting relevant facts that the classified information would tend to prove;

D) Provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused; or

E) Withhold disclosure if action under subsections (e)(4)(A) through (D) cannot be taken without causing identifiable damage to the national security. Any objection by the accused to withholding of information or to the conditions of disclosure shall be raised through a motion for appropriate relief at a pretrial session.

5) Pretrial Session. At any time after referral of charges and prior to arraignment, any party may move for a session under Code Section 39(a) to consider matters relating to classified information that may arise in connection with the trial. Following such motion or sua sponte, the military judge promptly shall hold a session under Code Section 39(a) to establish the timing of requests for discovery, the provision of notice under subsection (e)(8), and the initiation of the procedure under subsection (e)(9). In addition, the military judge may consider any other matters that relate to classified information or that may promote a fair and expeditious trial.

6) Action After Referral of Charges. If a claim of privilege has been made under this subsection (e) with respect to classified information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter shall be reported to the convening authority. The convening authority may:

A) institute action to obtain the classified information for use by the military judge in making a determination under subsection (e)(9);

B) dismiss the charges;

C) dismiss the charges or specifications, or both, to which the information relates; or

D) take such other action as may be required in the interests of justice. If, after a reasonable period of time, the information is not provided to the military judge in circumstances in which proceeding with the case without that information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates.

7) Disclosure of Classified Information to the Accused

A) Protective Order. If the government (i.e., the prosecution) agrees to disclose classified information to the accused, the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of the protective order may include provisions:

i) Prohibiting the disclosure of the information, except as authorized by the military judge;

ii) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

iii) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

iv) Requiring appropriate security clearances for persons having a need to examine the information in connection with the preparation of the defense. All persons requiring security clearances shall cooperate with investigatory personnel in any investigations that are necessary to obtain a security clearance.

v) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

vi) Regulating the making and handling of notes taken from material containing classified information; or

vii) Requesting the convening authority to authorize the assignment of government security personnel and the provisions of government storage facilities.

B) Limited Disclosure

i) The military judge, upon motion of the government, shall authorize the deletion of specified items of classified information from documents to be made available to the defendant, the substitution of a portion or summary of the information for the classified documents, or the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial.

ii) The government's motion and any materials submitted in support of the motion shall, upon request of the government, be considered by the military judge in camera and shall not be disclosed to the accused.

C) Disclosure of Certain Statements Previously Made by a Witness

i) Scope. After a witness called by the government has testified on direct examination, the military judge, on motion of the accused, may order production of statements in the possession of the government under Code Section 46. This provision does not preclude discovery or assertion of a privilege otherwise authorized under this Manual.

ii) Closed Session. If the privilege in this subsection (e) is invoked during consideration of a motion under Code Section 46, the government may deliver the statement for the inspection only by the military judge in camera and may provide the military judge with an affidavit identifying the portions of the statement that are classified and the

basis for the classification assigned. If the military judge finds that disclosure of any portion of the statement identified by the government as classified could reasonably be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute or regulation and that such portion of the statement is consistent with the witness' testimony, the military judge shall excise that portion from the statement. With the material excised, the military judge shall direct delivery of the statement to the accused for use by the accused. If the military judge finds that the portion of the statement is inconsistent with the witness' testimony, the government may move for a proceeding under subsection (e)(9).

D) Record of Trial. If, under this subsection (e), any information is withheld from the accused, the accused objects to that withholding, and the trial is continued to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents, as well as the government's motion and any materials submitted in support of the motion, shall be sealed and attached to the record of trial as an appellate exhibit. This material shall be made available to reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

8) Notice of the Accused's Intentions to Disclose Classified Information

A) Notice by the Accused. If the accused reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a court-martial proceeding, the accused shall notify the trial counsel in writing of that intention and file a copy of the notice with the military judge. The notice shall be given within the time specified by the military judge under subsection (e)(5) or, if no time has been specified, prior to arraignment of the accused.

B) Continuing Duty to Notify. Whenever the accused learns of classified information not covered by a notice under subsection (e)(8)(A) that the accused reasonably expects to disclose at any

proceeding, the accused shall notify the trial counsel and the military judge in writing as soon as possible thereafter.

C) Content of Notice. The notice required by this subsection (e)(8) shall include a brief description of the classified information. The description, to be sufficient, must be more than a mere general statement of the areas about which evidence may be introduced. The accused must state, with particularity, which items of classified information he or she reasonably expects will be revealed by his or her defense.

D) Prohibition Against Disclosure. The accused may not disclose any information known or believed to be classified until notice has been given under this subsection (e)(8) and until the government has been afforded a reasonable opportunity to seek a determination under subsection (e)(9).

E) Failure to Comply. If the accused fails to comply with the requirements of this subsection (e)(8), the military judge may preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the accused of any witness with respect to any such information.

9) In Camera Proceedings for Cases Involving Classified Information

A) Definition. For purposes of this subsection (e)(9), an "in camera proceeding" is a session under Code Section 39(a) from which the public is excluded.

B) Motion for In Camera Proceeding. Within the time specified by the military judge for the filing of a motion under this subsection (e), the government may move for an in camera proceeding concerning the use at any proceeding of any classified information. Thereafter, either prior to or during trial, the military judge, for good cause shown or otherwise upon a claim of privilege under this subsection (e) may grant the government leave to move for an in camera proceeding concerning the use of additional classified information.

C) Demonstration of National Security Nature of the Information. In order to obtain an in camera proceeding under this subsection (e)(9), the government shall submit the classified information and an affidavit ex parte for examination by the military judge only. The affidavit shall demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute or regulation.

D) In Camera Proceeding

i) Procedure. Upon finding that the government has met the standard set forth in subsection (e)(9)(C) with respect to some or all of the classified information at issue, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously has been made available to the accused in connection with proceedings in the same case. The government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information, when the government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the in camera proceeding, the military judge shall determine whether the information may be disclosed at the court-martial proceeding. When the government's motion under subsection (e)(5) is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

ii) Standard. Classified information is not subject to disclosure under this subsection (e) unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. In presentencing proceedings, relevant and

material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment shall be admitted only if no unclassified version of that information is available.

iii) Ruling. Unless the military judge makes a written determination that the information meets the standard set forth in subsection (e)(9)(D)(ii), the information may not be disclosed or otherwise elicited at a court-martial proceeding. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

iv) Alternatives to Full Disclosure. If the military judge makes a determination under this subsection (e)(9) that would permit disclosure of the information, or if the government elects not to contest the relevance, necessity and admissibility of any classified information, the government may proffer a statement admitting, for purposes of the proceeding, any relevant facts the information would tend to prove. The government may submit a portion of summary to be used in lieu of the information. The military judge shall order that the statement, portion or summary be used by the accused in place of the classified information unless the military judge finds that use of the classified information itself is necessary to afford the accused a fair trial.

v) Sanctions. If the military judge determines that alternatives to full disclosure may not be used and the government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice require, including an order:

- striking or precluding all or part of the testimony of a witness;

- declaring a mistrial;

- finding against the government on any issue as to which the evidence is relevant and material to the defense;

- dismissing the charges, with or without prejudice; or

- dismissing the charges or specifications, or both, to which the information relates.

vi) Any such order shall permit the government to avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

10) Introduction of Classified Information

A) Classification Status. Writing, recordings and photographs containing classified information may be admitted into evidence without change in their classification status.

B) Precautions by the Military Judge. In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of:

i) only part of a writing, recording or photograph; or

ii) the whole writing, recording or photograph with excision of some or all of the classified information.

C) Contents of Writing, Recording or Photograph. The military judge may permit proof of the contents of a writing, recording or photograph that contains classified information without requiring introduction into evidence of the original or a duplicate.

D) Taking of Testimony. During the examination of a witness, the government (i.e., the prosecution) may object to any question or line of inquiry that may require the witness to disclose classified

information not previously found to be relevant and necessary to the defense. Following such an objection, the military judge shall take suitable action to determine whether the response is admissible, considering whether the action will safeguard against the compromise of any classified information. The action may include requiring:

i) the government to provide the military judge with a proffer or the witness' response to the question or line of inquiry; and

ii) the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

E) Closed Session. The military judge may exclude the public during that portion of the presentation of evidence that discloses classified information.

F) Record of Trial. The record of trial with respect to any classified matter will be prepared in accordance with Code Section 54 and RCM 1103(h) and 1104(b)(1)(D).

11) Security Procedures to Safeguard Against Compromise of Classified Information Disclosed to Courts-Martial. The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to courts-martial and appellate authorities. (Il. Mil. R. Evid. 505)

f) Government Information Other Than Classified Information

1) General Rule of Privilege. Except when disclosure is required by law, government information is privileged from disclosure if disclosure would be detrimental to the public interest.

2) Scope. "Government information" includes official communication and documents and other information within the custody or control of the government. This subsection (f) does not apply to classified information, which is addressed in subsection (e), or to the identity of an informant, which is addressed in subsection (g).

3) Who May Claim the Privilege. The privilege may be claimed by the head of the executive or military department or government agency concerned. The privilege for records and information of the Inspector General may be claimed by the immediate superior of the inspector general officer responsible for creation of the records or information, the Inspector General, or any other superior authority. A person who may claim the privilege may authorize a witness or the trial counsel to claim the privilege on his or her behalf. The authority of a witness or the trial counsel to do so is presumed in the absence of evidence to the contrary.

4) Action Prior to Referral of Charges. Prior to referral of charges, the government shall respond in writing to a request for government information if the privilege in this subsection (f) is claimed for that information. The government shall:

A) delete specified items of government information claimed to be privileged from documents made available to the accused;

B) substitute a portion or summary of the information for those documents;

C) substitute a statement admitting relevant facts that government information would tend to prove;

D) provide the document subject to conditions similar to those set forth in subsection (f)(7); or

E) withhold disclosure if actions under (f)(4)(A) through (D) cannot be taken without causing identifiable damage to the public interest.

5) Pretrial Session. At any time after referral of charges and prior to arraignment, any party may move for a session under Code Section 39(a) to consider matters relating to government information that may arise in connection with the trial. Following that motion, or sua sponte, the military judge promptly shall hold a pretrial session under Code Section 39(a) to establish the timing of requests for discovery, the provision of notice under subsection (f)(8), and the initiation of the procedure under subsection (f)(9). In addition, the military judge may consider any other

matters that relate to government information or that may promote a fair and expeditious trial.

6) Action After Motion for Disclosure of Information. After referral of charges, if the defense moves for disclosure of government information for which a claim of privilege has been made under this subsection (f), the matter shall be reported to the convening authority. The convening authority may:

A) institute action to obtain the information for use by the military judge in making a determination under subsection (f)(9);

B) dismiss the charges;

C) dismiss the charges or specifications, or both, to which the information relates; or

D) take other action as may be required in the interests of justice. If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.

7) Disclosure of Government Information to the Accused. If the government agrees to disclose government information to the accused subsequent to a claim of privilege under this subsection (f), the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

A) Prohibiting the disclosure of the information, except as authorized by the military judge;

B) Requiring storage of the material in a manner appropriate for the nature of the material to be disclosed, upon reasonable notice;

C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

D) Requiring the maintenance of logs recording access by persons authorized by the military judge to have access to the government information in connection with the preparation of the defense;

E) Regulating the making and handling of notes taken from material containing government information; or

F) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

8) Prohibition Against Disclosure. The accused may not disclose any information known or believed to be subject to a claim of privilege under this subsection (f) unless the military judge authorizes that disclosure.

9) In Camera Proceedings in Cases Involving Nonclassified Government Information

A) Definition. For the purpose of this subsection (f)(8), an "in camera proceeding" is a session under Code Section 39(a) from which the public is excluded.

B) Motion for In Camera Proceeding. Within the time specified by the military judge for the filing of a motion under this subsection (f)(9), the government may move for an in camera proceeding concerning the use at any proceeding of any government information that may be subject to a claim of privilege. Thereafter, either prior to or during trial, the military judge, for good cause shown, or otherwise upon a claim of privilege, may grant the government leave to move for an in camera proceeding concerning the use of additional government information.

C) Demonstration of Damage to the Public Interest. In order to obtain an in camera proceeding under this subsection (f)(9), the government shall demonstrate, through the submission of affidavits and information for examination only by the military judge, that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

D) In Camera Proceedings

i) Finding of Identifiable Damage. Upon finding that the disclosure of some or all of the information submitted by the government under subsection (f)(9)(C) reasonably could be expected to cause identifiable damage to the public interest, the military judge shall conduct an in camera proceeding.

ii) Disclosure of the Information to the Defense. Subject to subsection (f)(9)(D)(vi), the government shall disclose government information for which a claim of privilege has been made to the accused, for the limited purpose of litigating in camera the admissibility of the information at trial. The military judge shall enter an appropriate protective order to the accused and all other appropriate trial participants concerning the disclosure of the information according to subsection (f)(7). The accused shall not disclose any information provided under this subsection (f)(9)(D)(ii) unless, and until, that information has been admitted into evidence by the military judge. In the in camera proceeding, both parties shall have the opportunity to brief and argue the admissibility of the government information at trial.

iii) Standard. Government information is subject to disclosure at the court-martial proceeding under this subsection (f)(9)(D)(iii) if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused and is otherwise admissible in the court-martial proceeding.

iv) Ruling. No information may be disclosed at the court-martial proceeding or otherwise unless the military judge makes a written determination that the information is subject to disclosure under the standard set forth in subsection (f)(9)(D)(iii). The military judge will specify in writing any information that he or she determines is subject

to disclosure. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

v) Alternatives to Full Disclosure. If the military judge makes a determination under this subsection (f)(9) that the information is subject to disclosure, or if the government elects not to contest the relevance, necessity and admissibility of the government information, the government may proffer a statement admitting, for purposes of the court-martial, any relevant facts the information would tend to prove. The government may submit a portion or summary to be used in lieu of the information. The military judge shall order that the statement, portion or summary, or some other form of information the military judge finds to be consistent with the interests of justice, be used by the accused in place of the government information unless the military judge finds that use of the government information itself is necessary to afford the accused a fair trial.

vi) Sanctions. Government information may not be disclosed over the government's objection. If the government continues to object to disclosure of the information following rulings by the military judge, the military judge shall issue any order that the interests of justice require, including an order:

- striking or precluding all or part of the testimony of a witness;

- declaring a mistrial;

- finding against the government on any issue as to which the evidence is relevant and necessary to the defense;

- dismissing the charges, with or without prejudice; or

- dismissing the charges or specifications, or both, to which the information relates.

10) Appeals of Orders and Rulings. In a court-martial in which a punitive discharge may be adjudged, the government may appeal an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification, directs the disclosure of government information, or imposes sanctions for nondisclosure of government information. The government may also appeal an order or ruling in which the military judge refuses to issue a protective order sought by the State to prevent the disclosure of government information, or to enforce such an order previously issued by appropriate authority. The government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

11) Introduction of Government Information Subject to a Claim of Privilege

A) Precautions by Military Judge. In order to prevent unnecessary disclosure of government information after there has been a claim of privilege under this subsection (f), the military judge may order admission into evidence of:

i) only part of a writing, recording or photograph; or

ii) the whole writing, recording or photograph with excision of some or all of the government information.

B) Contents of Writing, Recording or Photograph. The military judge may permit proof of the contents of a writing, recording or photograph that contains government information that is the subject of a claim of privilege under this subsection (f) without requiring introduction into evidence of the original or a duplicate.

C) Taking of Testimony. During examination of a witness, the prosecution may object to any question or line of inquiry that may require the witness to disclose government information not

previously found relevant and necessary to the defense if that information has been or is reasonably likely to be the subject of a claim of privilege under this subsection (f). Following such an objection, the military judge shall take suitable action to determine if the response is admissible, considering whether the action will safeguard against the compromise of any government information. The action may include requiring:

i) the government to provide the military judge with a proffer of the witness' response to the question or line of inquiry; and

ii) the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

12) Procedures to Safeguard Against Compromise of Government Information Disclosed to Courts-Martial. The Secretary of Defense or the Adjutant General may prescribe procedures for protection against the compromise of government information submitted to courts-martial and appellate authorities after a claim of privilege. (Il. Mil. R. Evid. 506)

g) Identity of Informants

1) Rule of Privilege. The United States or a State or subdivision thereof has a privilege to refuse to disclose the identity of an informant. An "informant" is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation or prosecution of crime. Unless otherwise privileged under this Section, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity.

2) Who May Claim the Privilege. The privilege may be claimed by an appropriate representative of the United States, regardless of whether information was furnished to an officer of the United States or a State or subdivision thereof. The privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof, except the privilege shall not be allowed if the prosecution objects.

3) Exceptions

A) Voluntary Disclosures; Informant as Witness. No privilege exists under this subsection (g):

i) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informant's own action; or

ii) if the informant appears as a witness for the prosecution.

B) Testimony on the Issue of Guilt or Innocence. If a claim of privilege has been made under this subsection (g), the military judge shall, upon motion by the accused, determine whether disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of each case, taking into consideration the offense charged, the possible defense, the possible significance of the informant's testimony, and other relevant factors. If it appears from the evidence in the case or from another showing by a party that an informant may be able to give testimony necessary to the accused's defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

C) Legality of Obtaining Evidence. If a claim of privilege has been made under this subsection (g) with respect to a motion under Section 400.635, the military judge shall, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the U.S. Constitution as applied to members of the armed forces. In making this determination, the military judge may make any order required by the interests of justice.

4) Procedures. If a claim of privilege has been made under this subsection (g), the military judge may make any order required by the interests of justice. If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this subsection

(g), and the prosecution elects not to disclose the identity of the informant, the matter shall be reported to the convening authority. The convening authority may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances. If, after a reasonable period of time, disclosure is not made, the military judge, sua sponte or upon motion of either counsel and after a hearing, if requested by either party, may dismiss the charge or specifications, or both, to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused. (Il. Mil. R. Evid. 507)

h) Political Vote. A person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally. (Il. Mil. R. Evid. 508)

i) Deliberations of Courts and Juries. Except as provided in Section 400.705(f), the deliberations of courts, courts-martial, military judges, and grand and petit juries are privileged to the extent that the deliberations are privileged, but the results of the deliberations are not privileged. (Il. Mil. R. Evid. 509)

j) Waiver of Privilege by Voluntary Disclosure

1) A person upon whom this Section confers a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This subsection (j)(1) does not apply if the disclosure is itself a privileged communication.

2) Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he or she may be entitled pertaining to the confidential matter or communication. (Il. Mil. R. Evid. 510)

k) Disclosure Under Compulsion or Without Opportunity to Claim Privilege

1) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

2) The telephonic transmission of information otherwise privileged under this Section does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under this Section does not affect the privileged character of that information if use of electronic means of communication is necessary and in furtherance of the communication. (Il. Mil. R. Evid. 511)

l) Comment Upon or Inference from Claim of Privilege; Instruction

1) The claim of a privilege by the accused, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the military judge or counsel for any party. No inference may be drawn from that claim of privilege.

2) The claim of a privilege by a person other than the accused, whether in the present proceeding or upon a prior occasion, normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn from that claim of privilege except when determined by the military judge to be required by the interests of justice.

3) In a trial before a court-martial with members, proceedings must be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members. This subsection (l)(3) does not apply to a special court-martial without a military judge.

4) Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn from the claim except as provided in subsection (l)(2). (Il. Mil. R. Evid. 512)

m) Psychotherapist and Patient Privilege

1) Definitions. For purposes of this subsection (m):

A) "Assistant to a Psychotherapist" or "Assistant" means a person directed by or assigned to assist a psychotherapist in providing professional services, or who is reasonably believed by the patient to be an assistant to a psychotherapist.

B) "Confidential Communication" or " Communication" not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for transmission of the communication.

C) "Evidence of a Patient's Records or Communications" means testimony of a psychotherapist or assistant psychotherapist, or patient records, that pertain to communications by a patient to a psychotherapist or assistant to a psychotherapist for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

D) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis or treatment of a mental or emotional condition.

E) "Psychotherapist" means a psychiatrist, clinical psychologist or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide these services from any military health care facility, or is a person reasonably believed by the patient to have the appropriate license or credentials.

2) General Rule of Privilege. A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made between the patient and a psychotherapist or assistant, in a case arising under the UCMJ, if the communication was

made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

3) Who May Claim the Privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

4) Exceptions. There is no privilege under this subsection (m):

A) when the patient is dead;

B) when the communication is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

C) when federal law, State law, or service regulation imposes a duty to report information contained in a communication;

D) when a psychotherapist or assistant believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

E) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

F) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information or the accomplishment of a military mission;

G) when an accused offers statements or other evidence concerning his or her mental condition in defense, extenuation or mitigation,

under circumstances not covered by Section 400.615. In these situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

H) when admission or disclosure of a communication is constitutionally required.

5) Procedure to Determine Admissibility of Patient Records or Communications

A) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

i) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

ii) serve the motion on the opposing party and the military judge and, if practical, notify the patient or the patient's guardian, conservator or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subsection (m)(5)(B).

B) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military

judge and members, the military judge shall conduct the hearing outside the presence of the members.

C) The military judge shall examine the evidence or a proffer of evidence in camera, if that examination is necessary to rule on the motion.

D) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

E) The motion, related papers, and record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise. (Il. Mil. R. Evid. 513)

n) Victim Advocate and Safe Helpline Privilege

1) Definitions. As used in this subsection (n):

A) "Assistant to a Victim Advocate" or "Assistant" means a person directed by or assigned to assist a victim advocate in providing victim and victim advocate services or who is reasonably believed by the victim to be an Assistant to a victim advocate.

B) "Confidential Communication" or "Communication" means a communication made to a victim advocate acting in the capacity of a victim advocate that is not intended to be disclosed to third persons other than:

i) those to whom disclosure is made in furtherance of the rendition of advice or assistance to the victim; or

ii) an assistant to a victim advocate reasonably necessary for transmission of the communication.

C) "Evidence of a Victim's Records or Communications" means testimony of a victim advocate, or record that pertains to communications by a victim to a victim advocate, for the purposes of advising or providing supportive assistance to the victim.

D) "Victim" means any person who suffered direct physical or emotional harm as the result of a sexual or violent offense.

E) "Victim Advocate" means a person who is:

i) designated in writing as a victim advocate;

ii) authorized to perform victim advocate duties in accordance with service regulations, and acting in the performance of those duties; or

iii) certified as a victim advocate pursuant to federal or State requirements.

2) General Rule of Privilege. A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication between the victim and a victim advocate, in a case arising under the UCMJ, if that communication was made for the purpose of facilitating advice or supportive assistance to the victim.

3) Who May Claim the Privilege. The privilege may be claimed by the victim or any guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a defense counsel representing the victim to claim the privilege on his or her behalf. The victim advocate who received the communication may claim the privilege on behalf of the victim. The authority of the a victim advocate, guardian or conservator, or a defense counsel representing the victim, to so assert the privilege is presumed in the absence of evidence to the contrary.

4) Exceptions. There is no privilege under this subsection (n):

A) when the victim is dead;

B) when federal law, State law or service regulation imposes a duty to report information contained in a communication;

C) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the victim advocate are

sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;

D) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information or completion of a mission;

E) when necessary to ensure the safety of any other person (including the victim) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger; or

F) when admission or disclosure of a communication is constitutionally required.

5) Procedure to Determine Admissibility of Victim Records or Communications

A) In any case in which the production or admission of records or communications of a victim is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

i) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

ii) serve the motion on the opposing party and the military judge and, if practical, notify the victim or the victim's guardian, conservator or representative that the motion has been filed and that the victim has an opportunity to be heard as set forth in subsection (n)(5)(B).

B) Before ordering the production or admission of evidence of a victim's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing

closed. At the hearing, the parties may call witnesses, including the victim, and offer other relevant evidence. The victim shall be afforded a reasonable opportunity to attend the hearing and be heard at the victim's own expense unless the victim has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

C) The military judge shall examine the evidence or a proffer thereof in camera, if that examination is necessary to rule on the motion.

D) To prevent unnecessary disclosure of evidence of a victim's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

E) The motion, related papers, and record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise. (Il. Mil. R. Evid. 514)

Section 400.705 Witnesses

a) Competency to Testify. Every person is competent to be a witness unless this Section provides otherwise. (Il. Mil. R. Evid. 601)

b) Need for Personal Knowledge. A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This subsection (b) is subject to the provisions of Section 400.715(a)(2) relating to the opinion testimony by expert witnesses. (Il. Mil. R. Evid. 602)

c) Oath or Affirmation to Testify Truthfully. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so. (Il. Mil. R. Evid. 603)

d) Interpreter. An interpreter is subject to the provisions of this Section relating to qualifications as an expert and the administration of an oath or affirmation that the interpreter will make a true translation. (Il. Mil. R. Evid. 604)

e) Military Judge's Competency as a Witness

1) The presiding military judge may not testify as a witness at any proceeding of that court-martial. A party need not object to preserve the issue.

2) This Section does not preclude the military judge from placing on the record matters concerning docketing of the case. (Il. Mil. R. Evid. 605)

f) Member's Competency as a Witness

1) A member of a court-martial may not testify as a witness before the other members at any proceeding of that court-martial. If a member is called to testify, the military judge must, except in a special court-martial without a military judge, give the opposing party an opportunity to object outside the presence of the members.

2) During an inquiry into the validity of a finding or sentence, a member of a court-martial may not testify about any statement made or incident that occurred during the deliberations of that court-martial; the effect of anything on that member's or another member's vote; or any member's mental processes concerning the finding or sentence, except that a member may testify on the question of whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial and whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. The military judge may not receive a member's affidavit or evidence of a member's statement on these matters.

3) Exception. A member may testify about whether:

A) extraneous prejudicial information was improperly brought to the member's attention;

B) unlawful command influence or any other outside influence was improperly brought to bear on any member; or

C) a mistake was made in entering the finding or sentence on the finding or sentence forms. (Il. Mil. R. Evid. 606)

g) Who May Impeach a Witness. The credibility of a witness may be attacked by any party, including the party calling the witness, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon showing of an affirmative damage. This subsection (g) does not apply to statements admitted pursuant to Section 400.720(a)(2), (a)(3) or (c). (Il. Mil. R. Evid. 607)

h) A Witness's Character for Truthfulness or Untruthfulness

1) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to these limitations:

A) the evidence may refer only to character for truthfulness or untruthfulness; and

B) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

2) Specific Instances of Conduct

A) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Section 400.705(i), may not be proved by extrinsic evidence.

B) They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

i) concerning character of the witness for truthfulness or untruthfulness; or

ii) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

C) The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

3) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced. (Il. Mil. R. Evid. 608)

i) Impeachment by Evidence of a Criminal Conviction

1) General Rule

A) For the purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime, except on a plea of nolo contendere, is admissible but only if the crime:

i) was punishable by death, dishonorable discharge or imprisonment in excess of one year under the law under which the witness was convicted; or

ii) involved dishonesty or false statement regardless of the punishment.

B) In either instance described in subsection (i)(1)(A), the court shall determines whether the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

2) Time limit. Evidence of a conviction under this Manual is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from confinement, whichever is later.

3) Effect of Pardon, Annulment or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this subsection (i) if:

A) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure; and

B) the procedure under which the procedure listed in subsection (i)(3)(A) was granted or issued required a substantial showing of rehabilitation or was based on innocence.

4) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this subsection (i). The military judge may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult, and the military judge is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

5) Pendency of Appeal. The pendency of an appeal from the underlying criminal conviction does not render evidence of that conviction inadmissible. Evidence of the pendency of an appeal is admissible. (Il. Mil. R. Evid. 609)

j) Religious Beliefs or Opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of his or her nature, the witness' credibility is impaired or enhanced. (Il. Mil. R. Evid. 610)

k) Mode and Order of Examining Witnesses and Presenting Evidence

1) Control by the Military Judge. The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

A) make the interrogation and presentation effective for the ascertainment of the truth;

B) avoid needless consumption of time; and

C) protect witnesses from harassment or undue embarrassment.

2) Scope of Cross-Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of his or her discretion, permit inquiry into additional matters as if on direct examination.

3) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness or an unwilling witness or an adverse party or an agent of an adverse party, as defined by Section 2-1102 of the Code of Civil Procedure, interrogation may be by leading questions.

4) Remote Live Testimony of a Child

A) In a case involving abuse of a child or domestic violence, the military judge shall, subject to the requirements of subsection (k)(4)(C), allow a child victim or witness to testify from an area outside the courtroom.

B) Definitions. For purposes of this subsection (k)(4):

i) "Child" means a person who is under the age of 16 at the time of his or her testimony;

ii) "Abuse of a Child" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

iii) "Exploitation" means child pornography or child prostitution;

iv) "Negligent Treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter or medical care, so as to endanger seriously the physical health of the child;

v) "Domestic Violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by:

- a current or former spouse, parent or guardian of the victim;
- a person with whom the victim shares a child in common;
- a person who is cohabiting with or has cohabited with the victim as a spouse, parent or guardian; or
- a person similarly situated to a spouse, parent or guardian.

C) Remote live testimony will be used only when the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused, for any of the following reasons:

i) The child is unable to testify because of fear;

ii) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

iii) The child suffers from a mental or other infirmity; or

iv) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.

D) Remote live testimony of a child shall not be utilized when the accused elects to absent himself or herself from the court room. (Il. Mil. R. Evid. 612)

l) Writing Used to Refresh a Witness' Memory

1) If a witness uses a writing to refresh his or her memory for the purpose of testifying, either while testifying or before testifying, if the military judge

determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness on that writing, and to introduce in evidence for the purpose of impeachment those portions that relate to the testimony of the witness.

2) If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or unrelated portions, and order delivery of the remainder to the entitled party. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit.

3) If a writing is not produced or delivered pursuant to order under this subsection (l), the military judge shall make any order justice requires, except that, when the prosecution elects not to comply, the order shall:

A) strike the testimony; or

B) if, in his or her discretion, the military judge determines that the interests of justice so require, declare a mistrial.

4) This subsection (l) does not preclude disclosure of information required to be disclosed under other provisions of this Manual. (Il. Mil. R. Evid. 612)

m) Witness' Prior Statement

1) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel.

2) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is first afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement, or the interests of justice otherwise require. This provision does not apply to admissions in Section 400.720(a)(2)(B).

n) Calling and Interrogation of Witnesses by the Court-Martial

1) Calling by the Court-Martial. The military judge may, sua sponte, or at the request of the members or the suggestion of a party, call witnesses. All parties are entitled to cross-examine those witnesses. The military judge shall determine whether it is appropriate to recall a witness under this Manual.

2) Interrogation by the Court-Martial. The military judge or members may interrogate witnesses, whether called by the military judge, the members or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

3) Objections. Objections to calling of witnesses by the military judge or the members or to the interrogation by the military judge or the members may be made at the time, or at the next available opportunity when the members are not present. (Il. Mil. R. Evid. 614)

o) Excluding Witnesses
At the request of the prosecution or defense, the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the orders sua sponte. This subsection (o) does not authorize exclusion of:

1) the accused;

2) a member of an armed service or an employee of the United States or of the State of Illinois designated as a representative of the United States or of the State of Illinois by the trial counsel;

3) a person whose presence is shown by a party to be essential to the presentation of the party's case;

4) a person authorized by statute to be present at courts-martial; or

5) any victim of an offense from the trial of an accused for that offense because that victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings. (Il. Mil. R. Evid. 615)

Section 400.710 Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are:

a) rationally based on the perception of the witness;

b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and

c) not based in scientific, technical or other specialized knowledge within the scope of Section 400.715(a). (Il. Mil. R. Evid. 701)

Section 400.715 Expert Testimony; Polygraph Examinations

a) Expert Witnesses

1) Testimony by Expert Witnesses

A) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise.

B) When an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs. (Il. Mil. R. Evid. 702)

2) Bases of an Expert's Opinion Testimony

A) The facts or date in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

B) If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (Il. Mil. R. Evid. 703)

3) Opinion on an Ultimate Issue
Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (Il. Mil. R. Evid. 704)

4) Disclosing the Facts or Data Underlying an Expert's Opinion

A) The expert may testify in terms of opinion or inference and give the expert's reason for the opinion or reference without prior disclosure of the underlying facts or data, unless the military judge requires otherwise.

B) The expert may, in any event, be required to disclose the underlying facts or data on cross-examination. (Il. Mil. R. Evid. 705)

5) Court-Appointed Expert Witnesses

A) Appointment and Compensation. The trial counsel, the defense counsel, and the court-martial have equal opportunity to obtain expert witnesses under Code Section 46.

B) Disclosure of Employment. In the exercise of discretion, the military judge may authorize disclosure to the members of the fact that the military judge called an expert witness.

C) Accused's Experts of Own Selection. Nothing in this subsection (a)(5) limits the accused in calling expert witnesses of the

accused's own selection and at the accused's own expense. (Il. Mil. R. Evid. 706)

b) Polygraph Examinations

1) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

2) Nothing in this subsection (b) is intended to exclude from evidence statements made during a polygraph examination that are otherwise admissible. (Il. Mil. R. Evid. 707)

Section 400.720 Hearsay Exclusions

a) Definitions. The following definitions apply to this Section:

1) "Declarant" means a person who makes a statement.

2) "Hearsay" means a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. A statement is not hearsay if it is:

A) a prior statement by the witness. In a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

i) *inconsistent with* the declarant's *testimony at the trial or hearing, and:*

- *was made under oath at a trial, hearing or* other *proceeding or in a deposition;*

- *narrates, describes or explains an event or condition of which* the declarant *had personal knowledge,* and *the statement is proved to have been written or signed by* the declarant;

- the declarant *acknowledged under oath the making of the statement in his* or her *testimony at the hearing or trial in which the admission into evidence of the prior statement is being* sought; *at* another *trial, hearing or other proceeding; or in a deposition; or*

- *the statement is proved to have been accurately recorded by a tape recorder, videotape recording,* or *any other similar electronic means of sound recording;* or [725 ILCS 5/115-10.1]

ii) *one of identification of a person made after perceiving* the person; or [725 ILCS 5/115-12]

B) an admission by a party-opponent offered against a party and is:

i) the party's own statement in either the party's individual or representative capacity;

ii) a statement of which the party has manifested the party's adoption or belief in its truth;

iii) a statement by a person authorized by the party to make a statement concerning the subject;

iv) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship;

v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy; or

vi) a statement by a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party.

3) "Statement" means:

A) an oral or written assertion; or

B) nonverbal conduct of a person, if it is intended by the person as an assertion. (Il. Mil. R. Evid. 801)

b) Hearsay Rule
Hearsay is not admissible except as provided by this Manual or by any Act of Congress applicable in trials by court-martial or by Illinois Supreme Court Rules. (Il. Mil. R. Evid. 802)

c) Exceptions to Hearsay Regardless of Declarant Availability
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

1) Illinois has not adopted the federal Present Sense Impression to the hearsay rule (Federal Rules of Evidence 803(1)).

2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

3) A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including:

A) A statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will; or

B) A statement of declarant's then existing state of mind, emotion, sensation or physical condition to prove the state of mind, emotion, sensation or physical condition of another declarant at the time or at any other time when the state of the other declarant is an issue in the action.

4) Statements for Purposes of Medical Diagnosis or Treatment

A) Statements made for the purpose of medical treatment or medical diagnosis in contemplation of treatment and describing medical

history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the symptoms, pain or sensations insofar as reasonably pertinent to diagnosis or treatment but, subject to Section 400.715(a)(2), not including statements made to a healthcare provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial; or

B) In prosecution for violation of Sections 11-1.20, 11-1.30, 11-1.40, 11-1.50 and 11-1.60 of the Criminal Code of 2012 or of a violation of an identical or closely-related provision of the criminal law of the state where the offense occurred, and assimilated under Code Section 149, statements made by the victim to medical personnel for purposes of medical diagnoses or treatment, including a description of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source of the symptoms, pain or sensation insofar as reasonably pertinent to diagnosis or treatment.

5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence, but may not itself be received as an exhibit unless offered by an adverse party.

6) Record of Regularly Conducted Activity

A) A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation. This evidence shall be presented by the testimony of the custodian or other qualified witness, or by certification that complies with Section 400.725(b)(2)(K) or any other statute permitting certification in a criminal proceeding in a court of the United

States. This exception from the hearsay rule applies unless the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness. The exception does not, in criminal cases, include medical records.

B) The term "business" as used in this subsection (c)(6) includes the armed forces, a business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit.

C) The following are admissible under this subsection (c)(6) as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record that fact or event:

i) enlistment papers;

ii) physical examination papers;

iii) outline figure and fingerprint cards;

iv) forensic laboratory reports;

v) chain of custody documents;

vi) morning reports and other personnel accountability documents;

vii) service records;

viii) officer and enlisted qualification records;

ix) records of court-martial convictions;

x) logs;

xi) unit personnel diaries;

xii) individual equipment records;

xiii) guard reports;

xiv) daily strength records of prisoners; and

xv) rosters of prisoners.

7) Absence of Entry in Records Kept in Accordance with the Provisions of subsection (c)(6). Evidence that a matter is not included in the memoranda reports, records or data compilations, in any form, kept in accordance with the provisions of subsection (c)(6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

8) Public Records and Reports

A) Records, reports, statements or data compilations in any form, of public offices or agencies, setting forth:

i) the activities of the office or agency;

ii) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and, in criminal cases, medical records and matters observed by police officers and other law enforcement personnel; or

iii) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

B) Notwithstanding subsection (c)(8)(A)(ii), the following are admissible under this Section as a record of a fact or event if made by a person within the scope of the person's official duties and

those duties include a duty to know or ascertain through appropriate and trustworthy channels of information that truth of the fact or event and to record that fact or event:

i) enlistment papers;

ii) physical examination papers;

iii) outline figure and finger print cards;

iv) forensic laboratory reports;

v) chain of custody documents;

vi) morning reports and other personnel accountability documents;

vii) service records;

viii) officer and enlisted qualification records;

ix) records of court-martial convictions;

x) logs;

xi) unit personnel diaries;

xii) individual equipment records;

xiii) guard reports;

xiv) daily strength records of prisoners; and

xv) rosters of prisoners.

9) Records of Vital Statistics. Facts contained in records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report was made to a public office pursuant to requirements of law.

10) Absence of Public Record or Entry. To prove the absence of a record, report, statement or data compilation in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Section 400.725(b) or testimony, that diligent search failed to disclose the record, report, statement, data compilation or entry.

11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

12) Marriage, Baptismal and Similar Certificates. Statements of fact obtained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a time thereafter.

13) Family Records. Statements of facts concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscription on family portraits, engravings on urns, crypts or tombstones, etc.

14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of the kind in that office.

15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

16) Statements in Ancient Documents. Statements in a document in existence 20 years or more, the authenticity of which is established.

17) Market Reports; Commercial Publications. Market quotations, tabulations, directories, lists (including government price lists), or other published compilations generally used and relied upon by the public or by persons in particular occupations.

18) Reputation Concerning Personal or Family History

A) Reputation:

i) among members of the person's family by blood, adoption or marriage;

ii) among the person's associates; or

iii) in the community.

B) The reputation investigation shall concern the person's birth, adoption; marriage; divorce; death; legitimacy; relationship by blood; adoption or marriage; ancestry; or other similar fact of the person's personal or family history.

19) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

20) Reputation as to Character. Reputation of a person's character among the person's associates or in the community.

21) Judgment of Previous Conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death, dishonorable discharge, or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be

shown but does not affect admissibility. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by Code Section 56 at the time of the conviction applies without regard to whether the case was tried by general, special or summary court-martial.

22) Judgment as to Personal, Family or General History or to Boundaries. Judgments as proof of matters of personal, family or general history, or boundaries essential to the judgment, if the same would be provable by evidence of reputation.

23) Receipt or Paid Bill. A receipt of a paid bill as prima facie evidence of the fact of payment and a prima facie evidence that the charge was reasonable. (Il. Mil. R. Evid. 803)

d) Exceptions to Hearsay When the Declarant is Unavailable

1) Definition. *"Unavailability as a Witness" means situations in which* the *declarant*:

A) *is exempted by ruling of the* military judge *on the ground of privilege from testifying concerning the subject matter* of the *declarant's statement*;

B) *persists in refusing to testify concerning the subject matter of the declarant's statement despite an order* of the military judge *to do so;* [725 ILCS 5/113-10.2(c) and 725 ILCS 4/115-10.2a(c)]

C) *testifies to a lack of memory of the subject matter of the declarant's statement;*

D) *is unable to be present or to testify at the hearing because of health or then existing physical or mental illness or infirmity;*

E) *is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance* (or, in the case of a hearsay exception under subsection (d)(3)(B), (C) or (D), the declarant's attendance or testimony *by process or other reasonable means*; or [725 ILCS 5/115-10.2a(c)]

F) is unavailable within the meaning of Code Section 49(d)(2).

2) *A declarant is not unavailable as a witness if the* declarant's *exemption, refusal, claim of lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of* the *declarant's statement for* the purpose *of preventing the witness from attending or testifying*.

3) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

A) Former Testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in an evidence deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross- or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, or other military tribunals, and before proceedings pursuant to or equivalent to those required by Code Section 32 is admissible under this subsection (d)(3)(A) if that record is a verbatim record. This subsection (d)(3)(A) is subject to the limitations set forth in Code Sections 49 and 50.

B) Statement Under Belief of Impending Death. In a prosecution for homicide or for any offense resulting in the death of the alleged victim, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

C) Statement Against Interest. A statement that was, at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible

unless corroborating circumstances clearly indicate the trustworthiness of the statement.

D) Statement of Personal or Family History

i) A statement concerning the declarant's own: birth; adoption; marriage; divorce; legitimacy; relationship by blood, adoption or marriage; ancestry; or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or

ii) a statement concerning the matters listed in subsection (d)(3)(D)(i), and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

E) Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. (Il. Mil. R. Evid. 804)

e) Hearsay Within Hearsay
Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception or exclusion to the hearsay rule. (Il. Mil. R. Evid. 805)

f) Attacking and Supporting the Declarant's Credibility

1) When a hearsay statement, or a statement described in subsections (a)(2)(B)(iii), (iv) or (v), has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.

2) The military judge may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

3) If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination. (Il. Mil. R. Evid 806)

Section 400.725 Authenticating Evidence

a) Authenticating or Identifying Evidence

1) General. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

2) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Section:

A) Testimony of Witness with Knowledge. Testimony that a matter is what it is claimed to be.

B) Nonexpert Opinion on Handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

C) Comparison by Trier or Expert Witness. Comparison by the trier of fact or by expert witnesses, with specimens that have been authenticated.

D) Distinctive Characteristics. Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.

E) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

F) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular persons or business, if:

i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

G) Public Records or Reports. Evidence that a writing authorized by law to be recorded or filed, and in fact recorded or filed in a public office, or a purported public record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept.

H) Ancient Documents or Data Compilation. Evidence that a document or data compilation, in any form:

i) is in such condition as to create no suspicion concerning its authenticity;

ii) was in place where it, if authentic, would likely be; and

iii) has been in existence 20 years or more at the time it is offered.

I) Processor System. Evidence describing a processor system used to produce a result and showing that the process or system produces an accurate result.

J) Methods Provided by Statute or Rule. Any method of authentication or identification provided by statute, Illinois Supreme Court rules, or other applicable rules prescribed pursuant to statutory authority. (Il. Mil. R. Evid. 901)

b) Evidence that Is Self-Authenticating

1) Definitions. Terms used in this subsection (b) have the meanings ascribed in Section 400.730(b).

2) Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for the following:

A) Domestic Public Documents Under Seal. A document bearing a seal, with a signature purporting to be an attestation or execution of that seal, purporting to be that of:

i) the United States;

ii) any state;

iii) any U.S. district, commonwealth, territory or insular possession;

iv) the Panama Canal Zone;

v) the Trust Territory of the Pacific Islands; or

vi) a political subdivision, department, officer or agency of any of these political subdivisions.

B) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity described in subsection (b)(2)(A) having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

C) Foreign Public Documents

i) A document purporting to be executed or attested to in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and

accompanied by a final certification as to the genuineness of the signature and official position of:

- the executing or attesting person; or

- any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution of attestation.

ii) A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown:

- order that those documents be treated as presumptively authentic without final certification; or

- permit them to be evidenced by an attested summary with or without final certification.

D) Certified Copies of Public Records. A copy of an official record or report of entry into those records, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with subsection (b)(2)(A), (B) or (C) or complying with any Act of Congress, rule prescribed by the Supreme Court pursuant to statutory authority, or an applicable regulation prescribed pursuant to statutory authority.

E) Documents or Records of the United States Accompanied by Attesting Certificates. Documents or records kept under the authority of the United States by any U.S. department, bureau,

agency, office or court when attached to or accompanied by an attesting certificate of the custodian of the document or record without further authentication.

F) Official Publications. Books, pamphlets or other publications purporting to be issued by public authority.

G) Newspapers and Periodicals. Printed material purporting to be newspapers or periodicals.

H) Trade Inscriptions, Etc. Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, content, ingredients or origin.

I) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

J) Commercial Paper and Related Documents. Commercial paper, signatures on those papers, and documents relating to those papers, to the extent provided by general commercial law.

K) Presumptions Under Acts of Congress and Regulations. Any signature, document or other matter declared by Act of Congress or by applicable regulation prescribed pursuant to statutory authority to be presumptively, or prima facie, genuine or authentic.

L) Certified Domestic Records of Regularly Conducted Activity The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Section 400.720(c)(6) if accompanied by a written certification of its custodian or other qualified person, in a manner complying with any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record was:

i) made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;

ii) kept in the course of the regularly conducted activity; and

iii) made by the regularly conducted activity as a regular practice. The word "certification" as used in this subsection (b)(2)(L) means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a record maintained or located in a foreign country, a written declaration signed in a country that, if falsely made, would subject the maker to criminal penalty under the laws of that country. A party intending to offer a record into evidence under this subsection (b)(2)(L) must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. (Il. Mil. R. Evid. 902)

Section 400.730 Documentary Evidence

a) Subscribing Witnesses' Testimony. The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. (Il. Mil. R. Evid. 903)

b) Contents of Writings, Recordings and Photographs
For purposes of this Section, the following definitions apply:

1) "Duplicate" means a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques that accurately reproduce the original. (Il. Mil. R. Evid. 1001; see also Il. Mil. R. Evid. 902)

2) "Original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print. If data are stored in a computer or similar device, any printout or

other output readable by sight, shown to reflect the data accurately, is an "original".

3) "Photographs" means still photographs, X-ray films, video tapes, and motion pictures and similar or other products or processes that produce a recorded image.

4) "Writings" and "Recordings" means letters, words, sounds or numbers, or their equivalent, set down by handwriting, typewriting, printing, photocopying, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. (Il. Mil. R. Evid. 1001)

c) Requirement of the Original
To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in this Manual, Illinois Statute or Act of Congress. (Il. Mil. R. Evid. 1002)

d) Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless:

1) a genuine question is raised as to the authenticity of the original; or

2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. (Il. Mil. R. Evid. 1003)

e) Admissibility of Other Evidence of Content
The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible if:

1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure;

3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of

proof at the hearing, and the party does not produce the original at the hearing; or

4) Collateral Matters. The writing, recording or photograph is not closely related to a controlling issue. (Il. Mil. R. Evid. 1004)

f) Copies of Public Records to Prove Content

1) The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct or attested to in accordance with Section 400.725(b) or testified to be correct by a witness who has compared it with the original.

2) If a copy that complies with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be given. (Il. Mil. R. Evid. 1005)

g) Summaries to Prove Content

1) The contents of voluminous writings, recordings or photographs that cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation.

2) The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The military judge may order that they be produced in court. (Il. Mil. R. Evid. 1006)

h) Testimony or Statement of a Party to Prove Content
Contents of writings, recordings or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the nonproduction of the original. (Il. Mil. R. Evid. 1007)

i) Functions of the Military Judge

1) When the admissibility of other evidence of contents of writings, recordings or photographs under this Section depends upon the fulfillment

of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the military judge to determine in accordance with the provisions of Section 400.600(e).

2) As in the case of other issues of fact, when an issue is raised, the issue for the trier of fact to determine is:

A) whether the asserted writing ever existed;

B) whether another writing, recording or photograph produced at trial is the original; or

C) whether other evidence of contents correctly reflects the contents. (Il. Mil. R. Evid. 1008)

Section 400.735 Applicability of This Subpart

a) Except as otherwise provided in this Manual, this Subpart applies generally to:

1) all courts-martial, including summary court-martial;

2) Code Section 39 hearings;

3) limited fact-finding proceedings ordered on review;

4) proceedings in revision; and

5) contempt proceedings other than contempt proceedings in which the judge may act summarily.

b) The application of this Subpart may be relaxed in presentencing proceedings. They do not apply to a military judge's preliminary questions of fact governing admissibility, pretrial investigations under Code Section 32, and proceedings for vacation of suspension of a sentence under Code Section 72, search authorizations, pretrial restraint, pretrial confinement, or other pretrial motions hearing.

c) The rules on privilege apply at all stages of a case or proceeding. (Il. Mil. R. Evid. 1101)

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF PROPOSED RULES

SUBPART G: TRIAL PROCEDURES

Section 400.800 Unlawfully Influencing Action of the Court

a) *No authority convening a general, special or summary court-martial, nor any other commanding officer, or officer serving on the staff* of the commanding officer*, may censure, reprimand or admonish the court or any member, the military judge, or counsel* of the court*, with respect to the findings or sentence adjudged by the court or with respect to any other exercise of its or their functions in the conduct of the proceedings. No person subject to* the *Code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or court of inquiry or any member of these bodies, in reaching the findings or sentence in any case, or the action of any convening, approving or reviewing authority with respect to their judicial acts. This subsection (a) shall not apply with respect to:*

1) *general instructional or informational courses in military justice if those courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial; or*

2) *statements and instructions given in open court by the military judge, summary court-martial officer, or counsel.*

b) *In the preparation of an effectiveness, fitness or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the SMF is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the SMF, or in determining whether a member of the SMF should be retained on active status, no person subject to the Code may, in preparing any such report:*

1) *consider or evaluate the performance of duty of any SMF member as a member of a court-martial or witness in a court-martial; or*

2) *give a less favorable rating or evaluation of any counsel of the accused because of zealous representation before a court-martial*. (Code Section 37)

c) Code Section 37 does not extend to protection from prosecution of crimes such as perjury or false official statement.

Section 400.805 Duties of Trial Counsel and Defense Counsel

a) Trial Counsel. *The trial counsel of a general or special court-martial shall be a member in good standing of the State bar and shall prosecute in the name of the State of Illinois, and shall, under the direction of the court, prepare the record of the proceedings.*

b) Counsel for the Accused

1) *The accused has the right to be represented in defense before a general or special court-martial or at an investigation under Code Section 32 as provided in this subsection (b).*

2) *The accused may be represented by civilian counsel at the provision and expense of the accused.*

3) *The accused may be represented by:*

A) *military counsel detailed under Code Section 27; or*

B) *military counsel of the accused's own selection if that counsel is reasonably available as determined under subsection (b)(9).*

4) *If the accused is represented by civilian counsel, military counsel detailed or selected under subsection (b)(3) shall act as associate counsel unless excused at the request of the accused.*

5) *Except as provided under subsection (b)(6), if the accused is represented by military counsel of his or her own selection under* subsection *(b)(3)(B), any military counsel detailed under subsection (b)(3)(A) shall be excused.*

6) *The accused is not entitled to be represented by more than one military counsel.* However, the convening authority, in his or her sole discretion, may:

A) *detail additional military counsel as assistant defense counsel*; and

B) *if the accused is represented by military counsel of the accused's own selection under subsection (b)(3)(B), approve a request from the accused that military counsel detailed under subsection (b)(3)(A) act as associate defense counsel*. (Code Section 38(b)(1) through (6))

7) Under the supervision of the defense counsel, an assistant defense counsel may perform any act or duty that a defense counsel may perform under the Code or this Manual.

8) Defense counsel may be excused only with the express consent of the accused or by the military judge upon application for withdrawal by the defense counsel for good cause shown, unless defense counsel faces immediate ethical or moral dilemma in ongoing representation.

9) *The senior judge advocate of the same* force *of which the accused is a member shall determine whether the military counsel selected by an accused is reasonably available*. (Code Section 38(b)(7))

c) *In any court-martial proceeding resulting in a conviction, the defense counsel may:*

1) *forward for attachment to the record of proceedings a brief of such matters as counsel determines should be considered on behalf of the accused on review, including any objection to the contents of the record that counsel considers appropriate;*

2) *assist the accused in the submission of any matter under* Code Section 60; *and*

3) *take other action authorized by the Code*. (Code Section 38(c))

Section 400.810 Sessions

a) Call to Session

1) *At any time after the service of charges that have been referred for trial to a court-martial composed of a military judge and members, the military*

judge may, subject to Code Section 35, call the court into session without the presence of the members for the purpose of:

A) *hearing and determining motions raising defenses or objections that are capable of determination without trial of the issues raised by a plea of not guilty;*

B) *hearing and ruling upon any matter that may be ruled upon by the military judge under the Code, whether or not the matter is appropriate for later consideration or decision by the members of the court;*

C) *holding the arraignment and receiving the pleas of the accused; and*

D) *performing any other procedural function that does not require the presence of the members of the court under the Code.*

2) *These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of court members and without regard to Code Section 29.* (Code Section 39(a))

b) Assembly of the Court-Martial. The military judge shall announce verbally, on the record, the court-martial has assembled and shall constitute the court-martial for hearing the case.

c) Proceedings. A court-martial trial conducted under the Code will proceed with respect to findings as provided in RCM 901 through 924.

d) Deliberation and Voting. *When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and the military judge.* (Code Section 39(b))

e) Procedures. The presiding military judge may, in his or her discretion, issue any protocol, procedure or guidance that is reasonably calculated to more efficiently,

practically or thoroughly resolve the pending court-martial. Those procedures shall remain in place until post-trial motions have concluded or until the military judge withdraws them, whichever comes first.

Section 400.815 Continuances

a) The military judge may issue, in writing or by oral order, any continuance as necessary, and may do so without conducting a formal motions hearing so long as all parties are promptly notified.

b) *A military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.* (Code Section 40)

Section 400.820 Challenges

a) Challenges in General

1) *The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge or the court shall determine the relevancy and validity of challenges for cause and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.*

2) *If exercise of a challenge for cause reduces the court below the minimum number of members required by Code Section 16, all parties shall, notwithstanding Code Section 29, either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court. However, peremptory challenges shall not be exercised at that time.*

b) Number of Challenges

1) *Each accused and the trial counsel are entitled initially to one peremptory challenge of members of the court. The military judge may not be challenged except for cause.*

2) *If exercise of a peremptory challenge reduces the court below the minimum number of members required by Code Section 16, the parties*

shall, notwithstanding Code Section 29, either exercise or waive any remaining peremptory challenge, not previously waived, against the remaining members of the court before additional members are detailed to the court.

c) *Whenever additional members are detailed to the court, and after any challenges for cause against those additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge*. (Code Section 41)

Section 400.825 Oaths

a) Oath by Trial Participants. *Before performing their respective duties, military judges, general and special courts-martial members, trial counsel, defense counsel, reporters, and interpreters shall take an oath or affirmation in the presence of the accused to perform their duties faithfully. The form of the oath or affirmation* is prescribed in subsection (f). *The time and place of the taking of the oath or affirmation, the manner of recording the oath or affirmation, and whether the oath or affirmation shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in statute or this Manual. These regulations may provide that an oath or affirmation to perform faithfully the duties as a military judge, trial counsel or defense counsel may be taken at any time by any judge advocate or other person certified or designated to be qualified or competent for the duty* (e.g., a court reporter or notary public). *If an oath or affirmation is taken, it need not again be taken at the time the judge advocate or other person is detailed to that duty.*

b) Oath by Witnesses. *Each witness before a court-martial shall be examined under oath or affirmation.* (Code Section 42)

c) Administrators of Oaths. *The following persons may administer oaths for the purposes of military justice:*

1) *All judge advocates.*

2) *All summary courts-martial.*

3) *All adjutants, assistant adjutants acting adjutants, and personnel adjutants.*

4) *The president, military judge and trial counsel for all general and special courts-martial.*

5) *The president and the counsel for the court of any court of inquiry* (see Section 400.1300).

6) *All officers designated to take a deposition.*

7) *All persons detailed to conduct an investigation.*

8) *All other persons designated by U.S. Army regulation 27-55* (notary services) *or by* 10 USC 1041a (authority to act as a notary). (Code Section 136(a) and (b))

d) Prescription of Oaths
Before performing their respective duties, military judges, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant or associate defense counsel, reporters and interpreters shall take an oath to perform their duties faithfully.

1) Oath for Military Judge. When the military judge is not previously sworn, the trial counsel will administer the following oath to the military judge:

"Do you (swear) (affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trial by court-martial, all the duties incumbent upon you as military judge of this court-martial (so help you God)?"

2) Oath for Members. The following oath, as appropriate, will be administered to the members by the trial counsel:

"Do you (swear) (affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trial by court-martial, the case of the accused now before this court; and that you will not disclose or discover the vote or opinion of any particular member of the court (upon a

challenge or) upon the findings or sentence unless required to do so in due course of law (so help you God)?"

3) Oaths for Counsel. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the military judge:

"Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?"

4) Oath for Reporter. The trial counsel will administer the following oath to every reporter of a court-martial who has not been previously sworn:

"Do you (swear) (affirm) that you will faithfully perform the duties of reporter to this court-martial (so help you God)?"

5) Oath for Interpreter. The trial counsel or the summary court-martial shall administer the following oath to every interpreter in the trial of any case before a court-martial:

"Do you (swear) (affirm) that, in the case now in hearing, you will interpret truly the testimony you are called upon to interpret (so help you God)?"

6) Oath for Witnesses. The trial counsel or the summary court-martial will administer the following oath to each witness before the witness first testifies in a case:

"Do you (swear) (affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth (so help you God)?"

Section 400.830 Statute of Limitations

a) *Except as otherwise provided in this* Section*, a person charged with any offense is not liable to be tried by court-martial or punished under Code Section 15 if the offense was committed more than* 3 years *before the receipt of sworn charges and*

specifications by an officer exercising court-martial jurisdiction over the command or before the imposition of punishment under Code Section 15.

b) *Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this Section.*

c) *The following periods shall be excluded in computing the period of limitation prescribed in this Section:*

1) *Periods in which the accused was absent from territory in which the State has the authority to apprehend the accused;*

2) *Periods when the accused was in the custody of civil authorities; or*

3) *Periods when the accused was in the hands of the enemy.*

d) Wartime suspension

1) *When the United States is at war or armed conflict authorized by law, the running of any statute of limitations is suspended for any offense under the Code:*

A) *involving fraud or attempted fraud against the United States, any state, or any agency of either in any manner, whether by conspiracy or not;*

B) *committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States or any state; or*

C) *committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation or other termination or settlement of any contract, subcontract or purchase order that is connected with or related to the prosecution of the war, or with any disposition of termination inventory by any war contractor or government agency.*

2) *The suspension remains effective until 2 years after the termination of hostilities or armed conflict as proclaimed by the President or by a joint resolution of Congress.* (Code Section 43(a) through (d))

Section 400.835 Former Jeopardy

a) *No person may, without his or her consent, be tried a second time for the same offense.*

b) *No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this Section until the finding of guilty has become final after review of the case has been fully completed.*

c) *A proceeding that, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this Section.* (Code Section 44)

Section 400.840 Arraignment and Pleas of the Accused

a) Arraignment shall be conducted in a court-martial session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading.

b) Persons subject to the Code are presumed innocent and cannot be found guilty without either:

1) being found guilty at courts-martial; or

2) knowingly and voluntarily entering an open or negotiated plea of guilty.

c) Prior to accepting a plea of guilty, the military judge shall comply with Illinois Supreme Court Rule 402.

d) *If an accused, after arraignment, makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead, a plea of not*

guilty shall be entered in the record, and the court shall proceed as though the accused had pleaded not guilty. (Code Section 45(a))

e) *With respect to any charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence. In that event, the proceedings shall continue as though the accused had pleaded not guilty.* (Code Section 45(b))

Section 400.845 Opportunity to Obtain Witnesses and Other Evidence

a) Trial counsel shall assist defense counsel and issue subpoenas or other process as reasonably requested by defense counsel. Trial counsel shall not withhold evidence from defense counsel.

b) *The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence as prescribed by regulations and provided by law. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall apply the principles of law and the rules of courts-martial generally recognized in military criminal cases in the courts of the armed forces of the United States, but may not be contrary to or inconsistent with the Code. Process shall run to any part of the United States, or the U.S. territories, commonwealths and possessions, and may be executed by civil officers as prescribed by the laws of the place where the witness or evidence is located or of the United States.* (Code Section 46)

Section 400.850 Refusal to Appear or Testify

a) The military judge may issue such warrants or body attachments for the arrest of any person refusing to appear pursuant to Code Section 47, in addition to any other relief deemed just and appropriate under Illinois law.

b) *The military court may punish in the same manner as a criminal court of the State any person not subject to the Code who:*

1) *has been duly subpoenaed to appear as a witness or to produce books and records before a court-martial or court of inquiry, or before any military*

or civil officer designated to take a deposition to be read in evidence before such a court;

2) *has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending a criminal court of the State; and*

3) *willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence that person may have been legally subpoenaed to produce.*

c) *The fees and mileage of witnesses shall be advanced or paid* by the State. (Code Section 47)

Section 400.855 Contempt

a) *A military judge may punish for contempt any person who refuses a court order, is disrespectful to the court, or who uses any menacing word, sign or gesture in its presence, or who disturbs its proceedings by any riot or disorder.*

b) *A person subject to the Code may be punished for contempt by confinement not to exceed 30 days or a fine up to $500, or both.*

c) *A person not subject to the Code may be punished for contempt by a military court in the same manner as a criminal court of the State*. (Code Section 48)

d) Any appeal shall be to the Fourth District of the Illinois Appellate Court.

Section 400.860 Depositions

a) Trial and defense counsel should be mindful of the accused's constitutional rights and shall not seek deposition except as a last resort when other methods to secure attendance of the witness has failed.

b) *At any time after charges have been signed as provided in Code Section 30, any party may take oral or written depositions unless the military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause*.

c) *The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition*.

d) *Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the State or by the laws of the place where the deposition is taken to administer oaths*.

e) *A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, digital image or file, or similar material, may be* admitted *in evidence before any military court if it appears that*:

1) *the witness resides or is beyond the state in which the court is ordered to sit, or beyond 100 miles from the place of trial or hearing;*

2) *the witness, by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of the trial or hearing; or*

3) *the present whereabouts of the witness is unknown*. (Code Section 49)

Section 400.865 Admissibility of Records of Courts of Inquiry

a) *In any case not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of that evidence.*

b) *The testimony may be read in evidence only by the defense in cases extending to the dismissal of a commissioned officer.*

c) *The testimony may also be read in evidence before a court of inquiry*. (Code Section 50)

Section 400.870 Defense of Lack of Mental Responsibility

a) *It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.*

b) *The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.*

c) *Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall instruct the members of the court as* to *the defense of lack of mental responsibility under Code Section 50a and charge them to find the accused* guilty, *not guilty or not guilty only by reason of lack of mental responsibility.*

d) *Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall find the accused guilty, not guilty or not guilty only by reason of lack of mental responsibility.*

e) *Notwithstanding the provisions of Code Section 52, the accused shall be found not guilty only by reason of lack of mental responsibility if*:

1) *a majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established; or*

2) *in the case of a court-martial composed of a military judge only, the military judge determines that the defense of lack of mental responsibility has been established*. (Code Section 50a)

Section 400.875 Voting By the Court-Martial

a) Voting and Ruling

1) *Voting by members of a general or special court-martial on the findings and on the sentence shall be by secret written ballot. The junior member*

of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

2) *The military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused is final and constitutes the ruling of the court. However, the military judge may change the ruling at any time during the trial. Unless the ruling is final, if any member objects to the ruling, the court shall be cleared and closed and the question decided by a voice vote as provided in Code Section 52, beginning with the junior in rank.*

3) *Before a vote is taken on the findings, the military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them that:*

A) *the accused must be presumed to be innocent until his or her guilt is established by legal and competent evidence beyond reasonable doubt;*

B) *in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;*

C) *if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and*

D) *the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the State.*

4) *Subsections* (a)(1), (2) and (3) *do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition, on request,* make special findings as provided in RCM

918(b). *If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear in that document.* (Code Section 51) The military judge may give any instructions necessary to clarify the members' questions after the conclusions of evidence, or to decline to answer any question in the event that response implicates inadmissible evidence.

5) Included Offenses. Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has been reached, the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue the vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each offense.

b) Procedure for Voting

1) Order. Each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object.

2) Counting Votes. The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

c) Number of Votes Required

1) *No person may be convicted of an offense except as provided in Code Section 45(b) or by the concurrence of ⅔ of the members present at the time the vote is taken.*

2) *All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote that indicates the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member*

challenged. A tie vote on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused. (Code Section 52)

3) Acquittal. If fewer than ⅔ of the members present vote for a finding of guilty, a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

d) Court to Announce Action

1) *A court-martial shall announce its findings and sentence to the parties as soon as determined*. (Code Section 53)

2) The military judge may take such actions as it deems reasonably necessary to secure the courtroom and safety of persons within the courtroom prior to, and after, the announcement of court-martial findings.

Section 400.880 Withdrawal of Guilty Plea

An accused may withdraw a plea of guilty as provided in RCM 910(h)(1) and (2).

SUBPART H: SENTENCING

Section 400.900 Presentencing Procedure

In a court-martial trial conducted under the Code resulting in a finding of guilt, the court shall follow the presentencing procedures provided in RCM 1001 through 1003 and 1005 through 1011 (RCM Chapter X (Sentencing, Rule)), except that neither death nor confinement in excess of 10 years may be adjudged.

Section 400.905 Sentencing

a) Cruel and Unusual Punishment Prohibited

1) Persons subject to the Code will be afforded all constitutional protections against cruel and unusual punishment, in accordance with U.S. Supreme Court and Illinois Supreme Court case law.

2) *Punishment by flogging, or by branding, marking or tattooing on the body, or any other cruel or unusual punishment may not be adjudged by a court-martial or inflicted upon any person subject to the Code. The use of irons, single or double, except for the purpose of safe custody, is prohibited*. (Code Section 55)

b) Maximum Limits

1) *The punishment a court-martial may direct for an offense may not exceed the limits prescribed by the Code, but in no instance may a sentence exceed more than 10 years for a military offense, nor shall a sentence of death be adjudged. A conviction by general court-martial of any military offense for which an accused may receive a sentence of confinement for more than one year is a felony offense. All other military offenses are misdemeanors*.

2) *The limits of punishment for violations of the punitive articles described in Subpart J shall be equal to, or the lesser of, the sentences prescribed by the MCM. In no instance shall any punishment exceed that authorized by the Code*. (Code Section 56)

c) *Effective Dates of Sentences*

1) Forfeiture of Pay or Allowances. *Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date the sentence is approved by the convening authority. No forfeiture may extend to any pay or allowances accrued before that date*.

2) Confinement. *Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement*.

3) *All other sentences of courts-martial are effective on the date ordered executed*, subject to Code Section 71 (see Section 400.1075). (Code Section 57)

d) Reconsideration of Sentence

1) Reconsideration. A sentence may be reconsidered at any time before it is announced in open session of the court.

2) The procedures detailed in RCM 1009 shall apply.

e) Report of Result of Trial; Post-Trial Restraint

1) After final adjournment of the court-martial, trial counsel shall promptly notify the accused's immediate commander, the convening authority or designee and, if appropriate, the officer in charge of the confinement facility of the findings and the sentence.

2) Confinement

A) General. An accused may be placed in post-trial confinement if the sentence adjudged by the court-martial includes confinement.

B) Who May Order. Unless limited by superior authority, a commander of the accused may order the accused into post-trial confinement when post-trial confinement is authorized under this subsection (e)(2). A commander authorized to order post-trial confinement may delegate this authority to the trial counsel.

f) *Deferment of Sentences*

1) *On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under that person's jurisdiction, the person exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may, in that person's sole discretion, defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the person who granted it or, if the accused is no longer under that person's jurisdiction, by the person exercising general court-martial jurisdiction over the command to which the accused is currently assigned.*

2) Process

A) *In any case in which a court-martial sentences an accused referred to in* subsection (f)(2)(B) *to confinement, the convening authority may defer the service of the sentence to confinement, without the consent of the accused, until after the accused has been permanently released to the SMF by a state, the United States, or a foreign country*.

B) Subsection (f)(2)(A) *applies to a person subject to* the *Code who*:

i) *while in the custody of a state, the United States or a foreign country is temporarily returned by that state, the United States or foreign country to the SMF for trial by court-martial; and*

ii) *after the court-martial, is returned to that state, the United States or foreign country under the authority of a mutual agreement or treaty, as the case may be*.

3) *In any case in which a court-martial sentences an accused to confinement and the sentence to confinement has been ordered executed, but in which review of the case under Code Section 57a(a) is pending, the Adjutant General may defer further service of the sentence to confinement while that review is pending*. (Code Section 57a)

g) Execution of Confinement

1) Confinement for one year or more. If a person subject to the Code and this Manual is convicted at court-martial for an offense punishable by more than one year confinement, and is sentenced to confinement of one year or more, at the conclusion of post-trial motions, that person will be transported to, and incarcerated with, the Illinois Department of Corrections.

2) Confinement for less than one year. If a person subject to the Code and this Manual is convicted at court-martial for an offense punishable by less than one year confinement, and is sentenced to confinement, that person will be transported to, and incarcerated in, the county jail.

3) Notwithstanding subsections (g)(1) and (2), the military judge, in his or her discretion, may always order confinement at any civilian county jail, department of corrections facility, or military confinement facility authorized under the Code that he or she deems reasonable and appropriate. The military judge should consider the interests of national security, State security, good order and discipline, and other applicable federal or State laws and this Manual.

4) *A sentence of confinement adjudged by a court-martial, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place authorized by the Code. Persons so confined are subject to the same discipline and treatment as persons regularly confined or committed to that place of confinement*.

5) *The omission of hard labor as a sentence authorized under the Code does not deprive the State confinement facility from employing it, if it otherwise is within the authority of that facility to do so*.

6) *No place of confinement may require payment of any fee or charge for receiving or confining a person, except as otherwise provided by law*. (Code Section 58)

h) *Sentences: Reduction in Enlisted Grade Upon Approval*

1) *A court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, reduces that member to pay grade E-1, effective on the date of that approval,* if the sentence includes:

A) *a dishonorable or bad-conduct discharge; or*

B) *confinement*. (Code Section 58a(a))

2) *If the sentence of a member who is reduced in pay grade under subsection* (h)(1) *is set aside or disapproved, or, as finally approved, does not include any punishment named in subsection* (h)(1)*, the rights and privileges of which the person was deprived because of that reduction shall be restored, including pay and allowances*. (Code Section 58a(b))

i) *Sentences: Forfeiture of Pay and Allowances During Confinement*

1) General

A) *A court-martial sentence described in subsection* (i)(1)(B) *shall result in the forfeiture of pay, or of pay and allowances, due that member during any period of confinement or parole. The forfeiture pursuant to this subsection* (i) *shall take effect on the date determined under Code Section 57(a) and may be deferred as provided by that Section. The pay and allowances forfeited, in the case of a general court-martial, shall be all pay and allowances due that member during the period of confinement or parole and, in the case of a special court-martial, shall be ⅔ of all pay due the member during that period.*

B) *A sentence covered by this subsection* (i) *is any sentence that includes*:

i) *confinement for more than 6 months; or*

ii) *confinement for 6 months or less and a dishonorable or bad-conduct discharge or dismissal.*

2) *In a case involving an accused who has dependents, the convening authority or other person acting under Code Section 60 may waive any or all of the forfeitures of pay and allowances required by subsection* (i)(1) *for a period not to exceed 6 months. Any amount of pay or allowances subject to the waiver will be paid, as the convening authority or other person taking action directs, to the dependents of the accused.*

3) *If the sentence of a member who forfeits pay and allowances under subsection* (i)(1) *is set aside or disapproved or, as finally approved, does not provide for a punishment referred to in subsection* (i)(1)(B), *the member shall be paid the pay and allowances that he or she would have been paid, except for the forfeiture, for the period during which the forfeiture was in effect.* (Code Section 58b)

SUBPART I: POST-TRIAL PROCEDURE AND REVIEWS

Section 400.1000 Post-Trial Procedure and Reviews

a) Appellate procedures for all convictions under the Code and this Manual shall be in accordance with those of the Illinois Appellate Court, Fourth District.

b) In each general and special court-martial, prior to adjournment, the military judge shall ensure that the defense counsel has informed the accused orally and in writing of:

1) The right to submit matters to the convening authority to consider before taking action;

2) The right to appellate review, as applicable, and the effect of waiver or withdrawal of that right; and

3) The right to the advice and assistance of counsel in the exercise of the rights described in subsections (b)(1) and (2) or any decision to waive them. The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and the defense counsel and inserted in the record of trial as an appellate exhibit.

Section 400.1005 Error of Law; Lesser Included Offenses

a) *A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused*.

b) *Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense*. (Code Section 59)

c) Any challenges to an error of law must be raised in a timely post-trial motion. Constitutional challenges may be raised at any time, including on appeal.

Section 400.1010 Preparation of the Record of Trial; Authentication; Service; Loss; Correction

In every court-martial trial conducted under the Code, the record of trial shall be prepared, authenticated and served substantially in accordance with RCMs 1103 through 1104. Any reference in those RCMs to the "Court of Criminal Appeals" shall instead refer to the "Illinois Appellate Court".

Section 400.1015 Recommendation of the State Judge Advocate

a) Before acting on a finding of guilt on any general or special court-martial in which there is a finding of guilt, the convening authority must obtain the written concurrence of the State Judge Advocate or designee by means of legal review. The convening authority will refer the authenticated record of trial to the State Judge Advocate who shall use it in preparation of the review.

b) Content. The legal review shall be in writing and shall contain the following:

1) Conclusions as to whether:

A) The court had jurisdiction over the accused and the offense;

B) The charge and specification stated an offense;

C) The sentence was within the limits prescribed as a matter of law.

2) A recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

c) The State Judge Advocate's recommendation and a copy of the authenticated record of trial will be served on the accused and his or her defense counsel who may submit matters to the convening authority as provided in Section 400.1020.

d) Disqualification. No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in any case may later act as State Judge Advocate or designee to any reviewing or convening authority in the same case.

Section 400.1020 Matters Submitted by the Accused

a) General. After a sentence is adjudged in any court-martial under the Code, the accused may submit matters to the convening authority in accordance with this Section.

b) Matters That May Be Submitted

1) The accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to disapprove any findings of guilty or to approve the sentence. Submissions must be in writing.

2) Submissions may include allegations of errors affecting the legality of the proceedings, portions or summaries of the record and copies of documentary evidence offered or introduced at trial, matters in mitigation not available at trial, and clemency recommendations from any person.

3) The accused may waive his or her right to make a submission to the convening authority, provided the waiver is in writing. Once accepted by the convening authority, waiver may not be revoked.

4) Failure to object to matters in the State Judge Advocate's recommendation waives the right to object to that matter.

c) Time Periods

1) The accused may submit matters under this Section *within* the later of *30 days after the accused has been given an authenticated* copy of the *record of trial or, if applicable, the recommendation of a* State Judge Advocate, or an addendum to the recommendation containing a new matter is served on the accused.

2) *If*, within the 30-day period, *the accused shows that additional time is required to submit the matters, the convening authority or other person taking action, for good cause* shown, *may extend the period* to submit matters for an additional 20 days. (Code Section 60(b)(1) and (2))

Section 400.1025 State Judge Advocate's Addendum

a) The State Judge Advocate or designee may, by addendum, supplement the recommendation after the accused and counsel have been served with the recommendation and given an opportunity to submit matters and comment.

b) If the addendum introduces new matter after the accused and counsel have examined the recommendation, the accused and counsel must be served with the addendum containing new matter and given 30 days from service of the addendum to submit comments.

Section 400.1030 Action by the Convening Authority

a) Who May Take Action. The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impractical. If it is impracticable for the convening authority to act, the convening authority shall, in accordance with regulations promulgated by the Adjutant General, forward the case to an officer exercising general court-martial jurisdiction who may take action.

b) Discretion to Modify. The authority *to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority* or other officer authorized to take action.

c) Action on the Sentence. *Action may be taken only after consideration of any matters submitted by the accused, or after the time* to submit them has expired, *whichever is earlier*. In his or her sole discretion, *the convening authority or other* officer authorized to *take action may approve, disapprove, commute or suspend the sentence in whole or in part*. The action may mitigate the sentence and change punishment to one of a different nature as long as the severity of the punishment is not increased. The action may not increase the punishment imposed by the court-martial. The action shall explicitly state approval or disapproval of the adjudged sentence.

d) Action on the Findings. *The convening authority or other* officer *acting on the sentence is not required* to take action on the findings. *However, that person, in his or her sole discretion, may*:

1) *Dismiss any charge or specification by setting aside a finding of guilty; or*

2) *Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification*. (Code Section 60(c))

e) Revision and Rehearing. The convening authority or other person taking action, in the person's sole discretion, may order a proceeding in revision or rehearing.

1) Rehearing. *The convening authority or other person taking action may, in his or her sole discretion, order a rehearing if that person disapproves the findings and sentence, and states the reasons of disapproval of the findings. If that person disapproves the findings and sentence and does not order a rehearing, he or she shall dismiss the charges. A rehearing as to findings shall not be ordered if there is a lack of sufficient evidence in the record to support the findings. A rehearing on the sentence may be ordered if the convening authority or other person taking action disapproves the sentence.* Rehearing will be in accordance with this Manual.

2) Revision. *A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case, however, may a proceeding in revision*:

A) *Reconsider a finding of not guilty of any specification or a ruling that amounts to a finding of not guilty;*

B) *Reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under the charge that sufficiently alleges a violation of some Section of the Code; or*

C) *Increases the severity of the sentence*. (Code Section 60(e))

Section 400.1035 General and Special Courts-Martial in Which There is a Finding of Guilty; Review by Senior Force Judge Advocate; Action by the Adjutant General

a) In addition to the judge advocate's recommendation under Code Section 60, *in a general and special court-martial in which there is a finding of guilt, the State Judge Advocate or designee shall review the case.* No person *may review the*

case who has acted as an accuser, member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in that case. The review shall be in writing and shall contain the following:

1) *Conclusions as to whether:*

A) *The court had jurisdiction over the accused and the offense;*

B) *The charge and specification stated an offense;*

C) *The sentence was within the limits prescribed as a matter of law.*

2) *A response to each allegation of error made in writing by the accused.*

3) *If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.*

b) *The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to the Adjutant General if:*

1) *The judge advocate who reviewed the case recommends corrective action;*

2) *The sentence approved by the convening authority under Code Section 60 extends to dismissal, bad-conduct discharge, dishonorable discharge, or confinement for more than 6 months; or*

3) *The action is required under regulations prescribed by the Adjutant General.*

c) *The Adjutant General may:*

1) *Disapprove or approve the findings or sentence, in whole or in part;*

2) *Remit, commute or suspend the sentence in whole or in part;*

3) *Except when evidence is insufficient at the trial to support the findings, order a rehearing on the findings, sentence or on both; or*

4) *Dismiss the charges.*

d) *If* the Adjutant General *orders a rehearing but the convening authority finds a hearing impractical, the convening authority shall dismiss the charges.*

e) *If, in the State Judge Advocate's opinion, corrective action is required as a matter of law, and if the Adjutant General does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of the trial and the action shall be sent to the Governor for review and action as deemed appropriate.*

f) *The State Judge Advocate, or designee, may review any case in which there has been a finding of not guilty of all charges and specifications. However, the State Judge Advocate may not review the case if he or she has acted as an accuser, member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in that case. The review shall be limited to questions of subject matter jurisdiction.*

g) *The records of trial and related documents in each case reviewed under subsection (f) shall be sent for action to the Adjutant General who may:*

1) *Void the court-martial ab initio when subject matter jurisdiction is found lacking, with or without prejudice to the government, as the Adjutant General deems appropriate;*

2) *Return the record of trial and related documents to the State Judge Advocate for appeal by the government as provided by law.* (Code Section 64)

Section 400.1040 Withdrawal of Appeal

a) The accused has a right to appeal. This right to appeal is permissive and not automatic. There are no exceptions to the right to appeal.

b) *In each case subject to appellate review under the Code, the accused may file with the convening authority a statement expressly withdrawing the right of the accused to appeal. The withdrawal shall be signed by both the accused and his or her defense counsel and must be filed in accordance with appellate procedures as*

provided by Article VI of the Illinois Supreme Court Rules (Appeals in Criminal Cases, Post-Conviction Cases and Juvenile Court Proceedings).

c) *The accused may withdraw an appeal at any time in accordance with appellate procedures as provided by* Supreme Court Rules, Article VI. The withdrawal must be in writing. (Code Section 61)

Section 400.1045 Appeal by the State

a) General

1) *In a trial by court-martial in which a punitive discharge may be adjudged, the State may appeal the following, other than a finding of not guilty with respect to the charge or specification by the members of the court-martial, or by a judge in a bench trial, so long as it is not made in reconsideration*:

A) *An order or ruling of the military judge that terminates the proceedings with respect to a charge or specification*;

B) *An order or ruling that excludes evidence that is substantial proof of a fact material in the proceeding*;

C) *An order or ruling that directs the disclosure of classified information*;

D) *An order or ruling that imposes sanctions for nondisclosure of classified information*;

E) *A refusal of the military judge to issue a protective order sought by the State to prevent the disclosure of classified information*; or

F) *A refusal by the military judge to enforce an order described in subsection (a)(1)(E) that has previously been issued by appropriate authority*.

2) *An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours after the order or ruling. The notice shall include a certification by the trial counsel that the appeal is not taken for the*

purpose of delay and, if the order or ruling appealed is one that excludes evidence, that the evidence excluded is substantial proof of a fact material in the proceeding.

3) *An appeal under this Section shall be diligently prosecuted as provided by law*.

b) *An appeal under this Section shall be forwarded to the court prescribed in Code Section 67a. In ruling on an appeal under Code Section 62, that court may act only with respect to matters of law*.

c) *Any period of delay resulting from an appeal under Code Section* 62 *shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay, with the knowledge that it was totally frivolous and without merit*. (Code Section 62)

d) Appellate procedures will be governed by the Fourth District of the Illinois Appellate Court.

Section 400.1050 Rehearing

a) *Each rehearing under the Code shall take place before a court-martial composed of members not members of the court-martial that first heard the case*.

b) *Upon a rehearing, the accused may not be tried for any offense of which he or she was found not guilty by the first court-martial, and no sentence in excess of, or more severe than, the original sentence may be approved, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory*.

c) *If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes a plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial*. (Code Section 63)

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Section 400.1055 Procedures for Rehearing, New Trials and Other Trials

a) General

1) Definition. "Other trial" means another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense.

2) Rehearing in Full and New or Other Trials. In rehearings that require findings on all charges and specifications referred to a court-martial and in new or other trials, the procedure shall be the same as in an original trial except as otherwise provided in this Section.

3) Rehearing on Sentence Only. In a rehearing on sentence only, the procedure shall be the same as in an original trial, except that the portion of the procedure that ordinarily occurs after challenges, and through the findings, is omitted, and except as otherwise provided in this Section.

b) Contents of the Record. The contents of the record of the original trial consisting of evidence properly admitted on the merits relating to each offense of which the accused stands convicted but not sentenced may be established by any party whether or not testimony so read is otherwise admissible under Section 400.720(d) and whether or not it was given through an interpreter.

c) Plea. The accused at a rehearing only on sentence may not withdraw any plea of guilty upon which findings of guilty are based. However, if that plea is found to be improvident, the rehearing shall be suspended and the matter reported to the authority ordering the rehearing.

d) Combined Rehearings. When a rehearing on sentence is combined with a trial on the merits of one or more specifications referred to the court-martial, whether or not those specifications are being tried for the first time or reheard, the trial will proceed first on the merits, without reference to the offenses being reheard on sentence only. After findings on the merits are announced, the members, if any, shall be advised of the offenses on which the rehearing on sentence has been directed. Additional challenges for cause may be permitted, and the sentencing procedure shall be the same as at an original trial, except as otherwise provided in this Section. A single sentence shall be adjudged for all offenses.

e) Composition

1) Members. No member of the court-martial that previously heard the case may sit as a member of the court-martial at any rehearing, new trial or other trial of the same case.

2) Military Judge. The military judge at a rehearing may be the same military judge who presided over a previous trial of the same case. The existence or absence of a request for trial by military judge alone at a previous hearing shall have no effect on the composition of a court-martial on rehearing.

3) Accused's Election. The accused at a rehearing or new or other trial shall have the same right to request enlisted members or trial by military judge alone as the accused would have at an original trial.

f) Examination of Record of Former Proceedings. No member may, upon a rehearing or upon a new or other trial, examine the record of any former proceedings in the same case except:

1) When permitted to do so by the military judge after those matters have been received in evidence; or

2) That the president of a special court-martial without a military judge may examine that part of the record of former proceedings that relates to errors committed at the former proceedings when necessary to decide the admissibility of offered evidence or other questions of law, and that part of the record may be read to the members when necessary for them to consider a matter, subject to objection by any member

g) Sentence Limitations

1) General. Sentences at rehearings, new trials or other trials shall be adjudged within the limitations set forth in Code Sections 55 through 58, except as otherwise provided in subsection (g)(2). Offenses on which a rehearing, new trial or other trial has been ordered shall not be the basis for an approved sentence in excess of, or more severe than, the sentence ultimately approved by the convening or higher authority following the previous trial or hearing, unless the sentence prescribed for the offense is

mandatory. When a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be approved by the convening authority shall be the maximum punishment under Code Sections 55 through 58 for the offenses being reheard (except as otherwise provided in subsection (g)(2)), plus the total maximum punishment under Code Sections 55 through 58 for any new charges of which the accused has been found guilty. In the case of an "other trial", no sentence limitations apply if the original trial was invalid because a summary or special court-martial improperly tried an offense involving mandatory punishment or otherwise considered capital.

2) Plea Agreement. If, after the earlier court martial, the sentence was approved in accordance with a plea agreement and at the rehearing the accused fails to comply with the pretrial agreement, by failing to enter a plea of guilty or otherwise, the approved sentence resulting at a rehearing of the affected charges and specifications may include any otherwise lawful punishment not in excess of, or more serious than, lawfully adjudged at the earlier court-martial.

Section 400.1060 Disposition of Records After Review by the Convening Authority

a) The original record of trial and all related documents shall be retained at Joint Force Headquarters, Office of the Staff Judge Advocate, 1301 N. MacArthur Blvd., Springfield IL 62702.

b) Court-martial convictions shall be reported to other necessary authorities in accordance with Illinois law (e.g., the FOID Act, etc.).

Section 400.1065 Review by State Appellate Authority

a) *Decisions of a court-martial are from a court with jurisdiction to issue misdemeanor and felony convictions*.

b) *All appeals from final decisions of a court-martial shall be to the Illinois Appellate Court in the same manner as are final decisions of a circuit court in accordance with the Illinois Appellate Court Act*.

c) The senior force judge advocate shall coordinate with the Clerk of the Illinois Appellate Court, Fourth District to ensure that all filing requirements and State deadlines on appeal are met.

d) Upon request, the senior force judge advocate will ensure that a copy of this Manual and the Code are provided to the Clerk of the Illinois Appellate Court, Fourth District for reference during proceedings.

e) *No appeal from a judgment entered upon a plea of guilty shall be taken except in accordance with* Article VI of the Illinois Supreme Court Rules (Appeals in Criminal Cases, Post-Conviction Cases and Juvenile Court Proceedings)

f) *Unless waived, an accused may appeal as a matter of right a finding of guilt resulting in an approved sentence of one-year confinement or more, or in a dismissal for a commissioned officer or warrant officer, a dishonorable discharge, or a bad-conduct discharge* in the case of an enlisted member.

g) *The appellate rights and procedures to be followed shall be those provided by applicable law and* Supreme Court Rules, Article VI. (Code Section 67a)

Section 400.1070 Appellate Counsel

a) The senior force judge advocate shall coordinate with the Attorney General regarding review or appeal of cases specified in Code Section 67a. *The Attorney General may appoint a judge advocate nominated by the senior force judge advocate as Special Assistant Attorney General to act as appellate government counsel to represent the State. The appointment as Special Assistant Attorney General shall be at the discretion of the Attorney General*. Appellate government counsel must be a member in good standing of the Illinois bar.

b) *Upon an appeal by the State, an accused has the right to be represented by detailed military counsel before any reviewing authority and before any appellate court*.

c) *Upon the appeal by an accused, the accused has the right to be represented by military counsel before any reviewing authority*.

d) *Upon the request of an accused entitled to be so represented, the senior force judge advocate shall appoint a judge advocate to represent the accused in the review or appeal of cases specified in subsections (b) and (c).*

e) *An accused may be represented by civilian appellate counsel at no expense to the State*. (Code Section 70)

Section 400.1075 Execution of Sentence

a) *Suspension of Sentence*

1) *If the* approved *sentence of the court-martial extends to dismissal or a dishonorable or bad-conduct discharge, and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn under Code Section 61, that part of the sentence extending to dismissal or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings. A judgment as to the legality of the proceedings is final in these cases when review is completed by the* Illinois Appellate Court for the Fourth District (see Code Section 67a) *and is deemed final by the law of this State*.

2) *If the sentence of the court-martial extends to dismissal or a dishonorable or bad-conduct discharge, and if the right of the accused to appellate review is waived, or an appeal is withdrawn under Code Section 61, that part of the sentence extending to dismissal or a dishonorable or bad-conduct discharge may not be executed until review of the case by the senior force judge advocate and any action on that review under Code Section 64 is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under Code Section 60 when so approved under that* statute. (Code Section 71)

b) *Vacation of Suspension*

1) *Before the vacation of the suspension of a special court-martial sentence that, as approved, includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on an alleged*

violation of probation. The probationer shall be represented at the hearing by military counsel if the probationer so desires.

2) *The record of the hearing and the recommendation of the officer having special court-martial jurisdiction shall be sent for action to the officer exercising general court-martial jurisdiction over the probationer. If the officer vacates the suspension, any unexecuted part of the sentence, except a dismissal, shall be executed, subject to applicable restrictions in the Code*.

3) *The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence*. (Code Section 72)

Section 400.1080 Petition for a New Trial

a) *At any time within 2 years after approval by the convening authority of a court-martial sentence, the accused may petition the Adjutant General for a new trial on the grounds of newly discovered evidence or fraud on the court-martial*. (Code Section 73)

b) A petition for a new trial of the facts may not be submitted on the basis of newly discovered evidence when the petitioner was found guilty of the relevant offense pursuant to a guilty plea.

c) The form of the petition shall comply with RCM 1210.

d) Newly Discovered Evidence. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:

1) The evidence was discovered after trial;

2) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

3) The newly discovered evidence, if considered by a court martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

e) Fraud on Court-martial. No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentenced adjudged.

Section 400.1085 Remission and Suspension of Sentence; Restoration

a) Remission and Suspension of Sentence

1) *Any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the Governor*.

2) *The Governor may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial*. (Code Section 74)

b) Restoration

1) *Under such regulations as may be prescribed, all rights, privileges and property affected by an executed part of a court-martial sentence that has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and the executed part is included in a sentence imposed upon the new trial or rehearing*.

2) *If a previously executed sentence of dishonorable or bad-conduct discharge is not imposed on a new trial, the Governor may substitute a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of the accused's enlistment*.

3) *If a previously executed sentence of dismissal is not imposed on a new trial, the Governor may substitute a form of discharge authorized for administrative issue, and the commissioned officer dismissed by that sentence may be reappointed by the Governor alone to the commissioned grade and with such rank as, in the opinion of the Governor, he or she would have attained had he or she not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a*

vacancy and shall affect the promotion status of other officers only insofar as the Governor may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances, as permitted by applicable financial management regulations. (Code Section 75)

Section 400.1090 Finality of Proceedings, Findings and Sentence

a) *The appellate review of records of trial provided by* the *Code, the proceedings, findings, and sentences of courts-martial as approved, reviewed or affirmed as required by* the *Code, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review or affirmation as required by* the *Code, are final and conclusive*.

b) *Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies and officers of the United States and the several states, subject only to action upon a petition for a new trial as provided in Code Section 73 and to action under Code Section 74*. (Code Section 76)

Section 400.1095 Leave Required to be Taken Pending Review of Certain Court-Martial Convictions

a) *Under regulations prescribed, an accused who has been sentenced by a court-martial may be required to take leave pending completion of action if the sentence, as approved under Code Section 60, includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge*.

b) *The accused may be required to begin leave on the date on which the sentence is approved under Code Section 60 or at any time after that date. The leave may be continued until it is completed or may be terminated at any earlier time* in accordance with applicable regulations of the armed forces. (Code Section 76a)

SUBPART J: PUNITIVE ARTICLES

Section 400.1100 Military Offenses

a) This Subpart J outlines the military offenses, also referred to as Punitive Articles, for which charges can be brought under the Code and this Manual.

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b) Principal. *A principal is any person subject to the Code who:*

1) *commits an offense punishable by* the *Code, or aids, abets, counsels, commands or procures its commission; or*

2) *causes an act to be done that, if directly performed by him or her, would be punishable by* the *Code*. (Code Section 77)

c) Directory of Military Offenses

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d) Military Offenses

1) Accessory After the Fact
Any person subject to the *Code who, knowing that an offense punishable by* the *Code has been committed, receives, comforts or assists the offender in order to hinder or prevent his or her apprehension, trial or punishment shall be punished as a court-martial may direct*. (Code Section 78)

2) Conviction of a Lesser Included Offense
An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included in the charge. (Code Section 79)

3) Attempts

A) *An act, done with specific intent to commit an offense under* the *Code, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense*.

B) *Any person subject to the* Code *who attempts to commit any offense punishable by the Code shall be punished as a court-martial may direct, unless otherwise specifically prescribed*.

C) *Any person subject to the Code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated*. (Code Section 80)

4) Conspiracy
Any person subject to the Code who conspires with any other person to commit an offense under the Code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct. (Code Section 81)

5) Solicitation

A) *Any person subject to the Code who solicits or advises another or others to desert in violation of Code Section 85 or mutiny in violation of Code Section 94 shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, the person shall be punished as a court-martial may direct*.

B) *Any person subject to the Code who solicits or advises another or others to commit an act of misbehavior before the enemy in*

violation of Code Section 99 or sedition in violation of Code Section 94 shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, the person shall be punished as a court-martial may direct. (Code Section 82)

6) Fraudulent Enlistment, Appointment or Separation
Any person who procures his or her own enlistment or appointment in the SMF by knowingly false representation or deliberate concealment as to his or her qualifications for that enlistment or appointment and receives pay or allowance thereunder, or procures his or her own separation from the SMF by knowingly providing false representation or deliberate concealment as to his or her eligibility for that separation, shall be punished as a court-martial may direct. (Code Section 83)

7) Unlawful Enlistment, Appointment or Separation
Any person subject to the Code who effects an enlistment or appointment in or a separation from the SMF of any person who is known to him or her to be ineligible for that enlistment, appointment or separation because it is prohibited by law, regulation or order shall be punished as a court-martial may direct. (Code Section 84)

8) Desertion

A) *Any member of the SMF is guilty of desertion who*:

i) *without authority goes or remains absent from his or her unit, organization, or place of duty with intent to remain away permanently*;

ii) *quits his or her unit, organization or place of duty with intent to avoid hazardous duty or to shirk important service; or*

iii) *without being regularly separated from one of the State military forces enlists or accepts an appointment in the same or another state military force, or in one of the armed forces of the United States, without fully disclosing the fact*

that he or she has not been regularly separated, or enters any foreign armed service except when authorized by the United States.

B) *Any commissioned SMF officer who, after tender of his or her resignation and before notice of its acceptance, quits his or her post or proper duties without leave and with intent to remain away permanently is guilty of desertion*.

C) *Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by confinement of not more than 10 years or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment as a court-martial may direct*. (Code Section 85)

9) Absence Without Leave
Any person subject to the Code who, without authority, fails to go to his or her appointed place of duty at the time prescribed, goes from that place, or absents himself or herself or remains absent from his or her unit, organization, or place of duty at which he or she is required to be at the time prescribed, shall be punished as a court-martial may direct. (Code Section 86)

10) Missing Movement
Any person subject to the Code who, through neglect or design, misses the movement of a ship, aircraft or unit with which he or she is required in the course of duty to move shall be punished as a court-martial may direct. (Code Section 87)

11) Contempt Toward Officials
Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Illinois Governor or General Assembly shall be punished as a court-martial may direct. (Code Section 88)

12) Disrespect Toward a Superior Commissioned Officer

Any person subject to the Code who behaves with disrespect toward his or her superior commissioned officer shall be punished as a court-martial may direct. (Code Section 89)

13) Assaulting or Willfully Disobeying a Superior Commissioned Officer
Any person subject to the Code who strikes his or her superior commissioned officer or draws or lifts up any weapon or offers any violence against his or her superior commissioned officer while that officer is in the execution of his or her office, or who willfully disobeys a lawful command of his or her superior commissioned officer, shall be punished, if the offense is committed in a time of war, by confinement of not more than 10 years or such other punishment as a court-martial may direct. If the offense is committed at any other time, the punishment shall be as a court-martial may direct. (Code Section 90)

14) Insubordinate Conduct Toward a Warrant Officer, Noncommissioned Officer, or Petty Officer
Any warrant officer or enlisted member who commits any of the following offenses shall be punished as a court-martial may direct:

A) *strikes or assaults a warrant officer, noncommissioned officer or petty officer while that officer is in the execution of his or her office*;

B) *willfully disobeys the lawful order of a warrant officer, noncommissioned officer or petty officer; or*

C) *treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer or petty officer, while that officer is in execution of his or her office*. (Code Section 91)

15) Failure to Obey Order or Regulation
Any person subject to the Code who commits any of the following offenses shall be punished as a court-martial may direct:

A) *violates or fails to obey any lawful general order or regulation;*

B) *having knowledge of any other lawful order issued by an SMF member that it is his or her duty to obey, fails to obey the order; or*

C) *is derelict in the performance of his or her duties*. (Code Section 92)

16) Cruelty and Maltreatment
Any person subject to the Code who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his or her orders shall be punished as a court-martial may direct. (Code Section 93)

17) Mutiny or Sedition

A) Offenses Defined

i) Mutiny. *Any person subject to the Code who, with intent to usurp or override lawful military authority, refuses, in concert with any other person, to obey orders or otherwise do his or her duty or creates any violence or disturbance is guilty of mutiny*.

ii) Sedition. *Any person subject to the Code who, with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence or other disturbance against that authority is guilty of sedition*; *or*

iii) Failure to Suppress or Report a Mutiny or Sedition. *Any person subject to the Code who fails to do his or her utmost to prevent and suppress a mutiny or sedition being committed in his or her presence, or fails to take all reasonable means to inform his or her superior commissioned officer or commanding officer of a mutiny or sedition that he or she knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition*.

B) *A person who is found guilty of* committing *or attempting to commit an offense defined in subsection (a) shall be punished as a court-martial may direct*. (Code Section 94)

18) Resistance, Flight, Breach of Arrest and Escape
Any person subject to the Code who commits any of the following shall be punished as a court-martial may direct:

A) *resists apprehension*;

B) *flees from apprehension*;

C) *breaks arrest; or*

D) *escapes from custody or confinement*. (Code Section 95)

19) Releasing Prisoner Without Proper Authority
Any person subject to the Code who, without proper authority, releases any prisoner committed to his or her charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law. (Code Section 96)

20) Unlawful Detention
Any person subject to the Code who, except as provided by law or regulation, apprehends, arrests or confines any person shall be punished as a court-martial may direct. (Code Section 97)

21) Noncompliance with Procedural Rules
Any person subject to the Code who is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under the Code, or knowingly and intentionally fails to enforce or comply with any provision of the Code regulating the proceedings before, during or after trial of an accused, shall be punished as a court-martial may direct. (Code Section 98)

22) Misbehavior Before the Enemy

Any person subject to the Code who, before or in the presence of the enemy, commits any of the following shall be punished as a court-martial may direct:

A) *runs away;*

B) *shamefully abandons, surrenders or delivers up any command, unit, place or military property that it is his or her duty to defend;*

C) *through disobedience, neglect or intentional misconduct endangers the safety of any command, unit, place or military property;*

D) *casts away his or her arms or ammunition;*

E) *is guilty of cowardly conduct;*

F) *quits his or her place of duty to plunder or pillage;*

G) *causes false alarms in any command, unit or place under control of the armed forces of the United States or the SMF;*

H) *willfully fails to do his or her utmost to encounter, engage, capture or destroy any enemy troops, combatants, vessels, aircraft, or any other thing that it is his or her duty to encounter, engage, capture or destroy; or*

I) *does not afford all practicable relief and assistance to any troops, combatants, vessels or aircraft of the armed forces belonging to the United States or its allies, to the State, or to any other state, when engaged in battle.* (Code Section 99)

23) Subordinate Compelling Surrender
Any person subject to the Code who compels or attempts to compel the commander of the military forces of this State or of any other state, place, vessel, aircraft or other military property, or of any body of members of the armed forces to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished as a court-martial may direct. (Code Section 100)

24) Improper Use of Countersign
Any person subject to the Code who in time of war discloses the parole (i.e., watchword) *or countersign to any person not entitled to receive it or who gives to another, who is entitled to receive and use the parole or countersign, a different parole or countersign from that which, to his or her knowledge, he or she was authorized and required to give, shall be punished as a court-martial may direct.* (Code Section 101)

25) Forcing a Safeguard
Any person subject to the Code who forces a safeguard shall be punished as a court-martial may direct. (Code Section 102)

26) Captured or Abandoned Property

A) *All persons subject to the Code shall secure all public property taken for the service of the United States or* the *State, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody or control*.

B) *Any person subject to the Code shall be punished as a court-martial may direct who*:

i) *fails to carry out the duties prescribed in subsection (d)(25)(A);*

ii) *buys, sells, trades or in any way deals in or disposes of taken, captured or abandoned property, whereby he or she receives or expects any profit, benefit or advantage to himself or another directly or indirectly connected with himself; or*

iii) *engages in looting or pillaging*. (Code Section 103)

27) Aiding the Enemy
Any person subject to the Code shall be punished as a court-martial may direct who:

A) *aids, or attempts to aid, the enemy with arms, ammunition, supplies, money or other things; or*

B) *without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly*. (Code Section 104)

28) Misconduct as a Prisoner
Any person subject to the Code shall be punished as a court-martial may direct who, while in the hands of the enemy in time of war:

A) *for the purpose of securing favorable treatment by his or her captors, acts without proper authority in a manner contrary to law, custom or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or*

B) *while in a position of authority over other military or civilian prisoners, maltreats them without justifiable cause*. (Code Section 105)

29) False Official Statements
Any person subject to the Code who, with intent to deceive, signs any false record, return, regulation, order or other official document made in the line of duty, knowing it to be false, or makes any other false official statement made in the line of duty, knowing it to be false, shall be punished as a court-martial may direct. (Code Section 107)

30) Military Property − Loss, Damage, Destruction or Wrongful Disposition
Any person subject to the Code who, without proper authority, sells or otherwise disposes of, willfully or through neglect damages, destroys or loses, or willfully or through neglect suffers to be lost, damaged, destroyed, sold or wrongfully disposed of, any military property of the United States or of any state shall be punished as a court-martial may direct. (Code Section 108)

31) Property Other Than Military Property – Waste, Spoliation or Destruction
Any person subject to the Code who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property

other than military property of the State of Illinois, the United States, or any other state shall be punished as a court-martial may direct. (Code Section 109)

32) Improper Hazarding of Vessel

A) *Any person subject to the Code who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces of the State of Illinois, the United States, or any other state shall suffer such punishment as a court-martial may direct*.

B) *Any person subject to the Code who negligently hazards or suffers to be hazarded any vessel of the armed forces of the State of Illinois, the United States, or any other state shall be punished as a court-martial may direct*. (Code Section 110)

33) Drunk on Duty
Any person subject to the Code, other than a sentinel or look-out, who is found drunk on duty shall be punished as a court-martial may direct. (Code Section 111)

34) Wrongful Use, Possession, Etc., of Controlled Substances

A) *Any person subject to the Code who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the United States, exports from the United States, or introduces into an installation, vessel, vehicle or aircraft used by or under the control of the armed forces of the United States or of any state military forces a substance described in subsection (d)(32)(B) shall be punished as a court-martial may direct*.

B) *The substances referred to in subsection (d)(32)(A) are the following*:

i) *Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid and marijuana, and any compound or derivative of any of these substances*.

ii) *Any substance not specified in* subsection (d)(32)(B)(i) *that is listed on a schedule of controlled substances prescribed by the President for the purposes of the Uniform Code of Military Justice of the armed forces of the United States*.

iii) *Any other substance not specified in* subsection (d)(32)(B)(i) *or contained on a list prescribed by the President under* subsection (d)(32)(B)(ii) *that is a Schedule I through V substance under Article 202 of the federal Controlled Substances Act*. (Code Section 112A)

35) Misbehavior of a Sentinel
Any sentinel or look-out who is found drunk or sleeping at his or her post, or leaves it before being regularly relieved, shall be punished, if the offense is committed in time of war, by confinement of not more than 10 years or other punishment as a court-martial may direct. If the offense is committed at any other time, punishment shall be as a court-martial may direct. (Code Section 113)

36) Dueling
Any person subject to the Code who fights, promotes, is concerned in, or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct. (Code Section 114)

37) Malingering
Any person subject to the Code who, for the purpose of avoiding work, duty or service, feigns illness, physical disablement, mental lapse or derangement, or intentionally inflicts self-injury, shall be punished as a court-martial may direct. (Code Section 115)

38) Riot or Breach of Peace
Any person subject to the Code who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct. (Code Section 116)

39) Provoking Speeches or Gestures

Any person subject to the Code who uses provoking or reproachful words or gestures towards any other person subject to the Code shall be punished as a court-martial may direct. (Code Section 117)

40) Frauds Against the Government
Any person subject to the Code shall be punished as a court-martial may direct who:

A) *knowing it to be false or fraudulent:*

i) *makes any claim against the United States,* the *State, or any officer of either; or*

ii) *presents to any person in the civil or military service, for approval or payment, any claim against the United States,* the *State, or any officer of either;*

B) *for the purpose of obtaining the approval, allowance or payment of any claim against the United States,* the *State, or any officer of either*:

i) *makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;*

ii) *makes any oath, affirmation or certification to any fact or to any writing or other paper knowing the oath, affirmation or certification to be false; or*

iii) *forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited;*

C) *having charge, possession, custody or control of any money or other property of the United States or* the *State, furnished or intended for the armed forces of the United States or the SMF, knowingly delivers to any person having authority to receive it, any amount less than that for which he or she receives a certificate or receipt; or*

D) *being authorized to make or deliver any paper certifying the receipt of any property of the United States or* the *State, furnished or intended for the armed forces of the United States or the SMF, makes or delivers to any person that writing without having full knowledge of the truth of the statements in the writing and with intent to defraud the United States or this State*. (Code Section 132)

41) Conduct Unbecoming an Officer and a Gentleman
Any commissioned officer, cadet, candidate or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct. (Code Section 133)

42) General Article
Though not specifically mentioned in the Code, all disorders and neglects to the prejudice of good order and discipline in the SMF and all conduct of a nature to bring discredit upon the SMF shall be taken cognizance of by a court-martial and punished at the discretion of a military court. However, when a crime constitutes an offense that violates both the *Code and the criminal laws of the state where the offense occurs or criminal laws of the United States, jurisdiction of the military court must be determined in accordance with Code* Section 2(b). (Code Section 134)

SUBPART K: NONJUDICIAL PUNISHMENT

Section 400.1200 Definitions

"AGR" means Active Guard Reserve.

"ANG" means the Illinois Air National Guard.

"Appropriate Nonpunitive Administrative Measures" means such actions as reprimands, administrative reduction in rank, administrative separation from SMF, etc.).

"ARNG" means the Illinois Army National Guard.

"Commander", as used in this Subpart, means a commissioned or warrant officer who, by virtue of his or her or grade and assignment, exercises primary command

authority over a military unit or organization recognized as a command. This term includes active duty and SMF commanders, whether in a Title 10 (U.S. Military) or Title 32 (National Guard) status, of installations or schools when a member's SMF commander is not also at the installation or school.

"Department" or "DMA" means the Illinois Department of Military Affairs.

"ETS" means expiration of term of service.

"Federal Uniform Code of Military Justice" or "UCMJ" means 10 USC 801 et seq.

"IDT" means inactive duty training.

"Illinois Code of Military Justice" or "Code" means 20 ILCS 1807.

"Imposing Commander" refers to the commander who actually imposes the NJP. The Adjutant General shall not act as an imposing commander, and he or she shall delegate NJP authority to an officer he or she deems appropriate. This delegation may be oral or in writing, and the delegation may specify a category of cases or only a particular case.

"Manual" means this Part, the Illinois Manual for Courts-Martial and Nonjudicial Punishment.

"Member" means a member of the State Military Force.

"Members of His or Her Command" refers to the assigned members of the unit or organization commanded, and to other members who are on temporary duty with, or otherwise attached to, the unit or organization. Attachment orders are not necessary if the commander exercises the usual responsibilities and attributes of command over the member.

"Minor Offense" means an offense made punishable by the military law of the United States, the laws of the State of Illinois, or the laws of the state in which the offense is committed (e.g., absence without leave (AWOL), disrespect).

"Next Superior Commander" refers to the next superior in the chain of command, or another authority designated by the Adjutant General as being next superior for NJP purposes.

"NGIL Forms" means the forms initiating and recording all nonjudicial punishment proceedings. Those forms can be seen on the websites at www.il.ngb.army.mil or www.goang.com/locations/illinois. The following are the NGIL Forms referenced in this Subpart:

"NGIL Form 60-R" means the form titled Record of Nonjudicial Punishment Proceedings. This form includes identifying information, the allegations, the record of the proceedings, and the outcome of the proceedings.

"NGIL Form 61-R" means the form titled Record of Supplementary Nonjudicial Punishment Action. This form is used when the outcome recorded on the NGIL Form 60-R is appealed and an appropriate authority suspends, mitigates, remits or sets aside a punishment.

"NGIL Form 62-R" means the form titled Record of Vacation of Suspended Nonjudicial Punishment.

"NGIL Form 63-R" means the form titled Request to Superior to Exercise Nonjudicial Punishment Authority. This form is used when a notifying commander who does not have certain punishment authorities pertaining to the SMF member through the NJP procedure requests that a superior commander who does exercise NJP authority reduce the rank.

"NGIL-HRO" means the Illinois National Guard Human Resources Office.

"NGIL-JA" means an Illinois National Guard Office of the Staff Judge Advocate.

"Nonjudicial Punishment" or "NJP" means disciplinary action without a judicial process (i.e., court-martial).

"Notifying Commander" refers to the commander who initiates NJP proceedings and completes item 1 of NGIL Form 60-R.

"Remission of Punishment" or "Remit Punishment" means to rescind punishment that has been imposed.

"SMF" means the State Military Forces subject to the Illinois Code of Military Justice.

Section 400.1205 Nonjudicial Punishment

a) General. This Subpart prescribes the requirements, policies, limitations and procedures for the imposition of nonjudicial punishment (NJP) pursuant to the Adjutant General's authority under Code Section 15. It is a modification of Part V of the MCM and should be interpreted consistent with the MCM. Unless modified by the Code or this Part, the applicable procedures contained in NGIL 27-10 and NGIL ANG Instruction 51-202 (both 2010; no later amendments or additions are incorporated) apply to NJP administered under this Subpart.

b) Use of Nonjudicial Punishment

1) Commander's Responsibility. Commanders are responsible for good order and discipline in their commands. Generally, discipline can be maintained through effective leadership, including administrative corrective measures. A commander should use nonpunitive disciplinary tools (e.g., counseling and reprimands) to the fullest extent to further the efficiency of the command before resorting to NJP. However, NJP may be used in all misconduct cases involving minor offenses for which the commander considers nonpunitive measures to be inadequate or inappropriate. In determining the method of discipline, commanders should consider the nature of the offense, the record of the service member, the need for good discipline, and the effect of punitive measures on the service member's record. All disciplinary measures shall be resolved at the lowest appropriate level and shall use the least severe discipline appropriate to the offense.

2) Statute of Limitations. Prompt action is essential for NJP to have the proper corrective effect. NJP may not be imposed for offenses committed more than 3 years before the date of initiation of NJP.

3) Applicability of Army or Air Force NJP Regulations

When the use of NJP is appropriate, the procedures of this Subpart shall be used in lieu of the administrative reduction in rank procedures created by applicable personnel regulations (Army Regulation (AR) 600-8-19, NGR (AR) 600-200 or ANGI 36-2503, etc.). When a situation arises that is not addressed by this Subpart, the Army or Air Force regulations concerning NJP should be consulted for guidance, as appropriate (e.g., AR 27-10, Air Force Instruction (AFI) 51-202).

4) Restriction on Punishment after Exercise of Jurisdiction by Civilian Authorities. An SMF member who has been tried in a civilian court may, but normally will not, be disciplined under this Subpart for the same acts over which the civilian court exercised jurisdiction. NJP action should not be used to discipline SMF members for civil court convictions because, in that instance, civil authorities have already disposed of criminal allegations and imposed criminal punishments. In cases of civil court convictions, the chain of command should normally consider appropriate administrative (i.e., nonpunitive) measures. Prior to imposition of NJP on SMF members for offenses that have been disposed of by civilian courts, commanders must obtain written approval of the Adjutant General or designee. Requests for that approval shall be staffed through command channels to:

Office of the Adjutant General
ATTN: NGIL-JA
1301 N. MacArthur Blvd.
Springfield IL 62702-2317

c) Personal Exercise of Discretion

1) A commander shall personally exercise discretion in the NJP process by:

A) Evaluating the case to determine whether NJP proceedings should be initiated.

B) Determining whether the member committed the offenses for which NJP proceedings are initiated.

C) Determining the amount and nature of any punishment, if punishment is appropriate.

2) No superior may direct any subordinate commander to impose NJP on any individual.

3) No superior may issue regulations or guidance that either directly or indirectly suggests to subordinate commanders that:

A) Certain categories of offenders or offenses should be disposed of by NJP (e.g., AWOL members shall be processed for NJP).

B) Predetermined kinds or amounts of punishment should be imposed for certain categories of offenders or offenses (e.g., AWOL NCOs shall be reduced one grade).

d) Multiple Punishments

1) When a commander determines that NJP is appropriate for a particular service member, all known offenses determined to be appropriate for disposition by NJP and ready to be considered at that time, including all the applicable offenses arising from a single incident or course of conduct, shall ordinarily be considered together and not made the basis for multiple punishments.

2) Double Jeopardy Prohibited
When a punishment has been imposed under NJP, or NJP proceedings are terminated for a reason tantamount to a finding of not guilty, further punishment may not be imposed for the same offense. Same offense means an offense that was part of a single incident or course of action. Administrative action, including administrative discharge proceedings, can be taken for an offense previously punished under NJP proceedings and does not constitute double punishment under this Subpart.

e) Cases Involving State or Federal Prosecution Interest
If an offense is subject to both NJP proceedings and to criminal trial in a State or federal court, the commander shall consult NGIL-JA prior to initiation of NJP proceedings.

f) Standard of Proof

1) NJP determinations must be supported by substantial evidence. For NJP purposes, this means a measure or degree of proof that reasonably convinces the imposing commander of the SMF member's guilt, considering:

A) all available direct evidence, i.e., evidence based on actual knowledge or observation of witnesses; and

B) all available indirect evidence, i.e., facts or statements from which reasonable inferences, deductions and conclusions may be drawn to establish an unobserved fact, knowledge or state of mind.

2) When considering the evidence, no distinction shall be made between the relative value of direct and indirect evidence. In some cases, direct evidence may be more convincing than indirect evidence and, in other cases, indirect evidence may be more convincing than the statement of an eyewitness.

g) Effect of Errors. Failure to comply with any of the procedural provisions in this Subpart shall not invalidate a punishment imposed under the Code, unless the error materially prejudiced a substantial right of the service member on whom the punishment was imposed.

Section 400.1210 Authority

a) Who May Impose Nonjudicial Punishment

1) Unless otherwise specified in this Subpart, or if authority to impose NJP has been limited or withheld by a superior commander (see subsection (a)(2)), any commander may impose NJP on members of his or her command for minor offenses.

2) A commander at any level may withhold from any subordinate commander all or part of the NJP authority that he or she would otherwise have had under this Subpart, such as over certain categories of military personnel, offenses or individual cases. The withholding action may be oral, in writing, or incorporated in a permanent directive, but it must clearly set out the specific authority withheld.

3) To impose NJP on officers, warrant officers, or enlisted personnel in grades E-8 or E-9, the commander must be in the rank of colonel or above and be assigned to at least a brigade/group/wing command position.

4) If a commander is the victim of a crime in his or her personal capacity (e.g., victim of an assault or larceny), as opposed to his or her official capacity (e.g., violation of commander's order), that commander shall forward a report of the incident to the next superior commander for review and appropriate action.

b) Persons on Whom Nonjudicial Punishment May Be Imposed
NJP may be imposed on the following persons, regardless of whether the offense was committed inside or outside the State of Illinois:

1) Members of the SMF for offenses committed while in a military duty or training status pursuant to 32 USC.

2) Members of the SMF for offenses committed while in a State Active Duty status pursuant to orders of the Governor.

3) All other persons lawfully ordered to duty in or with the SMF for the time period stated in the order or other directive.

Section 400.1215 Procedure

a) General. The authority to impose NJP charges a commander with the responsibility of exercising his or her authority in an absolutely fair and judicious manner. The commander's action must be temperate, just and conducive to good order and discipline.

b) Preliminary Inquiry. The commander of the alleged offender must ensure that the matter is promptly and adequately investigated. The preliminary investigation is usually informal and consists of interviews with witnesses and/or review of police/investigative reports, if available. The investigation should cover:

1) Whether an offense was committed;

2) The nature and circumstances of the offense; and

3) The age, maturity, experience and military record of the offender.

c) Initiation of Proceedings and Referral to Superior. A commander who, after a preliminary inquiry, determines that NJP proceedings may be appropriate, should consult with his or her Staff Judge Advocate for advice and assistance. NJP action should be initiated at the lowest level of command commensurate with the needs of discipline. If a commander determines his or her authority under NJP is insufficient to impose a proper punishment, the matter may be referred to a superior commander for initiation of proceedings (e.g., the offense may warrant reduction but the immediate commander does not have reduction authority). In such a case, all relevant documents shall be forwarded through command channels to the appropriate commander using NGIL Form 63-R (Request to Superior to Exercise Nonjudicial Punishment Authority). The superior commander shall either initiate the NJP action or refer the matter for other appropriate action.

d) Notification

1) The appropriate commander shall complete item 1 of NGIL Form 60-R (Record of Nonjudicial Punishment Proceedings) as follows:

A) State the allegation following the guidance provided by DMA and consult the appropriate Staff Judge Advocate for assistance. However, an NJP action remains valid even if the specification fails to include all the elements of an offense, provided that the member is reasonably informed of the nature of the alleged misconduct.

B) Inform the SMF member of his or her rights with respect to the NJP proceeding.

C) State the name, rank and duty title of the next superior commander.

D) Contact the appropriate Staff Judge Advocate or NGIL-JA for assignment of a military counsel to assist the member. At a minimum, the military counsel's name, rank and business telephone number shall be listed on the form, but his or her home addresses or telephone numbers shall not be included.

E) State the date and time at which the member must report to you to make his or her elections and presentation, if applicable. In this regard, the member shall be given a reasonable period of time to consult with counsel, to prepare his or her case, and to decide what rights noted under subsection (e) he or she shall exercise. The length of the decision period shall be determined by the notifying commander after considering such factors as the complexity of the case and the availability of counsel and witnesses. An NJP action may be initiated and completed within an inactive duty training (IDT) weekend if:

i) it is a non-complex case, i.e., an uncontested case;

ii) the notifying commander ensures availability of counsel and witnesses; and

iii) the member is provided sufficient duty time to prepare his or her defense.

F) Sign in the commander's signature block. The signature of the commander is nondelegable.

2) The notifying commander shall personally notify the member of the initiation of NJP proceedings in accordance with DMA guidance. However, when circumstances prevent the commander from personally notifying and serving the NGIL Form 60-R on the member, or the notifying commander elects not to do so, the notifying commander may direct a subordinate who is senior in rank to the member to notify and serve the member. The commander or the subordinate, as appropriate, shall date and sign item 2 (proof of service) of the NGIL Form 60-R when the member is served. Regardless of who serves the member, a copy of the NGIL Form 60-R shall be given to the member at that time. If personal notification is impractical because of the member's unauthorized absence or other reason, the member may be notified by certified mail, and the commander shall document the reason for the service by mail in item 11 of the NGIL Form 60-R. The member also has the right to examine all statements and evidence upon which the commander intends to rely in arriving at a decision whether to impose punishment, and the type and amount of punishment to be imposed, unless those matters are privileged

or restricted by law or regulation (e.g., Office of Special Investigation (OSI) or Criminal Investigation Command (CID) reports, classified information, etc.). In this case, NJP proceedings may proceed if the member's counsel has access to the records, or a summary of the information, for use in preparing a defense to the allegations.

3) The SMF member shall be informed of the maximum punishment that may be imposed under Appendix A if he or she is found guilty of the alleged offenses; however, the member is not entitled to be informed of the type or amount of punishment he or she will receive if NJP ultimately is imposed.

4) If a new commander takes command after NJP proceedings are initiated, but before the member presents his or her case to the imposing commander, a new NGIL Form 60-R shall be initiated by the new commander. Once again, the member shall be given a reasonable decision period in which to consult counsel.

5) When evidence of an additional offense or offenses arises following initiation of NJP proceedings, and before the member is notified of the punishment, a commander may:

A) Withdraw the initial NGIL Form 60-R and reinitiate NJP proceedings to include the additional offenses; or

B) Proceed with the initial NJP proceeding and create a second NGIL Form 60-R for the additional offenses.

e) Member's Election of Rights

1) The member has the following rights during NJP proceedings:

A) To remain silent and not make any statement concerning the allegations. However, if the member waives this right, any statements made may be used against him in the NJP proceedings or in any other proceedings.

B) To consult with appointed military counsel. The member is not entitled to request military counsel of his or her choice, but the

member may consult with civilian counsel retained at the member's own expense.

C) To make a personal presentation before the next superior commander in lieu of presenting his or her case before the notifying commander. To fully present his or her case before the imposing commander in writing or in person, or both (subject to subsection (f)). This includes the right to call witnesses if determined reasonably available by the imposing commander, the right to present evidence, to be represented by a spokesperson (if reasonably available), and to examine available evidence.

2) The member has the right to consult with appointed military counsel (in person or by telephone) prior to making his or her elections under subsection (e)(1)(C). If necessary, the member or his or her counsel may request an extension of the time period stated in item 1 of the NGIL Form 60-R. Such a request should be in writing, stating the reasons for the request. The commander may grant an extension for good cause shown by the member or his or her counsel.

3) A member requesting a personal presentation before the notifying commander shall indicate that request in item 3 of the NGIL Form 60-R. The presentation shall be made at that time or at such time as the commander directs.

4) If the member requests a personal presentation before the next superior commander, the member shall so indicate in item 3 of the NGIL Form 60-R. The notifying commander shall forward all documents, statements and evidence to that commander. The next superior commander shall then review the information, collect any additional information he or she feels is necessary, and notify the member and his or her counsel of the date and time of the presentation.

5) If the member does not notify the commander of his or her decision within the specified time and does not request a delay, or if the member refuses to complete or sign item 3 of the NGIL Form 60-R, the notifying commander may continue the proceedings based on available information. If punishment is imposed, that information shall be recorded in item 4 (commander's decision) of the NGIL Form 60-R, along with the following

entry: "Advised of his/her rights and (member failed to respond within the specified time) (member refused to complete and sign item 3)".

f) Member's Presentation

1) Following DMA guidance, the member shall be allowed to personally present matters in defense, extenuation or mitigation to the imposing commander, except when a personal appearance is prevented by unavailability of the commander or by extraordinary circumstances (e.g., the member is stationed at a geographic location remote from that of the imposing commander and cannot be readily brought before the commander). When a personal appearance is requested, but is not granted, the imposing commander shall appoint a commissioned officer who is superior to the member to conduct the presentation, and the member shall be entitled to make a personal presentation before that designated officer. The designated officer shall then prepare a memorandum summarizing the member's presentation and shall forward it to the imposing commander, along with all written matters submitted by the member.

2) The purpose of the personal presentation is to allow the member to present information to the commander in a manner that may be more effective or more persuasive than a written presentation. Formal rules of evidence are not applicable. The commander may consider any matter, including unsworn statements, that he or she believes to be relevant to the offense. The commander may ask questions to clarify facts or issues; however, the member's presentation is not an adversarial proceeding. The commander shall not present "government" witnesses or evidence, and neither the member nor a spokesperson (including any attorney present on behalf of the member) may examine or cross-examine witnesses, unless permitted by the imposing commander.

3) NJP presentations may be open or closed to members of the public at the discretion of the imposing commander. However, even when closed, the commander may have a member of his or her staff (e.g., the First Sergeant) attend the proceedings as he or she determines appropriate.

4) At the presentation, the member shall be entitled to:

A) Examine any relevant documents or physical objects on which the commander intends to rely in deciding whether to impose punishment or how much punishment to impose (subject to the limitations of subsection (d)(2)).

B) Be accompanied by a spokesperson provided or arranged for by the member. The member's spokesperson may be his or her appointed military counsel or civilian counsel retained at his or her own expense. However, the member has no right to legal counsel at the presentation, and the commander need not grant a delay for the appearance of any spokesperson if that person is not reasonably available, as determined by the commander.

C) Present relevant witnesses in defense, extenuation or mitigation who are reasonably available, as determined by the commander, and can be presented without legal process. To determine whether a witness is reasonably available, the imposing commander shall consider the fact that written statements are acceptable. Neither witness nor transportation fees are authorized to be paid. Reasonably available witnesses will normally include only personnel at the installation concerned, and those personnel whose attendance shall not unnecessarily delay the proceedings.

5) The imposing commander must carefully consider all matters submitted by the member in defense, extenuation or mitigation. If, after evaluation of all pertinent matters, the imposing commander determines that NJP is not warranted, the commander shall so indicate in item 4 of the NGIL Form 60-R, the member shall be notified, and the proceedings shall be terminated.

6) If, after evaluation of all pertinent matters, the imposing commander determines that NJP is warranted, the commander shall line out and initial the allegations, if any, that he or she determines the member did not commit. The commander shall then determine an appropriate punishment and complete item 4 of the NGIL Form 60-R, using the model punishment formats established by DMA. Whenever possible, the commander should impose NJP on the member in person. The commander may also counsel the member at this time concerning the misconduct. If appropriate, the commander shall refer the member to military or civilian agencies that can

assist in resolving any personal problems that may have contributed to the misconduct. The commander shall then explain appellate rights and procedures to the member, following DMA guidance. The member shall complete item 5 (member's appeal decision) of the NGIL Form 60-R.

g) Appeals of Nonjudicial Punishment

1) General. A member may appeal an NJP action if he or she considers the punishment to be unjust or disproportionate to the offense. The member may appeal either the findings, the punishment or both. The member shall appeal through the imposing commander to the next superior commander, or to such other authority designated by the Adjutant General for NJP purposes. If the appellate authority is the Adjutant General, he or she shall act on the appeal in the cases of officers, warrant officers or enlisted personnel in the grades of E-8 or E-9. In all other cases, he or she may delegate the power to act on the appeal to the Assistant Adjutant General (Army) or to the Assistant Adjutant General (Air). All matters to be considered on appeal must be submitted by the member in writing, the member has no right to an oral presentation on appeal, and only one appeal is permissible under NJP proceedings.

2) Procedure for Submitting an Appeal

A) At the time the punishment is announced to the member, he or she shall be informed of his or her right to appeal and shall be directed to state whether he or she is appealing the commander's action. The member shall indicate his or her appeal decision in item 5 (appeal decision) of the NGIL Form 60-R. If the member elects to appeal, the member may request 10 calendar days to submit any additional written matters in support of the appeal. The commander may grant an extension of the 10-day period for good cause shown by the member or his or her counsel. If written matters are not presented to the imposing commander within the prescribed time, the appeal shall be sent to the appellate authority for his or her decision with a statement to that effect.

B) The member is not required to state the reasons for his or her appeal or to submit any written matters. However, if the member elects to submit written matters in support of the appeal, these

matters must be presented initially to the imposing commander. They may not be presented directly to the appellate authority.

C) Punishments are not stayed pending final decision on an appeal unless no action is taken within 10 calendar days after the appeal was submitted. In that case, if the member requests, any unexecuted punishment involving restriction or extra duty shall be stayed until action is taken on the appeal.

D) If the member refuses to complete or sign item 5 of the NGIL Form 60-R, that refusal shall not be treated as an appeal. The commander shall process the NGIL Form 60-R as if the member declined to appeal and shall make the following entry in item 5: "Advised of punishment and appellate rights and member refused to (complete) (sign)."

3) Action by Imposing Commander. The imposing commander may take any action on the appeal that he or she deems appropriate, except that punishments may not be increased on appeal. The commander's action shall be indicated in item 6 (action on appeal) of the NGIL Form 60-R. The commander may suspend, mitigate, remit or set aside any part of the punishment. If the imposing commander grants the full relief requested by the member, the appeal is not forwarded to the appellate authority. In all other cases, the commander shall forward the appeal to the appellate authority, through the Staff Judge Advocate, along with all written materials considered in imposing the punishment. The commander may also forward appropriate comments addressing any matters raised by the member in his or her appeal, a statement of the commander's rationale for imposing the punishment, and a recommendation for action on the appeal.

4) Action by Staff Judge Advocate. The Staff Judge Advocate, or designee, shall advise the appellate authority as to the appropriateness of the punishment and whether the proceedings were conducted in accordance with the Illinois Code of Military Justice and this Subpart. The legal opinion may be either oral or written, and shall be documented in item 7 (review of appeal) of the NGIL Form 60-R.

5) Action by Appellate Authority. Action by the appellate authority shall be entered in item 8 of the NGIL Form 60-R. The appellate authority shall

take action expeditiously, normally within 10 calendar days after the appeal was submitted. The appellate authority may conduct an independent inquiry into the case, if the appellate authority so desires, and the appellate authority may exercise the same powers with respect to the punishment as may be exercised by the imposing commander. After the appellate authority takes action, the member shall be promptly notified of the results and shall complete item 9 (member acknowledgment of appeal action) of the NGIL Form 60-R. However, if all punishment is disapproved, the entire action must be set aside and removed from the member's record. A final NJP action cannot consist of "no punishment".

h) Notification by Certified Mail

1) All NJP proceedings shall be conducted in person with the member, whenever possible, to ensure the member understands the proceedings and has a full opportunity to exercise all rights granted under this Subpart. However, if the commander determines the member is not reasonably available to conduct any portion of the proceedings in person, the member may be notified by certified mail of the following matters:

A) Initiation of NJP proceedings, if the commander or his or her designee determines that personal notification is impractical, and the commander documents the reason for service by mail in item 11 of the NGIL Form 60-R.

B) Additional NJP matters, such as date and time of the personal presentation, the member's punishment, the member's right to appeal, and action taken on the appeal.

C) Supplementary NJP actions under Section 400.2040. However, vacation of suspension proceedings shall be initiated in person unless the commander or his or her designee determines that personal notification is impractical, and the commander documents the reason for service by mail in item 7 of the NGIL Form 62-R (Record of Vacation of Suspended Nonjudicial Punishment).

2) In all of the situations described in subsection (h)(1), the commander shall annotate the appropriate items on the NGIL Forms 60-R, 61-R (Record of Supplementary Nonjudicial Punishment Action) or 62-R showing

notification by certified mail. The certified mail receipts shall be forwarded with the applicable form.

Section 400.1220 Punishment

a) General. Whether to impose punishment, and the amount and nature of the punishment, are the sole decisions of the imposing commander. However, the commander is encouraged to discuss appropriate punishments with his or her Staff Judge Advocate after the SMF member has had an opportunity to present matters in defense, mitigation or extenuation. Commanders are also encouraged to consult with their NCOs and other subordinates on the appropriate type, duration and limits of punishment to be imposed. Additionally, as NCOs are often in the best position to observe a member undergoing punishment, and to evaluate performance and attitude, their views on clemency should be given careful consideration.

1) When forfeiture of pay will be imposed, the commander should consider imposing a forfeiture below the maximum authorized. Maximum forfeitures should be reserved for serious cases or repeat offenders.

2) Unsuspended reduction in grade should only be imposed in the same punishment with forfeiture of pay when the maximum exercise of nonjudicial punishment authority is warranted.

b) Rules for Imposing Punishment. Unsuspended reduction in grade and forfeitures of pay are effective on the date of imposition, which is the date item 4 of the NGIL Form 60-R is signed by the imposing commander. All other unsuspended punishments take effect immediately upon notification to the member, unless otherwise stated by the commander in item 4. In this regard, the commander cannot choose a date earlier than the date he or she signed that item, but he or she may delay the punishment for legitimate reasons (e.g., the member is hospitalized or on authorized emergency leave). In those cases, the execution of the punishment should begin immediately after the cause of the delay has abated. Also, if a member to be punished is currently undergoing a punishment involving restriction or extra duties under a prior NJP action, the commander can prescribe an additional punishment of restriction or extra duties to begin after the completion of the earlier punishment. Maximum punishments are prescribed in Appendix A.

1) Restriction. Restriction may be imposed with or without suspension from duties, and the limits of the restriction shall be announced at the time punishment is imposed.

2) Extra Duties. Extra duties may be required to be performed at any time and, within the duration of the punishment, for any length of time. However, when extra duties are performed during IDT periods, one day of extra duty shall be counted against each unit training assembly for that day. Extra duties may include the performance of fatigue duty or of any other military duty; however, no extra duty may be imposed that:

A) Constitutes cruel or unusual punishment, or a punishment not sanctioned by the customs of the service (e.g., using the offender as a personal servant);

B) Is a duty normally intended as an honor, such as assignment to a guard of honor;

C) Is required to be performed in a ridiculous or unnecessarily degrading manner (e.g., an order to clean a barracks floor with a toothbrush);

D) Constitutes a safety or health hazard to the offender; or

E) Would demean the member's grade or position.

3) Forfeiture of Pay. Forfeiture of one day's pay shall, in the case of IDT, constitute the pay for one unit training assembly (UTA; a paid IDT of no less than 4 hours). Forfeitures of pay may apply to pay accruing on or after the date punishment is imposed and to any pay accrued, but not yet paid, before that date.

4) Reduction in Grade

A) Reduction Authority

i) Members in the grade of E-9 may be reduced by the Assistant Adjutant General for Army or Air, as appropriate,

but that reduction shall be effective only upon the written approval of the Adjutant General.

ii) Members in the grades up to and including E-8 may be reduced by a commander in a Brigade or Wing command position, or higher.

iii) Members in the grades up to and including E-6 may be reduced by a commander in a Battalion or Squadron command position, or higher.

iv) Members in the grades up to and including E-4 may be reduced by a commander in a Company or Flight command position, or higher.

B) Date of Rank. When a member is reduced in grade as a result of an unsuspended reduction, his or her date of rank in the grade to which reduced is the date the punishment of reduction was imposed. If, however, the reduction is suspended either on or after the time the punishment was imposed, or is later set aside or mitigated to forfeiture, the date of rank in the grade held before the punishment was imposed remains unchanged. For example, if an E-5 has a date of rank of May 1, the member receives nonjudicial punishment on June 1 consisting of a reduction in rank, and the commander subsequently suspends, sets aside or mitigates the reduction on July 1, the date of rank for the restored grade is May 1.

C) Entitlement to Pay. When a member is restored to a higher pay grade because of a suspension or because a reduction is mitigated to forfeiture, entitlement to pay at the higher grade is effective on the date of the suspension or mitigation, even though an earlier date of rank is assigned. If, however, a reduction is set aside and all rights, privileges and property are restored, the member concerned will be entitled to pay as though the reduction had never been imposed.

D) Void Reduction. Any portion of a reduction imposed under NJP beyond the imposing commander's authority to reduce is void and

must be set aside; however, if a commander reduces a member below a grade to which the commander is authorized to reduce, and if the circumstances of the case indicate that the commander was authorized and intended to reduce the member at least one grade, a one-grade reduction may be approved.

5) Admonition and Reprimand. Admonitions or reprimands imposed on commissioned or warrant officers must be in writing. Admonitions or reprimands imposed on enlisted members may be administered orally or in writing. Written admonitions and reprimands imposed as a punishment may be included on the NGIL Form 60-R or may be written in memorandum format and listed as an attachment to the NGIL Form 60-R. Oral admonitions and reprimands shall be identified as such in item 4 of the NGIL Form 60-R.

c) Limitations on Punishments

1) Restriction. Restriction shall not be imposed on or served by members performing IDT. Restriction may be imposed and served only when the member is at an installation, camp or field-type duty away from home station, or under circumstances in which commuting home on a daily basis is not normally authorized.

2) Combination. All authorized punishments may be imposed in a single case in the maximum amounts, except that, when restriction and extra duties are combined, the combination may not exceed the maximum imposable for extra duties.

d) Announcement of Punishment. The results of NJP actions may be announced after punishment is imposed or, if appealed, after final decision on the appeal. The results of NJP proceedings may include a summary of the offense, rank of the offender, and the punishment imposed, but shall not include the offender's name or Social Security Number (SSN). The results may be announced orally at the next unit formation, may be posted on the unit bulletin board, or may be included in an appropriate newsletter or publication. The purpose of announcing punishments is to preclude the perception of unfairness of punishment and to deter similar misconduct by other members. However, an inconsistent or arbitrary policy regarding the announcement of punishments must be avoided, as that might result in the appearance of vindictiveness or favoritism.

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF PROPOSED RULES

Section 400.1225 Suspension, Vacation, Mitigation, Remission and Set Aside of Punishment

a) General. The imposing commander, his or her successor in command, or any superior commander may suspend, mitigate or remit punishment as a means of correcting behavior and rehabilitating the offender. If used correctly, these can be valuable tools in maintaining morale and discipline. This action can be taken on the commander's own initiative, or the SMF member can request the action. These commanders also have the authority to vacate suspended punishments or set aside punishments when appropriate.

1) Successor in Command. For these purposes, the successor in command may be either:

A) The officer who has succeeded to the command or position occupied by the imposing commander, if that officer has authority to impose the punishment involved on the member, and providing the member is still assigned to that command; or

B) The officer authorized to impose the punishment on the member, if the member has been reassigned.

2) Recording of Action. The imposing commander may suspend a punishment when completing item 4 of the NGIL Form 60-R. Any supplementary action involving suspension, mitigation, remission or set aside shall be recorded on NGIL Form 61-R. Any action involving vacation of a suspended punishment shall be recorded on NGIL Form 62-R.

3) A commander can suspend, mitigate, remit or set aside punishment only if the commander had the authority to impose that punishment. For example, a company commander cannot suspend, mitigate, remit or set aside a reduction imposed on an E-7. A commander not empowered to act may, however, recommend that action to the next superior commander authorized to impose the punishment involved.

b) Suspension. To suspend punishment is to postpone application of all or part of it for a specified probationary period, with the understanding that it will be

automatically remitted at the end of that period if the offender does not engage in further misconduct. Suspension is often warranted for a first offender or when there are persuasive matters in extenuation or mitigation.

1) A commander may, at any time, suspend any part or amount of the imposed punishment that remains unexecuted. Furthermore, an executed punishment of reduction in grade or forfeiture of pay may be suspended, at any time, provided the suspension is accomplished within a period of 4 months after the date of imposition.

2) Punishment may not be suspended for longer than 6 calendar months from the date of the suspension, or beyond an enlistment or the member's expiration of term of service (ETS). This 6-month limitation on suspensions may or may not be 180 days. For example, a punishment imposed on March 1 may be suspended until August 31, even though this period is 183 days. The suspension action shall set a specific date when, unless it is vacated sooner, the suspension shall terminate and the punishment shall be automatically remitted without further action.

3) Suspension of a punishment automatically includes a condition that the member does not violate, for the period of the suspension, any punitive articles of the UCMJ, criminal laws of the State of Illinois, or this Subpart. Commanders may specify other conditions as well, but any such conditions must be reasonably related to the offense. The commander must consult with his or her Staff Judge Advocate before imposing conditions. Furthermore, any additional conditions of suspension must be clearly stated within the punishment endorsement, and they must be capable of being completed during the period of suspension.

c) Vacation of Suspension. A commander may vacate any suspended punishment, provided the punishment is of a type and amount he or she could impose, if the commander determines that the member has committed an offense during the period of suspension or has failed to meet a condition upon which the suspension was based. Vacation proceedings shall be recorded on NGIL Form 62-R. The action must be initiated before the end of the suspension period.

1) The commander or his or her designee shall personally notify the member of the basis of the proposed vacation, date and sign item 2 of the NGIL Form 62-R when the member is served, and give the member an

opportunity to rebut the information on which the proposed vacation is based. If personal notification is impractical because of the member's unauthorized absence or other reason, the member may be notified by certified mail, and the commander shall document the reason for that service in item 7 of the form. The member may consult with counsel prior to submitting a rebuttal. The member does not have to make any statement concerning the allegations, but does not have the same procedural rights granted under Section 400.1220. The member shall be given the opportunity to present rebuttal matters, in person and/or in writing as determined by the commander, and the commander shall consider any such matters presented. However, the commander shall schedule the proceedings at his or her discretion, and the member has no right to appeal the commander's decision.

2) A single offense may be the basis for both vacation action and a new NJP proceeding only when the new offense warrants substantial additional punishment. Also, in a suitable case, the original punishment may be continued in a suspended status and a separate NJP proceeding may be initiated for the new offense.

3) If a reduction in grade is suspended and the suspension is later vacated, the reduction is effective on the date of vacation, but the member's date of rank in the grade to which reduced is the date the reduction was initially imposed. For example, if a member receives NJP on June 1 consisting of a suspended reduction in grade for 6 months, and the commander subsequently vacates the suspension on September 1, the effective date of the reduction is September 1, but the member's new date of rank is June 1.

d) Mitigation. To mitigate punishment is to change it to a less severe punishment in quantity or type; however, the general nature of the punishment must remain the same. For example, restraints on liberty (i.e., restriction or extra duties) may not be mitigated to monetary punishments (i.e., forfeitures of pay), and a forfeiture of pay may be mitigated only to a lesser forfeiture of pay. Mitigation may be appropriate when the offender's subsequent good conduct merits a reduction in severity of the punishment, or when the punishment imposed was disproportionate to the offense or the offender.

1) With the exception of reduction in grade, the power to mitigate exists only with respect to a punishment or portion of the punishment that is unexecuted.

2) A reduction in grade, whether or not executed, can be mitigated to a forfeiture of pay, but not to a lesser reduction or no reduction, provided the action is taken within 4 months after execution of the punishment.

3) Extra duties can be mitigated to restriction, but restriction, being the least severe restraint on liberty, cannot be mitigated to a different form of punishment. Also, when a restraint on liberty is mitigated, the lesser punishment may not run for a period greater than the remainder of the period for which the punishment was initially imposed. For example, when a person is given 15 days of extra duties, 5 days of this punishment has been served, and the punishment is then mitigated to restriction, the mitigated punishment may not exceed restriction for a period of 10 days.

e) Remission. To remit punishment is to excuse the offender from the unexecuted portion of the punishment, and remission may be appropriate under the same circumstances as for mitigation. In this regard, an unsuspended reduction is executed on imposition and cannot be remitted, but it may be suspended, mitigated or set aside if appropriate. In addition, the member's death, separation or discharge automatically remits any unexecuted punishment, and a member shall not be involuntarily held beyond his or her ETS to complete any unexecuted punishment.

f) Set Aside. When a commander determines that a member who was punished, or is being punished, has suffered a "clear injustice", the commander may cancel the punishment and restore the member's rights, privileges or property accordingly.

1) For these purposes, "clear injustice" means that there exists an unwaived legal or factual error that materially prejudices a substantial right of the member. For example, a clear injustice would exist when information later comes to the commander's attention that casts substantial doubt on the member's guilt or establishes persuasive extenuation for the commission of the offense.

2) A punishment cannot be set aside merely because a member avoids future misconduct, or because the member's subsequent performance of duty has

been exemplary, or because the punishment may have a future adverse impact on the retention or promotion potential of the member.

3) Setting aside a punishment in its entirety restores the member to the position he or she was in before the punishment was imposed, as if the nonjudicial punishment action had never been initiated. For example, if an E-5 receives NJP on June 1 consisting of a reduction in grade, and the punishment is set aside on September 1, the date of rank and effective date for the restored grade reverts to that held before reduction, and the member shall be entitled to pay at the E-5 grade for the 3 months he or she was paid at the reduced grade.

4) Action to set aside punishment must be taken within 4 months after execution of the punishment, unless the commander determines unusual circumstances exist. In such a case, the commander must explain those circumstances in item 1b of the NGIL Form 61-R.

Section 400.1230 Records of Punishment

a) NGIL Form 60-R: Record of Nonjudicial Punishment Proceedings. All NJP actions, including notification, election of rights, imposition of punishment, appeal, Staff Judge Advocate review, and action on appeal, shall be recorded on NGIL Form 60-R. After the SMF member indicates in item 5 that he or she does not appeal, or after completion of item 9 if the member appeals, a copy of the completed NGIL Form 60-R shall be given to the member. The original of the NGIL Form 60-R, with all attachments and supporting documents (see subsection (f)), shall then be mailed to the Office of the Adjutant General, ATTN: NGIL-JA, at the address specified in Section 400.1205(b)(4). The Office shall review the form for legal sufficiency, then shall distribute the form as indicated in subsections (a)(1) through (5).

1) For Army National Guard (ARNG) members, the original of the NGIL Form 60-R shall be filed in the member's Military Personnel Records Jacket (MPRJ). For Air National Guard (ANG) members, the original of NGIL Form 60-R shall be filed in the commander's Personnel Information File (PIF). These originals shall normally be destroyed by the custodian of the file at the end of 2 years from the date of imposition of punishment, unless:

A) the filing authority directs filing for either a shorter or longer period of time in accordance with applicable service regulations; or

B) the member has received an additional NJP in the interim. In the latter case, both NJP records shall be retained in the MPRJ or PIF and shall be destroyed at the end of 2 years from the latest date of imposition of punishment, or at the end of the time period determined by the commander in accordance with applicable service regulations.

2) One copy, with attachments and supporting documents, shall be filed with the NGIL-JA for one year from the date punishment was imposed, after which it shall be destroyed. NGIL-JA shall also forward a copy of the form to NGIL-HRO if the member is in an Active Guard Reserve (AGR) status.

3) One copy, with attachments, shall be permanently filed in the member's vault file (ARNG) or State 201 file (ANG).

4) If the punishment affects the member's pay (i.e., an unsuspended reduction in grade or forfeiture of pay), one copy of the NGIL Form 60-R shall be sent to the appropriate ARNG or ANG office that processes that member's military pay records.

5) If the punishment includes an unsuspended reduction in grade, one copy of the NGIL Form 60-R shall be sent to the appropriate reduction authority to process the reduction orders.

b) NGIL Form 61-R: Record of Supplementary Nonjudicial Punishment Action. All supplementary actions, except vacation of suspension, shall be recorded on NGIL Form 61-R. Supplementary action is any action taken by an appropriate authority to suspend, mitigate, remit or set aside a punishment after action has been taken on an appeal or the NGIL Form 60-R has been distributed according to subsection (a). After completion of item 1 on the NGIL Form 61-R, a copy of the completed form shall be given to the member. The original of the NGIL Form 61-R, with all attachments and supporting documents, shall then be mailed to the Office of the Adjutant General, ATT: NGIL-JA, at the address specified in Section 400.1205(b)(4). The Office shall review the form for legal sufficiency, then shall distribute the form as indicated in subsections (b)(1) through (5).

1) The original of the NGIL Form 61-R shall be filed in the MPRJ for ARNG members or in the commander's PIF for ANG. The NGIL Form 61-R shall be destroyed at the same time as the NGIL Form 60-R that it supplements.

2) One copy, with all attachments and supporting documents, shall be filed at NGIL-JA for one year from the date of the supplementary action, after which it shall be destroyed. NGIL-JA shall also forward a copy of the form to NGIL-HRO if the member is in an AGR status.

3) One copy, with attachments, shall be permanently filed in the member's vault file (ARNG) or State 201 file (ANG).

4) If the supplementary action affects the member's pay (e.g., set aside of a punishment), one copy of the NGIL Form 61-R and a copy of the initial NGIL Form 60-R shall be sent to the appropriate ARNG or ANG office that processes that member's military pay records.

5) If the supplementary action affects the member's grade (e.g., restoration to a higher grade), then one copy of the NGIL Form 61-R and a copy of the initial NGIL Form 60-R shall be forwarded to the appropriate promotion authority to process the order.

c) NGIL Form 62-R (Record of Vacation of Suspended Nonjudicial Punishment). Vacation of suspension proceedings shall be recorded on NGIL Form 62-R. After completion of item 4 on the NGIL Form 62-R, a copy of the completed form shall be given to the member. The original of the NGIL Form 62-R, with all attachments and supporting documents, shall then be mailed to the Office of the Adjutant General, ATTN: NGIL-JA, at the address specified in Section 400.1205(b)(4). The Office shall review the form for legal sufficiency, then shall distribute the form as indicated in subsections (c)(1) through (5).

1) The original of the NGIL Form 62-R shall be filed in the MPRJ for ARNG members or in the commander's PIF for ANG members. The NGIL Form 62-R shall be destroyed at the same time as the NGIL Form 60-R that it supplements.

2) One copy, with all attachments and supporting documents, shall be filed at NGIL-JA for one year from the date of the supplementary action, after

which it shall be destroyed. NGIL-JA shall also forward a copy of the form to NGIL-HRO if the member is in an AGR status.

3) One copy, with attachments, shall be permanently filed in the member's vault file (ARNG) or State 201 file (ANG).

4) If the vacation action affects the member's pay (e.g., vacation of a suspended reduction), then one copy of the NGIL Form 62-R and a copy of the initial NGIL Form 60-R shall be sent to the appropriate ARNG or ANG office that processes that member's military pay records.

5) If the vacation action affects the member's grade, then one copy of the NGIL Form 62-R and a copy of the initial NGIL Form 60-R shall be forwarded to the appropriate reduction authority to process the order.

d) Set Aside Actions. All copies of NGIL Forms 60-R and 61-R reflecting NJP actions that are later set aside in their entirety shall be destroyed, except for the permanent copies filed in the member's vault file (ARNG) or State 201 file (ANG).

e) Effect of Errors. A NJP proceeding is not legally sufficient if it contains an error that materially prejudices a substantial right of the member. If such an error exists and cannot be remedied within the same proceeding, the appropriate NJP authority shall set aside the defective action. A new NJP action may be initiated for the same misconduct, but any punishment imposed as a result of the new proceeding may be no more severe than that originally imposed. If a material error exists and can be remedied within the same proceeding without prejudicing the member's rights, the commander shall notify the member of the error by endorsement to the form and thoroughly explain the correction to the record. The member shall sign an acknowledgement and may submit comments. The endorsement and acknowledgement shall become attachments to the form. Administrative or clerical errors, and minor errors that do not affect a substantial right of the member, do not require correction to make the proceedings legally sufficient. These errors may be corrected with pen-and-ink changes initialed by the commander and the member, as appropriate.

f) Contents of Record

1) The record of NJP consists of the NGIL Forms 60-R, 61-R and 62-R, as applicable, and any of their attachments. All attachments shall be annotated in item 11 of the NGIL Form 60-R or 62-R in item 7 and shall be sent to NGIL-JA with the record. Attachments include, at a minimum:

A) evidence (see Army Regulation 15-6 (Procedures for Investigating Officers and Boards of Officers)) and other written materials relied on by the imposing commander;

B) statements of offenses;

C) any memorandum of reprimand imposed as punishment;

D) change of commander notification;

E) endorsements correcting errors that required explanation; and

F) written materials considered as a basis for vacating a suspended punishment or submitted by the member in mitigation, extenuation, defense or on appeal.

2) Except for memoranda of reprimand imposed as punishment that shall be filed in the member's personnel file as part of the record, attachments shall be filed at NGIL-JA and shall not be filed in the member's personnel file.

g) Use of Record

1) Records of NJP proceedings may be used as directed by the Adjutant General or as authorized by applicable regulations. Attachments transmitted with the originals or copies of NGIL Forms 60-R, 61-R and 62-R, or when filed with any of these forms, shall be considered to be maintained separately for the purpose of determining the admissibility of the originals or copies of those forms at administrative proceedings.

2) A record of NJP, not otherwise inadmissible, may be admitted at administrative proceedings from any file in which it is properly maintained pursuant to this Subpart.

SUBPART L: MISCELLANEOUS PROVISIONS

Section 400.1300 Courts of Inquiry

a) *Courts of inquiry to investigate any matter of concern to the SMF may be convened by any person authorized to convene a general court-martial, whether or not the persons involved have requested such an inquiry*.

b) *A court of inquiry consists of 3 or more commissioned officers. For each court of inquiry, the convening authority shall also appoint counsel for the court*.

c) *Any person subject to the Code whose conduct is subject to inquiry shall be designated as a party. Any person subject to the Code who has a direct interest in the subject of inquiry has the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and has the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence*.

d) *Members of a court of inquiry may be challenged by a party, but only for cause stated to the court*.

e) *The members, counsel, the reporter and interpreters of courts of inquiry shall take an oath to faithfully perform their duties* (see Section 400.825).

f) *Witnesses may be summoned to appear and testify and be examined before courts of inquiry, as provided for courts-martial.*

g) *Courts of inquiry shall make findings of fact but may not express opinions or make recommendations unless required to do so by the convening authority.*

h) *Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. If the record cannot be authenticated by the president, it shall be signed by a member in lieu of the president. If the record cannot be authenticated by the counsel for the court, it shall be signed by a member in lieu of the counsel*. (Code Section 135)

Section 400.1305 Authority to Act as Notary

The signature without seal of any commissioned *notary, together with the title of his or her office, is prima facie evidence of the person's authority*. (Code Section 136)

Section 400.1310 Sections of the Code to be Explained

a) When Sections of the Code will be explained;

1) *The Sections of the Code specified in* subsection (a)(3) *shall be carefully explained to each enlisted member at the time of, or within 30 days after, the member's initial entrance into a duty status with the SMF*.

2) *The Sections shall be explained again:*

A) *after the member has completed basic or recruit training; and*

B) at the time when the member re-enlists.

3) *This subsection (a) applies with respect to Code Sections 2* (persons subject to the Code), *3* (jurisdiction to try certain personnel), *7 through 15* (apprehension, restraint, pretrial punishment, delivery of offenders to civil authorities, and NJP), *25* (composition of courts-martial), *27* (trial and defense counsel), *31* (self-incrimination prohibited), *37* (unlawfully influencing the court), *38* (duties of trial and defense counsel), *55* (cruel and unusual punishment), *77 through 134* (punitive Sections), *and 137 through 139* (miscellaneous).

b) *The text of the Code and of the regulations or orders prescribed under the Code shall be made available to a member of the SMF, upon request by the member, for the member's personal examination, but the Code is effective and binding upon the SMF as of 1/1/17, and regulations or orders are effective upon their proper promulgation*. (Code Section 137)

Section 400.1315 Complaints of Wrongs

a) *Any member of the SMF who believes himself or herself wronged by a commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made*.

b) *The officer exercising general court-martial jurisdiction shall examine the complaint and take proper measures for redressing the alleged wrong. As soon as possible, that officer shall send to the Adjutant General a true statement of the complaint, along with a description of any proceedings that have occurred.* (Code Section 138)

Section 400.1320 Redress of Injuries to Property

a) *Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that the person's property has been wrongfully taken by members of the SMF, that person may convene a board to investigate the complaint. The board shall consist of from one to 3 commissioned officers. For the purpose of this investigation, the board has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, who shall also approve the amount of the assessment. The assessment shall be charged against the pay of the offenders. The order of the commanding officer authorizing the assessment amount is conclusive* instruction *for any disbursing officer* to make *payment to the injured parties of the damages assessed and approved*.

b) *If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be considered just upon the individual members who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board*. (Code Section 139)

Section 400.1325 Delegation by the Governor

The Governor may delegate any authority vested in the Governor under the Code and provide for the subdelegation of any such authority, except for the power given the Governor by Code Section 22 (convening of a court-martial). (Code Section 140)

Section 400.1330 Payment of Fees, Costs and Expenses

a) *The following shall be paid out of the* Illinois *State Military Justice Fund* (see Section 5.875 of the State Finance Act):

1) *fees and authorized travel expenses of all witnesses, experts, victims, court reporters and interpreters;*

2) *fees for the service of process;*

3) *the costs of collection, apprehension, detention and confinement;*

4) *and all other necessary expenses of prosecution and the administration of military justice, not otherwise payable by any other source*.

b) The State Military Justice Fund *is created in the State Treasury*. The fund *shall be administered by the Adjutant General. Expenses of military justice shall be paid from the Fund in the amounts and manner prescribed by law. The General Assembly may appropriate and have deposited into the* Fund or other appropriate State *fund such* funds *as it deems necessary to carry out the purposes of* the *Code*. (Code Section 141)

Section 400.1335 Payment and Disposition of Fines

a) *Fines imposed by a military court or through imposition of nonjudicial punishment shall be paid to the* Illinois Department of Military Affairs *and delivered to the court or imposing officer, or to a person executing their process. Fines may be collected in the following manner*:

1) *By cash or money order;*

2) *By retention of any pay or allowances due or to become due the person fined from any state or the United States; or*

3) *By garnishment or levy, together with costs, on the wages, goods and chattels of a person delinquent in paying a fine, as provided by law*.

b) *Any sum so received or retained shall be deposited into the Fund or to whomever the court so directs*. (Code Section 142)

Section 400.1340 Immunity for Action of Military Courts

All persons acting under the provisions of the Code, whether as a member of the military or as a civilian, shall be immune from any personal liability for any of the acts or omissions they did or failed to do as part of their duties under the Code. (Code Section 144)

Section 400.1345 Civilian Crimes Assimilated

Any person subject to the Code who commits an offense not enumerated in the Code but that is an offense under the laws of the United States, Illinois, or another state, U.S. commonwealth, territory, possession, or district (i.e., the laws of the jurisdiction)*, while that person is subject to the jurisdiction of the Code, is guilty of any act or omission that, although not made punishable by any enactment of this State, is punishable if committed or omitted within the jurisdiction of the laws of the* jurisdiction. *In accordance with Code Section 134, the offense may be charged as an offense under the substantive law of the jurisdiction where the offense was committed, in force at the time of the offense, and shall be punished pursuant to the law of that jurisdiction, subject only to the maximum punishment prescribed by* Appendix A. (Code Section 149)

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF PROPOSED RULES

Section 400.APPENDIX A Table of Maximum Punishments

Enlisted Personnel

Punishment	**Imposed by Company or Flight Commander (cannot impose any punishment on E-8 or E-9)**	**Imposed by Battalion or Squadron/Group Commander (see Section 400.2010(a)(3) for E-8 or E-9)**	**Imposed by Brigade or Wing Commander or AAG**
Reduction			
E-1 to E-4	1 Grade	2 Grades	2 Grades
E-5 to E-6	No	1 Grade	1 Grade
E-7 to E-8	No	No	1 Grade
E-9	No	No	[1]
Forfeiture	4 Days' Pay	6 Days' Pay[2]	6 Days' Pay[2]
Reprimand	Yes	Yes	Yes
Extra Duties	7 Days	14 Days[3]	14 Days[3]
Restriction	14 Days[1]	21 Days[4 & 5]	21 Days[4 & 5]

NOTES:

[1] May recommend reduction as part of NJP, but reduction is not effective unless and until approved in writing by the Adjutant General.

[2] May order forfeiture of 8 days' pay if acting as "next superior commander".

[3] May impose 21 days extra duties if acting as "next superior commander".

[4] Restriction cannot be imposed unless in a field environment or while performing duty away from home station.

[5] May impose 28 days restriction if acting as "next superior commander".

Officers and Warrant Officers

Punishment	**Imposed by Brigade,**	**Imposed by**

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF PROPOSED RULES

	Group or Wing Commander	**General Officer**
Reduction	No	No
Forfeiture	4 Days' Pay	6 Days' Pay[1]
Reprimand	Yes	Yes
Extra Duties	No	No
Restriction	14 Days[2]	21 Days[2 & 3]

NOTES:

[1] May order forfeiture of 8 days' pay if acting as "next superior commander".

[2] Restriction cannot be imposed unless in a field environment or while performing duty away from home station.

[3] May impose 28 days restriction if acting as "next superior commander".

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

1) Heading of the Part: Telecommunications Access for Persons with Disabilities

2) Code Citation: 83 Ill. Adm. Code 755

3)

Section Numbers:	Adopted Actions:
755.10	Amendment
755.15	Amendment
755.100	Amendment
755.105	Amendment
755.110	Amendment
755.115	Amendment
755.130	Amendment
755.135	Amendment
755.200	Amendment
755.205	Amendment
755.225	Amendment
755.230	Amendment
755.300	Amendment
755.305	Amendment
755.310	Amendment
755.400	Amendment
755.405	Amendment
755.410	Amendment
755.500	Amendment
755.505	Amendment
755.510	Amendment
755.515	Amendment
755.520	Amendment
755.EXHIBIT A	Amendment
755.EXHIBIT B	Amendment
755.EXHIBIT C	Amendment
755.EXHIBIT D	Amendment
755.EXHIBIT G	Amendment
755.EXHIBIT H	Amendment

4) Statutory Authority: Implementing Section 13-703 and authorized by Section 10-101 of the Public Utilities Act [220 ILCS 5/13-703 and 10-101].

5) Effective Date of Rules: May 5, 2017

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

6) Does this rulemaking contain an automatic repeal date? No

7) Does this rulemaking contain incorporations by reference? Yes

8) A copy of the adopted rules, including any material incorporated by reference, is on file in the Commission's Springfield office and is available for public inspection.

9) Notice of Proposal published in the *Illinois Register*: 40 Ill. Reg. 8896; July 8, 2016

10) Has JCAR issued a Statement of Objection to this rulemaking? No

11) Differences between Proposal and Final Version: References to hearing care professionals have been added to Sections 755.10, 755.115(a), 755.200(a), and 755.200(b), reflecting a change in terminology adopted in PA 99-847. In addition, definitions of the terms "acting in concert with," "affiliate," "person with a disability," and "vendor" have been added to Section 755.10. Technical edits have also been made.

12) Have all the changes agreed upon by the Agency and JCAR been made as indicated in the agreement letter issued by JCAR? Yes

13) Does this rulemaking replace any emergency rule currently in effect? No

14) Are there any rulemakings pending on this Part? No

15) Summary and Purpose of Rulemaking: The amendments stem from the enactment of PA 99-6, which expanded the sources of funding for the access programs to include wireless carriers and sellers of prepaid wireless service, in addition to the existing funding sources of local exchange carriers and fixed or non-nomadic voice over Internet protocol (VoIP) providers. The amendments reflect these additional sources of funding, and make other agreed-upon changes recommended by the Illinois Telecommunications Access Corporation.

16) Questions or requests for information about these rules shall be directed to:

Brian W. Allen
Office of General Counsel
Illinois Commerce Commission
527 East Capitol Avenue

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

Springfield IL 62701

217/558-2387

The full text of the Adopted Amendments begins on the next page:

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

TITLE 83: PUBLIC UTILITIES
CHAPTER I: ILLINOIS COMMERCE COMMISSION
SUBCHAPTER f: TELEPHONE UTILITIES

PART 755
TELECOMMUNICATIONS ACCESS FOR PERSONS WITH DISABILITIES

SUBPART A: GENERAL PROVISIONS

Section
755.10 Definitions
755.11 Waiver
755.15 Dispute Procedures
755.20 Notice (Repealed)
755.25 Deviations (Repealed)

SUBPART B: TELECOMMUNICATIONS CARRIER, INTERCONNECTED VOIP PROVIDER AND WIRELESS CARRIER OBLIGATIONS

Section
755.100 Components of ITAP Services
755.105 Execution and Administration of ITAP
755.110 Publicity Concerning ITAP
755.115 Application Procedure and Processing
755.120 Equipment
755.125 Equipment Set Specifications – Telebraille (Repealed)
755.126 Equipment Set Specifications – Text Telephone with LVD (Repealed)
755.130 Bids
755.135 ITAP Filing Requirements
755.145 Renewal of Agreements (Repealed)

SUBPART C: ELIGIBILITY AND PARTICIPATION

Section
755.200 Disability Certification
755.205 Eligibility and Application for Equipment for Recipients~~Residents~~
755.210 Eligibility and Application for Equipment for Organizations
755.220 Time Period for Possession
755.225 Shared Residence

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

755.230 Change of Recipient Information

SUBPART D: POSSESSION AND MAINTENANCE

Section
755.300 Equipment Ownership and Liability
755.305 Recipient Responsibility
755.310 Responsibility for Maintenance

SUBPART E: OVERSIGHT AND REVIEW

Section
755.400 Staff Liaison
755.405 Advisory Council
755.410 Advisory Council Rights
755.415 Biannual Workshop

SUBPART F: LINE CHARGE AND ASSESSMENT ADJUSTMENT MECHANISM

Section
755.500 Annual Filings
755.505 Carrier, Wireless Carrier, and Interconnected VoIP Provider Reports and Remittances to ITAC
755.510 Determination and Adjustment of the Line Charge and Assessment
755.515 Notice and Filing Requirements
755.520 Interim Line Charge and Assessment Adjustments
755.525 Waiver of Requirements of Section 755.500

755.EXHIBIT A Calculation of Monthly Line Charge and Assessment (Schedule A-1)
755.EXHIBIT B Comparison of Present and Proposed Line Charges and Assessments (Schedule A-2)
755.EXHIBIT C Projection Period Statement of Revenues and Expenses at Present Line Charge and Assessment, As Adjusted (Schedule A-3)
755.EXHIBIT D Prior Calendar Year Actual Revenues Over/(Under) Expenses (Schedule A-4)
755.EXHIBIT E Schedule of Adjustment to Projected Cash Balance (Schedule A-5)
755.EXHIBIT F Supporting Schedule of Planned Capital Expenditures During Projection Period (Schedule A-6)
755.EXHIBIT G Schedule of Projected Increase to Cash Under Proposed Line Charge and

	Assessment Before Cash Adjustment (Schedule A-7)
755.EXHIBIT H	Call Volumes and ~~Subscriber~~ Lines and Assessments (Schedule A-8)
755.EXHIBIT I	Depreciation Schedule (Schedule A-9)
755.EXHIBIT J	Projected Payroll Expenses, As Adjusted (Other than TRS Payroll Expenses) (Schedule A-10) (Repealed)
755.EXHIBIT K	Projected Line Charge Filing Expenses (Schedule A-11) (Repealed)
755.EXHIBIT L	Comparative Actual and Projected Balance Sheets, At Proposed Line Charge and Assessment, As Adjusted (Schedule A-12)
755.EXHIBIT M	Comparative Actual and Projected Statements of Revenues and Expenses at Proposed Line Charge, As Adjusted (Schedule A-13) (Repealed)
755.EXHIBIT N	Local Exchange Carrier Monthly Report to ITAC (Repealed)

AUTHORITY: Implementing Section 13-703 and authorized by Section 10-101 of the Public Utilities Act [220 ILCS 5/13-703 and 10-101].

SOURCE: Adopted at 12 Ill. Reg. 3687, effective February 1, 1988; amended at 14 Ill. Reg. 3042, effective February 15, 1990; emergency amendments at 14 Ill. Reg. 19375, effective November 25, 1990, for a maximum of 150 days; amended at 15 Ill. Reg. 5624, effective April 15, 1991; amended at 17 Ill. Reg. 5594, effective March 31, 1993; amended at 19 Ill. Reg. 17105, effective January 1, 1996; expedited correction at 20 Ill. Reg. 11490, effective January 1, 1996; amended at 28 Ill. Reg. 860, effective January 1, 2004; amended at 28 Ill. Reg. 8875, effective July 1, 2004; amended at 36 Ill. Reg. 15058, effective October 1, 2012; amended at 41 Ill. Reg. 5401, effective May 5, 2017.

SUBPART A: GENERAL PROVISIONS

Section 755.10 Definitions

"Act" means the Public Utilities Act [220 ILCS 5].

"Acting in concert with" means persons who, pursuant to an agreement or understanding (whether formal or informal), cooperate with a vendor to take actions that, if taken by the vendor directly, would give rise to a conflict of interest for that vendor.

"Affiliate" of a vendor means:

Any corporation or person owning or holding, directly or indirectly, or in any chain of successive ownership of, 10% or more of the voting capital stock of the vendor;

Any corporation or person, 10% of whose voting capital stock is owned by a person or corporation owning 10% or more of the vendor's voting capital stock, or by a person or corporation in any chain of successive ownership of 10% or more of the vendor's voting capital stock;

Any corporation, 10% or more of whose voting securities is owned, directly or indirectly, by the vendor;

Any corporation that has one or more elective officers or directors in common with the vendor;

Any corporation or person that, after investigation and hearing, the Commission determines is actually exercising substantial influence over the policies and actions of the vendor, even though that influence is not based upon stock holding, stockholders, directors or officers;

Any entity that, after investigation and hearing, the Commission determines is actually exercising substantial influence over the vendor's policies and actions of the vendor in conjunction with one or more other corporations or persons to which that person or corporation is related by ownership or blood relationship, or by action in concert, so that together the entity is affiliated with the vendor even though there is not a direct relationship between the two.

No person or corporation is affiliated, however, if that person or corporation has not had transactions or dealings other than the holding of stock and the receipt of stock dividends with the vendor during the previous two years.

"Assessment" means the charge authorized by Section 13-703(f) of the Act and includes the charge per subscription or per wireless line, or the equivalent percentage charge imposed per prepaid wireless telecommunications service retail transaction.

"Centers for Independent Living " means organizations serving the needs of those persons with hearing or speech disabilities as described in Section 12a of the Disabled Persons Rehabilitation Act [20 ILCS 2405/12a].

"Commission" means the Illinois Commerce Commission.

"Deaf-blind" refers to a person who is deaf or hard-of-hearing and who also has a sight-disability and who can regularly and routinely communicate by telephone only through the aid of equipment.

"Deaf or hard-of-hearing" refers to a condition of permanent hearing loss (whether continuous or variable) by which regular and routine telephone communication is possible only through the aid of equipment.

"Disability" refers to a condition of being permanently hearing disabled, deaf-blind, speech-disabled, hearing-sight disabled, or speech-sight disabled.

"Equipment" means telecommunications devices capable of servicing the needs of those persons with a hearing or speech disability as specified in ITAC's tariff or on ITAC's website pursuant to Section 755.135(a)~~(1)~~.

"Hearing care professional" means a person who is a licensed audiologist, a licensed hearing instrument dispenser, or a licensed physician.

"Hearing disability" refers to condition of being permanently deaf or hard-of-hearing.

"Hearing-sight disability" refers to a condition of permanent hearing and sight disability that renders regular and routine telephone communication possible only through the aid of equipment.

"Illinois Telecommunications Access Corporation" or "ITAC" means the not-for-profit corporation jointly established by Illinois telecommunications carriers providing local exchange service pursuant to Section 755.105 to administer programs mandated by Section 13-703 of the Act ~~[220 ILCS 5/13-703]~~.

"Interconnected Voice over Internet Protocol provider" or "interconnected VoIP provider" has the same meaning as "interconnected voice over Internet protocol provider" as defined in Section 13-235 of the Act. For purposes of this Part,

Interconnected VoIP providers are limited to those providers subject to Section 13-401.1 of the Act.

"ITAP" or "program" means the Illinois Telecommunications Access Program, by which Illinois telecommunications carriers providing local exchange service shall provide the telecommunications devices capable of servicing the needs of subscribers with disabilities as required by Section 13-703 of the Act.

"Line charge" means the charge authorized by Section 13-703(c) of the Act.

"Organizations" means Centers for Independent Living and those Illinois-based not-for-profit organizations not:

affiliated with or otherwise acting in concert with an owner or vendor of equipment promoted for use by persons with disability; or

owned or operated by any political subdivision, public institution of higher learning, state agency, or municipal corporation of this State

whose primary purpose is serving the needs of those persons with disabilities.

"Person with a disability" or "persons with a disability" means a person or persons with at least one disability as defined in this Section.

"Personal service contracts" means all contracts entered into by ITAC, on behalf of the carriers for publicity/marketing and accounting.

"Prepaid wireless telecommunications service" has the meaning given to that term in Section 10 of the Prepaid Wireless 9-1-1 Surcharge Act [50 ILCS 753].

"Projection period" means, for each annual filing required by Subpart F, a 12-month period beginning January 1 of the year in which the filing is made.

"Recipient" is a user or a parent or legal guardian of a minor user in whose name equipment is granted, as provided in Section 755.205(b).

"Retail transaction" has the meaning given to that term in Section 10 of the Prepaid Wireless 9-1-1 Surcharge Act.

"Selection center" is a location designated by ITAC to display and demonstrate equipment for an eligible recipient to test in order to select the appropriate equipment for the recipient's disability.

"Seller" has the meaning given to that term in Section 10 of the Prepaid Wireless 9-1-1 Surcharge Act.

~~"Social service agencies" means the Department of Human Services- Division of Rehabilitation Services; Department on Aging; Department of Healthcare and Family Services; Department of Public Health; Department of Children and Family Services; State Board of Education; University of Illinois Division of Specialized Care for Children; Illinois Deaf and Hard of Hearing Commission; and any other agency with which ITAC contracts to provide services for persons who are deaf-blind.~~

"Speech-disability" refers to a condition of permanent speech disability that precludes oral communication by which regular and routine telephone communication is possible only through the aid of equipment.

"Speech-sight disability" refers to a condition of permanent speech and sight disability that precludes oral communication, and by which regular and routine telephone communication is possible only through the aid of equipment.

"Staff" means individuals employed by the Illinois Commerce Commission.

"Subscriber lines" means a voice grade communication channel between a subscriber and a telecommunications carrier's public switched network that~~,~~ ~~which~~ would be required to carry the subscriber's interpremises traffic and that~~which~~ is capable of providing access to~~through~~ the public switched network~~ to the Illinois relay system~~. A subscriber line does not include 800 lines or access lines used for official communications of telecommunications carriers providing local exchange service. For customer bills issued before June 1, 2004, in calculating charges on subscriber lines of telecommunications carriers, each centrex line shall be equivalent to one-tenth of a residence or business access line. For customer bills issued on or after June 1, 2004, in calculating charges on subscriber lines pursuant to Section ~~220 ILCS 5/~~13-703(c) of the Act, one charge shall be applied for each five centrex lines, and five charges shall be applied for each PBX trunk. ITAC's tariff or website shall specify the manner of applying charges to other multi-channel technologies.

"Subscriptions" means a count of the maximum number of interconnected VoIP calls that an end-user may have active at the same time. If the interconnected VoIP provider's retail customer purchases a service or services that allows more than one interconnected VoIP call to be made from the customer's physical location at the same time, the number of subscriptions equals the maximum number of interconnected VoIP calls that the customer may have active at the same time. In the case of a business retail customer that purchases a service or services pursuant to a service agreement, the number of subscriptions equals the maximum number of interconnected VoIP calls that the customer may have active at the same time under the terms of the service agreements with that customer. In calculating assessments on business subscriptions, one assessment shall be applied for each five business subscriptions (i.e., the application of the assessment on business subscriptions shall mirror the application of the line charge to centrex lines).

"Telecommunications carrier" or "carrier" means a telecommunications carrier as that term is defined in Section 13-202 of the Act that is providing local exchange telecommunications service as defined in Section 13-204 of the Act. For purposes of this Part, "telecommunications carrier" or "carrier" also includes telecommunications carriers that are mutual concerns as defined in Section 13-202(b) of the Act.

"Telecommunications relay service" or "TRS" or "relay service call volumes" means all Illinois intrastate calls placed through any~~the~~ Illinois Relay Center, whether or not completed.

"User" means an Illinois resident with a disability whose eligibility has been established as provided in this Part for whose use equipment is provided, as set forth in Section 755.205.

"Vendor" means an owner or vendor of equipment or services promoted for use by persons with a disability.

"Voice grade access" means a functionality that enables a user of telecommunications services to transmit voice communications, including signaling the network that the caller wishes to place a call, and to receive voice communications, including receiving a signal indicating that there is an incoming call. For the purposes of this Part, bandwidth for voice grade access is 300 to

3,000 Hertz.

"Voucher program" means a program for the distribution of equipment offered by ITAC, on behalf of the carriers, pursuant to Section 755.100(b).

"Wireless carrier" has the meaning given to that term in Section 10 of the Wireless Emergency Telephone Safety Act.

"Wireless lines" means a communication channel between a subscriber and a wireless carrier's network that would be required to carry the subscriber's traffic and that is capable of providing access to the public switched network. A wireless line does not include lines used for official communications of wireless carriers.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.15 Dispute Procedures

a) If there is a problem with equipment distributed pursuant to Section 755.100(a):

1) the ITAC office~~Regional Center that distributed the equipment set~~ should be contacted; and

~~2) if the problem cannot be resolved at the Regional Center, then the ITAC office should be contacted; and~~

2~~3~~) if the ITAC office, with the assistance of the vendor, cannot satisfactorily resolve the problem, they shall inform the user of the address and telephone number of the Staff Liaison and the information contained in Section 755.410(b).

b) After receiving the complaint, the Staff Liaison will begin an informal investigation in an effort to settle the dispute.

c) Disputes arising under this Part shall also be governed by 83 Ill. Adm. Code 735.200.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

SUBPART B: TELECOMMUNICATIONS CARRIER, INTERCONNECTED VOIP PROVIDER AND WIRELESS CARRIER OBLIGATIONS

Section 755.100 Components of ITAP Services

ITAC, on behalf of the carriers, shall implement Section 13-703(a) of the Act through the provision of a loan and/or a voucher program to distribute equipment to recipients.

a) If ITAC, on behalf of the carriers, offers equipment through a loan program, ITAC shall:

1) Provide equipment to Illinois residents who are recipients, as prescribed by this Part;

2) Provide or contract for repair~~maintenance~~ or exchange services for the loaned equipment~~ at regional centers~~; and

3) Provide training in the use of the loaned equipment by~~at regional centers that have~~ personnel capable of communicating with the recipient~~multiple modes of communications~~.

b) In lieu~~fulfillment~~ of or in addition to implementation of a loan program~~the obligations~~ under subsection (a), ITAC, on behalf of the carriers, initiated~~shall by July 1, 2005 initiate~~ a voucher program in 2005. The terms and conditions of the voucher program and equipment available through the voucher program shall be specified in ITAC's tariff or on ITAC's website. Equipment obtained through the voucher program~~Under a voucher program, an eligible recipient may select equipment from the options offered in ITAC's tariff, and the selected equipment~~ shall become the property of the recipient. Notwithstanding subsection (a), ITAC and the carriers shall not be required to provide maintenance service, repair service, exchange service, or training for equipment offered as part of a voucher program. The equipment offered through the voucher program need not be the same as that~~those~~ offered through a loan~~the distribution~~ program implemented pursuant to subsection (a).

c) In addition to subsections (a) and (b), the carriers, through ITAC, may dispose of, by sale or other means, used, unneeded, or obsolete equipment.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.105 Execution and Administration of ITAP

a) Each carrier shall collect from its customers and remit to ITAC the monthly charge per subscriber line allowed by Section 13-703(c) of the Act and ordered by the Commission. The line charge identification shall be "IL Telecom Relay Service and Equipment" or an equivalent phrase that is not detrimental to persons with disabilities. The charge applies to all subscriber lines as defined in Section 755.10.

b) Each interconnected VoIP provider, directly or via another entity, shall collect from its customers and remit to ITAC the monthly assessment per subscription required by Section 13-703(f) of the Act and ordered by the Commission. Indirect remittances to ITAC shall indicate the interconnected VoIP provider on whose behalf assessments are being remitted. The assessment applies to all subscriptions as defined in Section 755.10. The requirements of this subsection (b) shall become effective January 1, 2011. ~~For the period between January 1, 2011 and the effective date of the earliest Commission Order establishing an explicit assessment pursuant to Section 13-703(f) of the Act, each interconnected VoIP provider is required to collect from its customers and remit to ITAC a monthly assessment equal to the then effective line charge or centrex charge, as provided in Section 755.10.~~

c) Each wireless carrier, with exception of sellers of prepaid wireless telecommunications services, directly or via another entity, shall collect from its customers and remit to ITAC the monthly assessment per wireless line required by Section 13-703(f) of the Act and ordered by the Commission. Indirect remittances to ITAC shall indicate the wireless carrier on whose behalf assessments are being remitted. The requirements of this subsection (c) shall become effective June 1, 2016, but, notwithstanding the effective date, wireless carriers shall have at least 60 days from the date the Commission files an order to implement the new rate established by the order.

d) Each seller of prepaid wireless telecommunications services shall collect from its customers an assessment, as required by Section 13-703(f) of the Act and ordered by the Commission, and remit the assessment to the Illinois Department of Revenue. These assessments shall be imposed per retail transaction as a percentage of the retail transaction on all retail transactions occurring in the State. Remittances to the Illinois Department of Revenue shall be on the same form and

in the same manner as remittances submitted pursuant to the Prepaid Wireless 9-1-1 Surcharge Act. The requirements of this subsection (d) shall become effective June 1, 2016, but, notwithstanding the effective date, sellers of prepaid wireless telecommunications services shall have at least 60 days from the date the Commission files an order to implement the new rate established by the order.

e~~c~~) The carriers or ITAC, on their behalf, may make voluntary or contractual agreements with businesses, agencies of local, state, or federal~~Federal~~ government, organizations, and other third parties for provision or distribution of equipment, maintenance, warehousing, training, administration, or miscellaneous supports services as required to fulfill the goals of this program in a manner consistent with the intent and provisions of the Act and this Part.

f~~d~~) The carriers or ITAC, on their behalf, shall administer the ITAP so as to take full advantage of any economies of scale that may exist by centralizing the provision of ITAP services listed in Section 755.100. However, the carriers or ITAC, on their behalf, shall provide sufficient selection~~regional~~ centers to insure a reasonable access to ITAP by persons with disabilities.

g~~e~~) The carriers may determine and propose to the Commission for approval, subject to the requirements of Section 7-101 and 7-102 of the Act [220 ILCS 5/7-101 and 7-102], a plan for joint execution and administration of ITAP. If the Commission approves a plan for joint execution and administration of ITAP through a not-for-profit corporation or other entity, all carriers shall join and participate fully in the plan for joint execution and administration.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.110 Publicity Concerning ITAP

a) Carriers shall publicize ITAP. Publicity shall include, but not be limited to, bill inserts or bill messages and notices published in the directories.

b) ITAC, on behalf of the carriers, shall provide publicity~~:1)Notification~~, at least annually, by~~to conventional media such as daily, weekly, or monthly newspapers or magazines, television or radio stations, electronic media, or other~~ cost-effective means of communication.~~;2)Written notification, at least annually, to organizations and to newsletters serving persons with disabilities and to other licensed professionals who deal with hearing issues.~~ Any entity wishing to

receive program information shall~~this notification must~~ contact ~~the telecommunications carriers through~~ ITAC and place itself~~themselves~~ on an ITAP information service list.~~; and3)Written notification to designated offices of the social service agencies. ITAC, on behalf of the carriers, shall obtain a list of designated offices from each of the social service agencies listed in this Part.~~

c) Information to be provided shall include at a minimum the services offered, descriptions of the intended recipients of these services, and the terms under which these services are available.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.115 Application Procedure and Processing

a) Applications~~Application packets~~ shall be made available to the public at all selection~~regional maintenance/training~~ centers ~~and at designated offices of the social service agencies, as identified in Section 755.110(b)(3),~~ and at the request of hearing care professionals, medical, educational or services agencies that serve persons with disabilities as defined in Section 755.10,~~audiologists~~ or any other similar entity. The application form~~packets~~ shall contain:

~~1) An explanation of the obligations of ITAC, on behalf of the carrier, to the recipient;~~

~~2) A description of the rights and obligations of the recipient under ITAP;~~

1~~3~~) A description of the application process for service under this Part;

~~4) A description of the Advisory Council and its role as liaison to persons with disabilities;~~

~~5) The office telephone number of the Staff Liaison;~~

2~~6~~) A certificate~~An eligibility form~~ to be filled out according to the provisions of Section 755.200, certifying the applicant as a person with a disability~~. Printed on the eligibility form shall be an explanation of its purpose, the definitions of disability contained in Section 755.10 and the certification requirements of Section 755.200~~;

~~7)~~ ~~A form for the prospective recipient to sign indicating that he/she understands and agrees with the rights and obligations created under this Part, and that he/she desires service under this Part;~~

3~~8~~) Information to be completed by~~A standard application form requesting that~~ the prospective recipient, including but not limited to ~~provide~~ his/her full name, address, last four social security number digits, birth date~~age~~, ~~and~~ telephone number, carrier, wireless carrier or VoIP provider, and the name of the person to whom telephone service is billed; and

4~~9~~) A section~~form~~ for the prospective recipient to sign ~~indicating that~~, if the prospective recipient is acting for a minor user~~, the equipment received under this program will be transferred to the user on the user's eighteenth birthday~~.

b) Assistance~~Carriers will provide assistance~~ in completing application forms shall be provided~~to those who desire assistance~~ at selection~~regional maintenance/training~~ centers and through ITAC.

c) Applicants shall complete (or have completed) all forms, attach all ~~necessary~~ documentation required by ITAC to establish eligibility, and mail the completed application to~~packet as directed by~~ ITAC~~, on behalf of the carriers~~.

d) Upon receipt of a completed application ~~packets~~, ITAC shall~~, on behalf of the carrier, shall acknowledge by postcard (addressed by applicant) and~~ process all applications. In no event shall the ITAC, on behalf of the carriers, take more than 21 calendar days to verify an applicant's eligibility. If ITAC, on behalf of the carrier, determines that it cannot make a decision within 21 days because the application is incomplete or contains inaccurate information, it must immediately notify the applicant upon making this determination and solicit clarification and additional information from the applicant in order to determine the applicant's eligibility.

e) Processing of applications by ITAC, on behalf of the carriers, shall consist of a review for completeness and verification of eligibility~~the assignment of priority status for distribution in the order of receipt of the completed applications~~.

f) Upon request, ITAC shall provide an applicant with:

1) a description of the Advisory Council and its role as liaison to persons with disabilities; and

2) the office telephone number of the Staff Liaison.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.130 Bids

a) Except as provided in subsection (c), prior~~Prior~~ to entering into new agreements with new providers~~contemplated by Section 755.135(b)~~, the carriers or ITAC, on their behalf, shall solicit and accept bids from various providers.

b) Bids will be evaluated and awarded based upon the bidder's ability, as demonstrated in the bid proposal, to advance the goals and objectives of ITAP, consistent with the following criteria~~ listed below~~:

1) Corporate and fiscal integrity, history, and ability of the bidder to deliver equipment or services up for bid must be evaluated;

2) Equipment up for bid must be evaluated in light of the factors specified in Section 755.120; and

3) Maintenance and training services up for bid must be deliverable as prescribed in Sections 755.100 and 755.310.

c) The requirements of subsections (a) and (b) shall not apply to arrangements for the provision of accounting or legal services for ITAP, or to amendments to, extensions of, or renewals of existing agreements not subject to the renewal requirements of the Illinois Procurement Code [30 ILCS 500].

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.135 ITAP Filing Requirements

a) ITAC, on behalf of the carriers, shall publish on its website or in its tariff~~file with the Commission for approval pursuant to the provisions of the Act and this Part,~~ the following ~~tariff~~ items:

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1) A description of~~tariff describing~~ any equipment distribution program offered pursuant to Section 755.100(a), with a detailed description of the equipment the carriers provide pursuant to ITAP, including:

A) the manufacturers of the equipment;~~,~~

B) the model numbers of the equipment;~~,~~

C) the model names of the equipment;~~,~~

D) a description of the operating functions and specifications of the equipment;~~,~~ and

E) the recipient disability certification requirements for receipt of each specific equipment offered.

2) A description of~~tariff sheet that describes~~ the voucher program described in~~pursuant to~~ Section 755.100(b), including the applicable recipient eligibility~~disability certification~~ requirements for equipment.

~~3) At a minimum, ITAC, on behalf of the carriers, shall give written notice of any tariff filing made under subsection (a) to each of the following: Staff Liaison, Chairperson of the Advisory Council, distribution centers, and local chapters of the Illinois Association for the Deaf, Association for Late-Deafened Adults, and Self Help for Hard of Hearing, as well as the social service agencies. This notice shall be given no later than the date of the tariff filing and shall describe generally the nature of the filing.~~

3~~4~~) Notwithstanding the requirements of subsections (a)(1) and ~~-~~(2~~3~~), ITAC, on behalf of the carriers, may purchase or otherwise obtain a limited number of pieces of equipment for distribution and use on a trial basis, for the purpose of evaluating whether that equipment~~they~~ should be offered to recipients pursuant to Section 755.100, without including the trial equipment on its website or tariff offerings~~ filing a tariff~~ under this subsection (a). However, the distribution and use shall be limited to ITAC employees, ITAC board members, members of the Advisory Council, and the persons identified by ITAC whose use characteristics will enable realistic testing of the equipment. The trial shall not exceed 20~~100~~ pieces of equipment and~~,~~ shall not exceed one year in duration~~, and shall be~~

~~preceded by written notification to the Director of the Commission's Consumer Services Division, the Staff Liaison, and the Chairperson of the Advisory Council. At the conclusion of the trial, ITAC shall provide a report indicating the results of the trial to the Director of the Commission's Consumer Services Division, the Staff Liaison, and the Chairperson of the Advisory Council~~.

b) ~~With reference to the provision of ITAP services, the carriers, or ITAC on their behalf, shall file for approval by the Commission all personal services contracts in excess of $40,000 and all other contracts in excess of $140,000.~~ All contracts entered into by ITAC, with the exception of contracts for regular and routine program operations,~~that are below these amounts~~ shall be filed with the Commission on an informational basis.

c) ITAC, on behalf of the carriers, shall file with the Commission an annual report (to be filed no later than March 31 of each year) that shall contain the following information:

1) Updates on administration procedures for ITAP;~~,~~

2) Description of program activities of the past year, including at a minimum the number of applications received, the number of and type of equipment and/or vouchers distributed, the number and location of selection~~regional~~ centers, and the number of maintenance/repair/exchange incidents;~~,~~ and

3) Description and brief evaluation of program effectiveness including at a minimum the following information:

~~A) the number and type of complaint incidents,~~

A~~B~~) the average period of time needed to process a typical application;~~,~~

B~~C~~) the average period of time between the processing of an application and the receipt of the equipment or voucher;~~,~~ and

C~~D~~) a list of issues or problem areas identified by the Advisory Council and any action taken by the carriers or ITAC in response.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

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SUBPART C: ELIGIBILITY AND PARTICIPATION

Section 755.200 Disability Certification

a) An applicant with a hearing disability seeking ITAP eligibility shall have completed by a hearing care professional~~licensed physician, licensed audiologist~~, a designated counselor with the Illinois Department of Human Services-Division~~Office~~ of Rehabilitation Services (DHS-DRS~~ORS~~), or a care coordinator with the University of Illinois Division of Specialized Care for Children (DSCC) a standard form (provided by ITAC, on behalf of the carriers) certifying that the applicant is deaf or hard-of-hearing as those terms are defined in this Part.

b) An applicant who is deaf-blind or hearing-sight disabled seeking ITAP eligibility shall have completed by a hearing care professional~~licensed physician, licensed audiologist~~, designated counselor with DHS-DRS~~ORS~~, a designated counselor with any agency with which ITAC contracts to provide services for persons who are deaf-blind or a care coordinator with DSCC a standard form (provided by ITAC, on behalf of the carriers), provisionally certifying the applicant as deaf-blind or hearing-sight disabled as those conditions are defined in this Part. In instances in which deaf-blindness or the hearing-sight disability is certified by a hearing care professional, the hearing care professional~~an audiologist, the audiologist~~ shall make the provisional certification only upon review of medical records that confirm the applicant's sight disability. An applicant who has been provisionally certified as deaf-blind or hearing-sight disabled, as those conditions are defined in this Part, shall receive final certification only upon determination by a designated counselor with any agency with which ITAC contracts to provide services for persons who are deaf-blind that the applicant has the potential skills and potential ability to appropriately utilize the applicable equipment to make a telephone call.

c) An applicant who has a speech disability seeking ITAP eligibility shall have completed by a licensed physician, speech-language pathologist, ~~or~~ care coordinator with DSCC, or designated counselor with DHS-DRS~~ORS~~ a standard form (provided by ITAC, on behalf of the carriers) certifying the applicant has a speech disability as that condition is defined in this Part. In instances in which the applicant's speech disability is certified by a designated counselor with DHS-DRS~~ORS~~ or a care coordinator with DSCC, the DHS-DRS~~ORS~~ counselor or DSCC care coordinator shall make this certification only upon review of medical

records that confirm the applicant's speech disability.

d) An applicant who has a speech-sight disability seeking ITAP eligibility shall have completed by a licensed physician, speech-language pathologist, a care coordinator with DSCC, or a designated counselor with DHS-DRS~~ORS~~ a standard form (provided by ITAC, on behalf of the carriers) certifying the applicant as a person with a speech-sight disability as that condition is defined in this Part. In instances in which the applicant has a speech-sight disability and the speech disability is certified by a speech-language pathologist, the speech-language pathologist shall make this certification only upon review of medical records that confirm the applicant's sight disability. In instances in which the applicant's speech disability and the sight disability is certified by a designated counselor with DHS-DRS~~ORS~~ or a care coordinator with DSCC, the DHS-DRS~~ORS~~ counselor or DSCC care coordinator shall make this certification only upon review of medical records which confirm the applicant's speech disability or disabilities.

~~e) ITAC, on behalf of the carriers, shall obtain from the Director of ORS a list of designated ORS counselors who have expertise in working with persons with hearing, speech, and sight disabilities and who are authorized to certify individuals for ITAP. ITAC, on behalf of the carriers, shall obtain from the Director of DSCC a list of the Division's designated care coordinators authorized to certify individuals for ITAP. ITAC, on behalf of the carriers, shall obtain updated lists annually.~~

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.205 Eligibility and Application for Equipment for Recipients~~Residents~~

a) Unless ITAC's tariff or website provides otherwise, one piece of landline or VoIP-compatible equipment shall be provided per subscriber line or per VoIP subscription in a residence that is the permanent legal residence of a certified user. Subject to subsection (g~~f~~), the maximum number of landline and VoIP-compatible pieces of equipment that shall be provided is the lesser of the number of certified users or the number of subscriber lines and VoIP subscriptions in the residence. Subject to subsection (g), there is only one recipient per subscriber line or subscription.

b) Unless ITAC's tariff or website provides otherwise, one piece of wireless-

compatible equipment shall be provided to an eligible, certified user of wireless telephone service. Unless ITAC's tariff or website provides otherwise, there is only one recipient per wireless line.

c~~b~~) The equipment shall be granted in the name of the recipient. ~~Subject to subsection (f), there is only one recipient per subscriber line.~~ Recipient status shall be granted to an eligible adult user or ~~within the residence. In the absence of an adult user within the residence, recipient status shall be granted to~~ the parent or legal guardian residing with an eligible~~a~~ minor user ~~in the residence~~.

d~~c~~) The recipient shall assume all responsibilities and liabilities for the equipment as prescribed by this Part.

e~~d~~) The recipient shall be required to sign and complete all forms and submit all documents required ~~provided~~ in the application ~~packet~~ as described in Section 755.115(a).

f~~e~~) Along with the completed application, the recipient shall provide copies of drivers' licenses, Illinois State I.D.'s, or some other proof of identification and Illinois residence for the recipient and identification of the person to whom telephone service is billed, and shall comply with all eligibility requirements specified on ITAC's website or in its tariff.

g~~f~~) Notwithstanding the requirements of subsection (a), if two or more certified users with different disabilities reside in the same legal residence, and if the certified users require dissimilar landline or VoIP-compatible equipment in order to engage in regular and routine telephone communications as a result of their differing disabilities, ITAC, on behalf of the carriers, shall provide an additional piece of landline or VoIP-compatible equipment or additional pieces of equipment.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.225 Shared Residence

In the event that two or more recipients share a common permanent legal residence, equipment distributed pursuant to Section 755.100(a) in excess of that permitted under Section 755.205 shall be returned to ITAC.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.230 Change of Recipient Information

If the recipient changes his/her permanent legal address, name, ~~or~~ telephone number, or carrier, wireless carrier, or VoIP provider, he/she must notify ITAC of this change.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

SUBPART D: POSSESSION AND MAINTENANCE

Section 755.300 Equipment Ownership and Liability

a) All loaned equipment distributed under Section 755.100(a) ~~of this Part~~ shall remain the property of ITAC. ~~Each recipient shall sign a form indicating that he/she understands and accepts the requirements of this Part regarding ownership and liability.~~

b) Equipment distributed pursuant to Section 755.100(a) and (b) may not be sold, loaned, or otherwise transferred out of the possession of the original recipient. Transfers will subject the recipient to disqualification from further ITAP participation~~liability for the full replacement cost of the equipment~~.

c) Upon implementation of a voucher system pursuant to Section 755.100(b), the tariff filed or website postings pursuant to Section 755.135(a)(2) shall specify the Program requirements regarding ownership and liability.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.305 Recipient Responsibility

a) In cases in which the recipient is the sole user within the residence:

1) in the event the recipient permanently relocates outside of Illinois, the recipient must return any loaned equipment distributed under Section 755.100(a)to ITAC prior to leaving the State;

2) in the event of the death of the recipient, the executor of the recipient's estate, or other responsible survivor must return any loaned equipment distributed under Section 755.100(a) to ITAC.

b) In cases in which the user of the loaned equipment distributed pursuant to Section 755.100(a) resides with a person with a disability and in the event of the user's death or permanent relocation outside of Illinois, the remaining person with the disability or the parent or legal guardian of the remaining person with a disability must give notice to ITAC and make application for the assignment of recipient status to the eligible individual within the residence.

c) In cases in which the recipient of loaned equipment distributed pursuant to Section 755.100(a) is not a user, on the occasion of the 18th birthday of a minor user, recipient status shall be transferred to the user.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.310 Responsibility for Maintenance

a) Unless otherwise specified by this Section, all ordinary expense of maintenance and repair of loaned equipment distributed pursuant to Section 755.100(a) is borne by ITAC, on behalf of the carriers.

b) If loaned equipment is damaged, lost, or destroyed due to negligence of the recipient and not due to ordinary wear and tear, the recipient shall be held responsible for the cost of replacing the lost or destroyed equipment or ITAC's cost of restoring the damaged equipment to its original condition, unless ITAC, on behalf of the carriers, assumes the responsibility for the costs of repair in these instances. ITAC shall have the right to bill the recipient for the cost of replacing or restoring the lost, destroyed, or damaged equipment, and to withhold further participation by the recipient in the programs offered under Section 755.100(a) and (b) of this Part until payment is made.

c) The recipient must immediately notify ITAC if any loaned equipment distributed pursuant to Section 755.100(a) is lost, destroyed, stolen, or damaged. If equipment is stolen, damaged, or destroyed due to fire, flood, or other acts of God, the police, fire, or insurance adjustor's report, specifying the stolen, damaged, or destroyed ITAC equipment, must be forwarded to ITAC within 30 days after the date the incident was reported.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

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SUBPART E: OVERSIGHT AND REVIEW

Section 755.400 Staff Liaison

The Executive Director of the Commission shall appoint one Staff member to act as Staff Liaison to the programs required by Section 13-703 of the Act. The Staff Liaison shall serve as a contact person, advisor and monitor of the ITAP administrators and the Advisory Council. ~~The Staff Liaison shall assemble for dissemination equipment specifications, training, and testing information in response to the equipment distributed pursuant to Section 755.100 to assist emergency telephone services Public Safety Answering Points ("PSAP").~~

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.405 Advisory Council

An Advisory Council composed of seven members who are representatives of persons with disabilities shall function as an organ for the input of individuals with disabilities to ITAP.

a) For the purpose of selecting representatives to the Advisory Council, the Commission shall divide the State~~state~~ into the following five districts:

1) District 1: Cook, DuPage, Grundy, Iroquois, Kane, Kankakee, Kendall, Lake, LaSalle, McHenry, Putnam, and Will Counties;

2) District 2: Boone, Carroll, DeKalb, Jo Daviess, Lee, Mercer, Ogle, Rock Island, Stephenson, Whiteside, and Winnebago Counties;

3) District 3: Bureau, Champaign, DeWitt, Ford, Fulton, Hancock, Henderson, Henry, Knox, Livingston, Logan, Marshall, Mason, McDonough, McLean, Peoria, Piatt, Stark, Tazewell, Vermilion, Warren, and Woodford Counties;

4) District 4: Adams, Brown, Cass, Christian, Clark, Coles, Cumberland, Douglas, Edgar, Effingham, Greene, Macon, Macoupin, Menard, Montgomery, Morgan, Moultrie, Pike, Sangamon, Schuyler, Scott, and Shelby Counties; and

5) District 5: Alexander, Bond, Calhoun, Clay, Clinton, Crawford, Edwards, Fayette, Franklin, Gallatin, Hamilton, Hardin, Jackson, Jasper, Jefferson,

Jersey, Johnson, Lawrence, Madison, Marion, Massac, Monroe, Perry, Pope, Pulaski, Randolph, Richland, Saline, St. Clair, Union, Wabash, Washington, Wayne, White, and Williamson Counties.

b) The Advisory Council shall be made up of seven members.

1) Three members shall be selected from District 1;

2) One member shall be selected from each of the four remaining districts; and

3) The Advisory Council members shall be elected to staggered terms of three years with an election being held annually.

c) In each district, nominations for seats on the Advisory Council shall be solicited by ITAC. The sitting Advisory Council shall identify appropriate local organizations, including, but not limited to, all selection~~distribution~~ centers, local chapters of the Illinois Association for the Deaf, the Association for Late-Deafened Adults, and Self Help for Hard of Hearing. Each nomination shall be accompanied by a resume of the nominee. Any nominee who is affiliated with or otherwise acts in concert with an owner or vendor of equipment or services promoted for use by persons with disability, or whose relationship with an owner or vendor could give rise to a conflict of interest, shall be disqualified.

d) Those local organizations identified in subsection (c) shall be entitled to vote for the Advisory Council members representing that district.

e) If no nominations are received for a seat in any district, that seat shall become an at-large seat, and the organizations specified in subsection (c) shall submit nominations, accompanied by resumes of the nominee, without regard to the residence of the nominee. All the local organizations identified in subsection (c) shall be entitled to vote for at-large seats.

f) The seven members of the Advisory Council shall elect a chairperson.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.410 Advisory Council Rights

a) ITAC shall serve notice~~one copy~~ of all filings, reports or other information pertaining to ITAP provided to the Commission on the chairperson of the Advisory Council.

b) Upon receipt of complaints concerning this program, ITAC shall inform the recipient that if he/she remains dissatisfied in his/her dispute, the recipient may contact the Advisory Council. ITAC shall provide the recipient with the name, telephone number and business address of a designated member of the Advisory Council and inform the recipient that the Advisory Council may be able to aid the recipient in his/her dispute.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

SUBPART F: LINE CHARGE AND ASSESSMENT ADJUSTMENT MECHANISM

Section 755.500 Annual Filings

a) On or before April 1 of each year, ITAC shall file with the Commission a verified petition requesting that the Commission establish the annual line charge and assessment, and shall file with the petition the following information, and shall serve the filing as provided in Section 755.515(b):

1) ITAC's audited financial statements as of December 31 of the prior calendar year;

2) A projected balance sheet, projected statement of revenues and expenses, projected statement of cash flows, and a summary of significant projection assumptions and accounting policies for the projection period;

3) A pro forma adjustment to annualize December levels of revenues and expenses for the projection period shall be added to the projected revenues and expenses;

4) A statement from an independent certified public accountant that the projected balance sheet and statements of revenues and expenses and cash flows comply with the guidelines for presentation of a projection established in the "Prospective Financial Information Guide", November 1, 2012,~~March 1, 2009~~ by the American Institute of Certified Public Accountants (1211 Avenue of the Americas, New York NY 10036), and

that the underlying assumptions provide a reasonable basis for management's projections. No later amendment or edition of the "Prospective Financial Information Guide" is included by this incorporation; and

5) Schedules for the projection period presenting the following information in the format of Exhibit A through Exhibit M:

A) A calculation of the proposed monthly line charge and assessment (Exhibit A);

B) A comparison of present and proposed line charges and assessments, as adjusted (Exhibit B);

C) A statement of revenues and expenses at present line charge and assessments, as adjusted (Exhibit C);

D) A statement of prior calendar year actual revenues over/(under) expenses (Exhibit D);

E) A schedule of adjustment to projected cash balance (Exhibit E);

F) A supporting schedule of planned capital expenditures during projection period (Exhibit F);

G) A schedule of projected increase to cash under proposed line charge and assessment before cash adjustment (Exhibit G);

H) A schedule of projected and historical TRS call volumes and projected and historical subscriber lines, wireless lines, subscriptions, and prepaid wireless telecommunications services retail transactions ~~and assessments~~ (Exhibit H);

I) A depreciation schedule (Exhibit I); and

J) Comparative actual and projected balance sheets, at proposed line charge and assessment, as adjusted (Exhibit L).

b) For purposes of projecting subscriber lines, wireless lines, and subscriptions for

the projection period as required by subsection (a), it shall be assumed, with the exception of the 2016~~2011~~ calendar year period, that subscriber lines, wireless lines, and subscriptions will increase or decrease annually from the number of subscriber lines, wireless lines, and subscriptions on December 31 of the prior calendar year reported by ITAC pursuant to subsection (a)(5)(H), at a weighted average growth rate. This growth rate shall be based on historical Illinois rates of increase or decrease in subscriber lines, wireless lines, and subscriptions. ~~For purposes of projecting subscriber lines and subscriptions for calendar year 2011 as required by subsection (a), it shall be assumed that subscriber lines and subscriptions will increase or decrease annually, from the number of subscriber lines on December 31 of the prior calendar year reported by ITAC pursuant to subsection (a)(5)(H) plus reported subscriptions as of December 31, 2010, at a weighted average growth rate. For purposes of projecting subscriptions for calendar year 2011, the weighted average growth rate shall be assumed to be zero.~~

c) For purposes of projecting TRS call volumes for the projection period as required by subsection (a), forecasts of call volumes shall be based on historical Illinois TRS call volumes.

d) For purposes of projecting expenses for the projection period as required by subsection (a), an annual inflation factor equal to the consensus Gross National Product implicit price deflator for the projection period, as reported in the publication "Blue Chip Economic Indicators" for January of the year in which the filing is made, shall be applied to all costs, excluding depreciation and costs fixed by contract between ITAC and another party, and other reasonably estimated costs.

e) For purposes of establishing the proposed line charge and assessment for the projection period, ITAC shall make calculations so that the following amounts are reflected in the proposed line charge and assessment over a 12 month period:

1) projection period revenues (over)/under expenses at present line charge and assessment, as adjusted;

2) the total difference, if any, between ITAC's actual revenues and ITAC's actual expenses for the prior calendar year; and

3) any adjustment necessary so that ITAC's cash balance, under the proposed line charge and assessment, at the end of the projection period will be no

less than one-eighth and no greater than one-fourth of ITAC's projected expenses, as adjusted, for the projection period, excluding depreciation, plus an allowance for planned capital expenditures during the projection period.

f) ITAC shall make available to the Commission Staff all workpapers, documentation, and calculations supporting its annual filing.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.505 Carrier, Wireless Carrier, and Interconnected VoIP Provider Reports and Remittances to ITAC

a) Each carrier, wireless carrier (with the exception of providers of prepaid wireless services), and interconnected VoIP provider (or affiliated entity on its behalf), as defined in this Part, shall provide a monthly remittance report to ITAC, indicating the number of subscriber lines excluding centrex lines, the number of telecommunications carriers' centrex lines, PBX lines and other technologies indicated in ITAC's tariff or on its website, the number of wireless lines, and the number of VoIP subscriptions; the applicable line charges and assessments; revenues from each source; adjustments for errors (if any) in prior monthly reports; and the total remittance. All revenue amounts shall be reported net of uncollectible amounts prescribed by 83 Ill. Adm. Code 756.220(d) and shall be remitted to ITAC as reported. This data shall be presented in the format defined in ITAC's tariff or on its website. The Staff Liaison shall provide assistance to ITAC in monitoring remittances. Indirect remittances to ITAC shall indicate the interconnected VoIP provider or wireless carrier on whose behalf reports are being remitted. The requirements of this subsection (a) shall become effective for interconnected VoIP providers on January 1, 2011. The requirements of this subsection (a) shall become effective for wireless carriers (with the exception of providers of prepaid wireless services) on June 1, 2016, but notwithstanding the effective date reports and remittances shall only be required with respect to periods following the wireless carrier's implementation of rates established by Commission orders. ~~In addition, interconnected VoIP providers shall provide, on or before February 1, 2011, a report to ITAC indicating the number of residential subscriptions and the number of business subscriptions as of June 30, 2010. interconnected VoIP providers shall provide, on or before March 7, 2011, a report to ITAC indicating the number of residential subscriptions and the number of business subscriptions as of December 31, 2010.~~

b) Information at the reporting entity level, submitted to ITAC pursuant to this Section, shall be considered confidential and shall only be disclosed (other than to the Commission and its staff) pursuant to a valid and enforceable subpoena or court order or as required by the Freedom of Information Act [5 ILCS 140]. Information reported pursuant to this Part may, however, be aggregated (e.g., according to carrier class and/or technology) and reported publicly provided subscribership information specific to each reporting entity is not disclosed or discernible from the information reported to the public.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.510 Determination and Adjustment of the Line Charge and Assessment

a) The Commission shall issue its order establishing the competitively neutral amount to be charged or assessed to subscribers of telecommunications carriers and wireless carriers, Interconnected VoIP service providers and purchasers of prepaid wireless telecommunications service on or prior to June 1 of each year.~~The Commission may, upon complaint, its own motion, or the petition of ITAC, enter upon a hearing concerning the propriety of the proposed line charge and assessment. If no hearing is held, the Commission shall issue an order determining the line charge and assessment level within 45 days after ITAC's annual filing. If a hearing is conducted, the Commission shall issue an order determining the line charge and assessment level within 105 days after ITAC's annual filing. If the Commission is unable to issue an order within this 105-day period, the Commission shall extend this period for a further period not exceeding six months.~~

b) The Commission's order establishing the line charge and assessment shall be served on ITAC, the ITAP Advisory Council chairperson, the Staff Liaison, the Director of the Commission's Policy Division~~Telecommunications Department~~, all carriers and wireless carriers, all~~, and~~ interconnected VoIP providers, and the Department of Revenue.

c) If any change in the line charge and assessment is ordered, the order shall direct each carrier, wireless carrier, interconnected VoIP service provider, and seller to implement the new rate and assessment~~file a tariff~~ within 60~~15~~ days in compliance with the order and without further notice.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.515 Notice and Filing Requirements

a) ITAC shall, beginning not later than ten days after it files the information required under Section 755.500 or under Section 755.520, cause to be published once each week for two consecutive weeks a notice of its filing in the official state newspaper and in a secular newspaper (that has been regularly published for at least six months prior to the first publication of this notice) in general circulation in the cities of Chicago and Springfield. This notice shall be not less than one column in width and three inches in length.

b) ITAC shall file with the Chief Clerk of the Commission the required reports and schedules pursuant to Section 755.500 and 755.520. Any documents filed with the Commission pursuant to those Sections shall also be served on the following persons: Director of the Commission's Consumer Services Division and Policy~~Telecommunications~~ Division, the Manager of the Accounting Department of the Commission's Financial Analysis Division, the Staff Liaison, the Director of the Department of Revenue, and the ITAP Advisory Council chairperson.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

Section 755.520 Interim Line Charge and Assessment Adjustments

a) ITAC may request, by petition, an interim line charge and assessment adjustment. This petition shall be verified and shall include documentation in substantially the same form as Exhibit A through Exhibit L of this Part supporting the need for an interim line charge and assessment adjustment and a projected cash flow statement. If a hearing is conducted, ITAC shall bear the burden of proof regarding the need for an interim line charge and assessment adjustment.

b) The Commission shall issue an order on an expedited basis addressing any requested interim line charge and assessment adjustment, either denying, granting in full, or granting in part the requested interim line charge and assessment adjustment. The Commission's order shall be served on the same persons as in Section 755.510(b). If the Commission determines that an interim line charge and assessment adjustment is necessary, the order shall authorize an interim line charge and assessment, to remain in effect until subsequent order of the Commission. If the Commission's order authorizes an interim line charge and

assessment adjustment, it shall direct all carriers, wireless carriers, interconnected VoIP providers and sellers to implement the new rate and assessment~~file tariffs~~ in compliance with the order.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

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Section 755.EXHIBIT A Calculation of Monthly Line Charge and Assessment (Schedule A-1)

Line (A)	Description (B)	Amount (C)
1	Projection Period Revenues (Over)/Under Expenses at~~At~~ Present Line Charge and Assessment, As Adjusted (a)	_____
2	Prior Calendar Year Actual Revenues (Over)/Under Expenses (b)	_____
3	Adjustment to~~To~~ Projected Cash Balance (c)	_____
~~4~~	~~Subtotal~~	_____
4~~5~~	End-of-Period Projected ~~Subscriber~~ Lines	_____
5~~6~~	Annual Revenue Adjustment Per ~~Subscriber~~ Line (Line 3~~4~~ Divided by Line 4~~5~~ – Rounded to 4 Decimal Places)	_____
6~~7~~	Increase (Decrease) in Monthly Line Charge and Assessment for Projection Period (Line 5~~6~~ Divided by 12 Months – Rounded to 4 Decimal Places)	_____
7~~8~~	Add: Present Line Charge and Assessment	_____
8~~9~~	Subtotal (Line 6~~7~~ Plus Line 7~~8~~)	_____
9~~10~~	Proposed Monthly Line Charge and Assessment (Line 8~~9~~ Rounded to Next Higher Cent)	_____

~~(a) Amount from Line 17, column E, schedule A-3.~~

~~(b) Amount from line 17, column D, schedule A-4.~~

~~(c) Amount from line 6 or 11, column D, schedule A-5.~~

10	Prepaid wireless sale (d)	_____
11	Proposed Monthly Line Charge (Line 9 as a Percentage of Line 10)	_____
12	3% Retailer Surcharge Collected Before ITAC Remittance (Line 11 multiplied by 1.03)	_____
13	2% IDOR Surcharge Collected After Retailer Surcharge and Before ITAC Remittance (Line 12 multiplied by 1.02)	_____
14	Proposed Prepaid Wireless Line Charge Percentage	_____

NOTES:

(a) Amount from Line 17, column E, schedule A-3.

(b) Amount from line 17, column D, schedule A-4.

(c) Amount from line 6 or 11, column D, schedule A-5.

(d) Estimated value of a prepaid wireless sale based 9-1-1 prepaid wireless charges.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

Section 755.EXHIBIT B Comparison of Present and Proposed Line Charges and Assessments (Schedule A-2)

Line (A)	Description (B)	Projection Period (Year) As Adjusted At Present Line Charge and Assessment (C)	Projection Period (Year) As Adjusted At Proposed Line Charge and Assessment (D)	Difference (Column D - Column C) (E)	Percentage Change (Column E/ Column C) (F)
1	Number of VoIP Residential Subscriptions, Wireless and Subscriber Lines and Equivalents, Excluding Centrex*				
2	Number of Business Subscriptions and Centrex Lines				
3	~~Subscriber~~ Line Charge and Assessment Excluding Centrex				
4	Centrex Line Charge				
5	Subtotal				
6	Investment Income				
7	TRS				
8	Other:				

9	Total Revenues				
10	Expenses				
11	Revenue Over/(Under) Expenses				

*Includes PBX and other advanced line equivalents.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

Section 755.EXHIBIT C Projection Period Statement of Revenues and Expenses at Present Line Charge and Assessment, As Adjusted (Schedule A-3)

Line (A)	Description (B)	Projection Period Ending 12/31/__ (C)	Adjustment to Annualize December Levels (D)	Total (E)
1	Revenues	_____	_____	_____
2	~~Subscriber~~ Line Charge and Assessment	_____	_____	_____
3	Investment Income	_____	_____	_____
4	TRS	_____	_____	_____
5	Other Income:	_____	_____	_____
6	TOTAL REVENUES	_____	_____	_____
7	Expenses:			
8	TRS	_____	_____	_____
9	Administration	_____	_____	_____
10	Equipment Distribution and Maintenance	_____	_____	_____
11	Legal	_____	_____	_____
12	Accounting and Consulting	_____	_____	_____
13	Depreciation	_____	_____	_____

14	(Gain)/Loss on Property and Equipment Retirements			
15	Other Expenses:			
16	TOTAL EXPENSES			
17	Revenues Over (Under) Expenses			

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

Section 755.EXHIBIT D Prior Calendar Year Actual Revenues Over/(Under) Expenses (Schedule A-4)

Line (A)	Description (B)	Year Ended 12/31/__ (C)	Amount (D)
1	Revenues:		
2	~~Subscriber~~ Line Charge and Assessment	_____	
3	Investment Income	_____	
4	TRS	_____	
5	Other Income:	_____	
6	TOTAL REVENUES		_____
7	Expenses:		
8	TRS	_____	
9	Administration	_____	
10	Equipment Distribution & Maintenance	_____	
11	Legal	_____	
12	Accounting and Consulting	_____	
13	Depreciation	_____	
14	(Gain)/Loss on Property and Equipment Retirements	_____	

15	Other Expenses:		
16	TOTAL EXPENSES		
17	Revenue Over/(Under) Expenses		

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

Section 755.EXHIBIT G Schedule of Projected Increase to Cash Under Proposed Line Charge and Assessment Before Cash Adjustment (Schedule A-7)

Line (A)	Description (B)	Amount (C)	Amount (D)
1	Projected Cash Balance at Present Rates, as adjusted		
2	Projected increase to Cash Balance at proposed line charge and assessment before cash adjustment calculation		
3	Projection Period Revenues (Over)/Under Expenses at Present Line Charge and Assessment, as adjusted (a)		
4	Prior period actual revenues (Over)/Under Expenses (b)		
5	Subtotal (Line 3 plus Line 4)		
6	Projected increase/(decrease) to cash under proposed line charge and assessment before cash adjustment (One-Fourth~~One-Half~~ of Line 5)		
7	Projected Cash Balance at proposed line charge and assessment before cash adjustment (Line 1 plus Line 6)		

NOTES:

(a) Amount of Line 17, Column E, Schedule A-3.

(b) Amount from Line 17, Column D, Schedule A-4.

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

Section 755.EXHIBIT H Call Volumes and ~~Subscriber~~ Lines and Assessments (Schedule A-8)

		TRS Call Volume			~~Subscriber~~ Lines and Equivalents		
Line (A)	Month (B)	Actual Prior Cal Yr (C)	Proj Period (D)	Diff Col D - Col C (E)	Actual Prior Cal Yr (F)	Proj Period (G)	Diff Col G - Col F (H)
1	Jan	_____	_____	_____	_____		
2	Feb	_____	_____	_____	_____		
3	Mar	_____	_____	_____	_____		
4	Apr	_____	_____	_____	_____		
5	May	_____	_____	_____	_____		
6	June	_____	_____	_____	_____		
7	July	_____	_____	_____	_____		
8	Aug	_____	_____	_____	_____		
9	Sept	_____	_____	_____	_____		
10	Oct	_____	_____	_____	_____		
11	Nov	_____	_____	_____	_____		
12	Dec	_____	_____	_____	_____	_____	_____
13	Total	_____	_____	_____			

(Source: Amended at 41 Ill. Reg. 5401, effective May 5, 2017)

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

1) Heading of the Part: Telecommunications Relay Services

2) Code Citation: 83 Ill. Adm. Code 756

3)

Section Numbers:	Adopted Actions:
756.10	Amendment
756.105	Amendment
756.110	Amendment
756.125	Amendment
756.200	Amendment
756.225	Amendment
756.305	Amendment

4) Statutory Authority: Implementing Section 13-703 and authorized by Section 10-101 of the Public Utilities Act [220 ILCS 5/13-703 and 10-101].

5) Effective Date of Rules: May 5, 2017

6) Does this rulemaking contain an automatic repeal date? No

7) Does this rule contain incorporations by reference? No

8) A copy of the adopted rules, including any material incorporated by reference, is on file in the Commission's Springfield office and is available for public inspection.

9) Notice of Proposal published in the *Illinois Register*: 40 Ill. Reg. 8939; July 8, 2016

10) Has JCAR issued a Statement of Objection to this rulemaking? No

11) Differences between Proposal and Final Version: Language has been added to Sections 756.105(a) and 756.225(a) to clarify their operation.

12) Have all the changes agreed upon by the Agency and JCAR been made as indicated in the agreement letter issued by JCAR? Yes

13) Will this rulemaking replace any emergency rule currently in effect? No

14) Are there any rulemakings pending on this Part? No

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

15) Summary and Purpose of Rulemaking: The amendments stem from the enactment of Public Act 99-6, which expanded the sources of funding for the access programs to include wireless carriers and sellers of prepaid wireless service, in addition to the existing funding sources of local exchange carriers and fixed or non-nomadic voice over Internet protocol (VoIP) providers. The amendments reflect these additional sources of funding, and make other agreed-upon changes recommended by the Illinois Telecommunications Access Corporation.

16) Information and questions regarding these adopted amendments shall be directed to:

Brian W. Allen
Office of General Counsel
Illinois Commerce Commission
527 East Capitol Avenue
Springfield IL 62701

217/558-2387

The full text of the Adopted Amendments begins on the next page:

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

TITLE 83: PUBLIC UTILITIES
CHAPTER I: ILLINOIS COMMERCE COMMISSION
SUBCHAPTER f: TELEPHONE UTILITIES

PART 756
TELECOMMUNICATIONS RELAY SERVICES

SUBPART A: GENERAL PROVISIONS

Section
756.10 Definitions
756.15 Dispute Procedures
756.20 Notice (Repealed)
756.30 Waiver

SUBPART B: TELECOMMUNICATIONS CARRIER OBLIGATIONS

Section
756.100 Components of Relay Service
756.105 Relay Service Execution and Administration
756.110 Publicity Concerning Relay Service
756.115 RFP Selection Process
756.116 Commission Approval of Proposal
756.120 System Provider Interactions
756.125 Filing Requirements

SUBPART C: RELAY SERVICE PROGRAM STANDARDS AND SPECIFICATIONS

Section
756.200 Relay Service General Quality Standards
756.205 Relay Service Operations and Specifications
756.210 Communications Assistant Standards
756.215 System Provider Reporting Requirements
756.220 Relay Service Billing and Collection Procedures
756.225 Relay Service Revenues

SUBPART D: OVERSIGHT AND REVIEW

ILLINOIS COMMERCE COMMISSION

NOTICE OF ADOPTED AMENDMENTS

Section
756.300 Staff Liaison
756.305 Advisory Council Rights
756.310 Biannual Workshop

AUTHORITY: Implementing Section 13-703 and authorized by Section 10-101 of the Public Utilities Act [220 ILCS 5/13-703 and 10-101].

SOURCE: Adopted at 12 Ill. Reg. 17321, effective October 15, 1988; amended at 15 Ill. Reg. 5618, effective April 15, 1991; emergency amendment at 16 Ill. Reg. 14470, effective September 3, 1992, for a maximum of 150 days; amended at 17 Ill. Reg. 1848, effective February 1, 1993; amended at 17 Ill. Reg. 12294, effective July 15, 1993; amended at 28 Ill. Reg. 6974, effective May 1, 2004; amended at 36 Ill. Reg. 15086, effective October 1, 2012; amended at 41 Ill. Reg. 5446, effective May 5, 2017.

SUBPART A: GENERAL PROVISIONS

Section 756.10 Definitions

"7-1-1" means the abbreviated dialing code for accessing all types of relay services anywhere in the United States.

"Act" means the Public Utilities Act [220 ILCS 5].

"Advisory Council" means the advisory council established by 83 Ill. Adm. Code 755.405.

"American Sign Language" or "ASL" means a visual language based on hand shape, position, movement, and orientation of the hands in relation to each other and the body.

"ASCII" is an acronym for the American Standard Code for Information Interexchange that employs an eight bit code and can operate at any standard transmission baud rate including 300, 1200, 2400 and higher.

"Baudot" means a seven bit code, only five of which are information bits. Baudot is used by some text telephones to communicate with each other at a 45.5 baud rate.

"Call release" means a Telecommunications Relay Service (TRS) feature that allows the Communications Assistant (CA) to sign-off or be "released" from the telephone line after the CA has set up a telephone call between the originating text telephone (TTY) caller and a called TTY party, such as when a TTY user must go through a TRS facility to contact another TTY user because the called TTY party can only be reached through a voice-only interface, such as a switchboard.

"Communications Assistant" or "CA" means a person who transliterates or interprets conversations between two or more end users of TRS. CA supersedes the term "TRS operator".

"Commission" means the Illinois Commerce Commission.

"Disability" refers to a condition of being permanently hearing disabled, deaf-blind, speech-disabled, hearing-sight disabled, or speech-sight disabled, as those terms are defined in 83 Ill. Adm. Code 755.10.

"FCC" means Federal Communications Commission.

"Hearing carry over" or "HCO" means a form of TRS in which~~where~~ the person with the speech disability is able to listen to the other end user and, in reply, the CA speaks the text as typed by the person with the speech disability. The CA does not type any conversation. Two-line HCO is an HCO service that allows TRS users to use one telephone line for hearing and the other for sending TTY messages. HCO-to-TTY allows a relay conversation to take place between an HCO user and a TTY user. HCO-to-HCO allows a relay conversation to take place between two HCO users.

"Illinois Telecommunications Access Corporation" or "ITAC" means the not-for-profit corporation jointly established by the Illinois telecommunications carriers providing local exchange service in order to administer the programs mandated by Section 13-703 of the Act ~~[220 ILCS 5/13-703]~~ on behalf of the carriers.

"Interconnected Voice over Internet Protocol Provider" or "Interconnected VoIP Provider" has the same meaning as defined in Section 13-235 of the Act. For purposes of this Part, Interconnected VoIP providers are limited to those providers subject to Section 13-401.1 of the Act.

"Interexchange carrier" or "IXC" means a telecommunications carrier providing interexchange service as defined in Section 13-205 of the Act.

"Non-English language relay service" means a telecommunications relay service that allows persons with hearing or speech disabilities who use languages other than English to communicate with voice telephone users in a shared language other than English, through a CA who is fluent in that language.

"Public Safety Answering Point" or "PSAP" means a facility that has been designated to receive 9-1-1 calls and route them to emergency services personnel.

"Qualified interpreter" means an interpreter who is able to interpret effectively, accurately and impartially, both receptively and expressively, using any necessary specialized vocabulary.

"Relay system" means the configuration, provision and operation of the facilities, equipment and personnel through which the telecommunications carriers shall provide relay service.

"Speech-to-speech relay service" or "STS" means a telecommunications relay service that allows individuals with speech disabilities to communicate with voice telephone users through the use of specially trained CAs who understand the speech patterns of persons with speech disabilities and can repeat the words spoken by that person.

"Speed dialing" means a TRS feature that allows a TRS user to place a call using a stored number maintained by the TRS facility. In the context of TRS, speed dialing allows a TRS user to give the CA a "short-hand" name or number for the user's most frequently called telephone numbers.

"SS7" or "Signaling System 7" means a carrier to carrier out-of-band signaling network used for call routing, billing and management. SS7 provides for the delivery of Caller ID, improves access to 9-1-1, and eliminates the need to collect some information currently collected manually through caller profiles.

"Staff Liaison" means the Staff Liaison established by 83 Ill. Adm. Code 755.400.

"System provider" means that corporation, organization, coalition or entity who, under contract to the ITAC, provides the relay system through which the telecommunications carriers shall provide relay service.

"Telecommunications carrier" or "carrier" has the same meaning as in Section 13-202 of the Act that is providing local exchange telecommunications service as defined in Section 13-204 of the Act. For purposes of this Part, "telecommunications carrier" or "carrier" also includes telecommunications carriers that are mutual concerns as defined in Section 13-202(b) of the Act.

"Telecommunications relay service " or "TRS" or "relay service" means telephone transmission services that provide the ability for an individual with a hearing or speech disability to engage in communication by wire or radio with a hearing individual in a manner that is functionally equivalent to the ability of an individual who does not have a hearing or speech disability to communicate using voice communication services by wire or radio. This term includes services that enable two-way communication between an individual who uses a text telephone or other nonvoice terminal device and an individual who does not use such a device, speech-to-speech services, non-English language relay service, and video relay service. TRS supersedes the terms "dual party relay system", "message relay services" and "TDD Relay".

"Text telephone" or "TTY" means a machine that employs graphic communication in the transmission of coded signals through a wire or radio communication system. TTY supersedes the term "TDD" or "telecommunications device for the deaf" and "TT".

"Three-way calling" means a TRS feature that allows more than two parties to be on the telephone line at the same time with the CA.

"Transliterate" means to verbally express a message received by TTY or to send by TTY a verbal message received.

"Video relay service" or "VRS" means a telecommunications relay service that allows people with hearing or speech disabilities who use sign language to communicate with voice telephone users through video equipment. The video link allows the CA to view and interpret the party's signed conversation and relay the conversation back and forth with a voice caller.

"Voice carry over" or "VCO" means a form of TRS in which the person with the hearing disability is able to speak directly to the other end user. The CA types the response back to the person with the hearing disability. The CA does not voice the conversation. Two-line VCO is a VCO service that allows TRS users to use one telephone line for voicing and the other for receiving TTY messages. A VCO-to-TTY TRS call allows a relay conversation to take place between a VCO user and a TTY user. VCO-to-VCO allows a relay conversation to take place between two VCO users.

"Wireless carrier" has the meaning given to that term in Section 10 of the Wireless Emergency Telephone Safety Act [50 ILCS 751].

(Source: Amended at 41 Ill. Reg. 5446, effective May 5, 2017)

SUBPART B: TELECOMMUNICATIONS CARRIER OBLIGATIONS

Section 756.105 Relay Service Execution and Administration

Each telecommunications carrier shall:

a) Fund the relay service in part through tariffed charges or, when authorized to do so by Section 13-501(c) of the Act, through charges included in a written service offering on its website to relay service users as provided in Section 756.125(a). The telecommunications carriers shall derive the balance of the relay service funding requirements from the revenues collected as authorized by the Commission pursuant to Section 13-703(c) and (f) of the Act;

b) Jointly administer the relay service through the ITAC, on behalf of the carriers;

c) Direct the ITAC, on behalf of the carriers, to develop and circulate, pursuant to the requirements of Section 756.115, a Request-for-Proposal (RFP) for the provision of the relay system;

d) Direct the ITAC, on behalf of the carriers, to establish a system provider selection procedure pursuant to the requirements of Section 756.115;

e) Direct the ITAC, on behalf of the carriers, to contract, pursuant to Section

756.120, with a system provider for the provision of the relay system;

f) Bill and collect charges for relay-assisted calls pursuant to the requirements of Sections 756.125(a) and 756.220; and

g) Retain individual and collective responsibility for ensuring the provision and maintenance of the relay service consistent with the standards set forth in this Part.

(Source: Amended at 41 Ill. Reg. 5446, effective May 5, 2017)

Section 756.110 Publicity Concerning Relay Service

a) Telecommunications carriers or ITAC, on their behalf, shall publicize the relay service to increase awareness of the availability and use of all forms of TRS offered in Illinois. Efforts to educate the public about TRS should extend to all segments of the public, including individuals who are hard of hearing or speech disabled and senior citizens, as well as members of the general population. Publicity shall include, at a minimum:

1) Annual bill inserts and notices published in the directories;

2) Placement of TRS instructions in telephone directories, through directory assistance services, and incorporation of TTY numbers in telephone directories; and

~~3) Notification, at least annually, to conventional news media such as daily, weekly, or monthly newspapers or magazines, television or radio stations, electronic media, or other cost-effective means of communication;~~

~~4) Written notification, at least annually, to organizations and to newsletters serving individuals with disabilities. Organizations and newsletters wishing to receive such notification must contact the telecommunications carriers through ITAC and place themselves on a relay service information service list;~~

~~5) Written notification to designated offices of the social service agencies, as provided in 83 Ill. Adm. Code 755.110(b)(3); and~~

3~~6~~) Ongoing education and outreach programs that publicize the availability of ~~7-1-1 access to~~ TRS in a manner reasonably designed to reach the largest number of consumers in a cost-effective manner~~possible~~.

b) Relay service information publicized by the telecommunications carriers or ITAC, on their behalf, shall include the items listed in this subsection. Each publication shall include all items whenever feasible and consistent with the purpose of the publicity.

1) Relay service access numbers;

2) A description of the relay service functions offered, which shall include, at a minimum, those prescribed in Section 756.100;

3) Statements of the full time availability of relay service; and

4) Statements advising that for the quickest response, TTY users should directly contact their local 9-1-1 service in emergency situations, or appropriate local emergency agencies in areas where 9-1-1 is not in service, instead of employing the relay service to complete emergency calls, and explaining the process defined in Section 756.205(e).

(Source: Amended at 41 Ill. Reg. 5446, effective May 5, 2017)

Section 756.125 Filing Requirements

In addition to the filing requirements prescribed in other Sections of this Part, the following filing requirements shall apply:

a) Each telecommunications carrier shall file a tariff or include a written service offering on its website:

1) Providing a description of the relay service functions offered, that shall include, at a minimum, those mandated in Section 756.100; and

2) Setting forth the basis for rates that shall be charged for relay-assisted calls.

A) Local TRS payphone calls shall be free.

B) TRS users shall not be charged for local calls placed or received through the relay system. For calls other than local calls, TRS users shall pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to those~~such~~ factors as the duration of the call, the time of day, and the distance from the point of origination to the point of termination.

C) Any discounts that~~which~~ would apply to a direct call between the originating and terminating points on the same day, time and duration of the relay-assisted call~~,~~ shall be applied to the charges billed for the relay-assisted call.

D) Access via the 7-1-1 dialing code to all relay services shall be toll free.

b) Each IXC shall file a tariff or include a written service offering on its website setting forth the basis for rates that~~which~~ shall be charged for relay-assisted calls that~~which~~ originate and terminate in different exchanges and that,~~which~~ if dialed directly without intervention by the relay service, would have been transmitted by an IXC.

1) TRS users shall pay rates no greater than the rates paid for functionally equivalent voice communication services with respect to such factors as the duration of the call, the time of day, and the distance from the point of origination to the point of termination.

2) Access via the 7-1-1 dialing code to all relay services shall be toll free.

3) Any discounts that would apply to a direct call between the originating and terminating points on the same day, time and duration of the relay-assisted call shall be applied to the charges billed for the relay-assisted call.

c) The ITAC, on behalf of the carriers, shall file an annual report with the Commission (to be filed no later than April 30 of each year) that shall contain the following information:

1) Updates on administration procedures for the relay service;

2) A description of program activities of the past year;

3) A description and brief evaluation of program effectiveness; and

4) As an appendix, the annual report provided by the system provider to the ITAC per the requirement of Section 756.215.

(Source: Amended at 41 Ill. Reg. 5446, effective May 5, 2017)

SUBPART C: RELAY SERVICE PROGRAM STANDARDS AND SPECIFICATIONS

Section 756.200 Relay Service General Quality Standards

Service provided under this Part shall conform to 83 Ill. Adm. Code 730 or 737, as applicable, unless specifically indicated otherwise in this Part. In addition, no rule in this Part is intended to discourage or impair the development of improved technology that fosters the availability of telecommunications to persons with disabilities.

(Source: Amended at 41 Ill. Reg. 5446, effective May 5, 2017)

Section 756.225 Relay Service Revenues

a) Each telecommunications carrier shall remit to ITAC the revenues collected each month pursuant to Section 13-703(c) of the Act. Each Interconnected VoIP provider and each wireless carrier, with the exception of prepaid wireless telecommunications services, shall remit to ITAC the revenues collected each month pursuant to Section 13-703(f) of the Act. Each seller of prepaid wireless telecommunications services shall collect from its customers an assessment, as required by Section 13-703(f) of the Act and ordered by the Commission, and remit the assessment to the Illinois Department of Revenue. The Commission will distribute to ITAC amounts available to the Commission for distribution to ITAC, from remittances to the Illinois Department of Revenue, pursuant to Section 13-703(f).

b) From those revenues ITAC, on behalf of the carriers, shall pay the system

provider for any fees or charges due under the contract specified in Section 756.120.

~~c) The relay system provider shall credit ITAC monthly in an amount equal to the intrastate TRS toll revenues billed by the relay system provider. This credit will not include intrastate toll calls processed through any carrier of choice other than the system provider.~~

(Source: Amended at 41 Ill. Reg. 5446, effective May 5, 2017)

SUBPART D: OVERSIGHT AND REVIEW

Section 756.305 Advisory Council Rights

a) ~~The~~ ITAC and the telecommunications carrier shall serve notice~~one copy~~ of all filings, reports, or other information pertaining to the relay service provided to the Commission on the chairperson of the Advisory Council.

b) Upon the receipt of complaints concerning the relay service, the system provider, ITAC or the telecommunications carrier staff shall inform the complainant that if the complainant remains dissatisfied in the complainant's dispute, the complainant may contact the Advisory Council. The system provider, ITAC, or the telecommunications carrier staff shall provide the complainant with the name, telephone number and business address of designated members of the Advisory Council and inform the recipient that the Advisory Council may be able to aid the complainant in the complainant's dispute.

(Source: Amended at 41 Ill. Reg. 5446, effective May 5, 2017)

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

1) Heading of the Part: Illinois Manual for Court-Martial and Nonjudicial Punishment

2) Code Citation: 95 Ill. Adm. Code 400

3)

Section Numbers:	Emergency Actions:
400.100	New Section
400.105	New Section
400.110	New Section
400.115	New Section
400.120	New Section
400.125	New Section
400.130	New Section
400.200	New Section
400.205	New Section
400.210	New Section
400.215	New Section
400.220	New Section
400.225	New Section
400.230	New Section
400.300	New Section
400.305	New Section
400.400	New Section
400.405	New Section
400.410	New Section
400.415	New Section
400.420	New Section
400.425	New Section
400.500	New Section
400.505	New Section
400.510	New Section
400.515	New Section
400.520	New Section
400.525	New Section
400.530	New Section
400.535	New Section
400.540	New Section
400.545	New Section
400.600	New Section
400.605	New Section

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

400.610	New Section
400.615	New Section
400.620	New Section
400.625	New Section
400.630	New Section
400.635	New Section
400.640	New Section
400.645	New Section
400.650	New Section
400.655	New Section
400.660	New Section
400.665	New Section
400.670	New Section
400.675	New Section
400.680	New Section
400.685	New Section
400.690	New Section
400.695	New Section
400.700	New Section
400.705	New Section
400.710	New Section
400.715	New Section
400.720	New Section
400.725	New Section
400.730	New Section
400.735	New Section
400.800	New Section
400.805	New Section
400.810	New Section
400.815	New Section
400.820	New Section
400.825	New Section
400.830	New Section
400.835	New Section
400.840	New Section
400.845	New Section
400.850	New Section
400.855	New Section
400.860	New Section

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

400.865	New Section
400.870	New Section
400.875	New Section
400.880	New Section
400.900	New Section
400.905	New Section
400.1000	New Section
400.1005	New Section
400.1010	New Section
400.1015	New Section
400.1020	New Section
400.1025	New Section
400.1030	New Section
400.1035	New Section
400.1040	New Section
400.1045	New Section
400.1050	New Section
400.1055	New Section
400.1060	New Section
400.1065	New Section
400.1070	New Section
400.1075	New Section
400.1080	New Section
400.1085	New Section
400.1090	New Section
400.1095	New Section
400.1100	New Section
400.1300	New Section
400.1305	New Section
400.1310	New Section
400.1315	New Section
400.1320	New Section
400.1325	New Section
400.1330	New Section
400.1335	New Section
400.1340	New Section
400.1345	New Section

4) Statutory Authority: 5 ILCS 100/5-45

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

5) Effective Date of Rules: May 8, 2017

6) If this emergency rule is to expire before the end of the 150-day period, please specify the date on which it is to expire: This emergency rule will not expire before the end of the 150-day period.

7) Date Filed with the Index Department: May 8, 2017

8) A copy of the adopted rules, including any material incorporated by reference, is on file and is available for public inspection at the Illinois Department of Military Affairs, 1301 N. MacArthur Blvd., Springfield IL 62702.

9) Reason for Emergency: In order to provide for the ability to court martial a member of the Illinois National Guard should the need arise prior to the effective date of the proposed rules.

10) A Complete Description of the Subjects and Issues Involved: This rule is a manual on how Illinois National Guard Judge Advocates are to process courts-martial cases under the Illinois Code of Military Justice.

11) Are there any other rulemakings pending on this Part? No

12) Statement of Statewide Policy Objective: To provide a consistent set of rules by which to administer Courts-Martials in the Illinois National Guard

13) Information and questions regarding this rule shall be directed to:

Illinois Department of Military Affairs
Office of the Staff Judge Advocate
Col. Robert C. Roth / Lt. Col. David D. Gorman
1301 N. MacArthur Blvd.
Springfield IL 62702

217/761-3366
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david.d.gorman.mil@mail.mil

The full text of the Emergency Rules begins on the next page:

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

TITLE 95: VETERANS AND MILITARY AFFAIRS
CHAPTER II: DEPARTMENT OF MILITARY AFFAIRS

PART 400
ILLINOIS MANUAL FOR COURT-MARTIAL AND NONJUDICIAL PUNISHMENT

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ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

AUTHORITY: Implementing and authorized by the Illinois Code of Military Justice [20 ILCS 1807].

SOURCE: Adopted by emergency rulemaking at 41 Ill. Reg. 3214, effective March 2, 2017, for a maximum of 150 days; emergency amendment at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days.

SUBPART A: GENERAL PROVISIONS

Section 400.100 Introduction
EMERGENCY

a) This Part, the Illinois Manual for Courts-Martial, referenced in this Part as the Manual, shall be construed to secure simplicity in procedure, fairness in administration, and elimination of unjustifiable expense and delay. The purpose of military law is to promote justice, to maintain good order and discipline, to promote efficiency and effectiveness in the military, and to strengthen the security of the United States and the State of Illinois. This Manual prescribes the policies and procedures pertaining to the administration of military justice and implements the Illinois Code of Military Justice [20 ILCS 1807] (the Code), applicable portions of the federal Uniform Code of Military Justice (UCMJ), and the Manual for Courts-Martial, United States (2012) (MCM).

b) To the extent allowed by Illinois law and as prescribed by the Code, this Manual reflects the MCM. Hence, this Manual must be construed so as to make it uniform, so far as practical, with the MCM. This Manual will be interpreted to include procedures and forms (e.g., DD Form 458, Charge Sheet) contained in the MCM and not contained in this Manual that may be needed from time-to-time in the administration of justice.

c) Insofar as any reference to the United States, President, or other federal official exists in the MCM, that reference encompasses the State, the Governor or State official, as appropriate.

d) Code Section 36 vests the Adjutant General of Illinois with the authority to make or adopt rules and regulations (this Manual) in conformity with the Code that, as nearly as practicable, must conform with the rules and regulations governing the U.S. armed forces. If this Manual differs from the rules and regulations governing the U.S. armed forces, this Manual shall apply.

e) There is no substitute for strong and effective military leadership. Commanders, officers, and non-commissioned officers should not attempt to replace leadership with military justice and punitive measures, except as a last resort and as punishment for offenses that have been committed. Proper leadership, guidance and counseling can be effective in preserving good order and discipline within the State military forces (SMF) and should reduce the need for use of the military justice system.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.105 Definitions and Referenced Materials
EMERGENCY

a) Definitions. Except as modified in this Manual, the definitions and rules of construction in RCM 103, as incorporated by reference in subsection (b), apply to courts-martial under the Code and this Manual.

"Accuser" means a person who signs and swears to charges, any person who directs that charges nominally be signed and sworn to by another, and any other person who has an interest other than an official interest in the prosecution of the accused. (Code Section 1(a)(1))

"AGR" means Active Guard Reserve.

"ANG" means the Illinois Air National Guard.

"Appropriate Nonpunitive Administrative Measures" means such actions as reprimands, administrative reduction in rank, administrative separation from SMF, etc.).

"ARNG" means the Illinois Army National Guard.

"Cadet" or "Candidate" means a person who is enrolled in or attending a State military academy, a regional training institute, or any other formal education program for the purpose of becoming a commissioned officer in the State military forces. (Code Section 1(a)(2))

"Classified Information" means:

> *any information or material that has been determined by an official of the United States or any state pursuant to law, an Executive Order, or regulation to require protection against unauthorized disclosure for* reasons *of national or State security; and*
>
> *any restricted data, as defined in section* 2014*(y) of the Atomic Energy Act of 1954 (42 USC 2014(y)).* (Code Section 1(a)(3))

"Code" means the Illinois Code of Military Justice [20 ILCS 1807].

"Commander" or *"Commanding Officer"*, for purposes of this Part, means a commissioned or warrant officer who, by virtue of his or her or grade and assignment, exercises primary command authority over a military unit or organization recognized as a command. This term includes active duty and SMF commanders, whether in a Title 10 (U.S. Military) or Title 32 (National Guard) status, of installations or schools when a member's SMF commander is not also at the installation or school. This term *shall include officers in charge only when* they are *administering nonjudicial punishment* under Subpart K. (Code Section 1(a)(5))

"Convening Authority" includes, in addition to the person who convened the court, a commissioned officer commanding for the time being or a successor in command to the convening authority. (Code Section 1(a)(6))

"Day" means a calendar day beginning at 0000 hours (12:00 a.m.) and ending at 2359 hours, 59 seconds (11:59, 59 seconds p.m.). Any punishment authorized by this Manual that is measured in terms of days shall, when served in a status other than annual field training, be construed to mean succeeding duty days. (Code Section 1(a)(7))

"Declination to Prosecute" or "Declination to Further Prosecute" is a written statement that, in the opinion of the appropriate civil authority:

> there is insufficient evidence to prove guilt beyond a reasonable doubt; or
>
> the offense does not otherwise merit prosecution or further prosecution and states the basis for that opinion.

"Department" or "DMA" means the Illinois Department of Military Affairs.

"Derivative Evidence" means facts, information or physical objects that tend to prove an issue in a court-martial, but that are excluded from consideration by the trier of fact because they were learned directly from information illegally obtained.

"Duty Status Other Than State Active Duty" or "OTAD" *means any other type of military duty or training pursuant to a written order issued under* 32 USC, *or traditional Inactive Duty Training periods pursuant to 32 USC 502(a).* (Code Section 1(a)(8)) It does not include "active duty" under 10 USC, i.e., "full-time duty in the active military service of the United States".

"Enlisted Member" means a person in an enlisted grade.

"ETS" means expiration of term of service.

"Government" means the U.S. Government or the State of Illinois or, in a trial setting, the trial counsel or the prosecution, as the context indicates.

"IDT" means inactive duty training.

"Judge Advocate" means a commissioned officer of the organized State military forces who is a member in good standing of the bar of the highest court of a state, and is:

> *certified or designated as a judge advocate in the Judge Advocate General's Corps of the Army, Air Force, Navy or Marine Corps, or designated as a law specialist as an officer of the Coast Guard, or a reserve or National Guard component of one of these; or*
>
> *certified as a non-federally recognized judge advocate by the senior judge advocate of the commander of the force in the SMF of which the accused is a member, as competent to perform such military justice duties required by the Code. If there is no such judge advocate available, then certification may be made by such senior judge advocate of the commander of another force in the SMF, as the convening authority directs.* (Code Section 1(a)(10))

"MCM" means the Manual for Courts-Martial, United States referenced in subsection (b).

"Manual" means this Part, the Illinois Manual for Courts-Martial and Nonjudicial Punishment.

"Member" means a member of the State Military Force.

"Members of His or Her Command" refers to the assigned members of the unit or organization commanded, and to other members who are on temporary duty with, or otherwise attached to, the unit or organization. Attachment orders are not necessary if the commander exercises the usual responsibilities and attributes of command over the member.

"Military Court" means a court-martial or a court of inquiry. (Code Section 1(a)(12))

"Military Judge" means an official of a general or special court-martial detailed in accordance with Code Section 26. (Code Section 1(a)(13))

"Military Offenses" means those offenses proscribed under Code Section 1(a)(14), the Code and Subpart J of this Manual.

"National Guard Bureau" or "NGB" means the channel of communications on all matters pertaining the National Guard, the Army National Guard of the United States, and the Air National Guard of the United States between Department of the Army, the Department of the Air Force, and the several states. (10 USC 10501(b))

"National Security" means the national defense and foreign relations of the United States. (Code Section 1(a)(15))

"NGIL-JA" means the Illinois National Guard Office of the Staff Judge Advocate.

"Nonjudicial Punishment" or "NJP" means action under Code Section 15 and Subpart K of this Manual.

"Officer" means a commissioned or warrant officer. (Code Section 1(a)(16))

"Officer in Charge" means a member of the Navy, the Marine Corps, or the Coast Guard designated as the officer in charge by the appropriate authority. (Code Section 1(a)(17))

"Principal Assistant" means a commissioned officer of the State military forces serving in a position immediately subordinate to the convening authority who would assume command in the event of the commander's death, prolonged absence, or disability, or to the vice-commander of the organization. However, in the case of the Air National Guard, the principal assistant may include an officer who is not "air rated" (as defined in the applicable service regulation pertaining to commanders) and is serving in a position immediately subordinate to the convening authority. Any delegation of authority to a "principal assistant" shall be in writing, unless exigencies prevent such written delegation. Verbal authorization shall be reduced to writing as soon as possible.

"Record", when used in connection with the proceedings of a court-martial, means:

> *an official written transcript, written summary, or other writing relating to the proceedings; or*
>
> *an official audiotape, videotape, digital image or file, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced.* (Code Section 1(a)(18))

"Senior Force Judge Advocate" means the senior judge advocate of the commander of the same force of the SMF as the accused and who is that commander's chief legal advisor. (Code Section 1(a)(22))

"SMF" means the State military forces subject to the Illinois Code of Military Justice.

"State", when not capitalized, means *one of the several states, the District of Columbia, the Commonwealth of Puerto Rico, Guam or the U.S. Virgin Islands.* (Code Section 1(a)(20)) When capitalized "State" means the State of Illinois.

"State Active Duty" means active duty in the SMF under an order of the Governor or the Adjutant General, or otherwise issued by authority of State law and paid by State funds.

"State Military Forces" or "SMF" means the Illinois *National Guard and any other military force organized under the Constitution and laws of* Illinois. This includes *the Illinois State Guard when*:

organized by the Governor as Commander-in-Chief under the Military Code of Illinois and the Illinois State Guard Act;

not in a status subjecting those forces *to* the *exclusive jurisdiction of* the UCMJ; and

traveling *to and from duty*. *(Code Section 1(a)(23))*

"Superior Commissioned Officer" means a commissioned officer superior in rank or command. (Code Section 1(a)(24))

"Uniform Code of Military Justice" or "UCMJ" means 10 USC 801 et seq.

b) Referenced Materials

1) The Constitution of the State of Illinois; Article XII (Militia)

2) Illinois Statutes:

Appellate Court Act [705 ILCS 25]

Code of Civil Procedure of 1963 [735 ILCS 5]

Code of Criminal Procedure [725 ILCS 5]

Criminal Code of 2012 [720 ILCS 5]

Firearm Owners Identification Card Act (FOID Act) [430 ILCS 65]

Freedom of Information Act [5 ILCS 140] (FOIA)

Illinois Code of Military Justice [20 ILCS 1807] (the Code)

Military Code of Illinois [20 ILCS 1805]

State Finance Act [30 ILCS 105]

State Guard Act [20 ILCS 1815]

3) Illinois Materials:

Illinois Rules of Evidence (http://www.illinoiscourts.gov/SupremeCourt/Evidence/Evidence.asp)

4) Federal Statutes:

Armed Forces (10 USC)

Atomic Energy Act of 1954 (42 USC 2014)

Controlled Substances Act (21 USC 812).

Criminal laws of the United States (18 USC and other non-military federal criminal laws)

National Guard (32 USC)

Uniform Code of Military Justice (10 USC 801 et seq.) (UCMJ)

3) Incorporations by Reference

A) The following materials are incorporated by reference:

Federal Rules of Evidence, United States Supreme Court (2017), www.rulesofevidence.org.

Manual for Courts-Martial, United States (2012 Edition) (MCM) (jsc.defense.gov/Portals/99/Documents/MCM2012.pdf)

Part II: Rules for Courts-Martial (2012 Edition) (RCM)

Part III: Military Rules of Evidence (2012 Edition)

Appendix 3: Department of Defense Directive 5525.7 (Implementation of the Memorandum of Understanding Between the Department of Justice and the Department of Defense Relating to the Investigation and Prosecution of Certain Crimes)

B) This subsection (b)(3) incorporates no later amendments or editions.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.110 Persons Subject to the Code; Jurisdiction
EMERGENCY

a) General Statement. No person may be punished under the Code for any offense provided for in the Code, unless there is jurisdiction over the person and jurisdiction over the offense.

b) Jurisdiction Over the Person. There is jurisdiction over the person if, at both the time the offense was committed and the time of trial, that person:

1) *is a member of the SMF*; and

2) is, for a *day or a portion of a day, in State Active Duty status or OTAD, and at no other times*. (Code Section 2(a))

c) Jurisdiction Over the Offense. Subject matter jurisdiction is established if the person:

1) commits a military offense as defined in Code Section 1(a)(14); or

2) commits an offense not in Code Section 1(a)(14) (non-military offense) that is in violation of either the Code or the criminal law of the state in which it was committed, or that of the United States; and

A) the appropriate civil authority has provided the NGIL-JA a declination to prosecute; or

B) a civil court of competent jurisdiction has dismissed the charge, and the appropriate civil authority has provided the NGIL-JA a declination to further prosecute, provided jeopardy has not attached.

d) Persons Assigned and Attached to Other Commands. For jurisdiction issues based on assignment or attachment, each service component shall refer to the current service component guidance, including regulations and policy directives. Prior to the initiation of any military justice action, the judge advocate will ensure that the commander will resolve any military justice authority issue regarding assigned or attached personnel.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.115 Jurisdiction to Try Certain Personnel
EMERGENCY

a) Jurisdiction Over the Person

1) The following persons are subject to jurisdiction under the Code:

A) a member of the SMF when in State active duty or OTAD, but at no other times;

B) a person in custody of the SMF before trial or serving a sentence imposed by a court-martial;

C) a person who has voluntarily enlisted in the SMF and who has the capacity to understand the significance of enlisting in the SMF. The enlistment shall be valid for purposes of jurisdiction and a change of status from civilian to member of the SMF. This form of jurisdiction shall be effective upon the taking of the oath of enlistment; and

D) notwithstanding any other provision of law, a person serving in the SMF who:

i) submitted voluntarily to military authority;

ii) met the mental competence and minimum age qualifications of 10 USC 504 and 505 at the time of voluntary submission to military authority;

iii) received military pay or allowances; and

iv) performed military duties.

2) A person remains subject to this Manual until the person's active status has been terminated in accordance with the law of the armed forces (10 USC) and the Military Code of Illinois [20 ILCS 1805] or the State Guard Act [20 ILCS 1815] and any of the applicable regulations of the National Guard Bureau or of that person's active component service, unless termination of status has been effectuated through the person's fraudulent activity. If a person is charged and found guilty at court-martial of fraudulently obtaining discharge, Code Section 3 applies and the person may thereafter be charged for all offenses that were committed under the Code prior to the discharge, subject to the statute of limitations provided for in Code Section 43.

3) The Adjutant General may, without the member's consent, order a member of the SMF to State Active Duty for the purposes of implementing any proceedings initiated under the Code.

4) *No person who has deserted from the* SMF *may be relieved from amenability to the jurisdiction of* the *Code by virtue of a separation from any later period of service*. (Code Section 3(b))

b) Subject Matter Jurisdiction

1) Military Offenses. Offenses of a military nature contained in Code Section 1(a)(14) may be the subject of administrative measures, nonjudicial punishment, or courts-martial jurisdiction, except as provided in subsection (b)(2). Offenses of a military nature are derived from the

UCMJ and, to the extent not inconsistent with the Code, this Manual reflects each element of the offense as described in the UCMJ, with the following clarifications:

A) Insofar as an element refers to the United States, the element also will refer to the State of Illinois.

B) Insofar as an element refers to individuals in the service of the United States or federal officials, the element also will include individuals in the service of the SMF or State officials as provided Code Sections 1(a)(14) and 88.

C) Insofar as an element refers to the property of the United States, the element also will include property of the State of Illinois.

2) Non-military Offenses

A) A non-military offense is an offense that *violates the Code and the criminal law of the United States, a state or a local jurisdiction.* (Code Section 2(b)) Non-military offenses may be disposed of by nonjudicial punishment or courts-martial, provided jurisdiction exists under the Code and this Manual. Non-military offenses may be subject to prosecution under U.S., state or local jurisdiction (see Code Sections 133, 134 and/or 149).

B) *A proper civilian court has primary jurisdiction when an act or omission violates both the Code and the criminal law* of the United States or of the state where the offense occurred. In such cases, *a State court-martial* or NJP proceeding *may be initiated only after the civilian authority has declined to prosecute or has dismissed charges, provided jeopardy has not attached*, as provided in Section 400.835. (Code Sections 2(b) and 44) However, nothing in this Manual precludes a commander from taking administrative action even if the civilian authority exercises jurisdiction. Administrative remedies shall not be considered double jeopardy.

C) An SMF member who is subject to jurisdiction under the Code may be ordered to duty involuntarily for any purposes under this Manual or the Code.

D) Coordination with the Attorney General or other appropriate prosecutorial authorities is essential to ensure that judge advocates prosecute with the cooperation of the local State's Attorney. A commander shall refer all suspected civilian offenses to a judge advocate who shall coordinate with the proper authorities when appropriate.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.120 Territorial Applicability of the Code
EMERGENCY

a) Territorial jurisdiction exists so long as there is personal jurisdiction under Code Section 2. This Manual applies wherever and whenever the Code applies. *Courts-martial, courts of inquiry,* and nonjudicial punishment proceedings *may be convened* and conducted, and punishment may be imposed, while in the State and *while those units are serving outside the State with the same jurisdiction and powers as if the proceedings were held* within *the State*. (Code Section 5(b))

b) Courts-martial may be conducted anywhere and in any facility as mission requirements and military exigencies dictate, in the judgment of the appropriate senior force judge advocate.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.125 Judge Advocates
EMERGENCY

a) Judge advocates must adhere to the State bar licensing requirements pursuant to Code Sections 1(a)(10), 26, 27 and 38.

b) The senior force judge advocate of each force of the SMF is responsible for the supervision of the administration of military justice in that force. (See Code Section 6.)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.130 Military Judges
EMERGENCY

a) *The Governor or the Adjutant General shall appoint at least one judge advocate officer from the active rolls of the Illinois National Guard who has been previously certified and qualified for duty as a military judge by the Judge Advocate General of the judge advocate officer's respective armed force under UCMJ Article 26(b) to serve as a military judge under the Code*.

b) *The military judge shall hold the rank of Major or above.* (Code Section 6(a)) The military judge not only rules on all legal issues, motions and items provided for in the Code and during courts-martial, but, in order to effectuate this intent and process, the military judge has the responsibilities provided in RCM 801.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

SUBPART B: APPREHENSION AND RESTRAINT

Section 400.200 Apprehension
EMERGENCY

a) *Apprehension is the taking of a person into custody.* (Code Section 7(a))

b) *Any person* subject to the Code who is *authorized by* the *Code to apprehend persons subject to* the *Code may do so only* after consultation with the NGIL-JA and only after having *probable cause that an offense has been committed and that the person apprehended committed it*. (Code Section 7(b))

c) Civilians Authorized to Apprehend Deserters. Under Code Section 7, any civilian officer having authority to apprehend offenders under laws of the United States, or of a state, may do so when apprehension is of a deserter from SMF. Upon receipt of DD Form 553 (Deserter/Absentee Wanted by the Armed Forces), civilians authorized to apprehend shall do so and detain that deserter until appropriate military authorities take custody.

d) How an Apprehension May Be Made

1) General. An apprehension is made by clearly notifying the person to be apprehended that the person is in custody. This notice should be given orally or in writing, but may be implied by the circumstances.

2) Warrants. Neither warrants nor any other authorization shall be required for an apprehension under this Manual, except as required by the U.S. Constitution as applied to members of the armed forces.

3) Use of Force. Any person authorized under this Manual to make apprehension may use such force and means as reasonably necessary under the circumstances to effect the apprehension.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.205 Imposition of Restraint
EMERGENCY

a) Types of Pretrial Restraint. Pretrial restraint is moral or physical restraint on a person's liberty that is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions on liberty, restriction in lieu of arrest, arrest or confinement.

1) Conditions on Liberty. Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. These conditions may be imposed in conjunction with other forms of restraint or separately.

2) Restriction in Lieu of Arrest. Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits. A restricted person shall, unless otherwise directed, perform full military duties while restricted.

3) Arrest. *Arrest is the restraint of a person by* oral or written *order not imposed as punishment, directing* the person *to remain within specified limits*. (Code Section 9(a)) A person in the status of arrest shall not be required to perform full military duties such as commanding or

supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

4) Confinement. Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. No person may be ordered into pretrial confinement, except upon determination of probable cause that the person committed an offense under the Code and with the concurrence of the NGIL-JA.

A) *An enlisted member may be ordered into arrest or confinement by any commissioned officer by an order, oral or written, delivered in person or through other persons subject to* the *Code. A commanding officer may authorize warrant officers, petty officers, or noncommissioned officers to order enlisted members of the commanding officer's command or subject to the commanding officer's authority into arrest or confinement.* (Code Section 9(b))

B) *A commissioned officer, a warrant officer, or a civilian subject to* the *Code or to trial* under the *Code may be ordered into arrest or confinement only by a commanding officer to whose authority the person is subject, by an order, oral or written, delivered in person or by another commissioned officer. The authority to order the persons into arrest or confinement may not be delegated*. (Code Section 9(c))

b) *No person subject to* the *Code may be* placed in any sort of pretrial restraint, *except*:

1) *for probable cause*, as described in subsection (c), has been determined *after coordination with a judge advocate officer*; and

2) when holding the person without restraint is *impractical or not possible* (Code Section 9(d)).

c) Probable cause for pretrial restraint exists when there is a reasonable belief that:

1) An offense triable by courts-martial has been committed;

2) The person to be restrained committed it; and

3) The restraint order is reasonably required by the circumstances.

d) Each person ordered to pretrial restraint shall be promptly informed of:

1) The nature of the offenses for which the person is held;

2) The right to remain silent and that any statement made by the person may be used against the person; and

3) The right to retain civilian counsel at no expense to the State of Illinois and the right to request free assignment of trial defense counsel through Illinois National Guard trial defense services.

e) *This* Section *does not limit the authority of persons authorized to apprehend offenders to secure the custody of an alleged offender until proper authority* is *notified*. (Code Section 9(d))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.210 Confinement of Persons Charged with Offenses
EMERGENCY

a) *Any person subject to* the *Code charged with an offense under* the *Code may be ordered into arrest or confinement, as circumstances require. When any person subject to* the *Code is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform the person of the specific wrong of which the person is accused and diligent steps shall be taken to try the person or to dismiss the charges and release the person.* (Code Section 10)

b) Requirements for Confinement. The commander shall direct the prisoner's release from pretrial confinement unless the commander believes, upon probable cause, that reasonable grounds exist that:

1) An offense triable by a court-martial has been committed;

2) The prisoner committed it;

3) Confinement is necessary because it is foreseeable that:

A) The prisoner will not appear at trial, pretrial hearing, or investigation; or

B) The prisoner will engage in serious criminal misconduct; and

4) Less severe forms of restraint are inadequate.

c) A person should not be confined as a mere matter of convenience or expedience. Some of the factors that should be considered under this subsection (c) are:

1) The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;

2) The weight of the evidence against the accused;

3) The accused's ties to the locale, including family, off-duty employment, financial resources, and length of residence;

4) The accused's character and mental condition;

5) The accused's service record, including any record of previous misconduct;

6) The accused's record of appearance at or flight from other pretrial investigations, trials and similar proceedings; and

7) The likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty.

d) Although the Illinois Military Rules of Evidence (Subpart F) are not applicable at this stage, the commander should judge the reliability of the information available. Before relying on the reports of others, the commander must have a reasonable belief that the information is believable and has a factual basis. The

information may be received orally or in writing. Information need not be received under oath, but an oath may add to its reliability. A commander may examine the prisoner's personnel records and police records and may consider the recommendations of others.

e) Less serious forms of restraint must always be considered before pretrial confinement is approved.

f) Review of Confinement. No later than 48-hours after confinement is ordered, that confinement shall be reviewed by a military judge as a "neutral and detached officer" under RCM 305.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.215 Place of Confinement; Reports and Receiving of Prisoners EMERGENCY

a) *If a person subject to* the *Code is confined before, during or after trial, confinement shall be in a county jail,* an Illinois *Department of Corrections* (DOC) *facility, or in a military confinement facility*. (Code Section 11(a))

b) *No person, sheriff or* DOC personnel *authorized to receive prisoners* under *subsection (a) may refuse to receive or keep any prisoner committed to the person's charge by a commissioned* SMF *officer* who *furnishes a statement, signed* by that *officer, of the offense charged or conviction obtained against the prisoner, unless otherwise authorized by law*. (Code Section 11(b))

c) *Every person authorized to receive prisoners pursuant to subsection (a) to whose charge a prisoner is committed shall, within 24 hours after that commitment, or as soon as the person is relieved from guard, report to the commanding officer of the prisoner the name of the prisoner, the offense charged against the prisoner, and the name of the person who ordered or authorized the commitment.* (Code Section 11(c))

d) Transportation from Confinement to Proceedings Under the Code. When a person is subject to pretrial restraint under the Code and this Manual, the person's constitutional right to appear at proceedings must be protected. Towards that end, a person confined under this Manual must be transported to and from courts of

inquiry, arraignment, pretrial hearings, motions arguments, court-martial, sentencing, and any other legal proceeding at which the person has a right to attend, unless circumstances are such that the SMF is manifestly unable to provide for that attendance, or unless the person flees from proceedings. Transportation shall occur in the following manner:

1) The peace officers, correctional officers, agents, employees or service members tasked with transportation of prisoners at the county jail, a DOC facility, or military confinement facility at which the person is confined shall transport the person subject to the Code to and from any legal proceeding the person has a right to attend, unless circumstances are reasonably such that the peace officers, correctional officers, agents, employees or service members are manifestly unable to transport the person;

2) If the peace officers, correctional officers, agents, employees or service members are manifestly unable to transport the confined person, military police shall transport the person to and from legal proceedings the person has a right to attend, unless circumstances are reasonably such that the military police officers are manifestly unable to transport the person; and

3) If the military police are manifestly unable to transport the person, the SMF may contract with a prisoner transportation service company to provide appropriate transportation services to and from any legal proceedings the person has a right to attend.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.220 Confinement with Enemy Prisoners Prohibited
EMERGENCY

No member of the SMF *may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces*. (Code Section 12)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.225 Punishment Prohibited Before Trial

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

EMERGENCY

No person, while being held for trial or awaiting a verdict, may be subjected to punishment or penalty other than arrest or confinement upon the charges pending against the person, nor shall the arrest or confinement imposed upon that person be any more rigorous than the circumstances required to insure the person's presence, but the person may be subjected to minor punishment during that period for infractions of discipline. (Code Section 13)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.230 Delivery of Offenders to Civil Authorities
EMERGENCY

a) *A person subject* to the *Code accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial or confinement*. (Code Section 14(a))

b) *When delivery under* this Section *is made to any civil authority of a person undergoing sentence of a court-martial, the delivery, if followed by conviction in a civil tribunal, interrupts the execution of the sentence of the court-martial, and the offender, after having answered to the civil authorities for the offense, shall, upon the request of competent military authority, be returned to the place of original custody for the completion of the person's sentence*. (Code Section 14(b))

c) The Adjutant General may authorize the delivery of a person pending court-martial proceedings under the Code to civil authorities for separate, unrelated offenses as alleged by the civil authority when presented with a warrant or similar court order for that person's arrest or delivery. The civil authority responsible for obtaining the warrant or similar court order must provide or arrange delivery to the appropriate receiving agency and pay or arrange payment for any costs incurred during the course of that delivery.

d) The Adjutant General shall authorize the delivery of a person pending court-martial proceedings under the Code to civil authorities for non-military offenses that have been charged by the civil authorities and that arise from the same allegations of misconduct that caused the person's pending court-martial proceedings under the Code. In this instance, Code Section 2(b) shall apply.

e) If a commanding officer receives a warrant or other court order demanding delivery of a person to civil authorities, that warrant or other court order must be forwarded to the Staff Judge Advocate and the Adjutant General immediately and within no more than 24 hours.

f) If a commanding officer receives a warrant or other court order demanding delivery of a person to civil authorities at a time when the person is present on a duty status and not under arrest or confinement under the Code, the commanding officer will order the person detained and will immediately, and within no more than 24 hours, notify the Staff Judge Advocate and the Adjutant General for confirmation and authority to deliver the person to civil authorities.

g) Nothing in this Manual limits the authority of federal or State law enforcement officials to apprehend persons, whether or not subject to trial by court-martial, to the extent permitted by applicable statutes and other laws.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

SUBPART C: PRELIMINARY INQUIRY, INVESTIGATIONS AND DISPOSITION OF OFFENSES

Section 400.300 Preliminary Inquiry Into Reported Offenses
EMERGENCY

a) Any person may report an offense subject to trial by court-martial. Ordinarily, any military authority that receives a report of an offense shall forward as soon as practicable the report and any accompanying information to the immediate commander of the suspect. Competent authority superior to that commander may direct otherwise.

b) Upon receipt of information that an SFM member is accused or suspected of committing an offense triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.

c) The preliminary inquiry may be informal, but should include an examination of the charges and an investigative report or other summary of evidence. The inquiry should gather all reasonably available evidence bearing on guilt or

innocence and any evidence relating to the aggravation, extenuation or mitigation of the conduct that the person is accused or suspect of committing.

d) If a person is accused or suspected of misconduct of a serious or complex nature, the commander should seek the assistance of civilian law enforcement personnel or military police in conducting any inquiry or further investigation.

e) The commanding officer should always consult with his or her judge advocate for appropriate legal guidance when notified of a potential offense, and use that legal guidance in directing the preliminary inquiry into the charges and offenses.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.305 Initial Disposition
EMERGENCY

a) Who May Dispose of Offenses. Subject to applicable military justice policies promulgated by proper authority, each commander has discretion to dispose of offenses by members of that command. Ordinarily, the immediate commander of a person accused or suspected of committing an offense triable by court-martial initially determines how to dispose of that offense.

b) A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

SUBPART D: COURTS-MARTIAL JURISDICTION AND COMPOSITION

Section 400.400 Courts-Martial Classified
EMERGENCY

The 3 kinds of courts-martial in the SMF *are*:

a) *general courts-martial, consisting of:*

1) *a military judge and not* fewer *than 5 members; or*

2) *only a military judge, if, before the court is assembled, the accused, knowing the identity of the military judge and after consultation with defense counsel, requests orally on the record or in writing a court composed only of a military judge, and the military judge approves;*

b) *special courts-martial, consisting of:*

1) *a military judge and not* fewer *than 3 members;* or

2) *only a military judge, if one has been detailed to the court and the accused, under the same conditions prescribed in* subsection (a)(2), *so requests; and*

c) *summary courts-martial consisting of one commissioned officer*. (Code Section 16)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.405 Jurisdiction of Courts-Martial
EMERGENCY

a) General. *Each component of the* SMF *has court-martial jurisdiction over all members of the particular component who are subject to* the *Code*. *Additionally, the Army and Air National Guard* SMF *have court-martial jurisdiction over all members subject* to the Code. (Code Section 17)

b) General Courts-Martial. *Subject to* subsection (a), *general courts-martial have jurisdiction to try persons subject to the Code for any offense made punishable by* the *Code, and may, under such limitations as the Governor may prescribe, adjudge any punishment not forbidden by* the Code. (Code Section 18)

c) Special Courts-Martial**.** *Subject to* subsection (a), *special courts-martial have jurisdiction to try persons subject to* the *Code for any offense made punishable by* the Code, *and may, under such limitations as the Governor may prescribe, adjudge any punishment not forbidden by* the *Code except dishonorable*

discharge, dismissal, confinement for more than one year, forfeiture of pay exceeding ⅔ pay per month, or forfeiture of pay for more than one year. (Code Section 19)

d) Summary Courts-Martial

1) *Subject to* subsection (a), *summary courts-martial have jurisdiction to try persons subject to* the *Code, except officers, cadets and candidates, for any offense made punishable by* the *Code under such limitations as the Governor may prescribe*. (Code Section 20(a))

2) *No person with respect to whom summary courts-martial have jurisdiction may be brought to trial before a summary court-martial if that person objects. If objection to trial by summary court-martial is made by an accused, trial by special or general court-martial may be ordered, as may be appropriate. Summary courts-martial may, under such limitations as the Governor may prescribe, adjudge any punishment not forbidden by the Code except dismissal, dishonorable or bad-conduct discharge, confinement for more than one month, restriction to specified limits for more than 2 months, or forfeiture of more than ⅔ of one month's pay*. (Code Section 20(b))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.410 Who May Convene a Court-Martial
EMERGENCY

a) General Courts-Martial

1) *General courts-martial may be convened by:*

A) *The Governor; or*

B) *The Adjutant General.* (Code Section 22)

2) Any superior commander can withhold convening authority from a subordinate commander but shall not delegate his or her own authority. When authority is withheld, that action should be in clearly defined

writing or permanent directive. The original letter withholding convening authority should be filed at Joint Force Headquarters, Office of the Staff Judge Advocate, 1301 N. MacArthur Blvd, Springfield IL 62702. A copy should also be kept by the judge advocate serving the commander whose authority has been withheld. Any such withholding remains in effect when a new commander is appointed to or assumes either command, until or unless expressly revoked by the superior commander. Any such action should be addressed by duty title and not by name.

b) Special Courts-Martial

1) *Special courts-martial may be convened by:*

A) *any person who may convene a general court-martial;*

B) *the Commander of the Illinois Army National Guard,* for *members of the Illinois Army National Guard, when empowered by the Adjutant General; or*

C) *the Commander of the Illinois Air National Guard,* for *members of the Illinois Air National Guard, when empowered by the Adjutant General.* (Code Section 23(a))

2) *If any officer listed in* subsection (b)(1) *is an accuser, the court shall be convened by superior competent authority and may, in any case, be convened by* that *superior authority if considered desirable by* that *authority*. (Code Section 23(b))

c) Summary Courts-Martial

1) *Summary courts-martial may be convened by:*

A) *any person who may convene a general or special court-martial;*

B) *the commanding officer or officer in charge of any other command when empowered by the Adjutant General*. (Code Section 24(a))

2) *When only one commissioned officer is present with a command or detachment, that officer shall be the summary court-martial of that*

command or detachment and shall hear and determine all summary court-martial cases. Summary courts-martial may, however, be convened in any case by superior competent authority if considered desirable by that *authority*. (Code Section 24(b))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.415 Courts-Martial Composition
EMERGENCY

a) Members of a Court-Martial

1) *Any* SMF *commissioned officer is eligible to serve on all courts-martial for the trial of any persons subject to* the *Code.* (Code Section 25(a))

2) *Any* SMF *warrant officer is eligible to serve on general and special courts-martial for the trial of any person subject to* the *Code, other than a commissioned officer*. (Code Section 25(b))

3) *Any enlisted member of the* SMF *who is not a member of the same unit as the accused is eligible to serve on general and special courts-martial for the trial of any enlisted member subject to* the *Code, but that member shall serve as a member of a court only if, before the conclusion of a session called by the military judge under* Code Section 39(a) *prior to trial or, in the absence of such a session, before the court is assembled for the trial of the accused, the accused personally has requested orally on the record or in writing that enlisted members serve on it. After such a request, the accused may not be tried by a general or special court-martial unless the membership includes at least ⅓ enlisted members, unless eligible enlisted members cannot be obtained on account of physical conditions or military exigencies. If* enlisted *members cannot be obtained, the court may be assembled and the trial held without them, but the convening authority shall make a detailed written statement, to be appended to the record, stating why they could not be obtained. In this* subsection (a), *"unit" means any regularly organized body of the* SMF *not larger than a company, a squadron or a body corresponding to a company or squadron.* (Code Section 25(c))

4) *When it can be avoided, no person subject to* the *Code may be tried by a court-martial any member of which is junior to the accused in rank or grade.* (Code Section 25(d))

5) *When convening a court-martial, the convening authority shall detail as members* of the court-martial *such* SMF *members as, in the convening authority's opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament. No* SMF *member is eligible to serve as a member of a general or special court-martial when that member is the accuser or a witness, or has acted as investigating officer or as counsel in the same case.* (Code Section 25(e))

6) *Before a court-martial is assembled for the trial of a case, the convening authority may excuse a member of the court from participating. The convening authority may delegate the authority under this* subsection (a)(6) *to a judge advocate or to any other principal assistant*. (Code Section 25(f))

7) Any delegation of authority to a judge advocate or principal assistant for purposes of excusal of members must be in writing, unless exigencies prevent written delegation. Verbal authorization shall be reduced to writing as soon as possible.

8) Duties. The members of a court-martial shall determine whether the accused is proved guilty and, if necessary, adjudge a proper sentence, based on the evidence and in accordance with the instructions of the military judge. Each member has an equal voice and vote in deliberating upon and deciding all matters, except as otherwise specifically provided in this Manual. No member may use rank or position to influence another member. No member of a court-martial may have access to or use in any open or closed session this Manual, reports of decided cases, or any other reference material, except that the president of a special court-martial without a military judge may use these materials in open session.

9) President

A) Qualifications. The president of a court-martial shall be the detailed member senior in rank then serving.

B) Duties. The president shall have the same duties as the other members and shall also:

i) Preside over closed sessions of the members of the court-martial during their deliberations;

ii) Speak for the members of the court-martial when announcing the decision of the members or requesting instructions from the military judge; and

iii) In a special court-martial without a military judge, perform the duties assigned by this Manual to the military judge, except as otherwise expressly provided.

b) Military Judges

1) Qualifications to serve as a military judge are described in Code Sections 6 and 26. In addition to the mandatory qualifications delineated in Code Sections 6 and 26, the following factors may be considered when certifying an officer as a military judge:

A) Appropriate judicial decorum, civility and temperament;

B) Civilian judicial experience;

C) Military judicial experience;

D) Military legal experience;

E) Designation as judge advocate;

F) Reputation;

G) Familiarity with the Code and this Manual;

H) Completion of the active component Military Judges Course;

I) Knowledge of general criminal law and procedures;

J) Education, training and experience;

K) Familiarity with the customs, procedures and organization of the service branch of the accused; and

L) Any other relevant factors.

2) *In addition to the requirements noted* in Code Section 6(a), *a military judge shall be*:

A) *an active commissioned officer of an organized* SMF;

B) *a member in good standing of the bar of the highest court of a state or a member of the bar of a federal court for at least 5 years;* and

C) *certified as qualified for duty as a military judge by the senior force judge advocate* that is in the *same force as the accused*. (Code Section 26(b))

3) *When a military judge is not a member of the bar of the highest court of the state,* he or she *shall be deemed admitted pro hac vice, subject to filing a certificate with the senior force judge advocate in the same force as the accused, setting forth the qualifications* listed *in* subsection (b)(1). (Code Section 26(c))

4) *The military judge of a general or special court-martial shall be designated by the senior force judge advocate* in *the same force as the accused, or a designee, for detail by the convening authority. Neither the convening authority nor any staff member of the convening authority shall prepare or review any report concerning the effectiveness, fitness or efficiency of the military judge* that *relates to performance of duty as a military judge*. (Code Section 26(d))

5) *No person is eligible to act as military judge in a case if that person is the accuser or a witness, or has acted as investigating officer or a counsel in the same case*. (Code Section 26(e))

6) *The military judge of a court-martial may not consult with the members of the court except in the presence of the accused, trial counsel, and defense counsel, nor vote with the members of the court.* (Code Section 26(f))

c) Absent and Additional Members

1) *No member of a general or special court-martial may be absent or excused after the court has been assembled for the trial of the accused unless excused as a result of a challenge, excused by the military judge for physical disability or other good cause, or excused by order of the convening authority for good cause.* (Code Section 29(a))

2) *Whenever a general court-martial, other than a general court-martial composed of a military judge only, is reduced below 5 members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not less than the applicable minimum number of 5. The trial may proceed with the new members present after the recorded evidence previously introduced before the members of the court has been read to the court in the presence of the military judge, the accused, and counsel for both sides.* (Code Section 29(b))

3) *Whenever a special court-martial, other than a special court-martial composed of a military judge only, is reduced below 3 members, the trial may not proceed unless the convening authority details new members sufficient in number to provide not* fewer *than 3 members. The trial shall proceed with the new members present as if no evidence had been introduced previously at the trial, unless a verbatim record of the evidence previously introduced before the members of the court, or a stipulation to that record, is read to the court in the presence of the military judge, the accused and counsel for both sides.* (Code Section 29(c))

4) *If the military judge of a court-martial composed of a military judge only is unable to proceed with the trial because of physical disability, as a result of a challenge, or for other good cause, the trial shall proceed, subject to any applicable conditions of* Code Section 16(1)(B) or (2)(B), *after the detail of a new military judge as if no evidence had previously been introduced, unless a verbatim record of the evidence previously introduced, or a stipulation to that record is read in court in the presence*

of the new military judge, the accused, and counsel for both sides. (Code Section 29(d))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.420 Trial Counsel and Defense Counsel
EMERGENCY

a) Detail of trial counsel and defense counsel shall be pursuant to Code Section 27. *Except as provided in* subsection (b), *trial counsel or defense counsel detailed for a general or special court-martial must be:*

1) *a judge advocate as defined* in Code Section 1(a)(10); and

2) *in the case of trial counsel, a member in good standing of the bar of the highest court of the state where the court-martial is held*. (Code Section 27(b))

b) *When a defense counsel is not a member of the bar of the highest court of* the *state, the defense counsel shall be deemed admitted pro hac vice, subject to filing a certificate with the military judge setting forth the qualifications that:*

1) the *counsel is:*

A) *a commissioned officer of the armed forces of the United States or a component thereof;*

B) *a member in good standing of the bar of the highest court of a state; and*

C) *certified as a judge advocate in the Judge Advocate General's Corps of the Army, Air Force, Navy or Marine Corps*; or

2) the counsel is *a judge advocate as defined in Code Section 1(a)(10)*. (Code Section 27(c))

c) Trial counsel or assistant trial counsel cannot be a person who was a convening authority, accuser or investigating officer. However, the trial counsel and

assistant trial counsel could have provided advice to the convening authority, the accuser or the investigator.

d) The defense counsel shall not be in the chain of command of the court-martial members, president of the court-martial, or convening authority.

e) A trial or defense counsel from one military component may be assigned to a court-martial in a different component and then detailed by the convening authority.

f) Upon appointment of defense counsel, the convening authority will provide sufficient resources to ensure effective assistance of counsel. Defense counsel may be placed in an appropriate duty or training status in order to provide defense services.

g) Trial counsel will be placed in an appropriate duty or training status in order to provide prosecutorial services.

h) The accused has a right to retain civilian counsel to represent him or her at his or her own expense and at no cost to the State or the United States. Civilian counsel must comply with the requirements of Code Section 27.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.425 Reporters and Court Interpreters
EMERGENCY

The convening authority of a general or special court-martial or court of inquiry shall detail or employ qualified court reporters who shall record the proceedings of, and testimony taken before that court and may detail or employ interpreters who shall interpret for the court. (Code Section 28)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

SUBPART E: PRETRIAL PROCEDURES

Section 400.500 Charges and Specifications

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

EMERGENCY

a) *Charges and specifications shall be signed by a person subject to the Code under oath before a commissioned officer authorized by* Code Section *136*(a) *to administer oaths and shall state that*:

1) *the signer has personal knowledge of, or has investigated, the matters set forth* in the charges and specifications; *and*

2) the charges and specifications *are true in fact to the best of the signer's knowledge and belief*. (Code Section 30(a))

b) *Upon the preferring of charges, the proper authority shall take immediate steps to determine what disposition should be made in the interest of justice and discipline. The person accused shall be informed of the charges as soon as practicable.* (Code Section 30(b))

c) If a person subject to the Code commits a non-military offense, and that offense is an offense under both the law of the state where committed and under the law of another state, then the charges and specifications shall be drafted as violations of the law of the state where the offense was committed.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.505 Compulsory Self-Incrimination Prohibited
EMERGENCY

a) *No person subject to* the *Code may compel any person to incriminate* himself or herself, or *to answer any question the answer to which may tend to incriminate* that person. (Code Section 31(a))

b) *No person subject to* the *Code may interrogate or request any statement from an accused or a person suspected of an offense without first informing that person of the nature of the accusation and advising that person that the person does not have to make any statement regarding the offense of which the person is accused or suspected and that any statement made by the person may be used as evidence against the person in a trial by court-martial*. (Code Section 31(b))

c) *No person subject to* the *Code may compel any person to make a statement or produce evidence before any military court if the statement or evidence is not material to the issue and may tend to degrade* that *person*. (Code Section 31(c))

d) *No statement obtained from any person in violation of this* Section *or through* the *use of coercion, unlawful influence, or unlawful inducement may be received in evidence against* that *person in a trial by court-martial*. (Code Section 31(d))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.510 Pretrial Investigation
EMERGENCY

a) *No charge or specification may be referred to a general or special court-martial for trial until a thorough and impartial investigation of all matters set forth* in the charge or specification *has been made. This investigation shall include inquiry as to the truth of the matter set forth in the charges, consideration of the form of charges, and a recommendation* of *the disposition* that *should be made of the case in the interest of justice and discipline*. (Code Section 32(a))

b) Who May Direct Investigation. Unless prohibited by applicable law or regulation, an investigation may be directed under the Code by any court-martial convening authority (see Section 400.410). That authority may also give procedural instructions not inconsistent with this Manual.

c) Investigating Officer. The commander directing an investigation under this Manual shall detail a judge advocate officer who is not the accuser to be the investigating officer. The investigating officer shall conduct the investigation and make a report of conclusions and recommendations. The investigating officer is disqualified to act later in the same case in any other capacity.

d) Scope of Investigation. The investigating officer shall inquire into the truth and form of the charges, and such other matters as may be necessary to make a recommendation of the disposition of the charges.

e) *The accused shall be advised of the charges against* him or her *and of the right to be represented by counsel at the investigation* (see Section 400.805). *At* the *investigation, full opportunity shall be given to the accused to cross-examine*

witnesses, if they are available, and to present anything the accused may desire on *the accused's own behalf, either in defense or mitigation. The investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after the investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides. A copy shall be given to the accused*. (Code Section 32(b))

f) *If an investigation of the subject matter of an offense has been conducted before the accused is charged with the offense, and if the accused was present at the investigation and afforded the opportunities for representation, cross-examination and presentation prescribed in subsection* (e), *no further investigation of that charge is necessary under this* Section *unless it is demanded by the accused after the accused is informed of the charge. A demand for further investigation entitles the accused to recall witnesses for further cross-examination and to offer any new evidence in the accused's own behalf*. (Code Section 32(c))

g) *If evidence adduced in an investigation under this* Section *indicates that the accused committed an uncharged offense, the investigating officer may investigate the subject matter of that offense* and make appropriate conclusions and recommendations as to disposition *without the accused having first been charged with the offense, if the accused is*:

1) *present at the investigation;*

2) *informed of the nature of each uncharged offense investigated; and*

3) *afforded the opportunities for representation, cross-examination and presentation prescribed in subsection* (e). (Code Section 32(d))

h) Witnesses. In general, any witness whose testimony would be relevant and not cumulative shall be produced if reasonably available. If not reasonably available, the investigating officer may consider alternatives to testimony (see RCM 405g(4), incorporated by reference in Section 400.105).

i) Evidence. Subject to Section 400.700, evidence, including documents or physical evidence that is under the control of the government and that is relevant and not cumulative shall be produced if reasonably available. This evidence includes evidence requested by the accused if the request is timely. Evidence is reasonably available if its significance outweighs the difficulty, expense, delay and effect on

military operations of obtaining the evidence. If the evidence is not reasonably available, the investigating officer may consider alternatives to evidence as provided in RCM 405g(5), incorporated by reference in Section 400.105.

j) Procedure for Presentation of Evidence, Objections, Access by Spectators, and Presence of the Accused. The provisions of RCM 405(h), incorporated by reference in Section 400.105, shall apply.

k) Illinois Military Rules of Evidence. Subpart F, other than Sections 400.610, 400.615, 400.620, 400.625, 400.695 and 400.700, shall not apply in pretrial investigations under this Manual.

l) Report of Investigation. The provisions of RCM 405(j), incorporated by reference in Section 400.105, shall apply.

m) Waiver. The accused may waive an investigation under this Manual. In addition, failure to make a timely objection under this Manual, including an objection to the report, shall constitute a waiver of the objection. Relief from the waiver may be granted by the investigating officer, the commander who directed the investigation, the convening authority, or the military judge, as appropriate, for good cause shown.

n) *The requirements of this* Section *are binding on all persons administering* the *Code, but failure to follow them does not constitute jurisdictional error*. (Code Section 32(e))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.515 Forwarding and Disposition of Charges
EMERGENCY

a) Only persons authorized to convene courts-martial or to administer nonjudicial punishment under Subpart K may dispose of charges. A superior competent authority may withhold the authority of a subordinate to dispose of charges in individual cases, types of cases, or generally.

b) When a commander with authority to dispose of charges receives charges, that commander shall promptly determine what disposition will be made in the interest

of justice and discipline, unless the authority to do so has been limited or withheld by superior competent authority. A commander may dispose of charges by dismissing any or all of them, forwarding any or all of them to another commander for disposition, or referring any or all of them to a court-martial the commander is empowered to convene.

c) *When a person is held for trial by general court-martial, the commanding officer shall, within 15 days after the accused is ordered into arrest or confinement, if practicable, forward the charges, together with the investigation and allied papers, to the person exercising general court-martial jurisdiction. If that is not practicable, the commanding officer shall report in writing to that person the reasons for delay*. (Code Section 33)

d) When charges are forwarded to a superior commander for disposition, the forwarding commander shall make a personal recommendation as to disposition. If the forwarding commander is disqualified from acting as convening authority in the case, the basis for the disqualification shall be noted.

e) Disposition by Summary Court-Martial Convening Authority. When in receipt of charges, a commander exercising summary court-martial jurisdiction may:

1) Dismiss any charges;

2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

3) Forward any charges to a superior commander for disposition;

4) Refer charges to a summary court-martial for trial.

f) Disposition by Special Court-Martial Convening Authority. When in receipt of charges, a commander exercising special court-martial jurisdiction may:

1) Dismiss any charges;

2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

3) Forward any charges to a superior commander for disposition;

4) Refer charges to a summary court-martial for trial; or

5) Unless otherwise directed by competent authority, direct a pretrial investigation under Code Section 32 and, if appropriate, refer any charges to a special court-martial for trial or forward the report of investigation with the charges to a superior commander for disposition.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.520 Advice of Judge Advocate and Referral for Trial
EMERGENCY

a) The convening authority shall refer the charges to the senior force judge advocate or designee for consideration and advice pursuant to Code Section 34. The judge advocate shall be provided with a complete copy of all documents, records or other evidence in the possession of the State and review all charges, together with the investigation and allied papers referenced in Code Section 33, as part of his or her legal review.

b) *Before any charge* or specification *may be referred for trial by general or special court-martial, the convening authority shall refer it to a judge advocate for consideration and advice*.

1) *The convening authority may not refer a specification under a charge to a general or special court-martial for trial unless the convening authority has been advised in writing by a judge advocate that:*

A) *the specification alleges an offense under* the *Code*;

B) *the specification is warranted by the evidence indicated in the report of investigation under* Code Section 32*, if there is such a report; and*

C) *a court-martial would have jurisdiction over the accused and the offense.* (Code Section 34(a))

2) The judge advocate shall also make to the convening authority a *recommendation of the action to be taken by the convening authority*. (Code Section 34(b)(2))

c) *The advice of the judge advocate under subsection* (b) *with respect to a specification under a charge shall include a written and signed statement by the judge advocate expressing conclusions with respect to each matter set forth in subsection* (b)(1). (Code Section 34(b)(1))

d) A copy of the advice of the judge advocate shall be referred to the accused if charges are referred to a general or special court-martial.

e) *If the charges or specifications are not formally correct or do not conform to the substance of the evidence contained in the report of the investigating officer, formal corrections, and such changes in the charges and specifications as are needed to make them conform to the evidence, may be made*. (Code Section 34(c))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.525 Action by Commander Exercising General Court-Martial Jurisdiction EMERGENCY

a) Disposition. When in receipt of charges, a commander exercising general court-martial jurisdiction may:

1) Dismiss any charges;

2) Forward charges (or, after dismissing charges, the matter) to a subordinate commander for disposition;

3) Forward any charges to a superior commander for disposition;

4) Refer charges to a summary court-martial;

5) Unless otherwise directed by competent authority, direct a pretrial investigation pursuant to Section 400.510, after which additional action under this Section may be taken; or

6) Refer charges to a special or general court-martial.

b) National Security Matters. When in receipt of charges the trial of which the commander exercising general court-martial jurisdiction finds would probably be inimical to the prosecution of war or harmful to national security, that commander, unless otherwise directed by competent authority, shall determine whether trial is warranted. If trial is warranted, he or she shall determine whether the security considerations involved are paramount to trial. As the commander finds appropriate, the commander may dismiss the charges, authorize trial of them, or forward them to superior authority.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.530 Referral of Charges
EMERGENCY

a) General. Referral is the order of a convening authority that charges against an accused will be tried by a specified court-martial.

b) Any convening authority may refer charges to a court-martial convened by that convening authority or a predecessor unless the power to do so has been withheld by superior competent authority.

c) An accuser may not refer charges to a general or special court-martial.

d) Basis for Referral. If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed, the accused committed that offense, and the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority, but a case may not be referred to a general court-martial except in compliance with subsection (e). The convening authority or judge advocate shall not be required, before charges are referred, to resolve legal issues, including objections to evidence, that may arise at trial.

e) General and Special Courts-Martial (see Code Section 34(a)). The convening authority may not refer a specification under a charge to a general or special court-martial unless:

1) There has been substantial compliance with the pretrial investigation requirements of Section 400.510; and

2) The convening authority has received the advice of the staff judge advocate required under Section 400.520. These requirements may be waived by the accused.

f) How Charges Shall be Referred

1) Order; Instructions. Referral shall be by the personal order of the convening authority. The convening authority shall include proper instructions in the order prescribed by RCM 601(e) (Discussion).

2) Joinder of Offenses. In the discretion of the convening authority, two or more offenses charged against an accused may be referred to the same court-martial for trial, whether serious offenses or minor offenses (see Section 400.1200) or both, regardless of whether related. Additional charges may be joined with other charges for a single trial at any time before arraignment if all necessary procedural requirements have been met concerning the additional charges. After arraignment of the accused upon the charges, no additional charges may be referred to the same trial without consent of the accused.

3) Joinder of Accused. Allegations against 2 or more accused may be referred for joint trial if the accused are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The accused may be charged in one or more specifications, together or separately, and every accused need not be charged in each specification. Related allegations against 2 or more accused that may be proved by substantially the same evidence may be referred to a common trial.

g) Superior Convening Authorities. Except as otherwise provided in this Section, a superior convening authority may cause charges, whether or not referred, to be

transmitted to the convening authority for further consideration, including, if appropriate, referral.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.535 Service of Charges
EMERGENCY

The trial counsel shall serve or caused to be served upon the accused a copy of the charges referred to trial. *No person may, against the person's objection, be brought to trial before a general court-martial within a period of 60 days after the service of charges upon the accused, or in a special court-martial, within a period of 45 days after the service of charges upon the accused*. (Code Section 35) In computing periods, the date of service of charges and the date of trial are excluded; holidays and Sundays are included.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.540 Changes to Charges and Specifications
EMERGENCY

a) Minor Changes Defined. Minor changes in charges and specifications are any except those that add a party, offenses or a substantial matter not fairly included in those previously preferred, or that are likely to mislead the accused as to the offenses charged.

b) Minor Changes Before Arraignment. Any person forwarding, acting upon, or prosecuting charges on behalf of the State, except an investigating officer appointed under Section 400.510 may make minor changes to charges or specifications before arraignment.

c) Minor Changes After Arraignment. After arraignment, the military judge may, upon motion, permit minor changes in the charges and specifications at any time before findings are announced if no substantial right of the accused is prejudiced.

d) Major Changes. Changes or amendments to charges or specifications other than minor changes may not be made over the objection of the accused unless the charge or specification affected is preferred anew.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.545 Withdrawal of Charges
EMERGENCY

a) Withdrawal. The convening authority or superior competent authority may, for any reason, cause any charges or specifications to be withdrawn from a court-martial at any time before findings are announced.

b) Referral of Withdrawn Charges. Charges that have been withdrawn from a court-martial may be referred to another court-martial unless the withdrawal was for an improper reason (see RCM 604(b) (Discussion)). Charges withdrawn after the introduction of evidence on the general issue of guilt may be referred to another court-martial only if the withdrawal was necessitated by urgent and unforeseen military necessity.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

SUBPART F: THE ILLINOIS MILITARY RULES OF EVIDENCE

Section 400.600 General
EMERGENCY

a) Introduction

1) This Subpart F is applicable only to courts-martial. It is not applicable to nonjudicial punishment, administrative boards, promotion boards, medical retention boards, retention boards, or investigations and/or actions pertaining to nonpunitive or administrative punishment.

2) This Subpart is also maintained in a publication titled Illinois Military Rules of Evidence that is organized to coincide with the federal Military Rules of Evidence (MCM Part III). In this Subpart, the parenthetical cross-reference at the end of a body of text labeled Il. Mil. R. Evid. reflects the numbering system applied to these policies in that publication.

b) Scope of Rules

1) This Subpart applies to general and special court-martial proceedings.

2) In the absence of guidance in this Manual, courts-martial will apply Illinois State Rules of Evidence except as provided in subsection (b)(3). The reviewing courts may look to general military case law in applying these rules of evidence, with particular emphasis on military offenses.

3) Cases Arising in a State Other Than Illinois. In any court-martial arising out of conduct in a state other than Illinois, evidence derived from an investigation conducted in that State is not inadmissible under this Subpart, provided that the evidence was lawfully obtained and would be admissible under the laws of that state. (Il. Mil. R. Evid. 101)

c) Purpose. This Subpart shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined. (Il. Mil. R. Evid. 102)

d) Rulings on the Evidence

1) Effect of Erroneous Ruling. Error may not be predicated upon a ruling that admits or excludes evidence unless the ruling materially prejudices a substantial right of a party and:

A) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or

B) Offer of Proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the military judge by offer or was apparent from the context within which questions were asked. Once the military judge makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal. The standard provided in this subsection (d)(1)(B) does not apply to errors involving requirements imposed

by the Constitution of the United States or the Constitution of the State of Illinois as applied to members of the armed forces unless the error arises under this Subpart and this subsection (d)(1)(B) provides a standard that is more advantageous to the accused than the constitutional standard.

2) Record of Offer and Ruling. The military judge may add any other or further statement that shows the character of the evidence, the form in which it was offered, the objection made, and the ruling. The military judge may direct the making of an offer in question and answer form.

3) Hearing of Members. In a court-martial composed of a military judge and members, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the members by any means, such as making statements or offers of proof or asking questions in the hearing of the members.

4) Plain Error. Nothing in this subsection (d) precludes taking notice of plain errors that materially prejudice substantial rights that were not brought to the attention of the military judge. (Il. Mil. R. Evid. 104)

e) Preliminary Questions

1) Questions of Admissibility Generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, the admissibility of evidence, an application for a continuance, or the availability of a witness shall be determined by the military judge. In making these determinations, the military judge is not bound by the rules of evidence, except those with respect to privileges.

2) Relevancy Conditioned on Fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the military judge shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. A ruling on the sufficiency of evidence to support a finding of fulfillment of a condition of fact is the sole responsibility of the military judge, except when this Manual provides expressly to the contrary.

3) Hearing of Members. Except in cases tried before a special court-martial without a military judge, hearings on the admissibility of statements of an accused under Sections 400.610 through 400.630 shall, in all cases, be conducted out of the hearing of the members. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if the accused so requests.

4) Testimony by Accused. The accused does not, by testifying upon a preliminary matter, become subject to cross-examination with regard to other issues in the case.

5) Weight and Credibility. This subsection (e) does not limit the right of a party to introduce before the members evidence relevant to weight or credibility. (Il. Mil. R. Evid. 104)

f) Limited Admissibility
When evidence that is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly. (Il. Mil. R. Evid 105)

g) Remainder of, or Related, Writings or Recorded Statements
When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require that party at that time to introduce any other part or any other writing or recorded statement that, in fairness, should be considered contemporaneously with it. (Il. Mil. R. Evid. 106)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.605 Judicial Notice
EMERGENCY

a) Judicial Notice of Adjudicative Facts

1) Scope of Section. This Section governs only judicial notice of adjudicative facts.

2) Kinds of Facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:

A) generally known universally, locally, or in the area pertinent to the event; or

B) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

3) When Discretionary. The military judge may take judicial notice, whether requested or not. The parties shall be informed in open court when, without being requested, the military judge takes judicial notice of an adjudicative fact essential to establishing an element of the case.

4) When Mandatory. The military judge shall take judicial notice if requested by a party and supplied with the necessary information.

5) Opportunity To Be Heard. A party is entitled, upon timely request, to an opportunity to be heard on the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

6) Time of Taking Notice. Judicial notice may be taken at any stage of the proceeding.

7) Instructing Members. The military judge shall instruct the members that they may, but are not required to, accept as conclusive any matter judicially noticed. (Il. Mil. R. Evid. 201)

b) Judicial Notice of Law

1) Domestic Law. The military judge may take judicial notice of State and federal law. If the law is a fact that is of consequence to the determination of the action, the procedural requirements of subsections (a)(1) through (6) apply.

2) Foreign Law. A party who intends to raise an issue concerning the law of a foreign country must give reasonable written notice. The military judge, in determining foreign law, may consider any relevant material or source,

including testimony, whether or not submitted by a party or admissible under this Subpart. This determination is a ruling on a question of law. (Il. Mil. R. Evid. 201A)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.610 Self-Incrimination
EMERGENCY

a) Privilege Concerning Compulsory Self-Incrimination

1) General. The privileges against self-incrimination provided by the Fifth Amendment to the U.S. Constitution and Code Section 31 are applicable only to evidence of a testimonial or communicative nature. The privilege most beneficial to the individuals asserting the privilege shall be applied.

2) Standing

A) In General. The privilege of a witness to refuse to respond to a question the answer to which may tend to incriminate the witness is a personal one that the witness may exercise or waive at the discretion of the witness.

B) Judicial Advice. If a witness who is apparently uninformed of the privileges under this Section appears likely to incriminate himself or herself, the military judge should advise the witness of the right to decline to make any answer that might tend to incriminate the witness and that any self-incriminating answer the witness might make can later be used as evidence against the witness. Counsel for any party or for the witness may request the military judge to so advise a witness provided that such a request is made out of the hearing of the witness and, except in a special court-martial without a military judge, the members. Failure to so advise a witness does not make the testimony of the witness inadmissible.

3) Exercise of the Privilege. If a witness states that the answer to a question may tend to incriminate him or her, the witness may not be required to answer unless facts and circumstances are such that no answer the witness

might make to the question could have the effect of tending to incriminate the witness or that the witness has, with respect to the question, waived the privilege against self-incrimination. A witness may not assert the privilege if the witness is not subject to criminal penalty as a result of an answer by reason of immunity, running of the statute of limitations, or similar reason.

A) Immunity Generally. The minimum grant of immunity adequate to overcome the privilege is that which, under the proper authority, provides that neither the testimony of the witness nor any evidence obtained from that testimony may be used against the witness at any subsequent trial other than in a prosecution for perjury, false swearing, the making of a false official statement, or failure to comply with an order to testify after the military judge has ruled that the privilege may not be asserted by reason of immunity.

B) Notification of Immunity or Leniency. When a prosecution witness before a court-martial has been granted immunity or leniency in exchange for testimony, the grant shall be reduced to writing and shall be served on the accused prior to arraignment or within a reasonable time before the witness testifies. If notification is not made as required by this subsection (a)(3)(B), the military judge may grant a continuance until notification is made, prohibit or strike the testimony of the witness, or enter such other order as may be required.

4) Waiver by a Witness. A witness who answers a question without having asserted the privilege against self-incrimination and thereby admits a self-incriminating fact may be required to disclose all information relevant to that fact except when there is a real danger of further self-incrimination. This limited waiver of the privilege applies only at the trial in which the answer is given, does not extend to a rehearing or new or other trial, and is subject to Section 400.705(h)(2).

5) Waiver by the Accused. When an accused testifies voluntarily as a witness, the accused waives the privilege against self-incrimination with respect to the matters concerning which he or she so testifies. If the accused is on trial for 2 or more offenses and on direct examination testifies concerning the issue of guilt or innocence as to only one or some

of the offenses, the accused may not be cross-examined as to guilt or innocence with respect to the other offenses unless the cross-examination is relevant to an offense concerning which the accused has testified. This waiver is subject to Section 400.705(h)(2).

6) Effect of Claiming the Privilege

A) Generally. The fact that a witness has asserted the privilege against self-incrimination in refusing to answer a question cannot be considered as raising any inference unfavorable to either the accused or the government.

B) On Cross-Examination. If a witness asserts the privilege against self-incrimination on cross-examination, the military judge, upon motion, may strike the direct testimony of the witness in whole or in part, unless the matters to which the witness refuses to testify are purely collateral.

C) Pretrial. The fact that the accused, during official questioning and in exercise of rights under the Fifth Amendment to the U.S. Constitution or Code Section 31, remained silent, refused to answer a certain question, requested counsel, or requested that the questioning be terminated is inadmissible against the accused.

7) Instructions. When the accused does not testify at trial, defense counsel may request that the members of the court be instructed to disregard that fact and not to draw any adverse inference from it. Defense counsel may request that the members not be so instructed. Defense counsel's election shall be binding upon the military judge except that the military judge may give the instruction when the instruction is necessary in the interests of justice. (Il. Mil. R. Evid. 301)

b) Waiver of the Privilege Against Self-Incrimination

1) General Rule. After receiving applicable warnings under Section 400.625, a person may waive the rights described in that Section and in subsection (a) of this Section and make a statement. The waiver must be made freely, knowingly and intelligently. A written waiver is not required. The accused or suspect must acknowledge affirmatively that he or she

understands the rights involved, affirmatively decline the right to counsel, and affirmatively consent to making a statement.

2) Counsel

A) If the right to counsel is applicable and the accused or suspect does not decline affirmatively the right to counsel, the prosecution must demonstrate by a preponderance of the evidence that the individual waived the right to counsel.

B) If an accused or suspect interrogated requests counsel, any subsequent waiver of the right to counsel obtained during custodial interrogation concerning the same or different offenses is invalid unless the prosecution can demonstrate by a preponderance of the evidence that:

i) the accused or suspect initiated the communication leading to the waiver; or

ii) the accused or suspect has not continuously had his or her freedom restricted by confinement, or other means, during the period between the request for counsel and the subsequent waiver. (Il. Mil. R. Evid. 305A)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.615 Privilege Concerning Mental Examination of an Accused EMERGENCY

a) General Rule. The accused has a privilege to prevent any statement made by the accused at a mental examination ordered under Code Section 76a and any derivative evidence obtained through use of such a statement from being received into evidence against the accused on the issue of guilt or innocence or during sentencing proceedings. This privilege may be claimed by the accused notwithstanding the fact that the accused may have been warned of the rights provided by Section 400.625 at the examination.

b) Exceptions

1) There is no privilege under this Section when the accused first introduces into evidence such statements or derivative evidence.

2) An expert witness for the prosecution may testify as to the reasons for the expert's conclusions and the reasons therefor as to the mental state of the accused if expert testimony offered by the defense as to the mental condition of the accused has been received in evidence, but that testimony may not extend to statements of the accused except as provided in subsection (b)(1).

c) Release of Evidence. If the defense offers expert testimony concerning the mental condition of the accused, the military judge, upon motion, shall order the release to the prosecution of the full contents, other than any statements made by the accused, of any report prepared pursuant to Code Section 76a. If the defense offers statements made by the accused at that examination, the military judge may, upon motion, order the disclosure of those statements made by the accused and contained in the report as may be necessary in the interests of justice.

d) Noncompliance by the Accused. The military judge may prohibit an accused who refuses to cooperate in a mental examination authorized under Code Section 76a from presenting any expert medical testimony on any issue that would have been the subject of the mental examination.

e) Procedure. The privilege in this Section may be claimed by the accused only under the procedure set forth in Section 400.620(a) through (g) for an objection or a motion to suppress. (Il. Mil. R. Evid. 302)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.620 Confessions; Admissions; Statements
EMERGENCY

a) Definitions. As used in this Section:

1) "Confession" means an acknowledgment of guilt.

2) "Admission" means a self-incriminating statement falling short of an acknowledgment of guilt, even if it was intended by its maker to be exculpatory.

3) "Involuntary" means "involuntary" if it is obtained in violation of the self-incrimination privilege or due process clause of the Fifth Amendment to the U.S. Constitution or Code Section 31, or through the use of coercion, unlawful influence or unlawful inducement.

b) General Rule. Except as provided in subsection (c), an involuntary statement or any derivative evidence from an involuntary statement may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence under this Section.

c) Exceptions

1) If the statement is involuntary only in terms of noncompliance with the requirements of Section 400.625(c) or (f), or the requirements concerning counsel under Section 400.610(b) and Section 400.625(d) and (e), this Section does not prohibit use of the statement to impeach by contradiction in the court testimony of the accused or the use of that statement in a later prosecution against the accused for perjury, false swearing, or the making of a false official statement.

2) Evidence that was obtained as a result of an involuntary statement may be used when the evidence would have been obtained even if the involuntary statement had not been made.

3) Derivative Evidence. Evidence that is challenged under this subsection (c) as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the statement, or that the evidence would have been obtained even if the statement had not been made.

d) Procedure

1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense the contents of all statements, oral or written, made by the accused

that are relevant to the case, known to the trial counsel, and within the control of the armed forces.

2) Motions and Objections

A) Motions to suppress or objections under this subsection (d)(2) or Section 400.615 or 400.625 to statements that have been disclosed shall be made by the defense prior to submission of a plea. In the absence of such motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the objection.

B) If the prosecution intends to offer against the accused a statement made by the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interests of justice.

C) If evidence is disclosed as derivative evidence under this subsection (d) prior to arraignment, any motion to suppress or objection under this subsection (d) or Section 400.615 or 400.625 shall be made in accordance with the procedure for challenging a statement under subsection (d)(2)(A). If that evidence has not been so disclosed prior to arraignment, the requirements of subsection (d)(2)(B) apply.

3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the taking of a statement, the military judge may make any order required in the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

4) Rulings. A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good cause, orders that it be deferred for determination at trial, but no such

determination shall be deferred if a party's right to appeal the ruling is affected adversely. When factual issues are involved in ruling upon the motion or objection, the military judge shall state essential findings of fact on the record.

5) Effect of Guilty Plea. Except as otherwise expressly provided in Code Section 45, a plea of guilty to an offense that results in a finding of guilty waives all privileges against self-incrimination and all motions and objections under this subsection (d) with respect to that offense, regardless of whether raised prior to plea.

e) Burden of Proof. When an appropriate motion or objection has been made by the defense under subsection (d)(2), the prosecution has the burden of establishing the admissibility of the evidence. When a specific motion or objection has been required under subsection (d)(3), the burden on the prosecution extends only to the grounds upon which the defense moved to suppress or object to the evidence.

1) In General. The military judge must find by a preponderance of the evidence that a statement by the accused was made voluntarily before it may be received into evidence. When trial is by a special court-martial without a military judge, a determination by the president of the court that a statement was made voluntarily is subject to objection by any member of the court. When such an objection is made, it shall be resolved by a majority vote of the members. The court-martial shall be closed, and the members shall vote orally, beginning with the member junior in rank.

2) Weight of the Evidence. If a statement is admitted into evidence, the military judge shall permit the defense to present relevant evidence with respect to the voluntariness of the statement and shall instruct the members to give such weight to the statement as it deserves under all the circumstances. When trial is by military judge without members, the military judge shall determine the appropriate weight to give the statement.

3) Derivative Evidence. Evidence that is challenged under this subsection (e) as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the statement was made voluntarily, that the evidence was not obtained by use of the

statement, or that the evidence would have been obtained even if the statement had not been made.

f) Defense Evidence. The defense may present evidence relevant to the admissibility of evidence to which there has been an objection or motion to suppress under this Section. An accused may testify for the limited purpose of denying that the accused made the statement or that the statement was made voluntarily. Prior to the introduction of that testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subsection (f). When the accused testifies under this subsection (f), the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or making of a false official statement.

g) Corroboration. An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth. Other uncorroborated confessions or admissions of the accused that would themselves require corroboration may not be used to supply this independent evidence. If the independent evidence raises an inference of the truth of some but not all of the essential facts admitted, the confession or admission may be considered as evidence against the accused only with respect to those essential facts stated in the confession or admission that are corroborated by the independent evidence. Corroboration is not required for a statement made by the accused before the court by which the accused is being tried, for statements made prior to or contemporaneously with the act, or for statements offered under a rule of evidence other than that pertaining to the admissibility of admissions or confessions.

1) Quantum of Evidence Needed. The independent evidence necessary to establish corroboration need not be sufficient of itself to establish beyond a reasonable doubt the truth of facts stated in the admission or confession. The independent evidence need raise only an inference of the truth of the essential facts admitted. The amount and type of evidence introduced as corroboration is a factor to be considered by the trier of fact in determining the weight, if any, to be given to the admission or confession.

2) Procedure. The military judge alone shall determine when adequate evidence of corroboration has been received. Corroborating evidence usually is to be introduced before the admission or confession is introduced, but the military judge may admit evidence subject to later corroboration.

h) Miscellaneous

1) Degrading Questions. No person may be compelled to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade that person.

2) Oral Statements. A voluntary oral confession or admission of the accused may be proved by the testimony of anyone who heard the accused make it, even if it was reduced to writing and the writing cannot be made available.

3) Statements by One of Several Accused. When 2 or more accused are tried at the same trial, evidence of a statement made by one of them which is admissible only against him or her or only against some but not all of the accused may not be received in evidence unless all references inculpating an accused against whom the statement is inadmissible are deleted effectively or the maker of the statement is subject to cross-examination. (Il. Mil. R. Evid. 306)

4) Completeness. If only part of an alleged admission or confession is introduced against the accused, the defense, by cross-examination or otherwise, may introduce the remaining portions of the statement.

5) Certain Admissions by Silence. A person's failure to deny an accusation of wrongdoing concerning an offense for which, at the time of the alleged failure, the person was under official investigation or was in confinement, arrest or custody does not support an inference of an admission of the truth of the accusation.

6) Refusal to Obey Order to Submit Body Substance. If an accused refuses a lawful order to submit for chemical analysis a sample of his or her blood, breath, urine or other body substance, evidence of that refusal may be admitted into evidence on:

A) A charge of violating an order to submit that sample; or

B) Any other charge on which the results of the chemical analysis would have been admissible. (Il. Mil. R. Evid. 304)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.625 Warnings About Rights
EMERGENCY

a) General. A statement obtained in violation of this Section is involuntary and shall be treated under Section 400.620.

b) Definitions. As used in this Section:

1) "Person Subject to the Code" means a person acting as a knowing agent of a military unit or of a person subject to the Code.

2) "Interrogation" means any formal or informal questioning in which an incriminating response either is sought or is a reasonable consequence of that questioning.

c) Warnings Concerning the Accusation, Right to Remain Silent, and Use of Statements. *A person subject to the Code* who is required to give warnings under Code Section 31 *may not interrogate or request any statement from an accused or a person suspected of an offense without first*:

1) *informing the accused or suspect of the nature of the accusation;*

2) *advising the accused or suspect that the accused or suspect has the right to remain silent;* and

3) *advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.* (Code Section 31(b))

d) Counsel Rights and Warnings

1) General. When evidence of a testimonial or communicative nature within the meaning of the Fifth Amendment to the U.S. Constitution either is sought or is a reasonable consequence of an interrogation, an accused or a person suspected of an offense is entitled to consult with counsel as provided in subsection (d)(2), to have counsel present at the interrogation, and to be warned of these rights prior to the interrogation if:

A) The interrogation is conducted by a person subject to the Code who is required to give warnings under Code Section 31 and the accused or suspect is in custody, could reasonably believe himself or herself to be in custody, or is otherwise deprived of his or her freedom of action in any significant way; or

B) The interrogation is conducted by a person subject to the Code acting in a law enforcement capacity, or the agent of such a person, the interrogation is conducted subsequent to the preferral of charges, and the interrogation concerns the offenses or matters that were the subject of the preferral of the charges.

2) Counsel. When a person entitled to counsel under this subsection (d) requests counsel, a judge advocate or an individual certified in accordance with Code Section 27(b) shall be provided by the State at no expense to the person and without regard to the person's indigency or lack of indigency before the interrogation may proceed. In addition to counsel supplied by the State, the person may retain civilian counsel at no expense to the State. Unless otherwise provided by regulations of the Adjutant General, an accused or suspect does not have a right under this subsection (d) to have military counsel of his or her own selection.

e) Presence of Counsel

1) Custodial Interrogation. Absent a valid waiver of counsel under Section 400.610(b), when an accused or person suspected of an offense is subjected to custodial interrogation under circumstances described in subsection (d)(1)(A), and the accused or suspect requests counsel, counsel must be present before any subsequent custodial interrogation may proceed.

2) Post-Preferral Interrogation. Absent a valid waiver of counsel under Section 400.610(b), when an accused or person suspected of an offense is subjected to interrogation under circumstances described in subsection (d)(1)(B), and the accused or suspect either requests counsel or has an appointed or retained counsel, counsel must be present before any subsequent interrogation concerning that offense may proceed.

f) Exercise of Rights

1) The Privilege Against Self-Incrimination. If a person chooses to exercise the privilege against self-incrimination under this Section, questioning must cease immediately.

2) The Right to Counsel. If a person subjected to interrogation under the circumstances described in subsection (d)(1) chooses to exercise the right to counsel, questioning must cease until counsel is present. (Il. Mil. R. Evid. 305)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.630 Standards for Nonmilitary Interrogations
EMERGENCY

a) General. When a person subject to the Code is interrogated by an official or agent of the United States, State of Illinois or any state, the person's entitlement to warnings about rights and the validity of any waiver of applicable rights will be determined by the principles of law generally recognized in the State of Illinois.

b) Warnings under Code Section 31 and the Fifth and Sixth Amendments to the U.S. Constitution are not required during an interrogation conducted outside of the U.S., including its possessions, by officials of a foreign government or their agents, unless the interrogation is conducted, instigated or participated in by SMF or U.S. military forces or their agents, or by officials or agents of U.S. federal, state or local jurisdictions. A statement obtained from a foreign interrogation is admissible unless the statement is obtained through the use of coercion, unlawful influence, or unlawful inducement (see MCM Appendix 22). An interrogation is not "participated in" by military personnel or their agents or by federal or state officials or agents merely because those officials or agents were present at an

interrogation conducted in a foreign nation by officials of a foreign government or their agents, or because such a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign interrogation. (Il. Mil. R. Evid. 305B)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.635 Evidence Obtained from Unlawful Searches and Seizures EMERGENCY

a) General. Evidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused if:

1) Objection. The accused makes a timely motion to suppress or an objection to the evidence under this Section; and

2) Adequate Interest. The accused had a reasonable expectation of privacy in the person, place or property searched; the accused had a legitimate interest in the property or evidence seized when challenging a seizure; or the accused would otherwise have grounds to object to the search or seizure under the U.S. Constitution as applied to members of the armed forces.

b) Exceptions

1) Evidence that was obtained as a result of an unlawful search or seizure may be used to impeach by contradiction the in-court testimony of the accused.

2) Evidence that was obtained as a result of an unlawful search or seizure may be used when the evidence would have been obtained even if the unlawful search or seizure had not been made.

3) Evidence that was obtained as a result of an unlawful search or seizure may be used if:

A) The search or seizure resulted from an authorization to search, seize or apprehend issued by an individual competent to issue the

authorization under Section 400.650(b)(4) or from a search warrant or arrest warrant issued by a competent civilian authority;

B) The individual issuing the authorization or warrant had a substantial basis for determining the existence of probable cause; and

C) The officials seeking and executing the authorization or warrant reasonably and with good faith relied on the issuance of the authorization or warrant. Good faith shall be determined on an objective standard.

c) Nature of Search or Seizure. A search or seizure is "unlawful" if it was conducted, instigated or participated in by:

1) Military Personnel. Military personnel or their agents and was in violation of the U.S. Constitution as applied to members of the armed forces, an Act of Congress applicable to trials by court-martial that requires exclusion of evidence obtained in violation of that Act or Sections 400.640 through 400.655 of this Manual;

2) Other Officials. Other officials or agents of the U.S. federal government or its possessions, and state or local government and was in violation of the U.S. Constitution, or is unlawful under the principles of law generally applied in the trial of criminal cases in the U.S. district courts involving a similar search or seizure; or

3) Officials of a Foreign Government. Officials of a foreign government or their agents and was obtained as a result of a foreign search or seizure that subjected the accused to gross and brutal maltreatment. A search or seizure is not "participated in" merely because a person is present at a search or seizure conducted in a foreign nation by officials of a foreign government or their agents, or because a person acted as an interpreter or took steps to mitigate damage to property or physical harm during the foreign search or seizure.

d) Motions to Suppress and Objections

1) Disclosure. Prior to arraignment, the prosecution shall disclose to the defense all evidence seized from the person or property of the accused, or believed to be owned by the accused, that it intends to offer into evidence against the accused at trial.

2) Motion or Objection

A) When evidence has been disclosed under subsection (d)(1), any motion to suppress or objection under this subsection (d) shall be made by the defense prior to submission of a plea. In the absence of such a motion or objection, the defense may not raise the issue at a later time except as permitted by the military judge for good cause shown. Failure to so move or object constitutes a waiver of the motion or objection.

B) If the prosecution intends to offer evidence seized from the person or property of the accused that was not disclosed prior to arraignment, the prosecution shall provide timely notice to the military judge and to counsel for the accused. The defense may enter an objection at that time and the military judge may make such orders as are required in the interest of justice.

C) If evidence is disclosed as derivative evidence under this subsection (d) prior to arraignment, any motion to suppress or objection under this subsection (d) shall be made in accordance with the procedure for challenging evidence under subsection (d)(2)(A). If the evidence has not been so disclosed prior to arraignment, the requirements of subsection (d)(2)(B) apply.

3) Specificity. The military judge may require the defense to specify the grounds upon which the defense moves to suppress or object to evidence. If defense counsel, despite the exercise of due diligence, has been unable to interview adequately those persons involved in the search or seizure, the military judge may enter any order required by the interests of justice, including authorization for the defense to make a general motion to suppress or general objection.

4) Rulings. A motion to suppress or an objection to evidence made prior to plea shall be ruled upon prior to plea unless the military judge, for good

cause, orders that it be deferred for determination at the trial of the general issue or until after findings, but no such determination shall be deferred if a party's right to appeal the ruling is affected adversely. When factual issues are involved in ruling upon the motion or objection, the military judge shall state essential findings of fact on the record.

e) Burden of Proof

1) General. When an appropriate motion or objection has been made by the defense under subsection (d), the prosecution has the burden of proving by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence would have been obtained even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize or apprehend, a search warrant, or an arrest warrant.

2) Derivative Evidence. Evidence that is challenged under this Section as derivative evidence may be admitted against the accused if the military judge finds by a preponderance of the evidence that the evidence was not obtained as a result of an unlawful search or seizure, that the evidence ultimately would have been obtained by lawful means even if the unlawful search or seizure had not been made, or that the evidence was obtained by officials who reasonably and with good faith relied on the issuance of an authorization to search, seize or apprehend, a search warrant, or an arrest warrant. Notwithstanding other provisions of this subsection (e)(2), an apprehension made in a dwelling in a manner that violates Code Section 7 does not preclude the admission into evidence of a statement of an individual apprehended provided that:

A) the apprehension was based on probable cause;

B) the statement was made subsequent to the apprehension at a location outside the dwelling; and

C) the statement was otherwise in compliance with this Section.

3) Specific Motions or Objections. When a specific motion or objection has been required under subsection (d)(3), the burden on the prosecution

extends only to the grounds upon which the defense moved to suppress or object to the evidence.

f) Defense Evidence. The defense may present evidence relevant to the admissibility of evidence as to which there has been an appropriate motion or objection under this Section. An accused may testify for the limited purpose of contesting the legality of the search or seizure giving rise to the challenged evidence. Prior to the introduction of that testimony by the accused, the defense shall inform the military judge that the testimony is offered under this subsection (f). When the accused testifies under this subsection (f), the accused may be cross-examined only as to the matter on which he or she testifies. Nothing said by the accused on either direct or cross-examination may be used against the accused for any purpose other than in a prosecution for perjury, false swearing, or the making of a false official statement.

g) Scope of Motion and Objections Challenging Probable Cause

1) General. If the defense challenges evidence seized pursuant to a search warrant or search authorization on the grounds that the warrant or authorization was not based upon probable cause, the evidence relevant to the motion is limited to evidence concerning the information actually presented to, or otherwise known by, the authorizing officer, except as provided in subsection (g)(2).

2) False Statements. If the defense makes a substantial preliminary showing that a government agent included a false statement knowingly and intentionally or with reckless disregard for the truth in the information presented to the authorizing officer, and if the allegedly false statement is necessary to the finding of probable cause, the defense, upon request, shall be entitled to a hearing. At the hearing, the defense has the burden of establishing by a preponderance of the evidence the allegation of knowing and intentional falsity or reckless disregard for the truth. If the defense meets its burden, the prosecution has the burden of proving by a preponderance of the evidence, with the false information set aside, that the remaining information presented to the authorizing officer is sufficient to establish probable cause. If the prosecution does not meet its burden, the objection or motion shall be granted unless the search is otherwise lawful under this Section.

h) Objections to Evidence Seized Unlawfully. If a defense motion or objection under this Section is sustained in whole or in part, the members may not be informed of that fact except that the military judge must instruct the members to disregard evidence.

i) Effect of Guilty Plea. Except as otherwise expressly provided in Code Section 45, a plea of guilty to an offense that results in a finding of guilty waives all issues under the Fourth Amendment to the U.S. Constitution, this Section, and Sections 400.640, 400.645, 400.650(a) and (b), and 400.655 with respect to the offense, whether or not raised prior to plea. **(**Il. Mil. R. Evid. 311)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.640 Body Views and Intrusions
EMERGENCY

a) General. Evidence obtained from body views and intrusions conducted in accordance with this Section is admissible at trial when relevant and not otherwise inadmissible under this Section.

b) Visual Examination of the Body

1) Consensual. Visual examination of the unclothed body may be made with the consent of the individual subject to the inspection in accordance with Section 400.650(a)(5).

2) Involuntary

A) An involuntary display of the unclothed body, including a visual examination of body cavities, may be required only if conducted in reasonable fashion and authorized under one or more of:

i) Section 400.645, Section 400.650(a)(2) and (3) if there is a reasonable suspicion that weapons, contraband or evidence of crime is concealed on the body of the person to be searched;

ii) Section 400.650(a)(8) if reasonably necessary to maintain the security of the jail or similar facility or its personnel;

iii) Section 400.650(a)(7) and (9) and Section 400.650(b).

B) An examination of the unclothed body under this subsection (b) should be conducted whenever practicable by a person of the same sex as that of the person being examined; provided, however, that failure to comply with this requirement does not make an examination an unlawful search within the meaning of Section 400.635.

c) Intrusion Into Body Cavities. A reasonable nonconsensual physical intrusion into the mouth, nose and ears may be made when a visual examination of the body under subsection (b) is permissible. Nonconsensual intrusions into other body cavities may be made:

1) For Purposes of Seizure. When there is a clear indication that weapons, contraband or other evidence of crime is present, to remove weapons, contraband or evidence of crime discovered under subsection (b) and (c)(2) or under Section 400.655(d)(4)(C) if the intrusion is made in a reasonable fashion by a person with appropriate medical qualifications; or

2) For Purposes of Search. To search for weapons, contraband or evidence of crime if authorized by a search warrant or search authorization under Section 400.650(b) and conducted by a person with appropriate medical qualifications. Notwithstanding this subsection (c)(2), a search under Section 400.650(a)(8) may be made without a search warrant or authorization if such search is based on a reasonable suspicion that the individual is concealing weapons, contraband or evidence of crime.

d) Extraction of Body Fluids. Nonconsensual extraction of body fluids, including blood and urine, may be made from the body of an individual pursuant to a search warrant or a search authorization under Section 400.650(b) and conducted by a person with appropriate medical qualifications. Nonconsensual extraction of body fluids may be made without a warrant or authorization, notwithstanding Section 400.650(b)(7) only when there is clear indication that evidence of crime will be found and that there is reason to believe that the delay that would result if a warrant or authorization were sought could result in the destruction of the

evidence. Involuntary extraction of body fluids under this subsection (d) must be done in a reasonable fashion by a person with appropriate medical qualifications.

e) Other Intrusive Searches. Nonconsensual intrusive searches of the body made to locate or obtain weapons, contraband or evidence of crime and not within the scope of subsection (b) or (c) may be made only with a warrant or search authorization under Section 400.650(b) and only if the search is conducted in a reasonable fashion by a person with appropriate medical qualifications and does not endanger the health of the person to be searched. Compelling a person to ingest substances for the purposes of locating the weapon, contraband or evidence or to compel the bodily elimination of that property is a search within the meaning of this subsection (e). However, a person who is neither a suspect nor an accused may not be compelled to submit to an intrusive search of the body for the sole purpose of obtaining evidence of crime.

f) Intrusions for Valid Medical Purposes. Nothing in this Section shall be deemed to interfere with the lawful authority of the SMF to take whatever action may be necessary to preserve the health of an SMF member. Evidence or contraband obtained from an examination or intrusion conducted for a valid medical purpose may be seized and is not evidence obtained from an unlawful search or seizure within the meaning of Section 400.650(a).

g) Medical Qualifications. The Adjutant General may prescribe appropriate medical qualifications for persons who conduct searches and seizures under this Section. (Il. Mil. R. Evid. 312)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.645 Inspections and Inventories in the Armed Forces
EMERGENCY

a) For purposes of this Section:

1) "Inspection" means an examination of the whole or part of a unit, organization, installation, vessel, aircraft, or vehicle, including an examination conducted at entrance and exit points, conducted as an incident of command the primary purpose of which is to determine and to ensure the security, military fitness, or good order and discipline of the

unit, organization, installation, vessel, aircraft or vehicle. Inspections must be conducted in a reasonable fashion and, if applicable, must comply with Section 400.640. Inspections may utilize any reasonable natural or technological aid and may be conducted with or without notice to those inspected.

2) "Inventory" means a reasonable examination, accounting or other control measure used to account for or control property, assets or other resources. It is administrative and not prosecutorial in nature and, if applicable, the inventory must comply with Section 400.640. An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inventory within the meaning of this Section.

b) An examination made for the primary purpose of obtaining evidence for use in a trial by court-martial or in other disciplinary proceedings is not an inspection within the meaning of this Section.

c) Evidence obtained from lawful inspections and inventories in the SMF is admissible at trial when relevant and not otherwise inadmissible under this Section. An unlawful weapon, contraband or other evidence of a crime discovered during a lawful inspection or inventory may be seized and is admissible in accordance with this Section.

d) An inspection may include, but is not limited to:

1) an examination to determine and to ensure that the command is:

A) properly equipped;

B) functioning properly;

C) maintaining proper standards of readiness, sea or airworthiness, sanitation and cleanliness; and

D) personnel are present, fit and ready for duty;

2) an order to produce body fluids, such as urine; and

3) an examination to locate and confiscate unlawful weapons and other contraband, provided subsection (b) is not violated. The prosecution must prove by clear and convincing evidence that the examination was an inspection within the meaning of this subsection (d)(3) if a purpose of an examination is to locate weapons or contraband and if:

A) the examination was directed immediately following a report of a specific offense in the unit, organization, installation, vessel, aircraft, or vehicle and was not previously scheduled;

B) specific individuals are selected for examination; or

C) persons examined are subjected to substantially different intrusions during the same examination. (Il. Mil. R. Evid. 313)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.650 Searches
EMERGENCY

a) Searches Not Requiring Probable Cause

1) General Rule. Evidence obtained from reasonable searches not requiring probable cause conducted pursuant to this subsection (a) is admissible at trial when relevant and not otherwise in admissible under this Section or the U.S. Constitution as applicable to the armed forces.

2) Border Searches. Border searches for customs or immigration purposes may be conducted when authorized by Act of Congress.

3) Searches Upon Entry or Exit from Illinois National Guard Installations, Aircraft and Vessels Abroad. In addition to the authority to conduct inspections under Section 400.645, the Adjutant General or any commander to whom he or she delegates authority, may authorize appropriate personnel to search persons or the property of those persons upon entry to or exit from the installation, enclave, aircraft or vessel to ensure the security, military fitness, or good order and discipline of the command. These searches may not be conducted at a time or in a manner

contrary to an express provision of a treaty or agreement to which the United States is a party. Failure to comply with a treaty or agreement, however, does not render a search unlawful within the meaning of Section 400.645. A search made for the primary purpose of obtaining evidence for use in a trial by court-martial or other disciplinary proceedings is not authorized by this Section.

4) Searches of Government Property. Government property may be searched under this Section unless the person to whom the property is issued or assigned has a reasonable expectation of privacy in the government property at the time of the search. Under normal circumstances, a person does not have a reasonable expectation of privacy in government property that is not issued for personal use. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use, but the determination as to whether a person has a reasonable expectation of privacy in government property issued for personal use depends on the facts and circumstances at the time of the search.

5) Consent Searches

A) General Rule. Searches may be conducted of any person or property with lawful consent.

B) Who May Consent. A person may consent to a search of his or her person or property, or both, unless control over that property has been given to another. A person may grant consent to search property when the person exercises control over that property.

C) Scope of Consent. Consent may be limited in any way by the person granting consent, including limitations in terms of time, place or property and may be withdrawn at any time.

D) Voluntariness. To be valid, consent must be given voluntarily. Voluntariness is a question to be determined from all the circumstances. Although a person's knowledge of the right to refuse to give consent is a factor to be considered in determining voluntariness, the prosecution is not required to demonstrate that knowledge as a prerequisite to establishing a voluntary consent.

Mere submission to the color of authority of personnel performing law enforcement duties or acquiescence in an announced or indicated purpose to search is not a voluntary consent.

E) Burden of Proof. Consent must be shown by clear and convincing evidence. The fact that a person was in custody while granting consent is a factor to be considered in determining the voluntariness of consent, but it does not affect the burden of proof.

6) Searches Incident to a Lawful Stop

A) Stops. A person authorized to apprehend under Code Section 7 and others performing law enforcement duties may stop another person temporarily when the person making the stop has information or observes unusual conduct that leads him or her reasonably to conclude in light of his or her experience that criminal activity may be afoot. The purpose of the stop must be investigatory in nature.

B) Frisks. When a lawful stop is performed, the person stopped may be frisked for weapons when that person is reasonably believed to be armed and presently dangerous. Contraband or evidence located in the process of a lawful frisk may be seized.

C) Motor Vehicles. When a person lawfully stopped is the driver or a passenger in a motor vehicle, the passenger compartment of the vehicle may be searched for weapons if the official who made the stop has a reasonable belief that the person stopped is dangerous and that the person stopped may gain immediate control of a weapon.

7) Searches Incident to a Lawful Apprehension. A person who has been lawfully apprehended may be searched.

A) Search for Weapons and Destructible Evidence. A search may be conducted for weapons or destructible evidence, in the area within the immediate control of a person who has been apprehended. The area within the person's "immediate control" is the area the individual searching could reasonably believe that the person

apprehended could reach with a sudden movement to obtain the property; provided, that the passenger compartment of an automobile, and containers within the passenger compartment, may be searched as a contemporaneous incident of the apprehension of an occupant of the automobile, regardless whether the person apprehended has been removed from the vehicle.

B) Examination for Other Persons

i) When an apprehension takes place at a location in which other persons might be present who might endanger those conducting the apprehension and others in the area of the apprehension, a reasonable examination may be made of the general area in which the other persons might be located. A reasonable examination under this subsection (a)(7)(B) is permitted if the apprehending officials have a reasonable suspicion based on specific and articulable facts that the area to be examined harbors an individual posing a danger to those in the area of the apprehension.

ii) Apprehending officials may, incident to apprehension, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of apprehension from which an attack could be immediately launched.

8) Searches Within Jails, Confinement Facilities, or Similar Facilities. Searches within jails, confinement facilities, or similar facilities may be authorized by persons with authority over the institution.

9) Emergency Searches to Save Life or for Related Purposes. In emergency circumstances to save life or for a related purpose, a search may be conducted of persons or property in a good faith effort to render immediate medical aid, to obtain information that will assist in the rendering of medical aid, or to prevent immediate or ongoing personal injury.

10) Searches of Open Fields or Woodlands. A search of open fields or woodlands is not an unlawful search within the meaning of Section 400.635.

11) Other Searches. A search of a type not otherwise included in this Section and not requiring probable cause under subsection (b) may be conducted when permissible under the U.S. Constitution as applied to members of the armed forces. (Il. Mil. R. Evid. 314)

b) Probable Cause Searches

1) General Rule. Evidence obtained from searches requiring probable cause conducted in accordance with this subsection (b) is admissible at trial when relevant and not otherwise inadmissible under this Section.

2) Definitions. As used in this subsection (b):

A) "Authorization to Search" means an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence or for a specific person and to seize that property, evidence or person. It may contain an order directing subordinate personnel to conduct a search in a specified manner.

B) "Search Warrant" means an express permission to search and seize issued by competent civilian authority.

3) Scope of Authorization. A search authorization may be issued under this subsection (b) for a search of:

A) Persons. The person of anyone subject to military law or the law of war wherever found;

B) Military Property. Military property of the United States or the Illinois National Guard, or nonappropriated fund activities of U.S. armed forces, wherever located;

C) Persons and Property Within Military Control. Persons or property situated on or in a military installation, encampment, vessel,

aircraft, vehicle, or any other location under military control, wherever located.

4) Power to Authorize. Authorization to search pursuant to this subsection (b) may be granted by an impartial individual in the following categories:

A) Commander. A commander or other person serving in a position designated by the Adjutant General as either a position analogous to an officer in charge or a position of command, who has control over the place where the property or person to be searched is situated or found, or, if that place is not under military control, having control over persons subject to military law or the law of war; or

B) Military Judge. A military judge or magistrate if authorized under regulations prescribed by the Adjutant General. An otherwise impartial authorizing official does not lose the character merely because he or she is present at the scene of a search or is otherwise readily available to persons who may seek the issuance of a search authorization; nor does such an official lose impartial character merely because the official previously and impartially authorized investigative activities when these previous authorization is similar in intent or function to a pretrial authorization made pursuant to the laws of the jurisdiction where the search is to be conducted.

5) Power to Search. Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police or shore patrol, or person designated by proper authority to perform guard or police duties, or any agent of any such person, may conduct or authorize a search when a search authorization has been granted under this subsection (b) or a search would otherwise be proper under subsection (b)(7).

6) Basis for Search Authorizations

A) Probable Cause Requirement. A search authorization issued under this subsection (b) must be based upon probable cause.

B) Probable Cause Determination. Probable cause to search exists when there is a reasonable belief that the person, property or evidence sought is located in the place or on the person to be searched. A search authorization may be based upon hearsay evidence in whole or in part. A determination of probable cause under this subsection (b)(6)(B) shall be based upon any or all of the following:

i) Written statements communicated to the authorizing officer;

ii) Oral statements communicated to the authorizing official in person, via telephone or by other appropriate means of communication; or

iii) Such information as may be known by the authorizing official that would not preclude the officer from acting in an impartial fashion.

7) Exigencies. A search warrant or search authorization is not required under this subsection (b) for a search based on probable cause when:

A) Insufficient Time. There is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction or concealment of the property or evidence sought;

B) Lack of Communications. There is a reasonable military operational necessity that is reasonably believed to prohibit or prevent communication with a person empowered to grant a search warrant or authorization and there is a reasonable belief that the delay necessary to obtain a search warrant or search authorization would result in the removal, destruction or concealment of the property or evidence sought;

C) Search of Operable Vehicle. An operable vehicle is to be searched, except in the circumstances in which a search warrant or authorization is required by the U.S. Constitution, the Code or this Manual; or

D) Not Required by the Constitution. A search warrant or authorization is not otherwise required by the U.S. Constitution as applied to members of the armed forces. For purpose of this subsection (b)(7), a vehicle is "operable" unless a reasonable person would have known at the time of search that the vehicle was not functional for purposes of transportation.

8) Execution

A) Notice. If the person whose property is to be searched is present during a search conducted pursuant to a search authorization granted under this subsection (b), the person conducting the search should, when possible, notify the property holder of the act of authorization and the general substance of the authorization. The notice may be made prior to or contemporaneously with the search. Failure to provide notice does not make a search unlawful within the meaning of Section 400.635.

B) Inventory. Under regulations prescribed by the appropriate authority, and with such exceptions as may be authorized by the U.S. Secretary of Defense, an inventory of the property seized shall be made at the time of a seizure under this subsection (b) or as soon as practicable thereafter. At an appropriate time, a copy of the inventory shall be given to a person from whose possession or premises the property was taken. Failure to make an inventory, furnish a copy of the inventory, or otherwise comply with this subsection (b)(8)(B) does not render a search or seizure unlawful within the meaning of Section 400.635.

C) Foreign Searches. Execution of a search authorization outside the United States and within the jurisdiction of a foreign nation should be in conformity with existing agreements between the United States and the foreign nation. Noncompliance with such an agreement does not make an otherwise lawful search unlawful.

D) Search Warrants. Any civilian or military criminal investigator authorized to request search warrants pursuant to applicable law or regulation is authorized to serve and execute search warrants. The

execution of a search warrant affects admissibility only insofar as exclusion of evidence is required by the U.S. Constitution or an applicable Act of Congress. (Il. Mil. R. Evid. 315)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.655 Seizures
EMERGENCY

a) General Rule. Evidence obtained from seizures conducted in accordance with this Section is admissible at trial if the evidence was not obtained as a result of an unlawful search and if the evidence is relevant and not otherwise inadmissible under this Section.

b) Seizure of Property. Probable cause to seize property or evidence exists when there is a reasonable belief that the property or evidence is an unlawful weapon, contraband or evidence of crime, or might be used to resist apprehension or to escape.

c) Apprehension. Apprehension is governed by Code Section 7.

d) Seizure of Property or Evidence

1) Abandoned Property. Abandoned property may be seized without probable cause and without a search warrant or search authorization. The seizure may be made by any person.

2) Consent. Property or evidence may be seized with consent consistent with the requirements applicable to consensual searches under Section 400.650(a).

3) Government Property. Government property may be seized without probable cause and without a search warrant or search authorization by any person listed in subsection (e), unless the person to whom the property is issued or assigned has a reasonable expectation of privacy, as provided in Section 400.650(a)(4), at the time of the seizure.

4) Other Property. Property or evidence not included in subsections (d)(1) through (3) may be seized for use in evidence by any person listed in subsection (e) if:

A) Authorization. The person is authorized to seize the property or evidence by a search warrant or a search authorization under Section 400.650(b);

B) Exigent Circumstances. The person has probable cause to seize the property or evidence and, under Section 400.650(b)(7), a search warrant or search authorization is not required; or

C) Plain View. The person, while in the course of otherwise lawful activity, observes in a reasonable fashion property or evidence that the person has probable cause to seize.

5) Temporary Detention. Nothing in this Section shall prohibit temporary detention of property on less than probable cause when authorized under the U.S. Constitution.

e) Power to Seize. Any commissioned officer, warrant officer, petty officer, noncommissioned officer, and, when in the execution of guard or police duties, any criminal investigator, member of the Air Force security police, military police or shore patrol, or individual designated by proper authority to perform guard or police duties, or any agent of any such person, may seize property pursuant to this Section.

f) Other Seizures. A seizure of a type not otherwise included in this Section may be made when permissible under the U.S. and Illinois Constitutions, as applied to members of the armed forces. (Il. Mil. R. Evid. 316)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.660 Eyewitness Identification
EMERGENCY

a) Eyewitness identification in courts-martial shall be conducted in accordance with Section 107A-2 of the Illinois Code of Criminal Procedure (CCP).

b) When the Section 107A-2 uses the following terms, for the purposes of this Manual those terms shall have meanings ascribed in this subsection (b).

1) CCP Section 107A-2(b) requires law enforcement to adopt written guidelines for determining when simultaneous or sequential lineups shall be conducted. For purposes of this Manual, the NGIL-JA, in coordination with civilian law enforcement, will develop those guidelines.

2) References in CCP Section 107A-2(i) to "State's Attorney" shall be considered under this Manual to be references to the "government's counsel".

3) References in CCP Section 107A-2 to "the court" shall be read as "military judge".

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.665 Relevant Evidence
EMERGENCY

a) Definition. "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. (Il. Mil. R. Evid. 401)

b) General Admissibility of Relevant Evidence

1) All relevant evidence is admissible, except as otherwise provided by law.

2) Evidence that is not relevant is not admissible. (Il. Mil. R. Evid. 402)

c) Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time
Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the members, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (Il. Mil. R. Evid. 403)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.670 Character Evidence; Crimes or Other Acts
EMERGENCY

a) Character Evidence

1) Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity with that person's character on a particular occasion, except:

A) Character of the Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut that evidence;

B) Subject to the Limitations Imposed by Section 115-7 of the Code of Illinois Criminal Procedure:

i) evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut that allegation; or

ii) evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide or battery case to rebut evidence that the alleged victim was the first aggressor.

C) Evidence of the character of a witness, as provided in Section 400.705(g), (h) and (i).

2) Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show action in conformity with that character, except as provided by Sections 115-7.3, 115-7.4 and 115-20 of the Code of Criminal Procedure. The evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident.

3) When the prosecution intends to offer evidence under subsection (a)(2), it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial or during trial if the military judge excuses pretrial notice on good cause shown. (Il. Mil. R. Evidence 404)

b) Admissible Methods of Proving Character

1) Definitions. For purposes of this subsection (b), the following definitions apply.

A) "Community", in the SMF, means post, camp, base, ship, station, unit or other military organization, regardless of size.

B) "Reputation" means the estimation in which a person generally is held in the community in which the person lives or pursues a business or profession. (Il. Mil. R. Evid. 405)

2) In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion.

3) In cases in which character or a trait of character of a person is an essential element of the charge, claim or defense, proof may also be made of specific instances of that person's conduct.

4) In criminal homicide or battery cases, when the accused raises the theory of self-defense and there is conflicting evidence as to whether the alleged victim was the aggressor, proof may also be made of specific instances of the alleged victim's prior conduct.

5) The defense may introduce affidavits or other written statements of persons other than the accused concerning the character of the accused. If the defense introduces affidavits or other written statements under this subsection (b)(5), the prosecution may, in rebuttal, also introduce affidavits or other written statements regarding the character of the accused. Evidence of this type may be introduced by the defense or prosecution only if, aside from being contained in an affidavit or other

written statement, it would otherwise be admissible under this Subpart. (Il. Mil. R. Evid. 405)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.675 Habit and Routine Practice
EMERGENCY

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. (Il. Mil. R. Evid. 406)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.680 Subsequent Remedial Measures
EMERGENCY

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This Section does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as:

a) proving ownership, control or feasibility of precautionary measures, if controverted; or

b) impeachment. (Il. Mil. R. Evid. 407)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.685 Compromise Offers; Offers of Reimbursement; Pleas
EMERGENCY

a) Compromise

1) Prohibited Uses of Evidence. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of, a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

A) Furnishing, offering or promising to furnish, or accepting, offering or promising to accept, a valuable consideration in compromising or attempting to compromise the claim; and

B) Conduct or statements made in the compromise negotiations regarding the claim.

2) Permitted Uses of Evidence

A) This Section:

i) does not require the exclusion of evidence otherwise discoverable merely because it is presented in the course of settlement negotiations; and

ii) does not require exclusion if the evidence is offered for purposes not prohibited by subsection (a)(1).

B) Examples of permissible purposes include proving a witness' bias or prejudice; negating an assertion of undue delay; establishing bad faith and proving an effort to obstruct a criminal investigation or prosecution. (Il. Mil. R. Evid. 408)

b) Offers to Pay Medical and Similar Expenses
In addition to the provisions of Section 8-1901 of the Code of Civil Procedure, evidence of furnishing, promising to pay, or offering to pay medical, hospital or similar expenses resulting from an injury is not admissible to prove liability for the injury. (Il. Mil. R. Evid. 409)

c) Pleas, Plea Discussions and Related Statements

1) Definitions

A) "Statement Made in the Course of Plea Discussions" means a statement made by the accused solely for the purpose of requesting disposition under an authorized procedure for administrative action in lieu of trial by court-martial.

B) "On the Record" means the written statement submitted by the accused in furtherance of a request for disposition.

2) Except as otherwise provided in this Section, evidence of the following is not admissible in any court-martial proceeding against the accused who made the plea or was a participant in the plea discussions:

A) a plea of guilty that was later withdrawn;

B) a plea of nolo contendere;

C) any statement made in the course of any judicial inquiry regarding either of the pleas is subsections (c)(2)(A) and (B); or

D) any statement made in the course of plea discussions with the convening authority, staff judge advocate, trial counsel or other counsel for the government that do not result in a plea of guilty or that result in a plea of guilty later withdrawn. However, such a statement is admissible:

i) in any proceeding in which another statement made in the course of the same plea or plea discussions has been introduced and the statement should, in fairness, be considered contemporaneously; or

ii) in a court-martial proceeding for perjury or false statement if the statement was made by the accused under oath, on the record and in the presence of counsel. (Il. Mil. R. Evid. 410)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.690 Liability Insurance

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

EMERGENCY

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. The military judge may admit this evidence for another purpose, such as proving witness bias or prejudice or proving agency, ownership or control or bias or prejudice of a witness. (Il. Mil. R. Evid. 411)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.695 Admissibility of Prior Sexual Activity and Offenses
EMERGENCY

a) Admissibility

1) When an accused is charged with *predatory criminal sexual assault of a child, aggravated criminal sexual assault, criminal sexual assault, aggravated criminal sexual abuse, criminal sexual abuse, or criminal transmission of HIV, and in prosecutions for battery/aggravated battery* that involve *sexual penetration or sexual conduct*, evidence of *the prior sexual activity or the reputation of the alleged victim or corroborating witness is inadmissible except*:

A) *as evidence concerning the past sexual conduct of the alleged victim or corroborating witness under Section 115-7.3 of* the *Code* of Criminal Procedure *with the accused when* the *evidence is offered by the accused upon the issue of whether the alleged victim or corroborating witness consented to the sexual conduct with respect to which the offense is alleged; or*

B) *when constitutionally required to be admitted.*

2) *No evidence admissible under this Section shall be introduced unless ruled admissible by the* military *judge after an offer of proof has been made at a hearing to be held in camera in order to determine whether the defense has evidence to impeach the witness in the event that prior sexual activity with the defendant is denied. The offer of proof shall include reasonably specific information as to the date, time and place of the past sexual*

conduct between the alleged victim or corroborating witness and the accused.

3) *Unless the* military judge *finds that reasonably specific information as to* the *date, time or place, or some combination thereof, has been offered as to prior sexual activity with the* accused, *counsel for the* accused *shall be ordered to refrain from inquiring into prior sexual activity between the alleged victim or corroborating witness and the* accused.

4) *The* military judge *shall not admit evidence under this* Section *unless* he or she *determines at the hearing that the evidence is relevant and the probative value of the evidence outweighs the danger of unfair prejudice.*

5) *The evidence shall be admissible at trial to the extent an order made by the* military judge *specifies the evidence that may be admitted and the areas with respect to which the alleged victim or corroborating witness may be examined or cross-examined*. [725 ILCS 5/115-7]

6) The military judge *may not order mental examination of a sex victim. Except when explicitly authorized by* the *Code of Criminal Procedure or by the Rules of the Supreme Court of Illinois, no* military judge *may require or order a witness who is the victim of an alleged sex offense to submit to or undergo either a psychiatric or psychological examination.* [725 ILCS 5/115-7.1]

7) Pursuant to Section 115-7.2 of the Code of Criminal Procedure, *in a prosecution for an illegal sexual act perpetrated upon a victim, testimony by an expert, qualified by the* military judge *relating to any recognized and accepted form of post-traumatic stress syndrome shall be admissible as evidence*. [725 ILCS 5/115-7.2] (Il. Mil. R. Evid. 412)

b) Similar Offenses

1) Evidence in Certain Cases. In a court-martial for an offense set forth in Section 115-7.3 of the Code of Criminal Procedure, or that of an identical or closely related offense under the law of the state where the offense occurred, evidence of the defendant's commission of another offense or offenses set forth in Section 115-7.3 is admissible, as provided in Section 115-7.3.

2) Evidence in Domestic Violence Cases. In a court-martial for an offense related to domestic violence as set forth in Section 115-7.4 of the Code of Criminal Procedure, to include that of a related offense under the law of the state where the offense occurred, evidence of the defendant's commission of another offense or offenses of domestic violence is admissible, as provided in Section 115-7.4.

3) Evidence of Prior Convictions. In a criminal case for the type of offenses set forth in Section 115-20 of the Code of Criminal Procedure, evidence of the defendant's conviction for an offense set forth in that Section is admissible when the victim is the same person who was the victim of the previous offense that resulted in the conviction of the defendant, as provided in Section 115-20.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.700 Privilege
EMERGENCY

a) General

1) A person may not claim a privilege with respect to any matter except as required by or provided for in:

A) The U.S. Constitution as applied to members of the armed forces;

B) An Act of Congress applicable to trials by courts-martial;

C) This Manual; or

D) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence insofar as the application of those principles in trials by courts-martial is practicable and not contrary to or inconsistent with the Code or this Manual.

2) A claim of privilege includes, but is not limited to, the assertion by any person of a privilege to:

A) Refuse to be a witness;

B) Refuse to disclose any matter;

C) Refuse to produce any object or writing; or

D) Prevent another from being a witness or disclosing any matter or producing any object or writing.

3) The term "person" includes an appropriate representative of the federal government, a state or political subdivision thereof, or any other entity claiming to be the holder of a privilege. Including any other provision of this Section, information not otherwise privileged does not become privileged on the basis that it was acquired by a medical officer or civilian physician in a professional capacity. (Il. Mil. R. Evid. 501)

b) Lawyer-Client Privilege

1) Definitions. As used in this Section:

A) "Client" means a person, public officer, corporation, association, organization or other entity, either public or private, who receives professional legal services from a lawyer, or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

B) "Confidential Communication" or "Communication" means a communication not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

C) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to practice law, or a member of the armed forces detailed, assigned or otherwise provided to represent a person in a court-martial case or in any military investigation or

proceeding. The term "lawyer" does not include a member of the armed forces serving in a capacity other than as a judge advocate, legal officer, or law specialist as defined in Code Section 1, unless the member:

i) is detailed, assigned or otherwise provided to represent a person in a court-martial case or in any military investigation or proceeding;

ii) is authorized by the armed forces, or reasonably believed by the client to be authorized, to render professional legal services to members of the armed forces; or

iii) is authorized to practice law and render professional legal services during off-duty employment.

D) "Representative" means a lawyer or a person employed by or assigned to assist a lawyer in providing professional legal services.

2) General Rule of Privilege. A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications made for the purpose of facilitating the rendition of professional legal services:

A) to the client;

B) between the client or the client's representative and the lawyer or the lawyer's representative;

C) between the lawyer and the lawyer's representative;

D) by the client or the client's lawyer to a lawyer representing another in a matter of common interest;

E) between representatives of the client or between the client and a representative of the client; or

F) between lawyers representing the client.

3) Who May Claim the Privilege. The privilege may be claimed by the client, the guardian or conservator of the client, the personal representative of a deceased client, or the successor, trustee or similar representative of a corporation, association or other organization, whether or not in existence. The lawyer or the lawyer's representative who received the communication may claim the privilege on behalf of the client. The authority of the lawyer to do so is presumed in the absence of evidence to the contrary.

4) Exceptions. There is no privilege under this Section in the following circumstances:

A) Crime or Fraud: If the communication clearly contemplated the future commission of a fraud or crime, or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

B) Claimants Through Same Deceased Client: As to a communication relevant to an issue between parties who claim, through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;

C) Breach of Duty by Lawyer or Client: As to a communication relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer;

D) Document Attested to by Lawyer: As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

E) Joint Clients: As to a communication relevant to a matter of common interest between 2 or more clients, if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients. (Il. Mil. R. Evid. 502)

c) Communications to Clergy

1) Definitions. As used in this subsection (c):

A) "Clergyman" means a minister, priest, rabbi, chaplain or other similar functionary of a religious organization, or an individual reasonably believed to be so by the person consulting the clergyman.

B) "Clergyman's Assistant" means a person employed by or assigned to assist a clergyman in his or her capacity as a spiritual advisor.

C) "Confidential Communication" or "Communication" means a communication made to a clergyman in the clergyman's capacity as a spiritual adviser, or to a clergyman's assistant in the assistant's official capacity, that is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the purpose of the communication or to those reasonably necessary for the transmission of the communication.

2) General Rule of Privilege. A person has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the person to a clergyman or to a clergyman's assistant if that communication is made either as a formal act of religion or as a matter of conscience.

3) Who May Claim the Privilege. The privilege may be claimed by the person, by the guardian or conservator, or by a personal representative if the person is deceased. The clergyman or clergyman's assistant who received the communication may claim the privilege on behalf of the person. The authority of the clergyman or clergyman's assistant to do so is presumed in the absence of evidence to the contrary. (Il. Mil. R. Evid. 503)

d) Husband-Wife Privilege

1) Definitions. As used in this subsection (d):

A) "Confidential Communication" or "Communication" means a confidential communication made privately by any person to the spouse of the person and is not intended to be disclosed to third

persons other than those reasonably necessary for transmission of the communication.

B) "A Child of Either" includes not only a biological child, adopted child, or ward of one of the spouses, but also includes a child who is under the permanent or temporary physical custody of one of the spouses, regardless of the existence of a legal parent-child relationship. For purposes of this subsection (d) only, a child is:

i) an individual under the age of 18; or

ii) an individual over the age of 18 with a mental disability that results in the individual functioning at the capacity of a person under the age of 18.

C) "Temporary Physical Custody" includes instances in which a parent entrusts his or her child to another. There is no minimum amount of time necessary to establish temporary physical custody, nor must there be a written agreement. Rather, the focus is on the parent's agreement with another for assuming parental responsibility for the child. For example, temporary physical custody may include instances in which a parent entrusts another with the care of his or her child for recurring care or during absences due to temporary duty or deployments.

2) Spousal Incapacity. A person has a privilege to refuse to testify against his or her spouse.

3) Confidential Communication Made During Marriage

A) General Rule of Privilege. A person has a privilege during and after the marital relationship to refuse to disclose, and to prevent another from disclosing, any confidential communication made to the spouse of the person while they were husband and wife and not separated as provided by law.

B) Who May Claim the Privilege. The privilege may be claimed by the spouse who made the communication or by the other spouse on his or her behalf. The authority of the latter spouse to do so is

presumed in the absence of evidence of a waiver. The privilege will not prevent disclosure of the communication at the request of the spouse to whom the communication was made if that spouse is an accused, regardless of whether the spouse who made the communication objects to its disclosure.

4) Exceptions

A) Spousal Incapacity Only. There is no privilege under subsection (d)(2) when, at the time the testimony of one of the parties to the marriage is to be introduced in evidence against the other party, the parties are divorced or the marriage has been annulled.

B) Spousal Incapacity and Confidential Communications. There is no privilege under subsection (d)(2) or (3):

i) In proceedings in which one spouse is charged with a crime against the person or property of the other spouse or a child of either, or with a crime against the person or property of a third person committed in the course of committing a crime against the other spouse;

ii) When the marital relationship was entered into with no intention of the parties to live together as spouses, but only for the purpose of using the purported marital relationship as a sham, and:

- with respect to the privilege in subsection (d)(2), the relationship remains a sham at the time the testimony or statement of one of the parties is to be introduced against the other; or

- with respect to the privilege in subsection (d)(3), the relationship was a sham at the time of the communication;

iii) In proceedings in which a spouse is charged, in accordance with Code Section 133 or 134:

- with importing the other spouse as an alien for prostitution or other immoral purposes in violation of 8 USC 1328;

- with transporting the other spouse in interstate commerce for immoral purposes or other offense in violation of 18 USC 2421 through 2424; or

- with violation of other similar statutes under which the privilege may not be claimed in the trial of criminal cases in the United States district courts; or

iv) When both parties have been substantial participants in illegal activity, communications between the spouses during the marriage regarding the illegal activity in which they have jointly participated. (Il. Mil. R. Evid. 504)

e) Classified Information

1) Definitions. As used in this subsection (e):

A) "Classified Information" means:

i) any information or material that has been determined by the U.S. government, pursuant to an executive order, statute or regulations, to require protection against unauthorized disclosure for reasons of national security; and

ii) any restricted data, as defined in Section 2014(6) of the federal Atomic Energy Act of 1954.

B) "National Security" means the national defense and foreign relations of the United States.

2) General Rule of Privilege. Classified information is privileged from disclosure if disclosure would be detrimental to the national security. As with other rules of privilege, this rule applies to all stages of the proceedings.

3) Who May Claim the Privilege. The privilege may be claimed by the head of the concerned executive or military department or government agency based on a finding that the information is properly classified and that disclosure would be detrimental to the national security. A person who may claim the privilege may authorize a witness or trial counsel to claim the privilege on his or her behalf. The authority of the witness or trial counsel to do so is presumed in the absence of evidence to the contrary.

4) Action Prior to Referral of Charges. Prior to referral of charges, the convening authority shall respond in writing to a request by the accused for classified information if the privilege in this subsection (e) is claimed for that information. The convening authority may:

A) Delete specified items of classified information from documents made available to the accused;

B) Substitute a portion or summary of the information for the classified documents;

C) Substitute a statement admitting relevant facts that the classified information would tend to prove;

D) Provide the document subject to conditions that will guard against the compromise of the information disclosed to the accused; or

E) Withhold disclosure if action under subsections (e)(4)(A) through (D) cannot be taken without causing identifiable damage to the national security. Any objection by the accused to withholding of information or to the conditions of disclosure shall be raised through a motion for appropriate relief at a pretrial session.

5) Pretrial Session. At any time after referral of charges and prior to arraignment, any party may move for a session under Code Section 39(a) to consider matters relating to classified information that may arise in connection with the trial. Following such motion or sua sponte, the military judge promptly shall hold a session under Code Section 39(a) to establish the timing of requests for discovery, the provision of notice under subsection (e)(8), and the initiation of the procedure under subsection (e)(9). In addition, the military judge may consider any other

matters that relate to classified information or that may promote a fair and expeditious trial.

6) Action After Referral of Charges. If a claim of privilege has been made under this subsection (e) with respect to classified information that apparently contains evidence that is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence in the court-martial proceeding, the matter shall be reported to the convening authority. The convening authority may:

A) institute action to obtain the classified information for use by the military judge in making a determination under subsection (e)(9);

B) dismiss the charges;

C) dismiss the charges or specifications, or both, to which the information relates; or

D) take such other action as may be required in the interests of justice. If, after a reasonable period of time, the information is not provided to the military judge in circumstances in which proceeding with the case without that information would materially prejudice a substantial right of the accused, the military judge shall dismiss the charges or specifications or both to which the classified information relates.

7) Disclosure of Classified Information to the Accused

A) Protective Order. If the government (i.e., the prosecution) agrees to disclose classified information to the accused, the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of the protective order may include provisions:

i) Prohibiting the disclosure of the information, except as authorized by the military judge;

ii) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;

iii) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

iv) Requiring appropriate security clearances for persons having a need to examine the information in connection with the preparation of the defense. All persons requiring security clearances shall cooperate with investigatory personnel in any investigations that are necessary to obtain a security clearance.

v) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;

vi) Regulating the making and handling of notes taken from material containing classified information; or

vii) Requesting the convening authority to authorize the assignment of government security personnel and the provisions of government storage facilities.

B) Limited Disclosure

i) The military judge, upon motion of the government, shall authorize the deletion of specified items of classified information from documents to be made available to the defendant, the substitution of a portion or summary of the information for the classified documents, or the substitution of a statement admitting relevant facts that the classified information would tend to prove, unless the military judge determines that disclosure of the classified information itself is necessary to enable the accused to prepare for trial.

ii) The government's motion and any materials submitted in support of the motion shall, upon request of the government, be considered by the military judge in camera and shall not be disclosed to the accused.

C) Disclosure of Certain Statements Previously Made by a Witness

i) Scope. After a witness called by the government has testified on direct examination, the military judge, on motion of the accused, may order production of statements in the possession of the government under Code Section 46. This provision does not preclude discovery or assertion of a privilege otherwise authorized under this Manual.

ii) Closed Session. If the privilege in this subsection (e) is invoked during consideration of a motion under Code Section 46, the government may deliver the statement for the inspection only by the military judge in camera and may provide the military judge with an affidavit identifying the portions of the statement that are classified and the basis for the classification assigned. If the military judge finds that disclosure of any portion of the statement identified by the government as classified could reasonably be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute or regulation and that such portion of the statement is consistent with the witness' testimony, the military judge shall excise that portion from the statement. With the material excised, the military judge shall direct delivery of the statement to the accused for use by the accused. If the military judge finds that the portion of the statement is inconsistent with the witness' testimony, the government may move for a proceeding under subsection (e)(9).

D) Record of Trial. If, under this subsection (e), any information is withheld from the accused, the accused objects to that withholding, and the trial is continued to an adjudication of guilt of the accused, the entire unaltered text of the relevant documents, as well as the

government's motion and any materials submitted in support of the motion, shall be sealed and attached to the record of trial as an appellate exhibit. This material shall be made available to reviewing authorities in closed proceedings for the purpose of reviewing the determination of the military judge.

8) Notice of the Accused's Intentions to Disclose Classified Information

A) Notice by the Accused. If the accused reasonably expects to disclose or to cause the disclosure of classified information in any manner in connection with a court-martial proceeding, the accused shall notify the trial counsel in writing of that intention and file a copy of the notice with the military judge. The notice shall be given within the time specified by the military judge under subsection (e)(5) or, if no time has been specified, prior to arraignment of the accused.

B) Continuing Duty to Notify. Whenever the accused learns of classified information not covered by a notice under subsection (e)(8)(A) that the accused reasonably expects to disclose at any proceeding, the accused shall notify the trial counsel and the military judge in writing as soon as possible thereafter.

C) Content of Notice. The notice required by this subsection (e)(8) shall include a brief description of the classified information. The description, to be sufficient, must be more than a mere general statement of the areas about which evidence may be introduced. The accused must state, with particularity, which items of classified information he or she reasonably expects will be revealed by his or her defense.

D) Prohibition Against Disclosure. The accused may not disclose any information known or believed to be classified until notice has been given under this subsection (e)(8) and until the government has been afforded a reasonable opportunity to seek a determination under subsection (e)(9).

E) Failure to Comply. If the accused fails to comply with the requirements of this subsection (e)(8), the military judge may

preclude disclosure of any classified information not made the subject of notification and may prohibit the examination by the accused of any witness with respect to any such information.

9) In Camera Proceedings for Cases Involving Classified Information

A) Definition. For purposes of this subsection (e)(9), an "in camera proceeding" is a session under Code Section 39(a) from which the public is excluded.

B) Motion for In Camera Proceeding. Within the time specified by the military judge for the filing of a motion under this subsection (e), the government may move for an in camera proceeding concerning the use at any proceeding of any classified information. Thereafter, either prior to or during trial, the military judge, for good cause shown or otherwise upon a claim of privilege under this subsection (e) may grant the government leave to move for an in camera proceeding concerning the use of additional classified information.

C) Demonstration of National Security Nature of the Information. In order to obtain an in camera proceeding under this subsection (e)(9), the government shall submit the classified information and an affidavit ex parte for examination by the military judge only. The affidavit shall demonstrate that disclosure of the information reasonably could be expected to cause damage to the national security in the degree required to warrant classification under the applicable executive order, statute or regulation.

D) In Camera Proceeding

i) Procedure. Upon finding that the government has met the standard set forth in subsection (e)(9)(C) with respect to some or all of the classified information at issue, the military judge shall conduct an in camera proceeding. Prior to the in camera proceeding, the government shall provide the accused with notice of the information that will be at issue. This notice shall identify the classified information that will be at issue whenever that information previously

has been made available to the accused in connection with proceedings in the same case. The government may describe the information by generic category, in such form as the military judge may approve, rather than identifying the classified information, when the government has not previously made the information available to the accused in connection with pretrial proceedings. Following briefing and argument by the parties in the in camera proceeding, the military judge shall determine whether the information may be disclosed at the court-martial proceeding. When the government's motion under subsection (e)(5) is filed prior to the proceeding at which disclosure is sought, the military judge shall rule prior to the commencement of the relevant proceeding.

ii) Standard. Classified information is not subject to disclosure under this subsection (e) unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence. In presentencing proceedings, relevant and material classified information pertaining to the appropriateness of, or the appropriate degree of, punishment shall be admitted only if no unclassified version of that information is available.

iii) Ruling. Unless the military judge makes a written determination that the information meets the standard set forth in subsection (e)(9)(D)(ii), the information may not be disclosed or otherwise elicited at a court-martial proceeding. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

iv) Alternatives to Full Disclosure. If the military judge makes a determination under this subsection (e)(9) that would permit disclosure of the information, or if the government elects not to contest the relevance, necessity and admissibility of any classified information, the government

may proffer a statement admitting, for purposes of the proceeding, any relevant facts the information would tend to prove. The government may submit a portion of summary to be used in lieu of the information. The military judge shall order that the statement, portion or summary be used by the accused in place of the classified information unless the military judge finds that use of the classified information itself is necessary to afford the accused a fair trial.

v) Sanctions. If the military judge determines that alternatives to full disclosure may not be used and the government continues to object to disclosure of the information, the military judge shall issue any order that the interests of justice require, including an order:

- striking or precluding all or part of the testimony of a witness;
- declaring a mistrial;
- finding against the government on any issue as to which the evidence is relevant and material to the defense;
- dismissing the charges, with or without prejudice; or
- dismissing the charges or specifications, or both, to which the information relates.

vi) Any such order shall permit the government to avoid the sanction for nondisclosure by permitting the accused to disclose the information at the pertinent court-martial proceeding.

10) Introduction of Classified Information

A) Classification Status. Writing, recordings and photographs containing classified information may be admitted into evidence without change in their classification status.

B) Precautions by the Military Judge. In order to prevent unnecessary disclosure of classified information, the military judge may order admission into evidence of:

i) only part of a writing, recording or photograph; or

ii) the whole writing, recording or photograph with excision of some or all of the classified information.

C) Contents of Writing, Recording or Photograph. The military judge may permit proof of the contents of a writing, recording or photograph that contains classified information without requiring introduction into evidence of the original or a duplicate.

D) Taking of Testimony. During the examination of a witness, the government (i.e., the prosecution) may object to any question or line of inquiry that may require the witness to disclose classified information not previously found to be relevant and necessary to the defense. Following such an objection, the military judge shall take suitable action to determine whether the response is admissible, considering whether the action will safeguard against the compromise of any classified information. The action may include requiring:

i) the government to provide the military judge with a proffer or the witness' response to the question or line of inquiry; and

ii) the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

E) Closed Session. The military judge may exclude the public during that portion of the presentation of evidence that discloses classified information.

F) Record of Trial. The record of trial with respect to any classified matter will be prepared in accordance with Code Section 54 and RCM 1103(h) and 1104(b)(1)(D).

11) Security Procedures to Safeguard Against Compromise of Classified Information Disclosed to Courts-Martial. The Secretary of Defense may prescribe security procedures for protection against the compromise of classified information submitted to courts-martial and appellate authorities. (Il. Mil. R. Evid. 505)

f) Government Information Other Than Classified Information

1) General Rule of Privilege. Except when disclosure is required by law, government information is privileged from disclosure if disclosure would be detrimental to the public interest.

2) Scope. "Government information" includes official communication and documents and other information within the custody or control of the government. This subsection (f) does not apply to classified information, which is addressed in subsection (e), or to the identity of an informant, which is addressed in subsection (g).

3) Who May Claim the Privilege. The privilege may be claimed by the head of the executive or military department or government agency concerned. The privilege for records and information of the Inspector General may be claimed by the immediate superior of the inspector general officer responsible for creation of the records or information, the Inspector General, or any other superior authority. A person who may claim the privilege may authorize a witness or the trial counsel to claim the privilege on his or her behalf. The authority of a witness or the trial counsel to do so is presumed in the absence of evidence to the contrary.

4) Action Prior to Referral of Charges. Prior to referral of charges, the government shall respond in writing to a request for government information if the privilege in this subsection (f) is claimed for that information. The government shall:

A) delete specified items of government information claimed to be privileged from documents made available to the accused;

B) substitute a portion or summary of the information for those documents;

C) substitute a statement admitting relevant facts that government information would tend to prove;

D) provide the document subject to conditions similar to those set forth in subsection (f)(7); or

E) withhold disclosure if actions under (f)(4)(A) through (D) cannot be taken without causing identifiable damage to the public interest.

5) Pretrial Session. At any time after referral of charges and prior to arraignment, any party may move for a session under Code Section 39(a) to consider matters relating to government information that may arise in connection with the trial. Following that motion, or sua sponte, the military judge promptly shall hold a pretrial session under Code Section 39(a) to establish the timing of requests for discovery, the provision of notice under subsection (f)(8), and the initiation of the procedure under subsection (f)(9). In addition, the military judge may consider any other matters that relate to government information or that may promote a fair and expeditious trial.

6) Action After Motion for Disclosure of Information. After referral of charges, if the defense moves for disclosure of government information for which a claim of privilege has been made under this subsection (f), the matter shall be reported to the convening authority. The convening authority may:

A) institute action to obtain the information for use by the military judge in making a determination under subsection (f)(9);

B) dismiss the charges;

C) dismiss the charges or specifications, or both, to which the information relates; or

D) take other action as may be required in the interests of justice. If, after a reasonable period of time, the information is not provided to the military judge, the military judge shall dismiss the charges or specifications or both to which the information relates.

7) Disclosure of Government Information to the Accused. If the government agrees to disclose government information to the accused subsequent to a claim of privilege under this subsection (f), the military judge, at the request of the government, shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused. The terms of any such protective order may include provisions:

A) Prohibiting the disclosure of the information, except as authorized by the military judge;

B) Requiring storage of the material in a manner appropriate for the nature of the material to be disclosed, upon reasonable notice;

C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;

D) Requiring the maintenance of logs recording access by persons authorized by the military judge to have access to the government information in connection with the preparation of the defense;

E) Regulating the making and handling of notes taken from material containing government information; or

F) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

8) Prohibition Against Disclosure. The accused may not disclose any information known or believed to be subject to a claim of privilege under this subsection (f) unless the military judge authorizes that disclosure.

9) In Camera Proceedings in Cases Involving Nonclassified Government Information

A) Definition. For the purpose of this subsection (f)(8), an "in camera proceeding" is a session under Code Section 39(a) from which the public is excluded.

B) Motion for In Camera Proceeding. Within the time specified by the military judge for the filing of a motion under this subsection (f)(9), the government may move for an in camera proceeding concerning the use at any proceeding of any government information that may be subject to a claim of privilege. Thereafter, either prior to or during trial, the military judge, for good cause shown, or otherwise upon a claim of privilege, may grant the government leave to move for an in camera proceeding concerning the use of additional government information.

C) Demonstration of Damage to the Public Interest. In order to obtain an in camera proceeding under this subsection (f)(9), the government shall demonstrate, through the submission of affidavits and information for examination only by the military judge, that disclosure of the information reasonably could be expected to cause identifiable damage to the public interest.

D) In Camera Proceedings

i) Finding of Identifiable Damage. Upon finding that the disclosure of some or all of the information submitted by the government under subsection (f)(9)(C) reasonably could be expected to cause identifiable damage to the public interest, the military judge shall conduct an in camera proceeding.

ii) Disclosure of the Information to the Defense. Subject to subsection (f)(9)(D)(vi), the government shall disclose government information for which a claim of privilege has been made to the accused, for the limited purpose of litigating in camera the admissibility of the information at trial. The military judge shall enter an appropriate protective order to the accused and all other appropriate trial participants concerning the disclosure of the information according to subsection (f)(7). The accused

shall not disclose any information provided under this subsection (f)(9)(D)(ii) unless, and until, that information has been admitted into evidence by the military judge. In the in camera proceeding, both parties shall have the opportunity to brief and argue the admissibility of the government information at trial.

iii) Standard. Government information is subject to disclosure at the court-martial proceeding under this subsection (f)(9)(D)(iii) if the party making the request demonstrates a specific need for information containing evidence that is relevant to the guilt or innocence or to punishment of the accused and is otherwise admissible in the court-martial proceeding.

iv) Ruling. No information may be disclosed at the court-martial proceeding or otherwise unless the military judge makes a written determination that the information is subject to disclosure under the standard set forth in subsection (f)(9)(D)(iii). The military judge will specify in writing any information that he or she determines is subject to disclosure. The record of the in camera proceeding shall be sealed and attached to the record of trial as an appellate exhibit. The accused may seek reconsideration of the determination prior to or during trial.

v) Alternatives to Full Disclosure. If the military judge makes a determination under this subsection (f)(9) that the information is subject to disclosure, or if the government elects not to contest the relevance, necessity and admissibility of the government information, the government may proffer a statement admitting, for purposes of the court-martial, any relevant facts the information would tend to prove. The government may submit a portion or summary to be used in lieu of the information. The military judge shall order that the statement, portion or summary, or some other form of information the military judge finds to be consistent with the interests of justice, be used by the accused in place of

the government information unless the military judge finds that use of the government information itself is necessary to afford the accused a fair trial.

vi) Sanctions. Government information may not be disclosed over the government's objection. If the government continues to object to disclosure of the information following rulings by the military judge, the military judge shall issue any order that the interests of justice require, including an order:

- striking or precluding all or part of the testimony of a witness;
- declaring a mistrial;
- finding against the government on any issue as to which the evidence is relevant and necessary to the defense;
- dismissing the charges, with or without prejudice; or
- dismissing the charges or specifications, or both, to which the information relates.

10) Appeals of Orders and Rulings. In a court-martial in which a punitive discharge may be adjudged, the government may appeal an order or ruling of the military judge that terminates the proceedings with respect to a charge or specification, directs the disclosure of government information, or imposes sanctions for nondisclosure of government information. The government may also appeal an order or ruling in which the military judge refuses to issue a protective order sought by the State to prevent the disclosure of government information, or to enforce such an order previously issued by appropriate authority. The government may not appeal an order or ruling that is, or amounts to, a finding of not guilty with respect to the charge or specification.

11) Introduction of Government Information Subject to a Claim of Privilege

A) Precautions by Military Judge. In order to prevent unnecessary disclosure of government information after there has been a claim of privilege under this subsection (f), the military judge may order admission into evidence of:

i) only part of a writing, recording or photograph; or

ii) the whole writing, recording or photograph with excision of some or all of the government information.

B) Contents of Writing, Recording or Photograph. The military judge may permit proof of the contents of a writing, recording or photograph that contains government information that is the subject of a claim of privilege under this subsection (f) without requiring introduction into evidence of the original or a duplicate.

C) Taking of Testimony. During examination of a witness, the prosecution may object to any question or line of inquiry that may require the witness to disclose government information not previously found relevant and necessary to the defense if that information has been or is reasonably likely to be the subject of a claim of privilege under this subsection (f). Following such an objection, the military judge shall take suitable action to determine if the response is admissible, considering whether the action will safeguard against the compromise of any government information. The action may include requiring:

i) the government to provide the military judge with a proffer of the witness' response to the question or line of inquiry; and

ii) the accused to provide the military judge with a proffer of the nature of the information the accused seeks to elicit.

12) Procedures to Safeguard Against Compromise of Government Information Disclosed to Courts-Martial. The Secretary of Defense or the Adjutant General may prescribe procedures for protection against the compromise

of government information submitted to courts-martial and appellate authorities after a claim of privilege. (Il. Mil. R. Evid. 506)

g) Identity of Informants

1) Rule of Privilege. The United States or a State or subdivision thereof has a privilege to refuse to disclose the identity of an informant. An "informant" is a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a person whose official duties include the discovery, investigation or prosecution of crime. Unless otherwise privileged under this Section, the communications of an informant are not privileged except to the extent necessary to prevent the disclosure of the informant's identity.

2) Who May Claim the Privilege. The privilege may be claimed by an appropriate representative of the United States, regardless of whether information was furnished to an officer of the United States or a State or subdivision thereof. The privilege may be claimed by an appropriate representative of a State or subdivision if the information was furnished to an officer thereof, except the privilege shall not be allowed if the prosecution objects.

3) Exceptions

A) Voluntary Disclosures; Informant as Witness. No privilege exists under this subsection (g):

i) if the identity of the informant has been disclosed to those who would have cause to resent the communication by a holder of the privilege or by the informant's own action; or

ii) if the informant appears as a witness for the prosecution.

B) Testimony on the Issue of Guilt or Innocence. If a claim of privilege has been made under this subsection (g), the military judge shall, upon motion by the accused, determine whether disclosure of the identity of the informant is necessary to the accused's defense on the issue of guilt or innocence. Whether such a necessity exists will depend on the particular circumstances of

each case, taking into consideration the offense charged, the possible defense, the possible significance of the informant's testimony, and other relevant factors. If it appears from the evidence in the case or from another showing by a party that an informant may be able to give testimony necessary to the accused's defense on the issue of guilt or innocence, the military judge may make any order required by the interests of justice.

C) Legality of Obtaining Evidence. If a claim of privilege has been made under this subsection (g) with respect to a motion under Section 400.635, the military judge shall, upon motion of the accused, determine whether disclosure of the identity of the informant is required by the U.S. Constitution as applied to members of the armed forces. In making this determination, the military judge may make any order required by the interests of justice.

4) Procedures. If a claim of privilege has been made under this subsection (g), the military judge may make any order required by the interests of justice. If the military judge determines that disclosure of the identity of the informant is required under the standards set forth in this subsection (g), and the prosecution elects not to disclose the identity of the informant, the matter shall be reported to the convening authority. The convening authority may institute action to secure disclosure of the identity of the informant, terminate the proceedings, or take such other action as may be appropriate under the circumstances. If, after a reasonable period of time, disclosure is not made, the military judge, sua sponte or upon motion of either counsel and after a hearing, if requested by either party, may dismiss the charge or specifications, or both, to which the information regarding the informant would relate if the military judge determines that further proceedings would materially prejudice a substantial right of the accused. (Il. Mil. R. Evid. 507)

h) Political Vote. A person has a privilege to refuse to disclose the tenor of the person's vote at a political election conducted by secret ballot unless the vote was cast illegally. (Il. Mil. R. Evid. 508)

i) Deliberations of Courts and Juries. Except as provided in Section 400.705(f), the deliberations of courts, courts-martial, military judges, and grand and petit juries

are privileged to the extent that the deliberations are privileged, but the results of the deliberations are not privileged. (Il. Mil. R. Evid. 509)

j) Waiver of Privilege by Voluntary Disclosure

1) A person upon whom this Section confers a privilege against disclosure of a confidential matter or communication waives the privilege if the person or the person's predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the matter or communication under such circumstances that it would be inappropriate to allow the claim of privilege. This subsection (j)(1) does not apply if the disclosure is itself a privileged communication.

2) Unless testifying voluntarily concerning a privileged matter or communication, an accused who testifies in his or her own behalf or a person who testifies under a grant or promise of immunity does not, merely by reason of testifying, waive a privilege to which he or she may be entitled pertaining to the confidential matter or communication. (Il. Mil. R. Evid. 510)

k) Disclosure Under Compulsion or Without Opportunity to Claim Privilege

1) Evidence of a statement or other disclosure of privileged matter is not admissible against the holder of the privilege if disclosure was compelled erroneously or was made without an opportunity for the holder of the privilege to claim the privilege.

2) The telephonic transmission of information otherwise privileged under this Section does not affect its privileged character. Use of electronic means of communication other than the telephone for transmission of information otherwise privileged under this Section does not affect the privileged character of that information if use of electronic means of communication is necessary and in furtherance of the communication. (Il. Mil. R. Evid. 511)

l) Comment Upon or Inference from Claim of Privilege; Instruction

1) The claim of a privilege by the accused, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by the

military judge or counsel for any party. No inference may be drawn from that claim of privilege.

2) The claim of a privilege by a person other than the accused, whether in the present proceeding or upon a prior occasion, normally is not a proper subject of comment by the military judge or counsel for any party. An adverse inference may not be drawn from that claim of privilege except when determined by the military judge to be required by the interests of justice.

3) In a trial before a court-martial with members, proceedings must be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the members. This subsection (l)(3) does not apply to a special court-martial without a military judge.

4) Upon request, any party against whom the members might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn from the claim except as provided in subsection (l)(2). (Il. Mil. R. Evid. 512)

m) Psychotherapist and Patient Privilege

1) Definitions. For purposes of this subsection (m):

A) "Assistant to a Psychotherapist" or "Assistant" means a person directed by or assigned to assist a psychotherapist in providing professional services, or who is reasonably believed by the patient to be an assistant to a psychotherapist.

B) "Confidential Communication" or " Communication" not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional services to the patient or those reasonably necessary for transmission of the communication.

C) "Evidence of a Patient's Records or Communications" means testimony of a psychotherapist or assistant psychotherapist, or patient records, that pertain to communications by a patient to a

psychotherapist or assistant to a psychotherapist for the purposes of diagnosis or treatment of the patient's mental or emotional condition.

D) "Patient" means a person who consults with or is examined or interviewed by a psychotherapist for purposes of advice, diagnosis or treatment of a mental or emotional condition.

E) "Psychotherapist" means a psychiatrist, clinical psychologist or clinical social worker who is licensed in any state, territory, possession, the District of Columbia or Puerto Rico to perform professional services as such, or who holds credentials to provide these services from any military health care facility, or is a person reasonably believed by the patient to have the appropriate license or credentials.

2) General Rule of Privilege. A patient has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication made between the patient and a psychotherapist or assistant, in a case arising under the UCMJ, if the communication was made for the purpose of facilitating diagnosis or treatment of the patient's mental or emotional condition.

3) Who May Claim the Privilege. The privilege may be claimed by the patient or the guardian or conservator of the patient. A person who may claim the privilege may authorize trial counsel or defense counsel to claim the privilege on his or her behalf. The psychotherapist or assistant who received the communication may claim the privilege on behalf of the patient. The authority of such a psychotherapist, assistant, guardian, or conservator to so assert the privilege is presumed in the absence of evidence to the contrary.

4) Exceptions. There is no privilege under this subsection (m):

A) when the patient is dead;

B) when the communication is evidence of child abuse or neglect, or in a proceeding in which one spouse is charged with a crime against a child of either spouse;

C) when federal law, State law, or service regulation imposes a duty to report information contained in a communication;

D) when a psychotherapist or assistant believes that a patient's mental or emotional condition makes the patient a danger to any person, including the patient;

E) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the psychotherapist are sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud;

F) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information or the accomplishment of a military mission;

G) when an accused offers statements or other evidence concerning his or her mental condition in defense, extenuation or mitigation, under circumstances not covered by Section 400.615. In these situations, the military judge may, upon motion, order disclosure of any statement made by the accused to a psychotherapist as may be necessary in the interests of justice; or

H) when admission or disclosure of a communication is constitutionally required.

5) Procedure to Determine Admissibility of Patient Records or Communications

A) In any case in which the production or admission of records or communications of a patient other than the accused is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

i) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the

military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

ii) serve the motion on the opposing party and the military judge and, if practical, notify the patient or the patient's guardian, conservator or representative that the motion has been filed and that the patient has an opportunity to be heard as set forth in subsection (m)(5)(B).

B) Before ordering the production or admission of evidence of a patient's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the patient, and offer other relevant evidence. The patient shall be afforded a reasonable opportunity to attend the hearing and be heard at the patient's own expense unless the patient has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

C) The military judge shall examine the evidence or a proffer of evidence in camera, if that examination is necessary to rule on the motion.

D) To prevent unnecessary disclosure of evidence of a patient's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

E) The motion, related papers, and record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise. (Il. Mil. R. Evid. 513)

n) Victim Advocate and Safe Helpline Privilege

1) Definitions. As used in this subsection (n):

A) "Assistant to a Victim Advocate" or "Assistant" means a person directed by or assigned to assist a victim advocate in providing victim and victim advocate services or who is reasonably believed by the victim to be an Assistant to a victim advocate.

B) "Confidential Communication" or "Communication" means a communication made to a victim advocate acting in the capacity of a victim advocate that is not intended to be disclosed to third persons other than:

i) those to whom disclosure is made in furtherance of the rendition of advice or assistance to the victim; or

ii) an assistant to a victim advocate reasonably necessary for transmission of the communication.

C) "Evidence of a Victim's Records or Communications" means testimony of a victim advocate, or record that pertains to communications by a victim to a victim advocate, for the purposes of advising or providing supportive assistance to the victim.

D) "Victim" means any person who suffered direct physical or emotional harm as the result of a sexual or violent offense.

E) "Victim Advocate" means a person who is:

i) designated in writing as a victim advocate;

ii) authorized to perform victim advocate duties in accordance with service regulations, and acting in the performance of those duties; or

iii) certified as a victim advocate pursuant to federal or State requirements.

2) General Rule of Privilege. A victim has a privilege to refuse to disclose, and to prevent any other person from disclosing, a confidential communication between the victim and a victim advocate, in a case arising

under the UCMJ, if that communication was made for the purpose of facilitating advice or supportive assistance to the victim.

3) Who May Claim the Privilege. The privilege may be claimed by the victim or any guardian or conservator of the victim. A person who may claim the privilege may authorize trial counsel or a defense counsel representing the victim to claim the privilege on his or her behalf. The victim advocate who received the communication may claim the privilege on behalf of the victim. The authority of the a victim advocate, guardian or conservator, or a defense counsel representing the victim, to so assert the privilege is presumed in the absence of evidence to the contrary.

4) Exceptions. There is no privilege under this subsection (n):

A) when the victim is dead;

B) when federal law, State law or service regulation imposes a duty to report information contained in a communication;

C) if the communication clearly contemplated the future commission of a fraud or crime or if the services of the victim advocate are sought or obtained to enable or aid anyone to commit or plan to commit what the victim knew or reasonably should have known to be a crime or fraud;

D) when necessary to ensure the safety and security of military personnel, military dependents, military property, classified information or completion of a mission;

E) when necessary to ensure the safety of any other person (including the victim) when a victim advocate believes that a victim's mental or emotional condition makes the victim a danger; or

F) when admission or disclosure of a communication is constitutionally required.

5) Procedure to Determine Admissibility of Victim Records or Communications

A) In any case in which the production or admission of records or communications of a victim is a matter in dispute, a party may seek an interlocutory ruling by the military judge. In order to obtain such a ruling, the party shall:

i) file a written motion at least 5 days prior to entry of pleas specifically describing the evidence and stating the purpose for which it is sought or offered, or objected to, unless the military judge, for good cause shown, requires a different time for filing or permits filing during trial; and

ii) serve the motion on the opposing party and the military judge and, if practical, notify the victim or the victim's guardian, conservator or representative that the motion has been filed and that the victim has an opportunity to be heard as set forth in subsection (n)(5)(B).

B) Before ordering the production or admission of evidence of a victim's records or communication, the military judge shall conduct a hearing. Upon the motion of counsel for either party and upon good cause shown, the military judge may order the hearing closed. At the hearing, the parties may call witnesses, including the victim, and offer other relevant evidence. The victim shall be afforded a reasonable opportunity to attend the hearing and be heard at the victim's own expense unless the victim has been otherwise subpoenaed or ordered to appear at the hearing. However, the proceedings shall not be unduly delayed for this purpose. In a case before a court-martial composed of a military judge and members, the military judge shall conduct the hearing outside the presence of the members.

C) The military judge shall examine the evidence or a proffer thereof in camera, if that examination is necessary to rule on the motion.

D) To prevent unnecessary disclosure of evidence of a victim's records or communications, the military judge may issue protective orders or may admit only portions of the evidence.

E) The motion, related papers, and record of the hearing shall be sealed and shall remain under seal unless the military judge or an appellate court orders otherwise. (Il. Mil. R. Evid. 514)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.705 Witnesses
EMERGENCY

a) Competency to Testify. Every person is competent to be a witness unless this Section provides otherwise. (Il. Mil. R. Evid. 601)

b) Need for Personal Knowledge. A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This subsection (b) is subject to the provisions of Section 400.715(a)(2) relating to the opinion testimony by expert witnesses. (Il. Mil. R. Evid. 602)

c) Oath or Affirmation to Testify Truthfully. Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so. (Il. Mil. R. Evid. 603)

d) Interpreter. An interpreter is subject to the provisions of this Section relating to qualifications as an expert and the administration of an oath or affirmation that the interpreter will make a true translation. (Il. Mil. R. Evid. 604)

e) Military Judge's Competency as a Witness

1) The presiding military judge may not testify as a witness at any proceeding of that court-martial. A party need not object to preserve the issue.

2) This Section does not preclude the military judge from placing on the record matters concerning docketing of the case. (Il. Mil. R. Evid. 605)

f) Member's Competency as a Witness

1) A member of a court-martial may not testify as a witness before the other members at any proceeding of that court-martial. If a member is called to testify, the military judge must, except in a special court-martial without a military judge, give the opposing party an opportunity to object outside the presence of the members.

2) During an inquiry into the validity of a finding or sentence, a member of a court-martial may not testify about any statement made or incident that occurred during the deliberations of that court-martial; the effect of anything on that member's or another member's vote; or any member's mental processes concerning the finding or sentence, except that a member may testify on the question of whether extraneous prejudicial information was improperly brought to the attention of the members of the court-martial and whether any outside influence was improperly brought to bear upon any member, or whether there was unlawful command influence. The military judge may not receive a member's affidavit or evidence of a member's statement on these matters.

3) Exception. A member may testify about whether:

A) extraneous prejudicial information was improperly brought to the member's attention;

B) unlawful command influence or any other outside influence was improperly brought to bear on any member; or

C) a mistake was made in entering the finding or sentence on the finding or sentence forms. (Il. Mil. R. Evid. 606)

g) Who May Impeach a Witness. The credibility of a witness may be attacked by any party, including the party calling the witness, except that the credibility of a witness may be attacked by the party calling the witness by means of a prior inconsistent statement only upon showing of an affirmative damage. This subsection (g) does not apply to statements admitted pursuant to Section 400.720(a)(2), (a)(3) or (c). (Il. Mil. R. Evid. 607)

h) A Witness's Character for Truthfulness or Untruthfulness

1) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to these limitations:

A) the evidence may refer only to character for truthfulness or untruthfulness; and

B) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

2) Specific Instances of Conduct

A) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in Section 400.705(i), may not be proved by extrinsic evidence.

B) They may, however, in the discretion of the military judge, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness:

i) concerning character of the witness for truthfulness or untruthfulness; or

ii) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

C) The giving of testimony, whether by an accused or by another witness, does not operate as a waiver of the privilege against self-incrimination when examined with respect to matters that relate only to character for truthfulness.

3) Evidence of Bias. Bias, prejudice or any motive to misrepresent may be shown to impeach the witness either by examination of the witness or by evidence otherwise adduced. (Il. Mil. R. Evid. 608)

i) Impeachment by Evidence of a Criminal Conviction

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

1) General Rule

A) For the purposes of attacking the credibility of a witness, evidence that the witness has been convicted of a crime, except on a plea of nolo contendere, is admissible but only if the crime:

i) was punishable by death, dishonorable discharge or imprisonment in excess of one year under the law under which the witness was convicted; or

ii) involved dishonesty or false statement regardless of the punishment.

B) In either instance described in subsection (i)(1)(A), the court shall determines whether the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice.

2) Time limit. Evidence of a conviction under this Manual is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from confinement, whichever is later.

3) Effect of Pardon, Annulment or Certificate of Rehabilitation. Evidence of a conviction is not admissible under this subsection (i) if:

A) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure; and

B) the procedure under which the procedure listed in subsection (i)(3)(A) was granted or issued required a substantial showing of rehabilitation or was based on innocence.

4) Juvenile Adjudications. Evidence of juvenile adjudications is generally not admissible under this subsection (i). The military judge may, however, allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult, and the military judge is satisfied that admission in

evidence is necessary for a fair determination of the issue of guilt or innocence.

5) Pendency of Appeal. The pendency of an appeal from the underlying criminal conviction does not render evidence of that conviction inadmissible. Evidence of the pendency of an appeal is admissible. (Il. Mil. R. Evid. 609)

j) Religious Beliefs or Opinions. Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that, by reason of his or her nature, the witness' credibility is impaired or enhanced. (Il. Mil. R. Evid. 610)

k) Mode and Order of Examining Witnesses and Presenting Evidence

1) Control by the Military Judge. The military judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

A) make the interrogation and presentation effective for the ascertainment of the truth;

B) avoid needless consumption of time; and

C) protect witnesses from harassment or undue embarrassment.

2) Scope of Cross-Examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The military judge may, in the exercise of his or her discretion, permit inquiry into additional matters as if on direct examination.

3) Leading Questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the testimony of the witness. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness or an unwilling witness or an adverse party or an agent of an adverse party, as defined by Section 2-1102 of the Code of Civil Procedure, interrogation may be by leading questions.

4) Remote Live Testimony of a Child

A) In a case involving abuse of a child or domestic violence, the military judge shall, subject to the requirements of subsection (k)(4)(C), allow a child victim or witness to testify from an area outside the courtroom.

B) Definitions. For purposes of this subsection (k)(4):

i) "Child" means a person who is under the age of 16 at the time of his or her testimony;

ii) "Abuse of a Child" means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child;

iii) "Exploitation" means child pornography or child prostitution;

iv) "Negligent Treatment" means the failure to provide, for reasons other than poverty, adequate food, clothing, shelter or medical care, so as to endanger seriously the physical health of the child;

v) "Domestic Violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against a person and is committed by:

- a current or former spouse, parent or guardian of the victim;
- a person with whom the victim shares a child in common;
- a person who is cohabiting with or has cohabited with the victim as a spouse, parent or guardian; or
- a person similarly situated to a spouse, parent or guardian.

C) Remote live testimony will be used only when the military judge makes a finding on the record that a child is unable to testify in open court in the presence of the accused, for any of the following reasons:

i) The child is unable to testify because of fear;

ii) There is substantial likelihood, established by expert testimony, that the child would suffer emotional trauma from testifying;

iii) The child suffers from a mental or other infirmity; or

iv) Conduct by an accused or defense counsel causes the child to be unable to continue testifying.

D) Remote live testimony of a child shall not be utilized when the accused elects to absent himself or herself from the court room. (Il. Mil. R. Evid. 612)

l) Writing Used to Refresh a Witness' Memory

1) If a witness uses a writing to refresh his or her memory for the purpose of testifying, either while testifying or before testifying, if the military judge determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness on that writing, and to introduce in evidence for the purpose of impeachment those portions that relate to the testimony of the witness.

2) If it is claimed that the writing contains privileged information or matters not related to the subject matter of the testimony, the military judge shall examine the writing in camera, excise any privileged information or unrelated portions, and order delivery of the remainder to the entitled party. Any portion withheld over objections shall be attached to the record of trial as an appellate exhibit.

3) If a writing is not produced or delivered pursuant to order under this subsection (l), the military judge shall make any order justice requires, except that, when the prosecution elects not to comply, the order shall:

A) strike the testimony; or

B) if, in his or her discretion, the military judge determines that the interests of justice so require, declare a mistrial.

4) This subsection (l) does not preclude disclosure of information required to be disclosed under other provisions of this Manual. (Il. Mil. R. Evid. 612)

m) Witness' Prior Statement

1) Examining Witness Concerning Prior Statement. In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel.

2) Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is first afforded an opportunity to explain or deny the statement and the opposite party is afforded an opportunity to interrogate the witness on the statement, or the interests of justice otherwise require. This provision does not apply to admissions in Section 400.720(a)(2)(B).

n) Calling and Interrogation of Witnesses by the Court-Martial

1) Calling by the Court-Martial. The military judge may, sua sponte, or at the request of the members or the suggestion of a party, call witnesses. All parties are entitled to cross-examine those witnesses. The military judge shall determine whether it is appropriate to recall a witness under this Manual.

2) Interrogation by the Court-Martial. The military judge or members may interrogate witnesses, whether called by the military judge, the members or a party. Members shall submit their questions to the military judge in writing so that a ruling may be made on the propriety of the questions or

the course of questioning and so that questions may be asked on behalf of the court by the military judge in a form acceptable to the military judge. When a witness who has not testified previously is called by the military judge or the members, the military judge may conduct the direct examination or may assign the responsibility to counsel for any party.

3) Objections. Objections to calling of witnesses by the military judge or the members or to the interrogation by the military judge or the members may be made at the time, or at the next available opportunity when the members are not present. (Il. Mil. R. Evid. 614)

o) Excluding Witnesses
At the request of the prosecution or defense, the military judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and the military judge may make the orders sua sponte. This subsection (o) does not authorize exclusion of:

1) the accused;

2) a member of an armed service or an employee of the United States or of the State of Illinois designated as a representative of the United States or of the State of Illinois by the trial counsel;

3) a person whose presence is shown by a party to be essential to the presentation of the party's case;

4) a person authorized by statute to be present at courts-martial; or

5) any victim of an offense from the trial of an accused for that offense because that victim may testify or present any information in relation to the sentence or that offense during the presentencing proceedings. (Il. Mil. R. Evid. 615)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.710 Opinion Testimony by Lay Witnesses
EMERGENCY

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are:

a) rationally based on the perception of the witness;

b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and

c) not based in scientific, technical or other specialized knowledge within the scope of Section 400.715(a). (Il. Mil. R. Evid. 701)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.715 Expert Testimony; Polygraph Examinations
EMERGENCY

a) Expert Witnesses

1) Testimony by Expert Witnesses

A) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise.

B) When an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs. (Il. Mil. R. Evid. 702)

2) Bases of an Expert's Opinion Testimony

A) The facts or date in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.

B) If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. (Il. Mil. R. Evid. 703)

3) Opinion on an Ultimate Issue
Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact. (Il. Mil. R. Evid. 704)

4) Disclosing the Facts or Data Underlying an Expert's Opinion

A) The expert may testify in terms of opinion or inference and give the expert's reason for the opinion or reference without prior disclosure of the underlying facts or data, unless the military judge requires otherwise.

B) The expert may, in any event, be required to disclose the underlying facts or data on cross-examination. (Il. Mil. R. Evid. 705)

5) Court-Appointed Expert Witnesses

A) Appointment and Compensation. The trial counsel, the defense counsel, and the court-martial have equal opportunity to obtain expert witnesses under Code Section 46.

B) Disclosure of Employment. In the exercise of discretion, the military judge may authorize disclosure to the members of the fact that the military judge called an expert witness.

C) Accused's Experts of Own Selection. Nothing in this subsection (a)(5) limits the accused in calling expert witnesses of the accused's own selection and at the accused's own expense. (Il. Mil. R. Evid. 706)

b) Polygraph Examinations

1) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence.

2) Nothing in this subsection (b) is intended to exclude from evidence statements made during a polygraph examination that are otherwise admissible. (Il. Mil. R. Evid. 707)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.720 Hearsay Exclusions
EMERGENCY

a) Definitions. The following definitions apply to this Section:

1) "Declarant" means a person who makes a statement.

2) "Hearsay" means a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. A statement is not hearsay if it is:

A) a prior statement by the witness. In a criminal case, the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is:

i) *inconsistent with* the declarant's *testimony at the trial or hearing, and:*

- *was made under oath at a trial, hearing or* other *proceeding or in a deposition;*

- *narrates, describes or explains an event or condition of which* the declarant *had personal knowledge,* and *the statement is proved to have been written or signed by* the declarant;

- the declarant *acknowledged under oath the making of the statement in his* or her *testimony at the hearing or trial in which the admission into evidence of the prior statement is being* sought; *at* another *trial, hearing or other proceeding; or in a deposition; or*

- *the statement is proved to have been accurately recorded by a tape recorder, videotape recording,* or *any other similar electronic means of sound recording;* or [725 ILCS 5/115-10.1]

ii) *one of identification of a person made after perceiving* the person; or [725 ILCS 5/115-12]

B) an admission by a party-opponent offered against a party and is:

i) the party's own statement in either the party's individual or representative capacity;

ii) a statement of which the party has manifested the party's adoption or belief in its truth;

iii) a statement by a person authorized by the party to make a statement concerning the subject;

iv) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment of the agent or servant, made during the existence of the relationship;

v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy; or

vi) a statement by a person, or a person on behalf of an entity, in privity with the party or jointly interested with the party.

3) "Statement" means:

A) an oral or written assertion; or

B) nonverbal conduct of a person, if it is intended by the person as an assertion. (Il. Mil. R. Evid. 801)

b) Hearsay Rule
Hearsay is not admissible except as provided by this Manual or by any Act of Congress applicable in trials by court-martial or by Illinois Supreme Court Rules. (Il. Mil. R. Evid. 802)

c) Exceptions to Hearsay Regardless of Declarant Availability
The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

1) Illinois has not adopted the federal Present Sense Impression to the hearsay rule (Federal Rules of Evidence 803(1)).

2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

3) A statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including:

A) A statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will; or

B) A statement of declarant's then existing state of mind, emotion, sensation or physical condition to prove the state of mind, emotion, sensation or physical condition of another declarant at the time or at any other time when the state of the other declarant is an issue in the action.

4) Statements for Purposes of Medical Diagnosis or Treatment

A) Statements made for the purpose of medical treatment or medical diagnosis in contemplation of treatment and describing medical

history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the symptoms, pain or sensations insofar as reasonably pertinent to diagnosis or treatment but, subject to Section 400.715(a)(2), not including statements made to a healthcare provider consulted solely for the purpose of preparing for litigation or obtaining testimony for trial; or

B) In prosecution for violation of Sections 11-1.20, 11-1.30, 11-1.40, 11-1.50 and 11-1.60 of the Criminal Code of 2012 or of a violation of an identical or closely-related provision of the criminal law of the state where the offense occurred, and assimilated under Code Section 149, statements made by the victim to medical personnel for purposes of medical diagnoses or treatment, including a description of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source of the symptoms, pain or sensation insofar as reasonably pertinent to diagnosis or treatment.

5) Recorded Recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence, but may not itself be received as an exhibit unless offered by an adverse party.

6) Record of Regularly Conducted Activity

A) A memorandum, report, record or data compilation, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation. This evidence shall be presented by the testimony of the custodian or other qualified witness, or by certification that complies with Section 400.725(b)(2)(K) or any other statute permitting certification in a criminal proceeding in a court of the United

States. This exception from the hearsay rule applies unless the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness. The exception does not, in criminal cases, include medical records.

B) The term "business" as used in this subsection (c)(6) includes the armed forces, a business, institution, association, profession, occupation and calling of every kind, whether or not conducted for profit.

C) The following are admissible under this subsection (c)(6) as a record of a fact or event if made by a person within the scope of the person's official duties and those duties included a duty to know or to ascertain through appropriate and trustworthy channels of information the truth of the fact or event and to record that fact or event:

i) enlistment papers;

ii) physical examination papers;

iii) outline figure and fingerprint cards;

iv) forensic laboratory reports;

v) chain of custody documents;

vi) morning reports and other personnel accountability documents;

vii) service records;

viii) officer and enlisted qualification records;

ix) records of court-martial convictions;

x) logs;

xi) unit personnel diaries;

xii) individual equipment records;

xiii) guard reports;

xiv) daily strength records of prisoners; and

xv) rosters of prisoners.

7) Absence of Entry in Records Kept in Accordance with the Provisions of subsection (c)(6). Evidence that a matter is not included in the memoranda reports, records or data compilations, in any form, kept in accordance with the provisions of subsection (c)(6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.

8) Public Records and Reports

A) Records, reports, statements or data compilations in any form, of public offices or agencies, setting forth:

i) the activities of the office or agency;

ii) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, police accident reports and, in criminal cases, medical records and matters observed by police officers and other law enforcement personnel; or

iii) against the government, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

B) Notwithstanding subsection (c)(8)(A)(ii), the following are admissible under this Section as a record of a fact or event if made by a person within the scope of the person's official duties and

those duties include a duty to know or ascertain through appropriate and trustworthy channels of information that truth of the fact or event and to record that fact or event:

i) enlistment papers;

ii) physical examination papers;

iii) outline figure and finger print cards;

iv) forensic laboratory reports;

v) chain of custody documents;

vi) morning reports and other personnel accountability documents;

vii) service records;

viii) officer and enlisted qualification records;

ix) records of court-martial convictions;

x) logs;

xi) unit personnel diaries;

xii) individual equipment records;

xiii) guard reports;

xiv) daily strength records of prisoners; and

xv) rosters of prisoners.

9) Records of Vital Statistics. Facts contained in records or data compilations, in any form, of births, fetal deaths, deaths or marriages, if the report was made to a public office pursuant to requirements of law.

10) Absence of Public Record or Entry. To prove the absence of a record, report, statement or data compilation in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Section 400.725(b) or testimony, that diligent search failed to disclose the record, report, statement, data compilation or entry.

11) Records of Religious Organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage, or other similar facts of personal or family history contained in a regularly kept record of a religious organization.

12) Marriage, Baptismal and Similar Certificates. Statements of fact obtained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a time thereafter.

13) Family Records. Statements of facts concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscription on family portraits, engravings on urns, crypts or tombstones, etc.

14) Records of Documents Affecting an Interest in Property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorizes the recording of documents of the kind in that office.

15) Statements in Documents Affecting an Interest in Property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

16) Statements in Ancient Documents. Statements in a document in existence 20 years or more, the authenticity of which is established.

17) Market Reports; Commercial Publications. Market quotations, tabulations, directories, lists (including government price lists), or other published compilations generally used and relied upon by the public or by persons in particular occupations.

18) Reputation Concerning Personal or Family History

A) Reputation:

i) among members of the person's family by blood, adoption or marriage;

ii) among the person's associates; or

iii) in the community.

B) The reputation investigation shall concern the person's birth, adoption; marriage; divorce; death; legitimacy; relationship by blood; adoption or marriage; ancestry; or other similar fact of the person's personal or family history.

19) Reputation Concerning Boundaries or General History. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which located.

20) Reputation as to Character. Reputation of a person's character among the person's associates or in the community.

21) Judgment of Previous Conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty (but not upon a plea of nolo contendere), adjudging a person guilty of a crime punishable by death, dishonorable discharge, or imprisonment in excess of one year, to prove any fact essential to sustain the judgment, but not including, when offered by the government for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be

shown but does not affect admissibility. In determining whether a crime tried by court-martial was punishable by death, dishonorable discharge, or imprisonment in excess of one year, the maximum punishment prescribed by Code Section 56 at the time of the conviction applies without regard to whether the case was tried by general, special or summary court-martial.

22) Judgment as to Personal, Family or General History or to Boundaries. Judgments as proof of matters of personal, family or general history, or boundaries essential to the judgment, if the same would be provable by evidence of reputation.

23) Receipt or Paid Bill. A receipt of a paid bill as prima facie evidence of the fact of payment and a prima facie evidence that the charge was reasonable. (Il. Mil. R. Evid. 803)

d) Exceptions to Hearsay When the Declarant is Unavailable

1) Definition. *"Unavailability as a Witness" means situations in which* the *declarant*:

A) *is exempted by ruling of the* military judge *on the ground of privilege from testifying concerning the subject matter* of the *declarant's statement*;

B) *persists in refusing to testify concerning the subject matter of the declarant's statement despite an order* of the military judge *to do so;* [725 ILCS 5/113-10.2(c) and 725 ILCS 4/115-10.2a(c)]

C) *testifies to a lack of memory of the subject matter of the declarant's statement;*

D) *is unable to be present or to testify at the hearing because of health or then existing physical or mental illness or infirmity;*

E) *is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance* (or, in the case of a hearsay exception under subsection (d)(3)(B), (C) or (D), the declarant's attendance or testimony *by process or other reasonable means*; or [725 ILCS 5/115-10.2a(c)]

F) is unavailable within the meaning of Code Section 49(d)(2).

2) *A declarant is not unavailable as a witness if the* declarant's *exemption, refusal, claim of lack of memory, inability or absence is due to the procurement or wrongdoing of the proponent of* the *declarant's statement for* the purpose *of preventing the witness from attending or testifying*.

3) Hearsay Exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness.

A) Former Testimony. Testimony given as a witness at another hearing of the same or different proceeding, or in an evidence deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had an opportunity and similar motive to develop the testimony by direct, cross- or redirect examination. A record of testimony given before courts-martial, courts of inquiry, military commissions, or other military tribunals, and before proceedings pursuant to or equivalent to those required by Code Section 32 is admissible under this subsection (d)(3)(A) if that record is a verbatim record. This subsection (d)(3)(A) is subject to the limitations set forth in Code Sections 49 and 50.

B) Statement Under Belief of Impending Death. In a prosecution for homicide or for any offense resulting in the death of the alleged victim, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be the declarant's impending death.

C) Statement Against Interest. A statement that was, at the time of its making, so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the position of the declarant would not have made the statement unless the person believed it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible

unless corroborating circumstances clearly indicate the trustworthiness of the statement.

D) Statement of Personal or Family History

i) A statement concerning the declarant's own: birth; adoption; marriage; divorce; legitimacy; relationship by blood, adoption or marriage; ancestry; or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or

ii) a statement concerning the matters listed in subsection (d)(3)(D)(i), and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

E) Forfeiture by Wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. (Il. Mil. R. Evid. 804)

e) Hearsay Within Hearsay
Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception or exclusion to the hearsay rule. (Il. Mil. R. Evid. 805)

f) Attacking and Supporting the Declarant's Credibility

1) When a hearsay statement, or a statement described in subsections (a)(2)(B)(iii), (iv) or (v), has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness.

2) The military judge may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it.

3) If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination. (Il. Mil. R. Evid 806)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.725 Authenticating Evidence
EMERGENCY

a) Authenticating or Identifying Evidence

1) General. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

2) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this Section:

A) Testimony of Witness with Knowledge. Testimony that a matter is what it is claimed to be.

B) Nonexpert Opinion on Handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

C) Comparison by Trier or Expert Witness. Comparison by the trier of fact or by expert witnesses, with specimens that have been authenticated.

D) Distinctive Characteristics. Appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances.

E) Voice Identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

F) Telephone Conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular persons or business, if:

i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

G) Public Records or Reports. Evidence that a writing authorized by law to be recorded or filed, and in fact recorded or filed in a public office, or a purported public record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept.

H) Ancient Documents or Data Compilation. Evidence that a document or data compilation, in any form:

i) is in such condition as to create no suspicion concerning its authenticity;

ii) was in place where it, if authentic, would likely be; and

iii) has been in existence 20 years or more at the time it is offered.

I) Processor System. Evidence describing a processor system used to produce a result and showing that the process or system produces an accurate result.

J) Methods Provided by Statute or Rule. Any method of authentication or identification provided by statute, Illinois Supreme Court rules, or other applicable rules prescribed pursuant to statutory authority. (Il. Mil. R. Evid. 901)

b) Evidence that Is Self-Authenticating

1) Definitions. Terms used in this subsection (b) have the meanings ascribed in Section 400.730(b).

2) Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for the following:

A) Domestic Public Documents Under Seal. A document bearing a seal, with a signature purporting to be an attestation or execution of that seal, purporting to be that of:

i) the United States;

ii) any state;

iii) any U.S. district, commonwealth, territory or insular possession;

iv) the Panama Canal Zone;

v) the Trust Territory of the Pacific Islands; or

vi) a political subdivision, department, officer or agency of any of these political subdivisions.

B) Domestic Public Documents Not Under Seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity described in subsection (b)(2)(A) having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

C) Foreign Public Documents

i) A document purporting to be executed or attested to in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position of:

- the executing or attesting person; or

- any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution of attestation.

ii) A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown:

- order that those documents be treated as presumptively authentic without final certification; or

- permit them to be evidenced by an attested summary with or without final certification.

D) Certified Copies of Public Records. A copy of an official record or report of entry into those records, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with subsection (b)(2)(A), (B) or (C) or complying with any Act of Congress, rule prescribed

by the Supreme Court pursuant to statutory authority, or an applicable regulation prescribed pursuant to statutory authority.

E) Documents or Records of the United States Accompanied by Attesting Certificates. Documents or records kept under the authority of the United States by any U.S. department, bureau, agency, office or court when attached to or accompanied by an attesting certificate of the custodian of the document or record without further authentication.

F) Official Publications. Books, pamphlets or other publications purporting to be issued by public authority.

G) Newspapers and Periodicals. Printed material purporting to be newspapers or periodicals.

H) Trade Inscriptions, Etc. Inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, content, ingredients or origin.

I) Acknowledged Documents. Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

J) Commercial Paper and Related Documents. Commercial paper, signatures on those papers, and documents relating to those papers, to the extent provided by general commercial law.

K) Presumptions Under Acts of Congress and Regulations. Any signature, document or other matter declared by Act of Congress or by applicable regulation prescribed pursuant to statutory authority to be presumptively, or prima facie, genuine or authentic.

L) Certified Domestic Records of Regularly Conducted Activity The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Section 400.720(c)(6) if accompanied by a written certification of its custodian or other qualified person, in a manner complying with

any Act of Congress or rule prescribed by the Supreme Court pursuant to statutory authority, certifying that the record was:

i) made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of these matters;

ii) kept in the course of the regularly conducted activity; and

iii) made by the regularly conducted activity as a regular practice. The word "certification" as used in this subsection (b)(2)(L) means, with respect to a domestic record, a written declaration under oath subject to the penalty of perjury and, with respect to a record maintained or located in a foreign country, a written declaration signed in a country that, if falsely made, would subject the maker to criminal penalty under the laws of that country. A party intending to offer a record into evidence under this subsection (b)(2)(L) must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. (Il. Mil. R. Evid. 902)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.730 Documentary Evidence
EMERGENCY

a) Subscribing Witnesses' Testimony. The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing. (Il. Mil. R. Evid. 903)

b) Contents of Writings, Recordings and Photographs
For purposes of this Section, the following definitions apply:

1) "Duplicate" means a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques that accurately reproduce the original. (Il. Mil. R. Evid. 1001; see also Il. Mil. R. Evid. 902)

2) "Original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original".

3) "Photographs" means still photographs, X-ray films, video tapes, and motion pictures and similar or other products or processes that produce a recorded image.

4) "Writings" and "Recordings" means letters, words, sounds or numbers, or their equivalent, set down by handwriting, typewriting, printing, photocopying, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. (Il. Mil. R. Evid. 1001)

c) Requirement of the Original
To prove the content of a writing, recording or photograph, the original writing, recording or photograph is required, except as otherwise provided in this Manual, Illinois Statute or Act of Congress. (Il. Mil. R. Evid. 1002)

d) Admissibility of Duplicates
A duplicate is admissible to the same extent as an original unless:

1) a genuine question is raised as to the authenticity of the original; or

2) in the circumstances it would be unfair to admit the duplicate in lieu of the original. (Il. Mil. R. Evid. 1003)

e) Admissibility of Other Evidence of Content
The original is not required, and other evidence of the contents of a writing, recording or photograph is admissible if:

1) Originals Lost or Destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

2) Original Not Obtainable. No original can be obtained by any available judicial process or procedure;

3) Original in Possession of Opponent. At a time when an original was under the control of the party against whom offered, the party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and the party does not produce the original at the hearing; or

4) Collateral Matters. The writing, recording or photograph is not closely related to a controlling issue. (Il. Mil. R. Evid. 1004)

f) Copies of Public Records to Prove Content

1) The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible, may be proved by copy, certified as correct or attested to in accordance with Section 400.725(b) or testified to be correct by a witness who has compared it with the original.

2) If a copy that complies with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be given. (Il. Mil. R. Evid. 1005)

g) Summaries to Prove Content

1) The contents of voluminous writings, recordings or photographs that cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation.

2) The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The military judge may order that they be produced in court. (Il. Mil. R. Evid. 1006)

h) Testimony or Statement of a Party to Prove Content
Contents of writings, recordings or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the nonproduction of the original. (Il. Mil. R. Evid. 1007)

i) Functions of the Military Judge

1) When the admissibility of other evidence of contents of writings, recordings or photographs under this Section depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the military judge to determine in accordance with the provisions of Section 400.600(e).

2) As in the case of other issues of fact, when an issue is raised, the issue for the trier of fact to determine is:

A) whether the asserted writing ever existed;

B) whether another writing, recording or photograph produced at trial is the original; or

C) whether other evidence of contents correctly reflects the contents. (Il. Mil. R. Evid. 1008)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.735 Applicability of This Subpart
EMERGENCY

a) Except as otherwise provided in this Manual, this Subpart applies generally to:

1) all courts-martial, including summary court-martial;

2) Code Section 39 hearings;

3) limited fact-finding proceedings ordered on review;

4) proceedings in revision; and

5) contempt proceedings other than contempt proceedings in which the judge may act summarily.

b) The application of this Subpart may be relaxed in presentencing proceedings. They do not apply to a military judge's preliminary questions of fact governing admissibility, pretrial investigations under Code Section 32, and proceedings for vacation of suspension of a sentence under Code Section 72, search authorizations, pretrial restraint, pretrial confinement, or other pretrial motions hearing.

c) The rules on privilege apply at all stages of a case or proceeding. (Il. Mil. R. Evid. 1101)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

SUBPART G: TRIAL PROCEDURES

Section 400.800 Unlawfully Influencing Action of the Court
EMERGENCY

a) *No authority convening a general, special or summary court-martial, nor any other commanding officer, or officer serving on the staff* of the commanding officer*, may censure, reprimand or admonish the court or any member, the military judge, or counsel* of the court*, with respect to the findings or sentence adjudged by the court or with respect to any other exercise of its or their functions in the conduct of the proceedings. No person subject to* the *Code may attempt to coerce or, by any unauthorized means, influence the action of a court-martial or court of inquiry or any member of these bodies, in reaching the findings or sentence in any case, or the action of any convening, approving or reviewing authority with respect to their judicial acts. This subsection (a) shall not apply with respect to:*

1) *general instructional or informational courses in military justice if those courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of courts-martial; or*

2) *statements and instructions given in open court by the military judge, summary court-martial officer, or counsel.*

b) *In the preparation of an effectiveness, fitness or efficiency report, or any other report or document used in whole or in part for the purpose of determining whether a member of the SMF is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the SMF, or in determining whether a member of the SMF should be retained on active status, no person subject to the Code may, in preparing any such report:*

1) *consider or evaluate the performance of duty of any SMF member as a member of a court-martial or witness in a court-martial; or*

2) *give a less favorable rating or evaluation of any counsel of the accused because of zealous representation before a court-martial*. (Code Section 37)

c) Code Section 37 does not extend to protection from prosecution of crimes such as perjury or false official statement.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.805 Duties of Trial Counsel and Defense Counsel
EMERGENCY

a) Trial Counsel. *The trial counsel of a general or special court-martial shall be a member in good standing of the State bar and shall prosecute in the name of the State of Illinois, and shall, under the direction of the court, prepare the record of the proceedings.*

b) Counsel for the Accused

1) *The accused has the right to be represented in defense before a general or special court-martial or at an investigation under Code Section 32 as provided in this subsection (b).*

2) *The accused may be represented by civilian counsel at the provision and expense of the accused.*

3) *The accused may be represented by:*

A) *military counsel detailed under Code Section 27; or*

B) *military counsel of the accused's own selection if that counsel is reasonably available as determined under subsection (b)(9)*.

4) *If the accused is represented by civilian counsel, military counsel detailed or selected under subsection (b)(3) shall act as associate counsel unless excused at the request of the accused*.

5) *Except as provided under subsection (b)(6), if the accused is represented by military counsel of his or her own selection under* subsection *(b)(3)(B), any military counsel detailed under subsection (b)(3)(A) shall be excused*.

6) *The accused is not entitled to be represented by more than one military counsel.* However, the convening authority, in his or her sole discretion, may:

A) *detail additional military counsel as assistant defense counsel*; and

B) *if the accused is represented by military counsel of the accused's own selection under subsection (b)(3)(B), approve a request from the accused that military counsel detailed under subsection (b)(3)(A) act as associate defense counsel*. (Code Section 38(b)(1) through (6))

7) Under the supervision of the defense counsel, an assistant defense counsel may perform any act or duty that a defense counsel may perform under the Code or this Manual.

8) Defense counsel may be excused only with the express consent of the accused or by the military judge upon application for withdrawal by the defense counsel for good cause shown, unless defense counsel faces immediate ethical or moral dilemma in ongoing representation.

9) *The senior judge advocate of the same* force *of which the accused is a member shall determine whether the military counsel selected by an accused is reasonably available*. (Code Section 38(b)(7))

c) *In any court-martial proceeding resulting in a conviction, the defense counsel may:*

1) *forward for attachment to the record of proceedings a brief of such matters as counsel determines should be considered on behalf of the accused on review, including any objection to the contents of the record that counsel considers appropriate;*

2) *assist the accused in the submission of any matter under* Code Section 60; *and*

3) *take other action authorized by the Code*. (Code Section 38(c))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.810 Sessions
EMERGENCY

a) Call to Session

1) *At any time after the service of charges that have been referred for trial to a court-martial composed of a military judge and members, the military judge may, subject to Code Section 35, call the court into session without the presence of the members for the purpose of:*

A) *hearing and determining motions raising defenses or objections that are capable of determination without trial of the issues raised by a plea of not guilty;*

B) *hearing and ruling upon any matter that may be ruled upon by the military judge under the Code, whether or not the matter is appropriate for later consideration or decision by the members of the court;*

C) *holding the arraignment and receiving the pleas of the accused; and*

D) *performing any other procedural function that does not require the presence of the members of the court under the Code*.

2) *These proceedings shall be conducted in the presence of the accused, the defense counsel, and the trial counsel and shall be made a part of the record. These proceedings may be conducted notwithstanding the number of court members and without regard to Code Section 29*. (Code Section 39(a))

b) Assembly of the Court-Martial. The military judge shall announce verbally, on the record, the court-martial has assembled and shall constitute the court-martial for hearing the case.

c) Proceedings. A court-martial trial conducted under the Code will proceed with respect to findings as provided in RCM 901 through 924.

d) Deliberation and Voting. *When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and the military judge*. (Code Section 39(b))

e) Procedures. The presiding military judge may, in his or her discretion, issue any protocol, procedure or guidance that is reasonably calculated to more efficiently, practically or thoroughly resolve the pending court-martial. Those procedures shall remain in place until post-trial motions have concluded or until the military judge withdraws them, whichever comes first.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.815 Continuances
EMERGENCY

a) The military judge may issue, in writing or by oral order, any continuance as necessary, and may do so without conducting a formal motions hearing so long as all parties are promptly notified.

b) *A military judge may, for reasonable cause, grant a continuance to any party for such time, and as often, as may appear to be just.* (Code Section 40)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.820 Challenges
EMERGENCY

a) Challenges in General

1) *The military judge and members of a general or special court-martial may be challenged by the accused or the trial counsel for cause stated to the court. The military judge or the court shall determine the relevancy and validity of challenges for cause and may not receive a challenge to more than one person at a time. Challenges by the trial counsel shall ordinarily be presented and decided before those by the accused are offered.*

2) *If exercise of a challenge for cause reduces the court below the minimum number of members required by Code Section 16, all parties shall, notwithstanding Code Section 29, either exercise or waive any challenge for cause then apparent against the remaining members of the court before additional members are detailed to the court. However, peremptory challenges shall not be exercised at that time.*

b) Number of Challenges

1) *Each accused and the trial counsel are entitled initially to one peremptory challenge of members of the court. The military judge may not be challenged except for cause.*

2) *If exercise of a peremptory challenge reduces the court below the minimum number of members required by Code Section 16, the parties shall, notwithstanding Code Section 29, either exercise or waive any remaining peremptory challenge, not previously waived, against the*

remaining members of the court before additional members are detailed to the court.

c) *Whenever additional members are detailed to the court, and after any challenges for cause against those additional members are presented and decided, each accused and the trial counsel are entitled to one peremptory challenge against members not previously subject to peremptory challenge*. (Code Section 41)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.825 Oaths
EMERGENCY

a) Oath by Trial Participants. *Before performing their respective duties, military judges, general and special courts-martial members, trial counsel, defense counsel, reporters, and interpreters shall take an oath or affirmation in the presence of the accused to perform their duties faithfully. The form of the oath or affirmation* is prescribed in subsection (f). *The time and place of the taking of the oath or affirmation, the manner of recording the oath or affirmation, and whether the oath or affirmation shall be taken for all cases in which these duties are to be performed or for a particular case, shall be as prescribed in statute or this Manual. These regulations may provide that an oath or affirmation to perform faithfully the duties as a military judge, trial counsel or defense counsel may be taken at any time by any judge advocate or other person certified or designated to be qualified or competent for the duty* (e.g., a court reporter or notary public). *If an oath or affirmation is taken, it need not again be taken at the time the judge advocate or other person is detailed to that duty.*

b) Oath by Witnesses. *Each witness before a court-martial shall be examined under oath or affirmation.* (Code Section 42)

c) Administrators of Oaths. *The following persons may administer oaths for the purposes of military justice:*

1) *All judge advocates.*

2) *All summary courts-martial.*

3) *All adjutants, assistant adjutants acting adjutants, and personnel adjutants.*

4) *The president, military judge and trial counsel for all general and special courts-martial.*

5) *The president and the counsel for the court of any court of inquiry* (see Section 400.1300).

6) *All officers designated to take a deposition.*

7) *All persons detailed to conduct an investigation.*

8) *All other persons designated by U.S. Army regulation 27-55* (notary services) *or by* 10 USC 1041a (authority to act as a notary). (Code Section 136(a) and (b))

d) Prescription of Oaths
Before performing their respective duties, military judges, members of general and special courts-martial, trial counsel, assistant trial counsel, defense counsel, assistant or associate defense counsel, reporters and interpreters shall take an oath to perform their duties faithfully.

1) Oath for Military Judge. When the military judge is not previously sworn, the trial counsel will administer the following oath to the military judge:

"Do you (swear) (affirm) that you will faithfully and impartially perform, according to your conscience and the laws applicable to trial by court-martial, all the duties incumbent upon you as military judge of this court-martial (so help you God)?"

2) Oath for Members. The following oath, as appropriate, will be administered to the members by the trial counsel:

"Do you (swear) (affirm) that you will answer truthfully the questions concerning whether you should serve as a member of this court-martial; that you will faithfully and impartially try, according to the evidence, your conscience, and the laws applicable to trial by court-martial, the case of the accused now before this court; and that you will not disclose or

discover the vote or opinion of any particular member of the court (upon a challenge or) upon the findings or sentence unless required to do so in due course of law (so help you God)?"

3) Oaths for Counsel. When counsel for either side, including any associate or assistant, is not previously sworn, the following oath, as appropriate, will be administered by the military judge:

"Do you (swear) (affirm) that you will faithfully perform all the duties of (trial) (assistant trial) (defense) (associate defense) (assistant defense) counsel in the case now in hearing (so help you God)?"

4) Oath for Reporter. The trial counsel will administer the following oath to every reporter of a court-martial who has not been previously sworn:

"Do you (swear) (affirm) that you will faithfully perform the duties of reporter to this court-martial (so help you God)?"

5) Oath for Interpreter. The trial counsel or the summary court-martial shall administer the following oath to every interpreter in the trial of any case before a court-martial:

"Do you (swear) (affirm) that, in the case now in hearing, you will interpret truly the testimony you are called upon to interpret (so help you God)?"

6) Oath for Witnesses. The trial counsel or the summary court-martial will administer the following oath to each witness before the witness first testifies in a case:

"Do you (swear) (affirm) that the evidence you shall give in the case now in hearing shall be the truth, the whole truth, and nothing but the truth (so help you God)?"

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.830 Statute of Limitations
EMERGENCY

a) *Except as otherwise provided in this* Section*, a person charged with any offense is not liable to be tried by court-martial or punished under Code Section 15 if the offense was committed more than* 3 years *before the receipt of sworn charges and specifications by an officer exercising court-martial jurisdiction over the command or before the imposition of punishment under Code Section 15*.

b) *Periods in which the accused is absent without authority or fleeing from justice shall be excluded in computing the period of limitation prescribed in this Section.*

c) *The following periods shall be excluded in computing the period of limitation prescribed in this Section:*

1) *Periods in which the accused was absent from territory in which the State has the authority to apprehend the accused;*

2) *Periods when the accused was in the custody of civil authorities; or*

3) *Periods when the accused was in the hands of the enemy.*

d) Wartime suspension

1) *When the United States is at war or armed conflict authorized by law, the running of any statute of limitations is suspended for any offense under the Code:*

A) *involving fraud or attempted fraud against the United States, any state, or any agency of either in any manner, whether by conspiracy or not;*

B) *committed in connection with the acquisition, care, handling, custody, control or disposition of any real or personal property of the United States or any state; or*

C) *committed in connection with the negotiation, procurement, award, performance, payment, interim financing, cancellation or other termination or settlement of any contract, subcontract or purchase order that is connected with or related to the prosecution of the*

war, or with any disposition of termination inventory by any war contractor or government agency.

2) *The suspension remains effective until 2 years after the termination of hostilities or armed conflict as proclaimed by the President or by a joint resolution of Congress.* (Code Section 43(a) through (d))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.835 Former Jeopardy
EMERGENCY

a) *No person may, without his or her consent, be tried a second time for the same offense.*

b) *No proceeding in which an accused has been found guilty by a court-martial upon any charge or specification is a trial in the sense of this Section until the finding of guilty has become final after review of the case has been fully completed.*

c) *A proceeding that, after the introduction of evidence but before a finding, is dismissed or terminated by the convening authority or on motion of the prosecution for failure of available evidence or witnesses without any fault of the accused is a trial in the sense of this Section.* (Code Section 44)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.840 Arraignment and Pleas of the Accused
EMERGENCY

a) Arraignment shall be conducted in a court-martial session and shall consist of reading the charges and specifications to the accused and calling on the accused to plead. The accused may waive the reading.

b) Persons subject to the Code are presumed innocent and cannot be found guilty without either:

1) being found guilty at courts-martial; or

2) knowingly and voluntarily entering an open or negotiated plea of guilty.

c) Prior to accepting a plea of guilty, the military judge shall comply with Illinois Supreme Court Rule 402.

d) *If an accused, after arraignment, makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that the accused has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if the accused fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though the accused had pleaded not guilty.* (Code Section 45(a))

e) *With respect to any charge or specification to which a plea of guilty has been made by the accused and accepted by the military judge or by a court-martial without a military judge, a finding of guilty of the charge or specification may be entered immediately without vote. This finding shall constitute the finding of the court unless the plea of guilty is withdrawn prior to announcement of the sentence. In that event, the proceedings shall continue as though the accused had pleaded not guilty.* (Code Section 45(b))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.845 Opportunity to Obtain Witnesses and Other Evidence EMERGENCY

a) Trial counsel shall assist defense counsel and issue subpoenas or other process as reasonably requested by defense counsel. Trial counsel shall not withhold evidence from defense counsel.

b) *The trial counsel, the defense counsel, and the court-martial shall have equal opportunity to obtain witnesses and other evidence as prescribed by regulations and provided by law. Process issued in court-martial cases to compel witnesses to appear and testify and to compel the production of other evidence shall apply the principles of law and the rules of courts-martial generally recognized in military criminal cases in the courts of the armed forces of the United States, but may not be contrary to or inconsistent with the Code. Process shall run to any part of the United States, or the U.S. territories, commonwealths and possessions,*

and may be executed by civil officers as prescribed by the laws of the place where the witness or evidence is located or of the United States. (Code Section 46)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.850 Refusal to Appear or Testify
EMERGENCY

a) The military judge may issue such warrants or body attachments for the arrest of any person refusing to appear pursuant to Code Section 47, in addition to any other relief deemed just and appropriate under Illinois law.

b) *The military court may punish in the same manner as a criminal court of the State any person not subject to the Code who:*

1) *has been duly subpoenaed to appear as a witness or to produce books and records before a court-martial or court of inquiry, or before any military or civil officer designated to take a deposition to be read in evidence before such a court;*

2) *has been duly paid or tendered the fees and mileage of a witness at the rates allowed to witnesses attending a criminal court of the State; and*

3) *willfully neglects or refuses to appear, or refuses to qualify as a witness or to testify or to produce any evidence that person may have been legally subpoenaed to produce.*

c) *The fees and mileage of witnesses shall be advanced or paid* by the State. (Code Section 47)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.855 Contempt
EMERGENCY

a) *A military judge may punish for contempt any person who refuses a court order, is disrespectful to the court, or who uses any menacing word, sign or gesture in its presence, or who disturbs its proceedings by any riot or disorder.*

b) *A person subject to the Code may be punished for contempt by confinement not to exceed 30 days or a fine up to $500, or both.*

c) *A person not subject to the Code may be punished for contempt by a military court in the same manner as a criminal court of the State*. (Code Section 48)

d) Any appeal shall be to the Fourth District of the Illinois Appellate Court.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.860 Depositions
EMERGENCY

a) Trial and defense counsel should be mindful of the accused's constitutional rights and shall not seek deposition except as a last resort when other methods to secure attendance of the witness has failed.

b) *At any time after charges have been signed as provided in Code Section 30, any party may take oral or written depositions unless the military judge hearing the case or, if the case is not being heard, an authority competent to convene a court-martial for the trial of those charges forbids it for good cause*.

c) *The party at whose instance a deposition is to be taken shall give to every other party reasonable written notice of the time and place for taking the deposition*.

d) *Depositions may be taken before and authenticated by any military or civil officer authorized by the laws of the State or by the laws of the place where the deposition is taken to administer oaths*.

e) *A duly authenticated deposition taken upon reasonable notice to the other parties, so far as otherwise admissible under the rules of evidence, may be read in evidence or, in the case of audiotape, videotape, digital image or file, or similar material, may be* admitted *in evidence before any military court if it appears that*:

1) *the witness resides or is beyond the state in which the court is ordered to sit, or beyond 100 miles from the place of trial or hearing;*

2) *the witness, by reason of death, age, sickness, bodily infirmity, imprisonment, military necessity, nonamenability to process, or other reasonable cause, is unable or refuses to appear and testify in person at the place of the trial or hearing; or*

3) *the present whereabouts of the witness is unknown*. (Code Section 49)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.865 Admissibility of Records of Courts of Inquiry
EMERGENCY

a) *In any case not extending to the dismissal of a commissioned officer, the sworn testimony, contained in the duly authenticated record of proceedings of a court of inquiry, of a person whose oral testimony cannot be obtained, may, if otherwise admissible under the rules of evidence, be read in evidence by any party before a court-martial if the accused was a party before the court of inquiry and if the same issue was involved or if the accused consents to the introduction of that evidence.*

b) *The testimony may be read in evidence only by the defense in cases extending to the dismissal of a commissioned officer.*

c) *The testimony may also be read in evidence before a court of inquiry*. (Code Section 50)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.870 Defense of Lack of Mental Responsibility
EMERGENCY

a) *It is an affirmative defense in a trial by court-martial that, at the time of the commission of the acts constituting the offense, the accused, as a result of a severe mental disease or defect, was unable to appreciate the nature and quality*

or the wrongfulness of the acts. Mental disease or defect does not otherwise constitute a defense.

b) *The accused has the burden of proving the defense of lack of mental responsibility by clear and convincing evidence.*

c) *Whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall instruct the members of the court as* to *the defense of lack of mental responsibility under Code Section 50a and charge them to find the accused* guilty, *not guilty or not guilty only by reason of lack of mental responsibility.*

d) *Subsection (c) does not apply to a court-martial composed of a military judge only. In the case of a court-martial composed of a military judge only, whenever lack of mental responsibility of the accused with respect to an offense is properly at issue, the military judge shall find the accused guilty, not guilty or not guilty only by reason of lack of mental responsibility.*

e) *Notwithstanding the provisions of Code Section 52, the accused shall be found not guilty only by reason of lack of mental responsibility if*:

1) *a majority of the members of the court-martial present at the time the vote is taken determines that the defense of lack of mental responsibility has been established; or*

2) *in the case of a court-martial composed of a military judge only, the military judge determines that the defense of lack of mental responsibility has been established*. (Code Section 50a)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.875 Voting By the Court-Martial
EMERGENCY

a) Voting and Ruling

1) *Voting by members of a general or special court-martial on the findings and on the sentence shall be by secret written ballot. The junior member*

of the court shall count the votes. The count shall be checked by the president, who shall forthwith announce the result of the ballot to the members of the court.

2) *The military judge shall rule upon all questions of law and all interlocutory questions arising during the proceedings. Any such ruling made by the military judge upon any question of law or any interlocutory question other than the factual issue of mental responsibility of the accused is final and constitutes the ruling of the court. However, the military judge may change the ruling at any time during the trial. Unless the ruling is final, if any member objects to the ruling, the court shall be cleared and closed and the question decided by a voice vote as provided in Code Section 52, beginning with the junior in rank.*

3) *Before a vote is taken on the findings, the military judge shall, in the presence of the accused and counsel, instruct the members of the court as to the elements of the offense and charge them that:*

A) *the accused must be presumed to be innocent until his or her guilt is established by legal and competent evidence beyond reasonable doubt;*

B) *in the case being considered, if there is a reasonable doubt as to the guilt of the accused, the doubt must be resolved in favor of the accused and the accused must be acquitted;*

C) *if there is a reasonable doubt as to the degree of guilt, the finding must be in a lower degree as to which there is no reasonable doubt; and*

D) *the burden of proof to establish the guilt of the accused beyond reasonable doubt is upon the State.*

4) *Subsections* (a)(1), (2) and (3) *do not apply to a court-martial composed of a military judge only. The military judge of such a court-martial shall determine all questions of law and fact arising during the proceedings and, if the accused is convicted, adjudge an appropriate sentence. The military judge of such a court-martial shall make a general finding and shall in addition, on request,* make special findings as provided in RCM

918(b). *If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear in that document.* (Code Section 51) The military judge may give any instructions necessary to clarify the members' questions after the conclusions of evidence, or to decline to answer any question in the event that response implicates inadmissible evidence.

5) Included Offenses. Members shall not vote on a lesser included offense unless a finding of not guilty of the offense charged has been reached. If a finding of not guilty of an offense charged has been reached, the members shall vote on each included offense on which they have been instructed, in order of severity beginning with the most severe. The members shall continue the vote on each included offense on which they have been instructed until a finding of guilty results or findings of not guilty have been reached as to each offense.

b) Procedure for Voting

1) Order. Each specification shall be voted on separately before the corresponding charge. The order of voting on several specifications under a charge or on several charges shall be determined by the president unless a majority of the members object.

2) Counting Votes. The junior member shall collect the ballots and count the votes. The president shall check the count and inform the other members of the result.

c) Number of Votes Required

1) *No person may be convicted of an offense except as provided in Code Section 45(b) or by the concurrence of ⅔ of the members present at the time the vote is taken.*

2) *All other questions to be decided by the members of a general or special court-martial shall be determined by a majority vote, but a determination to reconsider a finding of guilty or to reconsider a sentence, with a view toward decreasing it, may be made by any lesser vote that indicates the reconsideration is not opposed by the number of votes required for that finding or sentence. A tie vote on a challenge disqualifies the member*

challenged. A tie vote on a motion relating to the question of the accused's sanity is a determination against the accused. A tie vote on any other question is a determination in favor of the accused. (Code Section 52)

3) Acquittal. If fewer than ⅔ of the members present vote for a finding of guilty, a finding of not guilty has resulted as to the charge or specification on which the vote was taken.

d) Court to Announce Action

1) *A court-martial shall announce its findings and sentence to the parties as soon as determined*. (Code Section 53)

2) The military judge may take such actions as it deems reasonably necessary to secure the courtroom and safety of persons within the courtroom prior to, and after, the announcement of court-martial findings.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.880 Withdrawal of Guilty Plea
EMERGENCY

An accused may withdraw a plea of guilty as provided in RCM 910(h)(1) and (2).

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

SUBPART H: SENTENCING

Section 400.900 Presentencing Procedure
EMERGENCY

In a court-martial trial conducted under the Code resulting in a finding of guilt, the court shall follow the presentencing procedures provided in RCM 1001 through 1003 and 1005 through 1011 (RCM Chapter X (Sentencing, Rule)), except that neither death nor confinement in excess of 10 years may be adjudged.

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.905 Sentencing
EMERGENCY

a) Cruel and Unusual Punishment Prohibited

1) Persons subject to the Code will be afforded all constitutional protections against cruel and unusual punishment, in accordance with U.S. Supreme Court and Illinois Supreme Court case law.

2) *Punishment by flogging, or by branding, marking or tattooing on the body, or any other cruel or unusual punishment may not be adjudged by a court-martial or inflicted upon any person subject to the Code. The use of irons, single or double, except for the purpose of safe custody, is prohibited*. (Code Section 55)

b) Maximum Limits

1) *The punishment a court-martial may direct for an offense may not exceed the limits prescribed by the Code, but in no instance may a sentence exceed more than 10 years for a military offense, nor shall a sentence of death be adjudged. A conviction by general court-martial of any military offense for which an accused may receive a sentence of confinement for more than one year is a felony offense. All other military offenses are misdemeanors*.

2) *The limits of punishment for violations of the punitive articles described in Subpart J shall be equal to, or the lesser of, the sentences prescribed by the MCM. In no instance shall any punishment exceed that authorized by the Code*. (Code Section 56)

c) *Effective Dates of Sentences*

1) Forfeiture of Pay or Allowances. *Whenever a sentence of a court-martial as lawfully adjudged and approved includes a forfeiture of pay or allowances in addition to confinement not suspended, the forfeiture may apply to pay or allowances becoming due on or after the date the sentence*

is approved by the convening authority. No forfeiture may extend to any pay or allowances accrued before that date.

2) Confinement. *Any period of confinement included in a sentence of a court-martial begins to run from the date the sentence is adjudged by the court-martial, but periods during which the sentence to confinement is suspended or deferred shall be excluded in computing the service of the term of confinement*.

3) *All other sentences of courts-martial are effective on the date ordered executed*, subject to Code Section 71 (see Section 400.1075). (Code Section 57)

d) Reconsideration of Sentence

1) Reconsideration. A sentence may be reconsidered at any time before it is announced in open session of the court.

2) The procedures detailed in RCM 1009 shall apply.

e) Report of Result of Trial; Post-Trial Restraint

1) After final adjournment of the court-martial, trial counsel shall promptly notify the accused's immediate commander, the convening authority or designee and, if appropriate, the officer in charge of the confinement facility of the findings and the sentence.

2) Confinement

A) General. An accused may be placed in post-trial confinement if the sentence adjudged by the court-martial includes confinement.

B) Who May Order. Unless limited by superior authority, a commander of the accused may order the accused into post-trial confinement when post-trial confinement is authorized under this subsection (e)(2). A commander authorized to order post-trial confinement may delegate this authority to the trial counsel.

f) *Deferment of Sentences*

1) *On application by an accused who is under sentence to confinement that has not been ordered executed, the convening authority or, if the accused is no longer under that person's jurisdiction, the person exercising general court-martial jurisdiction over the command to which the accused is currently assigned, may, in that person's sole discretion, defer service of the sentence to confinement. The deferment shall terminate when the sentence is ordered executed. The deferment may be rescinded at any time by the person who granted it or, if the accused is no longer under that person's jurisdiction, by the person exercising general court-martial jurisdiction over the command to which the accused is currently assigned*.

2) Process

A) *In any case in which a court-martial sentences an accused referred to in* subsection (f)(2)(B) *to confinement, the convening authority may defer the service of the sentence to confinement, without the consent of the accused, until after the accused has been permanently released to the SMF by a state, the United States, or a foreign country*.

B) Subsection (f)(2)(A) *applies to a person subject to* the *Code who*:

i) *while in the custody of a state, the United States or a foreign country is temporarily returned by that state, the United States or foreign country to the SMF for trial by court-martial; and*

ii) *after the court-martial, is returned to that state, the United States or foreign country under the authority of a mutual agreement or treaty, as the case may be*.

3) *In any case in which a court-martial sentences an accused to confinement and the sentence to confinement has been ordered executed, but in which review of the case under Code Section 57a(a) is pending, the Adjutant General may defer further service of the sentence to confinement while that review is pending*. (Code Section 57a)

g) Execution of Confinement

1) Confinement for one year or more. If a person subject to the Code and this Manual is convicted at court-martial for an offense punishable by more than one year confinement, and is sentenced to confinement of one year or more, at the conclusion of post-trial motions, that person will be transported to, and incarcerated with, the Illinois Department of Corrections.

2) Confinement for less than one year. If a person subject to the Code and this Manual is convicted at court-martial for an offense punishable by less than one year confinement, and is sentenced to confinement, that person will be transported to, and incarcerated in, the county jail.

3) Notwithstanding subsections (g)(1) and (2), the military judge, in his or her discretion, may always order confinement at any civilian county jail, department of corrections facility, or military confinement facility authorized under the Code that he or she deems reasonable and appropriate. The military judge should consider the interests of national security, State security, good order and discipline, and other applicable federal or State laws and this Manual.

4) *A sentence of confinement adjudged by a court-martial, whether or not the sentence includes discharge or dismissal, and whether or not the discharge or dismissal has been executed, may be carried into execution by confinement in any place authorized by the Code. Persons so confined are subject to the same discipline and treatment as persons regularly confined or committed to that place of confinement*.

5) *The omission of hard labor as a sentence authorized under the Code does not deprive the State confinement facility from employing it, if it otherwise is within the authority of that facility to do so*.

6) *No place of confinement may require payment of any fee or charge for receiving or confining a person, except as otherwise provided by law*. (Code Section 58)

h) *Sentences: Reduction in Enlisted Grade Upon Approval*

1) *A court-martial sentence of an enlisted member in a pay grade above E-1, as approved by the convening authority, reduces that member to pay grade E-1, effective on the date of that approval,* if the sentence includes:

A) *a dishonorable or bad-conduct discharge; or*

B) *confinement*. (Code Section 58a(a))

2) *If the sentence of a member who is reduced in pay grade under subsection* (h)(1) *is set aside or disapproved, or, as finally approved, does not include any punishment named in subsection* (h)(1)*, the rights and privileges of which the person was deprived because of that reduction shall be restored, including pay and allowances*. (Code Section 58a(b))

i) *Sentences: Forfeiture of Pay and Allowances During Confinement*

1) General

A) *A court-martial sentence described in subsection* (i)(1)(B) *shall result in the forfeiture of pay, or of pay and allowances, due that member during any period of confinement or parole. The forfeiture pursuant to this subsection* (i) *shall take effect on the date determined under Code Section 57(a) and may be deferred as provided by that Section. The pay and allowances forfeited, in the case of a general court-martial, shall be all pay and allowances due that member during the period of confinement or parole and, in the case of a special court-martial, shall be ⅔ of all pay due the member during that period.*

B) *A sentence covered by this subsection* (i) *is any sentence that includes*:

i) *confinement for more than 6 months; or*

ii) *confinement for 6 months or less and a dishonorable or bad-conduct discharge or dismissal*.

2) *In a case involving an accused who has dependents, the convening authority or other person acting under Code Section 60 may waive any or*

all of the forfeitures of pay and allowances required by subsection (i)(1) *for a period not to exceed 6 months. Any amount of pay or allowances subject to the waiver will be paid, as the convening authority or other person taking action directs, to the dependents of the accused*.

3) *If the sentence of a member who forfeits pay and allowances under subsection* (i)(1) *is set aside or disapproved or, as finally approved, does not provide for a punishment referred to in subsection* (i)(1)(B), *the member shall be paid the pay and allowances that he or she would have been paid, except for the forfeiture, for the period during which the forfeiture was in effect*. (Code Section 58b)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

SUBPART I: POST-TRIAL PROCEDURE AND REVIEWS

Section 400.1000 Post-Trial Procedure and Reviews
EMERGENCY

a) Appellate procedures for all convictions under the Code and this Manual shall be in accordance with those of the Illinois Appellate Court, Fourth District.

b) In each general and special court-martial, prior to adjournment, the military judge shall ensure that the defense counsel has informed the accused orally and in writing of:

1) The right to submit matters to the convening authority to consider before taking action;

2) The right to appellate review, as applicable, and the effect of waiver or withdrawal of that right; and

3) The right to the advice and assistance of counsel in the exercise of the rights described in subsections (b)(1) and (2) or any decision to waive them. The written advice to the accused concerning post-trial and appellate rights shall be signed by the accused and the defense counsel and inserted in the record of trial as an appellate exhibit.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1005 Error of Law; Lesser Included Offenses
EMERGENCY

a) *A finding or sentence of a court-martial may not be held incorrect on the ground of an error of law unless the error materially prejudices the substantial rights of the accused.*

b) *Any reviewing authority with the power to approve or affirm a finding of guilty may approve or affirm, instead, so much of the finding as includes a lesser included offense*. (Code Section 59)

c) Any challenges to an error of law must be raised in a timely post-trial motion. Constitutional challenges may be raised at any time, including on appeal.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1010 Preparation of the Record of Trial; Authentication; Service; Loss; Correction
EMERGENCY

In every court-martial trial conducted under the Code, the record of trial shall be prepared, authenticated and served substantially in accordance with RCMs 1103 through 1104. Any reference in those RCMs to the "Court of Criminal Appeals" shall instead refer to the "Illinois Appellate Court".

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1015 Recommendation of the State Judge Advocate
EMERGENCY

a) Before acting on a finding of guilt on any general or special court-martial in which there is a finding of guilt, the convening authority must obtain the written concurrence of the State Judge Advocate or designee by means of legal review.

The convening authority will refer the authenticated record of trial to the State Judge Advocate who shall use it in preparation of the review.

b) Content. The legal review shall be in writing and shall contain the following:

1) Conclusions as to whether:

A) The court had jurisdiction over the accused and the offense;

B) The charge and specification stated an offense;

C) The sentence was within the limits prescribed as a matter of law.

2) A recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.

c) The State Judge Advocate's recommendation and a copy of the authenticated record of trial will be served on the accused and his or her defense counsel who may submit matters to the convening authority as provided in Section 400.1020.

d) Disqualification. No person who has acted as member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in any case may later act as State Judge Advocate or designee to any reviewing or convening authority in the same case.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1020 Matters Submitted by the Accused
EMERGENCY

a) General. After a sentence is adjudged in any court-martial under the Code, the accused may submit matters to the convening authority in accordance with this Section.

b) Matters That May Be Submitted

1) The accused may submit to the convening authority any matters that may reasonably tend to affect the convening authority's decision whether to

disapprove any findings of guilty or to approve the sentence. Submissions must be in writing.

2) Submissions may include allegations of errors affecting the legality of the proceedings, portions or summaries of the record and copies of documentary evidence offered or introduced at trial, matters in mitigation not available at trial, and clemency recommendations from any person.

3) The accused may waive his or her right to make a submission to the convening authority, provided the waiver is in writing. Once accepted by the convening authority, waiver may not be revoked.

4) Failure to object to matters in the State Judge Advocate's recommendation waives the right to object to that matter.

c) Time Periods

1) The accused may submit matters under this Section *within* the later of *30 days after the accused has been given an authenticated* copy of the *record of trial or, if applicable, the recommendation of a* State Judge Advocate, or an addendum to the recommendation containing a new matter is served on the accused.

2) *If*, within the 30-day period, *the accused shows that additional time is required to submit the matters, the convening authority or other person taking action, for good cause* shown, *may extend the period* to submit matters for an additional 20 days. (Code Section 60(b)(1) and (2))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1025 State Judge Advocate's Addendum
EMERGENCY

a) The State Judge Advocate or designee may, by addendum, supplement the recommendation after the accused and counsel have been served with the recommendation and given an opportunity to submit matters and comment.

b) If the addendum introduces new matter after the accused and counsel have examined the recommendation, the accused and counsel must be served with the addendum containing new matter and given 30 days from service of the addendum to submit comments.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1030 Action by the Convening Authority
EMERGENCY

a) Who May Take Action. The convening authority shall take action on the sentence and, in the discretion of the convening authority, the findings, unless it is impractical. If it is impracticable for the convening authority to act, the convening authority shall, in accordance with regulations promulgated by the Adjutant General, forward the case to an officer exercising general court-martial jurisdiction who may take action.

b) Discretion to Modify. The authority *to modify the findings and sentence of a court-martial is a matter of command prerogative involving the sole discretion of the convening authority* or other officer authorized to take action.

c) Action on the Sentence. *Action may be taken only after consideration of any matters submitted by the accused, or after the time* to submit them has expired, *whichever is earlier*. In his or her sole discretion, *the convening authority or other* officer authorized to *take action may approve, disapprove, commute or suspend the sentence in whole or in part*. The action may mitigate the sentence and change punishment to one of a different nature as long as the severity of the punishment is not increased. The action may not increase the punishment imposed by the court-martial. The action shall explicitly state approval or disapproval of the adjudged sentence.

d) Action on the Findings. *The convening authority or other* officer *acting on the sentence is not required* to take action on the findings. *However, that person, in his or her sole discretion, may*:

1) *Dismiss any charge or specification by setting aside a finding of guilty; or*

2) *Change a finding of guilty to a charge or specification to a finding of guilty to an offense that is a lesser included offense of the offense stated in the charge or specification*. (Code Section 60(c))

e) Revision and Rehearing. The convening authority or other person taking action, in the person's sole discretion, may order a proceeding in revision or rehearing.

1) Rehearing. *The convening authority or other person taking action may, in his or her sole discretion, order a rehearing if that person disapproves the findings and sentence, and states the reasons of disapproval of the findings. If that person disapproves the findings and sentence and does not order a rehearing, he or she shall dismiss the charges. A rehearing as to findings shall not be ordered if there is a lack of sufficient evidence in the record to support the findings. A rehearing on the sentence may be ordered if the convening authority or other person taking action disapproves the sentence.* Rehearing will be in accordance with this Manual.

2) Revision. *A proceeding in revision may be ordered if there is an apparent error or omission in the record or if the record shows improper or inconsistent action by a court-martial with respect to the findings or sentence that can be rectified without material prejudice to the substantial rights of the accused. In no case, however, may a proceeding in revision*:

A) *Reconsider a finding of not guilty of any specification or a ruling that amounts to a finding of not guilty;*

B) *Reconsider a finding of not guilty of any charge, unless there has been a finding of guilty under a specification laid under the charge that sufficiently alleges a violation of some Section of the Code; or*

C) *Increases the severity of the sentence*. (Code Section 60(e))

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1035 General and Special Courts-Martial in Which There is a Finding of Guilty; Review by Senior Force Judge Advocate; Action by the Adjutant General EMERGENCY

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NOTICE OF EMERGENCY RULES

a) In addition to the judge advocate's recommendation under Code Section 60*, in a general and special court-martial in which there is a finding of guilt, the State Judge Advocate or designee shall review the case.* No person *may review the case who has acted as an accuser, member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in that case. The review shall be in writing and shall contain the following:*

1) *Conclusions as to whether:*

A) *The court had jurisdiction over the accused and the offense;*

B) *The charge and specification stated an offense;*

C) *The sentence was within the limits prescribed as a matter of law.*

2) *A response to each allegation of error made in writing by the accused.*

3) *If the case is sent for action under subsection (b), a recommendation as to the appropriate action to be taken and an opinion as to whether corrective action is required as a matter of law.*

b) *The record of trial and related documents in each case reviewed under subsection (a) shall be sent for action to the Adjutant General if:*

1) *The judge advocate who reviewed the case recommends corrective action;*

2) *The sentence approved by the convening authority under Code Section 60 extends to dismissal, bad-conduct discharge, dishonorable discharge, or confinement for more than 6 months; or*

3) *The action is required under regulations prescribed by the Adjutant General.*

c) *The Adjutant General may:*

1) *Disapprove or approve the findings or sentence, in whole or in part;*

2) *Remit, commute or suspend the sentence in whole or in part;*

3) *Except when evidence is insufficient at the trial to support the findings, order a rehearing on the findings, sentence or on both; or*

4) *Dismiss the charges.*

d) *If* the Adjutant General *orders a rehearing but the convening authority finds a hearing impractical, the convening authority shall dismiss the charges.*

e) *If, in the State Judge Advocate's opinion, corrective action is required as a matter of law, and if the Adjutant General does not take action that is at least as favorable to the accused as that recommended by the judge advocate, the record of the trial and the action shall be sent to the Governor for review and action as deemed appropriate.*

f) *The State Judge Advocate, or designee, may review any case in which there has been a finding of not guilty of all charges and specifications. However, the State Judge Advocate may not review the case if he or she has acted as an accuser, member, military judge, trial counsel, assistant trial counsel, defense counsel, associate or assistant defense counsel, or investigating officer in that case. The review shall be limited to questions of subject matter jurisdiction.*

g) *The records of trial and related documents in each case reviewed under subsection (f) shall be sent for action to the Adjutant General who may:*

1) *Void the court-martial ab initio when subject matter jurisdiction is found lacking, with or without prejudice to the government, as the Adjutant General deems appropriate;*

2) *Return the record of trial and related documents to the State Judge Advocate for appeal by the government as provided by law.* (Code Section 64)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1040 Withdrawal of Appeal
EMERGENCY

a) The accused has a right to appeal. This right to appeal is permissive and not automatic. There are no exceptions to the right to appeal.

b) *In each case subject to appellate review under the Code, the accused may file with the convening authority a statement expressly withdrawing the right of the accused to appeal. The withdrawal shall be signed by both the accused and his or her defense counsel and must be filed in accordance with appellate procedures as provided by* Article VI of the Illinois Supreme Court Rules (Appeals in Criminal Cases, Post-Conviction Cases and Juvenile Court Proceedings).

c) *The accused may withdraw an appeal at any time in accordance with appellate procedures as provided by* Supreme Court Rules, Article VI. The withdrawal must be in writing. (Code Section 61)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1045 Appeal by the State
EMERGENCY

a) General

1) *In a trial by court-martial in which a punitive discharge may be adjudged, the State may appeal the following, other than a finding of not guilty with respect to the charge or specification by the members of the court-martial, or by a judge in a bench trial, so long as it is not made in reconsideration*:

A) *An order or ruling of the military judge that terminates the proceedings with respect to a charge or specification*;

B) *An order or ruling that excludes evidence that is substantial proof of a fact material in the proceeding*;

C) *An order or ruling that directs the disclosure of classified information*;

D) *An order or ruling that imposes sanctions for nondisclosure of classified information*;

E) *A refusal of the military judge to issue a protective order sought by the State to prevent the disclosure of classified information*; or

F) *A refusal by the military judge to enforce an order described in subsection (a)(1)(E) that has previously been issued by appropriate authority*.

2) *An appeal of an order or ruling may not be taken unless the trial counsel provides the military judge with written notice of appeal from the order or ruling within 72 hours after the order or ruling. The notice shall include a certification by the trial counsel that the appeal is not taken for the purpose of delay and, if the order or ruling appealed is one that excludes evidence, that the evidence excluded is substantial proof of a fact material in the proceeding*.

3) *An appeal under this Section shall be diligently prosecuted as provided by law*.

b) *An appeal under this Section shall be forwarded to the court prescribed in Code Section 67a. In ruling on an appeal under Code Section 62, that court may act only with respect to matters of law*.

c) *Any period of delay resulting from an appeal under Code Section* 62 *shall be excluded in deciding any issue regarding denial of a speedy trial unless an appropriate authority determines that the appeal was filed solely for the purpose of delay, with the knowledge that it was totally frivolous and without merit*. (Code Section 62)

d) Appellate procedures will be governed by the Fourth District of the Illinois Appellate Court.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1050 Rehearing
EMERGENCY

a) *Each rehearing under the Code shall take place before a court-martial composed of members not members of the court-martial that first heard the case*.

b) *Upon a rehearing, the accused may not be tried for any offense of which he or she was found not guilty by the first court-martial, and no sentence in excess of, or more severe than, the original sentence may be approved, unless the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory*.

c) *If the sentence approved after the first court-martial was in accordance with a pretrial agreement and the accused at the rehearing changes a plea with respect to the charges or specifications upon which the pretrial agreement was based, or otherwise does not comply with the pretrial agreement, the approved sentence as to those charges or specifications may include any punishment not in excess of that lawfully adjudged at the first court-martial*. (Code Section 63)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1055 Procedures for Rehearing, New Trials and Other Trials EMERGENCY

a) General

1) Definition. "Other trial" means another trial of a case in which the original proceedings were declared invalid because of lack of jurisdiction or failure of a charge to state an offense.

2) Rehearing in Full and New or Other Trials. In rehearings that require findings on all charges and specifications referred to a court-martial and in new or other trials, the procedure shall be the same as in an original trial except as otherwise provided in this Section.

3) Rehearing on Sentence Only. In a rehearing on sentence only, the procedure shall be the same as in an original trial, except that the portion of the procedure that ordinarily occurs after challenges, and through the findings, is omitted, and except as otherwise provided in this Section.

b) Contents of the Record. The contents of the record of the original trial consisting of evidence properly admitted on the merits relating to each offense of which the accused stands convicted but not sentenced may be established by any party whether or not testimony so read is otherwise admissible under Section 400.720(d) and whether or not it was given through an interpreter.

c) Plea. The accused at a rehearing only on sentence may not withdraw any plea of guilty upon which findings of guilty are based. However, if that plea is found to be improvident, the rehearing shall be suspended and the matter reported to the authority ordering the rehearing.

d) Combined Rehearings. When a rehearing on sentence is combined with a trial on the merits of one or more specifications referred to the court-martial, whether or not those specifications are being tried for the first time or reheard, the trial will proceed first on the merits, without reference to the offenses being reheard on sentence only. After findings on the merits are announced, the members, if any, shall be advised of the offenses on which the rehearing on sentence has been directed. Additional challenges for cause may be permitted, and the sentencing procedure shall be the same as at an original trial, except as otherwise provided in this Section. A single sentence shall be adjudged for all offenses.

e) Composition

1) Members. No member of the court-martial that previously heard the case may sit as a member of the court-martial at any rehearing, new trial or other trial of the same case.

2) Military Judge. The military judge at a rehearing may be the same military judge who presided over a previous trial of the same case. The existence or absence of a request for trial by military judge alone at a previous hearing shall have no effect on the composition of a court-martial on rehearing.

3) Accused's Election. The accused at a rehearing or new or other trial shall have the same right to request enlisted members or trial by military judge alone as the accused would have at an original trial.

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f) Examination of Record of Former Proceedings. No member may, upon a rehearing or upon a new or other trial, examine the record of any former proceedings in the same case except:

1) When permitted to do so by the military judge after those matters have been received in evidence; or

2) That the president of a special court-martial without a military judge may examine that part of the record of former proceedings that relates to errors committed at the former proceedings when necessary to decide the admissibility of offered evidence or other questions of law, and that part of the record may be read to the members when necessary for them to consider a matter, subject to objection by any member

g) Sentence Limitations

1) General. Sentences at rehearings, new trials or other trials shall be adjudged within the limitations set forth in Code Sections 55 through 58, except as otherwise provided in subsection (g)(2). Offenses on which a rehearing, new trial or other trial has been ordered shall not be the basis for an approved sentence in excess of, or more severe than, the sentence ultimately approved by the convening or higher authority following the previous trial or hearing, unless the sentence prescribed for the offense is mandatory. When a rehearing or sentencing is combined with trial on new charges, the maximum punishment that may be approved by the convening authority shall be the maximum punishment under Code Sections 55 through 58 for the offenses being reheard (except as otherwise provided in subsection (g)(2)), plus the total maximum punishment under Code Sections 55 through 58 for any new charges of which the accused has been found guilty. In the case of an "other trial", no sentence limitations apply if the original trial was invalid because a summary or special court-martial improperly tried an offense involving mandatory punishment or otherwise considered capital.

2) Plea Agreement. If, after the earlier court martial, the sentence was approved in accordance with a plea agreement and at the rehearing the accused fails to comply with the pretrial agreement, by failing to enter a plea of guilty or otherwise, the approved sentence resulting at a rehearing of the affected charges and specifications may include any otherwise

lawful punishment not in excess of, or more serious than, lawfully adjudged at the earlier court-martial.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1060 Disposition of Records After Review by the Convening Authority EMERGENCY

a) The original record of trial and all related documents shall be retained at Joint Force Headquarters, Office of the Staff Judge Advocate, 1301 N. MacArthur Blvd., Springfield IL 62702.

b) Court-martial convictions shall be reported to other necessary authorities in accordance with Illinois law (e.g., the FOID Act, etc.).

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1065 Review by State Appellate Authority EMERGENCY

a) *Decisions of a court-martial are from a court with jurisdiction to issue misdemeanor and felony convictions*.

b) *All appeals from final decisions of a court-martial shall be to the Illinois Appellate Court in the same manner as are final decisions of a circuit court in accordance with the Illinois Appellate Court Act*.

c) The senior force judge advocate shall coordinate with the Clerk of the Illinois Appellate Court, Fourth District to ensure that all filing requirements and State deadlines on appeal are met.

d) Upon request, the senior force judge advocate will ensure that a copy of this Manual and the Code are provided to the Clerk of the Illinois Appellate Court, Fourth District for reference during proceedings.

e) *No appeal from a judgment entered upon a plea of guilty shall be taken except in accordance with* Article VI of the Illinois Supreme Court Rules (Appeals in Criminal Cases, Post-Conviction Cases and Juvenile Court Proceedings)

f) *Unless waived, an accused may appeal as a matter of right a finding of guilt resulting in an approved sentence of one-year confinement or more, or in a dismissal for a commissioned officer or warrant officer, a dishonorable discharge, or a bad-conduct discharge* in the case of an enlisted member.

g) *The appellate rights and procedures to be followed shall be those provided by applicable law and* Supreme Court Rules, Article VI. (Code Section 67a)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1070 Appellate Counsel
EMERGENCY

a) The senior force judge advocate shall coordinate with the Attorney General regarding review or appeal of cases specified in Code Section 67a. *The Attorney General may appoint a judge advocate nominated by the senior force judge advocate as Special Assistant Attorney General to act as appellate government counsel to represent the State. The appointment as Special Assistant Attorney General shall be at the discretion of the Attorney General*. Appellate government counsel must be a member in good standing of the Illinois bar.

b) *Upon an appeal by the State, an accused has the right to be represented by detailed military counsel before any reviewing authority and before any appellate court*.

c) *Upon the appeal by an accused, the accused has the right to be represented by military counsel before any reviewing authority*.

d) *Upon the request of an accused entitled to be so represented, the senior force judge advocate shall appoint a judge advocate to represent the accused in the review or appeal of cases specified in subsections (b) and (c)*.

e) *An accused may be represented by civilian appellate counsel at no expense to the State*. (Code Section 70)

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(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1075 Execution of Sentence
EMERGENCY

a) *Suspension of Sentence*

1) *If the* approved *sentence of the court-martial extends to dismissal or a dishonorable or bad-conduct discharge, and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn under Code Section 61, that part of the sentence extending to dismissal or a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings. A judgment as to the legality of the proceedings is final in these cases when review is completed by the* Illinois Appellate Court for the Fourth District (see Code Section 67a) *and is deemed final by the law of this State*.

2) *If the sentence of the court-martial extends to dismissal or a dishonorable or bad-conduct discharge, and if the right of the accused to appellate review is waived, or an appeal is withdrawn under Code Section 61, that part of the sentence extending to dismissal or a dishonorable or bad-conduct discharge may not be executed until review of the case by the senior force judge advocate and any action on that review under Code Section 64 is completed. Any other part of a court-martial sentence may be ordered executed by the convening authority or other person acting on the case under Code Section 60 when so approved under that* statute. (Code Section 71)

b) *Vacation of Suspension*

1) *Before the vacation of the suspension of a special court-martial sentence that, as approved, includes a bad-conduct discharge, or of any general court-martial sentence, the officer having special court-martial jurisdiction over the probationer shall hold a hearing on an alleged violation of probation. The probationer shall be represented at the hearing by military counsel if the probationer so desires*.

2) *The record of the hearing and the recommendation of the officer having special court-martial jurisdiction shall be sent for action to the officer exercising general court-martial jurisdiction over the probationer. If the officer vacates the suspension, any unexecuted part of the sentence, except a dismissal, shall be executed, subject to applicable restrictions in the Code*.

3) *The suspension of any other sentence may be vacated by any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence*. (Code Section 72)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1080 Petition for a New Trial
EMERGENCY

a) *At any time within 2 years after approval by the convening authority of a court-martial sentence, the accused may petition the Adjutant General for a new trial on the grounds of newly discovered evidence or fraud on the court-martial*. (Code Section 73)

b) A petition for a new trial of the facts may not be submitted on the basis of newly discovered evidence when the petitioner was found guilty of the relevant offense pursuant to a guilty plea.

c) The form of the petition shall comply with RCM 1210.

d) Newly Discovered Evidence. A new trial shall not be granted on the grounds of newly discovered evidence unless the petition shows that:

1) The evidence was discovered after trial;

2) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and

3) The newly discovered evidence, if considered by a court martial in light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

e) Fraud on Court-martial. No fraud on the court-martial warrants a new trial unless it had a substantial contributing effect on a finding of guilty or the sentenced adjudged.

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1085 Remission and Suspension of Sentence; Restoration
EMERGENCY

a) Remission and Suspension of Sentence

1) *Any authority competent to convene, for the command in which the accused is serving or assigned, a court of the kind that imposed the sentence may remit or suspend any part or amount of the unexecuted part of any sentence, including all uncollected forfeitures other than a sentence approved by the Governor*.

2) *The Governor may, for good cause, substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial*. (Code Section 74)

b) Restoration

1) *Under such regulations as may be prescribed, all rights, privileges and property affected by an executed part of a court-martial sentence that has been set aside or disapproved, except an executed dismissal or discharge, shall be restored unless a new trial or rehearing is ordered and the executed part is included in a sentence imposed upon the new trial or rehearing*.

2) *If a previously executed sentence of dishonorable or bad-conduct discharge is not imposed on a new trial, the Governor may substitute a form of discharge authorized for administrative issuance unless the accused is to serve out the remainder of the accused's enlistment*.

3) *If a previously executed sentence of dismissal is not imposed on a new trial, the Governor may substitute a form of discharge authorized for*

administrative issue, and the commissioned officer dismissed by that sentence may be reappointed by the Governor alone to the commissioned grade and with such rank as, in the opinion of the Governor, he or she would have attained had he or she not been dismissed. The reappointment of such a former officer shall be without regard to the existence of a vacancy and shall affect the promotion status of other officers only insofar as the Governor may direct. All time between the dismissal and the reappointment shall be considered as actual service for all purposes, including the right to pay and allowances, as permitted by applicable financial management regulations. (Code Section 75)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1090 Finality of Proceedings, Findings and Sentence
EMERGENCY

a) *The appellate review of records of trial provided by* the *Code, the proceedings, findings, and sentences of courts-martial as approved, reviewed or affirmed as required by* the *Code, and all dismissals and discharges carried into execution under sentences by courts-martial following approval, review or affirmation as required by* the *Code, are final and conclusive*.

b) *Orders publishing the proceedings of courts-martial and all action taken pursuant to those proceedings are binding upon all departments, courts, agencies and officers of the United States and the several states, subject only to action upon a petition for a new trial as provided in Code Section 73 and to action under Code Section 74*. (Code Section 76)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1095 Leave Required to be Taken Pending Review of Certain Court-Martial Convictions
EMERGENCY

a) *Under regulations prescribed, an accused who has been sentenced by a court-martial may be required to take leave pending completion of action if the*

sentence, as approved under Code Section 60, includes an unsuspended dismissal or an unsuspended dishonorable or bad-conduct discharge.

b) *The accused may be required to begin leave on the date on which the sentence is approved under Code Section 60 or at any time after that date. The leave may be continued until it is completed or may be terminated at any earlier time* in accordance with applicable regulations of the armed forces. (Code Section 76a)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

SUBPART J: PUNITIVE ARTICLES

Section 400.1100 Military Offenses
EMERGENCY

a) This Subpart J outlines the military offenses, also referred to as Punitive Articles, for which charges can be brought under the Code and this Manual.

b) Principal. *A principal is any person subject to the Code who:*

1) *commits an offense punishable by* the *Code, or aids, abets, counsels, commands or procures its commission; or*

2) *causes an act to be done that, if directly performed by him or her, would be punishable by* the *Code*. (Code Section 77)

c) Directory of Military Offenses

SUBSECTION OF SECTION 400.1100	MILITARY OFFENSE/ PUNITIVE ARTICLE	CODE SECTION [20 ILCS 1807]
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d) Military Offenses

1) Accessory After the Fact
Any person subject to the *Code who, knowing that an offense punishable by* the *Code has been committed, receives, comforts or assists the offender in order to hinder or prevent his or her apprehension, trial or punishment shall be punished as a court-martial may direct*. (Code Section 78)

2) Conviction of a Lesser Included Offense
An accused may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included in the charge. (Code Section 79)

3) Attempts

A) *An act, done with specific intent to commit an offense under* the *Code, amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense*.

B) *Any person subject to the* Code *who attempts to commit any offense punishable by the Code shall be punished as a court-martial may direct, unless otherwise specifically prescribed*.

C) *Any person subject to the Code may be convicted of an attempt to commit an offense although it appears on the trial that the offense was consummated*. (Code Section 80)

4) Conspiracy
Any person subject to the Code who conspires with any other person to commit an offense under the Code shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct. (Code Section 81)

5) Solicitation

A) *Any person subject to the Code who solicits or advises another or others to desert in violation of Code Section 85 or mutiny in violation of Code Section 94 shall, if the offense solicited or advised is attempted or committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed or attempted, the person shall be punished as a court-martial may direct*.

B) *Any person subject to the Code who solicits or advises another or others to commit an act of misbehavior before the enemy in violation of Code Section 99 or sedition in violation of Code Section 94 shall, if the offense solicited or advised is committed, be punished with the punishment provided for the commission of the offense, but, if the offense solicited or advised is not committed, the person shall be punished as a court-martial may direct*. (Code Section 82)

6) Fraudulent Enlistment, Appointment or Separation
Any person who procures his or her own enlistment or appointment in the SMF by knowingly false representation or deliberate concealment as to his or her qualifications for that enlistment or appointment and receives pay or allowance thereunder, or procures his or her own separation from the SMF by knowingly providing false representation or deliberate concealment as to his or her eligibility for that separation, shall be punished as a court-martial may direct. (Code Section 83)

7) Unlawful Enlistment, Appointment or Separation
Any person subject to the Code who effects an enlistment or appointment in or a separation from the SMF of any person who is known to him or her to be ineligible for that enlistment, appointment or separation because it is

prohibited by law, regulation or order shall be punished as a court-martial may direct. (Code Section 84)

8) Desertion

A) *Any member of the SMF is guilty of desertion who*:

i) *without authority goes or remains absent from his or her unit, organization, or place of duty with intent to remain away permanently*;

ii) *quits his or her unit, organization or place of duty with intent to avoid hazardous duty or to shirk important service; or*

iii) *without being regularly separated from one of the State military forces enlists or accepts an appointment in the same or another state military force, or in one of the armed forces of the United States, without fully disclosing the fact that he or she has not been regularly separated, or enters any foreign armed service except when authorized by the United States.*

B) *Any commissioned SMF officer who, after tender of his or her resignation and before notice of its acceptance, quits his or her post or proper duties without leave and with intent to remain away permanently is guilty of desertion*.

C) *Any person found guilty of desertion or attempt to desert shall be punished, if the offense is committed in time of war, by confinement of not more than 10 years or such other punishment as a court-martial may direct, but if the desertion or attempt to desert occurs at any other time, by such punishment as a court-martial may direct*. (Code Section 85)

9) Absence Without Leave

Any person subject to the Code who, without authority, fails to go to his or her appointed place of duty at the time prescribed, goes from that place, or absents himself or herself or remains absent from his or her unit,

organization, or place of duty at which he or she is required to be at the time prescribed, shall be punished as a court-martial may direct. (Code Section 86)

10) Missing Movement
Any person subject to the Code who, through neglect or design, misses the movement of a ship, aircraft or unit with which he or she is required in the course of duty to move shall be punished as a court-martial may direct. (Code Section 87)

11) Contempt Toward Officials
Any commissioned officer who uses contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Illinois Governor or General Assembly shall be punished as a court-martial may direct. (Code Section 88)

12) Disrespect Toward a Superior Commissioned Officer
Any person subject to the Code who behaves with disrespect toward his or her superior commissioned officer shall be punished as a court-martial may direct. (Code Section 89)

13) Assaulting or Willfully Disobeying a Superior Commissioned Officer
Any person subject to the Code who strikes his or her superior commissioned officer or draws or lifts up any weapon or offers any violence against his or her superior commissioned officer while that officer is in the execution of his or her office, or who willfully disobeys a lawful command of his or her superior commissioned officer, shall be punished, if the offense is committed in a time of war, by confinement of not more than 10 years or such other punishment as a court-martial may direct. If the offense is committed at any other time, the punishment shall be as a court-martial may direct. (Code Section 90)

14) Insubordinate Conduct Toward a Warrant Officer, Noncommissioned Officer, or Petty Officer
Any warrant officer or enlisted member who commits any of the following offenses shall be punished as a court-martial may direct:

A) *strikes or assaults a warrant officer, noncommissioned officer or petty officer while that officer is in the execution of his or her office*;

B) *willfully disobeys the lawful order of a warrant officer, noncommissioned officer or petty officer; or*

C) *treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer or petty officer, while that officer is in execution of his or her office*. (Code Section 91)

15) Failure to Obey Order or Regulation
Any person subject to the Code who commits any of the following offenses shall be punished as a court-martial may direct:

A) *violates or fails to obey any lawful general order or regulation;*

B) *having knowledge of any other lawful order issued by an SMF member that it is his or her duty to obey, fails to obey the order; or*

C) *is derelict in the performance of his or her duties*. (Code Section 92)

16) Cruelty and Maltreatment
Any person subject to the Code who is guilty of cruelty toward, or oppression or maltreatment of, any person subject to his or her orders shall be punished as a court-martial may direct. (Code Section 93)

17) Mutiny or Sedition

A) Offenses Defined

i) Mutiny. *Any person subject to the Code who, with intent to usurp or override lawful military authority, refuses, in concert with any other person, to obey orders or otherwise do his or her duty or creates any violence or disturbance is guilty of mutiny*.

ii) Sedition. *Any person subject to the Code who, with intent to cause the overthrow or destruction of lawful civil authority, creates, in concert with any other person, revolt, violence or other disturbance against that authority is guilty of sedition*; *or*

iii) Failure to Suppress or Report a Mutiny or Sedition. *Any person subject to the Code who fails to do his or her utmost to prevent and suppress a mutiny or sedition being committed in his or her presence, or fails to take all reasonable means to inform his or her superior commissioned officer or commanding officer of a mutiny or sedition that he or she knows or has reason to believe is taking place, is guilty of a failure to suppress or report a mutiny or sedition*.

B) *A person who is found guilty of* committing *or attempting to commit an offense defined in subsection (a) shall be punished as a court-martial may direct*. (Code Section 94)

18) Resistance, Flight, Breach of Arrest and Escape
Any person subject to the Code who commits any of the following shall be punished as a court-martial may direct:

A) *resists apprehension*;

B) *flees from apprehension*;

C) *breaks arrest; or*

D) *escapes from custody or confinement*. (Code Section 95)

19) Releasing Prisoner Without Proper Authority
Any person subject to the Code who, without proper authority, releases any prisoner committed to his or her charge, or who through neglect or design suffers any such prisoner to escape, shall be punished as a court-martial may direct, whether or not the prisoner was committed in strict compliance with law. (Code Section 96)

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20) Unlawful Detention
Any person subject to the Code who, except as provided by law or regulation, apprehends, arrests or confines any person shall be punished as a court-martial may direct. (Code Section 97)

21) Noncompliance with Procedural Rules
Any person subject to the Code who is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under the Code, or knowingly and intentionally fails to enforce or comply with any provision of the Code regulating the proceedings before, during or after trial of an accused, shall be punished as a court-martial may direct. (Code Section 98)

22) Misbehavior Before the Enemy
Any person subject to the Code who, before or in the presence of the enemy, commits any of the following shall be punished as a court-martial may direct:

A) *runs away;*

B) *shamefully abandons, surrenders or delivers up any command, unit, place or military property that it is his or her duty to defend;*

C) *through disobedience, neglect or intentional misconduct endangers the safety of any command, unit, place or military property;*

D) *casts away his or her arms or ammunition;*

E) *is guilty of cowardly conduct;*

F) *quits his or her place of duty to plunder or pillage;*

G) *causes false alarms in any command, unit or place under control of the armed forces of the United States or the SMF;*

H) *willfully fails to do his or her utmost to encounter, engage, capture or destroy any enemy troops, combatants, vessels, aircraft, or any other thing that it is his or her duty to encounter, engage, capture or destroy; or*

I) *does not afford all practicable relief and assistance to any troops, combatants, vessels or aircraft of the armed forces belonging to the United States or its allies, to the State, or to any other state, when engaged in battle.* (Code Section 99)

23) Subordinate Compelling Surrender
Any person subject to the Code who compels or attempts to compel the commander of the military forces of this State or of any other state, place, vessel, aircraft or other military property, or of any body of members of the armed forces to give it up to an enemy or to abandon it, or who strikes the colors or flag to an enemy without proper authority, shall be punished as a court-martial may direct. (Code Section 100)

24) Improper Use of Countersign
Any person subject to the Code who in time of war discloses the parole (i.e., watchword) *or countersign to any person not entitled to receive it or who gives to another, who is entitled to receive and use the parole or countersign, a different parole or countersign from that which, to his or her knowledge, he or she was authorized and required to give, shall be punished as a court-martial may direct.* (Code Section 101)

25) Forcing a Safeguard
Any person subject to the Code who forces a safeguard shall be punished as a court-martial may direct. (Code Section 102)

26) Captured or Abandoned Property

A) *All persons subject to the Code shall secure all public property taken for the service of the United States or* the *State, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody or control*.

B) *Any person subject to the Code shall be punished as a court-martial may direct who*:

i) *fails to carry out the duties prescribed in subsection (d)(25)(A);*

ii) *buys, sells, trades or in any way deals in or disposes of taken, captured or abandoned property, whereby he or she receives or expects any profit, benefit or advantage to himself or another directly or indirectly connected with himself; or*

iii) *engages in looting or pillaging*. (Code Section 103)

27) Aiding the Enemy
Any person subject to the Code shall be punished as a court-martial may direct who:

A) *aids, or attempts to aid, the enemy with arms, ammunition, supplies, money or other things; or*

B) *without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly*. (Code Section 104)

28) Misconduct as a Prisoner
Any person subject to the Code shall be punished as a court-martial may direct who, while in the hands of the enemy in time of war:

A) *for the purpose of securing favorable treatment by his or her captors, acts without proper authority in a manner contrary to law, custom or regulation, to the detriment of others of whatever nationality held by the enemy as civilian or military prisoners; or*

B) *while in a position of authority over other military or civilian prisoners, maltreats them without justifiable cause*. (Code Section 105)

29) False Official Statements
Any person subject to the Code who, with intent to deceive, signs any false record, return, regulation, order or other official document made in the line of duty, knowing it to be false, or makes any other false official

statement made in the line of duty, knowing it to be false, shall be punished as a court-martial may direct. (Code Section 107)

30) Military Property − Loss, Damage, Destruction or Wrongful Disposition
Any person subject to the Code who, without proper authority, sells or otherwise disposes of, willfully or through neglect damages, destroys or loses, or willfully or through neglect suffers to be lost, damaged, destroyed, sold or wrongfully disposed of, any military property of the United States or of any state shall be punished as a court-martial may direct. (Code Section 108)

31) Property Other Than Military Property – Waste, Spoliation or Destruction
Any person subject to the Code who willfully or recklessly wastes, spoils, or otherwise willfully and wrongfully destroys or damages any property other than military property of the State of Illinois, the United States, or any other state shall be punished as a court-martial may direct. (Code Section 109)

32) Improper Hazarding of Vessel

A) *Any person subject to the Code who willfully and wrongfully hazards or suffers to be hazarded any vessel of the armed forces of the State of Illinois, the United States, or any other state shall suffer such punishment as a court-martial may direct*.

B) *Any person subject to the Code who negligently hazards or suffers to be hazarded any vessel of the armed forces of the State of Illinois, the United States, or any other state shall be punished as a court-martial may direct*. (Code Section 110)

33) Drunk on Duty
Any person subject to the Code, other than a sentinel or look-out, who is found drunk on duty shall be punished as a court-martial may direct. (Code Section 111)

34) Wrongful Use, Possession, Etc., of Controlled Substances

A) *Any person subject to the Code who wrongfully uses, possesses, manufactures, distributes, imports into the customs territory of the*

United States, exports from the United States, or introduces into an installation, vessel, vehicle or aircraft used by or under the control of the armed forces of the United States or of any state military forces a substance described in subsection (d)(32)(B) shall be punished as a court-martial may direct.

B) *The substances referred to in subsection (d)(32)(A) are the following*:

i) *Opium, heroin, cocaine, amphetamine, lysergic acid diethylamide, methamphetamine, phencyclidine, barbituric acid and marijuana, and any compound or derivative of any of these substances*.

ii) *Any substance not specified in* subsection (d)(32)(B)(i) *that is listed on a schedule of controlled substances prescribed by the President for the purposes of the Uniform Code of Military Justice of the armed forces of the United States*.

iii) *Any other substance not specified in* subsection (d)(32)(B)(i) *or contained on a list prescribed by the President under* subsection (d)(32)(B)(ii) *that is a Schedule I through V substance under Article 202 of the federal Controlled Substances Act*. (Code Section 112A)

35) Misbehavior of a Sentinel
Any sentinel or look-out who is found drunk or sleeping at his or her post, or leaves it before being regularly relieved, shall be punished, if the offense is committed in time of war, by confinement of not more than 10 years or other punishment as a court-martial may direct. If the offense is committed at any other time, punishment shall be as a court-martial may direct. (Code Section 113)

36) Dueling
Any person subject to the Code who fights, promotes, is concerned in, or connives at fighting a duel, or who, having knowledge of a challenge sent or about to be sent, fails to report the fact promptly to the proper authority, shall be punished as a court-martial may direct. (Code Section 114)

37) Malingering
Any person subject to the Code who, for the purpose of avoiding work, duty or service, feigns illness, physical disablement, mental lapse or derangement, or intentionally inflicts self-injury, shall be punished as a court-martial may direct. (Code Section 115)

38) Riot or Breach of Peace
Any person subject to the Code who causes or participates in any riot or breach of the peace shall be punished as a court-martial may direct. (Code Section 116)

39) Provoking Speeches or Gestures
Any person subject to the Code who uses provoking or reproachful words or gestures towards any other person subject to the Code shall be punished as a court-martial may direct. (Code Section 117)

40) Frauds Against the Government
Any person subject to the Code shall be punished as a court-martial may direct who:

A) *knowing it to be false or fraudulent:*

i) *makes any claim against the United States,* the *State, or any officer of either; or*

ii) *presents to any person in the civil or military service, for approval or payment, any claim against the United States,* the *State, or any officer of either;*

B) *for the purpose of obtaining the approval, allowance or payment of any claim against the United States,* the *State, or any officer of either*:

i) *makes or uses any writing or other paper knowing it to contain any false or fraudulent statements;*

ii) *makes any oath, affirmation or certification to any fact or to any writing or other paper knowing the oath, affirmation or certification to be false; or*

iii) *forges or counterfeits any signature upon any writing or other paper, or uses any such signature knowing it to be forged or counterfeited;*

C) *having charge, possession, custody or control of any money or other property of the United States or* the *State, furnished or intended for the armed forces of the United States or the SMF, knowingly delivers to any person having authority to receive it, any amount less than that for which he or she receives a certificate or receipt; or*

D) *being authorized to make or deliver any paper certifying the receipt of any property of the United States or* the *State, furnished or intended for the armed forces of the United States or the SMF, makes or delivers to any person that writing without having full knowledge of the truth of the statements in the writing and with intent to defraud the United States or this State*. (Code Section 132)

41) Conduct Unbecoming an Officer and a Gentleman
Any commissioned officer, cadet, candidate or midshipman who is convicted of conduct unbecoming an officer and a gentleman shall be punished as a court-martial may direct. (Code Section 133)

42) General Article
Though not specifically mentioned in the Code, all disorders and neglects to the prejudice of good order and discipline in the SMF and all conduct of a nature to bring discredit upon the SMF shall be taken cognizance of by a court-martial and punished at the discretion of a military court. However, when a crime constitutes an offense that violates both the *Code and the criminal laws of the state where the offense occurs or criminal laws of the United States, jurisdiction of the military court must be determined in accordance with Code* Section 2(b). (Code Section 134)

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(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

SUBPART L: MISCELLANEOUS PROVISIONS

Section 400.1300 Courts of Inquiry
EMERGENCY

a) *Courts of inquiry to investigate any matter of concern to the SMF may be convened by any person authorized to convene a general court-martial, whether or not the persons involved have requested such an inquiry*.

b) *A court of inquiry consists of 3 or more commissioned officers. For each court of inquiry, the convening authority shall also appoint counsel for the court*.

c) *Any person subject to the Code whose conduct is subject to inquiry shall be designated as a party. Any person subject to the Code who has a direct interest in the subject of inquiry has the right to be designated as a party upon request to the court. Any person designated as a party shall be given due notice and has the right to be present, to be represented by counsel, to cross-examine witnesses, and to introduce evidence*.

d) *Members of a court of inquiry may be challenged by a party, but only for cause stated to the court*.

e) *The members, counsel, the reporter and interpreters of courts of inquiry shall take an oath to faithfully perform their duties* (see Section 400.825).

f) *Witnesses may be summoned to appear and testify and be examined before courts of inquiry, as provided for courts-martial.*

g) *Courts of inquiry shall make findings of fact but may not express opinions or make recommendations unless required to do so by the convening authority.*

h) *Each court of inquiry shall keep a record of its proceedings, which shall be authenticated by the signatures of the president and counsel for the court and forwarded to the convening authority. If the record cannot be authenticated by the president, it shall be signed by a member in lieu of the president. If the record*

cannot be authenticated by the counsel for the court, it shall be signed by a member in lieu of the counsel. (Code Section 135)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1305 Authority to Act as Notary
EMERGENCY

The signature without seal of any commissioned *notary, together with the title of his or her office, is prima facie evidence of the person's authority*. (Code Section 136)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1310 Sections of the Code to be Explained
EMERGENCY

a) When Sections of the Code will be explained;

1) *The Sections of the Code specified in* subsection (a)(3) *shall be carefully explained to each enlisted member at the time of, or within 30 days after, the member's initial entrance into a duty status with the SMF*.

2) *The Sections shall be explained again:*

A) *after the member has completed basic or recruit training; and*

B) at the time when the member re-enlists.

3) *This subsection (a) applies with respect to Code Sections 2* (persons subject to the Code), *3* (jurisdiction to try certain personnel), *7 through 15* (apprehension, restraint, pretrial punishment, delivery of offenders to civil authorities, and NJP), *25* (composition of courts-martial), *27* (trial and defense counsel), *31* (self-incrimination prohibited), *37* (unlawfully influencing the court), *38* (duties of trial and defense counsel), *55* (cruel and unusual punishment), *77 through 134* (punitive Sections), *and 137 through 139* (miscellaneous).

b) *The text of the Code and of the regulations or orders prescribed under the Code shall be made available to a member of the SMF, upon request by the member, for the member's personal examination, but the Code is effective and binding upon the SMF as of 1/1/17, and regulations or orders are effective upon their proper promulgation*. (Code Section 137)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1315 Complaints of Wrongs
EMERGENCY

a) *Any member of the SMF who believes himself or herself wronged by a commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made*.

b) *The officer exercising general court-martial jurisdiction shall examine the complaint and take proper measures for redressing the alleged wrong. As soon as possible, that officer shall send to the Adjutant General a true statement of the complaint, along with a description of any proceedings that have occurred*. (Code Section 138)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1320 Redress of Injuries to Property
EMERGENCY

a) *Whenever complaint is made to any commanding officer that willful damage has been done to the property of any person or that the person's property has been wrongfully taken by members of the SMF, that person may convene a board to investigate the complaint. The board shall consist of from one to 3 commissioned officers. For the purpose of this investigation, the board has power to summon witnesses and examine them upon oath, to receive depositions or other documentary evidence, and to assess the damages sustained against the responsible parties. The assessment of damages made by the board is subject to the approval of the commanding officer, who shall also approve the amount of the*

assessment. The assessment shall be charged against the pay of the offenders. The order of the commanding officer authorizing the assessment amount is conclusive instruction *for any disbursing officer* to make *payment to the injured parties of the damages assessed and approved*.

b) *If the offenders cannot be ascertained, but the organization or detachment to which they belong is known, charges totaling the amount of damages assessed and approved may be made in such proportion as may be considered just upon the individual members who are shown to have been present at the scene at the time the damages complained of were inflicted, as determined by the approved findings of the board*. (Code Section 139)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1325 Delegation by the Governor
EMERGENCY

The Governor may delegate any authority vested in the Governor under the Code and provide for the subdelegation of any such authority, except for the power given the Governor by Code Section 22 (convening of a court-martial). (Code Section 140)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1330 Payment of Fees, Costs and Expenses
EMERGENCY

a) *The following shall be paid out of the* Illinois *State Military Justice Fund* (see Section 5.875 of the State Finance Act):

1) *fees and authorized travel expenses of all witnesses, experts, victims, court reporters and interpreters;*

2) *fees for the service of process;*

3) *the costs of collection, apprehension, detention and confinement;*

4) *and all other necessary expenses of prosecution and the administration of military justice, not otherwise payable by any other source*.

b) The State Military Justice Fund *is created in the State Treasury*. The fund *shall be administered by the Adjutant General. Expenses of military justice shall be paid from the Fund in the amounts and manner prescribed by law. The General Assembly may appropriate and have deposited into the* Fund or other appropriate State *fund such* funds *as it deems necessary to carry out the purposes of* the *Code*. (Code Section 141)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1335 Payment and Disposition of Fines
EMERGENCY

a) *Fines imposed by a military court or through imposition of nonjudicial punishment shall be paid to the* Illinois Department of Military Affairs *and delivered to the court or imposing officer, or to a person executing their process. Fines may be collected in the following manner*:

1) *By cash or money order;*

2) *By retention of any pay or allowances due or to become due the person fined from any state or the United States; or*

3) *By garnishment or levy, together with costs, on the wages, goods and chattels of a person delinquent in paying a fine, as provided by law*.

b) *Any sum so received or retained shall be deposited into the Fund or to whomever the court so directs*. (Code Section 142)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1340 Immunity for Action of Military Courts
EMERGENCY

ILLINOIS DEPARTMENT OF MILITARY AFFAIRS

NOTICE OF EMERGENCY RULES

All persons acting under the provisions of the Code, whether as a member of the military or as a civilian, shall be immune from any personal liability for any of the acts or omissions they did or failed to do as part of their duties under the Code. (Code Section 144)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

Section 400.1345 Civilian Crimes Assimilated
EMERGENCY

Any person subject to the Code who commits an offense not enumerated in the Code but that is an offense under the laws of the United States, Illinois, or another state, U.S. commonwealth, territory, possession, or district (i.e., the laws of the jurisdiction)*, while that person is subject to the jurisdiction of the Code, is guilty of any act or omission that, although not made punishable by any enactment of this State, is punishable if committed or omitted within the jurisdiction of the laws of the* jurisdiction. *In accordance with Code Section 134, the offense may be charged as an offense under the substantive law of the jurisdiction where the offense was committed, in force at the time of the offense, and shall be punished pursuant to the law of that jurisdiction, subject only to the maximum punishment prescribed by* Appendix A. (Code Section 149)

(Source: Added by emergency rulemaking at 41 Ill. Reg. 5459, effective May 8, 2017, for a maximum of 150 days)

JOINT COMMITTEE ON ADMINISTRATIVE RULES
ILLINOIS GENERAL ASSEMBLY

SECOND NOTICES RECEIVED

The following second notices were received during the period of May 1, 2017 through May 8, 2017. The following rulemakings are scheduled for review at the Committee's June 13, 2017 meeting. Other items not contained in this published list may also be considered. Members of the public wishing to express their views with respect to a rulemaking should submit written comments to the Committee at the following address: Joint Committee on Administrative Rules, 700 Stratton Bldg., Springfield IL 62706.

Second Notice Expires	Agency and Rule	Start of First Notice	JCAR Meeting
6/14/17	Illinois Community College Board, Public Access to Information (Repealer) (2 Ill. Adm. Code 5176)	12/30/16 40 Ill. Reg. 16386	6/13/17
6/14/17	Illinois Community College Board, Access to Records of the Illinois Community College Board (2 Ill. Adm. Code 5176)	12/30/16 40 Ill. Reg. 16391	6/13/17
6/16/17	Department of Insurance, Acquisition of Control of a Domestic Company (50 Ill. Adm. Code 651)	1/13/17 41 Ill. Reg. 312	6/13/17
6/16/17	Department of Insurance, Pre-Acquisition Notification (50 Ill. Adm. Code 653)	1/13/17 41 Ill. Reg. 332	6/13/17
6/16/17	Department of Insurance, Prior Notification of Dividends on Common Stock and Other Distributions (50 Ill. Adm. Code 655)	1/13/17 41 Ill. Reg. 340	6/13/17
6/18/17	Illinois Environmental Protection Agency, Procedures for Issuing Loans From the Water Pollution Control Loan Program (Repealer) (35 Ill. Adm. Code 365)	10/21/16 40 Ill. Reg. 14142	6/13/17

6/18/17	Illinois Environmental Protection Agency, Procedures for Issuing Loans From the Water Pollution Control Loan Program (New Part) (35 Ill. Adm. Code 365)	10/21/16 40 Ill. Reg. 14243	6/13/17
6/18/17	Illinois Environmental Protection Agency, Procedures for Issuing Loans From the Public Water Supply Loan Program (Repealer) (35 Ill. Adm. Code 662)	2/24/17 41 Ill. Reg. 2145	6/13/17
6/18/17	Illinois Environmental Protection Agency, Procedures for Issuing Loans From the Water Supply Loan Program (New part) (35 Ill. Adm. Code 662)	2/24/17 41 Ill. Reg. 2239	6/13/17

ILLINOIS ADMINISTRATIVE CODE
Issue Index - With Effective Dates

Rules acted upon in Volume 41, Issue 20 are listed in the Issues Index by Title number, Part number, Volume and Issue. Inquiries about the Issue Index may be directed to the Administrative Code Division at (217) 782-7017/18.

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