

## DEPARTMENT OF DEFENSE

### STATEMENT OF REGULATORY PRIORITIES

#### **Background**

The Department of Defense (DoD) is the largest Federal department, employing over 1.6 million military personnel and 750,000 civilians with operations all over the world. DoD's enduring mission is to provide combat-credible military forces needed to deter war and protect the security of our nation. To guide this mission, the Secretary of Defense has outlined three top priorities, which are to defend the nation, take care of our people, and succeed through teamwork. In addition, the National Defense Strategy sets out how DoD will contribute to advancing and safeguarding vital U.S. national interests – protecting the American people, expanding America's prosperity, promoting global security, seizing new strategic opportunities, and realizing and defending our democratic values. Because of this expansive and diversified mission and reach, DoD regulations can address a broad range of matters and have an impact on varied members of the public, as well as other federal agencies.

Pursuant to Executive Order 12866, "Regulatory Planning and Review" (September 30, 1993) and Executive Order 13563, "Improving Regulation and Regulatory Review" (January 18, 2011), the DoD issues this Regulatory Plan and Agenda to provide notice about the DoD's regulatory and deregulatory actions.

#### **Retrospective Review of Existing Regulations**

Pursuant to section 6 of Executive Order 13563 "Improving Regulation and Regulatory Review" (January 18, 2011), the Department continues to review existing regulations with a goal to eliminate outdated, unnecessary, or ineffective regulations; account for the currency and legitimacy of each of the Department's regulations; and ultimately reduce regulatory burden and costs.

#### **Public Participation and Community Outreach**

As the DoD develops our regulations, we seek to increase public participation and community outreach to be better informed of and address issues from members of the public affected by our

regulations. The following provides examples of our specific outreach and public participation efforts.

The Office of the Assistant to the Secretary of Defense for Public Affairs/Community Engagement Directorate, via its Opinion Leader Engagement portfolio, provides public affairs support to leaders throughout the Office of the Secretary of Defense (OSD) who are responsible for regulatory activities. This support includes convening roundtables and similar engagements for national stakeholder organizations to meet with OSD leaders to discuss and share information about DoD policies and programs that are governed by Federal regulations. For example, regular engagements with leaders of national military and veteran supporting organizations include topics such as military benefits, housing, healthcare, compensation, and sexual assault prevention and response, which are governed by law and Federal regulation. These meetings allow the regulating authorities in OSD an opportunity to dialogue with national organizations with a stakeholder interest in the impact and effect of DoD regulations.

DoD engages with the public on procurement-related regulations that will affect the Defense Federal Acquisition Regulation Supplement (DFARS) in several ways. In addition to publishing abstracts of and anticipated publication dates for upcoming rules in the biannual Unified Agenda, members of the public can track the progress of any open and pending DFARS regulation via the Open DFARS Cases Report, which is publicly available at [https://www.acq.osd.mil/dpap/dars/case\\_status.html](https://www.acq.osd.mil/dpap/dars/case_status.html). The report is updated on a weekly basis and includes the following information: a case number, title, DFARS parts anticipated to be impacted by the regulation, a summary of the basis for the regulation, and the status of the regulation. Members of the public who are interested in a particular DFARS case are encouraged to monitor the Open DFARS Cases Report to track the progress of a particular regulation through the rulemaking process.

DoD also meets with industry associations on a quarterly basis. Industry associations that regularly participate in these quarterly discussions include the Council of Defense and Space Industry Associations, the Professional Services Council, the Aerospace Industries Association, and the National Defense Industrial Association. During these meetings, DoD often provides updates on open DFARS cases.

While developing certain DFARS regulations, DoD may seek input from the public by publishing in the *Federal Register* an early engagement opportunity, an advance notice of proposed rulemaking (ANPR), or a general request for information (RFI). Notices for early engagement opportunities usually pertain to a recent law, such as the annual National Defense Authorization Act, and request input on implementation of the law in the DFARS. ANPRs and RFIs may include a summary of the overarching policy objectives of the regulation and a list of questions seeking input that will help DoD develop a proposed regulation. Information on whether DoD plans to publish an ANPR or RFI is included in both the Open DFARS Cases Report and the biannual Unified Agenda.

Occasionally, while an ANPR, proposed DFARS regulation, or interim DFARS regulation is out for public comment, DoD may hold a public meeting to allow the public to provide feedback to the Government in an open forum. Information about whether DoD plans on holding a public meeting for an ANPR or a regulation is normally included in the ANPR, proposed regulation, or interim regulation when it is published for public comment. Presentations made during the public meeting are made publicly available.

The U.S. Army Corps of Engineers (USACE) utilizes listening sessions prior to proposing a rule to obtain public input that is then used to inform the contents of the proposed rule. Additionally, *Federal Register* notices, website postings, press releases, and social media releases are used to notify the public of the dates and times for the listening sessions. When a *Federal Register* notice is used to provide notification of the listening sessions, the use of an open docket is employed for the submission public comments in addition to receipt of public comments during the listening sessions. Also, the USACE may publish an advanced notice of proposed rulemaking to engage the public on the development of a proposed rule. *Federal Register* notices, website postings, press releases, and social media releases are used to notify the public of the publication of the proposed rule and how they can provide comments and engage in the rulemaking effort.

Finally, the USACE has meetings with industry associations, NGOs, or similar stakeholders to provide updates on proposed policies or actions to solicit informal feedback that is used to help inform the path forward for the development of a proposed rule.

## **DOD Priority Regulatory Actions**

The regulatory and deregulatory actions identified in this Regulatory Plan embody the core of DoD's regulatory priorities for Fiscal Year (FY) 2024 and help support President Biden's regulatory priorities, the Secretary of Defense's top priorities, and those priorities set out in the National Defense Strategy. The DoD regulatory prioritization is focused on initiatives that:

- Promote the country's economic resilience, including addressing COVID-related and other healthcare issues.
- Support underserved communities and improve small business opportunities.
- Promote competition in the American economy.
- Promote diversity, equity, inclusion, and accessibility in the Federal workforce.
- Support national security efforts, especially safeguarding Federal Government information and information technology systems.
- Tackle the climate crisis and protect the environment.
- Address military family matters.

## **Rules that Promote the Country's Economic Resilience**

### **Pandemic COVID-19 Rules**

Pursuant to Executive Order 13987, "Organizing and Mobilizing the United States Government to Provide a Unified and Effective Response to Combat COVID-19 and to Provide United States Leadership on Global Health and Security," January 20, 2021; Executive Order 13995, "Ensuring an Equitable Pandemic Response and Recovery," January 21, 2021; Executive Order 13997, "Improving and Expanding Access to Care and Treatments for COVID-19," January 21, 2021; and Executive Order 13999, "Protecting Worker Health and Safety," January 21, 2021, the Department temporarily modified its TRICARE regulation so TRICARE beneficiaries have access to the most up-to-date care required for the diagnosis and treatment of COVID-19. TRICARE continues to reimburse like Medicare, to the extent practicable, as required by statute. The Department is researching the impacts of making some of those modifications permanent and may pursue such future action. These modifications include:

## TRICARE Coverage of National Institute of Allergy and Infectious Disease – Coronavirus Disease 2019

### Clinical Trials. RIN 0720-AB83

The Department of Defense is finalizing an interim final rule to amend 32 CFR part 199 to include coverage that was temporarily added for National Institute of Allergy and Infectious Disease-sponsored clinical trials for the treatment or prevention of COVID-19. This rule will also finalize the temporary addition of the treatment use of investigation drugs under U.S. Food and Drug Administration-approved expanded access programs for the treatment of coronavirus disease 2019 (COVID-19) from the interim final rule titled "TRICARE Coverage of Certain Medical Benefits in Response to the COVID-19 Pandemic" (32 CFR part 199, 0720-AB82), which published in the Federal Register on September 3, 2020 (85 FR 54914-54924).

### Expanding TRICARE Access to Care in Response to the COVID-19 Pandemic. RIN 0720-AB85

This rule finalizes an interim final rule that amended 32 CFR part 199 by: (1) adding freestanding End Stage Renal Disease (ESRD) facilities as a category of TRICARE-authorized institutional provider and modifying the reimbursement for such facilities; and (2) temporarily adopting Medicare's New COVID-19 Treatments Add-on Payment (NCTAP). The ESRD provisions are permanent, and the temporary NCTAP provisions expire at the end of the fiscal year in which the Secretary of Health and Human Services' declared coronavirus disease 2019 (COVID-19) public health emergency ends.

## **Medical Debt Relief**

### Medical Billing for Healthcare Services Provided by Department of Defense Medical Treatment Facilities

#### to Civilian Non-Beneficiaries. RIN 0720-AB87

This rule is aimed at preventing severe financial harm to civilians who are not covered beneficiaries of the Military Health System, and who receive healthcare services at military medical treatment facilities. The rule implements the requirement to apply a sliding fee and/or a catastrophic waiver to medical invoices of non-beneficiaries; to accept payments from health insurers as full payment; to not balance bill non-beneficiaries except for copays, coinsurance, deductibles, nominal fees, and non-covered services; and grants the Director of Defense Health Agency (DHA) discretionary authority to waive medical debts of non-beneficiaries when the healthcare provided enhances the knowledge, skills, and abilities of healthcare providers, as determined by the Director of DHA.

**Rules that Promote Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce**

Nondiscrimination on the Basis of Disability in Program or Activities Assisted or Conducted by the DoD and in Equal Access to Information and Communication Technology Used by DoD, and Procedures for Resolving Complaints. RIN: 0790-AJ04

Revisions to this regulation: (1) update and clarify the obligations that Section 504 of the Rehabilitation Act of 1973 (section 504) imposes on recipients of Federal financial assistance and the Military Departments and Components (DoD Components); (2) reflect the most current Federal statutes and regulations, as well as developments in Supreme Court jurisprudence, regarding unlawful discrimination on the basis of disability and promotes consistency with comparable provisions implementing title II of the Americans with Disabilities Act (ADA); (3) implement section 508 of the Rehabilitation Act of 1973 (section 508), requiring DoD make its electronic and information technology accessible to individuals with disabilities; (4) establish and clarify obligations under the Architectural Barriers Act of 1968 (ABA), which requires that DoD make facilities accessible to individuals with disabilities; and (5) Provide complaint resolution and enforcement procedures pursuant to section 504 and the complaint resolution and enforcement procedures pursuant to section 508. These revisions incorporate the directive of Executive Order 14035, "Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce" by defining, clarifying, advancing accessibility throughout DoD programs and activities.

**Executive Order 13985, "Advancing Racial Equity and Support for Underserved Communities Through the Federal Government" January 20, 2021**

USACE Implementing Procedures for Principles, Requirements, and Guidelines Applicable to Actions Involving Investment in Water Resources. RIN 0710-AB41

Section 2031 of the Water Resources Development Act of 2007 (Pub. L. 110-114) called for revisions to the 1983 Principles and Guidelines for Water and Land Related Resources Implementation Studies, resulting in the issuance of the Principles and Requirements (P&R) guidance document in March 2013 and the Interagency Guidelines in December 2014, which together comprise the Principles, Requirements, and Guidelines (PR&G). The PR&G are intended to provide a common framework and comprehensive policy and guidance for analyzing a diverse range of water resources projects, programs, activities, and related actions involving Federal investment in water resources. The U.S.

Army Corps of Engineers (Corps) proposes a regulation to show how it would apply the PR&G to the Corps' mission and authorities. In this proposed regulation, the Corps intends to increase consistency and compatibility in Federal water resources investment decision making to include considerations such as analyzing a broader range of long-term costs and benefits, enhancing collaboration, including a more thorough and transparent risk and uncertainty analyses, and improving resilience for dealing with emerging challenges, including climate change.

**Flood Control Cost-Sharing Requirements Under the Ability to Pay Provision. RIN: 0710-AB34**

Section 103(m) of the Water Resources Development Act (WRDA) of 1986, as amended (33 U.S.C. 2213(m)), authorizes the USACE to reduce the non-Federal share of the cost of a study or project for certain communities that are not able financially to afford the standard cost-share. Part 241 of title 33 in the Code of Federal Regulations provides the criteria that the USACE uses in making these determinations where the primary purpose of the study or project is flood damage reduction. The proposed rule would update this regulation, by broadening its applicability to include projects with other purposes (instead of just flood damage reduction) and the feasibility study of a project (instead of just design and construction). The WRDA 2000 modified section 103(m) to also include the following mission areas: environmental protection and restoration, flood control, navigation, storm damage protection, shoreline erosion, hurricane protection, and recreation or an agricultural water supply project which have not yet been added to the regulation. It also included the opportunity to cost share all phases of a USACE project to also include feasibility in addition to the already covered design and construction. This rule would provide a framework for deciding which projects are eligible for consideration for a reduction in the non-Federal cost share based on ability to pay.

**Rules that Support Underserved Communities and Improve Small Business Opportunities**

**Rules of particular Interest to Small Business**

**Small Business Innovation Research Program Data Rights (DFARS Case 2019-D043). RIN 0750-AK84**

This rule implements changes made by the Small Business Administration (SBA) related to data rights in the Small Business Innovation Research (SBIR) Program and Small Business Technology Transfer (STTR) Program Policy Directive, published in the Federal Register on April 2, 2019 (84 FR 12794). The SBIR and STTR programs fund a diverse portfolio of startups and small businesses

across technology areas and markets to stimulate technological innovation, meet Federal research and development (R&D) needs, and increase commercialization to transition R&D into impact. The final SBA Policy Directive includes several revisions to clarify data rights, which require corresponding revisions to the Defense Federal Acquisition Regulation Supplement (DFARS). These changes include harmonizing definitions, lengthening the SBIR/STTR protection period from 5 years to 20 years, and providing for the granting of Government-purpose rights license in place of an unlimited rights license upon expiration of the SBIR/STTR protection period. DoD hosted public meetings to obtain the views of interested parties regarding the advance notice of proposed rulemaking and the proposed rule published in the Federal Register on August 31, 2020 (85 FR 53758) and December 19, 2022 (87 FR 77680), respectively.

**Executive Order 14036, “Promoting Competition in the American Economy” July 9, 2021**

**Rule that Promotes Competition in the American Economy**

**Past Performance of Subcontractors and Joint Venture Partners (DFARS Case 2018-D055). RIN 0750-AK16**

This rule implements section 823 of the National Defense Authorization Act for Fiscal Year 2019, which establishes a requirement for use of the best available information regarding past performance of subcontractors and joint venture partners when awarding DoD construction and architect-engineer contracts. Section 823 requires annual performance evaluations for first-tier subcontractors and individual parties to joint ventures performing construction and architect-engineer contracts valued at either \$750,000 or more, or 20 percent of the value of the prime contract (whichever is higher), in accordance with specified conditions. In addition, processes for exceptions from the annual evaluation requirement will be established for construction and architect-engineer contracts where submission of annual evaluations would not provide the best representation of the performance of a contractor, including subcontractors and joint venture partners under specified conditions. This rule will make it easier for subcontractors and individual parties to joint ventures to establish a record of their past performance. These entities will be able to take credit for the work they performed on contracts and subcontracts, which will help them be more competitive when bidding on future DoD contracts. This will help increase competition for DoD contracts.



Modification of Prize Authority for Advanced Technology Achievements (DFARS Case 2022-D014). RIN 0750-AL65

This rule implements section 822 of the National Defense Authorization Act for Fiscal Year 2022 (Pub. L. 117-81). Section 822 revises 10 U.S.C. 2374a, redesignated as 10 U.S.C. 4025, regarding the award of prizes for advanced technology achievement to: (1) authorize the award of procurement contracts and other agreements "as another type of prize" (as in other than cash prizes); (2) permit the award of prizes, including procurement contracts and other agreements, in excess of \$10,000,000 with the approval of the Under Secretary of Defense for Research and Engineering; and (3) require DoD provide Congress with notice of an award of a procurement contract or other agreement under this program that exceeds \$10 million. This rule will help to expand the Defense Industrial Base, thereby increasing competition for future DoD contracts.

DFARS Buy American Act Requirements (DFARS Case 2022-D019). RIN 0750-AL74

This rule implements the requirements of Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers. Changes to the Federal Acquisition Regulation (FAR) were made via RIN 9000-AO22 (FAR Case 2021-008, Amendments to the FAR Buy American Act Requirements). This rule makes conforming changes to the DFARS.

**Rules that Support National Security Efforts**

Assessing Contractor Implementation of Cybersecurity Requirements (DFARS Case 2019-D041). RIN 0750-AK81

The purpose of this rule is to ensure that Defense Industrial Base (DIB) contractors will adequately protect sensitive unclassified information at a level commensurate with the risk, accounting for information flow down to its subcontractors in a multi-tier supply chain.

Cybersecurity Maturity Model Certification (CMMC) Program. RIN 0790-AL49

This rule establishes a requirement for Defense Industrial Base (DIB) contractors to be assessed against the Cybersecurity Maturity Model Certification (CMMC) requirements at Level 1, 2 or 3 to be eligible for award of designated future DoD contracts. The CMMC Program is designed to provide increased assurance to the DoD that defense contractors and subcontractors are compliant with information protection requirements for Federal Contract Information (FCI) and Controlled Unclassified

Information (CUI) and are protecting such information at a level commensurate with risk from cybersecurity threats.

Department of Defense (DoD)-Defense Industrial Base (DIB) Cybersecurity (CS) Activities. RIN: 0790-AK86

This rule will allow a broader community of defense contractors to access to relevant cyber threat information the Department believes is critical in defending unclassified networks and information systems and protecting DoD warfighting capabilities. These revisions seek to address the increasing cyber threat targeting all defense contractors by expanding eligibility to defense contractors that process, store, develop, or transmit DoD Controlled Unclassified Information (CUI). This rule is part of DoD's approach to collaborate with industry to counter cyber threats through information sharing.

**Rules that Tackle the Climate Crisis and Protect the Environment**

Policy and Procedures for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 U.S.C. 408. RIN: 0710-AB22

Where a party other than the USACE seeks to use or alter a Civil Works project that USACE constructed, the proposed use or alteration is subject to the prior approval of the USACE. Some examples of such alterations include an improvement to the project; relocation of part of the project; or installing utilities or other non-project features. These alterations may be proposed by local or state governments, other federal agencies, private corporations, or private citizens, for example. This requirement was established in section 14 of the Rivers and Harbors Act of 1899 and is codified at 33 USC 408 (section 408). Section 408 provides that the USACE may grant permission for another party to alter a Civil Works project, upon a determination that the alteration proposed will not be injurious to the public interest and will not impair the usefulness of the Civil Works project. The USACE is proposing to convert its policy that governs the section 408 program to a binding regulation. This policy, Engineer Circular 1165-2-220, Policy, and Procedural Guidance for Processing Requests to Alter US Army Corps of Engineers Civil Works Projects Pursuant to 33 USC 408, was issued in September 2018.

Natural Disaster Procedures: Preparedness, Response, and Recovery Activities of the Corps of Engineers. RIN 0710-AA78

The U.S. Army Corps of Engineers (Corps) is proposing to update the Federal regulation that covers the procedures that the Corps uses under section 5 of the Flood Control Act of 1941, as amended (33 U.S.C. 701n), commonly referred to as Public Law 84-99. The Corps relies on this program to prepare for, respond to, and help communities recover from a flood, hurricane, or other natural disaster, including the repair of damage to eligible flood risk reduction infrastructure. The Corps initiated this rulemaking process through an advanced notice of proposed rulemaking (ANPRM) on February 13, 2015. As a next step, the Corps is planning to propose revisions to the program to address statutory changes under various Water Resources Development Act provisions and to formalize certain agency guidance relating to natural disaster procedures. Hurricane Katrina (2005), Hurricane Sandy (2012), flooding on the Mississippi and Missouri Rivers (2008, 2011, and 2013), and Hurricanes Harvey, Irma, and Maria (2017) have provided a more detailed understanding of the nature and severity of risk associated with flood control projects. In addition, the maturation of risk-informed decision-making approaches and technological advancements influenced the outlook on the implementation of Public Law 84-99 activities, with a shift toward better alignment with Corps Levee Safety and National Flood Risk Management Programs, as well as the National Preparedness and Response Frameworks. Through these programs, the Corps works with non-Federal sponsors and stakeholders to assess, communicate, and manage the risks to people, property, and the environment associated with levee systems and flood risks.

Appendix C Procedures for the Protection of Historic Properties. RIN 0710-AB46

The U.S. Army Corps of Engineers (Corps) considers the effects of its actions on historic properties pursuant to section 106 of the National Historic Preservation Act (NHPA). The Corps' Regulatory Program's regulations for complying with the NHPA are outlined at 33 CFR 325 Appendix C. Since these regulations were promulgated in 1990, there have been amendments to the NHPA and revisions to the Advisory Council on Historic Preservation's (ACHP) regulations at 36 CFR part 800. In response, the Corps issued interim guidance until rulemaking could be completed in order to ensure full compliance with the NHPA and ACHP's regulations. Appendix C is intended to provide the

implementing procedures for the Regulatory Program's compliance with Section 106 of the National Historic Preservation Act. Rulemaking is required to ensure the Regulatory Program is compliant with the NHPA and ACHP's implementing regulations at 36 CFR 800 for federal agency compliance with Section 106.

Amendments to the Revised Definition of "Waters of the United States" RIN: 0710-AB55.

In April 2020, the EPA and the Department of the Army ("the agencies") published the Navigable Waters Protection Rule that revised the previously codified definition of "waters of the United States" (85 FR 22250, April 21, 2020). The Navigable Waters Protection Rule was vacated by courts. On January 18, 2023, the agencies issued a final rule, "Revised Definition of 'Waters of the United States'" (88 FR 3004) which became effective on March 20, 2023. On May 25, 2023, the U.S. Supreme Court issued its decision in the case of Sackett v. Environmental Protection Agency. In light of this decision, the agencies are interpreting the phrase waters of the United States consistent with the Supreme Court's decision in Sackett. The agencies are developing a rule to amend the final "Revised Definition of 'Waters of the United States'" rule, published in the Federal Register on January 18, 2023, consistent with the U.S. Supreme Court's decision in Sackett.

**Rules that Address Military Family Matters**

Definitions of Gold Star Family and Gold Star Survivor. RIN 0790-AL56

This rule implements section 626 of the FY 2022 NDAA to define the terms "gold star family" and "gold star survivor" for consistent use across all military departments. The Defense Department treats all surviving family members equally and survivor benefits are the same across the board unless their Service member is killed or dies from causes under dishonorable conditions.